

# YOU ASKED FOR IT, YOU GOT IT . . . TOY YODA: PRACTICAL JOKES, PRIZES, AND CONTRACT LAW

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For what seemed to be a simple contract dispute, *Berry v. Gulf Coast Wings Inc.*<sup>1</sup> garnered an unusual amount of attention in both the legal and popular press.<sup>2</sup> Former Hooters waitress Jodee Berry sued her ex-employer for breaching its promise to award a new Toyota to the winner of an April 2001 sales contest. Berry alleged that her manager, Jared Blair, told the waitresses at the Hooters where she worked at the time that whoever sold the most beer at each participating location during April 2001 would be entered in a drawing, the winner of which would receive a new Toyota. As the contest progressed,

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<sup>1</sup> No. 01-2642 Div. J (Fla. 14th Cir. Ct., Bay County, filed July 24, 2001). Gulf Coast Wings operated the Hooters restaurant in question.

<sup>2</sup> See, e.g., David Angier, "Toy-Yoda" Case is Still Buzzing One Year Later, PANAMA CITY NEWS HERALD, Apr. 1, 2002, available at <http://www.newsherald.com/articles/2002/04/01/lo040102a.htm> (last visited Apr. 30, 2003); *You've Won a Brand New . . . : Proffered Prize Produces Pique*, A.B.A. J., Oct. 2001, at 18; William W. Bedsworth, *Jerk of the Year 2001: A Criminal Waste of Space*, ORANGE COUNTY LAW., Oct. 2001, at 48, 53; *Judge OKs Suit by Hooters Waitress Who Says Contest was a Bust*, ANDREWS ENTER. INDUS. LITIG. REP., Oct. 2001, at 4; *Judge to Decide Whether Waitress Can Sue Over Toy Yoda*, BOSTON GLOBE, Oct. 10, 2001, available at [http://www.boston.com/news/daily/10/toy\\_yoda.htm](http://www.boston.com/news/daily/10/toy_yoda.htm) (last visited Apr. 30, 2003); Andrews & Kurth, L.L.P., *I Say Toy Yoda, You Say Toyota*, TEX. EMP. L. LETTER, Aug. 2001, at 6; *Oh, What a (Bad) Feeling, Toy Yoda*, HOUS. CHRON., Aug. 13, 2001, at A2 (available at 2001 WL 23620996); *Employer Promised Toyota, Not Toy Yoda, Suit Says*, ANDREWS EMP. LITIG. REP., Aug. 7, 2001, at 12; *Waitress Refuses to be Toyed With*, BBC NEWS, July 29, 2001; David Angier, *Hooters Fighting "Toy Yoda" Suit*, PANAMA CITY NEWS HERALD, Aug. 11, 2001, available at <http://www.newsherald.com/articles/2001/08/11/lo081101a.htm> (last visited Apr. 30, 2003); David Angier, "Toy Yoda" Prize Drives Waitress to Sue Restaurant, PANAMA CITY NEWS HERALD, July 26, 2001, available at <http://www.newsherald.com/articles/2001/07/26/lo072601a.htm> (last visited Apr. 30, 2003).

It also sparked a short, but lively, exchange among contracts professors subscribing to the Association of American Law Schools's Contracts list serve (aalscontracts@tc.umn.edu), including contributions from Hazel Beh (Hawaii), Charles Calleros (Arizona State), David Epstein (SMU), Mark Gergen (Texas), Alan Hyde (Rutgers-Newark), Sarah Howard Jenkins (Arkansas-Little Rock), Michael Kelly (San Diego), Lisa Lerman (Catholic), Mark Loewenstein (Colorado), Richard McAdams (Illinois), Adam Myers (Valparaiso), and Jamie Ratner (Arizona). To date, however, only this Article systematically discusses the case and related issues.

Blair allegedly told the waitresses that he did not know whether the winner would receive a Toyota car, truck, or van, but that she would have to pay any registration fees on the vehicle. In early May, Blair informed Berry that she had won the contest. He proceeded to blindfold her and lead her to the restaurant's parking lot. Waiting for her there was not a Toyota car, truck, or van, but a doll of the character Yoda from the *Star Wars* movies – a “toy Yoda.” Blair laughed. Berry did not. Berry sued for breach of contract and fraud. Hooters answered that Blair was only joking. While the case eventually settled favorably for Berry,<sup>3</sup> it raised three interesting questions of contract law that merit further discussion, namely: (1) whether Blair's statement was clearly in jest, such that it could not be accepted by Berry's performance;<sup>4</sup> (2) whether Blair's statement, even if not clearly in jest, constituted an offer to form a contract that could be accepted by Berry's performance;<sup>5</sup> and (3) whether Berry gave sufficient consideration to bind Hooters to the terms of Blair's offer.<sup>6</sup>

## I. “OFFERS” AND “ACCEPTANCES” MADE IN JEST

An offer made in jest may prevent a sincere acceptance from forming a binding contract. An acceptance made in jest may not form a binding contract when made in response to a sincere offer. An ostensible offer and acceptance, both made in jest, will almost certainly not form a binding contract, even though a reasonable, disinterested third party might understand the parties' words or actions to form a binding contract. But, why?

### A. *Lucy v. Zehmer and the Objective Theory of Assent*

The case best known to contemporary American attorneys, judges, and law professors in which a party attempted to avoid contractual liability on the basis that it was only joking when it made the alleged promise or formed the alleged contract is *Lucy v. Zehmer*.<sup>7</sup> Lucy had been trying to purchase Fergu-

<sup>3</sup> See *New Toyota to Replace Toy Yoda*, BRADENTON HERALD, May 10, 2002 (“David Noll, an attorney for Jodee Berry, said . . . that Berry can now go to a local car dealership and ‘pick out whatever type of Toyota she wants.’”), available at <http://www.bradenton.com/mld/bradentonherald/news/local/3233897.htm> (last visited Apr. 30, 2003)).

<sup>4</sup> See *infra* Part I.

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> See *infra* Part II.B.

<sup>7</sup> 84 S.E.2d 516 (Va. 1954).

*Lucy* has been a staple of contracts casebooks since shortly after it was decided, see, e.g., EDWIN W. PATTERSON, GEORGE W. GOBLE & HARRY W. JONES, CASES AND MATERIALS ON CONTRACTS 22 (4th ed. 1957); LAURENCE P. SIMPSON, CASES ON THE LAW OF CONTRACTS 20 (1956), and remains so today. *Lucy* appears as a principal case in ten of the fifteen contracts casebooks with a publication date of 2000, 2001, 2002, or 2003 (received as of April 30, 2003), see RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE 282 (3d ed. 2003); BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS 50 (2003); EDWARD J. MURPHY, RICHARD E. SPEIDEL & IAN AYRES, STUDIES IN CONTRACT LAW 233 (6th ed. 2003); DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 14 (2002); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 14 (3d ed. 2002); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 12 (2d ed. 2001); E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, CONTRACTS: CASES & MATERIALS 120 (6th ed. 2001); LON L.

son Farm from the Zehmers for years. One evening, over drinks, Lucy offered to buy the farm from the Zehmers for \$50,000 (\$30,000 more than Mr. Zehmer had once verbally agreed to take from Lucy for the farm before backing out of the deal). After a fairly lengthy discussion, Mr. Zehmer wrote the following on the back of a restaurant receipt: "We hereby agree to sell to W.O. Lucy the Ferguson Farm complete for \$50,000.00 title satisfactory to buyer."<sup>8</sup> Both Mr. and Mrs. Zehmer signed the writing, and then Mr. Zehmer gave it to Lucy.<sup>9</sup> A couple of weeks later, when Lucy informed Mr. Zehmer that he had the \$50,000 in cash and was ready to close, Mr. Zehmer replied that he never intended to sell the farm to Lucy.<sup>10</sup>

In their answer to Lucy's suit for breach of contract, the Zehmers argued, *inter alia*, that Mr. Zehmer had agreed to sell the farm to Lucy only "in jest," and that Lucy knew that the Zehmers were planning on keeping the farm for their son.<sup>11</sup> Reversing the trial court, the Virginia Supreme Court characterized the Zehmers' defense as "unusual, if not bizarre, . . . [w]hen made to the writing admittedly prepared by one of the defendants and signed by both."<sup>12</sup> The

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FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 364 (7th ed. 2001); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 383 (4th ed. 2001); JOHN D. CALAMARI, JOSEPH A. PERILLO & HELEN HADJIYANNAKIS BENDER, CASES AND PROBLEMS ON CONTRACTS 1 (3d ed. 2000), and is discussed in a lengthy note following *Leonard* in an eleventh, see JOHN E. MURRAY, CONTRACTS: CASES & MATERIALS 52-53 (5th ed. 2001); see also THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 1 (3d ed. 1999) (presenting *Lucy* as a principal case); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 100 (4th ed. 1999); GERALD E. BERENDT ET AL., CONTRACT LAW AND PRACTICE 43 (1998); MICHAEL L. CLOSEN, RICHARD M. PERLMUTTER & JEFFREY D. WITTENBERG, CONTRACTS: CONTEMPORARY CASES, COMMENTS, AND PROBLEMS 21-22 (1992) (all discussing *Lucy* in notes following one or more principal cases).

<sup>8</sup> See *Lucy*, 84 S.E.2d at 517.

<sup>9</sup> The Virginia Supreme Court describes the exchange this way:

On the night of December 20, 1952, around eight o'clock, [W. O. Lucy] took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. . . . He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, "I bet you wouldn't take \$50,000.00 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, "I do hereby agree to sell to W. O. Lucy the Ferguson Farm for \$50,000 complete." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, [made the requested change] and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for \$50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him \$5 which Zehmer refused, saying, "You don't need to give me any money, you got the agreement there signed by both of us."

*Id.* at 518.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 517-18.

<sup>12</sup> *Id.* at 520.

While Berry did not allege the existence of any writing signed by Blair or any other authorized representative of Hooters, no writing was required. In *Lucy*, the contract was for the sale of real property and could be enforced only if evidenced by a writing signed by the Zehmers. See VA. CODE § 11-2(6) (1950) ("No action shall be brought . . . [u]pon any contract for the sale of real estate . . . [u]nless the promise, contract, agreement . . . or some

court found that (1) the extent and nature of the parties' discussions prior to the execution of the writing, (2) Mr. Zehmer's acquiescence to Lucy's insistence that Mr. Zehmer change the wording of the writing and that Mrs. Zehmer also sign it, (3) Mr. and Mrs. Zehmer separately signing the writing, and (4) the Zehmers allowing Lucy to leave with the signed writing without any suggestion that they did not intend to be bound by it, collectively, "furnish[ed] persuasive evidence that the execution of the contract was a serious business transaction" rather than something that was done in "a casual, jesting matter."<sup>13</sup>

Moreover, and more particularly relevant to the present discussion, the court found that, even if Mr. Zehmer thought the agreement was a joke, "Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself."<sup>14</sup> Relying on what is now commonly known as the "objective manifestation of assent" test, the court held:

[T]he law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the

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memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent. . . ."); *see, e.g.*, *Gibbens v. Hardin*, 389 S.E.2d 478, 479 (Va. 1990) (refusing to enforce an oral contract for the conveyance of real property). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(d) (1979). In *Berry*, the contract was for services to be performed for a month. A contract for services to be performed in less than one year does not generally need to be evidenced by a writing signed by the party against whom enforcement is sought. *See* FLA. STAT. ANN. § 725.01 (West 2000) ("No action shall be brought . . . upon any agreement that is not to be performed within the space of 1 year from the making thereof . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized."); *see, e.g.*, *Rubenstein v. Primedica Healthcare, Inc.*, 755 So. 2d 746, 748 (Fla. Dist. Ct. App. 2000) ("Only if a contract could not possibly be performed within one year would it fall within the statute [of frauds]."). *See generally* RESTATEMENT (SECOND), *supra*, § 110(1)(e).

<sup>13</sup> *Lucy*, 84 S.E.2d at 520-21.

<sup>14</sup> *Id.* at 521.

Professor Chirelstein put it this way:

[E]ven if Zehmer truly did intend the contract to be a joke, Lucy apparently never got the point and instead considered the execution of the contract to be a serious commitment that was binding on Zehmer as well as on himself. He scurried about the very next day and arranged (with his brother) to put up half the purchase price, then engaged an attorney to examine title, and thereafter advised the [Zehmers] in writing that he was ready to close the deal. Since [Lucy] reasonably thought that the [Zehmers] w[ere] serious, and since the language of the contract was plain and unmistakable, the parties' mutual promises were enforceable despite [Mr.] Zehmer's undisclosed intention "to regard these doings as buffoonery."

defendants, in either event it constituted a binding contract of sale between the parties.<sup>15</sup>

The “objective manifestation” test applied in *Lucy* is – and for more than a century has been<sup>16</sup> – the prevailing test for the requisite intent to con-

<sup>15</sup> *Lucy*, 84 S.E.2d at 522 (citations omitted).

*Lucy*’s statement about the law imputing an intent “corresponding to the reasonable meaning of his words and acts” has been echoed in a number of subsequent cases. See, e.g., *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1197 (9th Cir. 1996) (holding that, by declaring that its employee stock purchase plan should “be construed so as to extend and limit participation in a manner consistent with the requirements of” section 423 of the Internal Revenue Code, which extends plan participation to common-law employees not expressly excepted by the terms of the plan, the employer “manifested an objective intent to make all common-law employees . . . eligible for participation”); *Am. Rock Salt Co. v. Norfolk S. Corp.*, 180 F. Supp. 2d 420, 423 (W.D.N.Y. 2001) (holding that a non-party to a contract can be bound by the contract’s terms by manifesting its intent to be bound by its words or its actions); *Adams v. United States, No. CIV. A. 97-0706-R*, 1999 WL 1059680, at \*2-3 (W.D. Va. Mar. 3, 1999) (holding that a plaintiff who signed a “complete release . . . of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim” could not later argue that he only intended to settle his property damage claim, because the release “reflect[ed] an objective intent to settle Adams’s claims arising from the accident, without any restrictions as to the scope of the settlement”), *aff’d*, 201 F.3d 435 (4th Cir. 1999); *Marefield Meadows, Inc. v. Lorenz*, 427 S.E.2d 363, 365 (Va. 1993) (holding that “[t]he trial court correctly found that this language constituted an offer” and neither the defendant’s nor her attorney’s “unexpressed reservations or intentions [could] override the written terms of that letter”); *Multicare Med. Ctr. v. Dep’t of Soc. & Health Servs.*, 790 P.2d 124, 133 (Wash. 1990) (en banc) (holding that the plaintiff hospitals “manifested an intention to agree to the arrangements in question, . . . regardless of the[ir] real, but unexpressed, intent,” when they voluntarily provided the care that was the subject of the agreement); see also *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384, 1387 n.8 (11th Cir. 1998) (observing that the U.N. Convention on Contracts for the International Sale of Goods’ deference to subjective intent is “[c]ontrary to what is familiar practice in United States courts,” as evidenced by, *inter alia*, *Lucy*). See generally Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1267 (1993).

<sup>16</sup> See, e.g., *Hudson v. Columbian Transfer Co.*, 100 N.W. 402, 403 (Minn. 1904) (“The meeting of minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intention, which may be wholly at variance with the former.” (quotation omitted)); *Kitzke v. Turnidge*, 307 P.2d 522, 527 (Or. 1957) (“The law of contracts is not concerned with the parties’ undisclosed intents and ideas. It gives heed only to their communications and overt acts.”); *First Nat’l Exch. Bank of Roanoke v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937) (“We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention.”); *City of Everett v. Sumstad’s Estate*, 631 P.2d 366, 367 (Wash. 1981) (en banc) (“We impute an intention corresponding to the reasonable meaning of a person’s words and acts. If the offeror, judged by a reasonable standard, manifests an intention to agree in regard to the matter in question, that agreement is established [by the offeree’s acceptance].”); W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH CENTURY TRANSFORMATION OF CONTRACT LAW* 20-21 (1996) (“American courts had replaced the will [subjective] theory with the so-called objective theory by 1900 or 1910.”); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 309 (Dover ed. 1991) (1881) (“The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”); Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 U. ILL. L.F. 85, 87 (1919) (“[A]n expression of mutual assent, and not the assent itself, is the essential element of contractual liability.”); see also CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 58-61 (1981) (recognizing, while criticizing, courts’ tendency, “[i]n the face of a claim of divergent intentions, to ‘imagine[ ]

tract.<sup>17</sup> As the Seventh Circuit colorfully explained in *Skycom Corp. v. Telstar Corp.*:<sup>18</sup>

"[I]ntent" does not invite a tour through [a party's] cranium, with [that party] as the guide. . . . Secret hopes and wishes count for nothing. The status of . . . a contract depends on what the parties express to each other and to the world, not on what they keep to themselves. It is therefore unimportant whether [one party] expected this letter to be the definitive agreement; the binding force of the document depends on public or shared expressions. . . .

The objective approach is an essential ingredient to allowing the parties jointly to control the effect of their [agreement]. If unilateral or secret intents could bind, parties would become wary . . . . A rule of law that could . . . inject the random element of a jury's determination about subjective intent [ ] would make transactions riskier.

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that it is respecting the will of the parties by asking what somebody else, say the ordinary person, would have intended by such words of agreement"). See generally LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 86-87 (1965).

<sup>17</sup> See, e.g., *Laserage Tech. Corp. v. Laserage Labs., Inc.*, 972 F.2d 799, 802 (7th Cir. 1992) (holding that the key to whether the parties entered into a binding settlement agreement and, if so, its terms "is determined by reference to what the parties expressed to each other . . . , not by their actual thought processes"); *Adams*, 1999 WL 1059680, at \*2-4 (holding that the plaintiff was foreclosed from suing the defendant, despite his contention that "he intended only to settle his claim for property damage, and not his claim for personal injuries," because "he objectively manifested an intent to settle all of his claims arising from the accident"); *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950-51 (Fla. Dist. Ct. App. 1991) (reversing the trial court's judgment for the defendant because the trial court improperly instructed the trial jury that it could only find for the plaintiff if the defendant subjectively intended to offer the amount of money stated in a misprinted newspaper advertisement); *Miller v. Walter*, 527 P.2d 240, 243 (Mont. 1974) (holding that the defendant bank could not avoid its guaranty obligation based on its argument that it "did not intend the letter to be a guaranty," where the bank clearly agreed in the letter to answer for the debt of its customer); *James Hardie Gypsum (Nevada), Inc. v. Inquipco*, 929 P.2d 903, 906 (Nev. 1996) (affirming the trial court's finding that the defendant could not avoid the effect of a modification signed by its authorized agent on the grounds that the agent, who had nearly thirty years experience, did not subjectively intend the writing to modify the prior contract), *disapproved of on other grounds* by *Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass'n*, 35 P.3d 964, 968-69 (Nev. 2001); *Hagrish v. Olson*, 603 A.2d 108, 110 (N.J. Super. Ct. App. Div. 1992) (holding that the defendant's "undisclosed intention to preserve a right to maintain a lawsuit against the plaintiffs," notwithstanding the plain language of the settlement agreement he signed, was "immaterial" because the defendant was bound by "the apparent intention he . . . outwardly manifest[ed]" to the plaintiffs, rather than his "different, secret intention"). See generally LARRY A. DiMATTEO, *CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT* 22-28 (1998); Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118, 139 (Peter Benson ed., 2001); Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49, 73 (2001); Manpreet S. Dhanjal, Daniel S. Strick & Mark A. Conrad, *Contracting on the Web: Collegiate Athletes and Sports Agents Confront a New Hurdle in Closing the Deal*, 8 VILL. SPORTS & ENT. L.J. 37, 53-55 (2001); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 351 (1998); Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1294-95 (1989); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 306 (1986); Wendell H. Holmes, *The Freedom Not to Contract*, 60 TUL. L. REV. 751, 751-52 (1986).

<sup>18</sup> 813 F.2d 810 (7th Cir. 1987).

Some beneficial transactions would be forgone. Others would become more cumbersome . . . .<sup>19</sup>

Or, in Judge Learned Hand's oft-repeated words:

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 twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.<sup>20</sup>

The law was not always thus. For much of the nineteenth century, courts focused on the subjective intent of the parties and their subjective understanding of whether a contract was formed and, if so, of its terms.<sup>21</sup> A classic sub-

<sup>19</sup> *Id.* at 814-15.

Just as a party's secret intent not to form a contract, when belied by its outward manifestations, will not prevent the formation of an enforceable contract, a party's secret intent to form a contract, if not outwardly manifested, will not cause the formation of an enforceable contract. *See, e.g.,* *Asbury v. Hugh L. Bates Lodge No. 686, F. & A. M.*, 24 N.E.2d 638, 639 (Ohio Ct. App. 1939) ("This intramural action of the lodge did not create an extraneous obligation any more than a resolution reached in the secret places of the mind of a natural person would bind him to an offeror, whose offer he had thus concluded to accept [without telling the offeror].").

<sup>20</sup> *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913), and *aff'd*, 231 U.S. 60 (1913), *quoted with approval in, e.g.,* *Luden's Inc. v. Local Union No. 6*, 28 F.3d 347, 364 n.29 (3d Cir. 1994); *Rateree v. Rockett*, 668 F. Supp. 1155, 1159 (N.D. Ill. 1987); *Hart v. Vt. Inv. Ltd. P'ship*, 667 A.2d 578, 583 (D.C. 1995); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 285 (Iowa 1995); *Chertkof v. Harry C. Weiskittel Co.*, 248 A.2d 373, 378 (Md. 1968); *Kabil Devs. Corp. v. Mignot*, 566 P.2d 505, 507 (Or. 1977); *Bill Walker & Assocs., Inc. v. Parrish*, 770 S.W.2d 764, 770 (Tenn. Ct. App. 1989).

<sup>21</sup> *See Newman v. Schiff*, 778 F.2d 460, 464-65 (8th Cir. 1985) (discussing the "significant doctrinal struggle in the development of contract law revolv[ing] around whether it was a party's actual or apparent assent that was necessary" to form a contract, and observing that "[b]y the end of the nineteenth century the objective approach to the mutual assent requirement had become predominant, and courts continue to use it today"); Williston, *supra* note 16, at 85 ("[N]ear the end of the eighteenth century, and for the ensuing half century, the prevalent theory of contract . . . involved as a necessary element actual mental assent. External acts were merely necessary evidence to prove or disprove the requisite state of mind."). *See generally* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 180-88 (1977).

This change of focus from subjective intent to objective intent was not unique to American contract law. Contract law was developing in a similar manner in other common law countries. *See* Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 296-97 (1997) (discussing a parallel movement in English and Australian contract law).

Professor Burton illustrates the difference between subjective assent and objective assent this way:

The distinction between subjective and objective theories of contract . . . employs an odd idea of the people who are contracting. It reminds me of an old Walt Disney cartoon in which Mickey Mouse personifies some ideas about vision. The camera's eye opens on a scene being viewed by Mickey Mouse, then cuts to a profile of Mickey's head as he then views the scene, and then pans around to face his eyes; it zooms through his eyes to the inside of his head. Lo and behold! Inside Mickey's head is a Little Mickey Mouse, sitting on an easy chair and watching a movie screen against the inside back of Big Mickey's head. The inside of Big Mickey's eyes are

jective intent case is *Raffles v. Wichelhaus*,<sup>22</sup> in which the parties agreed that Raffles would sell Wichelhaus and another (collectively, “the buyers”) 125 bales of cotton to arrive in Liverpool “ex *Peerless* from Bombay” – that is, on the ship *Peerless*, sailing from Bombay, India to Liverpool, England.<sup>23</sup> The problem was that there were two ships named *Peerless*, both of which sailed from Bombay to Liverpool carrying cotton: one ship sailed in October, the other in December.<sup>24</sup> The buyers were expecting their cotton on the October *Peerless*; the cotton Raffles intended to sell the buyers was aboard the December *Peerless*.<sup>25</sup> As a consequence, Raffles and Wichelhaus had no “meeting of the minds” with respect to a material term (which *Peerless* would be transporting Raffles’s cotton); and, therefore, they had no contract.<sup>26</sup>

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portrayed as movie projectors casting images of the scene we had seen on the outside, and the Little Mickey is watching the very same scene with which we had opened. There was a time when such a Little Mickey Mouse would be called a “homunculus” and would personify the human mind. This metaphor of the person splits us into two parts – a body like the Big Mickey Mouse and a mind like the homuncular Mickey.

We can understand the subjective and objective theories of contract law within this metaphor. An objective agreement is reached when Bug Mickey Mouse shakes hands with Donald Duck’s body; a subjective agreement is reached when [L]ittle Mickey Mouse, to speak figuratively, shakes hands with Donald’s homunculus. There would be no problem of mutual assent when the bodies and homunculi shake hands simultaneously [and on the same terms]. The problems arise when the bodies shake hands while [the] homunculi do not, or the reverse.

BURTON, *supra* note 7, at 17.

<sup>22</sup> 159 Eng. Rep. 375 (Exch. 1864) (per curiam).

<sup>23</sup> *Id.* at 375.

<sup>24</sup> *Id.* at 376.

<sup>25</sup> *Id.* at 375.

<sup>26</sup> *Id.* at 376.

American courts have mostly abandoned the “meeting of the minds” requirement in the nearly 140 years since *Raffles* was decided, thus diminishing the significance in a modern discussion of contractual intent of this “old chestnut of the common law” without knowledge of which “[n]o student of the law of contract could regard his education as complete.” A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 287-88 (1989); *see also* A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 135 (1995). Nonetheless, *Raffles* continues to be a cornerstone of modern discussions of contract interpretation, *see, e.g.*, *United States v. Rand Motors*, 305 F.3d 770, 774-75 (7th Cir. 2002) (citing *Raffles* for the principle that “[u]nder the doctrine of extrinsic ambiguity, a party may introduce objective evidence to establish an ambiguity”); *Charter Oil Co. v. Am. Employers’ Ins. Co.*, 69 F.3d 1160, 1167-68 (D.C. Cir. 1995) (citing, *e.g.*, *Raffles* to support the proposition that “[l]atent ambiguity can arise where language, clear on its face, fails to resolve an uncertainty when juxtaposed with circumstances in the world that the language is supposed to govern”); CHIRELSTEIN, *supra* note 14, at 87 (observing that *Raffles* “highlights the fallibility or variability of language itself and the possibility that the parties to a contract may use the same words to express quite different aims and expectations”); Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503, 518-19 (1991) (using *Raffles* to illustrate “the differences between the Willistonian (First Restatement) and Corbinian (Second Restatement) approaches to contract interpretation”), and of mutual mistake as a defense to contract formation and enforcement, *see, e.g.*, *Praxair, Inc. v. Hinshaw & Culbertson*, 235 F.3d 1028, 1034 (7th Cir. 2000) (describing mutual mistake as “a subdivision of extrinsic ambiguity well illustrated by the famous case of *Raffles v. Wichelhaus*”); *United States v. Barbosa*, 51 F. Supp. 2d 597, 598 (E.D. Pa. 1999) (observing that, “[w]ell before the second ship *Peerless* delivered its Bombay cotton on the Liverpool quay . . . , a feature of Anglo-American contract law has been the puzzle of mutual mistake of fact,” and applying the doctrine to a



*Embry v. Hargadine, McKittrick Dry Goods Co.*<sup>27</sup> illustrates the transition from subjective to objective intent. The issue for the court was whether an employer had renewed the contract of its employee (Embry), whose original contract of employment expired on December 15, 1903. After having twice before been rebuffed in his attempts to secure a renewal prior to the expiration of his contract, Embry approached the employer's president (McKittrick) on December 23, and again asked for a new contract. Without recounting the whole conversation, after Embry expressed his desire to stay on and satisfied McKittrick that his department was very busy, McKittrick allegedly said: "Go ahead, you are all right. Get your men out, and do not let [your contract] worry you."<sup>28</sup> McKittrick later denied that he had any intention of renewing Embry's contract for another year – and argued, therefore, that no renewal contract was formed.<sup>29</sup> After McKittrick discharged Embry on March 1, 1904, Embry brought suit. The trial court instructed the jury that, to find for Embry, it would have "not only to find the conversation occurred as [Embry] swore, but that both parties intended by such conversation to contract with each other for [Embry's] employment for the year from December, 1903, at a salary of \$2,000."<sup>30</sup> The jury did not so find, and the trial court entered judgment in favor of the employer. Embry appealed. Before turning to the merits of the dispute, the court of appeals cast its lot for objectivity, stating:

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element,

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sentencing guidelines issue that turned on whether the defendant was mistakenly smuggling cocaine instead of heroin (footnote omitted)); *Balistreri v. Nev. Livestock Prod. Credit Ass'n*, 262 Cal. Rptr. 862, 864-65 (Cal. Ct. App. 1989) (repeatedly citing *Raffles* in the course of a somewhat whimsical discourse on mutual mistake as to the identity of real property that was to be the subject of a deed of trust between the litigants before concluding, as in *Raffles*, that the parties had each meant a different parcel); ARCHIBALD H. THROCKMORTON & ALVIN C. BRIGHTMAN, *CLARK ON CONTRACTS* 273-74 (4th ed. 1931) (using *Raffles* to illustrate the consequence of mutual mistake as to the identity of the contract's subject matter where "[t]he things meant by the parties . . . fitted the description"); Hoffman F. Fuller, *Mistake and Error in the Law of Contracts*, 33 EMORY L.J. 41, 41-52 (1984) ("The case of *Raffles v. Wichelhaus* . . . presents the first basic question of the law of mistake: Under what circumstances will the legal effect of the error be that the contract is absolutely void; that what appeared to be a contract is in legal effect not a contract at all?"); see also FRIED, *supra* note 16, at 58-63 (discussing *Raffles* and a number of other cases clumped loosely into an analysis of "mistake, frustration, and impossibility," which share the common thread that "[t]he court cannot enforce the will of the parties because there are no concordant wills"); Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 674 n.60 (1998) ("In *Raffles* the parties' minds truly did not meet subjectively, and that failure prevented contract formation. Possibly the 'minds not met' rationale made its way into mutual mistake cases when judges who did not understand the difference between the two doctrines conflated them.").

<sup>27</sup> 105 S.W. 777 (Mo. Ct. App. 1907).

<sup>28</sup> *Id.* at 777.

<sup>29</sup> *Id.* at 777-78.

<sup>30</sup> *Id.* at 778.

it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts.<sup>31</sup>

Turning to the conversation between Embry and McKittrick, the court held that

though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.<sup>32</sup>

As to whether a reasonable man would have understood McKittrick to have renewed Embry's contract of employment, the court found that "no reasonable man would construe [McKittrick's] answer to Embry's demand that he be employed for another year[ ] otherwise than as an assent to the demand," and, therefore, "Embry had the right to rely on it as an assent."<sup>33</sup>

[I]f the conversation was according to [Embry]'s version, and he understood he was employed, it constituted in law a valid contract of re-employment, and the court erred in making the formation of a contract depend on a finding that both parties intended to make one. It was only necessary that Embry, as a reasonable man, had a right to and did so understand.<sup>34</sup>

A party seeking to avoid what appears to be a valid contract bears the burden of proving that she and her putative contracting partner did not intend to form a valid contract, despite their objective manifestations of assent.<sup>35</sup> The mere fact that "differences subsequently arise between the parties . . . is not of itself sufficient to affect the validity of the original contract."<sup>36</sup> Moreover, "the self-serving testimony of the parties as to their subjective intentions or understandings is not probative evidence of whether the parties entered into a contract."<sup>37</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 779.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 780.

The court of appeals remanded for the necessary fact finding, unencumbered by the first trial court's heavy-handed instruction. There is no report of the case following remand. And, despite the considerable scholarly attention the case has drawn in the intervening 95 years – see, e.g., Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 77 (1994); Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 192, 210-11 (1986); Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1125-26 (1984) – no one seems to have written on the end result in the case.

<sup>35</sup> See, e.g., *Warehousemen's Union Local No. 206 v. Cont'l Can Co.*, 821 F.2d 1348, 1350 (9th Cir. 1987) ("It thus falls to the company to demonstrate that, although its agreement with the union has the outward appearance of a valid contract, there was no meeting of the minds because the parties understood entirely different things by the written terms of the agreement.").

<sup>36</sup> *Id.* at 1350 (quotation omitted); see also *Bruce v. Bishop*, 43 Vt. 161 (1870) (holding that the trial court erred by not submitting the question of the parties' intent to the jury where "the circumstances and th[e] testimony did tend to show that the defendant's offer was intended and understood to be merely jocose, and not in earnest").

<sup>37</sup> *Mullen v. Christiansen*, 642 P.2d 1345, 1350 (Alaska 1982); accord *James Hardie Gypsum (Nevada), Inc. v. Inquipco*, 929 P.2d 903, 906 (Nev. 1996) (quoting *Mullen*), *disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass'n*, 35 P.3d 964, 968-69 (Nev. 2001).

B. *Leonard v. PepsiCo and the "Clear Jest"*

In *Leonard v. PepsiCo, Inc.*,<sup>38</sup> fast becoming a darling of casebook writers,<sup>39</sup> Pepsi ran a series of television advertisements with the common theme "Drink Pepsi, Get Stuff" in conjunction with a "Pepsi Stuff" catalog that included a variety of items that could be purchased using "Pepsi Points."<sup>40</sup> One such advertisement featured, along with more mundane items (a t-shirt, a leather jacket, and sunglasses), a Harrier fighter jet. As Judge Wood describes it:

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-coifed 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. Looking 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

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<sup>38</sup> 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

<sup>39</sup> Eight of the fifteen contracts casebooks with a publication date of 2000, 2001, 2002, or 2003 (received as of April 30, 2003) include *Leonard* as a principal case, *see* BARNETT, *supra* note 7, at 294; BLUM & BUSHAW, *supra* note 7, at 70; MURPHY, SPEIDEL & AYRES, *supra* note 7, at 253; EPSTEIN, MARKELL & PONOROFF, *supra* note 7, at 25; WILLIAM MCGOVERN, LARY LAWRENCE & BRYAN D. HULL, *CONTRACTS AND SALES: CONTEMPORARY CASES AND PROBLEMS* 47 (2d ed. 2002); SCOTT & KRAUS, *supra* note 7, at 19; MURRAY, *supra* note 7, at 47; AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, *CONTRACTING LAW* 176 (2d ed. 2000), and a ninth discusses it in notes following two principal cases, *see* FARNSWORTH, YOUNG & SANGER, *supra* note 7, at 125, 140.

<sup>40</sup> *See Leonard*, 88 F. Supp. 2d at 118.

following appears in more stylized script: "Drink Pepsi – Get Stuff." With that message, the music and the commercial end with a triumphant flourish.<sup>41</sup>

"Inspired by this commercial," and determined to "obtain a Harrier Jet,"<sup>42</sup> Leonard consulted the Pepsi Stuff catalog. He did not find the Harrier jet listed. He did find that he could purchase Pepsi Points for \$0.10 each and that he could order promotional merchandise with as few as fifteen earned (as opposed to purchased) Pepsi Points. The latter was good news to Leonard. Had he not been able to purchase Pepsi Points, he would have had to purchase roughly 190 Pepsis a day for the next 100 years in order to accumulate 7,000,000 points.<sup>43</sup>

Leonard proceeded to raise \$700,000 to purchase 7,000,000 Pepsi Points. He then submitted an order form, along with fifteen earned Pepsi Points, and a check for \$700,008.50.<sup>44</sup> Through an exchange of correspondence among Pepsi, Leonard, Leonard's attorneys, and Pepsi's advertising agency, Pepsi refused to process Leonard's order, arguing that the Harrier jet was included in the advertisement "to create a humorous and entertaining ad."<sup>45</sup>

Leonard sued Pepsi alleging, *inter alia*, that Pepsi breached the contract formed by its offer (via the television advertisement) of a Harrier jet for 7,000,000 Pepsi Points, which Leonard accepted by submitting an order form along with the necessary points, and for which Leonard gave consideration in the form of (1) purchasing Pepsi products to accumulate 15 original points and (2) enclosing a check in the amount of \$700,008.50.<sup>46</sup> The district court granted Pepsi summary judgment on Leonard's breach of contract claim because, *inter alia*, "no objective person could reasonably have concluded that the commercial actually offered consumers a Harrier jet."<sup>47</sup>

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<sup>41</sup> *Id.* at 118-19 (footnote omitted). Professor Val Ricks has posted all three versions of the advertisement on his web site. See <http://gateway.stcl.edu/faculty-dir/ricks/casebook/Leonardv.Pepsico.htm> (last visited Apr. 30, 2003).

<sup>42</sup> See *Leonard*, 88 F. Supp. 2d at 119.

<sup>43</sup> *Id.* at 129.

<sup>44</sup> *Id.* at 119. The court's opinion does not explain why the check was in the amount of \$700,008.50, instead of \$700,000.00 (or, for that matter, \$699,998.50 – the cost of the 6,999,985 Pepsi points Leonard needed to purchase to combine with the 15 Pepsi points he had already earned). Perhaps Leonard added \$10.00 to cover the shipping and handling charges on the \$23 million, fourteen ton aircraft. *Id.* at 129.

<sup>45</sup> *Id.* at 120.

<sup>46</sup> *Id.* at 127.

<sup>47</sup> *Id.*

The court also found that the advertisement was not an offer, because it was insufficiently definite, having explicitly reserved key details of the promotion to the Pepsi Stuff catalog, *id.* at 122-24; and that Pepsi's promotion was not in the nature of a "reward" offer, *id.* at 125-27. For further discussion of advertisements and rewards as offers, see *infra* text accompanying notes 80-85 and 93-115. The court also noted several times that the advertisement explicitly referenced the catalog, that the catalog explicitly stated that Pepsi Points could only be redeemed by using the catalog order form, and that the catalog order form did not include the Harrier jet. See, e.g., *Leonard*, 88 F. Supp. 2d at 118-19. The implication seems to be that, even if Leonard had satisfied the court that the advertisement was an offer, it was conditional on the advertised merchandise being included in the catalog – which the Harrier jet was not. Leonard could not accept that which Pepsi did not offer. Therefore, there would be no contract.

Starting from the premise that "[a]n obvious joke . . . would not give rise to a contract,"<sup>48</sup> and recognizing the counterpremise that, "if there is no indication that the offer is 'evidently in jest,' and that an objective, reasonable person would find that the offer was serious, then there may be a valid offer,"<sup>49</sup> the *Leonard* court explained that "the obvious absurdity of the commercial" defeated Leonard's argument that it "was not clearly in jest."<sup>50</sup> Judge Wood based her conclusion on five factors: (1) the exaggerated claim "that Pepsi Stuff merchandise will inject drama and moment into hitherto unexceptional lives";<sup>51</sup> (2) the "high improbability" that the teenager featured in the advertisement would be allowed to fly "the prize aircraft of the United States Marine Corps" and his "improbably insouciant attitude toward the relative difficulty and danger of piloting a fighter plane in a residential area";<sup>52</sup> (3) the "exaggerated adolescent fantasy" of commuting to school in a Harrier jet;<sup>53</sup> (4) the "clearly not serious" depiction of a Harrier jet, the "well-documented function[s]" of which are "attacking and destroying surface and air targets, armed reconnaissance and air interdiction, and offensive and defensive anti-aircraft warfare, . . . as a way to get to school in the morning";<sup>54</sup> and (5) the fact that, in order to amass sufficient points to "earn" a Harrier jet, Leonard would either have to drink 7,000,000 Pepsis, or "roughly 190 Pepsis a day for the next hundred years" (clearly, an impossible task) or raise \$700,000 to purchase a \$23,000,000 jet (clearly, "a deal too good to be true").<sup>55</sup>

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<sup>48</sup> *Id.* at 127 (citing *Graves v. N. N.Y. Publ'g Co.*, 22 N.Y.S.2d 537 (N.Y. App. Div. 1940) (dismissing a purported offer that appeared in a newspaper's "joke column")); see also 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.11, at 30 (rev. ed. 1993) (disqualifying "acts evidently done in jest or without intent to create legal relations" from being considered offers because they "do not lead others reasonably to believe that they are empowered 'to close the contract'"), cited with approval in *Leonard*, 88 F. Supp. 2d at 127.

<sup>49</sup> *Leonard*, 88 F. Supp. 2d at 127-28 (citing *Barnes v. Treece*, 549 P.2d 1152 (Wash. Ct. App. 1976), and *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954), as examples of cases in which a reasonable person could conclude that the subject act or statement was not clearly in jest). For more discussion of *Lucy*, see *supra* text accompanying notes 7-15. For more discussion of *Barnes*, see *infra* text accompanying notes 80-85.

<sup>50</sup> *Leonard*, 88 F. Supp. 2d at 130.

<sup>51</sup> *Id.* at 128.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 129.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

The "mechanical" aspects of *Leonard* are similar to those in *Alligood v. Procter & Gamble Co.*, 594 N.E.2d 668 (Ohio Ct. App. 1991). From 1981 to 1990, Procter & Gamble ("P&G") advertised a catalog promotion on packages of Pampers diapers. Each package bore a "Teddy Bear points" proof-of-purchase symbol. Each package explained that, by accumulating and redeeming Teddy Bear points, "a customer could order various baby items from the Pampers Softouches Baby Catalog at a reduced cost." *Id.* at 668. The catalog included pictures of items for sale and the number of Teddy Bear points and the cash redemption price for each item, instructions for redeeming points and ordering items from the catalog, and an order form for items included in the catalog. *Id.* at 668-69. Around April 1989, Pampers sent out a new catalog which bore, on its front cover, a notice that it would be the final catalog and that the promotion would end on February 28, 1990. *Id.* at 669. Apparently, Alligood and the other plaintiffs failed to redeem all of their Teddy Bear points on or before February 28, 1990, so they sued P&G, arguing that the promotional advertisement on each package of Pampers, which was silent as to the duration of the promotion, was an offer

### C. *Between the Poles*

*Lucy* and *Leonard* represent the two ends of an enforceability spectrum. On the *Lucy* end, an offer and an acceptance that have all of the outward manifestations of a serious contract will be enforced, despite the fact that one of the parties harbored a secret intent not to be bound. On the *Leonard* end, a statement or act that no reasonable person could understand to be an offer or an acceptance will not give rise to a contract, despite the fact that one party may have been in earnest. What of the seemingly vast middle ground between these two poles?

#### 1. "Sham Marriage" Cases

The richest vein of reported case law on the enforceability of agreements made in jest arises out of sham marriages.<sup>56</sup> The reported cases generally fall into two categories. In the first, both parties understood that, despite having satisfied the necessary formalities to be married and despite any apparent solemnity during the marriage ceremony, the marriage was made in jest or for some other deceptive purpose. In the second, only one party understood that the marriage was made in jest or for some other deceptive purpose.

In cases in which both parties understood the marriage to be in jest or for some deceptive purpose, courts have generally found no marriage contract to have been formed because, in the words of the leading case, *McClurg v. Terry*,<sup>57</sup> "[m]ere words without any intention corresponding to them will not make a marriage or any other civil contract," provided that "both parties intended and understood that they were not to have effect."<sup>58</sup>

In *McClurg*, the minor plaintiff sought to annul her marriage to the defendant on the grounds that they were wed in jest, that they did not intend to contract to marry, that they and the guests present at their wedding understood it to be in jest, and that they had not, at any time up to or following the wedding, lived together or otherwise "acted toward each other as man and wife."<sup>59</sup> Following a late night on the town with their friends (one of whom happened to

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for a unilateral contract that the plaintiffs accepted by clipping and saving Teddy Bear points; and, therefore, P&G could not revoke the offer once the plaintiffs had accepted. *Id.* Affirming the trial court's judgment in favor of P&G, the court of appeals held, *inter alia*, that the promotional advertisement on each package of Pampers explicitly referred to, and was therefore dependent upon the terms and conditions included in, the Pampers Softouches Baby Catalog. *Id.* Therefore, the package advertisement and catalog collectively formed an invitation to offer, so that there could be no acceptance unless and until P&G honored the plaintiffs' attempts to purchase items from the catalog by submitting a proper order form, the necessary number of points, and the cash price – something P&G was not required to do once the promotion expired. *Id.* What makes *Leonard* noteworthy, however, is not so much the mechanics of offer and acceptance, but the nature of the alleged offer, the memorable facts, and Judge Kimba Wood's exhaustive (but not exhausting) opinion.

<sup>56</sup> Indeed, these cases are sufficiently plentiful to have spawned a rather dated *American Law Reports* annotation. A. Della Porta, Annotation, *Validity of Marriage as Affected by Intention of the Parties That it Should be Only a Matter of Form or Jest*, 14 A.L.R.2d 624 (1950); see also *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 880-82 (S.D. Tex. 1969) (surveying the case law to date), *aff'd*, 440 F.2d 1163 (5th Cir. 1971).

<sup>57</sup> 21 N.J. Eq. (6 C.E. Green) 225 (N.J. Ch. 1870).

<sup>58</sup> *Id.* at 227.

<sup>59</sup> *Id.* at 226.

be a justice of the peace), the plaintiff "in jest challenged the defendant to be married to her on the spot, he in the same spirit accepted the challenge, and the justice . . . performed the ceremony, they making the proper responses."<sup>60</sup> After the ceremony, the "defendant escorted the [plaintiff] to her home, and left her there as usual on occasions of such excursions; both acted and treated the matter as if no ceremony had taken place."<sup>61</sup> Finding that neither party intended to marry, the chancellor granted the annulment.<sup>62</sup>

Likewise, in *Goldman v. Dithrich*,<sup>63</sup> the court invalidated a putative marriage between Mary Goldman and her son-in-law, E.J. Ganz, who was, at the time of the putative marriage, still married to Mary's daughter.<sup>64</sup> When E.J. and Mary applied for the wedding license and went through with the wedding ceremony, E.J. did so in the name of Mary's common-law husband, William Goldman, who had died only eight days earlier without ever legally marrying Mary.<sup>65</sup> The Florida Supreme Court declared the "pretended marriage" between Mary and E.J. "a nullity in its inception . . . without binding force and effect,"<sup>66</sup> explaining:

Ganz and his wife were living together at the time, . . . he and [Mary] never lived or cohabited together nor ever intended to, . . . their pretended ceremonial marriage was in no sense actuated of love, affection, the purpose to establish a home and family, or any other fact essential to constitute the marital state. By the admission of the parties, the whole transaction was foreign to the vital purpose of marriage and we fail to find a single element of a valid marriage in it.

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. . . [N]either party had any intention of giving effect to the marriage. . . . It was nothing more than a jest or mock marriage which is of no effect and there was no possibility of ratification by cohabitation or change in the status of the parties.<sup>67</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 226-27.

<sup>62</sup> *Id.* at 227.

<sup>63</sup> 179 So. 715 (Fla. 1938).

<sup>64</sup> *Id.* at 716.

Interestingly, neither Ganz, his wife (the court, perhaps feeling sorry for the embarrassment the case must have caused Ganz's wife, never identifies her by name), nor any of their offspring (if they had any) brought the suit. The plaintiff was W. Heber Dithrich, individually and as the executrix of Edward Dithrich, whom Mary married in Florida thirteen months after she pretended to marry E.J. Ganz in West Virginia. *Id.* at 715.

<sup>65</sup> *Id.* at 715-16.

Why would Ganz have gone through with such a charade, given "the traditional gulf of infelicity that is said to separate the affections of mother-in-law and son-in-law"? *Id.* at 717. Goldman was never legally married to William (Ganz's wife's father), because West Virginia, where they resided, did not recognize common-law marriages. Goldman claimed that she wanted a marriage certificate on file in order to "remove the stigma of bastardy from her daughter [Ganz's true wife]." *Id.* at 716. Dithrich claimed that Goldman was trying to legitimize her marriage to William so that she could inherit from his estate. *Id.*

<sup>66</sup> *Id.* at 716.

<sup>67</sup> *Id.* at 716-17; see also, e.g., *Amsden v. Amsden*, 110 N.Y.S.2d 307, 309 (N.Y. Sup. Ct. 1952) ("There is nothing in the record . . . to support the conclusion that a valid, legal and binding marriage took place. Although a legal ceremony was performed, it is clear that neither party intended or considered it to be a valid and legal marriage. On the contrary, it affirmatively appears that the sole object of the marriage ceremony was to give a name to the child to be born."); *Campbell v. Moore*, 1 S.E.2d 784, 791-92 (S.C. 1939) ("As neither plaintiff nor defendant . . . gave their free and willing consent to be bound by the ceremony,

When only one party understands that the marriage was made in jest or for some other deceptive purpose, courts have generally refused to invalidate the marriage contract because, absent a "show[ing] that both parties intended and understood that they were not entering into the matrimonial relation," one party "could not avoid the marriage by a mental reservation [or] secret intention not to become [wed to the other]."<sup>68</sup>

Thus, for example, in *Girvan v. Griffin*,<sup>69</sup> Girvan petitioned to have his marriage to Griffin annulled on the grounds that they married in jest and had

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or assume toward each other the relations ordinarily implied in its performance, or exercised the duties, obligations, rights and privileges incident to the relation, and have not since done any act or performed any such duties or obligations, or exercised such rights and privileges, thereby or otherwise indicating a purpose so to be bound, there appears no reason for refusing to order the annulment of the pretended marriage, and thereby remove any impediment that might otherwise exist."); *Meredith v. Shakespeare*, 122 S.E. 520, 526-27 (W. Va. 1924) (discussed *infra* note 73); *Crouch v. Wartenberg*, 104 S.E. 117, 118 (W. Va. 1920) (reversing the trial court's grant of demurrer in favor of the defendant who induced the minor plaintiff to marry him, without obtaining the necessary consent from the plaintiff's guardian, in order to "avoid detriment to defendant's business and loss of respect of his friends and associates, which would result from plaintiff's refusal to go through the ceremony" by assuring her that the "ceremony was to be treated as ineffectual for any purpose").

A sham marriage perpetrated to foil a statute is not only an unenforceable contract, it may subject the participants to criminal liability. For example, in *United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952), three honorably discharged American World War II veterans (Marcel Lutwak, Bessie Osborne, and Grace Klemtnier) agreed to "pretend to" marry three foreign nationals (Maria, Munio, and Leopold Knoll) and bring them into the United States, in derogation of the immigration laws then in effect, as "war brides." See *id.* at 751-52. Specifically, Lutwak "married" his already-married aunt, Maria Knoll; Osborne "married" Lutwak's uncle, Munio Knoll, who was Maria's true husband; and Klemtnier "married" Lutwak's uncle, and Munio's brother, Leopold Knoll. See *id.* at 752. While all three "marriages" were solemnized by wedding ceremonies in Paris, France, none of the parties intended to do anything but help the Knolls get into the United States. Affirming convictions of Lutwak, Munio Knoll, and Regina Treitler (Munio and Leopold's sister, who solicited Osborne's and Klemtnier's involvement, telling them that "she would see that the girls' ways were paid, that the marriages need not be consummated, and that divorces could be obtained after six months," *id.* at 752), the Seventh Circuit found that all three marriages were, despite their apparent solemnity, "in fact not true marriages but spurious in character," *id.* at 751; and, therefore, were "void under the law of this country as against public policy, . . . hav[ing] no validity," *id.* at 753.

Likewise, in *United States v. Rubenstein*, 151 F.2d 915 (2d Cir. 1945), the Second Circuit affirmed a conspiracy conviction arising from a sham marriage designed to permit a Czech national who was in the United States on a temporary visa to circumvent federal immigration laws. Judge Learned Hand explained the contract aspect of the court's holding:

Spitz and Sandler were never married at all. Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. Marriage is no exception to this rule: a marriage in jest is not a marriage at all. . . . It is quite true that a marriage without subsequent consummation will be valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others.

*Id.* at 918-19 (citations omitted).

<sup>68</sup> *In re Imboden's Estate*, 86 S.W. 263, 268 (Mo. Ct. App. 1905).

<sup>69</sup> 108 A. 182 (N.J. 1919).



never consummated the marriage, never lived together, and never provided one another any financial support. Affirming the vice chancellor's decision not to grant the annulment, the New Jersey Court of Errors and Appeals recounted Girvan's explanation of the circumstances leading up to their marriage as follows:

On Monday afternoon, the 13th of August, . . . [Girvan] said to [Griffin], "I have to go back to work," and she said, "Why don't you take a vacation?" [Girvan] said: "I can't take a vacation. The only way I could get a vacation is to take a fireman's job or get married." She said, "Why don't you get married?" [Girvan] said: "Who? Why don't you and I get married?" . . . That night they took out a license to marry. On the following Thursday evening, August 16th, at 8:30, the marriage ceremony was performed by Rev. Walter Earle Ledden, a minister of the Methodist Episcopal Church, at Belmar, N.J., in the presence of three witnesses brought by the parties to witness the ceremony.<sup>70</sup>

Despite the apparent frivolity and haste with which the parties approached their wedding,<sup>71</sup> the court found that the marriage was valid, based on the testimony of the minister and the witnesses to the wedding, and on the lack of admission by Griffin that the marriage was only in jest.<sup>72</sup>

The key to the "sham marriage" cases is the understanding and intent of the parties at the time they were purportedly married, not at the time the validity of their marriage becomes a matter for judicial resolution.<sup>73</sup>

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<sup>70</sup> *Id.* at 183.

<sup>71</sup> The court's opinion indicates that the parties had "kn[own] each other" for almost three years, but gives no indication that there was anything more than a casual acquaintance or friendship. *See id.* They do not appear to have taken together the vacation on which the fateful events occurred, because the opinion indicates that Griffin had already been in Belmar for some time before Girvan arrived, and that he intended to leave Belmar before she did. *See id.* Girvan arrived in Belmar on Saturday, but apparently did not see Griffin until Monday lunch. *See id.*

<sup>72</sup> The court stated:

There is nothing in the surrounding circumstances to indicate jest. All there is of testimony is petitioner's statement, which amounts to nothing more than his present opinion as to the effect of what was done. There is nothing at all to indicate that the defendant regarded the ceremony as a joke, or that it was so regarded by those who participated in it; the one witness present who was produced and gave evidence and the clergyman who performed the ceremony did not think they were participating in a joke.

. . . [C]orroboration is required in suits for nullity of marriage. . . . In this case there was no corroboration of the petitioner's testimony that the marriage ceremony was performed in jest.

*Id.*

<sup>73</sup> *See, e.g., Meredith v. Shakespeare*, 122 S.E. 520, 526-27 (W. Va. 1924) (holding that, because "both parties in this case were in accord in the beginning and until after defendant instituted her suit," it was "of no importance that the defendant, since the marriage . . . , has for some reason not explained, changed her mind; if there was no valid contract between the parties at the time of the marriage, she can not at her election afterwards convert a falsehood into a verity"). While a mere change of mind or heart will not make an invalid marriage valid, a change of sleeping arrangements may. *See id.* at 526 ("[T]he facts present and attending the marriage must control unless the invalid marriage has been since ratified by the parties as by cohabitation and a change in their status."); *see, e.g., Brooke v. Brooke*, 60 Md. 524 (1883) (holding that, despite the putative husband's admonition to his putative wife that he intended their wedding to have no legal effect and that he would never consummate it, his subsequent acts, including fathering one or more of her children, ratified the ceremony, despite its dubious context, and made them legally married).

## 2. Other Contexts

"Joke" or "sham" contracts in other contexts have received somewhat less uniform treatment from the courts. Still, there is ample authority that, in the absence of an obviously outlandish act or statement like that in *Leonard*,<sup>74</sup> or a context that belies the likelihood of genuine contractual intent,<sup>75</sup> both parties

<sup>74</sup> See *supra* text accompanying notes 38-55; see also, e.g., *Bologna v. Allstate Ins. Co.*, 138 F. Supp. 2d 310, 323-24 (E.D.N.Y. 2001) (holding that Allstate's slogan – "You're in good hands with Allstate" – did not offer an express warranty capable of acceptance by an insured's purchase or renewal of a policy); *Hubbard v. Gen. Motors Corp.*, 39 UCC Rep. Serv. 2d 83, 90 (S.D.N.Y. 1996) (finding that GM's advertisement claiming that Suburbans were "popular," "dependable," and "like a rock" was puffery that did not create express warranty); *The Sample, Inc. v. Pendleton Woolen Mills, Inc.*, 704 F. Supp. 498, 505 (S.D.N.Y. 1989) (concluding that the defendant's advertisement about "relationships that last a lifetime" could not reasonably be relied upon as a statement of the defendant's obligations); *Bader v. Siegel*, 657 N.Y.S.2d 28, 29 (N.Y. App. Div. 1997) (holding that vague promises by advertisers cannot be enforced as a contract because they are incapable of being proven true or false); *Prescott v. Farmers Tel. Co-op., Inc.*, 516 S.E.2d 923, 924 (S.C. 1999) (holding that an alleged offer to employ the plaintiff "[a]s long as you do your job, keep your nose clean," was not sufficiently explicit to constitute an offer to limit termination to just cause because "a reasonable person in [the plaintiff's] position would construe the statement as praise or encouragement, or even 'puffery,' rather than an offer of definite employment").

Of course, "outlandishness" is often in the eye of the beholder. In July 1998, the Pacific Suns of the Western League traded right-handed pitcher Ken Krahenbuhl to the Greenville Bluesmen of the Texas-Louisiana League for an undisclosed amount of cash, a player to be named later, and "10 pounds of expertly filleted Mississippi River catfish." Hank Hersch & Kostya Kennedy, *Deal of the Week: A Trade with a Catch*, SPORTS ILLUSTRATED, Oct. 10, 1998, at 18. Krahenbuhl reportedly commented "I didn't think I deserved to get traded for fish." *Id.* He proceeded to pitch a perfect game in his first start for the Bluesmen despite, or perhaps because of, persistent cat-calls of "Hey, Catfish Ken!" *Id.* The Bluesmen had previously traded second baseman Sean Murphy to the Sioux Falls Canaries for fifty pounds of pheasant, and had sent a mint copy of a classic Muddy Waters album to the Meriden Brakemen for first baseman Andre Keen. See *id.*

<sup>75</sup> As Judge Learned Hand explained:

[C]ontracts depend upon the meaning which the law imputes to the utterances, not upon what the parties actually intended; but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean, when used in their actual setting.

*N.Y. Trust Co. v. Island Oil & Transp. Corp.*, 34 F.2d 655, 656 (2d Cir. 1929); see, e.g., *Higgins v. Lessig*, 49 Ill. App. 459, 460-61 (1893) (reversing the trial court's judgment enforcing a putative offer to pay a \$100 reward to anyone finding the thief who stole a \$15 harness because the putative offer "was in the nature of an explosion of wrath against some supposed thief . . . , and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement so out of proportion to the supposed cause of it that it should be regarded rather as an extravagant exclamation of an excited man than as manifesting an intention to contract"); *Graves v. N. N.Y. Publ'g Co.*, 22 N.Y.S.2d 537, 538 (N.Y. App. Div. 1940) (holding that no contract was formed based on an alleged offer that ran in the defendant newspaper's "joke column" and promised to pay \$1,000 to the person who would furnish the offeror with a telephone number the offeror could have gotten free from directory assistance); *Asbury v. Hugh L. Bates Lodge No. 686, F. & A. M.*, 24 N.E.2d 638, 639 (Ohio Ct. App. 1939) (holding that statements made in the presence of putative offerors about the putative offeree's interest in consummating a deal did not give rise to an acceptance on the basis of which the putative offeree could be bound because the statements were made within the confines of a fraternal lodge of which the putative offerors were members and which was, collectively, the putative offeree); *Woods v. Fifth-Third Union Trust*

must have understood the act or statement to be insincere or otherwise not intended to evidence their intent to be bound at the time the alleged contract was made in order to avoid forming a contract.<sup>76</sup> It is not enough that one

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Co., 6 N.E.2d 987, 988-89 (Ohio Ct. App. 1936) (holding that mother's promise to "pay" her son for taking good care of her did not sufficiently evidence a contract to compensate the son by any means other than providing for him in the mother's will); *Mitzel v. Hauck*, 105 N.W.2d 378, 380-81 (S.D. 1960) (holding that no contract was formed based on the defendant's offer to take the plaintiff along on a hunting trip with mutual friends because the invitation was based on "friendship and social relation," rather than some "commercial arrangement"); *Bromley v. McHugh*, 210 P. 809, 810 (Wash. 1922) (holding that a call for bids, put out by the defendant's architect to various construction contractors, is "merely a call for offers to contract, and there is no contract until one of the bids is actually accepted").<sup>76</sup> See, e.g., *New York Trust*, 34 F.2d at 655-56 (applying the reasonable person standard and holding that a paper transaction between a corporate parent and its subsidiary was not an actual "commercial transaction," but was, instead, "a sham, which nobody did, and nobody advised could, understand as intended to be more"); *Smith v. Richardson*, 104 S.W. 705, 706-07 (Ky. 1907) (refusing to enforce defendant's agreement to pay off the plaintiff's indebtedness to a third party in exchange for shares of stock both men knew to be practically worthless because "from all the circumstances of the alleged transaction, that the whole conversation was begun and continued in a spirit of banter and mutual raillery, as often happens among men of business, and was never intended to be regarded in a serious light . . . it necessarily follows that there was no such meeting of the minds of the parties as was necessary to constitute a valid contract"); *Beaman-Marvell Co. v. Gunn*, 28 N.E.2d 443, 445 (Mass. 1940) (refusing to enforce a written agreement between the parties where the writing's "sole purpose . . . was to satisfy the [non-party] bank in order to obtain a loan secured by a mortgage," and the parties did not intend to modify the terms of their prior oral agreement); *Keller v. Holderman*, 11 Mich. 248, 248 (1863) (reversing the trial court's judgment in favor of the plaintiff, who sought to enforce a putative offer to pay \$300 for a \$15 watch, because "the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn, . . . no contract was ever made by the parties"); see also *Hoss v. Purinton*, 229 F.2d 104, 110 (9th Cir. 1955) (Pope, J., dissenting) (arguing that, because the parties dealt in good faith and made what they believed at the time to be a valid joint venture agreement, the plaintiff should be foreclosed from later offering evidence that the agreement "was a mere sham to deceive creditors of [the defendant]"); *Zell v. Am. Seating Co.*, 138 F.2d 641, 644 (2d Cir. 1943) (observing, in the context of a parol evidence dispute, that "a purported written agreement, which the parties designed as a mere sham, lacks legal efficacy"), *rev'd on other grounds*, 322 U.S. 709 (1944) (per curiam). But cf. *Deitrick v. Sinnott*, 179 N.W. 424, 427-428 (Iowa 1920) (permitting the defendant to avoid contractual liability based on his testimony that "what was said by him was in a spirit of banter and fun; that he at no time intended to purchase the [plaintiff's] cattle . . . and that plaintiff must have known he did not" and the absence of competent evidence to the contrary); *Theiss v. Weiss*, 31 A. 63, 67 (Pa. 1895) (suggesting that the jury, despite the lack of an admission by the plaintiff that the contract was made in jest, should have excused the defendant from contractual liability based on the testimony of a disinterested third party, present when the defendant made the alleged contract with the plaintiff, "that the defendant's statement to the plaintiff . . . was made in a bantering, joking way, and that his understanding was that the plaintiff regarded it as a joke," but, nonetheless, affirming the jury's verdict in favor of the plaintiff). See generally *Allensworth v. Allensworth's Ex'x*, 39 S.W.2d 198, 202 (Ky. 1931) ("[S]tatements, if not made in earnest and understood by [their recipient] not to have been made in earnest, cannot be the basis of a contract."); *Chiles v. Good*, 41 S.W.2d 738, 739 (Tex. Civ. App. 1931) ("[A]n offer and an acceptance, although complete, cannot be the foundation of a binding contract where the offer is made and accepted, not with the intention of making a contract, but as a mere jest or joke."), *rev'd on other grounds*, 57 S.W.2d 1100 (Tex. Comm'n App. 1933) (finding that the court of appeals improperly considered oral testimony that was introduced without basis in the pleadings); CHIRELSTEIN, *supra* note 14,

party thought so<sup>77</sup> – or, for that matter, *wished* it so.<sup>78</sup> Nor is it enough that a disinterested third person might have thought so.<sup>79</sup>

at 35 (“While the law normally treats a promisor as having been sincere in his spoken words or utterances, it would be absurd and ritualistic to hold a party to his promise if both he and the promisee understood the matter to be a joke.”); Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 61-62 (1993) (“There is a class of communications that are clearly promissory in character but are too casual or trivial to be subjects for contractual enforcement. The class is somewhat ill-defined, but it traditionally includes sham promises, jokes, at least some intrafamily promises, and social promises among friends (such as a promise to meet for lunch). . . . Such promises, by virtue of their terms or the circumstances surrounding their utterance, indicate to a reasonable person an intention not to be bound.” (footnotes omitted)).

<sup>77</sup> See, e.g., *Kinjerski v. Lamey*, 604 P.2d 782, 784-85 (Mont. 1979) (holding that the trial court erred by allowing the defendant to testify that the number of cows he intended to sell the plaintiff differed from the number set out in the bill of sale they both signed, where the plaintiff testified in support of the bill of sale); *Higby v. Hooper*, 221 P.2d 1043, 1052-53 (Mont. 1950) (reversing the trial court’s judgment in favor of a defendant who testified that the agreement he signed, stating he would build the plaintiffs’ house for \$8,300, was solely for the purpose of helping the plaintiffs obtain construction financing); *Marefield Meadows, Inc. v. Lorenz*, 427 S.E.2d 363, 365-66 (Va. 1993) (“MFM was entitled to believe that Lorenz meant what she said, and to rely on the clear language of White’s February 23 letter: ‘Ms. Lorenz is willing to purchase [MFM’s] interest in Maronjo for \$53,333.33.’ The trial court correctly found that this language constituted an offer by Lorenz to purchase MFM’s interest. Neither Lorenz’s nor White’s unexpressed reservations or intentions can override the written terms of that letter.”). See generally THROCKMORTON & BRIGHTMAN, *supra* note 26, at 54 (“Transactions intended as a joke or jest cannot result in a contract, for the reason that there is no intention to contract; there is no contemplation of legal consequences. Where, however, the offer is made in jest, but reasonably supposed by the offeree to have been made seriously, a contract will result.”); Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 27 (1998) (“[T]he promisee who is aware the promisor is bluffing cannot reasonably expect the promisor to perform; but when the promisee is unaware of the ‘joke’ and the promisor should reasonably know of the promisee’s lack of knowledge, the promisor will be held to his or her word.”).

<sup>78</sup> See, e.g., *Kerwin v. Donaghy*, 59 N.E.2d 299, 305 (Mass. 1945) (holding that a decedent’s second wife could not avoid the effect of two trusts the decedent set up at a time he was upset with her because “an inference of fact could not properly be drawn that the trust agreements were intended merely as shams. The evident purpose at the time was to disinherit the wife. The husband was careful to reserve the right to revoke the trusts, and revest the trust property in himself. The correct conclusion, we think, is that the trust agreements express [his] actual intention . . . at the time.”); *Wells v. Weston*, 326 S.E.2d 672, 676 (Va. 1985) (holding that, where a paragraph of the marital property settlement agreement provided that the ex-husband would pay \$500 per month alimony to his ex-wife “so long as Wife shall live,” the ex-husband could not benefit from his own interpretation of that paragraph that his obligation to pay would be cut off if and when his ex-wife remarried because “he never disclosed this interpretation” to either his ex-wife or her attorney, and because “[h]e executed the agreement, never indicating that he intended to be bound to pay spousal support until [his ex-wife]’s death or remarriage”); *Cole v. Cole*, No. N-8281-4, 1989 WL 646481, at \*2 (Va. Cir. Ct. Dec. 22, 1989) (refusing to set aside a marital property settlement on the ground that the ex-husband did not intend it to be final where, despite his alleged contrary intent, the ex-husband signed the agreement that, by all objective measures, was final).

<sup>79</sup> See, e.g., *Theiss v. Weiss*, 31 A. 63, 67 (Pa. 1895) (affirming the jury’s verdict that the parties had formed a binding contract, despite the testimony of a disinterested third party, present when the defendant made the alleged contract with the plaintiff, “that the defendant’s statement to the plaintiff . . . was made in a bantering, joking way, and that his understanding was that the plaintiff regarded it as a joke”).

For example, in *Barnes v. Treece*,<sup>80</sup> while testifying before the Washington State Gambling Commission regarding the reliability of Vend-A-Win's gambling devices, Treece stated that he would pay \$100,000 to anyone who could prove that any of Vend-A-Win's devices were "crooked."<sup>81</sup> Those present laughed. Barnes, who was not present, heard Treece's statement being replayed on television the next day. Having had previous dealings with Vend-A-Win, Barnes was in possession of two "crooked" devices. He called Treece to inquire about the sincerity of his statement, and Treece assured him that he was sincere and that the \$100,000 was in escrow.<sup>82</sup> When Barnes presented himself at Vend-A-Win's offices to collect the \$100,000, Treece refused to pay.<sup>83</sup> When Barnes sued, Treece "maintain[ed] that his statement was made in jest and lack[ed] the necessary manifestation of contractual intent."<sup>84</sup> The trial court found for Barnes. The court of appeals affirmed, explaining:

When expressions are intended as a joke and are understood or would be understood by a reasonable person as being so intended, they cannot be construed as an offer and accepted to form a contract. However, if the jest is not apparent and a reasonable hearer would believe that an offer was being made, then the speaker risks the formation of a contract which was not intended. It is the objective manifestations of the offeror that count and not secret, unexpressed intentions. . . .

. . . Although the original statement of Treece drew laughter from the audience, the subsequent statements, conduct, and the circumstances show an intent to lead any hearer to believe the statements were made seriously. . . . Treece, when given an opportunity to state that an offer was not intended, not only reaffirmed the offer but also asserted that \$100,000 had been placed in escrow and directed Barnes to bring the punchboard to Seattle for inspection. The parties met, Barnes was given a receipt for the board, and he was told that the board would be taken to Chicago for inspection. . . . The statements of the defendant and the surrounding circumstances reflect an objective manifestation of a contractual intent by Treece and support the finding of the trial court.<sup>85</sup>

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<sup>80</sup> 549 P.2d 1152 (Wash. Ct. App. 1976).

<sup>81</sup> See *id.* at 1154.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> *Id.* at 1155.

<sup>85</sup> *Id.*

Whether both parties understood the act or statement to be insincere is a question of fact. *Chiles v. Good*, 41 S.W.2d 738, 739 (Tex. Civ. App. 1931), *rev'd on other grounds*, 57 S.W.2d 1100 (Tex. Comm'n App. 1933). Thus, it was the case in *Theiss v. Weiss*, 31 A. 63 (Pa. 1895), that the Pennsylvania Supreme Court, despite concluding for its own purposes that the contract was made in jest, deferred to the trial jury's contrary determination that the parties had made an enforceable contract:

[A] calm review of the circumstances indicates clearly, as we think, that the making of the offer to sell 20,000 barrels of flour at \$4 a barrel, at the same time when he actually bought 400 barrels, in good business earnest, at \$4.45 a barrel, and the signing of a memorandum in writing of such a sale, were never regarded or intended by either party as more than a mere bluff or banter, without any serious intention that it should be performed as a real, bona fide contract. It was perfectly evident, and was abundantly proved, that the defendant, who was a small retail dealer, with limited means, was utterly unable to carry out such a contract, even if the flour could have been obtained in sufficient quantity, and was also unable, without a large advance in the price, to make deliveries at the rate of 400 barrels daily for 50 consecutive days. There is very grave reason to doubt the correctness of the plaintiff's statement that he immediately called upon the defendant to perform the contract, in view of the defendant's positive denial, and, what is

More recently, in *Luebbert v. Simmons*,<sup>86</sup> Simmons signed a promissory note evidencing her obligation to pay Luebbert (with whom Simmons and her two daughters were living at the time) \$12,200, plus interest, on or before December 30, 1995.<sup>87</sup> Simmons and her daughters subsequently moved out of Luebbert's house and Simmons did not pay Luebbert any of the debt evidenced by the note.<sup>88</sup> When Luebbert sued Simmons on the promissory note, Simmons denied intending to bind herself to repay Luebbert when she executed the promissory note.<sup>89</sup> Luebbert, by contrast,

insisted that each time he loaned her money to help her out, it was with the understanding that she would pay him back. His itemization demonstrated that she owed him \$12,200 – the amount of the promissory note. Mr. Luebbert also testified that the note came into being after he had begun to question Ms. Simmons concerning when she was ever going to repay him. He explained that Ms. Simmons insisted on giving him the promissory note because she had promised to pay him back the money he loaned her.<sup>90</sup>

In light of Luebbert's testimony, and resting its decision on the broad shoulders of *Lucy v. Zehmer*, the court of appeals affirmed the trial court's judgment in Luebbert's favor.<sup>91</sup>

### 3. *Whither Berry?*

The record in *Berry* was insufficiently developed to conclude whether the context in which Blair announced the contest to Berry and her co-workers belied his sincerity, whether Berry believed at the time that Blair's statement was a joke, or whether a disinterested third party would have concluded that both Blair and the waitresses knew that Blair's offer was insincere. It does

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more important, the continuance of their ordinary business relations, and the customary purchases by the defendant from the plaintiff of flour at the regular market rates, which were considerably above \$4 per barrel. One of the witnesses present, and entirely disinterested, testified that he heard and saw the whole transaction, that the defendant's statement to the plaintiff that he would sell him the flour was made in a bantering, joking way, and that his understanding was that the plaintiff regarded it as a joke. But, of course, all of these things were matters for the consideration of the jury, and it is out of our power to change the verdict, no matter what we may think of the effect of the testimony.

*Id.* at 67.

<sup>86</sup> 98 S.W.3d 72 (Mo. Ct. App. 2003).

<sup>87</sup> See *id.* at 74-75.

<sup>88</sup> She did give Luebbert two post-dated checks for \$1,000 each, but stopped payment on both checks before Luebbert could cash or deposit them. See *id.* at 75.

<sup>89</sup> See *id.* at 76. Indeed, she testified that the note "was a joke." *Id.*

<sup>90</sup> *Id.* at 78.

<sup>91</sup> The appeals court held:

With regard to Ms. Simmons's insistence that the promissory note was just a joke, Mr. Luebbert said otherwise. He loaned her the money and expected her to pay it back, and she filled out the promissory note in response to his insistence that she do so. . . . Ms. Simmons' conduct and insistence that she would pay Mr. Luebbert back after he questioned her about the money he loaned her suggest that she intended a real agreement. . . .

This was a credibility call, and the trial court was free to believe Mr. Luebbert's account of these dealings. The trial court's finding that Ms. Simmons had the necessary intent in signing the promissory note and that she was bound thereby is supported by Mr. Luebbert's testimony, supporting documentation, and other circumstantial evidence.

*Id.* at 78-79.

seem safe to conclude that Blair's statement was not so obviously outlandish that no reasonable person could have taken it seriously. A new Toyota seems a rather lavish prize for the waitress selling the most beer in a month. But, while courts will sometimes consider the relationship between the value of the thing offered for sale and the price at which the seller offers it to help ascertain whether the parties to a putative contract genuinely assented to be bound,<sup>92</sup> courts generally ignore the relationship between the value of an offered prize or reward and the value of the service rendered by the individual who claims it.

## II. OTHER FORMATION ISSUES IN *Berry*

Berry suggested two other contract formation issues: (1) whether Blair's statement, even if it objectively manifested an intent to be bound, constituted an offer to form a contract that could be accepted by Berry's performance; and (2) whether Berry, despite only doing her job, gave consideration sufficient to bind Hooters to the terms of Blair's offer.

### A. When is an "Offer" an Offer?

Whether Blair made an offer at all should turn on how much similarity the court finds between the nature of the offer in *Berry* and the line of "reward" cases epitomized by *Carlill v. Carbolic Smoke Ball Co.*<sup>93</sup> and, more recently, by *Barnes v. Treece*,<sup>94</sup> *Rosenthal v. Al Packer Ford, Inc.*,<sup>95</sup> and *Newman v. Schiff*.<sup>96</sup>

In *Carlill*, the defendant (Carbolic) offered a £100 reward to anyone who contracted influenza despite using its flu treatment as directed.<sup>97</sup> Carbolic also advertised that it had deposited £1000 in escrow against any future claims.<sup>98</sup> The plaintiff (Carlill) used the flu treatment as directed, but contracted the flu anyway.<sup>99</sup> When Carlill claimed the reward, Carbolic refused to pay. Carlill sued. The trial court entered judgment in Carlill's favor.<sup>100</sup> The Court of Appeal found that Carbolic had made a valid offer to pay a reward if its treatment did not work as advertised, that Carlill had accepted the offer by using the treatment as directed, and, therefore, that Carbolic owed Carlill the advertised rewards. The advertisement was not "mere puffery" because both the mention of, and the fact of, Carbolic's escrow deposit evidenced its sincere intent.<sup>101</sup>

<sup>92</sup> See, e.g., *Keller v. Holderman*, 11 Mich. 248 (1863) (seeming to attach significance to the fact that the defendant offered \$300 for a watch that both parties knew to be worth about \$15); *Chiles*, 41 S.W.2d at 739 (holding that defendant's offer to pay \$100 per share for stock that he knew was only selling for \$30 to \$40 per share, coupled with the parties' conduct, "was such as to make it reasonably appear to bystanders that the parties were joking").

<sup>93</sup> [1893] 1 Q.B. 256 (C.A. 1892).

<sup>94</sup> 549 P.2d 1152 (Wash. Ct. App. 1976); see *supra* text accompanying notes 80-85.

<sup>95</sup> 374 A.2d 377 (Md. Ct. Spec. App. 1977); see *infra* text accompanying notes 104-107.

<sup>96</sup> 778 F.2d 460 (8th Cir. 1985); see *infra* text accompanying notes 108-115.

<sup>97</sup> *Carlill*, [1893] 1 Q.B. at 261.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 257.

<sup>100</sup> See *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484, *aff'd*, [1893] 1 Q.B. 256 (C.A. 1892).

<sup>101</sup> See *Carlill*, [1893] 1 Q.B. at 261-62.

The validity of the offer was not diminished by the fact that the reward was offered to anybody who chose to accept by using the smoke ball as instructed.<sup>102</sup> Nor was *Carlill*'s acceptance defeated because she failed to notify Carbolic that she intended to use their treatment, as directed, three times daily for two weeks, because Carbolic made a continuing offer which could only be accepted by using the smoke ball as instructed, and the only notice Carbolic expected or required was notice in the event their treatment failed to work as advertised.<sup>103</sup>

In *Rosenthal*, an automobile dealer (Packer) advertised a reward of \$20,000 to anyone who could prove that he was selling cars for more than \$89 over factory invoice.<sup>104</sup> The court found this advertisement to be a valid offer – notwithstanding that the proffered reward was almost five times the sales price of the car in question (\$4,228)<sup>105</sup> – that invited *Rosenthal* to accept by proving that Packer was selling the car in question for more than \$89 over factory invoice.<sup>106</sup> The court ultimately held that Packer had not sold the car in question for more than \$89 over invoice; and, therefore, that *Rosenthal* was not entitled to the reward.<sup>107</sup>

In *Newman v. Schiff*,<sup>108</sup> while appearing live on *CBS News Nightwatch*, Schiff stated: "If anybody calls this show . . . and cites any section of [the Internal Revenue] Code that says an individual is required to file a tax return, I will pay them \$100,000."<sup>109</sup> The next morning, Schiff's statement was

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<sup>102</sup> *Id.* at 262.

<sup>103</sup> See *id.* at 262-63. See generally A.W.B. Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 J. LEG. STUD. 345 (1985).

*Carlill* is the most famous of the so-called "prove me wrong" cases. *Barnes*, *Packer*, and *Newman v. Schiff* (discussed *infra* text accompanying notes 108-115) are among its progeny, as are *James v. Turilli*, 473 S.W.2d 757 (Mo. Ct. App. 1971) (offering a \$10,000 reward to anyone who could prove that Jesse James had not been killed in 1882, as popularly believed, but had lived many years thereafter under an assumed name), and *Cudahy Junior Chamber of Commerce v. Quirk*, 165 N.W.2d 116 (Wis. 1969) (offering to give \$1,000 if it could be proven that "a daily dose of four glasses [of fluoridated water] cannot cause 'dermatologic, gastrointestinal and neurological disorders,'" or that the party making the offer had otherwise misrepresented any matters in the brochure that included the offer).

<sup>104</sup> *Rosenthal v. Al Packer Ford, Inc.*, 374 A.2d 377, 383 (Md. Ct. Spec. App. 1977).

<sup>105</sup> Compare *supra* note 92.

<sup>106</sup> See *Rosenthal*, 374 A.2d at 381-82.

<sup>107</sup> See *id.* at 383.

However, before doing so, the court summarized a line of "reward," "prize," or "contest" cases, originating with *Carlill*, as follows:

A lawful enforceable contract may come into being when one announces or circulates to all who may see or hear, an offer or promise that he will give or pay a reward or prize to a person who performs a specified act, and the offer is accepted by performance of the act.

*Id.* at 378.

While neither *Rosenthal* nor *Carlill* involved rewards or bonuses offered by an employer to its employees for extra effort, courts routinely recognize the validity of such offers, which become binding against the offering employer when an employee begins to substantially perform in reliance on the offer. See *infra* notes 122-140 and accompanying text.

<sup>108</sup> 778 F.2d 460 (8th Cir. 1985).

<sup>109</sup> *Id.* at 462. Before appearing on the show, Schiff had written several publications and spoke frequently about "tax rebellion," and had recently served four months in prison for failing to file a federal income tax return. See *id.* at 461-62.



rebroadcast on the *CBS Morning News*, at which time Newman first became aware of it.<sup>110</sup> Newman, an attorney, “[u]pon arriving at work that day, researched the issue and located several sections of the Code that to his satisfaction demonstrated the mandatory nature of the federal income tax system.”<sup>111</sup> The next day (now two days after the original broadcast), Newman called *CBS Morning News*, cited the relevant Code provisions, and then wrote and sent a follow-up letter wherein he requested payment of \$100,000 for his “performance of the consideration requested by Mr. Schiff in exchange for his promise to pay \$100,000.”<sup>112</sup> After not hearing anything from Schiff, Newman wrote him directly, reiterating his claim for the \$100,000.<sup>113</sup> When Schiff affirmatively refused to pay, Newman filed suit. Both the district court and the Eighth Circuit found that Schiff’s “offer” was valid only during the original *Nightwatch* broadcast; and, therefore, Newman’s attempted “acceptance” was untimely.<sup>114</sup> While it affirmed the district court’s judgment in Schiff’s favor, the Eighth Circuit clearly found that Schiff had made an offer that, had Newman timely accepted, would have bound Schiff to pay Newman the \$100,000 reward.<sup>115</sup>

Courts have also found valid offers for unilateral contracts in prize and reward offers that do not require the offeree to prove the offeror wrong, but merely to perform some act the offeree was not otherwise obligated to perform.<sup>116</sup> As the Nevada Supreme Court explained in one such case:

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<sup>110</sup> See *id.* at 462.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 463.

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at 463, 466-67.

<sup>115</sup> As the Eighth Circuit explained:

Schiff’s statement on *Nightwatch* that he would pay \$100,000 to anyone who called the show and cited any section of the Internal Revenue Code “that says an individual is required to file a tax return” constituted a valid offer for a reward. In our view, if anyone had called the show and cited the code sections that Newman produced, a contract would have been formed and Schiff would have been obligated to pay the \$100,000 reward, for his bluff would have been properly called. . . .

Newman, however, never saw the live CBS *Nightwatch* program upon which Schiff appeared and this lawsuit is not predicated on Schiff’s *Nightwatch* offer. Newman saw the CBS Morning News rebroadcast of Schiff’s *Nightwatch* appearance. This rebroadcast served not to renew or extend Schiff’s offer, but rather only to inform viewers that Schiff had made an offer on *Nightwatch*. The rebroadcast constituted a newsreport and not a renewal of the original offer. An offeror is the master of his offer and it is clear that Schiff by his words, “If anybody calls this show \* \* \*”, limited his offer in time to remain open only until the conclusion of the live *Nightwatch* broadcast. A reasonable person listening to the news rebroadcast could not conclude that the above language – “calls this show” – constituted a new offer; rather than what it actually was, a newsreport of the offer previously made, which had already expired.

*Id.* at 466.

<sup>116</sup> See, e.g., *Walsh v. St. Louis Exposition & Music Hall Ass’n*, 16 Mo. App. 502, 506 (1885) (holding that the defendant’s written solicitation of plans for a new exposition and music hall, which promised that “[t]he architect who is successful . . . shall be engaged as architect and superintendent, and shall be paid . . . the usual commissions as adopted by the American Institute and the St. Louis Institute of Architects,” constituted a valid offer for a unilateral contract that the plaintiff accepted by submitting the winning plans and was, therefore, entitled to the advertised position and compensation, subject to the defendant’s right on remand to convince the jury that it reserved the right not to employ the plaintiff despite his

The offer by one party of specified compensation for the performance of a certain act as a proposition to all persons who may accept and comply with its conditions constitutes a promise by the offeror. The performance of that act is the consideration for such promise. The result is an enforceable contract.<sup>117</sup>

Berry performed the specified act of selling the most beer of any waitress at her restaurant during April 2001. Admittedly, that only entitled her to be entered in the drawing. However, numerous courts have held that an offeree who performs all, or substantially all, of the tasks required by a reward or prize

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having submitted the winning plans); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961) (holding that a valid contract was formed, based on the appellant's "public offer to pay \$5,000 to any who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course," when the appellee, having paid the fifty cents and satisfied the other requirements of the offer, shot a hole-in-one on appellant's golf course); *Grove v. Charbonneau Buick-Pontiac, Inc.*, 240 N.W.2d 853 (N.D. 1976) (holding that notice that the first player in a specified tournament to make a hole-in-one on a specified hole would win "a 1974 Pontiac Catalina 4-door sedan with factory air" constituted an offer of a unilateral contract that the plaintiff could accept, and did accept, by being the first player to make a hole-in-one on the specified hole during the tournament; and, therefore, the offeror was bound to deliver the car or pay its equivalent in money damages); *Pastor v. Vacation Charters Ltd.*, 14 Pa. D. & C. 4th 554, 557 (Pa. Ct. Com. Pl. 1992) (holding that the defendant made an offer for a unilateral contract when it sent the plaintiff two "award claim tickets" purportedly entitling the plaintiff to any two of four listed prizes just for visiting a specified resort and that the plaintiff accepted the offer by traveling to the resort and "endur[ing]" a sales presentation); *see also, e.g.*, *Jackson v. Inv. Corp. of Palm Beach*, 585 So. 2d 949, 950-51 (Fla. Dist. Ct. App. 1991) (holding that whether the defendant's admittedly misprinted newspaper advertisement, stating that anyone picking the winners of six designated dog races would win \$825,000, constituted an offer that the plaintiff accepted by picking the winners for all six races was a jury issue, and that the trial court had erred by instructing the jury that it could only award the plaintiff \$825,000 if they found that the defendant intended to offer \$825,000); *Scott v. People's Monthly Co.*, 228 N.W. 263, 265-66 (Iowa 1929) (holding that the defendant's offer to pay a \$1,000 prize to the person submitting to the defendant "the 'largest correct list of words' made from the letters in the word 'determination'" of its "Word-Building Contest" was an offer for a unilateral contract, but that the plaintiff failed to properly accept it by submitting a list of words she knew violated the contest's rules); *Holt v. Rural Weekly Co.*, 217 N.W. 345, 346-47 (Minn. 1928) (reversing a judgment in favor of the defendant and ordering a new trial, on facts very similar to those in *Scott*, in order to determine whether the defendant had considered the plaintiff's entire entry, as it had that of the declared contest winner); *Johnson v. N.Y. Daily News*, 450 N.Y.S.2d 980, 982-83 (N.Y. Sup. Ct. 1982) (holding that a valid unilateral contract was formed when the plaintiff, in response to an advertisement for the defendant's Super Zingo Sweepstakes, submitted an entry form with the correct numbers circled, and that the plaintiff was entitled to recover under the contract when her entry form was chosen as the sweepstakes winner), *rev'd on other grounds*, 467 N.Y.S.2d 665 (N.Y. App. Div. 1983) (reversing the trial court's judgment because the plaintiff's entry form failed to conform to the contest's rules regarding the minimum permissible age for a contestant), *aff'd*, 462 N.E.2d 152 (N.Y. 1984).

<sup>117</sup> *Las Vegas Hacienda*, 359 P.2d at 86; *see also* *Robertson v. United States*, 343 U.S. 711, 713 (1952) ("[P]ayment of a prize to a winner of a contest is the discharge of a contractual obligation. The acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract."); *Johnson*, 450 N.Y.S.2d at 982 ("When and if an entrant, acting in response to a public contest or prize offer, performs the required conditions of the offer in accordance with its published terms, it creates a valid contract under which the contestant is entitled to the promised reward.").

offer has accepted the offer, notwithstanding that the prize or reward winner will ultimately be decided by a drawing,<sup>118</sup> a panel of judges,<sup>119</sup> or the like.

### B. Consideration Concerns

The final issue turns on whether employer-initiated prizes and bonus programs give rise to enforceable contracts, given that employees are already obliged to work on their employers' behalf. While an offeree's performance of, or promise to perform, a pre-existing obligation is generally not valid consideration,<sup>120</sup> "where the contract requires an additional obligation or burden not previously imposed by law, the contract is supported by consideration and is valid."<sup>121</sup> Courts generally appear willing to find consideration to support employer-initiated prizes and bonus programs as long as the employee, *inter alia*, must put forth unique or extra effort<sup>122</sup> or stay employed when she was

<sup>118</sup> See, e.g., *Haynes v. Dep't of Lottery*, 630 So. 2d 1177, 1179 (Fla. Dist. Ct. App. 1994); *Paulsen v. Mich. Bureau of State Lottery*, 421 N.W.2d 678, 681 (Mich. Ct. App. 1988); *Johnson*, 450 N.Y.S.2d at 982-83; *Jones v. Capitol Broad. Co.*, 495 S.E.2d 172, 174 (N.C. Ct. App. 1998); *Walters v. Nat'l Beverages, Inc.*, 422 P.2d 524, 525 (Utah 1967).

<sup>119</sup> See, e.g., *Johnson v. BP Oil Co.*, 602 So. 2d 885, 888-89 (Ala. 1992); *Walsh*, 16 Mo. App. at 506; *Olschiesky v. Times Publ'g Co.*, 23 Pa. D. & C. 2d 73, 76 (Pa. Ct. Com. Pl. 1961).

<sup>120</sup> See, e.g., *Judd v. Wasie*, 211 F.2d 826, 832 (8th Cir. 1954) ("A promise to pay an employee a bonus at the end of the year which does not obligate the employee to do or forego doing something that he was not otherwise obligated to do or forego is a mere gratuity."); *Windesheim v. Verizon Network Integration Corp.*, 212 F. Supp. 2d 456, 462 (D. Md. 2002) ("[N]o enforceable contractual obligation is created when an employer offers employees a bonus for doing that which an employee is already required to do pursuant to the terms of the engagement of employment. The rationale for the rule is that there is no consideration – critical to contract formation – to support the employer's promise of additional compensation." (citation omitted)); *Johnson v. Schenley Distillers Corp.*, 28 A.2d 606, 608 (Md. 1942) ("If the bonus plan was not based on a valuable consideration and was not a contract, then the bonus was and could only be regarded as a gratuity, which we find it to be, and this being so it cannot be enforced by Johnson against the Appellee.").

<sup>121</sup> *Multicare Med. Ctr. v. Dep't of Soc. & Health Serv.*, 790 P.2d 124, 132 (Wash. 1990) (en banc). See generally 2 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 7.1 (rev. ed. 1995).

<sup>122</sup> See, e.g., *Mears v. Nationwide Mut. Ins. Co.*, 91 F.3d 1118, 1122 (8th Cir. 1996) (discussed *infra* text accompanying notes 125-133); *Holland v. Earl G. Graves Publ'g Co.*, 46 F. Supp. 2d 681, 686-87 (E.D. Mich. 1998) (upholding the enforceability of a year-end incentive plan under which escalating bonuses were announced for employees generating net revenues about their annual quotas); *Jim Walter Corp. v. Knodel*, 200 So. 2d 473, 477-78 (Ala. 1967) (finding that the plaintiff was entitled to a bonus, promised to him "if he did as good a job next year," where plaintiff, for the year in question, had sales – which "were expected to materially benefit defendant's financial position" – equal to or greater than his prior year's sales); *Leone v. Precision Plumbing & Heating, Inc.*, 591 P.2d 1002, 1003-04 (Ariz. Ct. App. 1979) (discussed *infra* text accompanying notes 135-140); *Sieck v. Hall*, 34 P.2d 844, 851-52 (Cal. Dist. Ct. App. 1934) (finding that the plaintiffs were entitled to an equal share of one-half of the excess of gross sales over the prior year's gross sales, promised to them "if the plaintiff and the other said sales representatives by their efforts should bring an increase in the gross amount of sales of the said oil products during the said year over the gross sales made in the preceding year"); *Olsen v. Bondurant & Co.*, 759 P.2d 861, 864 (Colo. Ct. App. 1988) (upholding the enforceability of a promise to pay an equal bonus to all salespersons if they collectively sold more than their monthly quota); *MacIntosh v. Brunswick Corp.*, 215 A.2d 222, 225 (Md. 1965) (upholding the enforceability of a promised bonus "computed on the aggregate amount of sales in excess of a stipulated quota," payable annually, when the

otherwise free to leave.<sup>123</sup> Such offers for unilateral contracts become binding against the offering employer when an employee begins to substantially perform in reliance on the offer.<sup>124</sup>

plaintiff exceeded his annual quota for the year in question and did not leave the defendant's employ until after the end of the year); *Magruder v. Hagen-Ratcliff & Co.*, 50 S.E.2d 488, 494 (W. Va. 1948) (holding that the plaintiff was entitled to receive an all-expenses paid two-week vacation for him and his wife, or its equivalent value in cash, as a result of having been declared by his manager – the “sole judge” of the contest, by its terms – to have won a sales contest among his company's salesmen). See generally Elizabeth T. Tsai, Annotation, *Promise by Employer to Pay Bonus as Creating Valid and Enforceable Contract*, 43 A.L.R.3d 503 (1972 & Supp. 2002).

<sup>123</sup> See *Warren v. Mosher*, 250 P. 354, 355 (Ariz. 1926) (“[A] contract of employment whereby the employee is to be paid . . . a bonus in case he serves for a specified length of time, is valid as against the objection that the bonus is a promise of a mere gratuity, and if the employee does serve the proper length of time he may recover the bonus.”); accord *Leone*, 591 P.2d at 1004 (“[I]f continued employment is bargained for in making a bonus offer, continued employment is sufficient consideration. The same rule should apply if continued employment, although not expressly bargained for, is a condition of receipt of a bonus.”); see, e.g., *Olsen*, 759 P.2d at 864 (bonus for exceeding monthly sales quota necessitated at-will salesperson working for defendant broker through the end of the month); *Lamplsey v. Celebrity Homes, Inc.*, 594 P.2d 605, 608 (Colo. Ct. App. 1979) (upholding the enforceability of an employee profit-sharing plan because “the plan was established as an inducement to Celebrity's employees to remain in its employ and to perform more efficient and faithful service,” resulting in an “obvious benefit to Celebrity, and thus consideration” binding Celebrity to its offer); *Croskey v. Kroger Co.*, 259 S.W.2d 408, 412 (Mo. Ct. App. 1953) (holding that the defendant's “Branch Key Men's Incentive Plan,” requiring eligible employees to remain in the defendant's employ until the end of the plan year, was an offer of a unilateral contract that the plaintiff accepted by continuing his at-will employment with the defendant into the plan year, notwithstanding that the defendant terminated the plaintiff two weeks before the end on the plan year); *Scott v. J.F. Duthie & Co.*, 216 P. 853, 853-54 (Wash. 1923) (upholding the enforceability of a promise to divide “as a bonus” \$500,000 evenly among those individuals who remained employed at the end of the project); *Zwo-lanek v. Baker Mfg. Co.*, 137 N.W. 769, 772 (Wis. 1912) (upholding the enforceability of the defendant's offer to pay a bonus out of net profits to any employee “who performed a certain number of hours' service within a given period, provided net profits were earned, and provided the employe[e] did not quit or was not discharged before a stated time”). But see *Chrvala v. Borden, Inc.*, 14 F. Supp. 2d 1013, 1021 (S.D. Ohio 1998) (finding no consideration to support a purported offer of a bonus, other incentives, and severance pay “conditioned upon [the executives'] continuing to perform [their] jobs at a satisfactory level and continuing to remain in [Borden Global's] employ through the date of sale . . . and if requested through a transition period not to exceed thirty days after the sale” because “the financial rewards were contingent upon Chrvala continuing to do that for which he was already obligated to do under the [employment] agreements, which were still in effect at the time of the Golner Letter”). *Chrvala* is suspect, on its own facts, because the employment agreements in question allowed Chrvala to terminate his employment with Borden “at any time for any reason as long as the terminating party provided notice or payment in lieu of notice.” *Id.* at 1014-15. Therefore, it seems that Chrvala was not, in fact, “obligated” to stay in Borden's employ longer than the contractual notice period, so any services he rendered Borden after that time should, according to the weight of authority, be deemed consideration inuring to Borden's benefit. See generally Tsai, *supra* note 122.

<sup>124</sup> See 2 PERILLO & BENDER, *supra* note 121, § 6.2, at 214-15 (“[T]he employer's promise to pay a bonus or pension to an employee in case the latter continues to serve for a stated period . . . is not enforceable when made, but the employee can accept the offer by continuing to serve as requested, even though the employee makes no promise.” (footnotes omitted)); see, e.g., *Holland v. Earl G. Graves Publ'g Co.*, 46 F. Supp. 2d 681, 685 (E.D. Mich. 1998) (holding that an employer could not alter its employee's sales quota, thereby decreas-

For example, in *Mears v. Nationwide Mutual Insurance Co.*,<sup>125</sup> Nationwide informed all of its claims representatives, including Mears, that it was trying to come up with a "theme" for its next national claims convention. Nationwide announced a contest to create a theme for the event, and indicated that the creator of the winning theme could win, *inter alia*, "His and Her's Mercedes."<sup>126</sup> Mears submitted the winning theme – "At the Top and Still Climbing"<sup>127</sup> – some time prior to August 1, 1993. In October 1993, Mary Peterson, a member of the three-person committee chosen to select the winning theme, informed Mears that he had won the contest.<sup>128</sup> On one or two occasions prior to the convention, Peterson allegedly told Mears that he would receive the two Mercedes.<sup>129</sup> In January 1994, Peterson allegedly told Mears that Nationwide was only joking when it said it would award two Mercedes to the author of the winning theme<sup>130</sup> – a position that was repeated by Jeff Handy, another member of the three-person theme selection committee, sometime after the July 1994 claims convention.<sup>131</sup> In response to Mears's suit, Nationwide took a different tack, arguing that, while the contest was legitimate, Mears was not entitled to the Mercedes because there was no contract. Granting Nationwide judgment as a matter of law despite the jury's verdict in Mears's favor, the trial court agreed.<sup>132</sup> The Eighth Circuit reversed and reinstated the jury's verdict.<sup>133</sup> The court explained:

At trial, both Peterson and Mears testified that she told him that he had won two Mercedes while at a dinner attended by many Nationwide employees. Peterson claimed that she spoke with a facetious tone and, in reality, had no intention of awarding the automobiles. Mears, on the other hand, took Peterson at her word and believed that of the prizes listed on the contest announcement, he had won the Mercedes. It appears that others around Mears also believed that he had won the automobiles. Faced with this factual dispute, the jury had to decide which version of events was more credible. They believed Mears and we perceive no reasoning for undoing this jury determination.<sup>134</sup>

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ing her year-end bonus, after she had substantially performed under the compensation agreement containing the lower quota); *Magruder v. Hagen-Ratcliff & Co.*, 50 S.E.2d 488, 495 (W. Va. 1948) (holding that the defendant could not change the terms of its sales contest by publishing "supplementary rules" after the contest had begun). See generally RESTATEMENT (SECOND), *supra* note 12, at § 45 & cmt. d.

<sup>125</sup> 91 F.3d 1118 (8th Cir. 1996).

<sup>126</sup> *Id.* at 1120. If nothing else, we should commend Nationwide on their creative grammar.

<sup>127</sup> Sends shivers down your spine, doesn't it?

<sup>128</sup> *Mears*, 91 F.3d at 1121.

<sup>129</sup> *Id.* ("In October 1993, Peterson notified Mears that his theme had been chosen for the 1994 convention. Mears claims that Peterson also told him that he had won two Mercedes-Benz automobiles, a fact that Peterson disputes."); *id.* at 1122 ("At trial, both Peterson and Mears testified that she told him that he had won two Mercedes while at a dinner attended by many Nationwide employees.").

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1121.

<sup>132</sup> *Id.* ("[T]he 'contract' sued on herein was simply not a contract because the terms are not nearly definite enough to be enforced and there is simply no reasonably certain basis for giving an appropriate remedy.").

<sup>133</sup> *Id.* at 1124.

<sup>134</sup> *Id.* at 1122 (record citation omitted).

In *Leone v. Precision Plumbing & Heating of Southern Arizona, Inc.*,<sup>135</sup> a subcontractor (Precision) promised its foreman (Leone) a bonus of one-half of the difference between the estimated and actual cost of a construction project.<sup>136</sup> After overseeing the completion of the project at a savings of \$35,578.56, Precision refused to pay him the promised bonus.<sup>137</sup> Leone sued. Precision defended by arguing, *inter alia*, there was no consideration to support the alleged bonus contract because Leone was only doing what he had already agreed to do: serving as foreman on the project until its completion, and bringing it in at or under budget.<sup>138</sup> Leone prevailed at trial, and Precision appealed. The Arizona Court of Appeals affirmed on two grounds. First, because Leone had to induce his union crew to perform "at better than union standards" in order to earn the bonus, and because Precision offered the bonus to entice Leone to maximize his crew's efficiency, Leone's extra effort was consideration supporting the bonus.<sup>139</sup> Second, because Leone was an at-will employee, and because he would have to stay on the job until its completion in order to earn the bonus offered by Precision, his continued employment with Precision was consideration supporting the bonus.<sup>140</sup>

Employee and non-employee prize or bonus offers requiring unique or extra effort on the part of the alleged offeree are distinguishable from offers of prizes that do not. The latter are generally unenforceable for lack of consideration.<sup>141</sup>

An interesting case suggesting the contrary is *Harris v. Time, Inc.*,<sup>142</sup> in which Time sent out a mass mail advertising. Through a window on the front

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<sup>135</sup> 591 P.2d 1002 (Ariz. Ct. App. 1979).

<sup>136</sup> *Id.* at 1003.

<sup>137</sup> *Id.* at 1004.

<sup>138</sup> *Id.* at 1003.

<sup>139</sup> *Id.* at 1004 ("Appellee . . . , working at union standards, was obliged to direct and induce his crew to work at union standards. He could earn the bonus only if he induced his crew to perform at better than union standards. To encourage appellee to use extra efforts as foreman to maximize his crew's efficiency, appellant offered the bonus. The bonus, therefore, was supported by consideration.").

<sup>140</sup> *Id.* ("To receive the bonus, appellee had to continue his employment. His staying on the job attempting to gain the bonus constituted consideration supporting the bonus agreement."). The court was careful to point out that this was so even if Precision did not explicitly bargain for Leone's continued employment, as long as his continued employment was "a condition of receipt" of the bonus. *Id.*

<sup>141</sup> See, e.g., *In re Maxwell Communication Corp.*, 198 B.R. 63, 69 (S.D.N.Y. 1996) (refusing to enforce bonus agreement between debtor and executive because the services for which the bonus was promised occurred, if at all, prior to the date of the agreement); *Arrow Mfg. Co. v. Ross*, 346 P.2d 305, 307 (Colo. 1959) (refusing to enforce a promise to pay a year-end bonus made after the end of said year and after the employee had already fully performed the terms of his prior year's employment agreement); *Spickelmier Indus., Inc. v. Passander*, 359 N.E.2d 563, 565 (Ind. Ct. App. 1977) (same); see also *Rheinbauer v. DeKrieges*, 67 N.Y.S.2d 211, 212-13 (N.Y. City Ct. 1946) (refusing to enforce reward offer where the putative offeree was already in possession of the lost item before learning of the reward and where state law required the putative offeree to return the found item to its true owner). See generally Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1041-44 (1998); Mark B. Wessman, *Is "Contract" the Name of the Game?: Promotional Games as Test Cases for Contract Theory*, 34 ARIZ. L. REV. 635 (1992).

<sup>142</sup> 237 Cal. Rptr. 584 (Cal. Ct. App. 1987).

of the envelope, the recipient could see the following: "JOSHUA A GNAIZDA, I'LL GIVE YOU THIS VERSATILE NEW CALCULATOR WATCH FREE Just for Opening this Envelope Before Feb. 15, 1985."<sup>143</sup> Beneath these words was a picture of the calculator watch.<sup>144</sup> Joshua, being three years old, was tantalized, but when his mother opened the envelope, she read the following words, which appeared immediately below those quoted above: "AND MAILING THIS CERTIFICATE TODAY!"<sup>145</sup> The certificate, not surprisingly, was to start a subscription to one of Time's magazines (*Fortune*). The court described what happened next:

Although most of us, while murmuring an appropriate expletive, would have simply thrown away the mailer, and some might have stood on principle and filed an action in small claims court to obtain the calculator watch, Joshua's father did something a little different: he launched a \$15,000,000 lawsuit in San Francisco Superior Court.<sup>146</sup>

The court ultimately refused to enforce the contract on two alternative grounds. First, even if Time made a valid offer for a unilateral contract, which Joshua accepted by opening the envelope, Time was not bound by his acceptance, because Joshua never gave notice to Time that he had accepted the offer.<sup>147</sup> Second, even if Time were somehow bound, Joshua's

<sup>143</sup> *Id.* at 586.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The court earlier described Joshua's father as "a prominent Bay Area public interest attorney." *Id.* at 585.

<sup>147</sup> See *id.* at 588 (citing RESTATEMENT (SECOND), *supra* note 12, § 54(2) & cmt. b).

The court of appeals pulled no punches on this latter point:

This lawsuit is an absurd waste of the resources of this court, the superior court, the public interest law firm handling the case and the citizens of California whose taxes fund our judicial system. It is not a use for which our legal system is designed.

As a practical matter, plaintiffs' real complaint is that they were tricked into opening a piece of junk mail, not that they were misled into buying anything or expending more than the effort necessary to open an envelope. If Joshua's mother lost the initial skirmish in the battle of direct mail advertising by opening the envelope, she could have won the war by simply throwing the thing away. If she were angry she might even have returned Time's business reply envelope empty, requiring Time to pay the return postage. If she felt particularly hostile, she might have inserted a nasty note or other evidence of her displeasure in the reply envelope. A \$15,000,000 lawsuit, filed in a superior court underfunded and already overburdened with serious felony prosecutions and complex civil litigation involving catastrophic injury from asbestos, prescription drugs and intrauterine devices, is a vast overreaction. The law may permit junk mail to be delivered for a lower cost than the individual citizen must pay. It does not require that the public subsidize junk litigation.

For many, an unpleasant aspect of contemporary American life is returning to the sanctity of one's home each day and emptying the mailbox, only to be inundated with advertisements and solicitations. Some days, among all of the junk mail, one is fortunate to be able to locate a bill, let alone a letter from a friend or loved one. Insult is added to injury when one realizes that individual citizens must pay first class postage rates to send their mail, while junk mail, for reasons apparent only to Congress and the United States Postal Service, is sent at less than one-half of that rate. The irritation level soars to new heights when, succumbing to the cleverness or ruse of the sender of junk mail and believing one is being offered something for nothing, one actually opens an envelope and examines its contents, both of which would otherwise been deposited unopened in their rightful place, the garbage can. Snake oil salesmen have been replaced by bulk rate advertisers whose wares must be causing our postal carriers' backs to be nearing the breaking point under the weight of such mail.

claim ran afoul of the maxim *de minimis non curat lex* (the law disregards trifles).<sup>148</sup>

However, before reaching those points, the court first found that Time had made a valid offer for a unilateral contract, citing *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*:<sup>149</sup>

The text of Time's unopened mailer was, technically, an offer to enter into a unilateral contract: the promisor made a promise to do something (give the recipient a calculator watch) in exchange for the performance of an act by the promisee (opening the envelope). Time was not in the same position as a seller merely advertising price; the proper analogy is to a seller promising to give something to a customer in exchange for the customer's act of coming to the store at a specified time.<sup>150</sup>

Analogizing *Harris Lefkowitz* is troubling for at least two reasons. First, the plaintiff in *Lefkowitz* was required to travel to the location advertised, await the store's opening, get to the counter first with the advertised item, and then produce the money required to purchase it at the advertised price.<sup>151</sup> By contrast, the *Harris* court's contrary suggestion notwithstanding, all Joshua had to do was open an envelope. Second, the plaintiff in *Lefkowitz* complied with the terms of the entire advertisement.<sup>152</sup> By contrast, Joshua and the court of appeals ignored the final phrase of the putative offer – "AND MAILING THIS CERTIFICATE TODAY!"<sup>153</sup> The dispute did not arise because Joshua mailed in the certificate as instructed and did not receive a watch.<sup>154</sup> Joshua did not

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As much as one might decry this intrusion into our lives and our homes and sympathize with Joshua's plight, eliminating it lies with Congress, not the courts. The courts cannot solve every complaint or right every technical wrong, particularly one which causes no actual damage beyond the loss of the few seconds it takes to open an envelope and examine its contents. Our courts are too heavily overburdened to be used as a vehicle to punish by one whose only real damage is feeling foolish for having opened what obviously was junk mail.

*Id.* at 589-90.

<sup>148</sup> See *id.* at 589. See generally Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315 (2002).

<sup>149</sup> 86 N.W.2d 689 (Minn. 1957).

<sup>150</sup> *Harris*, 237 Cal. Rptr. at 587; see *Lefkowitz*, 86 N.W.2d at 691 (holding that a "first come, first served" newspaper advertisement, which clearly indicated the limited quantity of available goods, the precise location at which they could be found, and the time shortly after which the goods would be unavailable, was a valid offer for a unilateral contract, rather than a mere invitation to offer, because the advertisement was "clear, definite, and explicit, and le[ft] nothing open for negotiation").

*Lefkowitz* is the most famous of a line of cases that, due to peculiar facts, run contrary to the general rule that a mass advertisement is not an offer by the party placing the advertisement, but rather an invitation to the person reading the advertisement to make an offer to the partly placing the advertisement. See generally Lindsay E. Cohen, Note, *The Choice of a New Generation: Can an Advertisement Create a Binding Contract?*: Leonard v. PepsiCo, Inc., 65 MO. L. REV. 553, 557-62 (2000); Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 511-12 (1996); Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1166-72 (1994).

<sup>151</sup> See *Lefkowitz*, 86 N.W.2d at 691.

<sup>152</sup> See *id.*

<sup>153</sup> See *Harris*, 237 Cal. Rptr. at 586.

<sup>154</sup> See, e.g., *Mesaros v. United States*, 845 F.2d 1576, 1580-82 (Fed. Cir. 1988) (finding no contract, despite the fact that the plaintiff completed the order form enclosed with the advertisement mailed to him, on the grounds that, in remitting a completed order form, the plain-



ing more than open the envelope, ignore the language requiring him to submit a completed certificate, and file suit.

The Hooters contest was not simply a drawing for a Toyota. Berry had to sell the most beer at her restaurant during April 2001 in order to qualify to win the Toyota. That necessitated her staying employed at Hooters – something she otherwise was free not to do – and encouraged her to put forth additional effort. Both are hallmarks of consideration.

### III. EPILOGUE

Lest we think *Berry* was an aberration and dismiss the issues it raised as now moot, in February 2002 two loyal listeners of Quad Cities (Iowa) radio station KORB “93 Rock,” Richard Goddard and David Winkleman, filed suit against the station after they were denied a prize, announced by then-KORB disc jockey Ben Stone, of \$30,000 per year for five years for having the station’s logo permanently tattooed on their foreheads.<sup>155</sup> While the issue of consideration seems easier on its face<sup>156</sup> than in *Berry* because Goddard and Winkleman clearly owed no preexisting duty to KORB, the question of whether Stone’s statement constituted an offer to form a contract that could be accepted by Goddard’s and Winkleman’s performance (or a promise on the basis of which Goddard and Winkleman could reasonably foreseeably rely to their det-

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tiff was the offeror, and the defendant’s refusal to perform was simply a refusal to accept the plaintiff’s offer); *Alligood v. Procter & Gamble Co.*, 594 N.E.2d 668, 669 (Ohio Ct. App. 1991) (holding, *inter alia*, that plaintiffs, who collected “Teddy Bear points” from boxes and packages of Pampers diapers and then submitted them with order forms to purchased discounted items from the Pampers Softouches Baby Catalog, were offering to purchase the designated items from the catalog, and that the defendant was free not to accept their offer, having itself only made an invitation to offer by providing the catalog).

<sup>155</sup> *Goddard v. Cumulus Broad., Inc.*, No. 07821-LACE098401 (Iowa 7th Dist. Ct., filed Feb. 22, 2002). Before they got tattooed, they called the radio station, and then talked to station officials in person, to confirm that the promotion was legitimate. They allegedly were assured that it was. Following their visit to the Scorpion’s Den tattoo parlor, KORB took photos of their new tattoos and posted them to its web site (<http://www.93rock.net>). See *Branded: Human Billboards Are Promised Money, Get Needled Instead*, ABA J., Sept. 2002, at 20; Annie Hsia, *Here’s My Tattoo. Where’s the Cash?*, NAT’L L.J., June 24-July 1, 2002, at A4; Ann McGlynn, *Tattooed 93 Rock Fans Claim Station Reneged on \$150,000*, QUAD-CITY TIMES, May 27, 2002, available at [http://www.qctimes.com/search/story.php?file=/rednews/2002/05/27/stories/morning\\_edition/story98.txt](http://www.qctimes.com/search/story.php?file=/rednews/2002/05/27/stories/morning_edition/story98.txt) (last visited Apr. 30, 2003). Interestingly, KORB’s web site no longer includes pictures of the tattoos nor information about the disc jockey who perpetrated the gag: Benjamin Stromberg (a.k.a. “Ben Stone”), who the station appears to have fired. See [http://www.clt.astate.edu/pittman/LegalEnvironmentofBusiness/rock\\_on.htm](http://www.clt.astate.edu/pittman/LegalEnvironmentofBusiness/rock_on.htm) (last visited Apr. 30, 2003)).

In a truly bizarre twist to an already weird case, a couple with whom Goddard was sharing a mobile home were arrested recently for allegedly attempting to hang him and then beating him with a ball-peen hammer. The couple had apparently grown tired of Goddard’s constant complaining about his inability to find work and other ill effects of having KORB’s logo tattooed across his forehead. Police reported that “alcohol may have contributed to the incident.” See Matt Gergen, *Pair Charged with Trying to Hang Complainer*, QUAD-CITIES ONLINE, Feb. 4, 2003, available at <http://www.qconline.com/archives/qco/sections.cgi?cop!id!143377> (last visited Apr. 30, 2003).

<sup>156</sup> Or, should I say “their faces”? (Sorry, I couldn’t resist.) But, seriously, can there be any question that having something tattooed across one’s forehead is a detriment suffered by the offeree induced by the alleged offer?

riment<sup>157</sup>) – either because it was clearly in jest or because it was otherwise such that a reasonable person in Goddard’s or Winkelman’s position would not understand it to be a legitimate offer to form a unilateral contract – may well decide the case if it ever gets to a trial on the merits.<sup>158</sup>

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<sup>157</sup> Promissory estoppel comes into play here because, unlike Blair’s alleged offer to Berry and her co-workers, which would come to fruition, if at all, after one month’s labor, *see supra* note 12, Stone’s alleged offer on behalf of KORB was to pay Goddard and Winkelman over a five-year period. Therefore, it was a contract that could not be fully performed as contemplated in less than a year, and would have to have been evidenced by some writing signed by Cumulus, KORB, or some actually or impliedly authorized agent. *See* IOWA CODE ANN. § 622.32(4) (West 1999) (“Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by the party’s authorized agent: . . . Those that are not to be performed within one year from the making thereof.”). Unlike its counterpart in the *Restatement (Second) of Contracts*, Iowa’s one-year statute of frauds “does not void such oral contracts; it simply makes oral proof of them incompetent.” *Pollmann v. Belle Plain Livestock Auction, Inc.*, 567 N.W.2d 405, 407 (Iowa 1997). *Compare* RESTATEMENT (SECOND), *supra* note 12, at § 110(1)(e) (“The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception: . . . a contract that is not to be performed within one year from the making thereof (the one-year provision).”). Nonetheless, unless Cumulus, KORB, or an authorized agent was foolish enough to partially perform the contract despite the lack of a writing, in which case Iowa courts recognize a generous “partial performance” exception to the statute of frauds, *see, e.g.*, *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 166-67 (Iowa Ct. App. 1993) (applying the partial-performance exception to a contract not to be performed within one year, and concluding that the defendant’s partial performance allowed the plaintiff to recover on the entire contract), Goddard and Winkelman may be relegated to a claim of promissory estoppel because they will be unable to prove the existence and the terms of the alleged oral contract. *See, e.g.*, *Kolkman v. Roth*, 656 N.W.2d 148, 152-53 (Iowa 2003) (recognizing a promissory estoppel exception to the one-year statute of frauds).

<sup>158</sup> According to court records obtained via the Internet and other sources, Scott County District Court Judge David Schoenthaler dismissed Goddard’s and Winkelman’s claims on March 26, 2003, without prejudice to refile within the applicable limitations period, when Goddard failed to appear for a deposition, to obtain new counsel after his original attorney withdrew, and to attend a scheduled hearing on KORB’s motion to dismiss. *See* <http://www.iowacourts.state.ia.us/ESAWebApp/TviewCaseCivil?> (last visited Apr. 30, 2003); Todd Ruger, *Judge Dismissed 93 Rock Fans’ Suit Over Tattoos*, QUAD-CITY TIMES, Apr. 22, 2003, available at [http://www.qctimes.com/internal.php?story\\_id=1011202&t=Local+News&c=2,1011202](http://www.qctimes.com/internal.php?story_id=1011202&t=Local+News&c=2,1011202) (last visited Apr. 30, 2003)).