Chapter 3: The Bargain Context

A. Introduction: Contracting parties, no matter how hard they try, cannot negotiate every rule. For example, suppose I agree to sell and you agree to buy my tractor. We agree on the time of delivery and the sale price. When the time arrives, you tender a check and I say I will only accept cash. What do we do? Courts and legislatures have developed background rules that will apply in the absence of an agreement to the contrary.

1. Under what circumstances does it make sense for contracting parties to rely on background rules in lieu of negotiating their own rules? How should background rules be set?

2. Some rules cannot be changed by the contracting parties. Such rules are not background rules but instead constitute substantive rules of law.

B. Offer and Acceptance

1. Subjective and Objective Tests of Mutual Assent

a. Two parties verbally agree on all the terms of some bilateral exchange. Each party mistakenly believes that there is no binding obligation unless their agreement is reduced to writing. Is there a contract? Should be.

b. Same hypo but one says: "I'll have my lawyer draw up the contract and we can sign it tomorrow." Same result? Less clear: the final sentence indicates the possibility that the parties did not intend to be bound until signing. Compare §26 of the Restatement (at p. 4) and §27 (at p. 4).

2. Offer

a. Basic Concepts

i. What is an "offer"? According to Corbin (at p. 206), an offer is an act that gives to the offeree the power of acceptance. A similar definition can be found in §24 of the Restatement (at p. 4). Note that under the *objective* theory of contract, an act will be an offer only if a reasonable person in the position of the offeree would conclude that she has the power to bind the parties. See §25 of the Restatement (at p. 5).

ii. Can a party avoid a contract by proving that he was drunk at the time of making the offer? Should it be relevant whether the offeree was aware that the offeror was aware of the inebriation?

iii. Why is a craig's list advertisement not an offer? Is it reasonable to think the owner is giving the power of acceptance to every reader of the newspaper?

iv. Does a shopper accept the store's offer when he places an item into his grocery basket? If so, what would happen if the check-out clerk says that the items has been mispriced? What would the consequences be if the shopper changed his mind and returned the item to the shelf?

b. *Lucy v. Zehmer* (p. 14): The objective theory of contract. After a detailed analysis of the facts surrounding the transaction, the court concludes (in the first paragraph of page 17): "At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm."

c. *Leonard v. Pepsico* (p. 19): Is this case inconsistent with *Zehmer*? The conclusion that no reasonable person could have believe the offer was seriously intended should end the matter.

d. *Courteen Seed Co. v. Abraham* (p. 207)

i. Technical Issue: In the first sentence of the second paragraph

on page 207, what does "f.o.b." mean? Free on board. F.O.S. means free alongside ship.
lbs of seed for sale at 24 cents per pound. The sale information was sent to multiple parties (and that was clear from the note). The plaintiff initially rejected the offer but subsequently requested the lowest price possible, and defendant replied: "I am asking 23 cents per pound." Plaintiff promptly accepted this "offer."

iii. *Held*, no contract formed because no offer was made by the defendant. Why was the defendant's final communication not an offer? Is the specific language determinative ("offer" vs. "asking")? Was the communication from the plaintiff seeking a return offer? Note that it said "Wire firm offer." Does that not make the reply an "offer"?

iv. Is it relevant that the defendant has another offer? Is it relevant that the plaintiff knew of the other offer?

v. If the final communication from the plaintiff was not an "offer," then what was it? An invitation to deal (or to negotiate)..

e. *Fairmont Glass Works v. Cruden-Martin Woodenware Co.* (p. 210): Would this court have decided *Courteen Seed* differently? How do the two cases differ? Note the return communication that the court says is an "offer" includes the language "for immediate acceptance." Is there an interpretation of that language consistent with it being only an invitation to deal? What is the relevance of the information that (a) quantity is limited and (b) multiple sizes of jars are available within that quantity? Note that there is no indication that the communication was made to others or that the same, limited quantity is subject to another possible contract. If you were the lawyer for the seller, what facts would you try to show the buyer knew?

e. *Lefkowitz v. Great Minneapolis Surplus Store, Inc.* (Note 3, p. 213): The trial court holds that the plaintiff loses the first time but wins the second time. Should not both of those decisions be reversed?

i. Note that this was an offer for a unilateral contract.

ii. The court moved too quickly to the remedies question and so missed the formation issue.

3. Acceptance

a. Methods of Acceptance

i. *Ever-Tite Roofing Corp. v. Green* (p. 217): Defendants signed an agreement calling for plaintiff to re-roof defendant's house. The writing contained the following provision: This agreement shall become binding only upon written acceptance . . . or upon commencing performance of the work." Plaintiff loaded its truck with construction material and when it arrived at the defendant's home, other workers were there. Defendant at that time informed plaintiff that the offer was revoked. *Held*, for plaintiff, that the offer was accepted within a reasonable time of its making and prior to revocation: loading the truck with construction material was the beginning of performance.

(A) Should the court have held that performance had begun prior to the revocation? See RESTATEMENT OF CONTRACTS (2D) §50(2).

(B) Suppose the plaintiff's truck had turned around before getting to defendant's house. Has plaintiff now breached? See RESTATEMENT OF CONTRACTS (2D) §62(2).

ii. *Ciaramella v. Reader's Digest Ass'n, Inc.* (p. 221): A settlement of an anti-discrimination lawsuit was reduced to writing but never signed. The terms of the writing provided that it would not be binding until signed by both parties. Nonetheless, one of the parties wanted to enforce the agreement based on the oral agreement of the lawyers.

(a) Would this case have come out differently if the party

rather than the lawyer had uttered "deal."

(b) How would you respond to the argument that the party has chosen his lawyer to represent him, and that if the lawyer exceeds his authority or makes a bad decision, recourse should be against the lawyer rather than against the other party? What might one purpose of the "not binding until signed" language be?

(c) The court identifies four factors to consider (second full paragraph on page 221). How much weight should each be given? We will return to general problems of contract interpretation later, but note that courts look to (a) course of dealings between the parties, (b) industry customs, and (c) the expressions of the parties.

iii. Accommodations (Note 4 at 226): What happens if an offeree accepts by performance, but the performance fails to meet the terms of the contract? Consistent with Restatement of Contracts §54, the performance constitutes both an acceptance and a breach of contract. The same result obtains under U.C.C. §2-206(1) (p. 144) unless the defective performance constitutes an "accommodation" by the seller. What is an "accommodation"? Note that under U.C.C. §2-102, article 2 of the U.C.C. only applies to contracts for the sale of "goods." For the definition of "goods," see U.C.C. §2-105.

b. Silence or Dominion as Acceptance: Read Restatement (Second) §69 (at p. 10). Every state has provided by statute that unsolicited items sent through the mail may be treated as a gift. How is it that book-of-the-month clubs can make you pay for books unless you return the little card?

c. The Mailbox Rule

i. In general, communications are effective when received.

ii. An offeror may specify how and when an acceptance will be effective.

iii. If the offer has no provision to the contrary, an acceptance dispatched by appropriate means is effective upon dispatch rather than reception. Why? If the offeror seeks to minimize her exposure, what can she do? Is there anything the offeree can do? Note how this rule is similar to the rule that the terms of a contract should be interpreted against the drafter. When does such a rule make sense?

4. Revocation of Offers

a. Revocation in General

i. RESTATEMENT OF CONTRACTS (2D) §36:

(A) An offeree's power of acceptance may be terminated by

(1) rejection or counter-offer by the offeree, or

(2) lapse of time, or

(3) revocation by the offeror, or

(4) death of incapacity of the offeror or offeree.

(B) In addition, an offeree's power of acceptance is terminated by the nonoccurrence of any condition of acceptance under the terms of the offer.

ii. Rejection and the Mailbox Rule:

(a) Acceptance mailed on May 1, arrives May 5. Rejection mailed on May 2, arrives May 6. Contract on May 1.

(n) Rejection mailed on May 1, arrives May 5. Acceptance mailed on May 2, arrives May 6. Contract on May 2. What if offeror relies prior to receipt of acceptance? Equitable estoppel?

ii. A Note on Unilateral Contracts:

(A) Although the text speaks of an offeree "accepting" an

offer for a unilateral contracts, that seems to me to be a confusing approach. To be sure, courts also speak this way, but in the context of a unilateral contract, there is no difference between an offeree accepting the contract and the offeree performing the contract. Thus, to say that performance constitutes acceptance adds nothing.

(B) The offeror may revoke an offer for a unilateral contract until performance has begun. The line between performance and mere preparation is a difficult one to draw; presumably the greater the unrecoverable reliance, the more likely a court will say that performance has begun. Recall *Ever-Tite Roofing*.

(C) Note RESTATEMENT OF CONTRACTS (2D) §§32 and 62(2).

(D) The Restatement uses the term "option contract" instead of unilateral contract, but that way of speaking has never be accepted. We usually use the term "option contract" to mean a binding right in one party to force the other party to perform, with no reciprocal obligation.

b. Irrevocable Offers

i. *Pavel Enterprises, Inc. v. A.S. Johnson Company, Inc.* (p. 236): General contractor prepares a bid based on bids generated by subs. After the general uses the sub's bid but before the main contract is awarded, sub seeks to revoke its offer. At issue is whether that revocation is effective.

(a) Note that if the general contractor is not awarded the main contract, there is no obligation on either side.

(b) If the general contractor wins the main contract, the general often will try to shop subs. Note that at this point the general has all the negotiating power.

i. *James Baird Co. v. Gimbel Bros., Inc.* (Note 2, at 243): Plaintiff was a general contractor who solicited a bid from the defendant, a subcontractor, to use in the general's bid on a large project. After the general's bid on the main project was submitted, the sub informed the general that a mistake had been made and the sub's offer was revoked. *Held*, the revocation is effective.

(A) Why did Judge Hand refuse to apply promissory estoppel? The general contractor should have protected himself by accepting the offer; promissory estoppel can apply only to promises to make a gift and not to offers.

(B) How could the contract have been written to protect both parties, understanding that the sub's bid will be used by the general before the general knows if his overall bid has been accepted?

ii. *Drennan v. Star Paving Co.* (Note 2, at the bottom of 243): Essentially the same facts as in *James Baird*, but the opposite result. Why?

(A) Does Justice Traynor agree with Judge Hand that promissory estoppel should only apply to a promise to make a gift?Yes..

(B) Then why the different outcome? Justice Traynor finds an implicit promise by the sub to keep the offer open, and that implicit promise is a promise to make a gift. Thus, promissory estoppel can be used to enforce that promise (i.e., to hold the offer open), and the general can accept.

(C) Can the general shop subs once his overall bid has been accepted? See Note 2 on page 245.

iii. If you represent a sub, what would you advise?

C. Offer and Counteroffer

1. Introduction

a. See RESTATEMENT OF CONTRACTS (2D) §39.

b. *Dataserv Equipment, Inc .v. Technology Finance Leasing Corp.* (Text at 247):

i. Hypo: Seller offers to sell 100 bushels of number 2 wheat for $4.00 per bushel and gives Buyer 24 hours to consider the offer. Buyer responds: "I'll think about that, but if you can go 10 cents lower bushel, we have a deal right now." Seller says she cannot go lower, and an hour later Buyer calls to accept the original, $4.00 offer. Contract? Yes.

ii. Hypo: Seller offers to sell 100 bushels of number 2 wheat for $4.00 per bushel and gives Buyer 24 hours to consider the offer. Buyer responds: "I'll think about that, but if you can go 10 cents lower bushel, we have a deal right now." Seller says she cannot go lower, and adds: "I hereby revoke my offer." An hour later Buyer calls to accept the original, $4.00 offer. Contract? No (absent facts supporting promissory estoppel).

2. The Common Law View

a. The Mirror Image Rule:

i. The common law rule is that the offeror is the master of the offer, so that the offeree can only accept the bargain as offered or make a counter-offer. Accordingly, any communication that proposes a modification to the original offer is treated as a rejection and a counteroffer.

ii. Even under the common law "mirror acceptance rule," courts recognized that an offeree might accept and simultaneously try to clarify an ambiguous point. For example, an offeree might say: "I accept your offer, and I will pay by personal check." Assuming the original offer made no mention as to the method of payment, many courts would treat this communication by the offeree as an acceptance and a request for clarification.

b. The Last Shot Doctrine: Parties often conclude an exchange by action even though the documents they have exchanged do not agree. For example, the offeror makes an offer to purchase something, and the offer contains elaborate warranties. The offeree purports to accept that offer, but the written acceptance form provides that there are no warranties. Further, each form provides that there is no deal unless its terms are controlling. Despite this lack of agreement, the goods are shipped by the seller and accepted by the buyer. Under the mirror acceptance rule, the terms contained in the last writing are binding because all previous writings were rejected; the last writing was accepted either by shipping the goods (if the last writing was sent by the buyer) or by accepting the goods (if the last writing was sent by the seller). Thus, *the mirror acceptance rule leads to the last shot rule when the papers do not mirror one another yet there is performance.*

c. Note: Do not assume that the offeror is necessarily the buyer or the seller because a typical transaction can be started by either party. For example, a potential buyer might send out a solicitation for bids, making the seller the offeror. On the other hand, the potential buyer might place an order from a seller's catalogue, making the buyer the offeror.

3. U.C.C. Section 2-207

a. Statutory Overview:

i. Paragraph (1) expressly abolishes the mirror acceptance rule. In general, something which purports to be an acceptance will be operative as an acceptance even if it adds new or different terms. However, a purported acceptance that proposes new or additional terms operates as a rejection and counteroffer if the "acceptance is expressly made conditional on assent to the additional or new terms."

ii. Under paragraph (2) and assuming the transaction arises between merchants, any new terms proposed by an effective acceptance are unlikely to be

incorporated into the agreement because almost every term giving rise to litigation is likely to be determined to "materially alter" the transaction. In addition, standard boilerplate now provides a term triggering paragraph (2)(a).

iii. If the offeree does not accept because the purported acceptance is expressly made conditional on assent to the additional or new terms yet performance follows, paragraph (3) provides that the terms of the contract include only those provisions common to both writings.

iv. The premise underlying §2-207 seems to be that these transactions often occur without either party reading what the other party was written. If that is the case, why does §2-207 cause the outcome to turn on what is contained within the writings (e.g., the "expressly made conditional" language in paragraph (1) and the "expressly limited" language in paragraph (2)(b))?

b. *Ionics, Inc. v. Elmwood Sensors, Inc*. (p. 250): The case overrules the famous *Roto-Lith* case. That earlier case addressed two issues and got one of them right and one wrong. Many courts disagreed with *Roto-Lith*, but because there were two issues, it was unclear precisely how they disagreed and the law took a peculiar turn. We must address each issue in turn.

c. *Roto-Lith, Ltd. v. F.P. Bartlett & Co.* (Supplement): Buyer ordered certain goods from seller. The order form sent by buyer did not contain any warranty provisions although warranty provisions would have been implied had that form defined the contract.

i. The court first held that a merchant offeree who proposes additional or different terms that are burdensome to the offeror is necessarily within the "unless" clause of U.C.C. §2-207(1) because proposing such terms would have no effect otherwise. This broad interpretation of the "unless" clause in U.C.C. §2-207(1) has not – unfortunately – been supported by other courts. Most courts hold that a deviant acceptance operates as an acceptance (that is, that it does *not* fall within the "unless" clause of U.C.C. §2-207(1)) unless the deviant acceptance contains a very strong statement to the effect that any proposed terms must be assented to by the offeror or there is no contract. To be sure you fall within the "unless" clause of U.C.C. §2-207(1), the deviant acceptance should say that assent to the new terms must be transmitted (say, within a week or 10 days) to the offeree.

ii. The court then held that the deviant acceptance of the offeree constitutes a counteroffer which was accepted by the offeror's subsequent conduct. This aspect of *Roto-Lith* clearly is wrong: if the papers do not create a contract but the conduct of the parties does, then the terms of the contract include only the those terms common to both sets of papers (plus any default terms added by the U.C.C.) pursuant to U.C.C. §2-207(3). *Ionics* overrules this part of the *Roto-Lith*.

D. Contract Formation in the Internet Age

1. *Step-Saver Data Systems, Inc. v. Wyse Technology* (p. 260): Buyer made bulk purchases of retail commercial software for use in a hardware/software bundle that was resold to end users. Buyer routinely ordered over the telephone, and then the oral agreement would be followed by a paper purchase order sent by the buyer and the shipped goods would include a paper invoice sent by the seller. Neither the purchase order nor the invoice referred to warranty terms. The software failed, and the buyer sues seller for breach of warranty. The seller's defense is based on a box-top license that disclaims all warranties.

a. When was the contract formed? If the contract was formed orally, does it matter what the writings say? If the contract was not formed orally, when was the contract formed? Note that the seller argues that the oral agreement was fatally indefinite and so could

not form the contract between the parties, an argument the court rejects on page 264. Does this contract fall under U.C.C. §2-207?

b. Assuming U.C.C. §2-207 applies to this contract, how does the analysis proceed? The paper purchase order was the offer and the paper invoice was the deviant acceptance. How does the box-top license fit into the picture? Does section 2-207(2) allow for the possibility of multiple deviant acceptances? Note that the court concludes (p. 265-66) that if the box-top license is treated as falling within 2-207(1), then it falls *before* the comma. Does that matter?

c. The court concludes that the box-top license does not apply to the contract between the seller and the buyer. Why? The terms of the box-top license seem directed to the end-user rather than to a broker such as the buyer in this case. In particular, the box-top license precludes resale of the software while both parties knew that the buyer's only purpose in acquiring the software was for resale.

d. The court distinguishes cases in which warranty disclaimers are conspicuous to the buyer before the sale is made. Is that a valid distinction in this case given the repeated purchases by the buyer? Recall *Lefkowitz v. Great Minneapolis Surplus Store* (discussed at page 213 though wrongly decided).

2. *ProCD v. Zeidenberg* (Note 1 at 271): This court (in an opinion written by Judge Easterbrook) in an influential opinion enforces a shrink-wrap agreement on the theory that (1) it advances commercial exchanges and (2) the consumer can reject the terms by returning the product.

2. *Hill v. Gateway2000* (p. 267)

a. Is this case different from *ProCD* in any fundamental way? The court (again per Judge Easterbrook) says no even though the box exterior does not include a statement that additional terms are within. Here, though, the box was merely a shipping carton: the court concludes that the buyer had notice that additional terms would be forthcoming. Note that the seller did not offer to pay for return shipping, and in this case that could be a significant expense (nor did it offer to refund shipping costs incurred by the buyer). Should that change the outcome in this case? Did the court adequately address this important factor (at page 270).

b. Note *Klocek v. Gateway* (Note 2, at 272) in which the court applied U.C.C. §2-207 to the contract, saying that the consumer was the offeror and that Gateway's attempt to impose new terms was a deviant acceptance. Is it fair to say that if consumers have no patience for being read detailed contractual terms prior to sale then the rolling contract is the only alternative?

c. Note that none of these cases uphold the basic premise of a shrink-wrap license that by breaking the seal the customer has agreed to all the new terms *absent a provision for returning the software.* Do you think a refund will in fact be made available?