

Subject: Problem 2-1

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To recap the facts briefly, representatives from Super Comics have negotiated the essential terms of a proposed contract with JayRan Products. The contract will license JayRan to make lunch boxes and similar items that carry the image of certain Super Comics characters. The parties agreed on the length of the license, the rate of royalty payments, termination clause, etc. You, as general counsel for Super Comics, drafted the agreement and mailed four copies to JayRan with a note that JayRan should sign all four and return them to be signed by Super Comics president. Three days have passed since you mailed the documents.

Now, Super Comics would like to make a deal with another party instead of JayRan and you need to give advice on whether Super Comics has a contractual obligation to JayRan. So where does the transaction now stand?

First possibility: The draft is merely solicitation of an offer because Super Comics is reserving the right to sign last. See Restatement 2d § 26. This situation would be the best for Super Comics because even if JayRan has signed, it would still amount just to an offer which Super Comics would be free to reject.

Second possibility: The draft contract is an offer and the signature by JayRan will be an acceptance that will conclude the transaction. See Restatement 2d § 24. Under this view, the later signature by Super Comics would be a mere formality, though that may seem like a strained interpretation of the situation. On the other hand, this argument finds some support in the fact that Super Comics prepared the draft and might be understood to have already approved the terms. The cover letter may be read to support the view that Super Comics will automatically sign if JayRan signs.

If the draft is viewed as an offer, then Super Comics would want to act promptly to revoke the offer before JayRan accepts. Note that if JayRan has already signed the document and properly mailed the contract back to Super Comics, the acceptance may be binding under the "mailbox" rule even though Super Comics sent the offer over by messenger.

Third possibility: The parties have already made an oral contract, with mutual assent on the essential terms, and the writing is just intended to be a record. See Restatement 2d § 27. The fact that all of essential terms were negotiated and that only standard terms were added by Super Comics may support this view. On the other hand, the nature of this transaction may be such that the parties would consider the actual signing of the written contract as a prerequisite to mutual assent.

Fourth possibility: To the extent that there were important terms yet to be resolved, the parties may have bound themselves to bargain in good faith. The courts are split on this issue, of course, and one would need to see where the state courts have embraced this theory. If so, and if the

parties were deemed to have reached this level of agreement, then Super Comics could not simply back out of negotiations or decline to go forward on some pretext. Super Comics would need to bargain in good faith on any remaining terms.

Fifth possibility: Since only three days have passed, Super Comics could probably not argue that the offer lapsed due to passage of time. See Restatement 2d § 36. But one could consider whether the context of the bargaining would support an argument that JayRan needed to respond more swiftly than they did.