Preliminary Negotiations If a communication creates in the mind of a reasonable person in the position of the offeree an expectation that his acceptance will conclude a contract, then the communication is an offer. If it does not, then the communication is a preliminary negotiation. Initial communications between potential parties to a contract often take the form of preliminary negotiations, through which the parties either request or supply the terms of an offer that may or may not be made. A statement that may indicate a willingness to make an offer is not in itself an offer. For instance, if Brown writes to Young, "Will you buy my automobile for $3,000?" and Young replies, "Yes," there is no contract. Brown has not made an offer to sell her automobile to Young for $3,000. The offeror must demonstrate an intent to enter into a contract, not merely a willingness to enter into a negotiation.

Advertisements Merchants desire to sell their merchandise and thus are interested in informing potential customers about the goods, terms of sale, and price. But if they make widespread promises to sell to each person on their mailing list, the number of acceptances and resulting contracts might conceivably exceed their ability to perform. Consequently, a merchant might refrain from making offers by merely announcing that he has goods for sale, describing the goods, and quoting prices. He is simply inviting his customers and, in the case of published advertisements, the public, to make offers to him to buy his goods. His advertisements, circulars, quotation sheets, and displays of merchandise are *not* offers because (1) they do not contain a promise and (2) they leave unexpressed many terms that would be necessary to the making of a contract. Accordingly, his customers' responses are not acceptances because no offer to sell has been made.

Nonetheless, a seller is not free to advertise goods at one price and then raise the price once demand has been stimulated. Although as far as contract law is concerned the seller has made no offer, such conduct is prohibited by the Federal Trade Commission as well as by legislation in most states. Moreover, in some circumstances a public announcement or advertisement may constitute an offer if the advertisement or announcement contains a definite promise of something in exchange for something else and confers a power of acceptance on a specified person or class of persons. The typical offer of a reward is an example of a definite offer, as is the situation presented in the landmark *Lefkowitz v. Great Minneapolis Surplus Store, Inc.* case, which follows.

Lefkowitz v. Great Minneapolis Surplus Store, Inc.

SUPREME COURT OF MINNESOTA, 1957

251 MINN. 188, 86 N.W.2D 689

FACTS On April 6, 1956, Great Minneapolis Surplus Store published an advertisement in a Minneapolis newspaper reporting that "Saturday, 9:00 A.M. sharp; 3 brand new fur coats worth up to $100; first come, first served, $1 each." Lefkowitz was the first to arrive at the store, but the store refused to sell him the fur coats because the "house rule" was that the offers were intended for women only and sales would not be made to men. The following week, Great Minneapolis published a similar advertisement for the sale of two mink scarves and a black lapin stole. Again Lefkowitz was the first to arrive at the store on Saturday morning, and once again the store refused to sell to him, this time because Lefkowitz knew of the house rule. This appeal was from a judgment awarding the plaintiff the sum of $138.50 as damages for breach of contract.

DECISION Judgment for Lefkowitz affirmed.

OPINION Murphy, J. The defendant *** 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. [Citations.] ***

On the facts before us we are concerned with whether the advertisement constituted an offer.

***

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."

***

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. [Citations.] We are of the view on the facts before us that the offer by the defendant of the sale *** 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.

INTERPRETATION Although advertisements generally do not constitute offers, under some circumstances they do.

ETHICAL QUESTION Should Lefkowitz be entitled to damages? Why?

CRITICAL THINKING QUESTION Should an advertisement generally be construed as *not* constituting an offer? Explain.

Auction Sales The auctioneer at an auction sale does not make offers to sell the property being auctioned but invites offers to buy. The classic statement by the auctioneer is, "How much am I offered?" The persons attending the auction may make progressively higher bids for the property, and each bid or statement of a price or a figure is an offer to buy at that figure. If the bid is accepted, customarily indicated by the fall of the hammer in the auctioneer's hand, a contract results. A bidder is free to withdraw his bid at any time prior to its acceptance. The auctioneer is likewise free to withdraw the goods from sale *unless* the sale is advertised or announced to be without reserve.

If the auction sale is advertised or announced in explicit terms to be **without reserve**, the auctioneer may not withdraw an article or lot put up for sale unless no bid is made within a reasonable time. Unless so advertised or announced, the sale is with reserve. A bidder at either type of sale may retract his bid at any time prior to its acceptance by the auctioneer; such retraction, however, does not revive any previous bid.

Definiteness

The terms of a contract, all of which are usually contained in the offer, must be clear enough to provide a court with a reasonable basis for determining the existence of a breach and for giving an appropriate remedy. It is a fundamental policy that contracts should be made by the parties, not by the courts; accordingly, remedies for a breach must in turn have their basis in the parties' contract.

Where the parties have intended to form a contract, the courts will attempt to find a basis for granting a remedy. Missing terms may be supplied by course of dealing, usage of trade, or inference. Thus, uncertainty as to incidental matters seldom will be fatal so long as the parties intended to form a contract. Nevertheless, the more terms the parties leave open, the less likely it is that they have intended to form a contract. Moreover, given the great variety of contracts, stating the terms that are essential to all contracts is impossible. In most cases, however, material terms would include the parties, subject matter, price, quantity, quality, and time of performance. (See *DiLorenzo v. Valve and Primer Corporation* in Chapter 12.)

Open Terms With respect to agreements for the sale of goods, the UCC provides standards by which the courts may determine omitted terms, provided the parties intended to enter into a binding contract. The Code provides missing terms in a number of instances, where, for example, the contract fails to specify the price, the time or place of delivery, or payment terms. The Restatement has adopted an approach similar to the Code's in supplying terms omitted from the parties' contract.

Under the Code, an offer for the purchase or sale of goods may leave open particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness. **Good faith** is defined as honesty in fact in the conduct or transaction concerned. Under the 2001 Revised UCC Article 1, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing. **Commercial reasonableness** is a standard determined in terms of the business judgment of reasonable persons familiar with the practices customary in the type of transaction involved and in terms of the facts and circumstances of the case. (See *DiLorenzo v. Valve and Primer Corporation* in Chapter 12.)

Practical Advice

To make an offer that will result in an enforceable contract, make sure you include all the necessary terms.

offer at any time before the offeree's completion of performance. For example, Jordan offers Karlene $300 if Karlene will climb to the top of the flagpole in the center of campus. Karlene starts to climb, but when she is five feet from the top, Jordan yells to her, "I revoke."

The Restatement deals with this problem by providing that where the performance of the requested act necessarily requires the offeree to expend time and effort, the offeror is obligated not to revoke the offer for a reasonable time. This obligation arises when the offeree begins performance. If, however, the offeror does not know of the offeree's performance and has no adequate means of learning of it within a reasonable time, the offeree must exercise reasonable diligence to notify the offeror of the performance.

Practical Advice

When making an offer, be careful to make it irrevocable only if you so desire.

APPLYING THE LAW

Mutual Assent

Facts Taylor and Arbuckle formed a partnership for the purpose of practicing pediatric medicine together. They found new medical office space to lease and thereafter, among other things, they set about furnishing the waiting room in a way that children would find inviting. In addition to contracting with a mural painter, they decided to purchase a high-definition flat-panel television on which they could show children's programming. On a Monday, Taylor and Arbuckle visited a local retailer with a reputation for competitive pricing, called Today's Electronics. In addition to comparing the pictures on the various models on display, the doctors discussed the pros and cons of LCD (liquid crystal display) versus plasma with the store's owner, Patel.

While they were able to narrow their options down significantly, Taylor and Arbuckle nonetheless could not decide on the exact size set to purchase because they had not yet determined the configuration of the seating to be installed in the waiting room. Sensing that the doctors were considering shopping around, Patel offered them a sizeable discount: only $999 for the forty-inch LCD screen they had chosen, or the fifty-inch plasma model they favored for only $1,299. As they were leaving the store, Patel gave the doctors his business card, on which he had jotted the model numbers and discount prices, his signature, and the notation "we assure you this offer is open through Sun., April 27."

Anxious to have the waiting room completed, Taylor and Arbuckle quickly agreed on a feasible seating arrangement for the waiting room, ordered the necessary furniture, and decided that the fifty-inch television would be too big. On Friday, April 25, Taylor returned to Today's Electronics. But before she could tell Patel that they had decided on the forty-inch LCD, Patel informed her that he could not honor the discounted prices because he no longer had in stock either model the doctors were considering.

Issue Is Patel free to revoke his offer notwithstanding having agreed to hold it open through the weekend?

Rule of Law The general rule is that an offeror may revoke, or withdraw, an offer any time before it has been accepted. However, there are several limitations on an offeror's power to revoke an offer before acceptance. One of these is the Uniform Commercial Code's (UCC's) "merchant's firm offer" rule. Under the UCC, a merchant's offer to buy or sell goods is irrevocable for the stated period (or, if no period is stated, for a reasonable time) not exceeding three months, when he has signed a writing assuring the offeree that the offer will be kept open for that period. The Code defines a merchant as one who trades in the types of goods in question or who holds himself out, either personally or by way of an agent, to be knowledgeable regarding the goods or practices involved in the transaction.

Application The proposed contract between the doctors and Today's Electronics is governed by Article 2 of the Code because it involves a sale of goods, in this case a television set. Both Patel and Today's Electronics are considered merchants of televisions under the Code's definition, because Patel and his store regularly sell electronics, including television sets. Patel offered to sell to Taylor and Arbuckle either the forty-inch LCD television for $999 or the fifty-inch plasma for $1,299. By reducing his offer to a signed writing, and by promising in that writing that the stated prices were assured to be open through Sun., April 27, Patel has made a firm offer that he cannot revoke during that six-day period. Whether he still has either model in stock does not affect the irrevocability of the offer.

Conclusion Patel's offer is irrevocable through Sunday, April 27. Therefore Patel's attempt to revoke it is ineffective, and Taylor may still accept it.