CHAPTER 11

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THE AGREEMENT: OFFERS AND ACCEPTANCES

I should talk with my agent. I'd need something in writing about the nude scene …

Interior. A glitzy café, New York. Evening. Bob, a famous director, and Katrina, a glamorous actress, sit at a table, near a wall of glass looking onto a New York sidewalk that is filled with life and motion. Bob sips a margarita while carefully eyeing Katrina. Katrina stares at her wine glass.

BOB *(smiling confidently)*: *Body Work* is going to be huge—for the right actress. I know a film that's gonna gross a hundred million when I'm holding one. I'm holding one.

KATRINA *(perking up at the mention of money)*: It is quirky. It's fun. And she's very strong, very real.

BOB: She's you. That's why we're sitting here. We start shooting in seven months.

KATRINA *(edging away from the table)*: I have a few questions. That nude scene.

BOB: The one on the toboggan run?

KATRINA: *That* one was O.K. But the one in the poultry factory—very explicit. I don't work nude.

BOB: It's not really nude. Think of all those feathers fluttering around.

KATRINA: It's nude.

BOB: We'll work it out. This is a romantic comedy, not tawdry exploitation. Katrina, we're talking $2.5 million. A little accommodation, please. We'll give you $600,000 up front, and the rest deferred, the usual percentages.

KATRINA: Bob, my fee is $3 million. As you know. That hasn't changed.

Katrina picks up her drink, doesn't sip it, places it on the coaster, using both hands to center it perfectly. He waits, as she stares silently at her glass.

BOB: We're shooting in Santa Fe, the weather will be perfect. You have a suite at the Excelsior, plus a trailer on location.

KATRINA: I should talk with my agent. I'd need something in writing about the nude scene, the fee, percentages—all the business stuff. I never sign without talking to her.

Bob shrugs and sits back.

KATRINA *(made anxious by the silence)*: I love the character, I really do.

BOB: You and several others love her. *(That jolts her.)* Agents can wait. I have to put this together fast. We can get you the details you want in writing. *Body Work* is going to be bigger than *Sex in the City*.

That one hooks her. She looks at Bob. He nods reassuringly. Bob sticks out his hand, smiling. Katrina hesitates, lets go of her drink, and SHAKES HANDS, looking unsure. Bob signals for the check.

Do Bob and Katrina have a deal? *They* seem to think so. But is her fee $2.5 million or $3 million? What if Katrina demands that all nude scenes be taken out, and Bob refuses? Must she still act in the film? Or suppose her agent convinces her that *Body Work* is no good even with changes. Has Katrina committed herself? What if Bob auditions another actress the next day, likes her, and signs her? Does he owe Katrina her fee? Or suppose Bob learns that the funding has fallen apart and there will be no film. Is Katrina entitled to her money?

Bob and Katrina have acted out a classic problem in *agreement*, one of the basic issues in contract law. Their lack of clarity means that disputes are likely and lawsuits possible. Similar bargaining goes on every day around the country and around the world, and the problems created are too frequently resolved in court. Some negotiating is done in person; more is done over the phone, by fax, by email—or all of them combined. This chapter highlights the most common sources of misunderstanding and litigation so that you can avoid making contracts you never intended—or deals that you cannot enforce.

There almost certainly is no contract between Bob and Katrina. Bob's offer was unclear. Even if it was valid, Katrina counteroffered. When they shook hands, it is impossible to know what terms each had in mind.

Contracts Checklist

- [x] Offer
- [x] Acceptance
- [ ] Consideration
- [ ] Legality
- [ ] Capacity
- [ ] Consent
- [ ] Writing

MEETING OF THE MINDS

Remember from the last chapter that contracts have seven key characteristics. Agreements that have a problem in any of the areas do not amount to valid contracts. In this chapter, we examine the first two items on the checklist.

Parties form a contract only if they have a meeting of the minds. For this to happen, one side must make an **offer** and the other must make an **acceptance**. An offer proposes definite terms, and an acceptance unconditionally agrees to them.

Offer
An act or statement that proposes definite terms and permits the other party to create a contract by accepting those terms.

Throughout the chapter, keep in mind that courts make *objective* assessments when evaluating offers and acceptances. A court will not try to get inside Katrina's head and decide what she was thinking as she shook hands. It will look at the handshake *objectively*, deciding how a reasonable person would interpret her words and conduct. Katrina may honestly have meant to conclude a deal for $3 million with no nude scenes, while Bob might in good faith have believed he was committing himself to $2.5 million and absolute control of the script. Neither belief will control the outcome.

Offer

Bargaining begins with an offer. The person who makes an offer is the **offeror**. The person to whom he makes that offer is the **offeree**. The terms are annoying but inescapable because, like handcuffs, all courts use them.

Offeror
The person who makes an offer.

Offeree
The person to whom an offer is made.

Two questions determine whether a statement is an offer:

- Do the offeror's words and actions indicate an *intention* to make a bargain?
- Are the terms of the offer reasonably definite?

Zachary says to Sharon, "Come work in my English language center as a teacher. I'll pay you $800 per week for a 35-hour week, for six months starting Monday." This is a valid offer. Zachary's words seem to indicate that he intends to make a bargain and his offer is definite. If Sharon accepts, the parties have a contract that either one can enforce.

In the section below, we present several categories of statements that are generally *not* valid offers.

Statements that Usually do not Amount to Offers

Invitations to Bargain

An invitation to bargain is not an offer. Suppose Martha telephones Joe and leaves a message on his answering machine, asking if Joe would consider selling his vacation condo on Lake Michigan. Joe faxes a signed letter to Martha saying, "There is no way I could sell the condo for less than $150,000." Martha promptly sends Joe a cashier's check for that amount. Does she own the condo? No. Joe's fax was not an offer. It is merely an invitation to negotiate. Joe is indicating that he might well be happy to receive an offer from Martha, but he is not promising to sell the condo for $150,000 or for any amount.

Price Quotes

A price quote is generally not an offer. If Imperial Textile sends a list of fabric prices for the new year to its regular customers, the list is not an offer. Once again, the law regards it merely as a solicitation of offers. Suppose Ralph orders 1,000 yards of fabric, quoted in the list at $40 per yard. *Ralph* is making the offer, and Imperial may decline to sell at $40, or at any price, for that matter.

This can be an expensive point to learn. Leviton Manufacturing makes electrical fixtures and switches. Litton Microwave manufactures ovens. Leviton sent a price list to Litton, stating what it would charge for specially modified switches for use in Litton's microwaves. The price letter included a statement greatly limiting Leviton's liability in the event of any problem with the switches. Litton purchased thousands of the switches and used them in manufacturing its microwaves. But consumers reported fires due to defects in the switches. Leviton claimed that under the contract it had no liability. But the court held that the price letter was not an offer. It was a request to receive an offer. Thus the contract ultimately formed did not include Leviton's liability exclusion. Litton won over $4 million.[1] See Exhibit 11.1

Letters of Intent

In complex business negotiations, the parties may spend months bargaining over dozens of interrelated issues. Because each party wants to protect itself during the discussions, ensuring that the other side is serious without binding itself to premature commitments,

[1] *Litton Microwave Cooking Products v. Leviton Manufacturing Co., Inc.*, 15 F.3d 790, 1994 U.S. App. LEXIS 1876 (8th Cir. 1994).

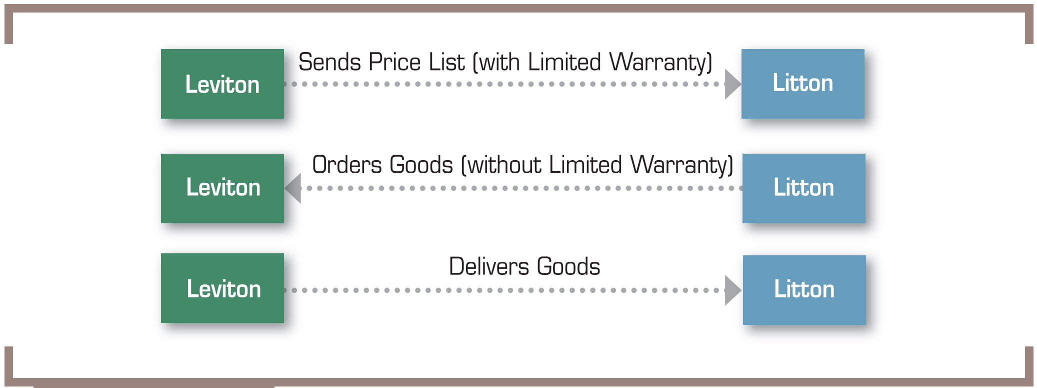

EXHIBIT 11.1 The Litton case demonstrates why it is important to distinguish a valid offer from a mere price quote. Leviton's price list (including a limited warranty) was *not* an offer. When Litton ordered goods (with no limit to the warranty), it was making an offer, which Leviton accepted by delivering the goods. The resulting contract did not contain the limited warranty that Leviton wanted, costing that company a $4 million judgment.

Letter of intent
A letter that summarizes negotiating progress.

it may be tempting during the negotiations to draft a **letter of intent**. The letter *might* help distinguish a serious party from one with a casual interest, summarize the progress made thus far, and assist the parties in securing necessary financing. Usually, letters of intent do not create any legal obligation. They merely state what the parties are considering, not what they have actually agreed to. But note that is possible for a letter of intent to bind the parties if its language indicates that the parties *intended* to be bound.

Advertisements

Mary Mesaros received a notice from the United States Bureau of the Mint, announcing a new $5 gold coin to commemorate the Statue of Liberty. The notice contained an order form stating:

> VERY IMPORTANT—PLEASE READ: YES, Please accept my order for the U.S. Liberty Coins I have indicated. I understand that all sales are final and not subject to refund. Verification of my order will be made by the Department of the Treasury, U.S. Mint. If my order is received by December 31, I will be entitled to purchase the coins at the Pre-Issue Discount price shown.

Mesaros ordered almost $2,000 worth of the coins. But the Mint was inundated with so many requests for the coin that the supply was soon exhausted. Mesaros and thousands of others never got their coins. This was particularly disappointing because the market value of the coins doubled shortly after their issue. Mesaros sued on behalf of the entire class of disappointed purchasers. Like most who sue based on an advertisement, she lost.[2] **An advertisement is generally not an offer.** An advertisement is merely a request for offers. The consumer makes the offer, whether by mail, as above, or by arriving at a merchant's store ready to buy. The seller is free to reject the offer.

Advertisers should be careful, however, not to be too specific in their ads. Some ads do count as offers, as the following case illustrates.

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[2] *Mesaros v. United States*, 845 F.2d 1576, 1988 U.S. App. LEXIS 6055 (Fed. Cir. 1988).

Landmark Case

Carlill v. Carbolic Smoke Ball Company

1 QB 256
Court of Appeal, 1892

Facts: In the early 1890s, English citizens greatly feared the Russian flu. The Carbolic Smoke Ball Company ran a newspaper ad that contained two key passages:

> "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball.
>
> "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter."

The product was a ball that contained carbolic acid. Users would inhale vapors from the ball through a long tube.

Carlill purchased a smoke ball and used it as directed for two months. She then caught the flu. She sued, arguing that because her response to the ad had created a contract with the company, she was entitled to £100.

The trial court agreed, awarding Carlill the money. The company appealed.

Issues: ***Did the advertisement amount to an offer? If so, was the offer accepted?***

Excerpts from Lord Justice Lindley's Decision: The first observation I will make is that we are dealing with an express promise to pay £100 in certain events. Read the advertisement how you will, and twist it about as you will, here is a distinct promise expressed in language which is perfectly unmistakable.

We must first consider whether this was intended to be a promise at all. The deposit is called by the advertiser as proof of his sincerity in the matter—that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, the performance of the conditions is the acceptance of the offer. Unquestionably, as a general proposition, when an offer is made, it is necessary that the acceptance should be notified. But is that so in cases of this kind? I think that in a case of this kind that the person who makes the [offer] shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them. Appeal dismissed.

Carlill lived 50 years more, dying at the age of 96—of the flu.

This case serves as a cautionary tale. Running a "normal" ad which describes a product, its features, and its price does not amount to an offer. But, if a company proposes to take an action—like pay $100 to customers who take certain, specific actions—then it may find itself contractually obligated to follow through on its promises. The acceptance of the offer makes a unilateral contract.

Note also that, regardless of whether an ad counts as an offer, consumers have protection from those shopkeepers who are intent upon deceit. Almost every state has some form of **consumer protection statute,** which outlaws false advertising. For example, an automobile dealer who advertises a remarkably low price but then has only one automobile at that price has probably violated a consumer protection statute because the ad was published in bad faith, to trick consumers into coming to the dealership. In the *Mesaros* case, the United States Mint did not violate any consumer protection statute because it acted in good faith and simply ran out of coins.

© AP Photo/Seth Wenig

You have the high bid—but you may not have the property.

Auctions

It is the property you have always dreamed of owning—and it is up for auction! You arrive bright and early, stand in front, bid early, bid often, bid higher, bid highest of all—it's yours! For five seconds. Then, to your horror, the auctioneer announces that none of the bids were juicy enough and he is withdrawing the property. Robbery! Surely he cannot do that? But he can. Auctions are exciting and useful, but you must understand the rules.

Every day, auctions are used to sell exquisite works of art, real estate, and many other things. **Placing an item up for auction is *not* an offer—it is merely a request for an offer.** The *bids* are the offers. If and when the hammer falls, the auctioneer has accepted the offer.

The important thing to know about a particular auction is whether it is conducted with or without reserve. Most auctions are *with reserve,* meaning that the items for sale have a minimum price. The law assumes that an auction is with reserve unless the auctioneer clearly states otherwise. The auctioneer will not sell anything for less than its reserve (minimum price). So when the bidding for your property failed to reach the reserve, the auctioneer was free to withdraw it.

The rules are different in an auction *without reserve.* Here, there is no minimum. Once the first bid is received, the auctioneer *must* sell the merchandise to the highest bidder.

EXAM Strategy

Question: Ahn and Chet are both unhappy. (1) Ahn, an interior designer, is working on a hotel project. In the annual catalog of a furniture wholesaler, she sees that sofa beds cost $3,000. Based on the catalog, she sends an order for 100 sofa beds to the wholesaler. The wholesaler notifies Ahn that the price has gone up to $4,000. (2) At an estate auction, held without reserve, Chet is high bidder on a rare violin. The seller considers Chet's bid too low and refuses to sell. Both Ahn and Chet sue, but only one will win. Which plaintiff will win, and why?

Strategy: (1) A contract requires an offer and an acceptance. When the furniture wholesaler sent out its catalog, did it make an offer that Ahn could accept? (2) Chet was high bidder. At some auctions, the high bidder is merely making an offer, but at others, he wins the item. Which kind of auction was this?

Result: (1) A price quote is generally not an offer. Ahn's order for 100 sofas was the offer, and the company was free to reject it. Ahn loses. (2) Most auctions are with reserve, meaning that the high bidder is merely making an offer. However, this one was without reserve. Chet gets the violin.

Problems with Definiteness

It is not enough that the offeror indicates that she intends to enter into an agreement. **The terms of the offer must also be definite.** If they are vague, then even if the offeree agrees to the deal, a court does not have enough information to enforce it and there is no contract.

You want a friend to work in your store for the holiday season. This is a definite offer: "I offer you a job as a sales clerk in the store from November 1 through December 29, 40 hours per week at $10 per hour." But suppose, by contrast, you say: "I offer you a job as a sales clerk in the store during the holiday season. We will work out a fair wage once we see how busy things get." Your friend replies, "That's fine with me." This offer is indefinite, and there is no contract. What is a fair wage? $15 per hour? Or $20 per hour? What is the "holiday season"? How will the determinations be made? There is no binding agreement.

The following case, which concerns a famous television show, presents a problem with definiteness.

Baer v. Chase

392 F.3d 609
Third Circuit Court of Appeals, 2004

Facts: David Chase was a television writer-producer with many credits, including a detective series called *The Rockford Files*. He became interested in a new program, set in New Jersey, about a "mob boss in therapy," a concept he eventually developed into *The Sopranos*. Robert Baer was a prosecutor in New Jersey who wanted to write for television. He submitted a *Rockford Files* script to Chase, who agreed to meet with Baer.

When they met, Baer pitched a different idea, concerning "a film or television series about the New Jersey Mafia." He did not realize Chase was already working on such an idea. Later that year, Chase visited New Jersey. Baer arranged meetings for Chase with local detectives and prosecutors, who provided the producer with information, material, and personal stories about their experiences with organized crime. Detective Thomas Koczur drove Chase and Baer to various New Jersey locations and introduced Chase to Tony Spirito. Spirito shared stories about loan sharking, power struggles between family members connected with the mob, and two colorful individuals known as Big Pussy and Little Pussy, both of whom later became characters on the show.

Back in Los Angeles, Chase wrote and sent to Baer a draft of the first *Sopranos* teleplay. Baer called Chase and commented on the script. The two spoke at least four times that year, and Baer sent Chase a letter about the script.

When *The Sopranos* became a hit television show, Baer sued Chase. He alleged that on three separate occasions Chase had agreed that if the program succeeded, Chase would "take care of" Baer, and would "remunerate Baer in a manner commensurate to the true value of his services." This happened twice on the phone, Baer claimed, and once during Chase's visit to New Jersey. The understanding was that if the show failed, Chase would owe nothing. Chase never paid Baer anything.

The district court dismissed the case, holding that the alleged promises were too vague to be enforced. Baer appealed.

Issue: ***Was Chase's promise definite enough to be enforced?***

Excerpts from Judge Greenberg's Decision: A contract arises from offer and acceptance, and must be sufficiently definite so that the performance to be rendered by each party can be ascertained with reasonable certainty. Therefore parties create an enforceable contract when they agree on its essential terms and manifest an intent that the terms bind them. If parties to an agreement do not agree on one or more essential terms of the purported agreement courts generally hold it to be unenforceable.

New Jersey law deems the price term, that is, the amount of compensation, an essential term of any contract.

An agreement lacking definiteness of price, however, is not unenforceable if the parties specify a practicable method by which they can determine the amount. However, in the absence of an agreement as to the manner or method of determining compensation the purported agreement is invalid. Additionally, the duration of the contract is deemed an essential term and therefore any agreement must be sufficiently definitive to allow a court to determine the agreed upon length of the contractual relationship.

Baer premises his argument on his view that New Jersey should disregard the well-established requirement of definiteness in its contract law when the subject-matter of the contract is an "idea submission." [However,] New Jersey precedent does not support Baer's attempt to carve out an exception to traditional principles of contract law for submission-of-idea cases. The New Jersey courts have not provided even the slightest indication that they intend to depart from their well-established requirement that enforceability of a contract requires definiteness with respect to the essential terms of that contract.

Nothing in the record indicates that the parties agreed on how, how much, where, or for what period Chase would compensate Baer. The parties did not discuss who would determine the "true value" of Baer's services, when the "true value" would be calculated, or what variables would go into such a calculation. There was no discussion or agreement as to the meaning of "success" of *The Sopranos*. There was no discussion how "profits" were to be defined. There was no contemplation of dates of commencement or termination of the contract. And again, nothing in Baer's or Chase's conduct, or the surrounding circumstances of the relationship, shed light on, or answers, any of these questions.

Affirmed.

Ethics Was it fair for Chase to use Baer's services without compensation? Did Baer really *expect* to get paid, or was he simply hoping that his work would land him a job?

EXAM Strategy

Question: Niels owned three adjoining parcels of land in Arizona ranging from 60 to 120 acres. Hannah wanted to buy one. The two had dinner in Chicago and then sketched this agreement: "Binding Contract: Niels agrees to sell one of his three Arizona lots to Hannah. Within 14 days, the parties will meet on the land, decide which lot Hannah is buying, and settle on a price. If they cannot agree on a price, they will decide a fair method of doing so. Both parties agree to be bound by this contract." Each signed. When they meet in Arizona, Niels refuses to sell any land, and Hannah sues. What will happen?

Strategy: Do not be fooled by wording such as "Binding Contract." Focus on the legal issues: Was there a meeting of the minds? Niels and Hannah *thought* they had a contract—but courts make an objective assessment, not subjective. Did Niels make an offer? Were the terms definite?

Result: Both parties believed they had a binding deal, and both parties were wrong. There are two primary issues—which lot is being sold and how much will it cost—and neither is specified. How are they to select a lot? What is a "fair method" of determining price? Other issues are not touched upon: When will the deal close, how will payment be made, what happens if Hannah cannot finance the purchase? The terms are too vague. The parties never reached a meeting of the minds, and Hannah will lose her suit.

The UCC and Open Terms

In the last chapter, we introduced the Uniform Commercial Code (UCC). Article 2 of the UCC governs contracts when the primary purpose is a sale of goods. Remember that goods are moveable, tangible objects. Usually, UCC provisions are not significantly different from common-law rules. But on occasion, the UCC modifies the common-law rule in some major way. In such cases, we will present a separate description of the key UCC provision. The UCC as a whole is covered in Unit 3. Depending on the class time available, some instructors prefer to discuss the UCC separately, while others like to include it in the general discussion of contracts. This book is designed to work with either approach.

We have just seen that, under the common law, the terms of an offer must be definite. But under the UCC, many indefinite contracts are allowed to stand. Throughout this unit, we witness how the Uniform Commercial Code makes the law of sales more flexible. There are several areas of contract law where imperfect negotiations may still create a binding agreement under the Code, even though the same negotiations under the common law would have yielded no contract. "Open terms" is one such area.

Yuma County Corp. produced natural gas. Yuma wanted a long-term contract to sell its gas so that it could be certain of recouping the expenses of exploration and drilling. Northwest Central Pipeline, which operated an interstate pipeline, also wanted a deal for 10 or more years so it could make its own distribution contracts, knowing it would have a steady supply of natural gas in a competitive market. But neither Yuma nor Northwest wanted to make a long-term *price* commitment, because over a period of years the price of natural gas could double—or crash. Each party wanted a binding agreement without a definitive price. If their negotiations had been governed by the common law, they would have run smack into the requirement of definiteness—no price, no contract. But because this was a sale of goods, it was governed by the UCC.

Under UCC §2-204(3), even though one or more terms are left open, a contract does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Thus, a contract for the sale of goods may be enforced when a key term is missing. Business executives may have many reasons to leave open a delivery date, a price, or some other term. But note that the parties must still have *intended* to create a contract. The UCC will not create a contract where the parties never intended one.

In some cases, the contract will state how the missing term is to be determined. Yuma County and Northwest drafted a contract with alternative methods of determining the price. In the event that the price of natural gas was regulated by the Federal Energy Regulatory Commission (FERC), the price would be the highest allowed by the FERC. If the FERC deregulated the price (as it ultimately did), the contract price would be the average of the two highest prices paid by different gas producers in a specified geographic area.

Gap Filler Provisions

Even if a UCC contract lacks a specific method for determining missing terms, the Code itself contains **gap-filler provisions**, which are rules for *supplying* missing terms. Some of the most important gap-filler provisions of the Code follow.

Gap-filler provisions
UCC rules for supplying missing terms.

Open Price. In general, if the parties do not settle on a price, the Code establishes that the goods will be sold for a reasonable price. This will usually be the market value or a price established by a neutral expert or agency. (UCC §2-305.)

Output and Requirements Provisions. An **output contract** obligates the seller to sell all of his output to the buyer, who agrees to accept it. For example, a cotton grower might agree to sell all of his next crop to a textile firm. A **requirements contract** obligates a buyer to obtain all of his needed goods from the seller. A vineyard might agree to buy all of its wine bottles from one supplier. Output and requirements contracts are by definition

Output contract
Obligates the seller to sell all of his output to the buyer, who agrees to accept it.

Requirements contract
Obligates a buyer to obtain all of his needed goods from the seller.

incomplete, since the exact quantity of the goods is unspecified. The Code requires that in carrying out such contracts, both parties act in good faith. Neither party may suddenly demand a quantity of goods (or offer a quantity of goods) that is disproportionate to their past dealings or their reasonable estimates. (UCC §2-306.)

Termination of Offers

Once an offer has been made, it faces only two possible fates—it can be terminated or accepted. If an offer is terminated, it can never be accepted. If it is accepted, and if there are no problems with any of the five remaining elements on the Contracts Checklist, then a valid contract is created. Offers can be terminated in four ways: revocation, rejection, expiration, and by operation of law.

Termination by Revocation

An offer is **revoked** when the offeror "takes it back" before the offeree accepts. In general, the offeror may revoke the offer any time before it has been accepted. Imagine that I call you and say, "I'm going out of town this weekend. I'll sell you my ticket to this weekend's football game for $75." You tell me that you'll think it over and call me back. An hour later, my plans change. I call you a second time and say, "Sorry, but the deal's off—I'm going to the game after all." I have revoked my offer, and you can no longer accept it.

In the next case, this rule was worth $100,000 to one of the parties.

Nadel v. Tom Cat Bakery

2009 N.Y. Misc. Lexis 5105
Supreme Court of New York, New York County, 2009

Facts: A Tom Cat Bakery delivery van struck Elizabeth Nadel as she crossed a street. Having suffered significant injuries, Nadel filed suit. Before the trial began, the attorney representing the bakery's owner offered a $100,000 settlement, which Nadel refused.

While the jury was deliberating, the bakery's lawyer again offered Nadel the $100,000 settlement. She decided to think about it during lunch. Later that day, the jury sent a note to the judge. The bakery owner told her lawyer that if the note indicated the jury had reached a verdict, that he should revoke the settlement offer.

Back in the courtroom, the bakery's lawyer said, "My understanding is that there's a note. . . . I was given an instruction that if the note is a verdict, my client wants to take the verdict."

Nadel's lawyer then said, "My client will take the settlement. My client will take the settlement."

The trial court judge allowed the forewoman to read the verdict, which awarded Nadel—nothing. She appealed, claiming that a $100,000 settlement had been reached.

Issue: ***Did Nadel's lawyer accept the settlement offer in time?***

Excerpts from Judge Figueroa's Decision: Plaintiff's motion to enforce "the settlement" has generated considerable debate between the parties. Plaintiff asserts that the defendant is bound to a settlement. Plaintiff's problem is that there was no "agreement" to speak of. To be sure, there was an offer from defendant. During the above-quoted colloquy, clearly there were also words of acceptance from plaintiff. But when the words, "my client will take the settlement" were uttered, it was too late for them to be effective. By that time, defense counsel had made it clear that if the jury had already come to a verdict, the offer was off the table. That condition could not be ignored, as the verdict that would mean all bets were off had already been reached. For the foregoing reasons, plaintiff's motion is denied.

Making Contracts Temporarily Irrevocable

Some offers cannot be revoked, at least for a time. Often, people and businesses need time to evaluate offers. If a car dealer offers you a green sedan for $25,000, you may want to shop around for a few days to try to find a better price. In the meantime, you may want to make sure that the green sedan is still available if you decide to return. Can you legally prevent the car dealer from selling the car to anyone else while you ponder the offer? In some circumstances, yes.

Option Contract (All types of contracts). With an option contract, an interested purchaser *buys* the right to have the offer held open. **The offeror may not revoke an offer during the option period.** Suppose you pay the car dealer $250 to hold open its offer until February 2. Later that day, the dealership notifies you that it is selling to someone else. Result? You can enforce *your* contract. The car dealer had no power to revoke because you purchased an option.

Firm Offers (UCC contracts only). Once again, the UCC has changed the law on the sale of goods. If a promise made in writing is signed by a *merchant,* and if it agrees to hold open an offer for a stated period, then an offer may not be revoked. The open period may not exceed three months. So, if the car dealer gives you a piece of paper that reads, "The offer on the green sedan is open at $25,000 until Friday at noon," he cannot revoke the offer before Friday at noon, even though you have not paid him anything. (UCC §2-205.)

Termination by Rejection

If an offeree clearly indicates that he does not want to take the offer, then he has **rejected** it. **If an offeree rejects an offer, the rejection immediately terminates the offer.** Suppose a major accounting firm telephones you and offers a job, starting at $80,000. You respond, "Nah. I'm gonna work on my surfing for a year or two." The next day, you come to your senses and write the firm, accepting its offer. No contract. Your rejection terminated the offer and ended your power to accept it.

Counteroffer. A party makes a **counteroffer** when it responds to an offer with a new and different proposal. Frederick faxes Kim, offering to sell a 50 percent interest in the Fab Hotel in New York for only $135 million. Kim faxes back and says, "That's too much, but I'll pay $115 million." Moments later, Kim's business partner convinces her that Frederick's offer was a bargain, and she faxes an acceptance of his $135 million offer. Does Kim have a binding deal? No. **A counteroffer is a rejection.** When Kim offered $115 million, she rejected Frederick's offer. Her original fax created a new offer, for $115 million, which Frederick never accepted. The parties have no contract at any price.

Termination by Expiration

An offeror may set a time limit. Quentin calls you and offers you a job in his next motion picture. He tells you, "I've got to know by tomorrow night." If you call him in three days to accept, you are out of the picture. **When an offer specifies a time limit for acceptance, that period is binding.**

If the offer specifies no time limit, the offeree has a *reasonable* period in which to accept. A reasonable period varies, depending upon the type of offer, previous dealings between the parties, and any normal trade usage or customary practices in a particular industry.

Termination by Operation of Law

In some circumstances, the law itself terminates an offer. **If an offeror dies or becomes mentally incapacitated, the offer terminates automatically and immediately**. Arnie offers you a job as an assistant in his hot-air balloon business. Before you can even accept, Arnie tumbles out of a balloon at 3,000 feet. The offer terminates along with Arnie.

Destruction of the subject matter terminates the offer. A car dealer offers to sell you a rare 1938 Bugatti for $7,500,000 if you bring cash the next day. You arrive, suitcase stuffed with cash, just in time to see Arnie drop 3,000 feet through the air and crush the Bugatti. The dealer's offer is terminated.

ACCEPTANCE

As we have seen, when there is a valid offer outstanding, it remains effective until it is terminated or accepted. An offeree accepts by saying or doing something that a reasonable person would understand to mean that he definitely wants to take the offer. Assume that Ellie offers to sell Gene her old iPod for $50. If Gene says, "I accept your offer," then he has indeed accepted, but there is no need to be so formal. He can accept the offer by saying, "It's a deal," or, "I'll take it," or any number of things. He need not even speak. If he hands her a $50 bill, he also accepts the offer.

It is worth noting that **the offeree must say or do *something* to accept.** Marge telephones Vick and leaves a message on his answering machine: "I'll pay $75 for your business law textbook from last semester. I'm desperate to get a copy, so I will assume you agree unless I hear from you by 6:00 tonight." Marge hears nothing by the deadline and assumes she has a deal. She is mistaken. Vick neither said nor did anything to indicate that he accepted.

Mirror Image Rule

If only he had known! A splendid university, an excellent position as department chair—gone. And all because of the mirror image rule.

Was it sensible to deny the professor a job over a mere 14-day difference? Sensible or not, that is the law.

Ohio State University wrote to Philip Foster offering him an appointment as a professor and chair of the art history department. His position was to begin July 1, and he had until June 2 to accept the job. On June 2, Foster telephoned the dean and left a message accepting the position, *effective July 15.* Later, Foster thought better of it and wrote the university, accepting the school's starting date of July 1. Too late! Professor Foster never did occupy that chair at Ohio State. The court held that since his acceptance varied the starting date, it was a counteroffer. And a counteroffer, as we know, is a rejection.[3]

Was it sensible to deny the professor a job over a mere 14-day difference? Sensible or not, that is the law. The common-law **mirror image rule** requires that acceptance be on *precisely* the same terms as the offer. If the acceptance contains terms that add or contradict the offer, even in minor ways, courts generally consider it a counteroffer. The rule worked reasonably well in the 19th century, when parties would write an original contract and exchange it, penciling in any changes. But now that businesses use standardized forms to purchase most goods and services, the rule creates enormous difficulties. Sellers use forms they have prepared, with all conditions stated to their advantage, and buyers employ their own forms, with terms they prefer. The forms are exchanged in the mail or electronically, with neither side clearly agreeing to the other party's terms.

Mirror image rule
Requires that acceptance be on precisely the same terms as the offer.

The problem is known as the "battle of forms." Once again, the UCC has entered the fray, attempting to provide flexibility and common sense for those contracts involving the

[3]*Foster v. Ohio State University*, 41 Ohio App. 3d 86, 534 N.E.2d 1220, 1987 Ohio App. LEXIS 10761 (Ohio Ct. App. 1987).

sale of goods. But for contracts governed by the common law, such as Professor Foster's, the mirror image rule is still the law.

UCC and the Battle of Forms

UCC §2-207 dramatically modifies the mirror image rule for the sale of goods. Under this provision, an acceptance that adds additional or different terms often will create a contract.

Additional or Different Terms

One basic principle of the common law of contracts remains unchanged: the key to creation of a contract is a valid offer that the offeree *intends* to accept. If there is no intent to accept, there is no contract. The big change brought about by UCC §2-207 is this: **an offeree who accepts may include in the acceptance terms that are additional to or different from those in the offer.** Thus, even with additional or different terms, the acceptance may well create a contract.

> *Example A.* Wholesaler writes to Manufacturer, offering to buy "10,000 wheelbarrows at $50 per unit. Payable on delivery, 30 days from today's date." Manufacturer writes back, "We accept your offer of 10,000 wheelbarrows at $50 per unit, payable on delivery. *Interest at normal trade rates for unpaid balances.*" Manufacturer clearly intends to form a contract. The company has added a new term, but there is still a valid contract.

However, if the offeree states that her acceptance is *conditioned on the offeror's assent* to the new terms, there is no contract.

> *Example B.* Same offer as above. Manufacturer adds the interest rate clause and states, "Our acceptance is conditional upon your agreement to this interest rate." Manufacturer has made a counteroffer. There is no contract, yet. If Wholesaler accepts the counteroffer, there is a contract; if Wholesaler does not accept it, there is no contract.

Additional terms are those that bring up *new* issues, such as interest rates, not contained in the original offer. Additional terms in the acceptance are considered proposals to add to the contract. Assuming that both parties are merchants, the additional terms *will generally become part of the contract*. Thus, in Example A, the interest rate will become a part of the binding deal. If Wholesaler is late in paying, it must pay whatever interest rate is current.

In three circumstances, the additional terms in the acceptance *do not* become part of the contract:

- If the original offer *insisted on its own terms.* In other words, if Wholesaler wrote, "I offer to buy them on the following terms and *no other terms,*" then the Manufacturer is not free to make additions.
- If the additional terms *materially alter* the original offer. Suppose Manufacturer wrote back, "We accept your offer for 10,000 wheelbarrows. Delivery will be made within 180 days, unless we notify you of late delivery." Manufacturer has changed the time from 30 days to 180 days, with a possible extension beyond that. That is a material alteration, and it will not become part of the contract. By contrast, Manufacturer's new language concerning "interest at normal trade rates" was not a material alteration, and therefore that interest rate becomes part of the contract.
- If the offeror receives the additional terms and *promptly objects* to them.

Different terms are those that contradict terms in the offer. For example, if the seller's form clearly states that no warranty is included, and the buyer's form says the seller warrants all goods for three years, the acceptance contains different terms. An acceptance may contain different terms and still create a contract. But in these cases, courts have struggled to decide what the terms of the contract are. **The majority of states hold that different**

(contradictory) terms cancel each other out. Neither term is included in the contract. Instead, the neutral terms from the Code itself are "read into" the contract. These are the gap-filler terms discussed above. If, for example, the forms had contradictory warranty clauses (as they almost always do), the different terms would cancel each other out, and the warranty clauses from the UCC would be substituted.[4]

EXAM Strategy

Question: Elaine faxes an offer to Raoul. Raoul writes, "I accept. Please note, I will charge 2 percent interest per month for any unpaid money." He signs the document and faxes it back to Elaine. Do the two have a binding contract?

Strategy: Slow down, this is trickier than it seems. Raoul has added a term to Elaine's offer. We must take two steps to decide whether there is a contract. In a contract for services, acceptance must mirror the offer, but not so in an agreement for the sale of goods.

Result: If this is an agreement for services, there is no contract. However, if this agreement is for goods, the additional term *may* become part of an enforceable contract.

Question: Assume that Elaine's offer concerns goods. Is there an agreement?

Strategy: Under UCC §2-207, an additional term will become part of a binding agreement for goods except in three instances. What are the three exceptions?

Result: Raoul's extra term will be incorporated in a binding contract unless (1) Elaine's offer made clear she would accept no other terms; (2) Raoul's interest rate is a material alteration of the offer (almost never the case for interest rates); or (3) Elaine promptly rejects the interest rate.

Clickwraps And Shrinkwraps

You want to purchase Attila brand software and download it to your computer. You type in your credit card number and other information, agreeing to pay $99. Attila also requires that you "read and agree to" all of the company's terms. You click "I agree," without having read one word of the terms. Three frustrating weeks later, tired of trying to operate defective Attilaware, you demand a refund and threaten to sue. The company replies that you are barred from suing because the terms you agreed to included an arbitration clause. To resolve any disputes, you must travel to Attila's hometown, halfway across the nation, use an arbitrator that the company chooses, pay one-half the arbitrator's fee, and also pay Attila's legal bills if you should lose. The agreement makes it financially impossible for you to get your money back. Is that contract enforceable?

You have entered into a "clickwrap" agreement. Similar agreements, called "shrinkwraps," are packaged inside many electronic products. A shrinkwrap notice might require that before inserting a purchased CD into your computer, you must read and agree to all terms in the brochure. Clickwraps and shrinkwraps often include arbitration clauses. They

[4]Not all states follow this rule, however. Some courts have held that when the acceptance contains terms that contradict those in the offer, the language in the offer should be final. A few courts have ruled that the terms in the acceptance should control.

frequently limit the seller's liability if anything goes wrong, saying that the manufacturer's maximum responsibility is to refund the purchase price (even if the software destroys your hard drive).

Many courts that have analyzed these issues have ruled that clickwrap and shrinkwrap agreements are indeed binding, even against consumers. The courts have emphasized that sellers are entitled to offer a product on any terms they wish, and that shrinkwrap and clickwrap are the most efficient methods of including complicated terms in a small space. Think before you click![5]

However, some courts have *refused* to enforce such contracts against a consumer, stating that the buyer never understood or agreed to the shrinkwrapped terms. The court in the following case works hard to balance the competing interests, and in the process demonstrates that this new area of law is very much in flux.

Specht v. Netscape Communications Corporation

306 F.3d 17
Second Circuit Court of Appeals, 2002

Facts: A group of plaintiffs sued Netscape, claiming that two of the company's products illegally captured private information about files that they downloaded from the Internet. The plaintiffs alleged that this was electronic eavesdropping, in violation of two federal statutes.

From Netscape's Web page, the plaintiffs had downloaded SmartDownload, a software plug-in that enabled them to download the company's Communicator software. The Web page advertised the benefits of SmartDownload, and near the bottom of the screen was a tinted button labeled "Download." The plaintiffs clicked to download. If, instead of downloading, they had scrolled further down, they would have seen an invitation to "review and agree to the terms of the Netscape SmartDownload software license agreement." By clicking the appropriate button, they would have been sent to a series of linked pages, and finally arrived at a license agreement. Among the terms was an agreement to arbitrate any dispute. In other words, a consumer downloading SmartDownload was in theory giving up the right to file suit if anything went wrong, and agreeing to settle the dispute by arbitration. However, the plaintiffs never reviewed the license terms.

In the district court, Netscape moved to dismiss the case and compel arbitration. Netscape claimed that the plaintiffs had forfeited any right to sue based on the license agreement. The district court denied the company's motion, ruling that the plaintiffs had not agreed to the terms of the license. Netscape appealed.

Issue: ***Had the plaintiffs agreed to arbitrate their claims?***

Excerpts from Judge Sotomayor's Decision: Defendants argue that plaintiffs must be held to a standard of reasonable prudence and that, because notice of the existence of SmartDownload license terms was on the next scrollable screen, plaintiffs were on "inquiry notice" of those terms. We disagree with the proposition that a reasonably prudent offeree in plaintiffs' position would necessarily have known or learned of the existence of the SmartDownload license agreement prior to acting, so that plaintiffs may be held to have assented to that agreement with constructive notice of its terms.

Receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms. These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions

[5] *ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447 (7th Cir. 1996), is the leading case to enforce shrinkwrap agreements (and, by extension, clickwraps). *Klocek v. Gateway,* 104 F. Supp. 1332 (D. Kan. 2000), is one of the few cases to reject such contracts. *Klocek,* however, was dismissed for failure to reach the federal court $75,000 jurisdictional level.

to "Download Now!" What plaintiffs saw when they were being invited by defendants to download this fast, free plug-in called SmartDownload was a screen containing praise for the product and, at the very bottom of the screen, a "Download" button. Defendants argue that a fair and prudent person using ordinary care would have been on inquiry notice of SmartDownload's license terms.

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. Thus, plaintiffs' apparent manifestation of consent was to terms contained in a document whose contractual nature was not obvious. Moreover, the fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape Web page remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms.

We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. There is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there.

For the foregoing reasons, we affirm the district court's denial of defendants' motion to compel arbitration and to stay court proceedings.

The plaintiffs in *Specht* won because they knew nothing about the arbitration clause and were unlikely to discover it on the company's website. Notice what happens when a user *does* know about terms posted online. Register.com was a registrar of Internet domain names, meaning that it issued domain names to people and companies establishing a new website. The company was legally obligated to make available to the public, for free, the names and contact information of its customers. Register was also in the business of assisting owners, for a fee, to develop their websites.

Verio, Inc. competed in the site development business. Verio's automated software program (robot) would search Register.com daily, seeking information about new sites. *After* Verio obtained contact information, a notice would appear on the Register site, stating:

> By submitting a query, you agree that under no circumstances will you use this data to support the transmission of mass unsolicited, commercial advertising or solicitation via email.

In fact, though, Verio used the contact information for exactly that purpose, sending mass emailings to owners of new websites, soliciting their development business. Register sued. Verio defended by stating it was not bound by the notice because the notice did not appear until after it had obtained the information. Verio argued that when it sent the queries, it was unaware of any restrictions on use of the data. The court was unpersuaded, and explained its reasoning with a simple but telling metaphor:

> The situation might be compared to one in which plaintiff P maintains a roadside fruit stand displaying bins of apples. A visitor, defendant D, takes an apple and bites into it. As D turns to leave, D sees a sign, visible only as one turns to exit, which says "Apples—50 cents apiece." D does not pay for the apple. D believes he has no obligation to pay because he had no notice when he bit into the apple that 50 cents was expected in return. D's view is that he never agreed to pay for the apple. Thereafter, each day, several times a day, D revisits the stand, takes an apple, and eats it. D never leaves money.
>
> P sues D in contract for the price of the apples taken. D defends on the ground that on no occasion did he see P's price notice until after he had bitten into the apples. D may well prevail as to the first apple taken. D had no reason to understand upon taking it that P was demanding the payment. In our view, however, D cannot continue on a daily basis to take apples for free, knowing full well that P is offering them only in exchange for 50 cents in compensation, merely because the sign demanding payment is so placed that on each occasion D does not see it until he has bitten into the apple.

Register.com won its case. Verio was prohibited from using the contact information for mass emailings because it had actual knowledge of the restrictions placed on its use.[6]

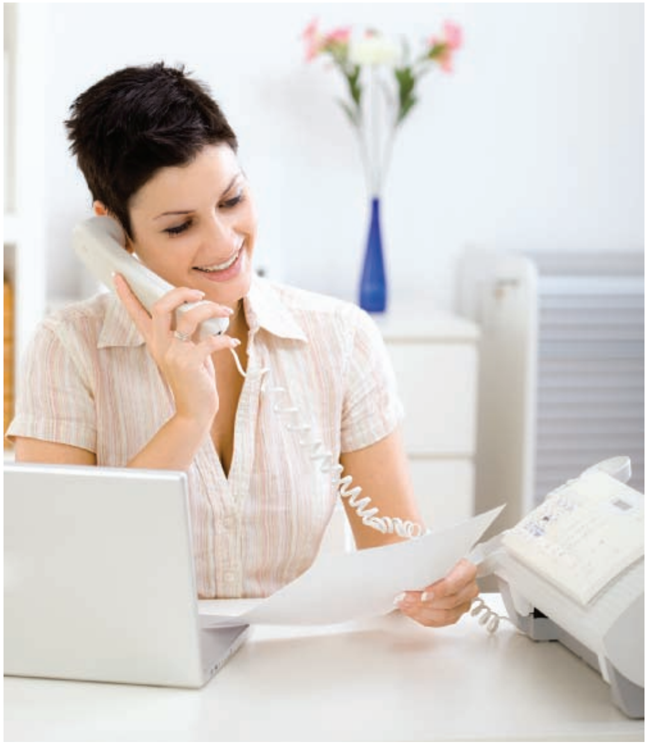
Communication of Acceptance

The offeree must communicate his acceptance for it to be effective. The questions that typically arise concern the method, the manner, and the time of acceptance.

Method and Manner of Acceptance

The term "method" refers to whether acceptance is done in person or by mail, telephone, email, or fax. The term "manner" refers to whether the offeree accepts by promising, by making a down payment, by performing, and so forth. **If an offer demands acceptance in a particular method or manner, the offeree must follow those requirements.** An offer might specify that it be accepted in writing, or in person, or before midnight on June 23. An offeror can set any requirements she wishes. Omri might say to Oliver, "I'll sell you my bike for $200. You must accept my offer by standing on a chair in the lunchroom tomorrow and reciting a poem about a cow." Oliver can only accept the offer in the exact manner specified if he wants to form a contract.

If the offer does not specify a type of acceptance, the offeree may accept in any reasonable manner and method. An offer generally may be accepted by performance or by a promise, unless it specifies a particular method. The same freedom applies to the method. If Masako faxes Eric an offer to sell 1,000 acres in Montana for $800,000, Eric may accept by mail or fax. Both are routinely used in real estate transactions, and either is reasonable.



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If the offer does not specify a type of acceptance, the offeree may accept in any reasonable manner and medium.

Time of Acceptance: The Mailbox Rule

An acceptance is generally effective upon dispatch, meaning the moment it is out of the offeree's control. Terminations, on the other hand, are effective when received. When Masako faxes her offer to sell land to Eric, and he mails his acceptance, the contract is binding the moment he puts the letter into the mail. In most cases, this **mailbox rule** is just a detail. But it becomes important when the offeror revokes her offer at about the same time the offeree accepts. Who wins? Suppose Masako's offer has one twist:

Mailbox rule
Acceptance is generally effective upon dispatch. Terminations are effective when received.

- On Monday morning, Masako faxes her offer to Eric.
- On Monday afternoon, Eric writes, "I accept" on the fax, and Masako mails a revocation of her offer.
- On Tuesday morning, Eric mails his acceptance.
- On Thursday morning, Masako's revocation arrives at Eric's office.
- On Friday morning, Eric's acceptance arrives at Masako's office.

[6]*Register.Com v. Verio, Inc.*, 353 F.3d 393 (2d Cir. 2004).

Outcome? Eric has an enforceable contract. Masako's offer was effective when it reached Eric. His acceptance was effective on Tuesday morning, when he mailed it. Nothing that happens later can "undo" the contract.

SOLDAU V. ORGANON, INC.

860 F.2d 355, 1988 U.S. App. LEXIS 14757
United States Court of Appeals for the Ninth Circuit, 1988

Facts: Organon fired John Soldau. Then the company sent to him a letter offering to pay him double the normal severance pay, provided Soldau would sign a full release, that is, a document giving up any and all claims he might have against Organon. The release was included with the letter. Soldau signed it, dated it, and took it to the nearest post office, where he deposited it in the mailbox. When he returned home, Soldau discovered in the mail a check from Organon for the double severance pay. He hustled back to the post office, where he persuaded a postal clerk to open the mailbox and retrieve the release he had posted. He then cashed Organon's check and finally filed a suit against the company, alleging that his firing was age discrimination.

The federal district court gave summary judgment for Organon, ruling that Soldau's acceptance of the proposed release was effective when he mailed it, creating a contract. He appealed.

Issue: ***Did Soldau create a contract by mailing the release?***

Excerpts from the *Per Curiam* Decision: The district court was clearly correct under California law. Soldau does not argue to the contrary. Instead, he contends that the formation and validity of the release are governed by federal law, and would not have been effective unless and until it had been received by Organon. We need not decide which body of law controls. Under federal as well as California law, Soldau's acceptance was effective when it was mailed.

The so-called mailbox or effective when mailed rule was adopted and followed as federal common law by the Supreme Court [at the beginning of the 20th century]. We could not change the rule, and there is no reason to believe the Supreme Court would be inclined to do so. It is almost universally accepted in the common law world. It is enshrined in the Restatement (Second) of Contracts and endorsed by the major contract treatises.

Commentators are also virtually unanimous in [supporting the "effective upon dispatch" rule,] pointing to the long history of the rule; its importance in creating certainty for contracting parties; its essential soundness, on balance, as a means of allocating the risk during the period between the making of the offer and the communication of the acceptance or rejection to the offeror; and the inadequacy of the rationale offered by the Court of Claims for the change.

Since Soldau's contractual obligation to release Organon in return for Organon's obligation to make the enhanced severance payment arose when Soldau deposited his acceptance in the post office mailbox, his subsequent withdrawal of the acceptance was ineffectual.

Affirmed.

Chapter Conclusion

The law of offer and acceptance can be complex. Yet for all its faults, the law is not the principal source of dispute between parties unhappy with negotiations. Most litigation concerning offer and acceptance comes from *lack of clarity* on the part of the people negotiating. The many examples discussed are all understandable given the speed and fluidity of the real world of business. But the executive who insists on clarity is likelier in the long run to spend more time doing business and less time in court.

Exam Review

1. **MEETING OF THE MINDS** The parties can form a contract only if they have a meeting of the minds, which requires that they understand each other and show that they intend to reach an agreement. (p. 252)

EXAM Strategy

Question: Norv owned a Ford dealership and wanted to expand by obtaining a BMW outlet. He spoke with Jackson and other BMW executives on several occasions. Norv now claims that those discussions resulted in an oral contract that requires BMW to grant him a franchise, but the company disagrees. Norv's strongest evidence of a contract is the fact that Jackson gave him forms on which to order BMWs. Jackson answered that it was his standard practice to give such forms to prospective dealers, so that if the franchise were approved, car orders could be processed quickly. Norv states that he was "shocked" when BMW refused to go through with the deal. Is there a contract?

Strategy: A court makes an *objective* assessment of what the parties did and said to determine whether they had a meeting of the minds and intended to form a contract. Norv's "shock" is irrelevant. Do the order forms indicate a meeting of the minds? Was there additional evidence that the parties had reached an agreement? (See the "Result" at the end of this section.)

2. **OFFER** An offer is an act or statement that proposes definite terms and permits the other party to create a contract by accepting those terms. (p. 253)

3. **OTHER STATEMENTS** Invitations to bargain, price quotes, letters of intent, and advertisements are generally not offers. However, an ad in which a company proposes to take a specific action when a customer takes a specific action can amount to an offer. And letters of intent that indicate the parties intended to be bound can also count as offers. (pp. 253–255)

EXAM Strategy

Question: "**Huge** selection of Guernsey sweaters," reads a newspaper ad from Stuffed Shirt, a clothing retailer. "Regularly $135, today only $65." Waldo arrives at Stuffed Shirt at 4:00 that afternoon, but the shop clerk says there are no more sweaters. He shows Waldo a newly arrived Shetland sweater that sells for $145. Waldo sues, claiming breach of contract and violation of a consumer protection statute. Who will prevail?

(a) Waldo will win the breach of contract suit and the consumer protection suit.

(b) Waldo will lose the breach of contract suit but might win the consumer protection suit.

(c) Waldo will lose the consumer protection suit but should win the breach of contract suit.

(d) Waldo will win the consumer protection suit only if he wins the contract case.

(e) Waldo will lose both the breach of contract suit and the consumer protection suit.

Strategy: Waldo assumes that he is accepting the store's offer. But did Stuffed Shirt make an offer? If not, there cannot be a contract. Does the consumer protection statute help him? (See the "Result" at the end of this section.)

4. **DEFINITENESS** The terms of the offer must be definite, although under the UCC the parties may create a contract that has open terms. (pp. 257–258)

5. **TERMINATION** An offer may be terminated by revocation, rejection, expiration, or operation of law. (pp. 260–262)

EXAM Strategy

Question: Rick is selling his Espresso Coffee Maker. He sends Tamara an email, offering to sell the machine for $350. Tamara promptly emails back, offering to buy the item for $300. She hears nothing from Rick, so an hour later Tamara stops by his apartment, where she learns that he just sold the machine to his roommate for $250. She sues Rick. Outcome?

(a) Tamara will win because her offer was higher than the roommate's.

(b) Tamara will win because Rick never responded to her offer.

(c) Tamara will win because both parties made clear offers, in writing.

(d) Tamara will lose because she rejected Rick's offer.

(e) Tamara will lose because her offer was not definite.

Strategy: A valid contract requires a definite offer and acceptance. Rick made a valid offer. When Tamara said she would buy the machine for a lower amount, was that acceptance? If not, what was it? (See the "Result" at the end of this section.)

6. **MIRROR IMAGE RULE AND UCC §2-207** The common-law mirror image rule requires acceptance on precisely the same terms as the offer. Under the UCC, an offeree may often create a contract even when the acceptance includes terms that are additional to or different from those in the offer. (pp. 262–264)

7. **CLICKWRAPS** Clickwrap and shrinkwrap agreements are generally enforceable. (pp. 264–267)

8. **MANNER OF ACCEPTANCE** If an offer demands acceptance in a particular method or manner, the offeree must follow those requirements. If the offer does not specify a type of acceptance, the offeree may accept in any reasonable manner and medium. (p. 267)

9. **MAILBOX RULE** An acceptance is generally effective upon dispatch, meaning from the moment it is out of the offeree's control. Terminations usually are not effective until received. (pp. 267–268)

1. Result: The order forms are neither an offer nor an acceptance. Norv has offered no evidence that the parties agreed on price, date of performance, or any other key terms. There is no contract. Norv allowed eagerness and optimism to replace common sense.[7]

3. Result: An advertisement is usually not an offer, but merely a solicitation of one. It is Waldo who is making the offer, which the store may reject. Waldo loses his contract case, but he may win under the consumer protection statute. The correct answer is B. If Stuffed Shirt proclaimed "Huge selection" when there were only five sweaters, the store was deliberately misleading consumers, and Waldo wins. However, if there was indeed a large selection, and Waldo arrived too late, he is out of luck.

5. Result: Tamara made a counteroffer of $300. A counteroffer is a rejection. Tamara rejected Rick's offer and simultaneously offered to buy the coffee maker at a lower price. Rick was under no obligation to sell to Tamara at any price. He will win Tamara's suit.

Multiple-Choice Questions

1. Rebecca, in Honolulu, faxes a job offer to Spike, in Pittsburgh, saying, "We can pay you $55,000 per year, starting June 1." Spike faxes a reply, saying, "Thank you! I accept your generous offer, though I will also need $3,000 in relocation money. See you June 1. Can't wait!" On June 1, Spike arrives, to find that his position is filled by Gus. He sues Rebecca.
   - (a) Spike wins $55,000.
   - (b) Spike wins $58,000.
   - (c) Spike wins $3,000.
   - (d) Spike wins restitution.
   - (e) Spike wins nothing.

2. Arturo hires Kate to work in his new sporting goods store. "Look," he explains, "I can only pay you $9.00 an hour. But if business is good a year from now, and you're still here, I'm sure I can pay you a healthy bonus." Four months later, Arturo terminates Kate. She sues.
   - (a) Kate will win her job back, plus the year's pay and the bonus.
   - (b) Kate will win the year's pay and the bonus.
   - (c) Kate will win only the bonus.
   - (d) Kate will win only her job back.
   - (e) Kate will win nothing.

[7]Based on *Arnold Pontiac-GMC, Inc. v. General Motors Co.*, 786 F.2d 564 (3d Cir. 1986).

3. Manny offers to sell Gina his TV for $100 on January 1. On January 2, Gina writes out a letter of acceptance. On January 3, Gina drops the letter in a mailbox. On January 4, a postal worker gets the letter out of the mailbox and takes it to the post office. On January 5, the letter arrives in Manny's mailbox. When (if ever) was a contract formed?
   (a) January 2
   (b) January 3
   (c) January 4
   (d) January 5
   (e) None of the above—a contract has not been formed.

4. Frank, an accountant, says to Missy, "I'll sell you my laptop for $100." Missy asks, "Will you give me until tomorrow to make up my mind?" "Sure," Frank replies. Which of the following is true?
   (a) Frank cannot revoke his offer, no matter what.
   (b) Frank cannot revoke his offer, but only if Missy pays him to keep the offer open until tomorrow.
   (c) Frank can revoke his offer no matter what, because he is not a merchant.
   (d) Frank can revoke his offer no matter what, because he did not promise Missy anything in writing.

5. Which of the following amounts to an offer?
   (a) Ed says to Carmen, "I offer to sell you my pen for $1."
   (b) Ed says to Carmen, "I'll sell you my pen for $1."
   (c) Ed writes, "I'll sell you my pen for $1," and gives the note to Carmen.
   (d) All of the above.
   (e) A and C only.

Essay Questions

1. The town of Sanford, Maine, decided to auction off a lot it owned. The town advertised that it would accept bids through the mail, up to a specified date. Arthur and Arline Chevalier mailed in a bid that turned out to be the highest. When the town refused to sell them the lot, they sued. Result?

2. The Tufte family leased a 260-acre farm from the Travelers Insurance Co. Toward the end of the lease, Travelers mailed the Tuftes an option to renew the lease. The option arrived at the Tuftes' house on March 30, and gave them until April 14 to accept. On April 13, the Tuftes signed and mailed their acceptance, which Travelers received on April 19. Travelers claimed there was no lease and attempted to evict the Tuftes from the farm. May they stay?

3. Consolidated Edison Co. of New York (Con Ed) sought bids from General Electric Co. (GE) and others to supply it with two huge transformers. Con Ed required that the bids be held open for 90 days. GE submitted a written bid and included a clause

holding the bid open for 90 days. During that period, Con Ed accepted GE's bid, but GE refused to honor it. Is there a contract?

4. The Dukes leased land from Lillian Whatley. Toward the end of their lease, they sent Ms. Whatley a new contract, renewing the lease for three years and giving themselves the option to buy the land at any time during the lease for $50,000. Ms. Whatley crossed out the clause giving them an option to buy. She added a sentence at the bottom, saying, "Should I, Lillian Whatley, decide to sell at end [sic] of three years, I will give the Dukes the first chance to buy." Then she signed the lease, which the Dukes accepted in the changed form. They continued to pay the rent until Ms. Whatley sold the land to another couple for $35,000. The Dukes sued. Are the Dukes entitled to the land at $50,000? At $35,000?

5. ***YOU BE THE JUDGE* WRITING PROBLEM** Academy Chicago Publishers (Academy) approached the widow of author John Cheever about printing some of his unpublished stories. She signed a contract, which stated:

   The Author will deliver to the Publisher on a mutually agreeable date one copy of the manuscript of the Work as finally arranged by the editor and satisfactory to the Publisher in form and content.... Within a reasonable time and a mutually agreeable date after delivery of the final revised manuscript, the Publisher will publish the Work at its own expense, in such style and manner and at such price as it deems best, and will keep the Work in print as long as it deems it expedient.

   Within a year, Academy had located and delivered to Mrs. Cheever more than 60 unpublished stories. But she refused to go ahead with the project. Academy sued for the right to publish the book. The trial court ruled that the agreement was valid; the appeals court affirmed; and the case went to the Illinois Supreme Court. Was Academy's offer valid, and was the contract enforceable? **Argument for Mrs. Cheever:** The agreement is too vague to be enforceable. None of the essential terms are specified: the number of stories, their length, who selects them, the date of publication, the size or cost of the book, or anything else. There is no contract. **Argument for Academy:** Mrs. Cheever wanted to publish this book and agreed in writing to help Academy do so. Both parties understood the essential nature of the book and were willing to permit some flexibility, to ensure a good edition. She has no right to back out now.

Discussion Questions

1. Advertisements usually do not amount to offers. Is this fair? Should businesses have legal obligations to sell items at an advertised price?

2. Most auctions are held "with reserve." If you place the highest bid at such an auction, and if your bid is below the reserve, then you do not get the item. Is this fair? Should the law award you the item at the price you bid?

3. Someone offers to sell you a concert ticket for $50, and you reply, "I'll give you $40," The seller refuses to sell at the lower price, and you say, "OK, OK, I'll pay you $50." Clearly, no contract has been formed, because you made a counteroffer. If the seller has changed her mind and no longer wants to sell for

$50, she doesn't have to. But is this fair? If it is all part of the same conversation, should you be able to accept the $50 offer and get the ticket?

4. If you click an "I agree" box, odds are that its terms are binding on you, even if the box contains dozens or even hundreds of lines of dense text. Is this fair? Should the law change to limit the enforceability of clickwraps?

5. Courts stick to objective (reasonable person) standards when evaluating offers and acceptances. Juries are not asked to "get inside someone's head," they are instructed to determine what a reasonable person would think of offerors' and offereees' statements. Is this practice reasonable? Would it be better if the law directly considered whether people *wanted* to make contracts?

CHAPTER 12


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CONSIDERATION

Have you ever rented a movie that you did not want every one of your friends to know about? Cathryn Harris did. Imagine her shock when she rented a movie online from Blockbuster, only to find out that this news was automatically transmitted to her Facebook page and then broadcast to all her "friends." Just think how bad that could be.

Harris sued Blockbuster for this violation of her privacy, only to find out she had clicked away her right to sue. To rent the movie, she had had to click that little box saying she agreed to all the terms and conditions. And one of those terms and conditions was an agreement to arbitrate, not litigate. Can Blockbuster get away with this?

To rent the movie, she had to click that little box saying she agreed to all the terms and conditions.

It turns out that this movie has a happy ending. The court ruled that the contract between Harris and Blockbuster was unenforceable because there was no *consideration*.

Consideration is our next step on the road to understanding contracts. In the last chapter, we learned what it takes to create an agreement. But an agreement is not necessarily a legally enforceable contract.

This is the first of four chapters that will examine problems that can prevent an agreement from becoming a contract. A lack of consideration is one of them. Without it, a promise is "just a promise" and nothing more.

What is Consideration?

Contracts Checklist

- ☐ Offer
- ☐ Acceptance
- ☑ Consideration
- ☐ Legality
- ☐ Capacity
- ☐ Consent
- ☐ Writing

The central idea of consideration is simple: contracts must be a two-way street. If one side gets all the benefit and the other side gets nothing, then an agreement lacks consideration and is not an enforceable contract.

There are three rules of consideration:

1. Both parties must get something of *measureable value* from the contract. That thing can be money, boots, an agreement not to sue, or anything else that has real value.
2. A *promise* to give something of value counts as consideration. A *promise* to mow someone's lawn next week is the equivalent of actually *doing* the yardwork when evaluating whether consideration exists.
3. The two parties must have *bargained for* whatever was exchanged and struck a deal: "If you do this, I'll do that." If you just decide to deliver a cake to your neighbor's house without her knowing, that may be something of value, but since you two did not bargain for it, there is no contract and she does not owe you the price of the cake.

Let's take an example: Sally's Shoe Store and Baker Boots agree that she will pay $20,000 for 100 pairs of boots. They both get something of value—Sally gets the boots, Baker gets the money. A contract is formed when the promises are made because a promise to give something of value counts. The two have bargained for this deal, so there is valid consideration.

Now for an example where there is no consideration. Marvin works at Sally's. At 9 a.m., he is in a good mood and promises to buy his coworker a Starbucks during the lunch hour. The delighted coworker agrees. Later that morning, the coworker is rude to Marvin, who then changes his mind about buying the coffee. He is free to do so. His promise created a one-way street: the coworker stood to receive all the benefit of the agreement, while Marvin got nothing. Because Marvin received no value, there is no contract.

What Is Value?

As we have seen, an essential part of consideration is that both parties must get something of value. That item of value can be either an "act" or a "forbearance."

Act

Act
Any action that a party was not legally required to take in the first place.

A party commits an **act** when she does something she was not legally required to do in the first place. She might do a job, deliver an item, or pay money, for example. An act does not count if the party was simply complying with the law or fulfilling her obligations under an existing contract. Thus, for example, suppose that your professor tells the university that she will not post final grades unless she is paid an extra $5,000. Even if the university agrees to this outrageous demand, that agreement is not a valid contract because the professor is already under an obligation to post final grades.

Forbearance

Forbearance
Refraining from doing something that one has a legal right to do.

A **forbearance** is, in essence, the opposite of an act. A plaintiff forbears if he agrees *not* to do something he had a legal right to do. An entrepreneur might promise a competitor not to open a competing business, or an elderly driver (with a valid driver's license) might promise concerned family members that he will not drive at night.

Let's apply these ideas to the most famous of all consideration lawsuits. Our story begins in 1869, when a well-meaning uncle makes a promise to his nephew. Ever since *Hamer v. Sidway* appeared, generations of American law students have dutifully inhaled the facts and sworn by its wisdom; now you, too, may drink it in.

Landmark Case

Hamer v. Sidway

124 N.Y. 538, 27 N.E. 256, 1891 N.Y. LEXIS 1396
New York Court of Appeals, 1891

Facts: This is a story with two Stories. William Story wanted his nephew to grow up healthy and prosperous. In 1869, he promised the 15-year-old boy (who was also named William Story) $5,000 if the lad would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until his twenty-first birthday. (In that wild era—can you believe it?—the nephew had a legal right to do all those things.) The nephew agreed and, what is more, he kept his word. When he reached his twenty-first birthday, the nephew notified his uncle that he had honored the agreement. The uncle congratulated the young man and promised to give him the money, but said he would wait a few more years before handing over the cash, until the nephew was mature enough to handle such a large sum. The uncle died in 1887 without having paid, and his estate refused to honor the promise. Because the nephew had transferred his rights in the money, it was a man named Hamer who eventually sought to collect from the uncle's estate. The estate argued that since the nephew had given no consideration for the uncle's promise, there was no enforceable contract. The trial court found for the plaintiff, and the uncle's estate appealed.

Issue: ***Did the nephew give consideration for the uncle's promise?***

Excerpts from Justice Parker's Decision: The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise, and insists that it follows that, unless the promisor was benefited, the contract was without consideration, a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.

Now applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator [that is, the uncle] that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it.

The issue of value in a contract is an important one, so let's look at another case. In the movies, when a character wants to get serious about keeping a promise—*really* serious—he sometimes signs an agreement in blood. As it turns out, this kind of thing actually happens in real life. In the following case, did the promise of forbearance have value? Did a contract signed in blood count? You be the judge.

You be the Judge

Kim v. Son

2009 Cal. App. LEXIS 2011
Court of Appeal of California, 2009

Facts: Stephen Son was a part owner and operator of two corporations. Because the businesses were corporations, Son was not personally liable for the debts of either one.

Jinsoo Kim invested a total of about $170,000 in the companies. Eventually, both of them failed, and Kim lost his investment. Son felt guilty over Kim's losses.

Later, Son and Kim met in a sushi restaurant and drank heroic quantities of alcohol. At one point, Son pricked his finger with a safety pin and wrote the following in his own blood: "Sir, please forgive me. Because of my deeds, you have suffered financially. I will repay you to the best of my ability." In return, Kim agreed not to sue him for the money owed.

Son later refused to honor the bloody document and pay Kim the money. Kim filed suit to enforce their contract.

The judge determined that the promise did not create a contract because there had been no consideration.

You Be The Judge: ***Was there consideration?***

Argument for Kim: As a part of the deal made at the sushi restaurant, Kim agreed not to sue Son. What could be more of a forbearance than that? Kim had a right to sue at any time, and he gave the right up. Even if Kim was unlikely to win, Son would still prefer not to be sued.

Besides, the fact that Son signed the agreement in blood indicates how seriously he took the obligation to repay his loyal investor. At a minimum, Son eased his guilty conscience by making the agreement, and surely that is worth something.

Argument for Son: Who among you has not at one point or another become intoxicated, experienced emotions more powerful than usual, and regretted them the next morning? Whether calling an ex-girlfriend and professing endless love or writing out an agreement in your own blood, it is all the same.

A promise not to file a meritless lawsuit has no value at all. It did not matter to Son whether or not Kim filed suit because Kim could not possibly win. If this promise counts as value, then the concept of consideration is meaningless because anyone can promise not to sue anytime. Son had no obligation to pay Kim. And the bloody napkin does not change that fact because it was made without consideration of any kind. It is an ordinary promise, not a contract that creates any legal obligation.

Adequacy of Consideration

Gold can make people crazy. At the turn of the 20th century, John Tuppela joined the gold rush to Alaska. He bought a mine and worked it hard, a disciplined man in an unforgiving enterprise. Sadly, his prospecting proved futile and mental problems overwhelmed him. In 1914, a court declared him insane and locked him in an institution in Portland, Oregon. Four years later, Tuppela emerged and learned to his ecstasy that gold had been discovered in his mine, now valued at over half a million dollars. Then the bad news hit: a court-appointed guardian had sold the mine for pennies while Tuppela was institutionalized. Destitute and forlorn, Tuppela turned to his lifelong friend, Embola, saying, "If you will give me $50 so I can go to Alaska and get my property back, I will pay you $10,000 when I win my property." Embola accepted the offer, advancing the $50.

After a long and bitter fight, Tuppela won back his mine, though a guardian would still supervise his assets. Tuppela asked the guardian to pay the full $10,000 to Embola, but the guardian refused. Embola sued, and the issue was whether his $50 was *adequate consideration* to support Tuppela's promise of $10,000. A happy ending: Embola won and recovered his money.

Courts seldom inquire into the *adequacy* of consideration. Although the difference between Embola's $50 and Tuppela's $10,000 was huge, it was not for a court to decide whether the parties had made an intelligent bargain. Embola undertook a risk, and his $50 was valid consideration. The question of adequacy is for the parties as they bargain, not for the courts.

Law professors often call this the "peppercorn rule," a reference to a Civil War–era case in which a judge mused, "What is a valuable consideration? A peppercorn."[1] Even the tiniest benefit to a plaintiff counts, so long as it has a measureable value.


REUTERS/Mario Anzuoni

How does the peppercorn rule apply in this situation?

EXAM Strategy

Question: 50 Cent has been rapping all day, and he is very thirsty. He pulls his Ferrari into the parking lot of a convenience store. The store turns out to be closed, but luckily for him, a PepsiCo machine sits outside. While walking over to it, he realizes that he has left his wallet at home. Frustrated, he whistles to a 10-year-old kid who is walking by. "Hey kid!" he shouts. "I need to borrow fifty cents!" "I know you are!" the kid replies. Fiddy tries again. "No, no, I need to *borrow* fifty cents!" The kid walks over. "Well, I'm not going to just give you my last fifty cents. But maybe you can sell me something." 50 Cent cannot believe it, but he really is very thirsty. He takes off a Rolex, which is his least expensive bling. "How about this?" "Deal," the kid says, handing over two quarters. Is the kid entitled to keep the watch?

Strategy: Even in extreme cases, courts rarely take an interest in *how much* consideration is given, or whether everyone got a "good deal." Even though the Rolex is worth thousands of times more than the quarters, the quarters still count under the peppercorn rule.

Result: After this transaction, 50 Cent may have second thoughts, but they will be too late. The kid committed an act by handing over his money—he was under no legal obligation to do so. And 50 Cent received something of small but measureable value. So there is consideration to support this deal, and 50 Cent would not get his watch back.

[1] *Hobbs v. Duff*, 23 Cal. 596 (1863).

Illusory Promises

Annabel calls Jim and says, "I'll sell you my bicycle for 325 bucks. Interested?" Jim says, "I'll look at it tonight in the bike rack. If I like what I see, I'll pay you in the morning." At sunrise, Jim shows up with the $325, but Annabel refuses to sell. Can Jim enforce their deal? No. He said he would buy the bicycle *if he liked it*, keeping for himself the power to get out of the agreement for any reason at all. He is not *committing* himself to do anything, and the law considers his promise illusory—that is, not really a promise at all. **An illusory promise is not consideration.** Because he has given no consideration, there is no contract, and *neither party* can enforce the deal.

Let's revisit the Blockbuster case from the opening scenario. Blockbuster's clickwrap box read, in part:

> "Blockbuster may at any time, and at its sole discretion, modify these Terms and Conditions of Use, including without limitation the Privacy Policy, with or without notice. Such modifications will be effective immediately upon posting."

Because Blockbuster had the ability to change the rules at any time for any reason, the court determined that the contract was illusory and that Harris was not bound by Blockbuster's arbitration clause.[2]

Applications Of Consideration

We will spend the remainder of the chapter looking at specific situations in which consideration plays a central role.

The UCC: Consideration in Requirements and Output Contracts

In a requirements contract, the buyer agrees to purchase 100 percent of her goods from one seller. The seller agrees to sell the buyer whatever quantity she reasonably needs. The quantity is not stated in the contract, though it may be estimated based on previous years or best calculations. The common law regarded requirements contracts as void because the buyer held all the power. She could purchase a vast quantity or none at all. She was making no commitment, and hence was giving no consideration. Common-law courts refused to enforce requirements contracts, as well as their counterpart, output contracts.

In an output contract, the seller guarantees to sell 100 percent of its output to one buyer, and the buyer agrees to accept the entire quantity. For example, a timber company might agree to sell all of its wood products to a lumber wholesaler. The common law frowned on this because now it was the seller who was making no real commitment.

The problem with the common-law rule was that many merchants valued these contracts. Consider the utility of requirements contracts. From the buyer's viewpoint, a requirements contract provides flexibility. The buyer can adjust purchases based on consumer demands. The agreement also guarantees her a source of goods in a competitive market. For a seller, the requirements agreement will ensure him at least this one outlet and will prevent competitors from selling to this buyer. The contract should enable the seller to spend less on marketing and may enable him to predict sales more accurately. Output contracts have similar value.

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[2] *Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex. 2009).

The UCC responded in a forthright fashion: **Section 2-306 expressly allows output and requirements contracts in the sale of goods**.[3] However, the Code places one limitation on how much the buyer may demand (or the seller may offer):

> A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur *in good faith*, …

The "good faith" phrase is critical. In requirements contracts, courts have ruled that it is the "good faith" that a buyer brings to the deal that represents her consideration.[4] In other words, by agreeing to act in good faith, she actually is limiting her options. Because she is obligating herself, the deal becomes binding. Beware that this is not just wordplay. A buyer *must make its requirement demands in good faith*, based on the expectations the parties had when they signed the deal.

Suppose that you operate a T-shirt business. You and a wholesaler agree on a two-year requirements contract with a fixed price of $3 per T-shirt and an estimate of 150 T-shirts per week. If business is slow the first two months, you are permitted to purchase only 25 T-shirts per week if that is all you are selling. Should sales suddenly boom and you need 200 per week, you may also require that many. Both of those demands are made in good faith. But suppose the price of cotton skyrockets and the wholesale cost of T-shirts everywhere suddenly doubles. You have a two-year guaranteed price of $3 per T-shirt. Could you demand 2,000 T-shirts per week, knowing that you will be able to resell the shirts to other retailers for a big profit? No. That is not acting in good faith based on the original expectations of the parties. The wholesaler is free to ignore your exorbitant demand. The legal requirement has come full circle: your good faith is valid consideration and makes the deal enforceable—but it is binding on you, too.

EXAM Strategy

Question: Will bought simple wood furniture and custom-painted it for sale to interior designers. He entered into a written agreement to buy all the furniture he needed, for two years, from Wood Knot, Inc. Wood Knot agreed to supply Will with all the furniture he requested. During the second year, Will's business grew, and he requested 28 percent more furniture than in the first year. Wood Knot would not deliver unless Will would pay a higher price per unit, which Will would not. Will sued. What kind of a contract was this? Will Will win? Why or why not?

Strategy: Because this agreement did not specify the quantity of goods being sold, we know that it was either a requirements contract or an output contract. Review the difference between the two. Which was this agreement? These contracts are now legal, with one major limitation. What is that limitation? Apply it here.

Result: This was a requirements contract because Will agreed to purchase all his furniture from Wood Knot. Under the UCC, requirements contracts are enforceable, provided the buyer makes his demands in good faith. Will's increased order was a result of his booming business. Indeed, he entered into this agreement to protect his ability to grow his company. He made the request in good faith, the contract is enforceable, and yes—Will will win.

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[3]UCC §2-306(2) permits a related type of contract, the exclusive dealing agreement. Here, either a buyer or a seller of goods agrees to deal exclusively with the other party. The results are similar to an output or requirements agreement. Once again, one party is receiving a guarantee in exchange for a promise that the common law would have considered illusory. Under the Code, such a deal is enforceable.

[4]*Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 1987 U.S. App. LEXIS 3634 (8th Cir. 1987).

Of course, exceptions are the spice of law …

Preexisting Duty

As we have seen, **a promise to do something that a party is already obligated to do is not consideration.** Of course, exceptions are the spice of law, and the preexisting duty rule provides us with a rackful. Courts have created these exceptions because a rigid application of the rule might interfere with legitimate business goals.

Exception: Additional Work

When a party agrees to do something above and beyond what he is obligated to do, his promise is generally valid consideration. Cecil has promised to build a fabulous swimming pool/cabana for Nathalie for $250,000. When the work is half complete, he offers to build the cabana out of seashells rather than pine wood. If Nathalie agrees to a new price of $300,000 for the pool complex, she is obligated to pay because Cecil's extra work is valid consideration for her promise.

Exception: Modification

If both parties agree that a modification is necessary, the surest way to accomplish that is to rescind the original contract and draft a new one. **To rescind means to cancel.** Thus, if neither party has completed its obligations, the agreement to rescind will terminate each party's rights and obligations under the old contract. This should be done in writing. Then the parties sign the new agreement. Courts will *generally* enforce a rescission and modification provided both parties voluntarily entered into it, in good faith. If one side, determined to earn greater profits, unfairly coerces the other into the changes, the modification is invalid.

Once again, the UCC has changed the common law, making it easier for merchants to modify agreements for the sale of goods. UCC §2-209 provides:

- An agreement modifying a contract within this Article needs no consideration to be binding.
- A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded.

Here is how these two provisions work together. Mike's Magic Mania (MMM) agrees to deliver 500 rabbits and 500 top hats to State University for the school's Sleight of Hand 101 course. The goods, including 100 cages and 1,000 pounds of rabbit food, are to arrive no later than September 1, in time for the new semester, with payment on delivery. By September 20, no rabbits have appeared, in or out of hats. The university buys similar products from another supply house at a 25 percent steeper price and sues MMM for the difference. Mike claims that in early September, the dean had orally agreed to permit delivery in October. The dean is on sabbatical in Tahiti and cannot be reached for comment. Is the alleged modification valid?

Under the common law, the modification would have been void because MMM gave no consideration for the extended delivery date. However, this is a sale of goods, and under UCC §2-209, an oral modification may be valid even without consideration. Unfortunately for Mike, though, the original agreement included a clause forbidding oral modification. Any changes had to be in writing, signed by both parties. Mike never obtained such a document. Even if the dean did make the oral agreement, the university wins.

The following case arose in a setting that is traumatic and lamentably common: a homeowner could not make his mortgage payments. Foreclosure loomed. Did the parties agree to save the home?

You be the Judge

Citizens Trust Bank v. White

274 Ga.App.508, 618 S.E.2d 9
Georgia Court of Appeals, 2005

Facts: Herbert White owned a house in Atlanta. He refinanced his home through Citizens Trust Bank, but fell behind on his loan payments. He owed about $43,000. The Bank notified White that it intended to foreclose. After some delays, the Bank sent White a formal notice that it would sell his house at a foreclosure sale on the courthouse steps, on May 7. The finance agreement provided that if the Bank foreclosed, White owed the full amount.

On that date, White arrived and offered the Bank $35,000 to stop the foreclosure. The Bank's collection manager, D.J. Hughlett, accepted the money and drafted a letter, which he and White signed:

> Citizens Trust Bank agrees to postpone the foreclosure [based on] a payment of $33,000.00 in certified funds and a possible $2,000.00 from the account of Cora White Cummings on the above-referenced property. Our Attorney, William A. Broughman, will forward to you a written agreement, for your signature, to consummate this transaction. The payoff balance as of 11:05 AM is $7,986.43. If his sister pays the $2,000.00, the balance will be $5,986.43.

White did pay the extra $2,000. Hughlett decided that the signed letter was a forbearance agreement with White, so he did not bother to send an additional document. Hughlett believed that White would pay the balance within 30 days, but White never did so. The Bank sent a new foreclosure notice and did in fact sell the house.

White sued the Bank, claiming that it had breached its agreement not to foreclose. The jury agreed, awarding White $250,000 in compensatory damages. The Bank appealed, arguing that White gave no consideration for the agreement because he was already obligated to pay the full balance.

You Be The Judge: ***Was the signed letter an enforceable contract?***

Argument for the Bank: Mr. White fell behind on his mortgage payments. As soon as the Bank notified him that it was foreclosing, his full debt became due. When he offered to pay a percentage of that debt, he was fulfilling a preexisting duty. He was *legally obligated* to pay the $35,000 that he "offered," along with the full balance due. A promise to do what a party is required to do is never consideration. Without consideration, there is no contract.

The jury made an emotional decision based on sympathy for the debtor. That leads to bad policy and bad law. The policy is poor because if everyone were allowed to default without suffering a loss, no bank would lend money and most citizens could never buy a house. The law is even worse because the case should not have gone to a jury. The trial judge should have dismissed the suit based on the preexisting duty rule.

Argument for Mr. White: There were two parties to this agreement, and both believed they had a binding agreement. The Bank's officer agreed to postpone foreclosure. He also promised to forward a formal document confirming the understanding but did not do so. And why did he send no other document? Because he believed the Bank had already agreed to halt any foreclosure effort. He was right.

Mr. White paid 80 percent of the balance due. It is wrong for the Bank to take the money and then break its promise. Furthermore, it is absurd to foreclose based on such a modest debt. The legal argument about consideration is nonsense. Mr. White's consideration was a check for $35,000.

The jury award indicates a group of average citizens who were angry about what the Bank did. The verdict should be affirmed.

EXAM Strategy

Question: Star Struck, a Hollywood talent agency, employs Puneet as one of its young agents and Max as a part-time delivery boy. Puneet's contract is for one year. She earns $5,000 per month, payable on the last day of each month. After she has worked at the firm for four months, a Star Struck executive says to her, "We are having cash flow problems. We cannot pay you this month, and will probably fall about two months behind. However, if you will agree to do Max's job for the next few months, we can pay you on time." Puneet cheerfully agrees to the deal. However, after a few weeks of the extra labor, Puneet confesses that she is overwhelmed and can no longer do Max's job. Star Struck fires her. Puneet sues. Was there a binding agreement for Puneet to do Max's work?

Strategy: Star Struck made an offer to Puneet and she accepted it. But a contract needs more than offer and acceptance. Both parties must give consideration. Had they done more than they were required to do under their preexisting duty?

Result: A promise to do what a party is already obligated to do is not consideration. Star Struck was required to pay Puneet every month, so its "offer" included no consideration. Without consideration, there can be no agreement. Puneet was not obligated to do Max's job, and she will win this lawsuit.

Exception: Unforeseen Circumstances

Hugo has a deal to repair major highways. Hugo hires Hal's Hauling to cart soil and debris. Hal's trucks begin work, but after crossing the work site several times, they sink to their axles in sinister, sucking slime. Hal demands an additional 35 percent payment from Hugo to complete the job, pointing out that the surface was dry and cracked and that neither Hal nor Hugo was aware of the subsurface water. Hal howls that he must use different trucks with different tires and work more slowly to permit the soil to dry. Hugo hems and haws and finally agrees. But when the hauling is finished, Hugo refuses to pay the extra money. Is Hugo liable?

Yes. When unforeseen circumstances cause a party to make a promise regarding an unfinished project, that promise is generally valid consideration. Even though Hal is only promising to finish what he was already obligated to do, his promise is valid consideration because neither party knew of the subsoil mud. Hal was facing a situation quite different from what the parties anticipated. It is almost as though he were undertaking a new project. Hal has given consideration, and Hugo is bound by his promise to pay extra money.

SETTLEMENT OF DEBTS

You claim that your friend Felicity owes you $90,000, but she refuses to pay. Finally, when you are desperate, Felicity offers you a cashier's check for $60,000—provided you accept it as full settlement. To get your hands on some money, you agree and cash the check. The next day, you sue Felicity for $30,000. Who wins? It will depend principally upon one major issue: was Felicity's debt liquidated or unliquidated?

Liquidated Debt

A **liquidated debt** is one in which there is no dispute about the amount owed. A loan is a typical example. If a bank lends you $10,000, and the note obligates you to repay that amount on June 1 of the following year, you clearly owe that sum. The debt is liquidated.

Liquidated debt
A debt in which there is no dispute about the amount owed.

In cases of liquidated debt, if the creditor agrees to take less than the full amount as full payment, her agreement is not binding. The debtor has given no consideration to support the creditor's promise to accept a reduced payment, and therefore the creditor is not bound by her word. The reasoning is simply that the debtor is already obligated to pay the full amount, so no bargaining could reasonably cause the creditor to accept less. If Felicity's debt to you is liquidated, your agreement to accept $60,000 is not binding, and you will successfully sue for the balance.

Exception: Different Performance

There is one important exception to this rule. If the debtor offers a *different performance* to settle the liquidated debt, and the creditor agrees to take it as full settlement, the agreement is binding. Suppose that Felicity, instead of paying $60,000, offers you five acres in Alaska, and you accept. When you accept the deed to the land, you have given up your entire claim, regardless of the land's precise value.

Unliquidated Debt: Accord and Satisfaction

A debt is **unliquidated** for either of two reasons: (1) the parties dispute whether any money is owed, or (2) the parties agree that some money is owed but dispute how much. When a debt is unliquidated for either reason, the parties may enter into a binding agreement to settle for less than what the creditor demands.

Unliquidated debt
A debt that is disputed because the parties disagree over its existence or amount.

Such a compromise will be enforced if:

- The debt is unliquidated;
- The parties agree that the creditor will accept as full payment a sum less than she has claimed; and
- The debtor pays the amount agreed upon.

This agreement is called an **accord and satisfaction**. The accord is the agreement to settle for less than the creditor claims. The satisfaction is the actual payment of that compromised sum. An accord and satisfaction is valid consideration to support the creditor's agreement to drop all claims. Each party is giving up something: the creditor gives up her full claim, and the debtor gives up his assertion that he owed little or nothing.

Accord and satisfaction
A completed agreement to settle a debt for less than the sum claimed.

Accord and Satisfaction by Check

Most accord and satisfaction agreements involve payment by check. UCC §3-311 governs these agreements, using the same common-law rules described above.[5] The Code specifies that when the debtor writes "full settlement" on the check, a creditor who cashes the check generally has entered into an accord and satisfaction. If Felicity's debt is unliquidated, and she gives you a check with "full payment of all debts" written on the face in bold letters, the moment you deposit the check, you lose any claim to more money. What happens if the debtor makes such a notation but the creditor changes it? A massage therapist learned the answer and felt sore for days.

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[5]A check is legally an instrument, which is why this section comes from Article 3 of the Code. For a full discussion of instruments, see Chapters 23–36.

HENCHES V. TAYLOR

138 Wash. App. 1026, 2007 WL 1241525
Washington Court of Appeals, 2007

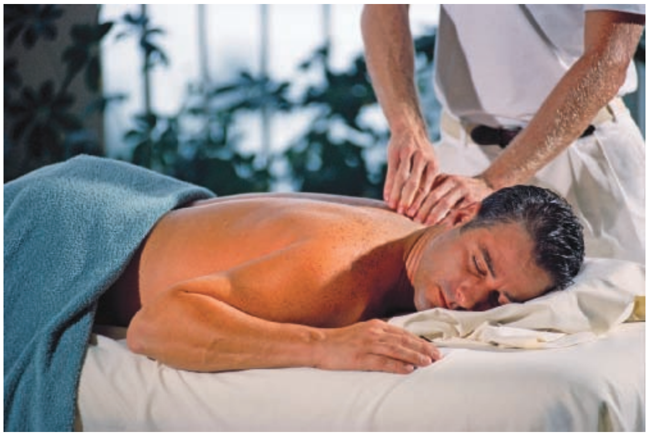
Facts: Jim Henches, a licensed massage therapist, treated Benjamin Taylor after he was injured in a car accident. When all treatments were finished, Henches billed Taylor for more than $7,000. Taylor's insurance company claimed the bill was exorbitant and paid only $2,625, for 24 massage treatments.

Henches continued to send bills to Taylor, not only for the balance due but for additional time spent consulting with Taylor's other health care providers, preparing to testify in Taylor's personal injury lawsuit, and attempting to collect his debts. In response to a bill for $11,945.86, Taylor's lawyer, James Harris, sent Henches a letter, stating:

> I have reviewed your billing statements and am having a difficult time understanding a number of charges you included. By my calculations, the amount owed to you is approximately $5,243.45. I have enclosed a check for that amount as payment in full to settle Mr. Taylor's account with you.

The letter was accompanied by a check with "final payment" written on the notation line. Henches filed suit, seeking the full balance. Then he wrote "attorney/fee" on the check, over the word "final," and deposited the check.

The trial court gave summary judgment to Taylor, ruling that deposit of the check constituted accord and satisfaction. Henches appealed.



© Jack Hollingsworth/Corbis

The massage feels great, but how much is it really worth?

Issue: ***Was there an accord and satisfaction, discharging the debt?***

Excerpts from Judge Ellington's Decision: A debt is discharged by accord and satisfaction when the debtor and creditor agree to settle a claim by some performance other than that which is claimed due, and the creditor accepts the substituted performance as full satisfaction of the claim. Accord and satisfaction requires a bona fide dispute, an agreement to settle the dispute for a certain sum, and performance of the agreement.

Taylor easily satisfied the first element of accord and satisfaction. The parties' contracts did not establish a liquidated amount for the services provided, and the letter that accompanied Taylor's check to Henches demonstrates a good faith dispute over the amount owed.

As with any contract, an accord and satisfaction cannot be formed without a meeting of the minds. But the required intent is shown when payment is offered in full satisfaction and is accompanied by conduct from which the creditor cannot fail to understand that payment is tendered on condition its acceptance constitutes satisfaction.

Given the undisputed facts here, Henches could not fail to understand that the check was offered on condition of full settlement. Henches' alteration of the "final payment" language is further demonstration that he read and understood the notation. Taylor tendered a check in final payment and Henches deposited the check, thereby accepting that payment.

A creditor can accept payment and avoid formation of an accord only where both parties understand before payment is accepted that the payment will not settle the claim. Henches contends his alteration of the check prevents accord and satisfaction. But a creditor cannot prevent formation of an accord by making a unilateral change to a draft tendered in full payment, even if the creditor endorses the check with the words accepted as partial payment and not as payment in full and not as an accord and satisfaction of the known full amount legally due and owing.

Where the amount due is in dispute, and the debtor sends cash or check for less than the amount claimed, clearly expressing his intention that it is sent as a settlement in full, and not on account or in part payment, the retention and use of the money or the cashing of the check is almost always held to be an acceptance of the offer operating as full satisfaction, even though the creditor may assert or send word to the debtor that the sum is received only in part payment.

Henches' alteration of the check was a unilateral act not communicated to Taylor. Accord and satisfaction discharged Taylor's debts to Henches. We affirm the trial court's summary judgment dismissal of Henches' suit.

UCC Exceptions

The Code creates two exceptions for accord and satisfaction cases involving checks. The first exception concerns "organizations," which typically are businesses. The general rule of §3-311 is potentially calamitous to them because a company that receives thousands of checks every day is unlikely to inspect all notations. A consumer who owes $12,000 on a credit card might write "full settlement" on a $200 check, potentially extinguishing the entire debt through accord and satisfaction. Under the exception, if an organization notifies a debtor that any offers to settle for less than the debt claimed must be made to a particular official, and the check is sent to anyone else in the organization, depositing the check generally does *not* create an accord and satisfaction. Thus a clerk who deposits 900 checks daily for payment of MasterCard debts will not have inadvertently entered into dozens of accord and satisfaction agreements.

The second exception allows a way out to most creditors who have inadvertently created an accord and satisfaction. If, within 90 days of cashing a "full payment" check, the creditor offers repayment of the same amount to the debtor, there is no accord and satisfaction. Homer claims that Virgil owes him $7 million but foolishly cashes Virgil's check for $3 million, without understanding that "paid in full" means just what it says. Homer has created an accord and satisfaction. But if he promptly sends Virgil a check for $3 million, he has undone the agreement and may sue for the full amount.

Consideration: Trends

Employment Agreements

In a noncompete agreement, an employee promises not to work for a competitor for some time after leaving the company. It used to be that these covenants were rare and reserved for top officers, but they have now become commonplace throughout many organizations. We will talk about them more in the next chapter, but often these covenants raise an issue of consideration: what consideration does the employee receive for signing a covenant not to compete? After all, the company is already under an obligation to pay the employee for working. What additional value does the employee receive in return for signing the agreement?

Although this area of law is developing and is a bit murky, the following case reflects the current majority view. Sometimes consideration issues can drive you nuts.

Snider Bolt & Screw v. Quality Screw & Nut

2009 U.S. Dist. LEXIS 50797
United States District Court for the Western District of Kentucky, 2009

Facts: James Scott signed a covenant not to compete when he went to work for Snider Bolt & Screw. The agreement prohibited him from taking a job with a competitor for one year after leaving Snider. Three years later, Scott quit his job at Snider and immediately went to work for Quality Screw & Nut (QSN).

Snider obtained a temporary restraining order that banned Scott from working at his new job. QSN argued that the covenant not to compete was void for lack of consideration. It asked the court to lift the temporary restraining order.

Issue: ***Did the covenant not to compete lack consideration?***

Excerpt from Judge Heyburn's Decision: Snider says that when Scott signed his covenant not to compete, he did so based upon an implied promise that Snider would continue his employment. Indeed, Snider did maintain Scott's employment until Scott himself left his job. Kentucky courts have found quite specifically that "where an employer has fulfilled an implied promise to continue the employee's employment, that promise is sufficient consideration

[to] support enforcement of the employee's promise not to compete." The Kentucky Supreme Court subsequently held that even continued at-will employment would be sufficient consideration. Here, Scott worked for another three years and left on his own accord to join QSN. These circumstances fit within the rule and the Court finds that the Covenant is supported by adequate consideration.

Consequently, the Court has no basis for sustaining QSN's motion.

Promissory Estoppel and "Moral Consideration"

Judges have a tool by which they can enforce agreements even if there is no consideration. Under the doctrine of promissory estoppel, a judge has the discretion to "ignore" the fact that consideration does not exist if a promise causes foreseeable reliance by a plaintiff and a great injustice would be done if the promise were broken. Some courts will use the phrase "moral consideration" to describe this basic idea.

For example, consider a pledge to charity. If Dave promises to give money to charity and then fails to make the donation, there is no consideration because he has received nothing in return. If the charity sues to enforce the promise, it cannot show that it has committed an act or forbearance.[6]

Nevertheless, some courts will force donors to make good on their donations anyway. Especially in the case of large donations, courts will often cite the "grave injustices" that can follow from this kind of promise breaking. "If you don't give the 'Coats for Kids' program the $100,000 you've pledged, then thousands of children will go without a coat this winter," a judge might say. Also, it may be that the charity has relied on the pledge to open another storefront or undertake a new program. Courts are likely to enforce the pledge in these circumstances.

It is unwise to make charitable pledges, especially large pledges, if you might change your mind.

EXAM Strategy

Question: In an Alabama case, Webb saved McGowin's life by preventing a giant block of wood from falling on his head.[7] Webb was permanently disabled in the accident and was never able to work again. Later, McGowin promised to give Webb money every two weeks for the rest of his life. McGowin made the payments for awhile but then stopped. Webb sued.

Strategy: No consideration exists here. McGowin made the promise to pay the money *after* Webb's heroic act. Webb did not give McGowin anything of value *in return for* the promise to pay money. But what about promissory estoppel?

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[6]An exception to this, of course, would be if the charity agreed to give Dave something at the time he made the pledge. As a "fix" for consideration problems, many charities send donors something of trivial value when pledges are made—maybe a water bottle or a tote bag. Under the peppercorn rule, even something of small value counts as a legal act, and it converts a mere promise of a donation into an enforceable contract.

[7]*Webb v. McGowin*, 168 So. 196 (Ala.1935).

Result: In the case, the court found that "moral consideration" was present, and that Webb was entitled to the payments to prevent substantial injustice.

It is important to note that applications of promissory estoppel and similar doctrines are rare. Ordinarily, if there is no consideration, then there is no contract. However, in extreme cases, it is possible for a court to enforce a deal even without consideration. But this is not something you can count on.

Chapter Conclusion

This ancient doctrine of consideration is simple to state but subtle to apply. The parties must bargain and enter into an exchange of promises or actions. If they do not, there is no consideration and the courts are unlikely to enforce any promise made. A variety of exceptions modify the law, but a party wishing to render its future more predictable—the purpose of a contract—will rely on a solid bargain and exchange.

Exam Review

1. **CONSIDERATION** There are three rules of consideration:
   - Both parties must get something of *measureable value* from the contract.
   - A *promise* to give something of value counts as consideration.
   - The two parties must have *bargained for* whatever was exchanged. (pp. 276–278)
2. **ACT OR FORBEARANCE** The item of value can be either an act or a forbearance. (pp. 276–277)

EXAM Strategy

Question: An aunt saw her eight-year-old nephew enter the room, remarked what a nice boy he was, and said, "I would like to take care of him now." She promptly wrote a note, promising to pay the boy $3,000 upon her death. Her estate refused to pay. Is it obligated to do so?

Strategy: A contract is enforceable only if the parties have given consideration. The consideration might be an act or a forbearance. Did the nephew give consideration? (See the "Result" at the end of this section.)

3. **ADEQUACY** The courts will seldom inquire into the adequacy of consideration. This is the "peppercorn rule." (pp. 278–279)
4. **ILLUSORY PROMISES** An illusory promise is not consideration. (pp. 278–280)

EXAM Strategy

Question: Eagle ran convenience stores. He entered into an agreement with Commercial Movie in which Commercial would provide Eagle with DVDs for rental. Eagle would pay Commercial 50 percent of the rental revenues. If Eagle stopped using Commercial's service, Eagle could not use a competitor's services for 18 months. The agreement also provided: "Commercial shall not be liable for compensation or damages of any kind, whether on account of the loss by Eagle of profits, sales or expenditures, or on account of any other event or cause whatsoever." Eagle complied with the agreement for two years but then began using a competitor's service, and Commercial sued. Eagle claimed that the agreement was unenforceable for lack of consideration. Please rule.

Strategy: In this case, both parties seem to have given consideration. But there is a flaw in the "promise" that Commercial made. Commercial can never be liable to Eagle—no matter what happens. (See the "Result" at the end of this section.)

5. **REQUIREMENT AND OUTPUT CONTRACTS** Under sales law, requirement and output contracts are valid. Although one side controls the quantity, its agreement to make demands *in good faith* is consideration. (pp. 280–283)

6. **PREEXISTING DUTY** Under the doctrine of preexisting duty, a promise to do something that the party is already legally obligated to perform is generally not consideration. (p. 282)

7. **LIQUIDATED DEBT** A liquidated debt is one in which there is no dispute about the amount owed. For a liquidated debt, a creditor's promise to accept less than the full amount is not binding. (pp. 285–287)

8. **UNLIQUIDATED DEBT** For an unliquidated debt, if the parties agree that the creditor will accept less than the full amount claimed and the debtor performs, there is an accord and satisfaction and the creditor may not claim any balance. (pp. 285–287)

9. **"FULL PAYMENT" NOTATIONS** In most states, payment by a check that has a "full payment" notation will create an accord and satisfaction unless the creditor is an organization that has notified the debtor that full payment offers must go to a certain officer. (pp. 285–287)

EXAM Strategy

Question: When White's wife died, he filed a claim with Boston Mutual for $10,000 death benefits under her insurance policy. The insurer rejected the claim, saying that his wife had misrepresented her medical condition in the application form. The company sent White a check for $478.75, which it said represented "a full refund of all applicable premiums paid" for the coverage. White deposited the check. Had the parties reached an accord and satisfaction?

Strategy: The UCC permits parties to enter into an accord and satisfaction by check. The debtor must make clear that the check is offered in full payment of a disputed debt. Debtors generally do that by writing "Final Settlement," "Accepted as Full Payment of All Debts," or some similar notation on the check. Had the insurance company complied with that requirement? (See the "Result" at the end of this section.)

10. PROMISSORY ESTOPPEL Sometimes, to prevent injustice, courts will enforce agreements even if no consideration is present. These deals are still not formal contracts, but the courts will enforce a promise nonetheless. (pp. 288–289)

EXAM Strategy

Question: Phil Philanthropist called PBS during a fund drive and pledged to donate $100,000. PBS then planned and began to produce a Fourth of July *Sesame Street* special, counting on the large donation to fund it. Later, Phil changed his mind and said he had decided not to donate the money after all. PBS sued because without the money, it would not be able to complete the show. Will PBS win the lawsuit?

Strategy: Analyze the promise to donate the $100,000. Does it contain consideration? If not, is there any other legal possibility? (See the "Result" at the end of this section.)

2. Result: The nephew gave no consideration. He did not promise to do anything. He committed no act or forbearance. Without consideration, there is no enforceable contract. The estate wins.

4. Result: Commercial's promise was illusory. The company was free to walk away from the deal at any time. Commercial could never be held liable. Commercial gave no consideration, and there was no binding contract for either party to enforce.

9. Result: The insurer merely stated that its check was a refund of premiums. Nowhere did the company indicate that the check was full payment of its disputed obligation. The company should have made it clear that it would not pay any benefits and that this payment was all that it would offer. There was no accord and satisfaction.

10. Result: There is no "regular" consideration here because Phil received no measureable benefit and PBS did not act or forbear. But PBS can likely make a strong case that a great injustice will be done if the money is not paid. A judge might well decide to apply the doctrine of promissory estoppel and require Phil to make the donation.

Multiple-Choice Questions

1. For consideration to exist, there must be:

(a) A bargained-for exchange

(b) A manifestation of mutual assent

(c) Genuineness of assent

(d) Substantially equal economic benefits to both parties

2. Which of the following requires consideration in order to be binding on the parties?
   (a) Modification of a contract involving the sale of real estate
   (b) Modification of a sale of goods contract under the UCC
   (c) Both A and B
   (d) None of the above

3. Ted's wallet is as empty as his bank account, and he needs $3,500 immmediately. Fortunately, he has three gold coins that he inherited from his grandfather. Each is worth $2,500, but it is Sunday, and the local rare coins store is closed. When approached, Ted's neighbor Andrea agrees to buy the first coin for $2,300. Another neighbor, Cami, agrees to buy the second for $1,100. A final neighbor, Lorne, offers "all the money I have on me"—$100—for the last coin. Desperate, Ted agrees to the proposal. Which of the deals is supported by consideration?
   (a) Ted's agreement with Andrea only
   (b) Ted's agreements with Andrea and Cami only
   (c) All three of the agreements
   (d) None of the agreements

4. In a(n) ____________ contract, the seller guarantees to sell 100 percent of its output to one buyer, and the buyer agrees to accept the entire quantity. This kind of arrangement ____________ acceptable under the UCC.
   (a) output; is
   (b) output; is not
   (c) requirements; is
   (d) requirements; is not

5. Noncompete agreements are common features of employment contracts. Currently, courts ____________ enforce these clauses.
   (a) always
   (b) usually
   (c) rarely
   (d) never

Essay Questions

1. American Bakeries had a fleet of over 3,000 delivery trucks. Because of the increasing cost of gasoline, the company was interested in converting the trucks to propane fuel. It signed a requirements contract with Empire Gas, in which Empire would convert "approximately 3,000" trucks to propane fuel, as American Bakeries requested, and would then sell all the required propane fuel to run the trucks. But American Bakeries changed its mind and never requested a single conversion. Empire sued for lost profits. Who won?

2. CeCe Hylton and Edward Meztista, partners in a small advertising firm, agreed to terminate the business and split assets evenly. Meztista gave Hylton a two-page document showing assets, liabilities, and a bottom line of $35,235.67, with half due to each partner. Hylton questioned the accounting and asked to see the books. Meztista did not permit Hylton to see any records and refused to answer her phone calls. Instead, he gave her a check in the amount of $17,617.83, on which he wrote "Final payment/payment in full." Hylton cashed the check, but she wrote on it, "Under protest—cashing this check does not constitute my acceptance of this amount as payment in full." Hylton then filed suit, demanding additional monies. Meztista claimed that the parties had made an accord and satisfaction. What is the best argument for each party? Who should win?

3. ***ETHICS*** Melnick built a house for Gintzler, but the foundation was defective. Gintzler agreed to accept the foundation if Melnick guaranteed to make future repairs caused by the defects. Melnick agreed but later refused to make any repairs. Melnick argued that his promise to make future repairs was unsupported by consideration. Who will win the suit? Is either party acting unethically? Which one, and why?

4. Sami walks into a restaurant. She is given a menu, which indicates that lobster is $30. Sami orders the lobster. It arrives, and Sami thinks it is very tasty. When the bill arrives, Sami tries to execute a clever ploy she learned about in her business law class. She writes a check to the restaurant for $20 and writes "full settlement" across the top. The waiter accepts the check without looking at it, and the restaurant manager later deposits it in the restaurant's bank account. Is this a liquidated or an unliquidated debt? Is Sami off the hook for the last $10?

5. In the bleachers…

"You're a prince, George!" Mike exclaimed. "Who else would give me a ticket to the big game?"

"No one, Mike, no one."

"Let me offer my thanks. I'll buy you a beer!"

"Ah," George said. "A large beer would hit the spot right now."

"Small. Let me buy you a small beer."

"Ah, well, good enough."

Mike stood and took his wallet from his pocket. He was distressed to find a very small number of bills inside. "There's bad news, George!" he said.

"What's that?"

"I can't buy you the beer, George."

George considered that for a moment. "I'll tell you what, Mike," he said. "If you march to the concession stand right this minute and get me my beer, I won't punch you in the face."

"It's a deal!" Mike said.

Discuss the consideration issues raised by this exchange.

6. Jack Tallas came to the United States from Greece in 1914. He lived in Salt Lake City for nearly 70 years, achieving great success in insurance and real estate. During the last 14 years of his life, his friend Peter Dementas helped him with numerous personal and business chores. Two months before his death, Tallas dictated a memorandum to Dementas, in Greek, stating:

> PETER K. DEMENTAS is my best friend I have in this country, and since he came to the United States, he treats me like a father and I think of him as my own son. He takes me in his car grocery shopping. He drives me to the doctor and also takes me every week to Bingham to pick up my mail, collect the rents, and manage my properties. For all the services Peter has given me all these years, I owe to him the amount of $50,000 (Fifty Thousand Dollars). I will shortly change my will to include him as my heir.

Tallas signed the memorandum, but he did not in fact alter his will to include Dementas. The estate refused to pay, and Dementas sued. Was there consideration? Please rule.

Discussion Questions

Apply the following material to the next three questions.

Some view consideration as a technicality that allows people to make promises and then back out of them. Perhaps all promises should be enforced. In Japan, for example, promises to give gifts are enforceable without consideration.[8]

In the United States, if I promise to give you a gift merely because I feel like being nice, I can freely change my mind as far as contract law is concerned. A court will not make me follow through because there is no consideration.

In Japan, I would be obligated to buy the gift if all other elements of a contract were present—an offer, an acceptance, and so forth.

Some argue that consideration in U.S. law is a doctrine left over from centuries long past, that it lacks any reasonable modern purpose, and that it should be abolished.

1. Do you agree with this statement: "A person should always keep his or her word."

2. When it comes to giving gifts, which is better—the Japanese or American rule?

3. Are there any specific types of agreements (perhaps high-value, long-term, extremely time-consuming ones) that should definitely require consideration?

4. In the gold rush example, Embola gave Tuppela $50 in exchange for a promise of $10,000 later. Under the peppercorn rule, the deal was a contract. Is the peppercorn rule sensible? Should courts require a more *even* exchange of value?

5. In the last two chapters, we have examined clickwrap boxes. Sometimes courts refuse to enforce clickwrap terms because of problems with acceptance or consideration, but usually the terms are enforced. Is there a way to make clickwraps fair to both sides? Would it be better to ban clickwrap boxes altogether?

[8] See Japan's Civil Code, Article 549.