

Did your CEO accidentally offer to sell a \$30 million Harrier jet?

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ABSTRACT

This case puts the student in the precarious shoes of the legal department for an energy drink company with a very eccentric CEO. The CEO is ecstatic about the company's seemingly innocuous commercial that is the flagship of their summer marketing campaign. Your students' applied knowledge of contract formation will be put to the test as they try to find potential legal issues with the commercial. Furthermore, their ability to tactfully communicate the most efficient course of action to a short-tempered CEO will be tested.

This entertaining case closely parallels a famous 1990's Pepsi commercial that resulted in an ambitious 21-year-old business student suing PepsiCo for the delivery of a \$30 million Harrier jet. Detailed instructor notes guide faculty through the use of this case study that covers a number of legal issues as well as ethical and business communication concepts.

Keywords: Contracts, Business Law, Advertisements, Advertising Liability, Contract Offers, Advertising Lawsuit



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Case

You work in the legal department for Extremely Tacky Energy, Inc. The company's main product is Armageddon Energy, a very highly caffeinated energy drink. The CEO is, to put it mildly, eccentric. He drives a monster truck to work, is an avid skydiver, and routinely lashes out at celebrities and politicians on Twitter. Your job in the legal department means you are constantly warning him against business and personal decisions, warnings that he often ignores.

Extremely Tacky Energy holds an internal promotional event to kick off their "Armageddon Points" campaign. At the event, the CEO recklessly rides through the crowd on a motorcycle to get to the stage where an excessive amount of haphazardly installed fireworks are discharged (both things you advised the CEO not to do). The CEO then enthusiastically talks about the new Armageddon Points summer campaign that revolves around a customer loyalty program. Essentially, customers earn one point for every can they purchase. Points can then be redeemed for various prizes. Before playing the commercial, the CEO says, "We spent a lot of %#\$@^&! money on this commercial, and it's perfect!"

The commercial starts with a teenage boy getting ready for school. He is wearing an Armageddon Energy shirt and a subtitle reads, "T-shirt, 75 points." He then puts on a leather jacket and a caption reads, "Leather jacket, 1,450 points." He then puts on sunglasses and a caption reads, "Sunglasses, 175 points." The commercial then shows some teenagers looking through an Armageddon Energy catalog and an announcer says, "Introducing the new Armageddon Energy catalog. The more you drink, the more great stuff you can get." A disclaimer in tiny print at the bottom says, "Offer not available in all areas. See details on specially marked packages." In the final scene the main teenager is shown landing a Harrier jet on the front lawn of his high school. The exhaust from the jet comedically damages the school building, strips one hapless teacher down to his underwear, and causes students to run for cover. The teenager, who is not wearing any safety equipment but has an Armageddon Energy drink in his hand, exits the jet while exclaiming, "Hey, sure beats the bus!" A final caption reads, "Harrier Fighter, 7,000,000 points."

The commercial is met with raucous applause from the audience. Before dismissing everyone with an eight minute guitar solo, the CEO points to you and jokingly says, "Surely even our overly cautious legal department won't have any problem with this ad!" After the event, you look through the catalog mentioned in the commercial. You see the shirt, jacket, and sunglasses, but no mention of a Harrier jet. You read through the fine print in the catalog and learn that points can be purchased for \$0.10 each. There is no limit to how many points can be purchased.

After a three-day trip to Tibet to meet with his spiritual advisor, the CEO comes to your office to get you to sign off on the commercial. Do you have any concerns you want to voice?

INSTRUCTOR NOTES

The Pepsi Case

Excluding the eccentric CEO, this case study closely parallels an advertisement that ran in 1996 by PepsiCo to promote their Pepsi points campaign. The commercial is easily found on YouTube and, if played for the class, demonstrates the 1990's humor involved (which is relevant in determining the reasonableness of the commercial being interpreted as an offer).

Unfortunately for PepsiCo, the commercial was seen by John Leonard, an ambitious 21-year-old business student. After organizing multiple financial backers, John mailed in 15 Pepsi points and a check drawn on his attorney's account for \$700,008.50 (6,999,985 points at \$0.10 each plus \$10 shipping and handling fee). PepsiCo's fulfillment center rejected the submission, returned the check, and notified John that the jet in the commercial, "is fanciful and is simply included to create a humorous and entertaining ad." John's attorneys responded:

Your letter is totally unacceptable. We have reviewed the video tape of the Pepsi Stuff commercial . . . and it clearly offers the new Harrier jet for 7,000,000 Pepsi points

This is a formal demand that you honor your commitment and make immediate arrangements to transfer the new Harrier jet to our client. If we do not receive transfer instructions within ten (10) business days of the date of this letter you will leave us no choice but to file an appropriate action against Pepsi.

After receiving the letter, PepsiCo maintained the commercial was not a serious offer to exchange a Harrier jet for 7,000,000 Pepsi points and the case of Leonard v. Pepsico was initiated. After three years of litigation, a New York district court ruled in favor of PepsiCo.

Would a reasonable person view the commercial as an offer for a Harrier jet?

The district court in Leonard v. Pepsico held no for multiple reasons. The commercial was nothing more than an "exaggerated adolescent fantasy." A teenager, especially one with no helmet and ear protection, is a "highly improbable pilot" for a \$30 million fighter jet. And the jet is an equally improbable mode of transportation to high school, for reasons comedically demonstrated in the commercial.

Parties are certainly free to enter into (and courts will enforce) disadvantageous contracts, but \$700,000 for a \$30 million item is extreme. No reasonable person would believe a company is willing to purchase a \$30 million item in order to exchange it for \$700,000. As the district court stated, this would be "a deal too good to be true."

The fact that John was the only person who tried to cash in on the Harrier jet based on a nationwide advertising campaign is strong evidence that a reasonable person would not think that the commercial constituted an offer.

Multiple facts in the Leonard v. Pepsico case reveal that it is unlikely the plaintiff himself thought the commercial constituted an offer. He never acquired a place to store a Harrier jet. The \$10 shipping fee included in his submission would be inadequate. Before getting multiple financial backers, he didn't ask PepsiCo if the offer for the Harrier was serious (he likely knew what the answer would have been). The ten days given to PepsiCo to procure and demilitarize a Harrier jet seems inadequate (which implies that he never expected to receive the jet and just wanted a settlement). Finally, the submitted order form contained a check drawn on an account of plaintiff's attorney. Therefore, he had lawyers involved from the start which implies he always knew PepsiCo was not going to give him the jet.

Note that even if John did legitimately believe he was accepting an offer, this would be irrelevant given that the standard is objective. What matters is would a reasonable person believe there was an outstanding offer they could accept. This is also an excellent illustration of why we use the objective reasonable person standard. It would be difficult for courts to delve into the psyche of John to determine exactly what he thought at the time, especially now that he has a \$30 million incentive to claim he thought there was an offer.

Whose reasonable person standard applies?

The court in *Leonard v. Pepsico* used a reasonable adult's perspective to determine whether the commercial could be reasonably construed as an offer. Although John was 21, his attorneys argued that a reasonable teenager standard should apply instead. In rare occasions there is precedent for using different reasonable person standards depending on the parties involved. Noting that the reasonable person standard is rooted in white male historical jurisprudence, certain harassment cases have utilized a reasonable woman standard and a reasonable black person standard.

The plaintiff's attorneys went even further stating that a judge should not be allowed to decide this case. Instead, it should go to a jury populated exclusively with the "Pepsi Generation" because that's who the advertisement was aimed at. Plaintiff's attorneys explain that the Pepsi Generation is, "young, open to adventure, and willing to do the unconventional." The judge denied this creative request.

Legality

Although the court never explicitly addressed the legality issue in *Leonard v. Pepsico*, a contract to sell a Harrier jet may be unenforceable on this theory alone. As the court pointed out, the Harrier jet is used by the United States Marine Corps to "attack and destroy surface targets under day and night conditions," and is capable of carrying over 9,000 pounds of bombs and missiles. While the U.S. military has sold demilitarized tanks to civilians, the parties disagreed as to whether a demilitarized version of the Harrier would even be capable of flight. Because of the numerous other reasons the defendant won, this is ultimately a moot point, but it brings up an interesting issue-spotting topic to discuss.

Potential liability suit

Although not the primary purpose of this case study, it is possible that this commercial could put the company at risk for a wrongful death lawsuit. Excessive caffeine intake can cause serious damage, especially in adolescents. In some instances, people have died from caffeine overdoses (Haelle, 2017). The commercial is clearly targeted at teenagers and encourages them to drink (or at least purchase) large amounts of this "very highly caffeinated" energy drink. The sunglasses alone are 175 points; that's nearly six cans a day for a month.

Tactfulness of response

In the business world, the strategy implemented to communicate information can sometimes be as important as the information itself. Given the CEO's temperament, how much money has been spent on making the commercial, how enthusiastic he is about it, and how it's the center of the summer marketing campaign, it would be a bad idea to recommend pulling the commercial.

Have your students consider the most cost-effective way to address the problem of a potential lawsuit like the one in *Leonard v. Pepsico*. The most cost-effective response is simply to change the caption in the commercial from 7,000,000 points to 700,000,000 points. This is exactly what PepsiCo did after they were made aware of John's lawsuit.

Preventative Legal Advice

Many business law students mistakenly believe that the legal goal of business is to ultimately win any potential lawsuits. As the real-world counterpart to this case study illustrates, this can be a costly mistake. While PepsiCo ultimately “won” in *Leonard v. Pepsico*, it came at a cost. PepsiCo endured a three-year legal battle and, although the law was clearly on their side, there was no guaranty the court would rule in their favor. Rather than trying to win lawsuits, a far better legal goal for business is to avoid having to contest lawsuits in the first place.

Understanding this answers a common question from students in their first business law class, “Why do fanciful car commercials contain disclaimers like, car does not actually fly? Surely they would never lose a lawsuit by someone who thought the car would fly.” Yes, but it’s a lot easier for the company to include a disclaimer than it is for them to fight frivolous lawsuits.

Some students will respond to this case study by saying, “I’d be fine running the commercial in its original form because it would not constitute an offer for the following reasons . . .” This shows a good understanding of contract formation but a lack of understanding for real-world application. This case study, along with its real-world corresponding lawsuit, is an excellent tool to illustrate the difference between winning a lawsuit and avoiding litigation altogether.

ADDITIONAL DISCUSSION QUESTIONS

1) If, in *Leonard v. Pepsico*, internal communications were produced that show PepsiCo clearly did not intend to offer anyone a Harrier jet, would that be relevant to the case?

Probably not. As previously stated, the mutuality of assent issue is an objective standard, not subjective. Therefore, it doesn’t really matter what the parties to the lawsuit actually thought. Rather, it matters what reasonable parties would have thought.

The plaintiff in *Leonard v. Pepsico* made extensive discovery demands (possibly to intimidate PepsiCo into a settlement). Plaintiffs alleged that they required the discovery to determine “how the defendant and its employees understood the commercial would be viewed.”

The court, recognizing the objective standard in contract formation, denied the request. The court stated that, “such discovery would serve only to cast light on defendant’s subjective intent in making the alleged offer, which is irrelevant to the question of whether an objective, reasonable person would have understood the commercial to be an offer.”

2) Would this commercial create a valid offer for the sunglasses in exchange for 175 points?

Probably not. Because advertisements are seen by many people, the general rule is that they are treated as invitations for offers and not offers themselves. It is assumed that the company has a limited stock of sunglasses to give out. The commercial was seen by millions of people and it would be unreasonable for consumers to expect Extremely Tacky Energy to keep enough inventory for the mere potentiality of high demand for the sunglasses. Another way to look at it is that it’s implied that Extremely Tacky Energy may run out of sunglasses, and therefore there is no offer to be accepted.

Consequently, when someone mails in the 175 points with the sunglasses option selected on the order form, they are the offeror making the offer to Extremely Tacky Energy (the offeree) who can then choose to accept or reject the offer.

However, an exception to the general rule exists if the advertisement is highly specific about the transaction and limits the power of acceptance to a specific number of offerees. While the advertisement in this case study is fairly specific (form to be filled out is provided, deadline is defined, exact number of points that need to be submitted is stated, etc.), there are no words of limitation as to who can accept. Therefore, this commercial would not qualify for this exception and would not be considered an offer. If, however, the commercial and accompanying catalog stated, "Sunglasses are limited to a quantity of 100 and only the first 100 completed requests will be fulfilled," this would probably constitute an offer from Extremely Tacky Energy.

Note that while the commercial as stated in this case study does not constitute an offer, the company's refusal to accept 175 points in exchange for the sunglasses could, under certain circumstances, violate a state's consumer protection act or the Federal Trade Commission's truth-in-advertising laws. At the very least, it would lead to bad publicity and disenfranchise their most loyal customers.

3) What legal theory could a customer who tenders 175 points use to potentially enforce the agreement for the glasses?

The customer could attempt to use a theory of promissory estoppel. Restatement (Second) of Contracts states: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Here, you could make the argument that Extremely Tacky Energy should have known the commercial would induce people to purchase the product to obtain the points. Furthermore, Extremely Tacky Energy would be unjustly enriched if they received the benefit of increased sales without paying out the prizes. However, a court may hold that there is no significant "injustice" because the consumer, while missing out on the sunglasses, did receive the energy drinks they paid for.

4) Despite your best efforts, the CEO decides to run the commercial in its original form. Extremely Tacky Energy is then sued by someone who was refused a Harrier jet despite tendering the 7,000,000 points. The complaint by the plaintiff and the subsequent response by Extremely Tacky Energy show that there are no relevant facts in dispute. Based on this, what should the lawyers for Extremely Tacky Energy do to avoid a costly and time-consuming trial?

Extremely Tacky Energy should move for summary judgment. If, after discovery, the material facts are not in dispute, either side can move for summary judgment. If the applicable law clearly favors the moving party, the judge will rule in favor of that party. While the losing party may appeal, summary judgment is effectively the same as a judgment that is the result of a long and costly trial.

5) Assume that Extremely Tacky Energy, in the middle of litigation, changed the commercial from 7,000,000 points for the Harrier jet to 700,000,000 points. Could this be used against them in court as an admission of guilt?

Probably not. This is exactly what happened in the Leonard v. PepsiCo case. The plaintiff claimed that, “Obviously, if PepsiCo truly believed that no one could take seriously the offer contained in the original ad that I saw, this change would have been totally unnecessary and superfluous.” The court held that this is not “probative of the seriousness of the offer.” Instead, “the increase in the number of points needed to acquire a Harrier jet may have been prompted less by the fear that reasonable people would demand Harrier jets and more by the concern that unreasonable people would threaten frivolous litigation.”

Federal Rule of Evidence 407 states that, “When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction.”

6) Pretend the commercial created a valid offer and there was no language stating when the promotion was to end. Armageddon Energy drinks with the promotional points stayed on store shelves for six months and the commercials ran for the same six months. One year after the promotion started (six months after the promotional activities ceased), the company receives an envelope from a consumer with the required amount of points for the jacket. Is Extremely Tacky Energy required to provide the jacket?

This question has built-in assumptions that limit the issue to when the “offer” expires. Offers that fail to provide a specific expiration date are valid for a reasonable time. Much like the standard for determining if an offer exists, a reasonable person standard is applied. Therefore, if a reasonable person would expect this offer to remain open for that period of time, then the offer is open. While this is up to interpretation, it is likely unreasonable for a consumer to expect a company to keep enough promotional stock to meet the demand of acceptances received six months after the promotion ended.

An important takeaway for students is that situations like this can be easily avoided by simply providing expirations for all offers.

7) If an item in the catalog was worth \$800, would the statute of frauds apply?

The court in Leonard v. PepsiCo held that exchanging points for an \$800 item would constitute the “sale” of a good over \$500 and therefore trigger the statute of frauds. However, they also held that the writing requirement in the statute of frauds was not satisfied. The commercial did not count as a writing and the submitted order form was also inadequate because it didn’t have PepsiCo’s signature. The notion that a commercial does not count as a writing to satisfy the statute of frauds, however, seems to be at odds with modern jurisprudence. Emails (Al-Bawaba.com, Inc. v. Nstein Technologies Corp., 2008), text messages (Egan, 2016), and audio recordings (Vittiglio v. Vittiglio, 2012) have been held to satisfy the written requirement for the statute of frauds.

For the purposes of evaluating this commercial it is ultimately a moot point because the plaintiff would lose on other, independent grounds. But this is an excellent example of how the

law is not as objective and uniformly applied as most students think. The same fact pattern can result in wildly different outcomes in different jurisdictions. Technological advances, globalization, and evolving community standards exacerbate these disparate outcomes.

8. Other potential topics to discuss

Could the commercial be construed as offering a reward to whoever returned the points? The court in *Leonard v. PepsiCo* held that the commercial sought a reciprocal promise and therefore was not a case regarding a reward.

If the plaintiff won in *Leonard v. PepsiCo*, would the court likely require the equitable remedy of specific performance, thus forcing PepsiCo to deliver a Harrier jet? Equitable remedies are only available when a remedy at law (money damages) is inadequate. In this hypothetical where the court enforces the Harrier contract, monetary damages would be adequate provided they were enough to acquire a demilitarized Harrier jet.

Assuming that John knew PepsiCo was not seriously offering a \$30 million jet for \$700,000, was it ethical for him, his financial backers, and his attorney to pursue this legal course of action? Ask your students what they would do if they could possibly win a large settlement against a company by misrepresenting what they thought of a commercial. Would their answer about what is right change if they owned the company that ran the commercial?

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