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THE OPTION CONTRACT: IRREVOCABLE NOT IRREJECTABLE

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Section 37 of the Second Restatement of Contracts states in pertinent part: “Notwithstanding [Sections] 38 [to] 49, the power of acceptance under an option contract is not terminated by rejection or counter offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.”¹

This statement represents the majority position with respect to the possible termination of an option contract² by the rejection or counter offer of the offeree/optionee.³ However, the Restatement’s approach and the concomi-

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1. RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979). Although this section is purportedly derived from section 47 of Restatement (First), it represents a marked departure from the original Restatement, which did not carve out special treatment for irrevocable offers or option contracts. *See id.* § 37 reporter’s note. In fact, section 47 involved termination by the offeror alone, and in no way even referred to the ability of the offeree to terminate. Consequently, section 37 is derivative only to the extent that it references the optionor’s inability to terminate, and it fails to establish even a historical justification for its premise. *See* RESTATEMENT OF CONTRACTS § 47 (1932).

2. The model arrangement envisioned as an option contract herein would simply involve a promise by A to sell B a parcel of land for a fixed sum of money, with a collateral promise to hold the offer open for a fixed period of time in exchange for some consideration (normally much less than the price of the subject property). Of course, there are numerous variations on this theme, many of which satisfy the broad definition of an option contract. *See infra* notes 57-64 and accompanying text.

3. For a comprehensive discussion of the majority and minority precedents, see *infra* notes 78-175 and accompanying text. Further, this Article will discuss the functional equivalent of a rejection and counter-offer at common law and possible points at which these terms differ. *See infra* notes 7, 40-56 and accompanying text. Finally, the terms “optionee” and “offeree” will be interchanged throughout this article.

tant judicial authority misperceive the purposes underlying an option contract. Moreover, they inappropriately vitiate application of traditional offer and acceptance principles in the context of the rejection of an offer rendered irrevocable by the securing of an option.⁴ An option contract generally creates an insulated time period within which the offeror surrenders his common law right to revoke prior to an acceptance. Yet, under no circumstances should such irrevocability presume to foreclose the termination of the offeree's power of acceptance either by outright rejection or by a counter-offer operating as a rejection.

An option contract should protect the optionee from an untimely revocation by the offeror, but should not operate to subvert traditional contract principles with respect to the offeree's prerogative to terminate the offer.⁵ A rejection or counter-offer that terminates a revocable offer should likewise bar acceptance of an irrevocable offer.⁶

Under the approach advanced herein, for example, if A, for consideration, extends an irrevocable offer to B for a designated period of time, and B rejects the offer outright, a subsequent acceptance, even one within the time frame covered by the option, would be ineffective. The rejection would terminate the offer, and the optionee's post hoc acceptance would represent nothing more than a new offer. Certain counter-offers would also operate as rejections and preempt subsequent acceptances.⁷

4. For example, some commentators suggest that the option contract, in effect, creates an irrevocable offer and that courts should address issues arising under the option contract under traditional offer and acceptance approaches. *See, e.g.,* J. CALAMARI & J. PERILLO, *CONTRACTS* § 2-25 (3d ed. 1987). These commentators quickly add that the rules change with respect to termination of the irrevocable offer embraced in an option. *Id.* Yet, little satisfactory explanation exists to explain why the rejection should not terminate the irrevocable offer much the same as it aborts the power of acceptance of a revocable offer. The crux of the problem lies in the option agreement's "dual nature" (i.e., both an offer and completed contract) which has caused courts no small amount of difficulty. *See, e.g.,* Palo Alto Town & Country Village, Inc. v. BBTX Co., 11 Cal. 3d 494, 521 P.2d 1097, 113 Cal. Rptr. 705 (1974). *See further infra* notes 57-64 and accompanying text.

5. *See generally* A. FARNSWORTH, *CONTRACTS* §§ 3.10, 3.20 (1982); J. CALAMARI & J. PERILLO, *supra* note 4, § 2-20.

6. The option contract's predominant purpose is to "freeze" or "preserve" an offer for a prearranged or reasonably inferred period of time. *See infra* notes 57-59 and accompanying text. Thus, those triggering devices that would terminate an offer rendered irrevocable by an option clearly do not include revocation. However, the predicate for disqualifying rejection as a terminator of an irrevocable offer has never been fully explicated; indeed, the conclusion thus drawn defies logical analysis.

7. Traditionally, a counter-offer serves as a rejection of the offer and terminates the power of acceptance because it reflects the offeree's unwillingness to accept the original terms of the offer. By dint of the "mirror image" rule, any deviation from the letter of the offer will render the offeree's response a nonacceptance and, under appropriate circumstances, a counter-offer/rejection. *See* United States v. Marietta Mfg. Co., 339 F. Supp. 18 (D. W. Va.

Under the predominant view, a rejection terminates the offer only if the original offeror has changed his position in reliance upon such rejection.⁸ However, this approach is far too limited and, in fact, represents the frailty and counter-intuitive nature of the majority position.⁹ Indeed, requiring the optionor to demonstrate reliance makes the option contract offer irrejectable as well as irrevocable. Such a construction disserves the optionor who typically has only agreed to hold his offer open for a designated or reasonable period of time, unless, of course, the parties to the option contract clearly manifest in the option itself that the optionee's rejection will not terminate the option, and the parties support this provision with consideration. Moreover, this oblique interpretation plainly distorts the rules of offer and accept-

1972); *Gyurkey v. Babler*, 103 Idaho 663, 651 P.2d 928 (1982); *Radio Picture Show Partnership v. Exclusive Int'l Pictures*, 482 N.E.2d 1159 (Ind. App. 1 Dist. 1985); *Rose v. Guerdon Indust. Inc.*, 374 N.W.2d 282 (Minn. App. 1985); *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915), *reh'g denied*, 216 N.Y. 771, 111 N.E. 1098 (1916); A. FARNSWORTH, *supra* note 5, §§ 3.13, 3.20, 3.21. *But see infra* notes 44-46 and accompanying text.

Admittedly, an approach that requires termination of the offer in the face of any response varying slightly from such offer presents potentially harsh consequences, especially in the context of option contracts. Therefore, this Article suggests a regime that represents broad adherence to traditional contract principles governing offer and acceptance, with an attendant sensitivity to the peculiar nuances of the option contract. Such an accommodation dictates that not all counter-offers at common law should operate to terminate the irrevocable offer notwithstanding any continuing vitality or smoldering vestige of the mirror image rule. Certainly, any proposed regime requiring termination of the irrevocable offer by rejection would not apply to situations in which the offeror or offeree manifests an intent to retain the power to accept notwithstanding the tendering of a counter-offer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 38(2) comment b, § 39 comments b & c (1979); *Collins v. Thompson*, 679 F.2d 168 (9th Cir. 1982); *Radford & Guisne v. Practical Premium Co.*, 125 Ark. 199, 188 S.W.562 (1916); *Katz v. Pratt St. Realty Co.*, 257 Md. 103, 262 A.2d 540 (1970). Likewise, the proffered revision of section 37 would not include within its definition of counter-offer grumbling acceptances, counter-inquiries, suggestions, requests for clarification, and similar responses that do not manifest the offeree's intent to advance a substitute bargain. In truth, neither of these examples would disturb even a strict application of the mirror image rule. Finally, however, in a clear departure from the mirror image rule, an optionee's response that constitutes a definite and seasonable acceptance of all material terms, but includes additional or varied terms, will not be deemed a counter-offer under the proposed revision of section 37. In this sense, the proposed approach echoes section 2-207(1) of the Uniform Commercial Code and its partial imitator, section 61 of the Second Restatement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 61 (1979). *See also* A. CORBIN, CORBIN ON CONTRACTS § 82 (1963). Of course, any acceptance made conditional upon the offeror's assent to additional or varied terms will constitute a counter-offer terminating the offeree's power of acceptance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979); U.C.C. § 2-207(1) (1977). In sum, this Article suggests a revamping of section 37, but favors retaining the remaining provisions of the Second Restatement as they pertain to the definitions of counter-offer and the abrogation of the mirror image rule. *See infra* notes 44-46 and accompanying text.

8. *See, e.g.,* *Ryder v. Wescoat*, 535 S.W.2d 269, 271 (Mo. Ct. App. 1976); *Axelrod, The Effect of Rejection on the Option Contract*, 6 OKLA. CITY U.L. REV. 415 (1981); *Harding, Contracts*, 23 SW. L.J. 113, 114 (1969). *See infra* notes 122-33 and accompanying text.

9. *See infra* notes 131-33 and accompanying text.

ance without adequate predicate in law and without the parties' demonstrable agreement.¹⁰ Most important, because the offer will lapse upon expiration of the option period, the majority's position amounts to an assertion that one cannot reject an option. That is, if the optionee (absent the optionor's reliance) can recant his rejection any time within the option period, and thus surrenders his acceptance prerogative only when the option expires, "rejection" in the traditional sense of that term becomes a dysfunctional concept.

This Article briefly examines the traditional contract principles governing offer and acceptance, particularly the various means to terminate an offer. It also explores the special circumstances governing option contracts and similar mechanisms utilized to transform a revocable offer into an irrevocable one. Further, this Article reviews Restatement (Second) Section 37 and case law that addresses the question of whether a rejection should terminate an irrevocable offer. It explains why the view articulated by section 37 and its decisional predicates are untenable. Finally, this Article presents an alternative to section 37 that reflects logical compliance with established contract formation principles, while doing no violence to the legal and practical considerations attending the creation of typical option contracts.

I. FORMATION OF THE CONTRACT

A. Offer and Acceptance Generally

The Restatement (Second) of Contracts broadly defines an offer as the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."¹¹ Professor John Murray describes the offer/acceptance scenario as a susceptibility-power relationship.¹² The impact of an offer lies in its grant to the offeree of the legal power to close the deal. When the offeror extends the offer, he becomes susceptible to the offeree's ability to

10. Again, the questions governing the rejection and subsequent acceptance of an irrevocable offer, or an offer embraced by an option contract, are properly matters of offer and acceptance. However, in theory, the option contract may constitute an independent agreement wherein the optionor assumes a duty not to revoke in exchange for the optionee's payment of consideration. Therefore, some may posit that the rejection question requires analysis under a performance approach. In this scenario, the rejection arguably is nothing more than a type of waiver, ineffectual absent new and independent consideration. *See infra* notes 271-310 and accompanying text. Notwithstanding the technical feasibility of this argument, the option contract functions as an irrevocable offer and all questions surrounding the acceptance or rejection of such offer should be addressed under formation, not performance, principles. *Id.* Moreover, even under a performance analysis, the conclusions reached herein are undisturbed. *Id.*

11. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979).

12. J. MURRAY, MURRAY ON CONTRACTS § 33 n.60 (3d ed. 1990).

create a legally enforceable contract. Thus, Professor Murray employs the phrase susceptibility-power rather than the traditional terminology "power-liability."¹³ Acceptance, the method of closing the circle of assent, simply represents a "voluntary act of the offeree whereby he exercises the power conferred upon him by the offer and thereby creates . . . a contract."¹⁴

Myriad problems emerge in ascertaining whether an offer is susceptible to an acceptance or invites an act that will conclude the transaction.¹⁵ For example, courts have wrestled perennially with the distinctions between true offers and preliminary negotiations, physicians' opinions, and offers to accept offers.¹⁶ Language of commitment, identity of the offeror and offeree, and specificity in terms of quality, quantity, and overall description of the goods or services illustrate some of the factors considered in drawing these often subtle distinctions.¹⁷ Other factors, such as an offeror's reservation of the right to approve the ultimate "agreement," or suggestions by a putative offeror that an offeree has no power to consummate the contract, may shed light on the determination of whether a particular proposal rises to the level of an offer. Yet, one cannot, without difficulty, predict the weight a court will accord each factor in resolving these questions.¹⁸ To say that it will

13. *Id.* See also Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

14. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 199 (1917).

15. See, e.g., A. FARNSWORTH, *supra* note 5, §§ 3.6, 3.10.

16. See, e.g., *Dooley v. West*, 210 F. Supp. 239 (W.D. Ark. 1962); *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1921); *Anderson v. Board of Pub. Schools*, 122 Mo. 61, 27 S.W. 610 (1894); *Millone Tucci v. BonaFide*, 49 Wash. 2d 363, 301 P.2d 759 (1956).

17. See generally J. CALAMARI & J. PERILLO, *supra* note 4, §§ 2-5, 2-6.

18. Comprehensive research yields evidence that the differentiations are often quite artificial and of little predictive value. For example, in the context of newspaper advertisements, compare *Lefkowitz v. Great Minneapolis Surplus Store*, 251 Minn. 188, 86 N.W.2d 689 (1957) (newspaper advertisement qualified by the words: "First Come, First Served," found to be an offer) with *Craft v. Elder & Johnston Co.*, 38 N.E.2d 416 (Ohio Ct. App. 1941) (newspaper advertisement held to be merely an invitation to deal). See also *Glen Marshall, Inc. v. Purolator Filter Div.*, 211 Neb. 306, 318 N.W.2d 284 (1982). Unfortunately, judicial opinions in this area frequently reflect post hoc, outcome-determinative decision making with attendant infirmity in the offered rationale. Courts generally consider those factors listed above when attempting to ascertain whether a particular proposal forms an offer rendering the offeror susceptible to an acceptance, or merely constitutes a preliminary foray into the negotiation process inviting no such acceptance. However, to suggest the application of any precise formula to evaluate the relative strengths of each of those factors in a particular case is a hopeless exercise. As Professor Murray has stated:

If a statement is sufficiently definite and there is a manifestation of commitment, a promise designed to induce action or forbearance which the promisor desires, an offer exists Even this reliable guide, however, must not be viewed algebraically Two or more courts could apply the suggested guide to virtually identical fact situations and arrive at opposite conclusions. There is no mathematical formula that promises a certain and just result in all cases.

vary from case to case or jurisdiction to jurisdiction vastly understates the idiosyncratic methodology of differentiating an offer from a nonoffer.

Once a court concludes that an offeror has made an offer, the next step entails identifying the character of the offer in order to determine whether a particular response constitutes a valid acceptance.¹⁹ If an offer explicitly seeks performance as its mode of acceptance, then generally a promise to perform will not consummate the transaction.²⁰ Similarly, the beginning of performance ordinarily will not constitute an effective acceptance of an offer that plainly seeks to elicit a promise.²¹ Of course, undertaking performance may be deemed an implied promise to complete, especially where the partial performance occurs in the presence of the offeror.²² Moreover, a large

J. MURRAY, *supra* note 12, § 34, at 73-74 (citations omitted); A. CORBIN, *supra* note 7, § 23. See also *Harvey v. Facey*, 62 L.J., P.C. 127, A.C. 552 (1893); *Owen v. Tunison*, 131 Me. 42, 158 A. 926 (1932).

19. Certain offers will invite promissory acceptance and others will invite acceptance by performance. Moreover, a third category emerges, which, due to history, custom, or course of performance, neither requires nor contemplates a response; there, the offeree's silence will constitute acceptance. This last category is certainly rare, and does not contradict the basic concept that silence is an inappropriate method or means of demonstrating acceptance. See RESTATEMENT (SECOND) OF CONTRACTS § 69 (1979).

20. *Id.* § 50 comment b § 32 comment b. See 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 73, at 238-39 (3d ed. 1957 & Supp. 1989); L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 46 (2d ed. 1965); see also *Becker v. Missouri Dep't of Social Servs.*, 689 F.2d 763 (8th Cir. 1982).

21. RESTATEMENT (SECOND) OF CONTRACTS § 53 (1979); see, e.g., Note, *Acceptance by Performance When the Offeror Demands A Promise*, 52 S. CAL. L. REV. 1917 (1979); *Allied Steel & Conveyors, Inc. v. Ford Motor Co.*, 277 F.2d 907 (6th Cir. 1960); see also *Shortridge v. Ghio*, 253 S.W.2d 838 (Mo. Ct. App. 1952). But see *Vermillion v. Marvel Merchandising Co.*, 314 Ky. 196, 234 S.W.2d 673 (1950) (beginning performance was sufficient to form a contract).

22. See, e.g., J. CALAMARI & J. PERILLO, *supra* note 4, § 2-26 n.80. In a related sense, even when the offer invites a promise as the method of acceptance, full performance effected prior to expiration of the offer has been deemed to constitute a valid acceptance if accompanied by appropriate notification. See generally S. WILLISTON, *supra* note 20, § 78A; RESTATEMENT OF CONTRACTS § 63 (1932), RESTATEMENT (SECOND) OF CONTRACTS § 50 comment c (1979). See also *Allied Steel & Conveyors, Inc. v. Ford Motor Co.*, 277 F.2d 907, 911 (6th Cir. 1960). Although notification of performance is not required in each and every case, generally notification of an intent to accept by promise is required. Therefore, where the offer seeks only a promise, and the offeree chooses to accept by performance, such performance should logically be an effective acceptance only if the offeree tendered the proper notification. See RESTATEMENT (SECOND) OF CONTRACTS §§ 54, 56, 63 (1979); Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 308-09 (1964). Section 50 of the Second Restatement suggests that notification requirements, where performance constitutes an implied return promise, may be governed by section 54, which would dispense with the need for notification in most cases. However, this intimation seems to contradict comment b of section 54, which explicitly states that "this Section applies only to offers which invite acceptance by performance." See RESTATEMENT (SECOND) OF CONTRACTS § 54 comment b (1979). Of course, the notice requirement may have nothing whatever to do with the acceptance of the offer. It has been argued that, in many instances, the notice is a condition precedent to the

number of cases involve situations where the offer is silent as to the mode of acceptance or invites either type of acceptance. While the traditional approach presumes this type of offer to require a return promise, the modern view permits the offeree to select the method of acceptance that he deems appropriate.²³

*B. Terminating the Offer and Aborting the Power of Acceptance:
Revocation and Rejection*

Typically, several acts can terminate an offer, including, among others, revocation by the offeror,²⁴ counter-offer²⁵ or outright rejection²⁶ by the offeree, the death of one of the parties,²⁷ the destruction of the subject matter contained in the offer,²⁸ and lapse of time.²⁹ For purposes of this Article,

promisor's duty to perform, but does not constitute a necessary part of the acceptance. *See* Murray, *A New Design for the Agreement Process*, 53 CORNELL L. REV. 785 (1968).

23. Compare RESTATEMENT (SECOND) OF CONTRACTS § 62 (1979) with *Davis v. Jacoby*, 1 Cal. 2d 370, 34 P.2d 1026 (1934). *See also* Note, *supra* note 21, at 1917.

24. The revocation manifests the offeror's intention to withdraw an offer and avoid entering a proposed contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 42 (1979).

25. *Id.* §§ 38, 39. *See supra* note 7.

26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 38 (1979). *Burton v. Coombs*, 557 P.2d 148 (Utah 1976). As discussed earlier, the counter-offer and rejection at common law are functional equivalents insofar as the termination of the offer is concerned. *See supra* notes 6-7 and accompanying text. However, they are different concepts, as most dramatically evidenced by the fact that the rejection does not always operate as a counter-offer, even though the true and "unqualified" counter-offer always acts as a rejection. *See* A. CORBIN, *supra* note 7, § 94; A. COPPOLA, *THE LAW OF BUSINESS CONTRACTS* § 1.25 (1964). Further, under the approach proposed in this Article, there may be circumstances in the irrevocable offer context where a typical counter-offer/rejection at common law should not operate to terminate an offer in every case. *See supra* note 7; *infra* notes 44-46 and accompanying text.

27. RESTATEMENT (SECOND) OF CONTRACTS § 48 (1979). *See also* *Jordan v. Dobbins*, 122 Mass. 168 (1877). In *Jordan*, the court considered whether, in the context of a continuing guarantee, the offer should terminate if the offeree (normally a creditor) was unaware of the guarantor's death when he accepted. *Id.* at 169-70. The court concluded that, even without such notice, the offer terminates upon the demise of the offeror/guarantor. *Id.* at 170. *But see* *Gay v. Ward*, 67 Conn. 147, 34 A. 1025 (1895) (positing an infinitely more plausible rule). In a related case involving the potential termination of an offer due to the offeror's intervening incapacity by virtue of an adjudicated insanity, the court found the offeror's revocation ineffective without notice. *See* *Swift & Co. v. Smigel*, 60 N.J. 348, 289 A.2d 793 (1972).

Section 37 declares that death or incapacity of the offeree will not terminate an irrevocable offer. While this Article does not embrace that assertion, *see* *Biggins v. Shore*, 365 Pa. Super. 237, 529 A.2d 487 (1987), *aff'd*, 365 A.2d 737 (1989), it submits that the situation is sufficiently distinguishable from the issue at hand so as to require no extended discussion. Even if section 37 articulates a legally tenable approach regarding death or incapacity, neither event involves the deliberate and conscious manifestation of intent not to accept that is characteristic of the rejection of an irrevocable offer. Thus, one may plausibly retain part of section 37, permitting an optionee's heirs or assigns opportunity to accept under an option, while denying an optionee the opportunity to accept after a rejection.

28. *See* RESTATEMENT (SECOND) OF CONTRACTS § 36 (1979).

revocation by the offeror and the outright rejection or counter-offer/rejection by an offeree are the critical "terminators" of an offer. These issues constitute the focal points of the discussion because this Article advances the overriding premise that the option contract compromises the offeror's right to revoke, yet in no way alters the rejection component of the offer/acceptance configuration.

1. Revocation

Most offers are presumed to be revocable at the will of the offeror, provided that the offeree has not already manifested his acceptance by some effective means.³⁰ Thus, even though the offeror has represented that a particular offer will remain open for a designated period of time, the offeror still reserves the right to revoke the offer within that time period, barring an effective acceptance.³¹ However, if the offeree has secured the offeror's pledge of irrevocability by some exchange of consideration, or through some rough equivalent, such as seal, detrimental reliance, or a statutory dispensation of the need for consideration, then that offer will remain open for the period of time agreed to, or for a reasonable timeframe.³²

Normally, an offeror must communicate notice of a revocation to protect the offeree from detrimentally relying upon an offer that no longer exists.³³ Thus, while an offeree's acceptance of an offer can be effective from the moment it leaves his possession (as in a situation where the parties invite mailing as an appropriate mode of acceptance),³⁴ revocation of an offer will not be effective until the offeree receives it. The realization that the offeror is technically the instigator of the transaction and invites the offeree's acceptance should quickly dispel any misgivings about this approach's apparent

29. *Id.* § 41. See also *Loring v. City of Boston*, 48 Mass. 409 (1844); *Morrison v. Rayen Inv. Inc.*, 97 Nev. 58, 624 P.2d 11 (1981); *Textron, Inc. v. Parkview Equities, Inc.*, 552 N.Y.S.2d 750 (N.Y. App. Div. 1990); *Sharp Bros. Contracting Co. v. Commercial Restoration, Inc.*, 334 S.W.2d 248 (Mo. Ct. App. 1960).

30. See A. CORBIN, *supra* note 7, § 38.

31. Of course, under the deposited-acceptance rule, if an offeree mails an acceptance prior to a lapse of time or the effective communication of the revocation, then that acceptance will form a binding contract, assuming that the contract is valid in all other respects. See, e.g., *Morrison v. Thaelke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963); *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818). See *infra* notes 242-70 and accompanying text.

32. See, e.g., Note, *The Requirement of a Definite Time Period in Option Contracts*, 34 LA. L. REV. 668 (1974); see also RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979). In the resulting option contract, the deposited acceptance rule should become inoperative and the ultimate acceptance should be effective upon receipt. See *infra* notes 259-70 and accompanying text.

33. See generally *L. & E. Wertheimer, Inc. v. Wehle-Hartford Co.*, 126 Conn. 30, 9 A.2d 279 (1939); RESTATEMENT (SECOND) OF CONTRACTS § 42 (1979).

34. See *infra* notes 242-58 and accompanying text.

bias in favor of the offeree. Because the offer invites acceptance, the offeror should assume that the offeree expects that acceptance to form a binding contract. Moreover, the offeror should realize that an offeree will act in reliance upon that logical assumption. By contrast, the offeree does not invite the offeror to revoke and therefore has no reasonable belief that a revocation is forthcoming until it actually arrives.³⁵ As master of the offer, the offeror may seek to restrict the method and time of acceptance and, theoretically, may expressly reserve the right to revoke at will and without notice.³⁶ However, absent some outward manifestation of the offeror's intent to revoke, some question exists as to whether this broad reservation of rights should permit an uncommunicated revocation to bar an otherwise effective acceptance.³⁷

Under appropriate circumstances, indirect or constructive communication of a revocation to an offeree may⁵ terminate the offer. If an offeree possesses knowledge from a reliable source that an offeror has contracted with a third party concerning the same subject matter contained in the original offer, and if the information is true, then such "indirect" revocation may operate to terminate the offer.³⁸ This approach seems to place substance over form and to give credence to an offeree's constructive knowledge that an offer no longer exists.

Absent some agreement to forestall the offeror's power to revoke, the offeree is at the mercy of the offeror who chooses to terminate the offer prior to an effective acceptance. An act by either party creating an option or otherwise validly rendering an offer irrevocable, eliminates the offeror's ability to

35. See generally A. CORBIN, *supra* note 7, § 39.

36. See RESTATEMENT (SECOND) OF CONTRACTS § 42 comment b (1979).

37. See generally J. CALAMARI & J. PERILLO, *supra* note 4, § 2-20(d). Of course, the extent to which such a reservation of rights will permit an uncommunicated revocation will vary from jurisdiction to jurisdiction, and will depend also upon whether the offeree effectively dispatched an acceptance so as to close the circle of assent and preclude revocation. The question becomes very complicated if the offeror has reserved a right to revoke without notice and the offeree has mailed his acceptance in a jurisdiction embracing the mailbox rule. In any event, it strains logic and credulity to permit an offeror effectively to reserve the right to revoke without any indications to the offeree. It seems more intellectually honest simply to characterize an offer that reserves the right to revoke without notice as no offer at all.

38. See, e.g., *Dickinson v. Dodds*, 2 Ch. D. 463 (1876). This case is not without its detractors. See also A. CORBIN, *supra* note 7, § 40, at 167-71; Note, *Recent Cases*, 30 TEX. L. REV. 770, 771 (1952). Compare RESTATEMENT OF CONTRACTS § 42 (1932) (offer is revoked if, prior to acceptance, offeree acquires reliable information that offeror has contracted to sell the interest to another) with RESTATEMENT (SECOND) OF CONTRACTS § 43 (1979) (offeree's power of acceptance terminates when he acquires reliable information that the offeror has taken definite action inconsistent with an intention to enter into the proposed contract). *But see* *Butler v. Wehrley*, 5 Ariz. App. 228, 425 P.2d 130 (1967).

abort the offer until the designated period of irrevocability, or in the absence thereof, a reasonable period of time, has elapsed.³⁹

2. Rejection

A rejection is essentially a "manifestation of intention not to accept an offer," assuming that the offeree has demonstrated no intent to consider the offer further.⁴⁰ A counter-offer is an "offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer."⁴¹ A counter-offer generally acts as a rejection and, absent qualifying language demonstrating the offeror's or offeree's intent to reserve the acceptance prerogative, will terminate the offer.⁴² As suggested above, an offeree's response that deviates in any way from the offer will operate as a rejection at common law and will vitiate the offeree's power of acceptance.⁴³ Further, the offeree may manifest an unconditional assent to the offer but simultaneously propose additional or varied terms. Under the common law mirror image rule, these additional terms that alter the proffered bargain compel the conclusion that the offeree finds the original offer unacceptable.⁴⁴ Finally, a conditional ac-

39. See generally Note, *supra* note 32, at 672-74.

40. See RESTATEMENT (SECOND) OF CONTRACTS § 38(2) (1979); see also *supra* note 7 and accompanying text.

41. See RESTATEMENT (SECOND) OF CONTRACTS § 39(1) (1979); see also *supra* note 7 and accompanying text.

42. RESTATEMENT (SECOND) OF CONTRACTS § 39(2) (1979). See also *Collins v. Thompson*, 679 F.2d 168 (9th Cir. 1982).

43. See A. FARNSWORTH, *supra* note 5, §§ 3.13, 3.20, 3.21; *Wagner v. Rainier Mfg. Co.*, 230 Or. 531, 371 P.2d 74 (1962). The rule requiring a mirror image acceptance does not vary with irrevocable offers. In both the revocable and irrevocable situations, the mirror image rule persists at common law. See *Landberg v. Landberg*, 24 Cal. App. 3d 742, 101 Cal. Rptr. 335 (1972); *Green v. First Am. Bank & Trust*, 511 So. 2d 569 (Fla. Dist. Ct. App. 1987); *McCormick v. Stephany*, 61 N.J. Eq. 208, 48 A. 25 (1900). However, as suggested earlier, many courts avoid strict application of the mirror image rule in both contexts by, inter alia, requiring that modifications in the offeree's response be material before they will terminate the power of acceptance. See, e.g., *J. R. Stone Co. v. Keate*, 576 P.2d 1285 (Utah 1978); *Madison v. Marlatt*, 619 P.2d 708 (Wyo. 1980); see also A. CORBIN, *supra* note 7, § 82, at 349. See *supra* note 7 and accompanying text.

44. Of course, the mirror image rule is now a pale reflection of its former self. It has been questioned by contract scholars, diluted by jurists, and vitiated by legislators. As several commentators have suggested, the mirror image rule "has been enforced with a rigor worthy of a better cause." See J. CALAMARI & J. PERILLO, *supra* note 4, § 2-21, at 102. Further, several courts have attempted to retrofit the rule and to mitigate its harshness by limiting it to situations in which the modifications of the offeree's terms are deemed material. See, e.g., *Newspaper Readers Serv., Inc. v. Canonsburg Pottery Co.*, 146 F.2d 963 (3d Cir. 1945); *Richardson v. Greensboro Warehouse & Storage Co.*, 223 N.C. 344, 26 S.E.2d 897 (1943); *J.R. Stone Co., Inc. v. Keate*, 576 P.2d 1285 (Utah 1978); see also *Pickett v. Miller*, 76 N.M. 105, 412 P.2d 400 (1966). Similarly, additional or varied terms are sometimes characterized simply as "sugges-

ceptance, which makes a purported acceptance of the offer dependent upon the offeror's acquiescence to other terms, will also generally terminate the offer even under the more progressive approaches denigrating the mirror image rule.⁴⁵

Thus, an offeree may terminate an offer by rejection in several ways, including: outright rejection; implied rejection drawn from the offeree's counter-offer; a qualified acceptance that purports to embrace the terms of an offer but conditions such acceptance upon the incorporation of varied or additional terms;⁴⁶ and in some jurisdictions, an apparently unconditional acceptance that includes varied or additional terms.

Yet, not all apparent counter-offers will act as rejections⁴⁷ terminating the offeree's power of acceptance. If, for example, the offeror explicitly makes

tions" so as to preserve the acceptances and to avoid the strict requirement of a mirror image response. See A. FARNSWORTH, *supra* note 5, at § 3.21. The most dramatic example of legislative abrogation of the mirror image rule is the codification of section 2-207 of the Uniform Commercial Code. U.C.C. § 2-207 (1977). See also RESTATEMENT (SECOND) OF CONTRACTS § 61 (1979); U.C.C. 2-207 (1977). See *supra* note 7 and accompanying text.

45. See RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979), U.C.C. § 2-207(1) (1977); see also *Bartholf v. Hautala*, 22 Misc. 2d 46, 194 N.Y.S.2d 660 (N.Y. Sup. Ct. 1959); A. CORBIN, *supra* note 7, § 82; L. SIMPSON, *supra* note 20, §§ 23-24.

46. With respect to acceptances that incorporate varied or additional terms, U.C.C. § 2-207 has altered the playing field in the context of the sale of goods. See U.C.C. § 2-207 (1977). Section 2-207 was adopted to remedy the negative effects of applying the mirror image rule to sales of goods where the "Battle of the Forms" was constantly being waged. The "Battle of the Forms" generally concerns the commercial occurrence wherein each party prepares a form designed to give itself the maximum advantage in a commercial transaction. These forms are exchanged as part of a contractual agreement (or as confirmation of an agreement already formed) in which the principal terms are agreed to in full. However, under the mirror image rule, if these forms contain terms that differ from the expressed terms of agreement, then the agreement would be nullified because the acceptance does not unqualifiedly reflect the terms of the offer. Section 2-207 was therefore developed to permit the formation of a contract notwithstanding the existence of additional or varied terms in an acceptance — provided the "dickered" or "material" terms (for example, price or quantity) were not in dispute. Section 2-207 also provides a mechanism to ascertain whether these additional terms should be embraced into the body of the final agreement. See generally Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171 (1975); Murray, *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981); Duesenberg, *Contract Creation: The Continuing Struggle With Additional and Different Terms Under Uniform Commercial Code Section 2-207*, 34 BUS. LAW 1477 (1979). While the development of section 2-207 was a positive step toward reconciliation of the mirror image rule with well-recognized commercial exigencies, it has hardly been hailed as a paragon of legislative draftsmanship. In fact, the critics seem to increase geometrically with the passage of each year. See, e.g., Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307 (1986); Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 U.C.C. L.J. 237 (1984); Travaglio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to UCC Section 2-207*, 33 CASE W. RES. L. REV. 327 (1983).

47. See *supra* note 7 and accompanying text.

the offeree aware that a counter-offer will not destroy the offer, then the offeree may tender such a counter-offer and yet subsequently accept the original offer, assuming that the offer has not been otherwise terminated.⁴⁸ Under prevailing objective theory, an offeror's clear manifestation of intent to indulge counter-offers, and to maintain the vitality of the offer in the face of such counter-offers, will preserve the offeree's power of acceptance notwithstanding any intervening posturing.⁴⁹ Moreover, if the offeree apprises the offeror of an intent to continue negotiations and a desire to keep the original offer under consideration, then the counter-offer accompanying the "reservation of rights" may properly be viewed as mere intermediate negotiations and not a rejection of the original offer.⁵⁰

Further, acceptances that raise further inquiries, comment negatively on the offer, or request a better offer do not necessarily constitute conditional acceptances or counter-offers containing varied terms.⁵¹ Rather, these responses simply represent types of grumbling acceptances that do not presume to present a substitute bargain in any way, but merely place the world on notice that the acceptor would be happier with a somewhat different deal. Clearly, the key in this latter context is to assess whether the additional term proposes a new contract, demonstrating dissatisfaction with the terms (some would say "material terms") of the original offer, or constitutes an acceptance conditional upon the offeror's assent to the new terms — both of which would negate the offeree's power to accept.

In any event, the outright rejection or the counter-offer/rejection does not become effective until communicated to the offeror.⁵² Thus, while acceptance generally becomes effective upon dispatch, a rejection will only terminate an offer upon receipt.⁵³ Therefore, under a scenario in which the offeree mails an acceptance and subsequently recants, the acceptance will close the circle of assent even though the offeror's receipt of the rejection

48. *Id.*

49. See RESTATEMENT (SECOND) OF CONTRACTS § 39 comment c (1979); see also J. CALAMARI & J. PERILLO, *supra* note 4, § 2-20(e), at 98; Quinn v. Feaheny, 252 Mich. 526, 233 N.W. 403 (1930).

50. RESTATEMENT (SECOND) OF CONTRACTS § 39 comment c (1979). See, e.g., Collins v. Thompson, 679 F.2d 168 (9th Cir. 1982); Radford & Guise v. Practical Premium Co., 125 Ark. 199, 188 S.W. 562 (1916); see also L. SIMPSON, *supra* note 20, § 24.

51. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 39 comment b (1979); A. CORBIN, *supra* note 7, § 84; see also Katz v. Pratt St. Realty Co., 257 Md. 103, 262 A.2d 540 (1970); Johnson v. Federal Union Sur. Co., 187 Mich. 454, 153 N.W. 788 (1915); Mall Tool Co. v. Far W. Equip. Co., 45 Wash. 2d 158, 273 P.2d 652 (1954).

52. See generally RESTATEMENT (SECOND) OF CONTRACTS § 40 (1979); Glacier Park Found. v. Watt, 663 F.2d 882 (9th Cir. 1981).

53. See Morrison v. Thoeke, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963). See *infra* notes 242-59 and accompanying text.

antedates the receipt of the acceptance. These generalizations are qualified by significant exceptions. For example, estoppel may bar the enforcement of the subsequent contract if the offeror has detrimentally relied on the rejection.⁵⁴ Further, and of greater significance, the "mailbox rule" should not operate in the option contract setting where time typically is "of the essence" and acceptance is only effective upon receipt, barring contrary manifestations of intent by the offeror.⁵⁵ As discussed below, the most plausible rationale to support this latter exception is that an option contract/irrevocable offer insulates the optionee from an unanticipated revocation. Accordingly, the offeree does not need the additional protection that the deposited acceptance rule provides.⁵⁶

II. THE OPTION CONTRACT

A. *United with or Apart from the Underlying Contract*

In the typical option contract, the optionor, generally in exchange for some consideration,⁵⁷ gives the optionee a designated or reasonable time-frame within which to reject or accept the offer.⁵⁸ While the optionor may not revoke during the designated period, the optionee need not exercise the option and may abandon the transaction at any time.⁵⁹ Thus, the optionee may evaluate market conditions and other variables without risking injury from the Damoclean sword of spontaneous revocation hanging overhead.

Commentators have characterized the option contract as a separate agreement or a contract "preliminary to another one; that is, a contract entered in contemplation of another contract that may come into existence later if the

54. See *E. Frederics, Inc. v. Felton Beauty Supply Co.*, 58 Ga. App. 320, 198 S.E. 324 (1938).

55. See *infra* notes 259-70 and accompanying text. See generally Note, *Option Contracts and Rights of First Refusal: Disposing of the Deposit Acceptance Rule*, 11 STETSON L. REV. 523 (1982).

56. See *infra* notes 259-70 and accompanying text.

57. Generally, only an offeree's payment of some consideration will convert a revocable offer into an irrevocable one, unless seal, statute, or other similar device effects the change by operation of law. See generally A. CORBIN, *supra* note 7, §§ 262-264; F. JAMES, *OPTION CONTRACTS* § 838 (1916); Litvinoff, *Consent Revisited*, 47 LA. L. REV. 699 (1987). At times, the consideration is minimal but while the negligible consideration may affect issues collateral to the option agreement, questions of adequacy generally will not impact the securing of the irrevocability option. See *infra* notes 233-36, 296-304 and accompanying text; RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979). Regarding the minimal consideration that often supports an irrevocable offer, see also A. CORBIN, *supra* note 7, § 263; Litvinoff, *supra*, at 749-50.

58. See Note, *supra* note 32. See also Litvinoff, *supra* note 57, at 748-49.

59. See RESTATEMENT (SECOND) OF CONTRACTS §§ 45, 87 (1979). See also F. JAMES, *supra* note 57, § 838. "The option grants [him] the right to accept or reject the offer in accordance with its terms, within the time and in the manner specified in the option." S. WILLISTON, *supra* note 20, § 61B.

grantor so elects.”⁶⁰ For example, A offers to sell property to B for \$200,000; and, in a separate transaction, A offers to hold the offer open for a set time period in exchange for \$10,000. This type of option contract has its own formation stage and consideration requirement; thus, there is an element of individuality distinguishing it from the underlying contract offer. However, the option contract generally is not separate and distinct in operation. Rather, it is wed to the offer-in-chief, rendering it irrevocable.⁶¹

Other types of options may swallow the underlying offer into a single transaction — such as a promise by A to sell property to B for \$200,000, amount payable within a set period of time, held open by a payment (consideration) of \$10,000. In this type of situation, the parties establish a unilateral contract with the payment of the \$200,000 constituting a condition precedent to A’s duty to convey the property.⁶² While this example differs from the model presented earlier and may suggest a somewhat atypical scenario, it nonetheless represents a type of option contract.

The determination of whether the option contract embraces the underlying offer or stands apart as a collateral precursor to the underlying offer will turn on the facts of each case. In most instances, the distinction arises from academic curiosity rather than functional significance. The effect in both situations is normally the same: the option renders the underlying offer ir-

60. Litvinoff, *supra* note 57, at 745.

61. See, e.g., A. CORBIN, *supra* note 7, § 262; J. CALAMARI & J. PERILLO, *supra* note 4, § 2-25.

62. J. CALAMARI & J. PERILLO, *supra* note 4, § 2-25. Moreover, these scenarios by no means encompass every option contract configuration; one can easily derive additional unilateral and bilateral models. One court offered this paradoxical definition of an option contract, which incorporates both the dual contract and single contract ideas:

[A]n option agreement is a contract distinct from the contract to which the option relates, since it does not bind the optionee to perform or enter into the contract upon the terms specified in the option. . . . The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. ‘The contract has already been made, as far as the optionor is concerned, but it is subject to conditions which are removed by the acceptance.’

Warner Bros. Pictures v. Brodel, 31 Cal. 2d 766, 772, 192 P.2d 949, 951-52 (1948) (quoting Seeburg v. El Royale Corp., 54 Cal. App. 2d 1, 4, 128 P.2d 362, 363 (1942)). See also Palo Alto Town & Country Village, Inc. v. BBTC, Co., 11 Cal. 3d 499, 521 P.2d 1097, 113 Cal. Rptr. 705 (1974); A. CORBIN, *supra* note 7, § 43.

Of course, the option often constitutes only part of a larger agreement, such as a provision giving a lessee the opportunity to renew a lease or purchase the property that is the subject of the lease. See, e.g., Ledford v. Atkins, 413 S.W.2d 68 (Ky. 1967).

revocable for a fixed or reasonable period of time.⁶³ Likewise, improvident revocation would command the same remedial disposition in either case.⁶⁴

B. *Bilateral or Unilateral*

Whether the option contract itself is bilateral or unilateral has sparked no small amount of scholarly debate. Professor Corbin declares that an option contract can assume either form.⁶⁵ Professor Williston differs, stating that an option agreement by its own definition necessarily represents "a unilateral contract."⁶⁶ However, Corbin's argument that the option arrangement can form either a unilateral or bilateral contract depending upon the parties' outward manifestations of intent staunchly resists dispute. For example, if A promises to keep an offer open in exchange for B's payment of \$500 or, alternatively, for B's promise to pay \$500, then the parties create an option upon the occurrence of either event. Thus, the option contract can be unilateral (if B tenders payment pursuant to an offer that seeks performance) or bilateral (if A receives a promise pursuant to an offer that sought such a

63. In most instances, irrevocable offers unsupported by consideration or some statutory validation are not actually irrevocable. However, when an offeree has paid the requisite consideration, or when the pertinent statutory validation (for example, U.C.C. § 2-205) intervenes, the offer then becomes irrevocable and the term "option contract" is employed to describe the result. Hence, the oft-perceived fungibility of the two terms is born. See J. CALAMARI & J. PERILLO, *supra* note 4, § 2-25, at 121-23. *But see* Litvinoff, *supra* note 57, at 715, 747-48. This point does not demean attempts to differentiate irrevocable offers from option contracts and to draw distinctions among various types of options. Differences may exist depending upon the nature of the agreement reached by the parties and pertinent statutory prescriptions. *Id.* at 747-48, 750-51, 753; *see also* McGovney, *Irrevocable Offers*, 27 HARV. L. REV. 644 (1914). Much of the debate centers upon the perceived differentiation between the *power* to revoke and the *right* to revoke, particularly the availability of specific performance as a remedy for improper revocation. See C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS, § 178 (1880); McGovney, *supra*, at 657. Yet, modern commentators tend to discredit the exercise, suggesting that the legal operation in most cases is the same. See A. CORBIN, *supra* note 7, § 262. See also J. MURRAY, *supra* note 12, § 43B. For purposes of this Article, the negligible operational differences between an irrevocable offer and an option contract do not warrant extended discourse. Accordingly, the remainder of this Article will assume the interchangeability of the words "option contract" and "irrevocable offer." See J. CALAMARI & J. PERILLO, *supra* note 4, § 2-25 at 124.

64. See *supra* note 63 and accompanying text. As Professor Corbin states:

The present writer is convinced that their legal operation is identical. . . . In both [the conditional contract and the irrevocable offer], a notice of revocation . . . would be a breach of contractual duty, and a cause of action [A]n acceptance after revocation would create a right and duty of immediate performance, enforceable by the usual contract remedies of damages, restitution, and specific performance. In both cases alike, [optionee's] right to specific performance could be blocked by [optionor], by transferring the property to an innocent purchaser for value.

A. CORBIN, *supra* note 7, § 262.

65. *Id.* § 260.

66. S. WILLISTON, *supra* note 20, § 61(b).

promise).⁶⁷ Of course, in one sense, the resulting option arrangement is unilateral or "one-sided": The optionor cannot escape, while the optionee has an unfettered choice. Yet, to characterize categorically an option as a "unilateral" contract, without ascertaining the nature of the option arrangement is inappropriate.⁶⁸

C. Constructive Option Contracts

Of course, not all option contracts are products of the parties' conscious design. In certain unilateral and bilateral contract contexts, courts have imposed a type of option contract construct in an effort to place the parties in the most equitable position and to reinforce their logical expectations.⁶⁹ For example, when an offer invites an offeree to accept by performance, and precludes promissory acceptance, a court may find a constructive option contract created by the offeree's beginning the invited performance. Partial performance becomes the functional equivalent of the consideration paid in a classic option contract — it freezes the offer for a reasonable period of time and precludes the offeror from revoking, even though the requested performance remains inchoate.⁷⁰

67. See, e.g., J. CALAMARI & J. PERILLO, *supra* note 4, § 2-25. Similarly, the "underlying offer" (made irrevocable by the option) may invite either an acceptance by performance or by promise. *Id.* In a variation on this theme, Professor Corbin has noted that "it is possible that in a single contract both parties shall have an option", operating as a "bilateral contract, binding on both parties and not revocable by either." See A. CORBIN, *supra* note 7, § 260. See also *Valashinas v. Koniuto*, 308 N.Y. 233, 124 N.E.2d 300 (1954).

68. This exercise amply demonstrates that the terms "unilateral" and "bilateral" are dated and rapidly falling into desuetude. See J. CALAMARI & J. PERILLO, *supra* note 4, § 1-10 n.66. The modern tendency is to employ terminology such as "offer seeking performance" and "offer seeking a promise" rather than unilateral and bilateral. Despite the semantic problem that may be created, this Article will, at times, use the terms unilateral and bilateral contract as much from force of habit as from a desire to accommodate the terminology employed by the cited cases.

69. See *infra* notes 71-76 and accompanying text.

70. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979); *Marchiondo v. Scheck*, 78 N.M. 440, 432 P.2d 405 (1967). Viewing partial performance in a unilateral contract setting as the functional equivalent of consideration in the classic option contract setting represents a more intelligent approach than the extreme, restrictive, and often inequitable alternative of limiting acceptance to full performance, see *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928), or, equally unsatisfying, allowing the beginning of performance to serve as a de facto promise to complete. See *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 P. 1086 (1902). See also *Ballantine, Acceptance of Offers for Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94, 97 (1921). Intellectual infirmities undermine both of these alternatives. In the former, the offeror would retain the right to revoke after an offeree has expended at least some effort to complete. In the latter, partial performance will be deemed a promise, where the offer in no way indicated that it would indulge a promissory acceptance and the offeree made no manifestation of intent to assume a

More remarkably, courts occasionally engraft an irrevocability component onto an offer that seeks a promissory acceptance, even where an offeror manifests no desire to surrender his revocation prerogative. A classic illustration of this rather unusual phenomenon involves subcontractor bidding in the construction industry. In *Drennan v. Star Paving*,⁷¹ the California Supreme Court interpreted a bid arrangement between a subcontractor and a general contractor as an option contract, irrevocable by the subcontractor for a reasonable period of time.⁷² The court reasoned that the subcontractor's bid, upon which the general contractor based his proposal to the "owner," constituted a promise begetting an additional implied promise of temporary irrevocability.⁷³ The court elected the option configuration in this situation because the general contractor necessarily could not submit its proposal to the "owner" unless he could securely rely upon the subcontractor's bid. Indeed, a spontaneous revocation by the subcontractor would unfairly vitiate part of the basis upon which the general contractor prepared his bid to the owner. Thus, employing a promissory estoppel rationale, the court allowed the general contractor's reliance to suspend the subcontractor's ability to revoke much the same as traditional consideration cements the irrevocability of an offer in an option contract of the parties' design.⁷⁴

binding commitment. See J. CALAMARI & J. PERILLO, *supra* note 4, § 2-22. As Professor Ballentine suggests:

It is certainly not contemplated by the parties that the [unilateral] offer should be revoked in the midst of performance; the injustice of that is at once felt. The suggestion has been made to protect the offeree, that there is an implied . . . promise contained in such an offer to hold it open for a reasonable time This theory reaches a just and desirable result.

Ballantine, *supra*, at 97 (footnote omitted).

The problem assumes greater complexity when, for example, the offeror extends a unilateral offer to an option contract and the offeree partially performs. The offeree may argue, probably unsuccessfully, that the partial performance constitutes acceptance or, incredibly, that the offer of irrevocability (i.e., the option contract offer) is itself made irrevocable at least for a reasonable period of time. In essence, a three-tiered construction could result, creating an option contract within an option contract. In this narrow context, a better and infinitely more plausible rule would be that notwithstanding the modern approach to partial performance in response to a unilateral contract offer, the optionee must tender consideration in full, and effect total performance as a prerequisite to the perfection of the option contract. Absent full performance or a promise to perform when the offeror invites one, no option exists, and the offeror can revoke the original offer at will. See, e.g., *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928); see also RESTATEMENT OF CONTRACTS § 263 comment b (1932).

71. 51 Cal. 2d 409, 333 P.2d 757 (1958).

72. *Id.* at 411, 333 P.2d at 760.

73. *Id.*, 333 P.2d at 760.

74. *Id.*, 333 P.2d at 760. See also RESTATEMENT (SECOND) OF CONTRACTS §§ 45, 87 (1979). Cf. *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933). Arguably, the *Drennan* approach exceedingly tilts in favor of the general contractor/offeree. Presumably, the court could have achieved the same result by requiring that the general contractor accept the

Balancing the equities, the court also indicated that any attempt by the general contractor to obtain a better deal would compromise his option and subject him to the subcontractor's prompt revocation of the offer.⁷⁵

Admittedly, the offeror in the constructive option situation has not intentionally surrendered his prerogative to revoke as does a typical option contractor. Rather, the court removes that prerogative forcefully. Further, the offeree may freely reject even after beginning performance. Nonetheless, conventional wisdom dictates that the offeror should evoke little sympathy largely because he sits as the master of the offer and presumably can demand the more prevalent and predictable promissory acceptance to avoid the problem. Yet, even if an offeror seeks a promissory acceptance, courts in limited circumstances, such as the *Drennan* situation, have sought to avoid injustice by prohibiting an offeror from revoking for at least a reasonable period of time.⁷⁶ In any event, whether the offeror seeks performance or a promise, the prudently employed constructive option allows courts to fortify the reasonable expectations of an offeree without imposing a binding contract upon the parties against their will.

Thus, the option contract can be the product of the parties' clear intentions or judicial construction. It may be unilateral or bilateral, depending upon the manifest objectives of the parties. Finally, it may be viewed as either a separate agreement, preliminary to the offer in chief, or as part of a larger agreement, in both events narrowing the revocability prerogative of the offeror. For purposes of examining an offeree's ability to accept an option-secured offer within the option period after having rejected the offer, this Article will assume that the typical option contract and irrevocable offer are functional equivalents.⁷⁷ Needless to say, such an assumption carries a

subcontractor's offer, making such acceptance expressly conditional upon its own successful job bid. If its own bid failed, it would owe no duty to the subcontractor. If the "owner" accepted its bid, then the general contractor's promise would bind him to the subcontractor. See *James Baird Co.*, 64 F.2d at 343.

75. *Drennan*, 51 Cal. 2d at 411, 333 P.2d. at 760. See *infra* note 181.

76. *Drennan* provides a typical example of courts seeking to do justice by forging an alloyed contract from the reconnected parts. 51 Cal.2d at 409, 333 P.2d at 757.

77. See *supra* notes 63-64 and accompanying text. But see RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979). Section 37 permits the rejection to terminate the power of acceptance if it satisfies the requirements "for the discharge of a contractual duty." *Id.* This phraseology suggests that the option contract, as a completed transaction, may be subject to a different analysis than an "irrevocable offer," particularly insofar as the "rejection" of the option is concerned. It is submitted that this wording, to the extent that it broadly distinguishes all option contracts and irrevocable offers, is infelicitous and perpetuates the faulty assumption underlying the majority position — that the rejection of an option is a subject of inquiry under a "performance analysis." See *infra* notes 280-310 and accompanying text.

caution that peculiar option arrangements, varying significantly from the models presented herein, may command divergent analyses.

III. THE MAJORITY: NEITHER OUTRIGHT REJECTIONS NOR TRUE COUNTER-OFFERS OPERATE TO TERMINATE AN OFFER TO AN OPTION CONTRACT

A. *McCormick v. Stephany*

The majority of courts and scant scholarship examining whether outright rejections or counter-offers terminate an offer in an option contract setting choose to adhere to the Second Restatement's reasoning that neither event terminates the offeree's power of acceptance.⁷⁸ One of the earliest cases addressing this issue involved the application of a lease provision that provided the lessee an option to purchase land for a specified price within a delineated timeframe.⁷⁹ The option clause declared:

And it is further agreed by and between the above parties that, in case the said party of the first part should find a purchaser for the said premises, then the said party of the second part shall have the option, during the continuance of this lease, to buy [from] the said party of the first part the said premises for the sum of twelve thousand dollars.⁸⁰

The parties made this "option"⁸¹ effective for a specified period of time⁸² and supported it with consideration.⁸³ Pursuant to the option, the lessee

78. Professor Axelrod has divided the majority case authority into discrete discussions of pure rejections of, and counter-offers to, options. See Axelrod, *supra* note 8, at 424-30. Yet, in the final analysis, Axelrod draws no real distinctions between the two concepts, and points to no case analysis explicitly differentiating them in any meaningful fashion. *Id.* Thus, one can certainly draw the inference that there is no functional distinction between a true counter-offer and a rejection in this context. Most courts and commentators seem to conclude that neither event serves to terminate the irrevocable offer. See *infra* notes 110-13, 117-21 and accompanying text. *But see* Cerbo v. Carabello, 376 Pa. 571, 103 A.2d 908 (1954) (the court intimated that the absence of any manifestation of an intent to reject by the optionee reinforced its conclusion regarding the continuing vitality of the offer notwithstanding the counter-offer). In any event, this discussion assumes that Restatement Second section 37 and the majority position roughly equate rejections and true counter-offers.

79. *McCormick v. Stephany*, 61 N.J. Eq. 208, 48 A. 25 (1900).

80. *Id.* at 210, 48 A. at 27.

81. This "option" actually had the properties of a right of first refusal. See *infra* notes 155, 167.

82. Most option contracts do remain open for a designated period of time. See, e.g., Note, *supra* note 32, at 673. See also *Clark v. Dixon*, 254 So. 2d 482 (La. Ct. App. 1971) (holding the option invalid because it lacked a definite time period).

83. In *McCormick*, the court found the requisite consideration in the rental payments that the parties incorporated into the lease proper. 61 N.J. Eq. at 211, 48 A. at 28. In this regard, some authority exists for the proposition that courts may presume the existence of considera-

requested a "deed with full covenants,"⁸⁴ beyond the purchase agreement's strict requirements. The lessor refused to provide the deed with such full covenants and disclaimed any duty to the lessee by selling the property in question to another party.⁸⁵ The lessee's executrix sued for breach of contract and demanded specific performance.⁸⁶ In defense, the lessor remonstrated that the lessee's demand for full covenants altered the terms of the offer and thereby constituted nothing more than a counter-offer.⁸⁷ The lessor urged the court to find that the lessee had rejected the offer or, alternatively, had waived her rights to accept the original option contract terms at a later date.⁸⁸ Thus, the lessee arguably forfeited the privilege to accept the offer rendered irrevocable by the lease payment/consideration.

While acknowledging the "indisputable" case authority that an "acceptance of an option must meet the proffered contract in every respect,"⁸⁹ the court refused to disqualify the lessee from timely exercising the option after she had tendered the qualified acceptance:

Such an agreement to convey is not a mere unaccepted proffer based upon no consideration, as is a letter offering to sell, nor is it a naked promise to sell at a price within a limited time. It is a completed purchase of a right to have a conveyance if the purchaser shall choose to buy upon the terms named. In such case there is no question of the arrival of the parties at a common intent. They have already made a contract upon consideration paid, by which the owner is bound to convey whenever the condition happens and the making of a counter proposal to him does not enable him to retain the consideration paid, and to declare the contract forfeited.⁹⁰

Having thus characterized the option contract, the court concluded that: "[i]f the transaction was a mere proffer, it might be withdrawn before acceptance; but when it was a contract for consideration paid, the party obligated

tion in such a context. See *Braten v. Baker*, 78 Wyo. 273, 275, 323 P.2d 929, 931 (1958); *Madison v. Marlatt*, 619 P.2d 708, 714 (Wyo. 1980).

84. *McCormick*, 61 N.J. Eq. at 208, 211, 48 A. at 25, 28. The purchase agreement did not include a deed "with full covenants free of all incumbrances." *Id.* at 208, 48 A. at 25.

85. *Id.* at 211, 48 A. at 28.

86. *Id.* at 208, 48 A. at 25.

87. *Id.*, 48 A. at 25.

88. *Id.* at 211, 48 A. at 28.

89. *Id.* at 211, 48 A. at 28. See also *Hutcheson v. Cronin*, 426 S.W.2d 638, 641 (Tex. Ct. App. 1968) ("The acceptance of an option, to be effectual, must be unqualified, absolute, unconditional, unequivocal, unambiguous, positive, without reservation, and according to the terms of the option.").

90. *Id.* at 211, 48 A. at 28-29 (citing *Page v. Martin*, 46 N.J. Eq. 585, 20 A. 46 (1890)). See also *Bartholf v. Hautala*, 22 Misc. 2d 46, 48, 194 N.Y.S.2d 660, 663 (N.Y. Sup. Ct. 1959).

to sell, if required, could not withdraw pending acceptance.”⁹¹ Accordingly, the court held that the lessor’s offer to sell retained vitality as to the lessee until the expiration of the option period, notwithstanding the lessee’s earlier counter-offer/rejection.⁹²

B. Tracy v. O’Neill

Several years later, the Connecticut Supreme Court, in *Tracy v. O’Neill*,⁹³ reinforced *McCormick* in a case roughly paralleling our model. In *Tracy*, the seller (through a broker) gave the buyer an option to purchase real estate (and, derivatively, gave the broker the option to sell the same real estate at a five percent commission) in consideration of a five dollar deposit.⁹⁴ The terms of the option made the offer irrevocable for a period of six days. Within the stated period, the buyer indicated a desire to purchase the property, but countered with additional terms governing the inclusion of certain plumbing fixtures arguably not a part of the original offer.⁹⁵ When the seller declined to convey the property under the new terms, the buyer, still within the option period, accepted the offer as initially presented. The seller then refused to close the transaction unless the buyer specifically addressed the additional terms and explicitly excluded the plumbing fixtures in question.⁹⁶

The seller obviously believed that the buyer’s counter-offer had terminated the offer and negated the offeree’s power of acceptance. Accordingly, when the broker demanded his commission for closing the deal, the seller claimed that the parties had not signed a contract for sale and that no duty to sell had been triggered. The court categorically rejected the seller’s defense and found the offer vulnerable to the buyer’s acceptance prerogative during the entire term of the option, even in the face of the intervening counter-offer.⁹⁷ Therefore, the court sustained the broker’s claim for commission by characterizing the legal relationship between seller and buyer as one in which “the defendant [seller] was bound to the plaintiffs to sell the property”⁹⁸

91. *Id.* at 211, 48 A. at 29. See also Axelrod, *supra* note 8, at 421.

92. *McCormick*, 61 N.J. Eq. at 211, 48 A. at 28. Again, it appears as though this court freely interchanged the terms counter-offer and rejection without distinction, ignoring the possible impact of the distinction upon the offeree’s power of acceptance. See *infra* notes 110-13 and accompanying text.

93. 103 Conn. 693, 131 A. 417 (1925).

94. *Id.* at 698, 131 A. at 419.

95. *Id.* at 696, 131 A. at 418.

96. *Id.*, 131 A. at 418.

97. *Id.* at 698, 131 A. at 419.

98. *Id.* at 696, 131 A. at 418. At least one court has applied the same rationale where a prospective purchaser made an irrevocable offer to a broker to consummate a transaction for the purchase of real property. *Tennent v. Leary*, 82 Ariz. 67, 308 P.2d 693 (1957). In *Tennent*, a buyer gave a real estate broker a brief period of time in which to obtain seller’s accept-

This decision, together with *McCormick v. Stephany*,⁹⁹ formed part of the basis for Professor Corbin's assertion that an offeree's counter-offer within a binding option, or similar negotiation not culminating in a contract, neither terminates the offer nor negates the offeree's power to accept.¹⁰⁰ As Corbin bluntly declared: "If the original offer is an irrevocable offer, creating in the offeree a 'binding option,' the rule that a counter-offer terminates the power of acceptance does not apply."¹⁰¹

C. Humble Oil & Refining Co. v. Westside Investment Corp.

Several cases decided in the past 30 years reinforce Professor Corbin's approach and suggest that the established period of time secured by an option amounts to a sacrosanct window of opportunity within which the offeree can reject and recant with impunity.¹⁰² In one of the more celebrated

ance of an offer to secure certain real property. *Id.* at 70, 308 P.2d at 695. The buyer's principal offer to purchase the property at a set price embraced the brokerage agreement. The seller rejected the offer and presented a counter-offer to the buyer. *Id.* at 70, 308 P.2d at 696. But, within the option period, the seller accepted the buyer's original offer. *Id.* at 71, 308 P.2d at 696. The court rejected the buyer's claim for return of earnest money paid to the broker and found that the seller's initial counter-offer did not abort the transaction:

That [seller's] counter-offer to Tennent's offer to purchase his property was in law a rejection of [buyer's] offer there can be no doubt. This did not, however, affect in anywise [buyer's] written authorization to [broker] to continue to negotiate with [seller] for the purchase of said property upon the terms of his written offer. . . . There could not possibly be any legal efficacy in requiring the same offer to be rewritten before submitted.

Id. at 72, 308 P.2d at 696 (citing *Hargrave v. Heard Inv. Co.*, 56 Ariz. 77, 105 P.2d 520 (1940)).

99. 61 N.J. Eq. 208, 48 A. 25 (1900).

100. A. CORBIN, *supra* note 7, § 91. "A binding option is a standing offer as well as a contract." *Id.* § 43. Ostensibly, the proponents of the majority view presume that because an offer is standing, it is also one which is impervious to the conduct and intentions of the optionee. However, in its purest sense, the option stands for the duration of the option period only in the absence of action by the optionee. For example, the option ceases to stand upon acceptance, when the option immediately becomes exercised. *See infra* notes 185-99 and accompanying text. If the option truly stood for the duration of the option period, an acceptance would be effectively postponed until the end of the option period.

101. A. CORBIN, *supra* note 7, § 43.

102. *See, e.g.*, *Ryder v. Wescoat*, 535 S.W.2d 269 (Mo. Ct. App. 1976); *Sunray Oil Co. v. Lewis*, 434 S.W.2d 777 (Mo. Ct. App. 1968); *Silverstein v. United Cerebral Palsy Ass'n*, 232 N.Y.S.2d 968, 17 A.D.2d 160 (N.Y. App. Div. 1962); *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976); *Humble Oil & Ref. Co. v. Westside Inv. Corp.*, 428 S.W.2d 92 (Tex. 1968).

In *Silverstein*, a New York court, relying upon no precedent other than Professor Corbin's prescription, declared:

[T]he irrevocable offer is not deemed rejected and cancelled out by mere counter-proposals or negotiations not culminating into any agreement between the parties. Absent a new agreement, express or implied, or facts and circumstances creating an estoppel, the irrevocable offer continues during and survives the making of a counter-proposal and discussions in connection therewith.

cases supporting this view, *Humble Oil & Refining Co. v. Westside Investment Corp.*,¹⁰³ the Texas Supreme Court held that an option holder's counter-offer did not terminate the power of acceptance and that a subsequent unconditional acceptance of the offer formed a binding contract.¹⁰⁴ In *Humble Oil*, the seller and buyer had entered into an option contract whereby the seller gave the buyer an exclusive and irrevocable option to purchase a tract of land.¹⁰⁵ Consideration secured the option agreement for a fixed duration of sixty days.¹⁰⁶ Approximately thirty days prior to the expiration of the option period, the buyer sent the following communique to seller, purporting to accept the offer but clearly inserting some of his own terms: "[Buyer] . . . hereby exercises its option to purchase As additional inducement for [buyer] to exercise its option to purchase, you have agreed that all utilities (gas, water, sewer and electricity) will be extended to the property prior to the closing of the transaction."¹⁰⁷

Within two weeks, however, buyer apprised seller of its intention to exercise the option unconditionally and purchase the land in question. This notification explicitly advised the seller that he could "disregard the proposed amendment to the contract" requested in the earlier correspondence.¹⁰⁸ The seller refused to convey the parcel premised on the fact that the conditional acceptance/counter-offer constituted a rejection terminating the option and aborting the offer.¹⁰⁹

Two Texas lower courts granted the seller's motion for summary judgment, finding that the parties had not consummated a contract.¹¹⁰ Revers-

232 N.Y.S.2d at 971, 17 A.D.2d at 162. Again, although the court intimated that it was directing its attention to counter-offers, it made no attempt to differentiate the counter-offer from the outright rejection here any more than most other cases addressing this question. *Id.* at 971-72, 17 A.D.2d at 163. See *infra* notes 110-13 and accompanying text. Yet, at least one court has construed the *Silverstein* opinion as creating a clear line of demarcation between counter-offers and rejections in this context: "[I]n fact, in *Silverstein*, the court specifically noted that an option, unlike an ordinary revocable offer, is not considered rejected by counter-offers, but only by express rejection." *Republic Nat'l Life Ins. Co. v. Marquette Bank*, 295 N.W.2d 89, 92 n.4. (Minn. 1980).

103. 428 S.W.2d 92 (Tex. 1968).

104. *Id.* at 95.

105. *Id.* at 93.

106. *Id.*

107. *Id.*

108. *Id.* (emphasis omitted). Clearly, at this point, the offeree/optionee had tendered an unequivocal acceptance of the offer and had withdrawn any reservations articulated earlier. The question thus joined was whether the earlier counter-offer terminated the option contract. *Id.* at 94.

109. *Id.*

110. *Id.* at 93; *Humble Oil & Ref. Co. v. Westside Inv. Corp.*, 419 S.W.2d 448 (Tex. Ct. App. 1967), *rev'd*, 428 S.W.2d 92 (1968). One of the Texas lower courts adopted the precise approach posited herein:

ing these decisions, the Texas Supreme Court concluded that the option was an "independent completed agreement" providing the optionee the prerogative "to purchase the property within the time specified."¹¹¹ The court reasoned that the buyer had expended "valuable consideration" for the "right to keep the option contract open for the time specified" and "[a]lthough [buyer] did have the right to *accept* or *reject* the option in the sense that it was free to take the action required to close the transaction, [buyer] was not foreclosed from negotiating relative to the contract of sale as distinguished from the option."¹¹² The court buttressed its conclusion with reference to commentators who, while acknowledging that counter-offers in the form of qualified or conditional acceptances traditionally constitute rejections, posit that such responses do not terminate option contracts because of the unique character of these agreements.¹¹³

Humble, however, contends that even if such letter of May 2, 1963, be construed as a conditional acceptance, it would not terminate the option agreement, and that it could thereafter, during the term provided in the option agreement, make an unconditional acceptance which would be valid and effective. We are not in agreement with Humble's contention. An option is a mere right of election, acquired by one under a contract, to *accept or reject* a present offer within the time therein fixed.

Humble Oil, 419 S.W.2d at 451. Rather than providing the optionee with the disjunctive right he acquired by contract, namely, to *accept or reject* the offer, the Texas Supreme Court gives the optionee a conjunctive right, the right to *accept and reject*. This broad prerogative is more than the optionor bargained for and corrupts the true nature of the option.

111. 428 S.W.2d at 95.

112. *Id.*

113. *Id.* at 94-95. The following commentary illustrates the distinction typically drawn between ordinary offers and irrevocable offers in this context:

It is clearly established . . . that a qualified or conditional acceptance of an offer does not raise a contract because the minds of the parties do not meet in agreement upon the same terms. It is said that such an acceptance is a counter-proposal for a new contract, to give legal life to which requires the assent or acceptance of the other party. It is in this sense that a qualified or conditional acceptance is a rejection of the offer first made.

F. JAMES, *supra* note 57, § 838 (footnotes omitted). *See also Humble Oil*, 428 S.W.2d at 94. However, in an option contract:

The minds of the parties have met in agreement, the distinctive feature of which is that the optionor, for a consideration, binds himself to keep the option open for election by the optionee, for and during the time stipulated, or implied by law. . . . [T]he rule peculiar to offers to the effect that a conditional acceptance is, in itself, in every case, a rejection of the offer, is not applicable to an option contract, supported by a consideration and fixing a time limit for election.

F. JAMES, *supra* note 57, § 838. Again, Professor James and the *Humble Oil* court declare that, though a counter-offer typically equals a rejection, it does not operate as a rejection in the context of an option contract. The court may have conceivably reached a different conclusion if the optionee had actually tendered an outright rejection prior to the eventual acceptance. However, the overall language of the opinion provides little more than a vague implication that the distinction between an outright rejection and a counter-offer/rejection might be legally

Applying this rationale, the court found that the seller's offer remained open until the expiration of the option period, despite the intervening counter-offer. Accordingly, the court granted the buyer's motion for summary judgment and ordered specific enforcement of the contract.¹¹⁴

The overwhelming majority of courts treating this issue echo the conclusions and reasoning articulated in *Humble Oil*.¹¹⁵ In particular, they refuse to yield on the distinction between a regular offer and one rendered irrevocable by consideration. In the latter, the majority of courts either explicitly or implicitly advance the notion that the offeree has paid for a set period of ruminating time and nothing may intrude upon that prerogative — even a clear counter-offer.¹¹⁶

The only question that these decisions arguably leave open is whether a distinction should be, or has been, drawn between the counter-offer/rejection and an outright rejection in the context of an irrevocable offer. While most of the foregoing opinions did not specifically address this issue, the earlier assumption seems safe: given the prefatory acknowledgments of the equivalence of counter-offers and rejections in these cases, no meaningful differentiation exists under the majority view.¹¹⁷ Thus, although most of these decisions address counter-offer/rejections rather than outright rejections, they convey the message that pure rejections command no greater def-

significant in an option contract. *Humble Oil*, 428 S.W.2d at 94; A. CORBIN, *supra* note 7, § 91.

Yet, the Pennsylvania Supreme Court in *Cerbo v. Carabello*, 376 Pa. 571, 574-75, 103 A.2d 908, 909 (1954), opined that outright rejection may compel a different result than a counter-offer:

[T]he difficulty with defendants' position is that neither the words nor conduct establish an intention to rescind or abandon the rights under the option. . . . At most it was a non-acceptance of an offer to enter into a new contract on the same terms except for a reduction in price. . . . Nowhere does it appear that the lessee waived his rights under the option to purchase.

Id. at 574-75, 103 A.2d at 909. *See also Humble Oil*, 428 S.W.2d at 94. While this language does not quite reach the conclusion that a pure rejection should terminate an optionee's prerogative to accept, it plants a seed of doubt regarding the breadth of the majority approach. *See also Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co.*, 295 N.W.2d 89, 92 n.4 (Minn. 1980) (Minnesota Supreme Court suggested that earlier precedent had, in fact, limited the scope of the majority approach to counter-offers, as opposed to rejections). However, the overall tenor of the controlling precedents seems to reflect the majority's view that *neither* a counter-offer *nor* a rejection should terminate the offeree/optionee's power of acceptance. *See, e.g., Ryder v. Wescoat*, 535 S.W.2d 269 (Mo. Ct. App. 1976); *see also supra* note 102.

114. *Humble Oil*, 428 S.W.2d at 94.

115. *See supra* note 102 and accompanying text.

116. *Id.* As discussed below, any reliance upon the consideration paid to conclude that the optionee has the entire period of time to vacillate is misplaced. *See infra* notes 185-99 and accompanying text.

117. *See supra* notes 110-13 and accompanying text.

erence than counter-offers with respect to the termination of irrevocable offers.¹¹⁸ That is, neither one will preempt a subsequent acceptance within the option period.

Moreover, those commentators treating this question have taken no pains to segregate the two concepts, at least concerning true counter-offers.¹¹⁹ As Professor Simpson indicates:

Where an offer is supported by a binding contract that the offeree's power of acceptance shall continue for a stated time, will a communicated rejection terminate the offeree's power to accept within the time? On principle, there is no reason why it should. . . . So an option holder may complete a contract by communicating his acceptance despite the fact that he has previously rejected the offer.¹²⁰

The precise wording of the Second Restatement, "the power of acceptance under an option contract is not terminated by rejection or counter-offer,"¹²¹ further reinforces the proposition that no meaningful distinction is thought to exist.

D. *Ryder v. Wescoat*

If any doubt lingers that most courts treating this issue readily equate counter-offers with outright rejections and, yet, are not dissuaded from concluding that neither will terminate the irrevocable offer, consider finally the case of *Ryder v. Wescoat*.¹²² In *Ryder*, the buyer secured an option to purchase a 120 acre farm. The optionor/seller actually possessed an option to purchase that tract of land and had transferred it to buyer.¹²³ The parties clearly defined the deadline for exercising the option and exchanged "valuable" consideration. Ten days before the scheduled lapse of the option, the buyer indicated to the seller that he would "pass" on the farm. Seller construed this comment to mean that buyer was rejecting the offer and that seller could now freely purchase the farm himself, or possibly extend the option to another potential optionee.¹²⁴ Consequently, when the buyer

118. *Id.*

119. See RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979); L. SIMPSON, *supra* note 20, §§ 23, 24; A. CORBIN, *supra* note 7, § 94.

120. See L. SIMPSON, *supra* note 20, § 23.

121. RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979); *Trautwein v. Leavey*, 472 P.2d 776, 780 (Wyo. 1970) (court effectively equated counter-offer and rejection).

122. 535 S.W.2d 269 (Mo. Ct. App. 1976).

123. *Id.*

124. *Id.* at 270.

presented an unqualified acceptance to the seller within the option period, the seller refused to execute the agreement.¹²⁵

The Missouri Court of Appeals concluded that the offer remained vital even in the face of the apparent intervening rejection. Reasoning that the option froze the offer to purchase for the scheduled period, the court deemed the buyer's fleeting decision to "pass" on the offer inconsequential.¹²⁶ The court found the seller's arguments that the premature rejection terminated the offer unimpressive:

Since an option stands on a different footing from an offer which is made without consideration being paid therefor, and since it has been held that an option is irrevocable for the time stated, and that a counter-offer does not effect a rejection, it necessarily follows that a rejection standing alone would not end the rights of the option holder.¹²⁷

As part of its opinion, the court noted that "[n]o case has been cited, and diligent research . . . has failed to locate any case involving this precise issue."¹²⁸ This statement reinforces the notion that judicial authority espousing the majority view prior to this case did not directly address whether an outright rejection would terminate an irrevocable offer.¹²⁹ However, the general discussions contained in those opinions acknowledging the loose interchangeability of true counter-offers and rejections presaged the ultimate application of the majority position to outright rejections. The court's reasoning in support of its refusal to "honor" the clear rejection appears to be an ineluctable extension of earlier decisional authority rather than a quantum leap forward into uncharted waters.¹³⁰

Still, the court qualified its opinion by clearing a path of retreat for an optionor who relies upon a subsequently recanted rejection (or counter-offer) by an optionee. Echoing the sentiments of Professors Simpson and Corbin, the court stated that a rejection of an irrevocable offer may terminate an

125. *Id.*

126. *Id.* at 271.

127. *Id.*

128. *Id.* *But see supra* notes 102, 110-13 and accompanying text.

129. 535 S.W.2d at 271. *But see* *Bartholf v. Hautala*, 194 N.Y.S.2d 660, 663 (1939) ("[A]n acceptance incorporating a term, condition or reservation not embraced within the terms of the offer is equivalent to a rejection; and the offer contained in the option may not be revived by a subsequent unconditional acceptance."). In *Stanley v. Gannon*, the court stated: "An acceptance incorporating a term, condition, or reservation not embraced within the terms of the offer is equivalent to a rejection [T]he last paragraph of the letter of September 8, 1919, destroys its efficacy as an acceptance of the proposal contained in the option of March 7, 1919, and . . . no contract, therefore, ever resulted." 109 Misc. 611, 613, 180 N.Y.S. 602, 606 (1919).

130. *See supra* notes 110-13 and accompanying text.

offer if the optionor materially alters his position in reliance upon the rejection prior to a timely acceptance.¹³¹ The court believed that this "concession" would accomplish a twofold purpose: It rewards the optionee for consideration paid by recognizing the full time period to consider the offer, and it insulates the optionor from any loss incurred by changes of position in reliance upon a premature rejection.

In a sense, the court adopted a typical, reliance-based "no harm, no foul" approach. Undeniably, this tack protects the optionor who sells property to another based on receipt of the optionee's rejection; but it does nothing for the optionor who simply wants peace of mind from knowing that his property is no longer for sale.¹³² It also fails to reach the optionor who immaterially changes position in reliance upon the unnecessary and precipitous rejection.

More critically, while the reliance-based approach may provide occasional solace to the optionor, it dramatically manifests the counter-intuitive nature of the majority position. If the optionee truly has paid for the entire period, then a premature rejection can never provoke *justifiable* reliance by the optionor.¹³³ A consistent application of the majority's premise would dictate that the optionee could reject and accept with impunity — and without fear that his ultimate acceptance could be compromised by estoppel. However,

131. *Ryder*, 535 S.W.2d at 271. See also *Holt v. Sofflet*, 338 Mich. 115, 61 N.W.2d 88 (1953); L. SIMPSON, *supra* note 20, § 23; A. CORBIN, *supra* note 7, § 94.

132. As the court held in *Theobald v. Chumley*, 408 N.E.2d 603 (Ind. Ct. App. 1980), an optionor has an expectancy interest as soon as an optionee accepts without the need to show reliance. *Id.* at 605. In essence, the optionor receives peace of mind from the knowledge that his property has been purchased, and he need not pursue other potential purchasers. Conversely, after a rejection or counter-offer, an expectancy interest arises from the knowledge that one will not be bound to a particular individual for a specific period. In a sense, the rejection is *de facto* a promise not to accept the underlying offer, and the promisee is entitled to the legitimate expectations — not merely the foreseeable effects of reliant conduct — that such a promise engenders. Of course, this point only begets the thorny question of whether this "promise" requires new consideration. See *infra* notes 280-311 and accompanying text. See also Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985) (suggesting a "new theory of distinctly contractual obligation" that enforces virtually every promise made pursuant to some economic activity). *Id.* at 905.

133. See generally RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); Boyer, *Promissory Estoppel: Principle From Precedents*, 60 MICH. L. REV. 639 (1952); Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983). Generally, an estoppel will not arise if the requisite reliance is not justifiable and within the contemplation of the promisor. See, e.g., *Smith v. Boise Kenworth Sales, Inc.*, 102 Idaho 63, 625 P.2d 417 (1981), *Fandess v. Borden, Inc.* 667 F. 2d 628 (7th Cir. 1981). If the optionee truly has bought the entire period, how could he ever be held accountable (and then estopped) for his premature rejection. The very possibility of an optionor's *reasonable* reliance upon such rejection proves that the option period is not the impenetrable enclave that it is cracked up to be.

by the *Ryder* court's own tacit admission, that result is profoundly undesirable and manifestly unfair to the optionor. Plainly, the majority has injected an estoppel component to ease the "pain" of the optionor. However, in prescribing this palliative, the majority exposes the frailties of its own diagnosis. In essence, by acknowledging the optionor's possible justifiable reliance upon a premature rejection, the court implicitly concedes that the optionee has not actually purchased the entire option period.

In sum, the foregoing case law reflects the majority jurisdictions' indulgence of an acceptance that succeeds an outright rejection in the context of an option contract. While the troublesome reliance component of the *Ryder* analysis assuages much of the harm that may spring from such indulgence, the majority approach constitutes an inexplicable subversion of traditional contract theory. Moreover, the apparent unwillingness to concede that at least an outright rejection should terminate the power of acceptance further impeaches the credibility of the majority position.

The results reached by those scarce decisions espousing the minority view are more intellectually satisfying and more attentive to the basic rudiments of contract law. Nonetheless, while this Article agrees with the conclusions reached in those minority jurisdictions, it by no means is satisfied that a fully explicated rationale has been articulated. Therefore, after brief discussion of the representative precedent that finds an option contract terminated by counter-offer/rejection, the Article will explain why the majority's posture is flawed, why the minority's view is favorable, and why the Second Restatement should be modified to reflect the more logical approach.

IV. COUNTER-OFFER/REJECTION TERMINATES THE IRREVOCABLE OFFER

A. The Landberg Rationale

In *Landberg v. Landberg*,¹³⁴ the California Court of Appeals unequivocally stated that an offeree's rejection terminated an offer made irrevocable and secured by consideration, and thereby rendered nugatory any subsequent acceptance.¹³⁵ In *Landberg*, the court confronted a divorce decree embracing a settlement agreement that prescribed a set procedure in the event that one spouse elected to sell or buy stock from the other.¹³⁶ Under

134. 24 Cal. App. 3d 742, 101 Cal. Rptr. 335 (Dist. Ct. App. 1972).

135. *Id.* at 757-58, 101 Cal. Rptr. at 345-46.

136. *Id.* at 747, 101 Cal. Rptr. at 338. Under the terms of the settlement agreement, if either spouse chose to sell to, or purchase stock from, the other, the following procedure would apply:

At any time either spouse may give to the other spouse . . . written notice that on or after the fifteenth subsequent calendar day, but prior to the twentieth subsequent

the terms of the agreement, when one spouse offered to buy or sell a block of shares thus creating an option, the other spouse would have thirty days to provide written notification of acceptance.¹³⁷ This option ripened into a controversy as a result of one spouse's offer to sell stock and the other spouse's communication of two separate and conflicting responses.¹³⁸

The offeror (husband) made an offer "to purchase or sell" the remaining interest in jointly held stocks with the offeree (wife).¹³⁹ This offer contained several conditions. Twenty-five days later, the wife provided the husband with an acceptance qualified by several of her own conditions. In no way did the acceptance mirror the terms of the original offer.¹⁴⁰ When the husband replied that the wife's response did not constitute a valid acceptance due to its failure to adopt all the conditions of the offer, the wife responded with a telegram that purported to accept the offer as presented.¹⁴¹ The wife sent the telegram in a timely fashion and offered no qualifications other than a reference to the fact that the "election [to buy or sell] is in conformity with and subject to the governing provisions of the April 10, 1967 [Settlement] Agreement."¹⁴² At this point, however, the husband advised the wife that the qualified acceptance was invalid and that the subsequent unconditional acceptance was ineffectual.¹⁴³

Affirming the lower court's denial of the wife's request for an order declaring valid her acceptance of the offer to "buy or sell," the California Court of Appeals held that the initial conditional acceptance was tantamount to a rejection and terminated the offer.¹⁴⁴ In its multi-tiered analysis, the court began with the broad proposition that an effective acceptance must be "abso-

calendar day, the party giving notice will state a price per share of the shares of each corporation, at which such shares shall be bought or sold. . . . Within thirty (30) days after the price per share is thus stated, the other spouse shall give written notice of his or her election to buy the first spouse's shares, or to sell his or her shares to the first spouse, at the price per share stated in the notice under part (c) hereof. . . . If the 'other spouse' shall have failed to make an election as hereinabove provided, the first spouse may elect to buy the 'other spouse's' shares, or to sell his or her shares to the other spouse, at the price per share stated under part 'c' hereof.

Id. at 747-48, 101 Cal. Rptr. at 338 (quoting paragraph 10 of the agreement).

137. *Id.* at 751, 101 Cal. Rptr. at 341. The facts herein are not appreciably unlike the "double option" contract observed by Professor Corbin. *See supra* note 67. *See also* Valashinas v. Koniuto, 308 N.Y. 333, 124 N.E.2d 300 (1968).

138. 24 Cal. App. 3d at 748-49, 101 Cal. Rptr. at 338-40.

139. *Id.* at 748, 101 Cal. Rptr. at 338-39.

140. *Id.* at 748-49, 101 Cal. Rptr. at 339.

141. *Id.* at 749, 101 Cal. Rptr. at 339-40.

142. *Id.*, 101 Cal. Rptr. at 340.

143. *Id.* at 749-50, 101 Cal. Rptr. at 340.

144. *Id.* at 752, 101 Cal. Rptr. at 342.

lute and unqualified.”¹⁴⁵ In the court’s words, anything less than this unequivocal acceptance would constitute “a rejection terminating the offer; it is a new proposal or counter-offer which must be accepted by the former offeror now turned offeree before a binding contract results.”¹⁴⁶ The court then defined an option contract, drew pertinent distinctions between revocable and irrevocable offers, and acknowledged that the husband’s “proposal” indeed constituted an irrevocable offer.¹⁴⁷ Further, bridging any perceived gap between revocable and irrevocable offers, the court declared that the offeree must accept the offer embraced by the option contract “in the terms in which it is made.”¹⁴⁸

Accordingly, the court reasoned that “if the acceptance contains conditions not embraced in the offer or adds new terms thereto . . . the purported acceptance may be ignored by the optionor.”¹⁴⁹ While these pronouncements were unremarkable, they set the stage for the point at which the *Landberg* court and the majority of jurisdictions treating this issue would begin to part ways: “If the optionee changes the terms of the offer embodied in the option agreement ‘the alteration of such terms, or the addition of any change or limitation, is tantamount to a rejection of the original offer and the making of a counter offer.’ ”¹⁵⁰

Having thus characterized the offer and acceptance framework in the option contract context, the court concluded that the wife’s unconditional acceptance constituted a “nullity” because the preceding qualified acceptance actually rejected the original offer and “put an end to it.”¹⁵¹ In an ironic yet

145. *Id.* at 750, 101 Cal. Rptr. at 340.

146. 24 Cal. App. 3d at 750, 101 Cal. Rptr. at 340.

147. *Id.* at 750-51, 101 Cal. Rptr. at 340.

148. *Id.*, at 752, 101 Cal. Rptr. at 341.

149. *Id.*, 101 Cal. Rptr. at 342. *See also* *Williams v. Espey*, 11 Utah 2d 317, 358 P.2d 903 (1961) (holding that an acceptance which adds qualifications or conditions is a counter-offer); *Alexander v. Bosworth*, 26 Cal. App. 589, 147 P. 607 (1915) (same). *But see* *J.R. Stone Co. v. Keate*, 576 P.2d 1285, 1288 (Utah 1978) (court qualified the mirror image rule’s application to option contracts such that a counter-offer existed only where a “substantial variance” between the terms of an option and an offer to exercise it existed).

150. *Landberg*, 24 Cal. App. 3d at 752, 101 Cal. Rptr. at 342 (quoting *Alexander*, 26 Cal. App. at 597, 147 P. at 611).

151. *Id.* at 757; 101 Cal. Rptr. at 345. “ ‘The rejection of an offer kills the offer.’ . . . [W]hen an offer under an option contract has been rejected, the party rejecting cannot subsequently, at his option, accept the rejected offer and thus convert the same to an agreement by acceptance.” (quoting *Stanley v. Robert S. Odell & Co.*, 97 Cal. App. 2d 521, 534, 218 P.2d 162, 171 (Ct. App. 1950)). *See also* *Goodwin v. Hidalgo County Water Control & Improvement Dist. No. 1*, 58 S.W.2d 1092 (Tex. Civ. App. 1933) (holding that a rejected offer cannot be subsequently accepted). *See also* *Bartholf v. Hautala*, 194 N.Y.S.2d 660, 663 (1939).

not unprecedented twist of phrase, the court declared that "the rejection in the instant case was irrevocable."¹⁵²

B. Jones v. Moncrief-Cook Co.

While *Landberg* is a rarity, it is not a derelict in mainstream contract jurisprudence considering this issue. Other California cases, as well as a few cases in other jurisdictions, comprise the minority view. The *Landberg* decision, however, is significant because it rekindled the flames of case law dating back to the turn of the century. In 1908, the Oklahoma Supreme Court authored one of earliest state court opinions on the issue in *Jones v. Moncrief-Cook Co.*¹⁵³ The court held that an optionee's counter-offer/rejection terminated the power of acceptance and freed the optionor from further susceptibility.¹⁵⁴

In *Jones*, a one-year lease permitted the lessee to exercise an option to purchase the leased land during the period of the lease at a price equal to an offer received from a prospective buyer.¹⁵⁵ After being informed of an offer by a third party to purchase the land in question, the lessee sent a letter to the lessor which, at best, was a grumbling acceptance and, at worst, a counter-offer/rejection.¹⁵⁶ Within a week, and before termination of the

152. *Landberg*, 24 Cal. App. 3d at 757, 101 Cal. Rptr. at 345. See also *Stanley v. Robert S. Odell & Co.*, 97 Cal. App. 2d 521, 218 P.2d 162 (Ct. App. 1950) (holding that once an offer has been rejected, it cannot be accepted); CLARK ON CONTRACTS § 21 (2d ed. 1904) (noting that a rejection prevents the offer from remaining open to acceptance); *Niles v. Hancock*, 140 Cal. 157, 73 P. 840 (1903) (holding that a counter-offer was a rejection of the original offer and subsequent acceptance by purchaser could not create a contract).

153. 25 Okla. 856, 108 P. 403 (1908).

154. *Id.* at 865, 108 P. at 407.

155. *Id.* at 858-59, 108 P. at 404. Again, the option agreement essentially resembled a version of the right of first refusal seen in many contemporary real estate transactions: "the party of the first part hereby guarantees to the second parties the privilege of purchasing the above lot at any time before the termination of this lease. . . ." *Id.* at 858, 108 P. at 404. Of course, the true option contract and the right of first refusal are different concepts, with the primary distinction being that the right of first refusal only gives the holder the prerogative to purchase on the same terms offered by third parties. See *Litvinoff*, *supra* note 57, at 745-47. As a practical matter, the right of first refusal ripens into an option contract at the time the optionor receives a bona fide offer to purchase or sell from a third party. The individual who has secured the option then has the opportunity to match the competing offer. *Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409 (Minn. 1984). See further *Green v. First Am. Bank & Trust*, 511 So. 2d 569, 573-74 (Fla. Dist. Ct. App. 1987) (holding that right of first refusal ripens into an option when third party's offer is received). *But see* A. CORBIN, *supra* note 7, § 261.

156. *Jones*, 25 Okla. at 859-60, 108 P. at 404-05. In pertinent part, the letter announced: "We are rather surprised at such a price that is offered for such property here, but of course we may be able to make some arrangements with you for the purchase of the lot If you could make us a good proposition, we might be able to handle the deal for you." *Id.*

lease, the lessee attempted to accept the original offer on its precise terms.¹⁵⁷ The lessor refused to close the transaction, contending, *inter alia*, that the first letter from the lessee constituted a refusal to purchase and absolved the lessor from further responsibility.¹⁵⁸

The court recognized that the initial correspondence fell far short of an acceptance and noted that there was no evidence of the lessee's desire to consider the original offer for an extended period of time. Rather, the court found that the lessee wrote "a letter which is tantamount to a rejection, to ask for an offer, the terms of which are not cash, but suggested payments at different times"¹⁵⁹ Construing the counteroffer as a rejection of the option terms and as an "effort to make a new contract,"¹⁶⁰ the court concluded that: "[t]he rejection of the offer was irrevocable. We think that amounted to a rejection and waiver of any privilege to purchase the lot prior to the termination of the lease at the price offered by the proposed purchaser."¹⁶¹

C. *A Sampling of Federal Court Cases: Title Insurance & Guaranty Co. v. Hart and James v. Darby*

Finally, in one of the rare federal court cases to reach this issue, the United States Court of Appeals for the Ninth Circuit held that a qualified acceptance or a counter-offer constituted a clear rejection of an original offer,¹⁶² and intimated that such action by an offeree could void his power of acceptance even in the context of an option contract.¹⁶³ However, the court actually skirted the subsequent acceptance issue by concluding that the offeree's failure to accept the original offer resulted from a mistaken belief that he could tender certain royalties rather than cash as part of the exercise of the option.¹⁶⁴ The court of appeals found that the offeree's deficient response was reasonable, and, while not constituting a bona fide acceptance, at

157. *Id.* at 860, 108 P. at 405 ("We will pay you thirty-one hundred dollars [the initial price] for lot thirty block forty, Lawton.").

158. *Id.*

159. *Id.* at 865, 108 P. at 407.

160. *Id.*

161. *Id.* (footnote omitted). *See also* CLARK, *supra* note 152, § 24. It is noteworthy that the court characterized this rejection as a *waiver* of the privilege to purchase the subject real estate. This Article discusses the employment of the term *waiver* and its pertinence to the rejection of an option contract *infra* notes 280-310 and accompanying text. *See also* RESTATEMENT OF CONTRACTS § 47 (1932).

162. *Title Ins. & Guar. Co. v. Hart*, 160 F.2d 961, 966 (9th Cir.), *cert. denied*, 332 U.S. 761 (1947).

163. *Id.* at 966.

164. *Id.* at 963.

the very least, left the offer intact and susceptible to a subsequent valid acceptance.¹⁶⁵

Ironically, commentators have cited this case as support for both the majority and minority positions.¹⁶⁶ Professor Corbin referred to this case as authority for the proposition that a “counteroffer by such an offeree . . . does not terminate the power of acceptance.”¹⁶⁷ By contrast, Professor Axelrod listed this decision as one of the few cases embracing the minority view that a counter-offer terminates an offer in an option contract.¹⁶⁸ While Professor Axelrod relied substantially upon dicta, his interpretation appears much more plausible than Professor Corbin’s.

Almost a half-century earlier, another federal court had articulated a preference for what would become the minority view. In *James v. Darby*,¹⁶⁹ the Court of Appeals for the Eighth Circuit held that a qualified acceptance was “under the authorities, and in fact, a rejection (of the option).”¹⁷⁰ In *James*, the optionor had provided optionee with a thirty-day option to purchase real property, commencing on November 2, 1896. On November 25, the optionee wrote to optionor and stated that “[i]f details are satisfactorily arranged, I have decided to accept your offer.” In addition, he sought an abstract to ensure that title was perfect.¹⁷¹

On November 27, 1896, optionor wrote to optionee, assuring him that “there will be no trouble about the title” and that he would procure an abstract. Optionor also referenced a commission which optionee would owe to a separate individual as a result of the sale.¹⁷² However, on December 24, 1896, optionee received a telegram from optionor stating that he had sold the property to a third party.

The court examined the language in the optionee’s November 25 correspondence and found that the letter contained “new conditions imposed, changes suggested” rendering the acceptance conditional.¹⁷³ Noting that, as of November 25, only one week remained on the option and that optionee

165. *Id.* at 963, 966-67. Preserving the offer without finding a binding acceptance is an appropriate approach where the optionee’s response does not reflect a rejection or its functional equivalent. *See infra* note 318.

166. *See infra* notes 167-78 and accompanying text.

167. *See* A. CORBIN, *supra* note 7, § 91 & n.29., at 385. *See also* J. MURRAY, *supra* note 12, § 43B n.26.

168. *See* Axelrod, *supra* note 8, at 419.

169. 100 F. 224 (8th Cir. 1900).

170. *Id.* at 228.

171. *Id.* at 225.

172. *Id.*

173. *Id.* at 228.

could not reasonably expect optionor to receive the letter and fulfill the conditions, the court held:

The letter of November 25, 1896, was not, therefore, an acceptance of the option. . . . It imposed conditions which could not be complied with within the time limited by the terms of the option, and both parties, in the very nature of things, must be held to have known it. The option of November 2, 1896, and the letter of November 25, 1896, therefore, created no contract, for the reason that the minds of the parties did not meet, but, on the contrary, the terms offered were distinctly rejected by the requirement of other and additional terms. So strict are the authorities, that after [optionor] received this letter . . ., [optionee] would not have been allowed, if he had so desired, to have recalled it, and then accepted in unconditional terms the option of November 2, 1896. The receipt by [optionor] of that letter rendered the option nugatory between the parties.¹⁷⁴

Accordingly, the court concluded that the letter was a rejection of the option and "ended all relations subsisting between [optionors] and [optionee] as to the option."¹⁷⁵

Essentially, the minority's rationale is predicated on an unwillingness to depart from traditional contract principles which focus on the action of the

174. *Id.* at 228-29.

175. *Id.* Interestingly, the Eighth Circuit cited Supreme Court authority in support of its conclusion that the rejection terminated the option. *Minneapolis & St. Louis Ry. v. Columbus Rolling Mill*, 119 U.S. 149 (1886). There, the defendant/offeree offered to sell plaintiff/offeree between 2000 and 5000 tons of 50 pound rails for \$54 per gross ton. Under the terms of the offer, the offeree was obligated to purchase at least 2000 tons, and to notify the offeror of his acceptance by December 20, 1879. The offeree tendered his acceptance on December 16; however, he only placed an order for 1200 tons. He subsequently accepted without qualification the terms of the offer within the designated time frame. The Supreme Court held:

A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it.

Id. at 151. While the Eighth Circuit cites this case in support of its finding that a rejection terminates an optionee's power of acceptance (and the author would welcome such weighty support for his position), a close reading of Justice Gray's opinion indicates that he was *not* addressing a classic option situation or an irrevocable offer. *Id.*

Yet, at least one other Supreme Court decision can be interpreted to stand for the proposition that a counter-offer/rejection terminates an option contract. In *Beaumont v. Prieto*, 249 U.S. 554 (1919), the offeror provided the offeree with a three-month option to purchase property in Manila. In an apparent attempt to accept the offer, the optionee, by letter dated January 17, 1912, stated, "I offer to purchase said property for the sum of three hundred and seven thousand (307,000.00) pesos, Ph. C., cash, net to you, payable the first day of May, 1912, or before and with delivery of a torrens title free of all encumbrances as taxes and other debts."

offeree in determining whether an offer in an option contract is terminated. While courts have not employed the precise rationale advanced in this Article, judicial decisions suggest an unspoken acceptance of the notion that the irrevocability of an offer is directly related to the conduct of the offeror — he cannot revoke the offer during the option period. The pledge of irrevocability does not, barring special covenants, address or purport to address the conduct of the offeree. Again, the recurring motif is self-evident: the option contract is an irrevocable not irrejectable offer. The following discussion springs from this premise and attempts to add flesh to the skeletal outline of the minority position.

V. APOLOGY FOR THE MINORITY VIEW: WHY A REJECTION OR PURE COUNTER-OFFER SHOULD OPERATE TO TERMINATE AN OPTION

Several persuasive arguments illustrate why the minority view represents the preferable approach. These positions draw upon technical and indisputable principles of contract formation, applications of tenets in analogous contexts, and considerations of public policy and reasonable commercial expectations. Of course, this treatment will necessarily deal in generalizations and broad prescriptions. In individual cases, parties may demonstrate an intent unique to their situation and divergent from the typical option contract. When that occurs, the commonly held rules and the *assumed* desires

Id. at 555. The option, however, had simply provided the opportunity to buy “for the price of its assessed government valuation.” *Id.*

Justice Holmes stated that “the letter of January 17 plainly departed from the terms of the offer as to the time of payment and was, as it expressed to be, a counter offer.” *Id.* at 556. He therefore reasoned:

We do not find it necessary to go into the discussion of the later communications [which purported to accept]. . . . The right to hold the defendant to the proposed terms by a word of assent was gone, and after that all the plaintiff could do was to make an offer in his turn.

Id.

Subsequent cases have attempted to distinguish *Beaumont* on the grounds that the option therein was not supported by consideration. *See, e.g., Humble Oil & Ref. Co. v. Westside Inv. Corp.*, 428 S.W.2d 92, 95 (Tex. 1968). While the Supreme Court’s opinion does not precisely address the nature of the option or its “validation,” it is unlikely that Justice Holmes would characterize a simple revocable offer (or a purportedly irrevocable offer that lacks consideration) as an option. Admittedly, there is an insufficient basis upon which to argue that the position advanced in the Second Restatement is at war with Supreme Court authority. Hence, its reference has been relegated to this footnote. There is, however, at least a hint that the *Beaumont* court would have treated the “majority” view inhospitably. *See Humble Oil & Ref. Co. v. Westside Inv. Corp.*, 419 S.W.2d 448, 451 (Tex. Ct. App. 1967), *rev’d*, 428 S.W.2d 92 (Tex. 1968).

of the parties will cede to their contrary intentions as manifested in each case.

A. An Irrevocable Offer Is Not by its Nature Irretractable

When an offeree pays valuable consideration to secure an option, he is concerned primarily with preventing the offeror from playing ball with a third party while the offeree mulls over the proposal. An offeree is not realistically planning to reject and subsequently accept the proposal within the "guaranteed period." The typical option contract envisions a scenario in which the optionee rests assured that the property or service will not be sold out from under him. However, an offeror's gratuitous representation that he will hold an offer open for a set period of time does not ipso facto preclude him from revoking the offer prior to the offeree's acceptance.¹⁷⁶ The law will not bind the offeror to his promise to hold the offer open unless the offeree pays valuable consideration to the offeror to secure the pledge of irrevocability.

As stated above, the Second Restatement declares that conventional rules governing termination of an offer by counter-offer/rejection, revocation, or death or incapacity of the offeror or offeree do not apply to option contracts.¹⁷⁷ Yet, no one has articulated a rationale for applying this exception in such an indiscriminate fashion. The justification for giving the irrevocable offer immunity from termination during the option period most likely stems from a basic misconception that the consideration paid guarantees flexibility of choice until the expiration of the agreed time period.¹⁷⁸

A much more plausible interpretation of the typical option transaction is that the offeree has paid for the privilege of contemplating an offer that exists for him alone, at least for a set timeframe or a reasonable period.¹⁷⁹ If he chooses to exercise his franchise by rejecting the offer, then the process should end and the offeror should be free to seek another contractor (or no other bidder) without fear of reprisal. To protect only the optionor who has detrimentally relied upon a premature rejection, while not reinforcing an

176. See A. CORBIN, *supra* note 7, § 262. But see U.C.C. § 2-205 (1977) (written contract for sale of goods which states that it will be held open for a specified period cannot be revoked during that period); RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979) (offer that is expected to induce reliance, and does so, is binding as option contract "to the extent necessary to avoid injustice").

177. RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979). See also *supra* note 27.

178. See A. CORBIN, *supra* note 7, § 273; L. SIMPSON, *supra* note 20, § 23; see also *supra* note 100.

179. See, e.g., *Ellis v. Waldrop*, 627 S.W.2d 791, 794 (Tex. App. 1982).

optionor's legitimate expectations drawn from such a rejection, falls short of the mark.¹⁸⁰

By securing the option, the offeree is cognizant of his ability to dictate the timing of his acceptance or rejection of the offer. This factor alone provides a valuable trade-off for the consideration exchanged. The optionee may now freely vacillate, negotiate, ponder, and seek other deals while the option remains open.¹⁸¹ If the optionee has any doubts regarding the ultimate decision, then he should simply do nothing. There is no reason for him to announce an early decision knowing that he might recant at a later time within the option period. In the ordinary situation, nothing in the underlying transaction suggests that the optionee has purchased a prerogative to yo-yo the offeror back and forth until the option's expiration date.

The very fact that an optionee has an insulated period to consider an offer makes it wholly unnecessary that he should also have an opportunity to present conflicting responses during such option period. Further, there is no legitimate reason in law or logic to tolerate a premature rejection and to permit it to imperil the optionor's freedom of choice or peace of mind. Although the protection afforded the optionor who detrimentally relies on the imprudent early rejection provides some relief,¹⁸² that relief is incomplete. As stated earlier, this "no harm, no foul" approach does nothing for the offeror who rightfully deserves the psychic comfort of knowing that a rejection has released him from any commitment.

It is certainly understandable that an optionee may wish to deliberate during the pendency of the option and may even wish to pursue other possibilities. Yet, he can accomplish that goal by a response manifesting a desire to

180. Plainly, the optionor should be allowed to treat a rejection as a termination of the offer and derive whatever legitimate expectation such assurance creates. To suggest that the concept of expectation has no place in this scenario would further nail the lid closed on the coffin holding the vestiges of bargain theory. See, e.g., G. GILMORE, *DEATH OF CONTRACT* 46-53 (1974); see also Feinman, *supra* note 133.

181. In certain circumstances, the ability to seek a better deal may be circumscribed, particularly in the case of constructive option contracts. For example, in *Drennan v. Star Paving*, 51 Cal. 2d 409, 333 P.2d 757 (1958), the court cautioned that the optionee would forfeit his constructive option if he began to dicker about the price in an effort to secure a better deal. *Id.* at 415; 333 P.2d at 760; see also *supra* notes 71-75 and accompanying text. This caveat strengthens the argument that an option contract protects the offeree from revocation, but does not insulate him from the effects of a rejection. In *Drennan*, the general contractor's reliance upon the subcontractor's bid constituted the rough equivalent of consideration in the classic option contract. 51 Cal. 2d at 414; 333 P.2d at 760. See *RESTATEMENT (SECOND) OF CONTRACTS* § 87(2) (1979). Yet, the court made clear that such reliance did not create an equitable option structure that would tolerate indiscriminate dickering. *Drennan*, 51 Cal. 2d at 415; 333 P.2d at 760. Likewise, courts should not permit the payment of consideration for an option to fabricate something far more enveloping than a simple irrevocable offer.

182. See *supra* notes 131-34 and accompanying text.

consider the matter further or by saying nothing at all. An optionee can simply avoid the finality of a rejection by indicating that the intermediate response to the offer does not intend to supplant the offer or alter the proposed bargain. If an optionee fails to preserve the vitality of an offer, then he should logically be barred from presenting a subsequent unconditional acceptance.

Again, the reams of scholarship devoted to option contracts address various aspects of the irrevocability question and, in some instances, valiantly draw subtle distinctions between an option contract and an irrevocable offer.¹⁸³ But, precious few discuss the irrejectability of an irrevocable offer or its brethren option contract. Certainly, no one satisfactorily explains why such offers should survive the offeree's counter-offer or outright rejection.¹⁸⁴

In sum, the termination of the power of acceptance by a pure rejection or counter-offer/rejection represents one of the cornerstones of contract formation and the offer/acceptance process. Thus, to preclude its applicability on mere juristic ipse dixit or the unexplained opinion of the Restatement's reporters is wholly inappropriate, however erudite and well-schooled its primogenitors may be. If compelling reasons were presented to justify an exception to traditional formation tenets, then, by all means the general rules should cede. Here, no evidence exists to warrant such an exception.

B. An Offeree Does Not Pay for an Entire Period of Vacillation

Some have argued that the payment of consideration provides an optionee with a shield that neither revocation nor rejection can penetrate.¹⁸⁵ The rationale centers upon the fact that an optionee has bought the time and can thereby reject an offer without endangering his prerogative to accept. However, this argument is completely untenable. The fact that an optionee cannot accept an offer and then subsequently reject it during the option period rebuts any notion that the entire option period is owned by the optionee.

It is axiomatic that an acceptance of an offer closes the circle of assent and forms a contract.¹⁸⁶ Moreover, there is no distinction drawn between the acceptance of a commonplace revocable offer and an offer rendered irrevoca-

183. See, e.g., McGovney, *supra* note 63; Litvinoff, *supra* note 57, at 747-48.

184. See Axelrod, *supra* note 8, at 417-28. Professor Axelrod correctly reports the divergence of legal opinion with regard to the rejection of an option contract, but he fails to offer any comprehensive rationale for the cases supporting the majority position. The author suggests that this failing should not be attributed to Professor Axelrod, but rather to the lack of any meaningful explanation for the majority position offered in those cases espousing it. The comments and illustrations supporting section 37 of the Second Restatement are likewise wanting.

185. See *supra* notes 78-130 and accompanying text.

186. See generally *supra* notes 19-23 and accompanying text.

ble as part of an option contract. The acceptance of an offer embraced by an option contract creates an agreement that cannot be unilaterally unmade or rescinded by a subsequent rejection — even if it occurs within the option period.¹⁸⁷ For example, in *Madison v. Marlatt*,¹⁸⁸ the Supreme Court of Wyoming declared that an option contract “becomes a bilateral contract, binding upon both parties” when the optionee manifests an intent to accept the offer within the designated timeframe.¹⁸⁹ The court added that the “essential difference between an option and an offer to sell is the option’s irrevocable nature.”¹⁹⁰

Similarly, in *Theobald v. Chumley*,¹⁹¹ the Indiana Court of Appeals reinforced the notion that acceptance of an irrevocable offer is final and irreversible. There, the court was directly confronted with a situation in which the optionors sought specific performance of an option that the optionee allegedly had exercised and then subsequently rejected. The optionee had secured a ninety-day option to exchange his 20.96 acres of land for cash and six acres of land owned by the optionor. The optionee informed optionor’s representatives that he intended to exercise his option. However, a survey of the land prepared for the sale included two to three acres of land more than the acreage included in the option. The optionee argued that, because the parties never agreed upon the additional acreage, there was never a meeting of the minds, and, consequently, the option was not effectively exercised.¹⁹²

The court rejected the optionee’s defense, finding that the

[o]ptionors had no reason to expect that the survey would contain any lands other than those described in the option. We believe the effect of the survey, by including additional acreage, was to merely make an offer as to the amount over that agreed to in the option agreement, which could be rejected or accepted by the optionors, but which did not effect [sic] the validity of the acceptance of the original option.¹⁹³

Thus, because the optionee effectively exercised the option, he could not then reject it. “Upon communication by [optionee] that the option would be exercised, the optionors acquired an expectancy interest that the option, as

187. See, e.g., A. CORBIN, *supra* note 7, § 264.

188. 619 P.2d 708 (Wyo. 1980). See also *Ferguson v. Seggern*, 434 S.W.2d 380 (Tex. Civ. App. 1968).

189. *Id.* at 714.

190. *Id.*

191. 77 Ind. 668, 408 N.E.2d 603 (1980).

192. 408 N.E.2d at 605.

193. *Id.*

agreed to, would be exercised.”¹⁹⁴ According to the court, the contract became enforceable at the time of such communication.

Other courts have echoed this sentiment in no uncertain terms: “So long as [the option] remains unaccepted it is a unilateral writing lacking the mutual elements of contract, but when accepted an executory contract arises mutually binding upon the parties. [W]hen the option . . . is accepted it ceases to be an option and becomes a mutually binding agreement.”¹⁹⁵

Moreover, although the Second Restatement explicitly distinguishes irrevocable and revocable offers in terms of the effectiveness of a rejection,¹⁹⁶ it draws no such distinction with regard to the impact of an acceptance. In fact, the Second Restatement’s subtext clearly implies that an acceptance of any offer, irrevocable or otherwise, ends any debate and forms a binding contract. The only mention of option contracts in this context is section 63’s instruction that “an acceptance under an option contract is not operative until received by the offeror.”¹⁹⁷ Neither the Restatement nor case law mentions any possibility that an optionee may accept an option, and then subsequently reject it within the option’s prescribed timeframe.¹⁹⁸ Thus, there appear to be no articulated exceptions to the general rule that once an optionee has manifested an acceptance, neither the optionor nor the optionee

194. *Id.* This court did not require that an optionor demonstrate detrimental reliance to estop the optionee from tendering an effective rejection. Rather, it intimated that the optionor’s expectancy interest arose at the moment of optionee’s acceptance. The remainder of the option period dissipated into thin air. It is eminently plausible to conclude that a rejection should have the same finality. If an optionee “owns” an entire period to accept or reject a specific offer, and he elects to reject, for example, on day two of a ninety-day option, it is only reasonable for the optionor to believe that the optionee does not agree to the terms of the option and that he will not change his mind. In fact, if a person exercises an option, it must be presumed that the optionee believes it to be in his best interests or to his advantage. If an optionee rejects or counter-offers, it must follow, therefore, that the optionee believes the option is not advantageous. Thus, an expectancy interest should accrue to the optionor who is now able to offer the property to another or is free to enjoy the property without the possibility of a sale.

195. *Schlein v. Gairoard*, 127 N.J.L. 358, 359-60, 22 A.2d 539, 540 (1941). *See also* Litvinnoff, *Of the Promise of Sale and Contract to Sell*, 34 LA. L. REV. 1017, 1036-37, nn. 121-22, 124, 128 (1974).

196. RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979). *See also supra* notes 1, 27, 177 and accompanying text.

197. RESTATEMENT (SECOND) OF CONTRACTS § 63 (1979). This provision represents an exception to the mailbox rule, which states generally that a proper acceptance by mail becomes effective upon dispatch, not receipt. *See infra* notes 258-68 and accompanying text.

198. Of course, any jurisdiction that does not embrace the mailbox rule would hold that an acceptance mailed first but received last would *not* form a binding agreement. But that approach does no violence to the notion that an acceptance, whenever effective, cannot be “unmade” by a subsequent rejection.

can unilaterally rescind, barring non-performance or similar provocation for the discharge of a contractual duty.¹⁹⁹

Taking the foregoing proposition as presented, any suggestion that the offeree has the entire option period for indiscriminate vacillation is fatuous. If an offeree cannot accept and then reject within the option period, then the *raison d'être* for allowing an acceptance after a rejection within such period, that the offeree has paid for the entire timeframe to debate this issue, is stripped of any legitimacy. It amounts to nothing more than a *post hoc* rationalization to justify the conclusion that a rejection should not terminate an irrevocable offer. Indeed, permitting an offeree to reject an irrevocable offer and then accept the same offer during an option period, while also refusing to allow an offeree to accept an irrevocable offer and then reject it during the pendency of such option is unfathomable. Applying traditional contract rules in the latter case, but dismissing them in the former, can again

199. The absence of specific language in the Restatement is not necessarily dispositive of the question. However, given the explicit phraseology of section 37, one can only assume that, if the possibility existed that an optionee could undo an acceptance by a subsequent rejection within the option period, the Restatement would have enunciated that principle in sections immediately following the definitions of acceptance. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 50-62 (1979).

Moreover, those commentators who have examined the deposited acceptance rule in the narrow confines of the irrevocable offer lend credence to the notion that there can be no effective acceptance/rejection scenario within the option period. For example, Professor Litvinoff explains that determining when a rejection may overtake an acceptance turns on whether an offeror made an offer revocable or irrevocable. Litvinoff, *supra* note 57, at 729-31. He declares that if an offer is irrevocable, then conceivably a rejection may override an earlier mailed acceptance. *Id.* at 729. Professor Litvinoff reaches this conclusion not by reasoning that an offeree has unlimited latitude during the option period; rather, he correctly proffers that the proverbial "mailbox" or "deposited acceptance" rule does not apply to option contracts. *Id.* at 730.

The key, however, is not so much the content of Professor Litvinoff's discussion, but its existence. Clearly, if an optionee could recant his acceptance with impunity during the option period, then this colloquy regarding the effective communication of the respective responses and any reference to the applicability of the mailbox rule would be academic and unnecessary — except in situations where the acceptance arrived after the option deadline and was thus ineffective, independent of any subsequent rejection. Indeed, in addressing the related question of whether an acceptance can overtake a rejection, Professor Litvinoff announces that when the parties make an offer irrevocable, both acceptance and rejection are effective upon receipt by the offeror. *Id.* at 731. Proceeding from this assumption, he concludes that "if an offeror receives an acceptance, a rejection that arrives later, though transmitted before the acceptance, does not prevent the formation of a contract." *Id.* Similar commentary suggests that the applicability or non-applicability of the mailbox rule to option contract scenarios may be of critical importance, thus negating the assumption that the entire period is available for the fickle optionee's vacillation. *See* A. CORBIN, *supra* note 7, §§ 78-80. Although this reasoning is somewhat tortuous, it further supports the argument that the communication of an effective acceptance closes the circle of assent with irreversible finality whether the offer inviting such acceptance is revocable or irrevocable.

only be explained by a blatant misperception of an option contract's nature. Option contracts encompass irrevocable offers, not "unacceptable" offers. Logic compels the conclusion that these same irrevocable offers are not "irrejectable."

Neither a binding acceptance nor a binding rejection would do violence to the purpose underlying the offer contained in an option contract and the consideration paid to secure its irrevocability. In both cases, the optionee, not the optionor, squeezes the trigger. The optionee has gained the advantage of his bargain — a precise time period within which the optionor cannot revoke the offer. The optionee has, and knows that he has, that entire period to mull the proposal. He hardly deserves sympathy if, within that period, he accepts the offer and then seeks escape through a subsequent rejection. Contract law in general will not allow the optionee to loosen the ties that bind the circle of assent. For exactly the same reasons, an optionee who rejects an offer has little room to complain if the law does not indulge a subsequent acceptance — even if it is tendered within the option period.

*C. Option Contracts Should Be Construed Strictly
in Favor of the Optionor*

In close cases, an option contract will almost always be interpreted in favor of an optionor and against an optionee.²⁰⁰ Contract jurisprudence is replete with examples of judicial favoritism to the optionor when difficult questions of interpretation have arisen.²⁰¹

For example, when courts have confronted issues involving the effectiveness of acceptances tendered beyond an option period, they have consistently construed the time requirements strictly, adhering to the principle that "time is of the essence" in the typical option contract.²⁰² Likewise, the mailbox rule,²⁰³ which is consciously pitched toward the offeree, generally is deemed inapplicable to option contracts.²⁰⁴ A few words about each of these illustrations will clarify why the optionor generally is the beneficiary of a doubt in the option context, and why he should be similarly treated in the rejection/ acceptance scenario.

200. See, e.g., *Sheppard v. Andrews*, 7 N.C. App. 517, 173 S.E.2d 67 (1970).

201. See, e.g., *Shell Oil v. Kellison*, 58 N.W.2d 724 (Iowa 1968); *Skarda v. Davis*, 83 N.M. 342, 491 P.2d 1153 (1971). But see *Stull v. Hicks*, 59 Ill. App. 3d 665, 375 N.E.2d 981 (1978).

202. See *infra* notes 205-41 and accompanying text.

203. See *infra* notes 242-70 and accompanying text.

204. See Note, *supra* note 55, at 524; see *infra* notes 258-68 and accompanying text.

1. *Time is of the Essence*

In *Cotter v. James L. Tapp Co.*,²⁰⁵ the Supreme Court of South Carolina found that a tenant's failure to comply literally with the terms of an option provision to extend a lease negated his ability to exercise the option.²⁰⁶ Under the terms of the lease, the tenant had secured a five-year option to rent certain "expansion areas" and also had acquired the right to extend the option for another three-year period "upon the payment by tenant of thirty cents (\$0.30) per sq. ft. per year . . . payable monthly as an option cost."²⁰⁷ Prior to the expiration of the principal option, the tenant notified the optionor of his intention to exercise the renewal option, but failed to tender a monetary payment.²⁰⁸

The court rejected the tenant's argument that the notification should have sufficed to preserve the option, and cited two basic premises in support of its conclusion.²⁰⁹ First, "option contracts are strictly construed in favor of the optionor and against the optionee."²¹⁰ In this regard, the court found the forfeiture that such an approach might occasion unpersuasive: "[The] argument by the defendant that the courts do not favor forfeiture and therefore the option to renew must be granted, overlooks the fact that options because unilateral, are strictly construed against the party claiming the option."²¹¹

Second, the court recited an equally well-settled proposition that, if an option requires compliance within a certain period, time is of the essence and precise adherence to the terms of the agreement are necessary.²¹² Because the terms of the option required the payment of money, the court concluded that notice alone could not qualify as an acceptance.²¹³

Similarly, in *Mathews v. Kingsley*,²¹⁴ an optionee failed to exercise an option to purchase a parcel of land and opted instead to negotiate for a substitute option agreement.²¹⁵ The original option contract required that the

205. 267 S.C. 647, 230 S.E.2d 715 (1976).

206. *Id.* at 653-54, 230 S.E. at 718.

207. *Id.* at 650, 230 S.E. at 716.

208. *Id.* at 652, 230 S.E. at 717.

209. *Id.* at 653-54, 230 S.E. at 718.

210. *Id.* at 653, 230 S.E. at 717.

211. *Id.*, 230 S.E. at 717 (quoting *Southern Silica Mining & Mfg. Co. v. Hoefler*, 215 S.C. 480, 497, 56 S.E.2d 321, 328 (1949)). Yet, the lease renewal situation has proved to be the rare fertile ground for sowing the seeds of the forfeiture argument and for finding a judicial willingness to retreat from rigid adherence to the "time is of the essence" principle. *See infra* note 231.

212. 267 S.C. 653, 230 S.E. at 717-18.

213. *Id.* at 654, 230 S.E. at 718. "Defendant could have given written notice every day in the month . . . and such notice still would not have satisfied a requirement to pay money." *Id.*

214. 100 So. 2d 445 (Fla. Dist. Ct. App. 1958).

215. *Id.* at 447-48.

optionee provide written notice of an intention to exercise the option, as well as tender a ten percent deposit toward the ultimate purchase price.²¹⁶ The optionee complied with neither of these provisions prior to the expiration of the option period.²¹⁷ After a two-month post-expiration negotiation period, the parties reached an oral agreement, but they never executed a written instrument. The optionor subsequently terminated the option.²¹⁸ The court, characterizing the option as “different from a contract to purchase” and noting that the optionee had “no equitable interest” in the property in question until he exercised the option, sustained the optionor’s right to terminate the outstanding offer.²¹⁹ The court explained that the optionee must strictly comply with the terms of the option to make the option exercise effective.²²⁰

With specific reference to the issue of timeliness, the court emphasized that the “time named in the option contract is to be regarded as of the essence of the option, *whether expressly stated or not . . .*”²²¹ The court cautioned, however, that an optionor could waive²²² the time for performance or, by his conduct, be estopped from insisting upon strict compliance.²²³

Smith v. Peninsula House, Inc. most poignantly demonstrates what a difference a day can make.²²⁴ In *Smith*, the manager of a beach club/motel had secured a contract with the owner, giving him the right to purchase the subject property on terms identical to those offered by a third-party if the selling price were under \$190,000.²²⁵ To exercise the option arising upon a third party offer, the manager/optionee had to provide notification within ten days.²²⁶ The notice was given on December 31, one day beyond the December 30 deadline.²²⁷ Notwithstanding the intervening holidays and the absence of any palpable harm to the optionor, the court concluded that the expiration of the ten-day period immediately terminated the power of acceptance.²²⁸

216. *Id.* at 449.

217. *Id.*

218. *Id.*

219. *Id.* at 446, 449-50.

220. *Id.* at 446.

221. *Id.* (emphasis added). *See also* *Rosenauer v. Pacelli*, 174 Cal. App. 2d 673, 345 P.2d 102 (1959). *But see* *Rank v. Sullivan*, 132 So. 2d 32 (Fla. Dist. Ct. App. 1961) (time was not of the essence in option contract).

222. 100 So. 2d at 447.

223. *Id.* *See also* *Ellis v. Waldrop*, 627 S.W.2d 791 (Tex. Ct. App. 1982).

224. 65 N.J. Super. 341, 167 A.2d 807 (1961).

225. *Id.* at 344, 167 A.2d at 808.

226. *Id.*

227. *Id.*

228. *Id.* at 345, 167 A.2d at 809.

A litany of additional case authority and critical commentary reinforces the proposition that strict compliance with the terms of an option is generally required.²²⁹ The “time is of the essence” principle, employed either constructively or through the explicit language of an agreement, provides a glowing illustration of judicial predilection to interpret option contracts in favor of the optionor. While courts and commentators may disagree on the extent to which the option language must explicitly make such time the essence of the agreement, there seems to be consensus that an optionor will generally receive the benefit of any ambiguity.²³⁰

At times, application of this rule visits harsh consequences upon careless or unwary optionees. The foregoing discussion exemplifies how optionees have surrendered options after delays involving only days or hours.²³¹ Notwithstanding the potentially onerous consequences, one can justify judicial preference for the optionor in several ways.

First, the very lifeblood of an option is usually an offer frozen for a fixed or, in some instances, a reasonable period of time. An option immobilizes the offeror until the offeree decides whether to accept (or, posited herein, reject) the offer in chief. The optionee has purchased a period of time within which he may freely test the waters, assess market conditions, and engage in wholesale speculation. Therefore, there are normally no misgivings about the importance of compliance with the timeframes outlined in the option. Either explicitly or implicitly, options place optionees on notice that tardi-

229. See, e.g., A. CORBIN, *supra* note 7, § 273-274; MURRAY, *supra* note 12, § 43B; *Rosenaur v. Pacelli*, 174 Cal. App. 2d 673, 345 P.2d 102 (1959). As one court synopsized the issue:

The reason why courts are strict in requiring an option to be exercised specifically as to its terms and within the specified time, is because of the power that the optionee exercises over the eventual formulation of a contract. Consequently, since the optionee is the sole party capable of consummating the option, courts require strict adherence to the option's terms, when the optionee is attempting to enforce the option. Thus, the requirement [exists] that [the acceptance] meet and correspond with the option in accordance with the option's terms. *Theobald v. Chumley*, 408 N.E.2d 603, 605 (Ind. Ct. App. 1980).

230. See, e.g., *Rice v. Wood*, 91 N.C. App. 262, 371 S.E.2d 500 (1988); *Sheppard v. Andrews*, 7 N.C. App. 517, 173 S.E.2d 67 (1970); *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 230 S.E.2d 715, 717 (1970).

231. See *supra* notes 201-30 and accompanying text. However, several courts have relaxed the requirement that an optionee strictly adhere to the terms of the option when such indulgence aids in avoiding a forfeiture. See *Ledford v. Adkins*, 413 S.W.2d 68 (Ky. Ct. App. 1967) (holding that situations which caused the assignee to be delinquent in his payments for oil lease would not result in forfeiture); see also *Loitherstein v. IBM Corp.*, 11 Mass. App. Ct. 91, 413 N.E.2d 1146 (1980) (court did not impose arbitrary penalty for tenant's failure to make timely payment on lease). Certain circumstances, such as an option for a lessee to renew a lease, seem to warrant tempering the justice of the “time of the essence” principle with the mercy of the “avoidance of forfeiture” concept. See A. FARNSWORTH, *supra* note 5, § 8.7.

ness can be a fatal flaw. Even when the option lacks expressed "time is of the essence" language, the nature of an irrevocable offer commands that the option-exercise trigger date be construed as critical.²³²

A second rationale for favoring an optionor in this context may be that the consideration exchanged for the irrevocability is often minimal. Indeed, the Second Restatement indulges a mere recitation of consideration supporting an option without need for actual exchange or a categorical promise of some barter.²³³ Professor Corbin acknowledges that an optionee generally surrenders a valuable consideration for the optional acceptance prerogative, but aptly observes that:

[T]his consideration is usually a comparatively small sum of money agreed upon as the exchange for the power of acceptance for the specified time. When that time expires, the option holder has received the full agreed equivalent of the price he paid for his option; and a refusal to give effect to an acceptance that is one minute late results in no forfeiture.²³⁴

Case authority holding that the consideration technically necessary to secure the option may be presumed when a lease contains a purchase option underscores the insignificance of the consideration exchanged, and the functional dispensation of the need to part with anything of meaningful value.²³⁵ Such a presumption is difficult to rebut and, absent a realistic way to parse the segments of the lease payments, virtually allows an option without a demonstrable indication that a lessee/options has provided independent consideration to support the promise of irrevocability.²³⁶

Third, the fact that an optionee generally holds all the cards dictates that a close case entitles an optionor to some deference. As in a revocable offer, an offeree has absolutely no duty to accept.²³⁷ For the often minimal consideration paid, however, an optionee assures himself of the power of accept-

232. See *supra* note 221 and accompanying text. Because an option by its very nature establishes a clearly defined timeframe within which the optionee may exercise the prerogative, a reasonable person may plausibly infer that time is always of the essence in this type of a transaction. Further, to extend the period beyond the established expiration date seems inappropriate, given the considerable advantage enjoyed by an offeree during an option period. See A. FARNSWORTH, *supra* note 5, § 8.7, at 572.

233. See RESTATEMENT (SECOND) OF CONTRACTS § 87(1) (1979); see also *Mack v. Coker*, 22 Ariz. App. 105, 523 P.2d 1342 (1974).

234. See A. CORBIN, *supra* note 7, § 273. But see *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 F. 796 (D.C.D. Del. 1920).

235. See *Madison v. Marlatt*, 619 P.2d 708, 714 (Wyo. 1980); *Braten v. Baker*, 323 P.2d 929, 931 (Wyo. 1958).

236. See A. CORBIN, *supra* note 7, § 263 n.42; MURRAY, *supra* note 12, § 43B. See also *Brown-Forman Distrib. Corp. v. Northwest Liquor Co.*, 171 F.2d 255 (7th Cir. 1948).

237. See RESTATEMENT (SECOND) OF CONTRACTS § 25 (1979).

ance for a fixed period. The transaction represents one of the few instances in which the offeror is unavoidably locked in, while the offeree remains free to obtain a better deal or no deal at all. Thus, some may view the transaction as one-sided. Further, and of no small consequence, an offeror can often dodge an acceptance, particularly in the pure unilateral contract setting, while no such opportunity exists for the optionor.²³⁸ As Professor Corbin has stated, the offeror of a revocable offer is "privileged to revoke . . . [but] the option holder has a conditional contract right as well as a power of acceptance; and the option giver has neither the privilege nor the power of revocation."²³⁹

For these reasons, an optionor receives the interpretative edge in close cases. Why this premise should not apply in the rejection/acceptance situation is almost incomprehensible. The minimal consideration often exchanged, the emphasis upon the irrevocability component and an optionor's vulnerable position dictate that courts should reward an optionor's expectation that a rejection or counter-offer represents an optionee's unwillingness to accept the proposed offer.²⁴⁰

Again, an optionee who is assured a full period to accept or reject, and who chooses to make and gain the benefit of a "premature" decision, should evoke little pathos when he changes his mind. For the same reasons, an optionor, who fully exchanged the revocability prerogative for an optionee's consideration, should be entitled to treat a rejection or its functional equivalent as a transaction terminator without having to demonstrate some justifiable and detrimental reliance on the subsequently recanted rejection.²⁴¹

2. *The Mailbox Rule and the Option Contract Exception*

The general refusal to apply the "mailbox" or "deposited acceptance" rule to the acceptance of an offer embraced by an option contract represents another illustration of judicial "favoritism" for the optionor. While this princi-

238. Professor Williston has noted that, "the offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say 'I revoke' before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated." See S. WILLISTON, *supra* note 20, § 60B.

239. See A. CORBIN, *supra* note 7, § 273 n.37.

240. See *supra* notes 132, 194 and accompanying text.

241. Again, it seems unduly burdensome to require an optionor to show a material change in position to justify finding a rejection as an offer terminator. It suggests that no one should place credence upon the bargain and the exchange of promises already made. That is, some have described a rejection as a revocation of the right to accept. In this spirit, one could also call a rejection a promise not to accept or to avail oneself of the remaining time allowed under the option. In this admittedly attenuated sense, an optionor should have the legitimate expectations realized from such promise, a release from all obligations, gratified. See *supra* notes 132, 194 and accompanying text. See also Farber & Matheson, *supra* note 132.

ple has been referenced earlier,²⁴² a brief summary of its background and scope is necessary here to insure appreciation of the option contract exception and its significance.

The mailbox rule states that an appropriately and properly mailed acceptance becomes effective when an offeree deposits it in the mail; as opposed to a rejection or revocation which becomes effective upon receipt.²⁴³ Thus, an acceptance received after, but mailed before, a rejection creates an enforceable agreement, absent some demonstration of detrimental reliance by the offeror.²⁴⁴ The Florida District Court of Appeals, in *Morrison v. Thaelke*,²⁴⁵ perhaps most comprehensively articulated the mailbox rule, which is not without its numerous exceptions.²⁴⁶ In *Morrison*, the court disallowed a seller's rejection of an offer to buy real estate where an acceptance had been sent, but not received, prior to such rejection.²⁴⁷ The court discounted the seller's argument that the right to recall mail made the post office the sender's agent. Thus, the court refused to find that the rejection negated seller's already posted acceptance.²⁴⁸ Acknowledging that both advocates and opponents of the rule "muster persuasive argument,"²⁴⁹ the court found that the balance tipped, "whether heavily or near imperceptively," toward reinforcement of the deposited acceptance approach.²⁵⁰ Recognizing that at some point the formation of a contract must be deemed completed, and plainly not altogether comfortable with the final selection,²⁵¹ the court reasoned that the "traditional acceptance of the rule as well as the modern changes in effective long-distance communication," warranted continued adherence.²⁵²

242. See *supra* notes 53-56, 203-04 and accompanying text.

243. See *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818); *Mactiers Admrs. v. Firth*, 6 Wend. 103 (N.Y. 1830).

244. See, e.g., *E. Frederics, Inc. v. Felton Beauty Supply*, 58 Ga. App. 320, 198 S.E. 324 (1938); see also RESTATEMENT (SECOND) OF CONTRACTS § 63 comment c (1979).

245. 155 So. 2d 889 (Fla. Dist. Ct. App. 1963).

246. There are several qualifications to the mailbox rule, including the option contract exception, the mailing of an acceptance subsequent to the mailing of a rejection, and situations in which the mails have been improperly used such as through an omitted or incorrect address, insufficient postage, and the like. See generally *J. CALAMARI & J. PERILLO, supra* note 4, § 2-23.

247. 155 So. 2d at 905.

248. *Id.* at 899.

249. *Id.* at 898.

250. *Id.* at 896.

251. *Id.* at 897.

252. *Id.* at 898. Although the court noted that traditional "acceptance" provided one reason to reinforce the mailbox rule, one should not deem this opinion as mere slavish conformity. On the contrary, the opinion presents an extremely detailed and probing analysis of the mailbox rule. Professor Corbin characterized it as "the most complete review of the authorities and reasoning . . . both judicial and academic, that this author has seen." See A. CORBIN,

Among the arguments that justify the *Morrison* decision are: (1) the legal rationale that the offeror is the master of the offer, including the timing and mode of the acceptance;²⁵³ and, (2) the pragmatic rationale that as a matter of proof, an offeree can more easily establish that he mailed an acceptance than an offeror can demonstrate that he never received it.²⁵⁴ Accordingly, because an offeror can forestall operation of the deposited acceptance rule by making the acceptance effective only upon receipt, it is plausible to permit an offeree to rest assured that mailing an acceptance of an offer, not so qualified by the offeror, has formed a contract.²⁵⁵ In essence, the offeror in the typical revocable offer situation is in the driver's seat. Therefore, the offeree derives the benefit of the doubt in close cases.

The critics of the mailbox rule argue strenuously that it is "unjust and indefensible" for both the offeror, who would be precluded from revoking his offer before he had any knowledge of an acceptance, and the offeree, who would be forbidden from withdrawing an acceptance "scant hours after it was posted but days before the offeror knew of it."²⁵⁶ Interestingly, these antagonists have suggested that if the courts are preoccupied with protecting the offeree from a spontaneous revocation, such security can be achieved by the offeree's "providing consideration, by buying an option."²⁵⁷

Yet, even in the context of an option contract, the point at which a mailed acceptance becomes effective must still be addressed. In fact, courts in several jurisdictions addressing this very issue have concluded that the mailbox rule does not apply to option contracts.²⁵⁸ For example, the same jurisdiction that embraced the mailbox rule in *Morrison* apparently adopts a different approach to mailed acceptances tendered under an option arrangement. In *Maloney v. Atlantique Condominium Complex, Inc.*,²⁵⁹ the sellers, pursuant to a right of first refusal, delivered notice of intent to sell their condominium property.²⁶⁰ According to the agreement containing the first refusal option, the buyer was required to tender acceptance of any offer to sell within ten days.²⁶¹ A prospective buyer sought to exercise his "option" and

supra note 7, § 78 n.67; *see also* Reserve Ins. Co. v. Duckett, 249 Md. 108, 119, 238 A.2d 536, 542 (1968).

253. *See, e.g.*, Union Interchange, Inc. v. Sierota, 144 Colo. 293, 355 P.2d 1089, 1091 (1960); *see also* A. FARNSWORTH, *supra* note 5, § 3.22.

254. *See* Note, *supra* note 55, at 530 n.49. *See also* Macneil, *Time of Acceptance: Too Many Problems For a Single Rule*, 112 U. PA. L. REV. 947 (1964).

255. *See* A. FARNSWORTH, *supra* note 5, § 3.22.

256. *See* Morrison v. Thaelke, 155 So. 2d at 904.

257. *Id.*

258. *See* Note, *supra* note 55, at 524, 534-36.

259. 399 So. 2d 1111 (Fla. Dist. Ct. App. 1981).

260. *Id.* at 1112.

261. *Id.*

mailed his acceptance within the ten-day period. However, the acceptance did not arrive until the eleventh day, after the sellers had already sold the subject property to another buyer.²⁶² Reversing the trial court's decision that invalidated the sale,²⁶³ the District Court of Appeals held that the mailbox rule did not apply to option contracts and preemptive rights of first refusal.²⁶⁴ Accordingly, the court deemed the timely mailed but tardily received acceptance ineffective and approved the sale to the "interloping" buyer.²⁶⁵

The court's opinion was somewhat idiosyncratic, focusing upon peculiar characteristics of condominium conversions. In particular, the court placed considerable emphasis upon the need for certainty, the effect of delays upon the property's marketability, and the risk assumed by the offeree who chooses to use the mails to respond.²⁶⁶ Yet, the one undeniable and universal predicate upon which the court distinguished mailed acceptances to revocable offers from mailed acceptances to irrevocable offers is that the offeree in the latter case has become the master and needs no additional protection.²⁶⁷

Because an option freezes an offer for a fixed or reasonable period, an optionee need not fear that an optionor will blithely revoke an offer after the optionee places his acceptance securely in the mail carrier's hands. Moreover, the optionor then becomes vulnerable because he cannot withdraw his offer during the relevant period and must await the optionee's "election." Therefore, the delicate balance recognized by all courts and commentators

262. *Id.*

263. *Id.* at 1114.

264. *Id.*

265. *Id.*

266. *Id.* at 1112-14.

267. *Id.* at 1113-14. The *Maloney* court made no significant effort to distinguish rights of first refusal and option contracts with respect to the application of the deposited acceptance rule. However, a distinction most definitely exists between the two concepts. See *supra* notes 155 and accompanying text. See also *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980); *Di Maria v. Michaels*, 90 A.D.2d 676, 455 N.Y.S.2d 875 (1982). Still, because the right of first refusal generally ripens into an option contract upon the receipt of a bona fide offer, it seems appropriate to apply an exception to the mailbox rule to both rights of first refusal and option contracts. While differences exist between the two concepts, the underlying rationale supporting the exception survives such differentiation. See *Vending Credit Corp. v. Trudy Toys Co.*, 5 Conn. Cir. Ct. 629, 633, 260 A.2d 135, 137 (1969); *Salminen v. Farankson*, 309 Minn. 438, 245 N.W.2d 839 (Minn. 1976). See also J. MURRAY, *supra* note 12, § 43B. But see Note, *supra* note 55, at 535-36.

must tip in favor of an offeror in light of the fact that the parties added the element of irrevocability to the equation.²⁶⁸

In sum, an offeror indisputably receives a slight edge in option contracts. It is similarly incontrovertible that this favoritism is a product of the offeror's pledge of irrevocability in exchange for often minimal, if not nominal, consideration. This consideration does not bequeath an offeree with special prerogatives such as allowing a mailed acceptance (received after the option period) to overtake a communicated rejection, or permitting an acceptance tendered after the option period has lapsed to be effective, absent the offeror's "waiver."²⁶⁹

Deviation from such preference for an optionor, when an optionee subsequently recants a rejection by a "timely" acceptance is anomalous indeed. Why should the courts digress from the common law mailbox rule to provide an edge to an optionor, but eschew the common law rule governing termination of offers to favor an optionee? The question has now become rhetorical, with the obvious response that the majority of jurisdictions mistake the option period as the offeree's insular enclave within which a rejection is rendered a nullity. The irrevocable/irretractable dichotomy and the refutation of any claim that the entire option period belongs irretrievably to the offeree should put such misperceptions to rest.²⁷⁰

D. A Word About Waiver

A perusal of the case authority addressing questions surrounding acceptance or rejection of an irrevocable offer yields evidence that courts frequently employ the term "waiver" to characterize the rejection. For example, some courts have reinforced the premise advanced in this Article

268. See *Maloney v. Atlantique Condominium Complex, Inc.*, 339 So. 2d at 1114; see also *Romain v. A. Howard Wholesale Co.*, 506 N.E.2d 1124, 1128 (Ind. Ct. App. 1987). In *Romain*, the Indiana court of appeals observed:

Under the option contract then, the option holder has a firm and dependable basis for decision. His power of acceptance is absolute for the time agreed upon in the option contract. The option holder has no interests needing protection. He can act promptly and with confidence in reliance on the contract. There is thus no reason to extend the rule that acceptance is operative upon mailing since the option contract device itself fulfills the same purpose. To impose such a rule, where the parties have not expressly provided, would alter the agreement by binding the option giver longer than originally agreed and would inflict upon the option giver the risk of delay avoided by entering into the option contract.

Id. (citations omitted). But see *APC Operating Partnership v. Mackey*, 841 F.2d 1031 (10th Cir. 1988); *Palo Alto Town & Country Village, Inc. v. BBTC Co.*, 11 Cal. 3d 494, 521 P.2d 1097, 113 Cal. Rptr. 705 (1974).

269. See *supra* notes 221-23; *infra* 273 and accompanying text.

270. See *supra* notes 176-99 and accompanying text.

by labelling a counter-offer or rejection within an option period as a "waiver."²⁷¹ Similarly, many courts have reasoned that an optionee or holder of a right of first refusal, who fails to exercise the "option" in a timely fashion or otherwise fails to adhere strictly to the option's terms, waives and terminates the right to purchase.²⁷² Correspondingly, some courts hold that an optionor waives his right to insist on strict compliance with the time requirement by indulging a tardy acceptance.²⁷³

In a technical sense, treating a rejection or similar contract formation component as a "waiver" is an uncharacteristic and possibly inappropriate use of that term. Typically, waiver arises in the context of a "performance" analysis rather than as part of the contract "formation" process. Obviously, a waiver occurring at the formation stage constitutes nothing more than a modification of the terms in the offer or acceptance prior or simultaneous to the completion of the agreement.²⁷⁴ More commonly, the doctrine of waiver applies to true performance questions, such as whether one party has surrendered his right to insist upon the other party's compliance with a condition precedent.²⁷⁵ If such waiver has occurred, then the party for whose benefit the condition existed must perform his end of the bargain, notwithstanding the nonoccurrence of the condition. The qualified duty to act has been trig-

271. See, e.g., *Jones v. Moncrief-Cook Co.*, 25 Okla. 856, 108 P. 403 (1908).

272. See, e.g., *Ellis v. Waldrop*, 627 S.W.2d 791 (Tex. App. 1982) (optionee failed to exercise its right of refusal within the prescribed 30-day period and therefore its rights under the agreement were deemed waived); *Green v. First Am. Bank & Trust*, 511 So. 2d 569 (Fla. App. 4 Dist. 1987) (optionee deemed to have waived his right of refusal when he failed to comply strictly with a provision of the agreement based upon an incorrect interpretation of the law); see also *LaGrave v. Jones*, 336 So. 2d 1330 (Ala. 1976) (optionee permitted to waive a condition in the agreement that was for the exclusive benefit of the optionee, thereby requiring the optionor to perform under the agreement).

273. See *State ex. rel. Howeth v. D.A. Davidson & Co.*, 163 Mont. 355, 517 P.2d 722 (Mont. 1973) (optionor estopped from claiming lack of strict compliance when he received notice prior to the termination date of the option and the optionee was justifiably led to believe the optionor would accept the terms of payment); *Beverly Bank v. Alsip Bank*, 436 N.E.2d 598 (Ill. Ct. App. 1982) (party to loan participation agreement may waive his legal right to insist on strict performance); see also *Townsend v. Melody Home Mfg. Co.*, 541 P.2d 1370 (Okla. Ct. App. 1975).

274. See J. CALAMARI & J. PERILLO, *supra* note 4, § 11-30.

275. See A. FARNSWORTH, *supra* note 5, § 8.5. Farnsworth opines that the reason for an overly broad utilization of the waiver concept centers upon the misplaced notion that employing the nomenclature "waiver" rather than "modification:" may relax the requirement of consideration; may do away with the need to satisfy the writing requirement under the Statute of Frauds; and, will require less precision in terms of identifying whether the necessary manifestation of assent is present. *Id.* § 8.5. See, e.g., *Nassau Trust Co. v. Montrose Concrete Prod. Corp.*, 56 N.Y.2d 175, 436 N.E.2d 1265, 451 N.Y.S.2d 663 (1982). Yet, the continued misuse of the term "waiver" is particularly vexatious to many contract scholars. See, e.g., J. MURRAY, *supra* note 12, § 111F.

gered, even though the condition was not satisfied, because compliance with such condition was excused by virtue of the waiver.²⁷⁶

Perhaps, one could argue that an optionee who rejects an offer made irrevocable by the original consideration has surrendered or waived his legal right to accept it at a later time. Certainly, in the most generic sense, an optionee's decision to reject such an offer would qualify as a voluntary relinquishment of a recognized right²⁷⁷ to accept the offer within the designated time period without the fear of intervening revocation. Yet, is this any different than saying that an offeree who rejects a revocable offer waives the legal right to accept it thereafter? Except in the broadest view of the term "waiver," the nomenclature is seemingly incorrect.²⁷⁸ In precise contract law lexicon, this action or inaction does not amount to a waiver; but rather, it simply constitutes a manifestation of intent not to accept an offer. The language pertains to contract formation, not contract performance.²⁷⁹

Presumably, proponents of the majority view would argue that the performance analysis is wholly appropriate and that the rejection does not meet the prerequisites of waiver necessary to extinguish an optionor's duty. That is, the option contract, whether existing as a separate agreement or embracing the underlying offer to buy or sell,²⁸⁰ contains a promise to hold an offer open for a set or reasonable period of time.²⁸¹ The duty to preserve for the

276. See *Clark v. West*, 193 N.Y. 349, 86 N.E. 1 (1908); *Schultz v. Los Angeles Dons*, 107 Cal. App. 2d 718, 238 P.2d 73 (1951).

277. See *Hoxie v. Home Ins. Co.*, 32 Conn. 21 (1864). Characterizing a waiver as a "voluntary relinquishment of a known right" is not without its problems. See J. MURRAY, *supra* note 12, § 111F n.3. Yet, this definition is employed with regularity. See, e.g., *Pentmanta Corp. v. Hollis*, 520 N.E.2d 120 (Ind. Ct. App. 1988); *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450 (Del. 1982); *Hauenstein & Bermeister, Inc. v. Met-Fab Indus.*, 320 N.W.2d 886 (Minn. 1982). *But see* *Garrard v. Lang*, 514 So. 2d 933 (Ala. 1987).

278. See A. FARNSWORTH, *supra* note 5, § 8.5. Professor Corbin acknowledges that waiver is a term of "indefinite connotation" that "like a cloak, . . . covers a multitude of sins." Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739, 754 (1919). Only with such an oversized cloak could one appropriately use the term waiver in a formation context.

279. See J. CALAMARI & J. PERILLO, *supra* note 4, § 2.25.

280. See *supra* notes 57-64 and accompanying text. On the surface, it would seem as though the argument for a "performance" approach is stronger when the option is part of a separate and distinct agreement. However, in reality, the debate will generally assume the same shape regardless of the nature of most option contracts.

281. *Id.* There is some question as to whether, by virtue of the option, the optionor has promised "not to revoke" or, alternatively, has promised to give the optionee the exclusive right to act during the option period — or both. Arguably, if it only is the former, a "waiver" by the optionee might, in an attenuated sense, leave a residue of the acceptance prerogative for a reasonable time if the optionor does not promptly revoke. If, however, the latter construction obtains, then the optionee's "waiver" of the right to accept should terminate the power of acceptance. For present purposes, it will be assumed that, regardless of the characterization (both of which have been employed herein), the optionee's rejection/waiver will bar subse-

optionee this insulated right to accept or reject is triggered by the payment of consideration, or promise of same, that seals the option portion of the transaction. Thus, for example, in a bilateral option contract, this promise not to revoke arguably creates a constructive condition upon which an optionee's promise to pay consideration depends.²⁸²

Clearly, an optionee has the ability to waive certain conditions existing for his benefit.²⁸³ However, ample authority establishes that a condition forming a material part of an exchange cannot be "waived" or, stated more appropriately, "modified," without consideration, even if such condition exists for the benefit of the waiving party.²⁸⁴ Little doubt exists that the promise of irrevocability and the condition that it begets present an advantage unique to the optionee. Yet, because the irrevocability facet is either embraced in a separate contract or is a distinct, critical component of a single contract, it is arguably a material part of the exchange and thus "unwaivable" without consideration.²⁸⁵ The majority would likely urge further that, even if the

quent acceptance even without an explicit revocation. *See further* Romain v. A. Howard Wholesale Co., 506 N.E.2d 1124, 1128 (Ind. Ct. App. 1987).

282. *See generally* Kingston v. Preston, Lofft. 194, 2 Doug. 684 (K.B. 1773); *see also* Howard v. Federal Crop Ins. Corp., 540 F.2d 695 (4th Cir. 1976); Roth v. Harding, 64 Wash. 2d 231, 391 P.2d 526 (1969). In one sense, the conditional nature of the promises will depend upon the required order of performance. *See generally* J. CALAMARI & J. PERILLO, *supra* note 4, § 11-25. Further, if the option contract were unilateral (i.e., formed by the payment of consideration in exchange for the promise not to revoke), then the terminology "release" or "discharge" would probably be more appropriate than "waiver." In either event, much of the argument dealing with waiver would have equal applicability to release, particularly regarding the possible dispensation with the need for consideration. *See, e.g.*, U.C.C. 1-107 (1977); RESTATEMENT (SECOND) OF CONTRACTS §§ 274-277 (1979).

283. A party cannot waive a condition unless the condition exists for his benefit. Clearly, the non-benefited party cannot waive a condition and self-excuse his own duty. *See, e.g.*, Bliss v. Carter, 26 Mich. App. 177, 182 N.W.2d 54 (1970). Further, if a condition exists for the benefit of both parties, then it cannot be waived unilaterally by either. *See, e.g.*, Wallstreet Properties, Inc. v. Gassner, 53 Or. App. 650, 632 P.2d 1310 (1981); Omaha Pub. Power Dist. v. Employers' Fire Ins. Co., 327 F.2d 912 (8th Cir. 1964).

284. Of course, such a requirement could be dispensed if the waiver related to an immaterial part of the underlying exchange. *See* Rose v. Mitsubishi Int'l Corp., 423 F. Supp. 1162 (E.D. Pa. 1976); Oleg Cassini, Inc. v. Couture Coordinates, Inc., 297 F. Supp. 821 (S.D.N.Y. 1969).

285. *See* Salvatore v. Trace, 55 N.J. 362, 262 A.2d 385 (1970); RESTATEMENT (SECOND) OF CONTRACTS § 84(2) (1979). In the analogous context of the sale of goods, *see* U.C.C. § 2-209(5) (1977). As indicated above, when the occurrence of the condition is a material part of the agreed exchange, it generally cannot be removed without consideration or detrimental reliance. In that event, use of the term "waiver" is technically erroneous. *See generally* J. MURRAY, *supra* note 12, § 111F. Nonetheless, courts persistently use the phraseology "waiver supported by consideration," and the author has exercised such license at certain points herein. *See infra* note 286 and accompanying text. *See also* Colbath v. H. B. Stebbins Lumber Co., 127 Me. 406, 144 A. 1 (1829); Smith v. Minneapolis Threshing Co., 89 Okla. 156, 158, 214 P. 178, 180 (1923).

condition could be waived, such waiver could still be withdrawn and the condition resurrected, provided the offeror has not changed his position in reliance upon the initial waiver.²⁸⁶ To that end, the optionee could argue that there can be no greater manifestation of the withdrawal of the waiver (rejection) than a subsequent acceptance within the option period.

Under this approach, which seems to reflect the unarticulated rationale of *Ryder v. Wescoat*,²⁸⁷ a duty not to revoke (and the optionee's exclusive prerogative to accept) persists, unless the offeror materially changes his position or an offeror returns all or a portion of the optionee's original consideration. That is, the rejection will be ineffectual unless the offeror provides the *new* consideration to support, in the broadest sense, the optionee's waiver of irrevocability (promise not to accept), or establishes the reliance necessary to create an estoppel.²⁸⁸

This rationale undoubtedly formed part of the predicate for the Second Restatement's language suggesting that a rejection would not terminate the power of acceptance under an option contract "unless the requirements are met for the discharge of a contractual duty."²⁸⁹ This language implies that,

286. See *Goebel v. First Fed. Sav. & Loan Ass'n*, 83 Wis. 2d 668, 266 N.W.2d 352 (1978). Again, although there is no explicit language identifying the initial rejection as a waiver, and a subsequent withdrawal as a retraction of such waiver, to the extent this issue is discussed in performance terms, such constructions can be inferred. Interestingly, some courts have further abused legal nomenclature by characterizing the acceptance or rejection of an option contract as an "election." *Flickinger v. Heck*, 187 Cal. 111, 113-14, 200 P. 1045 (1921). See also *Martin v. Lott*, 482 S.W.2d 917 (Tex. Ct. App. 1972). In *Martin v. Lott*, the court concluded that a rejection of an offer embodied in a preemptive right to buy terminates the power of acceptance:

When the owner of property subject to a pre-emptive right declares his intention to sell, the holder of the right has an election to purchase the property or decline As in the case of any other offer specifying no time for acceptance, the power of acceptance does not continue indefinitely but terminates on expiration of a reasonable time or by express rejection, or by conduct clearly inconsistent with an intention to purchase.

Id. at 922. The court, however, attempts to distinguish its facts from *Humble Oil & Ref. Co.*, 428 S.W.2d 921, (Tex. 1968), by asserting that the "present agreement is not an option which gives a power of acceptance at any time within a specified period notwithstanding previous rejection." *Id.* at n.8. The distinction drawn is anemic, at best, and seems to be nothing more than a feeble attempt to justify a conclusion plainly at war with *Humble Oil* and the majority view. In any event, an election generally refers to a waiver after a condition has failed. Thus, utilization of that term in the instant context only serves to muddy the semantic waters. See RESTATEMENT (SECOND) OF CONTRACTS § 84 (1979); see also J. MURRAY, *supra* note 12, § 111F; J. CALAMARI & J. PERILLO, *supra* note 4, § 11-32.

287. 535 S.W.2d 269 (Mo. Ct. App. 1976).

288. See *supra* notes 280-87 and accompanying text. See also RESTATEMENT (SECOND) OF CONTRACTS §§ 84, 87 (1979); *Industrial Mach. Inc. v. Creative Displays*, 344 So. 2d 743 (Ala. 1977); A. CORBIN, *supra* note 7, § 752 n.4.

289. See RESTATEMENT (SECOND) OF CONTRACTS § 37 (1979).

barring some evidence of a discharge, the duty not to revoke would continue until the period of irrevocability lapsed.²⁹⁰ However, for the reasons advanced below, it is submitted that this rationale is untenable or, at the very least, does not support the proposition that an irrevocable offer survives an offeree's rejection or counter-offer.

First, an option contract, while theoretically a contract separate and distinct from the main agreement, represents a unique concept whose most important feature is rendering an otherwise revocable offer irrevocable. The existence of an option contract as a distinct entity is purely a function of legal accident or convenience. It is a vehicle designed for one short trip, a road to a rejection or acceptance, free from impediments such as a possible revocation during the optionee's process of contemplation. As Professors Calamari and Perillo astutely note: "The first question that must be considered is did the option contract arise Once it arises so that there is an irrevocable offer then one is dealing essentially with an offer and acceptance situation and thus the rules of acceptance . . . apply."²⁹¹

In discussing the various types of option configurations and the technical differences between a power to revoke and a right to revoke, Professors Calamari and Perillo declare that whether the option is one contract or two separate agreements, the result remains the same: "we are still free to say . . . that the words option contract and irrevocable offer are used interchangeably."²⁹²

Thus, even though an option holder possesses a "conditional contract right as well as a power of acceptance,"²⁹³ the proper emphasis should be placed upon the irrevocability of the offer, the inchoate contract, the vulnerability of the optionor to an acceptance, and the optionor's inability to abort the offer until something occurs to terminate the power of acceptance. Thus, it seems counter-intuitive to apply principles uniquely suited to an analysis addressing the performance obligations of parties to an executory contract.²⁹⁴ The option contract, although arguably a distinct agreement, exists

290. There are an infinite number of events that could act to discharge a contractual duty. While it is unnecessary to list them here, a brief litany can be found in J. CALAMARI & J. PERILLO, *supra* note 4, §§ 21-1 to 21-17. See also RESTATEMENT (SECOND) OF CONTRACTS §§ 274-277 (1979). In any event, it is clear that there are instances in which a duty may be discharged without new consideration. *Id.* See also *infra* notes 296-304 and accompanying text.

291. *Id.* See also A. CORBIN, *supra* note 7, § 43.

292. *Id.* at 124.

293. A. CORBIN, *supra* note 7, § 273.

294. This situation is not the only instance in which courts have misapplied waiver in the context of an issue that deserves treatment under offer and acceptance principles. See *supra* note 275. The application of waiver here, however, seems particularly inappropriate consider-

on a continuum as a stepping stone to the consummation of the transaction-in-chief. As such, it is most reasonable to assess an offeree's response to an irrevocable offer under traditional tenets of offer and acceptance. Such an approach leads irresistibly to the conclusion that a rejection would terminate the option.²⁹⁵

Further, even if the question commands partial attention under a performance analysis, a rejection may operate as a waiver of the irrevocability condition or the exclusive right to accept, even without consideration. Likewise, if "discharge" is the word of choice, then the rejection, standing alone, qualifies as a suitable renunciation or discharge of the duty. The evolving jurisprudence in this area has considerably relaxed the consideration requirements for waiver in general and option contracts in particular. For example, the Second Restatement recognizes that mere recitals of consideration, unattended by a promise or actual exchange, may satisfy validation requirements for an option contract.²⁹⁶ Indeed, the comments attending section 87 make it abundantly clear that the recital of consideration is formal, not substantive. Thus, many courts will refuse even to entertain evidence that an offeree has not paid the recited consideration.²⁹⁷

Even where the facts indicate that such recital was unfulfilled or payment declined, courts have been loathe to void the transaction on consideration grounds.²⁹⁸ Similarly, certain types of modifications at the executory stage of an agreement may be enforceable even in the absence of new consideration, provided that the modifications are fair and equitable, and have been prompted by changes in circumstances not anticipated at the time of the contract's formation.²⁹⁹ In numerous other areas, consideration has become a shadow of its former self, often dispensated or fabricated from whole cloth.³⁰⁰

ing the clear fungibility of the option contract and irrevocable offer terminology. *See supra* notes 57-64 and accompanying text.

295. *See supra* notes 176-84 and accompanying text.

296. RESTATEMENT (SECOND) OF CONTRACTS § 87(1) (1979). *See also supra* notes 58, 233-36 and accompanying text.

297. RESTATEMENT (SECOND) OF CONTRACTS § 87(1) comment c (1979). *Compare id.* § 218 with *Farrar v. Young*, 158 W. Va. 977, 216 S.E.2d 575 (1975) (one dollar of consideration sufficient to support transfer of deed) and *In re Estate of Mingesz*, 70 Wis. 2d 734, 235 N.W.2d 296 (1975) (words "for value received" in guaranty contract raise rebuttable presumption that adequate consideration was given).

298. *See Mack v. Cohen*, 22 Ariz. App. 105, 523 P.2d 1342 (1974); *Kucera v. Kavan*, 165 Neb. 131, 84 N.W.2d 207 (1957).

299. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1979). *See also* *Angel v. Murray*, 113 R.I. 482, 32 A.2d 630 (1974); *Linz v. Schuck*, 106 Md. 220, 67 A. 286 (1907).

300. For example, courts often engraft an implied promise of "good faith" or "best efforts" onto the face of a promise which, by its own terms, manifests no commitment whatsoever.

Recent statutory pronouncements have demonstrated a legislative sensitivity to the need to make consideration requirements less rigorous in the areas of option contracts, contract modifications and the like.³⁰¹ For example, section 2-205 of the Uniform Commercial Code explicitly permits the creation of a firm or irrevocable offer without consideration for the period of the promised irrevocability or a reasonable time.³⁰² Under this provision, the option to accept is preserved for a period not to exceed ninety days simply on the strength of the offeror's written promise not to revoke.

See, e.g., Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917). In *Wood*, the court declared:

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation.' . . . Without an implied promise, the transaction [in which no commitment was truly made] cannot have such business 'efficacy as both parties must have intended that at all events it should have.'

Id. at 91, 118 N.E. at 214-15. Similarly, courts have construed notice requirements that attend contracts containing pure cancellation-at-will clauses as constituting sufficient consideration to support the contract. Thus, even though the bald cancellation prerogative seems to render the agreement bereft of any true commitment, courts, by both implying a reasonable notice provision and construing such notice provision as detriment, avoid the illusory promise dilemma. *See* *Sylvan Crest Sand & Gravel Co. v. U.S.*, 150 F.2d 642 (2d Cir. 1945). *But see* *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F.2d 693 (5th Cir. 1924). *See also* U.C.C. §§ 2-306, 309 (1987). *See also* G. GILMORE, *supra* note 180, at 62-64; Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980); Metzger & Phillips, *supra* note 133.

This increased relaxation of the need for consideration is strikingly evoked in the Second Restatement's treatment of certain discharges:

If a party, before he has fully performed his duty under a contract, manifests to the other party his assent to discharge the other party's duty to render part or all of the agreed exchange, the duty is to that extent discharged without consideration.

RESTATEMENT (SECOND) OF CONTRACTS § 275 (1979). Illustration 2 of this section is instructive:

A and B make a contract under which A promises to build a fence and B promises to pay A \$1,000. As A begins to build the fence, he says to B, 'The price we agreed on was too high, and you need pay only \$900 for the fence.' A then builds the fence. B's duty to pay A to the extent of \$100 is discharged and B owes A only \$900.

Id.

301. *See, e.g.,* LA. CIV. CODE ANN. art. 1933 (West 1987); N.Y. GEN. OBL. LAW § 5-1109 (McKinney 1978); Pennsylvania Uniform Written Obligation Act, PA. STAT. ANN. tit. 33 § 6 (Purdon 1967).

302. U.C.C. § 2-205 (1977). Clearly, this provision implicitly protects an unwary consumer who has received a representation from a merchant that the merchant will hold an offer open. It places the emphasis upon the promise, rather than a formal requirement of consideration, when the offeree receives written reaffirmation of the promise not to revoke. The absence of consideration could compel a conclusion that a rejection or pure counter-offer in a sale of goods context would terminate an irrevocable offer — even in the eyes of the majority. *See* A. FARNSWORTH, *supra* note 5, § 3.24.

If the offer can be made irrevocable without consideration, then surely an optionee can waive the option thus created without consideration. Admittedly, in a non-code context, common law still technically requires consideration to secure the irrevocability; but, this consideration is often minimal, occasionally presumed, and possibly never even paid.³⁰³ Moreover, little doubt exists that the parties can effect a waiver without consideration when the performance waived is an immaterial part of the exchange. Although the majority probably would urge that the irrevocability is the heart of the option arrangement, thus material, equally persuasive is the idea that the irrevocability component, like time of performance, is a formal, immaterial part of the broader contract to buy or sell.³⁰⁴

The remaining loose end involves the right of the optionee to revive his waiver/rejection and renew the irrevocability of an option. A rejection in this narrow context leaves no opportunity for such a renewal. The acceptance does not resurrect the condition of irrevocability, so much as it attempts to act on the initial offer as if no waiver had occurred.³⁰⁵

The act of manifesting an intent to forego the option must be deemed "conclusive" rather than "suspensive." One commentator addressing this issue suggests that:

303. See *supra* notes 233-36, 297-99 and accompanying text.

304. Ample authority supports the proposition that the time for performance is not a material part of an exchange. Even when the parties explicitly make time of the essence in a contract, courts have found that an optionor's indulgence of a tardy acceptance constitutes a waiver of any requirement that the time period be strictly followed. See *supra* notes 222-23 and accompanying text. Arguably then, the duty not to revoke a portion of the overall agreement to buy or sell, though material insofar as a discrete option contract exists, could be quite immaterial vis-a-vis the contract-in-chief. That is, a waiver of the irrevocability component could be placed on the same footing with a waiver of the need to accept within a designated timeframe when the parties have specifically made time of the essence. Each case involves explicit obligations of the optionor and optionee regarding rules governing the acceptance of the underlying offer. With regard to the duty not to revoke, the optionor has explicitly represented that he will not revoke within a designated period of time. With respect to the "time is of the essence" provision, the optionee has made it clear that he will accept within a certain timeframe or else imperil his ability to consummate the agreement. Accordingly, it is not totally implausible to suggest that the duty not to revoke constitutes an immaterial part of the exchange to the extent that the option contract component, though theoretically independent in some cases, exists as part of a larger transaction. Thus, those courts reasoning that a counter-offer or rejection of an option "effectively negate[d] or waive[d] the valid exercise of [an] option," are persuasive to the extent that a performance analysis and the attendant "waiver" nomenclature are appropriate. See *Green v. First Am. Bank & Trust*, 511 So. 2d 569, 575 (Fla. Dist. Ct. App. 1987).

305. See *Oleg Cassini v. Couture Coordinates Inc.*, 297 F. Supp. 821, 831 (S.D.N.Y. 1969): "Even when time of performance . . . is of the essence . . . conduct may be such as to indicate a waiver of the condition; and once manifested, it may not suddenly be abandoned." *Id.* (emphasis added).

In the case of rejection before completion of the time specified in an option, the grantee or offeree is in the same position as an obligee who renounces a term stipulated for his benefit. In an option, indeed, the time specified is the term for the performance of the grantor's obligation not to revoke the offer. That term is resolutive, rather than suspensive, and clearly intended for the benefit of the obligee.³⁰⁶

Explaining that the optionee may avail himself of the entire option period or renounce such privilege, Professor Litvinoff continues:

In making a rejection before the deadline the grantee is expressing an intent not to avail himself of the time not yet elapsed, which clearly amounts to a renunciation of the term. It is a well known principle that the party for whose exclusive benefit a term has been established may renounce it.³⁰⁷

Finally, Litvinoff draws the only possible conclusion given the backdrop that he has framed:

Because that term is resolutive, the obligee's renunciation puts an end to the duty of the obligor who is now free from obligation. After a rejection, thus, the grantor of the option is no longer bound not to revoke, and, therefore, the grantee may no longer accept if the grantor does not renew his consent.³⁰⁸

Yet, Litvinoff concedes unnecessarily that his argument applies to options created by statute. Accordingly, he suggests that it may be unavailing if the option has been secured by consideration. His rationale pays homage to the sacrosanct but tenuous notion that an optionee paying consideration has bought the entire period. But, given the minimal consideration generally paid in these contexts (and the dispensation with consideration in others), together with the fact that an optionee cannot reject after acceptance within the option period, this assumption that an optionee has paid for the entire timeframe has lived too charmed a life.³⁰⁹ Professor Litvinoff's basic premise regarding the resolutive, not suspensive, nature of the optionee's initial renunciation, is wholly appropriate to any rejection of an irrevocable offer. The conclusions that he draws should apply equally to all rejections of option contracts, regardless of the vehicle employed to secure the irrevocability.

Thus, whether viewed against the background of the evolving common law, the observations of noted contracts commentators, or recent legislative

306. Litvinoff, *supra* note 57, at 752 (footnote omitted).

307. *Id.*

308. *Id.*

309. *See supra* text accompanying notes 176-99 and accompanying text.

pronouncements, the requirement of consideration, particularly in the context of waiver or modification, hardly amounts to a wooden absolute.³¹⁰ Therefore, it is hardly a subversive notion to suggest that the rejection of an option contract effectively waives the right to accept the underlying offer, assuming in the first instance that a "performance" analysis is appropriate.

E. The Third-Party Beneficiary Analogy

Finally, the Second Restatement's treatment of an analogous situation involving a third-party beneficiary's disclaimer of rights provides a telling comment on the inherent contradiction in the majority's position.³¹¹ Section 306 of the Second Restatement provides in pertinent part: "A beneficiary who has not previously assented to the promise for his benefit may . . . render any duty to himself inoperative from the beginning by disclaimer."³¹² A promisor's duty may be discharged without consideration or formal requirement, provided that the beneficiary manifests the requisite disclaimer within a "reasonable time after learning" of the promise's existence.³¹³ Comment b to section 306 notes that the promisor's duty arises without assent of the third party, and that the disclaimer has the same effect on such duty as if no promise had been made. Not surprisingly, this comment recommends a comparison to section 38, which declares that a rejection or counter-offer terminates the power of acceptance. Comment b also cautions that a disclaimer, after assent, operates "only if the requirements are met for discharge of a contractual duty," specifically referencing section 37.³¹⁴

Interestingly, the comments to section 306 cross-reference sections 37 and 38. Comparisons of a third-party beneficiary's disclaimer and an optionee's rejection become irresistible. The situation involving a third party benefi-

310. Indeed, even such stalwart concepts as the need for some type of reliance to support a promissory estoppel are being threatened. The threat assumes the form of progressive legal analysts who opine that promises are to be enforced if they reflect commitments entered "in furtherance of economic activity." See Farber & Matheson, *supra* note 132, at 945. These commentators conceive an independent cause of action requiring "neither satisfaction of traditional notions of consideration nor the specific showing of detriment associated with promissory estoppel." *Id.* at 929. Certainly, a rejection of the option, framed as a promise not to accept, exemplifies the type of commitment envisioned by Professors Farber and Matheson. Requiring consideration or a reliance substitute to give meaning to this commitment again simply exalts form over substance.

311. RESTATEMENT (SECOND) OF CONTRACTS § 306 (1979). Professor Joseph Perillo initially suggested the possible applicability of a "third party beneficiary" analogy. Telephone conversation with Professor Joseph Perillo, Oct. 6, 1989. He deserves credit for the suggestion, but he also is to be given an automatic disclaimer from any "liability" resulting from this author's development of the idea.

312. RESTATEMENT (SECOND) OF CONTRACTS § 306 (1979).

313. *Id.*

314. *Id.* comment b.

ary's disclaimer of a promisor's duty resembles an optionee's rejection of an optionor's duty not to revoke. Once an optionee accepts the underlying offer, he should not have the power to abort the acceptance unilaterally, unless the requirements are met for the discharge of a contractual duty. Similarly, if a third-party beneficiary has assented to the underlying contract bequeathing certain benefits to him, then he cannot disclaim these rights unless he has met the requisite contractual discharge criteria.³¹⁵ Proceeding along these lines, a third-party beneficiary *may* disclaim a promisor's duty *prior* to an assent without consideration, even though the promisor and promisee have already formed an agreement. By analogy, one would assume that an optionee's rejection, read "disclaimer," of an option already formed through the collateral option contract should discharge an offeror's duty not to revoke, just as the third-party beneficiary's disclaimer discharges the duty assumed by the promisor.

Section 306 correctly references section 38 as the appropriate polestar when the third-party beneficiary has not assented to the original agreement. Section 306 also explicitly suggests comparison to section 37 when assent has already been provided. The internal consistency is beyond question, and the references to section 37 and 38 are sound. However, when one juxtaposes a third-party beneficiary's pre-assent disclaimer with an optionee's rejection, and when the Restatement categorically forecloses applicability of section 38 to the option contract, the anomaly becomes immediately evident. The rejection of the option bears a striking similarity to the disclaimer of the duty owed to a third-party beneficiary. If section 38 should apply to the pre-assent disclaimer of a third-party beneficiary, it logically should apply to rejections of an option contract.

This approach reinforces the premise of this Article in two ways. First, it supports the proposition that this issue, though hybrid in form, is properly one of offer and acceptance, hence the applicability of section 38. Second, the fact that a duty not to revoke exists in a discrete option agreement does not negate the argument that an optionee's rejection can serve to discharge such duty without consideration or other formal requirement.³¹⁶ Thus, the

315. *Id.* See also *id.* § 304. Again, the duty owed to the third party beneficiary arises upon the execution of the contract between the promisor and promisee. Similarly, the duty not to revoke the contract in chief between an optionor and optionee arises upon the payment of consideration in exchange for the promise of irrevocability. Thus, in both cases, independent transactions produce duties that parties may reject or disclaim without any formality. However, once the underlying contracts have been formed, the appropriate test should be whether the requisite standards for discharge of a contractual duty have been satisfied.

316. In a slightly attenuated but certainly not implausible twist, one may argue that the rejection of an offer contained in an option contract operates much the same as a traditional condition subsequent. A condition subsequent is defined broadly as an event that the parties

surrender of the irrevocability option, whether characterized as a rejection or waiver, should terminate the power of acceptance or, alternatively, discharge the duty not to revoke.

While one can reach an intellectually satisfactory accommodation through either formation or performance avenues, the most reasonable and direct route to a solution is to couch the option as an irrevocable offer, evaluate the termination possibilities under traditional rules of offer and acceptance (at least with regard to counter-offers and rejections) and assess the offer's continuing vitality under these tenets. Such an approach yields but one conclusion: the rejection and most true counter-offers will terminate the offer embraced by the option contract, and will negate the power of acceptance.

VI. RECOMMENDATION

An outright rejection or a pure counter-offer as defined above should terminate the power of acceptance whether the offer be revocable or irrevocable. There is simply no adequate basis to justify a special approach to option contracts, particularly with respect to outright rejections. Accordingly, section 37 should be modified at a minimum to exclude references to rejections

agree will serve to discharge a duty of performance. A. FARNSWORTH, *supra* note 5, § 8.2. The essence of the condition subsequent is that the duty in question has already arisen, and the operative effect of the occurrence of the condition will be to eliminate the need to fulfill the promised performance. *See* RESTATEMENT OF CONTRACTS § 250(b) (1932). The Second Restatement defines conditions as only those events that would fit under the former definition of conditions precedent. *See id.* § 224. Therefore, it dispenses with any event that serves to extinguish a duty after performance has occurred.

Although there is no expressed condition here, one can construct a condition from the overall arrangement in this fashion: The optionor promises not to revoke, or promises to hold an offer open, during a designated period. This duty arises upon the tendering of consideration (either through actual performance such as paying money or through a promise of same). The duty can only be extinguished upon the occurrence of certain events such as the expiration of a fixed time period or the optionee's rejection/counter-offer (an implied in fact or, possibly, constructive condition subsequent). The distinction between an implied-in-fact condition and a constructive condition is significant. In the former, the condition will operate as an express condition, and therefore require strict compliance. A constructive condition requires only substantial performance in order to trigger the corresponding duty. *See* *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695 (4th Cir. 1976); *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921). In this instance, a reasonable inference, drawn from the totality of the parties' agreement, is that a rejection is intended to extinguish the duty not to revoke.

Admittedly, this "construction" is somewhat contrived and perhaps reads too much into the language of the typical option contract. However, it represents little more than a logical reaction to the improvident wedging of an offer and acceptance issue into a rigid performance analysis. In any event, the duty not to revoke, triggered by the payment of the optionee's consideration, is discharged by the rejection, and the offer is aborted. *See, e.g.,* *Northwestern Nat'l Life Ins. Co. v. Ward*, 56 Okla. 188, 155 P. 524 (1916); *see also* *Barza v. Metropolitan Life Ins. Co.*, 281 Mich. 532, 275 N.W. 238 (1937) (failure to act within a specified period discharges party's duty to perform).

and counter-offers. For purposes of clarification, a new section should be drafted to reflect the retooled approach. The following phraseology would suffice:

[T]he power of acceptance of an offer contained in an option contract, or other like offer rendered irrevocable by consideration, statute, or other formality, shall be terminated if the offeree manifests an intent to reject such offer, either by means of an outright rejection or a counter-offer.

Under this model, a counter-offer that would have the force and effect of a rejection shall not include any response that manifests the optionee's desire to hold the offer open during further consideration of the offer, notwithstanding non-conformity in the optionee's response. Likewise, such a counter-offer shall not operate to terminate the optionee's power of acceptance where the optionor has manifested his intention to invite counter-offers and other negotiations during the option period. Most importantly, a definite and reasonable acceptance that contains additional or varied terms will not serve to abort the offer. Such a response will be deemed an acceptance, with the determination of whether to include additional terms left to common law devices or possibly to analogous statutory machinery such as section 2-207 of the Uniform Commercial Code.³¹⁷

Thus, the only counter-offers that would serve as functional equivalents to rejections would be those in which the optionee in no way manifested acceptance or the optionee conditioned his acceptance upon the insertion of terms not included in the original offer.³¹⁸ Any other response, such as a grumbling acceptance with additional inquiries, an acceptance that adds additional terms, an acceptance that expressly or implicitly manifests the offeree's intent to continue negotiating, or any similar manifestation of assent either would constitute an acceptance of the option, or, at the very least, would preserve the offer for a subsequent, unqualified acceptance within the option period. Aside from the obvious changes regarding the effects of an outright rejection, and, possibly, the proposed characterization of the type of "counter-offers" addressed by section 2-207, the proposal reaffirms and clari-

317. See U.C.C. § 2-207 (1977). See also *supra* note 46.

318. There is a middle ground that may be more palatable to those jurisdictions unwilling to make such a dramatic departure from the mirror image rule. A response that constitutes a definite and reasonable acceptance, but contains additional terms, could rest in a limbo status until the option expires or a more definite reply is made by the optionee. Thus, a response represented by section 61 of the Second Restatement or section 2-207 of the U.C.C. would *not* constitute an acceptance of the irrevocable offer, but it would also not terminate the offeree's power of acceptance. This approach retains much of the mirror image rule, but recognizes the peculiar attributes of an option contract, and reinforces the logical expectations of the typical optionee.

fies several other Restatement provisions governing counter-offers and rejections.³¹⁹

As described throughout this Article, leaving the current state of the law unaltered would constitute a continued corruption of existing contract law principles for no apparent purpose. On the other hand, a wholesale revision that allows any non-mirror image response to terminate an irrevocable offer ignores the practical implications of option contracts and the reasonable expectations of the contractors. The proposal herein offers an accommodation that permits all outright rejections and certain counter-offers, as narrowly defined in the Second Restatement, to terminate an optionee's power of acceptance. This approach should satisfy the needs of contract purists and commercial pragmatists alike without appreciably subverting the principles of either side.

319. See RESTATEMENT (SECOND) OF CONTRACTS §§ 38, 39, 59, 61 (1979).