The problem of liability arising out of unsuccessful negotiations is commonly viewed in the optic of offer and acceptance though, as has been pointed out, the classic sequence of offer and acceptance is often absent in important contract negotiations. Under the basic rules of offer and acceptance, there is no contractual liability until a contract is made by the acceptance of an offer. Prior to acceptance, the offeror is free to back out by revoking the offer. No sympathy is lost on the offeree if the offer is revoked, for an offeree is regarded as amply protected by the power to accept before revocation. An offeree that chooses to rely on the offer without accepting it is seen as taking the risk that the reliance will go uncompensated.

This “freedom from contract” is enhanced by the judicial reluctance to read a proposal as an offer in the first place. Courts have been even more reluctant to impose liability if no offer has been made at the time that the negotiations are broken off. At the root of this reluctance is the common law’s “aleatory view” of negotiations: a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations. That loss includes out-of-pocket costs the disappointed party has incurred, any worsening of its situation, and any opportunities that it has lost as a result of the negotiations. All this is hazarded on a successful outcome of the negotiations; all this is lost on failure. As an English judge expressed it, the disappointed party “undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made . . . .” This aleatory view of negotiations rests on a concern that limiting the freedom of negotiation might discourage parties from entering negotiations. With rare exceptions, Courts have resisted suggestions that parties may in some circumstances come under a duty to bargain in good faith.

A rare exception in which a court imposed a duty to bargain in good faith is Heyer Products Co. v. United States. Heyer, the disappointed low bidder on a government contract, sued the government, alleging that it had awarded the contract to a higher bidder in order to retaliate against Heyer for testimony at a Senate hearing. The United States Court of Claims held that, while the government "could accept or reject an offer as it pleased," it had an "obligation to honestly consider [Heyer's bid] and not to wantonly disregard it." For breach of this duty it would be liable to Heyer for its expenses in preparing its bid, although not for its lost profits. The rule must be regarded with caution, having been framed in context of an invitation to bid on a government contract where the bidder's power to revoke its bid is restricted. But though the court noted that recovery could be had only on proof of "a fraudulent inducement for bids," subsequent decisions have required only "arbitrary and capricious" behavior.

In recent decades, courts have shown increasing willingness to impose precontractual liability. The possible grounds can be grouped under four headings: (1) unjust enrichment resulting from the negotiations; (2) a misrepresentation made during the negotiations; (3) a specific promise made during the negotiations; (4) an agreement to negotiate in good faith.

No sooner had Lord Mansfield conceived of what we now call constructive conditions of exchange than the need arose to mitigate the harsh effects of the rules traditionally applied to express conditions. By invoking the concept of a condition to secure the expectations of one Party, he exposed the other party to the risk of forfeiture. If strict performance by a builder were regarded as a condition of the owner's duty to pay the slightest breach by the builder would deprive the builder of any right to payment under the contract. Kings Bench faced this problem in Boone v. Eyre only four years after it had decided Kingston v. Preston.

[Subsequently set out in detail.]
The word *assignment* here refers to the act by which an assignor transfers a contract right to an assignee.\(^1\) Such an act will sometimes also be referred to as an *effective assignment*, as distinguished from an *attempted or purported assignment*.

What is necessary for an effective assignment?\(^2\)

To make an effective assignment of a contract right, the owner of that right must manifest an intention to make a present transfer of the right required without further action by the owner or by the obligor. The owner may manifest this intention directly to the assignee or to a third person.

[Subsequently set out in detail.]

\(^3\)See the discussion of the Limits of traditional analysis in §3.5 supra.

\(^4\)Drennan v Star Paving Co., 333 P.2d 757 (Cal. 1958), described in the discussion of the example of Drennan in §3.25 supra, represents a limited inroad into the traditional freedom of negotiation. However, it extends protection only to offerees, not to offerors, and it does not protect a promisee if the promise falls short of being an offer.

\(^5\)See the discussion of reluctance to find an offer in §3.10 supra.


\(^7\)These suggestions go back to the German scholar Jhering, who in 1861 formulated a doctrine of culpa in contrahendo (fault in negotiating) under which "damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection . . . . Of course, the party who has relied on the validity of the contract to his injury will not be able to recover the value of the promised performance, the expectation interest. But . . . the law can ill afford to deny the innocent party recovery altogether; it has to provide for the restoration of the status quo by giving the injured party his 'negative interest' or reliance damages." Kessler & Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract, 77 Harv. L. Rev 401, 401-402 (1964). But See Racine & Laramie v. California Dept. of Parks & Recreation, 14 Cal. Rptr. 2d 335 (Ct. App. 1992) (doctrine of culpa in contrahendo "has never been accepted in Anglo-American jurisprudence").


\(^17\)See the discussion of the rule of revocability in §3.17 supra. However, Heyer Productions was extended in New England Insulation Co. v General Dynamics Corp., 522 N.E.2d 997 (Mass. App. 1988) ("no reason in principle why [misrepresentation cases] should not apply to private contractors").

\(^18\)140 F. Supp. at 414

\(^19\)See King v. Alaska State Hous. Auth., supra note 16 ("standard consistently relied on by the Court of Claims has been that . . . of 'arbitrary and capricious' behavior").

\(^20\)See generally S. Burton & E. Andersen, Contractual Good Faith ch. 8 (1995); Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev 217, 229-239, 263-269 (1987) (from which Part of this section of the treatise is adapted).

\(^21\)As noted earlier, for the sake of clarity this discussion is limited to a failure of performance that is a breach. However, the rules governing constructive conditions of exchange apply generally to any failure of performance. See the discussion of the point that the concept applies even if no breach in §8.9 supra.

\(^22\)However, the fact that the builder's performance is a condition of the owner's duty to pay does not affect the builder's right to retain any progress payments already received. See the discussion of the limits of dependence in §8.9 supra.

\(^23\)See the discussion of this case in §8.9 supra

\(^1\)The Restatement Second uses it in this Sense. See Restatement Second §317(1) ("assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right is, transferred"). The word is sometimes also used to refer to the transfer itself or to a writing evidencing the transfer.

\(^2\)The discussion here does not cover the transfer of contract rights by operation of law as when an executor or administrator is empowered to act for an estate or a trustee for a bankrupt. Nor does it cover the related equitable remedy of subrogation.

**Referring Principles:**

III.2 - Assignment of claim
IV.8.1 - Principle of pre-contractual liability

V.1.4 - Principle of simultaneous performance; right to withhold performance