Part One

Formation

Chapter 1

Offer

CHAPTER OBJECTIVES

The student will be able to:

- Use vocabulary regarding offers properly.
- Identify the offer as either unilateral or bilateral.
- Discuss whether all necessary terms are certain in order to be considered a valid offer.
- Determine whether the offer has been effectively communicated to the intended offeree.
- Determine the method of creation of the offer.
- Evaluate when an offer can be or has been terminated.
- Identify irrevocable offers.

This chapter will explore the TYPE (unilateral versus bilateral), WHO (parties), WHAT (subject matter), WHEN, and HOW (methods of creation and termination) of offers to enter into a contract. Two or more parties must both intend to enter into a binding agreement by an exchange of promises or actions. The proposal must specify who will be bound by the agreement, what will be exchanged between them, and when those obligations under the agreement must be performed. Offers may be created or terminated by a variety of methods. There may not be a need for a writing or even for words to be exchanged.

offeror
The person making the offer to another party.

offeree
The person to whom an offer is made.

offer
A promise made by the offeror to do (or not to do) something provided that the offeree, by accepting, promises or does something in exchange.

First, let's get some cumbersome vocabulary out of the way. The person who makes the offer, who initiates the potential formation of a contract, is called the **offeror**. The person to whom the offer is made is the **offeree**. As you learn about different areas of the law, you will come to notice that the initiator of a transaction, the one creating the terms, is followed by the suffix "or." For example, the offeror is also referred to as the promis**or**, the person leasing space in a building is the less**or**, the person making the guarantee is the guarant**or**, and the person writing the will is the testat**or**. It then follows that the persons on the receiving ends of these transactions are, respectively, the promis**ee**, the less**ee**, the guarant**ee** (although in common usage we call this person the borrower), and the devis**ee**. The **offer** itself is the promise between these parties. According to the *Restatement (Second) of Contracts* § 24: "*An offer is a promise which is in its terms conditional upon an act, forbearance or return promise being given in exchange for the promise or its performance.*" This legal language, of course, does the paralegal student no good as she/he reads this definition seven times trying to decipher what these people could possibly mean. What the definition really says is that two (or more) people exchange

1. Promises to do something for each other.
2. A promise to do something if the other person agrees not to do something that they might otherwise do.
3. A promise to do something if the other person simply does the act requested.

MUTUAL ASSENT

mutuality of contract
Also known as "mutuality of obligation"—is a doctrine that requires both parties to be bound to the terms of the agreement.

reasonable
Comporting with normally accepted modes of behavior in a particular instance.

objectively reasonable
A standard of behavior that the majority of persons would agree with or how most persons in a community generally act.

These two people must intend to be legally bound upon the offeree accepting the offer with no further discussions needed. This is the **mutuality of contract**—a mutual agreement to be bound by the terms of the offer. The "yes" is all it takes to form the legally binding contract. No one is surprised to be *in* a contract. (They may be surprised at the consequences but never at the mere fact they have entered into a contract.) A party must **reasonably** intend to make the offer binding at the time of the offer. The courts look at the surrounding circumstances to determine present intent to contract. The element of mutuality is absent where the offeror makes a statement that, while on its face seems to be an offer, is not intended to bind the parties to the agreement.

For example, Pete storms out of his car, slams the door, kicks the tires, and yells: "I will sell this hunk of junk to anyone who gives me a dollar!" because it has broken down yet again. Pete has not created a valid offer. Why? Because he's not seriously considering selling his car for a dollar; Pete is merely venting his frustration. Pete does not intend to be bound to someone who overhears and hands him a dollar. Additionally, Pete does not anticipate that any reasonable person who did overhear his exclamation would think that it was a valid offer.

Similarly, if words are spoken that may sound like an offer but are made in jest, there is not a valid offer. "Sure you can have my grandmother's beautiful antique brooch for a dollar." The person is obviously (objectively) being funny or sarcastic because she has no intention of parting with it for any amount of money. The standard here is reasonability. Is it **objectively reasonable** to think that a person would sell either of those items for a dollar? No, and no reasonable person would think that the speaker meant it. "*The primary test of an offer is whether it induces a reasonable belief in the recipient that he or she can, by accepting, bind the sender. An offer is judged by its objective manifestations, not by any uncommunicated beliefs, mental reservations, or subjective interpretations or intentions of the offeror.*" AL . JTQ . CNMSQ@BSR § 49. A court would not force Pete to make the exchange if someone sued him because he wouldn't sign over the title to his car after the person gave him a dollar. At most the court would just make Pete give the dollar back. It is not objectively reasonable on either party's part that either of those statements was meant to be a legally binding offer. There can be no mutual assent if the parties know or should know it is not a valid offer to which the offeror intends to be bound. The courts have determined that an intent to enter into a contract is specific to the intention to go through with the deal. The court in *State v. Alvarado*, 178 Ariz. 539, 542, 875 P.2d 198, 201 (App. Div. 1994.), determined that the defendant "*must be aware or believe that he has made an offer to sell marijuana, not that he has told a lie or made a joke.*" Through a contract law theory discussion, the defendant was found guilty because the evidence showed that he meant what he said to the undercover officer regarding the sale of marijuana. There was an intent to enter into a contract for sale. Again, the reference is to whether the statement would give rise to a reasonable belief that the offeror intended to be bound if the offeree agreed to the terms of the supposed offer.

Bilateral and Unilateral Contracts

bilateral contract
A contract in which the parties exchange a promise for a promise.

As described above, there are two kinds of contracts. Numbers (1) and (2) describe a **bilateral contract**—a contract in which the parties exchange a promise for a promise.

Example:

Miriam offers to sell her *Contracts* book to Mark if he promises to pay her $10.00 for it. A binding legal obligation arises when Mark agrees to buy the book. Miriam is bound to sell Mark the book and Mark is bound to purchase it, even if the actual exchange of money and the book doesn't occur until the following week.

unilateral contract
A contract in which the parties exchange a promise for an act.

The third example, a promise to do something if the other person simply does the act requested, is a **unilateral contract**. The offeror requests that the offeree actually do something, not merely promise to do something.

Example:

Miriam tells Mark that she will sell him her *Contract* book if he gives her $10.00. Here Miriam wants the $10.00 handed to her before she will complete the transaction; she doesn't want

Mark to merely promise to give her the money. Miriam becomes bound to Mark only after he performs on the contract by giving her the $10.00.

In the real world, common examples of unilateral contracts are offers for rewards (missing dog) and contests (best Halloween costume gets a prize). It is only when the offeree actually returns the dog or shows up in the best Halloween costume that the offeror is bound to give the reward or prize to them. They simply cannot promise to do those things and expect the reward or prize.

Further, perhaps of interest to paralegal students who will eventually be looking for employment, there is a distinction between "at-will" employment formed by a unilateral contract and employment formed by bilateral contract. At-will employment—the "day's work for a day's pay" type of job—is formed by the employee actually showing up and performing the tasks assigned. This is a unilateral contract. The employer/offeror is bound to pay the employee only when the work has been done. The employer is looking for performance, not merely the promise to do the job. In a very general way, this is why paychecks are issued for the prior week's performance. In contrast, employment that requires "good cause" for termination or other contractual provisions for a guarantee of employment term is bilateral. The court in *Flower v. T.R.A. Industries, Inc.*, 127 Wash. App. 13, 111 P.3d 1192 (2005), determined that Mr. Flower's promise to accept a position with the employer, sell his house, and move to Washington, while the employer promised to terminate their relationship only for good cause, formed a bilateral contract. Why is this scenario different? The employer was looking for Mr. Flower's promises to change his position (sell his house and move), not just his performance on the job.

Fine, you say, there is an academic distinction between bilateral and unilateral contracts, but why does a paralegal have to know this? In practical application, it is important to know what kind of offer was made to determine when the parties become obligated to each other. In the first example, Miriam and Mark were obligated to each other after they exchanged their promises. Miriam cannot sell her book to someone else during the time that Mark gets his money together and actually pays Miriam. If she does, Miriam is in **breach** of the contract and Mark can pursue **legal remedies** against her. However, the same does not hold true for the second situation. Miriam is not obligated to sell Mark her book until he hands over the cash; therefore, she is free to sell her book to anyone else who comes up with the cash before Mark does and she is not in breach of contract because the contract is not formed until performance.

breach
A violation of an obligation under a contract for which a party may seek recourse to the court.

legal remedy
Relief provided by the court to a party to redress a wrong perpetrated by another party.

Certainty of Terms

What other common element do we see in the examples above? A contract must be **certain in its terms**. In other words, the offeree must be certain as to what he is agreeing to do. A basic rule of thumb is: the more certain the terms, the more likely it is to be a valid offer. It is very important to remember that a court will *not* correct or interpret any terms in a contract. The creation of the contract is entirely up to the parties; this is the theory of freedom of contract introduced previously. Within the limits of contract law, parties may contract for *whatever* they wish; a court cannot create the **meeting of the minds** on the terms. Therefore, if the terms are uncertain, there is no contract because there has been no valid offer.

certainty
The ability for a term to be determined and evaluated by a party outside of the contract.

meeting of the minds
A legal concept requiring that both parties understand and ascribe the same meaning to the terms of the contract.

It is generally accepted that there are four elements that must be **certain** in a contract in order for there to be a valid offer:

1. Parties
2. Price
3. Subject matter
4. Time for performance

Parties

Usually we know the identity of the offeror, but it takes two parties to create an agreement. This is not generally an issue. However, since the power to create the contract is essentially within the power of the offeree, it is important to know who is capable of accepting the offer. Generally speaking, the offeree is any person (or entity) to whom the offer is communicated and/or specified in the offer. Miriam specified that the offeree was Mark when she told him she would sell her contracts book to him for $10.00. If she had posted the offer on the college's bulletin board, the offerees would have been anyone who read the offer.

parties
The persons involved in the making of the contract.

SURF'S UP!

As the influence of e-commerce grew, it became necessary to regulate transactions taking place entirely over the Internet. The legislative response was the Uniform Electronic Transactions Act of 1999. This act states that electronic records and signatures have the same weight and validity as their paper counterparts.

UETA § 2 deals with the definitions used in the act. Two significant definitions are

> (2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties **are not reviewed by an individual in the ordinary course in forming a contract**, performing under an existing contract, or fulfilling an obligation required by the transaction.

and

> (6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, **without review or action by an individual**.

Notice how both definitions contemplate the possibility of the absence of human interaction. Who are the "parties" to the transaction that is made automatically? The anonymity of the Internet has changed some of the basics of contract law. With regard to this "hiding place," see http://public.findlaw.com/internet/nolo/ency/FC6B446E-F408-4ECC-AF8D0CEAD0574D5E.html.

The most important example of knowing the offeree's identity is a personal service contract, wherein it matters who performs the act desired by the offeror. If a theater offers $1 million for the Rolling Stones (or insert any easily recognizable and distinct band) to perform, it has to be the Rolling Stones that performs. No one else may accept that contract because the Rolling Stones is a unique set of people (albeit a rather aged and grizzly group) with unique talents. This would generally hold true for any specific performance contract.

Price

price
The monetary value ascribed by the parties to the exchange involved in the contract.

Now that we know who is going to perform, the **price** must be specified in the contract. Otherwise there would be no way for the offeree to know how much he/she was expected to pay in return for the goods or services provided by the offeror. Therefore, there could be no meeting of the minds; an offeror cannot expect an offeree to accept *any* price and be legally bound by it. This is not to say that the exact monetary amount down to dollars and cents needs to be in the offer. As long as the price can be objectively determined, the offer is specific as to the price.

Example:

Farmer Fred offers to sell 100 bushels of granny smith apples to Buyer Bob at the market price prevailing on September 1st of that year. The offer is valid and Buyer Bob will be legally bound to pay the prevailing price on September 1st if he agrees to the contract. The market price is **objectively determinable** by both parties. The cost of the apples is precisely calculable. Buyer Bob has a pretty good idea of the price given the previous years' selling prices and has agreed to assume the risk that the price is yet to be determined to the exact penny.

objectively determinable
The ability of the price to be ascertained by a party outside of the contract.

Herein lies the key to certainty of price—objectivity. The price on September 1st will be an exact and certain cost; everyone who cares to look it up will find the same price. If the offer were for a "price to be determined" without any objective measure, meaning the offeror could make up any price he wanted, the offer would be an **illusory promise** to sell. It would have absolutely no meaning, just like an illusion in a magic show; it is not real and therefore is not an offer.

illusory promise
A statement that appears to be a promise but actually enforces no obligation upon the promisor because he retains the subjective option whether or not to perform on it.

Subject Matter

The persons and price they will pay have been identified, but the price for *what*? The goods or services that the parties are bargaining for also must be specified in the offer. Again, the offeree must be sure of what she is getting in return for the price set by the contract. The quantity, quality, and content must be reasonably specified so that the offeree could objectively ascertain what she is to take away from the agreement. The amount of detail needed, of course, depends on the **subject matter**.

subject matter
The bargained-for exchange that forms the basis for the contract.

Example:

Let's return to Farmer Fred and let's assume that Fred grows only one kind of apple, granny smiths. If Fred said to Bob: "I'll sell you 100 bushels of apples at the prevailing price on September 1st of this year," a valid offer would exist because Bob would be certain of the subject matter of the contract. Fred has offered 100 bushels of granny smith apples even though he didn't say that outright. It is only objectively reasonable that Fred can offer only that which he has to sell. However, if Farmer Fred grew several kinds of apples, the offer would fail for uncertainty because Bob would have no way of knowing which variety of apples he would be purchasing.

Therefore, if the subject matter could refer to more than one thing or have more than one interpretation, then the offer fails due to this ambiguity. Again, the test of whether the offer is valid is whether a reasonable person could be able to determine the subject of the contract. There are some interesting plot twists that come with this element.

If both parties are unaware of the ambiguity and there has been a meeting of the minds, the offer is still valid and the courts will uphold the contract. Ironically, it is the mutuality of the mistake that preserves the mutuality of the agreement.

Example:

Farmer Fred only grows granny smith apples on his farm and Bob knows this. Both parties have agreed to the purchase of 100 bushels of the apples at the certain price. Unknown to both Fred and Bob, Farmer Fred has inherited a huge apple orchard from his Uncle Frank Farmer. This farm grows a dozen different kinds of apples. While to the outside observer there may be an ambiguity in the contract, which kind of apples did Bob agree to buy? Fred has 13 different kinds of apples in his inventory; however, Fred and Bob both could only have agreed at the time to the purchase of the granny smith apples because they were unaware of the ambiguity in the contract. Both Bob and Fred thought they were certain in their terms.

This same scenario plays out slightly differently if only one of the parties is uncertain about the subject matter and the other is certain. If Buyer Bob is unaware of the inherited apple orchard and thinks Fred only has granny smiths to sell, but Fred knows he has 13 varieties to sell, then the offer was ambiguous. Fred has not identified to subject matter of the contract and there has been no valid offer. In this case, the court may uphold the agreement based on the unknowing party's interpretation based on principles of equity that will be discussed later.

Offering alternatives does not make the offer invalid for vagueness. As long as the offeror makes the alternatives clear in the offer, the subject matter is objectively reasonably determinable. Fred may have offered granny smiths or red delicious apples for a certain price. Bob would have to choose between the offers. The number of choices does not make an offer ambiguous; it may be complex if many alternatives are offered, but as long as the subject matter is readily discernable, the offer is valid.

Eye on Ethics

Attorneys regularly face ethical decisions in advising their clients about contract formation. Most poignant is the creation of the contract establishing the attorney-client relationship. In this personal service contract, the attorney must guard against overreaching or, worse, misrepresentation or fraud.

The attorney is the offeror in this transaction and, as such, can set the terms of the offer. However, the attorney is also in a privileged and sensitive position when making this offer. The attorney has substantially more knowledge about the legal process than the potential client. This may lead the attorney to unreasonably limit the scope of representation and the client would not be aware of this until, perhaps, it was too late. Indeed, the attorney may underestimate the degree of legal knowledge, skill, and amount of preparation that may be needed until the case is well underway. Additionally, the limitation may not negatively impact the attorney's duty to provide competent representation.

When would this underestimation in the offer rise to an ethical violation?

Spot the Issue!

Penny Paralegal has been on her job search for months. Finally, she was offered what seemed to be her dream job. The partners forwarded her the following employment contract. Is this a valid offer? What are the missing or ambiguous elements, if any? Rewrite the contract to create a valid offer.

EMPLOYMENT CONTRACT

Agreement made this day, _____, 20___ between Penny Paralegal ("Employee") and Big Law Firm ("Employer") for employment.

Big Law Firm agrees to pay Penny Paralegal for her services. Payment shall be made every 1st and 15th of the month.

Penny Paralegal shall be provided with benefits standard in the industry.

Penny Paralegal will have 2 weeks of paid vacation and be permitted a total of 10 sick days per year.

Big Law Firm agrees to send Penny Paralegal to at least one Continuing Legal Education course per year and will pay the fees and costs associated with same.

Signed:

_____

Employee—Penny Paralegal

_____

Employer—Big Law Firm

There are two special kinds of contracts that at first blush appear to be uncertain as to the amount of the subject matter to be purchased and therefore should fail as valid offers. They do not fail, however, because while the quantity is not specified, the quantity can be objectively determined. These two contracts are (1) **output contracts** and (2) **requirements contracts**. An output contract is certain as to the quality and content of the subject matter, but the amount is specified only as "all of the production (output) of the offeree." This would mean that Bob has agreed to buy all of the granny smith apples grown on Fred's farm that year. This contract focuses on how much production can occur. A requirements contract's focus is on a party's needs rather than the amount that can be produced. Essentially, the tables have turned. Fred has agreed to supply Bob with all the granny smith apples that Bob needs to make pies. This is unrelated to how many apples Fred can grow on his farm as long as it can meet Bob's requirements.

output contract
An agreement wherein the quantity that the offeror desires to purchase is all that the offeree can produce.

requirements contract
An agreement wherein the quantity that the offeror desires to purchase is all that the offeror needs.

Time for Performance

The parties (WHO) and price (HOW MUCH) they will pay for the subject matter (WHAT) have been expressed in certain terms. The last certainty must be WHEN. After a contract has been accepted, the parties do not have an indefinite period in which to fulfill their obligations under the contract. Of course, under the theory of freedom of contract, the parties may contract for any time period they choose. If a time for performance is not specified, the court will interpret this as a reasonable time. If the parties make a failed attempt at a time designation, the court cannot correct their mistake and the contract will fail for uncertainty of terms.

Time of the essence clauses specify a time for performance; should the party fail to perform by the date specified, she will be in breach of contract and the "innocent" party is entitled to remedies. This is most often found in real estate contracts. After the seller accepts the buyer's offer to purchase the property, the sales contract usually sets an approximate date for the closing to occur. This date is often not the day on which the parties actually close on the property, but it does set

time of the essence
A term in a contract that indicates that no extensions for the required performance will be permitted. The performance must occur on or before the specified date.

an expectation that the closing will occur around that date. If it is imperative that the buyers or sellers close on that date—perhaps they must vacate their current home—a "time is of the essence" clause will be inserted in the contract. If the closing does not take place on (or before) that day, the party making time of the essence can avoid the contract and recover a reasonable measure of damages.

executory
The parties' performances under the contract have yet to occur.

executed
The parties' performance obligations under the contract are complete.

The timing of the performance of the requested act determines whether the contract is deemed either **executory** or **executed**. An executory contract is one in which the parties have not yet performed their obligations. The contract has not been completed. It follows then that an executed contract is one that has been completed; the parties owe no further obligations to each other because they have performed (or otherwise discharged) their obligations.

Communication to Intended Offeree

At last! It has been determined whether the contract is unilateral or bilateral and the terms (all four categories) are certain. The last element of mutuality of contract is that the offer is actually communicated to the offeree. The offeree must know of the offer in order for the offer to be valid. This seems to be an intuitive, commonsensical element that needs no explanation. However, it must be made clear that the method of communication must reasonably reach the intended audience and include all the necessary information to form a contract. This is where advertisements fail to be offers. The method of communication, whether it's the newspaper or a television ad, only conveys solicitation to patronize the business. The communication fails to include all the certain terms. The exception to this general rule is where a business identifies a particular item, specifies a certain quantity for a certain price, and identifies who may accept the offer. The prime example is a car dealership stating that they have one certain vehicle identified by the VIN selling for $10,000 and that they will sell it to the first person to come in and give them the required deposit and credit line.

Without these elements—(1) how to accept the offer (by a promise in a bilateral contract or by an act in a unilateral contract), (2) the certainty of terms (parties, price, subject matter, and time for performance), and (3) knowledge of the offer—how would the parties know what was being bargained for? There could be no "meeting of the minds" or mutual assent. There are exceptions under the UCC for merchants—Chapter 15 deals with this in more detail.

METHOD OF CREATION

express contract
An agreement whose terms have been communicated in words, either in writing or orally.

implied contract
An agreement whose terms have not been communicated in words, but rather by conduct or actions of the parties.

A contract (either bilateral or unilateral) may be created either expressly or impliedly. An **express contract** has been expressed in words; it can be either an oral or written memorialization of the agreement. An **implied contract** is not created by words; it is created by actions of the parties. For example, an implied contract is formed when a customer plunks down $1.25 on the counter of the convenience store for morning coffee and the newspaper. No words are spoken, but the contract exists just the same. If this were to be an express contract, the offer's wording would be something like: "I will sell you this coffee and newspaper if you pay for them." The actions of the parties indicate the existence of the contract. The exchange is understood and the parties would not take those actions absent the unspoken agreement. The customer would be in breach of contract if she walked out without paying and the shopkeeper would be in breach if she did not provide the customer with the newspaper and coffee after the customer paid.

Spot the Issue!

Mark Mason and Charles Constructor entered into a contract for Mark to lay bricks at Charles' new home building project. Things have gone awry and Mark and Charles each claims that the other is in breach of the contract and litigation might be necessary. Mark's attorney calls Charles' attorney to see if Charles would agree to go to binding arbitration instead of court. A day later, Mark calls his attorney to revoke the offer to go to arbitration. Has there been a communication to the offeree? Why or why not? Examine to whom the communications were made and in what capacity. See *CPI Builders, Inc. v. Impco Technologies, Inc.,* 94 Cal. App. 4th 1167, 114 Cal. Rptr. 2d 851 (2001).

TERMINATION OF THE OFFER

Offers do not last forever; remember, there is nothing that the law of contracts likes better than certainty. When do offers end if no expiration date is specified in the offer? There are several methods to terminate an offer:

1. Lapse of time.
2. Revocation of the offer by the offeror.
3. Rejection/counteroffer by the offeree.
4. Incapacity or death of either party.
5. Destruction or loss of the subject matter.
6. Supervening illegality.

lapse of time
An interval of time that has been long enough to affect a termination of the offer.

Of these six, only the first, the **lapse of time**, is still relatively indefinite. The uncertainty of having an offer hang out there, not knowing if it will ever be accepted, is not permitted. The courts permit an offer to remain open for a reasonable amount of time, but the "reasonability" of the time frame depends on the circumstances of the offer. The comment to *Restatement (Second) of Contracts* § 41(b) reads:

> *In the absence of a contrary indication, just as acceptance may be made in any manner and by any medium which is reasonable in the circumstances (§ 30), so it may be made at any time which is reasonable in the circumstances. The circumstances to be considered have a wide range: they include the nature of the proposed contract, the purposes of the parties, the course of dealing between them, and any relevant usages of trade. In general, the question is what time would be thought satisfactory to the offeror by a reasonable man in the position of the offeree; but circumstances not known to the offeree may be relevant to show that the time actually taken by the offeree was satisfactory to the offeror.*

What this language really means is that what might be reasonable in one situation may not be in another and it is dependent on the actual effect it may have on the parties and their willingness to contract given that lapse of time. For example, three days may be a very long time to accept an offer to purchase a good where the price of that good is subject to drastic price fluctuations or is perishable. However, three days to accept an offer to purchase a home is not unreasonable at all; real estate is relatively stable both in price and durability within those three days.

revocation
The offeror's cancellation of the right of the offeree to accept an offer.

substantial beginning
An offeree has made conscientious efforts to start performing according to the terms of the contract. The performance need not be complete nor exactly as specified, but only an attempt at significant compliance.

detrimental reliance
An offeree has depended upon the assertions of the offeror and made a change for the worse in his position depending on those assertions.

The next five methods of termination are easily discernable. If the offer is revoked by the offeror before the offeree has given his acceptance, the offer is withdrawn. This can take the form of revocation in the contract terms themselves—"this offer will expire in 48 hours"—or by subsequent communication to the offeree. See, for example, *Thomas America Corp. v. Fitzgerald*, 957 F. Supp. 523 (S.D.N.Y. 1997) (an offer that specified the time period it will stay open cannot be accepted past that time period because it has lapsed). The offeree can no longer accept and has no recourse to force the offeror to go through with the deal. The **revocation** can be either a direct statement to the offeree conveying the offeror's unwillingness to enter into a contract or indirect communication by performing acts known to the offeree that are inconsistent with the offer. Either way, there is a clear indication that the offer is no longer open. For example, Miriam tells Mark that she is not going to sell him her *Contracts* book or Miriam, in the presence of Mark, who knows Miriam only has one *Contracts* book, sells the book to Jill. Either method of communication, directly telling Mark or indirectly communicating her intent to revoke through her actions of which Mark has knowledge, is an acceptable method of revocation of the offer.

This general rule that an offeror can revoke at any time up until acceptance has an exception in the case of unilateral contracts, where acceptance is not complete until full performance. An offeror cannot revoke the offer where the offeree has begun to perform the requested act. At that time, even though the contract has not been accepted because performance is not complete, where the offeree has made a **substantial beginning** or has changed his position in **detrimental reliance** on the offer, the power to revoke is terminated. This means that the offeree has essentially manifested his intent to be bound and to permit the offeror to revoke up until the last minute would offend our sense of fairness.

Example:

Archie Architect tells Paul the Painter he will pay him $1,000 if Paul paints his house on Thursday. Archie has made a unilateral offer: he wants Paul to paint his house on Thursday, not just promise to do so. Paul buys all the supplies he needs and shows up at Archie's house on Thursday. After Paul has completed about three-fourths of the house, Archie revokes the offer. Under strict contract interpretation, Paul has not accepted the contract because he hasn't given full and perfect performance. However, the law has created the doctrine of substantial beginning to protect Paul. Archie is no longer able to revoke his offer after that point. Further discussion about fairness can be found in Chapter 14 in the discussion of equity.

In *Clodfelter v. Plaza Ltd.*, 102 N.M. 544, 698 P.2d 1 (1985), homeowners entered into a unilateral real estate listing agreement. The owners would pay a commission to the Realtor if he sold the property. The court reemphasized that this kind of unilateral contract "*may be revoked at will until there is partial performance by the broker.*" The Realtor "*prepared brochures and provided advertising which resulted in inquiries and property viewings for prospective buyers. This evidence was sufficient for the trial court to find that the broker, pursuant to the agreement, had expended his time and effort to sell the property, therefore completing partial performance.*" *Id.* at 547.

rejection
A refusal to accept the terms of an offer.

counteroffer
A refusal to accept the stated terms of an offer by proposing alternate terms.

conditional acceptance
A refusal to accept the stated terms of an offer by adding restrictions or requirements to the terms of the offer by the offeree.

letter of intent/ nonbinding offer
A statement that details the preliminary negotiations and understanding of the terms of the agreement but does not create a binding obligation between parties.

An outright **rejection** of the offer obviously kills the offer. Additionally, a **counteroffer** terminates the original offer and creates an entirely new one in its place. The original offeror becomes the new offeree and the original offeree, who is making the counteroffer, becomes the new offeror. A **conditional acceptance** ("I accept your offer if…") is really a counteroffer because it changes the terms and therefore it also terminates the original offer. Sometimes, these offers and counteroffers are really part of the negotiation process and are not considered offers at that time. This can occur when a **letter of intent** (also known as a **nonbinding offer**) is sent to the offeree and if the terms are approved, will become the memorialization of the agreement. This letter contemplates a contract to be entered into at a later date. The agreement essentially only binds the parties to negotiate in good faith, not bind them to the terms of the letter. See, for example, *Hansen v. Phillips Beverage Co.*, 487 N.W.2d 925 (Minn. App. 1992). (The entire contents of the "nonbinding offer" were not binding terms enforceable against either party. The parties were bound only to negotiate for the sale of the company in good faith.) The letter may summarize the

Team Activity Exercise

IN-CLASS DISCUSSION

Apex Corporation has been in negotiations with Zenon Corporation for a few weeks regarding a licensing agreement. The following letter was sent from Apex to Zenon:

> *Dear Zenon:*
>
> *Enclosed please find five draft copies of our proposed license agreement. As per our conversation, we believe it fully reflects our understandings. I hope it is to your satisfaction. Please return four signed copies and keep one for your records.*
>
> *Sincerely,*
>
> *Apex.*

Note that the details of the actual agreement are not an issue.
Consider the following:

Have the parties come to an oral agreement?
Is there a binding contract already?
Is the letter an offer? Or merely a formality, memorializing the oral contract?

RESEARCH THIS!

Find a case in your jurisdiction that answers the following fact scenario:

Penny Pedestrian is hurt by Otto Auto in a motor vehicle accident. Otto offers to pay for Penny's injuries so they can settle the matter and keep it out of court. Penny says she will think about it. Two days later she calls Otto and asks if he would consider also paying for massage therapy as well.

What effect, if any does this have on the offer? Is the original offer still open?

whole negotiation process and have all the requisite elements of the agreement, but it is still open for change; there is still the potential for counteroffers. See, for example, *Brimex, Ltd. v. Warm Springs Rehabilitation Foundation, Inc.*, 2001 WL 487739 (Tex. App. 2001) (not approved for publication). (The court found that the letter of intent never became binding and no contract was formed as the parties were still negotiating the final contract price.)

incapacity
The inability to act or understand the actions that would create a binding legal agreement.

The fourth method of terminating the offer is just as intuitive as the one above. If either party is not able to perform their end of the bargain due to **incapacity or death**, the offer is terminated. An essential element of a valid offer—certainty of the parties involved—is now missing. This "incapacity" may take the form of insanity and makes for an interesting analysis. A party "*may have insane delusions regarding some matters and be insane on some subjects, yet capable of transacting business concerning matters wherein such subjects are not concerned, and such insanity does not make one incompetent to contract unless the subject matter of the contract is so connected with an insane delusion as to render the afflicted party incapable of understanding the nature and effect of the agreement or of acting rationally in the transaction.*" See *Breeden v. Stone*, 992 P. 2d 1167, 1170 (Colo. 2000) (the probate court held that the stress and anxiety that compelled the decedent to commit suicide did not deprive him of testamentary capacity). See also *Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P. 2d 256 (1946) (Hanks was suffering from an insane delusion regarding a "home-brewed" horse medicine, but there was no evidence of delusions or hallucinations in connection with the transaction in question or with his other business at that time).

destruction or loss of subject matter
The nonexistence of the subject matter of the contract, which renders it legally valueless and unable to be exchanged according to the terms of the contract.

Similarly, the fifth way an offer is terminated is by **destruction or loss of the subject matter**. If Miriam's *Contracts* book is destroyed, lost, or stolen, she can no longer sell it to Mark.

supervening illegality
An agreement whose terms at the time it was made were legal but, due to a change in the law during the time in which the contract was executory, that has since become illegal.

Lastly, an offer is terminated if the subject matter of the offer becomes illegal. This **supervening illegality** is different than a straightforward illegal agreement. If the offer, when made, contained provisions that were at the time perfectly legal but later became illegal due to new codes or ordinances, the offer is terminated for supervening illegality. The offeree can not agree to the terms.

Example:

Archie the Architect offers a construction contract to Chuck the Contractor to build a five-story office building in the center of Busytown. The offer contains all the necessary elements of a valid contract and, at the time Archie makes the offer, there are no building codes or zoning restrictions in place that affect the plans. However, before Chuck accepts the offer, Busytown passes a zoning ordinance making it impermissible to construct a building over three stories tall. The once-valid offer is terminated due to supervening illegality; the acts requested cannot be performed without violating the ordinance.

Spot the Issue!

Candy Cellar offers to sell her property composed of her small retail shop and 20 acres of sugar cane fields to Ronald Crump. Ronald wants to build a new casino on the site, to be called "Sweet Success." Before Ronald accepts the offer, the retail shop burns to the ground. Make an argument that the offer is still valid. What factors did you consider in taking that position?

irrevocable offers
Those offers that cannot be terminated by the offeror during a certain time period.

option contracts
A separate and legally enforceable agreement included in the contract stating that the offer cannot be revoked for a certain time period. An option contract is supported by separate consideration.

firm offers
An agreement made by a merchant-offeror, and governed by the Uniform Commercial Code, that he will not revoke the offer for a certain time period. A firm offer is not supported by separate consideration.

An illegal agreement is, and never was, a legally recognizable offer. A person cannot contract for a murder. Murder is per se illegal; the attempt to form an agreement on these terms is in no way valid in contract law.

On the opposite end of the spectrum from freely rescindable offers are **irrevocable offers**. There are two types of irrevocable offers: (1) **option contracts** and (2) **firm offers** (this will be discussed in greater detail in the last chapter on the Uniform Commercial Code). Generally and broadly speaking, these come into play only in commercial contracts. An option contract is one in which the offeror agrees to keep the offer open for a specified period of time during which she has no power to revoke the offer. An option contract must be supported by some sort of consideration for that privilege of having time in which the offer stays open for the offeree. Consideration, discussed in the next chapter, is the legal value that one party gives to the other in support of the contract. For example, if Greg offers his Cadillac for sale to Alice, but Alice needs time to get money together for the pricy car, she may offer $100 to Greg as consideration to keep the offer open for her until she can secure the financing for the car. The $100 is a separate transaction that keeps Alice's option to purchase the Cadillac open for a specified period of time. The $100 is nonrefundable as it pays for the option contract, not the car.

An option contract also may be created by detrimental reliance upon the agreement. This occurs often in construction bids. Typically, the general contractor solicits bids from subcontractors and suppliers as it prepares to bid on the whole construction project. In this context, the subcontractor's bid is an option contract—irrevocable until the general contractor has been awarded the prime contract. "*Although the subcontractor does not make an explicit promise to keep its bid open, the court infers such a promise.*" *Arango Constr. Co. v. Success Roofing, Inc.*, 46 Wash. App. 314, 322, 730 P. 2d 720, 725 (1986). A firm offer is an express promise between merchants (as defined by the Uniform Commercial Code) that an offer for the sale of goods will remain open for a specified period of time (up to three months) and the firm offer is in writing. No additional consideration is required.

Both these types of contracts stay open until the time specified has expired, or the subject matter is destroyed, thereby making it impossible to perform, or if there has been a supervening illegality. These are identical to some of the methods for terminating an offer described above. However, there are circumstances particular to option contracts and firm offers that do *not* terminate the offer where these circumstances would terminate a regular offer. Obviously, the option contract offer cannot be revoked by the offeror during the time period for which the option must remain open. Any attempt at revocation is null. Further, a counteroffer does not terminate the option contract offer. That offer remains open so that if the original offeror rejects the counteroffer, the original offeree can still accept the original offer under the option. Lastly, and maybe most interestingly, the death or insanity of the parties does not terminate the offer supported by the option contract. The offer remains open and will bind the "inheriting" parties. For example, Ebenezer offers to sell his horse farm to Tiny Tim and Tiny Tim gives Ebenezer $100 to keep the offer open for the next month while he secures financing. The parties have created an option contract. If Ebenezer dies within the month, the beneficiaries under his will must honor the option contract. If Tiny Tim exercises his option and accepts the offer of the horse farm, Ebenezer's beneficiaries must sell it to him despite their unwillingness to do so.

After it has been determined that a valid offer exists, with minds having met on the certain terms of parties, price, subject matter, and time for performance, termination can take many forms. The time for acceptance may lapse, it may be revoked or rejected, the parties or subject matter may no longer exist, or it may be illegal to complete performance.

Summary

When a person wishes to enter into an agreement to which he intends to be legally bound, he makes a bargain with the person(s) to whom he wants to exchange promises and actions. The initiator of the bargain is the *offeror*, the recipient of the bargain is the *offeree*, and the deal itself is the *offer*. If the offeror desires that the offeree make a mutually binding promise, it is a *bilateral* contract. On the other hand, if the offeror desires to be bound to the agreement only upon the performance (or nonperformance) of some action by the offeree, it is a *unilateral* contract. The offer may be created by *express* words (either written or oral) or *implied* by the actions of the parties.

Either way, the offer must be certain in its terms. The offeree must know what he is agreeing to. The terms that must be included are

1. *Parties.*
2. *Price* (which is objectively determinable).
3. *Subject matter* (including quality and quantity; recall the certainness of quantity in output or requirements contracts).
4. *Time for performance.*

The offer does not always lead to a binding contract. The offer may terminate in a number of ways:

1. *Lapse of time.*
2. *Revocation.*
3. *Rejection/counteroffer.*
4. *Incapacity or death.*
5. *Destruction or loss of the subject matter.*
6. *Supervening illegality.*

However, there are two kinds of offers that cannot be revoked within a set time period, *option contracts* and *firm offers*.

If the offer does not terminate for any of the above reasons, and it is certain in all the requisite terms, a binding contract may be formed on the basis of this valid offer. In the next chapter, we will examine the actual bargain of the contract more closely to determine whether it forms the basis for legal consideration.

Key Terms

Bilateral contract
Breach
Certainty
Conditional acceptance
Counteroffer
Destruction or loss of subject matter
Detrimental reliance
Executed
Executory
Express contract
Firm offers
Illusory promise
Implied contract
Incapacity
Irrevocable offers
Lapse of time
Legal remedy
Letter of intent
Meeting of the minds
Mutuality of contract
Objectively determinable
Objectively reasonable
Offer
Offeree
Offeror
Option contracts
Output contract
Parties
Price
Reasonable
Rejection
Requirements contract
Revocation
Subject matter
Substantial beginning
Supervening illegality
Time of the essence
Unilateral contract

Review Questions

MULTIPLE CHOICE

Choose the best answer(s) and please explain *why* you choose the answer(s).

1. Identify which of the following is an offer:
   a. I may sell you my car for $5,000.
   b. I will sell you my car for $5,000.

c. I will sell you one of my cars for $5,000.
d. I will consider selling you my car for $5,000.

2. Identify the following as either a bilateral or unilateral contract:
   a. I promise to pay $500 for your promise to sell me your gold watch.
   b. I promise to pay $500 for your selling me your gold watch.
   c. I promise to sell you my gold watch for your promise to pay $500.
   d. I promise to sell you my gold watch for your paying me $500.
   e. I promise to pay you $500 for your refraining from smoking for five years.

3. Which of the following is a "time of the essence" clause:
   a. The closing shall take place on September 30th at the office of the buyer's attorney.
   b. The closing must take place on September 30th at the office of the buyer's attorney.
   c. The closing shall take place on September 30th at the office of the buyer's attorney. Either party may indicate that time is of the essence and give notice by September 20th.

EXPLAIN YOURSELF

All answers should be written in complete sentences. A simple "yes" or "no" is insufficient.

1. A bilateral contract is:
2. A unilateral contract is:
3. What are the essential elements of every valid offer?
4. When does the offeror of a unilateral contract lose his ability to revoke the contract?
5. Explain the difference between an output contract and a requirements contract.
6. When does a contract become executed?
7. Must an express contract be written in words?

"FAULTY PHRASES"

All of the following statements are FALSE; state why they are false and then rewrite them as a true statement. Write a brief fact pattern that illustrates your answer.

1. An offer must be written down in order to be valid.
2. An offeree can accept the original offer by "conditional acceptance."
3. Insanity always terminates an offer.
4. If the terms of the offer are legal at the time of the making of the contract, then performance on the contract must be made according to those terms.
5. An offer will always terminate within one week after the offeror makes it. The offeree will not be able to accept it after that time.

"Write" Away! Portfolio Assignment

With the explosion of new building and renovation sweeping the country, construction contracts, both good and bad, are everywhere. The "Write" Away! exercises will construct one of these contracts piece by piece, term by term, as the student is exposed to them.

In this first exercise, draft an offer from "Druid Design & Build" to Carrie Kilt, the owner of a large parcel of land on which she would like to construct her new home.

Make sure the four necessary elements are present. Do not worry about too many detail; that will come later. You, the student, are in control of these details. There is no set prescription; this will be a fluid, dynamic, and changing document until the end of the book.

ADVERTISEMENTS AND OFFERS

United States District Court,
S.D. New York.
John D. R. LEONARD, Plaintiff,
v.
PEPSICO, INC., Defendant.
Nos. 96 Civ. 5320(KMW), 96 Civ. 9069(KMW).
Aug. 5, 1999.

Television commercial viewer, who submitted 700,000 product "points" or their cash equivalent to soft drink manufacturer, sued to enforce alleged contractual commitment of manufacturer or provide fighter jet aircraft in return. Manufacturer moved for summary judgment. The District Court, Kimba M. Wood, J., held that: (1) commercial was advertisement not constituting any offer; (2) commercial was not akin to "reward," which could result in contract through unilateral action of offeree; (3) there was no offer to which objective offeree could respond, as commercial was made in "jest;" (4) additional discovery would not be allowed; (5) there was no contract satisfying requirements of New York statute of frauds; and (6) viewer did not state claim of fraud under New York law.

Summary judgment for manufacturer.

West Headnotes

[1] Federal Civil Procedure 2492
170Ak2492 Most Cited Cases
Summary judgment in contract action is proper when words and actions that allegedly formed contract are so clear themselves that reasonable people could not differ over their meaning.

[2] Contracts 144
95k144 Most Cited Cases
Under Florida law, the choice of law in a contract case is determined by the place where the last act necessary to complete the contract is done.

[3] Contracts 17
95k17 Most Cited Cases
In general, advertisement does not constitute contractual offer. Restatement (Second) of Contracts § 26 comment.

[4] Contracts 17
95k17 Most Cited Cases
An advertisement is not transformed into an enforceable contractual offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form.

[5] Contracts 17
95k17 Most Cited Cases
Soft drink manufacturer's television commercial, showing various items of merchandise available in exchange for product "points," and ending with display of jet aircraft with words "7,000,000 points" appearing on screen, was not an offer to provide aircraft in exchange for specified points; offer occurred when viewer tendered points and requested aircraft.

[6] Contracts 17
95k17 Most Cited Cases
Offer which could be accepted through unilateral action of offeree, as in a reward case, was not made through soft drink manufacturer's television commercial, showing various items of merchandise available in exchange for "points," and ending with display of jet aircraft with words "7,000,000 points" appearing on screen; commercial was offer to negotiate through submission of order forms contained in merchandise catalogue, which made no mention of jet.

[7] Contracts 17
95k17 Most Cited Cases
Question whether offer has been made through advertisement depends on objective reasonableness of alleged offeree's belief that offer was intended to be made.

[8] Federal Civil Procedure 2492
170Ak2492 Most Cited Cases
Question whether television commercial for soft drink contained offer to provide jet fighter aircraft in return for "points" or their cash equivalent could be resolved by court on summary judgment motion, despite claim that jury was needed to allow for determination of question by "enormously broad American Socio-economic spectrum."

[9] Contracts 17
95k17 Most Cited Cases
Objective viewer would conclude no contractually enforceable offer was made through soft drink manufacturer's television commercial, showing various items of merchandise available in exchange for product "points," and ending with display of jet aircraft with words "7,000,000 points" appearing on screen; reference to aircraft, shown used by student to travel to his high school, was made in jest as part of fanciful commercial, directed at teenagers.

[10] Federal Civil Procedure 2553
170Ak2553 Most Cited Cases
Additional discovery would not be allowed in opposition to summary judgment motion, so that viewer of television commercial who submitted 700,000 soft drink beverage points in return for alleged offer of jet fighter aircraft could explore whether earlier versions of commercial more clearly indicated that no aircraft offer was intended, as to defendant's subjective response to commercial, and as to response of others; as determination of whether offer was made was objective, nothing would be accomplished through discovery. Fed. Rules Civ. Proc. Rule 56(f), 28 U.S.C.A.

[11] Frauds, Statute Of 118(1)
185k118(1) Most Cited Cases
In order to satisfy New York statute of frauds, when combination of signed and unsigned writings are involved, signed writing relied upon must establish contractual relationship between parties, and unsigned writing must on its face refer to same transaction as that set forth in signed writing.

[12] Frauds, Statute Of 118(1)
185k118(1) Most Cited Cases
Alleged contract in which soft drink manufacturer was to furnish jet fighter aircraft in return for 700,000 product "points" was unenforceable under New York statute of frauds; television commercial extending alleged offer was not a writing, order form submitted by claimant did not bear signature of manufacturer, and claimant was not party to any written contracts between manufacturer and advertisers.

[13] Fraud 3
184k3 Most Cited Cases
Elements of a cause of action for fraud, under New York law, are representation of a material existing fact, falsity, scienter, deception and injury.

[14] Fraud 31
184k31 Most Cited Cases
General allegations that defendant entered into contract while lacking the intent to perform it are insufficient to support claim of fraud under New York law; instead, claimant must show misrepresentation was collateral, or served as inducement, to separate agreement between parties.

[15] Fraud 31
184k31 Most Cited Cases
Claimant failed to establish fraud on part of soft drink manufacturer, under New York law, by allegedly offering through television commercial to provide jet fighter aircraft in return for 700,000 product "points;" no collateral misrepresentation was cited, and claim that manufacturer never intended to fulfill commitment to furnish aircraft was insufficient.

***117** OPINION & ORDER

KIMBA M. WOOD, District Judge.
Plaintiff brought this action seeking, among other things, specific performance ***118** of an alleged offer of a Harrier Jet, featured in a television advertisement for defendant's "Pepsi Stuff" promotion. Defendant has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, defendant's motion is granted.

I. Background

This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi. (*See* PepsiCo Inc.'s Rule 56.1 Statement ("Def. Stat.") ¶ 2.) [FN omitted] The promotion, entitled "Pepsi Stuff," encouraged consumers to collect "Pepsi Points" from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo. (*See id.*¶¶ 4, 8.) Before introducing the promotion nationally, defendant conducted a test of the promotion in the Pacific Northwest from October 1995 to March 1996. (*See id.* ¶¶ 5–6.) A Pepsi Stuff catalog was distributed to consumers in the test market, including Washington State. (*See id.* ¶ 7.) Plaintiff is a resident of Seattle, Washington. (*See id.*¶ 3.) While living in Seattle, plaintiff saw the Pepsi Stuff commercial (*see id.*¶ 22) that he contends constituted an offer of a Harrier Jet.

A. The Alleged Offer

Because whether the television commercial constituted an offer is the central question in this case, the Court will describe the commercial in detail. The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, "MONDAY 7:58 AM." The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle "SHADES 175 PEPSI POINTS." A voiceover then intones, "Introducing the new Pepsi Stuff catalog," as the camera focuses on the cover of the catalog. (*See* Defendant's Local Rule 56.1 Stat., Exh. A (the "Catalog").) [FN omitted].

The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalog, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, ***119** the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voiceover announces: "Now the more Pepsi you drink, the more great stuff you're gonna get."

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. "[L]ooking very pleased with himself," (Pl. Mem. at 3,) the teenager exclaims, "Sure beats the bus," and chortles. The military drumroll sounds a final time, as the following words appear: "HARRIER FIGHTER 7,000,000 PEPSI POINTS." A few seconds later, the following appears in more stylized script: "Drink Pepsi—Get Stuff." With that message, the music and the commercial end with a triumphant flourish.

Inspired by this commercial, plaintiff set out to obtain a Harrier Jet. Plaintiff explains that he is "typical of the 'Pepsi Generation' . . . he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously." (Pl. Mem. at 3.) Plaintiff consulted the Pepsi Stuff Catalog. The Catalog features youths dressed in Pepsi Stuff regalia or enjoying Pepsi Stuff accessories, such as "Blue Shades" ("As if you need another reason to look forward to sunny days."), "Pepsi Tees" ("Live in 'em. Laugh in 'em. Get in 'em."), "Bag of Balls" ("Three balls. One bag. No rules."), and "Pepsi Phone Card" ("Call your mom!"). The Catalog specifies the number of Pepsi Points required to obtain promotional merchandise. (*See* Catalog, at rear foldout pages.) The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points (*see id.* (the "Order Form")). Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. (*See id.*) The amount of Pepsi Points required to obtain the listed merchandise ranges from 15 (for a "Jacket Tattoo" ("Sew 'em on your jacket, not your arm.")

to 3300 (for a "Fila Mountain Bike" ("Rugged. All-terrain. Exclusively for Pepsi.")). It should be noted that plaintiff objects to the implication that because an item was not shown in the Catalog, it was unavailable. (*See* Pl. Stat. ¶¶ 23–26, 29.)

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. (*See* Catalog, at rear foldout pages.) These directions note that merchandise may be ordered "only" with the original Order Form. (*See id.*) The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order. (*See id.*)

Although plaintiff initially set out to collect 7,000,000 Pepsi Points by consuming Pepsi products, it soon became clear to him that he "would not be able to buy (let alone drink) enough Pepsi to collect the necessary Pepsi Points fast enough." (Affidavit of John D.R. Leonard, Mar. 30, 1999 ("Leonard Aff."), ¶ 5.) Reevaluating his strategy, plaintiff "focused for the first time on the packaging materials in the Pepsi Stuff promotion," (*id.,*) and realized that buying Pepsi Points would be a more promising option. (*See id.*) Through acquaintances, plaintiff ultimately raised about $700,000. (*See id.* ¶ 6.)

B. Plaintiff's Efforts to Redeem the Alleged Offer

On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for $700,008.50. (*See* Def. Stat. 36.) Plaintiff appears to have been represented by counsel at the time he mailed his check; the check is drawn on an account of plaintiff's first set of attorneys. (*See* Defendant's Notice of Motion, Exh. B (first).) At the bottom of the Order Form, plaintiff wrote in "1 Harrier Jet" in the "Item" column and "7,000,000" in the "Total Points" column. (*See id.*) In a letter accompanying his submission, ***120** plaintiff stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial." (*See* Declaration of David Wynn, Mar. 18, 1999 ("Wynn Dec."), Exh. A.)

On or about May 7, 1996, defendant's fulfillment house rejected plaintiff's submission and returned the check, explaining that:

> The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program.
>
> The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

(Wynn Aff. Exh. B (second).) Plaintiff's previous counsel responded on or about May 14, 1996, as follows:

> Your letter of May 7, 1996 is totally unacceptable. We have reviewed the video tape of the Pepsi Stuff commercial… and it clearly offers the new Harrier jet for 7,000,000 Pepsi Points. Our client followed your rules explicitly. . . .
>
> This is a formal demand that you honor your commitment and make immediate arrangements to transfer the new Harrier jet to our client. If we do not receive transfer instructions within ten (10) business days of the date of this letter you will leave us no choice but to file an appropriate action against Pepsi. . . .

(Wynn Aff., Exh. C.) This letter was apparently sent onward to the advertising company responsible for the actual commercial, BBDO New York ("BBDO"). In a letter dated May 30, 1996, BBDO Vice President Raymond E. McGovern, Jr., explained to plaintiff that:

> I find it hard to believe that you are of the opinion that the Pepsi Stuff commercial ("Commercial") really offers a new Harrier Jet. The use of the Jet was clearly a joke that was meant to make the Commercial more humorous and entertaining. In my opinion, no reasonable person would agree with your analysis of the Commercial.

(Wynn Aff. Exh. A.) On or about June 17, 1996, plaintiff mailed a similar demand letter to defendant. (*See* Wynn Aff., Exh. D.)

[. . .]

In an Order dated October 1, 1998, the Court ordered Leonard to pay $88,162 in attorneys' fees within thirty days. Leonard failed to do so, yet sought nonetheless to appeal from his voluntary dismissal and the imposition of fees. In an Order dated January 5, 1999, the Court noted that Leonard's strategy was "'clearly an end-run around the final judgment rule.'" (Order at 2 (quoting *Palmieri v. Defaria,* 88 F.3d 136 (2d Cir. 1996)).) Accordingly, the Court ordered Leonard either to pay the amount due or withdraw his voluntary dismissal, as well as his appeals therefrom, and continue litigation before this Court. (*See* Order at 3.) Rather than pay the attorneys' fees, Leonard elected to proceed with litigation, and shortly thereafter retained present counsel.

On February 22, 1999, the Second Circuit endorsed the parties' stipulations to the dismissal of any appeals taken thus far in this case. Those stipulations noted that Leonard had consented to the jurisdiction of this Court and that PepsiCo agreed not to seek enforcement of the attorneys' fees award. With these issues having been waived, PepsiCo moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. The present motion thus follows three years of jurisdictional and procedural wrangling.

II. Discussion

A. The Legal Framework

1. *Standard for Summary Judgment*

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Comm'rs,* 834 F.2d 54, 58 (2d Cir. 1987) (citations and internal quotation marks omitted). To prevail on a motion for summary judgment, the moving party therefore must show that there are no such genuine issues of material fact to be tried, and that he or she is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Citizens Bank v. Hunt,* 927 F.2d 707, 710 (2d Cir. 1991). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," which includes identifying the materials in the record that "it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. 2548.

[. . .]

[1] The question of whether or not a contract was formed is appropriate for resolution on summary judgment. As the Second Circuit has recently noted, "Summary judgment is proper when the 'words and actions that allegedly formed a contract [are] so clear themselves that reasonable people could not differ over their meaning.'" *Krumme v. Westpoint Stevens, Inc.,* 143 F.3d

71, 83 (2d Cir. 1998) (quoting *Bourque v. FDIC*, 42 F.3d 704, 708 (1st Cir. 1994) (further citations omitted); *see also* *Wards Co. v. Stamford Ridgeway Assocs.*, 761 F.2d 117, 120 (2d Cir. 1985) (summary judgment is appropriate in contract case where interpretation urged by non-moving party is not "fairly reasonable"). Summary judgment is appropriate in such cases because there is "sometimes no genuine issue as to whether the parties' conduct implied a 'contractual understanding.'. . . In such cases, 'the judge must decide the issue himself, just as he decides any factual issue in respect to which reasonable people cannot differ.'" *Bourque*, 42 F.3d at 708 (quoting *Boston Five Cents Sav. Bank v. Secretary of Dep't of Housing & Urban Dev.*, 768 F.2d 5, 8 (1st Cir. 1985)).

2. *Choice of Law*

[2] The parties disagree concerning whether the Court should apply the law of the state of New York or of some other state in evaluating whether defendant's promotional campaign constituted an offer. Because this action was transferred from Florida, the choice of law rules of Florida, the transferor state, apply. *See* *Ferens v. John Deere Co.*, 494 U.S. 516, 523–33, 110 S. Ct. 1274, 108 L. Ed. 2d 443 (1990). Under Florida law, the choice of law in a contract case is determined by the place "where the last act necessary to complete the contract is done." *Jemco, Inc. v. United Parcel Serv., Inc.*, 400 So. 2d 499, 500–01 (Fla. Dist. Ct. App. 1981); *see also* *Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1119 (11th Cir. 1990).

[. . .]

B. Defendant's Advertisement Was Not an Offer

1. *Advertisements as Offers*

[3] The general rule is that an advertisement does not constitute an offer. The *Restatement (Second) of Contracts* explains that:

> Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. The same is true of catalogues, price lists and circulars, even though the terms of suggested bargains may be stated in some detail. ***123** It is of course possible to make an offer by an advertisement directed to the general public (see § 29), but there must ordinarily be some language of commitment or some invitation to take action without further communication.

Restatement (Second) of Contracts § 26 cmt. b (1979). Similarly, a leading treatise notes that:

> It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, a catalog or circular or on a placard in a store window. *It is not customary to do this, however; and the presumption is the other way.* . . . Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them as otherwise unless the circumstances are exceptional and the words used are very plain and clear.

1 Arthur Linton Corbin & Joseph M. Perillo, *Corbin on Contracts* § 2.4, at 116–17 (rev. ed.1993) (emphasis added); *see also* 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.10, at 239 (2d ed.1998); 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:7, at 286–87 (4th ed. 1990). New York courts adhere to this general principle. *See* *Lovett v. Frederick Loeser & Co.*, 124 Misc. 81, 207 N.Y.S. 753, 755 (N.Y. Mun. Ct. 1924) (noting that an "advertisement is nothing but an invitation to enter into negotiations, and is not an offer which may be turned into a contract by a person who signifies his intention to purchase some of the articles mentioned in the advertisement"); *see also* *Geismar v. Abraham & Strauss*, 109 Misc. 2d 495, 439 N.Y.S.2d 1005, 1006 (N.Y. Dist. Ct. 1981) (reiterating *Lovett* rule); *People v. Gimbel Bros.*, 202 Misc. 229, 115 N.Y.S.2d 857, 858 (N.Y. Sp. Sess. 1952) (because an "[a]dvertisement does not constitute an offer of sale but is solely an invitation to customers to make an offer to purchase," defendant not guilty of selling property on Sunday).

[4][5] An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form. In *Mesaros v. United States*, 845 F.2d 1576 (Fed. Cir. 1988), for example, the plaintiffs sued the United States Mint for failure to deliver a number of Statue of Liberty commemorative coins that they had ordered. When demand for the coins proved unexpectedly robust, a number of individuals who had sent in their orders in a timely fashion were left empty-handed. *See id.* at 1578–80. The court began by noting the "well-established" rule that advertisements and order forms are "mere notices and solicitations for offers which create no power of acceptance in the recipient." *Id.* at 1580; *see also* *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 538–39 (9th Cir. 1983) ("The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller."); [FN omitted]. *Restatement (Second) of Contracts* § 26 ("A manifestation of willingness to enter a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). The spurned coin collectors could not maintain a breach of contract action because no contract would be formed until the advertiser accepted the order form and processed payment. *See id.* at 1581; *see also* *Alligood v. Procter & Gamble*, 72 Ohio App. 3d 309, 594 N.E.2d 668 (1991) (finding that no offer was made in promotional campaign for baby diapers, in which consumers were to redeem teddy bear proof-of-purchase symbols for catalog merchandise); ****124*** *Chang v. First Colonial Savings Bank*, 242 Va. 388, 410 S.E.2d 928 (1991) (newspaper advertisement for bank settled the terms of the offer once bank accepted plaintiffs' deposit, notwithstanding bank's subsequent effort to amend the terms of the offer). Under these principles, plaintiff's letter of March 27, 1996, with the Order Form and the appropriate number of Pepsi Points, constituted the offer. There would be no enforceable contract until defendant accepted the Order Form and cashed the check.

The exception to the rule that advertisements do not create any power of acceptance in potential offerees is where the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation," in that circumstance, "it constitutes an offer, acceptance of which will complete the contract." *Lefkowitz v. Great Minneapolis Surplus Store*, 251 Minn. 188, 86 N.W.2d 689, 691 (1957). In *Lefkowitz*, defendant had published a newspaper announcement stating: "Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth to $100.00, First Come First Served $1 Each." *Id.* at 690. Mr. Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under defendant's "house rules," the offer was open to ladies, but not gentlemen. *See id.* The court ruled that because plaintiff had fulfilled all of the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. *See id.; see also* *Johnson v. Capital City Ford Co.*, 85 So. 2d 75, 79

(La. Ct. App. 1955) (finding that newspaper advertisement was sufficiently certain and definite to constitute an offer).

The present case is distinguishable from *Lefkowitz*. First, the commercial cannot be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the Catalog. [FN omitted]. The commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier Jet. The advertisement in *Lefkowitz,* in contrast, "identified the person who could accept." Corbin, *supra*, § 2.4, at 119. *See generally* United States v. Braunstein, 75 F. Supp. 137, 139 (S.D.N.Y. 1947) ("Greater precision of expression may be required, and less help from the court given, when the parties are merely at the threshold of a contract."); Farnsworth, *supra*, at 239 ("The fact that a proposal is very detailed suggests that it is an offer, while omission of many terms suggests that it is not."). [FN omitted]. Second, even if the Catalog had included a Harrier Jet among the items that could be obtained by redemption of Pepsi Points, the advertisement of a Harrier Jet by both television commercial and catalog would still not constitute an offer. As the *Mesaros* court explained, the absence of any words of limitation such as "first come, first served," renders the alleged offer sufficiently indefinite that no contract could be formed. *See Mesaros,* 845 F.2d at 1581. "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." Farnsworth, *supra*, at 242. There was no such danger in *Lefkowitz,* owing to the limitation "first come, first served."

The Court finds, in sum, that the Harrier Jet commercial was merely an advertisement. The Court now turns to the line of cases upon which plaintiff rests much of his argument.

125 2. *Rewards as Offers

[6] In opposing the present motion, plaintiff largely relies on a different species of unilateral offer, involving public offers of a reward for performance of a specified act. Because these cases generally involve public declarations regarding the efficacy or trustworthiness of specific products, one court has aptly characterized these authorities as "prove me wrong" cases. *See* Rosenthal v. Al Packer Ford, 36 Md. App. 349, 374 A.2d 377, 380 (1977). The most venerable of these precedents is the case of *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (Court of Appeal, 1892), a quote from which heads plaintiff's memorandum of law: "[I]f a person chooses to make extravagant promises … he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them." *Carbolic Smoke Ball,* 1 Q.B. at 268 (Bowen, L.J.).

Long a staple of law school curricula, *Carbolic Smoke Ball* owes its fame not merely to "the comic and slightly mysterious object involved," A.W. Brian Simpson. *Quackery and Contract Law: Carlill v. Carbolic Smoke Ball Company (1893), in Leading Cases in the Common Law* 259, 281 (1995), but also to its role in developing the law of unilateral offers. The case arose during the London influenza epidemic of the 1890s. Among other advertisements of the time, for Clarke's World Famous Blood Mixture, Towle's Pennyroyal and Steel Pills for Females, Sequah's Prairie Flower, and Epp's Glycerine Jube-Jubes, *see* Simpson, *supra*, at 267, appeared solicitations for the Carbolic Smoke Ball. The specific advertisement that Mrs. Carlill saw, and relied upon, read as follows:

> 100 £ reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000 £ is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.
>
> During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

Carbolic Smoke Ball, 1 Q.B. at 256–57. "On the faith of this advertisement," *id.* at 257, Mrs. Carlill purchased the smoke ball and used it as directed, but contracted influenza nevertheless. [FN omitted]. The lower court held that she was entitled to recover the promised reward.

Affirming the lower court's decision, Lord Justice Lindley began by noting that the advertisement was an express promise to pay £ 100 in the event that a consumer of the Carbolic Smoke Ball was stricken with influenza. *See id.* at 261. The advertisement was construed as offering a reward because it sought to induce performance, unlike an invitation to negotiate, which seeks a reciprocal promise. As Lord Justice Lindley explained, "advertisements offering rewards … are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer." *Id.* at 262; *see also id.* at 268 (Bowen, L.J.). [FN omitted]. Because Mrs. Carlill had complied with the terms of the offer, yet ***126** contracted influenza, she was entitled to £ 100.

Like *Carbolic Smoke Ball*, the decisions relied upon by plaintiff involve offers of reward. In Barnes v. Treece, 15 Wash. App. 437, 549 P.2d 1152 (1976), for example, the vice-president of a punchboard distributor, in the course of hearings before the Washington State Gambling Commission, asserted that, "'I'll put a hundred thousand dollars to anyone to find a crooked board. If they find it, I'll pay it.'" *Id.* at 1154. Plaintiff, a former bartender, heard of the offer and located two crooked punchboards. Defendant, after reiterating that the offer was serious, providing plaintiff with a receipt for the punchboard on company stationery, and assuring plaintiff that the reward was being held in escrow, nevertheless repudiated the offer. *See id.* at 1154. The court ruled that the offer was valid and that plaintiff was entitled to his reward. *See id.* at 1155. The plaintiff in this case also cites cases involving prizes for skill (or luck) in the game of golf. *See* Las Vegas Hacienda v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961) (awarding $5,000 to plaintiff, who successfully shot a hole-in-one); *see also* Grove v. Charbonneau Buick-Pontiac, Inc., 240 N.W.2d 853 (N.D. 1976) (awarding automobile to plaintiff, who successfully shot a hole-in-one).

Other "reward" cases underscore th\e distinction between typical advertisements, in which the alleged offer is merely an invitation to negotiate for purchase of commercial goods, and promises of reward, in which the alleged offer is intended to induce a potential offeree to perform a specific action, often for noncommercial reasons. In Newman v. Schiff, 778 F.2d 460 (8th Cir. 1985), for example, the Fifth Circuit held that a tax protestor's assertion that, "If anybody calls this show … and cites any section of the code that says an individual is required to file a tax return, I'll pay them $100,000," would have been an enforceable offer had the plaintiff called the television show to claim the reward while the tax protestor was appearing. *See id.* at 466–67. The court noted that, like *Carbolic Smoke Ball,* the case "concerns a special type of offer: an offer for a reward." *Id.* at 465. James v. Turilli, 473 S.W.2d 757 (Mo. Ct. App. 1971), arose from a boast by defendant that the "notorious Missouri desperado" Jesse James had not been killed

in 1882, as portrayed in song and legend, but had lived under the alias "J. Frank Dalton" at the "Jesse James Museum" operated by none other than defendant. Defendant offered $10,000 "to anyone who could prove me wrong." *See id.* at 758–59. The widow of the outlaw's son demonstrated, at trial, that the outlaw had in fact been killed in 1882. On appeal, the court held that defendant should be liable to pay the amount offered. *See id.* at 762; *see also* Mears v. Nationwide Mutual Ins. Co., 91 F.3d 1118, 1122–23 (8th Cir. 1996) (plaintiff entitled to cost of two Mercedes as reward for coining slogan for insurance company).

In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7,000,000 Pepsi Points on the Fourth of July would receive a Harrier Jet. Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the Catalog to determine how they could redeem their Pepsi Points. The commercial sought a reciprocal promise, expressed through acceptance of, and compliance with, the terms of the Order Form. As noted previously, the Catalog contains no mention of the Harrier Jet. Plaintiff states that he "noted that the Harrier Jet was not among the items described in the catalog, but this did not affect [his] understanding of the offer." (Pl. Mem. at 4.) It should have. [FN omitted].

***127** *Carbolic Smoke Ball* itself draws a distinction between the offer of reward in that case, and typical advertisements, which are merely offers to negotiate. As Lord Justice Bowen explains:

> It is an offer to become liable to any one who, before it is retracted, performs the condition. . . . It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think, some learned judge in one of the cases has said.

Carbolic Smoke Ball, 1 Q.B. at 268; *see also* Lovett, 207 N.Y.S. at 756 (distinguishing advertisements, as invitation to offer, from offers of reward made in advertisements, such as *Carbolic Smoke Ball*). Because the alleged offer in this case was, at most, an advertisement to receive offers rather than an offer of reward, plaintiff cannot show that there was an offer made in the circumstances of this case.

C. An Objective, Reasonable Person Would Not Have Considered the Commercial an Offer

Plaintiff's understanding of the commercial as an offer must also be rejected because the Court finds that no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.

1. *Objective Reasonable Person Standard*

[7] In evaluating the commercial, the Court must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey. *See* Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 57 (2d Cir. 1994) ("[W]e are not concerned with what was going through the heads of the parties at the time [of the alleged contract]. Rather, we are talking about the objective principles of contract law."); Mesaros, 845 F.2d at 1581 ("A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer."); Farnsworth, *supra,* § 3.10, at 237; Williston, *supra,* § 4:7 at 296–97.

If it is clear that an offer was not serious, then no offer has been made:

> What kind of act creates a power of acceptance and is therefore an offer? It must be an expression of will or intention. It must be an act that leads the offeree reasonably to conclude that a power to create a contract is conferred. This applies to the content of the power as well as to the fact of its existence. *It is on this ground that we must exclude* invitations to deal or acts of mere preliminary negotiation, and *acts evidently done in jest* or without intent to create legal relations.

Corbin on Contracts, § 1.11 at 30 (emphasis added). An obvious joke, of course, would not give rise to a contract. *See, e.g., Graves v. Northern N.Y. Pub. Co.*, 260 A.D. 900, 22 N.Y.S.2d 537 (1940) (dismissing claim to offer of $1000, which appeared in the "joke column" of the newspaper, to any person who could provide a commonly available phone number). On the other hand, if there is no indication that the offer is "evidently in jest," and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer. *See* Barnes, 549 P.2d at 1155 ("[I]f the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended."); *see also* Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516, 518, 520 (1954) ***128** (ordering specific performance of a contract to purchase a farm despite defendant's protestation that the transaction was done in jest as "'just a bunch of two doggoned drunks bluffing'").

2. *Necessity of a Jury Determination*

[8] Plaintiff also Contends that summary judgment is improper because the question of whether the commercial conveyed a sincere offer can be answered only by a jury. Relying on dictum from Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998), plaintiff argues that a federal judge comes from a "narrow segment of the enormously broad American socio-economic spectrum," *id.* at 342, and, thus, that the question whether the commercial constituted a serious offer must be decided by a jury composed of, *inter alia,* members of the "Pepsi Generation," who are, as plaintiff puts it, "young, open to adventure, willing to do the unconventional." (*See* Leonard Aff. ¶ 2.) Plaintiff essentially argues that a federal judge would view his claim differently than fellow members of the "Pepsi Generation."

Plaintiff's argument that his claim must be put to a jury is without merit. *Gallagher* involved a claim of sexual harassment in which the defendant allegedly invited plaintiff to sit on his lap, gave her inappropriate Valentine's Day gifts, told her that "she brought out feelings that he had not had since he was sixteen," and "invited her to help him feed the ducks in the pond, since he was 'a bachelor for the evening.'" *Gallagher*, 139 F.3d at 344. The court concluded that a jury determination was particularly appropriate because a federal judge lacked "the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." *Id.* at 342. This case, in contrast, presents a question of whether there was an offer to enter into a contract, requiring the Court to determine how a reasonable, objective person would have understood defendant's commercial. Such an inquiry is commonly performed by courts on a motion for summary judgment. *See* Krumme, 143 F.3d at 83; *Bourque,* 42 F.3d at 708; *Wards Co.*, 761 F.2d at 120.

3. *Whether the Commercial Was "Evidently Done In Jest"*

[9] Plaintiff's insistence that the commercial appears to be a serious offer requires the Court to explain why the commercial

is funny. Explaining why a joke is funny is a daunting task; as the essayist E.B. White has remarked, "Humor can be dissected, as a frog can, but the thing dies in the process. . . ." [FN omitted]. The commercial is the embodiment of what defendant appropriately characterizes as "zany humor." (Def. Mem. at 18.)

First, the commercial suggests, as commercials often do, that use of the advertised product will transform what, for most youth, can be a fairly routine and ordinary experience. The military tattoo and stirring martial music, as well as the use of subtitles in a Courier font that scroll terse messages across the screen, such as "MONDAY 7:58 AM," evoke military and espionage thrillers. The implication of the commercial is that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives. The commercial in this case thus makes the exaggerated claims similar to those of many television advertisements: that by consuming the featured clothing, car, beer, or potato chips, one will become attractive, stylish, desirable, and admired by all. A reasonable viewer would understand such advertisements as mere puffery, not as statements of fact, *see, e.g., Hubbard v. General Motors Corp.,* 95 Civ. 4362(AGS), 1996 WL 274018, at *6 (S.D.N.Y. May 22, 1996) (advertisement describing automobile as "Like a Rock," was mere puffery, not a warranty of quality); *Lovett,* 207 N.Y.S. at 756; and refrain from interpreting the promises of the commercial as being literally true.

Second, the callow youth featured in the commercial is a highly improbable pilot, one who could barely be trusted with the ***129** keys to his parents' car, much less the prize aircraft of the United States Marine Corps. Rather than checking the fuel gauges on his aircraft, the teenager spends his precious preflight minutes preening. The youth's concern for his coiffure appears to extend to his flying without a helmet. Finally, the teenager's comment that flying a Harrier Jet to school "sure beats the bus" evinces an improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area, as opposed to taking public transportation. [FN omitted].

Third, the notion of traveling to school in a Harrier Jet is an exaggerated adolescent fantasy. In this commercial, the fantasy is underscored by how the teenager's schoolmates gape in admiration, ignoring their physics lesson. The force of the wind generated by the Harrier Jet blows off one teacher's clothes, literally defrocking an authority figure. As if to emphasize the fantastic quality of having a Harrier Jet arrive at school, the Jet lands next to a plebeian bike rack. This fantasy is, of course, extremely unrealistic. No school would provide landing space for a student's fighter jet, or condone the disruption the jet's use would cause.

Fourth, the primary mission of a Harrier Jet, according to the United States Marine Corps, is to "attack and destroy surface targets under day and night visual conditions." United States Marine Corps, Factfile: AV-8B Harrier II (last modified Dec. 5, 1995) <http://www.hqmc.usmc.mil/factfile.nsf>. Manufactured by McDonnell Douglas, the Harrier Jet played a significant role in the air offensive of Operation Desert Storm in 1991. *See id.* The jet is designed to carry a considerable armament load, including Sidewinder and Maverick missiles. *See id.* As one news report has noted, "Fully loaded, the Harrier can float like a butterfly and sting like a bee—albeit a roaring 14-ton butterfly and a bee with 9,200 pounds of bombs and missiles." Jerry Allegood, *Marines Rely on Harrier Jet, Despite Critics,* News & Observer (Raleigh), Nov. 4, 1990, at C1. In light of the Harrier Jet's well-documented function in attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, depiction of such a jet as a way to get to school in the morning is clearly not serious even if, as plaintiff contends, the jet is capable of being acquired "in a form that eliminates [its] potential for military use." (*See* Leonard Aff. ¶ 20.)

Fifth, the number of Pepsi Points the commercial mentions as required to "purchase" the jet is 7,000,000. To amass that number of points, one would have to drink 7,000,000 Pepsis (or roughly 190 Pepsis a day for the next hundred years—an unlikely possibility), or one would have to purchase approximately $700,000 worth of Pepsi Points. The cost of a Harrier Jet is roughly $23 million dollars, a fact of which plaintiff was aware when he set out to gather the amount he believed necessary to accept the alleged offer. (*See* Affidavit of Michael E. McCabe, 96 Civ. 5320, Aug. 14, 1997, Exh. 6 (Leonard Business Plan).) Even if an objective, reasonable person were not aware of this fact, he would conclude that purchasing a fighter plane for $700,000 is a deal too good to be true. [FN omitted].

***130** Plaintiff argues that a reasonable, objective person would have understood the commercial to make a serious offer of a Harrier Jet because there was "absolutely no distinction in the manner" (Pl. Mem. at 13,) in which the items in the commercial were presented. Plaintiff also relies upon a press release highlighting the promotional campaign, issued by defendant, in which "[n]o mention is made by [defendant] of humor, or anything of the sort." (*Id.* at 5.) These arguments suggest merely that the humor of the promotional campaign was tongue in cheek. Humor is not limited to what Justice Cardozo called "[t]he rough and boisterous joke . . . [that] evokes its own guffaws." *Murphy v. Steeplechase Amusement Co.,* 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). In light of the obvious absurdity of the commercial, the Court rejects plaintiff's argument that the commercial was not clearly in jest.

4. *Plaintiff's Demands for Additional Discovery*

[10] [. . .]

Plaintiff's demands for discovery relating to how defendant itself understood the offer are also unavailing. Such discovery would serve only to cast light on defendant's subjective intent in making the alleged offer, which is irrelevant to the question of whether an objective, reasonable person would have understood the commercial to be an offer. *See Kay-R Elec. Corp.,* 23 F.3d at 57 ("[W]e are not concerned with what was going through the heads of the parties at the time [of the alleged contract]."); *Mesaros,* 845 F.2d at 1581; *Corbin on Contracts,* § 1.11 at 30. Indeed, plaintiff repeatedly argues that defendant's subjective intent is irrelevant. (*See* Pl. Mem. at 5, 8, 13.)

[. . .]

III. Conclusion

In sum, there are three reasons why plaintiff's demand cannot prevail as a matter of law. First, the commercial was merely an advertisement, not a unilateral offer. Second, the tongue-in-cheek attitude of the commercial would not cause a reasonable person to conclude that a soft drink company would be giving away fighter planes as part of a promotion. Third, there is no writing between the parties sufficient to satisfy the Statute of Frauds.

For the reasons stated above, the Court grants defendant's motion for summary judgment. The Clerk of Court is instructed to close these cases. Any pending motions are moot.

Source: Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116 (St. Paul, MN: Thomson West). Reprinted with permission from Westlaw.

ATTEMPT TO RESCIND

Superior Court of Pennsylvania.
Amos COBAUGH, Appellee,
v.
KLICK-LEWIS, INC., Appellant.
500 HSBG. 1988
Argued Feb. 2, 1989.
Filed July 14, 1989.

Golfer sued automobile dealer to compel delivery of automobile offered as prize. The Court of Common Pleas, Lebanon County, Civil Division, No. 87-01002, Gates, J., entered summary judgment for golfer and dealer appealed. The Superior Court, No. 500 Harrisburg 1988, Wieand, J., held that: (1) by its signs on automobile located near ninth hole, dealer made offer to award prize which golfer performed by shooting a hole-in-one; (2) adequate consideration existed for contract; and (3) mutual mistake did not exist to void contract where only mistake was dealer's failure to limit offer to previously held tournament and to remove signs.

Affirmed.

Popovich, J., dissented and filed opinion.

West Headnotes

[1] Contracts 16
95k16 Most Cited Cases
An "offer" is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

[2] Contracts 16
95k16 Most Cited Cases
Offer to award a prize in a contest will result in an enforceable contract if the offer is properly accepted by the rendition of the requested performance prior to revocation.

[3] Contracts 16
95k16 Most Cited Cases
Enforceable contract was formed when automobile dealer's offer to award automobile as a prize to anyone who made a hole-in-one at the ninth hole was accepted by golfer who shot a hole-in-one; sign on automobile which stated "hole-in-one wins this" automobile constituted an offer which person reading sign would reasonably have understood could be accepted by shooting a hole-in-one.

[4] Contracts 50
95k50 Most Cited Cases
Requirement of consideration as an essential element of a contract is nothing more than a requirement that there be a bargained for exchange; consideration confers a benefit upon the promisor or causes a detriment to the promisee.

[5] Contracts 50
95k50 Most Cited Cases
Adequate consideration to support contract existed where automobile was to be given in exchange for the feat of golfer's shooting a hole-in-one; by making an offer to award automobile as a prize, automobile dealer benefitted from the publicity generated by promotional advertising and in exchange golfer was required to perform act which he was under no legal duty to perform.

[6] Contracts 93(1)
95k93(1) Most Cited Cases
Where mistake is not mutual but unilateral and is due to the negligence of the party seeking to rescind a contract, relief will not be granted.

[7] Contracts 22(1)
95k22(1) Most Cited Cases
It is the manifested intent of the offeror and not his subjective intent which determines the persons having the power to accept the offer.

[8] Contracts 93(5)
95k93(5) Most Cited Cases
Contract to award automobile as prize to golfer was not voidable on ground of mutual mistake where automobile dealer's intent to offer prize for hole-in-one was manifested by signs posted at ninth tee and mistake upon which dealer relied was its own failure to limit offer to previously held golf tournament and to remove signs promptly after tournament had been completed.

Robert M. Frankhouser, Jr., Lancaster, for appellant.

Wiley P. Parker, Lebanon, for appellee.

Before WIEAND, POPOVICH and HESTER, JJ.

WIEAND, Judge:

On May 17, 1987, Amos Cobaugh was playing in the East End Open Golf Tournament on the Fairview Golf Course in Cornwall, Lebanon County. When he arrived at the ninth tee he found a new Chevrolet Beretta, together with signs which proclaimed: "HOLE-IN-ONE Wins this 1988 Chevrolet Beretta GT Courtesy of KLICK-LEWIS Buick Chevy Pontiac $49.00 OVER FACTORY INVOICE in Palmyra." Cobaugh aced the ninth hole and attempted to claim his prize. Klick-Lewis refused to deliver the car. It had offered the car as a prize for a charity golf tournament sponsored by the Hershey-Palmyra Sertoma Club two days earlier, on May 15, 1987, and had neglected to remove the car and posted signs prior to Cobaugh's hole-in-one. After Cobaugh sued to compel delivery of the car, the parties entered a stipulation regarding the facts and then moved for summary judgment. The trial court granted Cobaugh's motion, and Klick-Lewis appealed.

Our standard of review is well established. A motion for summary judgment may properly be granted only if the moving party has

shown that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *French v. United Parcel Service,* 377 Pa. Super. 366, 371, 547 A.2d 411, 414 (1988); ***590** *Thorsen v. Iron and Glass Bank,* 328 Pa.Super. 135, 140, 476 A.2d 928, 930 (1984). Summary judgment should not be entered unless a case is clear and free from doubt. *Weiss v. Keystone Mack Sales, Inc.*, 310 Pa. Super. 425, 430, 456 A.2d 1009, 1011 (1983); *Dunn v. Teti,* 280 Pa. Super. 399, 402, 421 A.2d 782, 783 (1980).

The facts in the instant case are not in dispute. To the extent that they have not been admitted in the pleadings, they have been stipulated by the parties. Therefore, we must decide whether under the applicable law plaintiff was entitled to judgment as a matter of law.

[1] An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement (Second) of Contracts § 24; 8 P.L.E. Contracts § 23. Consistent with traditional principles of contract law pertaining to unilateral contracts, it has generally been held that "[t]he promoter of [a prize-winning] contest, by making public the conditions and rules of the contest, makes an offer, and if before the offer is withdrawn another person acts upon it, the promoter is bound to perform his promise." Annotation, Private Rights and Remedies Growing Out of Prize-winning Contests, 87 A.L.R.2d 649, 661. The only acceptance of the offer that is necessary is the performance of the act requested to win the prize. *Id.* See also: *Robertson v. United States,* 343 U.S. 711, 72 S. Ct. 994, 96 L. Ed. 1237 (1952) ("The acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract."); 17 C.J.S. Contracts § 46.

[2] The Pennsylvania cases which have considered prize-winning contests support the principle that an offer to award a prize in a contest will result in an enforceable contract if the offer is properly accepted by the rendition of the requested performance prior to revocation. See: *Olschiefsky v. Times Publishing Co.*, 23 D. & C.2d 73 (Erie 1959) (overruling demurrer to action against newspaper for failure to award prize to winner of puzzle contest); *Holt v.* ****591*** *Wood, Harmon & Co.*, 41 Pitt. L.J. 443 (1894) (holding offer to award house to person submitting name selected for new housing development resulted in binding contract). See also: *Aland v. Cluett, Peabody & Co.*, 259 Pa. 364, 103 A. 60 (1918); *Palmer v. Central Board of Education of Pittsburg,* 220 Pa. 568, 70 A. 433 (1908); *Trego v. Pa. Academy of Fine Arts,* 2 Sad. 313, 3 A. 819 (1886); *Vespaziani v. Pa. Dept. of Revenue,* 40 Pa. Cmwlth 54, 396 A.2d 489 (1979).

[3] Appellant argues that it did nothing more than propose a contingent gift and that a proposal to make a gift is without ****1250** consideration and unenforceable. See: Restatement (Second) of Contracts § 24, Comment b. We cannot accept this argument. Here, the offer specified the performance which was the price or consideration to be given. By its signs, Klick-Lewis offered to award the car as a prize to anyone who made a hole-in-one at the ninth hole. A person reading the signs would reasonably understand that he or she could accept the offer and win the car by performing the feat of shooting a hole-in-one. There was thus an offer which was accepted when appellee shot a hole-in-one. Accord: *Champagne Chrysler-Plymouth, Inc. v. Giles,* 388 So. 2d 1343 (Fla. Dist. Ct. App. 1980) (bowling contest); *Schreiner v. Weil Furniture Co.*, 68 So. 2d 149 (La. App. 1953) ("Count-the-dots" contest); *Chenard v. Marcel Motors,* 387 A.2d 596 (Me. 1978) (golf tournament); *Grove v. Charbonneau Buick-Pontiac Inc.,* 240 N.W.2d 853 (N.D. Sup. Ct. 1976) (golf tournament); *First Texas Savings Assoc. v. Jergins,* 705 S.W.2d 390 (Tx. Ct. App. 1986) (free drawing).

[4][5] The contract does not fail for lack of consideration. The requirement of consideration as an essential element of a contract is nothing more than a requirement that there be a bargained for exchange. *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 541, 526 A.2d 1192, 1195 (1987); *Commonwealth Dept. of Transp. v. First Nat'l Bank*, 77 Pa. Cmwlth. 551, 553, 466 A.2d 753, 754 (1983). Consideration confers a benefit upon the promisor or causes a detriment to the promisee. ***592** *Cardamone v. University of Pittsburgh,* 253 Pa. Super. 65, 72 n.6, 384 A.2d 1228, 1232 n.6 (1978); *General Mills, Inc. v. Snavely,* 203 Pa. Super. 162, 167, 199 A.2d 540, 543 (1964). By making an offer to award one of its cars as a prize for shooting a hole-in-one at the ninth hole of the Fairview Golf Course, Klick-Lewis benefited from the publicity typically generated by such promotional advertising. In order to win the car, Cobaugh was required to perform an act which he was under no legal duty to perform. The car was to be given in exchange for the feat of making a hole-in-one. This was adequate consideration to support the contract. See, e.g.: *Las Vegas Hacienda, Inc. v. Gibson,* 77 Nev. 25, 359 P.2d 85 (1961) (paying fifty cents and shooting hole-in-one was consideration for prize). See also: *First Texas Savings v. Jergins, supra* (enforcing duty to award prize in free drawing where only performance by plaintiff was completing and depositing entry form). [FN omitted].

***593** [6] There is no basis for believing that Cobaugh was aware that the Chevrolet automobile had been intended as a prize only for an earlier tournament. The posted signs did not reveal such an intent by Klick-Lewis, and the stipulated facts do not suggest that appellee had knowledge greater than that acquired by reading the ****1251** posted signs. Therefore, we also reject appellant's final argument that the contract to award the prize to appellee was voidable because of mutual mistake. Where the mistake is not mutual but unilateral and is due to the negligence of the party seeking to rescind, relief will not be granted. *Rusiski v. Pribonic,* 326 Pa. Super. 545, 552, 474 A.2d 624, 627 (1984), *rev'd on other grounds*, 511 Pa. 383, 515 A.2d 507; *McFadden v. American Oil Co.*, 215 Pa. Super. 44, 53–54, 257 A.2d 283, 288 (1969).

In *Champagne Chrysler-Plymouth, Inc. v. Giles, supra*, a mistake similar to that made in the instant case had been made. There, a car dealer had advertised that it would give away a new car to any bowler who rolled a perfect "300" game during a televised show. The dealer's intent was that the offer would continue only during the television show which the dealer sponsored and on which its ads were displayed. However, the dealer also distributed flyers containing its offer and posted signs advertising the offer at the bowling alley. He neglected to remove from the alley the signs offering a car to anyone bowling a "300" game, and approximately one month later, while the signs were still posted, plaintiff appeared on a different episode of the television show and bowled a perfect game. The dealer refused to award the car. A Florida court held that if plaintiff reasonably believed that the offer was still outstanding when he rolled his perfect game, he would be entitled to receive the car. See also: *Grove v. Charbonneau Buick-Pontiac Inc., supra* (car dealer required to award prize to participant in 18-hole golf tournament played

on nine-hole golf course where it had offered to award a car "to the first entry who shoots a hole-in-one on Hole No. 8" and plaintiff aced the hole marked No. 8 while driving from the seventeenth tee).

***594** [7][8] It is the manifested intent of the offeror and not his subjective intent which determines the persons having the power to accept the offer. Restatement (Second) of Contracts § 29. In this case the offeror's manifested intent, as it appeared from signs posted at the ninth tee, was that a hole-in-one would win the car. The offer was not limited to any prior tournament. The mistake upon which appellant relies was made possible only because of its failure to (1) limit its offer to the Hershey-Palmyra Sertoma Club Charity Golf Tournament and/or (2) remove promptly the signs making the offer after the Sertoma Charity Golf Tournament had been completed. It seems clear, therefore, that the mistake in this case was unilateral and was the product of the offeror's failure to exercise due care. Such a mistake does not permit appellant to avoid its contract.

Affirmed.

Cobaugh v. Klick-Lewis, Inc., 385 Pa. Super. 587, 561 A.2d 1248 (St. Paul, MN: Thomson West). Reprinted with permission from Westlaw.