**Invitations to Negotiate**

Welcome to this podcast on Invitations to Negotiate and Other Expressions that are not Offers brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is the basic concepts related to invitations to negotiate or preliminary negotiations and other types of communications that are not offers. In particular, we will look at the basic attributes of advertisements, price quotations, invitations to bid, and auction sales.

Recall that contractual promises take the form of a manifestation of mutual assent which is most often shown by virtue of an offer followed by an acceptance. You might hear the requirements for an offer referred to generally as the three C’s: (i) the promisor’s commitment to the terms of the offer; (ii) certainty of the terms; and (iii) communication to the offeree. Remember that in contracts we use an objective test to evaluate the facts. That is, what a reasonable person would believe in the circumstances. In this podcast we will see that some circumstances indicate that the reasonable person would not believe an offer was intended.

Let’s begin with advertisements. Imagine a local supermarket with weekly buy one get one free specials. This week’s circular advertises buy one get one free for a 12 pack of Pepsi products. Does the supermarket manifest willingness to enter into a bargain with the shopper based upon the weekly circular? Most often the answer is no. While advertisements can be troublesome, they most often tend not to be offers, but rather preliminary negotiations, often referred to as invitations to negotiate. Meaning, ordinarily it is the buyer who is the offeror for the Pepsi products, rather than the supermarket. The shopper who takes the two 12 packs of Pepsi products to the front register for purchase is in effect saying, “I offer to purchase these two for the price of one.” Basically, the seller has informed buyers through the advertisement of the weekly circular that it is willing to consider offers at the stated terms of the advertisement, so long as it still has goods available.

In most cases, the seller is not itself making the offer when it advertises the goods for sale. Of course, that is not always the case. In the well-known case of *Lefkowitz v. Great Minneapolis Surplus Store*, the court found an advertisement for a fur coat for the price of one dollar valued at $100 was an offer where the advertisement specified how many fur coats were available and stated they would be sold first come, first served. The court explained that where an advertisement is clear, definite and explicit, leaving nothing open for negotiation, then the advertisement is an offer. The Great Minneapolis Surplus Store advertisement satisfied this test because it specified how many fur coats were available, the value of the coats and contained the first come, first served language. While the advertisement was made to the public at large, this type of language indicates a commitment to sell a specified number of fur coats and identifies who can accept and how.

So, why are advertisements often not offers? Most advertisements, such as our weekly supermarket circular, do not contain any specification about how many Pepsi products are available or who can make the purchase. If hundreds of people show up at the supermarket all wanting to purchase the buy one get one free products, must the store sell to everybody? Surely, the supply of Pepsi products is not unlimited. As such, the buy one get one free supermarket circular lacks commitment and is not an offer, but rather an invitation to negotiate. Meaning, if you show up at the supermarket, you may be able to purchase Pepsi product buy one get one free if your offer to buy is accepted. A seller might reject your offer to purchase the Pepsi products for any reason, but perhaps simply because all Pepsi products covered by the buy one get one free have already been sold. Quite simply, most advertisements are not offers because they are general publicity for goods in the absence of special language of commitment. Instead, the law presumes that supermarket through its weekly circular has made an invitation to buyers who then come to the store and the buyer makes the offer.

Note that sellers can take advantage of this rule. When the buyer makes the offer, the clerk might respond, “We don’t have any Pepsi left, but we can sell you this Cheapo Cola instead.” This tactic is known as a “bait and switch.” While contract law can’t do anything about it, in most jurisdictions it is prohibited by consumer protection laws. You will often see that the ad contains language such as “while supplies last” or “limited to stocks on hand” – that is to comply with those laws.

Catalogues and price quotations are similar to advertisements. A catalogue or price quotation is just a statement of price for particular goods or services. Like advertisements, catalogues and price quotations are typically understood as inviting offers, rather than making them. This would be true even if the word “offer” was used. In order to determine whether any particular catalogue or price quotation is an offer, look for facts involving the terms of any previous inquiry, the completeness of the terms contained in the catalogue or price quotation and the number of persons to whom it is directed. Let’s look at two examples.

Example #1. Marshall asks soccer coach for the price of 10 private goalkeeper lessons. Coach responds: “I can quote you $60 per hour with 10 one hour lessons.” This price quotation is not likely to be an offer due to the use of the word “quote” and the lack of specificity about when and where the lessons would take place, even though the communication is directed to a specific person, Marshall.

Example #2. The same facts as example #1, except Coach responds: “I am available to do the training and can offer you $60 per hour with 10 one hour lessons to begin next Tuesday at 6:30 PM at City Park. Cash every week after the lesson.” Now we might conclude that this response by Coach is an offer because it states that Coach is available, uses the word “offer” and mentions the length of the lesson, time of the lesson, location for the lesson and even the payment terms.

While many times price quotations and catalogues are not offers, it seems that sometimes they are. In the well-known case of *Fairmont Glass Works v. Cruden-Martin Woodenware Co.*, a price quotation for Mason jars was found to be an offer. In this case, the buyer had asked the seller to “advise us the lowest price you can give us on our order of 10 car loads of Mason green jars, complete, with caps, packed one dozen in a case,” and providing delivery terms and requesting the seller’s terms and discounts. The seller responded with a detailed quote for the Mason jars, complete, “for immediate acceptance.” The court found that the seller’s price quotation was an offer because it demonstrated commitment to sell to the buyer in light of its detail and “for immediate acceptance” language. However, we might expect a different outcome if the price quotation had not included the “for immediate acceptance” language and was sent to multiple customers to whom the company had sold Mason jars to in the past.

Let’s turn to invitations to bid. Invitations to bid, even when the terms are specified, are not offers because the other person either knows or has reason to know that the person requesting the bid does not intend to conclude a bargain prior to evaluating all the bids that are received.

Example #3. Southern City requests bids from potential landscapers for the city parks. Green World Company and others submit bids for the work. Southern City did not make an offer to the landscapers when it requested the bids. Southern City is making a request for offers such that Green World Company and others will likely have made offers upon submission of their bids.

A similar result occurs with auctions. At an auction, the auctioneer does not make an offer, but, rather, invites offers from bidders. The auctioneer may accept a bid in the auction at some point by saying “sold” or bring down the hammer when one is used to indicate acceptance. Most often, auctions are conducted “with reserve” such that the auctioneer can withdraw the goods at any time prior to completion of the sale. Sometimes, an auction is “without reserve” meaning that once the goods are put up for auction, they will not be withdrawn and will be sold to the highest bidder. In an auction without reserve, though, the item can be withdrawn prior to it going up for auction. As to bidders, they can retract a bid prior to the completion of the sale. However, auctions often have their own rules publicized before the auction begins as to the bidding process. Let’s look at an example.

Example #4. Best Charity holds its annual auction fundraiser. At the auction, the auctioneer announces, “Our next item is the six-month membership to Local Country Club.” Beverly bids $100. The auctioneer tries to urge others to bid higher. It would seem that the auctioneer has invited offers and Beverly, as a bidder in an auction, has made an offer to purchase the membership. Unless the auction is with reserve, the item cannot be withdrawn, and Beverly will get the membership if there are no other bidders when the auctioneer brings the hammer down, says “Sold for $100!” or otherwise indicates acceptance.

At this point, you should be able to identify the four types of communications that are typically not offers, but rather invitations to negotiate: (i) advertisements; (ii) catalogues and price quotations; (iii) requests for bids; and (iv) an auctioneer beginning an auction. You should also be able to determine when an offer might be made in response to one of these types of communications.

I hope you’ve enjoyed this podcast on Invitations to Negotiate and Other Communications that are Not Offers.

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