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## Conditional Offer Implied From A Request To Submit Proposals

*Arden v. Freydberg*<sup>1</sup>

Plaintiff, an independent insurance agent, was asked to devise a plan of life insurance to meet the specific problems of the defendants and their associates in certain corporate enterprises. After the plan was submitted, insurance consultants were called in to review the problem and the defendants orally promised plaintiff that the insurance would be placed through him. Thereafter, plaintiff was told that defendants would use his exact plan but were going to place the insurance through another agent, an officer of defendants' firm who acquired an insurance license for the sole purpose of writing this business. Plaintiff brought suit for breach of contract for an amount equal to the commissions he would have received on the policies had they been placed with him. He alleged that defendants, when they requested a plan, implied that insurance would be placed through plaintiff if the plan were accepted, and he also argued that defendants were liable on the subsequent oral promise. The trial court rendered an amended judgment for plaintiff from which an appeal was taken. The Appellate Division reversed on the law and the facts,<sup>2</sup> and the plaintiff appealed. In a 4-3 decision sustaining the Appellate Division, the Court of Appeals of New York held that the agent did not make out a case of an enforceable contract. The majority ruled that at the time plaintiff was asked to submit a plan, defendants made no promise, express or implied, to buy the insurance from plaintiff. Although subsequent to plaintiff's submission of the plan, assurances were given him that he would be the recipient of the business, the Court said "[s]uch assurances, although in the nature of promises, came too late to benefit the plaintiff. He had already performed what he had undertaken to do. His past performance, although rendered upon request, afforded no consideration for the belated oral promises."<sup>3</sup>

The dissenting judges stated that the case should be remanded for a new trial. In their opinion defendants impliedly promised to buy insurance policies through plaintiff if he submitted an acceptable plan.

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<sup>1</sup> 9 N.Y. 2d 393, 174 N.E. 2d 495 (1961).

<sup>2</sup> 201 N.Y.S. 2d 151 (1960).

<sup>3</sup> 9 N.Y. 2d 393, 174 N.E. 2d 495, 497 (1961).

Normally the compensation an insurance agent receives is commissions if and when insurance is placed with an underwriter. He submits no bills for time spent negotiating the policy, nor does he usually charge a fee for consultation. Thus, unless he is entitled to commissions for acting as agent between the customer and the insurer, he is not entitled to anything. The question is then, when does he become entitled to commissions. Is the appropriation and use of his plan by the purchaser enough, or must he prove more in order to sustain an action?

Most courts have taken a very strict view and have said that he is not entitled to commissions unless the contract expressly designates him as agent.<sup>4</sup> One court has said, "[t]he law is clear, an insurance purchaser may employ a new broker *at any time*."<sup>5</sup> (Emphasis supplied.) This rule has worked hardship in several cases. For instance, an insurance company permitted the customer to designate a different agent just at the time of signing the insurance contract. The first agent had literally done all the negotiating and the work preparatory to the sale of the policy, but his right to compensation for that work was effectively cut off by the last minute change of name.<sup>6</sup> There, as in the *Arden* case, the plaintiff's plan was appropriated but that fact was insufficient to sustain a cause of action in contract.

There is, however, a valid argument that an agent should be entitled to commissions when he has his plan appropriated.<sup>7</sup> This argument is based on the theory of implied contracts. The process of implication is one of interpreting the promisor's words and conduct in view of the surrounding circumstance which involves the mak-

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<sup>4</sup> *E.g.*, *Erlin v. National Union Fire Ins. Co.*, 217 Cal. 374, 18 P. 2d 660 (1933); *Cronin v. National Shawmut Bank*, 306 Mass. 202, 27 N.E. 2d 717 (1940); *Clinchy v. Grandview Dairy*, 283 N.Y. 39, 27 N.E. 2d 425 (1940). There seems to be no Maryland Court of Appeals cases on the issue of when an insurance agent is entitled to commissions.

<sup>5</sup> *Hanley v. Marsh & McLennan* — *J. B. F. Davis & Son*, 46 Cal. App. 2d 787, 117 P. 2d 69, 73 (1941).

<sup>6</sup> *Clinchy v. Grandview Dairy*, *supra*, n. 4.

<sup>7</sup> In *Gunderson v. North American Life & Casualty Co.*, 248 Minn. 114, 78 N.W. 2d 328 (1956), an insurance agent negotiated an insurance contract which, on request of the customer, was then placed through another established agent of the same insurance company. Plaintiff recovered the commissions for the sale in a suit against the insurance company on the theory that he had consummated the sale. This decision applies a concept familiar in real estate brokerage law, but it is a lone decision in the field of insurance. See Anno. 88 A.L.R. 716 (1934). No space has been devoted to the discussion of the merits of this decision because this note examines primarily the transaction between the agent and the purchaser rather than that between the agent and the insurance company.

ing of logical and factual inferences. The aim of the process is to determine the promisor's intention, i.e., whether he intended a promise but did not express it in promissory words.<sup>8</sup> Thus, when an action is taken by one who intended to charge, at the request of one who intended to pay, there is by implication a unilateral contract in its simplest form. The request for service is the sole assertion of the intention to pay, and as such, it is the single factor from which a promise to pay is implied. For example, A requests B, a professional gardener, to mow his lawn. B mows the lawn and when A refuses to pay, B has an action for breach of a contract. Nothing was expressly said about a promise to pay, but any reasonable man would find such an intention expressed in A's conduct. This type of transaction is a common occurrence, and the legal result is a clear one.

Equally common in today's business world is the request by a prospective customer for the services of an insurance agent, an interior decorator or an architect. The initial request is for them to furnish plans and estimates of cost. Whether this request shows an intention to pay is not as clear as in the lawn mowing case. There probably is no intention to pay for merely the submission of the plans. Nor is there an intention to be bound to take any plan at all. Perhaps the request is an offer that if any plan is suitable its writer shall be employed to oversee construction of the project in the case of an architect; to decorate the office in the case of an interior decorator; or, in insurance, to secure an underwriter for the plan. Thus, it may be argued that a promise to employ the agent conditioned upon the plan being satisfactory and acceptable to the customer may be implied from the request for proposals.<sup>9</sup> Interpreting the request in this way would not seem foreign to the intentions of potential customers. Their motive is to get good ideas from the salesmen, and offering employment as a reward for the best idea is the incentive to this end. Actual acceptance of the plan amounts to an assertion by the customer that the plan satisfied the condition of the offer. Thus, when a prospective customer uses the plan but does not compensate the writer of it, the agent should be allowed to sustain a suit for breach of contract and recover in damages an amount equal to the commission.

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<sup>8</sup> 3 CORBIN, CONTRACTS (1960), Ch. 25, p. 276.

<sup>9</sup> See RESTATEMENT OF AGENCY 2d § 441, p. 1027, Comment (a) for illustrations of conditional offers in situations similar to the insurance one.

In Massachusetts and in California, however, the courts have not interpreted the request for submission of proposals as a conditional offer. They hold that a request for proposals is a mere request for offers and not an offer itself.<sup>10</sup>

Perhaps courts which have considered the problem have refused to raise an implied agreement for reasons apart from strict contract interpretation.

One good reason may be that this sort of implied promise has never been effectively argued. In *Cronin v. National Shawmut Bank*,<sup>11</sup> the plaintiff-agent argued that defendant impliedly promised "that if the proposal submitted . . . should be the lowest or most advantageous to the defendant, it would be accepted. . . ."<sup>12</sup> In the instant case, plaintiff argued that defendants impliedly promised to buy insurance policies through plaintiff if he would devise a corporate life insurance plan for them and other stockholders that would solve the corporate and the defendants' problem. A similar promise was argued in *Hanley v. Marsh & McLennan — J. B. F. Davis & Son*.<sup>13</sup> These promises are conditional, but the condition to be satisfied as a precedent to a contract is an event over which the customer has no control. The prospective customer does not make an offer to be bound on the happening of such a condition. He intends to reserve the right to be influenced by matters other than mere rates and terms. The advantage of the solution offered herein is that the customer controls the happening of the condition. He reserves the absolute right to be satisfied. However, once he unequivocally manifests his satisfaction by accepting a plan, he should not be allowed to say he did not intend to incur an obligation to pay for it.

Another reason why courts may have been reluctant to imply the type of promise urged herein is for reasons of

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<sup>10</sup> See *Erlin v. National Union Fire Ins. Co.*, 217 Cal. 374, 18 P. 2d 660 (1933) and *Cronin v. National Shawmut Bank*, 306 Mass. 202, 27 N.E. 2d 717, 721 (1940). In the latter case, the Court distinguished the real estate situation from that of insurance. The Court said:

"There is nothing in the evidence to show the existence of a business custom or usage that the insured should pay an insurance broker's commission similar to the general practice out of which the legal implication of an offer by the real estate owner to the real estate broker originally sprang."

See *Heslop v. Dieudonne*, 209 Md. 201, 120 A. 2d 669 (1956) for conditional offer in the real estate law in Maryland. See also 1 Md. CODE (1957) Art. 2, § 17.

<sup>11</sup> *Supra*, n. 4.

<sup>12</sup> 306 Mass. 202, 27 N.E. 2d 717, 720 (1940).

<sup>13</sup> 46 Cal. App. 2d 787, 117 P. 2d 69, 73 (1941).

public policy. For instance, the court in the *Arden* case said:

“To hold that circumstances such as here described give rise to an enforceable contract for payment of commissions on policies of insurance to be written would open the door to an entirely new field of liability.”<sup>14</sup>

There seems to be the further feeling in the decisions that if courts make implied agreements for parties where there is some doubt as to what the parties intended, there will be an interference with the freedom of contract. Courts have said that purchasers should be free to change agents whenever they want.<sup>15</sup> In New York this policy has been embodied to a limited extent in a statute requiring that certain types of insurance brokers' claims for compensation be based on written memoranda.<sup>16</sup>

It is, however, submitted that in making an effort to preserve the freedom of contract and the right of prospective customers to deal with whom they desire, the courts have permitted them to abuse their privileges. The decisions have resulted in a judicially enforced Statute of Frauds. Under the present decisions, an insurance agent, in order to be protected, must, before submitting any proposals, exact from the prospective customer a promise that he will be employed if a proposal is used. While some salesmen have sometimes succeeded in obtaining similar promises,<sup>17</sup> it is believed that most prospective customers would be unwilling to so commit themselves.

Other remedies an agent may have are difficult to prove, and recovery is inadequate.<sup>18</sup> Hence the proposition that

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<sup>14</sup> 9 N.Y. 2d 393, 174 N.E. 2d 495, 496 (1961).

<sup>15</sup> *Supra*, ns. 4 and 5.

<sup>16</sup> “No insurance broker shall have any right to compensation other than commissions deductible from premiums on insurance policies or contracts, from any insured or prospective insured for or on account of the negotiation or procurement of, or other services in connection with, any contract of insurance made or negotiated in this state, unless such right to compensation is based upon a written memorandum, signed by the party to be charged, and specifying or clearly defining the amount or extent of such compensation.” 27 MCKINNEY'S NEW YORK CONSOL. LAWS (1949) § 129. Maryland has no corresponding statutory provision.

<sup>17</sup> For similar situations where the plaintiff has been an unsolicited salesman see *Masline v. New York, N.H. & H.R. Co.*, 95 Conn. 702, 112 A. 639 (1921); *Singer v. Karron*, 162 Misc. 809, 294 N.Y.S. 566 (1937).

<sup>18</sup> A quasi-contractual recovery is not satisfactory because of the speculative nature of damages. See discussion in *Cronin v. National Shawmut Bank*, 306 Mass. 202, 27 N.E. 2d 717, 722 (1940). The measure of damages in such a case is the amount of unjust enrichment. It is interesting to note that defendants offered to pay plaintiff in the *Arden* case a relatively small sum for his ideas. *Arden* refused to take it. Agents can try

an implied agreement, based on acceptance of the agent's plan, is necessary to afford him some semblance of adequate protection. This is not to suggest that an agent should have a cause of action for every useful bit of information he reveals and which is later used by customers. He, of course, must bear the normal risks of not being able to make a sale. But if a prospective customer abuses the agent's services by appropriating a valuable proposal (as in the instant case), an agreement should be implied. If the courts continue not to recognize such a promise as a matter of policy, then should not the legislature enact a statute similar to that in the real estate area<sup>19</sup> to at least clarify the agent's rights.

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to sue for conversion of ideas in a situation such as here, but courts have been very reluctant to recognize a property right in ideas. Even in the jurisdictions where recovery is allowed, an agent must prove that his idea was original, concrete and useful. An agent in the typical insurance situation would probably be unable to meet this burden of proof. For a discussion of the right to compensation for the unsolicited disclosure of business ideas see NOTE, *Compensation For Unsolicited Disclosure of Business Ideas*, 21 Md. L. Rev. 139 (1961).

<sup>19</sup> 1 MD. CODE (1957) Art. 2, § 17.