**Offer**

Welcome to this podcast on Offer brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is the basic concepts related to offers. In particular, we will look at the basic attributes of offers and also look at the particular types of communications that are typically not offers, such as advertisements and price quotations.

Recall that a contract is a promise or set of promises which the law enforces. That is, in order to have a contract, we need promises, basically a manifestation of intention to act or refrain from acting in a specified way. This exchange of promises results in a manifestation of mutual assent. Ordinarily, the manifestation of mutual assent takes place by virtue of an offer by the offeror, which is then followed by an acceptance by the offeree. Most of the time we will be looking at the events that occur in a factual situation to see if a party has, in fact, made an offer. Also, remember that in contracts we use an objective test to evaluate the facts. That is what a reasonable person would believe in the circumstances.

Restatement § 24 provides that “an offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” We can break this rule down to several parts. First, a manifestation of willingness to enter into a bargain is ordinarily understood as an intention or commitment made by the offeror. Second, in order for another person to reasonably believe that assent is invited, the offer must be reasonably certain as to its terms. Third, because assent must be invited, the offer must be communicated to the offeree. You might hear these three requirements 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.

Let’s look at an example. Martin needs a dog sitter for when she goes out of town. Martin sends Julian a text that says “I’m going to Orlando this weekend and need a dog sitter for my dogs, Angus and Porter. If you can watch them Saturday and Sunday and walk them twice a day, I will pay you $75 per day.” Is this an offer? First, the “I will pay you” language does appear to demonstrate an intention or commitment to making the offer. Second, the terms seem certain and definite where we know there are two dogs to be walked, Angus and Porter, the dates are Saturday and Sunday, the dogs are to be walked twice a day, and the rate of pay is $75 per day. Finally, this offer has been communicated to the offeree, Julian, when Martin sent him the text. This appears to be an offer.

Of course, to have an operative offer, each of the elements must be met.

With respect to commitment, or intention to make an offer, we evaluate the facts to determine whether the circumstances, when viewed objectively, indicate an intention to enter into a binding agreement. In our example with the dog sitting, Martin has used clear language about needing a dog sitter and hiring Julian. However, we might conclude that there would be no commitment to make an offer if Martin had only said she was “considering going out of town for the weekend” or that she “might be interested in having Julian walked the dogs.”

Problems can occur with the certainty of terms also, though courts may supply omitted terms where we believe the parties really did intend to enter into a contract. Indefiniteness problems often arise where there are indefinite terms, omitted terms or simply agreements to agree. For instance, if the text by Martin had stated that she was going out of town but never specified the dates, there might not be an offer because the time for performance would be unknown and not generally determinable in this case. However, lack of terms is not always fatal. For instance, if the text did not specify a daily rate, there might still be an offer if Martin had hired Julian in the past and always paid him $75 per day. Whether the purported communication is certain enough to be an offer will then turn on whether the terms of the contract are sufficiently defined or can be supplied by some type of context or past practice.

The traditional third element is communication of the offer to the offeree. For instance, if Martin told José that she was going to ask Julian to walk the dogs this weekend for $75 per day, this would not be an offer to Julian because the offer has not been communicated to Julian. Moreover, José could not accept the offer because the dog walking position was not offered to him either.

Knowing whether the three criteria are satisfied in some cases is difficult.

Advertisements can be troublesome, but 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 advertised goods and services, rather than the seller. For example, if you see that a store has advertised fur coats for $100, and you walk into the store and take a fur coat to the sales clerk, you are in effect saying, “I offer you $100 for this coat.” In essence, the seller has informed buyers through the advertisement that it is willing to consider offers at the stated terms of the advertisement, so long as it still has goods available.

In the well-known case of *Lefkowitz v. Great Minneapolis Surplus Store*, however, 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 that 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? As it turns out, the newspaper advertisement used by the Great Minneapolis Surplus Store advertised many things for sale on Saturday at 9 AM in addition to the three brand-new fur coats. The advertisement also provided for a genuine ToastMaster toaster regularly priced at $24.95, guaranteed new and perfect for $14.88. Is this an offer? I don’t think so. There’s no specification about how many toasters are available or who could make the purchase. If hundreds of people show up on Saturday morning all wanting to buy a toaster, must the store sell to everybody? Surely, the supply of toasters is not unlimited. As such, the toaster advertisement lacks commitment and is not an offer, but rather an invitation to negotiate. Meaning, if you show up on Saturday, you might be able to get a toaster if your offer to buy is accepted. A seller might reject your offer to purchase the toaster for any reason, but perhaps simply because all toasters 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 Great Minneapolis Surplus Store through its advertisement has made an invitation to buyers who then come to the store and the buyer makes the offer if there are goods available.

Catalogues and price quotations post similar problems. A catalogue or price quotation is just a statement of price for particular services or quantity and quality of goods, such as a price list or circular. Like advertisements, catalogues and price quotations are typically understood as inviting offers, rather than making them. 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.

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 fruit 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.

At this point, you should be able to identify the elements of an offer: commitment to the offer, certainty of terms and communication to the offeree. You should also be able to determine when an advertisement or catalogue or price quotation is an offer.

I hope you’ve enjoyed this podcast on Offers.

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