Welcome to this podcast on Silence as Acceptance brought to you by CALI. I am Professor Jennifer S. Martin.

The topic of this podcast is when silence itself can be acceptance of an offer. Acceptance is simply the name given to the action of an offeree in making the offeror’s promise enforceable. In this podcast, we look at the exceptional cases where notification of the intention to accept an offer is accomplished by silence.

Recall that a contract is just a promise or set of promises which the law enforces. In order to have a contract, we need the parties to manifest their assent. Ordinarily, we are looking for an offer by the offeror creating the power of acceptance in the offeree, and then, of course, you have the acceptance by the offeree. Now, most of the time, we are looking for events that occur in a factual situation to see if a party has in fact accepted an offer by showing commitment to the terms of the offer, in the method and manner invited or required by the offer and which is made by a person to whom the offer is directed while the offer is still open. Also, remember that in contracts we use an objective test to evaluate the facts. That is, we look at what a reasonable person would believe in the circumstances. So, if the acceptance is made, then, there’s mutual assent.

We might ask, could that manifestation of commitment by an offeree be accomplished by silence? The general rule is that silence is not acceptance. Suppose I send you an email offering to tutor you in contracts for $100 per hour and end the email with “If I don’t hear from you by Thursday, I will assume you’ve accepted my offer, let the tutoring begin!” It would not be reasonable to hold you, the offeree, to such a deal just because I made you an offer. The offeree might consider the offer and ultimately accept or reject, but it’s not clear whether the offeree will accept without further communication. However, like most legal rules, there are exceptions to the presumption against silence being acceptance. What we are going to see is that there are four limited cases where silence can be acceptance. Now again, this is exceptional, and even where a set of facts might fit under one of the scenarios we are going to talk about, the presumption is against silence constituting acceptance.

Let’s turn to these exceptional circumstances. Three of these are in Restatement § 69 (1) and the fourth is in Restatement § 69(2). First, where the offeree *takes the benefit of offered services* with the reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation. Second, 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*. Third, where because of *previous dealings or otherwise*, it is reasonable that the offeree should notify the offeror if he does not intend to accept. The fourth situation is simply where the offeree does any *act inconsistent with offeror’s ownership of offered property*.

Let’s turn to the first situation of taking of the benefit of offered services under Restatement § 69(1)(a). In such cases, acceptance can be reasonably inferred from the circumstances because the recipient of the services knew they were being offered with the expectation of compensation and yet chose to allow the offeror to perform the services and receive the benefit. Perhaps, it might at times be the case that the act of silence in such cases is representative of affirmatively stating, “I agree or I accept.” The offeree might believe that by allowing the offeror to perform the services, the silence is sufficient for acceptance.

Let’s have example #1 here. Suppose that Aaron has walked my dogs Angus and Porter for $20 per walk in the past. Knowing that I am really busy, Aaron makes it clear to me that he will walk my dogs every Tuesday of the fall semester of school and charge me the same price. I never affirmatively tell Aaron to walk the dogs, but I allow the dog walking to continue throughout the fall semester knowing that Aaron intends to be paid. Most likely, I have accepted Aaron’s offer here by one of the limited cases where silence is acceptance, that is, I have taken the benefit of the offered dog walking. I will be bound to pay Aaron the price under the contract.

Now, let’s talk about the silence by the offeree’s silent intention under Restatement § 69(1)(b). Here, the offeror communicates that silence will count as acceptance and acceptance then arises from the offeree’s subjective intent. Here, the offeree in remaining silent and inactive actually intends to accept the offer. This form of assent is most likely to be invoked when the offeree seeks to enforce the contract, and it seems reasonable to bind the offeror when that party established that silence would be sufficient to indicate assent. Furthermore, usage of trade, past dealing, and explicit statements of the parties can all impact whether this type of silence is acceptance. The offer may itself include the understanding of silence, and if the offeree intends to accept the offer, then the case falls squarely in Subsection 1(b).

Let’s look at example #2 here. Suppose that Aaron, our dog walker, calls me and leaves a voicemail saying, “I know you always go away for the third week of December and I will plan to watch the dogs and no worry I have got your back. You don’t need to trouble or give me a call. I will be there on the 21st of December.” In this case, if I make no reply and don’t intend to accept there’s no contract. But, what if instead I make no reply, but I really do intend to accept? In this situation, there’s likely a contract because Aaron indicated that silence can be an acceptance and I, the offeree, actually subjectively intended that Aaron would watch the dogs while I am away as he promised to do so. In the event that Aaron later fails to watch the dogs, I could enforce the contract.

There’s a somewhat similar situation concerning silence under Restatement § 69(1)(c) whereby the parties’ previous dealings could make it reasonable to require the offeree to speak if assent is not intended. The previous dealings would create an understanding between the parties concerning the meaning of silence and that shared understanding would justify finding silence to mean assent in subsequent dealings. Notice that in such cases, silence is acceptance regardless of actual intent. Recall in the last exception we required actual intent of the offeree even though the intent to accept was made by silence. But where there is previous dealings supporting silence, there is acceptance regardless of actual subjective intent.

Let’s turn to example #3 now and those dogs again. Suppose that Aaron calls and in this instance, he leaves a voicemail saying he will watch the dogs for the third week of December, just like he has done every December for the last five years. Aaron says, “Don’t worry you don’t need to get to back to me. I’ve got the dogs taken care of. I’ll be there on the 21st to watch them.” Perhaps Aaron even states “Hey, your silence alone would be acceptance.” In light of the prior conduct of Aaron watching the dogs for the last five years, we might expect that silence is acceptance and a contract is formed.

One final exception regarding silence remains -- the exercise of dominion under Restatement § 69(2). Now we’re considering situations where the offeree does some act inconsistent with the offeror’s ownership of offered property. In these cases, there is actually conduct, not just silence, that demonstrates the assent to the offer. So in this instance there is no intention to act as an acceptance like Restatement   
§ 69(1()(b), and we don’t really have prior conduct like under § 1(c). Yet, there is a manifestation of assent based on the exercise of dominion. The terms of the contract that are accepted by the person exercising dominion are those stated by the offeror, unless those terms are manifestly unreasonable.

Let’s turn to example #4 now. Suppose our dog watcher, Aaron, goes into business making organic dog biscuits. Further suppose that Aaron leaves a bag of the biscuits after watching the dogs with a note stating “Hey, these are my new organic dog biscuits. The price is $30. Let me know if you want them.” In this instance, my retaining the biscuits appears a whole lot like conduct. So, if I feed those biscuits to those darling dogs, this would be an act inconsistent with Aaron’s ownership of the offered property, the dog biscuits. And it would seem to be an acceptance of the dog biscuits for the price of $30. Again, so long as that price is not manifestly unreasonable, Aaron can enforce the contract.

Before we conclude, let’s look at a case where acceptance by silence was at issue.

The case of *Nirvana v. ADT*, 535 F.Appx. 12 (2d Cir. 2013) involved provisions in a burglar alarm system contract where the jewelry store owner signed the first three pages of ADT’s contract, but actually had not explicitly agreed to some of the provisions in the end of the proposed contract, including a provision limiting the liability of ADT. Ultimately, Nirvana was robbed and wanted to bring a suit against ADT. This is probably an application of Restatement § 69(1)(a) because here the jewelry store run by Nirvana took the benefit of the offered services, the security system, by allowing its installation knowing payment was expected as well as the terms that were being offered by ADT in full, including the limitation of liability. Accordingly, Nirvana was bound by the terms of the contract with ADT.

Alternatively, the *Nirvana* case might be argued under Restatement § 69(1)(c) in light of the sequence of events where Nirvana signed parts of the contract and then subsequently acted as though there was a contract by permitting the installation of the burglar alarm system to go forward. Of course, it might also be argued that Nirvana’s actions might have made it unreasonable for ADT to believe that the store would speak up if it didn’t agree to all of the pages of the contract well knowing that the property owner had not agreed to the contract in full. Under that view, I guess silence meant “I’m still not agreeing to the terms of the unsigned pages,” and ADT should have asked for the rest of document to be signed if it wanted to argue agreement to the terms offered. However, in the case, the court sided with ADT and found that Nirvana’s silence was acceptance of all of ADT’s contract. This case surely underscores the lack of confidence parties should have when acceptance is alleged to be given by silence or that a party can rely on being silent to avoid contractual obligations arising is exceptional cases.

At this point, you should be able to explain that silence is almost never acceptance and that the presumption is against silence is being acceptance. You should be able to identify and apply the exceptions to this rule whereby silence can be acceptance: (i) where the offeree takes a benefit with the reasonable opportunity to reject it and there is an expectation of compensation; (ii) where there is prior conduct indicating an offeree should be bound by silence; (iii) where the offeror indicates silence can be acceptance and the offeree intends to accept, and (iv) where there is an exercise of dominion by the offeree of the offeror’s property.

I hope you’ve enjoyed this podcast on silence as acceptance.

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