

Option Contracts

In *Dickinson v. Dodds* is a famous 1876 English case involving the sale of a home (as discussed in OAN4), the seller Dodds had written the following memorandum to potential buyer Dickinson about the sale:

I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

£800. (Signed) John Dodds.

P.S.—This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth), 12th June, 1874.

(Signed) J. Dodds.

Despite the “P.S.” promising that the offer would be “left over until Friday,” the court held that Dodds revoked the offer (indirectly) on Thursday, leaving no offer for Dickinson to accept.

Dickinson v. Dodds raised an interesting question: how can an offeror credibly commit to keep an offer open for a period of time? A promise will not do—or at least, it was insufficient for lack of consideration in 1800s English courts. Has the law evolved over time? How would courts handle the Dodds memorandum today? What other ways can an offeror assure an offeree that the offer will stay open? And why would an offeror want to commit to such a promise?

An option contract is a form of irrevocable offer—an offer that cannot be revoked for a certain period of time. It is a contract to make a contract. Even under the common law circa *Dickinson v. Dodds*, parties could make option contracts as long as there was consideration for both parties. Dodds’s promise to hold open the offer for a few days was essentially a gift promise—he was providing a benefit to Dickinson with no benefit provided in return.

In order to address the consideration requirement, some option contracts provide for the side receiving the option to pay a nominal amount for the option. Under the normal rules of consideration, would an amount such as \$1.00 or \$5.00 create a binding option contract? Alternatively, courts also have looked to promissory estoppel when the offeree relies on the

promise to keep the offer open and is then worse off for the reliance. Both of these theories are considered in *Berryman v. Kmoch*.

Berryman v. Kmoch

559 P.2d 790 (Supreme Court of Kansas 1977)

FROMME, Justice.

Wade Berryman, a landowner, filed this declaratory judgment action to have an option contract declared null and void. Norbert H. Kmoch, the optionee, answered and counter-claimed seeking damages for Berryman's failure to convey the land. After depositions were taken and discovery proceedings completed both parties filed separate motions for summary judgment. The trial court entered a summary judgment for plaintiff and held the option was granted without consideration, was in effect an offer to sell subject to withdrawal at any time prior to acceptance and was withdrawn in July, 1973, prior to its being exercised by Kmoch. Kmoch has appealed.

The option agreement dated June 19, 1973, was signed by Wade Berryman of Meade, Kansas, and was addressed to Mr. Norbert H. Kmoch, 1155 Ash Street, Denver, Colorado. The granting clause provided:

‘For \$10.00 and other valuable consideration, I hereby grant unto you or your assigns an option for 120 days after date to purchase the following described real estate: [Then followed the legal description of 960 acres of land located in Stanton County, Kansas.]’

The balance of the option agreement sets forth the terms of purchase including the price for the land and the growing crops, the water rights and irrigation equipment included in the sale, the time possession was to be delivered to the purchaser, and other provisions not pertinent to the questions presented here on appeal.

Before examining the questions raised on appeal it will be helpful to set forth a few of the facts admitted and on which there is no dispute. Berryman was the owner of the land. Kmoch was a Colorado real estate broker. A third person, Samuel N. Goertz, was a Nebraska agricultural consultant. Goertz learned that Berryman was interested in selling the land and talked to Berryman about obtaining an option on the land for Kmoch. Goertz talked to Kmoch and Kmoch prepared the option contract dated June 19, 1973. Goertz and Kmoch flew to Johnson, Kansas, where a meeting with Berryman had been arranged. At this meeting

the option agreement was signed by Berryman. Although the agreement recited the option was granted 'for \$10.00 and other valuable consideration', the \$10.00 was not paid.

The next conversation between Berryman and Kmoch occurred during the latter part of July, 1973. Berryman called Kmoch by telephone and asked to be released from the option agreement. Nothing definite was worked out between them. Berryman sold the land to another person. In August, Kmoch decided to exercise the option and went to the Federal Land Bank representative in Garden City, Kansas, to make arrangements to purchase the land. He was then informed by the bank representative that the land had been sold by Berryman. Kmoch then recorded the option agreement in Stanton County. After a telephone conversation with Berryman was unproductive, Kmoch sent a letter to Berryman in October, 1973, attempting to exercise his option on the land. Berryman responded by bringing the present action to have the option declared null and void.

Appellant, Kmoch, acknowledges that the \$10.00 cash consideration recited in the option agreement was never paid. However, he points out the agreement included a provision for 'other valuable consideration' and that he should have been permitted to introduce evidence to establish time spent and expenses incurred in an effort to interest others in joining him in acquiring the land. He points to the deposition testimony of Goertz and another man by the name of Robert Harris, who had examined the land under option. Their services were sought by Kmoch to obtain a farm report on the land which might interest other investors. In addition appellant argues that promissory estoppel should have been applied by the trial court as a substitute for consideration.

An option contract to purchase land to be binding must be supported by consideration the same as any other contract. If no consideration was given in the present case the trial court correctly found there was no more than a continuing offer to sell. An option contract which is not supported by consideration is a mere offer to sell which may be withdrawn at any time prior to acceptance. ***

We turn next to appellant's contention that the option contract should have been enforceable under the doctrine of promissory estoppel. This doctrine has been discussed in *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163, and in *Kirkpatrick v. Seneca National Bank*, 213 Kan. 61, 515 P.2d 781. In *Marker* it is held:

'In order for the doctrine of promissory estoppel to be invoked the evidence must show that the promise was made under circumstances where the promisor intended and reasonably expected that the promise would be relied upon by the

promisee and further that the promisee acted reasonably in relying upon the promise. Furthermore promissory estoppel should be applied only if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice.’ (211 Kan. 427, Syl. 4, 506 P.2d 1163.)

In *Kirkpatrick* it is held:

‘Under the doctrine of promissory estoppel a promise is binding and will be enforced when it is a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance and if injustice can be avoided only by enforcement of the promise.’ (213 Kan. 61, Syl. 1, 515 P.2d 781.)

In order for the doctrine of promissory estoppel to be invoked as a substitute for consideration the evidence must show (1) the promise was made under such circumstances that the promisor reasonably expected the promisee to act in reliance on the promise, (2) the promisee acted as could reasonably be expected in relying on the promise, and (3) a refusal by the court to enforce the promise must be virtually to sanction the perpetration of fraud or must result in other injustice.

The requirements are not met here. This was an option contract promising to sell the land to appellant. It was not a contract listing the real estate with Kmoch for sale to others. Kmoch was familiar with real estate contracts and personally drew up the present option. He knew no consideration was paid for the same and that it had the effect of a continuing offer subject to withdrawal at any time before acceptance. The acts which appellant urges as consideration conferred no special benefit on the promisor or on his land. The evidence which appellant desires to introduce in support of promissory estoppel does not relate to acts which could reasonably be expected as a result of extending the option promise. It relates to time, effort, and expense incurred in an attempt to interest other investors in this particular land. The appellant chose the form of the contract. It was not a contract listing the land for sale with one entrusted with duties and obligations to produce a buyer. The appellant was not obligated to do anything and no basis for promissory estoppel could be shown by the evidence proposed.

An option contract can be made binding and irrevocable by subsequent action in reliance upon it even though such action is neither requested nor given in exchange for the option promise. An option promise is no different from other promises in this respect but cases are rare in

which an option holder will be reasonably induced to change his position in reliance upon an option promise that is neither under seal nor made binding by a consideration, or in which the option promisor has reason to expect such change of position. (1A Corbin on Contracts, § 263, pp. 502-504.)

When an option is conditioned upon a performance of certain acts, the performance of the acts may constitute a consideration to uphold a contract for option; but there is no such condition imposed if the acts were not intended to benefit nor were they incurred on behalf of the optionor.

The appellant argues that to assume Berryman gave the option without expecting something from him in return is to avoid the realities of the business world and that consideration was encompassed by a promise for a promise. The difficulty with that argument is apparent. Appellant did not promise to purchase the land. He was required to do nothing and any assertion that Berryman expected him to raise and pay money for the land as consideration for the option confuses motive with consideration.

In 17 Am.Jur.2d, Contracts, § 93, pp. 436, 437, it is said:

‘The motive which prompts one to enter into a contract and the consideration for the contract are distinct and different things. . . . These inducements are not . . . either legal or equitable consideration, and actually compose no part of the contract. . . .’

In 1 Williston on Contracts, 3rd Ed., § 111, p. 439, it is stated:

‘Though desire to obtain the consideration for a promise may be, and ordinarily **795 is, the motive inducing the promisor to enter into a contract, yet this is not essential nor, on the other hand, can any motive serve in itself as consideration. . . .’

Appellant here confuses Berryman's possible motives—to sell the land—with consideration given. The fact Berryman expected appellant to expend time and money to find a buyer is really irrelevant because he was not bound to do so. He made no promise legally enforceable by Berryman to that effect. To be sufficient consideration, a promise must impose a legal obligation on the promisor. (17 Am.Jur.2d, Contracts, § 105, pp. 450-451.) As stated in 1A Corbin on Contracts, § 263, p. 505:

‘ . . . So, if the only consideration is an illusory promise, there is no contract and no binding option, although there may still be an operative offer and a power of acceptance.’

Time and money spent by a party in trying to sell property for which he holds an option cannot be construed as a consideration to the party from whom he has secured the option. ***

Two cases relied on by appellant to support his position are *Talbott v. Nibert*, supra, and *Stell v. Eagle*, 207 Kan. 146, 483 P.2d 1063. They are not persuasive and are readily distinguishable on the facts.

In *Talbott* the plaintiff had acquired an option to purchase majority stock interests in an oil drilling company from another stockholder. In reliance on the option plaintiff personally obtained valuable drilling contracts for the company, paid off a \$23,000.00 mortgage on a drilling rig, and pulled the company out of financial straits. During this time the stock had increased in value from \$90.00 per share to \$250.00 per share, largely as a result of plaintiff's efforts. It was plaintiff's intention to acquire a controlling interest in the company by exercising the option, this the optionor knew. The court found the option-offer was duly accepted and the purchase price was tendered before revocation. In our present case the option-offer was withdrawn before acceptance. We will discuss the withdrawal of the option later in this opinion.

In *Steel* the option was for the sale of a milling company. The option agreement stated that the optionee promised to place \$5,000.00 with an escrow agent no later than a specified time in the future and that if the option was not exercised according to its terms the \$5,000.00 would be forfeited. It was held that the option was adequately supported by consideration, a promise for a promise. The optionor granted the option and promised to transfer title to the company. The optionee promised to pay \$5,000.00 as evidence of good faith, said sum to be forfeited in event the option was not exercised. This is not the case here. Our present option recited a completed payment of \$10.00, even though it had not been paid. Payment during the option period was not contemplated by either party and the tender of the \$10.00 was not made by defendant-appellant in his counter-claim when that pleading was filed.

Now we turn to the question of revocation or withdrawal of the option-promise before acceptance.

Where an offer is for the sale of an interest in land or in other things, if the offeror, after making the offer, sells or contracts to sell the interest to another person, and the offeree

acquires reliable information of that fact, before he has exercised his power of creating a contract by acceptance of the offer, the offer is revoked.

In Restatement of the Law, Second, Contracts, § 42, p. 96, it is said:

‘An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.’

The appellant in his deposition admitted that he was advised in July, 1973, by telephone that Berryman no longer wanted to be obligated by the option. Appellant further admitted that he has advised in August, 1973, by a representative of the Federal Land Bank, which held a substantial mortgage on the land, that Berryman had disposed of this land. The appellant's power of acceptance was terminated thereby and any attempted exercise of the option in October came too late when you consider the appellant's own admissions.

Summary judgment was therefore proper and the judgment is affirmed.

Notes and Questions

1. Restatement (Second) of Contracts § 87 takes two approaches to enforcing irrevocable offers where there is an absence of traditional consideration. Section (1) provides:

(1) An offer is binding as an option contract if it

(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) is made irrevocable by statute.

Under the rule in § 87(1)(a), would Kmoch have succeeded in his claim?

Section 87(2) provides:

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

How does § 87(2) differ from § 90? Why did the Kmoch fail to make out a claim under promissory estoppel?

2. Under Restatement (Second) of Contracts § 45, an option contract is created when an offer invites acceptance only by performance and the offeree begins the requested performance. The offer is not accepted until the performance is complete. How does the theory behind § 45 option contracts compare with the option contracts formed under § 87?
3. The UCC also provides a method for the creation of option contracts without consideration:

§ 2-205. Firm Offers

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Why didn't Kmoch bring a claim under UCC § 2-205?

Consider Restatement § 87 and UCC § 2-205 with reference to the case below:

In re Wheeling-Pittsburgh Steel Corp., Debtor.

Triad Metals, Inc. v. Wheeling-Pittsburgh Steel Corp.

360 B.R. 632 (United States Bankruptcy Court, Northern District of Ohio 2006)

RICHARD L. SPEER, Bankruptcy Judge.

This cause is before the Court on the opposing Parties' Dispositive Motions: the Defendant/Debtor's Motion for Summary Judgment as to the Plaintiff's complaint as well as on its counterclaim against Plaintiff; and the Plaintiff's Motion for Partial Summary Judgment as to the affirmative defenses raised by the Defendant against the Plaintiff's complaint. On these respective Motions, both of the Parties filed multiple supporting memoranda, as well as numerous supporting documents. After having had the opportunity to review the arguments of the Parties in light of their evidentiary materials, the Court, for the reasons now explained,

finds that the Defendant's Motion for Summary Judgment should be Granted and, as a result, the Plaintiff's Partial Motion for Summary Judgment must be Denied.

FACTS

The Debtor/Defendant, Wheeling–Pitt Steel Corporation (hereinafter “WPSC”), is a manufacturer of flat-rolled steel products. In the latter part of 2000, WPSC sought to reorganize its business affairs by commencing a case under Chapter 11 of the United States Bankruptcy Code. WPSC's efforts were ultimately successful, with a plan of reorganization being confirmed by the bankruptcy court in May of 2003. In its plan of reorganization, it was provided that administrative claims would be paid “in accordance with the terms and provisions of the particular transaction and agreements relating thereto.”

The Plaintiff, Triad Metals, Inc. (hereinafter “TMI”), currently no longer in operation, was a steel servicing center, and customer of WPSC. During the progression of WPSC's bankruptcy case, TMI requested a fixed-price contract for six months in duration. Based upon this request, WPSC provided TMI a price quote, by facsimile, dated October 11, 2001; the relevant terms therein provided:

Subject: Six Month Pricing HR/CR Package

Wheeling–Pittsburgh Steel Corp. is pleased to offer the following HR and CR pricing for your inquiry of October 8th, 2001.

HR—\$12.50/cwt Base

CR—\$16.50/cwt Base

This price will be valid from November 2001 through April 2002.

Drew Conti

Sales Representative

Wheeling–Pittsburgh Steel Corp.

Based upon the quote's duration, the price for steel stated therein was greater than the “spot rate,” or current market rate, for the product at that particular time. Because of this, TMI did not place an immediate order on this quote, but instead requested “spot quotes” for the coming months of December and January. In response, WPSC, like before, provided TMI a

price quote by facsimile. Except with regards to the quote's duration and price, the structure of this quote was substantially the same as the one previous, setting forth, in relevant part:

Subject: HR/CR offer

Wheeling–Pittsburgh Steel Corp. is pleased to offer the following based prices for you inquiry of November 20th, 2001.

December HR—\$10.75/cwt Base

January HR—\$11.00/cwt Base

January CR—\$15.25

These prices are based upon 5000 Tons per Month of HR and 1500 Tons per Month of CR.

Drew Conti

Sales Representative

Wheeling–Pittsburgh Steel Corp.

Based upon these terms, TMI placed several orders for steel from WPSC. Such an arrangement also occurred for steel orders placed in February and March of 2002; the only substantive difference being that under the terms of the new quote from which TMI placed its orders, WPSC's prices were slightly higher so as to reflect the new “spot rate” for steel.

In February of 2002, this process—of WPSC offering spot quotes from which TMI would place its orders—then began to repeat itself, with WPSC submitting to TMI a quote for product purchases that would be made in April of 2002. Like the previous two “spot quotes,” the only substantive difference in the terms of this quote was the price. But as to price, there existed this critical difference: the “spot rate” for its steel products now exceeded that as first quoted by WPSC the previous October when it offered its fixed pricing for a period of six months. As a direct result, TMI declined to place an order on this quote, instead requesting that the prices offered in the October quote be honored.

The first of these requests took place in early March of 2002, and ended with TMI sending WPSC a formal purchase order, dated April 29, 2002, for 10,000 tons of hot rolled steel. WPSC, however, refused to process any orders under its October quote, taking the position that TMI had previously rejected the offer. All the same, the Parties continued to do business together.

From October to November of 2003, after both the confirmation and “effective date” of the plan of reorganization, TMI placed numerous orders with WPSC for additional product. WPSC filled these orders, but TMI has yet to pay for the orders. The balance owed on these orders is \$654,280.03, plus interest.

LAW

In this matter, the lynchpin of TMI's complaint, for breach of contract and then promissory estoppel, stems from this one allegation: that WPSC wrongly failed to honor its promise, as set forth in its October–2001 quote (hereinafter referred to as the “October quote”), to sell its product at a set price for a period of six months. TMI's other claims, such as its position that it is the holder of an administrative claim, are directly dependent on the validity of this position. As such, resolution of the dispute between the Parties must necessarily begin by looking to the Parties' respective contractual rights and obligations under the October quote. * * *

DISCUSSION

The Parties' dispute in this matter centers on whether the October quote offered by WPSC to TMI can serve as the basis of a legally binding contract. It is axiomatic that the creation of a contract requires the existence of three elements: offer, acceptance and consideration. The arguments presented by WPSC call into question each of these essential elements.

An offer is the manifestation of a 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. Completing the picture, acceptance is then the manifestation of assent to the terms of the offer. When these two contractual prerequisites are in place, there is said to be a meeting of the minds, that is, the parties have an agreement.

Excluding momentarily the October quote, the process by which the Parties entered into a contractual relationship in this matter involved this progression of events: upon a request by TMI, WPSC would issue a quote; and thereafter, if TMI found the quote acceptable, a purchase order would be issued thereon, with WPSC thereafter supplying its product. With the October quote, this same sequence of events, without the goods being shipped, is relied upon to establish the existence of an enforceable contract.

When a quote is issued for the sale of goods, it is the general rule that the initial quote is viewed as an invitation to an offer, not an actual offer, with the purchase order constituting the first document having the legal attributes of an offer. UCC § 2–206(1) serves to complement this

rule by allowing for acceptance by either the prompt promise or prompt shipment of the goods. But when applied in this matter, an inconsistency arises.

Excluding again the October quote, those other transactions conducted by the Parties nicely fit the mold just outlined. Upon request by TMI, WPSC would issue a quote thereby providing an invitation for an offer. Thereafter, if it found the quote acceptable, the offer would occur through TMI issuing a purchase order on the quote. Finally, acceptance, as provided in § 2–206, would take place when WPSC supplied the product.

On the other hand, with respect to the October quote, the acts constituting offer and acceptance do not fit the mold, being juxtaposed. Necessarily for a contract to exist, the October quote must be viewed not as an invitation for an offer, but as the offer, with the communications made by TMI the following year, including its purchase order, constituting the purported acceptance thereof. It could not be otherwise. If TMI's purchase order were to constitute the initial offer, then no contract could possibly exist; the very essence of the Parties' dispute arises from WPSC's refusal to honor TMI's purchase order, undoubtedly an act by WPSC which does not exhibit a manifestation of assent to the terms of the order, thereby negating the necessary element of acceptance.

Resultantly, TMI's position, that the October quote gave rise to a contractual obligation on the part of WPSC, starts on shaky grounds as unlike their other transactions, it does not fit the traditional offer-acceptance mold when a quote is issued for the sale of goods. But even assuming that the October quote constituted a valid offer capable of being accepted, an even more fundamental deficiency exists: the termination of WPSC's offer before its acceptance.

Unless otherwise specified, an offer is of indefinite duration, limited only by its reasonableness. 17A AM. JUR. 2D Contracts § 58. Yet while pending, an offer may—subjected to limited exceptions, discussed *infra*—be terminated at any time by either party. In legal parlance, the offeror revokes the offer while the offeree rejects it. 1 Williston on Contracts § 5:2 (4th ed.2006).

But whether revocation or rejection, the termination of an offer is accomplished by one party communicating to the other, through words or acts, an unwillingness to enter into the bargain. *Id.*, at §§ 5:2; 5:8. Generally, this occurs by a party undertaking an act inconsistent with the offer, the classic example being a counteroffer.

When viewed in this light, what is most noticeable is TMI informing WPSC that its October quote was not competitive, thereafter requesting and then accepting new price quotes offered

by WPSC. Common sense dictates that such acts on the part of TMI should be viewed as introducing a new term to the original offer, thereby constituting a counteroffer, and thus a rejection of the original offer. To hold otherwise begs the question: Why would a party be willing to keep a quote open, thereby exposing themselves to risk, when afterward they are issuing new quotes at lower prices?

The whole point of offering a fixed price is to spread risk; the purchaser agrees to pay a higher price and in return for this consideration, the seller assumes the risk of a subsequent increase in its costs. TMI, however, seeks to have it both ways—by having the benefit, if commodity prices should increase, of the price fixed in the October quote, while foregoing any present obligation, when prices are lower, to make a purchase under the fixed price quote. A close analogy on this point is a mortgage.

Commonly when entering into a mortgage contract, a purchaser is offered a lower but variable rate of interest, or they can instead take a higher fixed rate of interest. Yet either way, it is simply understood that once the purchaser makes their choice, the other option is rejected, notwithstanding that the mortgage offer contained any wording to the effect that the interest rate quoted therein would stay open for a longer period of time. The Court can see very little difference here. Once TMI chose to accept those lower-rate quotes offered subsequent to the October quote, it rejected the October quote.

Other points then go on to reinforce the termination of the October quote. First, the evidence before the Court shows that it was not generally WPSC's practice to keep two or more quotes in effect at the same time. Similarly, it was not the Parties' practice to enter into long-term quotes. Also telling are TMI's actions, or perhaps better termed, inactions.

It is the position of TMI that the October quote was critical to their business operations. In their own words, “when WPSC failed to honor a long-term quote for hot and cold rolled steel[,] WPSC's actions caused [TMI] to incur substantial damages and eventually go out of business.” But after WPSC issued the October quote, and despite new quotes and new orders being issued, no discussions regarding the October quote took place until the following March. In turn, this begs the question as to why, after telling of the uncompetitiveness of the October quote and then requesting new quotes, did not TMI at least contact WPSC to seek further assurances as to the October quote's continued viability? Given the importance TMI now claims it attached to the October quote, their silence regarding the quote for approximately five months is deafening.

TMI, however, argues that regardless of their actions, WPSC's October quote could not have terminated because its own terms provided otherwise—that it was to be valid and kept open for a period of six months, until April 2002. At common law, a promise to keep an offer open is known as an option contract. The UCC provides for a partial codification of this principle in § 2–205, entitled “Firm Offers,” by providing, in relevant part:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months[.]

The § 2–205 firm offer, however, differs from the common law in an important respect: it does not require that the offeree provide any consideration to make the promise enforceable. The intent of this was to limit the power of an offeror to withdraw a firm offer when the offeree reasonably relies on the offer's firmness.

At the same time, § 2–205 sets forth temporal limitations on its duration; notably, providing that, regardless of any agreement of the parties to the contrary, in no event may the “period of irrevocability exceed three months [.]” And under any method of computation, the offer made by WPSC exceeds this three-month window; WPSC faxed its quote to TMI on October 11, but no response was forthcoming until the following March, approximately five months later.

This, however, only represents one side of the coin because while the UCC is applicable to the Parties' transaction, the § 2–205 firm offer does not displace the common law option contract. UCC § 1–103 provides that, unless otherwise displaced by particular provisions of the UCC, “the principals of law and equity, ... shall supplement their provisions.” In this way, § 2–205 gives no indication that, when a party promises to keep a quote open, common law principles would not supplement rather than displace the contractual obligations of the parties. In *Bethlehem Steel Corp. v. Litton Indus., Inc.*, a case on point, the court explained, the UCC “discloses no legislative intent to eliminate the option contract, with its requirement of consideration. Hence, the necessary distinction between the ‘option’ which is in reality a firm offer and the option contract.”

Unlike a UCC § 2–205 firm offer, an option contract is not limited in its duration; to the contrary, unless nullified by other contractual principles, an option contract will last according to its terms. But as alluded to earlier, a non-UCC option contract requires the existence of consideration. This is because the option contract is, for all practicable purposes, a separate

contract,—a contract whereby, in return for consideration given, a promisor agrees to be limited in his power to revoke an offer, normally by a prescribed period of time. See 17A AM. JUR. 2D Contracts § 53 (2006). It is the position of WPSC that this necessary element, consideration, is lacking.

Consideration, as that is necessary to form a contract, is given when a person does anything legal that he or she is not bound to do, or refrains from doing anything that he or she has a right to do. Consideration must also be mutual, that is it must flow from both the offeror and offeree to the other. Against this requirement of mutuality, WPSC argues that the consideration TMI gave in return for its 6-month quote was illusory as it “contains no actual obligation by [TMI] to do anything.” Against this, TMI argues that its promise to WPSC was not illusory because in “exchange for the Quote, Triad agreed to give WPSC the right to a last bid on any orders for the duration of the Quote.”

As put forth by WPSC, the existence of an illusory promise prevents the formation of a contract for want of mutual consideration. An illusory promise is one which, according to its own terms, makes the promisor's performance optional. Another way of looking at it: with an illusory promise no consideration is given as, with performance being optional, the promisor “has it within his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee.” 3 Williston on Contracts, § 7:7 (4th ed.). Indicative of an illusory promise is the type of situation presented here, where the buyer has not committed itself to any specified quantity for purchase.

A contract must be definite and certain as to the quantity of the goods sold. See U.C.C. § 2–201 (contract is not enforceable beyond the quantity of goods shown in writing). While this does not mean that an exact quantity must be specified, the quantity must be capable of being determined with reasonable certainty. In looking to whether a quantity can be determined with reasonable certainty, it is helpful to look at two similar types of agreements, involving the sale of goods, which straddle the wall between an enforceable and unenforceable contract: an indefinite quantities contract and a requirements contract.

An indefinite quantities contract is an agreement under which the buyer agrees to purchase and the seller agrees to supply whatever quantity of goods the buyer chooses to purchase from the seller. A requirements contract, on the other hand, is one in which the purchaser agrees to buy all of its needs of a specified material from a particular supplier, and the supplier agrees, in turn, to fill all of the purchaser's needs during the period of the contract. While each of these agreements lack a specified quantity, there exists this key difference: Under a

requirements contract, by the buyer agreeing to turn to the seller for its purchase requirements, a legal duty arises upon the buyer to make such purchases in good faith, contingent only upon its actual needs. By contrast, with an indefinite quantities contract, even if the buyer needs the commodity in question, he is not obligated to purchase it from the seller. Resultantly, with an indefinite quantities contract, at least in the absence of a guaranteed minimum purchase, the buyer's promise is deemed illusory and unenforceable. To this end, the UCC recognizes the validity of the requirements contract, § 2-306, but not the indefinite quantities contract.

Viewed from this perspective, the October quote given to TMI by WPSC is significantly more akin to that of an indefinite quantities contract. The material requirements of TMI were never made a part of the October quote; nor did the agreement contain any sort of minimum purchase requirement. Instead, as properly pointed out by WPSC, under its quote, TMI “could buy steel or not, could present other suppliers' prices to Wheeling–Pitt or not, and could purchase the same steel at other prices or not.” The fact that TMI agreed to give WPSC the right to a last bid, does nothing to change this; it in no way obligated TMI to make a purchase, even a minimum one, had WPSC submitted the lowest bid.

In short then, had TMI decided not to accept WPSC's October price quote, it would not have suffered even an iota of legal detriment. This point was acknowledged by TMI, when its principal testified at a deposition as follows:

Question: So is it your testimony that [the October quote] was a quote that was to be left open while [TMI] purchased steel at lower prices throughout the entire period?

Answer: If it was available to us. We gave them the opportunity to meet the lowest price in the marketplace if—that was their choice. We gave them the opportunity for last look as you would call it.

Question: But at the same time, [TMI] believed that it could still at any time from November to April, 02, order steel at prices set forth in the October quote, correct?

Answer: Yes

Question: Even though it was ordering steel from [WPSC] under new quotes for the same steel during the same periods?

Answer: We could have ordered that from other mills as well. That was made available to us.

(Dep. Tr., John M. Telepo, dated March 10, 2006).

Resultantly, given the weight of these considerations, WPSC's promise to keep its offer open for six months was not binding. There is simply no convincing evidence that TMI provided WPSC with consideration to keep the October quote open; it could, at its sole option and for absolutely no reason, decline to place an order on WPSC's quote without suffering any legal consequence. Consequently, when all things are then considered, WPSC's October quote cannot form the foundation of a legally binding contract. As first explained in this Court's analysis, it is questionable whether the October quote even constituted an offer. But, even if it did, the circumstances in this case show that the offer terminated prior to TMI's purported acceptance, approximately five months later. These same circumstances then show that, whether under the UCC or the common law, TMI gave no consideration to WPSC to keep the quote open.

In the absence of a contractual agreement, TMI also seeks to recover under the doctrine of promissory estoppel. This doctrine may be defined, according to its elements, as (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. Like with the option contract, the UCC does not displace a party's right to seek recovery under this doctrine, except possibly where the UCC's statute of frauds is applicable.

The function of the promissory estoppel doctrine is to promote equity by preventing a party from asserting rights under a rule of law when the party's own conduct renders the assertion of such rights contrary to equity and good conscience. Thus, it can serve as a substitute for consideration in contract formation, including an option contract. But the doctrine is to be applied cautiously. And when placed in this context, the circumstances in this matter do not rise to the level to justify applying the doctrine.

Central to the concept of promissory estoppel, is a party's detrimental reliance. Accord 4 Williston on Contracts §§ 8:4, 8:5 & 8:6 (4th ed.). In this matter, TMI claims such reliance because it "relied on its contract with WPSC and ... entered into long term contracts with certain of its customers." But even if true, TMI's reliance was not reasonably warranted. As already explained in detail, when discussing TMI's rejection of the October quote, logic holds that when a lower price quote is accepted over a higher fixed price quote, the latter is rejected. Additionally, even if this were not the case, the necessary element of WPSC's inducement is

lacking as TMI made sales promises based on the October quote on its own accord, not at the urging of WPSC.

Simple equity also does not call for the application of the promissory estoppel doctrine. To begin with, TMI has withheld payment to WPSC on a liquidated debt, in the hopes that it would be able to offset such an amount on its disputed claim in this matter. But more important, the Court is troubled by the time line in this matter. Specifically, TMI submitting its purchase order on the October quote just days before the time stated therein was to expire, and then requesting in the order, an amount of steel which appears out of alignment, to the higher, with its past order. Simply put, it appears that TMI was attempting to buy a lawsuit from a financially troubled company, hardly a laudable goal.

In summation, whether for breach of contract or on the basis of promissory estoppel, the Court cannot find that TMI is entitled to recover damages for WPSC not honoring the price as contained in its quote issued in October of 2001. In reaching the conclusion found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Notes and Questions

1. What arguments did TMI raise in support of their claims against WPSC? Write down the list and explain the court's response to each.
2. The court did not discuss the possibility of an option contract under Restatement § 87(1). If TMI had raised that argument, what result?
3. The court stated towards the end of the opinion: "Simply put, it appears that TMI was attempting to buy a lawsuit from a financially troubled company, hardly a laudable goal." How much of the court's doctrinal analysis was influenced by this perspective?