CASES, PROBLEMS, AND MATERIALS
ON

CONTRACTS

CASES, PROBLEMS, AND MATERIALS ON CONTRACTS

FOURTH EDITION

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This book is dedicated

by Thomas Crandall to Nadine;

and by Douglas Whaley to
Barbara K. Shipek

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INTRODUCTION TO THE STUDY OF THE LAW OF CONTRACTS

The law of contracts derives its contours from many sources. It is necessary for you, the student, to appreciate the relative weight that is given to any one source so that you can gauge its importance in deciding the issue at hand. What follows is a discussion of the hierarchy of sources of law, plus a short explanation of each.

The foundation of law in the United States is the United States 1 Constitution. All other legal rules must be in conformity with it. Immediately under the Constitution in importance are 2 federal statutes and treaties. No state can pass legislation or announce a rule of law in conflict with these federal enactments. For that matter, 3 state law is also subordinate to regulations passed by the various federal agencies. The Supremacy Clause of Article VI of the Constitution states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Next in line in any given jurisdiction is the 4 state constitution, and under it the laws passed by the 5 state legislature. There will also be 6 regulations passed by state regulatory agencies, and these are the next rung of the legal ladder, followed by the 7 local ordinances passed by municipalities.

That exhausts the legislation that controls our law. Incredible as it may seem, however, that is not the end of it. In spite of all these enactments, there are still many situations unaccounted for that must be subject to rule of law. The development of these rules is left to the courts.

In countries taking their cue from Great Britain (such as the United States), one decision is precedent for subsequent ones, thus building up a body of *common law*, judicially created and followed thereafter by later courts. This concept is called *stare decisis*. As time goes on and society changes, the precedents may lose their weight and be altered or overruled, but this is not done lightly. Our common law system has great respect for the wisdom of the past. Some of the cases you will study are quite old. One, Kingston v. Preston, page 683, was decided by Lord Mansfield, the father of commercial law, in 1773 (and we will refer to others even older).

Of course, technically the only decisions that bind a given court are those from the highest court in that particular jurisdiction. Nonetheless, particularly where the issue has never arisen in that jurisdiction (or has not arisen in modern times), courts will look to the decisions of other jurisdictions to see how the matter is being handled. When casting about for guidance, the courts will also look to the learned treatises on point as well as the sections of the so-called Restatements (about which more in a moment).

Uniform Laws. In the specialized field of contracts most (but not all) of the law is created at the state level. For many decades each state had rules both legislative and judicial that were similar but not identical. This worked fine as long as merchants stayed within state boundaries to do their trading, but commerce cannot long be so confined. As time went on and the traffic between the states increased, the need for uniform rules became apparent. Various "model" or "uniform" laws were created by different groups and were submitted to the state legislatures with the recommendation of adoption without change. Some of these proposed statutes had greater success than others. Two widely adopted statutes were the Uniform Sales Act (first proposed in 1906, passed by two-thirds of the states) and the Uniform Negotiable Instruments Law (1896, passed by all of the states).

The Uniform Commercial Code. Eventually even these statutes became outdated, and the same body that had created them, the National Conference of Commissioners on Uniform State Laws, along with the American Law Institute, decided in the 1940s to overhaul these and other related statutes and produce a comprehensive code dealing with the issues central to commercial law. The Chief Draftsman of this statute was Professor Karl N. Llewellyn of the Columbia Law School. Under his stewardship, committees of drafters produced version after version of a work that was eventually called the "Uniform Commercial Code." Starting with Pennsylvania in 1953, the Uniform Commercial Code (abbreviated to "UCC," or, simply, the "Code") was enacted, with some modifications, in every jurisdiction in the United States (though Louisiana, with its French civil law tradition and very different laws, has enacted only parts of the UCC).

The Code, which repealed prior uniform enactments on point, is divided into distinct parts, called "Articles." Article 1 is a general Article, containing basic concepts (such as the requirement of good faith, see §1-203) and definitions (see §1-201).[1]

1. Incidentally, the symbol "§" means "section." Two together ("§§") signify the plural: "sections." The citation "§1-201" refers you to Article 1 of the Uniform Commercial Code in the first digit, and the three numbers after the hyphen refer to the section within that Article that you should consult in your statute book. If the citation contains additional numbers or letters, such as "§2-201(3)(a)," the parenthetical items are references to subsections within the larger section. Look up §2-201(3)(a) to see what is meant by this.

A major focus of this course is Article 2 of the Code. It deals with the *sale of goods. Goods* are defined in §2-105(1) as follows:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section of goods to be severed from realty (Section 2-107).

Things in action refers to intangible property, such as insurance policies. Thus the definition of goods refers to *personal* (as opposed to *real*) property, the items that your course in Property will call *chattels*. What is excluded by the above definition is land or interests in land, service contracts (such as contracts with a health spa), the sale of paper rights (such as stocks or bonds), and the sale of intangibles (again, insurance). As you study this course, be sensitive to the possible application of the Uniform Commercial Code's Article 2. If a problem involves a sale of goods, then this statute applies. Application of the common law rules, to the extent they differ from the UCC, will mean that your answer is wrong unless you make it clear that you are applying Article 2 only by analogy (which is often done by the courts).

Article 2A of the Uniform Commercial Code deals with the leasing of goods. Its rules are copied from those in Article 2 on the sale of goods, so that anyone who is familiar with the provisions of Article 2 will find Article 2A reassuringly familiar.

The chief complication with the Uniform Commercial Code in recent years has been the 2003 revision of Articles 2 and 2A approved by the two governing bodies shortly before this edition of the book was written. The major reasons for the rewrite was to update various provisions and to clarify the scope of these Articles when it came to the sale of software. Generally these Articles deal with the sale and lease of *goods*. The new Articles make it clear that the sale of "information" is not covered, but that leaves a lot of gray areas. The Official Comment to the new version of §2-103(k) has this explanation:

> The definition of "goods" in this article has been amended to exclude information not associated with goods. Thus, this article does not directly apply to an electronic transfer of information, such as the transaction involved in Specht v. Netscape, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). However, transactions often include both goods and information: some are transactions in goods as that term is used in Section 2-102, and some are not. For example, the sale of "smart goods" such as an automobile is a transaction in goods fully within this article even though the automobile contains many computer programs. On the other hand, an architect's provision of architectural plans on a computer disk would not be a transaction in goods. When a transaction includes both the sale of goods and the transfer of rights in information, it is up to the courts to determine whether the transaction is entirely within or outside of this article, or whether or to what extent this article should be applied to a portion of the transaction. While this article

may apply to a transaction including information, nothing in this Article alters, creates, or diminishes intellectual property rights.

Since the new revision was promulgated powerful forces (major manufacturers of both goods and software, among others) are at work to make sure that it is not widely adopted by the state legislatures. Since there is no group enthusiastically pushing for the adoption of the new Articles, it looks bleak for its passage. This casebook will mention the chief new changes where relevant, but will mostly focus on the old Articles 2 and 2A until the fate of the revisions is clearer.

The United Nations Convention on Contracts for the International Sale of Goods. Effective January 1, 1988, the United States became bound by a new treaty: the United Nations Convention on Contracts for the International Sale of Goods (hereafter "CISG"). The Convention only covers issues of contract formation and the rights and duties of the parties thereto. It excludes coverage of products liability issues, as well as matters touching on contract validity, such as fraud, illegality, and so on. CISG's rules are divided into different sections called "Articles."

Most of the major commercial powers in the world have ratified the treaty (at this writing Japan is the biggest exception). CISG applies if the contracting parties are located in different countries (called "States" by the treaty) and they do not agree that the law of some particular jurisdiction applies. Article 6 clearly allows the parties to avoid the application of CISG by choosing instead to be bound by some other body of law.

While the law reflected in CISG has some variations from the rules we will study in this book, for the most part its provisions are very similar to those of the common law and the Uniform Commercial Code. This book will highlight some of the major changes.

The Restatement. Throughout this book you will also see citations to the Restatement of Contracts. The Restatement, promulgated by the American Law Institute, is one of many similar works created by experts in the various fields of law that attempts to reduce the rules of the common law to set and uniform descriptions. The Restatement of Contracts was first approved by the American Law Institute in 1932; its Chief Reporter was the leading Contracts expert of his day, Professor Samuel Williston of the Harvard Law School. It is important to understand that the Restatement is *not* a statute. It is mere advice to the courts on what the common law *should* be. Thus it is not on the same level as the Uniform Commercial Code, which is a statute and *must* be followed if relevant to the dispute. But even though the Restatement is not binding law, drafted as it was by the then leading commercial authorities, it has been very influential in shaping the development of the common law.

Like the early uniform statutes, the original Restatement became outdated as time passed, so the American Law Institute promulgated a new version in 1979: the Restatement (Second) of Contracts. Professor E. Allan Farnsworth of Columbia Law School was the Chief Reporter for the final version.

Treatises. Contract law also benefits from a number of well-written learned treatises on point. Williston wrote one in 1920 and it was very influential. Another important one was written by Professor Arthur L. Corbin of the Yale Law School, published in 1950. These two works are often cited by the courts, and we will refer to them (particularly the later work by Corbin) throughout the book. In recent years, other helpful treatises on the law of Contracts have also appeared: J. Murray, *Murray on Contracts* (4th ed. 2001), J. Calamari and J. Perillo, *Calamari and Perillo's Hornbook on Contracts* (5th ed. 2003), and E. Farnsworth, *Farnsworth on Contracts* (2d ed. 1998). The leading treatise on the Uniform Commercial Code is J. White and R. Summers, *Uniform Commercial Code* (5th ed. 2000).

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CHAPTER 1

INTENT TO CONTRACT: OFFER AND ACCEPTANCE

I. INTRODUCTION: THE PRINCIPLE OF MUTUAL ASSENT

At the very heart of contract law is the determination of the parties' intent to contract. A showing of mutual assent is necessary for an enforceable contract. In determining whether there is mutual assent, courts typically ask whether there has been an *offer* to contract and an *acceptance* of that offer. If the offeror has clearly manifested a willingness to enter into a contract in such a way that the other party, the offeree, knows that assent is all that is necessary to cement the deal, and the offeree accepts, the requisite mutual assent exists.

Problem 1

Should a court find that there is the requisite mutual assent if the response to the following statements is "I accept"?

(a) "I'm considering selling my car to you for $1,200." invite to offer
(b) "I will sell you my car for $1,200."
(c) "Would it be a good deal if I sold you my car for $1,200?" a ? more
(d) "You wouldn't consider paying $1,200 for my car, would you?" invite to offer by itself

LUCY v. ZEHMER
Supreme Court of Virginia, 1954
196 Va. 493, 84 S.E.2d 516

BUCHANAN, Justice.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station, and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, "I bet you wouldn't take $50,000.00 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, "I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him $5 which Zehmer refused, saying, "You don't need to give me any money, you got the agreement there signed by both of us."

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it "complete, everything there," and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he was "pretty high." He said to Lucy, "Boy, you got some good liquor, drinking, ain't you?" Lucy then offered him a drink. "I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too."

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, "I bet you wouldn't take $50,000.00 for it." Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, "You haven't got $50,000.00 in cash." Lucy said he did and Zehmer replied that he did not believe it. They argued "pro and con for a long time," mainly about "whether he had $50,000 in cash that he could put up right then and buy that farm."

Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, "you sign that piece of paper here and say you will take $50,000.00 for the farm." He, Zehmer, "just grabbed the back off of a guest check there" and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to "see if I recognize my own handwriting." He examined the paper and exclaimed, "Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine."

After Zehmer had, as he described it, "scribbled this thing off," Lucy said, "Get your wife to sign it." Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he "was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm." Zehmer then "took it back over there . . . and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' . . . I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'"

after

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, "I bet you wouldn't take $50,000.00 cash for that farm," and Zehmer replied, "You haven't got $50,000 cash." Lucy said, "I can get it." Zehmer said he might form a company and get it, "but you haven't got $50,000.00 cash to pay me tonight." Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, "I agree to sell the Ferguson Place to W. O. Lucy for $50,000.00 cash." Lucy said, "All right, get your wife to sign it." Zehmer came back to where she was standing and said, "You want to put your name to this?" She said "No," but he said in an undertone, "It is nothing but a joke," and she signed it.

before

She said that only one paper was written and it said: "I hereby agree to sell," but the "I" had been changed to "We." However, she said she read what she signed and was then asked, "When you read 'We hereby agree to sell to W. O. Lucy,' what did you interpret that to mean, that particular phrase?" She said she thought that was a cash sale that night; but she also said that when she read that part about "title satisfactory to buyer" she understood that if the title was good Lucy would pay $50,000 but if the title was bad he would have a right to reject it, and that that was her understanding at the time she signed her name.

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it in his wallet, then said to Zehmer, "Let me give you $5.00," but Zehmer said, "No, this is liquor talking. I don't want to sell the farm, I have told you that I want my son to have it. This is all a joke." Lucy then said at least twice, "Zehmer, you have sold your farm," wheeled around and started for the door. He paused at the door and said, "I will bring you $50,000.00 tomorrow. . . . No, tomorrow is Sunday. I will bring it to you Monday." She said you could tell definitely that he was drinking and she said to her husband, "You should have taken him home," but he said, "Well, I am just about as bad off as he is."

The waitress referred to by Mrs. Zehmer testified that when Lucy first came in "he was mouthy." When Zehmer came in they were laughing and joking and she thought they took a drink or two. She was sweeping and cleaning up for next day. She said she heard Lucy tell Zehmer, "I will give you so much for the farm," and Zehmer said, "You haven't got that much." Lucy answered, "Oh, yes, I will give you that much." Then "they jotted down something on paper . . . and Mr. Lucy reached over and took it, said let me see it." He looked at it, put it in his pocket and in about a minute he left. She was asked whether she saw Lucy offer Zehmer any money and replied, "He had five dollars laying up there, they didn't take it." She said Zehmer told Lucy he didn't want his money "because he didn't have enough money to pay for his property, and wasn't going to sell his farm." Both of them appeared to be drinking right much, she said.

She repeated on cross-examination that she was busy and paying no attention to what was going on. She was some distance away and did not see either of them sign the paper. She was asked whether she saw Zehmer put the agreement down on the table in front of Lucy, and her answer was this: "Time he got through writing whatever it was on the paper, Mr. Lucy reached over and said, 'Let's see it.' He took it and put it in his pocket," before showing it to Mrs. Zehmer. Her version was that Lucy kept raising his offer until it got to $50,000.

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, §133, b., p.483; Taliaferro v. Emery, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract. . . .

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up and said, "Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap." Lucy testified that at that time Zehmer told him that he did not want to "stick" him or hold him to the agreement because he, Lucy, was too tight and didn't know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer's version was that he said to Lucy: "I am not trying to claim it wasn't a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00." A disinterested witness testified that what Zehmer said to Lucy was that "he was going to let him up off the deal, because he thought he was too tight, didn't know what he was doing. Lucy said something to the effect that 'I have been stuck before and I will go through with it.'"

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'" First Nat. Exchange Bank of Roanoke v. Roanoke Oil Co., 169 Va. 99, 114, 192 S.E. 764, 770.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, §71, p.74.

> ... The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them.... Clark on Contracts, 4 ed., §3, p.4.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, §32, p.361; 12 Am. Jur., Contracts, §19, p.515.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement. 17 C.J.S., Contracts, §47, p.390; Clark on Contracts, 4 ed., §27, at p.54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties....

The complainants are entitled to have specific performance of the contract sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.

NOTE

The court mentioned the concession at oral argument that Zehmer was not too drunk to contract. As we shall see in Chapter 6, sometimes the impaired mental state of one of the parties prevents that person from having the legal capacity to enter into a contract.

Problem 2

John Falstaff bought a new car for $25,000, but the first day he drove it to work it broke down on the highway and stranded him. John finally managed to get to his neighborhood bar where he loudly trumpeted his disgust with the car. When the busboy, Francis Feeble, who was known by all to have a very low I.Q., said, "I love your new car," John raised his stein of beer and toasted Francis, replying, "It's yours for $1,500—just go get it." Francis said, "Thanks, Mr. Falstaff, I'll do it now and pay you this evening." Everyone in the tavern laughed as Francis rushed off to rescue the car.

Later that day, after Francis had had the car towed to his home, Francis showed up at the bar where John was still consoling himself and put $1,500 on the counter in front of John. When John asked, "What's this?" Francis explained that it was the payment for the car. John refused to take the money, saying that of course he had not been serious earlier in the day. Is Francis entitled to the car in your opinion? See Leonard v. Pepsico, Inc., 88 F. Supp. 116 (S.D.N.Y. 1999), aff'd, 210 F.3d 88 (2d Cir. 2000) (plaintiff took Pepsi up on its joking offer to exchange 7,000,000 "Pepsi Points" for a Harrier fighter jet); Keith A. Rowley, Toy Yoda: Practical Jokes, Prizes, and Contract Law, 3 Nev. L.J. 526 (2003).

Problem 3

U. N. Owen was a fanatical bridge player. Once a year he invited a number of people to his remote home on Indian Island for a weekend of nonstop bridge. He sent the invitations two months in advance and followed them with phone calls to make sure everybody was really going to come. One of the guests, a retired jurist named Justice Wargrave, assured Mr. Owen that he would make the journey but backed out at the last minute and went to a pinochle tournament instead. When the guests arrived at the island, Owen was dismayed to find that he did not have enough people for the complicated bridge tournament he had planned, so he cancelled the entire weekend and sent everyone home. He then sent Wargrave a bill for $2,750, the expenses he had undergone in setting up the weekend. Must Justice Wargrave pay?

NOTE ON SOCIAL CONTRACTS

The existence of a familial relationship may affect the ability to create an enforceable contract. For example, courts have been traditionally reluctant to become involved in disputes within a harmonious, unbroken marital relationship. A husband and wife are not precluded from enforcing such agreements as they may make in a *commercial* transaction, but contracts regulating matters essential to the marital relationship are viewed with great suspicion. See McDowell, Contracts in the Family, 45 B.U. L. Rev. 43 (1965). For example, a spouse employed in a business must be paid wages. See, e.g., Peterson v. Massey, 155 Neb. 829, 53 N.W.2d 912 (1952). Similarly, a spouse can bring an action to recover on a loan made to the other spouse for an independent business enterprise. See, e.g., Kraemer v. Kraemer, 76 Nev. 265, 352 P.2d 253 (1960). On the other hand, courts will not usually concern themselves with enforcing domestic agreements controlling relations within the marriage. Typically, for example, agreements for bearing children are unenforceable. Similarly, courts generally will not involve themselves with living arrangements within the home, such as privileges to be afforded children from prior marriages. As a practical matter, courts are not likely to be confronted with these kinds of disputes in an ongoing marriage since breaches serious enough to result in litigation also terminate the marriage. See Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 Cal. L. Rev. 1169, 1270 (1974).

The law does recognize some spousal agreements that affect the relationship: agreements that anticipate the eventual dissolution of the marital relationship, whether by death or divorce, and that seek to control the disposition of the parties' respective interests upon death or dissolution. The courts limit their enforcement to matters of dissolution, custody of children, and apportionment of property. See Loeb, Prenuptial and Postnuptial Agreements, 54 Wis. B. Bull. 3 (1981).

In recent years the courts have become involved in disputes arising from agreements between unmarried cohabitants. The enforceability of an alleged contract in this context is discussed in Chapter 6.

Increasingly, social ties give rise to expectations concerning sharing lottery winnings. Many friendships are lost on this battlefield. Consider the following case.

STEPP v. FREEMAN

Court of Appeals of Ohio, 1997
119 Ohio App. 3d 68, 694 N.E.2d 792

FREDERICK N. YOUNG, Presiding Judge.

Donald Freeman, defendant, appeals the trial court's holding in favor of Lionel Stepp, plaintiff, on the issues of equitable estoppel and implied contract.

I

This matter arose out of the events surrounding the purchase of a winning lottery ticket on March 1, 1993. Freeman and Stepp were members of a group of employees at the Chrysler Acustar Plant who jointly purchased lottery tickets. The group had been in existence in excess of five years. Freeman took over running the group approximately two years prior to the date the group purchased the winning ticket. The group had no written rules, but it had established certain unwritten rules of conduct.

The group was restricted to only twenty members. Freeman kept a list of the members. The members pooled their money to purchase lottery tickets whenever the jackpot reached $8 million or higher. Each member was expected to contribute $2.20 to the pool. Freeman would keep track of who had paid, whether payment was in advance, and who had not yet paid by noting it in the appropriate column on the list of the members. The group purchased forty tickets and four "kickers" with the pooled money.

To increase their chances of winning, the group would use half of the pooled money to purchase tickets in Cincinnati, Ohio, and the other half to purchase tickets in Beavercreek, Ohio. Freeman purchased the tickets in Beavercreek, Ohio, and Fred Krueger, another member of the group, purchased the tickets in Cincinnati, Ohio. The tickets were purchased either on Monday, for the Wednesday drawing, or on Thursday, for the Saturday drawing. In the weeks that the group played the lottery, Stepp was in charge of making photocopies of the tickets on Tuesday and/or Friday. Sometimes, however, another member of the group, James Saul, would make the copies of the tickets if Stepp was unavailable. Stepp would leave the photocopies on Freeman's desk. Freeman would either leave the copies on his desk for the members to pick up or would sometimes distribute some of the copies to members.

Freeman was recognized as being in charge of receiving the money for the pool. Freeman testified that a few times he had to explicitly inform or remind some members that their money was due. Freeman further stated that he had to remind all of the members of the group at least once or twice during the two years that he ran the group that their shares were due. Freeman also often indirectly reminded members that their shares were due by walking around the plant with the list of members in his hand. When the members saw Freeman with the card in his hand, they knew it was time to contribute, and they would get out their money and pay their shares without Freeman having to expressly ask for their contributions.

Members would sometimes cover other members' shares when they ran into Freeman. Furthermore, Freeman or other members would cover another member's portion of the pool if the member was absent from work. When members knew that they would be on vacation or otherwise unavailable, they would pay their contribution in advance or would inform Freeman that they would pay when they returned. Since the time that Freeman began running the group, none of the members had ever failed to participate, and no fewer than forty tickets, two for each member, had ever been purchased.

Individuals who wanted to join the group had to put their names on a waiting list and could join the group only when one of the existing members decided to leave the group. The members that actually dropped out of the group while Freeman was running it were taken off the list only after Freeman had a conversation with them and the member had conveyed to Freeman that he or she was not going to contribute any longer and that he or she was leaving the group. No member had ever been unilaterally removed from the list by Freeman because the member had not timely paid his or her share. After a member left the group, Freeman would ask the first person on the waiting list if he or she wanted to join the group. If the individual decided to join the group, Freeman would add the individual's name to the list.

In the week prior to the group purchasing the winning lottery ticket, Freeman and Stepp had a serious work-related disagreement. As a result of their disagreement, Freeman called Stepp a derogatory name and, according to Stepp, threatened him. Following their disagreement, Freeman and Stepp did not speak to one another with the exception of a few brief work-related discussions. The lottery jackpot reached $8 million over the weekend following their conflict. On the ensuing Monday, Freeman collected money from the group for the drawing by, in part, walking around with the member list in his hand. Freeman, however, did not ask for Stepp's money, nor did he inform Stepp that the lottery had reached $8 million. Likewise, Stepp, who claims that he was unaware that the lottery had reached $8 million, did not offer his $2.20.

At the end of the day, Freeman gave Krueger the usual $20 to buy tickets in Cincinnati. Freeman put in the extra dollar himself. Freeman did not inform Krueger or Stepp that he did not consider Stepp to be included in the pool, but he did tell some other members that Stepp was out of the group because he had not paid his $2.20. Furthermore, Stepp never conveyed to Freeman that he was dropping out of the pool. Even though Freeman testified that he considered Stepp to be out of the pool, Freeman did not consult anyone on the waiting list to fill Stepp's spot. Freeman did, however, purchase nineteen, rather than twenty, tickets in Beavercreek, Ohio. Conversely, Krueger purchased the usual twenty tickets in Cincinnati. Therefore, the group had one more ticket than the group should have had if the group had purchased only enough tickets for nineteen members. *

On Tuesday, Freeman asked James Saul, rather than Stepp, to make copies of the tickets, explaining that "Stepp hasn't come around." On Wednesday, March 3, 1993, the lottery group won the $8 million lottery jackpot. The winning ticket was one of the twenty tickets purchased in Cincinnati by Fred Krueger. When Stepp arrived at work on Thursday, he was informed by some of his coworkers that the group had won the lottery, and that the group considered that he was not entitled to a share of the money because he had failed to contribute his portion to the pool. The group, however, let one of the members, who was on vacation when the money for the lottery was collected, pay his $2.20 on the Friday after the group had won the lottery. The group let that member pay late because he had purportedly made arrangements with Freeman that he would pay when he returned from his vacation.

On September 1, 1993, Stepp commenced an action, claiming that he was denied his rightful share of the lottery winnings. In support of his claim, Stepp asserted three causes of action: breach of express contract, breach of implied contract, and equitable estoppel. The case was referred to a magistrate for a hearing pursuant to Civ. R. 53. The magistrate issued a finding in favor of Stepp on both the equitable estoppel and breach of contract claim, and recommended that the trial court enter judgment for Stepp in the amount of $60,000 for his portion of the accrued winnings in the years 1993-1996 and one-twentieth of each of the future jackpot payouts. Freeman put on objections to the magistrate's findings of fact and conclusions of law. The trial court considered Freeman's objections and independently reviewed the record as well as all of the evidence presented. After the court concluded its review, it rendered a thoughtful opinion in favor of Stepp on both the equitable estoppel and breach of implied contract claims. Freeman now brings this timely appeal of that decision.

II

Freeman presents the following four assignments of error:

1

"The trial court erred by allowing plaintiff to assert equitable estoppel as a cause of action, when equitable estoppel is merely an affirmative defense and not a separate cause of basis for monetary recovery."

2

"The trial court's determination that plaintiff had stated an equitable estoppel claim was erroneous, because equitable estoppel claims require proof of actual or constructive fraud and the trial court had previously granted defendants summary judgment on plaintiff's fraud claim."

3

"The trial court's determination that plaintiff had proven an equitable estoppel claim and has proven a claim based upon implied contract were each against the manifest weight of the evidence."

4

"The trial court erred by holding that plaintiff could recover under an implied contract theory when plaintiff had not proven all of the essential contract elements."

We determine that we need not consider the assignments of error relating to the equitable estoppel claim because we believe that Stepp proved his cause of action for breach of an implied-in-fact contract, which is sufficient alone to support the court's monetary award. We find both that Stepp proved all of the elements of an implied-in-fact contract and that the court's finding that the contract was breached was not against the manifest weight of the evidence.

It is well established that there are three categories of contracts: express, implied in fact, and implied in law. Legros v. Tarr (1989), 44 Ohio St. 3d 1, 6, 540 N.E.2d 257, 262-263. Express and implied-in-fact contracts differ from contracts implied in law in that contracts implied in law are not true contracts. Sabin v. Graves (1993), 86 Ohio App. 3d 628, 633, 621 N.E.2d 748, 751-752. Implied-in-law contracts are a legal fiction used to effect an equitable result. Id. Because a contract implied in law is a tool of equity, the existence of an implied-in-law contract does not depend on whether the elements of a contract are proven. Id.

On the contrary, the existence of express or implied-in-fact contracts does hinge upon proof of all of the elements of a contract. Lucas v. Costantini (1983), 13 Ohio App. 3d 367, 368, 13 OBR 449, 449-451, 469 N.E.2d 927, 928-929. Express contracts diverge from implied-in-fact contracts in the form of proof that is needed to establish each contractual element. Penwell v. Amherst Hosp. (1992), 84 Ohio App. 3d 16, 21, 616 N.E.2d 254, 257-258. In express contracts, assent to the terms of the contract is actually expressed in the form of an offer and an acceptance. *Lucas*, supra. On the other hand, in implied-in-fact contracts the parties' meeting of the minds is shown by the surrounding circumstances, including the conduct and declarations of the parties, that make it inferable that the contract exists as a matter of tacit understanding. Point E. Condominium Owners' Assn. v. Cedar House Assn. (1995), 104 Ohio App. 3d 704, 712, 663 N.E.2d 343, 348-349. To establish a contract implied in fact a plaintiff must demonstrate that the circumstances surrounding the parties' transaction make it reasonably certain that an agreement was intended. *Lucas*, supra.

Stepp proved all of the elements of an implied-in-fact contract. The circumstances surrounding this pool make it inferable that a contract existed as a matter of tacit understanding. The group membership was restricted to twenty. No new members could join until one of the twenty members dropped out of the group. There was a waiting list to join the group. Members joined the group by consulting Freeman and having Freeman place them on the group roster. Placing an individual's name on the roster created an implied agreement that the individual was a member of the group. Furthermore, there was an implied agreement that each member was to contribute $2.20 to the pool whenever the group played the lottery and that the members would share the winnings equally.

The members thought that the group was run very informally and left the details of running the group to Freeman. Many of the members knew very little about how the group was run. Some members did not even know that the group played the lottery only when the jackpot was $8 million or higher. Most members saw their duty as a member of the group as just contributing their share whenever they saw Freeman walking around the plant with the list in his hand or were otherwise informed that their shares were due.

There was an implied agreement among the members that once their names were on the list as members of the group, they would be informed when they owed their share of the pool and how much they owed. The implied agreement was that members would be informed when their money was due either verbally by Freeman, by other members, or by seeing Freeman walking about with the list in his hand. Freeman testified that he had to expressly remind some members that their money was due a few times and that he had to remind every member of the group that their money was due at least once or twice during the period that he ran the group. Freeman also admitted that he indirectly reminded people that there shares were due by frequently walking around the plant with the list in his hand when the group was going to be playing the lottery.

Because the members perceived the group as running informally and because Freeman had reminded the members that their money was due, a member could also count on not being dropped from the group after neglecting to make payment. No members had been unilaterally dropped from the group by Freeman because they had not paid their share in a timely manner. Those who had not paid their shares in a timely manner were dropped from the group only after Freeman had a conversation with them and they conveyed to him that they were not going to pay and that they were leaving the group.

Stepp had belonged to this group for over five years, and he had never failed to contribute to the lottery during those years. Stepp testified that he had always depended upon Freeman, who was in charge of the lottery, to inform him when the jackpot reached $8 million. Stepp testified that Freeman had always told him when his share was due and how much he owed. As consideration for being told that he owed his share, Stepp would contribute his $2.20 or Freeman would cover his $2.20.

Freeman admitted that he would sometimes cover Stepp's share even when Stepp was not absent from work. In particular, Freeman testified that sometimes the group would play the lottery twice a week and that in some instances he would only collect $2.20 from Stepp, and if they ended up playing a second time, he would put in the additional money for Stepp and collect it later. Freeman also admitted to putting in money for Stepp and collecting it later when Stepp was present but did not have enough money to contribute his share. Finally, Freeman sometimes put money in for Stepp and other members of the group when they were absent from work.

In addition to contributing his share to the group, Stepp performed a more formal role in the group than most of the other members in consideration for being informed when the group was playing the lottery. When Stepp was told that the group was playing the lottery, he would make copies of the lottery tickets. Stepp would pick up the tickets from Freeman on either Tuesday morning or Friday morning to make the copies and then return the tickets and copies to Freeman.

*

We believe from these facts and circumstances that there was an implied contract that Stepp, who had been a member of the group for over five years, who never had failed to contribute his share, who had a formal role in the group, whose share had been previously covered by Freeman under certain circumstances, and who had been reminded that his money was due in the past, would pay his share and perform his role in the group when he was informed that the group was playing the lottery. This contract was breached by Freeman when he failed to inform Stepp that the group was playing the lottery.

Moreover, we are of the opinion that there was an implied agreement that Stepp would not be dropped from the group unless he had expressed his wish to leave the group to Freeman or Freeman had informed him that he was being dropped from the group for the failure to pay his share. We determine that Freeman breached this implied agreement when he unilaterally dropped Stepp from the group. Accordingly, we find that Stepp proved all of the elements of breach of implied contract and that the trial court's decision was not against the manifest weight of the evidence. The assignments of error are overruled.

Based upon the foregoing the judgment of the trial court is affirmed.

Judgment affirmed.

NOTE

As the court notes, the distinction between an express contract and an implied in fact contracting is simply one that relates to whether assent is expressed in words (written or oral) — an express contract — or, as in the case of implied in fact contracts, through an interpretation of surrounding circumstances including declarations of the parties and their conduct. The line is often a fine one, but the issue only has to do with whether there was mutual assent — an issue of formation. The rights and duties of the parties within an enforceable contract do not vary by whether a contract is an express or implied in fact contract.

For a collection of other cases concerning contracts to share lottery winnings see "Enforceability of Contract to Share Winnings from Legal Lottery Ticket," 90 A.L.R.4th 784.

Problem 4

Beaumont and Fletcher signed a contract agreeing to each put up $50,000 for a theatrical performance that they were to write themselves. The five-page, single-spaced contract contained this clause:

> This contract shall not be enforceable in a court of law.

When Beaumont refused to contribute his share of the money or attend any writing sessions, Fletcher sued. Does the quoted clause strip the court of jurisdiction? See American Cas. Co. v. Griffith, 107 Ga. App. 224, 129 S.E.2d 549 (1963); Smith v. MacDonald, 37 Cal. App. 503, 174 P. 80 (1918).

II. THE OFFER

A. *Preliminary Negotiations*

Anticipation of receiving a benefit sought through contracting causes some parties to presume too early that others have expressed their intent to contract.

LEEDS v. FIRST ALLIED CONNECTICUT CORP.
Court of Chancery of Delaware, 1986
521 A.2d 1095

ALLEN, Chancellor.

In this contract action the principal issue is whether an agreement signed by both parties constitutes a contract. Plaintiff, asserting that it does not, sues to remove a cloud on title to real estate caused by defendant's recording of the document which it contends to be a contract to sell that land. Defendant has counterclaimed for specific performance of the alleged contract. This is the Court's opinion on both of these claims following a two-day trial.

I

It is elementary that determination of the question whether a contract has been formed essentially turns upon a determination whether the parties to an alleged contract intended to bind themselves contractually. A court determining if such intention has been manifested, however, does not attempt to determine the subjective state of mind of either party, but, rather, determines this question of fact from the overt acts and statements of the parties. Industrial America, Inc. v. Fulton Industries, Inc., Del. Supr., 285 A.2d 412, 415 (1971). Thus, the ordinary meaning of the language employed in writings reflecting agreements, the course and substance of negotiations, prior dealings between the parties and customs or practices in their trade or business are typically turned to in order to determine whether the parties intended to bind themselves. Under this approach, the so-called "objective" theory of contract law, the unexpressed, subjective intention of a party is irrelevant.

Thus, in this case, our task is to determine the factual setting in which the document that is here claimed to constitute a contract was negotiated and executed and to decide the factual question whether a reasonable negotiator in the position of one asserting the existence of a contract would have concluded, in that setting, that the agreement reached constituted agreement on all of the terms that the parties themselves regarded as essential and thus that the agreement concluded the negotiations and formed a contract. I turn then first to a statement of the facts of this case from which such determination must be made.

II

Plaintiff, Leonard Leeds, is the owner of Parkview Convalescent Center, a 150-bed nursing home located in the city of Wilmington. The written agreement asserted to be a contract relates to a sale of Parkview to defendant First Allied Connecticut Corporation.

Following the sale in 1984 of another nursing home in which Mr. Leeds had an interest, he decided to solicit offers to purchase Parkview. In the earlier nursing home sale, the seller had financed the sale by taking back tax-exempt industrial revenue bonds (IRBs) that were issued as an economic development measure by a state agency specifically in connection with that sale. The appeal of tax-exempt IRB financing to a seller who was willing to himself finance a large part of the transaction — as Leeds apparently was — is obvious and Leeds had it in his mind from the start that IRB financing would be a desirable aspect of any sale of Parkview.

In mid-1985 Leeds placed a small advertisement in two national publications inviting indications of interest in the purchase of Parkview. William Sondericker, a young professional employee of Mr. Malcolm Glazer — the sole shareholder of First Allied Connecticut — saw one of the ads, and in August Mr. Sondericker wrote Leeds expressing an interest in discussing a possible deal. While Mr. Sondericker is relatively new at the business of negotiating the acquisition of businesses, his employer, Mr. Glazer, is expert in that field. A self-made man, Glazer has negotiated and acquired many businesses, for his own account, across the country. Among these are four or five nursing homes, mobile home parks and television stations. Mr. Glazer is a knowledgeable and sophisticated businessman. Sondericker, who had, with one important exception, all of the communications with Leeds, reported regularly and fully to Glazer.

The Sondericker-Leeds negotiations began with a call by Leeds to Sondericker on August 20, 1985. Their accounts of that conversation differ somewhat.

According to Leeds, he had a standard "spiel" which he gave to Sondericker: The price asked was $4.5 million, but if IRB financing was arranged, the price would be $3.5 million; the deal would require $1 million cash down and Leeds would take back the remainder with a 25-year installment note (or bonds) at 12 percent interest. According to Leeds, a significant pre-payment penalty and a $1 million payment if the IRBs became for any reason taxable, were also mentioned as conditions of the sale.

Sondericker recalls a price of $4 million being mentioned, with $1 million down. He also recalls IRB financing being mentioned, but says he never had encountered IRBs and didn't understand them. To him, the significant facts (other than those concerning the value of the property) were the price, the amount of cash required, and that the seller would finance the purchase.

Sondericker concluded the original conversation by asking for financial information concerning Parkview, which Leeds promptly provided. Sondericker and Leeds talked on other occasions during this period. After receipt of financial information from Leeds, Sondericker consulted with Glazer. Glazer decided that the deal required too much cash to be attractive. He instructed Sondericker to let the situation sit for sixty days and to then see if the deal could be made more attractive.

Towards the end of October, Sondericker contacted Leeds again to ask if there had been any change in his position. Leeds replied that he would take $3.5 million with one million down (*i.e.*, according to Leeds, the same thing he had said in August; according to Sondericker a $500,000 reduction in price). Some further mention of IRB financing was made, but again that did not cause Sondericker to understand that in order to make such tax-exempt financing available, the investor — Glazer in this instance — would have to invest 15% of the value of bonds in capital improvements to the facility whose purchase was being financed with the bond proceeds. Indeed, there is no indication in the record, as I recall it, that Leeds himself understood that technical requirement at that time. In all events, Sondericker continued to think of IRB financing as simply some version of seller financing, and took the view that how Leeds wanted to arrange the form of the obligation he would take back was Leeds' concern. Glazer also testified that that was his view as well. While it is credible that the relatively inexperienced Sondericker may have failed to grasp the significance of IRB financing to a seller taking back paper, it is far less likely that Mr. Glazer, a businessman very experienced in the purchase and sale of businesses, failed to understand the importance to such a seller of getting tax-exempt financing if available.

In all events, Sondericker continued to have conversations with Leeds and continued to report to Glazer. Leeds had had several indications of interest in Parkview but no firm offer. At some point, Sondericker succeeded in getting Leeds to reduce the cash portion of the deal to $750,000. At this point, Glazer became interested. Sondericker arranged a telephone call among himself, Glazer, and Leeds. The call which apparently occurred on November 14, 1985, lasted only a short time. Glazer said he was interested in buying Parkview at $3.5 million, but the cash down payment was too high. He offered $500,000 down and the parties quickly compromised on $600,000.

According to Leeds, Glazer said he would send out a "letter of intention" for Leeds to sign because he (Glazer) had in the past dealt with persons without authority. Thereafter, the parties could enter into a formal contract. Leeds does not report that in this short conversation he brought up the list of his "requirements" previously described.

According to Glazer (and Sondericker), once the price, the down payment, and the interest rate on the purchase money note had been agreed upon, Glazer asked if Leeds would sell on those terms. When Leeds responded yes, Glazer said he would put a "contract" promptly in the mail for Leeds to execute and return.

Glazer immediately had the following document prepared:

> Dear Mr. Leeds:
>
> We wish to purchase all of the assets and real property known as Parkview Convalescent Center, 2801 West 6th Street, Wilmington, Delaware 19805 ("Seller"), being a nursing home fully equipped and licensed for 150 patients, and Seller has a Certificate of Need for an additional 82 beds, and including all buildings, land of approximately one (1) acre, and any other assets of the nursing home, subject to the inspection of the books, records, and assets which must be satisfactory to the Buyer on the following basis:
>
> Price. $3,500,000.00 (THREE MILLION FIVE HUNDRED THOUSAND DOLLARS)

> Terms. $600,000.00 (SIX HUNDRED THOUSAND DOLLARS) maximum cash on date of transfer of title to Buyer.
>
> $2,900,000.00 (TWO MILLION NINE HUNDRED THOUSAND DOLLARS) approximate bond to be taken back by Seller, payable principal and interest at 12%, payable approximately $30,544.00 per month for a period of 25 years.
>
> In the event Buyer adds additional beds to the Parkview Convalescent Center, Seller agrees to subordinate its bond to any new first mortgages or bonds, and in that event the interest rate on the Seller's bond would increase from 12% to 14%.
>
> This offer is good until November 19, 1985 at 6:00 P.M., Rochester, New York time.
>
> Please advise if the above will be acceptable to you.

The document was signed by an officer of FACC, a corporation with no assets. It was dated November 15, sent on November 14 and received by Leeds on the 15th. Leeds "accepted" the letter agreement by signing it immediately and returning it by express mail to FACC on November 16.

Following the November 14 conversation but before "accepting" the FACC letter of November 15, Leeds also drafted a letter which contained the first written statement of the detailed provisions that Leeds had in mind. It was addressed to Sondericker and provided as follows:

> Dear Bill:
>
> In order that we may proceed as quickly as possible with a final and acceptable contract, I am taking the liberty of providing you with some terms which must be part of the transaction. If all of them are understood from the outset, it will save a lot of legal maneuvering and mailing back and forth.
>
> The price and terms at which it is being offered are only possible because of the availability of IRB financing. If this were to be a cash deal, the price would be 4.5 million. Therefore, if any event causes the bonds to become taxable, or default, they would be due and payable immediately with an additional payment of one million dollars. I do not want any prepayment or balloon in the note. Building to be sold in "as is" condition with the stipulation that all major systems are in good operating order at the time of transfer.
>
> I will be responsible for all liabilities of the corporation up to the day of transfer. I will retain the corporation but give up the name. All income and assets of the corporation predating transfer will remain mine. Transfer taxes will be split equally, the normal custom here. All fees associated with bonding will be your responsibility.
>
> The actual sale will be from seller to Bonding Authority and then to you. It is a somewhat complicated transaction and perhaps it would be simpler to have a Delaware attorney do the actual contracts after a basic and perhaps simpler sales agreement.
>
> If you have any questions about any of the above, please do not hesitate to contact me. I look forward to a mutually satisfactory conclusion to our transaction.

Curiously, Leeds did *not* send the November 16 draft letter that he had prepared reflecting his desires for additional terms when he signed and returned First Allied Connecticut's letter.

Upon receiving the signed November 15 document, Glazer went through the ritual of convening the board of FACC (he is the corporation's sole director) and adopted a resolution approving the execution of the November 15 document. This formality is, of course, consistent with Glazer's litigating position that he viewed the November 15 document as his contract to buy Parkview and not simply as an expression of interest or a "letter of intention." This action is also consistent with plaintiff's assertion that Glazer is a clever, aggressive businessman who tried to outsmart Leeds in getting him to sign what plaintiff claims is a vacuous-appearing ("We wish to purchase . . ."), one-sided (". . . subject to [an] inspection . . . which must be satisfactory to Buyer") paper and was, through this corporate formality, trying to technically shore-up his advantage.

At the time the November 15 document was signed, no representative of FACC had inspected or even seen the Parkview property. An inspection trip took place on December 9, at which time no aspect of the deal, its documentation, or schedule, was discussed. Thereafter, Leeds contacted Sondericker. In Leeds' version of the discussion, Leeds wanted to set up a meeting to negotiate a formal agreement and he mentioned at that time that he wanted a pre-payment penalty included in the purchase money note. In Sondericker's version, Leeds called to say he wanted a pre-payment penalty provision and, after Sondericker consulted Glazer, a trip to Wilmington for December 19 was agreed upon. Sondericker told Leeds that they would prepare a paper for discussion purposes.

Leeds then, for the first time, retained a lawyer. He told the lawyer that a meeting was set for December 19, and that Glazer would be sending down a draft contract before the meeting. He did not mention to his lawyer that he had signed the November 15 paper. Sondericker and Glazer had a four-page single-spaced standard contract form that Glazer had apparently used in the purchase of other nursing homes. That document was modified to reflect the financial terms agreed to on November 15 and to include the specific pre-payment penalty requested by Leeds. Glazer and Sondericker did not send this draft down in advance, but brought it with them to the meeting.

The December 19 meeting did not go well. The parties approached the subject from very different perspectives. Up to this point, Leeds had apparently been treading very softly, raising his positions early-on but not causing much attention to be paid to them. His decision not to send the November 16 draft letter, for example, is best explained, in my mind, not as reflecting an abandonment of the positions reflected in that letter but rather as a decision, having raised them in some light fashion, to let the relationship with Glazer and Sondericker mature and the deal develop further before making an issue of those points. Now Leeds was represented by an attorney who wanted to assert his client's interests aggressively.

Glazer approached the negotiations from the perspective of a man who had gone through the corporate ritual of adopting resolutions approving the November 15 "contract." In other words, he, in effect, seems ultimately to have taken the position in that meeting that he already had a deal and any modifications would be on his terms. Significantly, the November 15 paper was brought to this meeting by neither Glazer nor Leeds.

The parties could agree on virtually nothing. Such minor points as who would pay for title insurance and transfer taxes (matters as to which established local practice gave clear guidance as to a reasonable accommodation) could not be agreed upon. Leeds took the position that attorneys' fees in connection with the IRB financing (probably $25,000 to $35,000) would be for FACC's account. Glazer said the IRB financing was not something he had any interest in and, if Leeds wanted it, Leeds should pay for it. The parties never seemed to discuss what would probably have been a deal breaker even had agreement been reached on the other points — that is the requirement for the investor in the IRB-financed acquisition to invest 15% of the value of the property in capital improvements to the property. Such a requirement would almost double the cash Glazer would have to put into the deal and would radically change the economics of the transaction from his perspective.

The day-long meeting was not in all respects pleasant. At some point Leeds decided that he did not want to do business with Glazer, although he allowed Mr. Glazer to continue to think they were working towards a deal. The meeting terminated with Leeds stating that he or his lawyer would be getting back to Sondericker with their positions on various of the subjects discussed.

About a month later, after several telephone inquiries from Sondericker, Leeds wrote to Sondericker disclaiming any interest in "doing a deal" with First Allied. Sondericker then promptly replied, asserting that First Allied had "a signed acceptance dated November 16, 1985 . . . of our offer to purchase," and "[w]e are proceeding towards a closing thereof." Thereafter, First Allied recorded the November 15 document and Leeds continued his search for a buyer. Very recently, he has entered into an elaborately-drafted contract of sale containing most of the provisions reflected in his unsent letter of November 16.

III

The central question presented is whether a contract to sell Parkview was formed when Leeds signed and returned the "offer" of November 15. Because I conclude, for the reasons that follow, that no contract was formed, I do not need to address the subsidiary positions advanced by plaintiff.

While I am persuaded by the evidence that Leeds did not intend to bind himself to sell Parkview on the terms set forth in the November 15 letter, that conclusion is not helpful to him in this litigation, for the law is clear in Delaware, as elsewhere, that subjective intention is itself not the test of whether a contract has been formed. As our Supreme Court state in Industrial America, Inc. v. Fulton Industries, Inc., Del. Supr., 285 A.2d 412, 415 (1971):

> It is basic that overt manifestation of assent — not subjective intent — controls the formation of a contract; that the "only intent of the parties to a contract which is essential is an intent to say the words or do the acts which constitute their manifestation of assent. . . ."

Accordingly, our inquiry is the "objective" one: whether a reasonable man would, based upon the "objective manifestation of assent" and all of the surrounding circumstances, conclude that the parties intended to be bound by contract. See *Industrial America, Inc.*, 285 A.2d at 415; Western Natural Gas Co. v. Cities Service Gas Co., Del. Supr., 223 A.2d 379, 382-83 (1966).

This is not a simple or mechanical test to apply. Negotiations typically proceed over time with agreements on some points being reached along the way towards a completed negotiation. It is when all of the terms that the parties themselves regard as important have been negotiated that a contract is formed. 1 Corbin on Contracts §29 at 87-88 (1963); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir. 1984); cf. Universal Products Co. v. Emerson, Del. Supr., 179 A. 387, 394 (1935). In determining whether agreements reached were meant to address all of the terms that a reasonable negotiator should have understood that the other party intended to address as important, courts look to all of the surrounding circumstances, including the course and substance of the negotiations, prior dealings between the parties, customary practices in the trade or business involved and the formality and completeness of the document (if there is a document) that is asserted as culminating and concluding the negotiations.

Until it is reasonable to conclude, in light of all of these surrounding circumstances, that all of the points that the parties themselves regard as essential have been expressly or (through prior practice or commercial custom) implicitly resolved, the parties have not finished their negotiations and have not formed a contract. Agreements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multifaceted commercial transactions could hardly proceed in any other way. See International Telemeter Corporation v. Teleprompter Corporation, 592 F.2d 49 (2d Cir. 1979) (Friendly, J., concurring).[4]

The November 15 document clearly evidences agreement concerning key elements of the transaction these parties were negotiating—price,

4. Judge Friendly quotes from 2 Schlesinger (ed.), Formation of Contracts: A Study of the Common Core of Legal Systems at 1584-86 (1968), the following passage that fairly reflects the typical course of negotiating a significant commercial transaction. It is the pattern that Leeds, at least, had in mind when he confirmed the agreements reached on November 14 by signing the letter agreement of November 15:

> Especially when large deals are concluded among corporations and individuals of substance, the usual sequence of events is not that of offer and acceptance; on the contrary, the business men who originally conduct the negotiations, often will consciously refrain from ever making a binding offer, realizing as they do that a large deal tends to be complex and that its terms have to be formulated by lawyers before it can be permitted to become a legally enforceable transaction. Thus the original negotiators will merely attempt to ascertain whether they see eye to eye concerning those aspects of the deal which seem to be most important from a business point of view. Once they do, or think they do, the negotiation is then turned over to the lawyers, usually with instructions to produce a document which all participants will be willing to sign....
>
> ... After a number of drafts have been exchanged and discussed, the lawyers may finally come up with a draft which meets the approval of all of them, and of their clients. It is only then that the parties will proceed to the actual formation of the contract, and often this will be done by way of a formal "closing" ... or in any event by simultaneous execution or delivery in the course of a more or less ceremonial meeting, of the document or documents prepared by the lawyers.

International Telemeter, 592 F.2d at 57.

principal amount of the note, its term and interest rate. The relevant factual inquiry is whether Sondericker and Glazer, as agents of First Allied Connecticut, did reasonably understand that in signing that document Leeds intended to conclude negotiations. If they (or what amounts to the same thing, a hypothetical "reasonable man" in these circumstances) could not reasonably so believe, then it follows that they had reason to understand that material elements of the transaction remained to be negotiated and could not conclude that an intention to be bound to a *contract* had been manifested by the making of the agreement of November 15.

In light of all of the circumstances, I conclude that a reasonable person in the circumstances of Mr. Glazer could not have understood that the November 15 document represented a completed negotiation. Most importantly, Sondericker and Glazer knew that IRB financing was an important point that Leeds had brought up on several occasions with Sondericker and that the point had not been dealt with. Glazer knew or should have known that the tax-free status of interest on such bonds would be an important term to one who had raised the question. He could not reasonably assume, in these circumstances, that this point had been abandoned.

Moreover, while it is surely possible to make a binding contract to sell a \$3.5 million business, including real estate, on a single page, it would be extraordinary to do so. Absent a clear indication that the other party intended that unusual course, a reasonable commercial negotiator—and surely one with Mr. Glazer's experience—could not conclude in these circumstances that that was intended. For example, putting aside the question of the impact on the transaction of having IRB financing available, there are myriad topics and terms utterly conventional when a commercial seller in a significant transaction takes back a note—such as financial covenants, including restrictions on dividends or other stockholder distributions; warranties concerning the financial condition and due organization of the maker of the note; and terms defining and governing defaults and cures of default. There is no legal requirement that these topics be dealt with before negotiations resulting in agreements may be regarded as having concluded in a contract. But, unless there is some affirmative basis to suppose that the parties actually intended to pass over such points, a reasonable negotiator in a transaction of this size and type would not be justified in concluding that such was the unexpressed intention.

I therefore conclude as a factual matter, that, judging from the conduct of the parties and the setting and course of their negotiations, no intention to be bound by a contract was expressed in the November 15 agreement. This conclusion is further supported by the evidence which tends to show that neither Leeds nor Glazer really thought of the negotiations as having been completed as of November 15. Neither Glazer nor any agent of his had even yet seen Parkview. Moreover, he did not bring a copy of the November 15 agreement to the meeting of December 19 which was set up for the purpose of further negotiations. Finally, the language of that document itself ("We wish to purchase. . . .") when contrasted with the language of the December 19 proposal ("First Allied Connecticut Corporation ('Buyer'), agrees to purchase. . . .") further supports the conclusion that the parties themselves did not intend the November 15 agreement to reflect their final, binding understanding.

Thus, I find that although the parties reached certain agreements on November 14 and recorded and evidenced them in the writing of November 15, those agreements were not intended to be contractual, in the sense of creating legal rights and duties. The negotiations had not yet reached the point at which a contract was formed.

So concluding, I need not address plaintiff's contentions that FACC's obligations under that document were illusory or that Mr. Glazer is too clever and sharp in his negotiating practices to be afforded the aid of a court of equity. I should say, however, on this latter point that while Mr. Glazer is no doubt a clever man and likely sought some advantage in putting the understandings reached on November 14th in the form he did in the letter agreement of November 15, there is no basis in the evidence to conclude that he is not a man of integrity, as worthy as his adversary of the aid of this court, in an appropriate instance.

Judgment will be rendered for plaintiff on his claim and against defendant on its counterclaim. A form of implementing order shall be submitted on notice.

B. *Statement of Opinion or Intention*

Problem 5

You represent John Cabot, an attorney with three years' practice experience. John has been sued by a former client, Martin Frobisher. Frobisher, a boat builder, had come to Cabot and asked if Cabot would bring an antitrust action against a manufacturer of rivets. Frobisher was very distraught. Cabot said he not only would bring the action but said "We'll win, for sure." The case was a loser. Frobisher figures that in addition to Cabot's attorney's fee of $25,000, which was paid in advance, he lost $100,000 in down time, court costs, and the like. Assume the facts show that Cabot was not negligent in any way. What is the best argument you can make for your client? What will be the counterargument?

C. *Solicitations*

Problem 6

The advertisement in the newspaper said:

> Radial snow tires, major brand, four for $99.00 each, now through July 5 at Tire Warehouse, Inc., 44 E. Main Street.

Is this an offer that a buyer could accept by calling up the seller or going down to the store and saying, "I accept!"?

LEFKOWITZ v. GREATER MINNEAPOLIS SURPLUS STORE, INC.

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

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

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

Saturday 9 A.M. Sharp
3 Brand New
Fur
Coats
Worth to $100.00
First Come
First Served
$1
Each

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

Saturday 9 A.M.
2 Brand New Pastel
Mink 3-Skin Scarfs
Selling for $89.50
Out they go
Saturday. Each . . . $1.00
1 Black Lapin Stole
Beautiful,
Worth $139.50 . . . $1.00
First Come
First Served

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

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

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

The defendant relies principally on Craft v. Elder & Johnston Co. supra. In that case, the court discussed the legal effect of an advertisement offering for sale, as a one-day special, an electric sewing machine at a named price. The view was expressed that the advertisement was (38 N.E.2d 417, 34 Ohio L.A. 605) "not an offer made to any specific person but was made to the public generally. Thereby it would be properly designated as a unilateral offer and not being supported by any consideration could be withdrawn at will and without notice." It is true that such an offer may be withdrawn before acceptance. Since all offers are by their nature unilateral because they are necessarily made by one party or on one side in the negotiation of a contract, the distinction made in that decision between a unilateral offer and a unilateral contract is not clear. On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance.

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

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

nothing left to negotiate issue

The authorities . . . emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. The most recent case on the subject is Johnson v. Capital City Ford Co., La. App., 85 So. 2d

75, in which the court pointed out that a newspaper advertisement relating to the purchase and sale of automobiles may constitute an offer, acceptance of which will consummate a contract and create an obligation in the offeror to perform according to the terms of the published offer.

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. Annotation, 157 A.L.R. 744, 751; 77 C.J.S., Sales, §25b; 17 C.J.S., Contracts, §389. We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale. Ruling

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

Affirmed.

NOTE ON DECEPTIVE PRACTICES

A *bait and switch* advertisement is a solicitation for the sale of a product that the seller does not really plan to sell. The purpose of the ad is to get the customer into the store (or the seller into the customer's living room) where the advertised product will be disparaged and a more expensive one promoted. The Federal Trade Commission has the power to prevent "unfair and deceptive acts or practices in or affecting interstate commerce." 15 U.S.C. §45(a)(1). The FTC occasionally issues informal guides to help people avoid such acts or practices.

The following bait advertising guide is an example:

> Acts or practices considered in determining if an advertisement is a bona fide offer are:
>
> (a) the refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer,
>
> (b) the disparagement by acts or words of the advertised product or the disparagement of the guarantee, credit terms, availability of service, repairs or parts, or in any other respect, in connection with it,
>
> (c) the failure to have available to all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses the supply is limited and/or the merchandise is available only at designated outlets,

(d) the refusal to take orders for the advertised merchandise to be delivered within a reasonable period of time,

(e) the showing or demonstrating of a product which is defective, unusable, or impractical for the purpose represented or implied in the advertisement,

(f) use of a sale plan or method of compensation for salesmen or penalizing salesmen, designed to prevent or discourage them from selling the advertised product.

Problem 7

The catalog of the Mountain Law School described the course in contracts as follows:

> **Contracts** (5 hours). The course explores the elements of a valid contract, as well as its interpretation and the effect thereon of mistake, impossibility, unconscionability, incapacity, and illegality. Contractual remedies are covered, as well as the rights of third-party beneficiaries and the law of assignments.

Professor Chalk taught Contracts year after year, and he never once got far enough along in the book to reach third party beneficiary law or the law of assignments. May a disgruntled student sue the school for a partial tuition remission, giving this lack of coverage as the reason?

Problem 8

You represent Susan Morel. She owns 160 acres of prime land on the border of Rock City, Wyoming. Susan is not sure she wants to sell the land. Sidney Chanterelle wants the property for investment purposes and has called her a number of times to ask the price and terms Susan thinks acceptable. Other interested parties have called at least once. So far she has told everyone that she is not ready to sell. Now Susan wants to develop a more active negotiating stance and to begin "feeling out" potential buyers. She has decided to write those who have inquired to date and also to place an ad in the newspaper. What can she do to avoid making an offer?

D. *Written Contract to Follow*

By now you should no longer be wedded to the notion that an enforceable contract requires a piece of paper entitled "Contract." Even most oral agreements are enforceable in our law, a legal truth not often appreciated by those untrained in the law.

Nonetheless, a writing or group of writings attempting to express the exact terms of the agreement is frequently of critical importance to the parties. It may provide the best evidence of the actual agreement and gives the parties greater certainty as to the terms to which they are bound. Also, a writing is sometimes required by law—a *statute of frauds* issue to be discussed in Chapter 4 at considerable length. Further, a court may find that, even though no writing is generally required under the law for the particular type of agreement at issue, the parties did not intend to be bound until a writing was executed.

CONTINENTAL LABORATORIES v. SCOTT PAPER CO.

United States District Court, Southern District of Iowa, 1990
759 F. Supp. 538, aff'd, 938 F.2d 184 (8th Cir. 1991)

VIETOR, Chief Judge.

The court has before it defendant Scott Paper Company's (Scott) motion for summary judgment. Plaintiff Continental Laboratories, Inc. (Continental) has resisted and oral arguments have been heard.

BACKGROUND

A. FACTS

During early 1987, representatives of Continental and Scott[1] entered into negotiations concerning a potential supply and distribution agreement whereby Continental would supply hotel amenity products[2] to Scott and Scott would distribute the products within designated areas of the United States. In the course of negotiations, the parties also discussed the possibility of a partial or total acquisition of Continental by Scott, but this possibility was not pursued to fruition. Beginning in May, 1987 and continuing throughout the negotiations period, Scott representatives prepared at least five drafts of a written Supply and Distribution Agreement, which they submitted to Continental. Each new draft incorporated changes which had resulted from negotiations about the prior draft and the subsequent revised draft then became the basis for further negotiations.

On July 19, 1987, Scott, through Jim Smith, announced internally that Scott and Continental had reached a supply and distribution agreement in principle. The parties' representatives exchanged phone calls and participated in numerous meetings between July 29 and August 26, 1987. Mr. Krislov's affidavit and deposition testimony show that Continental representatives believed that a binding oral contract was reached by the

1. The individuals who represented Continental were: 1. Clinton A. Krislov, who has a legal degree and is also chairman of the board for Continental, 2. David Bequeaith, Continental's vice-president of operations, and 3. Austin Hirsch, legal counsel for Continental. Mr. Hirsch became involved in the negotiations in July 1987. James Smith, Scott's Director, New Business Development, was the primary representative for Scott.

2. Hotel amenity products consist of the complimentary, personal sized, health and beauty products that are often provided by hotels to their patrons, i.e.: shampoo, bath gel, hand lotion, bar soap, shower caps, shoe polishing cloths, etc.

parties during a telephone conference call on either August 25 or 26, 1987, between Krislov, Hirsch, Smith, and Steve Ford, Scott's legal counsel. Continental, through Krislov, further believed that Scott representatives would reduce the terms of the allegedly binding oral contract to written form in a document entitled "Supply and Distribution Agreement," as a memorial of the contract. Mr. Smith's affidavit, on the other hand, demonstrates that Scott through Smith never intended to be bound by an oral agreement, but only by a written contract executed by both parties.

Scott representatives sent Continental representatives a copy of a written "Supply and Distribution Agreement" which bears the stamp "DRAFT" and the stamp "REC'D SEP 02 1987." It is believed that Continental employees placed the "REC'D" stamp on the document when they received the copy on September 2, 1987, but the origin of the "DRAFT" stamp is not known for certain. The September 2nd document contains a space for the "Commencement Date," which the Scott representatives left blank. Although the September 2nd document contains a signature page showing Scott vice-president P. N. White's signature, no officer of Continental ever signed the document.

After Continental representatives received the September 2nd document, the parties' representatives conducted meetings on September 9th and 10th to further discuss implementation of the venture. Subsequent to these meetings, Mr. Smith, on behalf of Scott, prepared a revised copy of the "Supply and Distribution Agreement," which he presented to Mr. Krislov at O'Hare Airport in Chicago. On September 16, 1987, the parties' representatives met in Madrid, Iowa. During the September 16th meeting, Mr. Smith informed the Continental representatives that Scott was no longer interested in the venture and he terminated the meeting and any further discussions regarding the proposed venture.

B. PROCEEDINGS

Continental filed suit against Scott in the Iowa District Court for Boone County, alleging that the parties had entered into a final and binding, oral contract during the August telephone conference and that Mr. Smith's actions on September 16, 1987 constituted a breach of that contract by Scott. On April 6, 1988, defendant Scott removed the action to this court on the basis of diversity of citizenship jurisdiction. Defendant Scott has moved for summary judgment on the ground that there was no binding contract. Alternatively, Scott argues that even if there was a binding contract, it contained a condition precedent to Scott's performance, which Continental never fulfilled and Scott properly canceled the contract. . . .

Under Iowa law, a binding oral contract may exist even though the parties intend to memorialize their agreement in a fully executed document. Elkader Coop. Co. v. Matt, 204 N.W.2d 873, 875 (Iowa 1973); Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 421 (Iowa 1977). On the other hand, the parties can make the execution of a written document a condition precedent to the birth of a binding contract. *Elkader*, 204 N.W.2d at 875; Emmons v. Ingebretson, 279 F. Supp. 558, 566 (N.D. Iowa

1968). If either party intends not to be bound in the absence of a fully executed document, no amount of negotiation or oral agreement as to specific terms will result in the formation of a binding contract. *Severson,* 250 N.W.2d at 420; Marti v. Ludeking, 185 N.W. 476, 477-78 (1921). See Restatement (Second) of Contracts §27 comment b (1981).

It is the parties' intent which will determine the time of the contract formation. *Emmons,* 279 F. Supp. at 566. Plaintiff contends that the parties, through their representatives, intended to and did enter into a binding oral contract on August 25 or 26, 1987, during a telephone conference call. Defendant, however, argues that it never intended to be bound until the parties had fully executed a written contract. The court must determine the intent of the parties objectively from their words and actions viewed within the context of the situation and surrounding circumstances. Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1141 (8th Cir. 1974).

In ascertaining whether the parties intended to be bound prior to execution of a written document, the court should consider the following factors: 1. whether the contract is of a class usually found to be in writing; 2. whether it is of a type needing a formal writing for its full expression; 3. whether it has few or many details; 4. whether the amount is large or small; 5. whether the contract is common or unusual; 6. whether all details have been agreed upon or some remain unresolved; and 7. whether the negotiations show a writing was discussed or contemplated. *Emmons,* 279 F. Supp. at 572, cited in *Severson,* 250 N.W.2d at 421. See Restatement (Second) of Contracts §27 comment c (1981). After considering these factors in the context of this case, I conclude that the summary judgment record lacks sufficient evidence from which it could be found that Scott intended to be bound in the absence of an executed written contract.

Factors 1 and 2 support Scott's position. The matter was a large and complex commercial undertaking, which is usually put into written form. The parties, who were both represented by legal counsel, negotiated for over seven months and exchanged numerous drafts of a written proposed agreement. Mr. Smith, Scott's representative, stated in his affidavit that he considered the potential relationship with Continental to be a significant matter and that it was Scott's and his own custom and practice to require all significant business agreements to be in writing. The written Agreement does not mention the August 26th phone conference nor does it contain any language which indicates that it is a written memorial of an oral contract. It does, however, contain a clause which states: "[e]xcept as specifically provided herein, this Agreement and the Exhibits hereto reflect the complete agreement of the parties and there are no other agreements or understandings applicable hereto."

Similarly, factors 3, 4, and 5 support Scott's contention. First, the 12-page contract contains many details and references numerous exhibits. The Agreement addresses such issues as exclusivity of distributorship, products and services supplied, pricing, purchase commitment, payment terms, advance payments, confidentiality, and termination. Additionally, the Agreement references a related agreement between Continental and Redken. Second, the transaction at issue involves a commitment by Scott to purchase a minimum of $2.25 million worth of products from

Continental during the term of the contract. Lastly, although supply and distribution agreements are fairly common in the commercial world, this particular contract was unusual for Scott because it involved Scott's entrance into a new market.

Under factor 6, although Mr. Smith announced internally to Scott officials that the parties had reached an agreement in principle in July, 1987, many details were still unresolved. Even after the August telephone conference and the exchange of the September 2nd written agreement, the parties held several meetings in September, 1987, to finalize all of the details regarding manufacture and distribution of the products. On September 14, Mr. Smith even presented Mr. Krislov with another revised draft of the agreement, which Mr. Krislov accepted grudgingly. This evidence suggests that Scott, through Smith, did not consider that there was a final and binding oral agreement.

Finally, an analysis of the summary judgment record under factor 7 also supports Scott's position that it intended to be bound only by a written and executed contract. During the negotiations, the parties had exchanged drafts of proposed written agreements. Also, Scott representatives had left the space for the Commencement Date of the September 2nd Agreement blank, suggesting that they did not consider August 26th to be that date. In the Agreement itself, the parties required that modifications, amendments, terminations, territorial expansions, etc., would all require a writing. See Exhibit A to Complaint, pgs. 2, 4, 8, 9, 10, 11, and 12. It would be strange for Scott to require written modifications without first contemplating a written contract.

Based upon the preceding analysis of the relevant factors, I conclude that Continental has failed to overcome Scott's summary judgment motion. Continental has failed to generate a genuine issue of material fact regarding whether Scott intended to be bound by an oral agreement or only by a written and executed agreement. The summary judgment record shows that, based upon all of the circumstances, Scott communicated its intent to be bound only by a written contract, signed by both parties. No such contract ever existed. Therefore, defendant's motion for summary judgment is granted.

NOTES AND QUESTIONS

1. Restatement (Second) of Contracts §27, comment c, cited by the court, lists some factors "which may be helpful" in determining whether a contract is concluded even though an anticipated writing is never executed:

> [T]he extent to which express agreement has been reached on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and whether either party takes any action in preparation for performance during the negotiation.

2. Why would this last criterion be important, and was it relevant in this case?

3. What advice do you have for a party who definitely does not want to have an enforceable contract until the agreement is reduced to a final writing? For a party who wants to ensure that there is an enforceable contract whether or not the agreement is reduced to a formal writing?

Problem 9

Arthur Greenbaum agreed to sell his apartment building to Jerry Bunge. They hired Lorri Latek, a lawyer, to put their contract into acceptable legal form, and after she had drawn it up, they met in her office to sign the written agreement. Each man read the copy of the contract she had prepared, and both agreed that the writing correctly reflected their understanding. Each signed the copy in front of the other. They were about to exchange copies and sign the one the other had signed when Bunge casually mentioned that he was going to pay by personal check. This bothered Greenbaum, who insisted on a cashier's check. Bunge proposed that they meet in Latek's office the following day, and he would bring a cashier's check. They left, each man taking with him the copy of the contract that he had signed. That night Bunge changed his mind and decided not to purchase the building. When Greenbaum found this out, he sued. Was there a contract here? See Schwartz v. Greenberg, 304 N.Y. 250, 107 N.E.2d 65 (1952).

III. ACCEPTANCE

A. *Effect of Acceptance*

Problem 10

Archie Goodwin signed a purchase order for a new car to be sold by Wolf Motors. The purchase order stated that $800 would be deducted from the price as a trade-in allowance on his old car. When he delivered the old car, Rex Stout, Wolf's sales manager, told him that a mistake had been made and that the car was worth only $600. Stout stated that Wolf Motors would not go through with the deal unless Goodwin agreed to this reduction. Goodwin sued. How should this come out? See Trowbridge v. Jefferson Auto Co., 92 Conn. 569, 103 A. 843 (1918).

The moment of acceptance has an important legal consequence: It fixes the terms of the contract to those agreed upon in the offer. While the parties thereafter are free to modify the contract by mutual agreement, unless the original contract reserves the power to do so one party may not unilaterally alter the contract by changing its terms. Sellers, banks, and insurance companies often forget this and send out notices of additional matters (typically limitations of liability) after the acceptance has taken place. Such "Oh, by the way, we forgot to mention" sorts of changes are not effective unless agreed to by the recipient or unless they are mere clarifications of implied understandings. See, e.g., Tropicana Pools, Inc. v. Boysen, 296 So. 2d 104 (Fla. Dist. Ct. App. 1974) ("Lifetime Guarantee" of swimming pool sent after construction had begun held ineffective to change terms of the existing warranties); Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1271 (9th Cir. 1990) ("A party may not protect itself from liability under a contract by asserting that a heretofore hidden term is somehow part of the agreement").

The sale of information on a global scale is one of the most exciting developments in the last century, growing exponentially and encompassing many forms: software, access to the Internet, entertainment (movie rentals, for example), specialty services (such as Westlaw or Lexis), and so on. When legal issues involving these matters entered the courtrooms, the judges were none too sure what law to apply. Courts could not agree whether the sale of software, for example, was the sale of goods (thus triggering the rules of Article 2 of the Uniform Commercial Code) or services (leading to the application of the common law). Federal copyright law, certainly beyond the scope of this course, also affects the outcome of some of the issues presented.

The primary issue presented below addresses the issue of the moment of acceptance (and its effect on attempts to change the "deal") in the sale of computer software.

PROCD, INC. v. ZEIDENBERG

United States Court of Appeals, Seventh Circuit, 1996
86 F.3d 1447, 29 U.C.C. Rep. Serv. 2d 1109

EASTERBROOK, Circuit Judge. Must buyers of computer software obey the terms of shrinkwrap licenses? The district court held not, for two reasons: first, they are not contracts because the licenses are inside the box rather than printed on the outside; second, federal law forbids enforcement even if the licenses are contracts. 908 F. Supp. 640 (W.D. Wis. 1996). The parties and numerous amici curiae have briefed many other issues, but these are the only two that matter — and we disagree with the district judge's conclusion on each. Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable). Because no one argues that the terms of the license at issue here are troublesome, we remand with instructions to enter judgment for the plaintiff.

I

ProCD, the plaintiff, has compiled information from more than 3,000 telephone directories into a computer database. We may assume that this database cannot be copyrighted, although it is more complex, contains more information (nine-digit zip codes and census industrial codes), is organized differently, and therefore is more original than the single alphabetical directory at issue in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). See Paul J. Heald, The Vices of Originality, 1991 Sup. Ct. Rev. 143, 160-68. ProCD sells a version of the database, called SelectPhone™, on CD-ROM discs. (CD-ROM means "compact disc—read only memory." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwrap," and some vendors, though not ProCD, have written licenses that become effective as soon as the customer tears the wrapping from the package. Vendors prefer "end user license," but we use the more common term.) A proprietary method of compressing the data serves as effective encryption too. Customers decrypt and use the data with the aid of an application program that ProCD has written. This program, which is copyrighted, searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee, plus all firms with 'Door Systems' in the corporate name"). The resulting lists (or, as ProCD prefers, "listings") can be read and manipulated by other software, such as word processing programs.

The database in SelectPhone™ cost more than $10 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and zip codes enables manufacturers to compile lists of potential customers. Manufacturers and retailers pay high prices to specialized information intermediaries for such mailing lists; ProCD offers a potentially cheaper alternative. People with nothing to sell could use the database as a substitute for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. ProCD decided to engage in price discrimination, selling its database to the general public for personal use at a low price (approximately $150 for the set of five discs) while selling information to the trade for a higher price. It has adopted some intermediate strategies too: access to the SelectPhone™ database is available via the America Online service for the price America Online charges to its clients (approximately $3 per hour), but this service has been tailored to be useful only to the general public.

If ProCD had to recover all of its costs and make a profit by charging a single price—that is, if it could not charge more to commercial users than to the general public—it would have to raise the price substantially over $150. The ensuing reduction in sales would harm consumers who value the information at, say, $200. They get consumer surplus of $50 under the current arrangement but would cease to buy if the price rose substantially. If because of high elasticity of demand in the consumer segment of the market the only way to make a profit turned out to be a price attractive to commercial users alone, then all consumers would lose out—and so would the commercial clients, who would have to pay more for the listings because ProCD could not obtain any contribution toward costs from the consumer market.

To make price discrimination work, however, the seller must be able to control arbitrage. An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services, next to the videotape and laserdisc market, and finally to cable and commercial TV. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up the minimum price at which ProCD would sell to anyone.

Instead of tinkering with the product and letting users sort themselves—for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price—ProCD turned to the institution of contract. Every box containing its consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.

Matthew Zeidenberg bought a consumer package of SelectPhone™ in 1994 from a retail outlet in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to resell the information in the SelectPhone™ database. The corporation makes the database available on the Internet to anyone willing to pay its price—which, needless to say, is less than ProCD charges its commercial customers. Zeidenberg has purchased two additional SelectPhone™ packages, each with an updated version of the database, and made the latest information available over the World Wide Web, for a price, through his corporation. ProCD filed this suit seeking an injunction against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Zeidenberg purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that the second and third licenses stand no different from the first, even though they are identical, because they *might* have been different, and a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase. 908 F. Supp. at 654.

II

holding

Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between "contracts" and "licenses" (which may matter under the copyright doctrine of first sale) is a subject for another day. See Microsoft Corp. v. Harmony Computers & Electronics, Inc., 846 F. Supp. 208 (E.D.N.Y. 1994). Zeidenberg does not argue that Silken Mountain Web Services is free of any restrictions that apply to Zeidenberg himself, because any effort to treat the two parties as distinct would put Silken Mountain behind the eight ball on ProCD's argument that copying the application program onto its hard disk violates the copyright laws. Zeidenberg does argue, and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. Peeters v. State, 154 Wis. 111, 142 N.W. 181 (1913). In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed. One cannot agree to hidden terms, the judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license. Zeidenberg's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 Farnsworth on Contracts §4.26 (1990); Restatement (2d) of Contracts §211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."). Doubtless a state could forbid the use of standard contracts in the software business, but we do not think that Wisconsin has done so.

← we know this is not true. Putting products on shelf is not offer, invitation.

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent, who explains the essentials (amount of coverage, number of years) and remits the premium to the home office, which sends back a policy. On the district judge's understanding, the terms of the policy are irrelevant because the insured paid before receiving them. Yet the device of payment, often with a "binder" (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order.

Dicta

The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995) (bills of lading). Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg's lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products. Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information — but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

Next consider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations ("MegaPixel 3.14159 cannot be used with BytePusher 2.718"), and the terms of sale. The user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms — so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age.

According to the district court, the UCC does not countenance the sequence of money now, terms later. (Wisconsin's version of the UCC does not differ from the Official Version in any material respect, so we use the regular numbering system. Wis. Stat. §402.201 corresponds to UCC §2-201, and other citations are easy to derive.) One of the court's reasons — that by proposing as part of the draft Article 2B a new UCC §2-2203 that would explicitly validate standard-form user licenses, the American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law, see 908 F. Supp. at 655-66 — depends on a faulty inference. To propose a change in a law's text is not necessarily to propose a change in the law's *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction—although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it. See Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-70 (5th Cir. 1988); Arizona Retail Systems, Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993). As their titles suggest, these are not consumer transactions. *Step-Saver* is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. See Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir. 1994) (Illinois law); Douglas G. Baird & Robert Weisberg, Rules, Standards, and the Battle of the Forms: A Reassessment of §2-207, 68 Va. L. Rev. 1217, 1227-31 (1982). Our case has only one form; UCC §2-207 is irrelevant. *Vault* holds that Louisiana's special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

What then does the current version of the UCC have to say? We think that the place to start is §2-204(1): "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance. So although the district judge was right to say that a contract can be, and often is, formed simply by paying the price and walking out of the store, the UCC permits contracts to be formed in other ways. ProCD proposed such a different way, and without protest Zeidenberg agreed. Ours is not a case in which a consumer opens a package to find an insert saying "you owe us an extra $10,000" and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price. Nothing in the UCC requires a seller to maximize the buyer's net gains.

Section 2-606, which defines "acceptance of goods," reinforces this understanding. A buyer accepts goods under §2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under §2-602(1). ProCD extended an opportunity to reject if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to §2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see Gillen v. Atalanta Systems, Inc., 997 F.2d 280, 284 n.1 (7th Cir. 1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.

Some portions of the UCC impose additional requirements on the way parties agree on terms. A disclaimer of the implied warranty of merchantability must be "conspicuous." UCC §2-316(2), incorporating UCC §1-201(10). Promises to make firm offers, or to negate oral modifications, must be "separately signed." UCC §§2-205, 2-209(2). These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Lines*. Zeidenberg has not located any Wisconsin case—for that matter, any case in any state—holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced. In the end, the terms of the license are conceptually identical to the contents of the package. Just as no court would dream of saying that SelectPhone? must contain 3,100 phone books rather than 3,000, or must have data no more than 30 days old, or must sell for $100 rather than $150—although any of these changes would be welcomed by the customer, if all other things were held constant—so, we believe, Wisconsin would not let the buyer pick and choose among terms. Terms of use are no less a part of "the product" than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy. Digital Equipment Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996). ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements. As we stressed above, adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.

[The court then held that federal copyright law did not forbid ProCD's restriction on the use of the software.]

Reversed and remanded.

Does the result in this case seem right to you? Fair? There has been a furious debate about this and similar cases, and we will return to the issue when we talk about the battle of the forms later in this chapter.

B. *Manifesting Assent*

RESTATEMENT (SECOND) OF CONTRACTS

§50. Acceptance of Offer Defined; Acceptance by Performance; Acceptance by Promise

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

BEARD IMPLEMENT CO. v. KRUSA
Appellate Court of Illinois, 1991
208 Ill. App. 3d 953, 567 N.E.2d 345

Justice STEIGMANN delivered the opinion of the court:

This action involves an alleged breach of contract between plaintiff seller, Beard Implement Company, Inc., a farm implement dealership, and defendant buyer, Carl Krusa, a farmer, for the purchase of a 1985 Deutz-Allis N-5 combine. The dispositive issue on appeal is whether the trial court in a bench trial erred in finding a contract existed between the parties. Specifically, defendant contends that plaintiff never accepted defendant's offer to purchase the combine. We agree and reverse.

At trial, defendant testified that between December 20 and December 23, 1985, he had several conversations with plaintiff's representatives concerning the purchase of a new combine. Defendant owned a 1980 Deutz-Allis N-5 combine at that time. In fall 1985, both spindles on his combine had broken and defendant spoke with plaintiff's representatives about repairing them.

On December 23, 1985, defendant met with plaintiff's representatives at plaintiff's office in Arenzville, Illinois. Defendant testified that one of plaintiff's representatives, either Jim Beard or Gerry Beard, filled out a purchase order for a new combine for the price of $52,800 cash and the trade-in of the combine defendant then owned. . . . Defendant signed the Allis-Chalmers purchase order, which was dated December 23, 1985. None of plaintiff's representatives signed that order on December 23, 1985, or at any time thereafter. The bottom left corner of this order reads as follows:

____
DEALER'S SALESMAN
This order subject to acceptance by dealer.
Accepted by: ____________
DEALER

At the same time defendant signed the purchase order, he also signed a counter check drawn on a local bank in the amount of $5,200. Defendant testified that because he did not have his checkbook, plaintiff provided him with the counter check. The check was undated and intended to represent a down payment on the combine. Defendant testified that the check was not dated because he was to call plaintiff later and let plaintiff know if he wanted to proceed with the transaction. At that time, plaintiff would put a date on the check.

Defendant testified that he had misgivings over the Christmas weekend and, after discussing the situation with his wife, telephoned plaintiff's manager, Duane Hess, on December 26, 1985, and told Hess that he did not wish to proceed with the transaction. Defendant explained to Hess that defendant and his wife had determined that "the price was too high" and they "did not want to go further into debt to finance the transaction." Defendant testified that Hess told him that if defendant thought the combine was too expensive, Hess would let defendant out of the deal. Hess did not indicate whether he had signed the order.

Earlier on December 26, 1985, defendant had met with a representative of Cox Implement Company. Defendant identified a copy of the order form that one of Cox's salesman had filled out. This order was dated December 26, 1985, but was signed on December 27. Defendant testified that he told Cox's salesman that his price was too high and that defendant could not go through with either that bid or plaintiff's bid. However, after Cox's quoted price was reduced and the figures on the purchase order were scratched out, defendant signed the purchase order with Cox on December 27, 1985. Defendant stated the agreement with Cox was for the same model combine he was negotiating for with plaintiff but at a lower price. He wanted to consummate the transaction by December 31, 1985, in order to take advantage of the investment tax credit.

Defendant wrote a letter to plaintiff that was dated December 26, 1985, but sent on December 27, 1985. That letter read as follows:

> Dec. 26, '85
>
> Dear Sirs:
>
> As I told you by phone on Dec. 26, '85, I do not wish to purchase the 1985 N-5 combine we talked about so please send me the uncashed counter check on the Bank of Bluffs for the amount of $5,200. Since my "Purchase Order Sheet" had not yet been signed by the dealer rep, the check wasn't cashed before notification, & the combine wasn't picked up, the [inconvenience] should have been slight.
>
> Feel free to consult my attorney, John D. Coonrod, for details. Again, excuse these changes of events.
>
> Sincerely,
>
> Carl W. Krusa
> (FOR "K" FARMS)

Defendant testified that Jim Beard visited defendant at his farm around lunchtime on December 27, 1985. During this visit, Jim told defendant, "There's no problem, Carl, just please send a check to Tony Thomas for his time explaining the differences between models and options." Defendant recalled that their conversation was friendly and that Jim told him something to the effect that, "Carl, we maybe lost a little bit of commission on this, but don't worry about it. I'll make it up on the next sales." Defendant signed the contract with Cox later that afternoon.

Defendant testified that when he spoke with Hess on the evening of December 26, Hess did not indicate that he had signed the order that had been signed earlier by defendant. Defendant testified that in his letter to plaintiff, he enclosed a check for $100 made payable to Thomas for Thomas' time. Defendant believed that once this sum was paid, he was released from any obligation to plaintiff seller.

Jim Beard testified that in fall 1985, he approached defendant several times about purchasing a new combine. Jim testified that he again spoke with defendant about purchasing a new combine at plaintiff's Arenzville office at 3:30 or 4 P.M. on December 23, 1985. Gerry Beard was also present. Jim stated that he did not have the authority to sell the combine at a given price; only Gerry and Hess had that authority. The price quoted by Gerry to defendant was $52,800 and the trade-in of defendant's existing combine. Jim identified the purchase order bearing defendant's signature. Jim filled in all the other information on that order.

Jim testified that defendant did not make any statements that he was going to consider the purchase further after signing the purchase order. Jim also stated that defendant did not make any statements to the effect that the purchase order was not to be considered a completed contract.

P's claim

Jim identified the counter check payable to plaintiff for $5,200. He stated that he filled out the check and defendant signed it, but that he forgot to fill in the date on the check. Jim did not recall any statement made by defendant that the check should be held. Jim recalled that the purchase order and check were signed at approximately 5:30 P.M. He stated that defendant was not threatened or told that he could not leave the office until he signed the order. Jim stated that he would not have signed the order if defendant had said anything about reserving the right to call back later and cancel the deal.

Jim next spoke with defendant on December 27, 1985. Hess told Jim that defendant did not want to buy the combine and asked Jim to visit defendant. Jim met with defendant that same day and asked defendant why he could not buy the combine. Defendant told him that he could not afford it. Jim stated that defendant did not mention that he had purchased a combine from someone else.

On cross-examination, Jim admitted that he did not sign the purchase order which defendant had signed. He testified that Gerry and Hess are authorized to accept offers on behalf of plaintiff, but that neither one signed the order.

Gerry Beard testified that defendant came to plaintiff's office in the afternoon of December 23. Gerry stated that he attempted to persuade defendant to purchase a new combine. Gerry testified that he offered to sell the new combine to defendant for $52,800 and that defendant replied, "I'll take the deal." Defendant then signed the order and counter check and left plaintiff's offices.

Gerry stated that he is authorized to accept contracts on behalf of plaintiff. He testified that he accepted the contract with defendant. Gerry stated that defendant did not indicate, after signing the counter check and purchase order, that the transaction was not a completed deal.

On appeal, defendant argues that the trial court erred in finding that a contract existed between him and plaintiff for the purchase of a combine.

Defendant argues plaintiff never accepted defendant's offer to purchase the combine because the purchase order defendant signed required a signature by a "dealer" on behalf of plaintiff for acceptance and none of plaintiff's representatives ever signed that order. Accordingly, defendant's subsequent refusal to "go through with the deal" constituted a valid revocation of his offer.

Plaintiff argues that a contract existed between the parties even before their agreement was reduced to writing. Essentially, plaintiff contends that after the verbal agreement was reached, the terms of that agreement were memorialized on the purchase order, which was then signed by defendant. Further, plaintiff argues that this verbal agreement was evidenced by a counter check, which was also signed by defendant and which represented a down payment on the combine. Plaintiff asserts that it accepted both the purchase order and the down payment by placing those documents in its office.

In deciding whether the offer in the present case has been accepted, this court must first identify both the offeror and the offer. A treatise on contract law provides some guidance on this issue: "A problem arises when A, through a salesman, has frequently solicited orders from B, the contract to arise when approved by A at A's home office. As we have seen in this situation[,] B is the offeror and A the offeree." J. Calamari & J. Perillo, Contracts §2-18, at 85 (3d ed. 1987).

In Foremost Pro Color, Inc. v. Eastman Kodak Co. (9th Cir. 1983), 703 F.2d 534, the court considered whether a contract existed based on two unsigned purchase orders. The district court had concluded that no contract existed because the purchase orders were merely offers to buy, inviting acceptance either by a prompt promise to ship or by prompt or current shipment. (*Foremost*, 703 F.2d at 538.) The court of appeals agreed and stated that the weight of authority suggests that purchase orders are not enforceable contracts until accepted by the offeree. *Foremost*, 703 F.2d at 539.

In the instant case, the purchase order form signed by defendant constitutes an offer made by defendant to plaintiff. Thus, this court needs to determine whether defendant's offer was accepted by plaintiff.

Section 2-206 of the Uniform Commercial Code—Sales (Code) states the following:

> (1) Unless otherwise unambiguously indicated by the language or circumstances
>
> (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
>
> (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
>
> (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(Ill. Rev. Stat. 1989, ch. 26, par. 2-206.) For the purposes of the present case, the key word in this statute is the term "unambiguously." If defendant's offer contained on the purchase order is unambiguous in inviting acceptance only by the signature of plaintiff's "dealer," no contract exists until the purchase order is signed accordingly. If, however, defendant's offer is ambiguous in inviting plaintiff's acceptance, a contract between plaintiff and defendant could be found to exist. Rule

On appeal, defendant has cited several cases supporting the argument that the purchase order he signed unambiguously invites acceptance only by signature of plaintiff's "dealer." One such case is Brophy v. City of Joliet (1957), 14 Ill. App. 2d 443, 144 N.E.2d 816, which involved the sale of revenue bonds. In that case, the court stated that where an offer requires an acceptance to be made in writing, no other form of acceptance can be made. The offer in *Brophy* read as follows:

> The signed acceptance of this proposal shall constitute a contract between the undersigned and the city. . . .
>
> [ ]Accepted for and on behalf of . . . , which is hereby acknowledged by the duly, qualified officials.
>
> [ ]_____________
> Mayor
> [ ]_____________
> City Clerk

Brophy, 14 Ill. App. 2d at 448, 144 N.E.2d at 819.

In La Salle National Bank v. Vega (1988), 167 Ill. App. 3d 154, 117 Ill. Dec. 778, 520 N.E.2d 1129, the court dealt with a real estate sales document which was signed by the seller as offeror and clearly stated that a contract would be in full force upon execution by the purchasing trust. The court held that the document did not constitute a valid contract in the absence of acceptance by the written execution of the purchasing trust. The court noted that an offeror has complete control over his offer and its terms of acceptance, and no other mode may be used where a written acceptance is required. *La Salle National Bank*, 167 Ill. App. 3d at 161-62, 117 Ill. Dec. at 782, 520 N.E.2d at 1133.

In Zinni v. Royal Lincoln-Mercury, Inc. (1980), 84 Ill. App. 3d 1093, 40 Ill. Dec. 511, 406 N.E.2d 212, the court wrote the following:

> Although the modes of a valid acceptance may be varied, the requirement of an acceptance by the offeror still exists. . . . Where an order form, containing the buyer's offer, requires the acceptance of the seller, no contract will exist until the seller has manifested acceptance of the offer. The record before us contains no manifestation of the defendant's acceptance of the plaintiff's offer. Although the order form contains a space for the defendant's signature, defendant did not sign it. While we believe defendant's acceptance may be manifested in ways other than its signature, plaintiff's complaint fails to allege an alternative manifestation of defendant's acceptance. Absent an acceptance by the defendant, no contract existed between the parties.

Zinni, 84 Ill. App. 3d at 1094-95, 40 Ill. Dec. at 513, 406 N.E.2d at 214.

In Southwestern Stationery & Bank Supply, Inc. v. Harris Corp. (10th Cir. 1980), 624 F.2d 168, the court held that the seller's purchase order, which provided that the order was "'subject to acceptance by Seller'" and that "'Seller shall mail to Purchaser a signed duplicate copy hereof, and the same shall constitute the entire contract between the parties,'" unambiguously specified the proper method of acceptance. (*Southwestern Stationery*, 624 F.2d at 169.) Therefore, in absence of a written acceptance by the seller, there was no contract for the sale of a printing press. The face of that purchase order stated the following:

> This order is hereby accepted and dated at Seller's Cleveland, Ohio, Office on ______________ HARRIS CORPORATION, a Delaware Corporation Sheet Fed Press Division,
>
> Seller
>
> By______________________________

Southwestern Stationery, 624 F.2d at 170.

A case most like the present one is Antonucci v. Stevens Dodge, Inc. (N.Y. Civ. Ct. 1973), 73 Misc. 2d 173, 340 N.Y.S.2d 979, where the Civil Court of the City of New York wrote:

> When the offeror extends a promise and asks for a promise in return, and where the offeree accepts the offer by making the requested promise, the agreement is called a bilateral contract. Where the agreement takes the form of a written instrument, the acceptance is effective only when the document has been signed and delivered, unless it was clearly the intention of the parties that the earlier verbal agreement be binding and that the writing act merely as a memorandum or better evidence of the oral contract.
>
> The printed form agreement before the Court was drafted by the defendant and contains the following clause: "This order cancels and supersedes any prior agreement and as of the date hereof comprises the entire agreement relating to the subject matters covered hereby. . . ." It is clear that the defendant, the offeree, intended that this form agreement be deemed to be the entire contract and any verbal agreements, if contrary to the terms of the written agreement, not be binding.
>
> In the bottom lefthand corner of the agreement there is printed in large underlined type: "... THIS ORDER SHALL NOT BECOME BINDING UNTIL ACCEPTED BY DEALER OR HIS AUTHORIZED REPRESENTATIVE." . . . At the bottom of the paragraph containing this sentence is a blank line under which is printed "purchaser's signature." Plaintiff signed on this line. Below this is a blank line which has printed before it "Accepted By." Under this line is printed "Dealer or his Authorized Representative." This line bears no signature.
>
> On the back of the agreement are printed ten conditions. . . . Paragraph 10 states:
>
> > "This order is subject to acceptance by the dealer, which acceptance shall be signified by the signature of Dealer, Dealer's Manager or other authorized signature on the reverse side hereof."
>
> It is obvious that the parties intended the agreement to be bilateral and that the offer by the plaintiff to purchase the pickup be deemed accepted by the defendant only when he or his authorized representative signed the order.

> The presenting of the order by the dealer was an invitation to the plaintiff to make an offer to purchase the pickup truck. The signing of the order by the plaintiff constituted an offer by him to purchase the truck. By the printed terms of the agreement only the signature of the defendant or its authorized representatives would constitute acceptance of the plaintiff's offer and thus create a binding bilateral contract. In a bilateral contract it is essential that the fact of acceptance be communicated to the offeror. The failure of the defendant or his representative to sign the order is conclusive proof that the defendant did not accept the offer. It was the defendant who drafted the agreement and set forth the manner in which it would accept an offer. The fact that defendant ordered and accepted delivery of a pickup truck does not constitute acceptance under the terms of the agreement. By the terms of the agreement only the signature of the defendant could constitute acceptance. The plaintiff's refusal to accept the truck constituted a valid revocation of his offer. As a general rule, an offer may be revoked or withdrawn at any time before it is accepted with certain exceptions set forth in the Uniform Commercial Code. This case does not fall within any of the code exceptions.
>
> The Court finds by a fair preponderance of the credible evidence that an enforceable bilateral contract was not formed because of defendant's failure to accept plaintiff's offer and that plaintiff validly revoked his offer.

Antonucci, 340 N.Y.S.2d at 982-83.

Plaintiff counters defendant's argument by contending that plaintiff was the one to offer the combine to defendant and defendant accepted plaintiff's offer by signing a counter check and giving that check to plaintiff as a down payment on the combine. We are unpersuaded.

We construe section 2-206 of the Code as giving approval to an ancient and cardinal rule of the law of contracts: the offeror is the master of his offer. An offeror may prescribe as many conditions or terms of the method of acceptance as he may wish, including, but not limited to, the time, place, and manner. (Kroeze v. Chloride Group Ltd. (5th Cir. 1978), 572 F.2d 1099, 1105.) We also note that contracts are generally construed against the party who drafted the document (see Restatement (Second) of Contracts §206, at 105 (1981)) and that plaintiff drafted the purchase order in the present case, and then gave it to defendant to use for his offer to purchase the combine.

Based on the foregoing, we conclude that the purchase order in this case "unambiguously" required the signature by plaintiff's "dealer" in order to be a proper acceptance of defendant's offer. Because plaintiff's "dealer" never signed the purchase order, no contract ever existed.

For the reasons stated, the judgment in favor of plaintiff is reversed.

Reversed.

NOTES AND QUESTIONS

1. Exactly who was the offeror and who the offeree in this case?
2. Consider the following statute:

Uniform Commercial Code §2-204. Formation in General[1]

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale 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.

Does subsection (1) dictate a different result in *Beard*?

3. Is it a good idea to postpone effectiveness until the home office or some other official approves? Why would the implement dealer have done this?

4. The Federal Trade Commission has promulgated a rule that generally allows individuals who make purchases of $25 or more for a personal, family, or household purpose a three-day cooling off period (that is, three days to cancel the transaction) when the buyer's "agreement or offer to purchase" is made at a place other than the regular place of business of the seller. 16 C.F.R. §429.1. The purpose of the rule is to give consumers who buy from door-to-door sellers a time within which to reconsider the transaction. The "agreement or offer to purchase" language prevents a door-to-door seller from requiring home office approval and then arguing that the sale is at the regular place of the seller's business.

FUJIMOTO v. RIO GRANDE PICKLE CO.
United States Court of Appeals, Fifth Circuit, 1969
414 F.2d 648

GOLDBERG, Circuit Judge. This appeal involves claims by George Fujimoto and Jose Bravo against the Rio Grande Pickle Company upon written contracts of employment. The questions before us are of contract formation and construction.

Rio Grande Pickle Company, a Colorado corporation engaged in the business of raising and selling cucumbers for the pickling industry, hired Fujimoto in the Spring of 1965 and Bravo in the following Fall. Both of these employees were given important jobs. Fujimoto was employed as

1. The 2003 rewrite of §2-204 adds provisions allowing electronic agents to contract with one another—which is happening on the Internet—and blessing the so-called click wrap agreements created by a computer user who is given access to legal terms and who then clicks on an "I Agree" icon.

the supervisor of the planting and growing operations, while Bravo functioned as the labor recruiter.

In order to encourage them to work with zeal and not to leave the company's employ, Rio Grande offered contracts with profit sharing bonus provisions to both Fujimoto and Bravo. Prior to the offer of the written contracts, the company had responded to the offerees' demands for more compensation by orally agreeing to pay them a salary plus a bonus of ten percent of the company's annual profits. Bravo told the president of Rio Grande that he wanted the agreement in writing, and the president replied "I will prepare one and send you a contract in writing." The contractual documents sent to Fujimoto and Bravo did not specify how the offers could be accepted or how the acceptances should be communicated to the company. Under these circumstances Fujimoto and Bravo signed their respective contracts but did not return them to the company. Believing that they had accepted the company's offers and that they were working under the proffered bonus contracts, the two employees remained in the employ of Rio Grande until November 30, 1966.

The written contracts called for the employees to devote their best efforts to Rio Grande and promised in return that the company would pay each offeree a bonus amounting to ten percent of the company's net profits for each fiscal year. Each employee was to agree to return half of his bonus to the company as an investment in company stock.

Partly as a consequence of projected changes in the nature of the corporation's business, Fujimoto and Bravo quit their jobs with Rio Grande on November 30, 1966. Shortly thereafter the company ceased doing business in Texas. Fujimoto and Bravo then brought this suit, claiming that they had accepted the offered contracts and that they had not received the ten percent bonuses due them. They alleged that they were each entitled to ten percent of the company's net profits for the fiscal year ending September 30, 1966, and ten percent of the profits of the subsequent two months, October and November, 1966.

In answer to special interrogatories the jury found that Fujimoto and Bravo each had entered into a written contract in October, 1965. It was then determined that Fujimoto and Bravo should each recover the sum of $8,964.25 as damages for the company's breach of contract.

On appeal Rio Grande argues that there is insufficient evidence in the record to support the jury's finding that Fujimoto and Bravo had accepted the offered bonus contracts. The company further argues that even if the contracts had been accepted, the district court's judgment still should be reversed because the court erred in charging the jury as to how to compute the net profits of the corporation.

We have concluded that employment contracts were accepted and that they subsisted throughout the fiscal year ending September 30, 1966, and for two months into the following fiscal year. However, we have also concluded that the district court erred in instructing the jury on how to compute Rio Grande's net profits for the truncated period of October and November, 1966. The judgment of the district court is, therefore, affirmed in part and reversed and remanded in part.

I

Rio Grande argues that there were no contracts because Fujimoto and Bravo did not accept the written bonus offers by signing and returning the written instruments to the company. Each contract was signed by the respective employee, but neither was returned. Thus the first issue is whether the offers, which by their terms did not specify the means by which they could be accepted, could be accepted by a mode other than the return of the signed instruments.

Professor Corbin has summarized the law on this issue as follows:

> In the first place, there is no question that the offeror can require notice of acceptance in any form that he pleases. He can require that it shall be in any language and transmitted in any manner. He may require notice to be given by a nod of the head, by flags, by wig-wag, by a smoke signal on a high hill. He may require that it be by letter, telegraph or radio, and that there shall be no contract unless and until he is himself made conscious of it.
>
> Secondly, the offeror can specify a mode of making an acceptance of his offer, without making that method exclusive of all others. If the mode that he specifies is one that may not bring home to him the knowledge that his offer has been accepted, then such knowledge by him is not a requisite. The offeror can specify a mode of acceptance without any knowledge of the law of contract and without thinking in terms of offer and acceptance at all. This will be considered below.
>
> Thirdly, if the offeror specifies no mode of acceptance, the law requires no more than that the mode adopted shall be in accord with the usage and custom of men in similar cases. If proof of such usage and custom is wanting or is uncertain, the court must consider probable convenience and results and then help by its decision to establish a custom for the future and a rule of law. Corbin on Contracts §67, p.109 [student ed. 1952].

See also Allied Steel & Conveyors, Inc. v. Ford Motor Company, 6 Cir. 1960, 277 F.2d 907, 910-911.

This case falls within the third of Professor Corbin's rules. Neither written offer specified a particular mode of acceptance, and there is no evidence that Rio Grande ever manifested any intent that the offers could be accepted only by the return of the signed instruments. Moreover, there is substantial and convincing evidence to the contrary. The record is replete with evidence that the company conditioned the bonus offers primarily upon the offerees remaining in the company's employment and that the employees understood that they did not have to return the signed contracts in order to have contracts under which they would each get a ten percent bonus.

Since we have found that the return of the signed documents was not the exclusive means by which the offerees could convey their acceptances, we must now determine whether Fujimoto and Bravo in fact adequately communicated such acceptances to the company. Where, as here, the offer and surrounding circumstances are silent as to permissible modes of acceptance, the law requires only that there be some clear and unmistakable expression of the offeree's intention to accept. In the words of Professor Corbin: