

Is Silence Truly Acquiescence?

Principles of contract law applicable to the three-step notary presentment process.

I sincerely hope that this paper will be treated as constructive and helpful and not seen as unduly critical of the work we have done and continue to do in the area of commercial and lawful remedy. My reason for bringing the following to your attention is that I feel a duty to share with my colleagues any and all information that if adopted might enhance our endeavors, or conversely, if not considered, could lead to damage to ourselves or the society. I will certainly edit this paper as new information comes to my attention.

As we are all aware, one of the lawful concepts or maxims that we have relied upon for the founding of our administrative process is “tacit acquiescence” or “agreement through silence”. This ancient concept is indeed a legal maxim and if we apply the concept to common situations in everyday life, we can easily see how it applies. But when does it apply and when does it not apply?

As we know, there are few laws that apply in every situation. And as we are also aware, our common law heritage and system of jurisprudence has made elaborate mechanisms for dealing with the vagaries of law and its application. Our English predecessors in law formed Courts of Chancery. These courts were commissioned directly under the Crown and were established to offer remedy to petitioners (often creditors and landlords), where the common law of England was too strict and rigid. In America, this practice was handled in the Courts of Equity. Courts of Law strictly applied statute (legislative law) and common law (judicial holdings/case precedent), and Courts of Equity allowed judges to bend the application of law slightly just so long as the intent of the law was preserved. These two law forms were merged in the U.S. administratively in 1937. We often refer to our present day courts as equity courts even though that is not entirely accurate.

Now, the equity court or the equity side of the court is where contract law that is not specifically delineated in statute or case precedent is adjudicated. If one were to bring suit into court where one’s legal theory was based on a maxim of law that is known to be well founded but where the application of that maxim is not spelled out in statute or prior holdings, it would be “equitable” or “just” for such a maxim to be applied if it “served the ends of justice”. And alternatively, if one were to enter a private judgment or order into the “private side” of the court, the “ends of justice” would still need to be served if that order were to be granted. Regardless of how one’s “plea” is entered into our justice system, the lawful basis for our motions must be in alignment with historical precedent and the context of our “arguments” must be applicable under the same historical standards. You may replace the above used legal terms with your own words, but the concepts still apply.

One might ask, “Why do I need to follow any of those rules at all?” Or one might say, “Those courts are corporate, for profit entities, they aren’t lawful!” Or maybe even, “Those systems of justice are operating in admiralty jurisdiction, I want to use our trusted English and American common law and I can’t get that there.” I find all of those objections valid. But are they reason to abandon law itself? If we abandon the law itself

because it has been altered or corrupted to some degree, what is our status in society? Or what about using civil disobedience to alter the present legal system? I find that valid too, just so long as we understand that this is what we are doing with some of our courtroom techniques and we understand what the consequences may be.

A human being who decides that the law forms and the legal systems that his society is commonly using are immoral or distasteful has the option to leave society as a whole. There are plenty of places to go where one will not be found and where one can adopt Natural Law as an alternative law form to follow. But regardless of all this, man must follow law in one form or another. And a society by definition is a collection of people who agree on common ideas and ways of living or operating. A collectively agreed upon law form is one of the main requisites for a society to exist. So I ask, what society are you living in? What law form do you and those in your society agree to operate under?

The reasons I am addressing these concepts before discussing the main topic of this paper is because I feel that they are important to understand because they apply directly to the administrative process that we are using for commercial remedy. If it is found that our administrative process is not aligned with historical precedent as well as what we once thought, it is going to be essential that we bring it into alignment or else suffer the consequences, whatever those may be.

What brought me to stick my nose into this particular subject was an actual personal situation where I had perfected a three step administrative process on a debt collector and wished to convert my process into something that could be recognized in court. I was open to bringing it into the public or the private; I just needed to have it recognized so that I might stop a lawsuit from being brought against me. That lawsuit is still ongoing at this time. I wont discuss what measures I took or attempted, but suffice it to say, I was thwarted. I was forced to look more closely at my private process when I considered how I might get my process into court. I found it very helpful to look at my own measures through the eyes of the judge, as best I could, and to try to imagine what he would think. The more I read law, the more I started to understand the way lawyers and judges thought and the more I understood the logic of the court and our history of jurisprudence.

As I developed my pleadings and legal writings, I actually found it hard to defend my administrative process in a way that aligned with what I was learning about law. I asked many colleagues and considered as much as I could about this subject but could not find what I was looking for to back up my positions. I then turned to contract law books to analyze the actual lawful theories that our process was based on and this paper is what came out of what I discovered.

Our administrative process is based on three maxims of law that have always and still do hold weight. Offer and Acceptance, Due Process, and Witness. I wont go into all of these that much here but quickly let us analyze them. For a contract to be initiated there must be an offer. The one who makes an offer is the Offerer. Then, for a binding contract to form there must be acceptance by another; that other is called the Offeree. If

one extends an offer and another accepts that offer, a contract is formed and both parties are bound to the specific terms and conditions of that contract.

Due process is a concept of law that is equitable in nature. It's application helps to create fair and just conditions under which contracts may be formed. Due process in application is dependant on many factors such as the type of operation that is in process, but generally, it is about giving the offeree a second chance of redemption so that it is less likely that a mistake might lead to the formation of an unintended contract. Making an offer twice or more times before making a conclusion is giving the offeree "due process". Witness, again equitable in its nature, is a lawful concept that we have historically applied to ensure objectivity so that mistakes are not made. Due Process and Witness are enshrined in our United states Constitution and also have biblical roots.

It is my conclusion that our three step administrative process is well grounded with its application of offer, due process and witness, but not so solid in the area of acceptance. We commonly use a notary presentment process where we make an initial offer, we send that offer a second time and then we sometimes even give a third chance for redemption before certified dishonor results. The notary is our witness and is established to be a very credible witness. We are definitely making an offer and it is definitely an offer that is witnessed and we are very fairly offering chances for redemption. But what if our offers are not truly being accepted under the laws of contract or lawful precedent?

In performing our three step administrative processes and binding offerees to our contracts, we have been relying on the lawful maxim "silence is agreement". This is also known as tacit agreement, tacit acquiescence and is related to tacit procuration. This one concept, which is holding up our administrative process as one leg of a table, I do now believe, is not applicable in a large number of situations where we use the administrative process. To find out if this was true, I looked at many contract books and other law books at my local law library. What I found was that this concept is applicable in a few standard situations but not applicable in any others. And once we understand those few situations, we can apply them in our imagination and they do make common sense. Lawful principles always make common sense. If you cannot apply a proposed lawful principle to yourself and to a common, real life scenario, you might later find that it is not a real principle of law. And if it is not a real principle of law, members of our common, American society may not use it in their engagement with others within that society. To do so would be to engage in anarchy (or civil disobedience to be fair). Now, on to some actual citations.

Brian Blum's "Contracts" from the Examples and Explanations series, second edition, is a very well written and thorough work on contract law. It refers frequently to the "Restatement on Contracts" which is the quintessential American contract law reference work. On page 96, the author outlines the two accepted contexts where an offeree's silence can be equated with agreement to the terms and conditions of the offer.

1. "If the offeror proffers property or services with the offer, and the offeree, having reasonable opportunity to return or refuse them, exercises any ownership rights

over the property, or keeps the benefit of any services, the offer is accepted. For example, the offeror leaves an elegantly wrapped basket of fruit and gourmet food on the offeree's doorstep with a note stating: "Because we understand you to be a person of taste and refinement, we offer you this exquisite hamper of food for the bargain price of only \$50! If we have misjudged and you are not a person of taste and refinement, you may refuse our offer by returning this hamper to the address below within 24 hours of delivery. If not, we will bill you at the end of the month." The offeree need not return the basket and is at liberty to leave the food to rot at the doorstep, but if she takes it inside and eats it or otherwise acts as if it is her property, she is bound.

2. If prior dealings of the parties or other circumstances make it reasonable for the offeror to expect the offeree to give notice of rejection, silence is acceptance. If in the prior example, the offeree was a longstanding customer of the offeror and had previously made the choice of either accepting and paying for hampers left on her doorstep or returning them, the offeree may have a duty to take action to reject and the offeror may be justified in treating her silence as acceptance."

After understanding the two principles outlined in Blum's book, I continued to search for more texts that restated or opposed what Blum outlined. Other than one example, which I will give later, I was unable to find anything to the contrary as I looked for several months. Recently, I found another text that backed up Blum's explanations (which themselves come from the Restatement on Contracts). This was a book called California Law of Contracts, which is a collection of California statute and common law organized to address all of the most relevant areas of contract law. Each state in the U.S. and every jurisdiction in the world adopts contract law into its own laws in such a way that is in alignment with its own particular societal norms. California statute and judicial holdings seem to mirror what Blum outlined and in his book. On pages 182-183, California Law of Contracts addresses the concept of agreement by silence.

"As a general rule, silence or inaction in the face of an offer will not constitute acceptance of the offer. *Southern Cal. Acoustics Co. v C.V. Holder Inc.* (1969) 71 C2d 719, 722, 79 CR 319; *Golden Eagle Ins. Co. v Foremost Ins. Co.* (1993) 20 CA4th, 1372, 1385, 25 CR2d 242

An acceptance by silence may be inferred if the offeree is under a duty to act, as for example, under CC 1589 which provides that acceptance of the benefits of a contract constitutes an assumption of the associated obligation. See *Golden Eagle Ins. Co. v Foremost Ins. Co.* (1993) 20 CA4th, 1372, 1385, 25 CR2d 242

Silence may constitute an acceptance if there is a relationship between the parties or a previous course of dealing by which silence should be understood as acceptance. *Southern Cal. Acoustics Co. v C.V. Holder Inc.* (1969) 71 C2d 719, 722, 79 CR 319" See also *Circuit City Stores Inc. v Najd* (9th Cir. 2002), 294 F3rd 1104, 1109

Silence may operate as an acceptance under the rule stated in the Restatement (Second) of Contracts 69(1)(b) “ where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer. *Golden Eagle Ins. Co. v Foremost Ins. Co.* (1993) 20 CA4th, 1372, 1385, 25 CR2d 242

In absence of special circumstances, however, an offeror cannot unilaterally impose silence as acceptance, *e.g.*, by stating in the offer that failure to respond within 10 days shall constitute acceptance. “A party cannot bind another to a contract simply by so reciting in a piece of paper.” *Mitsui O.S.K. Lines Ltd. V Dynasea Corp.* (1969) 72 CA4th 208, 212, 85 CR2d 1. See also *Sorg v Fred Weiss & Assocs.* (1979) 14 CA5th 78, 81, 91 CR 918 (“ The tactic of attempting to create a contract, by letter stating a price, on theory that silence or inaction would constitute an acceptance, has been consistently rejected by the courts”). The offeror may be the master of her offer, but not of the acceptance.”

I do believe that these two above quoted sources serve as very instructive to us regarding these concepts and their applicability. One question that may still be unanswered by these texts is the question of an offeror’s duty. When is an offeree duty-bound to respond and furthermore, when are they bound to act in accordance with the terms of the offer?

My answer to this is that outside of express terms in a pre-existing contract, the question can only be answered in an equity court proceeding. That question is entirely context related and can be very subjectively viewed and will require a third party, impartial trier of fact. We cannot make a decision about an offeree’s duty where the duties themselves are not solidly agreed upon by both parties. I have to ask what powers do we have to be judge and jury to an offeree in a situation where there is no perfectly clear answer in law? We may believe our actions are justified, but without third party mediation, we have no objective basis on which to claim damages and be granted relief. This is precisely why equity courts were founded.

Now that we are familiar with the above concepts, let’s relate them to two commercial methods that we commonly undertake. This first is a situation where a homeowner wishes to terminate a mortgage because she has found out through personal study that there was not full disclosure in regards to a mortgage contract and that she has an entitlement right to the Promissory Note. She now wants to rescind the original offer and keep the home free and clear as a form of relief

She sends a letter to the CEO of the mortgage company which is the present stated owner or duty-bound servicer wherein she outlines what she believes are elements of fraud in the contract. She also states that the respondent’s failure to respond or to respond adequately will constitute agreement with her demands to terminate the mortgage contract and will give her permission to issue a full reconveyance of the title which she will sign for the bank president as his agreed upon agent. She gives the respondent 30 days to answer her questions and she states that the answers must be committed to writing in affidavit form and signed under penalties of perjury.

Lets also suppose she uses a notary witness and engages in proper due process. In one instance, let us suppose that the respondent does not answer at all. In another, let us say that the respondent answers but does not adequately address the most pertinent questions and seems to dodge the most damning accusations. The offeror then considers the responses or lack of responses and in both cases, she decides to act as she had outlined in her offer, and she issues a new title into the county recorder's office. The bank subsequently sues her for breach of contract and she enters a counterclaim for breach of contract and fraud.

I am going to suppose that when a judge entertains her legal theory, either in the public or private, he will ask "What duties did the bank agents have to conform with her offers?" And, "Did the bank truly accept her terms and conditions?" Well, she did have a prior relationship. She had communication with one or more bank agents in the past over other issues. The mortgage contract itself did state expressly that the bank agents were bound to respond to her questions regarding her account and any misapplied monies or similar questions. But there was nothing in the mortgage contract stating that bank agents were bound to answer any kinds of questions regarding commercial banking theory or commercial law principles and certain kinds of deep issues that most bank agents are not even aware of.

As the offerer, she was certainly entitled to present under the Freedom of Information Act, a request to the bank for internal documents, but that type of request was not what she had made. Were her questions reasonable and was she taking a reasonable position from the point of view of an objective observer? What about the contractual stipulation that she would take over as the bank's agent and sign for them in the case that they didn't respond properly? What about the fact that she provided no evidence whatsoever to back up her claims and that even if she had evidence, the private jurisdiction is not generally where evidence is weighed in our society? Did she have the right to engage in her own private judicial proceeding with no jury and no verified evidence?

The clear answer is that her private proceeding was unlawful and not in accord with the established principles of contract law or our societal history. I think at this point, that is easy to see. There are some other related principles that might also be explored; such as the concept that for the mortgage contract to form in the first place there must be a "meeting of the minds" and two signatures, among others. But if the offeror's remedy presentment itself was unlawful, those other issues can't be considered because there was no impartial trier of facts or verified evidence as there would be in a court proceeding.

Just to be clear on those two extra issues, it is well founded under the principles of contract acceptance that two or more parties need not sign a contract if the parties to the contract perform in accordance with the contract's terms as if they were indeed bound. She sent payments for several years indicating acceptance by performance. And also, a meeting of the minds does not mean that all parties need to be in absolute agreement as to the technical meanings of all words in the contract. A meeting of the minds means that

all parties had a chance to review all of the express terms and conditions of the contract and that there were no material facts left out of the contract that the offeree accepted. What about lack of full disclosure or the homeowner's rights to proceeds on the Note as an Issuer and creator of the currency itself? Those questions do seem to be valid arguments but must be proven in court with a preponderance of the evidence where the burden of proof is upon the accuser.

One final area I should address is the valid point that in our society, commercial entities do make offers to us where they often state that our silence will be acceptance. Consider a summons to a court hearing, or an IRS bill, or a traffic ticket. Those offers often do come with the stipulation that the offeree's silence will equate to agreement with the terms of the offer. But what we must consider in those cases is the fact that there is always a prior contract in place between the parties where this type of operation is disclosed to the parties to be part of the agreement of the contract. For example, an offeree's acceptances through silences of a traffic ticket fee is laid out in statute in the public for all to see and when we take a driver license, we agree to abide by those rules. With the IRS, when we take the benefit of a Social Security number, we agree to be bound by the federal code including Title 26 where this type of operation is explained. An acceptor of a court summons is bound by ones taking of the benefit of state or federal citizenship ones prior acceptance of the laws of those jurisdictions. In each of these cases, there is a prior contract where the rules of operation are expressly laid out for us to see. If we do not want to be bound by those rules and laws, we need not accept the benefit of the relationships in the first place. Again, one can make a valid argument relating to non disclosure or even fraudulent construing of a trust, but where will you have your grievances addressed objectively? Do you have your bona fide evidence in hand?

The final scenario I would like to go over is one where an offeror presents a negotiable instrument in the form of an Accepted for Value payoff statement to the CFO of a bank. This type of scenario calls into our operation, the Uniform Commercial Code (UCC). Negotiable Instruments are commercial currency, not lawful tender and they are governed by statute. The UCC utilizes the same concept from Brian Blum's book in regards to negotiable instruments by which an offeree accepts the benefit of an offer and is thereby bound to accept the terms of the offer. That is codified in at least one place in the U.C.C. under Article 3, subsection 603.

U.C.C. 3-603 TENDER OF PAYMENT

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser accommodation party having a right of recourse with respect to the

obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

Now, an Accepted for Value payoff statement is a negotiable instrument by definition. So if this instrument is presented to someone entitled to enforce that instrument with terms and conditions expressly given, and the offeree does not return the instrument for a defect, they are bound to the terms given in the offer. We know this because, as the U.C.C. states, it is governed under the principles of acceptance of tender of payment under a simple contract. If I give you money to pay off a debt that originated under a contract, one cannot refuse the payment and keep you bound to the contract.

It appears upon first glance, that our Accepted for Value operations do have standing in law. But I can see how there might be some ambiguity or some areas that are not so cut and dry. Consider these questions:

Is the CFO entitled to enforce the instrument as the U.C.C. states? “Entitled” and “Enforce” have specific meanings in the U.C.C.

Did the instrument actually arrive at the place of business of the CFO in actual fact and has he taken possession of the instrument? How do you know?

If questioned, could you prove beyond reasonable doubt that the Accepted for Value payoff statement is indeed a negotiable instrument under the definitions within the U.C.C.?

If you cannot prove the above, can you prove that the CFO took a benefit of your offer and used the A4V?

Finally, if you determine that you do have a valid claim, and you do have evidence that is strong enough to pass the muster of a judge or jury, are you willing to take your grievance to the court? Again, do you have the right to be judge and jury by yourself without the objective forum that the court provides for in our society?

Finally, out of fairness to those who may still be of the mind that silence *is* acceptance in more ways than I have described here, I should bring in something I happened onto recently, and that is Georgia Evidence Code Title 24, Section 24-4-23:

“In the ordinary course of business, when good faith requires an answer, it s the duty of the party receiving a letter from another to answer within a reasonable time.

Otherwise he is presumed to admit the propriety of the acts mentioned in the letter of the correspondence and to accept them.”

Quite powerful isn't it? It seems at first glance to be a valid argument to my position. But let us analyze this a bit further. This is taken from the State of Georgia Evidence Code. It is a legal maxim that was included to pertain to court proceedings because it is inside of their rules of evidence. It is certainly there to aid in acts of discovery and making certain items admissible. Nevertheless, it is a maxim that can be drawn upon at any time for use in any area of legal proceeding in Georgia and to form a basis for a valid argument. It is there to bring all parties into full responsibility to act in good faith. But remember, this citation is not a statute passed by the legislature. It is a rule in court proceedings. Anyone may use it as persuasive, but it is only applicable in equity and would be under the discretion of a judge or jury. It is exciting to see that the state of Georgia has raised the bar of responsible conduct for parties contracting, at least within court proceedings, but it is not intended to be used as a way to create adhesion contracts. The general concepts of contract law that I have quoted and discussed in the paper still wholly apply.

I hope the reader will try to remember that we each have contracted as state citizens to be bound to the basic lawful principles that our society chooses as a whole. It is true that we each are not in actual fact, citizens; that citizen is a title and is not what we are in essence. But we are accepting the benefits and privileges of citizenship and the society at large and therefore, we must cooperate with the principles that are enshrined in our state or country's founding documents and the common law tenets. What really applies here is that we, acting as state citizens, have agreed to mediate disputes in courts of law and we must follow that law or we may not be considered members of the society as a whole.

If our courts have been corrupted, or if the laws have been changed in such a way as to not give use recourse for our grievances, we do have the right to change our government. Our founding documents do provide for this option. But as a general rule we are not free to accept some benefits and reject others or pick and choose what laws we will follow and which laws we will break in an arbitrary fashion. One could make the case for civil disobedience or reforming activism, and if so, one should make that case and then act accordingly. But as is well known, doing so may result in a reaction from the public that considers the actor as an insurgent. This is the price that political reformers always pay.

Let us be very thoughtful when we undertake actions that are outside of statute or well-founded common law. Regardless of how it may look to some, our present laws are technically the will of the people. If we do not believe the law is fair and equitable, there are ways of changing the law and/or government that our founding documents prescribe. But that takes organization of people and a proper form.

Are you up to what it takes to reform our system in a way that places you on the highest moral ground and is in accordance with the highest principles of law? I truly do hope so.

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