

## Question 3: Contracts

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

### Response Provided By BarWrite (Dr. Mary Campbell Gallagher):

1. Contract formation: bilateral and unilateral contracts. Under the common law of contracts, formation of a contract requires offer, acceptance, and consideration. An advertisement like RC's handbills is normally not an offer, since it is not made to a designated offeree, but it is instead merely an invitation to make an offer. Where, by contrast, an advertisement is directed to a specific offeree--for example, someone who qualifies for a reward--it is an offer.

Here, RC advertised its housecleaning services by hanging handbills on the doorknobs of houses. Assuming that RC could not in fact clean every one of those houses, the handbills did not contain an offer to the residents, but merely an invitation to make an offer. Maria telephoned RC that same day, accepting RC's invitation to make an offer.

An offer for a bilateral contract seeks acceptance by a return promise. If, as she later said, Maria wanted her house cleaned because she wanted to sell it, she may have sought the security of a return promise, and thus a bilateral contract. When the manager said, "We can be at your house on Friday," Maria replied, "Great!" Arguably, the manager had made a return promise.

An offer for a unilateral contract does not seek a promise in return, but performance, instead. Maria can argue that she did not seek a return promise from RC. Instead, she wanted RC to know that if their crew cleaned her house, she would pay for their services.

Note that there is a \$20-off coupon on RC's handbills that, although contained in an advertisement, does offer a contract to specified offerees. ("This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500.") Maria has satisfied the condition precedent. She has called immediately, she has spoken with the manager--there are no facts suggesting he lacks authority to

commit RC—and she has asked for the cleaning. She has also received confirmation ("That's right," said the manager) that she will receive the \$20 discount.

Promise or condition. Maria may argue that her saying "give me a call before your crew comes" established a condition, failure of which would excuse her performance. Since, however, RC told Maria that the crew would come on Friday, further notice of the time of arrival was not a condition, but a mere promise. In any event, the contract had already been formed when Maria asked for that phone call.

Statute of frauds. The oral contract between RC and Maria does not fall within the statute of frauds, and it therefore need not be in writing to be enforceable.

2. Pre-existing duty rule and attempted modification of contract. Under the pre-existing duty rule, where a party promises to do what he is already obligated to do, that is not sufficient detriment to constitute consideration. An enforceable agreement to modify a contract requires consideration on both sides.

Here, immediately after the phone conversation, RC sent Maria a document labeled "Confirmation of Order" in the mail. It contained a new term, a 48-hour cancellation clause, and it thus sought modification of the contract.

Maria will argue that RC has a pre-existing duty under their agreement, and since RC has not offered new consideration for the new 48-hour cancellation term, it is bound by their existing agreement, and the new term does not come in. Even if the "Confirmation" could be interpreted as containing a new offer, in any event, it would not be effective until it was received, which was at 10:30am on Friday, half an hour after Maria had already repudiated the contract.

Likewise, if the "Confirmation" could be regarded as part of RC's acceptance, it would not be effective on dispatch, but only upon receipt, since it is not reasonable. It is not reasonable to send a significant new condition by mail when the date for performance is only a few days away and the document may not be received before the time set for performance, when previous negotiations have taken place on the telephone, and when a speedier medium, email, is available.

In any event, by the time Maria received the "Confirmation," she had already repudiated the contract.

4. Promise or condition subsequent. Maria will argue that her selling her house before RC's crew could clean it is a condition subsequent to performance. A condition subsequent is any event the existence of which, by agreement of the parties, operates to discharge a duty of performance that has already arisen.

Here, however, there is no agreement of the parties that Maria's selling the house will discharge RC's duty of performance. Indeed, before she reached an agreement with RC, Maria did not even tell RC that she was selling her house. Maria did subsequently notify RC, by email. She asked RC to take extra care, she did not seek agreement to a condition.

Therefore, Maria's not selling the house was not a condition subsequent to RC's duty of performance.

For the same reason, Maria cannot assert the defense of impossibility. Maria assumed the risk that the house would sell before RC could clean it.

5. Revocation of offer for a unilateral contract or anticipatory repudiation of a bilateral contract. If Maria has offered RC a unilateral contract, then her email to RC at 10:00am on Friday morning ("No need to send your crew") is an attempt to revoke her offer. If Maria's contract with RC is a bilateral contract, that email is a repudiation of the contract. Either way, Maria is in breach of contract, and RC can recover the full amount of the bargain.

Regarding Maria's offer as having been an offer to RC for a unilateral contract, the rule in the Restatement Second is that where the offeror has made an offer for a unilateral contract, the offer is irrevocable once the offeree begins to perform. Beginning to perform must be more than just preparing to perform.

Here, RC, the offeree, has made tender of performance by dispatching its crew, before 10:00am. Because Maria must cooperate in order for RC actually to clean her house, since RC cannot enter the house without her permission, RC's tender of performance is the equivalent of performance.

Therefore, as of 10:00am Friday morning, Maria can no longer revoke her offer of a unilateral contract. She must perform her part of the bargain or be found in breach of contract.

Anticipatory repudiation provides the aggrieved party with a choice of actions. Here, however, although Maria's repudiation of the contract occurs only hours before the time for her performance, it would not make sense for RC to urge Maria to perform, nor could RC go ahead with its own performance, since that

would require entering Maria's house. Therefore, Maria's repudiation is best treated as a present repudiation.

6. Breach of contract and damages. Whether the contract was unilateral or bilateral, Maria breached the contract. RC is entitled to recover the full amount, \$500. Maria no longer qualifies for the \$20 discount, because she has revoked her own offer, or breached the agreement, for the full housecleaning service. Nor can Maria demand that RC mitigate damages, since a cleaning crew could not be expected to find substitute work that same day.

[www.BarWrite.com](http://www.BarWrite.com)