

GEORGE GEIS:

All right. Good afternoon, everyone.

STUDENT:

Good afternoon.

[LAUGHTER]

GEORGE GEIS:

Today, we will discover-- we will continue our discussion of offer and acceptance in contract law. And as we've been talking about with a contract, you don't have one imposed upon you by legal fiat. It's not like tort law or criminal law. But you only enter into a contract if there's a voluntary agreement between two parties. And we've been looking at a number of situations for us to figure out whether or not you have something that can count as a real legal offer. And in a moment, we'll get to what happens when you do have a real legal offer and we're looking at what it takes to actually accept the offer.

First off, though, how do you know whether you've got something that is an offer? We looked at two cases last time that were pretty close factually. And I'm not sure I would want to do this, but I guess if I was going to try to distinguish the two cases or to justify why one case came out one way and the other case came out the way that it did, I guess I might try to do it like this-- I'd say, if you remember back to the *Loneragan* case, we have letters being exchanged for real estate deals. In that situation, there was no offer even in the final letter that was sent over to the potential purchaser.

Why not? Well the buyer plaintiff should know by the language of that letter that the seller was reserving a right of final approval. In other words, they were reserving the right to make a final decision on whether they really were willing to sell the land over to the potential buyer. It wasn't a case where the buyer could say, I accept, and know that they were done with it.

Rather, there was a final round of assent. If that's true, it meant it was not an offer and therefore you couldn't have a real legal contract.

Conversely, if we look at the *Southworth* case, which was, again, very similar factually, we could say-- although it's a close one-- we could say this case also came out correctly. Why? Well, the letter was really detailed. It had a lot of the key terms there. It was limited in audience. It only went to a couple of people. And furthermore, we might think that this was a situation, perhaps based on the background discussions between the parties, where a reasonable offeree could think that they could say, I accept, and know that they were done with it, know that everything had been finished.

In other words, in both cases, the key question is whether the power of approval-- the power of final approval had been given over to the other side? If the power of approval is given over to the other side, and they can just say I accept and know that they're done with it, then you've made them a real legal offer. If on the other hand, you're reserving that right of final approval with yourself, you haven't done something that amounts to an offer yet. You're still just in the situation where you're making a preliminary negotiation or an invitation for them to make you an offer that you can then accept or not accept according to what you see fit.

Now we're ready to continue by looking at the case of *Lefkowitz versus Great Minneapolis Store*. This is on page 219. Now, I don't know if you watch that HBO comedy series *Curb Your Enthusiasm* with Larry David. This case reminds me of something that the actor Larry David would do. I mean, in my mind, he is my model for Lefkowitz. We've got a situation where a store-- Great Minneapolis Store-- runs an advertisement one day in the newspaper I think up in Minneapolis.

And here's what it says-- Saturday 9 AM sharp, 3 brand new fur coats. Worth to \$100. First come first served \$1 each. Lefkowitz sees the ad. He decides that he's interested in accepting the offer. So he gets up early Saturday morning, marches over to the Great Minneapolis Store, waives his dollar and says I'd like to accept. And the store says, no, we're not selling you anything. You should know, Lefkowitz, that this offer was directed for women only. You can't accept it.

A little more time goes by. Lefkowitz presumably is upset. Next week, he sees another ad. Same store-- Saturday 9 AM sharp. Two brand new pastel mink scarves. Selling for \$89.50 out they go. Each \$1. One black lapin stole. Beautiful. Worth \$139.50. \$51 \$1, first come, first served. Same thing-- Lefkowitz gets up early Saturday morning, marches over to the store, waives his dollar and that store says, Lefkowitz, you know our rules, you can't accept this offer. We're not giving you the stole. Lefkowitz decides that he's going to sue.

All right. Joey, let's think this one through. Lefkowitz wants the value of both furs presumably or products from both of the advertisements. Let's start with the first ad. Is this an offer that Lefkowitz can accept?

**STUDENT:**

I would say so, although the court did not award him damages for the first one.

**GEORGE GEIS:**

So the court presumably said no, or they would have awarded him some damages. But you think this is an offer. How do we know?

**STUDENT:**

Well, the price is clearly defined in the advertisement. And also, it's specifically directed at the first person to arrive in the store in the morning.

**GEORGE GEIS:**

Does this worth two \$100 mean anything to you? I mean, does two change anything?

**STUDENT:**

Yeah, that's the issue that court found was that the actual price of the coat was speculative. It was uncertain, so they didn't know how much to award him in damages.

**GEORGE GEIS:**

And it might be the case that the store hadn't even identified which specific coat it was-- is designating to sell. We don't know whether the advertisement was just saying we're going to pick a few out, but we haven't decided yet which ones, or if they've got a few specifically identified coats. In either event, it's a little bit indefinite whether they were offering \$100 coat or if they were offering something worth much, much less, perhaps a cheaper coat. And so I think for that reason, the first ad didn't count as an offer according to the court.

And that, by the way, is I think consistent with what we had historically understood advertisements as being.

Advertisements-- remember we talked about last time-- are not generally understood to be offers. They're invitations to make an offer. Hey, I'm selling this kind of stuff. Make me an offer. I'll probably go-- I'll probably accept it. I'm probably going to accept it. Now, you said you thought this was an advertisement-- or this was an offer. Why do you disagree with the court?

**STUDENT:**

So it has the appearance of an offer as the other advertisement did. I'm thinking now that maybe it wasn't specific enough with which coat, since they didn't have a clear price for how much it was worth. It's possible that they hadn't had the details worked out. So maybe it didn't constitute an offer actually.

**GEORGE GEIS:**

So maybe not. I mean, it's close but maybe not. The court didn't think it was. But let's jump up to the second offer. You mentioned a minute ago that that might be treated differently. Will Lefkowitz recover for this?

**STUDENT:**

Yes.

**GEORGE GEIS:**

Yes, he will. He will. He wins on this. Notice he doesn't win the full \$139.50. Notice he doesn't win the right to get this specific stole through specific performance. He gets the difference in the dollar he would have had to pay and the \$139.50 that presumably this stole was worth. Or \$138.50. But fundamentally, for our purposes, the court says this actually did count as an offer. Now, how can this be? How can an advertisement be an offer when that is so counter to what we said before?

**STUDENT:**

Well, in this circumstance, an advertisement-- usually an advertisement is directed to the public-- no one in particular. So it's more of an invitation for an offer as opposed to an offer itself, because the store has limited inventory. So if everyone was to come forward and try to accept the offer, they wouldn't want to hold the store bound by all those so-called contracts. But in this case, it was specifically directed at the first person to be at the store. So it was a lot more direct.

**GEORGE GEIS:**

So first come, first served. We're telling you in advance everything you need to do to accept it. And only one person is going to be able to accept it, at least for each of the products. This said first come, first served. Why wasn't-- what's the difference?

**STUDENT:**

So the second ad is a lot more specific with what was being sold. It's specifically the black lapin stole worth \$139.50. So they knew exactly what the product was and how much it was worth.

**GEORGE GEIS:**

So we've got an exception to our general rule that advertisements are not normally offers. We see this at the bottom of 220, over to the top of 221. Where an offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. And I think they meant where the advertisement is clear and definite.

So if you have a really clear advertisement, then it can count as an offer. And here, I think they say exactly what it is and exactly how it should be accepted. So Lefkowitz wins on the second ad, but the second ad only. Now, Joey, does the store have the right to withdraw the offer?

**STUDENT:**

If it's a clear offer, they have a right to withdraw before it's accepted.

**GEORGE GEIS:**

So when does Lefkowitz accept? Suppose I'm Lefkowitz and you see me walking towards you at the store, and I'm waving the newspaper, and I've got my dollar.

[LAUGHTER]

Have I accepted yet?

**STUDENT:**

I think at the moment that he appears at the store at-- I think 9 AM-- with the dollar, that would constitute acceptance.

**GEORGE GEIS:**

So if you're the store keeper, and you see me marching across the parking lot, and you know that last week I tried to accept this offer, you could get out your megaphone and say, we revoke Lefkowitz.

[LAUGHTER]

Would I have a contractual right if you did that?

**STUDENT:**

I'm not sure. I think the-- I think up to that moment they would be able to withdraw the offer.

**GEORGE GEIS:**

If you've revoked it and you've revoked it before I've accepted it, then you've squashed that offer. I can't scrape it back up and somehow turn it into a contract. It's gone. So timing is going to be really important with a lot of these cases. If you don't want the offer to be available anymore, you've got to pull it back. The store could have pulled it back, but they didn't. And presumably

Lefkowitz accepted it when he showed up first in line waving his dollar, claiming the stole.

**STUDENT:**

Does the-- I mean, you gave the example of the megaphone. Does the publicity of the revocation matter? Whether he whispers I revoke, or whether he declares it, puts it in the newspaper, et cetera.

**GEORGE GEIS:**

Yeah, I mean, we'll talk a little bit about this-- general, you've got to communicate it to the parties. And it might be easy if Lefkowitz is marching over and you see Lefkowitz trying to come and you want to revoke it for Lefkowitz. It might be harder-- suppose you're the store, and you make this offer out there, and then you realize that, oh, boy, we really messed up. We don't want to make this offer anymore. We want to try to revoke it for everyone.

That can be a little tricky. Because you could try to run a newspaper ad again, but maybe everybody doesn't see that. And as we'll talk about shortly, usually if you're revoking an offer you've got to try to communicate that. Any ideas on what you might try to do if you're revoking the offer? Yeah, Gillian.

**STUDENT:**

Put up a sign up in front of the store. Like right-- so the person would have to walk around the sign to get in.

**GEORGE GEIS:**

All right. So I think that's not a bad idea. That newspaper advertisement that we posted, that might be construed as an offer, we revoke it right now for everybody, including you, Lefkowitz. And maybe something like that would allow you to argue that it revoked it. Now, by the way, there are some special consumer protection problems that sometimes arise in situations like this.

The notes after the case talks a little bit about some of the special rules that have been enacted on top of contract law to try to prevent against deceptive trade practices. And maybe

even something like that wouldn't save you if you would engage in some sort of a deceptive trade practice by trying to get people in when you knew that you weren't ultimately going to sell the product. But as a matter of contract law, I think Gillian's idea probably would work. You communicated your revocation before the other side accepted it. Andy?

**STUDENT:**

Could we argue-- the court kind of glosses over this, but the first time when they told him that it was only an offer for women and that these offers were intended for women, in general, could that be a revocation of the offer from Lefkowitz specifically?

**GEORGE GEIS:**

Joey, how do we think about that? Lefkowitz knew that the initial offer was only made for women. Shouldn't that preclude him from accepting the second ad even if it was an offer?

**STUDENT:**

Well, once again, the second advertisement didn't include any stipulation like that. So in isolation, I would instead say the second advertisement-- it just said whoever is the first person at the store at 9:00 AM.

**GEORGE GEIS:**

So the court says-- court thinks about that. It says they claim that this wasn't directed at Lefkowitz. But they didn't say that in the offer itself. Now, here's an interesting question-- could they have said that in the advertisement? This is directed for women only. Men, you're not able to accept it.

**STUDENT:**

They could have put it in the advertisement. And if they had, Lefkowitz probably would not have been able to recover. But they did not.

**GEORGE GEIS:**

Can you make offers that are only available to one gender?

**STUDENT:**

I think so.

**GEORGE GEIS:**

Yeah. I mean, you can in some cases. It's a tricky and developing area of the law. And there is some federal law that



says in certain situations-- housing, and employment, and in certain special areas-- you actually can't discriminate on the basis of gender when you're contracting. I think California has a pretty broad prohibition on gender discrimination in contracting. But in many states, I think it is all right if you want to direct your offer for only a certain audience.

And if they had done it, then maybe this case would have come out differently. Here they didn't. They didn't say that. Maybe Lefkowitz knew or should have known. But then again, Lefkowitz could have thought that maybe that was only for the first one, not for the second one. They didn't put it in. They can't change it after the fact. He's already accepted the contract. Therefore, it's too late for them to try to modify who it applies to. Christoff, your hand's up.

**STUDENT:**

I'm thinking about the first case-- let's say a woman coming to the store and she wants to buy this coat. We can still say that it's not specific enough-- this offer is not specific enough.

**GEORGE GEIS:**

I think that's right. I think if they didn't want to sell it, they didn't have to sell it. I don't think gender mattered one way or the other. I mean, I guess that was motivating them maybe to not give it to Lefkowitz initially. I really don't know why they didn't just sell it to Lefkowitz initially if that's what they wanted to do. But I think as a matter of offer, the problem here was that it wasn't specific, definite enough and left nothing open to negotiation. It was still not enough to count as a change to our normal rule that ads aren't offers.

**STUDENT:**

But we have a specific price there-- \$1 like each, right?

**GEORGE GEIS:**

Well, we have a price, but we don't know exactly what it is we're selling. At least that's how the court saw it. What exactly are we selling? Three brand new coats worth I think up to \$100. Maybe it's a cheap one. Maybe it's a nice one. I think the problem that's

bothering the court is that here we don't really know exactly what's being put on offer. Here we've got apparently one specific thing in mind-- this one black lapin stole worth \$139.50. So that's what I think really is the distinguishing factor between the two cases.

With that, let's move on. I want to take a look at the Statue of Liberty problem on page 223. And I think we can quickly talk through this one. We've got a situation where Congress is trying to raise some money for Ellis Island and to restore the Statue of Liberty. And they decide they're going to issue some commemorative coins. And they decide they're going to mail some advertising materials around to certain people that have bought-- some collectors that have bought coins from them in the past.

Here's what the materials say-- the mint-- if the mint received your reservation by December 31, 1985, you'll enjoy a favorable pre-issued discount saving you up to 16% on your coins. And there's a huge demand apparently. The [? Massaros ?] send in the order form. I don't know how many of these they order. Ultimately, they're told back we can't process your order. We can't sell you the commemorative Statue of Liberty coins. Sorry.

They decide they're going to sue. They thought they had a contract. How do we analyze this situation? Is there offer and acceptance, such that there is a contract here-- the [? Massaros ?] should be able to win their case. Any thoughts? Yeah.

**STUDENT:**

I mean, I think there's offer and acceptance. But what the thing that they're getting is the 60% discount and not the coin itself. So what they've accepted the offer for is the opportunity to get a discount if they buy one later, but not necessarily a guarantee that they get the coin.

**GEORGE GEIS:**

So they had-- have they had a commitment that they're really--

are they really binding themselves then? Are they really-- or does each side still have a free way out?

**STUDENT:**

I mean, they're binding themselves in that if they sell the coin, they have to sell it at this discount.

**GEORGE GEIS:**

But how is that locked into any real legal commitment if they're free to sell or not sell as the mint sees fit? Yeah, I mean, there's language in there certainly suggesting that maybe they should be entitled to a discount. I guess the question is, do they really have any legal entitlement as a matter of contract law? Gillian?

**STUDENT:**

I'm just a little confused by this. It says that they sent in their credit card information.

**GEORGE GEIS:**

Yeah.

**STUDENT:**

So did they prepay for the coin at a 16% discount or did they pre-order it? I didn't quite understand.

**GEORGE GEIS:**

I don't know that we know for sure. But what I envision is we've got one of these order forms. And they wrote in what they want and the pricing reflected a 16% discount. They summed it up. And then it was one of those things where you write in your credit card and they send that all in. And then the mint said, sorry, we won't process your order. And then they decide to file a suit saying we had a contract. Is there a contract? Yeah.

**STUDENT:**

I think that this situation is similar to the first ad in the last case where the coat was worth two \$100. Because here it's saying you'll get a discount up to 16%. And it doesn't seem definite enough.

**GEORGE GEIS:**

So the fact that it says-- let's get the language exactly right-- [INAUDIBLE] saving you up to 16%. You're bothered by that up. What if on the order form it actually had a 16% price savings.

**STUDENT:**

I think that would constitute an offer then, because they're being

clear [INAUDIBLE].

**GEORGE GEIS:**

So what's the offer, the order form coming from the mint?

**STUDENT:**

I think so.

**GEORGE GEIS:**

Other thoughts? Yeah.

**STUDENT:**

I think if they made it clear that they were selling only a limited number, it's kind of like that first come, first served issue, so even if it were an offer, then only a certain number of people would be able [INAUDIBLE]. So [INAUDIBLE].

**GEORGE GEIS:**

So if the plaintiffs here had been in the initial group before they had sold out, does that mean that the mint was compelled to give them the coin?

**STUDENT:**

I think so.

**GEORGE GEIS:**

I mean, that's one way to understand it. We're giving you an offer. We'll sell you this at a certain price, conditional or contingent upon you accepting-- you can accept it by being one of the first number of people through.

**STUDENT:**

Yes. Do we have a price here? Is the price specified somehow? We have just a discount, right?

**GEORGE GEIS:**

Yeah, I'd like to see the order form. I don't know exactly what was on the order form. My guess, based on my exchange with Gillian, was that there actually was a price listed that you were lining up how much you owed. But I'm speculating a little bit.

**STUDENT:**

But wouldn't if this is a contract-- and I've ordered clothes from stores before and like had it in my cart, processed the order, and then I get an email that says like it's out of stock, never mind. Then they've breached my contract.

**GEORGE GEIS:**

Well, that's exactly the situation here. So can you sue them now, right?

[LAUGHTER]

**STUDENT:**

So there was [INAUDIBLE] I've never been, like, man, I should really take this to court.

[LAUGHTER]

**GEORGE GEIS:**

Well, should you? I mean, should you? Have they made you an offer and then you've accepted it?

**STUDENT:**

Well, doesn't then the issue of when I return merchandise, too, like I'm in breach?

**GEORGE GEIS:**

Well, returns are a little bit different, because they may have a standing policy allowing or not allowing for returns. So that may be a part of your contract. But I think your example of you ordering something with either a written form or maybe an online form, and then they're saying, no, sorry, we can't give it to you, raises the exact question of have you created a contract yet? Do you have an entitlement to that specific product? Or are they OK legally not giving you what you thought you had purchased already?

**STUDENT:**

I could sue so many companies.

**GEORGE GEIS:**

Maybe so.

[LAUGHTER]

Should she? Should we recruit a legal defense fund and send money Carly's way? Tiffany.

**STUDENT:**

Well, I was going to-- maybe they're defining-- yes, they sent in their form, but maybe they needed to accept the form before the actual reservation could be complete? So maybe that's like the wording could get them out of it, because they made an offer, they sent it in, but had the other person accepted? You do a lot of applications and a lot of forms, but somebody has to process

it to actually become a [INAUDIBLE].

**GEORGE GEIS:**

So you're saying the offer didn't come from the mint to the buyers. That was an invitation to make an offer. The offer came from the buyers into the mint. And then the mint was free to accept it or not accept it as they saw fit. Yeah, that's the way the court saw it when they actually litigated this case.

They said, you have an open-ended form, there's an open-ended quantity term on the form. That's important. You can't expect that they're necessarily going to commit to selling an unlimited number of these coins. So therefore, the invitation to make an offer came from them. The offer then came from the buyers. And the mint could accept it or not accept it as they saw fit. Does that seem right to you?

**STUDENT:**

I don't-- I took issue specifically with the portion that said they told them it was because they couldn't process their credit.

**GEORGE GEIS:**

Yeah. That seems a little bit sneaky, doesn't it?

**STUDENT:**

It does because to me they're saying, oh, if you had done this correctly, then our contract would have been valid. So to me there's some sort of bad faith there.

**GEORGE GEIS:**

Yeah. That's an interesting question. I mean, they didn't have to say that. They could have just said, no, sorry, we're not going to honor your award. But does the fact that they did say that and it doesn't seem to be true, or we at least would suspect that it's to change anything-- maybe not as a matter of offer and acceptance, but that might be a good example of bad faith where they're saying something that doesn't seem to really be the truth. Kevin.

**STUDENT:**

I don't remember if we already talked about this, but let's say the court went the other way. Are they usually a lot more lenient when it's something that you could reasonably expect you'd run

out of stock, as opposed to a commodity?

**GEORGE GEIS:**

Are they lenient in what way? More lenient about finding an offer and acceptance?

**STUDENT:**

No, not that. In awarding damages-- would they say, a reasonable person would have expected that this could of run out and that almost first come, first served is implied?

**GEORGE GEIS:**

I don't know that they would necessarily change the way that they would understand it. I mean, in either case, we've got to figure out is there a contract or is there not a contract? I suppose the mint probably could have and should have maybe been a little more careful in the language that it used. And it limited it to the while supplies last or put something like that. You see language like that. It's a way to protect yourself.

If this had been an offer from the mint down to the plaintiffs, presumably they could have written in we'll take 500,000 of these things, if they thought the price was going to spike up, thought they had a contractual entitlement, and then sued for the price differences between what they would have gotten and what they did get, which I guess was nothing.

**STUDENT:**

So last time I got into an argument with a customer service rep about cancelling my order, they actually said that they specifically do not charge credit cards until the point at which they ship the product, because the credit card charging constitutes the acceptance of-- your acceptance of the offer.

**GEORGE GEIS:**

So you don't want to raise the Carly Defense Fund that's going to get us lots of money by--

[LAUGHTER]

--suing all the companies that don't send her the stuff.

**STUDENT:**

Yeah, I mean, they have the right to revoke.

**GEORGE GEIS:**

Yeah, I think that's how most companies would say it works. When you're sending in your order, you're making the offer.

**STUDENT:**

But I think that they run my credit card. I have gotten emails saying here's your receipt, here's your order, and then three weeks later it's like we checked and we don't have it in inventory. Sorry, we're processing a refund.

**GEORGE GEIS:**

All right. We'll continue to ponder then whether we're going to raise your defense fund.

[LAUGHTER]

We want to see the fine print of exactly what's on these order forms for us to know whether the offer and acceptance-- I mean, this is a good discussion because it's not always perfectly clear exactly when the offer happens and exactly when the acceptance happens. And that's important when you're trying to figure out whether you even have something that you can accept.

Here's another example. Think about this-- suppose you attend an open outcry auction. You go to an auction and you're interested in buying something. When's the offer and the acceptance? How does that work in an auction context? Selling a brand new Mercedes. Do I hear \$40,000? Do I hear \$50,000? [INAUDIBLE].

**STUDENT:**

Me raising my hand and bidding is that I'm offering to pay that? And when the guy say, going once, going twice, he's like giving me kind of an opportunity to--

**GEORGE GEIS:**

To revoke. I revoke. Never mind.

[LAUGHTER]

So when I say selling the Mercedes \$50,000, presumably that's not an offer. And if I want to I could say, oh, never mind, I'm



going to cancel the auction. But then when you bid \$40,000, \$42,000, \$43,000, those are all offers coming in. And I'm saying going once, going twice, you say, stop, never mind, I didn't mean to do it. When is the acceptance?

**STUDENT:**

When he says sold.

**GEORGE GEIS:**

Sold-- the gavel. That's typically the acceptance when you're dealing with an auction contract. What about eBay, like an online auction site? When is the offer and acceptance there? Carly?

**STUDENT:**

When the timer runs out.

**GEORGE GEIS:**

When the timer runs out. So who's making the offer? I put a product up on eBay. Is that an offer?

**STUDENT:**

I feel like they are resuming the final right of approval because there's been times when you can try to purchase something on there, and they either don't like how high the bids got or they decide after the fact they're not going to actually sell it to you. I've had that happen to me. So I had to-- see that, I should have sued them.

[LAUGHTER]

**GEORGE GEIS:**

I mean, eBay is an interesting one because there's lots of different models that they use. And you can make different choices, I think, about how you actually put stuff, and buy stuff, and sell stuff on there. Let's start with just a traditional one-- you list an item. I think that probably is an offer. You're making an invitation to sell something just like when you're listing an item out for auction.

And then the bids come in. Those presumably are the offers. If you make a bid and you win the item, are you locked into a contract? I think so, right? I think so. So I presume that when the timer runs out, or when they say it's over, then that now counts

as the acceptance and you're locked in unless there's some other special arrangement there.

**STUDENT:**

So are you saying that me as-- if I'm selling my car and I put it up on eBay-- so I put up the car, that's the offer.

**GEORGE GEIS:**

No.

**STUDENT:**

The different bids that come in, those are just considered acceptances, not--

**GEORGE GEIS:**

No, I don't think that can be the case the way it works. Otherwise you'd have lots and lots of contracts. And you can't have that. You can't sell your car to 20 different people.

**STUDENT:**

So we have two offers then operating?

**GEORGE GEIS:**

I think when you put your car up on eBay, you're inviting people to make you offers. And you can set the terms. You could have a minimum price, a maximum price. Is that how you see it?

**STUDENT:**

Yeah, I was going to say [INAUDIBLE]. But then also it's confusing if you have a "Buy It Now" feature on it.

**GEORGE GEIS:**

How does that work? Tell us.

**STUDENT:**

Because they would have listed a price, which I think you can do an auction and a "Buy It Now," so there's a minimum price. The minimum price would be an offer and then me clicking "Buy It Now" I would think would be an acceptance of that offer.

**GEORGE GEIS:**

So if you want to put something up for auction and you want to include a provision that anybody can buy it immediately by clicking the "Buy It Now" price, then I think you're right. I think that the putting it up for auction would count as the offer. Then the "Buy It Now" would count as the acceptance. And you don't need the timer to click down. The deal is over. So there's lots of different ways.

**STUDENT:**

I guess this would be assuming that you can't cancel the offer after you've received the highest bidder after somebody pressed "Buy It Now." In that case, wouldn't shipping it be the acceptance then, or when you run the credit card or whatever it is? Because I think-- I'm maybe wrong-- but I think maybe you can cancel it after it's been processed or that timer has gone down.

**GEORGE GEIS:**

Yeah, I'd need to know more about exactly what your rights are to cancel to know whether there's been a contract that's created that now has a cancellation provision that's part of the contractual relationship or whether you haven't yet had an offer and acceptance. I think it might be the former, but I'm not sure.

**STUDENT:**

I have a question about the timing of revocation. So let's say we're living not in the age of email, but in the age of letters. And so-- yeah--

[LAUGHTER]

--I put out an offer and before the person replies by letter saying that they've accepted my offer, I've sent out my revocation but they haven't received it.

**GEORGE GEIS:**

Yeah, so this was--

**STUDENT:**

So does the communication have to go-- have to be received by the party or does it have to be sent by the person who's rejecting?

**GEORGE GEIS:**

So this is such a good question and in like two weeks time we're going to spend a whole class talking about something called the mailbox rule which deals with exactly this problem. Because nowadays, if we're face to face, it's not a problem. You say you accept and I hear it. But if there's a delay, and it could be mail, or it could be email, it could be anything-- we've got to figure out just which rule to pick.

The shorter answer is that your acceptance will be good as soon as it's sent by mail, regardless of whether I hear it or not. But a revocation is not good until it's actually received. But we'll come back-- we'll spend a lot of time on that because there's old cases that really sort out with that problem. And it's a real problem. Timing is always really tricky. All right. A couple more.

**STUDENT:**

So would a silent auction that's done in person work more like eBay? We used to do these a lot where I worked. You would put out a piece of paper and people would come and just write their bid on a piece of paper. If I come back and erase it, like--

[LAUGHTER]

--does it count?

**GEORGE GEIS:**

I've always wondered if you could do that. I mean, you write a bid or your spouse goes around and writes a bid and you want to cancel it out.

[LAUGHTER]

Thoughts on that? I mean, I think I would analyze it that way. You're not making-- you're not accepting when you're writing it down I don't think anything. How could you? Someone else could come in after and write a higher amount. So wouldn't it be the case that they're offering this item. Your writing is an offer. Someone else could make a higher offer or you could go back and cross out your offer. And then when the timer runs out and whoever's working the auction comes around and grabs the paper, that's acceptance I think. Does that make sense?

**STUDENT:**

Yeah.

**GEORGE GEIS:**

Yeah, I think that's how it would work. I mean, there's lots of different nuances here, though. There are some auctions that are actually confirmed auctions where the sellers are

guaranteeing that they will sell the item and not withdraw it at whatever the best price is offered. If that's the case, maybe that looks more like an offer when you list the item up for auction. So there's lots and lots of different rules.

**STUDENT:**

Your eBay example made me think of Uber. I mean, how should we think about offer and acceptance with Uber? Because if I understand it correctly, when a driver, quote unquote, "accepts," he or she doesn't know exactly where he's going to be driving you or she's going to be driving you until he or she picks you up.

**GEORGE GEIS:**

Don't they know already when they-- I don't know enough about how--

**STUDENT:**

They know how much money--

**GEORGE GEIS:**

--what the Uber driver sees.

**STUDENT:**

--how much money the trip is potentially going to pay.

**GEORGE GEIS:**

But they don't know where to you?

**STUDENT:**

I think they know.

[INTERPOSING VOICES]

**STUDENT:**

It's a price quote.

**GEORGE GEIS:**

Someone help us out who knows a lot about Uber.

[LAUGHTER]

Nicholas, you look like you know exactly.

[LAUGHTER]

[INTERPOSING VOICES]

**STUDENT:**

You don't know where they're going when you accept the trip. I don't believe you always also know how much money you're actually going to get, because it varies depending on the time.

**GEORGE GEIS:**

So when are you in a legal commitment as an Uber driver?

**STUDENT:**

Well, I can revoke after I accept the trip if I want to before I get there. It's once they get in your car, I believe, is when offer and acceptance occur. When acceptance occurs is when they get into your car. Because before that you can drive off, you can cancel it.

**STUDENT:**

But they can charge you.

**STUDENT:**

But I think in your car-- if we're like in [INAUDIBLE], I'm like, oh, I'm going to Washington DC. And I don't want to drive the person to Washington DC. Can I legally then say get out of my car?

[LAUGHTER] I

**GEORGE GEIS:**

Don't know. And that's a really interesting question, right? I mean--

**STUDENT:**

[INAUDIBLE].

**GEORGE GEIS:**

I mean, there's the law of contracts and then there's the practical law of really are you willing to fight that through? We will see some examples of this a little bit later on when we talk about internet contracting. So we're not quite done with this yet, but let's pause for a minute here because I want to turn to our next case.

This is the case of *Leonard v. PepsiCo*. And I think there's only one way to fully appreciate what's going on here.

[LAUGHTER]

And that's to go to the tape. I think it's fair use if it's educational.

[VIDEO PLAYBACK]

[BEEPING]

- Introducing a new Pepsi stuff catalog. Now the more Pepsi you drink, the more great stuff you're going to get.

- [INAUDIBLE] the boss.

[LAUGHTER]

[END PLAYBACK]

[LAUGHTER]

**GEORGE GEIS:**

That's our advertisement. Let me see if I can turn the volume up a little bit. I want to play you one other version of the commercial. There are actually three versions of the commercial that were run. This is another version of the commercial. I think it ran around the time of the case or maybe a little bit after. See if you notice anything different.

[VIDEO PLAYBACK]

[MUSIC PLAYING]

- Introducing the new Pepsi stuff catalog. Now the more Pepsi you drink, the more great stuff you're going to get.

- [INAUDIBLE] the boss.

[LAUGHTER]

[END PLAYBACK]

**GEORGE GEIS:**

Did you guys see the difference? Hold on. Let me get my slides. All right. So everyone see the difference? 700 million instead of 7 million. And there's a little just kidding sign I think there too. All

right. So let's try to think this one through. Connor, let me come down to you, if I can. Our hero, Leonard--

[LAUGHTER]

--was tempted by the blue shades. He was tempted by the leather jacket. He was tempted by the bag of balls. But no, he had to have the Harrier Jet once he saw this commercial. Now, he quickly figured out that he wouldn't be able to drink enough Pepsi. There was no way he could drink 7 million Pepsis in time.

But he read the fine print and he realized that you could buy Pepsi points for-- I don't know what it was-- \$0.10 a point. And somehow he raised \$700,000, mailed the check in to Pepsi, and decided that he was going to argue that he was in a contract for receiving the Harrier Jet. Now, Pepsi said, no, and some humorous back and forth between the various parties here.

Ultimately, it looks like Leonard was getting ready to sue and Pepsi apparently was worried enough about this that they decided to bring a lawsuit first, bringing a declaratory judgment case so that they could, I think, get the case in federal court instead of in state court. Now, I guess we need to ask the fundamental question-- does this ad comprise an offer?

**STUDENT:**

No.

**GEORGE GEIS:**

No. Why not?

**STUDENT:**

Because generally ads aren't offers except for some exceptions.

**GEORGE GEIS:**

So why wouldn't this be specific enough to count as an offer?

**STUDENT:**

Well, there's no language that indicates a commitment to supply the jet if you have 7 million points.

**GEORGE GEIS:**

So what then should the offer and acceptance actually be? I mean, how would we think about the offer and acceptance?



Was there an offer and acceptance here at all?

**STUDENT:**

No. It was an invitation to make an offer almost.

**GEORGE GEIS:**

And so if you wanted to try to get into a contract-- I mean, let's put aside the Harrier Jet for a minute. Say you just wanted to get the leather jacket. What would the offer and acceptance look like there?

**STUDENT:**

Well, I guess sending in enough points to get the jacket and then they accept your points and supply the jacket.

**GEORGE GEIS:**

So we've got the catalog. The catalog is just an order form like the coin order form. And you write in I'd like this. You put your Pepsi points in place. And then they could say, no, we're not giving you the jacket, sorry.

**STUDENT:**

I guess it depends if they-- I guess they could back out.

**GEORGE GEIS:**

I mean, I think under that conception of the offer and acceptance, they presumably could. You make the offer when you send it in. All of this is like an invitation to make an offer. Hey, we're running this contest. We're giving a bunch of stuff out probably for Pepsi points. Send it in. Make us an offer. We'll probably accept it by returning and sending you the jacket. But it's perfectly free for us to either accept it or not accept it as we see fit.

That doesn't sound very well for Leonard. Does anyone want to try to save his case from an offer and acceptance standpoint? Is there any other way to look at this? Jack?

**STUDENT:**

Well, so it's different from, for example, the advertisements for a coat or something, because even by-- Pepsi's idea with this is that it's going to get people to go out and buy more soda. So they're getting something from this to start with. So they're-- he's relying on this advertisement. Pepsi is getting something out of it to start with.

And then he sent them-- in theory he sends him these points that he's gotten from cans. So it's not just that they're putting out an offer and if they-- or that they're receiving an offer and if they don't accept it, nobody loses. Because in theory at least he's already lost by buying Pepsi.

**GEORGE GEIS:**

Yeah.

[LAUGHTER]

I'm not sure they'd like to think of it that way.

[LAUGHTER]

So just so I understand you, are you arguing that a reliance theory might work even apart from offer and acceptance, coming back to an earlier part of the class?

**STUDENT:**

Yeah, maybe. He's actually incurring-- or at least the people who are buying the product are incurring a detriment.

**GEORGE GEIS:**

So let's move to the Harrier Jack context. It'd be reasonable to expect that someone would see that commercial and that would induce them to spend 700,000 points to get the Harrier Jet?

**STUDENT:**

I mean, I think you should give the man his jet.

[LAUGHTER]

**GEORGE GEIS:**

Maybe that theory is more promising than offer and acceptance.

**STUDENT:**

I do think that the objective standard at the end of the day-- so I think that if you were to send in the points for the jacket, for example, and then they said, no, never mind, then that is an issue because you've already bought their product, and you've accumulated the points, and you've relied on it to get the jacket. I think the objective standard that the court relies on here makes

the whole Harrier Jet--

**GEORGE GEIS:**

So you're willing to go to bat for Leonard for the jacket, but if he really wants to try to get the jet, which he wants to do, you're going to be nervous about your reliance theory. Maybe so. Brian.

**STUDENT:**

Could you argue that-- so in the coin example, you weren't held liable because they ran out of coins. But they had coins. In this example, it's like the bait example that they were going with the fur coats. They never had a Harrier Jet. They didn't have a single one that they ran out of.

[LAUGHTER]

And they told you you could buy a Harrier Jet and you couldn't buy a Harrier Jet.

**GEORGE GEIS:**

Yeah. So I don't know if that would be covered by our federal consumer protection statutes. I mean, I'm not sure that it would be. As a matter of contract law, though, I think we have to ask what exactly is the offer, what exactly is the acceptance. I hear Connor saying that the offer didn't happen until you sent in the order form. Because of that-- was there a Harrier Jet in the order form?

**STUDENT:**

No.

**GEORGE GEIS:**

There wasn't, right? Suppose there had been a Harrier Jet. Down at the bottom, they decided to push the joke a little bit further and they had a Harrier Jet. 7 million Pepsi Points and they had a big jet. Would that change the outcome?

**STUDENT:**

Yeah, it probably would because the commercial referred to the catalog saying what kind of things you can actually buy. So if they were dumb enough to put it in there--

**GEORGE GEIS:**

So they get clever-- they put it at the bottom. Leonard-- oh,

yeah, I'll take one of those. Fills out a one, here's a check for \$700,000, sends it in. And then Pepsi's, oh, shoot, someone actually did this. And then they say, never mind, we're not giving you the Harrier Jet. Will Leonard win that case?

**STUDENT:**

I think it goes back to what we were talking about earlier where if you send in the points, can they just say no, because I think if you're sending in the points, you're making the offer.

**GEORGE GEIS:**

So if you are making the offer, and you're sending in the points, and even if the jet's listed at the bottom of the circular, I think Pepsi could still say we are not accepting your offer. Sorry, we're not giving you the jet. And unless you've got some sort of a reliance argument or something like that, then I don't think you're going to be able to win as a matter of offer and acceptance as the court sees this. Carol.

**STUDENT:**

I feel like they do stipulate that the catalog is what is the offer. So if you follow the terms in the catalog, then that's their offer. And you sending in your Pepsi points or your money, depending on which way you go, that's your acceptance of the offer. And they are then obligated to send you whatever you order. So if they did jokingly put the Harrier Jet in the catalog, which they stipulated the catalog was-- the order form/catalog is their offer.

**GEORGE GEIS:**

So is that inconsistent with the last example with the Statue of Liberty coins? If the offer was coming on the order form, then wouldn't the acceptance be when they decided whether or not to take it and send you the product or not? Is there anything different about this situation that would allow us to distinguish that prior case? I mean, I think Pepsi was arguing for exactly that. Andy?

**STUDENT:**

I think I would say that the distinction lies, again, in what Lizzy was mentioning about the up to 16% part. It wasn't definite enough in the original one to be an actual offer. Whereas in this

case, everything was relatively definite. So if the Harrier Jet has been included on the catalog, that would have been an offer.

**GEORGE GEIS:**

Did they tell us what model of Harrier Jet?

[LAUGHTER]

There's a lot of options when you're ordering a Harrier Jet, right? I mean, do you get it with guided laser missiles or-- so I mean, we could always make out an indefiniteness problem if we want to. Jeffrey.

**STUDENT:**

Well, he does argue that there's a specific model that they're offering-- the non-weaponized.

**GEORGE GEIS:**

The non-weaponized one.

[LAUGHTER]

He says the non-weaponized is available and maybe he assumed that's the one.

**STUDENT:**

But I agree with Caroline that this catalog is their offer because of the previous discussion. It's almost like the *Southworth* case where they've discussed it before. This commercial was like the initial like, hey, we're having this thing. This is our offer in the catalog.

**GEORGE GEIS:**

All right. So if they put in the Harrier Jet, then they're going to be bound if Leonard sends in the money and accepts their offer.

**STUDENT:**

Yeah, I would want to see the catalog. But that's what I took it as.

**GEORGE GEIS:**

It's-- yeah, I agree, I'd want to see the catalog. I think it's close. Caroline.

**STUDENT:**

Isn't the catalog is a little more like shopping online or something? You're actually-- when you send in, that's your

offering it to them. And they can still say, we don't have that in stock anymore. And I know that they can keep your money. So I feel like-- I don't know how in this case, they would-- they could send you the coins back and you can do something else. They sent his money-- his check back. They didn't deposit the check and be like, oh, that's stupid. You sent us all this money.

[LAUGHTER]

So I feel like it's more of an online shopping.

**GEORGE GEIS:**

So you see the offer coming from the consumer, from the Leonard, and then they can accept it or not. I mean, we're on the border. Christoff, how do you see it?

**STUDENT:**

Actually, I agree with Jeff and Caroline, because it's a little bit different than the example with the coin. He bought already all this Pepsi, right?

**GEORGE GEIS:**

Yeah.

**STUDENT:**

He was counting on collecting--

**GEORGE GEIS:**

Well, he bought some Pepsi.

**STUDENT:**

Yeah. Let's say he collected this-- I don't know what was the amount that all this points by buying something-- buying Pepsi. He already spent his money. And they put the jet in the catalog. So that would be an offer.

**GEORGE GEIS:**

All right. So let's assume the jet's in the catalog. And let's assume that he didn't spend all kinds of money buying Pepsi, but he's buying points for \$0.10 a point. And he's writing the check for that. And he drank a couple of Pepsis. Connor, does that mean that if it's in the catalog, it is a serious intent to be bound? I mean, isn't this a joke?

**STUDENT:**

Yeah, it's entirely a joke.

**GEORGE GEIS:** It's entirely a joke. It's not a serious intent to be bound. Why not? How do we know?

**STUDENT:** Well, the judge lists like seven reasons.

**GEORGE GEIS:** OK, hold on.

[LAUGHTER]

Should the judge even decide this? Leonard says the judge is not qualified. Judge Wood is a respected judge, but she's not a member of the Pepsi generation.

[LAUGHTER]

She's not entrepreneurial enough to understand. Should it go to a jury of young Pepsi drinking peers?

**STUDENT:** No, because it has to do with a contract or granting summary judgment, which is what judges deal with all the time.

**GEORGE GEIS:** So judges normally evaluate under the objective test whether something should objectively be understood as a serious intent to be bound. And here Judge Wood says this is not a serious intent to be bound. It's a joke. Maybe even if it's in the catalog, we should understand it as a joke. Why is it a joke?

**STUDENT:** You want me to list the reasons?

**GEORGE GEIS:** Well, don't dissect the frog all the way.

[LAUGHTER]

But I mean, at least give us a couple.

**STUDENT:** Well, like a Harrier Jet is \$23 million it says.

**GEORGE GEIS:** All right.

**STUDENT:** So you couldn't be expected to buy it for \$700,000.

**GEORGE GEIS:**

Let me stop you there. Now, I think that's a clear reason why they do think it might be a joke. Now, I'm not that good at math, but one thing we could do is take a look at the contract price over the fair value of the item as a way to try to figure out whether something's too good to be true, and in that case, may be a joke. Now, what was the contract price of the jet? About \$700,000, right? And how much was the fair value of it?

**STUDENT:**

It says \$23 million.

**GEORGE GEIS:**

All right. So let's assume that they're right. \$23 million. If we do that ratio, we get a number of about 1 to 34. So in other words, Leonard would be getting it at 1/34 of the fair price. Come back to the case of *Lefkowitz* and the stole. In *Lefkowitz*, the contract price is \$1 and the stole is \$139.50. So he's getting something at 1/140 almost of what the fair value would be. How come this isn't binding because it's an obvious joke-- it's too good of a deal to be true-- yet this one is legally binding?

**STUDENT:**

Because in-- well, in *Lefkowitz* there was that expectation-- a reasonable person would expect that they-- if you come first when it's first come, first served, that you get one of the scarves. A reasonable person doesn't think they're getting a Harrier Jet.

**GEORGE GEIS:**

So we understand maybe why the store would want to do this, even though on a ratio test it's actually a better deal and maybe one we shouldn't think is very serious here. But in this one it is out of proportion. But there's got to be some other reasons. So I think the price is one, but there's some other things going on here too, aren't there? What else?

**STUDENT:**

He's flying it without a helmet.

**GEORGE GEIS:**

All right. He's not wearing a helmet.

[LAUGHTER]

He's a teenager. I mean, I think most of us, even if we were of



the Pepsi generation, looking at this from above would say this can't be a real offer. And I'm not sure that much changes if we actually have a line item for the Harrier Jet at the catalog. That seemed to be just extending the joke in a little way that that's not terribly serious.

Now let's think about this-- imagine that you've graduated. You've started your own law practice. And you are sitting around in your office one Thursday afternoon when all of a sudden Mark Zuckerberg walks into your office. And Zuckerberg says, I just saw the following video clip on YouTube and I would like your advice on how I should accept this offer. Can I accept it? And if so, how?

[VIDEO PLAYBACK]

[MUSIC PLAYING]

- Do you control a large percentage of the world's natural resources? Are there extremely tall buildings honoring your good name? Do you like to travel on your airline? Are you a billionaire?

Introducing an exciting offer for the 100 wealthiest people on planet Earth. The first \$10.5 million cell phone-- the BlackBerry 8830 world edition smartphone from Sprint. This is the same phone preferred by CEOs, innovators and influential heads of state. Designed for people who want to control the world. Maybe that's because it has state of the art features, such as a multifunction web browser, an internal global positioning system. Voice activated dialing.

- White House.

- The queen.

- Pizza.

- A multi-platform audio and video player and so much more. But we won't bother you with the details. It's powerful and fast. That's all you need to know. For a limited time, buy a BlackBerry 8830 world edition smartphone for \$10.5 million and we'll throw in your very own private island.

By itself, this extraordinary device is only \$199.99 with \$100 mail-in rebate. But the peace and serenity that a private island can offer, money can't buy. Think about it. \$10.5 million. Now, that may not sound like a lot, but we think you'll find controlling the world with this smartphone from your very own private island worth even more than the price tag.

- The BlackBerry 8830 world edition smartphone from Sprint, rated for Sprint speed, available for \$199.99. Island offer available for a limited time. Act now.

- The BlackBerry 8830 world edition smartphone from Sprint, rated for Sprint speed. Take advantage of this exclusive offer. Buy before September 29, 2007. Offer valid with \$100 mail-in rebate, two-year agreement, new service activation, and purchase of a BlackBerry data plan. Note, no matter your wealth and experience finding corporations, your island cannot be a start-up country. Exclusive offer for the world's 100 richest people available only at [Sprint.com/islandoffer](http://Sprint.com/islandoffer). Restrictions apply.

[END PLAYBACK]

[LAUGHTER]

**GEORGE GEIS:**

What are you going to tell Zuckerberg?

[LAUGHTER]

Is this a real offer? Can he accept it? You'd like to win him over as a permanent client.

[LAUGHTER]

What do you think?

**STUDENT:**

Also, there's two sides to this. One, there's a website apparently where there are maybe more terms. I think that would be a good starting place. But two, it feels like they took this way too far to just be a joke.

[LAUGHTER]

It seems different from the Harrier Jet that they like kept pushing on it instead of just mentioning it once and having a [INAUDIBLE] youth, as the casebook says, sitting in the jet.

**GEORGE GEIS:**

All right. So even near the end, in the fine print, offer limited to the world's 100 wealthiest people. So this might not be a joke. It might be a serious attempt to be bound. Sara.

**STUDENT:**

I think the fine print is really important because whereas in like the actual commercial itself you may be able to understand this as a joke, I think most of the time, even in a commercial setting, most of us understand that when you get to the really fast-speaking fine print part, that's like the real information that you need.

[LAUGHTER]

That you would tune into. So I think-- I agree with Greg, I think they're taking this way too far to a point where you may actually want to be able to pursue this.

**GEORGE GEIS:**

Serious intent to be bound-- if you're advising Zuckerberg, say

call them up and say I accept. Or maybe look at the fine print. If the fine print is consistent with what you've seen all along, say you accept. Chris?

**STUDENT:**

I think it all depends on the context in which you're watching this. I think, honestly, if I was watching that ad during a football game, I would think the whole thing was ironic even the fine print alleging to be serious. But because we're watching this in a contracts class--

[LAUGHTER]

--maybe it is [INAUDIBLE]. I don't know. I think a reasonable person would see it as a joke.

**GEORGE GEIS:**

It's a joke.

**STUDENT:**

It's a joke.

**GEORGE GEIS:**

It's not real. It's a joke. Steven.

**STUDENT:**

I agree with Chris just on that, as well as there's not been any terms on what type of island you're going to get and where's this location and how large is it. There's a lot of terms that just are completely left out.

**GEORGE GEIS:**

All right. So an island could be really, really nice. An island could be really, really lousy. We might have a little bit of a *Lefkowitz* ad part one type problem, where we're not really sure what island you're going to get. Caroline.

**STUDENT:**

Yeah, so where it says actual island may very, it could literally be a kitchen island.

**GEORGE GEIS:**

Yeah.

[LAUGHTER]

**STUDENT:**

It could be anything.

**GEORGE GEIS:**

That starts pushing the objective test and the objective understanding of island. But I mean, we'll see cases. It's not that different than the *Peerless* case in some ways if you want to try to argue for that.

**STUDENT:**

If I am one of the 100 richest people--

**GEORGE GEIS:**

Yeah, and you're going to be after we raise that legal defense fund.

[LAUGHTER]

**STUDENT:**

Yeah. I am taking this as a legit offer. I would pursue this all the way through. If I go to that website and it has photos of islands, like I am getting one of those islands.

[LAUGHTER]

It is like-- yeah, like I agree with what people were saying. It's gone too far. Like they--

[LAUGHTER]

--the price of like \$10.5 million is probably not going to buy you an island, but it's close. Like we're getting pretty close to it being a reasonable expectation.

**GEORGE GEIS:**

All right. And you're really going to like it if you've got pictures of islands like this. If you've got these little teeny islands that are small things, then maybe you might get nervous about it.

**STUDENT:**

It's not small, but it's still an island.

**GEORGE GEIS:**

I'd probably--

[LAUGHTER]

--I might have that for \$10 million, depending on where it's located. Quinn.

**STUDENT:**

I'm wondering how the reasonable person test works with this, because for all of us who think this is crazy-- if you see what Kanye West spends on some stuff, we're also like that's crazy. For people in that top tier, it is reasonable. So how do you-- is there a difference or how do we subject that--

**GEORGE GEIS:**

I mean, that's a hard question because it gets into the heart of the objective test by saying what context matters when we're thought-- when we're thinking about what a reasonable person would say. This is limited to 100 people. That's clearly the case. Do we care what the 100th richest people would think about whether it's a serious offer or not, and does that differ at all from what the average person would think?

I don't know that we can put our finger on that. It's going to depend I think a little bit about how a court objectifies the test, and what the judge is willing to do, and how far they're willing to dial back the zoom lens to figure out who we should be focusing on here.

**STUDENT:**

Oh, to Quinn's point, I think that the objective test listens and what makes it such a joke is that I think most people would say that Apple runs the world and that Blackberry hasn't been as successful.

[LAUGHTER]

I really think that that is the context of what makes it a joke.

**GEORGE GEIS:**

Yeah. So this commercial-- so that may be true now. This was an old commercial. It ran probably 10, 12 years ago. So maybe back then, people would. Nowadays, if you're trying to pitch a BlackBerry phone, maybe that is much more of a joke. Carly.

**STUDENT:**

Did any of the rich people act on this?

**GEORGE GEIS:**

I don't know of any rich people that acted. But I've got to-- these are so fun, I've got to do one more if you'll indulge me.

[LAUGHTER]

Let me make sure I can find it here. Let's see if I've got the link. All right. Here it is. Did any of you see this commercial that someone put on YouTube a couple of years ago? It involved Greenie-- Greenie. Take a look at this and see if you think it's a real offer.

[VIDEO PLAYBACK]

[MUSIC PLAYING]

- You-- you're different. You do things your way. That's what makes you one of a kind. You don't need things. You're happy with who you are.

You don't care about money. You have everything you've ever wanted. You don't do it for appearances. You do it because it works. And this-- this is not a car. This is you. It's a lifestyle, a choice. Your choice.

Introducing a used 1996 Honda Accord, the car for people who have life figured out and just need a way to get somewhere. Luxury is a state of mind.

[END PLAYBACK]

[LAUGHTER]

**GEORGE GEIS:**

Is that an offer? Can you accept that? What do you think?

**STUDENT:**

So I like everything except for the starting at \$499. I feel like that is actually the rock bottom.

[VIDEO PLAYBACK]

- Locking your keys inside the car.

[END PLAYBACK]

**GEORGE GEIS:**

Oops.

[LAUGHTER]

This is really dangerous, isn't it, playing YouTube.

[LAUGHTER]

Playing YouTube ads when we're recording the class.

[LAUGHTER]

**STUDENT:**

I'm not sure [INAUDIBLE] But I mean, if it said at \$499, I will sell you this green Accord, I don't think that was enough of a joke to actually negate the offer. But the starting ad is the lock bottom.

**GEORGE GEIS:**

And why does that bother you?

**STUDENT:**

Because it's merely an invitation to start negotiating. That's like the rock bottom in [INAUDIBLE].

**GEORGE GEIS:**

So if you saw that and you said, I accept, should you think that the power to accept had been conveyed over to you? Maybe not, right? Maybe it's like some of our earlier cases where you didn't quite have the power to just say I accept and know that you were done with it.

Rather we should understand this like our real estate listing cases where you're putting this out there, I'm selling this. Make me offers, I'll probably accept. Start at a certain price. That's my minimum. But I want to hear what offers are going to come in on Greenie and then I'll decide whether or not we'll take those offers or not. I think that's probably right. They got a response.

[VIDEO PLAYBACK]

- To the guy who posted the video for the 1996 Honda Accord and his girlfriend, now fiancée--



[END PLAYBACK]

**GEORGE GEIS:**

I'm sorry.

[VIDEO PLAYBACK]

- To the guy who posted the video for the 1996 Honda Accord and his girlfriend, now fiancée, I've been authorized by CarMax to make a legal and binding offer for Greenie, the aforementioned Accord. Now, CarMax doesn't play games, haggle, or pull the wool over anyone's eyes. And with our same price for everyone policy, we can't-- nay won't-- get into a bidding war for the car.

But believe me when I tell you that your commercial has made a 1996 Honda Accord size hole in our heart. And we will not rest until we filled it. So here's what we're prepared to offer. We'll buy the Accord, obviously. We'd also like to buy the cat for \$5,000.

[LAUGHTER]

We're cat people. That old passenger seat coffee pot, we want it. Let's say \$3,500. Mexico mug-- need it. \$2,000. Also, your fiancée's fuzzy sweatshirt jacket thing looks comfy, so let's call it another couple of cozy geez. And at the end when she's eating a sandwich on the cliff at sunset, if there's any leftover, we want that too. We'll give you \$500. \$400 if it has mayonnaise. That's right. We want it all.

Our offer-- let's round up and call it \$20,000. This offer is redeemable at any of our 188 CarMax locations for the next seven days like all our written offers. The Mexico mug is non-negotiable. The cat is optional. At CarMax, we buy all the cars. And sometimes the jackets and sandwiches too.

[END PLAYBACK]

**STUDENT:** Wow.

**GEORGE GEIS:** Is that an offer? Can she go back and say I accept? And if you're nodding, how come? How do we know?

**STUDENT:** It's specific.

**GEORGE GEIS:** It's specific.

**STUDENT:** It was directed to her.

**GEORGE GEIS:** It was directed at her. Was it serious? Was it a serious intent to be bound or was this CarMax joking around?

**STUDENT:** I think a reasonable person could interpret that being serious.

**GEORGE GEIS:** All right. So she sees it. She sees Greenie. She thinks it's serious.

**STUDENT:** What about the [INAUDIBLE] music, the strange offer inside a YouTube video and--

[LAUGHTER]

They're in the actual business of buying cars, though. That's great advertisement just for them, so that's kind of why they could take it as being serious.

**GEORGE GEIS:** Yeah.

**STUDENT:** Yeah, I liked something that was said in the PepsiCo case. They said if a person makes extravagant promises, he probably does so because it pays him. An extravagance of the promise is no reason in law why it shouldn't be bound. They're doing it obviously for the publicity and they're making far more than \$20,000 by making this.

**GEORGE GEIS:** So you see a reason why they might be doing it, like the first store might be doing it in the second ad perhaps. It's a good

offer, but they're enjoying the publicity. May I ask for a vote? How many of you think this is a serious offer and the seller of Greenie could go back to CarMax and say, I accept your offer? Almost everybody. Guess what-- they did.

[LAUGHTER]

They said, we accept. And CarMax said, OK, and they concluded the deal. Everyone asks, did she sell the cat?

[LAUGHTER]

\$5,000 is \$5,000.

[LAUGHTER]

CarMax didn't actually make her sell the cat. It said, we're going to donate the \$5,000 on top of everything and you don't have to sell the cat. So she got the \$20,000 and she got to keep the cat as well. But I like that example, because we've now run the gamut from a complete joke, I think, in the Pepsi case, all the way to a situation where you could conceivably have a video be an offer.

But I think it's got to be something like that. And I think all of us see that may or may not be serious. We can debate it. But probably it seems serious. We can understand why. It was specific. It was directed at a single person, not anybody. So maybe in circumstances like that, we can understand that and did understand it legally, I think, as being a real offer. Yeah.

**STUDENT:**

Does the fact that they said this is a legally binding offer that we actually wanted to make have any effect on that? Like they said clearly we actually mean this.

**GEORGE GEIS:**

Yeah.

**STUDENT:**

Does that have--

**GEORGE GEIS:**

I mean, I don't think it hurts if you're trying to make out an objective test argument that it's an offer. Now, the PepsiCo case, Connor, said offer not available in all places. Offer not available. They called it an offer there too, right? Does that make it an offer?

**STUDENT:**

No, probably not.

**GEORGE GEIS:**

Probably not. So I don't think it's dispositive. And that actually might cut the other way, right? If it's not available in all places, how do you know it's available to you, Leonard? So I don't think the fact that you call it an offer means it's over, but I think the fact that they said they were making an offer would at least to me lead it to be more of a reasonable serious thing that they're doing.

All right. Let's try the case of the his and her Mercedes on page 233. This is another example of one of those sneaky insurance companies trying to get out of a contest. Let me set out the facts, then I want to give you about 30 seconds to talk this over with your neighbor and see if you can come to a resolution.

We have an insurance company that decides it's going to sponsor a contest. And they say that if one of the employees picks the best new slogan, then-- and they decide that they're going to use the slogan, then, quote, "Here's what you could win. His or her Mercedes, an all expense paid trip for two around the world, additional prizes to be announced. All prizes subject to availability."

Mears submits the slogan, "At The Top and Still Climbing." The insurance company picks the slogan and uses it for all of their various advertising events at the convention. However, they tell Mears, we're sorry, the Mercedes are not available. Here are some restaurant gift certificates that you can have instead.

Take a minute or two and talk it over with your neighbor. And try

to figure out does Mears have a good argument that there's been an offer and acceptance here that should entitle Mears to the cars or to some other lucrative prize?

[SIDE CONVERSATION]

All right. Let me stop you here. How do we resolve this situation? Do you want to take up the case for Mears or should Mears just go out to dinner and enjoy his gift certificates at his restaurant? What would we argue? Sam.

**STUDENT:**

I'll take up the case for Mears.

[LAUGHTER]

So I'd say in this case here that when he submitted the slogan, that constituted the offer. And when Mercedes told him-- or the insurance, I guess-- told him that he won the contest and would receive a Mercedes, that constituted the acceptance. Then the insurance used the slogan for their convention but didn't perform their end of that legally-binding contract. Therefore, they're in breach. The advertisement is not the offer, though. So that's-- that would be-- so in this then Mears is perfectly entitled to the cars.

**GEORGE GEIS:**

Later he was informed that he had won the contest and was told that he won two Mercedes-Benz automobiles. And so you don't see that here's what you could win languages as limiting things at all.

**STUDENT:**

No, because that's not the offer.

**GEORGE GEIS:**

Other thoughts? Chris?

**STUDENT:**

I see this as really similar to the hole in one case that we spent a lot of time on last time. Except it's even clear because in this case the car dealership sees the hole in one, goes yep, you win

the car, and then goes ha, ha, no, just kidding. So I see it as-- I don't know that-- I think this is an offer with conditions. He fulfills the conditions. Then the company recognizes that the condition was fulfilled and then backs out.

**GEORGE GEIS:**

What do we make of the-- here's what you could win-- all prizes subject to availability. Phil.

**STUDENT:**

I think a reasonable person would read that to mean you could win these prizes if your slogan is selected. So a reasonable person would expect that they would not put a prize in this list that they had no intention of giving. Because that's just not reasonable I don't think.

**GEORGE GEIS:**

Who decides whether a prize is available? Steven?

**STUDENT:**

Well, my thing is like later on after he's told when they said these are the prizes you're going to get, it's like they additionally went on and specifically stated these are the prizes out of that pool that you're now going to get for having won this contest. Like if they had said, you won the trip around the world instead, then that's what they would have been obligated to do.

**GEORGE GEIS:**

But you think the fact that they actually made a statement along those lines-- I mean, I think that's to Sammy's understanding, too, of when it happened. Or maybe the contract was created first and this is now something that's happened after the fact. Christoff?

**STUDENT:**

I'm just wondering how these prizes couldn't be available, because it's one person winning, right?

**GEORGE GEIS:**

Yeah.

**STUDENT:**

So they have the prize or they don't have the prize. So they were lying or--

[LAUGHTER]

--they had a car at the beginning.

**GEORGE GEIS:**

I mean, available is a pretty slippery word. CeeCee, how do you see it?

**STUDENT:**

Well, I think that's why I'm confused because when they try to back out, they say that he might not receive it because the theme might change not because the cars aren't available. And then they go ahead and use his thing anyways.

**GEORGE GEIS:**

So does that argue that Mears should get the car?

**STUDENT:**

I think so.

**GEORGE GEIS:**

Yeah, so here's how the case came out. The jury found for the plaintiff-- found for Mears. The court basically reversed-- JNOV'd the case and said, nah, sorry, these weasel words are enough that they're going to let the insurance company back out.

Appellate court reinstated the case for the plaintiff and Mears got his car. Now, this may stretch the language of the objective test a little bit, because to me those words that-- availability and here's what you could win-- are almost like a [INAUDIBLE] provision that we talked about. But that's not how the appellate court saw this case.

Let me try to pull this together by talking a little bit more about the acceptance of an offer and where we're going to go next time. We've now talked through what it takes to have a legally binding offer. You've got to have something that basically gives you the power to say I accept and know that you're done with it. Next, we're going to turn to talk about what it takes to actually accept the offer. Once you've got an offer, how do you accept it?

Now, remember again, that the place to start is by looking at the

terms of the offer itself. Masters-- the offeror is master of the offer. If you're making the offer and you want to dictate exactly how acceptance must happen, you've got the right to do it.

Remember I offered [INAUDIBLE] my house if he's willing to flip up on a handstand and come down and accept it. That's how he's got to do it. He doesn't have to do that, of course. He doesn't need to accept my offer, but he wants to accept my offer. You want to start by looking at the very terms of the offer itself.

Now, beyond that, though, there are often three ways that you might accept. You can often accept by a return promise. I accept your offer. You might be able to accept by a return performance. Or in some cases, you might be able to accept by silence. And you say, ah, how could I ever accept an offer by silence? But you'll have to wait till next week. We'll talk about that tomorrow.