

Not every proposal qualifies as an offer. Some proposals are vague, for example, or made in jest, or thrown out merely as a way of opening negotiations. To distinguish an offer, courts look for three requirements. First, they look for some objective indication of a *present intent to contract* on the part of the offeror. Second, they look for specificity, or *definiteness*, in the terms of the alleged offer. Third, they look to see whether the alleged offer has been *communicated to the offeree*.

The preceding chapter discussed the fact that contracts for the sale of goods are governed by Article 2 of the UCC whereas contracts for services, real estate, and intangibles are generally governed by the common law of contracts. Common law and UCC standards for contract formation have a great deal in common, but they also differ somewhat. This chapter will point out those areas in which an offer for the sale of goods would be treated somewhat differently from an offer for services, real estate, and intangibles.

Intent to Contract For a proposal to be considered an offer, the offeror must indicate *present intent to contract*. Present intent means the intent to enter the contract upon acceptance. It signifies that the offeror is not joking, haggling, or equivocating. It makes sense that intent on the part of the offeror would be required for an offer—otherwise, an unwilling person might wrongly be bound to a contract. But what is meant by intent? Should courts look at what the offeror actually in his own mind (*subjectively*) intended? Or should intent be judged by the impression that he has given to the rest of the world through words, acts, and circumstances that *objectively* indicate that intent?

The Objective Standard of Intent Early American courts took a subjective approach to contract formation, asking whether there was truly a “meeting of the minds” between the parties. This subjective standard, however, created uncertainty in the enforcement of contracts because it left every contract vulnerable to disputes about actual intent. The desire to meet the needs of the marketplace by affording predictable and consistent results in contracts cases dictated a shift toward an *objective theory of contracts*. By the middle of the 19th century, the objective approach to contract formation, which judges agreement by looking at the parties’ outward manifestations of intent, was firmly established in American law. Judge Learned Hand once described the effect of the objective contract theory as follows:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If however, it were proved by 20 bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of that sort.¹

Following the objective theory of contracts, then, an offeror’s intent will be judged by an objective standard—that is, what his words, acts, and the circumstances signify about his intent. If a reasonable person familiar with all the circumstances would be justified in believing that the offeror intended to contract, a court would find that the intent requirement of an offer was satisfied even if the offeror himself says that he did not intend to contract. The following *Meram v. MacDonald* case illustrates the objective standard of intent.

¹*Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

Meram v. MacDonald

2006 U.S. Dist. LEXIS 79069 (U.S. Dist. Ct. S.D. Cal.)

Allianz Sales invited Frank Meram to attend a presentation on September 29, 2005, to meet Robert MacDonald, who was promoting his new book, *Cheat to Win*. MacDonald was a multimillionaire who had started as an insurance agent and built LifeUSA, a billion dollar company, which was owned by Allianz at the time of the presentation. Meram attended the presentation along with approximately 100 other financial representatives.

At the beginning of the presentation, MacDonald announced that one of the attendees would leave that day with one million dollars. All that was required was to place a business card in the basket that was passed around, and to stay until the end of the presentation. At the end, MacDonald would select one card from the basket, and the person whose name was on the card would leave with a million dollars. Meram placed his business card in the basket and attended the presentation until the end. At the end of the presentation, MacDonald pulled Meram’s business card out of the basket. He congratulated Meram and then explained

how "this works." MacDonald said Meram would receive one dollar per year for a million years. He gave Meram \$100 in cash for the first 100 years. According to MacDonald, all Meram had to do was attend a presentation once a year to claim the rest of the million dollars. MacDonald then laughed and thanked everyone for coming.

Meram filed an action for breach of contract against MacDonald and Allianz, seeking the remainder of the promised one million dollars. The defendants moved to dismiss Meram's case for failure to state a claim.

Lorenz, Judge

Defendants maintain no valid contract was created because MacDonald's statements at the seminar did not constitute a valid offer. To establish an offer, the defendant must communicate to the plaintiff that he is willing to enter into a contract with the plaintiff, the communication must contain specific terms, and, based on the communication, the plaintiff could have reasonably concluded that a contract with these terms would result if he accepted the offer. The issue is whether, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. Defendants contend MacDonald's alleged offer was too good to be true, and Meram could not have reasonably concluded the offer was for a million dollars.

Meram alleges he concluded the offer was genuine, since he was aware that MacDonald was a multi-millionaire, that Allianz was a billion dollar company, and that each had the financial means to pay the promised sum. More significantly, MacDonald elaborated on the offer, and mentioned it at least twice. Based on these facts, Meram alleges he reasonably believed that defendants would pay the promised sum.

Reading the allegations in the light most favorable to the plaintiff, the allegations do not lead to an inescapable conclusion that the offer was a joke or that MacDonald meant anything other than what he said. Accordingly, the court cannot conclude that no reasonable person could conclude the offer was genuine. Meram therefore sufficiently alleged the offer and its terms.

Defendants next argue that there was no valid contract because the offer was too vague for failure to identify who would receive the million dollars or the terms of payment. To form an enforceable contract, its terms must be clear enough that the parties could understand what each was required to do. By the alleged terms of the offer, the pool of potential winners was defined by the business cards placed in the basket. The winner's name was pulled out of the basket, and he or she would receive the prize so long as he or she also attended the presentation. Furthermore, MacDonald stated the winner would "walk out of here with a million dollars today." Accordingly, the alleged offer is sufficiently definite to support formation of a contract.

Motion to dismiss the action for breach of contract denied in favor of Meram.

Definiteness of Terms

If Smith says to Ford, "I'd like to buy your house," and Ford responds, "You've got a deal," has a contract been formed? An obvious problem here is lack of specificity. A proposal that fails to state specifically what the offeror is willing to do and what he asks in return for his performance is unlikely to be considered an offer. One reason for the requirement of definiteness is that definiteness and specificity in an offer tend to indicate an intent to contract, whereas indefiniteness and lack of specificity tend to indicate that the parties are still negotiating and have not yet reached agreement. In the conversation between Smith and Ford, Smith's statement that he'd like to buy Ford's house is merely an invitation to offer or an invitation to negotiate. It indicates a willingness to contract in the future if the parties can reach agreement on mutually acceptable terms, but not a present intent to contract. If, however,

Smith sends Ford a detailed and specific written document stating all of the material terms and conditions on which he is willing to buy the house and Ford writes back agreeing to Smith's terms, the parties' intent to contract would be objectively indicated and a contract probably would be created.

A second reason definiteness is important is that courts need to know the terms on which the parties agreed in order to determine if a breach of contract has occurred and calculate a remedy if it has. Keep in mind that the offer often contains all the terms of the parties' contract. This is so because all that an offeree is allowed to do in most cases is to accept or reject the terms of the offer. If an agreement is too indefinite, a court would not have a basis for giving a remedy if one of the parties alleged that the "contract" was breached. The following *Armstrong* case raises the issue of definiteness.