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## “FIRM OFFERS” UNDER UCC SECTION 2-205 SHOULD BE TREATED THE SAME WAY AS ARE OFFERS INCLUDED IN OPTION CONTRACTS

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### ABSTRACT

“Firm offers” under Section 2-205 of the Uniform Commercial Code are irrevocable for a period of time in accordance with the terms of that provision. But should those statutorily irrevocable offers be treated the same way as offers that are included in option contracts, and that are thereby contractually irrevocable, for the application of the “death or legal disability of the offeror” doctrine, or the “rejection or counteroffer” rules, or the “mailbox rule”? Or should firm offers be treated in a different fashion, as are offers not included in option contracts, for those purposes? This article argues that firm offers should be treated in the same way as are offers included in option contracts for those purposes.

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When I teach contract law to first-year law students, I initially cover some introductory material regarding law school and legal practice. I then discuss in some detail the classical principles governing offers, after which I introduce students to one of the mid-twentieth century abridgments of these classical principles, Section 2-205 of the Uniform Commercial Code (UCC), a provision

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which has been adopted by almost all of the states.<sup>1</sup> That section is titled “Firm Offers” and limits the freedom of persons qualifying as “merchants” under the UCC to revoke their offers if the offers have been made through a “signed writing,” and if those offers give assurances that they will be held open for a period of time.<sup>2</sup> This provision makes those offers irrevocable for that period of time, subject to some qualifications.<sup>3</sup> Those offers, in effect, create option contract rights for the offerees to accept the offer at any point during that time period despite the lack of a contractual agreement.<sup>4</sup>

The interesting question that the more insightful and inquisitive students often raise when they are introduced to UCC Section 2-205 is whether offers qualifying as firm offers, which have the key irrevocability property of an offer that is included in an option contract,<sup>5</sup> are regarded as offers included in option contracts for all other legal purposes? In particular, do these firm offers survive the death or legal disability of the offeror, which offers generally do not,<sup>6</sup> but which those offers included in option contracts do,<sup>7</sup> and do they survive if rejected (or counter-offered to) by the offeree, which again offers generally do

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1. Henry Mather, *Firm Offers Under the UCC and the CISG*, 105 DICK. L. REV. 31, 34 (2000) (“The 1962 Official Text of the UCC, enacted as statutory law in most states, includes a firm offer rule in section 2-205.”).

2. SECTION 2-205. FIRM OFFERS

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months, but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

U.C.C. § 2-205 (AM. L. INST. & UNIF. L. COMM’N 1977).

3. *Id.*

4. After introducing students to UCC Section 2-205, I then spend several weeks discussing the common law development of several other limitations on the classical freedom of offerors to revoke their offers. These limitations are now embodied by Sections 45, 86, 87(2), and especially Section 90 of the Restatement (Second) of Contracts. RESTATEMENT (SECOND) OF CONTRACTS §§ 45, 86, 87(2), 90 (AM. L. INST. 1981).

5. I will throughout this article refer to offers made irrevocable by their inclusion in an option contract relationship as “offers included in an option contract,” rather than by the more succinct phrase “option contract offers,” so as to avoid possible confusion between an irrevocable offer contained in an option contract and a revocable offer made to someone to encourage them to enter into an option contract. *See supra* p. 285; *see also infra* p. 286–90.

6. SECTION 48. DEATH OR INCAPACITY OF OFFEROR OR OFFEREE

An offeree’s power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

RESTATEMENT (SECOND) OF CONTRACTS § 48 (AM. L. INST. 1981).

7. SECTION 37. TERMINATION OF POWER OF ACCEPTANCE UNDER OPTION CONTRACT

Notwithstanding §§ 38–49, 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 discharge of a contractual duty.

*Id.* § 37.

not,<sup>8</sup> but which those offers included in option contracts do?<sup>9</sup> And finally, are acceptances of such firm offers effective only when received, as are acceptances of offers included in option contracts under *Restatement (Second) of Contracts* Section 63(b),<sup>10</sup> rather than effective when sent under the Section 63(a) mailbox rule that usually applies to acceptances unless the offer states otherwise?<sup>11</sup>

The broader issue giving rise to these several specific questions is that since firm offers are not offers included in option contracts—in fact they are not part of contractual agreements at all but are simply offers that have been made irrevocable by statutory decree—should they be regarded as though they were offers included in option contracts for other purposes as well, or should they instead be treated like any other offers in all ways except for their statutorily mandated irrevocability?

I have until now in my teaching gone with my intuitions here and have told my students that courts will probably treat Section 2-205 firm offers the same way they do offers included in option contracts for all purposes, including with regard to the several subtle issues that I have here raised. But I have now decided to look into these questions more fully to see if I have been giving correct advice all of these years.

I have unfortunately found very little case law regarding this general question as to whether firm offers under UCC Section 2-205 should be regarded the same way as offers included in option contracts for all purposes.<sup>12</sup> The few opinions that address this classification issue do so only briefly in passing,<sup>13</sup> and I have found no case law authority at all regarding the more specific questions of whether the option contract exceptions to the common law death of the offeror

8. SECTION 36. TERMINATION OF THE POWER OF ACCEPTANCE

An offeree's power of acceptance may be terminated by  
(a) rejection or counter-offer by the offeree . . .

*Id.* § 36(1)(a).

9. *See supra* note 6.

10. SECTION 63. TIME WHEN ACCEPTANCE TAKES EFFECT

Unless the offer provides otherwise, (a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as it is put out of the offeree's possession, without regard to whether it ever reaches the offeror; but (b) an acceptance under an option contract is not operative until received by the offeror.

RESTATEMENT (SECOND) OF CONTRACTS § 63.

11. *Id.*

12. The limited case law authority here is terse and ambivalent. *See Bethlehem Steel Corp. v. Litton Indus., Inc.*, 488 A.2d 581, 592 (Pa. 1985) (“The firm offer which Code § 2-205 makes irrevocable . . . has a different character than the option contract recognized at common law.”); *cf.* *Chicago Fineblanking Corp. v. D.J. Cotter & Co.*, No. 95-CV-71666-DT, 1996 U.S. Dist. LEXIS 21882, at \*13 (E.D. Mich. May 22, 1996) (“[S]uch an obligation [created by an offer under UCC Section 2-205] is simply an enforceable option contract.”); *Sun Refin. & Mktg. Co. v. Spelman*, No. 63164, 1992 Ohio App. LEXIS 6421, at \*7 n.2 (Ohio Ct. App. Dec. 17, 1992) (“We consider it necessary to note that under the Uniform and Commercial Code a seller can offer a buyer an option contract by making an irrevocable offer . . . See U.C.C. § 2-205.”); *Fordham v. Eason*, 521 S.E.2d 701, 706 (N.C. 1999) (“[U]nder the Uniform Commercial Code, certain option contracts can remain open without consideration, *see* [UCC § 2-205] . . .”).

13. *See Bethlehem Steel Corp.*, 488 A.2d at 592; *Chicago Fineblanking Corp.*, 1996 U.S. Dist. LEXIS 21882, at \*13; *Spelman*, 1992 Ohio App. LEXIS 6421, at \*7 n.2; *Fordham*, 521 S.E.2d at 706.

doctrine, or to the rules regarding rejection of offers or counteroffers, or to the mailbox rule, apply to firm offers.

There is also only a very modest amount of informed commentary on these questions. The Official Comment to Section 2-205 unfortunately does not provide any useful clarification.<sup>14</sup> The usually authoritative *White & Summers* treatise on the Uniform Commercial Code also provides no assistance.<sup>15</sup> The discussion of Section 2-205 in *Corbin on Contracts* also does not address these particular classification issues.<sup>16</sup>

The *Murray on Contracts* treatise does briefly address these issues, although very generally and indirectly, when it ambivalently states that offers made subject to Section 2-205 “may be viewed as option contracts in terms of their effect.”<sup>17</sup> But that treatise does not opine when this should be done; if it is regarded as a matter of judicial discretion, as Murray’s choice of the word “may” suggests; and, if so, whether all or only some aspects of the law regarding offers included in option contracts should be applied to firm offers. *Calamari and Perillo on Contracts* tersely states that the “supervening death . . . of the offeror or offeree does not terminate an irrevocable offer” made under Section 2-205 but does not offer a rationale for extending this option-contract-based principle to firm offers, nor address the other questions here posed.<sup>18</sup> And while E. Allan Farnsworth in his well-known one-volume *Contracts* treatise states that it is “less clear” that an offer under Section 2-205 will survive rejection by the offeree than will an offer that is included in an option contract, and provides some limited support for this position,<sup>19</sup> he does not address these other questions I have posed.

There is also very modest journal literature published in the early years after the promulgation of Section 2-205 that focused primarily on what impact this new provision was likely to have, if any, on the construction industry controversies that gave rise to the extension of the promissory estoppel doctrine

14. Comment 3 to Section 2-205 states that “[t]his section deals only with the offer which is not supported by consideration,” which makes clear that the provision has no applicability to offers included in option contracts, but does not address whether offers made under that section are to have any other features of offers included in option contracts beyond the irrevocability of the offer. U.C.C. § 2-205 cmt. 3 (AM. L. INST. & UNIF. L. COMM’N 1977).

15. See 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 52–54 (3d ed. 1988).

16. 1 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 2.26 (Matthew Bender, 2022).

17. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 44(C)(7) (5th ed. 2011).

18. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 102 (6th ed. 2009).

19. E. ALLAN FARNSWORTH, CONTRACTS 179 (4th ed. 2004). However, the support for this claim that Farnsworth offers is primarily limited to a 1953 Michigan case and to a *Restatement (Second) of Contracts* Section 37 illustration that each relate to rejections of offers included in option contracts—not to firm offers under UCC Section 2-205. See *id.* at 179 n.25. He does, however, also refer to a principle he claims is embraced by both the Vienna Convention and the UNIDROIT Principles (that “even an irrevocable offer” would be terminated by the offeror’s rejection), which he opines would probably not apply to offers included in option contracts. *Id.* This suggests different treatment under the Vienna Convention between these two types of irrevocable offers in this regard. *Id.*

to commercial relationships.<sup>20</sup> But that literature dealt broadly only with the core irrevocability aspects of offers made under Section 2-205 and did not address the more technical questions here considered. There are also a couple of later articles focusing primarily on Section 2-205,<sup>21</sup> but neither of those articles address the general question of whether firm offers under that provision should be regarded as offers included in option contracts for all purposes.

So, while I admittedly have found very little on-point guidance here, let me offer my thoughts regarding these questions. The rationale for having offers included in option contracts survive the death or legal disability of the offeror is quite clear and compelling. Otherwise, the offeree could not have confidence that they would have the full option contract period to decide whether to accept the offer. One would think that the drafters of the UCC and the state legislatures that enacted Section 2-205 into law would want offerees to whom firm offers have been made to have the same confidence in the endurance of those offers as would offerees of offers included in option contracts. I therefore strongly favor regarding firm offers as equivalent to offers included in option contracts with regard to the consequences of the death or legal disability of the offeror, enduring despite those circumstances, and I think that most, if not all, courts would agree with me here.

The rationale for having offers included in option contracts survive rejections or counteroffers by the offeree is far less compelling, since the offeree has full control over these actions on their part. One commentator in particular, Michael J. Cozzillio, wrote an extensive article that takes sharp issue with this position and argues that such actions by the offeree should terminate the offeree’s option contract rights.<sup>22</sup> However, despite this criticism, protection against offer termination by rejection or counter-offer is now provided by courts to offerees for offers included in option contracts as a general matter.<sup>23</sup> Given this current judicial practice, I do not see any obvious reason why that same protection should then not also be provided to offerees under Section 2-205, although I agree with Cozzillio that the justification for providing this particular protection to offerees of offers included in option contracts is relatively weak.<sup>24</sup> And I can also see how Farnsworth could have come to the conclusion that this relatively weak justification would make the rationale for the extension of that protection to Section 2-205 offerees “less clear,” particularly given his stated view that courts applying the international law Vienna Convention and UNIDROIT Principles to a dispute would likely treat these firm offers differently in this regard.<sup>25</sup> Nevertheless, I still favor providing such protection to offerees under firm offers, so as to conform to the practice followed for offers included in

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20. See, e.g., J.C.C., Jr., *Another Look at Construction Bidding and Contracts at Formation*, 53 VA. L. REV. 1720 (1967); Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

21. Mather, *supra* note 1; Michael J. Cozzillio, *The Option Contract: Irrevocable Not Irrejectable*, 39 CATH. U.L. REV. 491 (1990).

22. Cozzillio, *supra* note 21, at 554–55.

23. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 37 (AM. L. INST. 1981).

24. See Cozzillio, *supra* note 21.

25. FARNSWORTH, *supra* note 19, at 179 n.25.

option contracts, in order to avoid confusion, and I think that most—but perhaps not all—courts would agree with me here.

The rationale for having an exception to the mailbox rule for acceptances of offers included in option contracts is much more convincing, although somewhat more complex. One obvious justification commonly advanced is that the offeree does not need the security provided by the mailbox rule of knowing that the contract has been formed once they have put their acceptance into the mail, since the offer is contractually irrevocable and contract formation will occur once the acceptance is received, so long as it is received during the option contract period.<sup>26</sup> The offeree under an option contract can, if necessary, take steps to confirm that their acceptance has been received in a timely manner.<sup>27</sup> They do not need mailbox rule protection against offer revocation during the option contract period while the acceptance is in transit since they already have that protection provided by their option contract rights.<sup>28</sup>

A second justification often advanced for this exception from the mailbox rule is that the offeror in an option contract may need to know if a contract has already been formed when the option contract period expires. Otherwise, they would be unable to make other binding arrangements at that time if they wanted to do so in order to no longer bear the risk of adverse price movements. But if the mailbox rule were to apply to form a contract when the acceptance was put into the mail, which may not arrive until after the termination of the option contract period, if at all, this would leave the offeror uncertain if they were already contractually committed at the time that the option contract period expired—an unfair result.

Even if one accepts the somewhat problematic rationale for the application of the mailbox rule to ordinary offers, which rule allocates the risk of non-delivery of the acceptance to the offeror rather than the offeree (which is probably an inefficient risk allocation in terms of the relative costs to the offeror and offeree of monitoring delivery of the acceptance in most instances<sup>29</sup>) it does not appear justified to apply this principle to offers included in option contracts which do not raise similar concerns for offerees. As evidenced by *Restatement (Second) of Contracts* Section 63(b), the courts have not done so with respect to offers included in option contracts.<sup>30</sup>

One would think that the drafters of the UCC and the state legislatures that enacted UCC Section 2-205 into law would want offerors who have made firm offers under UCC Section 2-205 to similarly have the assurance that they could not be contractually committed under the mailbox rule prior to their receiving notice of acceptance of their offer, so that they would know where they stood contractually at the time of expiration of the option contract. And just as for

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26. See PERILLO, *supra* note 18, at 100–103.

27. See *id.*

28. See generally *id.* (citing some cases in support).

29. One would think that since the offeree knows when and by what means of delivery the acceptance has been sent, and the offeror may not, the offeree would in general be the lower cost monitor of the delivery of the acceptance.

30. RESTATEMENT (SECOND) OF CONTRACTS § 63(b) (AM. L. INST. 1981).

offers included in option contracts, the offerees do not need the protection during the period of irrevocability against offer revocation that the mailbox rule provides for ordinary offers. I therefore also strongly favor regarding firm offers as equivalent to offers included in option contracts in that the acceptances will be effective only when received. I believe that most, if not all, courts would agree with me here if presented with this issue.

Based on my review of this limited body of guidance and upon my reasoning regarding the wisdom of applying the various rules formulated for offers included in option contracts to firm offers under Section 2-205, I will therefore continue to explain to my students that these firm offers should be regarded in the same way as are offers included in option contracts for death or legal disability of the offeror, rejection of the offer or counteroffer, or mailbox rule purposes, even though they are not actually offers included in option contracts. I think that most, if not all, courts would likely agree if presented with any of those questions. These conclusions have a solid rationale despite there being a relative lack of specific case law authority or supportive legal commentary on these points. But I will continue to keep an eye out for additional cases or commentary that might explore these issues more fully and that might suggest the need for a more nuanced application of option contract principles to firm offers.