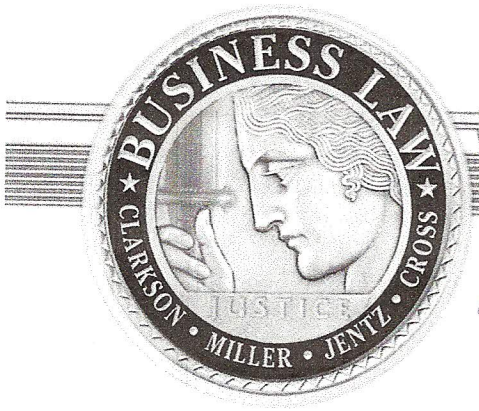


CHAPTER 11
Agreement

An essential element for contract formation is **agreement**—the parties must agree on the terms of the contract and manifest to each other their **mutual assent** (agreement) to the same bargain. Ordinarily, agreement is evidenced by two events: an *offer* and an *acceptance*. One party offers a certain bargain to another party, who then accepts that bargain. The agreement does not necessarily have to be in writing. Both parties, however, must manifest their assent to the same bargain. Once an agreement is reached, if the other elements of a contract are present (consideration, capacity, and legality—discussed in subsequent chapters), a valid contract is formed, generally creating enforceable rights and duties between the parties.

Note that not all agreements are contracts. John and Kevin may agree to play golf on a certain day, but a court would not hold that their agreement is an enforceable contract. A *contractual* agreement arises only when the terms of the agreement impose legally enforceable obligations on the parties.

In today's world, contracts are frequently formed via the Internet. For a discussion of online offers and acceptances, see Chapter 19, which is devoted entirely to the subject of electronic contracts, or e-contracts.

Requirements of the Offer

As mentioned in Chapter 10, the parties to a contract are the *offeror*, the one who makes an offer or proposal to another party, and the *offeree*, the one to whom the offer or proposal is made. An **offer** is a promise or commitment to do or refrain from doing some specified thing in the future. Under the common law, three elements are necessary for an offer to be effective:

1. The offeror must have a serious intention to become bound by the offer.
2. The terms of the offer must be reasonably certain, or definite, so that the parties and the court can ascertain the terms of the contract.
3. The offer must be communicated to the offeree.

Once an effective offer has been made, the offeree has the power to accept the offer. If the offeree accepts, an agreement is formed (and thus a contract arises, if other essential elements are present). The requirements for traditional offers apply to online offers as well, as you will read in Chapter 19.

Intention

The first requirement for an effective offer is a serious intent on the part of the offeror. Serious intent is not determined by the *subjective* intentions, beliefs, and assumptions of the offeror. As discussed in Chapter 10, courts generally adhere to the *objective theory of contracts* in determining whether a contract has been formed. Under this theory, a party's words and conduct are held to mean whatever a reasonable person in the offeree's position would think they meant. The court will give words their usual meanings even if "it were proved by twenty bishops that [the] party . . . intended something else."[1]

1. Judge Learned Hand in *Hotchkiss v. National City Bank of New York*, 200 F. 287 (2d Cir. 1911), aff'd 231 U.S. 50, 34 S.Ct. 20, 58 L.Ed. 115 (1913).

Offers made in obvious anger, jest, or undue excitement do not meet the intent test because a reasonable person would realize that a serious offer was not being made. Because these offers are not effective, an offeree's acceptance does not create an agreement. For example, suppose that you and three classmates ride to school each day in Davina's new automobile, which has a market value of $20,000. One cold morning, the four of you get into the car, but Davina cannot get the car started. She yells in anger, "I'll sell this car to anyone for $500!" You drop $500 in her lap. Given these facts, a reasonable person, taking into consideration Davina's frustration and the obvious difference in worth between the market value of the car and the proposed purchase price, would declare that her offer was not made with serious intent and that you did not have an agreement.

The concept of intention can be further clarified through an examination of the types of expressions and statements that are *not* offers. We look at these expressions and statements in the subsections that follow. In the classic case of *Lucy v. Zehmer,* presented here, the court considered whether an offer made "after a few drinks" met the serious-intent requirement.

CASE 11.1 Lucy v. Zehmer

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

Background and Facts W. O. Lucy and J. C. Lucy, the plaintiffs, filed a suit against A. H. Zehmer and Ida Zehmer, the defendants, to compel the Zehmers to transfer title of their property, known as the Ferguson Farm, to the Lucys for $50,000, as the Zehmers had allegedly agreed to do. Lucy had known Zehmer for fifteen or twenty years and for the last eight years or so had been anxious to buy the Ferguson Farm from Zehmer. One night, Lucy stopped in to visit the Zehmers in the combination restaurant, filling station, and motor court they operated. While there, Lucy tried to buy the Ferguson Farm once again. This time he tried a new approach. According to the trial court transcript, Lucy said to Zehmer, "I bet you wouldn't take $50,000 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Throughout the evening, the conversation returned to the sale of the Ferguson Farm for $50,000. At the same time, the parties continued to drink whiskey and engage in light conversation. Eventually, Lucy enticed Zehmer to write up an agreement to the effect that the Zehmers would sell the Ferguson Farm to Lucy for $50,000 complete. Later, Lucy sued Zehmer to compel him to go through with the sale. Zehmer argued that he had been drunk and that the offer had been made in jest and hence was unenforceable. The trial court agreed with Zehmer, and Lucy appealed.

IN THE LANGUAGE OF THE COURT
***BUCHANAN,* J. [Justice] delivered the opinion of the court.**

* * * *

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. * * *

* * * *

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.

* * * *

CASE CONTINUES

CASE 11.1 CONTINUED

In the field of contracts, as generally elsewhere, *[w]e 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. [Emphasis added.]

* * * *

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.

Decision and Remedy *The Supreme Court of Virginia determined that the writing was an enforceable contract and reversed the ruling of the lower court. The Zehmers were required by court order to follow through with the sale of the Ferguson Farm to the Lucys.*

Impact of This Case on Today's Law *This is a classic case in contract law because it illustrates so clearly the objective theory of contracts with respect to determining whether a serious offer was intended. Today, the courts continue to apply the objective theory of contracts and routinely cite* Lucy v. Zehmer *as a significant precedent in this area.*

What If the Facts Were Different? *Suppose that the day after Lucy signed the purchase agreement for the farm, he decided that he didn't want it after all, and Zehmer sued Lucy to perform the contract. Would this change in the facts alter the court's decision that Lucy and Zehmer had created an enforceable contract? Why or why not?*

Expressions of Opinion An expression of opinion is not an offer. It does not indicate an intention to enter into a binding agreement. Consider an example. Hawkins took his son to McGee, a physician, and asked McGee to operate on the son's hand. McGee said that the boy would be in the hospital three or four days and that the hand would *probably* heal a few days later. The son's hand did not heal for a month, but the father did not win a suit for breach of contract. The court held that McGee had not made an offer to heal the son's hand in a few days. He had merely expressed an opinion as to when the hand would heal.[2]

Statements of Future Intent A statement of an *intention* to do something in the future is not an offer. If Arif says, "I *plan* to sell my stock in Novation, Inc., for $150 per share," a contract is not created if John "accepts" and tenders the $150 per share for the stock. Arif has merely expressed his intention to enter into a future contract for the sale of the stock. If John accepts and tenders the $150 per share, no contract is formed because a reasonable person would conclude that Arif was only *thinking about* selling his stock, not *promising* to sell it.

2. *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929).

Preliminary Negotiations A request or invitation to negotiate is not an offer. It only expresses a willingness to discuss the possibility of entering into a contract. Statements such as "Will you sell Blythe Estate?" or "I wouldn't sell my car for less than $5,000" are examples. A reasonable person in the offeree's position would not conclude that these statements indicated an intention to enter into a binding obligation. Likewise, when the government or private firms require construction work, they invite contractors to submit bids. The *invitation* to submit bids is not an offer, and a contractor does not bind the government or private firm by submitting a bid. (The bids that the contractors submit are offers, however, and the government or private firm can bind the contractor by accepting the bid.)

Agreements to Agree Traditionally, agreements to agree—that is, agreements to agree to the material terms of a contract at some future date—were not considered to be binding contracts. The modern view, however, is that agreements to agree may be enforceable agreements (contracts) if it is clear that the parties intended to be bound by the agreements. In other words, under the modern view the emphasis is on the parties' intent rather than on form.

For example, after a person was injured and nearly drowned on a water ride at Six Flags Amusement Park, Six Flags, Inc., filed a lawsuit against the manufacturer that designed the particular ride. The defendant manufacturer claimed that there was no binding contract between the parties, only preliminary negotiations that were never formalized into a construction contract. The court, however, held that a faxed document specifying the details of the water ride, along with the parties' subsequent actions (beginning construction and handwriting notes on the fax), was sufficient to show an intent to be bound. Because of the court's finding, the manufacturer was required to provide insurance for the water ride at Six Flags, and its insurer was required to defend Six Flags in the personal-injury lawsuit that arose out of the incident.[3]

Increasingly, the courts are holding that a preliminary agreement constitutes a binding contract if the parties have agreed on all essential terms and no disputed issues remain to be resolved.[4] In contrast, if the parties agree on certain major terms but leave other terms open for further negotiation, a preliminary agreement is binding only in the sense that the parties have committed themselves to negotiate the undecided terms in good faith in an effort to reach a final agreement.[5]

Advertisements In general, advertisements—including representations made in mail-order catalogues, price lists, and circulars—are treated not as offers to contract but as invitations to negotiate. Suppose that Loeser advertises a used paving machine. The ad is mailed to hundreds of firms and reads, "Used Loeser Construction Co. paving machine. Builds curbs and finishes cement work all in one process. Price: $42,350." If Star Paving calls Loeser and says, "We accept your offer," no contract is formed. Any reasonable person would conclude that Loeser was not promising to sell the paving machine but rather was soliciting offers to buy it. If such an ad were held to constitute a legal offer, and fifty people accepted the offer, there would be no way for Loeser to perform all fifty of the resulting contracts. He would have to breach forty-nine contracts. Obviously, the law seeks to avoid such unfairness.

Price lists are another form of invitation to negotiate or trade. A seller's price list is not an offer to sell at that price; it merely invites the buyer to offer to buy at that price. In fact, the seller usually puts "prices subject to change" on the price list. Only in rare circumstances will a price quotation be construed as an offer.[6]

Although most advertisements and the like are treated as invitations to negotiate, this does not mean that an advertisement can never be an offer. On some occasions, courts have construed advertisements to be offers because the ads contained definite terms that invited acceptance (such as an ad offering a reward for the return of a lost dog).[7]

The plaintiff in the following case argued that an ad on a Web site constituted an offer, which he accepted.

3. *Six Flags, Inc. v. Steadfast Insurance Co.*, 474 F.Supp.2d 201 (D.Mass. 2007).

4. See, for example, *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89 (2d Cir. 2007); and *Florine On Call, Ltd. v. Fluorogas Limited*, No. 01-CV-186 (W.D.Tex. 2002), contract issue affirmed on appeal at 380 F.3d 849 (5th Cir. 2004). A significant precedent in this area is *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). (Generally, a complete Texas Court of Appeals citation includes the writ-of-error history showing the Texas Supreme Court's disposition of the case. In this case, *writ ref'd n.r.e.* is an abbreviation for "writ refused, no reversible error," which means that Texas's highest court refused to grant the appellant's request to review the case, because the court did not think there was any reversible error.)

5. See, for example, *MBH, Inc. v. John Otte Oil & Propane, Inc.*, 727 N.W.2d 238 (Neb.App. 2007); and *Barrand v. Whataburger, Inc.*, 214 S.W.3d 122 (Tex.App.—Corpus Christi 2006).

6. See, for example, *Nordyne, Inc. v. International Controls & Measurements Corp.*, 262 F.3d 843 (8th Cir. 2001).

7. The classic example is *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689 (1957).

CASE 11.2 Trell v. American Association of the Advancement of Science

United States District Court, Western District of New York, 2007. __ F.Supp.2d __.

Background and Facts The American Association for the Advancement of Science (AAAS) maintains Science NOW, a daily Internet news service, and publishes *Science*, a scholarly journal. An ad on the Science NOW Web site asks for "news tips" and states that each tip will be investigated for its

CASE CONTINUES

CASE 11.2 CONTINUED suitability as an item for Science NOW or an article for *Science*. In response to the ad, Erik Trell, a professor and physician, submitted a manuscript in which he claimed to have solved a famous mathematical problem, popularly known as Beal's Conjecture. AAAS decided that Trell's manuscript contained neither news nor a solution to Beal's Conjecture and declined to publish it. Trell filed a suit in a federal district court against AAAS and others, alleging, among other things, breach of contract. Trell asserted, in part, that the Science NOW ad was an offer, which he accepted with his submission of a manuscript. The defendants filed a motion to dismiss this claim.

IN THE LANGUAGE OF THE COURT
***JOHN T. ELFVIN,* * * * D.J. [District Judge]**

* * * *

* * * Resolution of this issue requires consideration of principles of contract law that are not limited to the law of any one state * * * [and] implicate questions of contract law deeply ingrained in the common law of England and the States of the Union. It is upon these principles that the Court will examine this issue.

With respect to the formation of a contract, the Court finds that the relevant facts are contained in paragraphs 26 through 28 of [Trell's] Amended Complaint. In those paragraphs, plaintiff alleges that "AAAS provides a daily news service, Science NOW, as one of its Web products," that "[i]n one of its Internet [advertisements] for [news] tips," Science NOW indicated that "its news team would investigate any tip submitted that was suitable for an item in Science NOW, and that the same might even lead to a story in the print version of defendant AAAS's *Science* magazine" and that in response to this advertisement, "[p]laintiff submitted his manuscript to defendant Science NOW, entitled 'Reproving Fermat's Last Theorem: also confirming Beal's and related conjectures.'"

Having reviewed the Amended Complaint, the Court finds that, upon the facts as alleged in the Amended Complaint, this claim must be dismissed because no contract was formed. Quite simply, the Court finds that the advertisement for "news tips" on the Science NOW Web site cannot be construed as an offer * * *. Statements that urge members of the general public to take some action in response thereto, as is clearly depicted in the Amended Complaint herein, are commonly characterized as advertisements. *Advertisements are not offers—they invite offers. Likewise, responses to advertisements are not acceptances—they are offers.* At best, it was Trell's submission of the manuscript that was the offer, which Trell clearly admits defendants declined to accept. This is the controlling law. *The Court finds no distinction requiring a different analysis or result merely because the advertisement was soliciting ideas (i.e., "news tips") rather than goods, or because it was communicated over the Internet as opposed to through television, radio or newspaper advertisement.* [Emphasis added.]

There is a very narrow and limited exception to this rule, but it is rarely applied and only in exceptional circumstances where the advertisement clearly communicates an offer that is definite, explicit and leaves nothing open for negotiation. There is nothing alleged in the Amended Complaint which could reasonably be construed to apply this exception.

Decision and Remedy *The court granted the defendants' motion and dismissed the plaintiff's complaint. Science NOW's ad for "news tips" was not an offer, but an invitation for offers.*

The Ethical Dimension *Besides breach of contract, Trell charged the defendants with fraud, misappropriation of property, breach of fiduciary duty, unfair competition, conversion, and conspiracy with intent to defraud. What might have been Trell's motivation for all of these charges? Is this a reasonable basis for a lawsuit? Discuss.*

The E-Commerce Dimension *Should the court have made an exception to the rule applied in this case because the ad was posted on the Internet? Why or why not?*

Auctions In an auction, a seller "offers" goods for sale through an auctioneer, but this is not an offer to form a contract. Rather, it is an invitation asking bidders to submit offers. In the context of an auction, a bidder is the offeror, and the auctioneer is the offeree. The offer is accepted when the auctioneer strikes the hammer. Before the fall of the hammer, a bidder may revoke (take back) her or his bid, or the auctioneer

may reject that bid or all bids. Typically, an auctioneer will reject a bid that is below the price the seller is willing to accept.

When the auctioneer accepts a higher bid, he or she rejects all previous bids. Because rejection terminates an offer (as will be discussed later), those bids represent offers that have been terminated. Thus, if the highest bidder withdraws his or her bid before the hammer falls, none of the previous bids is reinstated. If the bid is not withdrawn or rejected, the contract is formed when the auctioneer announces, "Going once, going twice, sold!" (or something similar) and lets the hammer fall.

Traditionally, auctions have been referred to as either "with reserve" or "without reserve." In an auction with reserve, the seller (through the auctioneer) may withdraw the goods at any time before the auctioneer closes the sale by announcement or by the fall of the hammer. All auctions are assumed to be auctions with reserve unless the terms of the auction are explicitly stated to be *without reserve*. In an auction without reserve, the goods cannot be withdrawn by the seller and must be sold to the highest bidder. In auctions with reserve, the seller may reserve the right to confirm or reject the sale even after "the hammer has fallen." In this situation, the seller is obligated to notify those attending the auction that sales of goods made during the auction are not final until confirmed by the seller.[8]

Definiteness of Terms

The second requirement for an effective offer involves the definiteness of its terms. An offer must have terms that are reasonably definite so that, if it is accepted and a contract formed, a court can determine if a breach has occurred and can provide an appropriate remedy. The specific terms required depend, of course, on the type of contract. Generally, a contract must include the following terms, either expressed in the contract or capable of being reasonably inferred from it:

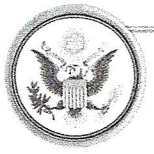
1. The identification of the parties.
2. The identification of the object or subject matter of the contract (also the quantity, when appropriate), including the work to be performed, with specific identification of such items as goods, services, and land.
3. The consideration to be paid.
4. The time of payment, delivery, or performance.

An offer may invite an acceptance to be worded in such specific terms that the contract is made definite. For example, suppose that Marcus Business Machines contacts your corporation and offers to sell "from one to ten MacCool copying machines for $1,600 each; state number desired in acceptance." Your corporation agrees to buy two copiers. Because the quantity is specified in the acceptance, the terms are definite, and the contract is enforceable.

Courts sometimes are willing to supply a missing term in a contract when the parties have clearly manifested an intent to form a contract. If, in contrast, the parties have attempted to deal with a particular term of the contract but their expression of intent is too vague or uncertain to be given any precise meaning, the court will not supply a "reasonable" term because to do so might conflict with the intent of the parties. In other words, the court will not rewrite the contract.[9] The following case illustrates this point.

8. These rules apply under both the common law of contracts and the Uniform Commercial Code (UCC)—see UCC 2–328.

9. See Chapter 20 and UCC 2–204. Article 2 of the UCC specifies different rules relating to the definiteness of terms used in a contract for the sale of goods. In essence, Article 2 modifies general contract law by requiring less specificity.



EXTENDED CASE 11.3 Baer v. Chase

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

***GREENBERG*, Circuit Judge.**

* * * *

[David] Chase, who originally was from New Jersey, but relocated to Los Angeles in 1971, is the creator, producer, writer and director of *The Sopranos*. Chase has numerous credits for other television productions as well. * * * Chase had worked on a number of projects involving organized crime activities based in New Jersey, including a script for "a mob boss in therapy," a concept that, in part, would become the basis for *The Sopranos*.

In 1995, Chase was producing and directing a *Rockford Files* "movie-of-the-week" when he met Joseph Urbancyk who was working on the set as a camera operator and temporary director of photography. * * *

CASE CONTINUES

CASE 11.3 CONTINUED

[Through Urbancyk, Chase met Robert] Baer, * * * a New Jersey attorney [who] recently had left his employment in the Union County Prosecutor's Office in Elizabeth, New Jersey, where he had worked for the previous six years.

* * * *

Chase, Urbancyk and Baer met for lunch on June 20, 1995 * * * , with Baer describing his experience as a prosecutor. Baer also pitched the idea to shoot "a film or television shows about the New Jersey Mafia." At that time Baer was unaware of Chase's previous work involving mob activity premised in New Jersey. At the lunch there was no reference to any payment that Chase might make to Baer for the latter's services * * * .

In October 1995, Chase visited New Jersey for three days. During this "research visit" Baer arranged meetings for Chase with Detective Thomas Koczur, Detective Robert A. Jones, and Tony Spirito who provided Chase with information, material and personal stories about their experiences with organized crime. * * * Baer does not dispute that virtually all of the ideas and locations that he "contributed" to Chase existed in the public record.

After returning to Los Angeles, Chase sent Baer a copy of a draft of a *Sopranos* screenplay that he had written, which was dated December 20, 1995. Baer asserts that after he read it he called Chase and made various comments with regard to it. Baer claims that the two spoke at least four times during the following year and that he sent a letter to Chase dated February 10, 1997, discussing *The Sopranos* script. * * *

* * * *

Baer asserts that he and Chase orally agreed on three separate occasions that if the show became a success, Chase would "take care of" Baer, and "remunerate Baer in a manner commensurate to the true value of his services." * * *

Baer claims that on each of these occasions the parties had the same conversation in which Chase offered to pay Baer, stating "you help me; I pay you." Baer always rejected Chase's offer, reasoning that Chase would be unable to pay him "for the true value of the services Baer was rendering." Each time Baer rejected Chase's offer he did so with a counteroffer, "that I would perform the services while assuming the risk that if the show failed Chase would owe me nothing. If, however, the show succeeded he would remunerate me in a manner commensurate to the true value of my services." Baer acknowledges that this counteroffer * * * always was oral and did not include any fixed term of duration or price. * * * In fact, Chase has not paid Baer for his services.

On or about May 15, 2002, Baer filed a * * * complaint against Chase in [a federal] district court * * * [claiming among other things] * * * breach of implied contract. Eventually Chase brought a motion for summary judgment * * * .Chase claimed that the alleged contract * * * [was] too vague, ambiguous and lacking in essential terms to be enforced * * * .

The district court granted Chase's motion * * * .

* * * *

Baer predicates [bases] his contract claim on this appeal on an implied-in-fact contract * * * .The issue with respect to the implied-in-fact contract claim concerns whether Chase and Baer entered into an enforceable contract for services Baer rendered that aided in the creation and production of *The Sopranos*. * * *

* * * *

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

* * * *

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

* * * *

CASE 11.3 CONTINUED

The * * * question with respect to Baer's contract claim, therefore, is whether his contract is enforceable in light of the traditional requirement of definitiveness * * * . A contract may be expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. There is a point, however, at which interpretation becomes alteration. In this case, even when all of the parties' verbal and non-verbal actions are aggregated and viewed most favorably to Baer, we cannot find a contract that is distinct and definitive enough to be enforceable.

Nothing in the record indicates that the parties agreed on how, how much, where, or for what period Chase would compensate Baer. The parties did not discuss who would determine the "true value" of Baer's services, when the "true value" would be calculated, or what variables would go into such a calculation. There was no discussion or agreement as to the meaning of "success" of *The Sopranos*. There was no discussion [of] how "profits" were to be defined. There was no contemplation of dates of commencement or termination of the contract. And again, nothing in Baer's or Chase's conduct, or the surrounding circumstances of the relationship, sheds light on, or answers, any of these questions. The district court was correct in its description of the contract between the parties: "The contract as articulated by the Plaintiff lacks essential terms, and is vague, indefinite and uncertain; no version of the alleged agreement contains sufficiently precise terms to constitute an enforceable contract." We therefore will affirm the district court's rejection of Baer's claim to recover under a theory of implied-in-fact contract.

QUESTIONS

1. Why must the terms of a contract be "sufficiently definite" before a court will enforce the contract?
2. What might a court consider when looking for a "sufficiently definite meaning" to make a contract term enforceable?

Communication

A third requirement for an effective offer is communication—the offer must be communicated to the offeree. Ordinarily, one cannot agree to a bargain without knowing that it exists. Suppose that Estrich advertises a reward for the return of his lost dog. Hoban, not knowing of the reward, finds the dog and returns it to Estrich. Hoban cannot recover the reward because she did not know it had been offered.[10]

SECTION 2 Termination of the Offer

The communication of an effective offer to an offeree gives the offeree the power to transform the offer into a binding, legal obligation (a contract) by an acceptance. This power of acceptance, however, does not continue forever. It can be terminated either by action of the parties or by operation of law.

Termination by Action of the Parties

An offer can be terminated by action of the parties in any of three ways: by revocation, by rejection, or by counteroffer.

Revocation of the Offer by the Offeror

The offeror's act of withdrawing (revoking) an offer is known as **revocation.** Unless an offer is irrevocable (discussed shortly), the offeror usually can revoke the offer (even if he or she has promised to keep it open) as long as the revocation is communicated to the offeree before the offeree accepts. Revocation may be accomplished by express repudiation of the offer (for example, with a statement such as "I withdraw my previous offer of October 17") or by performance of acts that are inconsistent with the existence of the offer and are made known to the offeree (for example, selling the offered property to another person in the presence of the offeree).

10. A few states allow recovery of the reward, but not on contract principles. Because Estrich wanted his dog to be returned and Hoban returned it, these few states would allow Hoban to recover on the basis that it would be unfair to deny her the reward just because she did not know it had been offered.

In most states, a revocation becomes effective when the offeree or the offeree's agent (a person acting on behalf of the offeree) actually receives it. Therefore, if a letter revoking an offer is mailed on April 1 and arrives on April 3, the revocation becomes effective on April 3.

An offer made to the general public can be revoked in the same manner that the offer was originally communicated. Suppose that a department store offers a $10,000 reward to anyone providing information leading to the apprehension of the persons who burglarized the store's downtown branch. The offer is published in three local papers and four papers in neighboring communities. To revoke the offer, the store must publish the revocation in all seven of the papers in which it published the offer. The revocation is then accessible to the general public, even if some particular offeree does not know about it.

Irrevocable Offers Although most offers are revocable, some can be made irrevocable—that is, they cannot be revoked, or canceled. An option contract involves one type of irrevocable offer. Increasingly, courts also refuse to allow an offeror to revoke an offer when the offeree has changed position because of justifiable reliance on the offer. (In some circumstances, "firm offers" made by merchants may also be considered irrevocable—see the discussion of the "merchant's firm offer" in Chapter 20.)

Option Contract. An **option contract** is created when an offeror promises to hold an offer open for a specified period of time in return for a payment (consideration) given by the offeree. An option contract takes away the offeror's power to revoke the offer for the period of time specified in the option. If no time is specified, then a reasonable period of time is implied. For example, suppose that you are in the business of writing movie scripts. Your agent contacts the head of development at New Line Cinema and offers to sell New Line your latest movie script. New Line likes your script and agrees to pay you $25,000 for a six-month option. In this situation, you (through your agent) are the offeror, and New Line is the offeree. You cannot revoke your offer to sell New Line your script for the next six months. If after six months no contract has been formed, however, New Line loses the $25,000, and you are free to sell the script to another movie studio.

Real Estate Option Contracts. Option contracts are also frequently used in conjunction with the sale or lease of real estate. For example, you might agree with a landowner to lease a home and include in the lease contract a clause stating that you will pay $9,000 for an option to purchase the home within a specified period of time. If you decide not to purchase the home after the specified period has lapsed, you forfeit the $9,000, and the landlord is free to sell the property to another buyer.

Additionally, contracts to lease business premises often include options to renew the leases at certain intervals, such as after five years. Typically, a lease contract containing a renewal option requires notification—that is, the person leasing the premises must notify the property owner of his or her intention to exercise the renewal option within a certain number of days or months before the current lease expires.

Detrimental Reliance and Promissory Estoppel. When the offeree justifiably relies on an offer to her or his detriment, the court may hold that this *detrimental reliance* makes the offer irrevocable. For example, assume that Sue Fox has rented commercial property from Luis Rivera for the past thirty-three years under a series of five-year leases. As their seventh lease nears its end, Fox tells Rivera that she is going to look at other, less expensive properties as possible sites for her business. Wanting Fox to remain a tenant, Rivera promises to reduce the rent in their next lease. In reliance on the promise, Fox continues to occupy and do business on Rivera's property and does not look at other sites. When they sit down to negotiate a new lease, however, Rivera says he has changed his mind and will increase the rent. Can he effectively revoke his promise?

Normally, he cannot, because Fox has been relying on his promise to reduce the rent. Had the promise not been made, she would have relocated her business. This is a case of detrimental reliance on a promise, which therefore cannot be revoked. In this situation, the doctrine of **promissory estoppel** comes into play. To **estop** means to bar, impede, or preclude someone from doing something. Thus, promissory estoppel means that the promisor (the offeror) is barred from revoking the offer, in this situation because the offeree has already changed her actions in reliance on the offer. We look again at the doctrine of promissory estoppel in Chapter 12 in the context of consideration.

Detrimental Reliance and Partial Performance. Detrimental reliance can also occur when an offeree partially performs in response to an offer to form a unilateral contract. As discussed in Chapter 10, an offer to

form a unilateral contract invites acceptance only by full performance; merely promising to perform does not constitute acceptance. Injustice can result if an offeree expends time and funds in partial performance, only to have the offeror revoke the offer before performance can be completed. Many courts will not allow the offeror to revoke the offer after the offeree has performed some substantial part of his or her duties.[11] In effect, partial performance renders the offer irrevocable, giving the original offeree reasonable time to complete performance. Of course, once the performance is complete, a unilateral contract exists.

Rejection of the Offer by the Offeree If the offeree rejects the offer, the offer is terminated. Any subsequent attempt by the offeree to accept will be construed as a new offer, giving the original offeror (now the offeree) the power of acceptance. A rejection is ordinarily accomplished by words or conduct indicating an intent not to accept the offer. As with a revocation, a rejection of an offer is effective only when it is actually received by the offeror or the offeror's agent.

Note that merely inquiring about an offer does not constitute rejection. Suppose that a friend offers to buy your PlayStation 3 for $300, and you respond, "Is that your best offer?" or "Will you pay me $375 for it?" A reasonable person would conclude that you did not reject the offer but merely made an inquiry for further consideration of the offer. You can still accept and bind your friend to the $300 purchase price. When the offeree merely inquires as to the firmness of the offer, there is no reason to presume that he or she intends to reject it.

Counteroffer by the Offeree A **counteroffer** is a rejection of the original offer and the simultaneous making of a new offer. Suppose that Burke offers to sell his home to Lang for $270,000. Lang responds, "Your price is too high. I'll offer to purchase your house for $250,000." Lang's response is called a counteroffer because it rejects Burke's offer to sell at $270,000 and creates a new offer by Lang to purchase the home at a price of $250,000.

At common law, the **mirror image rule** requires the offeree's acceptance to match the offeror's offer exactly—to mirror the offer. Any change in, or addition to, the terms of the original offer automatically terminates that offer and substitutes the counteroffer. The counteroffer, of course, need not be accepted; but if the original offeror does accept the terms of the counteroffer, a valid contract is created.[12]

Termination by Operation of Law

The power of the offeree to transform the offer into a binding, legal obligation can be terminated by operation of law through the occurrence of any of the following events:

1. Lapse of time.
2. Destruction of the specific subject matter of the offer.
3. Death or incompetence of the offeror or the offeree.
4. Supervening illegality of the proposed contract.

Lapse of Time An offer terminates automatically by law when the period of time *specified in the offer* has passed. For example, suppose that Alejandro offers to sell his camper to Kelly if she accepts within twenty days. Kelly must accept within the twenty-day period or the offer will lapse (terminate). The time period specified in an offer normally begins to run when the offer is actually received by the offeree, not when it is formed or sent. If the offer states that it will be left open until a particular date, then the offer will terminate at midnight on that day. When the offer is delayed (through the misdelivery of mail, for example), the period begins to run from the date the offeree would have received the offer, but only if the offeree knows or should know that the offer is delayed.[13]

If the offer does not specify a time for acceptance, the offer terminates at the end of a *reasonable* period of time. What constitutes a reasonable period of time depends on the subject matter of the contract, business and market conditions, and other relevant circumstances. An offer to sell farm produce, for example, will terminate sooner than an offer to sell farm equipment because farm produce is perishable and subject to greater fluctuations in market value.

Destruction of the Subject Matter An offer is automatically terminated if the specific subject

11. *Restatement (Second) of Contracts*, Section 45.

12. The mirror image rule has been greatly modified in regard to sales contracts. Section 2–207 of the UCC provides that a contract is formed if the offeree makes a definite expression of acceptance (such as signing the form in the appropriate location), even though the terms of the acceptance modify or add to the terms of the original offer (see Chapter 20).

13. *Restatement (Second) of Contracts*, Section 49.

matter of the offer is destroyed before the offer is accepted.[14] If Johnson offers to sell his prize greyhound to Rizzo, for example, but the dog dies before Rizzo can accept, the offer is automatically terminated. Johnson does not have to tell Rizzo that the animal has died for the offer to terminate.

Death or Incompetence of the Offeror or Offeree An offeree's power of acceptance is terminated when the offeror or offeree dies or is deprived of legal capacity to enter into the proposed contract. A revocable offer is personal to both parties and cannot pass to the heirs, guardian, or estate of either. Furthermore, this rule applies whether or not the other party had notice of the death or incompetence. If the offer is irrevocable, however, the death of the offeror or offeree does not terminate the offer.[15]

14. *Restatement (Second) of Contracts,* Section 36.
15. *Restatement (Second) of Contracts,* Section 48. If the offer is such that it can be accepted by the performance of a series of acts, and those acts began before the offeror died, the offeree's power of acceptance is not terminated.

Supervening Illegality of the Proposed Contract A statute or court decision that makes an offer illegal automatically terminates the offer.[16] For example, Lee offers to lend Kim $10,000 at an annual interest rate of 12 percent. Before Kim can accept the offer, a law is enacted that prohibits interest rates higher than 10 percent. Lee's offer is automatically terminated. (If the statute is enacted after Kim accepts the offer, a valid contract is formed, but the contract may still be unenforceable—see Chapter 13.) *Concept Summary 11.1* provides a review of the ways in which an offer can be terminated.

Section 3 Acceptance

Acceptance is a voluntary act by the offeree that shows assent (agreement) to the terms of an offer. The offeree's act may consist of words or conduct. The

16. *Restatement (Second) of Contracts,* Section 36.

Concept Summary 11.1 Methods by Which an Offer Can Be Terminated

By Action of the Parties

1. *Revocation*—Unless the offer is irrevocable, it can be revoked at any time before acceptance without liability. Revocation is not effective until received by the offeree or the offeree's agent. Some offers, such as a merchant's firm offer and option contracts, are irrevocable. Also, in some situations, an offeree's detrimental reliance and/or partial performance will cause a court to rule that the offeror cannot revoke the offer.
2. *Rejection*—Accomplished by words or actions that demonstrate a clear intent not to accept the offer; not effective until received by the offeror or the offeror's agent.
3. *Counteroffer*—A rejection of the original offer and the making of a new offer.

By Operation of Law

1. *Lapse of time*—The offer terminates (a) at the end of the time period specified in the offer or (b) if no time period is stated in the offer, at the end of a reasonable time period.
2. *Destruction of the subject matter*—When the specific subject matter of the offer is destroyed before the offer is accepted, the offer automatically terminates.
3. *Death or incompetence of the offeror or offeree*—If the offeror or offeree dies or becomes incompetent, this terminates the offer (unless the offer is irrevocable).
4. *Supervening illegality*—When a statute or court decision makes the proposed contract illegal, the offer automatically terminates.

acceptance must be unequivocal and must be communicated to the offeror.

Unequivocal Acceptance

To exercise the power of acceptance effectively, the offeree must accept unequivocally. This is the *mirror image rule* previously discussed. If the acceptance is subject to new conditions or if the terms of the acceptance change the original offer, the acceptance may be deemed a counteroffer that implicitly rejects the original offer.

An acceptance may be unequivocal even though the offeree expresses dissatisfaction with the contract. For example, "I accept the offer, but I wish I could have gotten a better price" is an effective acceptance. So, too, is "I accept, but can you shave the price?" In contrast, the statement "I accept the offer but only if I can pay on ninety days' credit" is not an unequivocal acceptance and operates as a counteroffer, rejecting the original offer.

Certain terms, when added to an acceptance, will not qualify the acceptance sufficiently to constitute rejection of the offer. Suppose that in response to an offer to sell a piano, the offeree replies, "I accept; please send a written contract." The offeree is requesting a written contract but is not making it a condition for acceptance. Therefore, the acceptance is effective without the written contract. If the offeree replies, "I accept if you send a written contract," however, the acceptance is expressly conditioned on the request for a writing, and the statement is not an acceptance but a counteroffer. (Notice how important each word is!)[17]

Silence as Acceptance

Ordinarily, silence cannot constitute acceptance, even if the offeror states, "By your silence and inaction, you will be deemed to have accepted this offer." This general rule applies because an offeree should not be obligated to act affirmatively to reject an offer when no consideration has passed to the offeree to impose such a duty.

In some instances, however, the offeree does have a duty to speak. In these situations, her or his silence or inaction will operate as an acceptance. For example, silence may be an acceptance when an offeree takes the benefit of offered services even though he or she had an opportunity to reject them and knew that they were offered with the expectation of compensation. Suppose that Sayre watches while a stranger rakes his leaves, even though the stranger has not been asked to rake the yard. Sayre knows the stranger expects to be paid and does nothing to stop her. Here, his silence constitutes an acceptance, and an implied-in-fact contract is created (see Chapter 10). He is bound to pay a reasonable value for the stranger's work.

Silence can also operate as acceptance when the offeree has had prior dealings with the offeror. Suppose that a business routinely receives shipments from a certain supplier and always notifies that supplier when defective goods are rejected. In this situation, silence regarding a shipment will constitute acceptance.

Communication of Acceptance

Whether the offeror must be notified of the acceptance depends on the nature of the contract. In a bilateral contract, communication of acceptance is necessary because acceptance is in the form of a promise (not performance) and the contract is formed when the promise is made (rather than when the act is performed). The offeree must communicate the acceptance to the offeror. Communication of acceptance is not necessary, however, if the offer dispenses with the requirement. Additionally, if the offer can be accepted by silence, no communication is necessary.

Because a unilateral contract calls for the full performance of some act, acceptance is usually evident, and notification is therefore unnecessary. Nevertheless, exceptions do exist, such as when the offeror requests notice of acceptance or has no way of determining whether the requested act has been performed. In addition, sometimes the law requires notice of acceptance, and thus notice is necessary.[18]

Mode and Timeliness of Acceptance

Acceptance in bilateral contracts must be timely. The general rule is that acceptance in a bilateral contract is timely if it is made before the offer is terminated.

17. As noted in footnote 12, in regard to sales contracts, the UCC provides that an acceptance may still be valid even if some terms are added. The new terms are simply treated as proposed additions to the contract.

18. Under UCC 2–206(1)(b), an order or other offer to buy goods for prompt shipment may be treated as an offer contemplating either a bilateral or a unilateral contract and may be accepted by either a promise to ship (bilateral contract) or actual shipment (unilateral contract). If the offer is accepted by actual shipment of the goods, the buyer must be notified of the acceptance within a reasonable period of time, or the buyer may treat the offer as having lapsed before acceptance [UCC 2–206(2)]. See also Chapter 20.

Problems may arise, though, when the parties involved are not dealing face to face. In such situations, the offeree should use an authorized mode of communication.

Acceptance takes effect, thus completing formation of the contract, at the time the offeree sends or delivers the communication via the mode expressly or impliedly authorized by the offeror. This is the so-called **mailbox rule,** which the majority of courts follow. Under this rule, if the authorized mode of communication is the mail, then an acceptance becomes valid when it is dispatched (placed in the control of the U.S. Postal Service)—*not* when it is received by the offeror.

The mailbox rule was created to prevent the confusion that arises when an offeror sends a letter of revocation but, before it arrives, the offeree sends a letter of acceptance. Thus, whereas a revocation becomes effective only when it is *received* by the offeree, an acceptance becomes effective on *dispatch* (when sent, even if it is never received), provided that an *authorized* means of communication is used.

The mailbox rule does not apply to instantaneous forms of communication, such as when the parties are dealing face to face, by telephone, or by fax. There is still some uncertainty in the courts as to whether e-mail should be considered an instantaneous form of communication to which the mailbox rule does not apply. If the parties have agreed to conduct transactions electronically and if the Uniform Electronic Transactions Act (to be discussed in Chapter 19) applies, then e-mail is considered sent when it either leaves control of the sender or is received by the recipient. This rule takes the place of the mailbox rule when the Uniform Electronic Transactions Act applies but essentially allows an e-mail acceptance to become effective when sent (as it would if sent by U.S. mail).

Authorized Means of Acceptance A means of communicating acceptance can be expressly authorized—that is, expressly stipulated in the offer—or impliedly authorized by the facts and circumstances surrounding the situation or by law.[19] An acceptance sent by means not expressly or impliedly authorized normally is not effective until it is received by the offeror.

When an offeror specifies how acceptance should be made (for example, by overnight delivery), *express authorization* is said to exist, and the contract is not formed unless the offeree uses that specified mode of acceptance. Moreover, both offeror and offeree are bound in contract the moment this means of acceptance is employed. For example, Shaylee & Perkins, a Massachusetts firm, offers to sell a container of antique furniture to Leaham's Antiques in Colorado. The offer states that Leaham's must accept the offer via FedEx overnight delivery. The acceptance is effective (and a binding contract is formed) the moment that Leaham's gives the overnight envelope containing the acceptance to the FedEx driver.

When the Preferred Means of Acceptance Is Not Indicated. Most offerors do not expressly specify the means by which the offeree is to accept. When the offeror does not specify expressly that the offeree is to accept by a certain means, or that the acceptance will be effective only when received, acceptance of an offer may be made by any medium that is *reasonable under the circumstances.*[20]

Whether a mode of acceptance is reasonable depends on what would reasonably be expected by parties in the position of the contracting parties. Courts look at prevailing business usages and other surrounding circumstances such as the method of communication the parties have used in the past and the means that were used to convey the offer. The offeror's choice of a particular means in making the offer implies that the offeree is authorized to use the same *or a faster* means for acceptance. Suppose that two parties have been negotiating a deal via fax and then the offeror sends a formal contract offer by priority mail without specifying the means of acceptance. In that situation, the offeree's acceptance by priority mail or by fax is impliedly authorized.

When the Authorized Means of Acceptance Is Not Used. An acceptance sent by means not expressly or impliedly authorized normally is not effective *until it is received by the offeror.* For example, suppose that Frank Cochran is interested in buying a house from Ray Nunez. Cochran faxes an offer to Nunez that clearly specifies acceptance by fax. Nunez has to be out of town for a few days, however, and doesn't

19. *Restatement (Second) of Contracts,* Section 30, provides that an offer invites acceptance "by any medium reasonable in the circumstances," unless the offer is specific about the means of acceptance. Under Section 65, a medium is reasonable if it is one used by the offeror or one customary in similar transactions, unless the offeree knows of circumstances that would argue against the reasonableness of a particular medium (the need for speed because of rapid price changes, for example).

20. *Restatement (Second) of Contracts,* Section 30. This is also the rule under UCC 2–206(1)(a).

have access to a fax machine. Therefore, Nunez sends his acceptance to Cochran via FedEx instead of by fax. In this situation, the acceptance is not effective (and no contract is formed) until Cochran receives the FedEx delivery. The use of an alternative method does not render the acceptance ineffective if the substituted method performs the same function or serves the same purpose as the authorized method.[21]

Exceptions The following are three basic exceptions to the rule that a contract is formed when an acceptance is sent by authorized means:

1. If the offeree's acceptance is not properly dispatched, in most states it will not be effective until it is received by the offeror. For example, if an e-mailed acceptance lists the recipient's e-mail address incorrectly, or if the acceptance is faxed to the wrong telephone number, it will not be effective until received by the offeror. If U.S. mail is the authorized means for acceptance, the offeree's letter must be properly addressed and have the correct postage. Nonetheless, if the acceptance is timely sent and timely received, despite the offeree's carelessness in sending it, it may still be considered to have been effective on dispatch.[22]
2. If the offer stipulates when acceptance will be effective, then the offer will not be effective until the time specified. The offeror has the power to control the offer and can stipulate both the means by which the offer is accepted and the precise time that an acceptance will be effective. For example, an offer might state that acceptance will not be effective until it is received by the offeror, or it might make acceptance effective twenty-four hours after being shipped via DHL delivery.
3. Sometimes, an offeree sends a rejection first, then later changes his or her mind and sends an acceptance. Obviously, this chain of events could cause confusion and even detriment to the offeror, depending on whether the rejection or the acceptance arrived first. In such situations, the law cancels the rule of acceptance on dispatch, and the first communication received by the offeror determines whether a contract is formed. If the rejection arrives first, there is no contract.[23]

For a review of the effective time of acceptance, see *Concept Summary 11.2.*

21. See, for example, *Osprey, L.L.C. v. Kelly Moore Paint Co.*, 984 P.2d 194 (Okla. 1999).
22. *Restatement (Second) of Contracts,* Section 67.
23. *Restatement (Second) of Contracts,* Section 40.

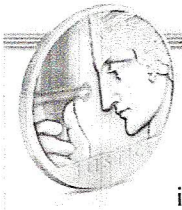
CONCEPT SUMMARY 11.2
Effective Time of Acceptance

Acceptance	Time Effective
By Authorized Means of Communication	Effective at the time communication is sent (deposited in a mailbox or delivered to a courier service) via the mode expressly or impliedly authorized by the offeror (mailbox rule). *Exceptions:* 1. If the acceptance is not properly dispatched, it will not be effective until received by the offeror. 2. If the offeror specifically conditioned the offer on receipt of acceptance, it will not be effective until received by the offeror. 3. If acceptance is sent after rejection, whichever is received first is given effect.
By Unauthorized Means of Communication	Effective on receipt of acceptance by the offeror (if timely received, it is considered to have been effective on dispatch).

Technology and Acceptance Rules

Clearly, some of the traditional rules governing acceptance do not seem to apply to an age in which acceptances are commonly delivered via e-mail, fax, or other delivery system, such as FedEx or DHL. For example, when accepting an online offer, the mailbox rule does not apply to online acceptances, which typically are communicated instantaneously to the offeror. Nonetheless, the traditional rules—and the principles that underlie those rules—provide a basis for understanding what constitutes a valid acceptance in today's online environment. This is because, as in other areas of the law, much of the law governing online offers and acceptances has been adapted from traditional law to a new context.

Although online offers are not significantly different from traditional offers contained in paper documents, online acceptances have posed some unusual problems for the court. These problems, as well as other aspects of e-contracting, will be discussed in detail in Chapter 19.



REVIEWING Agreement

Shane Durbin wanted to have a recording studio custom-built in his home. He sent invitations to a number of local contractors to submit bids on the project. Rory Amstel submitted the lowest bid, which was $20,000 less than any of the other bids Durbin received. Durbin called Amstel to ascertain the type and quality of the materials that were included in the bid and to find out if he could substitute a superior brand of acoustic tiles for the same bid price. Amstel said he would have to check into the price difference. The parties also discussed a possible start date for construction. Two weeks later, Durbin changed his mind and decided not to go forward with his plan to build a recording studio. Amstel filed a suit against Durbin for breach of contract. Using the information presented in the chapter, answer the following questions.

1. Did Amstel's bid meet the requirements of an offer? Explain.
2. Was there an acceptance of the offer? Why or why not?
3. Suppose that the court determines that the parties did not reach an agreement. Further suppose that Amstel, in anticipation of building Durbin's studio, had purchased materials and refused other jobs so that he would have time in his schedule for Durbin's project. Under what theory discussed in the chapter might Amstel attempt to recover these costs?
4. How is an offer terminated? Assuming that Durbin did not inform Amstel that he was rejecting the offer, was the offer terminated at any time described here? Explain.

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QUESTIONS AND CASE PROBLEMS

11-1. Ball writes to Sullivan and inquires how much Sullivan is asking for a specific forty-acre tract of land Sullivan owns. In a letter received by Ball, Sullivan states, "I will not take less than $60,000 for the forty-acre tract as specified." Ball immediately sends Sullivan a telegram stating, "I accept your offer for $60,000 for the forty-acre tract as specified." Discuss whether Ball can hold Sullivan to a contract for the sale of the land.

11-2. QUESTION WITH SAMPLE ANSWER

Schmidt, operating a sole proprietorship, has a large piece of used farm equipment for sale. He offers to sell the equipment to Barry for $10,000. Discuss the legal effects of the following events on the offer:

(a) Schmidt dies prior to Barry's acceptance, and at the time he accepts, Barry is unaware of Schmidt's death.
(b) The night before Barry accepts, fire destroys the equipment.
(c) Barry pays $100 for a thirty-day option to purchase the equipment. During this period, Schmidt dies, and later Barry accepts the offer, knowing of Schmidt's death.
(d) Barry pays $100 for a thirty-day option to purchase the equipment. During this period, Barry dies, and Barry's estate accepts Schmidt's offer within the stipulated time period.

• **For a sample answer to Question 11-2, go to Appendix I at the end of this text.**

11-3. Perez sees an advertisement in the newspaper indicating that the ABC Corp. is offering for sale a two-volume set of books, *How to Make Repairs around the House*, for $39.95. All Perez has to do is send in a card requesting delivery of the books for a thirty-day trial period. If he does not ship the books back within thirty days of delivery, ABC will bill him for $39.95. Discuss whether Perez and ABC have a contract under either of the following circumstances:

(a) Perez sends in the card and receives the books in the U.S. mail. He uses the books to make repairs and fails to return them within thirty days.
(b) Perez does not send in the card, but ABC sends him the books anyway through the U.S. mail. Perez uses the books and fails to return them within thirty days.

11-4. On Thursday, Dennis mailed a letter to Tanya's office offering to sell his car to her for $3,000. On Saturday, having changed his mind, Dennis sent a fax to Tanya's office revoking his offer. Tanya did not go to her office over the weekend and thus did not learn about the revocation until Monday morning, just a few minutes after she had mailed a letter of acceptance to Dennis. When Tanya demanded that Dennis sell his car to her as promised, Dennis claimed that no contract existed because he had revoked his offer prior to Tanya's acceptance. Is Dennis correct? Explain.

11-5. Definiteness of Terms. Southwick Homes, Ltd., develops and markets residential subdivisions. William McLinden and Ronald Coco are the primary owners of Southwick Homes. Coco is also the president of Mutual Development Co. Whiteco Industries, Inc., wanted to develop lots and sell homes in Schulien Woods, a subdivision in Crown Point, Indiana. In September 1996, Whiteco sent McLinden a letter enlisting Southwick Homes to be the project manager for developing and marketing the finished lots (lots where roads had been built and on which utility installation and connections to water and sewer lines were complete); the letter set out the roles and expectations of each of the parties, including the terms of payment. In October 1997, Whiteco sent Coco a letter naming Mutual Development the developer and general contractor for the houses to be built on the finished lots. A few months later, Coco told McLinden that he would not share in the profits from the construction of the houses. McLinden and others filed a suit in an Indiana state court against Coco and others, claiming, in part, a breach of fiduciary duty. The defendants responded that the letter to McLinden lacked such essential terms as to render it unenforceable. What terms must an agreement include to be an enforceable contract? Did the letter sent to McLinden include these terms? In whose favor should the court rule? Explain. [*McLinden v. Coco*, 765 N.E.2d 606 (Ind.App. 2002)]

11-6. CASE PROBLEM WITH SAMPLE ANSWER

The Pittsburgh Board of Public Education in Pittsburgh, Pennsylvania, as required by state law, keeps lists of eligible teachers in order of their rank or standing. According to an "Eligibility List" form made available to applicants, no one may be hired to teach whose name is not within the top 10 percent of the names on the list. In 1996, Anna Reed was in the top 10 percent. She was not hired that year, although four other applicants who placed lower on the list—and not within the top 10 percent—were hired. In 1997 and 1998, Reed was again in the top 10 percent, but she was not hired until 1999. Reed filed a suit in a federal district court against the board and others. She argued, in part, that the state's requirement that the board keep a list constituted an offer, which she accepted by participating in the process to be placed on that list. She claimed that the board breached this contract by hiring applicants who ranked lower than she did. The case was transferred to a Pennsylvania state court. What are the requirements of an offer? Do the circumstances in this case meet those requirements? Why or why not? [*Reed v. Pittsburgh Board of Public Education*, 862 A.2d 131 (Pa.Cmwlth. 2004)]

- **To view a sample answer for Problem 11–6, go to this book's Web site at academic.cengage.com/blaw/clarkson, select "Chapter 11," and click on "Case Problem with Sample Answer."**

11–7. Intention. Music that is distributed on compact discs and similar media generates income in the form of "mechanical" royalties. Music that is publicly performed, such as when a song is played on a radio, included in a movie or commercial, or sampled in another song, produces "performance" royalties. Each of these types of royalties is divided between the songwriter and the song's publisher. Vincent Cusano is a musician and songwriter who performed under the name "Vinnie Vincent" as a guitarist with the group KISS in the early 1980s. Cusano co-wrote three songs entitled "Killer," "I Love It Loud," and "I Still Love You" that KISS recorded and released in 1982 on an album titled *Creatures of the Night.* Cusano left KISS in 1984. Eight years later, Cusano sold to Horipro Entertainment Group "one hundred (100%) percent undivided interest" of his rights in the songs "other than Songwriter's share of performance income." Later, Cusano filed a suit in a federal district court against Horipro, claiming, among other things, that he never intended to sell the writer's share of the mechanical royalties. Horipro filed a motion for summary judgment. Should the court grant the motion? Explain. [*Cusano v. Horipro Entertainment Group,* 301 F.Supp.2d 272 (S.D.N.Y. 2004)]

11–8. Agreement. In 2000, David and Sandra Harless leased 2.3 acres of real property at 2801 River Road S.E. in Winnabow, North Carolina, to their son-in-law and daughter, Tony and Jeanie Connor. The Connors planned to operate a "general store/variety store" on the premises. They agreed to lease the property for sixty months with an option to renew for an additional sixty months. The lease included an option to buy the property for "fair market value at the time of such purchase (based on at least two appraisals)." In March 2003, Tony told David that the Connors wanted to buy the property. In May, Tony gave David an appraisal that estimated the property's value at $140,000. In July, the Connors presented a second appraisal that determined the value to be $160,000. The Connors offered $150,000. The Harlesses replied that "under no circumstances would they ever agree to sell their old store building and approximately 2.5 acres to their daughter . . . and their son-in-law." The Connors filed a suit in a North Carolina state court against the Harlesses, alleging breach of contract. Did these parties have a contract to sell the property? If so, what were its terms? If not, why not? [*Connor v. Harless,* 176 N.C.App. 402, 626 S.E.2d 755 (2006)]

11–9. Offer. In August 2000, in California, Terry Reigelsperger sought treatment for pain in his lower back from chiropractor James Siller. Reigelsperger felt better after the treatment and did not intend to return for more, although he did not mention this to Siller. Before leaving the office, Reigelsperger signed an "informed consent" form that read, in part, "I intend this consent form to cover the entire course of treatment for my present condition and for any future condition(s) for which I seek treatment." He also signed an agreement that required the parties to submit to arbitration "any dispute as to medical malpractice. . . . This agreement is intended to bind the patient and the health care provider . . . who now or in the future treat[s] the patient." Two years later, Reigelsperger sought treatment from Siller for a different condition relating to his cervical spine and shoulder. Claiming malpractice with respect to the second treatment, Reigelsperger filed a suit in a California state court against Siller. Siller asked the court to order the dispute to be submitted to arbitration. Did Reigelsperger's lack of intent to return to Siller after his first treatment affect the enforceability of the arbitration agreement and consent form? Why or why not? [*Reigelsperger v. Siller,* 40 Cal.4th 574, 150 P.3d 764, 53 Cal.Rptr.3d 887 (2007)]

11–10. A QUESTION OF ETHICS

*In 1980, Kenneth McMillan and his associate in a dental practice obtained life insurance policies that designated each the beneficiary of the other. They set up automatic withdrawals from their bank accounts to pay the premiums. Later, Laurence Hibbard joined the practice, which was renamed Bentley, McMillan and Hibbard, P.C. (professional corporation), or BMH. When the three terminated their business relationship in 2003, McMillan sold his BMH stock to Hibbard. But Hibbard did not pay, and McMillan obtained a judgment against him for $52,972.74. When Hibbard still did not pay, McMillan offered him a choice. In lieu of paying the judgment, Hibbard could take over the premiums on Bentley's insurance policy or "cash" it in. Either way, the policy's proceeds would be used to pay off loans against the policy—which McMillan had arranged—and Hibbard would accept responsibility for any unpaid amount. Hibbard signed the agreement but did not make a choice between the two options. McMillan filed a suit in a Georgia state court against Hibbard, seeking reimbursement for the premiums paid since their agreement. [*Hibbard v. McMillan, 284 Ga.App. 753, 645 S.E.2d 356 (2007)]*

(a) McMillan asked the court to award him attorneys' fees because Hibbard had been "stubbornly litigious," forcing McMillan to litigate to enforce their agreement. Should the court grant this request? Are there any circumstances in which Hibbard's failure to choose between McMillan's options would be justified? Explain.

(b) Generally, parties are entitled to contract on their own terms without the courts' intervention. Under the principles discussed in this chapter, what are some of the limits to this freedom? Do any of these limits apply to the agreement between McMillan and Hibbard? Why or why not?

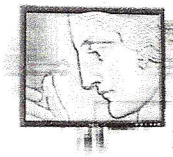
11-11. VIDEO QUESTION

Go to this text's Web site at **academic.cengage.com/blaw/clarkson** and select "Chapter 11." Click on "Video Questions" and view the video titled *Offer and Acceptance*. Then answer the following questions.

(a) On the video, Vinny indicates that he can't sell his car to Oscar for four thousand dollars and then says, "maybe five ...." Discuss whether Vinny has made an offer or a counteroffer.

(b) Oscar then says to Vinny, "Okay, I'll take it. But you gotta let me pay you four thousand now and the other thousand in two weeks." According to the chapter, do Oscar and Vinny have an agreement? Why or why not?

(c) When Maria later says to Vinny, "I'll take it," has she accepted an offer? Why or why not?



LAW ON THE WEB

For updated links to resources available on the Web, as well as a variety of other materials, visit this text's Web site at

academic.cengage.com/blaw/clarkson

To learn what kinds of clauses are included in typical contracts for certain goods and services, you can explore the collection of contract forms made available by FindLaw at

forms.lp.findlaw.com

Legal Research Exercises on the Web

Go to **academic.cengage.com/blaw/clarkson**, the Web site that accompanies this text. Select "Chapter 11" and click on "Internet Exercises." There you will find the following Internet research exercises that you can perform to learn more about the topics covered in this chapter.

Internet Exercise 11–1: Legal Perspective
Contract Terms

Internet Exercise 11–2: Management Perspective
Sample Contracts

Internet Exercise 11–3: Ethical Perspective
Offers and Advertisements