

The Offer

Oddly, or perhaps ironically, the definition of “offer” itself is somewhat hard to pin down. It's important to understand that “offer” here is a specific legal term with a definition different than the common understanding. A person might “offer” their home for sale without making a legal offer to sell their home. In the colloquial sense, the seller is generally “offering” their goods or services for sale. But from a legal perspective, the seller will often only invite buyers to make an offer to purchase, freeing the seller to have the last word with an acceptance of the buyer's offer. Thus, an “offer” has specific meaning in contract law that diverges from its nonlegal definition.

The Restatement (Second) of Contracts § 24 defines an offer as “the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding [their] assent to that bargain is invited and will conclude it.” As a corollary, there is no offer “if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until [they have] made a further manifestation of assent.” Restatement (Second) of Contracts § 26.

The offer is defined in terms of what it communicates to the other party—that the offeror is willing to make a deal if the other side agrees. But, as Samuel Williston acknowledged in the commentary to the first Restatement of Contracts § 25, “It is often difficult to draw an exact line between offers and negotiations preliminary thereto.” There are many occasions where one party will have proposed a transaction complete as to its terms but lacking the finality—the willingness to conclude the deal—that is necessary to find an offer. Divining the difference between these can be complicated and something upon which courts can disagree.

The following factors have been useful to courts in determining whether a communication is an offer:

1. Finality. This is the primary factor to be consulted, as Restatement § 24 makes clear: is the (purported) offeror willing to be bound if the other party agrees? When deciding cases involving price quotes or advertisements, as discussed below, courts have generally found them not to be offers because they lack the requisite finality to seal the deal then and there. However, finality is often a slippery concept to deduce, as it often requires reading the intent of the parties in ways that may not be obvious.
2. Completeness. This factor is often cited by courts as a critical component of an offer. *See, e.g.,* Nordyne, Inc. v. Int'l Controls & Measurements Corp., 262 F.3d 843, 846 (8th

Cir. 2001) (“Factors relevant in determining whether a price quotation is an offer include . . . the completeness of the terms of the suggested bargain”). However, price quotations and advertisements can often be sufficiently complete to make a deal, so it is important not to overemphasize this factor.

3. Context. Individual proposals do not stand alone; they are often made in context of an ongoing set of communications. Courts have found that one party’s eagerness to make a deal can give finality to a communication that in other contexts would merely be a preliminary step.
4. Audience. To what extent has the proposal been circulated? If it’s an advertisement placed in a newspaper or on social media, then the audience indicates that the proposal is likely not an offer. Conversely, a proposal sent specifically to one person may be more likely to represent a willingness to commit to the deal.
5. Jargon. Our lives as contract lawyers would be easier if everyone had to follow a specific script to make an offer: “I am making you a legally-binding offer to buy 200 widgets for \$500, payable on delivery.” If specific terminology is used with the understanding of its legal import, courts generally accept these expressions of intent.
6. Method of Acceptance. If the proposal provides a specific way to accept the deal and therefore conclude the bargain, that is an indication of an offer.
7. Public Policy/Fairness. Although courts may not explicitly cite this as a factor, some courts may find an offer invalid under unusual circumstances when it looks like one party has taken advantage of ambiguity to mislead the other party. However, promissory estoppel (a subject you will cover elsewhere) is another tool for solving these equitable issues.

Price quotations often look like offers, because they contain all the elements of the deal: the goods or services being sold, price, quantity, and other key aspects of the bargain. However, such quotations are generally taken not to be offers, as they lack the necessary finality. Yet there are also exceptions to this general practice. In the following two cases, look to see what

factors courts have relied upon in finding an offer, and when general practices are overridden by particular circumstances.

Moulton v. Kershaw

18 N.W. 172 (Wisconsin Supreme Court 1884)

TAYLOR, Judge.

The complaint of the respondent alleges that the appellants were dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association; that the respondent was a dealer in salt in the city of La Crosse, and accustomed to buy salt in large quantities, which fact was known to the appellants; that on the nineteenth day of September, 1882, the appellants, at Milwaukee, wrote and posted to the respondent at La Crosse a letter, of which the following is a copy:

MILWAUKEE, September 19, 1882.

J. H. Moulton, Esq., La Crosse, Wis.—DEAR SIR: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

Yours truly,

C. J. KERSHAW & SON.

The balance of the complaint reads as follows: “And this plaintiff alleges, upon information and belief, that said defendants did not send said letter and offer by authority of, or as agents of, the Michigan Salt Association, or any other party, but on their own responsibility. And the plaintiff further shows that he received said letter in due course of mail, to-wit, on the twentieth day of September, 1882, and that he, on that day, accepted the offer in said letter contained, to the amount of two thousand barrels of salt therein named, and immediately, and on said day, sent to said defendants at Milwaukee a message by telegraph, as follows:

‘LA CROSSE, September 20, 1882.

To C. J. Kershaw & Son, Milwaukee, Wis.: Your letter of yesterday, received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt, as offered in your letter. Answer.

J. H. MOULTON.’

[The complaint further alleged that on September 20, C.J. Kershaw and Son (defendants/appellants) received the above telegraph message from Moulton (plaintiff/respondent), and on September 21 they sent a telegram withdrawing their offer. Plaintiff insisted upon performance, but defendants failed to send the salt. Plaintiff alleged that 2,000 barrels was a reasonable quantity to purchase, and that he was suffered damages of \$800 due to the defendants failing to perform on the contract allegedly formed.]

To this complaint the appellants interposed a general demurrer. The circuit court overruled the demurrer, and from the order overruling the same the defendants appeal to this court.

The only question presented is whether the appellant's letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2,000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter. We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. The learned counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants by said letter made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto.

The counsel for the respondent claims that the letter of the appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of the appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way

depend upon the language used in the written contract, but upon proofs to be made outside of the writings.

If the letter of the appellants is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell such quantity as the appellants, from their knowledge of the business of the respondent, might reasonably expect him to order. Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requesting the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice FOSTER in the opinion in *Lyman v. Robinson*, 14 Allen 242, 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent we will sell you all the Michigan fine salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the appellant might have ordered, possibly any amount, or make good their default in damages.

The case cited by the counsel decided by the California supreme court (*Keller v. Ybarra*, 3 Cal. 147 (1853)) was an offer of this kind with an additional limitation. The defendant in that case had a crop of growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year at 10 cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1,900 pounds of his grapes on the terms stated. The court held there was a contract to deliver the 1,900 pounds. In this case the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be

bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at bar....

We [] place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word “sell” is not used. They say, “we are authorized to offer Michigan fine salt,” etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

The order of the circuit court is reversed, and the cause remanded for further proceedings, according to law.

Nordyne, Inc. v. International Controls & Measurements Corp.

262 F.3d 843 (8th Cir. 2001)

RICHARD S. ARNOLD, Circuit Judge

Nordyne, Inc., appeals from the District Court’s order granting the motion of International Controls & Measurements Corporation (ICM) to dismiss Nordyne’s breach-of-warranty action for improper venue. Nordyne, as buyer, and ICM, as seller, had been doing business for approximately ten years when the current dispute arose. Nordyne argues that the District Court erred in holding that a forum-selection clause on the reverse side of ICM’s invoices was enforceable. We affirm.

I.

Nordyne, a Delaware corporation with its principal place of business in St. Louis, Missouri, manufactures heating, ventilation, and air conditioning equipment. ICM, a New York corporation, manufactures electronic defrost control boards for use in such equipment. Before the dispute underlying this lawsuit, Nordyne had purchased control boards from ICM for

approximately ten years. In shipping products to Nordyne, ICM would forward a Customer Service Invoice with the following printed immediately below the heading: "CUSTOMER'S ORDER IS ACCEPTED ON THE EXPRESS CONDITION THAT THE TERMS AND CONDITIONS SET FORTH ON THE FACE AND REVERSE SIDE OF THIS INVOICE ... SHALL APPLY AND THEY SHALL CONSTITUTE THE COMPLETE AGREEMENT BETWEEN THE PARTIES."

One of the Terms and Conditions of Sale printed on the reverse side of the Customer Service Invoice was a forum-selection provision: "In any action or proceeding brought pursuant to this agreement venue shall be laid in Onondaga, New York." Another term provided that ICM warranted its products for one year from the date of shipment. On several occasions, Nordyne availed itself of this one-year warranty.

In 1997, ICM began marketing a new version of the control panel Nordyne had been purchasing. ICM sent the first quotation for this product to Nordyne on May 13, 1997. Upon Nordyne's determination that one of the new features was not necessary for its purposes, ICM modified the control panel, and on July 29, 1997, tendered a new quotation for the unit as modified. This quotation was for Nordyne's estimated annual usage of 40,000 units at \$9.87 per unit. The quotation provided that it was valid until December 31, 1997, that "[b]lanket orders must be fully released within one year," that standard commercial packaging would apply, that shipment would be "net 30 days; FOB Syracuse, NY," and that all orders were non-cancelable and non-returnable.

Printed on the bottom of the quotation was the following: "CONDITIONS ON REVERSE ARE PART OF THIS QUOTATION." These conditions included the following: "This quote is subject to the Seller's standard terms and conditions contained on the order acknowledgment." The conditions also included the statement, "All orders are subject to acceptance by the Seller at its home office in Cicero, New York."

Nordyne asked to see manufactured samples of the new control panel. On September 12, 1997, ICM sent five such samples to Nordyne with a letter from ICM's home office stating, "Full blown manufacturing of this device is awaiting your sign off of these check samples as approved for production. Please review the samples and 'sign off' this document and send it back by return fax so that we may fulfill your production requirements in a timely manner." On September 15, Nordyne signed the production approval.

Two days later Nordyne issued a purchase order for 20,000 units at the quoted price, and under the shipping, payment, and packaging terms set forth in the quotation of July 29. The

purchase order form stated, "Please enter our order for the above, subject to terms and conditions printed on reverse side.... Please acknowledge by signing and returning the attached acknowledgment form giving date of shipment." On the reverse side of the purchase order appeared Terms and Conditions, including the following: "Buyer shall not be bound by this order until Buyer receives the acknowledgment copy of this order executed by Seller, and acceptance of the order constitutes an acceptance of all of the conditions stated herein." None of the conditions related to choice of forum in case of a dispute. The acknowledgment form, which ICM signed on September 22, stated, "This order is acknowledged and accepted subject to the expressed terms and conditions thereon. Any exceptions are noted under vendor remarks at left." ICM did not insert any exceptions into the provided space.

ICM made its first shipment on September 30, 1997. Between that date and mid-August 1998, ICM shipped Nordyne's entire order of 46,151 units at the rate of approximately one shipment per week. With each shipment, ICM included the Customer Service Invoice described above, as had been the practice between the parties. Nordyne paid in full for all the units it ordered.

Thereafter, Nordyne began experiencing difficulties with the ICM control panel and filed a breach-of-warranty action in the District Court. ICM moved to dismiss the complaint for improper venue, invoking the forum-selection clause on the reverse side of its Customer Service Invoices.

II.

The District Court agreed with ICM that the forum-selection clause was part of the contract between the parties. Applying Missouri law, the Court held that the July 1997 price quotation was an offer because it was the result of negotiations between the parties and it was sufficiently complete and detailed. It stated price per unit, estimated quantity, and a description of the product. It also stated the date the quote would expire, the packaging to be used, and terms regarding delivery and payment. The Court held that the "order acknowledgment" referred to in this quotation was ICM's invoice, which as noted above, begins with the statement, "CUSTOMER'S ORDER IS ACCEPTED" Nordyne accepted the offer by signing the production approval on September 15, 1997. Thus, the terms and conditions, including the forum-selection clause, on the reverse side of ICM's invoices were incorporated by reference in ICM's offer, and Nordyne accepted these terms when it accepted ICM's quotation.

On appeal, Nordyne argues that the District Court erred as a matter of law in holding that the contract between the parties included the forum-selection clause. It argues that the July 1997 quotation did not amount to an offer because (1) it was not for immediate acceptance, but was

subject to ICM's approval at its home office, and to ICM's providing acceptable samples, and (2) it did not specify quantity and did not include a delivery schedule. Nordyne proposes that its September 1997 purchase order was the offer, which ICM accepted by signing and returning Nordyne's acknowledgment form. Nordyne argues that the terms and conditions on ICM's invoices were not part of the contract because the first invoice arrived after the contract had been made. These terms and conditions were thus simply proposals for modifying an existing contract and not binding on Nordyne without its express consent.

III.

*** The transaction between Nordyne and ICM for the sale of goods is governed by Article 2 of the Uniform Commercial Code (UCC), as adopted by Missouri, Mo.Rev.Stat. § 400.1–201 et seq. A determination of the terms of the contract between ICM and Nordyne must begin with identification of the offer and acceptance. Because the UCC does not define “offer,” Missouri looks to its common law and to the Restatement of Contracts for the definition.

Under Missouri case law, an “offer is made when the offer leads the offeree to reasonably believe that an offer has been made.” *** The Restatement (Second) of Contracts § 24 defines offer as “the 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.” The general rule is that a price quotation, such as one appearing in a catalogue or on a flyer, is not an offer, but is rather a suggestion to induce offers by others. However, a price quotation, “if detailed enough, can amount to an offer creating the power of acceptance; to do so it must reasonably appear from the price quote that assent to the quote is all that is needed to ripen the offer into a contract.” *** Factors relevant in determining whether a price quotation is an offer include the extent of prior inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom the price quotation is communicated. Restatement (Second) of Contracts § 26, comment c.

Here all factors weigh in ICM's favor. ICM and Nordyne had been communicating for several months regarding the contract at issue before the July 29, 1997, quotation was sent, this quotation was sent only to Nordyne, and the quotation included quantity, price, and time in which to accept, as well as packaging, shipping, and payment terms. We note that the quotation was for a product specifically designed for Nordyne. We find Nordyne's argument that the quotation was not an offer because it did not contain a delivery schedule to be without merit. The quotation included sufficient terms to constitute an offer under Missouri law.

The fact that ICM's home office issued the letter of September 12, 1997, asking for Nordyne's production approval, i.e., Nordyne's acceptance of ICM's offer, undermines Nordyne's argument that the quotation was not an offer because it required ICM's home office approval. This approval in fact occurred, and thereafter Nordyne approved the beginning of production.

We also reject Nordyne's argument that the quotation could not be the offer because the quantity was not definite. The quoted price-per-unit was based on Nordyne's own estimated annual usage of 40,000 units. Once Nordyne signed the production approval, we believe it was bound to purchase approximately this many units, just as ICM was bound to provide them at the quoted price. In fact, each party lived up to its side of the bargain in these respects. Nordyne ordered and paid for 46,151 units; ICM shipped the units ordered and charged Nordyne \$9.87 apiece. Each purchase order issued by Nordyne, including the first one for 20,000 units, was not a new offer, but rather part performance of the contract between the parties. This contract included the terms and conditions under which the parties had been dealing for approximately ten years. The forum-selection provision had been part of the parties' course of dealing and incorporated by reference into the present contract. Lastly, we perceive no unfairness in enforcing one term of the terms and conditions on ICM's invoices, when Nordyne itself had been taking advantage of another such term—namely, the one-year warranty. Thus the District Court correctly granted ICM's motion to dismiss on the basis of improper venue.

Accordingly, we affirm.

Notes and Questions

1. What is the general rule as to whether a price quotation is an offer? When do courts make an exception? Are *Moulton* and *Nordyne* distinguishable, or do they represent noncompatible perspectives on the definition of an offer?
2. In *Moulton v. Kershaw*, what if the seller's letter of Sept. 19 had been preceded by a telegram from the buyer to seller on Sept. 17 saying: "Please advise us the best price you can make us on our order of 2,000 barrels of Michigan fine salt, either delivered here or f.o.b. cars your place, as you prefer"?
3. In *Fairmount Glass Works v. Crunden-Martin Woodenware Co.*, 51 S.W. 196, 197 (Ky. 1899), the parties had the following correspondence

April 20, 1895: Letter from Buyer: “Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in a case, either delivered here, or f. o. b. cars your place, as you prefer. State terms and cash discount.”

April 23: Letter from Seller: “Replying to your favor of April 20, we quote you Mason fruit jars, complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints \$4.50, quarts \$5.00, half gallons \$6.50, per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance, or 2 off, cash in ten days. Yours, truly, Fairmount Glass Works. Please note that we make all quotations and contracts subject to the contingencies of agencies or transportation, delays or accidents beyond our control.”

April 24: Telegram from Seller: “Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed.”

The Seller responded the same day with a telegram, saying “Impossible to book your order.” However, the court found that the April 23 letter was an offer, and the April 24 telegram was an acceptance. The court stated: “The expression in appellant's letter, ‘for immediate acceptance,’ taken in connection with appellee's letter, in effect, at what price it would sell it the goods, is, it seems to us, much stronger evidence of a present offer, which, when accepted immediately, closed the contract.” *Id.* at 197.

4. Advertisements are similarly considered not to be offers as a general matter—but again, there are exceptions. Restatement (Second) of Contracts § 26 states: “Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. The same is true of catalogues, price lists and circulars, even though the terms of suggested bargains may be stated in some detail. It is of course possible to make an offer by an advertisement directed to the general public (see § 29), but there must ordinarily be some language of commitment or some invitation to take action without further communication.”

Craft v. Elder & Johnston

38 N.E.2d 416 (Court of Appeals of Ohio 1941)

BARNES, J.

On or about January 31, 1940, the defendant, the Elder & Johnston Company, carried an advertisement in the *Dayton Shopping News*, an offer for sale of a certain all electric sewing machine for the sum of \$26 as a 'Thursday Only Special'. Plaintiff in her petition, after certain formal allegations, sets out the substance of the above advertisement carried by defendant in the *Dayton Shopping News*. She further alleges that the above publication is an advertising paper distributed in Montgomery County and throughout the city of Dayton; that on Thursday, February 1, 1940, she tendered to the defendant company \$26 in payment for one of the machines offered in the advertisement, but that defendant refused to fulfill the offer and has continued to so refuse. The petition further alleges that the value of the machine offered was \$175 and she asks damages in the sum of \$149 plus interest from February 1, 1940.

The particular advertisement set forth on page 9 of the publication can not be reproduced in this opinion, but may be described as containing a cut of the machine and other printed matter including the price of \$26 and all conforming substantially to the allegations of the petition.

The trial court dismissed plaintiff's petition as evidenced by a journal entry, the pertinent portion of which reads as follows: 'Upon consideration the court finds that said advertisement was not an offer which could be accepted by plaintiff to form a contract, and this case is therefore dismissed with prejudice to a new action, at costs of plaintiff.'

It seems to us that this case may easily be determined on well-recognized elementary principles. The first question to be determined is the proper characterization to be given to defendant's advertisement in the *Shopping News*. It was not an offer made to any specific person but was made to the public generally. Thereby it would be properly designated as a unilateral offer and not being supported by any consideration could be withdrawn at will and without notice. This would be true because no contractual relations of any character existed between the defendant company and any other person.

There are instances where unilateral offers through advertisements may create contractual relations with members of the public, but these instances involve special circumstances.

‘The most frequent case in which an advertisement has been construed as an offer in the technical sense, involves a published offer of a reward for the furnishing of certain information, the return of particular property, or the doing of a certain act. In such case all that is necessary to confer the benefit demanded by the offeror is performance of the required act. Such offers, of course, are unilateral contracts, and principles of unjust enrichment alone would prevent the offeror from refusing to perform his promise upon the doing of the act.’ 6 R.C.L. p. 607, paragraph 30.

Furthermore, conditions sometimes arise where an offer is made through an advertisement and a customer procures the articles without notice of the withdrawal of the offer and in such instances the advertiser will be held to his offer, but it must be noted that in these cases the relations of the parties have progressed to a consummated deal.

From the cases cited in connection with our own independent investigation, we find that very generally courts hold against liability under offers made through advertisements. *** ‘It is clear that in the absence of special circumstances an ordinary newspaper advertisement is not an offer, but is an offer to negotiate—an offer to receive offers—or, as it is sometimes called, an offer to chaffer.’ Restatement of the Law of Contracts, Par. 25, Page 31.

Under the above paragraph the following illustration is given, ‘A’, a clothing merchant, advertises overcoats of a certain kind for sale at \$50. This is not an offer but an invitation to the public to come and purchase.’

‘Thus, if goods are advertised for sale at a certain price, it is not an offer and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer. So a published price list is not an offer to sell the goods listed at the published price.’ Williston on Contracts, Revised Edition, Vol. 1, Par. 27, Page 54.

‘The commonest example of offers meant to open negotiations and to call forth offers in the technical sense are advertisements, circulars and trade letters sent out by business houses. While it is possible that the offers made by such means may be in such form as to become

contracts, they are often merely expressions of a willingness to negotiate.’ Page on the Law Contracts, 2d Ed., Vol. 1, Page 112, Par. 84.

‘Business advertisements published in newspapers and circulars sent out by mail or distributed by hand stating that the advertiser has a certain quantity or quality of goods which he wants to dispose of at certain prices, are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. They are merely invitations to all persons who may read them that the advertiser is ready to receive offers for the goods at the price stated.’ 13 Corpus Juris 289, Par. 97.

‘But generally a newspaper advertisement or circular couched in general language and proper to be sent to all persons interested in a particular trade or business, or a prospectus of a general and descriptive nature, will be construed as an invitation to make an offer.’ 17 Corpus Juris Secundum, Contracts, page 389, § 46, Column 2.

We are constrained to the view that the trial court committed no prejudicial error in dismissing plaintiff’s petition.

The judgment of the trial court will be affirmed and costs adjudged against the plaintiff-appellant.

Lefkowitz v. Great Minneapolis Surplus Store, Inc.

251 Minn. 188 (Supreme Court of Minnesota 1957)

MURPHY, J.

This is an appeal from an order of the Municipal Court of Minneapolis denying the motion of the defendant for amended findings of fact, or, in the alternative, for a new trial. The order for judgment awarded the plaintiff the sum of \$138.50 as damages for breach of contract.

This case grows out of the alleged refusal of the defendant to sell to the plaintiff a certain fur piece which it had offered for sale in a newspaper advertisement. It appears from the record that on April 6, 1956, the defendant published the following advertisement in a Minneapolis newspaper:

‘Saturday 9 A.M. Sharp 3 Brand New Fur Coats Worth to \$100.00
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First Come First Served \$1 Each'

On April 13, the defendant again published an advertisement in the same newspaper as follows:

'Saturday 9 A.M. 2 Brand New Pastel Mink 3-Skin Scarfs Selling for \$89.50

Out they go Saturday. Each ... \$1.00

1 Black Lapin Stole Beautiful, worth \$139.50 ... \$1.00

First Come First Served'

The record supports the findings of the court that on each of the Saturdays following the publication of the above-described ads the plaintiff was the first to present himself at the appropriate counter in the defendant's store and on each occasion demanded the coat and the stole so advertised and indicated his readiness to pay the sale price of \$1. On both occasions, the defendant refused to sell the merchandise to the plaintiff, stating on the first occasion that by a 'house rule' the offer was intended for women only and sales would not be made to men, and on the second visit that plaintiff knew defendant's house rules.

The trial court properly disallowed plaintiff's claim for the value of the fur coats since the value of these articles was speculative and uncertain. The only evidence of value was the advertisement itself to the effect that the coats were 'Worth to \$100.00,' how much less being speculative especially in view of the price for which they were offered for sale. With reference to the offer of the defendant on April 13, 1956, to sell the '1 Black Lapin Stole * * * worth \$139.50 * * *' the trial court held that the value of this article was established and granted judgment in favor of the plaintiff for that amount less the \$1 quoted purchase price.

1. The defendant contends that a newspaper advertisement offering items of merchandise for sale at a named price is a 'unilateral offer' which may be withdrawn without notice. He relies upon authorities which hold that, where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms.

The defendant relies principally on *Craft v. Elder & Johnston Co.* In that case, the court discussed the legal effect of an advertisement offering for sale, as a one-day special, an electric sewing machine at a named price. The view was expressed that the advertisement was (38 N.E.2d 417, 34 Ohio L.A. 605) 'not an offer made to any specific person but was made to the public generally. Thereby it would be properly designated as a unilateral offer and not being supported by any consideration could be withdrawn at will and without notice.' It is true that such an offer may be withdrawn before acceptance. Since all offers are by their nature unilateral because they are necessarily made by one party or on one side in the negotiation of a contract, the distinction made in that decision between a unilateral offer and a unilateral contract is not clear. On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance.

The test of whether a binding obligation may originate in advertisements addressed to the general public is 'whether the facts show that some performance was promised in positive terms in return for something requested.' 1 Williston, *Contracts* (Rev. ed.) s 27.

The authorities above cited emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. ***

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. Annotation, 157 A.L.R. 744, 751; 77 C.J.S., Sales, § 25b; 17 C.J.S., Contracts, § 389. We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.

2. The defendant contends that the offer was modified by a 'house rule' to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. ***

Affirmed.

Notes and Questions

1. How does the court's opinion in *Lefkowitz* distinguish from the *Craft & Elder* decision? Do you think the *Craft & Elder* court would agree that the ads in *Lefkowitz* should be considered offers?
2. In a number of situations, an advertisement proposes a bargain that requires the offeree to take action on the assumption that the offeror will follow through on their promise. Courts have often found these ads to be offers, on the assumption that offerees have changed their behavior in reliance on the proposed exchange, often to their detriment. These offers requiring acceptance by performance are discussed further in later modules. One such example follows.

Leonard v. PepsiCo, Inc.

[Part I]

88 F. Supp 2d. 116 (Southern District of New York 1999)

KIMBA M. WOOD, District Judge.

Plaintiff [John D.R. Leonard] brought this action seeking, among other things, specific performance of an alleged offer of a Harrier Jet, featured in a television advertisement for defendant's "Pepsi Stuff" promotion. Defendant has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, defendant's motion is granted.

I. Background

This case arises out of a promotional campaign conducted by defendant, the producer and distributor of the soft drinks Pepsi and Diet Pepsi. The promotion, entitled "Pepsi Stuff," encouraged consumers to collect "Pepsi Points" from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo. Before introducing the promotion nationally, defendant conducted a test of the promotion in the Pacific Northwest from October 1995 to March 1996. A Pepsi Stuff catalog was distributed to consumers in the test market, including Washington State. Plaintiff is a resident of Seattle,

Washington. While living in Seattle, plaintiff saw the Pepsi Stuff commercial that he contends constituted an offer of a Harrier Jet.

A. The Alleged Offer

Because whether the television commercial constituted an offer is the central question in this case, the Court will describe the commercial in detail. The commercial opens upon an idyllic, suburban morning, where the chirping of birds in sun-dappled trees welcomes a paperboy on his morning route. As the newspaper hits the stoop of a conventional two-story house, the tattoo of a military drum introduces the subtitle, “MONDAY 7:58 AM.” The stirring strains of a martial air mark the appearance of a well-coiffed teenager preparing to leave for school, dressed in a shirt emblazoned with the Pepsi logo, a red-white-and-blue ball. While the teenager confidently preens, the military drumroll again sounds as the subtitle “T-SHIRT 75 PEPSI POINTS” scrolls across the screen. Bursting from his room, the teenager strides down the hallway wearing a leather jacket. The drumroll sounds again, as the subtitle “LEATHER JACKET 1450 PEPSI POINTS” appears. The teenager opens the door of his house and, unfazed by the glare of the early morning sunshine, puts on a pair of sunglasses. The drumroll then accompanies the subtitle “SHADES 175 PEPSI POINTS.” A voiceover then intones, “Introducing the new Pepsi Stuff catalog,” as the camera focuses on the cover of the catalog.

The scene then shifts to three young boys sitting in front of a high school building. The boy in the middle is intent on his Pepsi Stuff Catalog, while the boys on either side are each drinking Pepsi. The three boys gaze in awe at an object rushing overhead, as the military march builds to a crescendo. The Harrier Jet is not yet visible, but the observer senses the presence of a mighty plane as the extreme winds generated by its flight create a paper maelstrom in a classroom devoted to an otherwise dull physics lesson. Finally, the Harrier Jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voiceover announces: “Now the more Pepsi you drink, the more great stuff you're gonna get.”

The teenager opens the cockpit of the fighter and can be seen, helmetless, holding a Pepsi. “[L]ooking very pleased with himself,” the teenager exclaims, “Sure beats the bus,” and chortles. The military drumroll sounds a final time, as the following words appear: “HARRIER FIGHTER 7,000,000 PEPSI POINTS.” A few seconds later, the following appears in more

stylized script: “Drink Pepsi—Get Stuff.” With that message, the music and the commercial end with a triumphant flourish.*

Inspired by this commercial, plaintiff set out to obtain a Harrier Jet. Plaintiff explains that he is “typical of the ‘Pepsi Generation’ ... he is young, has an adventurous spirit, and the notion of obtaining a Harrier Jet appealed to him enormously.” Plaintiff consulted the Pepsi Stuff Catalog. The Catalog features youths dressed in Pepsi Stuff regalia or enjoying Pepsi Stuff accessories, such as “Blue Shades” (“As if you need another reason to look forward to sunny days.”), “Pepsi Tees” (“Live in ‘em. Laugh in ‘em. Get in ‘em.”), “Bag of Balls” (“Three balls. One bag. No rules.”), and “Pepsi Phone Card” (“Call your mom!”). The Catalog specifies the number of Pepsi Points required to obtain promotional merchandise. The Catalog includes an Order Form which lists, on one side, fifty-three items of Pepsi Stuff merchandise redeemable for Pepsi Points. Conspicuously absent from the Order Form is any entry or description of a Harrier Jet. The amount of Pepsi Points required to obtain the listed merchandise ranges from 15 (for a “Jacket Tattoo” (“Sew ‘em on your jacket, not your arm.”)) to 3300 (for a “Fila Mountain Bike” (“Rugged. All-terrain. Exclusively for Pepsi.”)). It should be noted that plaintiff objects to the implication that because an item was not shown in the Catalog, it was unavailable.

The rear foldout pages of the Catalog contain directions for redeeming Pepsi Points for merchandise. These directions note that merchandise may be ordered “only” with the original Order Form. The Catalog notes that in the event that a consumer lacks enough Pepsi Points to obtain a desired item, additional Pepsi Points may be purchased for ten cents each; however, at least fifteen original Pepsi Points must accompany each order.

Although plaintiff initially set out to collect 7,000,000 Pepsi Points by consuming Pepsi products, it soon became clear to him that he “would not be able to buy (let alone drink) enough Pepsi to collect the necessary Pepsi Points fast enough.” Reevaluating his strategy, plaintiff “focused for the first time on the packaging materials in the Pepsi Stuff promotion,” and realized that buying Pepsi Points would be a more promising option. Through acquaintances, plaintiff ultimately raised about \$700,000.

* [Editor’s Note: A recording of the original commercial can be found at this link: https://www.youtube.com/watch?v=U_n5SNrMaL8. A subsequent modified version of the ad can be found here: <https://www.youtube.com/watch?v=Ln0VSA9UJ-w>.]

B. Plaintiff's Efforts to Redeem the Alleged Offer

On or about March 27, 1996, plaintiff submitted an Order Form, fifteen original Pepsi Points, and a check for \$700,008.50. Plaintiff appears to have been represented by counsel at the time he mailed his check; the check is drawn on an account of plaintiff's first set of attorneys. At the bottom of the Order Form, plaintiff wrote in "1 Harrier Jet" in the "Item" column and "7,000,000" in the "Total Points" column. In a letter accompanying his submission, plaintiff stated that the check was to purchase additional Pepsi Points "expressly for obtaining a new Harrier jet as advertised in your Pepsi Stuff commercial."

On or about May 7, 1996, defendant's fulfillment house rejected plaintiff's submission and returned the check, explaining that:

The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program.

The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

Litigation of this case initially involved two lawsuits, the first a declaratory judgment action brought by PepsiCo in this district (the "declaratory judgment action"), and the second an action brought by Leonard in Florida state court (the "Florida action"). *** The present motion thus follows three years of jurisdictional and procedural wrangling.

II. Discussion

B. Defendant's Advertisement Was Not An Offer

1. Advertisements as Offers

The general rule is that an advertisement does not constitute an offer. The Restatement (Second) of Contracts explains that:

Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell. The same is true of catalogues, price lists and circulars, even though the terms of suggested bargains may be stated in some detail. It is of course possible to make an offer by an advertisement directed to the general public (see § 29), but there must ordinarily be some language of commitment or some invitation to take action without further communication.

Restatement (Second) of Contracts § 26 cmt. b (1979). Similarly, a leading treatise notes that:

It is quite possible to make a definite and operative offer to buy or sell goods by advertisement, in a newspaper, by a handbill, a catalog or circular or on a placard in a store window. It is not customary to do this, however; and the presumption is the other way. ... Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them as otherwise unless the circumstances are exceptional and the words used are very plain and clear.

1 Arthur Linton Corbin & Joseph M. Perillo, Corbin on Contracts § 2.4, at 116–17 (rev. ed.1993) (emphasis added); see also 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.10, at 239 (2d ed.1998); 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 4:7, at 286–87 (4th ed.1990). New York courts adhere to this general principle. ***

An advertisement is not transformed into an enforceable offer merely by a potential offeree's expression of willingness to accept the offer through, among other means, completion of an order form. In *Mesaros v. United States*, 845 F.2d 1576 (Fed.Cir.1988), for example, the plaintiffs sued the United States Mint for failure to deliver a number of Statue of Liberty commemorative coins that they had ordered. When demand for the coins proved unexpectedly robust, a number of individuals who had sent in their orders in a timely fashion were left empty-handed. *See id.* at 1578–80. The court began by noting the “well-established” rule that advertisements and order forms are “mere notices and solicitations for offers which create no power of acceptance in the recipient.” *Id.* at 1580; see also *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 538–39 (9th Cir.1983) (“The weight of authority is that purchase orders such as those at issue here are not enforceable contracts until they are accepted by the seller.”); Restatement (Second) of Contracts § 26 (“A manifestation of willingness to enter a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.”). The spurned coin collectors could not maintain

a breach of contract action because no contract would be formed until the advertiser accepted the order form and processed payment. *** Under these principles, plaintiff's letter of March 27, 1996, with the Order Form and the appropriate number of Pepsi Points, constituted the offer. There would be no enforceable contract until defendant accepted the Order Form and cashed the check.

The exception to the rule that advertisements do not create any power of acceptance in potential offerees is where the advertisement is "clear, definite, and explicit, and leaves nothing open for negotiation," in that circumstance, "it constitutes an offer, acceptance of which will complete the contract." *Lefkowitz v. Great Minneapolis Surplus Store*, 251 Minn. 188, 86 N.W.2d 689, 691 (1957). In *Lefkowitz*, defendant had published a newspaper announcement stating: "Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth to \$100.00, First Come First Served \$1 Each." *Id.* at 690. Mr. Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under defendant's "house rules," the offer was open to ladies, but not gentlemen. See *id.* The court ruled that because plaintiff had fulfilled all of the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. See *id.*; see also *Johnson v. Capital City Ford Co.*, 85 So.2d 75, 79 (La.Ct.App.1955) (finding that newspaper advertisement was sufficiently certain and definite to constitute an offer).

The present case is distinguishable from *Lefkowitz*. First, the commercial cannot be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the Catalog. The commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier Jet. The advertisement in *Lefkowitz*, in contrast, "identified the person who could accept." Corbin, *supra*, § 2.4, at 119. *** Second, even if the Catalog had included a Harrier Jet among the items that could be obtained by redemption of Pepsi Points, the advertisement of a Harrier Jet by both television commercial and catalog would still not constitute an offer. As the *Mesaros* court explained, the absence of any words of limitation such as "first come, first served," renders the alleged offer sufficiently indefinite that no contract could be formed. See *Mesaros*, 845 F.2d at 1581. "A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory." Farnsworth, *supra*, at 242. There was no such danger in *Lefkowitz*, owing to the limitation "first come, first served."

The Court finds, in sum, that the Harrier Jet commercial was merely an advertisement. ***

[For further discussion, see *Leonard v. PepsiCo, Inc.* Part II in the discussion on unilateral contracts.]

Notes and Questions

1. Along with discussing the general presumption that advertisements are not offers, the court in *Leonard v. PepsiCo* found this particular ad to be a joke not to be taken seriously. As a result, the court held that “no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier Jet.” *Id.* at 127. While acknowledging that “[e]xplaining why a joke is funny is a daunting task,” the court characterized the commercial as “the embodiment of what defendant appropriately characterizes as ‘zany humor.’” *Id.* at 128. Did the plaintiff respond unreasonably to the advertisement? If plaintiff believed in good faith that the ad was genuinely offering a Harrier Jet, should that fact affect the legal analysis? For more on the case and the players in it, see Netflix’s four-part documentary series, *Pepsi, Where My Jet?* at <https://www.netflix.com/title/81446626>.
2. In *Harris v. Time, Inc.*, 191 Cal. App. 3d 449 (Ct. App. 1st Dist. 1987), the magazine publisher was sued when they sent out a mailing offering a free calculator watch “Just for, Opening this Envelope.” When the envelope was opened, the underlying letter revealed the additional requirement of a magazine subscription purchase. The court held that the text of the “unopened mailer was, technically, an offer to enter into a unilateral contract,” since it asked the offeree to open the envelope—something that the court considered “valuable consideration.” Ultimately, however, the court dismissed the class action on the theory that the lawsuit was “an absurd waste of the resources of the court” based on a *de minimis* claim of harm.