

ANALYSING THE FINE PRINT: DISTINGUISHING CONTRACTUAL OBLIGATIONS FROM NON-CONTRACTUAL PROMISES

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Contracts and advertisements are crucial aspects of any business, and understanding how they influence you and your customers is extremely critical for controlling business accountability and liability. Considering this, it is important to understand the intersection between contracts and advertisements to help assure legal compliance, defend consumer rights, and negotiate the intricacies of modern advertising practises. It enables advertisers and consumers to create unambiguous rights and obligations, reducing risks and promoting a transparent and fair marketplace. Section 10 of the Indian Contract Act, 1872 defines contracts as agreements that are made of free consent of parties that are competent to contract for a lawful consideration and with a lawful object, and that are not expressly declared to be void.¹ However, a unilateral contract is defined as a legal arrangement in which one party commits to take a specified action on the condition that the other party takes or refrains from performing a specific action proactively. Unilateral contracts are similar to advertisements in that they do not impose a legal duty on one side to perform.² Keeping in mind these definitions it can be stated that certain advertisements may be considered as offers to enter into contracts. This paper will articulate what advertisements constitute contracts and what advertisements do not through relevant case laws.

WHEN ADVERTISEMENTS ARE NOT CONTRACTS?

In general, advertisements are not considered to be offered by courts. They are, instead, an invitation to initiate negotiations. This makes practicable sense. Consider if all advertisements were considered to be offers and someone who saw an advertisement for a coffee brand claiming to provide 'The world's best coffee'. A coffee lover might say, "I accept your offer to purchase the world's best coffee. On the off chance that it's not the best I've ever tasted, get

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¹The Indian Contract Act, 1872 arrangement of sections - India Code. Available at: <https://www.indiacode.nic.in/bitstream/123456789/2187/2/A187209.pdf> (Accessed: 22 July 2023).

² Pearson, O. (2017) Differences between an advertisement and a unilateral contract, Small Business - Chron.com. Available at: <https://smallbusiness.chron.com/differences-between-advertisement-unilateral-contract-26362.html> (Accessed: 22 July 2023).

prepared to confront the legal consequences!"³ Further, imagine a person advertising a product for sale, the advertiser having a limited stock of a product cannot be expected to sell to all the people who might reply to the advertisement. In such a situation it would be unfair to consider the proposer or advertiser to be legally bound to a legally enforceable contract formed through the acceptance by the offerees. However, an advertiser can in no case make outrageous claims about his products. In general, an advertisement has to be true, or at least have a reasonable foundation in fact.

Let us consider the case of *Leonard V. Pepsico*⁴, where the main issue of the lawsuit was whether the advertisement made by Pepsi constituted an offer to sell. The brief summary of the facts of the case is as follows; Pepsi ran an advertising campaign that allowed customers to earn Pepsi Points by purchasing Pepsi merchandise and products. The advertisement showed a boy landing at a school in a Harrier jet worth 7 million points, with a condition that additional points could be purchased for 10 cents. The Plaintiff and his friend accumulated enough points to "purchase" a Harrier jet and mailed a check to Defendant. The defendant refused to sell the jet and instead instructed him to read a pamphlet of advertising regulations and stated that the Harrier Jet was not part of the promotion. Following this the plaintiff sued for breach of contract.⁵ The synopsis of the rule of law is that an advertisement that is not considered seriously by a reasonable person and refers to other information is not an offer and by extension no acceptance. This case effectively demonstrates that when an advertisement that would normally be deemed an offer is so ridiculous that a reasonable person would not consider it serious, there is no offer and no acceptance. It is also worth mentioning that the advertising in question directed viewers to a catalogue of Pepsi products that did not include a Harrier Jet. Hence in this case the catalogue was the real offer rather than the advertisement. Hence, it was held that the advertisement was not to be considered to be an offer.⁶

The issue of whether an advertisement constituted an offer of sale or only an invitation to treat was also brought up in the case of *Lefkowitz v Great Minneapolis Surplus Store Inc*⁷. In the

³ Is an advertisement an offer? - Find Law. Available at: <https://www.findlaw.com/smallbusiness/business-contracts-forms/is-an-advertisement-an-offer.html> (Accessed: 22 July 2023).

⁴ LEONARD v. PEPSICO, INC. 88 F. Supp. 2d 116 (S.D.N.Y. 1997) kentlaw. Available at: <http://www.kentlaw.edu/faculty/sharris/classes/contractsfall09/CourseDocs/2009Supplement.pdf>

⁵ LEONARD V. PEPSICO (Case of advertisements as offers)Trace Your Case. Available at: <https://traceyourcase.com/leonard-v-pepsico/> (Accessed: 24 July 2023).

⁶ Leonard v. Pepsico (no date) Casebriefs Leonard v Pepsico Comments. Available at: <https://www.casebriefs.com/blog/law/contracts/contracts-keyed-to-murphy/the-bargain-relationship/leonard-v-pepsico/> (Accessed: 03 August 2023).

⁷ LEFKOWITZ v. GREAT MINNEAPOLIS SURPLUS STORE, INC. 86 N.W.2d 689 (Minn. 1957)

aforementioned case, the defendant ran two advertisements in a newspaper, one stating that the defendant would sell three fur coats for \$100.00 each, first come, first served, and the other stating that three fur stoles valued between \$89.00 and \$139.50 would be sold by the defendant for one dollar each. The claimant was the first to come on both occasions. The defendant, however, declined to sell the products to Plaintiff, alleging a "house rule" that restricted the bargains to women.⁸ The court determined that the exact language of the advertising created a contractual obligation on the defendant. The criteria used to separate an offer from an invitation to treat was mutuality of obligation i.e., whether, on the facts of the case, a performance was guaranteed in exchange for a performance that was asked. In this case, the advertisement was an offer by the defendant to transfer the goods to the first individual who responded, and as such, its terms could not be changed once accepted, and the contract was established without the other party's consent. As a result, when the plaintiff accepted the offer, the defendant had no right to impose new terms or conditions that were not contained in the original publicised offer.⁹

WHEN ADVERTISEMENTS ARE CONTRACTS?

While advertising is not normally a legal offer, there are three factors that can turn an advertisement into an offer:-

- The advertisement has defined terms.
- The advertisement should be directed at a specific person or a limited group of individuals.
- The circumstances of publication must indicate that the advertisement is meant to make a contractual offer. In other words, there is a clear indication of an intention to enter into legal relations.¹⁰

Further, an advertisement can constitute a unilateral contract, the acceptance of which would be complete by fulfilling the conditions mentioned in the advertisement. This rule can be illustrated through the case of *Carlill v. Carbolic Smoke Ball Co.*¹¹ In this case, the Defendant,

⁸ Lefkowitz v. Great Minneapolis Surplus Store (no date) Casebriefs Lefkowitz v Great Minneapolis Surplus Store Comments. Available at: <https://www.casebriefs.com/blog/law/contracts/contracts-keyed-to-murphy/the-bargain-relationship/lefkowitz-v-great-minneapolis-surplus-store/> (Accessed: 03 August 2023).

⁹ Lefkowitz v Great Minneapolis Surplus Store (2023) Law Teacher. Available at: <https://www.lawteacher.net/cases/lefkowitz-v-great-minneapolis-surplus.php> (Accessed: 03 August 2023).

¹⁰ Is an advertisement a contract: Everything you need to know (no date) UpCounsel. Available at: <https://www.upcounsel.com/is-an-advertisement-a-contract> (Accessed: 03 August 2023).

¹¹ *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 QB 256

the Carbolic Smoke Ball Company of London, advertised in many newspapers on November 13, 1891, claiming that their product, "The Carbolic Smoke Ball," when used three times daily for two weeks, would prevent colds and influenza. The manufacturers of the smoke ball also promised a 100£ award to anyone who developed influenza while using their product, guaranteeing this monetary reward by saying in their advertisements that they had placed 1000£ in the bank as a sign of their sincerity. Carlill, the plaintiff, purchased a smoke ball and used it as directed. The plaintiff became unwell a few weeks after starting to use the smoke ball. She then sued for the cost mentioned in the advertisement.¹² While considering the facts of the case, the court determined that fulfilling the terms of the contract represented acceptance of the offer. The offer was made to everyone who acted on the conditions mentioned in the advertisement, and the intention to form legally binding relations can be deduced from the money deposited. As a result of this reasoning, the court ruled in favor of the plaintiff.¹³

From the aforementioned information and case laws we can deduce that advertisements generally do not constitute contracts but rather they are considered to be an invitation to treat, unless the advertisement is definite in its terms and when the circumstances clearly indicate an intention to enter into a legally binding contract upon acceptance. Hence, not all advertisements are contracts, but if they meet the criteria for a legal offer and acceptance, they may have the legal force of a contract. Before presuming a contractual connection, consumers should be attentive and informed of the exact terms and conditions indicated in advertisements and certain laws related to it.

In conclusion, the intricate relationship between advertisements and contract law emphasises the importance of having an extensive understanding of their legal ramifications. However, this distinction becomes less evident when an advertisement presents provisions in a definite and unambiguous manner, and the surrounding circumstances demonstrate a clear desire to establish a legally binding contract upon acceptance. Advertisements can take on the qualities of valid offers in such cases, transcending their conventional role as invitations to treat. As a result, not all advertising has the inherent characteristics of contracts, but those that meet the requirements of a legal offer and acceptance can wield the legal force of a contract. Thus, consumers must be informed and discerning when navigating the terrain of advertising and

¹² Carlill v. carbolic smoke ball co.. (no date) Casebriefs Carlill v Carbolic Smoke Ball Co Comments. Available at: <https://www.casebriefs.com/blog/law/contracts/contracts-keyed-to-calamari/the-agreement-process/carlill-v-carbolic-smoke-ball-co-2/> (Accessed: 03 August 2023).

¹³ Trace your case (no date) Trace Your Case. Available at: <https://traceyourcase.com/carlil-v-carbolic-smoke-ball-co/> (Accessed: 03 August 2023).

contract law. While it is tempting to assume a contractual link based on an intriguing advertisement, there is a requirement for a comprehensive evaluation of the particular terms and conditions specified within the advertisement. The importance of paying close attention to the details of these conditions cannot be emphasised, since they form the foundation for the legitimacy of any subsequent agreement.

