The Agreement: Offer

Requirements for an Offer
- Intent to contract
- Definite terms
- Communication to the offeree

Intent to Contract
- The offeror must indicate present intent to contract.
- **Objective Standard** of Intent
  - An offeror’s intent will be judged by what his words, acts, and the circumstances signify about his intent.
  - Compare: Early American courts used **subjective intent** standard.
Definiteness of Terms
- Indicate a present intent to contract.
- Allows courts to fashion a remedy in the event of breach.

Definiteness Standards Under the Common Law
- Courts are contract enforcers not contract makers under the traditional common law.
- All of the essential terms of a proposed contract must be stated in the offer.
- The trend of modern contract law is to tolerate a lower degree of specificity.

Definiteness Standards Under the UCC
- UCC often creates a contract in situations where a contract would not exist in common law.
- UCC section 2-204 says contracts can be created in "any manner sufficient to show agreement, including conduct which recognizes the existence of a contract."
- As long as the parties intended to contract, open terms in the agreement will not defeat the contract.
- The UCC "gap-filling" rules fill in the open terms.
Communication to the Offeree

- An offer must be communicated by the offeror to the offeree.
  - Offeror: Makes offer
  - Offeree: Accepts or rejects offer
- E.g., Al tells Bob that he is going to offer his services to Cathy. Bob tells Cathy about the offer. Not a valid offer.
  - Exception: Unless Bob was acting as Al’s agent

Special Offer Problem Areas

- Advertisements
- Rewards
- Auctions
- Bids

Advertisements

- Advertisements for the sale of goods at specified prices are generally not considered offers.
- Ads that were highly specific about the nature and number of items and what is requested in return have been held to be offers.
  - e.g. Car dealers ads
Rewards

- Notices for rewards for lost property, for information, or for the capture of criminals are generally treated as offers for unilateral contracts.

Auctions

- A bidder at an auction is generally considered the offeror.
- The seller is the offeree.

Bids

- Advertisements for bids are generally considered *invitations to make offers*.
- Those who submit bids are treated as offerors.
- Once offeree accepts the bid, contract is formed and both parties are bound
  - Bids may be binding in some cases: Promisory Estoppel
Which Terms Are Included in the Offer?

- Modern courts tend to enforce only those terms of which offerees had actual or reasonable notice.
  - Compare: Old common law view: Offerees were bound by all the terms of the offer, since every person had duty to protect himself by reading agreements carefully before signing.
- Software and Internet: Shrinkwrap and Clickwrap contracts
  - EULAs – End User License Agreement.
    - Enforceability of shrinkwrap and clickwrap EULAs depends on jurisdiction, how it is written, facts of case, other factors.
  - UCITA – Model code, very pro-software company (anti-consumer)
    - Passed in only VA, MD
    - "Bomb-shelter" provisions passed in several states
      - Iowa, North Carolina, Vermont, West Virginia

Termination of Offers

- A contract may not be formed if the offer has terminated.
- The offeror is “the master of the offer.”
  - The offeror has the power to determine the terms and conditions under which he will be bound to a contract.

Termination of Offers

- Offers may be terminated in a number of ways:
  - Terms of the offer
  - Lapse of time
  - Revocations
  - Rejection
  - Death or insanity
  - Destruction of the subject matter
  - Intervening illegality
Terms of the Offer

- An offer may expressly state that it will terminate on a specific date and time.
- “Good for five days” can be problematic – five days from when?

Lapse of Time

- An offer that does not state a specific termination period will lapse after a reasonable time.

Revocations

- General rule: An offer may be revoked by the offeror any time prior to acceptance.
  - This is so, even if the offer states that it will remain open for a stated period of time.
Exceptions to the Rule That the Offer Is Revocable

- Options
- Offers for unilateral contracts and performance has begun
- Promissory estoppel
- Firm offers (UCC)

Options

- Offeror promises to hold the offer open and receives consideration for the promise.
  - Rather than buying the property outright (and paying a large purchase price), an interested party may acquire an "option" (i.e., the exclusive right to purchase the property at a future date)
  - Example: $50,000 option on a novel for screenplay rights for one year.
    - Author cannot sell the rights to the novel to another studio for one year.

Offers for Unilateral Contracts and Performance Has Begun

- Offeree has started to perform the requested acts before offeror revokes.
  - e.g., You offer to pay someone to mow your lawn for $10. They begin mowing. Can you revoke? No.
  - Two basic approaches:
    - 1) Power to revoke suspended for reasonable time to complete performance
    - 2) For purposes of revocation, a bilateral contract is created once the offeree begins performance
Promissory Estoppel

- Offeree reasonably and foreseeably relies on an offer being held open and injustice is avoided by enforcing the promise.
- Example: General contractor relying on subcontractor’s bid when submitting general bid

Firm Offers (UCC)

- A merchant offeror makes a written offer to buy or sell goods and gives the assurance that the offer will remain open.
- A merchant is one who regularly deals in the goods of the kind sold in the contract, or holds himself out as having special skills or knowledge concerning those goods.

Time of Effectiveness of Revocations

- Revocations are generally effective when they are received by the offeree.
Rejection

- An offer terminates when the offeree expressly or impliedly rejects the offer.
- The offer is impliedly rejected when the offeree makes a counteroffer.
- The offerees response to an offer is a counteroffer if the terms are materially different from the original offer.

Time of Effectiveness of Rejection

- A rejection is effective when received by the offeror.

Death or Insanity

- Death or insanity of either party terminates the offer.
**Destruction of the Subject Matter**

- The offer terminates if prior to acceptance, the subject matter of the proposed contract is destroyed through no fault of either party.
- Example: P offers to sell D his house, but the house is destroyed by a fire before acceptance. Offer is terminated.

**Intervening Illegality**

- An offer terminates if the proposed performance becomes illegal prior to acceptance.
- Examples:
  - Offer to sell computer equipment to a foreign company, then Congress passes a trade embargo on the country.
  - Offer to sell Ephedra (e.g., Twinlab’s Ripped Fuel), which is banned by the FDA three days later.