CHAPTER 2

CREATING CONTRACTUAL OBLIGATIONS

SECTION 1. THE NATURE OF ASSENT

What kind of assent to a bargain is necessary to bind a party? Different answers are given by two contrasting theories of contract, commonly described as "objective" and "subjective." They are illustrated by the following excerpts from two distinguished jurists, Judge Learned Hand[a] and his colleague on the bench Judge Jerome Frank,[b] concurring in a case in which Hand wrote the opinion of the court.

According to Hand:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort.

Hotchkiss v. National City Bank of New York, 200 F. 287, 293 (S.D.N.Y.1911).

According to Frank:

> In the early days of this century a struggle went on between the respective proponents of two theories of contracts, (a) the 'actual intent' theory—or 'meeting of the minds' or 'will' theory—and (b) the so-called 'objective' theory.[1] Without doubt, the first theory

[a] Learned Hand (1872–1961) was admitted to the practice of law in New York in 1897, appointed to the United States District Court for the Southern District of New York in 1909 and to the United States Court of Appeals for the Second Circuit in 1924. He retired in 1951, after having sat on the bench longer than any other federal judge. Justice Cardozo called him "the greatest living American jurist," and he was so regarded by many of his contemporaries. His extrajudicial utterances may be sampled in The Spirit of Liberty (1952) and The Bill of Rights (1958).

[b] Jerome New Frank (1889–1957) practiced in Chicago and New York for more than twenty years before going to Washington in 1933, where he served first as a government lawyer and then as a member and later chairman of the Securities and Exchange Commission. In 1941 he was appointed to the United States Court of Appeals for the Second Circuit. He also lectured at the Yale Law School and was associated with the philosophy of law known as "legal realism." One of his best known books is Law and the Modern Mind (1930).

[1] "The 'actual intent' theory, said the objectivists, being 'subjective' and putting too much stress on unique individual motivations, would destroy that legal certainty and stability which a modern commercial society demands. They depicted the 'objective' standard as a necessary adjunct of a 'free enterprise' economic system. In passing, it should be noted that they arrived at a sort of paradox. For a 'free enterprise' system is, theoretically, founded on 'individualism'; but, in the name of economic individualism, the objectivists refused to consider those reactions of actual specific individuals which sponsors of the 'meeting-of-the-minds' test purported to cherish. 'Economic individualism' thus shows up as hostile to real

> had been carried too far: Once a contract has been validly made, the courts attach legal consequences to the relation created by the contract, consequences of which the parties usually never dreamed—as, for instance, where situations arise which the parties had not contemplated. As to such matters, the 'actual intent' theory induced much fictional discourse which imputed to the parties intentions they plainly did not have.
>
> But the objectivists also went too far. They tried (1) to treat virtually all the varieties of contractual arrangements in the same way, and (2), as to all contracts in all their phases, to exclude, as legally irrelevant, consideration of the actual intention of the parties or either of them, as distinguished from the outward manifestation of that intention. The objectivists transferred from the field of torts that stubborn anti-subjectivist, the 'reasonable man'; so that, in part at least, advocacy of the 'objective' standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses. Whether (thanks to the 'subjectivity' of the jurymen's reactions and other factors) the objectivists' formula, in its practical workings, could yield much actual objectivity, certainty, and uniformity may well be doubted. At any rate, the sponsors of complete 'objectivity' in contracts largely won out in the wider generalizations of the Restatement of Contracts and in some judicial pronouncements.

Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 761 (2d Cir.1946).

Bear these theories in mind as you read the next two cases concerning assent. Lucy v. Zehmer, directly below, involves a transaction for the sale of a farm after some back and forth over drinks and a promise written out on the back of a restaurant receipt. Specht v. Netscape, on p. 131, moves us from what the court called "the world of paper" to online transactions. When reading these cases, question whether the court has gone too far or not far enough in excluding the parties' actual intent.

Lucy v. Zehmer

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

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

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

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individualism. This is nothing new: The 'economic man' is of course an abstraction, a 'fiction.' "

[c] Here is a photocopy from the record:

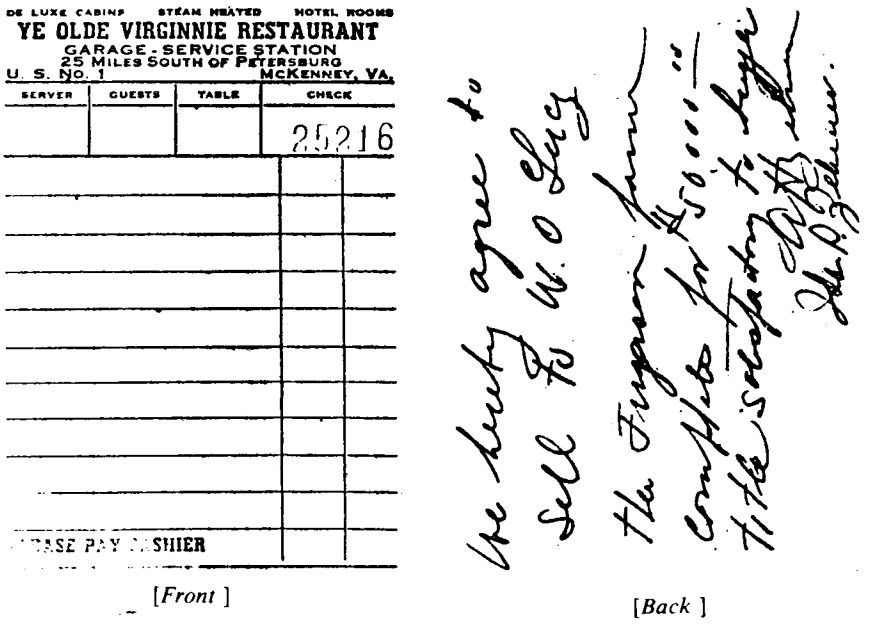
The answer of A.H. Zehmer admitted that at the time mentioned W.O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his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

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

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

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

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition


DE LUXE CABINS STEAM HEATED HOTEL ROOMS
YE OLDE VIRGINNIE RESTAURANT
GARAGE - SERVICE STATION
25 MILES SOUTH OF PETERSBURG
U. S. NO. 1 McKENNEY, VA.

SERVER	GUESTS	TABLE	CHECK
			25216

PLEASE PAY CASHIER

[Front]

We hereby agree to sell to W.O. Lucy the Ferguson farm for $50,000.00 complete for cash, title satisfactory to buyer. A.H. Zehmer. Ida P. Zehmer.

[Back]

of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. C.J.S. Contracts, § 133, b., p. 483; Taliaferro v. Emery, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning "I hereby agree to sell." Zehmer first said he could not remember about that, then that "I don't think I wrote but one out." Mrs. Zehmer said that what he wrote was "I hereby agree," but that the "I" was changed to "We" after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

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

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

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

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

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for

a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

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

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

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement. . . .

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

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

Reversed and remanded.

NOTES

(1) *Questions.* Does either the objective or subjective theory alone adequately explain the decision in the case? Did Zehmer believe that Lucy intended to sell the Ferguson Farm? What facts suggest an affirmative answer? Why is Zehmer's honest belief alone not sufficient to bind Lucy? What more does the court require?

The United States Court of Appeals for the Tenth Circuit has stated that "contracts are not formed by comparing mental states; they are formed by what the parties *communicate*." Navair, Inc. v. IFR Americas, 519 F.3d 1131 (2008). Are there risks in this position? What are its benefits? Recall Jerome Frank's questioning of whether such an approach could actually yield the hoped for certainty and uniformity claimed by the objectivist formula. Can you develop any practical alternatives?

(2) *Jesting and Bluffing.* What result if the price offered for the Zehmer farm had been $50 rather than $50,000? In Keller v. Holderman, 11 Mich. 248 (1863), Holderman, as a "frolic and banter," gave Keller a $300 check for a watch worth about $15. Holderman had no money in the bank and intended to insert a condition in the check rendering him not liable. This he neglected to do. Keller sued Holderman on the check and had judgment. Holderman appealed. *Held:* Reversed.

"When the Court below found as a fact that 'the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn,' the conclusion should have been that no contract was ever made by the parties. . . . " How does this use of the price differ from that of a peppercorn discussed above at Note 4, p. 39?

In addition to contending that "the whole matter was a joke," the Zehmers, in the case above, further contended that the writing "was prepared as a bluff or dare to force Lucy to admit that he did not have $50,000." What result if Lucy, knowing this, had "called their bluff" by raising the money from his brother? Should a distinction be made between jesting on the one hand, and bluffing or daring on the other? Are both "jokes"?

(3) *The Right Stuff.* John Leonard watched a television commercial touting a range of items ("Pepsi Stuff") that consumers could acquire by redeeming "Pepsi Points" obtained by buying specially marked packages of Pepsi products. The commercial showed a suburban high school student using various items from the Pepsi collection, with legends identifying each item and the number of Pepsi Points for which it could be obtained ("SHADES 175 PEPSI POINTS"; "LEATHER JACKET 1450 PEPSI POINTS"), and arriving at school in a fighter jet. On the same screen as the fighter jet, a similar legend appeared on the screen, stating "HARRIER JET 7,000,000 PEPSI POINTS." Using an official order form, Leonard ordered one Harrier Jet, enclosing 15 Pepsi Points and a check for $700,000. (Pepsi permitted consumers to buy additional points for 10 cents a point.) Pepsi did not send Leonard the Harrier Jet. Instead, it returned Leonard's check, explaining that the "Harrier jet in the Pepsi commercial is fanciful and simply intended to create a humorous and entertaining ad." Leonard then sued Pepsico, arguing that it was bound to sell him the Harrier Jet in exchange for the Pepsi Points and $700,000. Held: For Pepsico.

Noting "the obvious absurdity of the commercial," the court held that "no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier jet. . . . The commercial is the embodiment of what defendant [Pepsi] appropriately characterizes as 'zany humor.' " "In light of the Harrier Jet's well documented function in attacking and destroying surface and air targets, . . . depiction of such a jet as a way to get to school in the morning is clearly not serious. . . . " Leonard v. Pepsico, 88 F.Supp.2d 116, 129 (S.D.N.Y.1999), aff'd 210 F.3d 88 (2d Cir. 2000).

Do you agree? What result in the *Pepsico* case under *Lucy*? The court in *Leonard*, noting that the price of a Harrier jet is roughly 23 million dollars, stated that "[e]ven 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." *Id.* Is a price too good to be true always an indication that no offer has been made?

(4) *Proving Subjective Intent.* If a party's subjective intent is to play any role in contract law, how is that intent to be proved? As Grant Gilmore explained, "If . . . the actual state of the parties' minds is relevant, then each litigated case must become an extended factual inquiry into what was 'intended,' 'meant,' 'believed,' and so on. If, however, we can restrict ourselves to the 'externals' (what the parties 'said' or 'did'), then the factual inquiry will be much simplified." Gilmore, *The Death of Contract* 42 (1974).

Contract law's preference for the objective has not, however, completely solved the problem of proof. Suppose, for example, that Lucy had actually known that the Zehmers were joking even though this was not objectively apparent. Does this mean that a witness's testimony as to intent simply goes unchallenged? A number of safeguards suggest that the answer is No. These include: the availability of pretrial discovery to reveal prior inconsistent statements or other such evidence; confidence in a jury's ability to discern when a witness is untruthful; and the fact that the person whose intent is at issue may well be a corporation or other organization leading to the possibility of conflicting sources of information regarding intent, such as testimony from disaffected former employees or email trails.

For the argument that the application of subjective intent "brings the formation of contracts into harmony with the rules governing contract interpretation, consideration, and gap-filling," see Lawrence Solan, Contract as Agreement, 83 Notre Dame L. Rev. 353 (2007).

Specht v. Netscape Communications Corp.

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

■ SOTOMAYOR, CIRCUIT JUDGE.[d] This is an appeal from a judgment of the Southern District of New York denying a motion by defendants-appellants Netscape Communications Corporation and its corporate parent, America Online, Inc. (collectively, "defendants" or "Netscape"), to compel arbitration and to stay court proceedings. In order to resolve the central question of arbitrability presented here, we must address issues of contract formation in cyberspace. Principally, we are asked to determine whether plaintiffs-appellees ("plaintiffs"), by acting upon defendants' invitation to download free software made available on defendants' webpage, agreed to be bound by the software's license terms (which included the arbitration clause at issue), even though plaintiffs could not have learned of the existence of those terms unless, prior to executing the download, they had scrolled down the webpage to a screen located below the download button. We agree with the district court that a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants' invitation to download the free software, and that defendants therefore did not provide reasonable notice of the license terms. In consequence, plaintiffs' bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms.

[d] Sonia Sotomayor (1954–____) became an Associate Justice of the Supreme Court in 2009, having served on the United States Court of Appeals for the Second Circuit (1998–2009) and on the United States District Court for the Southern District of New York (1991–1998). She received her J.D. from Yale Law School in 1979, and began her career as an Assistant District Attorney in the New York County District Attorney's Office (1979–1984).

BACKGROUND

I. Facts

In three related putative class actions, plaintiffs alleged that, unknown to them, their use of SmartDownload transmitted to defendants private information about plaintiffs' downloading of files from the Internet, thereby effecting an electronic surveillance of their online activities in violation of two federal statutes, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 et seq., and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

In the time period relevant to this litigation, Netscape offered on its website various software programs, including Communicator and SmartDownload, which visitors to the site were invited to obtain free of charge. It is undisputed that five of the six named plaintiffs—Michael Fagan, John Gibson, Mark Gruber, Sean Kelly, and Sherry Weindorf—downloaded Communicator from the Netscape website. These plaintiffs acknowledge that when they proceeded to initiate installation of Communicator, they were automatically shown a scrollable text of that program's license agreement and were not permitted to complete the installation until they had clicked on a "Yes" button to indicate that they accepted all the license terms.[1] If a user attempted to install Communicator without clicking "Yes," the installation would be aborted. All five named user plaintiffs expressly agreed to Communicator's license terms by clicking "Yes." The Communicator license agreement that these plaintiffs saw made no mention of SmartDownload or other plug-in programs, and stated that "[t]hese terms apply to Netscape Communicator and Netscape Navigator" and that ... "all disputes relating to this Agreement (excepting any dispute relating to intellectual property rights)" are subject to "binding arbitration in Santa Clara County, California."

Although Communicator could be obtained independently of SmartDownload, all the named user plaintiffs, except Fagan, downloaded and installed Communicator in connection with downloading SmartDownload. Each of these plaintiffs allegedly arrived at a Netscape webpage captioned "SmartDownload Communicator" that urged them to "Download With Confidence Using SmartDownload!" At or near the bottom of the screen facing plaintiffs was the prompt "Start Download" and a tinted button labeled "Download." By clicking on the button, plaintiffs initiated the download of SmartDownload. Once that process was complete, SmartDownload, as its first plug-in task, permitted plaintiffs to proceed with downloading and installing Communicator, an operation that was accompanied by the clickwrap display of Communicator's license terms described above.

The signal difference between downloading Communicator and downloading SmartDownload was that no clickwrap presentation accompanied the latter operation. Instead, once plaintiffs Gibson, Gruber, Kelly, and Weindorf had clicked on the "Download" button located at or near the bottom of their screen, and the downloading of SmartDownload was complete, these plaintiffs encountered no further information about the plug-in pro-

[1] This kind of online software license agreement has come to be known as "clickwrap" because it "presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked." Specht, 150 F.Supp.2d at 593–94 (footnote omitted).

gram or the existence of license terms governing its use. The sole reference to SmartDownload's license terms on the "SmartDownload Communicator" webpage was located in text that would have become visible to plaintiffs only if they had scrolled down to the next screen.

Had plaintiffs scrolled down instead of acting on defendants' invitation to click on the "Download" button, they would have encountered the following invitation: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software." . . .

Even for a user who, unlike plaintiffs, did happen to scroll down past the download button, SmartDownload's license terms would not have been immediately displayed in the manner of Communicator's clickwrapped terms. Instead, if such a user had seen the notice of SmartDownload's terms and then clicked on the underlined invitation to review and agree to the terms, a hypertext link would have taken the user to a separate webpage entitled "License & Support Agreements." The first paragraph on this page read, in pertinent part:

The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software.

Below this paragraph appeared a list of license agreements, the first of which was "License Agreement for Netscape Navigator and Netscape Communicator Product Family (Netscape Navigator, Netscape Communicator and Netscape SmartDownload)." If the user clicked on that link, he or she would be taken to yet another webpage that contained the full text of a license agreement that was identical in every respect to the Communicator license agreement except that it stated that its "terms apply to Netscape Communicator, Netscape Navigator, and Netscape SmartDownload." The license agreement granted the user a nonexclusive license to use and reproduce the software, subject to certain terms. Among the license terms was a provision requiring virtually all disputes relating to the agreement to be submitted to arbitration.

DISCUSSION

I. Standard of Review and Applicable Law

A district court's denial of a motion to compel arbitration is reviewed de novo. The determination of whether parties have contractually bound themselves to arbitrate a dispute—a determination involving interpretation of *state law*—is a legal conclusion also subject to de novo review. The findings upon which that conclusion is based, however, are factual and thus may not be over-turned unless clearly erroneous. . . . The district court properly concluded that in deciding whether parties agreed to arbitrate a certain matter, a court should generally apply state-law principles to the issue of contract formation. . . . The district court further held that California law governs the question of contract formation here; the parties do not appeal that determination. [citations omitted]

III. Whether the User Plaintiffs Had Reasonable Notice of and Manifested Assent to the SmartDownload License Agreement

Whether governed by the common law or by Article 2 of the Uniform Commercial Code ("UCC"), a transaction, in order to be a contract, requires a manifestation of agreement between the parties. . . . California's common law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." Id. . . .

Arbitration agreements are no exception to the requirement of manifestation of assent. "This principle of knowing consent applies with particular force to provisions for arbitration." Windsor Mills, 101 Cal.Rptr. at 351. Clarity and conspicuousness of arbitration terms are important in securing informed assent. "If a party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto." Commercial Factors Corp. v. Kurtzman Bros., 131 Cal.App.2d 133, 134–35, 280 P.2d 146, 147–48 (1955). Thus, California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted.

A. The Reasonably Prudent Offeree of Downloadable Software

Defendants argue that plaintiffs must be held to a standard of reasonable prudence and that, because notice of the existence of SmartDownload license terms was on the next scrollable screen, plaintiffs were on "inquiry notice" of those terms. We disagree[.] It is true that "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." Marin Storage & Trucking, 89 Cal.App.4th at 1049, 107 Cal.Rptr.2d at 651. But courts are quick to add: "An exception to this general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term." Id.

Most of the cases cited by defendants in support of their inquiry-notice argument are drawn from the world of paper contracting. See, e.g., Taussig v. Bode & Haslett, 134 Cal. 260, 66 P. 259 (1901) (where party had opportunity to read leakage disclaimer printed on warehouse receipt, he had duty to do so); In re First Capital Life Ins. Co., 34 Cal.App.4th 1283, 1288, 40 Cal.Rptr.2d 816, 820 (1995) (purchase of insurance policy after opportunity to read and understand policy terms creates binding agreement). . . ; King v. Larsen Realty, Inc., 121 Cal.App.3d 349, 356, 175 Cal.Rptr. 226, 231 (1981) (where realtors' board manual specifying that party was required to arbitrate was "readily available," party was "on notice" that he was agreeing to mandatory arbitration); Cal. State Auto. Ass'n Inter–Ins. Bureau v. Barrett Garages, Inc., 257 Cal.App.2d 71, 76, 64 Cal.Rptr. 699, 703 (1967) (recipient of airport parking claim check was bound by terms printed on claim check, because a "ordinarily prudent" person would have been alerted to the terms).

As the foregoing cases suggest, receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms. "Every person who has actual notice of circum-

stances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Cal.Civ.Code § 19. These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to "Download Now!". What plaintiffs saw when they were being invited by defendants to download this fast, free plug-in called SmartDownload was a screen containing praise for the product and, at the very bottom of the screen, a "Download" button. Defendants argue that under the principles set forth in the cases cited above, a "fair and prudent person using ordinary care" would have been on inquiry notice of SmartDownload's license terms. Shacket, 651 F.Supp. at 690.

We are not persuaded that a reasonably prudent offeree in these circumstances would have known of the existence of license terms. Plaintiffs were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms. . . . Moreover, the fact that, given the position of the scroll bar on their computer screens, plaintiffs may have been aware that an unexplored portion of the Netscape webpage remained below the download button does not mean that they reasonably should have concluded that this portion contained a notice of license terms. . . . Plaintiffs testified, and defendants did not refute, that plaintiffs were in fact unaware that defendants intended to attach license terms to the use of SmartDownload.

We conclude that in circumstances such as these, where consumers are urged to download free soft-ware at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.

C. Online Transactions

. . . After reviewing the California common law and other relevant legal authority, we conclude that under the circumstances here, plaintiffs' downloading of SmartDownload did not constitute acceptance of defendants' license terms. Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility. We hold that a reasonably prudent offeree in plaintiffs' position would not have known or learned, prior to acting on the invitation to download, of the reference to SmartDownload's license terms hidden below the "Download" button on the next screen. We affirm the district court's conclusion that the user plaintiffs, including Fagan, are not bound by the arbitration clause contained in those terms.

CONCLUSION

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

NOTES

(1) *Questions.* What action was argued by Netscape to constitute assent in *Specht*? Can a keystroke ever constitute a party's intent to be bound? How does the plaintiffs' challenge to its assent in Specht differ with the seller's

challenge to assent in Lucy v. Zehmer? Does it matter that the party disputing their assent is the offeror in one case, and the offeree in the other?

Recall that in *Lucy*, the question was whether there was a contract at all. In this case, there was apparently no doubt that there was a contract for the deal as a whole; the question, instead, was whether Specht agreed to a particular term. What is the significance of the difference?

(2) *Inquiry Notice.* Must an "offeree of downloadable software," as the court describes the plaintiffs, have actually read the terms of the deal before clicking can constitute assent? According to Specht, what does it take to bind a person who clicks on "I agree."? Compare Netscape's presentation of terms in *Specht* from a procedure where the seller's technician showed the buyer the terms on the technician's laptop, and the buyer was unable to complete the transaction without clicking on one of three boxes ("Exit Registration," "I Accept," or "I Reject") located under the Terms of Service, see Hancock v. AT & T, (10th Cir., 2012) (available at http://www.ca10.uscourts.gov/opinions/11/11-6233.pdf). Would you find intent by an offeree who clicks on "I Accept" in the latter case?

ASSENT AND EXPRESS LIMITATIONS ON THE INTENT TO BE BOUND

Certain cases in the last chapter were presented as if parties made deals without much fuss: Hawkins agreed to the hand surgery; Story, Jr. forebore from vice. Yet some negotiation is a common precursor to most agreements, even seemingly straightforward ones. (Recall that Dr. McGee really wanted to practice the surgery on Hawkins, and so sweetened the deal to secure consent.) For more complex deals—the acquisition of companies, real estate developments, divorce settlements—negotiations are usually more protracted and may take shape over an extended period of time. Negotiating parties in these transactions may want to record, or perhaps lock in, terms that have been agreed upon, yet not be contractually bound to that term until a final agreement is reached, and often not until that agreement takes formal written form. During this transactional process, it is therefore important to ask: even when parties have assented, just what have they have agreed to?

"Mutual assent has many implications for contract law theory and doctrine. Importantly, it sets the boundary between the precontractual and the contractual stages. Prior to attaining a consensus, while an agreement is still being negotiated, no liability arises between the parties. At some point in time, the positions of the parties (or, more correctly, their outward manifestations) meet, and full expectation liability emerges." Omri Ben–Shahar, "Contracts without Consent: Exploring a New Basis for Contractual Liability," 152 U. Penn. L. Rev. 1829 (2004). Assent is a necessary condition for contractual liability, but it is not sufficient. For example, let's say that two parties agree on what they consider to be the essential terms of a contract, leaving the details to be worked out by their lawyers in a final, formal document that the parties expect to sign. If one of the parties then refuses to sign the formal document, can the other enforce their agreement?

The answer depends on whether the parties *intended* to conclude their agreement at the earlier point in time. In that regard, courts have developed two widely-accepted common law principles:

> (a) that absent an expressed intent that no contract shall exist, mutual assent between the parties, even though oral or informal, to exchange acts or promises is sufficient to create a binding contract; and (b) that to avoid the obligation of a binding contract, at least one of the parties must express an intention not to be bound until a writing is executed.

Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 570 (2d Cir.1993).

But how does a court determine whether or not a party has sufficiently expressed an intention not to be bound in the absence of a formal document? In Winston v. Mediafare Entertainment Corp., 777 F.2d 78 (2d Cir.1985), the court listed "several factors that help." These factors are:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Id. at 80. Despite such guidance, cases involving this question are frequently before the courts. For two classic discussions, see Charles Knapp, Enforcing the Contract to Bargain, 44 N.Y.U. L. Rev. 673 (1969) and E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum.L.Rev. 217 (1987).

Other forms of precontractual commitment include "gentlemen's agreements" and letters of intent.[e] We will engage with letters of intent more fully on p. 252 in connection with precontractual liability; for now it is enough to consider them along the lines of "agreements in principle" in which negotiating parties keep a record of, or memorialize, matters on which accord has been reached. At the same time, letters of intent typically include language that seeks to prevent the letter from signaling an intent to be bound, such as "This letter is not intended to create nor should it be construed as creating any legal obligation." White Construction Co. v. Martin Marietta Materials, 633 F. Supp.2d 1302 (M.D.Fla. 2009).

Let us consider one further form of preliminary agreement, an agreement to negotiate. May parties bind themselves not to a particular term, but to the process of achieving the terms? The answer is Yes. As one court stated, in a contract to negotiate,

> the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Under a contract to negotiate, the parties do not intend to be bound if negotiations fail to reach ultimate agreement on the substantive deal . . . [N]o breach occurs if the parties fail to reach agreement on the sub-

[e] "A gentlemen's agreement is . . . an agreement which is not an agreement, made between two persons neither of whom is a gentleman, whereby each expects the other to be strictly bound without himself being bound at all." Wilma Fall, Letters of Comfort, 1990 J. S. Afr. L. 73 (1990) (quoting Chemo Leasing v. Rediffusion, 1 FTLR 201 CA, (1987)).

> stantive deal. The contract to negotiate is breached only when one party fails to conform to the specific course of conduct agreed upon.

Keystone Land & Development Co. v. Xerox Corp., 94 P.3d 945 (Wash., 2004). How does a contract to negotiate differ from an "agreement to agree," defined by the court in Keystone Land as "an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete"?

NOTES

(1) *Open Term Agreements.* In an influential case further treating the factors in *Winston*, Judge Pierre Leval distinguished between two types of binding preliminary agreements, now designated as "Tribune I" and "Tribune II." Teachers Insurance & Annuity Association v. Tribune Co., 670 F.Supp. 491 (S.D.N.Y.1987). The two types have been described as follows.

A Tribune Type I contract "is created when the parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document. Such an agreement is fully binding; it is 'preliminary in form—only in the sense that the parties desire a more elaborate formalization of the agreement. . . . [I]t binds both sides to their ultimate contractual objective in recognition that, 'despite the anticipation of further formalities,' a contract has been reached. . . . "

In contrast, a Tribune Type II contract, "dubbed a 'binding preliminary commitment,' . . . is created when the parties agree on certain major terms, but leave other terms open for further negotiation." A Type II agreement " 'does not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith toward a final contract' " Adjustrite Systems v. GAB Business Services, 145 F.3d 543, 548 (2d Cir.1998).

Some courts have sought to distinguish between open terms that are "deal breakers" and those that are not. See A/S Apothekernes Laboratorium v. I.M.C. Chemical, 873 F.2d 155 (7th Cir.1989). How might a party make certain, throughout negotiations, that every open term is a deal breaker? See Budget Marketing, Inc. v. Centronics Corp., 927 F.2d 421 (8th Cir.1991).

(2) *Of Oil and Honor.* One celebrated case involving "formal contract contemplated" was a so-called "handshake deal" between the Pennzoil Company and the Getty Oil Company. Getty, having negotiated a sale of stock to Pennzoil, refused to perform and sold the stock to Texaco, Inc. Pennzoil's first legal sally was an attempt to charge Getty with breach of contract in Delaware. When that failed, Pennzoil shifted its ground to Texas and sued Texaco there for interfering with the alleged Getty contract. This action produced a verdict against Texaco for $10.53 billion and (after much maneuvering, including a reduction of $2 billion in the jury's punitive-damage award and a visit to the Supreme Court of the United States) led to Texaco's bankruptcy. Its bankruptcy petition was designed to effectuate a $3 billion settlement agreement between the parties. For a description of the Pennzoil–Getty dealings see Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex.App.1987). See also T. Petzinger, Oil and Honor: The Texaco–Pennzoil Wars (1987).

INTENT IN CONTEXT

Lucy v. Zehmer, above, suggests that a promisor may not be bound if the promise, whether from its content or from the circumstances of its making, is insufficiently sincere to indicate the promisor's intent to be bound. In addition to disregarding jests, courts and sometimes legislatures are also reluctant to enforce a statement on the ground that no binding promise was intended. One area where this reluctance is observed, touched upon in Chapter 1, concerns optimistic statements made by doctors to patients. See Note 2, p. 3 above. In an omitted passage from Sullivan v. O'Connor, p. 15 the court observed that "patients may transform such statements into firm promises in their own minds. . . . " Statements made for social purposes or among family members provide a second category in which the promisor may not have intended to make a legally enforceable promise.

In thinking further about the nature or quality of assent necessary to make a promise binding, consider Professor Edwin Patterson's[f] suggestion that:

> A good legal rule as to the enforceability of promises should make contracting available to non-lawyers who will take the pains to clarify their ideas as to what they want to contract about; yet it should not make contracting so easy that it hooks the unwary signer or the casual promisor. The first may be called freedom *to* contract, the second, freedom *from* contract. These are, of course, counsels of perfection.

NOTES

(1) *Dining Together.* Should a court enforce a promise made for a social purpose, such as a promise to be a guest at a dinner party? Would it make a difference if the host had gone to considerable expense to make elaborate preparations in honor of the guest? What if the broken promise was one to marry and the plaintiff's expenses had included a wedding dress and the rental of a hall for the reception? See Ferraro v. Singh, 495 A.2d 946 (Pa.Super.1985).

(2) *Hunting Together.* Two friends, Mitzel and Hauck, went duck hunting in a car driven by Hauck. While taking a curve on a country road at 74 miles per hour, Hauck lost control and crashed the car, injuring Mitzel, who then sued Hauck. South Dakota law provides that "no person transported . . . as a guest" has a cause of action against the driver for negligence. Mitzel testified that he was not a guest: "I told him I would accompany him on this trip to look for ducks. I would take my time and go along on this trip and look for ducks on the agreement he would take the car." From a judgment for Hauck, plaintiff appealed. *Held*: For Hauck.

"It is not every agreement that results in a binding, legally enforceable contract. Neither party may intend the writing to be a contract; it must contemplate the assumption of legal rights and duties. . . . This is not to say . . . that contracts may not be implied in fact or in law . . . [Yet to] spell out a con-

[f] Edwin W. Patterson (1889–1965) practiced for four years in Kansas City and then taught at Texas, Colorado, Iowa and Columbia. He was one of the Advisers for the Restatement of Restitution. Among his writings are books on contracts, insurance and jurisprudence, including four editions of the predecessor of this casebook.

tract from this hunting trip of these young men . . . would 'transcend reality,' and transform this sport and similar social affairs to a new legal field. . . . It was not a commercial arrangement or one that removed [plaintiff] from his status as a guest." Mitzel v. Hauck, 105 N.W.2d 378, 380 (S.D.1960).

(3) *Living Together.* What effect should be given promises made between spouses or cohabitants? In Balfour v. Balfour, p. 35 above, the court denied the wife recovery on her husband's promise to pay her an allowance on the ground that such promises "are not contracts because the parties did not intend that they should be attended by legal consequences." This strict traditional view persists in judicial reluctance to enforce agreements between husband and wife, although it has been relaxed considerably. As for unmarried couples, one court has said that "[o]rdinary contract principles are not suspended . . . for unmarried persons living together, whether or not they engage in sexual activity." Boland v. Catalano, 521 A.2d 142 (Conn.1987).

(4) *Ethics in Educating a Client.* When a party's intent is key to a determination regarding formation, how is a lawyer to ascertain a client's state of mind at the earlier time? It is popular wisdom that a client's report regarding intent may be influenced by what the client knows of the law. Hence there are situations in which it is at least questionable for a lawyer to give legal advice "to assist his client in developing evidence relevant to the [client's] state of mind." See Code of Professional Responsibility (Ethical Consideration 7–6). Precepts issued by the American Bar Association emphasize, however, that a lawyer *may* properly assist a client in that way, and "may discuss the legal consequences of any proposed course of conduct with a client." Rule 1.2(d) of the Model Rules of Professional Conduct.

For a colloquy on the question "whether it is proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury," see Monroe Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich.L.Rev. 1469, 1478–82 (1966), and John Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 Mich.L.Rev. 1485, 1488 (1966). In a later book, Prof. Freedman conceded that there comes a point where "nothing less than 'brute rationalization' can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participating in the creation of perjury." Freedman, *Lawyers' Ethics in an Adversary System* 73, 75 (1975).

Although the problem has drawn attention chiefly in connection with defense preparations in criminal matters, in which intent is often a critical fact, counsel's explanation of the law might also bear on a client's recollection regarding a contractual transaction. Recall Mitzel, Note 2, above, who testified that he went duck hunting "on the agreement" that his friend would drive.

Whether or not a contract has been formed often depends on choosing between conflicting accounts of a conversation. Recall the conflicting testimony in Lucy v. Zehmer. Does the decision in that case ease or intensify qualms that lawyers may have about educating their clients about contract law?

SECTION 2. THE OFFER

The process by which parties arrive at a bargain varies widely according to the circumstances. It is common to treat the process as involving

two distinct steps: first, an offer by one party and, second, an acceptance by the other. In practice, however, the process of contract formation is often more complicated and muddled.

> [H]owever suited [the rules of offer and acceptance] may have been to the measured cadence of contracting in the nineteenth century, they have little to say about the complex processes that lead to major deals today. . . . During the negotiation of such deals there is often no offer or counter-offer for either party to accept, but rather a gradual process in which agreements are reached piecemeal in several 'rounds' with a succession of drafts. . . . When the ultimate agreement is reached, it is often expected that it will be embodied in a document or documents that will be exchanged by the parties at a closing. . . .

Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum.L.Rev. 217, 219 (1987). Article 2 of the UCC addresses this aspect of formation explicitly in section 2–204: "An agreement sufficient to make a contract for sale may be found even though the moment of its making is undetermined."

Nonetheless, it is useful in developing the basics of contract formation to begin with the assumption of a clear offer followed by a clear acceptance.

What then is an offer? Corbin gave this answer:

> An offer is . . . an act whereby one person confers upon another the power to create contractual relations between them. . . . It must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him. . . . 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. All these are acts that do not lead others reasonably to believe that they are empowered 'to close the contract.'

Arthur Corbin, Offer and Acceptance, and Some of The Resulting Legal Relations, 26 Yale L.J. 169, 181–82 (1917). Is this a helpful definition? Compare Restatement § 24. It may be helpful to keep Corbin's view and the Restatement definition in mind as you read the next three cases. Why might the courts in the first two cases seem so careful, even reluctant, to find a contract? What lessons does each case suggest with regard to drafting offers?

Note that in the cases that follow, the means of communication may appear somewhat old-fashioned: letters, telegraphs, and telegrams. Today telephones, email, instant messaging and other forms of electronic media serve as the means by which offers are often made; see, for example, International Casings Group, Inc. v. Premium Standard Farms, Inc., 358 F. Supp. 2d 863 (W.D.Mo., 2005), in which the court examines lengthy email correspondence between the parties. The importance for purposes of formation is less the medium than the intent revealed by the communication; see Brighton Investment, Ltd. v. Har–ZVI, 88 A.D.3d 1220, 932 N.Y.S.2d 214 (2011) ("an exchange of e-mails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents, when the communications are "sufficiently clear and concrete" to establish such an intent").

Owen v. Tunison

Supreme Judicial Court of Maine, 1932.
131 Me. 42, 158 A. 926.

Action by W.H. Owen against R.G. Tunison for breach of contract.

■ BARNES, J. This case is reported to the law court, and such judgment is to be rendered as the law and the admissible evidence require.

Plaintiff charges that defendant agreed in writing to sell him the Bradley block and lot, situated in Bucksport, for a stated price in cash, that he later refused to perfect the sale, and that plaintiff, always willing and ready to pay the price, has suffered loss on account of defendant's unjust refusal to sell, and claims damages.

From the record it appears that defendant, a resident of Newark N.J., was, in the fall of 1929, the owner of the Bradley block and lot.

With the purpose of purchasing, on October 23, 1929, plaintiff wrote the following letter:

"Dear Mr. Tunison:

"Will you sell me your store property which is located on Main St. in Bucksport, Me. running from Montgomery's Drug Store on one corner to a Grocery Store on the other, for the sum of $6,000.00?"

Nothing more of this letter need be quoted.

On December 5, following, plaintiff received defendant's reply apparently written in Cannes, France, on November 12, and it reads:

"In reply to your letter of Oct. 23rd which has been forwarded to me in which you inquire about the Bradley Block, Bucksport, Me.

"Because of improvements which have been added and an expenditure of several thousand dollars it would not be possible for me to sell it unless I was to receive $16,000.00 cash.

"The upper floors have been converted into apartments with baths and the b'l'dg put into first class condition.

"Very truly yours,
"[Signed] R.G. Tunison."

Whereupon, and at once, plaintiff sent to defendant, and the latter received, in France, the following message:

"Accept your offer for Bradley block Bucksport Terms sixteen thousand cash send deed to Eastern Trust and Banking Co Bangor Maine Please acknowledge."

Four days later he was notified that defendant did not wish to sell the property, and on the 14th day of January following brought suit for his damages.

Granted that damages may be due a willing buyer if the owner refuses to tender a deed of real estate, after the latter has made an offer in writing to sell to the former, and such offer has been so accepted, it remains for us to point out that defendant here is not shown to have written to plaintiff an offer to sell.

There can have been no contract for the sale of the property desired, no meeting of the minds of the owner and prospective purchaser, unless

there was an offer or proposal of sale. It cannot be successfully argued that defendant made any offer or proposal of sale.

In a recent case the words, "Would not consider less than half" is held "not to be taken as an outright offer to sell for one-half." Sellers v. Warren, 116 Me. 350, 102 A. 40, 41.

Where an owner of millet seed wrote, "I want $2.25 per cwt. for this seed f.o.b. Lowell," in an action for damages for alleged breach of contract to sell at the figure quoted above, the court held: "He [defendant] does not say, 'I offer to sell to you.' The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted, by any or all of the persons addressed." Nebraska Seed Co. v. Harsh, 98 Neb. 89, 152 N.W. 310, 311, and cases cited in note L.R.A. 1915F, 824.

Defendant's letter of December 5 in response to an offer of $6,000 for his property may have been written with the intent to open negotiations that might lead to a sale. It was not a proposal to sell.

Judgment for defendant.

NOTE

Offer v. Non-offer. In his letter of November 12, did Tunison indicate an intention to empower Owen "to close the contract"? Consider the language "it would not be possible for me to sell it unless I were to receive $16,000 cash." Was the problem in the statement a matter of the price or of Tunison's intent to sell or both? What result if Tunison had said, "I will sell for $16,000"? What if he had said, "I will not entertain an offer for less than $16,000"? Could Tunison have expected Owen to respond with an offer of more than $16,000? If your answer is No, was it not reasonable for Owen to infer that he could close the deal by acceding to that price?

PROBLEM

Neighborly Buy-out. In May, Joseph Oliver spoke individually to several neighbors about his plans to dispose of his ranch. On June 13, one of them, J.W. Southworth who Oliver knew had long wanted to buy the property, asked Oliver if his plans for selling "continued to be in force." Oliver responded that he expected soon to be able to put a price on the property. Southworth then said that he had the money available, that Oliver "didn't have to worry," and that "everything was ready to go." Four days later, Oliver sent a letter to four neighbors, including Southworth, enclosing "the information that I had discussed with you," as follows:

> Selling [ranch as described] at the assessed market value of . . . $324,419. Terms available—29% down—balance over 5 years at 8% interest. Negotiate sale date for December 1, 1976 or January 1, 1977. . . .

Has Oliver made an offer to sell his ranch? See Southworth v. Oliver, 587 P.2d 994 (Or.1978). Assume that his letter began: "I am sending this letter to you and three other neighbors." Develop reasoning that is based on that sentence and that leads to this conclusion: None of the recipients could have understood, reasonably, that the letter was an offer. See Southworth v. Oliver, 587 P.2d 994 (Or.1978).

Harvey v. Facey

[1893] A.C. 552 (Privy Council) (Jamaica).

[Harvey and another, solicitors in Kingston, were interested in a piece of property known as Bumper Hall Pen. Facey, the owner, had been engaged in negotiations for its sale to the town of Kingston for £ 900. Harvey telegraphed Facey, who was on a journey, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid." Facey replied by telegram, "Lowest price for Bumper Hall Pen £ 900." Harvey answered, "We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you." Harvey sued for specific performance of this agreement and for an injunction to restrain the town of Kingston from taking a conveyance of the property. The trial court dismissed the action on the ground that the agreement did not disclose a concluded contract; the Supreme Court of Jamaica reversed; the defendants appealed to the Judicial Committee of the Privy Council.]

■ LORD MORRIS. . . . [T]heir Lordships concur in the judgment of Mr. Justice Curran that there was no concluded contract between the appellants and L.M. Facey to be collected from the aforesaid telegrams. The first telegram asks two questions. The first question is as to the willingness of L.M. Facey to sell to the appellants [i.e. Harvey]; the second question asks the lowest price, and the word "telegraph" is in its collocation addressed to that second question only. L.M. Facey replied to the second question only, and gives his lowest price. The third telegram from the appellants treats the answer of L.M. Facey stating his lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L.M. Facey as binding him in any respect, except to the extent it does by its term, viz., the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L.M. Facey. The contract could only be completed if L.M. Facey had accepted the appellants' last telegram. It has been contended for the appellants that L.M. Facey's telegram should be read as saying "yes" to the first question put in the appellants' telegram, but there is nothing to support that contention. L.M. Facey's telegram gives a precise answer to a precise question, viz., the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry. . . . [Reversed and the judgment of the trial court restored.]

NOTES

(1) *More Analysis of Communications.* Is it significant that Harvey presumably knew that he was not the only potential buyer for Bumper Hall Pen? What result if Harvey's first telegram had read, "What is the lowest price at which you will sell me Bumper Hall Pen?" Redraft Facey's telegram so that it clearly would have been an offer.

(2) *Addressee of Offer.* Generally, an offer can be accepted only by the person the offeror has invited to furnish the consideration. Although one might expect this principle to have frequent application, as when an offer is ad-

dressed to an enterprise that may have changed its corporate identity, in fact, there are few cases exemplifying the principle. Why might that be so?

In a 19th–century case, Boulton, the manager of a leather "pipe hose" business, bought out the owner, Brocklehurst. Later the same day a regular customer named Jones, who had a running account with Brocklehurst, sent him an order for merchandise. Boulton received the order and supplied the goods without notifying Jones of the change of ownership. When Jones refused to pay, Boulton sued for the price. *Held:* for Jones. "When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a setoff, no other person can interpose and adopt the contract." Boulton v. Jones, 157 Eng.Rep. 232 (1857) (Exchequer Chamber) (Bramwell, B.).

Was the personality of Brocklehurst likely to be of importance in this transaction? In sales transactions generally?

Fairmount Glass Works v. Crunden–Martin Woodenware Co.

Court of Appeals of Kentucky, 1899.
106 Ky. 659, 51 S.W. 196.

Action by the Crunden–Martin Woodenware Company against the Fairmount Glass Works to recover damages for breach of contract. Judgment for plaintiff, and defendant appeals. Affirmed.

■ HOBSON, J. On April 20, 1895, appellee wrote appellant the following letter:

"St. Louis, Mo., April 20, 1895. Gentlemen: Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f.o.b. cars your place, as you prefer. State terms and cash discount. Very truly, Crunden–Martin W.W. Co."

To this letter appellant answered as follows:

"Fairmount, Ind. April 23, 1895. Crunden–Martin Wooden Ware Co., St. Louis, Mo.—Gentlemen: Replying to your favor of April 20, we quote you Mason fruit jars, complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints, $4.50, quarts, $5.00, half gallons, $6.50 per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance,[g] or 2 off, cash in ten days. Yours truly, Fairmount Glass Works.

"Please note that we make all quotations and contracts subject to the contingencies of agencies or transportation delays or accidents beyond our control."

For reply thereto, appellee sent the following telegram on April 24, 1895:

"Fairmount Glass Works, Fairmount, Ind.: Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed. Crunden–Martin W.W. Co."

In response to this telegram, appellant sent the following:

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[g] In this context the word "acceptance" is not used to denote a response to an offer. Rather, here it refers to a form of commitment used to assure payment in sixty days.

"Fairmount, Ind., April 24, 1895. Crunden–Martin W.W. Co., St. Louis, Mo.: Impossible to book your order. Output all sold. See letter. Fairmount Glass Works."

Appellee insists that, by its telegram sent in answer to the letter of April 23d, the contract was closed for the purchase of 10 car loads of Mason fruit jars. Appellant insists that the contract was not closed by this telegram, and that it had the right to decline to fill the order at the time it sent its telegram of April 24. This is the chief question in the case. The court below gave judgment in favor of appellee, and appellant has appealed, earnestly insisting that the judgment is erroneous.

We are referred to a number of authorities holding that a quotation of prices is not an offer to sell, in the sense that a completed contract will arise out of the giving of an order for merchandise in accordance with the proposed terms. There are a number of cases holding that the transaction is not completed until the order so made is accepted. 7 Am. & Eng.Enc.Law (2d Ed.) p. 138; Smith v. Gowdy, 8 Allen, Mass., 566; Beaupre v. Telegraph Co., 21 Minn. 155. But each case must turn largely upon the language there used. In this case we think there was more than a quotation of prices, although appellant's letter uses the word "quote" in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole. Appellee's letter of April 20th, which began the transaction, did not ask for a quotation of prices. It reads: "Please advise us the lowest price you can make us on our order for ten carloads of Mason green jars. . . . State terms and cash discount." From this appellant could not fail to understand that appellee wanted to know at what price it would sell ten car loads of these jars; so when, in answer, it wrote: "We quote you Mason fruit jars . . . pints $4.50, quarts $5.00, half gallons $6.50, per gross, for immediate acceptance; . . . 2 off, cash in ten days,"—it must be deemed as intending to give appellee the information it asked for. We can hardly understand what is meant by the words "for immediate acceptance," unless the latter was intended as a proposition to sell at these prices if accepted immediately. In construing every contract, the aim of the court is to arrive at the intention of the parties. In none of the cases to which we have been referred on behalf of appellant was there on the face of the correspondence any such expression of intention to make an offer to sell on the terms indicated. . . . The expression in appellant's letter, "for immediate acceptance," taken in connection with appellee's letter, in effect, at what price it would sell it the goods, is, it seems to us, much stronger evidence of a present offer, which, when accepted immediately, closed the contract. Appellee's letter was plainly an inquiry for the price and terms on which appellant would sell it the goods, and appellant's answer to it was not a quotation of prices, but a definite offer to sell on the terms indicated, and could not be withdrawn after the terms had been accepted.

[The court quoted further from Crunden–Martin's telegram of April 24 and a letter in which it gave "specifications": shipment not later than May 15; first carload to contain 55 gross quart jars and other specified quantities of pint and half-gallon jars; and "The jars and caps to be strictly first-quality goods." Referring to the latter expression, Fairmount observed that it was not in its offer of April 23, and contended that, because the offer had not been "accepted as made", Fairmount was not bound. The court observed that this objection came late in the day. The court further stated: "Crunden–Martin offers proof tending to show that these words, in the

trade in which parties were engaged, conveyed the same meaning as the words used in Fairmount's letter and were only a different form of expressing the same idea. Fairmount's conduct would seem to confirm this evidence." (In this quotation the parties' names have been substituted for "appellant" and "appellee.")]

Appellant also insists that the contract was indefinite, because the quantity of each size of the jars was not fixed, that ten car loads is too indefinite a specification of the quantity sold, and that appellee had no right to accept the goods to be delivered on different days. The proof shows that "ten car loads" is an expression used in the trade as equivalent to 1,000 gross, 100 gross being regarded as a car load. The offer to sell the different sizes at different prices gave the purchaser the right to name the quantity of each size, and, the offer being to ship not later than May 15th, the buyer had the right to fix the time of delivery at any time before that. . . . The petition, if defective, was cured by the judgment, which is fully sustained by the evidence.

Judgment affirmed.

NOTES

(1) *The Fairmount Letter.* Suppose that Fairmount's letter of April 23 had not been in response to a preliminary letter from Crunden–Martin. Would the result have been the same? What significance should be attached to the use of the expression "we quote you" in the Fairmount letter? What facts make "quote" mean "offer"?

(2) *The Salt–Trade Case.* Consider the foregoing questions in relation to the decision in Moulton v. Kershaw, 18 N.W. 172 (Wis.1884). Kershaw wrote to Moulton:

> In consequence of a rupture in the salt trade we are authorized to offer Michigan fine salt in full car load lots of 80 to 95 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N.W.R.R. Co. only. At this price it is a bargain as the price in general remains unchanged. Shall be pleased to receive your order.

Moulton immediately wired Kershaw, "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." Kershaw failed to ship the salt, and Moulton sued for breach of contract. The trial court overruled Kershaw's demurrer and Kershaw appealed. *Held:* Reversed. "The language is not such as a business man would use in making an offer to sell . . . a definite amount of property." Moulton v. Kershaw, 18 N.W. 172 (Wis.1884).

Suppose Kershaw's communication to Moulton had read, "we are authorized to offer one to twenty-five carloads Michigan fine salt," etc. Would the result have been different? What would be the objection to construing Kershaw's communication as an offer to sell any reasonable quantity of salt—say one to twenty-five car load lots—leaving it to the offeree to name the precise quantity? Has not Kershaw committed himself in advance to supply any reasonable quantity? What result if Kershaw's communication had read, "we are authorized to offer you all the Michigan fine salt you will order," etc.?

ADVERTISEMENTS AS OFFERS

Proposals to engage in a transaction are sometimes addressed to a very wide audience. Advertisements by sellers to the general public provide a familiar example. Are such proposals offers? The general rule is that an advertisement is not an offer, but rather an invitation by the seller to the buyer to make an offer to purchase.

What about reward notices, which are also typically made to a general audience? Do they empower the offeree to "close the contract," in Corbin's phrase? What does Broadnax v. Ledbetter, discussed on p. 70 above, suggest?

If advertisements were held to be offers, what would be a store's position if the demand for its advertised wares exceeded its supply? Might the problem of unexpected demand be solved if sellers were required to have on hand a reasonable supply of advertised merchandise? Another solution might require "first come, first served" to be read into every advertisement. This appears to be the approach of French law, under which "the great majority of authorities consider such a proposal to be an offer, even if it can be accepted only by one of those to whom it is addressed. But such an offer is subject to the condition, as to each offeree, that it has not already been accepted by a quicker-acting offeree." 1 Rudolf B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems* 359 (1968). Which approach do you prefer? Which better protects the parties' expectations?

Whether an advertisement can *ever* be an offer is considered in the next case.

Lefkowitz v. Great Minneapolis Surplus Store

86 N.W.2d 689 (Minn.1957).

[The Great Minneapolis Surplus Store published the following advertisement in a Minneapolis newspaper:

SATURDAY 9 A.M.
2 BRAND NEW PASTEL
MINK 3–SKIN SCARFS
Selling for $89.50

Out they go
SATURDAY, EACH $1.00

1 BLACK LAPIN STOLE . . .

Beautiful,
worth $139.50 ..... $1.00

FIRST COME
FIRST SERVED[h]

[h] The text of the ad appeared as one of scores of boxed items in a full-page ad featuring widely varying type sizes. A snippet from the page, somewhat reduced in size, is reproduced here:

Lefkowitz was the first to present himself on Saturday and demanded the Lapin stole for one dollar. The store refused to sell to him because of a "house rule" that the offer was intended for women only. Lefkowitz sued the store and was awarded $138.50 as damages. The store appealed.]

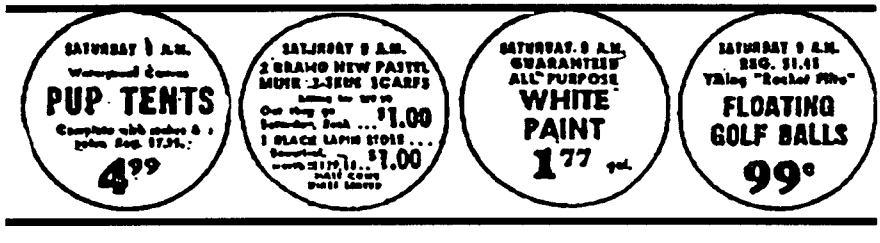
■ MURPHY, JUSTICE. . . . On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance. There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract. . . . The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." 1 Williston, Contracts (rev. ed.) § 27. The authorities above cited emphasize that, where the offer is clear, definite and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. . . . Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. . . . We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. . . . The defendant contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. . . .

Affirmed.

NOTES

(1) *More Facts.* The store's advertisement was actually the second one by the store to which Lefkowitz had responded. The first, published a week earlier, was: "3 Brand New Fur Coats Worth to $100.00/First Come First Served/$1 Each." To Lefkowitz's claim based on that ad the court answered that the ad was not an offer because the word "to" made the value of the coats "speculative and uncertain." This ruling is criticized in Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 105–106 (1989).

On the first occasion the Store had also refused to sell to Lefkowitz, saying that by a "house rule" the offer was intended for women only; sales would not be made to men. Considering this additional fact (and putting aside ques-



tions of discrimination), do you agree with the court's decision that he could recover under the second advertisement?

(2) *Case Comparison.* In Leonard v. Pepsico, described at Note 3, p. 130, the would-be purchaser of the Harrier jet, relying on *Lefkowitz*, argued that the Pepsi Stuff television commercial was an offer. The court held it was not: "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.[i] 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.' Second, even if the Catalog had included a Harrier Jet among the items that could be obtained by redemption of Pepsi Points, 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." 88 F.Supp.2d at 124.

(3) *Consumer Protection.* In Geismar v. Abraham & Strauss, 439 N.Y.S.2d 1005 (Dist.Ct.1981), a disappointed shopper sued a department store that had advertised a set of china dishes regularly priced at $280 for only $39.95, but had refused to sell them at that price. The court held that since the advertisement was not an offer, there was no breach of contract. But it went on to hold that she could recover $50 under a New York statute providing that any person "injured" by advertising "which is misleading in a material respect" is entitled to recover actual damages or $50, whichever is greater. Many other states have enacted laws dealing with false advertising, such as the Uniform Deceptive Trade Practices Act. In addition, Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) declares "unfair or deceptive acts or practices" to be unlawful as a matter of federal law.

Consumers may also be protected by bait-and-switch legislation that makes unlawful "the disparagement by acts or words of the advertised product" and "the failure to have available . . . a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited. . . . " 16 C.F.R. § 238.3 (2006).

(4) *Competitive Bidding.* Contracting parties may fix the contract price, leave it to negotiation, or determine it by competitive bidding. A party who chooses to determine it by competitive bidding may invite open bids at an auction, as is often done in the sale of goods or land, or may invite sealed bids, as is common in the letting of building contracts.

If a party invites competitive bids, is this an offer to be accepted by the highest bidder when the bid is made? Or is it merely an invitation for offers by bids that can then be accepted or rejected by the one who has invited them? The law has taken the latter view, that it is the bidder who makes the offer. Can you see why? This is the general rule stated in UCC § 2–328 with respect to the sale of goods by auction. Under that section the auctioneer may, however, make an offer by advertising the sale to be "without reserve." Note that if the sale is "without reserve," the auctioneer is bound not to withdraw after a

[i] It also communicated additional words of reservation: "Offer not available in all areas. See details on specially marked packages."

bid is made, but the bidder is not similarly bound. Local statutes may also govern auction sales.

The rather elaborate provisions of UCC § 2–328 are, of course, expressly applicable only to the sale of goods. UCC § 2–102. Might they be extended by analogy to the sale of land? Comment 1 to UCC § 1–103 considers that possibility:

> The courts have often recognized that the policies embodied in an act are applicable in reason to subject-matter that was not expressly included in the language of the act . . . and did the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general. . . . Nothing in the Uniform Commercial Code stands in the way of the continuance of such action by the courts.

See Chevalier v. Town of Sanford, 475 A.2d 1148 (Me.1984), a land auction case in which the court reasoned by analogy to UCC § 2–328.

Although UCC § 2–328 describes a sale by auction as "complete when the auctioneer so announces by the fall of the hammer or in other customary manner," thousands of auctions daily are now concluded with a click rather than a hammer, as buyers bid on on-line auction websites such as e-Bay. Millions of auctions can be found at any time on that and other sites, governed by a set of rules that bidders and sellers agree to as a condition of using the site. An on-line seller may also condition the offer to sell by setting a"reserve price" that must be met in order for the seller to be bound; see Note 4, p. 150–151 above.

PROBLEM

The Midas Touch. In 1985, as part of the Liberty–Ellis Island Commemorative Coin Act, the United States Mint produced a limited run of 500,000 gold five dollar coins. Announcements were sent to lists of coin collectors, who were informed that "[i]f the Mint receives your reservation by December 31, 1985, you will enjoy a favorable Pre–Issue Discount saving you up to 16% on your coins." The Mint received over 756,000 orders, and a number of buyers were sorely disappointed when their order forms were returned. (The court noted that many buyers "developed a more serious case of disappointment when it became apparent that the gold coins had increased in value by approximately 200% with the first months of 1986.") Two such buyers, Mary and Anthony Mesaros, sued for breach of contract, arguing that their order forms ("YES, please accept my order for the U.S. Liberty Coins I have indicated. I understand that all sales are final. Verification of my order will be made by the Department of Treasury, US Mint . . . ") were acceptances of the Mint's advertised offer. Did the Mesaros have a contract with the United States? See Mesaros v. United States, 845 F.2d 1576, 1578 (Fed.Cir.1988).

CONSTRUCTION CONTRACTS

Construction contracts are the last of the "typical categories" of cases we highlight here. Given the construction industry's significant role in the economy, such agreements are of great importance. In consequence, dis-

putes arising from construction contracts often result in litigation. The complexity of the typical transaction, with a general contractor perched between an owner and a subcontractor, invites sophisticated analysis that is often useful by analogy in other transactions involving intermediaries, also called brokers or middlemen. See Note 2, p. 499.

Some of the most intractable disputes in construction contracts involve claims of improper performance. This is not surprising given the length of time required to build a particular project and the difficulty of complying with the details of plans and specifications; such claims are dealt with in later chapters. We begin, however, with the problem of mistake in the formation stage. For major construction projects, the process of offer and acceptance typically involves a complicated bidding process in which general contractors compete with each other by submitting bids that are in turn based on bids received from subcontractors, who also compete with each other. Bidding is particularly common, and often highly regulated, when the construction is for a branch of government rather than a private landowner. Why might that be?

MISTAKES IN OFFERS

Mistakes occur, or are at least noticed, at various points throughout the contracting process. They may be made by one party (unilateral mistake) or by both parties (bilateral mistake). In this section, we are concerned with unilateral mistakes in offers that are computational in nature or that result from an error in the transmission of the offer, the sort of mistake that Professor Melvin Eisenberg calls "mental blunders." . In Chapter 8, we consider *mutual* mistakes that are sometimes in the nature of a misunderstanding between the parties about the terms of their agreement than the more flatfooted errors at issue at here.

Mistakes in offers tend to occur in situations where the contracting process is complex, is subject to deadlines, and involves input from multiple parties. This explains why mistakes commonly arise in bids (offers) submitted by contractors for work on construction projects. Not only must the contractor solicit, select, and coordinate bids from multiple subcontractors across the building trades in exact compliance with the owner's specifications, but the entire process occurs within a short and frequently pressured time frame:

> Subcontractor and supplier bidders may fear that their bids will be undercut by their competition, so they often wait to submit their bids until the last hour or two before the general contractor's bid is due. Frequently, a subcontractor or materialman will discover after submitting his bid that he has made a mistake, perhaps because one of the general contractors informs him that he is either substantially higher or substantially lower than other bidders. He must then frantically review the plans (if he still has access to them), correct his mistake, and telephone his corrected price to all concerned. While this last-minute subcontractor bidding is being received, the general contractor is collating and comparing the prices and the qualifying restrictions that he has received, adding in factors for his own workforce and supervision, and adjusting the total as later prices are received by phone.

Comment, The Subcontractor's Bid: An Option Contract Arising Through Promissory Estoppel, 34 Emory L.J. 421, 425–28 (1985).

In Elsinore Union Elementary School District v. Kastorff, for example, the contractor made what the court identified as "an honest clerical error" in his bid on a building contract after he failed to include anything for plumbing in his bid. When the bids were opened, Kastorff's was the lowest by some $11,000. Noticing this, the school superintendent asked Kastorff if his numbers were correct. After checking with his assistant, Kastorff replied that they were, and was awarded the contract. After realizing his mistake the next day, Kastorff informed the school district he could not do the job for the amount bid. The school district refused to release him from the contract. When Kastorff refused to perform, the school district hired the second lowest bidder, and sued Kastorff for the difference between the two bids. 353 P.2d 713 (Cal. 1960). Judgment was given for the school district, and Kastorff appealed. Held: Reversed.

The Supreme Court of California agreed with the trial court that "the bid had been submitted as the result of an excusable and honest mistake of a material and fundamental character, that [Kastorff] had not been negligent in preparing the proposal, that it had acted promptly to notify the board of the mistake and to rescind the bid, and that the board had accepted the bid with knowledge of the error. . . . Under the circumstances, the "bargain" for which the board presses. . . appears too sharp for law and equity to sustain." What factors appear to have made Kastorff's mistake excusable?

A second area in which mistakes occur with some regularity is in settlement agreements. As you read the next case, consider if there are similarities in the circumstances of formation between construction contracts and settlements agreements.

NOTES

(1) *Knowledge of Mistake.* If an offeree knows or has reason to know, of the offeror's material mistake at the time of acceptance, the offeror is not bound. "One cannot snap up an offer or bid knowing that it was made in mistake." Tyra v. Cheney, 152 N.W. 835 (Minn.1915).

Professor Melvin Eisenberg argues that to grant relief for a bidder, in a case like *Kastorff*, is the morally correct thing to do. Eisenberg, Mistake in Contract Law, 91 Calif.L.Rev. 1573, 1586 (2003). On that view, should the size of the party's computational error matter? Is it any more immoral to take advantage of a known thousand-dollar mistake than of a ten-dollar mistake? In Kastorff's case, the court took note of the magnitude of his mistake.

(2) *Mistakes in Bidding.* As noted in the excerpt on subcontractors' bids, p. 152 above, "Mistakes come in a variety of flavors. There may be mistakes in construing the language of the plans and specification, in estimating quantities required, in unit pricing, in multiplying quantities by unit prices, in transferring data from one work-sheet to another, in typing the bid form, and many others." Id. Courts considering bidders' claims for relief for mistake have often distinguished between mistakes that are "clerical" or "computational" from those of "judgment." Consider a dealer in lumber, invited to bid on a sale of shingles required to roof a building. What mistakes might the dealer make that would be certainly ones of judgment? Is it apparent why the courts disfavor giving relief for mistakes of that kind? See M.A. Mortenson v. Timberline

Software Corp., 998 P.2d 305 (Wash.2000), where the mistake was attributable to faulty computer software.

Does the provision of relief to a contractor like Kastorff tempt low bidders to manufacture evidence of mistakes in computation when the mistake was really one of misjudgment? Professor Eisenberg has discounted that threat on the ground that typically, when a computational error has been made, "the work papers, surrounding circumstances, or both, clearly demonstrate" the error. See Eisenberg, cited in Note 1 above, at 1587.

(3) *Statutory Sequel.* More than a decade after the decision in *Kastorff*, mentioned in the text above, the California legislature enacted the following statute:

> A bidder [on a public contract] shall not be relieved of the bid unless by consent of the awarding authority nor shall any change be made in the bid because of mistake, but the bidder may bring an action against the public entity in a court of competent jurisdiction in the county in which the bids were opened for the recovery of the amount forfeited, without interest or costs.
>
> The bidder shall establish to the satisfaction of the court that:
>
> (a) A mistake was made.
>
> (b) He or she gave the public entity written notice within five days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred.
>
> (c) The mistake made the bid materially different than he or she intended it to be.
>
> (d) The mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

Why might the legislature have enacted this statute? What result in *Kastorff* under this statute?

(4) *Knowledge* vs. *Reason to Know.* An offeror who has submitted a mistaken bid may claim that the magnitude of the mistake was such that it should have been apparent from the face of the offer. What sorts of circumstances might warrant suspicion on the part of the offeree? See Sumerel v. Goodyear Tire & Rubber, Co., 232 P.3d 128 (Colo.Ct. App., 2009), presented in full in Chapter 9, involving the settlement agreement of a lawsuit, in which the plantiffs' counsel argued that a $500,000 misstatement of the amount of a settlement in an email was binding. (Plaintiffs' counsel attributed the overstatement "to a possible desire on [defendant's] part to 'sweeten the pot.' ") As the court admonished: "In our view, the present case is a prototype for a purported offer that was "on its face manifestly too good to be true." *The jury had* already spoken, and the parties had agreed on the relevant accrual dates. All that should have been left was a simple mathematical calculation. . . . [T]he proper course [of conduct] was obvious to us: plaintiffs' counsel should have called [defendant's counsel], identified the discrepancy, and concluded the

matter without further delay. . . [T]he law will not countenance the patently inequitable result that plaintiffs seek."

Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons' Co., 264 F.2d 435 (8th Cir.1959), provides another good example. There Kiewit was preparing a bid for the construction of a hospital and Heifetz offered to do the kitchen work for $99,500, $52,000 less than Kiewit's next lowest quotation. Kiewit lowered its bid by $52,000, which made it $17,942,200, the lowest by $9,000. After Kiewit was awarded the contract and had accepted the Heifetz offer, Heifetz discovered that in preparing its quotation it had overlooked some subsidiary kitchen installations required by the plans. It sought rescission and argued that since its quotation was one-third less than the next lowest, Kiewit should have realized that there had been a mistake. The court rejected this contention and held that the contract was enforceable. It relied upon testimony by Kiewit's employees that they were ignorant of the mistake, upon Kiewit's lack of familiarity with the kitchen equipment field, and upon "testimony indicating that at times some contractor would have a special reason for desiring to obtain a particular job and would submit a figure controlled by that consideration." It noted that "the figures submitted by subcontractors on the electrical work for the project has varied from $1,400,000 to $1,850,000 and on the lathing and plastering work from $672,000 to $1,028,000; and the 'mechanical spread' had been between $3,647,000 and $6,000,000."

Is it of any significance that a general contractor will sometimes pass over a low bid to accept one from a subcontractor with which the general contractor has a personal or business connection, and that subcontractors sometimes deliberately make losing bids to break up such combinations? Is it of any significance that subcontractors sometimes bid low in the expectation that changes will later be made to provide for profitable extra work?

(5) *Errors in Advertising.* What should a merchant to do when it finds that it has misstated the price for advertised goods? One solution is to withdraw the ad, before opportunistic shoppers have proceeded to checkout. Another, given a serious understatement of price, is simply to dishonor orders from shoppers, on the ground that shoppers should have known the price was "too good to be true." Is there protective language a merchant might include in every ad, such as "One to a customer"? See Mark Budnitz, Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?, 16 Ga.St.U.L.Rev. 741 (2000).

PROBLEM

Transmission Problems. In the market for a car, Donovan read an advertisement placed by Lexus of Westminster in his local newspaper, the Daily Pilot. The advertisement presented a number of used cars for sale, including a sapphire blue 1995 Jaguar XJ6, VIN 720603, listed for $25,995. Donovan went down to the dealership, took the advertised car for a test drive, and told the sales representative that he would buy it. The sales representative immediately informed Donovan that the advertised price was a mistake. Although Donovan began to write a check for the advertised price, he was informed that the car could only be sold for $37,016. Donovan refused to pay the higher price and sued the dealership for breach of contract. Donovan v. RRL Corp., 88 Cal. Rptr.2d 143 (Cal.App. 1999).

In that case, the appellate court made the following observation:

> A first year law student would not be surprised to be called upon to answer the questions we address here. Does an advertisement for a specific used car at a designated price constitute an offer that may be accepted by tendering the purchase price? Does a statute prohibiting an automobile dealer from refusing to sell a vehicle at the advertised price affect the answer? Finally, does the answer change if the erroneous price inserted in the advertisement was the result of an error? We believe the answers are respectively 'possibly,' 'yes,' and 'no.' However, since such cryptic answers would not entitle our hypothetical law student to a passing grade, we must explain these answers below.

Id. at 144. Do you agree with the court's answers? As a *real* first year law student, what are your explanations? A few additional facts may help: the newspaper had made a typographical error which caused the 1995 Jaguar to be advertised at the price of a 1994 Jaguar; the dealership failed to proofread the advertising copy received from the Daily Pilot; a California statute makes it unlawful for an automobile dealer to "[f]ail to sell a vehicle to any person at the advertised total price, exclusive of taxes and [certain other specified fees]"; and Donovan did not know the market price of a 1995 Jaguar.

In 2001, the California Supreme Court reversed the appellate court decision. Donovan v. RRL Corp., 27 P.3d 702 (Cal.2001). On what grounds might the lower court have failed to get a passing grade?

(1) *Errors on Line?* Foley, in the market for a boat, examined a 55' Hatteras Convertible ("Material Girls") owned by Yale and Donna Turner, but decided not to make an offer. Five months later, the Turners informed Foley that the boat was listed on eBay as a "reserve auction" (reserving the sellers' right not to sell unless an undisclosed minimum reserve price was met). Although Foley was the highest bidder, he had not met the reserve price, so no sale was concluded. A week later, the boat was listed again on eBay as a reserve auction; again the reserve price was not met. The boat was then listed again, but this time as a "No Reserve" auction with an opening bid of $100,000. Foley was the highest bidder (at $135,000) and received an eBay generated email informing him that he had "won." The Turners refused to sell him the boat on the grounds that their agent had mistakenly listed the auction as "No Reserve."

Assuming that the Turners' agent was authorized to act for them (and leaving further questions about agency for your course on torts), are the Turners obligated to sell the boat to Foley? How would you describe the nature of an offer created by a reserve auction? See Foley v. Yacht Management Group, Inc., 2009 WL 2020776 (N.D. Ill, 2009).

SECTION 3. THE ACCEPTANCE

What is an acceptance? Corbin gave this answer: "An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract. What acts are sufficient to serve this purpose? We must look first to the terms in which the offer was expressed, either by words or by other conduct. . . . The offeror has, in the beginning, full power to determine the acts that are to constitute acceptance." Arthur L. Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations, 26 Yale L.J. 169, 199 (1917).

Assuming that there has been an offer, the offeree by exercising the power of acceptance "thereby creates," as Corbin puts it, "the set of legal relations called a contract." One of the most important consequences of this "set of legal relations" is that the offeror is no longer free to change its mind and withdraw from the relationship without incurring liability. (In Hohfeldian terminology, see Note 2, p. 72, "the offeree has, before the contract is made, a power to create a contract by means of acceptance. A power is the capacity to change a legal relationship.") By what means, then, may the offeree exercise this power of acceptance? If, as Corbin says, the offeror has "full power to determine the acts that are to constitute acceptance," the first step in answering this question is to look at the offer to see what sort of acceptance it invited.

We already know from Chapter 1 that an offeror may bargain either for a performance or for a promise. As suggested at Note 5, p. 40, the more economically significant transactions usually involve the latter sort of bargain, in which the offeror seeks the assurance of another promise in return for its own. When a promise is sought, can it be inferred from conduct of the offeree? Can mere silence ever count? Must the offeree notify the offeror of the acceptance? This section considers these and related questions.

International Filter Co. v. Conroe Gin, Ice & Light Co.

Commission of Appeals of Texas, 1925.
277 S.W. 631.

Action by the International Filter Company against the Conroe Gin, Ice & Light Company. Judgment for defendant was affirmed in 269 S.W. 210, and plaintiff brings error. Reversed and remanded.

■ NICKELS, J. Plaintiff in error, an Illinois corporation, is a manufacturer of machinery, apparatus, etc., for the purification of water in connection with the manufacture of ice, etc., having its principal office in the city of Chicago. Defendant in error is a Texas corporation engaged in the manufacture of ice, etc., having its plant, office, etc., at Conroe, Montgomery County, Tex. [Hereafter plaintiff in error is referred to as International Filter, and defendant in error as Conroe Gin.]

On February 10, 1920, through its traveling solicitor, Waterman, International Filter, submitted to Conroe Gin, acting through Henry Thompson, its manager, a written instrument, addressed to Conroe Gin, which (with immaterial portions omitted) reads as follows:

"Gentlemen: We propose to furnish, f.o.b. Chicago, one No. two Junior (steel tank) International water softener and filter to purify water of the character shown by sample to be submitted. . . . Price: Twelve hundred thirty ($1,230.00) dollars. . . . This proposal is made in duplicate and becomes a contract when accepted by the purchaser and approved by an executive officer of the International Filter Company, at its office in Chicago. Any modification can only be made by duly approved supplementary agreement signed by both parties.

"This proposal is submitted for prompt acceptance, and unless so accepted is subject to change without notice.

"Respectfully submitted,
"International Filter Co.

"W.W. Waterman."

On the same day the "proposal" was accepted by Conroe Gin through notation made on the paper by Thompson reading as follows:

"Accepted Feb. 10, 1920.
"Conroe Gin, Ice & Light Co.,
"By Henry Thompson, Mgr."

The paper as thus submitted and "accepted" contained the notation, "Make shipment by Mar. 10." The paper, in that form, reached the Chicago office of International Filter, and on February 13, 1920, P.N. Engel, its president and vice president, indorsed thereon: "O.K. Feb. 13, 1920, P.N. Engel." February 14, 1920, International Filter wrote and mailed, and in due course Conroe Gin received, the following letter:

"Feb. 14, 1920.

"Attention of Mr. Henry Thompson, Manager.

"Conroe Gin, Ice & Light Co., Conroe, Texas–Gentlemen: This will acknowledge and thank you for your order given Mr. Waterman for a No. 2 Jr. steel tank International softener and filter, for 110 volt, 60 cycle, single phase current—for shipment March 10th.

"Please make shipment of the sample of water promptly so that we may make the analysis and know the character of the water before shipment of the apparatus. Shipping tag is inclosed, and please note, the instructions to pack to guard against freezing.

"Yours very truly,
"International Filter Co.
"M.B. Johnson."

By letter of February 28, 1920, Conroe Gin undertook to countermand the "order," which countermand was repeated and emphasized by letter of March 4, 1920. By letter of March 2, 1920 (replying to the letter of February 28th), International Filter denied the right of countermand, etc., and insisted upon performance of the "contract." The parties adhered to the respective positions thus indicated, and this suit resulted.

International Filter sued for breach of the contract alleged to have been made in the manner stated above. The defense is that no contract was made because: (1) Neither Engel's indorsement of "O.K.," nor the letter of February 14, 1920, amounted to approval "by an executive officer of the International Filter Company, at its office in Chicago." (2) Notification of such approval, or acceptance, by International Filter was required to be communicated to Conroe Gin; it being insisted that this requirement inhered in the terms of the proposal and in the nature of the transaction and, also, that Thompson, when he indorsed "acceptance" on the paper stated to Waterman, as agent of International Filter, that such notification must be promptly given; it being insisted further that the letter of February 14, 1920, did not constitute such acceptance or notification of approval, and therefore Conroe Gin, on February 28, 1920, etc., had the

right to withdraw or countermand, the unaccepted offer. Thompson testified in a manner to support the allegation of his statement to Waterman. There are other matters involved in the suit which must be ultimately determined, but the foregoing presents the issues now here for consideration.

The case was tried without a jury, and the judge found the facts in favor of Conroe Gin on all the issues indicated above, and upon other material issues. The judgment was affirmed by the Court of Civil Appeals, 269 S.W. 210.

We agree with the honorable Court of Civil Appeals upon the proposition that Mr. Engel's indorsement of "O.K." amounted to an approval "by an executive officer of the International Filter Company, at its office in Chicago," within the meaning of the so-called "proposal" of February 10th. The paper then became a "contract," according to its definitely expressed terms, and it became then, and thereafter it remained, an enforceable contract, in legal contemplation, unless the fact of approval by the filter company was required to be communicated to the other party and unless, in that event, the communication was not made.

We are not prepared to assent to the ruling that such communication was essential. There is no disposition to question the justice of the general rules stated in support of that holding, yet the existence of contractual capacity imports the right of the offerer to dispense with notification; and he does dispense with it "if the form of the offer," etc., "shows that this was not to be required." 9 Cyc. 270, 271; Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (and other references in note 6, 9 Cyc. 271). . . .

The Conroe Gin, Ice & Light Company executed the paper for the purpose of having it transmitted, as its offer, to the filter company at Chicago. It was so transmitted and acted upon. Its terms embrace the offer, and nothing else, and by its terms the question of notification must be judged, since those terms are not ambiguous.

The paper contains two provisions which relate to acceptance by the filter company. One is the declaration that the offer shall "become a contract . . . when approved by an executive officer of the International Filter Company, at its Chicago office." The other is thus stated: "This proposal is submitted for prompt acceptance, and unless so accepted is subject to change without notice." The first provision states "a particular mode of acceptance as sufficient to make the bargain binding," and the filter company (as stated above) followed "the indicated method of acceptance." When this was done, so the paper declares, the proposal "became a contract." The other provision does not in any way relate to a different method of acceptance by the filter company. Its sole reference is to the time within which the act of approval must be done; that is to say, there was to be a "prompt acceptance," else the offer might be changed "without notice." The second declaration merely required the approval therein before stipulated for to be done promptly; if the act was so done, there is nothing in the second provision to militate against, or to conflict with, the prior declaration that, thereupon, the paper should become "a contract."

A holding that notification of that approval is to be deduced from the terms of the last-quoted clause is not essential in order to give it meaning or to dissolve ambiguity. On the contrary, such a construction of the two provisions would introduce a conflict, or ambiguity, where none exists in the language itself, and defeat the plainly expressed term wherein it is said that the proposal "becomes a contract . . . when approved by an execu-

tive officer." There is not anything in the language used to justify a ruling that this declaration must be wrenched from its obvious meaning and given one which would change both the locus and time prescribed for the meeting of the minds. The offerer said that the contract should be complete if approval be promptly given by the executive officer at Chicago; the court cannot properly restate the offer so as to make the offerer declare that a contract shall be made only when the approval shall have been promptly given at Chicago and that fact shall have been communicated to the offerer at Conroe. In our opinion, therefore, notice of the approval was not required.

The letter of February 14th, however, sufficiently communicated notice, if it was required. . . . Here the fact of acceptance in the particular method prescribed by the offerer is established aliunde the letter—Engel's "O.K." indorsed on the paper at Chicago did that. The form of notice, where notice is required, may be quite a different thing from the acceptance itself; the latter constitutes the meeting of the minds, the former merely relates to that pre-existent fact. The rules requiring such notice, it will be marked, do not make necessary any particular form or manner, unless the parties themselves have so prescribed. Whatever would convey by word or fair implication, notice of the fact would be sufficient. And this letter, we think, would clearly indicate to a reasonably prudent person, situated as was the defendant in error, the fact of previous approval by the filter company. If the Gin, Ice & Light Company had acted to change its position upon it as a notification of that fact, it must be plain that the filter company would have been estopped to deny its sufficiency. . . .

We recommend that the judgment of the Court of Civil Appeals be reversed, and that the cause be remanded to that court for its disposition of all questions not passed upon it by it heretofore and properly before it for determination.

■ CURETON, C.J. Judgment of the Court of Civil Appeals reversed, and cause remanded to the Court of Civil Appeals for further consideration by that court, as recommended by the Commission of Appeals.

NOTES

(1) *Questions.* Which party was the offeror in this case? Who prepared the offer? Which of the following constituted the acceptance: The buyer's notation "Accepted Feb. 10, 1920"? The seller's indorsement "O.K. Feb. 13, 1920"? The seller's Feb. 14, 1920 letter? What function does each of these perform in the formation process?

(2) *Expressions of Acceptance.* The Court of Civil Appeals, reasoned that International Filter's letter of February 14 "did not constitute an acceptance of appellee's proposal." International Filter Co. v. Conroe Gin, Ice & Light Co., 269 S.W. 210, 215 (1925). It relied on Courtney Shoe Co. v. E.W. Curd & Son, 134 S.W. 146 (Ky.1911). In that case a manufacturer wrote, "Your order . . . is at hand and will receive our prompt and careful attention," but sent a second letter eight days later rejecting the order on the ground that the salesman had made the sale without authority. It was held that the first letter was not an acceptance. Assume, for the moment, that the February 14 letter was the only response to the proposal signed by Conroe Gin. Do you agree with the Court of Civil Appeals?

(3) *Control of Representatives.* When a seller is a large organization with salespersons ("traveling solicitors" in the opinion above) who are expected to use a carefully prepared standard form for all contracts, there is still a risk that the salespersons will make written changes on the form during their negotiations with customers. Does this fact suggest a use for a home-office-approval clause? See Restatement, Second, of Agency § 167 as to the effect of such language as: "No agent of seller has authority to change the terms hereof." What additional benefits or risks might such a clause provide the seller? The buyer?

(4) *Notice in Bilateral Contracts.* Can you distinguish the position of International Filter from that of the offeree who merely thinks or mutters "I accept"? See Restatement §§ 54 and 56. For a case holding that the mere signing of the contract by the offeree was not acceptance even though the contract said that it would be binding "when . . . signed by both parties," see Kendel v. Pontious, 261 So.2d 167 (Fla.1972). If notice of acceptance is necessary for an offer that seeks a promise, on what basis did the court find that no notice was required in International Filter? Whether notice is required in unilateral contracts is discussed, on p. 166. Do you have an intuition about whether it should be?

PROBLEMS

(1) *Expression of Acceptance I.* On May 16, a Seattle retailer ordered men's fall suits on a printed form supplied by the manufacturer's salesman that provided that the manufacturer was not bound until acceptance by one of its officers in New Jersey. On May 23, the manufacturer, by form letter, advised the retailer that, "You may be assured of our very best attention to this order." On July 18, after the time for placing orders for fall suits had passed, and at the instigation of one of the retailer's competitors in Seattle, the manufacturer wrote to "cancel" the order. The retailer sued the manufacturer and had judgment in the trial court, which found that the manufacturer's form letter had been an acceptance. The Supreme Court of Washington affirmed. Are the facts in this case distinguishable from those in *International Filter,* above? Hill's, Inc. v. William B. Kessler, Inc., 246 P.2d 1099 (Wash.1952).

(2) *Expression of Acceptance II.* Through its website, Smoking Everywhere, Inc. sold an alternative to regular cigarettes called "electronic cigarettes," or "E–Cigs." To generate web traffic to its site, Smoking Everywhere entered into a contract with CX Digital Media, Inc., ("CX Digital"), a specialist in on-line advertising. Smoking Everywhere agreed to pay CX Digital a commission of $45 for every customer referral or "lead" that resulted from an ad placed by CX Digital or its affiliates, subject to a limit of 200 per day. A dispute arose when Smoking Everywhere refused to pay a CX Digital invoice for more than 200 referrals a day. CX Digital argued that the parties' original agreement had been modified to provide for compensation for an unlimited number of leads. At trial, the CX Digital produced the following transcript, part of a day-long instant-message conversation, between Nick Touris, a Smoking Everywhere vice-president, and Pedram Soltani, an account manager at CX Digital:

> pedramcx (2:49:45 PM): A few of our big guys are really excited about the new page and they're ready to run it

pedramcx (2:50:08 PM): We can do 2000 orders/day by Friday if I have your blessing

pedramcx (2:52:13 PM): those 2000 leads are going to be generated by our best affiliate and he's legit

nicktouris (4:43:09 PM): NO LIMIT

pedramcx (4:43:21 PM): awesome!

Treating the modification as an issue of formation, how would you analyze this sequence of exchanges? What claim must CX Digital make for the meaning of the message "awesome!"? Do you agree? See CX Digital Media, Inc. v. Smoking Everywhere, Inc., 09–62020–CIV, 2011 WL 1102782 (S.D. Fla. Mar. 23, 2011).

White v. Corlies & Tift

Court of Appeals of New York, 1871.
46 N.Y. 467.

Appeal from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth Street, New York City.

The defendants were merchants at 32 Day Street.

In September, 1865, the defendants furnished the plaintiff with specifications for fitting up a suite of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September 28th, the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications, and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' bookkeeper wrote the plaintiff the following note:

"New York, September 29.

"Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

"The writer will call again, probably between 5 and 6 this p.m.

"W.H.R.
For J.W. Corlies & Co.,
32 Dey St."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.[j]

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey Street (meaning to give notice of assent), before commencing the work?

In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties."

To this defendants excepted. . . .

■ FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September 30th[k] was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the

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[j] Some additional facts, taken from the record on appeal of White's testimony may be helpful. Corlies' initial request was to have the office done in black walnut, a hard wood, within 21 days. White replied that he could not do the job in a hard wood in that time. Corlies then requested an estimate for white pine, a soft wood. White left the estimate on September 28, but did not indicate the time within which he would finish. Corlies made a change in the specifications to which White assented. There followed the letter of September 29 from Corlies. The countermand from Corlies said that it had decided to do the office in black walnut and requested an estimate for that in place of pine. Record, pp. 7–12.

[k] It appears the court meant September 29.

defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought, formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

Judgment reversed, and new trial ordered.

NOTES

(1) *An Ambiguity.* According to Judge Folger's first paragraph, the bookkeeper's note of September 29 was a proposal, and not an acceptance of an offer made by White in the estimate he left with Corlies & Tift. That might be explained in two ways. One is that the estimate was not an offer. Were there any facts that suggest that White's estimate may have constituted an offer? Might "I estimate . . . " constitute an offer just as well as "we quote you Mason fruit jars"?

The other explanation is that the opening phrase of the September 29 note—*"Upon an agreement"*—was understood to mean "When we have agreed about finishing the fitting up the offices (and not before). . . . " The brief on appeal for Corlies & Tift characterized the phrase this way, as one "demanding an agreement." Consider an alternate reading: "With reference to the work of fitting up. . . . " That reading may comport better with 19th–century diction, and with the opinion as a whole.

(2) *Problems of Manifestation.* Assuming that the bookkeeper's note constituted an offer, does the court's opinion imply that White might have accepted it by some kind of activity? If so, what kind of activity might count? Activity at a lumberyard? At his shop? If not, what sense can be made of ". . . you can begin at once"?

The court stated a familiar rule about contracts created by correspondence: posting a letter sometimes constitutes the acceptance of an offer. (The "mailbox rule" is further considered at p. 195 below.) In such instances, however, the offeror is at risk, for no more than a few days, of having made a commitment that it is unaware of. Corlies & Tift would have borne that risk if White could have bound it to a contract simply by busying himself with "stuff" suited only for offices at 57 Broadway. On the other hand, Corlies & Tift gave some indication of willingness to bear that risk: ". . . you can begin at once."

Ever–Tite Roofing Corporation v. Green

83 So.2d 449 (La.App.1955).

The Greens wished to have Ever–Tite Roofing re-roof their residence, and signed a document that set out the work in detail and the price in monthly installments. This document was also signed by Ever–Tite's sales

representative who, however, had no authority to bind Ever–Tite. The document contained a provision that, "This agreement shall become binding only upon written acceptance hereof, by the principal or authorized officer of the Contractor, or upon commencing performance of the work." As the Greens knew, since the work was to be done entirely on credit, it was necessary for Ever–Tite to get credit reports and obtain the approval of the lending institution that was to finance the contract. When this was accomplished, about nine days after execution of the agreement, Ever–Tite loaded two trucks and sent them with its workmen some distance to the Green's residence. Upon their arrival they found that others had been engaged two days before, and they were not permitted to work. Ever–Tite sued the Greens for breach of contract. From a judgment for defendant, plaintiff appealed.

■ AYRES, JUDGE. . . . The basis of the judgment appealed was that defendants had timely notified plaintiff before "commencing performance of work". The trial court held that notice to plaintiff's workmen upon their arrival with the materials that defendants did not desire them to commence the actual work was sufficient and timely to signify their intention to withdraw from the contract. With this conclusion we find ourselves unable to agree. . . . Defendants evidently knew this work was to be processed through plaintiff's Shreveport office. The record discloses no unreasonable delay on plaintiff's part in receiving, processing or accepting the contract or in commencing the work contracted to be done. No time limit was specified in the contract within which it was to be accepted or within which the work was to be begun. It was nevertheless understood between the parties that some delay would ensue before the acceptance of the contract and the commencement of the work, due to the necessity of compliance with the requirements relative to financing the job through a lending agency. The evidence as referred to hereinabove shows that plaintiff proceeded with due diligence. [In an omitted part of the opinion the court set out several articles of the Louisiana Civil Code. Under article 1809, the most relevant here, the offeror "may therefore revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of the offer he has given, or from the circumstances of the case he may be supposed to have intended to give to the party to communicate his determination."] [S]ince the contract did not specify the time within which it was to be accepted or within which the work was to have been commenced, a reasonable time must be allowed therefor in accordance with the facts and circumstances and the evident intention of the parties. A reasonable time is contemplated where no time is expressed. What is a reasonable time depends more or less upon the circumstances surrounding each particular case. The delays to process defendants' application were not unusual. The contract was accepted by plaintiff by the commencement of the performance of the work contracted to be done. This commencement began with the loading of the trucks with the necessary materials in Shreveport and transporting such materials and the workmen to defendants' residence. Actual commencement or performance of the work therefore began before any notice of dissent by defendants was given plaintiff. The proposition and its acceptance thus became a completed contract.

[Reversed.]

NOTE

Means of Acceptance. What means of acceptance were authorized by the Greens offer to Ever–Tite? What was the purpose of the words 'or upon commencing performance of the work?' Could the court have read this language more favorably to the Greens? Was the contract between the Greens and Ever–Tite bilateral or unilateral? What is the difference an offer such as the one made by the Greens above, and an offer seeking performance?

NOTIFICATION OF ACCEPTANCE IN UNILATERAL CONTRACTS

As White v. Corlies & Tift suggests, if an offeror proposes a "bilateral" contract and invites acceptance by means of a promise, it is ordinarily understood that the offeree must at least take steps to see that the promise is, in the words of the opinion in that case, "in some reasonable time communicated" to the offeror. The court stressed the fact that White had neither indicated his determination to accept by *speech* nor "put in course of indication" to Corlies & Tift of anything he had *done*. See Restatement § 56. (Can the *International Filter* and *Ever–Tite* cases be reconciled with this rule?)

The necessity of giving notice is less obvious if the offer proposes a "unilateral" contract, inviting acceptance by means of performance and not a promise. A celebrated case is Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256 (C.A.). It arose out of the following advertisement:

> £ 100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball.[1] £ 1000 is deposited with the Alliance Bank, Regent Street shewing our sincerity in the matter. . . .

After buying and using a smokeball as directed, Carlill contracted influenza. When the Company refused to pay, she sued and was awarded £ 100 in damages. The Company argued that Carlill had failed to notify it of her acceptance, but its appeal was dismissed.

As Lindley, L.J., explained, the advertisement was not "a mere puff" but an offer under which "the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball." The fact that she had not notified the Company of her acceptance was not fatal to her claim. According to Bowen, L.J., "One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. . . . But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for

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[1] The smoke ball was a small compressible hollow ball filled with carbolic acid in powder form, worn around the neck on a cord. When the ball was squeezed, the powder was forced through a small opening in the ball and created a small cloud of smoke. For more on the case, including pictures of the advertisement, facts on the smokeball and the lethality of carbolic acid in more than small amounts, see Simpson, Quackery and Contract Law: The Case of the Carbolic Smoke Ball, 14 J.Legal Stud. 345 (1985), reprinted in A.W.B. Simpson, Leading Cases in the Common Law 259, 262–64 (1995).

the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself, if he thinks it desirable to do so . . . [I]f the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification. . . . "

How can one tell if the offer has dispensed with notice? Bowen explained: "In many cases you look to the offer itself. In many cases you extract from the character of the transaction. . . . and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained."

NOTES

(1) *Questions.* Was the acceptance of the Carbolic Smoke Ball Company's offer: (a) the purchase of the smoke ball; (b) its use in accordance with directions; (c) the plaintiff's contracting influenza; or (d) all of the above? Which of these acts was bargained for? Recall that a promise may be conditional, so that its performance becomes due only if a specified event occurs. See Note 1, p. 72 above. Was the promise conditional in the Carbolic Smoke Ball case?

(2) *Notice from Afar.* A leading American case on the necessity of notice of acceptance of a unilateral offer is Bishop v. Eaton, 37 N.E. 665, 667 (Mass.1894). In that case Frank Eaton, in Nova Scotia, had written to Bishop, in Illinois, that if Bishop would help Eaton's brother, Harry, to get money, "I will see that it is paid." Bishop did help Harry get money by signing his note as surety when Harry got a loan. When Harry did not repay the loan, Bishop did, and sued Frank on his promise. The court thought that this was a case in which notice of acceptance should have been given, since the loan was made in Illinois and Frank was in Nova Scotia. "Ordinarily there is no occasion to notify the offeror of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance." The court concluded, however, that notice had been given.

Allied Steel and Conveyors, Inc. v. Ford Motor Co.

United States Court of Appeals, Sixth Circuit, 1960.
277 F.2d 907.

[On August 19, 1955, Ford ordered machinery from Allied on Ford's printed form, Purchase Order No. 15145, which provided that if Allied was required to perform work of installation on Ford's premises, Allied would be responsible for all damages caused by the negligence of its own employees. Attached to and made a part of the Purchase Order was another printed form, Form 3618, which included a much broader indemnity provision requiring Allied to assume full responsibility not only for the negligence of its own employees, but also for the negligence of Ford's employees in con-

nection with Allied's work, but this provision was marked "VOID."[m] The Purchase Order was accepted by Allied and the contract performed.

Subsequently, on July 26, 1956, Ford submitted to Allied Amendment No. 2 to Purchase Order 15145, by which Ford proposed to purchase additional machinery. The Amendment provided:

> This purchase order agreement is not binding until accepted. Acceptance should be executed on acknowledgment copy which should be returned to buyer.

The copy of Ford's Form 3618 attached to the Amendment was identical to that attached to Purchase Order No. 15145, but the broad indemnity provision of Form 3618 was not marked "VOID." The acknowledgment copy of the Amendment was executed by Allied on November 10 and reached Ford on November 12, 1956. By that time Allied had already begun installation and an employee of Allied had sustained personal injuries as a result of the negligence of Ford's employees in connection with Allied's work. The employee later brought suit against Ford and Ford in turn impleaded Allied, relying on the indemnity provision of Form 3618. The trial resulted in a verdict for the employee against Ford and for Ford against Allied. Allied's motion for judgment notwithstanding the verdict was denied and judgment was entered against it. Allied appealed.]

■ MILLER, DISTRICT JUDGE. . . . Allied first says that the contractual provisions evidenced by Amendment No. 2 were not in effect at the time of the injury because it had not been accepted at that time by Allied in the formal manner expressly required by the amendment itself. It argues that a binding acceptance of the amendment could be effected only by Allied's execution of the acknowledgment copy of the amendment and its return to Ford.

With this argument we cannot agree. It is true that an offeror may prescribe the manner in which acceptance of his offer shall be indicated by the offeree, and an acceptance of the offer in the manner prescribed will bind the offeror. And it has been held that if the offeror prescribes an exclusive manner of acceptance, an attempt on the part of the offeree to accept the offer in a different manner does not bind the offeror *in the absence of a meeting of the minds on the altered type of acceptance.* Venters v. Stewart, Ky.App., 261 S.W.2d 444, 446; Shortridge v. Ghio, Mo.App., 253 S.W.2d 838, 845. On the other hand, if an offeror merely suggests a permitted method of acceptance, other methods of acceptance are not precluded. Restatement, Contracts, Sec. 61; Williston on Contracts, Third Ed. Secs. 70, 76. Moreover, it is equally well settled that if the offer requests a return promise and the offeree without making the promise actually does or tenders what he was requested to promise to do, there is a contract if such performance is completed or tendered within the time allowable for accepting by making a promise. In such a case a tender operates as a promise to render complete performance. Restatement, Contracts, Sec. 63; Williston on Contracts, Third Ed. Sec. 75.

Applying these principles to the case at bar, we reach the conclusion, first, that execution and return of the acknowledgment copy of Amendment No. 2 was merely a suggested method of acceptance and did not pre-

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[m] An indemnity agreement is one whereby a party undertakes contingent liability for a loss threatening another. If the loss occurs, the indemnitor pays. Agreements of this kind are commonplace. See Pacific Gas and Electric v. G.W. Thomas Drayage and Rigging Co., p. 382 below.

clude acceptance by some other method; and, second, that the offer was accepted and a binding contract effected when Allied, with Ford's knowledge, consent and acquiescence, undertook performance of the work called for by the amendment. The only significant provision, as we view the amendment, was that it would not be binding until it was accepted by Allied. This provision was obviously for the protection of Ford, Albright v. Stegeman Motorcar Co., 168 Wis. 557, 170 N.W. 951, 952, 19 A.L.R. 463, and its import was that Ford would not be bound by the amendment unless Allied agreed to all of the conditions specified therein. The provision for execution and return of the acknowledgement copy, as we construe the language used, was not to set forth an exclusive method of acceptance but was merely to provide a simple and convenient method by which the assent of Allied to the contractual provisions of the amendment could be indicated. The primary object of Ford was to have the work performed by Allied upon the terms prescribed in the amendment, and the mere signing and return of an acknowledgment copy of the amendment before actually undertaking the work itself cannot be regarded as an essential condition to completion of a binding contract.

It is well settled that acceptance of an offer by part performance in accordance with the terms of the offer is sufficient to complete the contract. . . .

Other authorities are to the effect that the acceptance of a contract may be implied from acts of the parties. Malooly v. York Heating & Vent. Corp., 270 Mich. 240, 253, 258 N.W. 622; and may be shown by proving acts done on the faith of the order, including shipment of the goods ordered, Petroleum Products Distributing Co. v. Alton Tank Line, 165 Iowa 398, 403, 146 N.W. 52. Cf. Texas Co. v. Hudson, 155 La. 966, 971, 99 So. 714, 716. It would seem necessarily to follow that an offeree who has unjustifiably led the offeror to believe that he had acquired a contractual right, should not be allowed to assert an actual intent at variance with the meaning of his acts.

It has been argued on behalf of Allied, by way of analogy, that Ford could have revoked the order when Allied began installing the machinery without first having executed its written acceptance. If this point should be conceded, cf. Venters v. Stewart, supra, it would avail Allied nothing. For, after Allied began performance by installing the machinery called for, and Ford acquiesced in the acts of Allied and accepted the benefits of the performance, Ford was estopped to object and could not thereafter be heard to complain that there was no contract. Sparks v. Mauk, 170 Cal. 122, 148 P. 926. . . .

Affirmed.

NOTES

(1) *Questions.* At what point in time would it be reasonable to say that Ford could not have withdrawn the offer it made to Allied in "Amendment No. 2"? When Allied's truck pulled up at the gate to Ford's plant, and the gate was opened? Before that? After that?

(2) *Case Comparisons.* Can the *Ever-Tite* and *Allied Steel* cases be distinguished from White v. Corlies & Tift? What is the critical language of the offer in each case? What reason did Ford have for putting the clause on its form?

Consider, in this connection, the 1970 revision of Ford's purchase order, which reads:

> ACCEPTANCE—Unless otherwise provided herein, it is understood and agreed that the written acceptance by Seller of this purchase order or the commencement of any work or the performance of any services hereunder by Seller (including the commencement of any work or the performance of any services with respect to samples) shall constitute acceptance by Seller of this purchase order and of all of its terms and conditions, and that such acceptance is expressly limited to such terms and conditions.

Would the result have been different if the court had held that the offer had stated the *exclusive* means of acceptance? Had the UCC been enacted at this time, would it have applied to this case? What result under UCC § 2–204(1)?

PROBLEM

Acceptance and Rejection. The Chicago Medical School distributed a bulletin for prospective students stating that it selected applicants "on the basis of scholarship, character, and motivation," in addition to "academic achievement." Robert Steinberg received a bulletin, applied for admission, and paid the School the required $15 fee. Following his rejection, Steinberg learned that candidates were also evaluated on nonacademic criteria, such as their family's ability to make large donations. He argues that by failing to evaluate his application according to the stated criteria, the School is in breach of its contract with him. Can you state a theory of contract liability? Who made the offer? See Steinberg v. Chicago Medical School, 371 N.E.2d 634 (Ill.1977).

SHIPMENT OF GOODS AS ACCEPTANCE

Is a seller's shipment of goods, in response to a buyer's order, an acceptance? The question usually arises when the buyer attempts to revoke an order after the seller has shipped the goods in response to the buyer's order. UCC § 2–206(1)(b) provides that an order "for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods."

Why does UCC § 2–206(1)(b) state that shipment of *non-conforming* goods will constitute acceptance? That situation is taken up in the opinion that follows.

Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories

United States District Court, S.D. Indiana, Indianapolis Division, 1989.
724 F.Supp. 605.

■ MCKINNEY, DISTRICT JUDGE. Defendant Lederle Laboratories is a pharmaceutical manufacturer and distributor that makes a number of drugs, including the DTP vaccine. Plaintiff Corinthian Pharmaceutical is a distributor of drugs that purchases supplies from manufacturers such as Lederle Labs and then resells the product to physicians and other provid-

ers. One of the products that Corinthian buys and distributes with some regularity is the DTP vaccine. . . .

Lederle periodically issued a price list to its customers for all of its products. Each price list stated that all orders were subject to acceptance by Lederle at its home office, and indicated that the prices shown "were in effect at the time of publication but are submitted without offer and are subject to change without notice." The price list further stated that changes in price "take immediate effect and unfilled current orders and back orders will be invoiced at the price in effect at the time shipment is made."

From 1985 through early 1986, Corinthian made a number of purchases of the vaccine from Lederle Labs. During this period of time, the largest single order ever placed by Corinthian with Lederle was for 100 vials. When Lederle Labs filled an order it sent an invoice to Corinthian. . . .

During this period of time, product liability lawsuits concerning DTP increased, and insurance became more difficult to procure. As a result, Lederle decided in early 1986 to self-insure against such risks. In order to cover the costs of self-insurance, Lederle concluded that a substantial increase in the price of the vaccine would be necessary.

In order to communicate the price change to its own sales people, Lederle's Price Manager prepared "PRICE LETTER NO. E–48." This document was dated May 19, 1986, and indicated that effective May 20, 1986, the price of the DTP vaccine would be raised from $51.00 to $171.00 per vial. Price letters such as these were routinely sent to Lederle's sales force, but did not go to customers. Corinthian Pharmaceutical did not know of the existence of this internal price letter until a Lederle representative presented it to Corinthian several weeks after May 20, 1986.

Additionally, Lederle Labs also wrote a letter dated May 20, 1986, to its customers announcing the price increase and explaining the liability and insurance problems that brought about the change. Corinthian somehow gained knowledge of this letter on May 19, 1986, the date before the price increase was to take effect. In response to the knowledge of the impending price increase, Corinthian immediately ordered 1000 vials of DTP vaccine from Lederle. Corinthian placed its order on May 19, 1986, by calling Lederle's "Telgo" system. The Telgo system is a telephone computer ordering system that allows customers to place orders over the phone by communicating with a computer. After Corinthian placed its order with the Telgo system, the computer gave Corinthian a tracking number for its order. On the same date, Corinthian sent Lederle two written confirmations of its order. On each form Corinthian stated that this "order is to receive the $64.32 per vial price."

On June 3, 1986, Lederle sent invoice 1771 to Corinthian for 50 vials of DTP vaccine priced at $64.32 per vial. The invoice contained the standard Lederle conditions noted above. The 50 vials were sent to Corinthian and were accepted. At the same time, Lederle sent its customers, including Corinthian, a letter regarding DTP vaccine pricing and orders. This letter stated that the "enclosed represents a partial shipment of the order for DTP vaccine, which you placed with Lederle on May 19, 1986." The letter stated that under Lederle's standard terms and conditions of sale the normal policy would be to invoice the order at the price when shipment was made. However, in light of the magnitude of the price increase, Lederle had decided to make an exception to its terms and conditions and

ship a portion of the order at the lower price. The letter further stated that the balance would be priced at $171.00, and that shipment would be made during the week of June 16. The letter closed, "If for any reason you wish to cancel the balance of your order, please contact [us] . . . on or before June 13."

Based on these facts, plaintiff Corinthian Pharmaceutical brings this action seeking specific performance for the 950 vials of DTP vaccine that Lederle Labs chose not to deliver. [Lederle moved for summary judgment urging] a number of alternative grounds for disposing of this claim, including that no contract for the sale of 1000 vials was formed, that if one was formed, it was governed by Lederle's terms and conditions, and that the 50 vials sent to Corinthian were merely an accommodation. . . .

Discussion

Despite the lengthy recitation of facts and summary judgment standards, this is a straightforward sale of goods problem resembling those found in a contracts or sales casebook. The fundamental question is whether Lederle Labs agreed to sell Corinthian Pharmaceuticals 1,000 vials of DTP vaccine at $64.32 per vial. As shown below, the undisputed material facts mandate the conclusion as a matter of law that no such agreement was ever formed. . . .

Initially, it should be noted that this is a sale of goods covered by the Uniform Commercial Code, and that both parties are merchants under the Code. The parties do not discuss which state's laws are to apply to action, but because the Code is substantially the same in all states having any connection to this dispute, the Court will, for ease of reference, refer in general to the U.C.C. with relevant interpretations from Indiana and other states.

The starting point in this analysis is where did the first offer originate. An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." H. Greenberg, Rights and Remedies Under U.C.C. Article 2 § 5.2 at 50 (1987) [hereinafter "Greenberg, U.C.C. Article 2"], (quoting 1 Restatement (Second), Contracts § 4 (1981)). The only possible conclusion in this case is that Corinthian's "order" of May 19, 1986, for 1,000 vials at $64.32 was the first offer. Nothing that the seller had done prior to this point can be interpreted as an offer.

First, the price lists distributed by Lederle to its customers did not constitute offers. It is well settled that quotations are mere invitations to make an offer, particularly where, as here, the price lists specifically stated that prices were subject to change without notice and that all orders were subject to acceptance by Lederle.

Second, neither Lederle's internal price memorandum nor its letter to customers dated May 20, 1986, can be construed as an offer to sell 1,000 vials at the lower price. There is no evidence that Lederle intended Corinthian to receive the internal price memorandum, nor is there anything in the record to support the conclusion that the May 20, 1986, *letter was* an offer to sell 1,000 vials to Corinthian at the lower price. If anything, the evidence shows that Corinthian was not supposed to receive this letter until after the price increase had taken place. Moreover, the letter, just like the price lists, was a mere quotation (i.e., an invitation to submit an offer) sent to all customers. As such, it did not bestow on Corinthian nor

other customers the power to form a binding contract for the sale of one thousand, or, for that matter, one million vials of vaccine.

Thus, as a matter of law, the first offer was made by Corinthian when it phoned in and subsequently confirmed its order for 1,000 vials at the lower price. The next question, then, is whether Lederle ever accepted that offer.

Under the Code, an acceptance need not be the mirror-image of the offer. U.C.C. § 2–207. However, the offeree must still do some act that manifests the intention to accept the offer and make a contract. Under § 2–206, an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. The first question regarding acceptance, therefore, is whether Lederle accepted the offer prior to sending the 50 vials of vaccine.

The record is clear that Lederle did not communicate or do any act prior to shipping the 50 vials that could support the finding of an acceptance. When Corinthian placed its order, it merely received a tracking number from the Telgo computer. Such an automated, ministerial act cannot constitute an acceptance. See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 539 (9th Cir.1983) (logging purchase orders as received did not manifest acceptance); Southern Spindle & Flyer Co. v. Milliken & Co., 53 N.C.App. 785, 281 S.E.2d 734, 736 (1981) (seller's acknowledgement of receipt of purchase order did not constitute assent to its terms). Thus, there was no acceptance of Corinthian's offer prior to the delivery of 50 vials.

The next question, then, is what is to be made of the shipment of 50 vials and the accompanying letter. Section 2–206(1)(b) of the Code speaks to this issue:

> [A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, *but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.*

§ 2–206 (emphasis added). Thus, under the Code a seller accepts the offer by shipping goods, whether they are conforming or not, but if the seller ships non-conforming goods and seasonably notifies the buyer that the shipment is a mere accommodation, then the seller has not, in fact, accepted the buyer's offer. See Greenberg, U.C.C. Article 2 § 5.5 at 53.

In this case, the offer made by Corinthian was for 1,000 vials at $64.32. In response, Lederle Labs shipped only 50 vials at $64.32 per vial, and wrote Corinthian indicating that the balance of the order would be priced at $171.00 per vial and would be shipped during the week of June 16. The letter further indicated that the buyer could cancel its order by calling Lederle Labs. Clearly, Lederle's shipment was non-conforming, for it was for only 1/20th of the quantity desired by the buyer. See § 2–106(2) (goods or conduct are conforming when they are in accordance with the obligations under the contract); Michiana Mack, Inc. v. Allendale Rural Fire Protection, 428 N.E.2d 1367, 1370 (Ind.App.1981) (non-conformity describes goods and conduct). The narrow issue, then, is whether Lederle's response to the offer was a shipment of non-conforming goods not constituting an acceptance because it was offered only as an accommodation under § 2–206.

An accommodation is an arrangement or engagement made as a favor to another. Black's Law Dictionary (5th ed. 1979). The term implies no consideration. Id. In this case, then, even taking all inferences favorably for the buyer, the only possible conclusion is that Lederle Labs' shipment of 50 vials was offered merely as an accommodation; that is to say, Lederle had no obligation to make the partial shipment, and did so only as a favor to the buyer. The accommodation letter, which Corinthian is sure it received, clearly stated that the 50 vials were being sent at the lower price as an exception to Lederle's general policy, and that the balance of the offer would be invoiced at the higher price. The letter further indicated that Lederle's proposal to ship the balance of the order at the higher price could be rejected by the buyer. Moreover, the standard terms of Lederle's invoice stated that acceptance of the order was expressly conditioned upon buyer's assent to the seller's terms.

Under these undisputed facts, § 2–206(1)(b) was satisfied. Where, as here, the notification is properly made, the shipment of nonconforming goods is treated as a counteroffer just as at common law, and the buyer may accept or reject the counteroffer under normal contract rules. 2 W. Hawkland, Uniform Commercial Code Series § 2–206:04 (1987).

Thus, the end result of this analysis is that Lederle Lab's price quotations were mere invitations to make an offer, that by placing its order Corinthian made an offer to buy 1,000 vials at the low price, that by shipping 50 vials at the low price Lederle's response was non-conforming, but the non-conforming response was a mere accommodation and thus constituted a counteroffer. Accordingly, there being no genuine issues of material fact on these issues and the law being in favor of the seller, summary judgment must be granted for Lederle Labs. . . .

For all these reasons, the defendant's motion for summary judgment is granted.

NOTES

(1) *Questions.* What functions does each of the following events play in the process of contract formation: Lederle's letter to customers? Corinthian's telephone order? Telgo's assignment of a tracking number? Lederle's shipment to Corinthian and accompanying letter?

If the seller's shipment is not an acceptance of the buyer's offer but is a counter-offer, what means of acceptance does that counter-offer invite? See UCC § 2–206(1). (For cases not within the scope of UCC Article 2, compare Restatement §§ 32 and 62.)

The court quickly disposed of the argument that the tracking number was an acceptance by Lederle: "Such an automated, ministerial act cannot constitute an acceptance." Why should that be so? Was the fact of automation or the ministerial purpose that made the computer-generated response legally insignificant in this case?

(2) *Non-conforming.* According to Comment 4 to UCC § 2–206, subsection (1)(b) "deals with the situation where a shipment made following an order is shown by a notification of shipment to be referable to that order but has a defect." If that refers to defective *goods*, the situation in the main case was different. Perhaps, although the statute speaks of non-conforming *goods*, the Comment refers to defective *shipment*. In either case the court's application of

the subsection may make good sense. What of an order calling for goods to be "shipped within ten days"? Is a shipment after that a non-conforming one? Observe that the statute speaks of promptness by offerees.

Observe also that, by shipping non-conforming goods, an offeree—one who does not say they are sent as an accommodation—commits itself to supply goods that conform to the order. For example, by shipping wormy apples, a grower might bind itself to ship apples without worms.

To what other situations might the subsection apply? To one in which apples are ordered, and oranges are shipped? Are oranges defective apples?

(3) *Preparation for Shipment of Goods as Acceptance?* What if a buyer attempts to revoke an order after the seller has incurred expense in preparing to ship the goods but has not actually shipped them? In Doll & Smith v. A. & S. Sanitary Dairy Co., 211 N.W. 230 (Iowa 1926), the Dairy Company ordered advertising materials from Doll & Smith ("Doll"), through an agent. Two days after Doll received the order in New York, the Dairy Company wired a cancellation of the order. In an action by Doll it contended that he had incurred expenses in response to the order, having referred it to a factory and paid a commission to the agent. A judgment in favor of the Dairy Company was affirmed on appeal: "No case for damages . . . is made." Id. Can this decision be reconciled with the *Ever-Tite* case, above?

SILENCE NOT ORDINARILY ACCEPTANCE

The general rule is that silence alone is not acceptance. "So fundamental is the tenet . . . that, even as the master of the offer, the offeror is powerless to alter the rule." 1 Farnsworth on Contracts § 3.15 (2d ed. 1998) The offeror who appends to an offer, "Unless I hear from you within 48 hours, you will be deemed to have accepted my offer," cannot hold the offeree who fails to reject. The rule, along with some real or apparent exceptions to it, is stated in Restatement § 69.

In a Massachusetts case from 1893, however, the court concluded that a silent retention amounted to an acceptance. A seller sued for $108.50, the price of 2,350 eelskins that he had sent to the buyer. Holmes wrote:

> The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. . . . [S]ending them [imposed] on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance.

Hobbs v. Massasoit Whip Co., 33 N.E. 495. What, beyond mere silence, was there in this case?

What if the parties are reversed and it is the *buyer* who asserts that the seller has accepted by silent retention of the buyer's order? American Bronze Corp. v. Streamway Products, 456 N.E.2d 1295, 1300 (Ohio App.1982), is such a case. For over twenty years Streamway had called in orders to American by telephone and followed them up with written purchase orders, at which time American would begin production. When

American refused to fill three orders, Streamway claimed damages and, from a denial of its claim, appealed. The Ohio Court of Appeals reversed and remanded, citing UCC § 2–204(1). "The filling of these orders in this manner as a regular practice constituted a valid acceptance and thus created a binding contract. . . . Absent a notice of rejection Streamway would be justified in believing that American had indeed begun production." Id. What, beyond mere silence, was there in *this* case?

NOTE

Unsolicited Merchandise. A persistent consumer complaint concerns the practice of sending unsolicited merchandise, often coupled with the suggestion that the recipient will be liable for the price if it is not returned. As you might suppose, this suggestion is not the law: the recipient who lays the merchandise on a shelf and does not use it incurs no liability. Nonetheless, the practice is at best irritating and at worst deceptive. A number of states have enacted statutes dealing with it. See, *e.g.,* N.Y.Gen.Bus.L. § 396–2a. Federal laws regulating the mails also restrict such practices.

Marketing programs for book or CD clubs depend on a subscriber's agreement that merchandise not specifically ordered will be paid for in the absence of an instruction to the contrary. Is it significant that these arrangements "typically provide some up-front benefits to the offeree," such as an introductory bonus, and place mailing costs on the offeror? See Avery Katz, The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation, 89 Mich.L.Rev. 215, 264–65, 271–72 (1990). Professor Katz suggests an efficiency argument for the offeree's "right to be let alone." More simply, it might be thought that freedom *from* contract is a more important ideal than is freedom *to* contract. See Edwin Patterson, An Apology for Consideration, 58 Colum.L.Rev. 929, 948 (1958).

THE SIGNIFICANCE OF CONTRACT FORMATION

Beyond the basic legal obligation to perform, there are important consequences under contract law in concluding that a contract exists For example, suppose that as a shopper was lifting a soft drink bottle from the merchant's shelf to place it in a shopping cart, the bottle exploded, seriously injuring the shopper. Was there a "contract for . . . sale," triggering an implied warranty of merchantability, as provided under UCC § 2–314? See Barker v. Allied Supermarket, 596 P.2d 870 (Okla.1979).

Whether or not a contract exists may also have significance for non-contractual areas of law, such as anti-discrimination law. Section 1981 of the Civil Rights Act of 1866 provides that "all persons . . . shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. Against that background, consider these facts. Edith Perry telephoned her hair salon and made an appointment for a "wash and set." When Perry arrived at the salon, she was asked if she would mind seeing another hairdresser as her regular hairdresser was sick. Perry agreed. However, when the substitute hairdresser saw Perry, she announced that she did not "do black hair." Perry left the salon distraught and later brought suit under § 1981. The appellate court agreed there had been discriminatory behavior, but remanded the case on the doctrinal question of whether a contract existed at the time Perry was denied service, as required by § 1981. Do you find an offer and an acceptance

in the transaction described? Perry v. Command Performance, 913 F.2d 99 (3d Cir.1990).

Consider also Barfield v. Commerce Bank, 484 F.3d 1276 (10th Cir. 2007), in which Chris Barfield, an African–American man, entered a Commerce Bank branch and requested change for a $50 bill. He was refused change on the ground that he was not an account-holder. The next day, a white friend of Barfield's father made the same request of the bank, and was given change without being asked whether he was an account-holder . When Barfield's father came in a few minutes later and asked for change, he was told he would not be given change unless he was an account-holder. The Barfields filed suit under 42 U.S.C. § 1981, alleging racial discrimination in the impairment of the ability to contract. The bank defended in part on the grounds that there was no consideration. Do you find consideration on these facts?

Unlike the 1866 Civil Rights Act, which prohibited discrimination in the *making* of contracts, the Civil Rights Act of 1991 has a broader scope and prohibits *post-formation* racial discrimination; it includes "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." In Hampton v. Dillard Dept. Stores, 247 F.3d 1091 (10th Cir.2001), a shopper was detained by house detectives on the suspicion of shop-lifting *after* purchasing an item at one counter and going to another. Would the Civil Rights Act of 1991 statute apply?

SECTION 4. TERMINATION OF THE POWER OF ACCEPTANCE

After a party has made an offer, conferring on another the power of acceptance, that power can be terminated (1) by lapse of the offer, (2) by its revocation by the offeror, (3) by the offeror's death or incapacity, or (4) by the offeree's rejection.

This section begins with lapse—the expiration of the period within which an offer can be accepted. How long does an offer remain "open" when an offeror neglects to state a period for acceptance: When does it become too late for the offeree to accept?

Revocation is considered next. The basic rule in common-law countries is that an offeror can terminate an ordinary offer, at any time before it has been accepted, by revoking it. An exception to this rule occurs when the offeror has made a "firm offer" or otherwise created an option contract. In contrast to ordinary offers, option contracts are offers that are—for a time—not subject to revocation. Irrevocability is the defining characteristic of an option contract.

Attention then briefly turns to a third terminating event: the death or the incapacity of the offeror. While posing interesting conceptual problems (the rule holds whether or not the offeree learns of the death), the practical import of the rule has been greatly reduced since the typical offeror is now often a deathless corporate entity.

The fourth terminating event is rejection, an act by the offeree which puts an end to an ordinary offer. Here we examine what counts as a rejection under the common law "mirror image" rule. The materials also consider the effect of rejecting a firm offer.

the relatively rare instances referred to in Note 2, p. 20 above, where courts take account of lost opportunities? Are there reasons why this might be so?

A conventional objection to the recovery of expectation damages when negotiations fail is that a court cannot know what agreement would have been reached and therefore has no way to measure lost expectation. Goodstein Construction Corp. v. City of New York, 604 N.E.2d 1356, 1361 (N.Y.1992). But in Venture Associates Corp. v. Zenith Data Systems Corp., 96 F.3d 275 (7th Cir.1996), Judge Posner said that

> if the plaintiff can prove that had it not been for the defendant's bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant's bad faith, and, provided that it is a foreseeable consequence, the defendant is liable for that loss—liable, that is, for the plaintiff's consequential damages. . . . The difficulty, which may well be insuperable, is that since by hypothesis the parties had not agreed on *any* of the terms of their contract, it may be impossible to determine what those terms would have been and hence what profit the victim of bad faith would have had. . . . But this goes to the practicality of the remedy, not the principle of it.

96 F.3d 275 at 278-79. See 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.26b (3d ed.2004 & Supp.2013). As we will see in *Oglebay Norton*, p. 266 below, a court might even grant specific performance for breach of a promise to negotiate.

(2) *The Meaning of Bad Faith.* What would amount to bad faith in negotiation? In PSI Energy v. Exxon Coal USA, 17 F.3d 969 (7th Cir.1994), Judge Easterbrook said:

> An obligation to negotiate 'in good faith' nixes trickery and certain forms of obduracy, . . . but it does not require one side in negotiations to reveal its bargaining strategy or its reservation price, to disclose every tidbit that would be of use to the other side, or to refrain from taking advantage of its opportunities.

Id. at 972. Would it be bad faith to renege on an agreed term? Recall that a *Tribune* Type II contract requires agreement "on certain major terms." To engage in negotiations with another party (as Grumman did with Codar in *Cyberchron*)? To terminate negotiations without warning in order to make a contract with another party (as Grumman presumably did to make a contract with Codar in *Cyberchron*)? See 1 Farnsworth on Contracts § 3.26b (2d ed. 1998).

SECTION 7. THE REQUIREMENT OF DEFINITENESS

In Channel Home Centers, p. 252 above, the court asked first "whether both parties manifested an intention to be bound by the agreement" and second "whether the terms of the agreement are sufficiently definite to be enforced." The preceding sections of this chapter explored the first question: Did both parties assent to be bound? This section explores the second: Is an agreement definite enough to be enforced? Both questions must be answered in the affirmative for there to be a contract.

The requirement of definiteness serves two basic functions. In order for a court to determine whether or not a contract has been broken, it

must first know with some certainty what the terms of the contract are. The concept of definiteness is also implicit in the principle that the promisee's expectation interest is to be protected. In calculating the damages that will put a promisee in the position it would have been in had the promise been performed, a court must be able to determine with some precision what the promise was. For requirement of definiteness in Article 2, see UCC § 2–204(3); in the Restatement, see § 33.

The effect of indefiniteness can be seen from Varney v. Ditmars, 111 N.E. 822 (N.Y.1916). Varney, an architectural draftsman, sued Ditmar, his employer, on Ditmar's promise to pay Varney "a fair share of my profits," in addition to a stated salary. The court denied recovery of profits on the ground that the amount was a matter of "pure conjecture" and might be "any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered."

In deciding whether or not an agreement is sufficiently definite, a court may piece together terms from such sources as preliminary negotiations, prior communications, external sources such as governmental regulations and applicable trade usages. A course of dealing between the parties prior to the transaction, or a course of performance between them after their agreement may also provide terms. See UCC § 1–303. Indefiniteness may also be cured, sometimes, by resort to a term implied by law, in the way that the duty to use reasonable efforts was supplied in Wood v. Lucy, p. 86 above.

Terms such as good faith and reasonable efforts are regarded as sufficiently definite if their content can be determined by reference to some external standard. Probably that would have been done in Wood v. Lucy, had it been necessary to determine what efforts were required of Wood in the circumstances. The processes by which language is interpreted, and terms such as "reasonable efforts" and "good faith" are supplied and construed, are explored in Chapter 5. Consider now a case illustrating certain consequences of indefiniteness.

Toys, Inc. v. F.M. Burlington Company

Supreme Court of Vermont, 1990.
582 A.2d 123.

[F.M. Burlington Company, a mall owner, entered into a five year lease with Toys, Inc., a retailer. The lease gave Toys an option to renew for an additional five years, requiring Toys to notify Burlington in writing of its intention to exercise the option one year before the lease expired. The lease further provided that "the fixed minimum rental [for the renewal period] shall be renegotiated to the then prevailing rate within the mall." In February, Toys gave timely written notice to Burlington of its intent to renew. *Burlington* confirmed Toy's exercise of the option and stated the then prevailing rate per square foot in the mall. A week later Toys replied that its renewal had been premised on a "substantially different understanding of the prevailing rate."

For the next ten months, the parties engaged in what the court called "paper jousting" as they attempted to negotiate a rent structure for the renewal period, creating and extending various deadlines for doing so along the way. By November, no agreement had been reached, and Burlington advised Toys that it was listing the location for rent. Toys then left the mall, found alternative space, and sued for breach of contract. Burling-

ton argued, that owing to Toys's failure to accept the prevailing rate stated in February and a second rent proposal made by Burlington in July, the renewal option had lapsed. The trial court granted summary judgment, holding that the lease had created a binding option. Burlington appealed on the ground that the option was too indefinite.]

■ DOOLEY, J. . . . We agree with the trial court that summary judgment for plaintiff was appropriate. . . . The lease provision created a valid option for plaintiff to renew for an additional five years. Defendant characterizes the lease renewal provision as merely an agreement to agree and therefore not enforceable. If defendant's construction were correct, the lease provision would not create an enforceable option. See Reynolds v. Sullivan, 136 Vt. 1, 3, 383 A.2d 609, 611 (1978). In Reynolds we held that a preliminary option agreement that was vague and uncertain in its terms "would be an impossibility to enforce." Id. The test is whether the option agreement contains "all material and essential terms to be incorporated in the subsequent document." Id. The agreement in Reynolds was labeled as preliminary and specifically provided that the parties "agree to enter an agreement for an option" and that "more specific terms will be stated in the option to purchase." Id. at 2, 383 A.2d at 610.

It is not necessary under Reynolds that the option agreement contains all the terms of the contract as long as it contains a practicable, objective method of determining the essential terms. See Krupinsky v. Birsky, 278 A.2d 757, 760 (Vt.1971) (option contract valid even though it "did not fix a price certain" where "it did appoint a mode of determining the price"); Restatement (Second) of Contracts § 33 comment a, § 34(1) (1981) ("The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance."). We must construe the option agreement in a way to give it binding effect if possible. See Agway, Inc. v. Marotti, 540 A.2d 1044, 1046 (Vt.1988) (before voiding a contract for vagueness, indefiniteness or uncertainty of expression, Court must attempt to construe the contract to avoid the defect). We are also mindful that defendant drafted the language of the option clause and that a doubtful provision in a written instrument is construed against the party responsible for drafting it. See Trustees of Net Realty v. AVCO Financial Services, 520 A.2d 981, 983 (Vt.1986).

The option agreement states that "the fixed minimum rental shall be renegotiated to the then prevailing rate within the mall." We believe that this language sets forth a definite, ascertainable method of determining the price term for the lease extension. Within days after plaintiff stated its original intent to exercise its option, defendant replied by quoting the "prevailing rate within the mall" at that time. Neither defendant nor plaintiff have disputed the accuracy of this calculation.

Defendant puts much emphasis on the use of the term "renegotiate" in the renewal clause, as showing an intent to reach a future agreement. While the choice of wording could have been more precise, we agree with the plaintiff that the term means that the then-existing "prevailing rate" would be determined by agreement, and does not mean that the parties would start from a clean slate in renegotiating a rent term. Even if we give defendant the benefit of all inferences and reasonable doubt, we find no genuine issue of fact bearing on whether there was an enforceable option to renew and hold as a matter of law that a valid option existed.

NOTES

(1) *Questions.* What consideration supported the option? What did the exercise of the option require? Could the parties have drafted the rent term more clearly?

(2) *Open Price Terms.* Would you expect a similar result if the option provision in Toys had been: "Tenant shall be provided one option to extend the lease for five years at annual rentals to be agreed upon"? See Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 417 N.E.2d 541 (N.Y.1981). Consider a contract for the sale of goods, which "if [the parties] so intend," can be concluded even though they leave the price term "open." UCC § 2–305. Why might the law be more indulgent of indefiniteness with regard to price in agreements for the sale of goods than in landlord-tenant agreements? We return to this question later in the chapter.

(3) *The Case of the Business Opportunity.* In Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447 (2d Cir.1977), a jury found that when Seagram contracted in writing to buy a wholesale liquor distributorship (Capitol City), it had orally agreed with some of its owners to provide them, within a reasonable time, with a Seagram distributorship in another city, in a location acceptable to them, "whose price would require roughly an amount equal to the capital obtained by [those owners] for the sale of their interest in Capitol City." Id. at 450. In an action by the promisees, a judgment was entered against Seagram and it appealed. It contended in part that the oral agreement was so vague and indefinite as to be unenforceable. Held: Affirmed. The plaintiffs had testified about the financial record of Capitol City and produced expert testimony about the industry standard for valuing a liquor distributorship.

Why do you suppose the parties were not more precise in defining their obligations with respect to the new distributorship? What answer can be given to Seagram's further point that the oral agreement was illusory, owing to the promisees' "unbridled discretion" to accept or to reject any new situation that Seagram might proffer? Suppose that the promisee had been an investor negotiating to buy Capitol City, and that Seagram had persuaded the investor to break off negotiations by making a comparable promise. Same result?

(4) *Offers of Job Security.* In Sayres v. Bauman, 425 S.E.2d 226 (W.Va.1992), the claimants were employees of a firm whose ownership changed hands. There was evidence that before the buy-out, they were told that "you won't lose your job because a new company is buying us out." Id. at 231. The plaintiffs continued in their jobs for more than a year under the new ownership but were then discharged. Might the statement attributed to the former owners be construed as an offer to the employees of job security—one that the employees accepted by continuing on their jobs? In an action by the employees for wrongful discharge, the court reversed a judgment for the plaintiffs, saying: "an oral promise which has as its effect the alteration of an 'at will' employment relationship must contain terms that are both ascertainable and definitive in nature to be enforceable." Id. at 227.

Recall that statements of company policy, announced in handbooks or manuals for employees, have often been found to be incorporated in the terms of employment for personnel already in place, as well as for new recruits. The "handbook" cases frequently permit employees to escape the rigors of the doctrine of at-will employment. See the discussion of Employee Handbooks, p. 68

above. In Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989), according to the lead opinion, the defendant employer had "created and distributed a disciplinary action policy which was read and understood by the plaintiff," thereby limiting the grounds on which it could discharge her. The court reversed a judgment for the employer and ordered a retrial on the theory of an implied-in-fact contract. On these facts, was an offer any more evident than in Sayres?

(5) *Restitution.* A party who has, in the course of performing an agreement that is unenforceable for indefiniteness conferred a benefit upon the other party is entitled to restitution. For example, in Varney v. Ditmars, above, the court suggested that if the architectural draftsman's work was worth more than his salary, he would have had a right to restitution measured by the difference. Similarly, in Pyeatte v. Pyeatte, p. 121 above, the court refused to enforce the husband's promise to put his wife through a master's degree program, finding the agreement too indefinite as to timing, place, duration, and costs: "Such a loosely worded agreement can hardly be said to have fixed [his] liability with certainty." But although the agreement "failed to meet the requirements of an enforceable contract, [it] still has importance in considering [her] claim for unjust enrichment because it both evidences [her] expectation of compensation and the circumstances which make it unjust to allow [him] to retain the benefits of her extraordinary efforts." The court then awarded the former wife restitution. Why were the Pyeattes not more precise? Which recovery—restitution or expectation—would have been greater?

PROBLEM

Forbearing on a Claim. Review Note 1, p. 75 above. Suppose that Louisa Sheffield had written to Strong: "I will be responsible for my husband's debt if you will not bother him about it for a reasonable time." Would she have been accountable to Strong if he had done nothing about the note for two years? See Baker v. Citizens State Bank of St. Louis Park, 349 N.W.2d 552 (Minn.1984). Farmers Union Oil Co. of New England v. Maixner, 376 N.W.2d 43 (N.D.1985).

INDEFINITENESS AND CONTRACTUAL INCOMPLETENESS

Contracts need not specify all their essential terms at formation in order to be enforceable. It is enough for agreements to provide means for making those terms sufficiently definite by the time performance is due. Take, for example, output and requirements contracts, which usually have undetermined delivery quantities at the time of formation; see discussion in Structural Polymer Group, Ltd., p. 81. Consider also Fairmount Glass, p. 145, where the seller complained "that the contract was indefinite, because the quantity of each size of the jars was not fixed", but the court held that the agreement was not unenforceable because the buyer had "the right to name the quantity of each size" before shipment. The same is true when other particulars of performance are to be specified by one of the parties. See UCC § 2–311.

A degree of indefiniteness is common to all contracts. Yet agreements may be indefinite in several ways. In addition to vague terms, an agreement may be indefinite because of contractual incompleteness. Contracts are

"incomplete" in two distinct senses. First, relevant terms may simply be absent, leaving gaps in the contract. Courts are quite familiar with this type of incompleteness and, in many circumstances, will fill in what is missing, either through conventional gap-filling rules, or, where appropriate, by implying a term; recall the duty of reasonable efforts supplied by Cardozo in Wood v. Lucy, p. 86 above. (Gap-fillers rules are explored more thoroughly in section 6 of Chapter 5.)

"The second form of contractual incompleteness is more subtle. A contract may also be incomplete in that it is insensitive to relevant future contingencies[:] specified duties are not tailored to economically relevant future events." Ian Ayres & Robert Gartner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*. 99 Yale L. J. (1990) 87 at 92 n.29. Imagine, for example, a simple contract where a seller agrees to ship to buyer a fixed quality and quantity of rice by December 31. The agreement is "complete" in the sense that the specified shipment is required by the end of the calendar year in all eventualities. What if war or weather, however, disrupts shipping routes for an extended period of time? A contract that is more meaningfully complete would specify what should occur should such contingencies arise. While the simple contract is literally complete, a more thoroughgoing notion of contractual completeness would require the parties to specify exact actions and obligations for important contingencies that arise in such states of the world. "Courts seldomly [sic] recognize the second form of contractual incompleteness. That is, they are generally unwilling to alter (they strictly enforce) the terms of a contract that is insufficiently state-contingent." Id.

Why do contract parties leave their agreements incomplete? Consider the following possibilities:

(a) They do not want to take the time or pay attorneys for their time to work through every eventuality, or they are willing to rely on the terms that a court will supply in the event of dispute arises.

(b) They are reluctant to raise difficult issues for fear that the deal may fall through.

(c) They do not, due to bounded rationality or bias, foresee problems that might arise.

(d) They cannot adequately describe certain features of their agreement at formation.

(e) They choose to withhold business information in order to retain an advantage.

Do other reasons come to mind? Might the reason in a particular case affect the court's willingness to overlook some indefiniteness?

INDEFINITENESS AND RELATIONAL CONTRACTING

A completely contingent contract, surely hypothetical, provides a specific course of action for every possible eventuality or contingency that might occur under the agreement. For the reasons stated above—the costs of writing fully contingent agreements, limited foreseeability, bounded rationality, indescribability and so on—all contracts are incomplete in the strong sense of the term. But some contractual exchanges are subject to more incompleteness than others. Contractual incompleteness tends to be

more pronounced in agreements between parties who deal with one another on a regular basis ("repeat players") or who interact over an extended period, giving rise to what are often called "relational contracts." The expression derives from an influential article by Professor Stewart Macaulay, Non–Contractual Relations in Business: A Preliminary Study, 28 Am.Soc.Rev. 55 (1963).

The study of relational contracts was advanced significantly by Professor Ian MacNeil, Contracts: Adjustment of Long–Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U.L. Rev. 854 (1978); see also MacNeil, Relational Contract Theory: Challenges and Queries, 94 Nw. U. L. Rev. 877 (2000). MacNeil proposed a spectrum of contractual exchanges. At one end sits the "transactional" ideal type, characterized by discrete, simple, immediate, one-shot, impersonal exchanges, like one-off sales transactions made at a bazaar or in the spot market. The deal is as complete as it needs to be for its discrete purpose. At the other end of the spectrum, the "relational" ideal exhibits exchange characteristics that are complex, extended, repeated and often quite personal. Transactions in family businesses, franchise arrangements, as well as those among partners, joint-venturers and between principals and their agents are common examples of more relational exchanges.

While various bodies of law have specifically adapted to the contours of these transactions—including agency, employment, family and partnership law among others—the material covered in this casebook, so-called "neoclassical contract law", is also pertinent relational exchanges. Professors Charles Goetz and Robert Scott, for example, long ago describe how "best efforts" and "termination" clauses (discussed in Chapters 6 and 1, respectively) respond to the unique challenges in long-term relational contracts:

> These rules serve the important purpose of saving most bargainers the cost of negotiating a tailor-made arrangement. . . . All relevant risks thus can be assigned optimally either by legal rule or through individualized agreement because future contingencies are not only known and understood at the time the bargain is struck, but can also be addressed by efficacious contractual responses.

Charles Goetz & Robert Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1091 (1981). For parties in relational exchanges, Goetz and Scott point out, "a complete contingent contract may not be a feasible contracting mechanism. Where the future contingencies are peculiarly intricate or uncertain, practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting." Id., at 1090. On the other hand, the very fact that their exchanges are relational will often render the objective of contractual completeness less consequential. Why might parties in relational exchanges be less concerned with addressing every contingency, such as the effect of defective performance, than parties to other sorts of parties? Authority, status, trust, social role, familial ties and habits inter alia can all influence behavior in relational contexts, making strict contractual enforcement *of ex ante* specified terms less essential. Also, of central importance is the role of reputation in relational exchanges. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373 (1990). In recent years economists have developed a rich literature based on repeated games to advance reputation as an alternative to formal contractual en-

forcement. See, e.g., George Baker, Robert Gibbons & Kevin J. Murphy, *Relational Contracts and the Theory of the Firm*, 117 Quarterly J. Econ. 39 (2002); Avinash Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (2004).

INDEFINITENESS AND CONTRACT PRICE

Parties sometimes intentionally leave aspects of their agreements unspecified at formation and subsequently fill-in the blanks at a later date when more information is available. For example, a buyer of goods to be shipped may specify a dock or warehouse delivery location just prior to delivery. Deferred decisions of this sort are common and to be expected. But what about leaving indefinite something as basic as the contract price? This too is not uncommon.

Suppose that over a long term a seller wants to be assured of an outlet for a fixed quantity of a product and that a buyer wants to be assured of a source of supply for the same quantity. Neither party, however, wants to take the risk of a shift in the market: the seller does not want to risk a rise in prices before delivery, and the buyer does not want to risk a fall. How can they make an agreement that will be legally enforceable and yet will allow the price of the goods to fluctuate?

One possibility is to leave the price term open; the price will then be "a reasonable price at the time for delivery." See UCC § 2–305. Of course this leaves open opportunities for dispute over what is "reasonable." If the parties anticipated too much dispute over determining the "reasonable price," they might stipulate a schedule of prices, which would set the contact price based on observed contingencies. Professors Benjamin Hermalin and Michael Katz suggest exactly this approach in their 'fill-in-the-price' mechanism, where "[t]he initial contract is incomplete in the sense that the price is initially 'left blank' and is only later 'filled in.' But in a more important sense, it is complete: All contingencies (including the process by which the blanks are to be filled in) are covered." Benjamin E. Hermalin & Michael L. Katz, *Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach*, 9 (2) J. Law, Econ. & Org. 230, 232 (1993). As the title of their article indicates, parties must be very sophisticated if they are to devise a fully contingent price schedule. As much as Hermalin and Katz supposed extremely rational actors, they were perhaps even more motivated by a skepticism concerning the capacity of courts to determine prices ex post. In their framework, "the courts' role is simply to make sure that the various monetary transfers (payments and 'liquidated damages') called for by the contract are made." Id. Courts, however, are often reluctant to enforce liquidated damages without inquiry into their content and compensatory purpose (as elaborated in the remedies material in Chapter 7) and for this reason courts may not play as deferential role to the parties' contract as Professors Hermalin and Katz would demand.

Parties skeptical of judicial capacity to determine and fill-in an appropriate price may use an alternative mechanism, such as designating a third party (perhaps one with some transaction-specific expertise) to fix the price if the parties should disagree. Again, see UCC § 2–305. Arbitrators are a prominent example of such third-parties, toward whom courts are required to show great deference under Federal Arbitration Act. After

the arbitrator renders a ruling on the price term, the parties may then enforce that award in court. In this two-step approach, might a liquidated price term that would not survive the scrutiny of judges be nonetheless enforceable in their courts?

Another possibility is to use an "escalator clause" under which the price will be fixed according to a formula tied in some way to the market; see the Eastern Airlines case, p. 889 below, and the following case. Would it be easier to draft such an agreement if there were an ascertainable market price for the raw materials required by the seller to produce his product? An ascertainable market price for the product itself? (On ascertainable market price, see UCC §§ 2–723 and 2–724.) Would prices charged by competing sellers or to competing buyers be useful?

Helpful analogies can be found in common commercial lease clauses, wherein rent is tied to gross profits, and in collective bargaining agreements clauses, in which wages are tied to the cost of living, and in the clauses of construction contracts that tie the price to costs ("cost-plus" contracts). An interesting variant is patterned after the "most favored nation" clause found in treaties. See, for example, Reynolds Metals Co. v. United States, 438 F.2d 983 (Ct.Cl.1971), in which the United States promised Reynolds to amend their contract "if later agreements with the Aluminum Company of America and/or the Kaiser Aluminum and Chemical Company are, in your opinion, more favorable than the agreement which has been executed with you." What standard might a court apply to the term "in your opinion"? An objective one, subjective one, or both? 'Most favored counterparty' clauses are now quite common in contracts between buyers and sellers as well as in settlement agreements. See Thomas P. Lyon, *Most Favored Customer Clauses, in The New Palgrave Dictionary of Economics and the Law* (Peter Newman ed., 1998); Kathryn E. Spier, *The Use of "Most–Favored–Nation" Clauses in Settlement of Litigation*, 34(1) RAND J. of Econ. 78 (2003).

Although there are a number of ways to specify a flexible, if somewhat indefinite, pricing mechanism at contract formation, such specification does not, however, assure that an unanticipated contingency will not develop and unravel the mechanism. What then? The final case of this chapter raises this challenge and returns us to the question of assent. As we shall see, the parties have been in a long-term, cooperative relational contract whose terms became indefinite over the course of the contract's performance. The case raises questions about the vitality of assent when a flexible price mechanism appears to fail. In reading the case, keep the following questions in mind: What evidence does the court assemble to assess whether or not the parties intended to remain bound over time? Could these sophisticated actors have avoided the problem through better contractual specification?

Oglebay Norton Co. v. Armco, Inc.

Supreme Court of Ohio, 1990.
52 Ohio St.3d 232, 556 N.E.2d 515.

[In 1957, Armco made a long-term contract with Oglebay requiring Oglebay to have adequate shipping capacity available and requiring Armco to use that capacity for the transportation of iron ore on the Great Lakes. The contract provided for a primary and a secondary price mechanism:

Armco agrees to pay . . . for all iron ore transported hereunder the regular net contract rates for the season in which the ore is transported, as recognized by the leading iron ore shippers in such season for the transportation of iron ore. . . . If, in any season of navigation hereunder, there is no regular net contract rate recognized by the leading iron ore shippers for such transportation, the parties shall mutually agree upon a rate for such transportation, taking into consideration the contract rate being charged for similar transportation by the leading independent vessel operators engaged in transportation of iron ore from The Lake Superior District. [Emphasis supplied by the court.

During the next 23 years the parties modified the contract four times, each time extending the time and entailing substantial capital investment by Oglebay to meet Armco's requirements. After the fourth modification, which extended the contract to the year 2010, Oglebay began a $95 million capital improvement program.

From 1957 through 1983 the parties established the contract shipping rate by reference to a rate published in Skillings Mining Review, in accord with the contract's primary price mechanism. After a serious downturn in the iron ore industry in 1983, Armco challenged the rate quoted by Oglebay and the parties negotiated a mutually satisfactory rate for the 1984 season. After that, however, the parties were unable to agree on a rate and, in April of 1986, Oglebay sought a declaratory judgment, asking the court to declare the contract rate to be the correct rate or, in the absence of such a rate, to declare a reasonable rate. Armco denied that the rate sought by Oglebay was the "contract rate" and denied that the court had jurisdiction to declare a rate of its own accord. The parties continued to perform pending resolution of the dispute. In August of 1987, Armco filed a supplementary counterclaim seeking a declaration that the contract was no longer enforceable.

In November of 1987, the trial court issued its declaratory judgment, fixing $6.25 as the rate for the 1986 season and holding that, if the parties were unable to agree on a rate for the upcoming seasons, they must notify the court, which would appoint a mediator and require the parties' chief executive officers to meet and "mutually agree upon a rate." The court of appeals affirmed and a motion was made to certify the record.]

■ PER CURIAM. This case presents three mixed questions of fact and law. First, did the parties intend to be bound by the terms of this contract despite the failure of its primary and secondary pricing mechanisms? Second, if the parties did intend to be bound, may the trial court establish $6.25 per gross ton as a reasonable rate for Armco to pay Oglebay for shipping Armco ore during the 1986 shipping season? Third, may the trial court continue to exercise its equitable jurisdiction over the parties, and may it order the parties to utilize a mediator if they are unable to mutually agree on a shipping rate for each annual shipping season? We answer each of these questions in the affirmative and for the reasons set forth below affirm the decision of the court of appeals.

I

Appellant Armco argues that the complete breakdown of the primary and secondary contract pricing mechanisms renders the 1957 contract unenforceable, because the parties never manifested an intent to be bound in the event of the breakdown of the primary and secondary pricing mechanisms. Armco asserts that it became impossible after 1985 to utilize the

first pricing mechanism in the 1957 contract, i.e., examining the published rate for a leading shipper in the "Skillings Mining Review," because after 1985 a new rate was no longer published. Armco asserts as well that it also became impossible to obtain the information necessary to determine and take into consideration the rates charged by leading independent vessel operators in accordance with the secondary pricing mechanism. This is because that information was no longer publicly available after 1985 and because the trial court granted the motions to quash of non-parties, who were subpoenaed to obtain this specific information. Armco argues that since the parties never consented to be bound by a contract whose specific pricing mechanisms had failed, the trial court should have declared the contract to be void and unenforceable.

The trial court recognized the failure of the 1957 contract pricing mechanisms. Yet the trial court had competent, credible evidence before it to conclude that the parties intended to be bound despite the failure of the pricing mechanisms. The evidence demonstrated the long-standing and close business relationship of the parties, including joint ventures, interlocking directorates and Armco's ownership of Oglebay stock. As the trial court pointed out, the parties themselves contractually recognized Armco's vital and unique interest in the combined dedication of Oglebay's bulk vessel fleet, and the parties recognized that Oglebay could be required to ship up to 7.1 million gross tons of Armco iron ore per year.

Whether the parties intended to be bound, even upon the failure of the pricing mechanisms, is a question of fact properly resolved by the trier of fact. . . . Since the trial court had ample evidence before it to conclude that the parties did so intend, the court of appeals correctly affirmed the trial court regarding the parties' intent. We thus affirm the court of appeals on this question.

II

Armco also argues that the trial court lacked jurisdiction to impose a shipping rate of $6.25 per gross ton when that rate did not conform to the 1957 contract pricing mechanisms. The trial court held that it had the authority to determine a reasonable rate for Oglebay's services, even though the price mechanism of the contract had failed, since the parties intended to be bound by the contract. The court cited 1 Restatement of the Law 2d, Contracts (1981) 92, Section 33, and its relevant comments to support this proposition. Comment e to Section 33 explains in part:

". . . [Where the parties] intend to conclude a contract for the sale of goods . . . and the price is not settled, the price is a reasonable price at the time of delivery if . . . (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded. Uniform Commercial Code § 2–305(1)." Id. at 94–95. . . .

The court therefore determined that a reasonable rate for Armco to pay to Oglebay for transporting Armco's iron ore during the 1986 shipping season was $6.00 per gross ton with an additional rate of twenty-five cents per gross ton when self-unloading vessels were used. The court based this determination upon the parties' extensive course of dealing, . . . "the detriment to the parties respectively, and valid comparisons of market price which reflect [the] economic reality of current depressed conditions in the American steel industry."

The court of appeals concluded that the trial court was justified in setting $6.25 per gross ton as a "reasonable rate" for Armco to pay Oglebay for the 1986 season, given the evidence presented to the trial court concerning various rates charged in the industry and given the intent of the parties to be bound by the agreement. . . .

III

Armco also argues that the trial court lacks equitable jurisdiction to order the parties to negotiate or in the failure of negotiations, to mediate, during each annual shipping season through the year 2010. The court of appeals ruled that the trial court did not exceed its jurisdiction in issuing such an order.

3 Restatement of the Law 2d, Contracts (1981) 179, Section 362, entitled "Effect of Uncertainty of Terms," is similar in effect to Section 33 and states:

"Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order."

Comment b to Section 362 explains:

. . . "Before concluding that the required certainty is lacking, however, a court will avail itself of all of the usual aids in determining the scope of the agreement. . . . Expressions that at first appear incomplete may not appear so after resort to usage . . . or the addition of a term supplied by law. . . . " Id. at 179.

Ordering specific performance of this contract was necessary, since, as the court of appeals pointed out, . . . "the undisputed dramatic changes in the market prices of great lakes shipping rates and the length of the contract would make it impossible for a court to award Oglebay accurate damages due to Armco's breach of the contract." We agree with the court of appeals that the appointment of a mediator upon the breakdown of court-ordered contract negotiations neither added to nor detracted from the parties' significant obligations under the contract.

It is well-settled that a trial court may exercise its equitable jurisdiction and order specific performance if the parties intend to be bound by a contract, where determination of long-term damages would be too speculative. See 3 Restatement of the Law 2d, Contracts, supra, at 171–172, Section 360(a), Comment b; Columbus Packing Co. v. State, ex rel. Schlesinger (1919), 126 N.E. 291, 293–294. Indeed, the court of appeals pointed out that under the 1962 amendment, Armco itself had the contractual right to seek a court order compelling Oglebay to specifically perform its contractual duties.

The court of appeals was correct in concluding that ordering the parties to negotiate and mediate during each shipping season for the duration of the contract was proper, given the unique and long-lasting business relationship between the parties, and given their intent to be bound and the difficulty of properly ascertaining damages in this case. The court of appeals was also correct in concluding that ordering the parties to negotiate and mediate with each shipping season would neither add to nor detract from the parties' significant contractual obligations. This is because the order would merely facilitate in the most practical manner the parties' own ability to interact under the contract. Thus we affirm the court of appeals on this question. . . .

Judgment affirmed.

NOTES

(1) *Relationship-specific Investments and Holdups.* What is the significance, if any, of Oglebay's capital improvement plan? See the discussion of holdups on p. 751. The threat of holdups is commonplace in long-term relational exchanges where one party makes an investment that is to some extent sunk, which is to say an investment that has a lower return outside of the relationship or transaction.

(2) *Inferring Intent.* What, if anything, should be made of the four contract modifications? Would the court's assessment of the parties' intent to be bound differ if their inability to agree on a price had occurred at the formation stage? Did Oglebay's investment in capital improvement imply an intent to be bound?

(3) *Express Default Pricing Mechanisms.* Parties who anticipate the inability to agree on renegotiating a price term in a long-term contract may provide their own default formula, should agreement prove impossible. Consider the following clause from a contract between a coal supplier and a utility company for the renegotiated price of coal:

If the parties are unable to reach agreement, BUYER will accept SELLER's last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal called for under the remaining term of this Agreement (herein referred to as a "competitive offer"). It shall also provide SELLER with documentary proof of such offer, and permit SELLER to examine all supporting data and information submitted with the offer. SELLER shall have the right to meet such competitive offer.

Why did the contract require the competing offer be a firm offer?

The clause is taken from PSI Energy, Inc. v. Exxon Coal USA, Inc., 17 F.3d 969 (7th Cir.1994), mentioned at Note 2, p. 258 above. In that litigation, the seller (Exxon Coal) argued that the firm offer received by the buyer (PSI) from another coal supplier was not competitive because delivery and other terms were different from and incommensurate with those in the Exxon–PSI contract. According to Exxon, it was therefore not required to meet the offer, and its last offer (of $30 per ton) would be the price. From a trial court ruling for PSI, Exxon appealed. Held: Reversed. The court observed:

> Under the contract, when the parties do not agree and there is no valid competitive offer, the seller's last offer prevails. Not 'the market price' in the abstract, but the seller's last offer. Persons negotiating such a contract would understand that this default rule gives the seller the whip hand; it is simultaneously an element of compensation for taking the risk of developing a new mine (which cost Exxon several hundred million dollars, . . .) and a goad to accommodation. Knowing that it is apt to pay more than the market price if it fails to come up with a competitive offer, PSI had every incentive to be scrupulous in finding a proper bid. We concluded on the prior appeal that it had failed. Now we quantify the price of that failure: $30 per ton.

Id. at 969 (Easterbrook, J.).

(4) *Remedies.* Generally in those cases where the court orders specific performance or enjoins a threatened breach, it must know the scope of the party's promise with greater precision than when it awards monetary damages, because failure to obey the court's order may subject the promisor to the court's contempt power. Why then in Oglebay did the Supreme Court of Ohio approve specific performance with so little apparent hesitation? What exactly did the trial court order the parties to do? Is the remedy not so extraordinary under the terms of the particular contract at issue in the case?

Edwin Patterson, An Apology for Consideration, 58 Colum.L.Rev. 929, 958 (1959)Melvin Eisenberg, Mistake in Contract Law, 91 Calif.L.Rev. 1573, 1586 (2003)E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L.Rev. 217, 255–56 (1987)