

## It's Just an Ad. How Can It Be A Contract?

It's nothing new to have extravagant claims made for bizarre alleged cures or preventives. In 1891 a British company advertised that its "carbolic smoke balls," containing phenol (a precursor to aspirin and many plastics that can also be used for embalming) would prevent the flu if the user inhaled its vapors by squeezing it thrice a day. They promised £100, equivalent to over \$15,000 today, to anyone who used the product according to directions and still got the flu. The company also deposited £1000 with a bank to secure payment. One Louisa Carlill did use the ball but got the flu anyway. Regrettably for the company, her husband was a lawyer and he sued in her behalf for the £100.

The company defended by saying they had no contract with Ms. Carlill, and so could not be held liable for breach of contract when its questionable concoction failed.

Normally a contract forms when someone ("offeror") makes an offer to a specific other person ("offeree") and the offeree accepts. The offer must contain something of value going each way, an exchange or "consideration," and enough detail that a reasonable person can understand what the deal is. Here, of course, the offer was made to everyone in the world, and it was not clear what was going to the Carbolic Smoke Ball Co. in exchange for its promise to pay £100.

Few if any drug companies make such outlandish offers today, and people still get the flu. Still, offers of rewards are made often for information about criminals. Are these reward offers enforceable contracts? What about an offer to pay twice the difference if you can find the same product cheaper at another store?

The Court of Appeal held for Ms. Carlill. Why? Well, there were three judges, each with his own opinion. But we can distill this out: First, the exchange—the consideration going to the Company—was the increase in sales presumably due to the ad, combined with the inconvenience put up with by the unfortunate Ms. Carlill in using the obnoxiously vaped balls thrice a day. Second, this was no advertising "puff" but a serious offer, as shown by their £1000 bank deposit. Third, buying and using the smoke ball was the legal equivalent of accepting a contract offer.

Incidentally, after the case, the owner of the Smoke Ball Company ran the ad again, now with a £200 guarantee, pointing out that only three of some 10,000 users had claimed £100, proving how effective it was.

Are there lessons for businesses today? The case is still considered valid law, and anyone foolish enough to make a similar guarantee today would likely be treated the same. People offering rewards for information leading to criminal convictions are also likely to have to pay.

But to me the most interesting situations would be merchants offering free stuff for visiting a store or a website. Again, the action of the visit—not likely what the visitor would otherwise have done if they were not influenced by the ad—is the consideration. If the jury believes from all the circumstances that readers of the ad were supposed to take it seriously then it will not be taken as a mere "puff." That means offering a free rocket ship is probably a puff, but offering a free BMW probably is not.

So, if you are planning to offer free stuff, make sure your ad contains a precise and complete description of everything the person needs to do to qualify for the free stuff. Or you could end up behind the ... carbolic smoke ball.