THE LAW OF CONTRACTS

SUPPLEMENTAL READINGS

Class 04

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law outlines

Contracts

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Wolters Kluwer

CHAPTER 1
INTRODUCTION

I. MEANING OF "CONTRACT"

A. Definition: A "contract" can be defined for most purposes as an ***agreement*** which the law will ***enforce*** in some way. See C&P, p. 1.

1. Containing at least one promise: A contract must contain at least one ***promise***, i.e., a commitment to do something in the ***future***. A contract is thus said to be "executory," rather than "executed."

> **Example:** Suppose *A* transfers title to her car to *B*, and in return simultaneously receives $1,000 from *B*; this whole transaction is done on the spur of the moment. No contract has been created. Since the transaction contains no promise by either party of a ***future*** performance, it is completely executed, rather than executory. If, on the other hand, *A* had ***promised*** that she would transfer title to *B*, and *B* had promised to give *A* $1,000 (or had in fact given *A* the $1,000 immediately), there *would* be a contract, since *A*'s performance was to occur in the future.

2. Written vs. oral contracts: The term "contract" is often used to refer to a written document which embodies an agreement. But for legal purposes, an agreement may be a binding and enforceable contract in most circumstances even though it is ***oral***. The few kinds of contracts for which a written document is necessary are discussed in the chapter on the Statute of Frauds, *infra*, p. 275.

3. Contracts vs. quasi-contracts: Contracts must be distinguished from what are sometimes called ***"quasi-contracts."*** A quasi-contract is not a contract at all, but is rather the term used by some courts to denote a recovery imposed by law where justice so requires, even though the parties have not made any agreement. Thus a physician who renders emergency services to an injured pedestrian he finds on the sidewalk might be allowed to recover in quasi-contract even though his services were not requested by the victim (or by anyone else). Quasi-contractual recovery is discussed more fully *infra*, p. 335.

a. Implied in law: A quasi-contractual recovery is often called "implied in law" recovery. The term "implied in law" should not be confused with a contract that is "implied in fact." An "implied-in-fact" contract is a real contract, but one in which agreement is reached by the parties' actions, rather than their words. If a person

visits a doctor to discuss an ailment, an agreement to pay a reasonable fee will be "implied in fact" even though neither party mentions payment. Implied-in-fact contracts are treated exactly like "express" contracts (i.e., contracts agreed upon by words) for almost all purposes, but are treated very differently from "implied-in-law" contracts (i.e., quasi-contracts).

II. VOID, VOIDABLE AND UNENFORCEABLE CONTRACTS

A. Differing legal consequences: The usual contract, which may be enforced by either party, is said to be "enforceable." There are, however, certain kinds of agreements which are not fully enforceable.

1. **Void contracts:** Some kinds of agreements are said to be ***"void,"*** although this is a contradiction in terms. What is meant is that these agreements have no legal effect. Thus a gambling contract might be said to be "void as against public policy."

2. **Voidable contracts:** A ***"voidable"*** contract is one which one party may at his option either enforce or not enforce. Thus a ***minor*** who has made what would otherwise be a binding agreement, or a person who has been induced to agree by ***fraud***, has the choice of either "avoiding" the contract (i.e., acting as if no agreement had ever been made), or enforcing it.

3. **Unenforceable contracts:** An ***"unenforceable"*** contract is one which does not give an immediate right to judicial relief, but which nonetheless has some legal status. The most important difference between an "unenforceable" contract and a so-called "void" contract is that the unenforceable contract may be converted into a fully binding contract by the act of one of the parties, while a void contract may not.

   a. **Statute of Frauds:** A common example of an unenforceable contract is an oral agreement of a type for which a writing is necessitated by the Statute of Frauds (e.g., a contract for the sale of land). If, after such an oral agreement has been reached, one party produces a written statement of its terms, the agreement is rendered enforceable against him. (A "void" contract, on the other hand, can never be rendered enforceable by the act of just one party.)

III. ECONOMIC ANALYSIS OF CONTRACT LAW

A. Generally: An important development in the law of contracts over the last few decades has been the increasing use of ***economic theory*** to analyze contracts problems.

1. The "Chicago school" of legal analysis: The use of economic analysis is closely associated with the University of Chicago Law School, so much so that the predominant wing of economics-and-law is known as the "Chicago school." That wing has been led by Richard Posner and Frank Easterbrook, both University of Chicago law professors who subsequently became judges on the U.S. Court of Appeals for the Seventh Circuit.

B. Focus on efficiency: The central tenet of economic analysis is that ***"efficiency"*** should be the major objective of contract law. Most scholars who promote efficiency as an objective have in mind two main sorts of goals:

1. keeping ***"transaction costs"*** (e.g., litigation costs and legal fees) as ***low as possible***;

2. ***allocating resources*** to their ***most highly valued uses***. K&C, p. 11.

C. Various contexts: We will be encountering a number of contexts in which economic analysis of particular contract-law rules seems especially useful. Most of these contexts involve "remedies," that is, the means by which courts attempt to protect a contracting party when the other party breaches the agreement.

1. Some examples: It is hard, at this early point in your Contracts course, to give you good examples of how economic analysis may be used in contract law. However, here are a couple of illustrations, both connected with the problem of compensating a party who has been the victim of breach.

> **Example 1:** Treadmill Co. manufactures electric treadmills, for which it needs many component parts. Treadmill Co. gets an order for 10,000 machines from Wal-Mart stores. Treadmill Co. contracts with Component Corp. to have Component Corp. custom manufacture 100,000 precisely machined gears, 10 of which are needed for each treadmill. Component Corp. custom manufactures the first 10,000 gears, delivers them to Treadmill Co., and is paid. Wal-Mart than cancels the remainder of its contract with Treadmill. Treadmill Co. immediately tells

Component Corp. to stop making any more gears. The president of Component Corp. replies, “I’ve got a contract, and I’m going to make the remaining 90,000 gears and insist that you pay for them.” Because these gears are to be custom machined, they will have no other use, and will only be saleable for their salvage value.

If the law of Contracts permits or encourages Component Corp. to insist on finishing the contract and recovering the full contract price, economic waste — inefficiency — will obviously result. (Time and materials will be spent making the 90,000 pieces, which will just end up being sold for scrap by either Component Corp. or Treadmill.) Therefore, a court will instead require that Component ***“mitigate its damages.”*** (See *infra*, p. 347.) That is, Component will not be permitted to recover for any of its costs incurred after receiving the stop-manufacturing notice from Treadmill. Component will instead be allowed to recover the profits it would have made from the last 90,000 pieces, and no time and materials will be wasted. See K&C, p. 1010.

Example 2: Same initial facts as Example 1. Assume that the price under the contract with Treadmill is $1 per gear. Also, assume that after Component Corp. has custom manufactured the 100,000 gears, a new customer, Bicycle Co., says to Component Corp., “We need 100,000 gears [which coincidentally require the same specs as the ones made for Treadmill] by tomorrow, and we’ll pay $3 per gear.” There’s no time for Component to make an additional 100,000 gears, so it will either have to forgo the Bicycle order or breach the Treadmill contract by giving Bicycle the gears made for Treadmill. Assume that the gears, if timely delivered, would be worth $1.50 per unit to Treadmill, so that Treadmill would suffer a “loss” of 50¢ by not getting the shipment on time.

Economic analysis says that the law of Contracts should impose a rule of damages such that the gears will end up going to Bicycle instead of to Treadmill. Indeed, that analysis says that the rules should be ones that encourage Component to ***break its contract*** with Treadmill and deliver to Bicycle. The standard “expectation” measure of damages — which gives Treadmill a damage award of 50¢ per gear, the difference between the contract price and the value of the gears to Treadmill — will do this: Component can charge Bicycle $3, pay 50¢ damages to Treadmill, and pocket the remaining $2.50 (which is $1.50 more than it would have gotten had it honored the contract). So each party is better off than it would have been under a system which compels or strongly encourages the parties not to breach (e.g., a scheme under which Component had to pay Treadmill 10 times its actual losses in the event of a breach).

Note: These two examples over-simplify many aspects of the analysis. For instance, Example 2 ignores transaction costs, such as Treadmill’s legal fees in having to bring suit to collect the 50¢ per gear difference between the contract price and the value of the gears to it. Furthermore, our analysis ignores the fact that the parties always have the power to agree to a consensual “buy out” of the contract, so that a damages rule that facilitates breach is not the only way to bring about an efficient result. For instance, even if the rule was that the breaching seller (Component) had to pay 10 times the buyer’s actual damages, Treadmill Co. could agree to surrender its contract rights for, say, $1 per gear, leaving all three parties better off.

Despite the oversimplification inherent in these two examples, they indicate that economic analysis can help:

(1) explain why the standard rules of contract law are what they are; and

(2) in a few instances, perhaps, show why the standard rules should be changed to produce more efficient outcomes.

IV. SOURCES OF CONTRACT LAW

A. The UCC: In most states, most aspects of contract law are governed by case law (i.e., "common law"), rather than by statutes. But in every state except Louisiana, ***sales of goods*** (i.e., sales of things other than land or services) are governed by a statute that is roughly the same in all states, called the ***Uniform Commercial Code***. The UCC has a number of Articles, concerned with a variety of kinds of transactions; here, our principal interest will be in ***Article 2***, which deals with ***sales of goods***.

1. State enactments: The UCC is a "model statute," originally drafted by, and now periodically updated by, a group called the National Conference of Commissioners of Uniform State Laws ("NCCUSL"). Each state legislature makes its own decision about whether and when to adopt revisions of the various UCC articles proposed by the NCCUSL.

a. 2003 Revision: The NCCUSL drafted a ***revision*** of Article 2 in ***2003***. That revision made some significant changes, especially in the area of electronic commerce. However, this 2003 Revision failed spectacularly in the "marketplace" of state legislatures: ***no state adopted it***. Therefore, the NCCUSL withdrew the 2003 revision in 2011. Consequently, the version of Article 2 in force virtually everywhere in the U.S. as of this writing (mid 2015) is the ***1990 text***.

b. Our text: Therefore, when this book refers to an Article 2 provision, the reference is to the ***1990 version*** of Article 2, which is essentially unchanged since the original promulgation of Article 2 in 1957.

2. Common-law residue: Even in a transaction involving the sale of goods, if the UCC is silent as to a particular question, the case law

controls. Thus UCC § 1-103(b) provides that the "principles of law and equity" control "unless displaced by the particular provisions of [the UCC]."

B. The Restatements: In order to organize and summarize the American common law of contracts, the American Law Institute published the ***Restatement of Contracts*** in 1932. Since then, the Restatement has had enormous importance. A second edition of the Restatement, usually referred to as the *Second Restatement of Contracts*, was published in 1980 and is frequently cited here.

CHAPTER 2
OFFER AND ACCEPTANCE

*ChapterScope*_____

This chapter discusses the first major requirement for a valid contract: that the parties have reached "mutual assent" on the basic terms of the deal. Here are a few of the key principles covered in this chapter:

- **Mutual assent:** For a contract to be formed, the parties must reach ***"mutual assent."*** That is, they must ***both intend to contract***, and they must ***agree*** on at least the ***main terms*** of their deal.
- **Objective theory of contracts:** In determining whether the parties have reached mutual assent, what matters is ***not*** what each party ***subjectively intended***. Instead, a party's intentions are measured by what a ***reasonable person in the position of the other party*** would have thought the first party intended, based on the first party's actions and statements. This principle is known as the ***"objective theory of contracts."***
- **Offer and acceptance:** Normally, for a contract to come into existence, there must be an "offer" and an "acceptance."
  - **Offer:** An ***"offer"*** is a statement or act that creates a "power of acceptance." When a person makes an offer, she is indicating that she is willing to be ***immediately bound*** by the other person's acceptance, ***without further negotiation.***
  - **Acceptance:** An ***"acceptance"*** is a statement or act that indicates the offeree's immediate intent to ***enter into the deal*** proposed by the offer. As long as the acceptance takes place while the offer is still outstanding, ***a contract is formed as soon as the acceptance occurs.***
- **Duration of the power of acceptance:** When you analyze facts to see whether a valid offer and acceptance occurred, one of your key jobs is to figure out whether the offer ***ended*** before the "acceptance" occurred (in which case there's no contract). The main ways in which an offer can end are:
  - the offer is ***rejected*** by the offeree;
  - the offeree makes a ***counter-offer***;

□ the offeror ***revokes*** the offer;

□ the offer ***lapses*** by passage of time;

□ either the offeror or the offeree ***dies*** or becomes incapacitated.

I. INTENT TO CONTRACT

A. Mutual assent: For a contract to be formed, the parties must reach an agreement to which they "mutually assent." This mutual assent is almost invariably reached through what are called "the offer" and "the acceptance" (see *infra*, p. 9).

1. Not subjective agreement: However, this requirement of "mutual assent" does not mean that the parties must have ***subjectively*** (i.e., in their minds) been in agreement. Rather, it means that each party must ***act*** in such a way as to lead the other to reasonably believe that an agreement has been reached. The doctrine that only the parties' acts, and not their subjective thoughts, are relevant in determining whether there has been mutual assent, stems from the ***objective theory of contracts***, discussed below.

2. Agreement required only as to major terms: The requirement of mutual assent does not mean that the parties must agree (even by the objective standard) on ***all*** the terms of the contract. Instead, they must agree on the "major" or "essential" terms. If they disagree on minor terms, or if they have simply not provided for such minor terms, the court may conclude that one party's understanding controls, or may supply the missing terms. But the parties must, despite the minor gaps or minor disagreements, ***intend*** to have a contract. For a more full discussion of missing or misunderstood terms, see *infra*, p. 67 and p. 155.

B. Objective theory of contracts: Because neither contracting parties nor courts are mind-readers, it is important that the existence and terms of contracts be determined from the ***manifestations*** made by each of the parties, rather than by each party's subjective intention. Thus a party's intentions are to be gauged ***objectively***, rather than subjectively.

1. Test for intent: The objective measure of a party's intention is, in most circumstances, ***what a reasonable person in the position of the***

other party would conclude that his objective manifestations of intent meant. C&P, p. 26.

> **Example:** *A* says to *B*, "I'll sell you my house for $1,000." *B* says, "OK, you've got a deal." *A*'s house is in fact worth considerably more than $1,000, and *A* refuses to consummate the deal. *B* sues. If *B* can demonstrate that *A*'s tone of voice or *A*'s known lack of business acumen led *B* to the reasonable conclusion that *A*'s offer was serious, the court will treat *A* as having intended to contract. This will be so even though *A* proves definitively that he intended a joke (e.g., by producing *X* to testify that *A* told *X* right after the offer that he intended a joke).
>
> If, on the other hand, a person in *B*'s position would reasonably have understood that *A* was joking (e.g., if *B* should have recognized the bantering tone in *A*'s voice, or should have known that *A*'s house was worth so much more than $1,000 that the offer could only have been made in jest), the court will treat *A* as not having intended to contract, and no contract will be found to have been formed.
>
> Similarly, if *A* can prove that *B* knew *A* was joking (e.g., *A* produces a witness who says that *B* told him, "I knew *A* was joking, but I'm going to try to force the sale anyway"), there is no mutual assent, even though it would not have been unreasonable for *B* to think *A* was serious. This is because *B* is charged with both knowledge that he actually had about *A*'s intent, and the knowledge that he should reasonably have had. If *B* either knew, or should have known, that *A* was joking, there is no mutual assent and no contract. C&P, p. 27.

a. Secret intent: A corollary of the objective theory of contracts is that a party's ***secret*** intentions (that is, secret from the other party) are ***irrelevant*** in determining whether a contract exists, and what its terms are.

2. Other uses for objective theory: The objective theory of contracts will be used not only to determine whether the mutual assent necessary to form a contract has occurred, but also to determine the ***meaning*** of particular terms of the contract.

> **Example:** *A* and *B* sign a complex agreement for a sale of goods by *B* to *A*. The contract makes no mention of whether *B* is to insure the shipment. *B* has always done so in past deals with *A*, but this time he subjectively intends not to insure the goods, because insurance prices have gone up. He says to *A*, however, "This deal's just like the ones we've done before." A court would probably hold that *A* reasonably expected *B* to insure the shipment as he had always done, and *B* will be placed under a contractual obligation to do so, despite his subjective intent to the contrary.

C. Intent to create legal relations: What happens if the parties go through all of the motions of giving mutual assent to what appears to be a contractual agreement, but subjectively neither party expects the "contract" to be enforceable in court?

1. **Modern view:** Under modern case law, the importance of the parties' intention, or lack of intention, that the contract be legally enforceable, depends largely upon the ***context*** of the agreement.

2. **Business agreements:** Where the transaction is one which would normally be considered a ***"business"*** transaction, it will be ***presumed*** that the parties intended that the agreement be ***legally enforceable.*** Rest. 2d, § 21.

   a. **Contract made in jest:** Thus in a business context, even if one party makes an offer ***in jest***, and the other party reasonably believes that she is serious, and seriously accepts the offer, the contract will be binding.

      Example: P offers the Ds (husband and wife) $50,000 for their farm. The Ds write out a one-line statement — "We hereby agree to sell to [P] the Ferguson Farm complete for $50,000, title satisfactory to buyer" — and they sign it. When the Ds fail to go through with the sale, P sues. The Ds defend on the ground that they were drunk when they signed the document, and were only joking, and that they thought that P was also only joking. Also, they claim that they told P, even before he left the premises, that they didn't really intend to sell the farm.

      Held, the Ds are bound, even if they subjectively did not intend to sell, and were only joking. The evidence indicates that P took them completely seriously, and that he was not unreasonable in doing so. "A person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement." *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

   b. **Manifest intent not to have legal relations:** There is one exception to this general rule that what appears to be a business transaction shall be presumed to have been intended to be enforceable. The exception is that where ***both*** parties to a business arrangement ***explicitly*** manifest their understanding that the arrangement is not to be legally binding, it will not be enforced by a court. C&P, pp. 29-30; Rest. 2d, § 21.

3. **Domestic and social situations:** Where an agreement arises in a ***social*** or ***domestic*** situation, on the other hand, the presumption is that legal relations were ***not*** intended.

   Example: Husband promises to pay a certain monthly allowance to Wife, with whom he is living amicably at the time of the promise. The couple later separate; Wife sues for the payments owing.

   Held, the agreement is not enforceable, because agreements between family

members living amicably together are presumed not to have been intended as legally enforceable. *Balfour v. Balfour*, 2 K.B. 571 (1919).

Note: Where an agreement is made between family members ***not*** living together amicably (e.g., a separation settlement), the agreement will usually be presumed to have been intended to be legally enforceable. Even in the *Balfour* situation, the contract will be enforced if the parties explicitly agree that it is to be enforceable. See Rest. 2d, § 21, Comment c.

D. Intent to memorialize agreement in writing: Suppose two parties negotiate with each other, reach a mutual assent on all the terms of the proposed agreement, and also decide that they will ***subsequently put their entire agreement into a formal written document*** which both will sign. Is there a contract as soon as the mutual assent is reached, or only when the formal document is written up and signed? The question can arise not only when the parties conduct their preliminary negotiations orally, but also when they exchange letters or documents.

1. **Where intent to be bound manifested:** If the parties' actions or words make it clear that they intend to be bound even before the legal document is drawn up, the courts will almost always find an enforceable contract, even if the document is never drawn up. Murray, p. 34. C&P, pp. 47-48.

2. **Where intent not to be bound manifested:** If the parties' actions or words make it clear that they intend ***not*** to be bound unless and until the document is drawn up, the courts will not find an enforceable contract until the document is drawn up. *Id*.

3. **Where no intent manifested:** Where the parties have not manifested any intent at all about whether they want to be bound before the document is drawn up, and have indicated only that they wish such a document to be produced, the courts are split as to whether there is a contract.

   a. **Majority view:** Most have held that in this situation a contract exists ***as soon as the mutual assent is reached***, even if no formal document is ever drawn up. C&P, p. 48. Murray, p. 35.

4. **Letter of intent, contemplating more formal agreement:** A similar problem can arise where the parties sign a so-called ***"letter of intent"*** (or, as it is sometimes called, an "agreement in principle.") Such a document memorializes the basic terms on which the parties have

agreed, but anticipates ***further negotiations*** on more minor issues. Often, the letter of intent indicates that a fuller and more formal agreement will be prepared later. If the parties are unable to settle the supposedly small issues, what happens if one party asserts that the letter of intent is binding, and the other disagrees?

a. Intent of parties, as shown by document: All courts agree that the test is whether the parties ***intended to be bound*** by the letter of intent itself. Most courts further agree that the most important indication of the parties' intent is the terms of the letter agreement itself (since under the objective theory of contracts a party's subjective intentions are meaningless, and the best objective indication of intent is the written document).

b. Clues in the document: The letter of intent may contain a number of clues about whether the parties intended to be immediately bound. Here are some examples:

- □ If the letter says that it is ***"subject to"*** a formal asset purchase agreement or the like, this is a strong clue that the letter itself was not intended to be binding.
- □ If the document discloses particular issues on which ***further negotiation is necessary***, and these issues appear non-trivial, that militates against a finding that the letter was to be binding.
- □ Any reference to ***procedural formalities*** that one or both parties must go through before any closing (e.g., shareholder approval) cuts against enforceability.
- □ The ***larger or more complex*** the transaction, the less likely it is that the letter of intent was intended to be binding.

II. OFFER AND ACCEPTANCE GENERALLY

A. Requirement of offer and acceptance: The "mutual assent" necessary for the formation of a contract generally takes place through what are called an ***"offer***" and an ***"acceptance."*** That is, one party proposes a bargain (this proposal is the offer) and the other party agrees to this proposed bargain (this agreement is the acceptance).

B. Restatement definition: The Second Restatement defines an offer to be "the manifestation of ***willingness to enter into a bargain***, so made as to

justify another person in understanding that his assent to that bargain is invited and will ***conclude*** [the bargain]." Rest. 2d, § 24.

C. Promise contained in offer: In most cases, the offer will contain a conditional promise, and will propose that the other party accept the proposal by making a promise in return.

> **Example:** *A* makes the following offer to *B*: "I offer to buy your 2010 Toyota for $10,000, delivery and payment to occur three months from now." What *A* has done through his offer is to make a promise to pay *B* $10,000, conditional on *B*'s making a promise to deliver the car to *A*. Thus *A* has proposed that the parties exchange ***promises***.

1. **Unilateral contracts:** In some instances, the offer will propose not an exchange of promises, but rather an exchange of the offeror's promise for the offeree's ***act***. A contract in which only one party promises to do something, and the other party is free to act or not as she wishes, is called a ***unilateral*** contract.

> **Example:** *A* says to *B*, "If you walk across the Brooklyn Bridge, I promise to pay you $1,000." The bargain which *A* has proposed is not an exchange of promises, since *A* does not seek to have *B* promise to do anything. Instead, *A* has proposed that he exchange his promise (to pay $1,000) for *B*'s ***act*** of walking across the Bridge. Thus *A* has made an offer for a unilateral contract, since *B* is not bound to do anything, and the offer is accepted (if at all) by *B*'s act, rather than his promise. (For an explanation of what constitutes an acceptance of an offer for a unilateral contract, see *infra*, p. 20.)

2. **Bilateral contracts:** A contract which consists of an ***exchange of promises***, on the other hand, is called a ***bilateral*** contract. Most contracts are bilateral, since usually both parties promise to do something. If, in the above example, *A* had said, "I promise to pay you $1,000 on April 15 if you promise to walk across the Brooklyn Bridge on April 1," *A*'s offer would have been for a bilateral contract, i.e., an exchange of promises.

3. **Distinction less significant:** The distinction between unilateral and bilateral contracts is probably less significant than it used to be. The Second Restatement, in fact, does not even use the "unilateral" and "bilateral" terminology. (But it does make what is in practice the same distinction, by referring in § 45(1) to an offer which "invites an offeree to accept by rendering a performance," in contrast to an offer which invites acceptance by promise.) The "unilateral"/"bilateral"

language is also absent from the Uniform Commercial Code.

a. Still significant: The distinction between the two types of contracts is, however, still significant in some contexts. For instance, somewhat different rules apply to the question of whether the offeror may ***revoke*** the offer once the offeree relies on the offer to his detriment; compare the rules for offers for unilateral contracts, *infra*, p. 55, offers whose unilateral/bilateral status is unclear, *infra*, p. 58, and offers (whether for bilateral or unilateral contracts) where there are pre-acceptance preparations (*infra*, p. 58).

D. Offer creates power of acceptance: The legal effect of an offer is to create a ***power in the offeree to enter into a contract***. Murray, p. 36. The offeree enters the contract by making his ***acceptance***.

1. Options: In most cases, the offer does not by itself bring a contract into being, and the contract is formed only when the offer is accepted. One kind of offer, however, the ***option***, is not only an offer to contract, but is at the same time a contract in which the offeror promises that she will keep the offer open for a certain time. See Rest. 2d, § 25.

> **Example:** *A* grants *B* an option to buy Blackacre for $1,000 at any time during the next month. *B* pays $10 for this option. The option constitutes not only an offer of sale, but also a contract binding *A* to keep the offer open for 30 days. Cf. Rest. 2d, § 25, Illustr. 2.

III. VALIDITY OF PARTICULAR KINDS OF OFFERS

A. Offer made in jest: An offer which the offeree knows or should know is made ***in jest*** is not a valid offer, and even if it is purportedly "accepted," no contract is created. See the example on p. 6, *supra*; see also *Leonard v. Pepsico, Inc.*, *infra*, p. 13 (P should have known that D's TV ad purporting to offer a $23 million Harrier Jet for $700,000 worth of "Pepsi Points" was a joke, and thus not a valid offer).

B. Offer distinguished from expression of opinion: An offer must contain a ***promise*** or ***commitment***, rather than merely an ***opinion***. C&P, p. 32.

1. Objective test: The test for distinguishing a bona fide offer from an expression of opinion, like the test for distinguishing an offer from a

jest, is the objective "reasonable person" test. That is, the question is whether a reasonable person in the position of the "offeree" would have understood the "offeror" as having proposed a bargain, rather than as having merely stated an opinion.

C. Preliminary negotiations distinguished from offers: A party desiring to reach a contract may make a statement which is not an offer but rather a ***solicitation*** of an offer from or further discussions with the other party. Such statements cannot be "accepted," but instead merely serve as a basis for ***preliminary negotiations***.

1. **Objective test:** Here, again, the test is whether a person in the "offeree's" shoes would reasonably have understood that the "offeror" was merely seeking to invite an offer or start preliminary negotiations. The subjective intent of the "offeror" is irrelevant. Rest. 2d, § 26.

   > **Example:** Uncle mails a letter to Nephew that states: "I am thinking of selling my pickup truck, which you have seen and ridden in. I would consider taking $7,000 for it." A reasonable person in Nephew's position would understand that Uncle is making merely a solicitation of an offer, not an offer. Therefore, when Nephew writes back, "I will buy the truck for $7,000 cash," this is an offer, not an acceptance, and no contract has yet been formed. Cf. Rest. 2d, § 26, Illustr. 4.

2. **Statement of future intention:** An announcement by a person that he ***intends to contract in the future*** will not usually be considered an offer.

   > **Example:** *A* says to *B*, "I am going to sell my car for $500." No offer has been made, since *A*'s statement should reasonably be understood by *B* to be merely an expression of *A*'s future intent to contract. C&P, p. 34.

3. **Offer must indicate that other party can seal the bargain:** For an expression to be an "offer," the other person must be justified in thinking that the would-be offeror has intended to give that other person the ability to ***"seal the deal" immediately, without further assent from the offeror.*** As the Restatement puts the idea, "A manifestation of willingness to enter into a bargain is ***not an offer*** if the person to whom it is addressed knows or has ***reason to know*** that the person making [the manifestation] ***does not intend to conclude a bargain*** until [the maker] has ***made a further manifestation of intent***." Rest. 2d, § 26.

a. More details to work out: Therefore, if a statement by one party, call her *A*, to *B* indicates that *A* believes that ***further details must be worked out*** between *A* and *B* before a deal is completed — details that *A* must approve — *A*'s statement is almost certainly ***not*** an offer, but rather, merely an invitation to continue discussions or negotiations.

b. "Let's discuss": Thus if *A* and *B* have had discussions about a deal, and *A* then makes a statement or proposal accompanied by words like ***"Let's discuss,"*** those words probably put *B* on notice that *A* has not just made an offer, but has merely invited continuing negotiations. In that event, there is nothing for *B* to "accept," and *B* cannot unilaterally bind *A* to a contract by *B*'s response.

> **Example:** The Ps bring a products liability suit against D, a large corporation. A jury awards the Ps a verdict for a particular amount. After the verdict, it is necessary for the parties to agree on additional numerical items like the pre-judgment interest that D owes on this verdict. Lawyers for the two sides (Brooks for D and Gray for the Ps) each propose figures, and realize that there is some sort of clerical discrepancy between the two sides' numbers.[1] Then, on Nov. 2, Brooks emails Gray a set of computations that Brooks says shows the amount that D "believes is appropriate." The email adds, "Please review these, then let's discuss." Gray makes no response, but his co-counsel, Maywhort, responds by writing to Brooks' co-counsel, Thomasch, "We accept Brooks' Nov. 2 offer." The two lawyers for D immediately respond that Brooks' Nov. 2 email was not an offer, and that there *was* no offer on the table for the Ps to accept. The Ps sue to obtain enforcement of a contract based on what they say was D's Nov. 2 emailed offer.
>
> *Held*, for D. Brooks' Nov. 2 email used only "qualifying and indefinite language" (by describing the calculations as being what D "believes is appropriate"). Furthermore, the language of that email ("Please review [then] let's discuss") "did not solicit an acceptance but rather solicited a return call." Therefore, the email was merely a continuation of prior discussions about the discrepancies in computation; it did not do what an offer must do, which is to justify the recipient in understanding that he is being asked to give an assent that will ***"conclude a bargain."*** *Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128 Col. Ct. of App. 2009) (also discussed *infra*, p. 165).

D. Price quotations distinguished from offers: It is a frequent business practice for one person to request a ***"quote"*** from another. In such a situation, is the person who makes the quote making an offer? Courts typically consider the following factors in deciding the answer:

1. Quantity: The quote will only be an offer if it, or the request to which it is a response, makes clear the ***quantity*** in question. Thus a quotation

consisting of merely a "per unit" price, with no reference to the number of units which the seller is willing to sell at that price, is not an offer (unless the quote is in response to a request for a per unit price for a particular quantity).

2. **Addressee:** If the quote is not addressed to a particular person, but is merely part of a general price list, or is sent out pursuant to a large mailing, it is unlikely to constitute an offer.

3. **Use of term "quote" or "offer":** The precise words used in the alleged "offer" are often relevant. For instance, if the proposal itself refers to the fact that it is a quotation (e.g., "We quote you apples at 40¢ per pound"), it is less likely to be an offer than if there were no such reference. Conversely, if the document says "I offer…," this will make it more likely that a formal offer will be found to have been made.

4. **Need for further expression of assent:** Recall that an offer creates on the part of the offeree a "power of acceptance," i.e., the power to enter into a contract. (See *supra*, p. 10.) It follows from this that a proposal is not an offer if it ***reserves to the proposer*** the power to close the deal.

   > **Example:** The local branch office of Seller sends to a prospective customer a solicitation. The solicitation contains enough specific price and quantity information to constitute an offer. However, it also contains the proviso that "No orders will be shipped until approved by the home office." This provision indicates that Seller is reserving to itself the power to consummate the deal; therefore, the proposal is not an offer, and an order sent in response is not an acceptance. See Farnsworth p. 136.

5. **Reluctance to find contract:** If the existence of an offer presents a close question, the court will generally find that there was ***not an offer***. Farnsworth, p. 134. Whereas once a contract has been found to exist, courts will be quite willing to supplement the actual terms with provisions on which the parties have not explicitly agreed (*infra*, p. 68), they are much less willing to take liberties with the language of what is asserted to be an offer. This reflects the general view that a person should not be found to have "taken the significant step of creating a power of acceptance unless he quite clearly made a commitment." C&P, p. 45.

E. Advertisements as offers: Most ***advertisements*** appearing in the mass media, in store windows, etc., are ***not*** offers to sell, because they do not contain sufficient words of commitment to sell. Rest. 2d, § 26, Comment b.

> **Example 1:** D, a clothing store, sends out a circular saying, "StormKing Extra Insulated wool coats, $100." This is not an offer, because of the absence of any further details about what D is actually committing to do (e.g., the number of coats being offered at that price). Cf. Rest. 2d, § 26, Illustr. 1.
>
> **Example 2:** D (Pepsico) runs a television ad for a "Pepsi Stuff" promotion, under which people who buy Pepsi get points that can be redeemed for merchandise. The end of the ad shows a teenager redeeming 7 million Pepsi Points for a Harrier Fighter Jet which he intends to use to commute to school. The ad mentions that the merchandise being offered is contained in a "Pepsi Stuff catalog." P, a consumer who sees the ad, consults the Pepsi catalog, and discovers that it does not list a Harrier Jet among the items that can be purchased with Pepsi points, but also sees that the catalog allows Pepsi Points to be purchased for 10 cents each. P sends D a check for $700,000 and orders a Harrier Jet (the real-world cost of which is $23 million), then sues to enforce the alleged contract.
>
> *Held*, for D. "The general rule is that an advertisement does not constitute an offer." It's true that an advertisement can be an offer if it is "clear, definite, and explicit, and leaves nothing open for negotiation." But that was not the case here — the TV ad was not sufficiently definite, since it reserved the details of the offer to a separate writing (the catalog). (Also, an obvious joke cannot be a valid offer — see *supra*, p. 10 — and the mention of the Harrier Jet here was an obvious joke.) *Leonard v. Pepsico, Inc.*, 88 F.Supp.2d 116 (S.D. N.Y. 1999).

1. Specific terms or promises: But if the advertisement contains words expressing the advertiser's commitment or promise to sell a ***particular number of units***, or to sell the items in a ***particular manner***, there may be an offer.

> **Example 3:** Same facts as Example 1 above. Now, however, suppose that the circular also contained this sentence: "15 coats available at this price, to be sold first-come first-served starting this Saturday at 9 AM." That sentence probably indicates sufficient commitment to sell 15 units under a particular procedure that it *would* amount to an offer. Consequently, if P showed up with a check for $100 before anyone else at 9 AM Saturday, she would be able to accept the offer and have a contract. Cf. Rest. 2d, § 26, Illustr. 1.
>
> **Example 4:** A manufacturer advertises that it will pay $100 to anyone who contracts influenza after using its anti-influenza medicinal smoke-balloon for two weeks. *Held*, the advertisement constitutes an offer, because its language contains an express commitment. *Carlill v. Carbolic Smoke Ball Co.*, Q.B. 256 (1893). Observe that the "acceptance" of this offer was not by a return promise to use the product, but by the purchaser's ***act*** of using the product. That is, the contract was unilateral.

F. Offers at auctions: When an auctioneer puts an item up for ***auction***, has he made an offer? Under modern case law and the UCC, the auctioneer, by opening the bidding on an item, does ***not*** make an offer. Instead, he solicits offers (bids) from the audience. UCC § 2-328. See also Rest. 2d, § 28.

1. **With reserve:** Auction sales under the UCC are said to be ***"with reserve"*** unless the goods are explicitly put up "without reserve." The auctioning of goods "with reserve" means that even after the start of bidding, the auctioneer may withdraw the goods from the sale. That is, putting up goods "with reserve" ***does not constitute an offer to sell them***. It is only when the auctioneer concludes the sale by letting the hammer fall that she is deemed to have "accepted" the last bid, and the contract of sale is complete. UCC § 2-328(3).

2. **Without reserve:** But if it is made clear to the public that the goods to be auctioned will be sold ***"without reserve,"*** the auctioneer is deemed to have made an ***irrevocable offer to sell the goods to the highest bidder***. Once the bidding starts, the auctioneer cannot then withdraw the goods because the bids are too low. UCC § 2-328(3).

3. **Withdrawal of bids:** Whether or not an auction is with reserve, a bidder may withdraw his bid at any time prior to completion of the sale. If the most recent bid is withdrawn, earlier bids are not automatically reinstated. UCC § 2-328(3).

G. Invitations to bid: Where bids are solicited through the sending out of ***invitations to submit bids***, the invitation is not an offer unless it contains language so indicating. In the usual case, the invitation is simply a solicitation of offers, the bids are offers, and it is up to the inviter to decide which, if any, of the bids to accept.

1. **Language indicating offer:** If the invitation to submit a bid contains language indicating a ***commitment*** on the part of the inviter to award the contract or sale to the highest bidder, the invitation may be held to constitute an offer, and the inviter will be bound to a contract with the highest bidder.

> **Example:** *A* advertises, "I offer my farm Blackacre for sale to the highest cash bidder and undertake to make conveyance to the person submitting the highest bid received at the address below within the next thirty days." *A* has made an offer.

Each bid operates as an acceptance, whose effectiveness is conditional on no higher bid being received within 30 days. Rest. 2d, § 28, Illustr. 3.

H. Seller's response to inquiry: Where a ***seller responds*** to an ***inquiry*** from a customer about whether the seller has available a particular quantity of items for delivery at a particular time, the seller's response with details of what she has for sale is likely to contain sufficient words of commitment to ***constitute an offer***, even though the response does not contain the word "offer."

Example: Buyer emails Seller: "Do you have 100 widgets for immediate shipment?" Seller emails Buyer: "Yes, at a price of $2.37 per widget." Seller's response is an offer, because it implies that Seller is willing to let Buyer *immediately conclude* a contract for the items.

I. Indefinite offers: For a contract to be formed, the parties must reach mutual assent on ***all of the essential terms of the agreement***. These essential terms are usually held to be:

☐ ***parties***;

☐ ***subject matter***;

☐ ***time for performance***; and

☐ ***price***

1. Vague offer: What purports to be an offer will in some cases not contain all of these essential elements. Can such an offer nonetheless give rise to a valid contract? If the acceptance does not supply the missing essential terms, there will be no contract because of ***indefiniteness***.

Example: *A* says to *B*, "I'll sell you any quantity of widgets you want for $5 each." *B* says, "OK, I accept." Since the offer does not contain details as to the quantity to be contracted for, and since the acceptance does not fill in this missing term, there is no contract because of indefiniteness.

2. Ways of avoiding indefiniteness: Even though the offer and acceptance do not themselves contain all of the essential elements, the contract may be saved from fatal indefiniteness if the parties' later actions supply the missing terms by implication, or if the court is willing to supply the missing terms through what are sometimes called "gap fillers."

Note: Because the problem of indefiniteness is not purely a problem of inadequate ***offer***, but rather a problem of an offer and acceptance which together are

insufficiently definite, the full discussion of indefiniteness is given *infra*, p. 67.

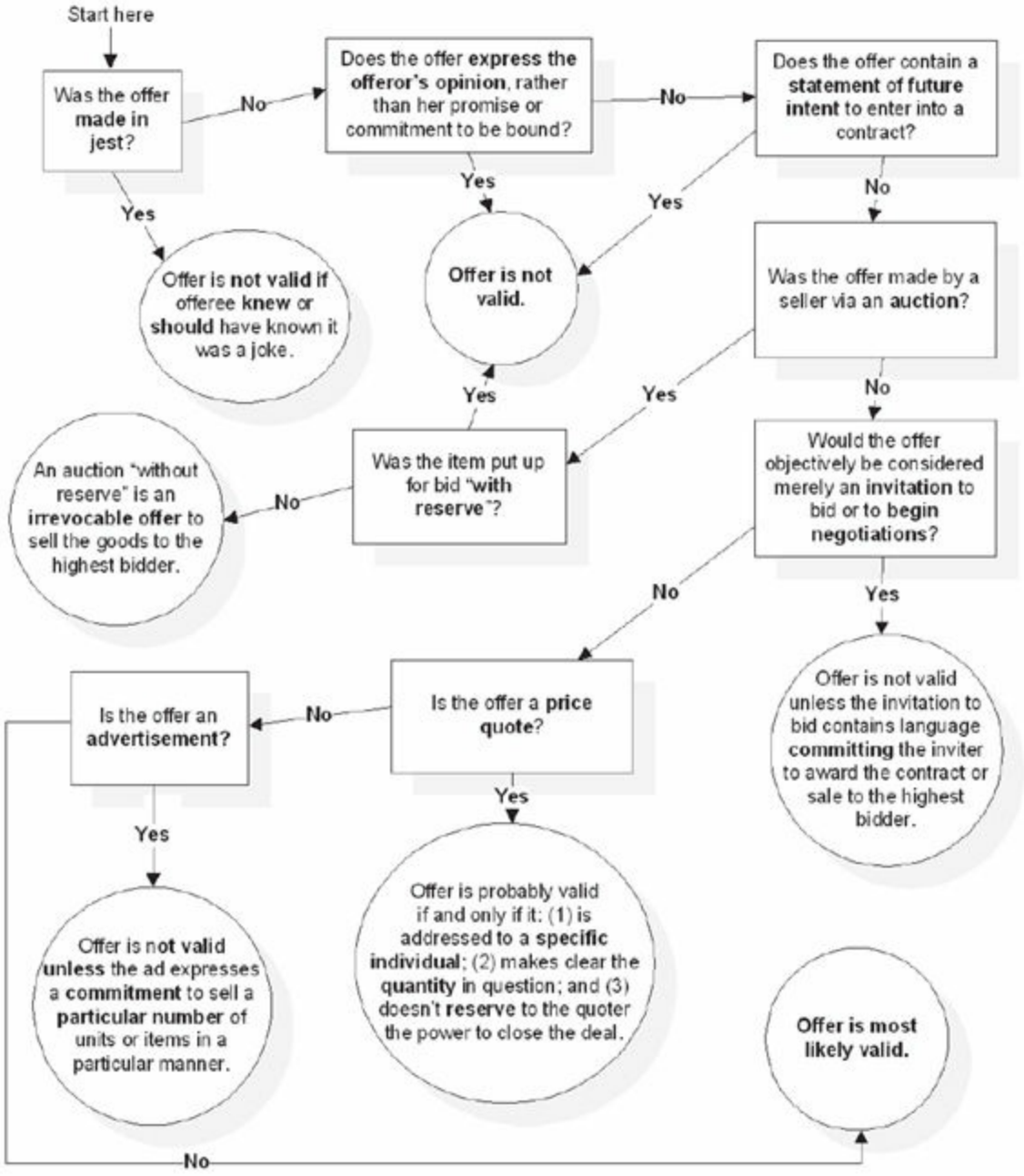
J. Offers proposing a series of contracts: It may not be clear whether a particular offer looks to one acceptance, or to a series of acceptances from time to time, and therefore a series of contracts. The court will decide whether the offer contemplates one or several contracts by judging what a reasonable person in the position of the offeree would think. The distinction between a single contract with several installments, and a series of contracts, is important for purposes of revocation of the offer as well as for the consequences of a breach.

> **Example:** *A* says to *B*, "I will sell you all of your requirements of coal during the next twelve months, not exceeding 100 tons in any month, provided you promise not to buy coal from anyone else during this period." This offer is for a single contract in which a series of orders are to be made. If the offer had said "I promise to sell you whatever quantities of coal you order at any time during the next twelve months, provided that I have that much in stock," the offer would probably give rise to a series of contracts, one for each order placed by *B*.

Figure 2-1

Is the "Offer" Valid?

A valid offer is one that instills in the offeree the power to enter into a contract simply by saying "yes." (The chart uses the word "offer" to refer to expressions that may or may not be true offers. Where an expression is a true offer -- i.e. a statement that if accepted will automatically form a contract -- the chart calls that expression a "valid" offer.) This chart helps you determine whether a given communication really *is* an offer.



The difference between the two is significant. *A* has the right to revoke his offer prospectively any time he wishes in the "series of contracts" case, even if *B* has already placed previous orders; he may not revoke in the "single contract, several installments" case once *B* has accepted initially. See Rest. 2d, § 31, Illustr. 1 and 3.

Quiz Yourself on
VALIDITY OF OFFERS

1. Dorothy, owner of the Wizard of Odd-Sizes Shoe Store, is chatting with the Wicked Witch about her ruby slippers. Dorothy says, "I'm planning on selling my ruby slippers for $50." Wicked Witch says, "Here's my check. I accept." Is there a contract?

2. CityWatt, an electric utility serving the city of Metro, posts the following notice on its website on January 1, 2015:

To All CityWatt Homeowner Customers — Solar Rebate Program

> If you placed a Qualifying Solar Panel Installation ("QSPI") [a term carefully defined elsewhere in the website] in service at your home during calendar year 2014, under our Solar Rebate Program you are eligible for a 10% credit against the cost of your QSPI. Submit the information required in the application form below, and our home office will determine your eligibility; if you are approved, we will contact you with the amount of your Rebate.

Gary Green, a CityWatt customer who made what was in fact a Qualifying Solar Panel Installation during 2014, submits on Jan. 15, 2015 all information required by the online application form. However, before CityWatt makes any further contact with Green, the company on Jan. 17 posts this notice on its website: "We regret to say that the Solar Rebate Program has been canceled. All pending applications are null and void." Green asserts that he accepted CityWatt's offer of a rebate on Jan. 15. Is there a contract between CityWatt and Green whereby CityWatt is obligated to pay Green the QSPI Rebate?

3. Einstein, intending his statement as a joke, tells Oppenheimer, "I'll sell you my chemistry set for $50." Oppenheimer, who has no idea that the set's plutonium alone is worth many times the $50 price (or that Einstein is joking) says, "I accept." Is there a contract?

4. The Camelot Army/Navy Surplus Store advertises in a local circular, "Magic Swords, Excalibur model, for sale @ $24 ea." Lance walks into the store, and says "I accept your ad; here's my $24, give me 1 sword." Is there a contract?

5. Same basic facts as prior question. Now, however, assume instead that the ad reads: "Sale — Saturday only — Excalibur, the magic sword. Only one left. Was $500, now only $24. First come, first served." Lance walks in and makes the same response as in the prior question. Is there a contract?

Answers

1. **No, because Dorothy's statement was not an offer,** but rather a statement of her intention to contract in the future. An offer requires the present intention to enter into a contract; here, Dorothy did not intend to create in Wicked Witch the immediate power of acceptance. Therefore, no contract results.

2. **No, because a reasonable person in Green's position would have understood that CityWatt did not intend to be bound until its home office determined an applicant's eligibility.** Rest. 2d, § 26 says, "A manifestation of willingness to enter into a bargain is ***not an offer*** if the person to whom it is addressed knows or has ***reason to know*** that the person making [the manifestation] ***does not intend to conclude a bargain*** until [the maker] has ***made a further manifestation of intent***." Here, the communication that Green asserts was an offer — the Jan. 1 website notice — tells customers to submit an "application form," and says that CityWatt's "home office will determine your eligibility." These references to an application and a determination of eligibility would give the customer reason to know that (in the Restatement's words), CityWatt did not intend for any "bargain" (agreement to award a rebate) to be concluded until CityWatt had made a "further manifestation of intent," namely at least a determination of eligibility, and probably also contact with the customer. In other words, the website made it clear to one in Green's position that the customer's application would be the *offer*, and that acceptance would not occur until the home office's determination of eligibility and notice of such to the customer. Cf. *McAtee v. City of Austin*, 2013 Tex. App. LEXIS 12518 (Ct. App. Tex. 2013) (same basic facts as this question).

3. **Yes, probably.** If a reasonable person in Oppenheimer's position would have no reason to know of the value of the plutonium (or any other

reason for thinking that Einstein was joking), then under the ***objective theory of contracts,*** Einstein's offer would create an immediate power of acceptance in Oppenheimer. The fact that Einstein actually was joking is irrelevant; it's the ***appearance*** of a valid offer that counts. If, however, Oppenheimer *knew* that Einstein had a very dry sense of humor, and realized at the time that Einstein was joking, there'd be no valid offer and thus no contract. (An "offer" which the offeree *knows* is made in jest is not a valid offer, regardless of what any other "reasonable person" might think.)

4. **No.** Mass-market advertisements are generally construed as invitations for offers, not offers themselves, because they do not contain sufficient words of commitment to sell.

5. **Yes,** because under these facts, Camelot's offer was specific as to quantity ("one left"), price ($24), and the person to whom the offer was made ("first come"), and was, in general, worded as a ***commitment*** to enter into a deal on proposed terms. As such, it created an immediate power of acceptance in anyone who chose to purchase the sword under the terms advertised.

IV. THE ACCEPTANCE

A. Acceptance defined: For as long as an offer is in force, the person to whom it is addressed may conclude the bargain — cause a contract to come into existence — by ***"accepting"*** the offer. An "acceptance" is the offeree's manifestation of ***assent to the terms of the offer***, made in a manner invited or required by the offer. Rest. 2d, § 50.

B. Who may accept the offer: An offer may be accepted ***only*** by a person ***in whom the offeror intended to create a power of acceptance.*** (Rest. 2d, §§ 29, 54).

> **Example:** *A* sends *B* an order for ice. *C*, from whom *A* previously has refused to buy such goods, has purchased *B*'s business. *C* ships ice to *A* without notifying him of the change in the ownership of *B*'s business. *Held*, *A* did not create a power of acceptance in *C*; therefore, *C*'s "acceptance" is ineffective, and there is no contract. *Boston Ice Co. v. Potter*, 123 Mass. 28 (1877).
>
> **Note:** Of course, under the objective theory of contracts what counts is not whether *A* subjectively intended not to deal with *C*, but whether a reasonable person in *C*'s position should have realized that *A* would not want to deal with *C*. On these facts, *C* should have realized this, so he was not empowered to accept the offer.

C. Must be in response to an offer: An acceptance must be ***in response to an offer,*** not in response to something other than an offer such as a ***solicitation*** of offers.

> **Example:** Reconsider the Example on p. 11: An uncle mails a letter to his adult nephew that says: "I am thinking of selling my pickup truck. I would consider taking $7,000 for it." The nephew writes back, "I will buy the truck for $7,000 cash." Because the uncle's letter was a solicitation of offers, not an offer, the nephew's response "I will buy" was *not an acceptance* (but was instead itself an offer).

D. Offeree usually required to know of the offer: An acceptance is usually valid only if the offeree ***knows of the offer*** at the time of his alleged acceptance. C&P, p. 71; 1 Corbin § 59.

1. **Restatement formulation:** The Restatement expresses this idea by saying that "It is essential to a bargain that each party manifest assent ***with reference to the manifestation of the other.***" Rest. 2d § 23.

2. **Rewards:** This rule means that where a ***reward*** is offered for a particular act, a person who does the act without ***knowing*** about the reward ***cannot claim it.***

   a. **Exceptions:** However, a number of states have granted a ***noncontractual*** right to recover in the reward situation, if the reward is offered by a public agency. See C&P, p. 72, n. 8. Also, a ***"standing offer"*** by a governmental body (e.g., $1,000 to anyone furnishing information leading to the conviction of any person for arson) may be held to confer a contractual right on one who furnishes such information without knowing about the standing offer. See Rest. 2d, § 23, Illustr. 3.

3. **Cross offers:** The requirement that an accepting party know of the offer, and be responding to it, means that ***"cross-offers,"*** even if they match precisely, will not create a contract.

> **Example:** *A* has on previous occasions discussed with *B A*'s possible interest in selling Blackacre to *B* for $100,000. (Assume, however, that the discussions between them never amounted to either an offer or a contract.) Some time thereafter, on Oct. 1, *A* sends *B* a letter saying, "I'll sell you Blackacre, as we discussed, for $100,000, if you reply promptly." Also on Oct. 1, *B*, without realizing that *A* has sent a letter, sends her own letter to *A* saying, "I hereby offer to buy Blackacre from you for $100,000." The two letters cross in the mail. There is no contract, because neither letter was with reference to the other, and therefore neither letter could serve as an acceptance. Cf. Rest. 2d § 23, Illustr. 4.

a. Subsequent performance as creating a contract: However, in sale-of-goods cases governed by UCC Article 2, a contract may result even though the offers cross. This can happen if the ***subsequent conduct*** of both parties ***"recognizes the existence of a contract."*** UCC § 2-207(3). This provision is discussed *infra*, p. 36. Thus suppose the exchange of letters in the above example had involved, say, a rare book. Suppose further that after *A* got *B*'s letter, *A* wrote, "I'm glad that we've agreed; tell me where to send the book," and *B* responded by sending a mailing address. This later conduct by both parties, showing their belief that they had a deal, would be enough to create a contract under § 2-207(3) even though it's hard to say exactly what acts constituted the offer and the acceptance.

4. Objective manifestation is what counts: Despite the general rule that the offeree must be aware of the offer in order to accept it, it is important to remember that the objective theory of contracts applies to the acceptance. That is, as long as the offeree's conduct leads the offeror to reasonably conclude that the offeree knew of the offer, it does not matter that subjectively the offeree was unaware of the offer. See C&P, p. 73.

a. Acceptance of unknown terms: Similarly, an offeree can by her actions bind herself to an offer even though she is ignorant of certain of its terms. Here, as in the case in which the offeree does not even know that there is an offer, the offeree will be bound if her conduct reasonably leads the offeror to conclude that the offer has been accepted.

> **Example:** *A* sends to *B* an offer to sell a particular lot for $5,000. The offer also states terms as to time of payment, mortgage, taxes and insurance. *B* is so anxious to buy the lot that without reading these additional terms, she sends an acceptance to *A* that does not list any conditions. Because *B*'s act has reasonably led *A* to conclude that his offer has been accepted, there is a contract on the terms stated in *A*'s offer. See Rest. 2d, § 23, Illustr. 7.

E. Method of acceptance: The offeror is the ***"master of his offer."*** This means, in part, that he may prescribe the ***method*** by which it may be accepted. For instance, he may require that it be accepted by a telegram, letter, signature, etc.

> **Example:** *A* sends *B* a letter proposing to sell Blackacre for a stated price. The letter says, "You may accept this proposal only by signing this letter on the dotted line provided for your signature, and returning it to me by Sept. 1." *B* sends *A* a telegram on Aug. 31, saying "I hereby accept your offer." *B* has not accepted (and there is no contract), because *B* has not used the method of acceptance specified by *A*. See Rest. 2d, § 30, Illustr. 1.

1. **Can suspend mailbox rule:** The offeror's right to prescribe the method of acceptance means that the offeror can ***suspend*** the usual ***"mailbox"*** rule, under which an acceptance is effective upon dispatch. (See *infra*, p. 60). The offeror can do this by saying, "No acceptance shall be effective until received by offeror" — such a provision will be ***enforced***.

2. **Mode of acceptance where not specified in offer:** If the offer does ***not specify*** the mode of acceptance, the acceptance may be given ***"in any manner and by any medium reasonable in the circumstances."*** Rest. 2d, § 30(2).

3. **Acceptance of unilateral contract:** Suppose that the offeror's offer proposes that the offeree accept by performing an act, rather than by making a promise. Such an offer looks to a ***unilateral*** contract.

   a. **Option contract arising on part performance:** When an offer to a unilateral contract is made, it can be accepted only by ***full*** performance. But if the offeree begins to perform, most courts treat the offer as having become temporarily irrevocable; that is, the offeree receives an option contract. See Rest. 2d, § 45. This topic is discussed further *infra*, p. 55.

   b. **Intent to accept implied:** If *A* makes *B* an offer for a unilateral contract, and *B* performs the requested act, it is of course possible that *B* ***did not intend*** by doing the act to make a contract. If it is clear from *B*'s words or conduct that he did not intend his act to constitute an acceptance, there will be no contract. But if there is no evidence, one way or the other, about whether *B* intended the act to constitute an acceptance, *B* will usually be treated as having intended to accept, and a contract will be found.

4. **Acceptance of bilateral contract:** If the offer looks to a ***bilateral*** contract (i.e., looks to an acceptance that is by promise rather than performance), the acceptance will usually be in words (e.g., a letter

stating "I accept your offer of May 23"). But the acceptance may also be in the form of ***actions***, if these fairly indicate to the offeror that the offeree intends to enter into the contract.

a. Assent must be implied: But, under the objective theory of contracts, the conduct will only be an acceptance if it reasonably appears to the offeror that this is what the offeree has intended.

b. Account stated: One kind of acceptance by action rather than words is called an ***account stated***. An account stated comes into existence when a creditor sends a bill to his debtor, and the debtor accepts the bill as an accurate estimation of the charges (usually by simply failing to object to it within a reasonable period of time). See p. 513, *infra*.

c. Notice of acceptance of bilateral contract: There are a few situations in which the offeree may accept merely by being ***silent***; these are discussed *infra*, p. 23. Generally, however, for the acceptance to be effective, the offeree must at least ***attempt*** to ***communicate it*** to the offeror, in a reasonably prompt manner. Rest. 2d, § 56.

> **Example:** *A* writes *B*, "I hereby offer to sell you Blackacre for $10,000." *B* composes a letter to *A* accepting the offer, but he doesn't mail it for several days, during which time *A* purports to revoke the offer. The acceptance never became effective, since *B* never made a reasonably prompt attempt to communicate it to *A*.
>
> **Note:** But if *B* had mailed the letter of acceptance, it would have become effective upon dispatch (not merely when *A* received it). This "acceptance effective upon dispatch" rule is discussed further *infra*, p. 60.

i. **Where offer indicates notification unnecessary for acceptance:** However, if the ***offer itself*** indicates that an acceptance can become effective even before any attempt to communicate it is made, then the acceptance will indeed become immediately effective.

5. Where offer invites either promise or performance: It will often be the case that the offer does not make clear whether acceptance is to occur through a promise or through a performance. That is, it is unclear whether the offer seeks a unilateral or a bilateral contract. In this ambiguous situation, the offer "is interpreted as inviting the

offeree to accept ***either*** by promising to perform what the offer requests or by rendering the performance, as the offeree chooses." Rest. 2d, § 32.

a. Language of offer relevant to mode of acceptance: The language of the offer, and the circumstances under which it is made, must be scrutinized in order to determine whether the offeror is really indifferent as to whether the offer is accepted by promise or by performance.

> **Example:** *A* writes to his nephew, *B*, aged 16, that if *B* will refrain from drinking, smoking and gambling until he is 21, *A* will pay him $5,000 at age 21. *B* writes to *A*, "I promise to refrain from doing these things." The circumstances and language of the offer indicate that *A* probably was not interested in having *B*'s *promise* to refrain, but was only interested in having *B actually* refrain. If so, *B*'s promise is not an acceptance. (But if *B* begins to refrain, *A*'s offer becomes irrevocable under Rest. 2d, § 45 for as long as *B* continues to refrain, and if he refrains until he is 21, there is a contract under which *A* must pay $5,000.) See *Hamer v. Sidway*, 124 N.Y. 538 (1891); see also Rest. 2d, § 32, Illustr. 4, drawn from *Hamer*.

b. Shipment of goods: One common situation in which the offer may not make it clear whether acceptance is to be through promise or performance is where the offer is a request that ***goods be shipped***. In this situation, the UCC follows the Restatement view that either shipment or a promise to ship constitutes acceptance: "…an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.…" UCC § 2-206(1)(b).

i. **Acceptance by shipment of non-conforming goods:** Sometimes the seller may ***accept and breach with the same act,*** by ***shipping non-conforming goods.*** Notice that § 2-206(1)(b), quoted above, says that an order can normally be accepted "by the prompt or current shipment of conforming or ***non-conforming goods***[.]" Ignoring for the moment the issue of an accommodation shipment (one in which the seller *knows* that she is shipping non-conforming goods and explains that she is doing so to help the buyer, as discussed in sub-Paragraph (ii) below), you can see from this language that a seller who in response to an order ***ships non-conforming***

goods without acknowledging that they are non-conforming both accepts and breaches at the same time.

Example: Retailer, an office supply store, orders 1,000 dozen "No. 2 pencils" from Manufacturer, for immediate shipment. Due to an error in the shipping department, Manufacturer ships 1,000 dozen "No. 3 pencils." By making the shipment, Manufacturer has accepted the order. Furthermore, since Manufacturer has shipped non-conforming goods (without qualifying for the "accommodation shipment" scenario), Manufacturer has breached the agreement. Therefore, Retailer will be entitled to reject the non-conforming shipment, and if any cure period (see *infra*, p. 233) expires without a cure, Retailer will be entitled to sue for breach.

ii. **Accommodation shipments:** There is one important exception to the rule just summarized, that an order to buy goods for current shipment will ordinarily be deemed accepted if the seller ships conforming or non-conforming goods. This is the ***"accommodation shipment."*** The last sentence of UCC § 2-206(1)(b) (which comes after the clause quoted in Par. (b.) above) says, "Such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an ***accommodation*** to the buyer."

That is, the seller can ship what she knows to be non-conforming goods ***without risking being found in breach***, by accompanying the shipment with a message saying words to the effect, "I know I'm sending goods that don't match your order, and I'm doing this only to accommodate you. You may keep the goods and pay for them, or you may return them in which case there will be no contract between us."

(1) **Buyer's choice:** When the seller makes such an accommodation shipment, the shipment is generally treated not as an acceptance, but rather as a ***counteroffer*** of the goods that have been shipped as they are. Thus if the seller ships 50 widgets instead of the 100 that were ordered, the seller is making a counteroffer for a contract of 50 widgets. Similarly, if the buyer orders green widgets and the seller ships blue ones, the seller is making a counter-offer for a contract for blue widgets.

When the buyer receives the non-conforming goods shipped as an accommodation, he has a choice: (1) he can ***keep*** the non-conforming goods, in which case there is a ***contract for the goods as they are***, at the price the seller has indicated she will charge for them; or (2) the buyer can ***reject*** the shipment and thus prevent a contract from coming into existence at all (in which case

neither party will be liable for breach of anything).

But what the buyer ***cannot*** do is to ***hold the seller in breach*** for having shipped non-conforming goods, or ***demand conforming goods*** — that's the whole point of the accommodation-shipment provision of § 2-206(1)(b).

Example: Buyer sends Seller an order for "100 red gizmos, at $5.75 each, for immediate shipment." Seller sends 100 blue gizmos, with a note reading "I'm all out of red gizmos. I've taken the liberty of shipping you 100 blue ones instead, at the same price, hoping that they'll do for you."

Seller's shipment of the blue gizmos is an accommodation shipment under § 2-206(1)(b). Therefore, Seller's shipment does not constitute an acceptance. Instead, it is a counter-offer of blue gizmos. Buyer can accept the counter-offer (by keeping them, in which case he owes the $5.75 for each with no discount for the non-conformity) or reject the counter-offer (by sending them back). If Buyer rejects the counter-offer by sending the blue gizmos back, Seller has not breached (because there was never any accepted order), so Seller does not owe Buyer any compensation.

6. Acceptance by silence: May the offeree accept by virtue of his ***silence***? Although the common law never treated silence as acceptance, modern courts and authorities recognize that silence may sometimes manifest an intent to accept.

a. Common-law rule: The common-law rule is expressed by the phrase "he who is silent does not give his consent." This rule often led to unfair results.

Example: *A* has insured *B*'s house for years. *A* then notifies *B* that it will continue *B*'s policy in force, unless it hears from *B* to the contrary. Relying on this statement, *B* does not reply. *B*'s house burns down, and *A* claims that there was no contract. Under the common-law approach, *B* would have no contractual recourse against *A*. *Prescott v. Jones*, 69 N.H. 305 (1898).

b. Modern view of implied-in-fact contracts: Modern courts, and the Second Restatement, try to correct such injustices by ***recognizing silence*** as a mode of acceptance in several scenarios. These scenarios in which the parties do not expressly exchange an offer and acceptance, but in which they ***indicate by their silence (or non-verbal conduct)*** their understanding that a contract is being formed, are sometimes said to involve ***"implied-in-fact"*** contracts. Here are some of the scenarios where silence can give rise to an implied-in-fact contract, according to the Second Restatement:

i. **Reason to understand that silence is consent:** Where the offeror has given the offeree ***reason to understand that***

silence will constitute acceptance, the silence or inaction of the offeree will operate as an acceptance ***if*** she subjectively intends to be bound. Rest. 2d, § 69(1)(b).

Example: Suppose the facts are the same as in *Prescott v. Jones* (the previous example). The insurer has explicitly indicated to the offeree that the latter's silence will constitute acceptance. In this situation, the offeree's silence will constitute acceptance *if and only if* he subjectively intended to accept.

ii. **Acceptance of services:** An offeree who ***silently receives the benefit*** of ***services*** (not goods) will be held to have accepted a contract for them if she (1) had a reasonable opportunity to ***reject*** them and (2) ***knew or should have known*** that the provider of the services ***expected to be compensated*** for them. Rest. 2d, § 69(1)(a).

Example: *A*, a private music teacher, gives several piano lessons to *B*'s child. *A* tells *B* that the cost of a series of 20 lessons will be $100. *B* has never asked for the lessons, and remains silent when *A* tells him the cost of the course. *B* finally stops the lessons after 10 have been given. *B* has by his silence accepted *A*'s offer of a 20-lesson course, and must pay the contract price, not just the value of the lessons actually given.

(1) **Distinguish from quasi-contract:** The implied-in-fact contract which exists in the above conscious-acceptance-of-benefits example must be distinguished from the ***quasi-contractual*** right of recovery of one who provides services in an emergency, without the consent of the recipient (e.g., emergency aid by a doctor to an unconscious patient; see *infra*, p. 336). In the quasi-contract situation, the provider of the services may recover only the ***reasonable value*** of his services. In the conscious-acceptance-of-a-contract-by-silence case discussed above, on the other hand, the service-provider receives the contract price, which will often, but not always, be more than the reasonable value of the services.

(2) **Intra-familial transactions:** The requirement that the provider of services "***expected to be compensated***" means when one party performs small-scale services for another and the two are ***close relatives***, if neither party expressly explains to the other that payment is expected, the court is

likely to conclude that the services were a ***gift*** rather than a commercial transaction.

Example: Dad, an 80-year-old living alone, breaks a hip in a fall. He says to his grown son Sam, "For the next month, please come over once a week to mow the lawn and rake the leaves." Sam does so, and each time Dad looks on, says "Thanks," and says nothing further.

If Sam sues Dad for the reasonable value of these yard services on an implied-in-fact contract theory, the court will almost certainly conclude that no such contract came into existence, because the intra-familial context should have led one in Dad's position to believe that Sam was rendering these services for free rather than in expectation of payment.

iii. **Prior conduct making acceptance by silence reasonable:** Even if the offeror has not indicated to the offeree that silence will constitute acceptance, the prior ***course of dealing*** of the parties may make it reasonable that the offeree's silence be construed as consent. This will be the case when the prior dealings make it "reasonable that the offeree should ***notify*** the offeror if he does not intend to accept." Rest. 2d, § 69(1)(c).

Example: *A* Corp., through its salespeople, has frequently solicited orders from *B*. These orders have always been subject to approval by the *A* home office, but in every case the goods have been promptly shipped to *B* with no notice to *B* except a bill on shipment. This time *B* gives an order to *A*'s salesperson, and *A* fails to ship or notify *B* that it will not ship. *B*, relying on his order, does not buy from anyone else. Because *B* reasonably assumed that had *A* rejected *B*'s order (i.e., *B*'s "offer"), *A* would have so notified him, *A* by its silence has accepted *B*'s order. Therefore, there is a contract. See Rest. 2d, § 69, Illustr. 5.

Note: Observe that in this situation, where the prior dealings of the parties lead the offeror to believe that if the offeree decides not to accept he will so notify the offeror, the objective theory of contracts applies. That is, the test is whether the offeree's conduct was such that a person in the offeror's position would reasonably expect to be notified of any rejection, not whether the offeror subjectively expected such notification. See C&P, p. 82.

iv. **Acceptance by dominion:** Where the offeree receives goods, he may be held to have accepted a contract for the goods even though he does not intend to do so. She may make such an unintentional acceptance by ***exercising "dominion"*** over the goods in a way inconsistent with the offeror's ownership of the goods. Rest. 2d, § 69(2). See also UCC § 2-606(1)(c).

Example: *A* sends *B* a letter saying "Would you like to become a member of the *A* Book Club? If so, just fill out the enclosed card and send it to us." *A* then starts

sending books to *B*, even though *B* has not sent the card in. *B* takes the books and gives them away as gifts. *B*'s giving away of the books is inconsistent with *A*'s ownership of them, so *B* will be held to have accepted *A*'s offer, even though he did not intend to do so. If *B* had merely kept the books, waiting for *A* to ask for them back, there would be no contract since *B* would not have exercised dominion. See Rest. 2d, § 69, Illustr. 7 and 8.

Note: The above example indicates that silence coupled with the exercise of "dominion" over goods may constitute acceptance. Many states, however, have statutes changing this result where unsolicited goods are sent by mail. N.Y. Gen. Obl. L. 5-332, for instance, allows the recipient of unsolicited goods sent by mail to treat them as an "unconditional gift." This statute is sometimes called the "Book of the Month Club" statute.

7. Notice of acceptance of unilateral contract: Where an offer looks to a ***unilateral contract***, most courts now hold that the offeree must give ***reasonably prompt notice*** of his acceptance after he has done the requested act (unless the offeror promptly learns of the acceptance in some other way). If the offeree does not do this (and the offeror doesn't otherwise learn of the acceptance or indicate that notice is unnecessary), the contract that was formed by the act is ***discharged***. Rest. 2d, § 54(2).

Example: On Feb. 1, Tycoon sends Artist, a painter, a color photo of himself, and says in the accompanying letter, "I'm interested in having you paint my portrait in oils, on a canvas of at least 24 x 36. Do not proceed unless you're willing to do the work for $10,000." Artist receives the letter on Feb. 3, says nothing to Tycoon, and immediately starts work. On Feb. 10, Artist finishes the work, but does not for months notify Tycoon either that he started the work or that he finished it. On July 1, Artist finally sends Tycoon the painting, together with a bill for $10,000. Does Tycoon have to take and pay for the painting?

No. It's true that Artist's commencement of work constituted an acceptance of the offer, since the offer was reasonably interpreted to call for either acceptance by promise to paint or acceptance by the beginning of actual painting. But continuation of the contract was subject to Artist's giving Tycoon ***reasonably prompt notice of acceptance*** once Artist completed the work (assuming that Tycoon didn't learn about the completion by some other means, or indicate that no notice was necessary). Because Artist did not do this, the contract will be "***discharged***." So Tycoon will have no obligation to pay the contract price, unless he keeps the painting.

a. Suretyship contracts: The principle that the offeree must give the offeror prompt notice of acceptance after the offeror has accepted by beginning performance is important in ***suretyship cases.***

Example: Own, a property owner, is having Con, a contractor, do work on Own's house. Own writes to Hardware, a hardware store, "if you extend credit to Con for

materials that Con will use on my house, I will make good if Con defaults."

Own would probably be held to have made an offer for a unilateral contract — Own is looking mainly for the actual extension of credit, not a promise to extend credit. The offer can therefore be accepted by Hardware's advancing credit. But Own's duty to guarantee payment by Con will be ***discharged*** if Hardware does not give Own ***prompt notice*** that Hardware extended the credit.

Quiz Yourself on THE ACCEPTANCE

6. Jackson Pol-lick, an avant-garde artist who paints landscapes with his tongue, sends a letter to Artie Snob, an art dealer, offering to sell his painting "Sunset Over Breakfast" for $5,000. At the same time, Snob sends Pol-lick a letter offering to buy "Sunset Over Breakfast" for $5,000. The letters cross in the mail. Nothing further happens. Is there a contract?

7. As Elvira knows, Lilly Munster often gives ten-lesson private classes on the art of interior decorating for a total of $400. (The market price for such courses tends to be more like $300.) Lilly and Elvira meet at a party, and Lilly says, "I could come to your house and teach you." Elvira says nothing. Lilly then shows up at Elvira's house every Thursday evening for ten weeks, and teaches Elvira her decorating tricks. Elvira never says anything to indicate that she's expecting to pay for the lessons. At the end of the ten weeks, what, if anything, does Elivra owe Lilly, and on what basis?

8. Prince Charming finds a glass slipper on the sidewalk in front of his house. Unbeknownst to him, Cinderella has offered $1,000 as a reward for the slipper's return. Charming goes from house to house, looking for the slipper's owner. He finally finds Cinderella and returns the slipper to her. Is there a contract between Cinderella and Charming for payment of $1,000?

Answers

6. No. Under these facts we have two offers and no acceptance. Neither letter was sent with the expectation that it would create a binding contract, because neither was sent in response to what the sender knew to be an offer.

7. **$400, on a contract.** Elvira accepted the benefit of Lilly's services, having had the opportunity to reject them, when she knew or should have known that Lilly expected to be compensated for them at Lilly's standard rate. Therefore, she will be held to have impliedly agreed to a contract for those services, on what she knew to be Lilly's standard terms. The "market rate" or "market value" of such lessons is irrelevant, since the implied-in-fact contract was for Lilly's standard terms ($400), not for lessons at the prevailing market rate.

8. **No.** An offer can generally be accepted only by a person who knows of the offer and intends to accept. This rule applies to rewards. Charming didn't know about the reward, so his actions of returning the slipper did not constitute a valid acceptance.

V. ACCEPTANCE VARYING FROM OFFER

A. Problem generally: In some situations, the acceptance will accept ***all*** of the terms of the offeror's offer. Often, however, the acceptance will be a qualified one, e.g., "I accept your offer if you will ship the goods by the middle of next week." When the terms of the acceptance diverge from those of the offer, either by conflicting with terms in the offer or adding terms not present in the offer, it is often difficult to tell whether a contract exists. If it is determined that a contract does exist, it is also frequently difficult to determine what the terms of that contract are.

B. Common-law view: Under the common law, the offeree's response operates as an acceptance only if it is a ***precise mirror image*** of the offer. If the response conflicts to the slightest extent with the terms of the offer, or if it adds new terms on issues not even discussed in the offer (except for terms which the offer explicitly left to the offeree's choice, e.g., quantity of goods in many contracts), the reported acceptance is in fact not an acceptance but a rejection and counter-offer.

1. **Injustice:** This strict common-law interpretation frustrated many commercial transactions, and often led to unjust results. Most significantly, the "mirror image" rule often let one party ***slip out of the deal*** for reasons that had nothing to do with the variation between offer and acceptance.

   Example: On March 1, Buyer sends Seller a purchase order for 1,000 widgets at $20 each, shipment to occur June 1. The purchase order says, in boilerplate, that

shipment will be "FOB Buyer's place of business." Seller promptly sends a form marked "Acknowledgment" that agrees with the quantity, price, time-of-delivery and all other terms in the purchase order, except that it says, in boilerplate, that shipment will be "FOB Seller's plant." (For what these two FOB terms mean, see *infra*, p. 437.) Neither party notices that the two forms disagree. 10 weeks go by. The price of widgets skyrockets, causing Seller to decide that it wants to get out of the contract prior to making shipment.

Under the common-law mirror-image rule, Seller would be able to claim that because its acknowledgment (the purported "acceptance") deviated from the purchase order (the offer) in this small way, the acknowledgment was not an acceptance after all, so that there is no contract. This would be true even if Buyer could prove to the court that Seller's reliance on the minor inconsistency between the forms was just a pretext to let Seller get out of what it later decided was a bad bargain.

C. Liberal UCC view: The UCC attempts to ***prevent a party from slipping out of the contract,*** as she was frequently able to do under the common-law "acceptance must be a mirror image of offer" rule. Not only does the UCC provide that a contract may in some cases be created where the acceptance does not match the offer, but the Code also attempts to specify what the terms are of such a contract. Both of these things are done in UCC § 2-207, which we explore in detail because of its great importance.[2]

1. "Battle of the forms": Before we examine the text of § 2-207 in detail, it will be useful to examine the factual context in which most § 2-207 cases arise. It is relatively rare that the offeror sends an offer that is completely handwritten or typewritten, and that consists of terms drafted especially for the particular deal at hand; similarly, it is rare that the acceptance is a completely custom-drafted document. Rather, both the offer and the acceptance are usually ***pre-printed forms***, with blanks left for the particular "negotiated" terms to be filled in.

a. Purchase order: Thus the buyer's purchase order department typically sends a pre-printed ***"purchase order"*** form, filled with lots of fine-print clauses favoring the buyer (e.g., extensive warranties). The buyer simply fills in the blanks for product description, quantity, shipment date and one or two other aspects that vary from deal to deal.

b. Acknowledgment: The seller's order department then typically responds with a pre-printed ***"acknowledgment form,"*** containing

fine-print clauses that favor the seller (e.g., a complete disclaimer of all warranties); this form, too, has blanks, and the seller probably copies these terms from the corresponding entries on the purchase order.

c. **Performance:** Sometimes, a dispute will arise following this exchange of purchase order and acknowledgment forms, but prior to any shipment of goods. More typically, however, the seller goes ahead and ships the goods and, either before or after the buyer has paid for them, some dispute erupts concerning the adequacy of the seller's performance (e.g., a dispute about the quality of the goods). Only then do the parties consult the purchase order and acknowledgment, and discover that these forms are not in complete agreement on some or many of the "non-negotiated" terms.

2. **Role of § 2-207:** § 2-207 has two main jobs to perform in this ***"battle of the forms"*** situation: (1) to determine whether a contract has been formed at all by the exchange of documents; and (2) if a contract has been formed, to determine what the terms of that contract are.

3. **Text of § 2-207:** Because of **§** 2-207's extreme importance, it is worth reproducing that section here in its entirety before we dissect it:

§ *2-207 Additional Terms in Acceptance or Confirmation:*

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

4. **Summary:** § 2-207 makes two major changes from the common-law approach:
   - □ it provides, in § 2-207(1), that a document can constitute an acceptance "even though it states terms additional to or different from those offered or agreed upon," thus ***abolishing the common-law "mirror image" rule***; and
   - □ it provides, in § 2-207(2), that between merchants, the ***additional terms*** proposed in the acceptance can ***become part of the contract*** in certain circumstances if the other party (the offeror) merely ***remains silent***. § 2-207(2) thus effectively modifies the common-law rule that a proposal for a contract cannot be accepted by silence.

D. Detailed discussion: We now proceed to our detailed discussion of the various aspects of § 2-207. Rather than examining the section clause by clause, we will examine seven different types of factual situations, and analyze how the section governs each of these situations. In this, we follow more or less the approach used in W&S, pp. 6-24. The situations which we will examine are:

1. the purported "acceptance" is ***expressly made conditional*** on the ***offeror's assent*** to terms additional to or different from those contained in the offer;
2. the acceptance deals with a certain issue, on which the ***offer*** is ***silent*** (what § 2-207 calls an ***"additional"*** term);
3. the offer deals with a certain issue, on which the ***acceptance*** is ***silent***;
4. the acceptance and the offer deal with a particular issue in ***conflicting*** ways (making the acceptance's handling of the issue a ***"different"*** term in § 2-207's vernacular);
5. the purported "acceptance" recites terms which ***diverge*** so much from those contained in the offer that ***no contract is in fact formed*** by the exchange of documents;
6. the parties make an oral agreement, then one or both sends a ***confirming*** document which adds to, or conflicts with, the oral agreement; and

7. the parties do not use form documents at all, but rather, exchange documents that are completely ***custom-drafted***.

E. Acceptance expressly conditional on assent to changes: § 2-207(1) provides that any "expression of acceptance" or "written confirmation" acts as an acceptance even though it states terms that are "additional to or different from" those contained in the offer. (This is the general rule, which, as noted, overturns the common-law "mirror image" rule.) However, that subsection also contains one extremely important proviso: the "expression of acceptance" does ***not*** form a contract if it is ***"expressly made conditional on assent to the additional or different terms."***

1. Significance of exception: This exception means that if the purported "acceptance" contains additional or different terms from the offer, and also states something like "This acceptance of your offer is effective only if you agree to all of the terms listed on the reverse side of this acceptance form," ***there is no contract*** formed by the exchange of documents.

> **Example:** Buyer sends a purchase order for steel coils to Seller. Seller sends back an acknowledgment form. The acknowledgment form contains the following clause: "Seller's acceptance is, however, expressly conditional on Buyer's assent to the additional or different terms and conditions set forth below and printed on the reverse side. If these terms and conditions are not acceptable, Buyer should notify Seller at once."
>
> *Held*, no contract was formed by the exchange of purchase order and acknowledgment. The clause quoted above fell within § 2-207(1)'s "expressly conditional" exception, thus preventing what would otherwise have been an acceptance from being one (since Buyer never did assent to the additional or different terms). Thus even after sending the form, Seller would have been free to decide not to ship and could have walked away from the deal with no liability. (However, Seller did in fact ship, and Buyer paid for the goods. Therefore, a contract by performance, under § 2-207(3), came into existence; see *infra*, p. 36.) *C. Itoh (America), Inc. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977).

a. Danger to offeror: Observe that the possibility that the offeree may use a clause like the one in *C. Itoh* represents a significant risk to an offeror that sends out numerous purchase orders. If the buyer/offeror does not read the seller/offeree's acknowledgment form containing such an "expressly conditional" clause, and believes that a contract has been made, he will later discover to his chagrin that he has no contract claim if the seller then fails to ship

the goods. Thus the moral of the story, at least for buyer/offerors, is: read the seller's fine print.

2. **Restrictive reading:** However, courts will not lightly presume that language in the "acceptance" insisting on the offeree's terms falls within the "expressly conditional" exception to § 2-207(1). In general, courts have taken the view that the exception will be triggered and a contract avoided *only if* the offeree makes it clear that he is ***unwilling to close the deal*** unless the offeror agrees to the additional or different terms.

   a. **Must virtually track language of § 2-207(1):** Therefore, as a practical matter the offeree's response will be found to be "expressly conditional" only if the offeree's language ***virtually tracks the phrasing*** of § 2-207(1)'s expressly-conditional clause. F&E, p. 635.

3. **Offeror's assent to changes:** If the offeree uses an "expressly conditional" acceptance, the original offeror may, of course, ***assent*** to the changes; in that event, the changes become part of the contract.

F. Additional term in acceptance: We turn now to the situation in which the offeree's response contains an ***"additional"*** term, i.e., a clause taking a certain position on an issue with which the offer does not deal at all. (We assume that the offeree's response is not made expressly conditional on the offeror's assent to this additional term.) There are two issues: (1) Does the additional term prevent the offeree's response from being an acceptance?; and (2) If not, under what circumstances can the additional term become part of the contract?

1. **Contract formed:** Of key significance is the fact that the additional term ***does not prevent the offeree's response from giving rise to a contract***. It is precisely in this situation that § 2-207 changes the common-law "mirror image" rule, by which the additional term would have been enough to make the offeree's response a counter-offer rather than an acceptance. Remember, § 2-207(1) says that "[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time ***operates as an acceptance even though it states terms additional to or different from*** those offered or agreed upon[.]"[3]

Example: Seller emails Buyer with an offer to sell Buyer green widgets. This offer says nothing about whether Seller is making any warranties. Buyer sends back a "purchase order" form that says, "Seller, by shipping, warrants that any goods will be fit for Buyer's particular purposes of re-selling the goods for use by children younger than 3."

Buyer's form ***constitutes an acceptance*** under § 2-207(1), even though the warranty term is an "additional" term. That is so because Buyer's form indicates an intent to enter into the proposed transaction, and does not make the deal expressly conditional on Seller's agreement to make the warranty. So regardless of whether the warranty term becomes part of the contract (we discuss this below), the important thing is that ***the fact that the two forms did not agree did not prevent a contract from coming into existence.*** (The same would be true if Buyer's form contained a "different" provision, i.e., one conflicting with a clause in Seller's offer.)

2. **Proposal for addition to the contract:** Under § 2-207(2), whether the additional term becomes part of the contract depends, in the first instance, on whether both parties are ***merchants***.

   a. **Who is a merchant:** "Merchant" is defined in § 2-104(1) to mean "a person who deals in ***goods of the kind*** or otherwise by his occupation holds himself out as having ***knowledge or skill peculiar to the practices or goods involved*** in the transaction.…" As Comment 2 to § 2-104 points out, in the offer-and-acceptance context the transactions at issue are "non-specialized business practices such as answering mail." Therefore, the Comment suggests, for purposes of § 2-207(2) ***almost every person in business*** will be considered a "merchant"; the Comment gives as examples ***banks*** and ***universities***.

3. **At least one party not merchant:** If at least one party is ***not a merchant***, the only way the additional term can become part of the contract is if the offeror ***explicitly assents*** to it. That is, the additional term becomes a "proposal for addition to the contract" (§ 2-207(2)), and must be accepted as if it were a self-standing offer. In this situation, § 2-207(2) does not change the common-law rule requiring affirmative assent.

4. **Both parties merchants:** But if ***both parties*** to the transaction ***are merchants***, § 2-207(2) makes a dramatic exception to common-law practices. The additional term ***automatically becomes part of the contract***, as a general rule. Only if one of three exceptions is triggered does the addition fail to become part of the contract. The three

exceptions are recited in § 2-207(2)(a), (b) and (c); the additional terms become part of the contract unless

> "(a) the offer ***expressly limits*** acceptance to the terms of the offer;
>
> (b) they ***materially alter it***; or
>
> (c) notification of ***objection*** to them has already been given [by the offeror] or is given within a reasonable time after notice of them is received."

a. Objection: Subsections (a) and (c) are aspects of the same concept, namely, that the addition will not become part of the contract if the offeror affirmatively ***indicates that he does not want it to***.

b. Materiality: The most important of the three exceptions is that given by (b), that the addition not be one which ***"materially alter[s]"*** the contract. No satisfactory definition of material alteration has emerged, and the issue is more or less faced anew in each case.

i. **Disclaimer of warranty:** A ***disclaimer of warranty*** will almost always be considered a ***material alteration***. See § 2-207, Comment 4. Therefore, the disclaimer term will not become part of the contract.

> **Example:** P, a software reseller, orders 142 copies of a software package from D in a series of transactions. For each transaction, P sends a purchase order and D follows up with an invoice. Both documents contain essentially identical terms governing price, quantity, shipping and payment. No reference is made to any disclaimer of warranties or a limitation of remedies provision. However, when D ships the software, each package of software has printed on its box (as part of a "box-top license") a disclaimer of all express and implied warranties. P then sells the software to its customers, and almost immediately starts receiving complaints about it. P sues D for various breaches of warranties. D defends on the theory that the disclaimer-of-warranty clause became part of the contract.
>
> *Held*, for P. The warranty disclaimer in the box-top license should be treated as a proposed additional term to the contract. Because the proposed term would have materially altered the contract, it could not have become part of the contract unless P expressly agreed to it (which P never did). Therefore, the disclaimer did not become part of the contract, and P may maintain its suit for breach of warranty. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991).

ii. **Arbitration clause:** A number of cases have focused on whether a clause calling for ***arbitration*** of disputes under the contract is a material alteration. The courts have been quite

split on this issue. Some have said that the clause always constitutes a material alteration, some that it never does, and some that its materiality depends on case-by-case factors such as custom of the particular industry involved.

5. **Recap of how additional terms are handled:** To review § 2-207's treatment of an "additional" term in the acceptance, let's consider the following hypothetical:

> **Hypothetical:** Buyer sends a purchase order to Seller for 100 widgets at a particular price on a particular day. The purchase order says nothing about the forum in which disputes should be resolved. Seller sends back an acknowledgment form, repeating the same product, price and delivery terms, but also including a clause providing for arbitration in the event of any dispute relating to the contract. Assume that both parties are merchants, and that Buyer makes no response once it receives the acknowledgment form.
>
> Under § 2-207(1), Seller's acknowledgment was a "definite and seasonable expression of acceptance," and consequently operated as an acceptance, even though it contained the additional term (the arbitration clause). Therefore, a contract has been formed. The arbitration clause is an "additional" term, since it deals with an issue not covered in Buyer's purchase order. Therefore, it becomes a proposal for addition to the contract. Since both parties are merchants, it will automatically become part of the contract unless one of the subsections of § 2-207(2) is triggered. Here, we assume that the purchase order does not "expressly limit acceptance to the terms of the offer," and the facts tell us that Buyer makes no objection.
>
> Therefore, the only event that could prevent the arbitration clause from becoming part of the contract would be if it "materially alters" the bargain. On this issue, as noted above, the courts are split. If the arbitration clause was found not to be a material alteration, that clause would become part of the contract. If the court *did* find it to be a material alteration, it would not become part of the contract, but the contract would continue without that clause (and ordinary judicial redress would be available to either party).

6. **Additional term in first document but not second:** As a brief aside, let's consider the much easier situation of an issue which is handled in the first document (the offer), but ***not in the second*** (the acceptance). For instance, suppose that the buyer's purchase order contains an arbitration clause, and the seller's acknowledgment form is silent on the issue of a forum for litigation. In this situation, § 2-207 says nothing specifically on point. However, it seems quite clear that, assuming that the seller's form was a "definite and seasonal expression of acceptance" (i.e., assuming that it did not so diverge from the offer on other terms that it was blocked from being an

acceptance), it will be deemed to have accepted ***all*** terms of the offer, not just those on which the writings agree. Therefore, the arbitration clause becomes part of the contract. See W&S, p. 13.

G. Different (conflicting) terms in documents: We turn now to one of the most troublesome situations with which § 2-207 must deal: the situation in which an issue is covered one way in the offering document and another (***conflicting***) way in the acceptance. In the terminology of § 2-207(1), the acceptance's term is one which is ***"different from"*** (rather than "in addition to") the corresponding term in the offer.

1. Two approaches: Courts and commentators have evolved two dramatically different approaches to this situation.

a. "Knockout" rule: A majority of courts, and most commentators, have subscribed to what is sometimes called the ***"knockout"*** rule. Under this approach, the conflicting clauses "knock each other out" of the contract, so that ***neither enters the contract***. Instead, a UCC "gap-filler" provision is used if one is relevant; otherwise, the common law controls. See, e.g., *Northrop Corp. v. Litronic Industr.*, 29 F.3d 1173 (7th Cir. 1994) (stating that "the majority view is that the discrepant terms fall out and are replaced by a suitable UCC gap-filler").

Example: Buyer and Seller are both merchants. Buyer sends a purchase order to Seller for 1,000 bicycles. The purchase order contains a clause in which Seller expressly warrants that the bicycles will not break for 1 year. Seller sends an acknowledgment form that matches the purchase order in all material respects, except that it contains a complete disclaimer of warranties. Buyer makes no response to the acknowledgment. Seller then ships the bicycles, some of which prove defective. Buyer wants to sue for breach of warranty. A court following the "knockout" rule will analyze the situation in the following steps:

[1] A contract was formed by the exchange of documents, since they matched well enough to indicate generally agreement about the terms of the deal.

[2] The disclaimer-of-warranties clause in the acknowledgment (the acceptance) materially altered the terms of the purchase order (the offer). Therefore, that clause did not become part of the contract, but was instead, under § 2-207(2)(b), merely a proposal for an addition to the contract. Buyer never accepted that proposal for addition.

[3] Buyer's warranty clause (bikes won't break for a year) and Seller's clause (complete disclaimer of warranty) squarely conflict, so these clauses "knock each other out," and each clause disappears.

[4] The contract then consists of the clauses on which the parties' forms agree (price, quantity, etc.), plus all relevant UCC gap-fillers. One of those gap fillers is an implied warranty of merchantability (§ 2-314), so the contract contains that implied warranty.

i. **Rationale:** Nothing in the text of § 2-207 explicitly mandates the "knockout" rule. But the majority of courts and commentators supporting the knockout rule point to Comment 6 to § 2-207, which provides that "where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract." (But opponents of the knockout theory argue that this language applies only to "confirming forms," not to a conflict between a form that is an offer and a form that is an acceptance. See W&S, p. 12.)

b. Alternative approach: A few courts and commentators have proposed an alternative to the knockout theory. Under this approach, the clause proposed in the second form (i.e., the acceptance) simply ***fails to have any effect***. The result is that the clause appearing in the offer enters the contract. This is the approach urged by Professor Summers; see W&S, p. 12.

2. Criticism: One powerful criticism of the "knockout" theory is that it leads to the result that "An offeror has been defrocked of his prime common-law prerogative, that of ***determining the basis on which he is willing to contract.***…" 34 Bus. Law. 477, 1484-86, quoted in Farns., p. 297.

a. Explanation: As this criticism points out, the knockout doctrine is much more devastating to the offeror's ability to control his offer

than is the "additional term" provision of § 2-207(2); the latter only applies where the variance is immaterial. With the knockout rule, by contrast, the offeror's term on a very major issue can be knocked out, and he can find himself being bound to a contract in which the UCC "gap-filler" becomes a term. For instance, an offeror/seller who is only willing to contract based on a complete disclaimer of warranties will, if the buyer's acceptance contains a conflicting warranty term, find himself bound to the § 2-314 implied warranty of merchantability.

H. Response diverges too much to be acceptance: Not every response which purports to "accept" an offer will in fact be regarded as an acceptance under §2-207(1). That section treats as an acceptance only a "definite and seasonable expression of acceptance." Thus a purported acceptance may in fact ***diverge so materially*** from the terms of the offer that it will ***not serve as an acceptance at all.***

1. **Agreement on bargained terms:** There is no hard-and-fast rule about what kinds of discrepancies between offer and "acceptance" will be great enough to prevent a contract from being formed. White and Summers (3rd Edition, p. 32) state the following general principle: "[I]n the usual purchase order-acknowledgment context the forms [do not fail to give rise to a contract] if [they] do not diverge as to price, quality, quantity, or delivery terms, but only as to the ***usually unbargained terms on the reverse side*** concerning remedies, arbitration, and the like."

I. Contract by parties' conduct: If the offer and "acceptance" diverge so much that there is no contract, and neither party begins to perform, that will be the end of the matter — neither party will have any liability to the other. But what often happens in this case of offer/acceptance divergence is that the parties go ahead and make full or partial ***performance***. In that case, the parties' ***conduct*** implicitly creates a contract.

1. **Solution:** The UCC recognizes that this can happen, by saying in § 2-207(3) that "Conduct by both parties which ***recognizes the existence of a contract*** is sufficient to ***establish a contract*** for sale although the writings of the parties do not otherwise establish a contract."

a. Two main scenarios: There are two main scenarios of "contract by conduct." These are where:

[1] **Too much divergence:** The parties exchange documents (say a purchase order and an acknowledgment), and the ***two documents diverge so much*** that the second one does not constitute an acceptance, but the seller ***ships goods*** that the ***buyer keeps***.

> **Example:** Buyer's purchase order is for 100 widgets at $5 each. Seller's acknowledgment form is for 200 widgets at $7 each. Buyer does not say anything in response to the acknowledgment form. Seller ships the 200 widgets, and Buyer keeps them. Even though the exchange of documents did not create a contract, the parties' conduct gave rise to a contract by performance, for 200 widgets (at a price to be supplied by the UCC's "gap filler" provision, discussed below, in this case, a "reasonable price").

[2] **Buyer keeps goods:** There are ***no writings***, or just ***one writing*** (e.g., a purchase order), but the seller ***ships goods*** that the ***buyer keeps***.

> **Example:** Buyer sends a purchase order for 100 widgets at $5 each. Seller does not send any acknowledgment or other writing, but ships the 100 widgets and Buyer keeps them. Even though there was no exchange of documents, the parties' conduct gave rise to a contract by performance, for 100 widgets at $5 each.

b. Summary: The basic idea is that if the parties behave in a way indicating that they ***think they have an agreement***, that agreement will be enforced even if there ***never was a formal offer or acceptance***, or even a recognizable ***attempt*** at making an offer or acceptance.

c. Terms: Where such a contract-by-conduct is formed, the ***terms*** "consist of those terms in which the writings of the parties agree, together with any ***supplementary terms*** incorporated under any other provisions of this Act." § 2-207(3). (These "supplementary terms" are called ***"gap fillers."***) For instance, the ***price term*** would be a "reasonable price at the time for delivery," as imposed by § 2-305's price "gap filler."

d. "Acceptance by conduct" can occur in non-UCC contracts: The principle that acceptance can occur by conduct applies also to ***non-UCC cases.*** Thus Rest. 2d, § 19 says that "the manifestation of

assent may be made wholly or partly by written or spoken words or ***by other acts*** or by failure to act."

i. **Acts during course of extended negotiations:** "Acceptance by conduct" often occurs during the course of ***extended negotiations*** that fail to culminate in words or documents that constitute acceptance. While the parties go back and forth on their attempts to form an explicit contract, one will start to perform, and this start of performance may justify the conclusion that that party was non-verbally accepting a then-outstanding offer.

Example: Owner negotiates over a period of time with Contractor to have Contractor re-pave Owner's driveway. At one point, Contractor sends a proposal to Owner listing a proposed price of $5,000. Owner sends a response, "$5,000 won't work, but how about $4,000?" Contractor doesn't make a verbal response, but shows up and paves the driveway. A court is likely to conclude that Contractor's work of paving the driveway constituted his acceptance by conduct of Owner's offer of $4,000.

J. Confirmation of oral agreement: So far, we have generally discussed only those situations where no contract exists up until the time the parties exchange documents. Sometimes, however, the parties initially reach an ***oral agreement***. Although in some cases this agreement may not be enforceable due to failure to comply with the Statute of Frauds (see *infra*, p. 275), it is nonetheless a contract. Therefore, a document subsequently sent by one party to the other cannot be viewed as an "acceptance." § 2-207 treats it as a separate category, the ***confirmation.***

1. **Additional terms in confirmation:** A confirmation containing terms that are ***additional*** to the oral agreement is treated exactly the same as an acceptance containing terms additional to the offer. That is, the confirmation's additional terms become part of the contract unless one of the three subsections of § 2-207(2) is satisfied. Since subsection (a) (offer expressly limiting acceptance to terms of offer) will never be applicable in the confirmation case, the additional terms in the confirmation become part of the contract unless they ***materially alter*** the oral agreement, or the party receiving the confirmation ***objects*** to the additional terms.

2. **"Different" terms in confirmation:** Assume now that a clause contained in the confirmation is ***"different"*** from a term on the same

issue reached in the oral agreement. In this situation, the court will almost certainly say that the different term in the confirmation does ***not*** enter the contract, even if the party receiving the confirmation fails to object. Furthermore, the "knockout" rule (which most courts apply in the case of a different term in the exchange-of-documents context; see *supra*, pp. 34-35) will almost certainly not be applied, and the term in the oral agreement will remain in force, rather than being "knocked out." This result is easily justified on the theory that if the parties have indeed reached an oral agreement, one party should not be permitted to contradict that agreement by his unilateral act.

3. **Request that confirmation be signed:** Suppose that, after an oral agreement, one party sends a confirmation, and ***requests that the other party sign and return that confirmation.*** In this kind of scenario, there will be ***no consequence*** if the recipient doesn't sign or return the confirmation — the deal is complete when the confirmation is received.

> **Example:** Buyer and Seller are both merchants. Buyer telephones Seller and says, "Send me 100 blue widgets, your Model 101, at $3, delivery to occur in 30 days." Seller says, "OK." Seller then faxes a confirmation, with a cover sheet that says, "Please sign and return this confirmation." Buyer doesn't sign the confirmation, but instead puts it in the file. The price of widgets rises, and Seller sends a notice (before 30 days have passed) saying "Because you didn't sign or return the confirmation, we have no deal and will not deliver."
>
> Seller has breached. The parties' deal was completed no later than the moment when Seller sent the confirmation (and probably was complete even earlier, at the moment of the oral agreement). Therefore, Buyer's failure to sign and return the confirmation had no effect, and Seller was obligated to fulfill the contract.

K. "Terms to follow" contracts (a/k/a "rolling" contracts): Goods are sometimes sold under what is sometimes called a ***"terms to follow"*** or ***"rolling" contract.*** In such a contract, the buyer, usually a consumer, orders and pays for the goods ***without seeing most of the contract terms.*** The detailed terms are then contained ***on or in the box*** containing the goods. When the buyer receives the goods, she is told that if she does not agree with the detailed terms, she has a certain time within which to return the goods for a full credit.

There are two interesting questions raised by such rolling contracts: (1) when is the contract formed? and (2) what are its terms? A court's answer to the second of these questions tends to depend on its answer to the first. There are two main approaches to the

first question.

1. **First approach: "Contract not formed until receipt":** A number of courts have taken the approach that ***no contract is formed until the buyer has received the goods and has kept them*** for beyond the prescribed return period. This approach tends to yield a contract that includes ***all of the seller's terms,*** on the theory that the action of the buyer in keeping the goods rather than returning them should be interpreted as an ***acceptance by performance,*** an acceptance that includes the buyer's assent to all of the seller's proposed terms.

   a. **The *Hill v. Gateway 2000* case:** Probably the best-known decision taking the "no contract formed until the buyer receives and keeps the goods" approach is ***Hill v. Gateway 2000, Inc.***, 105 F.3d 1147 (7th Cir. 1997). The author of the opinion was Judge (and former University of Chicago law professor) Frank Easterbrook, known for his economics-oriented approach to law. *Hill* involved the issue of what terms were included when consumer ordered a computer by phone, and ***first saw the detailed contract terms in a document contained in the box in which the computer was shipped.*** Easterbrook decided that (1) ***no contract was formed until the buyer received the comp***uter together with enclosed detailed terms and kept the computer beyond the prescribed return period; and (2) ***all of the detailed terms contained in the box became part of the contract.***

TABLE 2-1
RECAP: UCC § 2-207 Battle of the Forms[a]

Situation	Example	Test/Outcome
[1] B's form is silent; S's form has "***additional***" term; both parties are "merchants"	B (retailer), orders widgets from S. Order silent about implied warranties. S's acknowledgment says, "All warranties are hereby disclaimed." B makes no response.	**Rule 1:** There is a contract if S's doc doesn't diverge so much that it fails to be a "definite expression of acceptance." Here, there is a contract. **Rule 2:** The disclaimer becomes part of the contract *unless* (a) offer says acceptance must be ***limited*** to the terms of the offer (not present here); (b) disclaimer "***materially alters***" the deal; or (c) B ***objects*** to the disclaimer within a reasonable time (not present here). **Outcome:** Disclaimer doesn't become part of contract, because warranty disclaimers are always held to be "material alterations."
[2] Same as [1], but at least one party is ***not a merchant***	B (consumer), orders widgets from S. Order silent about implied warranties. S's acknowledgment says, "All warranties are hereby disclaimed." B makes no response.	**Rule 1:** There's a contract if S's doc doesn't diverge so much that it fails to be a "definite expression of acceptance." This didn't happen here, so there is a contract. **Rule 2:** Since at least one party (B) is not a merchant, S's warranty disclaimer becomes a "***proposal*** for addition to the contract," and won't become part of it unless B ***explicitly approves*** (which B didn't). **Outcome:** Since B didn't approve, the contract includes the standard UCC warranties.
[3] B's form and A's form have ***"different"*** (i.e., ***conflicting***) versions of same term	B (retailer), orders widgets from S. Order says, "B shall have 30 days to pay." S's acknowledgment says, "All sales are C.O.D." B makes no response.	**Rule 1:** There's a contract if S's doc doesn't diverge so much that it fails to be a "definite expression of acceptance." Here, there is a contract. **Rule 2 (Majority view):** The conflicting clauses (credit vs. C.O.D.) "***knock each other out.***" UCC gap-fillers, if any, apply. **Outcome:** The gap-filler on credit is that there is none, i.e., all sales are C.O.D. That's what applies.
[4] S's acceptance is made ***expressly conditional*** on B's assent to changes	B (retailer), orders widgets from S. S's acknowledgment says, "This acceptance is expressly conditional on your assent to all the terms on the rear of this form. If you object, notify us ASAP." One of the terms on the rear is a disclaimer of all warranties. B makes no response.	**Rule:** If "acceptance" containing changed terms is made "***expressly conditional on assent*** to the additional or different terms," then ***no contract is formed*** by exchange of documents. **Outcome:** No contract formed by B's order and S's acknowledgment. Unless the parties then make a contract by performance (e.g., S ships anyway, and B keeps the goods), there's no contract.

a. This table assumes that Buyer ("B") sends in an "order" (which is an offer) for goods, and Seller ("S") responds with an "acknowledgment" (which may or may not be an acceptance). This chart tells you: (1) Is there a contract?; and (2) If so, what are its terms? We cover only the most important scenarios here.

i. **Facts:** In *Hill*, the Ps (the Hills) ordered a computer from Gateway (D) by phone, apparently without being told anything

about the detailed terms that would govern the purchase. They paid by credit card before shipment. The computer arrived at their home, and inside the box was a contract document containing a variety of terms, ***including a mandatory-arbitration clause***. The document recited that all terms in it would become the parties' contract unless the customer returned the computer for a full refund within 30 days. The Hills kept the computer, then were unhappy with the computer's performance. They brought a federal-court class action on behalf of themselves and similarly-situated Gateway owners, claiming that Gateway was a racketeer and seeking treble damages. Gateway sought to dismiss the suit on the theory that the contract was not formed until the Hills kept the computer for 30 days, thereby agreeing to the terms-in-the-box, including the arbitration clause. The Hills seem to have argued, *inter alia*, that the contract was formed at the time they ordered, that the case was governed by UCC § 2-207, and that under that section the arbitration clause never became part of the contract.

ii. **Decision for Gateway:** Judge Easterbrook ***found for Gateway***, accepting the argument that the contract was only formed when the Hills kept the computer for 30 days, thus making the arbitration clause part of the contract.

(1) **§ 2-207 argument rejected:** Easterbrook rejected the Hills' argument that UCC § 2-207 should apply. The Hills had argued not only that § 2-207 should apply,[4] but that the way it should be applied was that the arbitration clause was an "additional term" to be construed as a "proposal for addition to the contract"; they further argued that because they were not "merchants," the proposal never became part of the contract (as it might have done had they been merchants, under the second sentence of § 2-207(2) — see *supra*, p. 32). But Easterbrook, describing § 2-207 as "the infamous battle-of-the-forms section," asserted that ***"when there is only one form, 'section 2-207 is irrelevant'."***

Note: Judge Easterbrook's conclusion in *Hill* that § 2-207 does not apply to

any case in which only one party uses a form is ***clearly incorrect.*** See, e.g., 71 Fordham L.Rev. 743 at 753: "Easterbrook was plainly wrong about section -2-207's applicability. Nothing in the text of the section limits it to transactions involving more than one form." Easterbrook's incorrectness is shown by Official Comment 1 to § 2-207, which says that the section applies "where an agreement has been reached ... orally ... and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed." (An oral agreement followed by one party's sending of a formal memorandum is obviously not a multi-form scenario, so Easterbrook's "only applies to multiple-form scenarios" rule cannot be correct.)

2. Second approach: "Contract is formed at time of order": The other major approach to the rolling contract problem is to hold that § 2-207 *does* apply, and that its application means that ***a contract is formed at the time of the order.*** Under this approach, the ***buyer*** is usually considered to be the ***offeror***, the ***seller*** is an **offeree** who is proposing additional or different terms, and at least where the buyer is a consumer those terms ***never become part of the contract*** unless the buyer expressly agrees to them (which she usually doesn't).

   a. *Klocek v. Gateway, Inc.*: The leading case applying this § 2-207-based approach is probably another Gateway case, ***Klocek v. Gateway, Inc.***, 104 F.Supp. 1332 (D. Kan. 2000). The court there was a mere federal district court rather than the mighty Seventh Circuit that decided *Hill*, but the *Klocek* court seems to most observers to have gotten the better of the argument.

      i. **Facts:** The facts of *Klocek* were a virtual repeat of those of *Hill*. Plaintiff ordered a Gateway computer, Gateway shipped one to him, and the box arrived with a standard form contract inside containing an arbitration clause. P brought a class action for breach of warranty, and Gateway claimed, as it had in *Hill*, that the terms of the form contract, including the arbitration clause, became part of the contract when P kept the computer beyond the return period. The only difference in the factual settings was that this time, the return period was limited to five days instead of 30 days.

      ii. **Holding:** But this time, the court ***found for P***, holding that the ***arbitration clause never became part of the contract,*** so that P's judicial suit could go forward. In reaching this conclusion,

the court completely ***rejected*** the *Hill* decision. Instead, the *Klocek* court concluded that ***§ 2-207 applied***, and produced the result that the arbitration clause never became part of the contract.

(1) **§ 2-207 applies to a single-form case:** First, the court concluded that *Hill* was simply wrong when it concluded that § 2-207 could not apply to a case involving only one form. The court acknowledged that § 2-207 *often* involves "battle of the forms" cases, i.e., cases in which each party uses a preprinted form. But, the court said, § 2-207 by its terms "applies to an acceptance or written confirmation [and] states nothing which requires another form before the provision becomes effective." Therefore, § 2-207 applied to this fact pattern in which buyer places an order without using a form, and seller ships the product together with a form document (which in this case the court referred to as Gateway's "Standard Terms").

(2) **Buyer is offeror:** The court next discussed who was the offeror and who the offeree. Here, as in the typical consumer transaction, the court said, ***"the purchaser is the offeror, and the vendor is the offeree."*** Whether the transaction took place by phone, mail order or in-store purchase,[5] Gateway accepted either by agreeing to ship, and/or actually shipping, the computer. (The court cited § 2-206(b) on this point: "An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment[.]")

(3) **Status of Standard Terms:** Since Gateway accepted by shipping or agreeing to ship, the court next had to determine the status of Gateway's inclusion of its Standard Terms with the product. Under § 2-207, the court said, the Standard Terms constituted "either an expression of acceptance or [a] written confirmation." It didn't matter which; either way, the contents of the Standard Terms were ***proposals for "additional or different terms."*** Since

there was nothing to indicate that Gateway had made its acceptance conditional upon the buyer's assent to Gateway's Standard Terms, and since buyer (P) was not a merchant, under § 2-207(2) "any additional or different terms ***did not become part of the parties' agreement unless [P] expressly agreed to them."*** There was no evidence that P had agreed to any of the additional or different terms, including the provision that by keeping the computer for five days P was agreeing to make all of the Standard Terms part of the contract. Therefore, P's act of keeping the computer had no legal effect, and none of the additional terms in the Standard Terms document (including the arbitration clause) ever became part of the contract. Consequently, P did not have to arbitrate, and could sue instead.

3. **Evaluation:** As between the basic approach of *Hill* on the one hand (§ 2-207 does not apply to the rolling-contract scenario in which only seller uses a form, so no contract is deemed formed until buyer receives the goods and the seller's form), and *Klocek* on the other (§ 2-207 applies to the one-form situation, so a contract is formed at the time of the order, and if the buyer is a consumer any proposed additional terms don't become part of the contract unless agreed upon by the buyer), the *Klocek* view seems more in keeping with the intent of § 2-207.

L. Negotiations not involving standardized forms: In all of the categories considered above, we have assumed that one or both parties used standardized, non-negotiated forms. If the parties do not proceed via the standard form route, and instead send ***draft agreements*** back and forth between each other, together with letters proposing various changes, traditional offer and acceptance analysis must be used to determine what document contains enough information to be an offer, and what document constitutes the first bona fide "acceptance" under § 2-207(1).

In this actively-negotiated context, it may well be that there never do emerge both an offer and an acceptance, since deviations between one party's view and the other's are more likely to be considered significant (and thus fatal to the existence of a contract) than where standard form documents are exchanged. In this situation, there are two possible outcomes:

(1) the court will find that there simply was never any contract, and either party is free to walk away; or

(2) the court will find that ***by their conduct*** (e.g., by the seller's shipping the goods and the buyer's holding them or paying for them), the parties recognized the existence of an unwritten contract. In this latter situation, § 2-207(3) will be applied.

M. Electronic commerce, and its effect on contract formation: The rise of "electronic commerce" or ***"e-commerce"*** poses some special problems for determining whether a contract has been formed, and if so what its provisions are. In e-commerce, frequently one party (in a goods case, that party is usually the seller) is ***not represented by a human being*** who is consciously involved in making a decision to sell. Instead, the "I agree to sell" decision is essentially made by the computer, acting as what is sometimes called an ***"electronic agent."***

1. Contract formation: Let's consider the first question formed by the use of an electronic agent representing (let's assume) the seller: ***can a contract be formed*** when a human buyer interacts with a computer program or website that "represents" the seller?

a. Existing law unclear: Article 2 is ***unclear*** on this point — not surprisingly, the existing language (dating from the late 1950s) does not contemplate computer programs or other non-humans acting as contract-formers. There are few cases on point, perhaps because transactions large enough to be worth litigating over are not yet very often handled on even one side without human intervention. But it seems likely that, depending on how the order flow works, the computer can make an "offer," or can "accept" the buyer's "offer" (her order).

> **Example:** Let's take the garden-variety scenario in which Consumer orders a book from Amazon's website. Assume that at some point in the process, the website asks Consumer, "Do you confirm your order for *War and Peace*, price of $19.95 + $2 shipping and handling?" Consumer clicks the "yes" button (and leaves the "no" or "cancel" button unchecked). A court would likely conclude that Amazon has made an offer of *War and Peac*e, and that Consumer has accepted that offer, even though no human acted from the Amazon side.

2. Terms of the resulting contract: If a contract is formed by such an interaction of a human and an electronic agent, ***what are its terms?***

Let's assume that what we are talking about is a purchase by buyer from seller's website.

a. **Terms fully shown to human buyer:** If the seller's website ***fully disclosed*** the proposed terms to the buyer in a document that the buyer must have seen before the buyer indicated assent,[6] the odds are very good that a court interpreting Article 2 would conclude that ***all of the terms*** in the seller's set of proposed terms will ***become part of the contract.*** That's because, if the court is willing to treat the text of the seller's website as being a contract document at all, it will likely treat those terms as being equivalent to a document, and a buyer who signs the seller's proposed contract document will be deemed to have agreed to all non-unconscionable terms in it. That is, a party who receives the other party's contract form normally has a ***"duty to read"*** the form (i.e., is bound by its contents even if not read), and the computer version of a party's form would likely receive the same judicial treatment.

b. **Terms not necessarily shown to human buyer:** But now, suppose that due to lax lawyering or lax programming, the seller's website is designed in such a way that the buyer does ***not*** necessarily see (or assent to) all of the proposed terms. Here, a court may well find that terms that the buyer *could* have seen on the website but did not actually see or assent to ***do not become part of the contract.*** *Cf. Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002), where the court reached this result, so that the seller's website's terms did not become part of the resulting contract.

N. **Modern view of divergences in non-UCC cases:** In contracts that are not for the sale of goods (i.e., service contracts, construction contracts, and other contracts not falling under the UCC), a modern court may well follow the Second Restatement approach to divergences between offer and acceptance, rather than the common-law rule (by which the acceptance must mirror the offer).

1. **Matches UCC:** The Restatement's basic handling of such divergences ***matches*** the approach of UCC § 2-207(1):

a. **Acceptance forms a contract:** Thus Restatement 2d, § 61, states that "An acceptance which requests a ***change or addition*** to the

terms of the offer is ***not thereby invalidated*** unless the acceptance is made to ***depend on assent*** to the changed or added terms."

b. Conditional on assent to new terms: § 59, in turn, states that where a reply to an offer purports to accept that offer, but *is* conditional on the offeror's assent to the new terms, the offeree's response is not an acceptance, but is a counter-offer.

2. Does not specify what the terms are: But the Second Restatement does not attempt to specify ***what the terms of the contract*** are when the acceptance proposes new terms. So it's far less specific than the UCC in this regard.

Quiz Yourself on
ACCEPTANCE VARYING FROM OFFER

9. Fern owns an antique shop, Junk Is Us. She makes a written offer to buy Euphrates Antique Wholesalers' entire inventory of old string over a period of months. Fern's offer promises that she'll pay any invoice within 30 days, but says nothing about what happens if Fern doesn't pay on time. Nor does the offer says anything specific about what kind of response by Euphrates will constitute an acceptance. Euphrates immediately sends a written response that says, "We accept your offer." The response includes an extra clause providing for 8% interest (a rate typical in the industry) on overdue invoices. Fern makes no response to the overdue-invoices clause, receives the first shipment of string and places it into her inventory.

    (A) Is there a contract?

    (B) If your answer to (A) is yes, is the overdue-invoices clause part of that contract?

10. Wallflower Mart sends a purchase order to Harry's Wholesale Florist for 500 dried flower arrangements, style 402, for $3 each, to be paid in full 60 days after receipt of goods. Harry's sends back an acknowledgment form confirming that it will sell 500 dried flower arrangements, style 402, for $3 each, to be paid in full 10 days after receipt of goods. At the bottom of the acknowledgment form there is the following statement in

bold type: “This acknowledgment shall operate as an acceptance if and only if you assent to any terms in it that may be different from terms in your order. If you do not so assent, you should notify us immediately.”

(A) Assume that Wallflower receives the acknowledgment, reads it, and makes no response. Harry’s has not yet made shipment. At this moment, is there a contract? If so, what are the contract’s payment terms?

(B) Now, assume that Harry’s, not having heard any response to its acknowledgment form 5 days after sending it, sends the flower arrangements. Wallflower Mart receives the flowers and immediately resells them. Is there a contract? If so, what are its payment terms?

11. Willie Wonka places an order with Nuts To You for 1,000 pounds of Grade A almonds at $1.25/pound, to be delivered in five days to his chocolate factory. A clause in the boilerplate of the order form states that Willie Wonka will be entitled to recover his reasonable attorney’s fees should he have to sue over a problem with the contract.

(A) Nuts To You sends an acknowledgment form in which it states that it will sell Willie Wonka 1,000 pounds of Grade A almonds, to be delivered in five days to his chocolate factory. In the boilerplate language in the acknowledgment form, Nuts states that each party will be responsible for its own attorney’s fees should a suit arise from the contract. Is there a contract? If so, what does the contract say about who will pay Willie’s attorney’s fees if he has to sue?

(B) Same as part (A), except now assume that the Nuts To You acknowledgment form, instead of mentioning attorney’s fees, changes the grade of almonds to Grade B at a $1.25/pound price. (Grade B almonds are perceived in the marketplace as being significantly less good-tasting than Grade A ones, and typically sell for about 10% less.) Is there a contract? If so, what does the contract say about the Grade?

Answers

9. (A) Yes. This is a contract covered by Article 2 of the UCC (since it’s for the sale of goods). Under § 2-207(1), the fact that an “expression of acceptance” “states terms additional to or different from those offered or agreed upon” does not prevent that expression from operating as an

acceptance, unless the expression is "expressly made conditional on assent to the additional or different terms." Since Euphrates' response didn't indicate that Euphrates was unwilling to enter the deal if Fern wouldn't agree to the overdue-invoices clause, the response was not "expressly made conditional on [Fern's] assent" to the overdue-invoices clause, and that response therefore served as an acceptance.

(B) Yes. Unlike at common law, under the UCC terms in an acceptance that fail to match those in the offer can nonetheless become part of the contract in some circumstances. Under § 2-207(2), if both parties are merchants, an "additional" term in the acceptance will become part of the contract unless either: (a) the offer expressly limits acceptance to the terms of the offer; (b) the additional term "materially alters" the offer; or (c) the offeror gives notice of her objection to the additional term either before the acceptance, or within a reasonable time after the offeror receives notice of the additional term.

Here, Fern and Euphrates are both merchants. (Since we're told that Fern has an antique shop, we know she's in the business of dealing in the type of merchandise in question, i.e., antiques.) The facts make it clear that neither (a) nor (c) applies — Fern didn't indicate in advance that Euphrates had to accept exactly on the offer's terms, and she remained silent after she got notice of the new clause in the acceptance. As to (b), The overdue-invoices clause is probably not a material alteration to the contract, since: (i) it will apply only if Fern fails to do what she's already promised she'd do (pay on time), and (ii) a charge for overdueness that's of a size typical for the industry probably isn't a material change to the overall agreement. Therefore, § 2-207(2) says that the clause became part of the contract.

10. (A) No, there is no contract. Under § 2-207(1), an "expression of acceptance" acts as an acceptance even though it contains different or additional terms, "unless acceptance is expressly made conditional on assent to the additional or different terms." Harry's acknowledgment form was "expressly made conditional on assent," since the form made it clear that Harry's was only willing to enter into the transaction if Wallflower assented to all the terms in Harry's form, which Wallflower did not do. Wallflower's mere silence (and failure to comply with Harry's directive that Wallflower immediately indicate if it's unwilling

to assent to all aspects of Harry's form) doesn't change the fact that Wallflower has failed to assent to Harry's form in its entirety. Therefore, Harry's acknowledgment form was a rejection and counter-offer, which Wallflower could either accept or reject. As of the moment of the question, Wallflower hadn't done either, so there's no contract.

(B) Yes; it's not clear whether payment will be due on receipt, or within 10 days. Even though no contract was formed by the exchange of documents (see (A)), the parties later created a contract by their ***actions*** (i.e. shipping and accepting the goods). See § 2-207(3), first sentence ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.") The terms of the contract will be those "on which the writings of the parties agree" (*id.*, second sentence). The terms will also include any "supplementary terms incorporated under any other provisions" of the UCC (*id.*), so that the Code's "gap fillers" for the terms on which the parties did not agree also become part of the contract. In this case, payment on delivery would probably be such a gap-filler, since § 2-310(a) says that "Unless otherwise agreed, … payment is due at the time and place at which the buyer is to receive the goods." But a court might, instead, hold that the writings agreed on giving Wallflower at least 10 days (since even Harry's less-generous form gave Wallflower this much time). In that case, Wallflower would get the 10 days.

11. (A) Yes, there is a contract; Willie will have to pay his own fees. Under the UCC, the fact that documents purporting to be an offer and an acceptance deviate from each other does not prevent the two documents from forming a contract (assuming they agree on essential points). § 2-207(1) (see previous question, part (A), discussing this aspect.) When a term differs between the offer and acceptance, most courts apply the "knockout" rule. Under this approach, both conflicting terms are knocked out of the contract and replaced with a UCC gap filler, if one applies, or with a provision derived from the common law. Here, the parties have agreed on all major terms of the contract and disagree only as to who will be responsible for attorney's fees should a conflict arise. The conflicting terms will be knocked out and replaced with the common-law rule that each party to a commercial transaction is

responsible for his own fees should a dispute arise.

(B) There is no contract. Under these facts, the parties significantly disagree over a material term of the contract: the Grade (quality) of product to be shipped. As a general rule, when the purchase order and acknowledgment forms differ significantly as to price, quality, quantity, or delivery terms, courts will hold that the acknowledgment diverges so materially from the offer that it is not an acceptance at all but rather a counter-offer. Therefore, no contract has been formed yet, and Willie Wonka can either choose to accept Nuts To You's counter-offer or reject it.

VI. DURATION OF THE POWER OF ACCEPTANCE

A. Determining whether the acceptance is timely: The material which follows sets forth the rules for determining whether a power of acceptance exists at a particular moment. After this discussion, the rules for determining when an acceptance becomes effective are set out. For an acceptance to be valid, it must become effective while the power of acceptance is still in effect. When there is any doubt as to whether the acceptance is timely, the student must therefore pinpoint ***the moment at which the purported acceptance became effective***, and must then determine ***whether the power of acceptance was in effect at that moment***.

B. "Continuing offers" implied: An offer gives to the offeree a ***continuing power of acceptance*** until this power has been terminated. This power of acceptance may be terminated in a variety of ways.

C. Four ways of terminating offer: There are ***four main ways*** in which the offeree's power of acceptance may be terminated. Rest. 2d, § 36(1). These methods of termination are:

(a) ***rejection*** or ***counter-offer*** by the offeree;

(b) ***lapse of time***;

(c) ***revocation*** by the offeror; and

(d) ***death*** or ***incapacity*** of the offeror or the offeree.

We'll consider each of these methods separately.

By the way, these four ways in which the power of acceptance may be terminated apply only to what are called ***"revocable"*** offers, as opposed to irrevocable offers. The ordinary offer is revocable at the offeror's wish; an irrevocable offer is usually called an "option contract." Option contracts are treated *infra*, p. 52.

D. Offer terminated by offeree's rejection: If the offeree ***rejects*** the offer, her power of acceptance is terminated unless either:

[1] the ***offeror*** indicates that the offer ***still stands*** in spite of the rejection; or

[2] the ***offeree*** states that although she does not now intend to accept the offer, she wishes to ***consider it further***.

See Rest. 2d, §§ 38(1) and (2).

Example: *A* makes an offer to *B*, and adds, "I'll keep this offer open for a week." *B* rejects the offer the following day, but later in the week attempts to accept it. There is no contract, since *B*'s power of acceptance has terminated when he rejected the offer. But now, suppose that, instead of rejecting the offer outright, *B* had said to *A*, "I'm pretty sure I don't want to take your offer, but I'd still like to think about it." Here, the power of acceptance would *not* have been terminated.

Similarly, if *B* had rejected the offer outright, but *A* had said, "Think about the offer some more," *B*'s power of acceptance would not have terminated. See Rest. 2d, § 38, Illustr. 1.

E. Counter-offer terminates power to accept: If the offeree makes a ***counter-offer***, his power to accept the original offer is terminated just as if he had flatly rejected the offer.

Example: *A* offers to sell *B* Blackacre for $5,000, stating that the offer will remain open for 30 days. B replies, "I'll give you $4,800 for the property." *A* rejects that proposal. *B* then says, "I accept at $5,000." Because *B*'s counter-offer terminated his power of acceptance, there is no contract. See Rest. 2d, § 38, Illustr. 1.

1. Contrary statement of offeror or offeree: But just as is the case with a rejection, a counter-offer does not terminate the power of acceptance if either the offeror or the offeree ***indicates otherwise***.

Example: Suppose that on the facts of the above example, *A* had said, "I'll shake hands on the deal right away at $4,800. But if you won't take $4,800, I'd like to think about your $5,000 price for the rest of the 30 days." This would not have been a rejection, and the power of acceptance would not have been terminated — although *A* would thereby have made a counter-offer, his indication that he wished to keep the original offer under advisement would have been sufficient to prevent his power of acceptance from being terminated.

Note: Recall that an offeree's response may, under UCC § 2-207(1), be a valid

acceptance, rather than a counter-offer, even if it contains some terms different from or in addition to those of the offer. See *supra*, p. 29. The offeree's power of acceptance is terminated only when his response is a true counter-offer, rather than a qualified acceptance of the sort referred to in § 2-207(1).

2. **Counter-offer when original offer is irrevocable:** If the offer is ***irrevocable***, a counter-offer will not terminate the offeree's power of acceptance. This rule is discussed as part of the general treatment of irrevocable offers (principally "option contracts") *infra*, p. 52.

3. **Distinguish counter-offer from exploration:** Be careful to distinguish a counter-offer from a response by the offeree that is too ***equivocal*** or ***uncertain*** to be a counter-offer, and that instead merely ***explores the possibility of some other arrangement*** while keeping the original offer alive. Statements like ***"Would you consider***...?" or "I might be interested instead in ..." will typically have this non-counter-offer effect.

Example: On Feb. 1, Seller writes to Buyer, "I'll sell you 2,000 widgets @ $20; you must take all or none." On Feb. 5, Buyer faxes Seller, "Would you consider letting me buy 1,800 at the $20 price?" Seller makes no response. On Feb. 9, Buyer faxes an order for all 2,000 at $20.

Buyer's order for all 2,000 is a valid acceptance. That's because Buyer's Feb. 5 fax, although it explored an alternative arrangement, was not so definitive that it should be considered a counter-offer (which would have had the effect of terminating Seller's offer). Instead, the Feb. 5 fax had no effect on the validity of the Feb. 1 offer, so that offer remained in place to be accepted by Buyer on Feb. 9.

F. Lapse of time: Because the offeror is "master of his offer," he can set a time limit for acceptance. At the end of this time limit, the offeree's power of acceptance automatically terminates by ***"lapse."*** See Rest. 2d, § 41(1).

1. **Expiration after reasonable time:** If the offer does not set a time limit for acceptance, the power of acceptance terminates "at the end of a ***reasonable time period.***" Rest. 2d, § 41(1).

   a. Question of fact: The court must determine what a reasonable time for acceptance is as a question of fact, "depending on all the circumstances existing when the offer and attempted acceptance are made." Rest. 2d, § 41(2).

   b. Offer made by mail: If the offer is made by mail, the Second Restatement takes the position that an acceptance is, as a general

rule, timely if it is mailed the same day that the offer is received. Rest. 2d, § 40(3).

c. Speculative transactions: If the offer relates to the sale of an item that is subject to sharp fluctuations in value, a reasonable time for acceptance would probably be shorter than if the item has a relatively stable value. See Rest. 2d, § 40, Comment f.

d. Offeror's tacit approval of late acceptance: If the offeree does not accept until after the time for acceptance has lapsed, the acceptance is invalid, and the offeror is under no obligation to notify the offeree that his acceptance is invalid. However, the late acceptance acts as an ***offer***, and may then be accepted by the original offeror. Furthermore, the silence of the original offeror may be the kind of manifestation of assent which would constitute tacit acceptance; see *supra*, p. 23, for a discussion of acceptance by silence. C&P, p. 89.

e. Direct negotiations: When parties are bargaining face-to-face or over the telephone, the power of acceptance continues ***only during the conversation***, unless the parties' words or actions indicate that they intend the power of acceptance to continue. See Rest. 2d, § 41, Comment d.

G. Revocation: Except in the case of an option contract (see *infra*, p. 52) the offeror is free to ***revoke*** his offer at any time before it is accepted. The following rules determine when a revocation becomes effective:

1. Effective upon receipt: *A revocation by the offeror does not become effective until it is received by the offeree.* Rest. 2d, § 42.

> **Example:** *A* sends *B* an offer by mail to buy Blackacre. *A* then sends a letter revoking his offer, but before *B* receives the revocation, *B* dispatches his own acceptance. The offer is not revoked until *B* actually receives the letter of revocation. Since *B*'s acceptance was effective upon dispatch (see *infra*, p. 60), there is a contract.

a. Contrary state statutes: However, several states (e.g., California) have ***statutes*** making revocations effective upon ***dispatch***.

2. Lost revocation: If the letter or telegram revoking the offer is ***lost*** through misdelivery, the revocation ***never becomes effective***.

3. **What constitutes receipt of revocation:** The offeree is deemed to have received the revocation when it comes into his own possession, the possession of someone authorized to receive it for him, or when it is put into his mailbox.

> **Example:** *A* sends a letter of revocation to *B*. The letter is delivered to *B*'s house, where a servant takes it and misplaces it. *B* is deemed to have received the revocation when his servant received it, even though *B* never actually sees the letter. Had the letter been put in *B*'s mailbox, that would have constituted receipt, even if the letter had then been stolen from the mailbox.

   a. **UCC approach:** The UCC applies virtually the same test for determining when a revocation (or any other notice) has been "received." See UCC § 1-202(e).

4. **Indirect communication of revocation:** If the offeror behaves in a way ***inconsistent with an intention to enter the contract*** she has proposed, and the offeree learns indirectly that the offeror has taken such an action, there is a revocation, even though the offeror never intended to communicate directly with the offeree.

> **Example:** *A* offers to sell Blackacre to *B* at a stated price, and gives *B* a week in which to respond. Within the week, *A* contracts to sell the land to *C*, and *B* learns of this through a tenant of Blackacre. *B* nonetheless sends a formal acceptance, which is received by *A* within the week. There is no contract between *A* and *B*, because *A*'s offer to *B* was revoked at the time that *B* learned that *A* had made the contract with *C*. See Rest. 2d, § 42, Illustr. 1.

   a. **Where offeree learns of offer made to third party:** As the above example indicates, there is an indirect revocation when the offeree learns that the offeror has taken a ***definite step*** inconsistent with the proposed contract, as by selling the land in question to another.

      i. **Negotiations or offer not enough:** But the mere fact that the offeror has entered into ***negotiations*** with a third person, or even that she has made an ***offer*** to a third person, is generally ***not*** sufficient to constitute a revocation when the original offeree learns of it.

      ii. **Mere rumor not sufficient:** Similarly, if the offeree merely hears ***rumors*** that the offeror has or will take action inconsistent with the offer, and she reasonably disbelieves the rumor, there is no revocation, even if the rumor turns out to

have been true. Rest. 2d, § 43, Comment d.

iii. **Act not learned of by offeree:** If the offeror takes an act inconsistent with the outstanding offer (as by selling land to a third person) but the offeree does ***not*** learn of the inconsistent act, his power of acceptance is ***not revoked.*** So the offeree can then accept the contract (assuming her power of acceptance hasn't terminated for some other reason, such as lapse of time), and if the offeror does not perform, sue him for breach.

Note: Not all offers are revocable. A discussion of various kinds of irrevocable offers is given *infra*, p. 52.

5. Revocation of general offer: Suppose that an offer has been made by ***newspaper*** advertisement or other general ***public notice***. If so, it may be revoked by a similar general notice (e.g., publication in the same newspaper as the original offer).

a. Offeree does not learn of revocation: Such a revocation by general notice will be effective even if one of the potential offerees ***does not learn about it*** and acts in reliance on the offer (e.g., by capturing a criminal to get a reward.) Rest. 2d, § 46.

H. Death or incapacity of offeror or offeree: If either the offeree or the offeror ***dies***, or if either loses the ***legal capacity*** to enter into the contract (e.g., she becomes insane; see the discussion of capacity, *infra*, p. 486) the power to accept is ***terminated.*** This is so even if the offeree does not learn of the offeror's death or incapacity until after he has dispatched what he intends as an acceptance. See Rest. 2d, § 48.

Table 2-2
RECAP: Ways a Revocable Offer Can Terminate

Method	Example	Notes/Variations
Rejection by offeree	On 1/1, A offers to sell Blackacre to B for $100K. On 2/1, B says, "No thanks." On 3/1, B says, "I accept." There's no contract, because B's power of acceptance ended when he rejected on 2/1.	But the rejection *won't* terminate the power of acceptance if *either*: • Offeror indicates the offer still stands (*Example:* At left, after B says "No thanks" on 2/1, A responds, "Why don't you think about it some more?" The offer remains open.) OR • Offeree states that she doesn't intend to accept now but wants to keep considering it.
Counter-offer by offeree	On 1/1, A offers to sell Blackacre to B for $100K. On 2/1, B says, "I'll pay you $75K." On 3/1, B says, "I changed my mind; I accept the $100K offer." There's no contract,because B's counter-offer on 2/1 terminated B's power of acceptance.	Same as above (for rejection). That is, the counter-offer won't terminate the power of acceptance if *either*: • Offeror indicates the offer still stands (see above *Example* in Rejection); OR • Offeree states that she doesn't intend to accept now but wants to keep considering it.
Revocation by offeror	On 1/1, A offers Blackacre to B for $100K. On 1/2, A sends telegram "Offer revoked" (which B gets that day). On 1/3, B sends acceptance. No contract, because A's revocation terminated the offer.	• Revocations (unlike properly-addressed acceptances) are not effective until ***received***. • Revocation can be ***indirect.*** For instance, at left, suppose that on 1/2, B learns from a third party that A has sold to C. That's an indirect revocation, so B can't accept any longer.
Lapse of time	On 1/1, A offers publicly-traded stock to B. Offer will lapse when A's offer says it will lapse. If offer is silent, it will lapse "after a reasonable time."	What's a "reasonable time" depends on circumstances. Two rules of thumb: • In face-to-face or phone negotiations, offer usually lapses at end of conversation. • In fast-moving markets, offer lapses earlier than in slow-moving ones.
Death or incapacity of offeror or offeree	On 1/1, A offers Blackacre to B, saying, "Offer will remain open for one month." On 1/3, A dies. On 1/4, B "accepts" (not knowing of A's death). A's death made the offer terminate on 1/3, so the "acceptance" was not effective.	If it's an "option" contract (irrevocable because consideration was paid for it to remain open), death of offeror or offeree does *not* terminate the offer.

1. **Exception for objective theory:** Observe that the "revocation by death" rule, when it is applied to an offeror's death that is unknown to

the offeree, is a sharp exception to the general objective theory of contracts — under the objective theory, "a manifestation of assent is effective without regard to actual mental assent" (Rest. 2d, § 48, Comment a), so the offeror's unseen death should not terminate his assent. See Farnsworth, § 3.18.

2. **Option contracts:** If the offer is an option contract (i.e., an irrevocable offer), the offeree's power to accept it is ***not*** terminated by the death or incapacity of either party. Thus if the offeror dies before acceptance, the offeree can by accepting bind the offeror's estate; similarly, if the offeree dies before accepting, his estate may choose to exercise the option. See Rest. 2d, § 37. Option contracts are discussed below.

3. **Impossibility of performing contract:** Even in the option contract case, however, the death of one of the parties may, although not preventing the formation of a contract, render the performance of the contract impossible. For the consequences of impossibility of performance, see *infra*, p. 432.

I. Supervening illegality: If a contract that would have been legal at the time the offeror proposed it becomes ***illegal*** through a new statute (e.g. a new usury law), the power of acceptance is terminated. (For the consequences of illegality occurring ***before*** the offer, see the section on Illegality, *infra*, p. 460.)

J. Irrevocable offers: The ordinary offer is ***revocable*** at the will of the offeror. This is so even though the offer ***states that it will remain open for some stated period of time***, and even though that statement is in writing.

> **Example:** *A* writes to *B*, "I hereby offer to sell you Blackacre for $100,000. This offer will remain open for 30 days. You must accept in writing." After 20 days, *A* dies, unbeknownst to *B*. On the 24th day, *B* sends a letter of acceptance. The letter of acceptance will be ineffective, because the offer lapsed when *A* died (see p. 50 *supra*); the fact that the offer said that it would remain open for 30 days is irrelevant.

1. **Exceptions:** There are, however, several ***exceptions*** to the general rule allowing revocation:

   [1] the standard "***option contract***";

[2] "***firm offers***" under the UCC; and

[3] temporary irrevocability as the result of the offeree's ***part performance*** or ***detrimental reliance***.

We consider each of these exceptions in turn.

2. **The standard option contract:** One way to make an offer irrevocable is for the offeror to grant the offeree an ***"option"*** to enter into the contract. The irrevocable offer so formed is usually called an "option contract."

   a. **Common-law requirement of consideration:** At common law, the only way an option contract could be formed was if the offeree gave the offeror ***consideration*** **—** essentially, something of value **—** in return for the offer. (See the chapter on Consideration, p. 85, *infra*.) Otherwise the so-called "option" was revocable.

   b. **Recitals of consideration sufficient under Restatement:** But the modern approach, exemplified by the Second Restatement, does ***not*** continue this common-law requirement that an option be supported by ***actual consideration***. Rest. 2d, § 87(1)(a), provides that a written and signed option contract can be formed without the actual giving of consideration as long as it ***"recites a purported consideration*** for the making of the [irrevocable] offer." Thus the option contract need merely say "Upon consideration of $1.00 rendered this day, I promise to keep this offer open for two weeks," and the option contract is enforceable. This is the case even though no dollar is ever paid.

      i. **Gratuitous options:** Under the Restatement, even if the offeror ***states that his offer is irrevocable*** for a certain period, and even if he uses the word "option," the offer is nonetheless ***revocable*** unless there is a written recitation to the effect that consideration has been paid, *or* consideration has in fact been paid.

      Example: On Feb. 1, *A*, knowing that *B* desires to purchase Blackacre, sends a letter to *B* saying, "I hereby grant you an option to purchase Blackacre from me for $100,000 cash. This offer shall be irrevocable until March 1." *B* does not give *A* anything of value in return for this promise of irrevocability. On Feb. 27, *A* sends *B* a telegram, "Sorry, I have to revoke your option." On Feb. 28, *B* shows up at *A*'s premises with $100,000 cash, demanding to purchase the property.

Even under the Restatement (and modern) view, *A* was entitled to revoke, and *B* therefore has no ability to accept and no claim for breach. (But the offer would be irrevocable until March 1 if *A*'s letter had also said that the option was granted "in consideration of your having paid me $1," even if no dollar was ever really paid. Also, if *B* relies to his detriment on the promise of irrevocability, such as by making preparations, B's reliance may cause the offer to become temporarily irrevocable; see *infra*, p. 58.)

c. Counter-offer does not terminate power of acceptance: If an irrevocable offer exists (whether because consideration was paid or because, under the Restatement, there was a recital of consideration), ***the usual rule that a counter-offer terminates the power of acceptance does not apply***.

Example: In return for a payment of $50 by Buyer, Seller gives Buyer a two-month option to purchase a certain tract of land on certain terms. Before the option expires, Buyer sends Seller a letter stating that it will exercise the option if Seller will give better terms. Soon afterwards, Buyer attempts to exercise the option on the original (less favorable) terms. Seller claims that Buyer's attempt to get better terms constituted a counter offer which terminated the option contract.

Held, Buyer's attempt to get better terms did not terminate the option contract. "If the original offer is an irrevocable offer [as in the case of an option contract] the rule that a counter-offer terminates the power of acceptance does not apply." *Humble Oil & Refining Co. v. Westside Investment Corp.*, 428 S.W.2d 92 (Tex. 1968).

3. "Firm offers" under the UCC: The UCC allows the formation of an irrevocable offer under certain circumstances even if no recitation of the payment of consideration is made. UCC § 2-205 creates so-called ***"firm offers."*** That section says that an offer to buy or sell goods is ***irrevocable*** (i.e., is a "firm offer") if the offer meets three conditions:

□ it is by a ***merchant*** (defined in § 2-104 to mean a person who "deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction"); and

□ it is in a ***signed writing***; and

□ it gives ***explicit assurance*** that the offer will be held open.

Such an offer is irrevocable even though there is ***neither consideration nor a recital*** that consideration has been paid.

a. Reasonable time period: If the UCC firm offer offer does not state for how long a time the offer will be held open, it is irrevocable ***"for a reasonable time."*** (§ 2-205).

b. Stated time: If the offer states a time period during which it is irrevocable, that time period controls.

c. Three month limit: Whether or not a time period is stated, an offer under §2-205 ***cannot be made irrevocable for a longer period than three months***. (If the offeree gives consideration for the irrevocability, the offer will be irrevocable for whatever period is stated. § 2-205 deals only with firm offers for which no consideration is given.)

> **Example:** On July 1, Dealer, a car dealer, sends a signed email to Consumer offering to sell Consumer a Model X car with certain specs for $20,000; the email says that the offer "will remain open until the end of the year." On Nov. 1, Dealer phones Consumer to say, "The offer is withdrawn." Consumer immediately purports to accept, citing the "open until the end of the year" language.
>
> No matter what the offer said, it was not irrevocable under § 2-205 past September 30 (three months). Therefore, Dealer's revocation was effective, and Consumer's acceptance was not effective. (But if Dealer had purported to revoke on *August 1* and Consumer purported to accept on August 2, then the revocation would have been ineffective and the acceptance would have been effective.)

d. Forms supplied by offeree: If the firm offer is contained on a form drafted by the offer***ee***, the offer is irrevocable only if that particular "firm offer" clause is ***separately signed by the offeror***. See Comment 4 to § 2-205.

e. Effect if not by a merchant: Be on the lookout for a purported firm offer that relates to a sales contract, but that is ***made by a non-merchant*** — such an offer is ***not firm***, and will therefore be ***revocable***.

> **Example:** Consumer sends a letter to Furniture Co. offering to sell it some used office shelving presently on the walls of Consumer's house. The letter says that the offer "will remain open for the next 60 days." After 40 days, Consumer sends another letter, saying "I sold the shelving to someone else."
>
> This revocation letter is effective, because Consumer is not a "merchant," and only "merchants" can make firm offers. (Remember that § 2-204 says that a merchant is one who "deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.") For purposes of firm offers, virtually any person who is making an offer during the course of her business is a "merchant," but Consumer does not meet this definition. Consequently, the offer was revocable even though it recited that it wasn't.

f. Effect if not firm: Suppose a merchant makes an offer that almost,

but not quite, satisfies the UCC firm-offer rules. When this happens, the offer ***may still be a valid and open offer*** — as long as the merchant offeror has not revoked the offer as of the moment in question (and it hasn't lapsed by the passage of more than a "reasonable time" under the circumstances), it's ***still valid even though it's not "firm".***

Example: Merchant makes an offer of particular goods at a particular price to Customer "Good for the next 12 months." Five months go by, at which point Customer purports to accept. The acceptance will form a contract — even though the offer was not firm beyond three months (the limit on firm offers under § 2-205), it was still an ordinary offer, since it hasn't been revoked or lapsed for passage of time. Therefore, it was capable of being accepted.

i. **Same rule in non-UCC cases for option without consideration:** By the way, a very similar principle applies in the non-UCC context: when an offer purports to be irrevocable (i.e., to be an option), but isn't because of lack of consideration or because of some other contract term, ***the offer can still be accepted until it is revoked.***

4. Part performance or detrimental reliance: ***Part performance*** or ***detrimental reliance*** by the offeree may render the offer ***temporarily irrevocable***. This exception is sufficiently complex and important that we consider it as a separate section, beginning in the next paragraph.

K. Temporary irrevocability caused by part performance or detrimental reliance: There are a number of situations in which an offeree might, before the formation of a formal contract, take action in ***reliance*** upon the offer. She might, for instance, ***begin the performance*** that is called for by an offer looking to a unilateral contract. Or, she might make costly ***preparation*** in anticipation of a contract before she in fact makes the promise necessary for acceptance.

Modern courts, and the Second Restatement, therefore recognize several situations in which an offeree's actions in reliance upon an offer may render that offer ***temporarily irrevocable***. The three main situations in which this may occur, each of which is treated as a separate numbered section below, are:

- the offer is for a ***unilateral*** contract, and the offeree ***begins to perform***;
- it is not ***clear*** whether the offer is for a unilateral or bilateral

contract, and the offeree ***begins to perform***; and

□ the offeree makes ***preparations*** prior to acceptance (whether acceptance is to be by promise or by performance).

Although the offeree obtains protection in each of these situations, the degree to which s*he* is bound, and the extent of the protection given to her, are different in the three situations.

1. Offer for unilateral contract: If the offer makes it clear that acceptance can occur only through performance, and not through promise (i.e., the offer is for a unilateral contract), the ***beginning of performance*** by the offeree creates an ***option contract***. That is, ***once the offeree starts to perform, the offer becomes temporarily irrevocable***. Rest. 2d, § 45(1).

Example: D offers to sell a particular piece of property at a particular price to X, and also offers to pay P (a real estate broker) a commission if X buys the property. Both offers have a 6-day time limit. Shortly before expiration of the 6 days, D revokes both offers. Then (still before the end of the 6 days) X agrees to buy the property on the terms originally proposed by D, D refuses, and P sues D for the commission.

Held, for P. D's offer to P was for a unilateral contract (since P was to accept by performance, i.e., by finding a willing buyer). Assuming that P had begun to perform before he received notice of D's revocation (an issue to be left to the trial court), this beginning of performance made D's offer of a commission irrevocable. Since P later completed the desired performance (finding a willing buyer), he is entitled to the commission. *Marchiondo v. Scheck*, 432 P.2d 405 (N.M. 1967).

a. Offeror's duty conditional upon complete performance by offeree: Although in this unilateral contract situation, the beginning of performance by the offeree makes the offer irrevocable, the offeror's duty under the contract is conditional on the offeree's ***completing*** performance as specified in the offer. Rest. 2d, § 45(2). He must not only do whatever is specified in the offer, but he must do it within the time specified in the offer.

Example: Mrs. Hodgkin, a widow, writes to her daughter and son-in-law, the Brackenburys, who live in another state. The letter states that if the Brackenburys give up their home, and come to live with and care for Mrs. Hodgkin during her life, Mrs. Hodgkin will leave them her farm when she dies. The Brackenburys give up their home, move in with Mrs. Hodgkin, and begin caring for her.

No contract exists until the Brackenburys have completed the performance asked for in Mrs. Hodgkin's offer (i.e., until they have cared for her up to her death). However, because the Brackenburys have begun to perform, Mrs. Hodgkin is bound by an option contract, and her offer is irrevocable as long as the Brackenburys continue to perform. The Brackenburys are not bound by any

contract, and may cease performance whenever they wish (thus declining to exercise their option). See *Brackenbury v. Hodgkin*, 116 Me. 399 (1917). See also Rest. 2d, § 45, Illustr. 6 (drawn from the *Brackenbury* case).

b. Two limitations: There are two important limitations to the types of situations with which Rest. 2d § 45 is designed to deal:

i. **Unilateral contract:** First, § 45 is limited to cases where the offer is for a ***unilateral*** contract, i.e., where the offer calls for acceptance by ***performance***, rather than by promise. (If the offer does not make clear whether acceptance is to come by promise or performance, Rest. 2d, § 62, not § 45, applies; § 62 is discussed below.)

ii. **Preparations for performance:** Secondly, § 45 takes effect only when the offeree starts the ***actual performance*** requested by the offer. It does not take effect upon ***preliminary preparations*** that are not explicitly called for by the offer.

Example: D holds a mortgage on P's property. D offers to give P a $780 reduction in the amount of the principal if P will pay off the mortgage before the end of May. In late May, P goes to D's house and tells him "I have come to pay off the mortgage." D replies that he has sold the mortgage. P shows that he has enough cash to pay the principal less the $780 discount, but D refuses to take it. P (who has contracted to convey the property free and clear to someone else) is then required to pay the full principal amount of the mortgage to the person who bought it from D. P sues D, claiming that P accepted an open offer for the $780 reduction.

Held, for D. The only act requested by D's offer was the actual tender of payment. Until that tender, D was free to revoke his offer. Since D revoked before P made the actual tender, there was no contract. *Petterson v. Pattberg*, 161 N.E. 428 (N.Y. 1928).

Note: *Petterson* was decided before there was a Restatement. Nonetheless, it is probable that a court today would agree that no ordinary contract came into existence. P's act of contracting to sell the property free and clear to another, and his act of going to D's house with the cash, would probably be held to be merely ***preparations*** to perform, not the beginning of actual performance. Therefore, Rest. 2d, § 45 would not apply. However, P would today probably be able to recover "to the extent necessary to avoid injustice" under Rest. 2d, § 87(2), discussed *infra*, p. 59. (§ 45 and § 87(2) differ in that a plaintiff under § 45 gets the full "expectation" measure of damages under a contract, i.e., the lost profit, whereas a plaintiff under § 87(2) gets only his "reliance" damages, i.e., the amount by which he has suffered by relying on the offer. In the *Petterson* case, both measures seem to produce the same result, $780.)

(Incidentally, where the performance that is requested is payment, all the offeree need do to fully accept is to ***"tender"*** payment, that is, to show that he has payment on hand and that he is willing to transfer it. Thus in the *Petterson*

situation, had P been able to whip out his money and say, "I'm here to pay off the mortgage" before D had been able to say "I revoke," there would have been a full acceptance, even had D refused to take the money. This result would be true even if § 45 did not exist.)

c. Offer explicitly revocable: Even if the offeree starts the actual performance requested by the offeror, the offer will not be irrevocable if the ***offer itself*** makes clear that a right of revocation is ***reserved*** to the offeror. See Rest. 2d, § 45, Comment b.

d. Prior common-law view: Prior to the 1932 adoption of the First Restatement, the common-law view was that the offeror could revoke an offer for a unilateral contract any time up until the ***completion*** of the requested performance. As many a law professor put it, if *A* were to offer B $100 for crossing the Brooklyn Bridge, *A* could wait until *B* had gotten halfway across the bridge and then say "I revoke."

e. UCC view of partial performance: The UCC does not deal with whether an offer may become temporarily irrevocable upon the beginning of performance by the offeree. This possibility is left to the common law (supposedly codified by § 45 of the Second Restatement); see Comment 3 to § 2-206. The UCC does specify, however, that where the beginning of performance would be a reasonable form of ***acceptance***, it is effective as an acceptance only if the offeree seasonably notifies the offeror that he has accepted. § 2-206(2).

2. Unclear whether offer is unilateral or bilateral: Suppose that the offer does not make clear whether it is to be accepted by a promise or performance. (See the discussion of such ambiguous offers, *supra*, p. 21.) This will often be the case, for example, where one party sends the other a request for work that does not make it clear whether acceptance is to occur by the seller's promise to perform (i.e., his sending of an acknowledgment form), or by his actual performance. In this situation the offeree may accept ***either*** by promising to perform or by performing, at the offeree's option. Rest. 2d, § 32. Also in this situation, an acceptance occurs as soon as the offeree ***begins to perform***. Rest. 2d, § 62.

Example: Consumer ships a well-worn leather chair to Upholsterer, together with a

note saying, "I'd like this chair re-upholstered to match the enclosed swatch, if you can do it for $100." It's not clear from the context whether Consumer expects Upholsterer to accept by promising to do the work, or by doing the work itself. Therefore, Upholsterer can accept by starting the work. The moment Upholsterer starts the job, Consumer can no longer revoke.

a. Effect of beginning to perform: So as the above Example shows, where the offeree has a choice between accepting by promise or accepting by performance, the offeree is protected against the offeror's revocation as soon as the offeree accepts by beginning performance. In this respect, he receives the same protection under Rest. 2d, § 62 as § 45 gives to the offeree who begins to perform under an explicitly unilateral contract. However, there is an important difference between the § 45 case (where acceptance must be by performance) and the § 62 case (where the offeree may choose between accepting by promise and accepting by performance) — in the § 62 case, once the offeree begins to perform, ***he has accepted the contract, and is bound to complete performance***.

Example: In the above Example, as soon as Upholsterer starts the job, he's bound, just as Consumer is bound. So Upholsterer can't do part of the work, change his mind, undo the work and send back the chair in its original condition.

b. Preparations for a performance: § 62 of the Second Restatement, like § 45, only takes effect when actual performance has begun, not when preparations for performance are made. Here, again, however, preparations may make the offer temporarily irrevocable under Restatement 2d, §87(2), discussed below.

c. Notice of acceptance required under UCC: UCC § 2-206(2), like Rest. 2d, § 62, contemplates that an offeree may bind both himself and the offeror (i.e., accept the offer) by beginning his requested performance. Under § 2-206(2), however, the beginning of performance operates as an acceptance only if the offeror is ***notified of the acceptance within a reasonable time.***

3. Offeree makes preparations prior to acceptance: §§ 45 and 62 of the Second Restatement, discussed above, apply only in those situations where the offeree begins actual performance. What happens if the offeree makes ***preparations*** that are not explicitly required by the contract, but which are necessary before performance may begin?

If the offeree makes such preparations prior to his acceptance, may he ever by his reliance turn the offer into an irrevocable one, or otherwise recover his expenses?

a. Restatement view: The answer is ***"yes"*** under § 87(2) of the Second Restatement. That section provides that "an offer which the offeror ***should reasonably expect to induce action or forbearance of substantial character*** on the part of the offeree before acceptance and which ***does induce such action or forbearance*** is ***binding*** as an option contract to the ***extent necessary to avoid injustice.***"

b. § 87(2) distinguished from §§ 45 and 62: Rest. 2d, § 87(2) can apply not only to preparations made prior to an acceptance by *promise* (as in *Drennan v. Star Paving*, discussed shortly below), but also to preparations made prior to an acceptance by *performance*. Thus in situations where the actual beginning of true performance would fall under § 45 or § 62, preparations for performance may fall under § 87(2).

i. **Enforceability limited:** However, the important difference between § 87(2) on the one hand, and §§ 45 and 62 on the other, is that under § 87(2), the offer is irrevocable only to the ***"extent necessary to avoid injustice."*** Thus in particular situations, a court may find that it is not necessary to hold the offeror to the proposed contract, as long as he is willing to reimburse the offeree for any damages he has suffered by ***reliance***. See the discussion of reliance damages *infra*, p. 326. See also Comment e to § 87(2).

c. Offers by sub-contractors: § 87(2) is most often often used in the case of offers by ***sub-contractors*** to general contractors. Where the sub-contractor submits a bid to the general contractor, who then ***relies upon it in figuring his own over-all bid,*** the sub-contractor's bid is usually held to be irrevocable for at least the time necessary for the general contractor to obtain the job and then accept the sub-contractor's bid.

Example: *S*, a sub-contractor, submits a written offer for paving to *G*, a general contractor. Since *S*'s bid is the lowest, *G* relies on it in preparing its own bid, and

also submits *S*'s identity as required in the bidding procedure for the general contract. *S* then notifies *G* that its bid was too low because of an error. *G*'s bid on the general contract is accepted, and *S* refuses to perform.

Held, because *G* justifiably and substantially relied upon *S*'s offer (its bid), *S*'s offer was irrevocable until *G* had a reasonable chance to notify *S* of the award and of *G*'s acceptance of *S*'s bid. (But if *G* should have realized, from the low bid, that it was probably due to an error, *G*'s reliance would not have been "justifiable," and there would have been no recovery.) *Drennan v. Star Paving*, 51 Cal. 2d 409 (1958). See also Rest. 2d, § 87(2), Illustr. 6 (drawn from *Drennan*).

i. **Change from prior law:** The *Drennan* opinion, written by Justice Traynor, represents a sharp departure from previous law. For instance, in the older, well-known, case of *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933), a sub-contractor's bid was relied upon in almost precisely the same circumstances as in *Drennan*. The court, in an opinion written by Judge Hand, held that promissory estoppel could not apply, because there was no binding promise of an irrevocable offer, and there was no consideration for such a promise. Nor was the court willing to treat the sub-contractor's bid as an option contract, because there was "not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation." (The obligation would have been one-sided for the reason described in the following paragraph.)

ii. **Binding the general contractor:** Observe that the approach of Rest. 2d, § 87(2) and *Drennan* can be criticized as ***unfair to the sub-contractor:*** the sub-contractor is bound to do the work at the price quoted to the general contractor, but the general contractor is ***not bound to award the job*** to the sub-contractor even if the general gets the job. **?????**

VII. WHEN ACCEPTANCE BECOMES EFFECTIVE

A. Introduction: So far, we have considered the rules governing the length of time during which a power of acceptance is effective. We turn now to the rules governing the time at which an acceptance becomes effective. The underlying question in this area is always the same: At the moment at which the acceptance became effective, was the power of acceptance (i.e. the offer) still in effect? If so, a contract has been formed.

B. General "mailbox" rule: Most courts follow the general rule that the

acceptance ***is effective upon proper dispatch***. The rule is often called the ***"mailbox"*** rule (since deposit of a letter of acceptance into a mailbox will cause the acceptance to become effective). However, the rule also applies to acceptances dispatched by means other than letters (e.g., telegrams, emails).

1. **Restatement's language:** As the Second Restatement puts it, "[A]n 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 put out of the offeree's possession, without regard to whether it ever reaches the offeror…***" Rest. 2d, § 63(a).

   > **Example:** *A* sends *B* a letter offering to sell him wool; the letter of offer is delayed in the mails. Upon receipt of the offer, *B* mails an acceptance. After *B* has mailed the acceptance, but before *A* receives it, *A* sells the wool to someone else. There is a binding contract between *A* and *B*. (The offer lasted for a "reasonable time," which presumably had not elapsed as of the moment *B* mailed his acceptance. Because *B*'s acceptance became effective when he mailed it, a contract was formed.) *Adams v. Lindsell*, 106 Eng. Rep. 250 (1818).

2. **Rationale:** The mailbox rule was, during the nineteenth century, usually justified on the theory that an offeror who makes an offer by mail makes the Post Office his agent to receive the acceptance; thus under this theory, the offeror "constructively receives" the letter as soon as it is mailed.

   a. **Criticism:** However, this theory makes little sense, since under U.S. Postal Regulations, the sender of a letter has the power to stop delivery and reclaim the letter.

   b. **Better explanation of rule:** A better explanation of the mailbox rule is that "the offeree needs a dependable basis for his decision whether to accept." (Rest. 2d, § 63, Comment a.) In other words, it is useful to the offeree to know that if he accepts, the deal will be closed immediately, and that he will not have to run the risk that the offer will be revoked before the acceptance has been received.

      i. **Criticism:** However, this argument does not seem very compelling, since the offeree can almost always accept by either telephoning or sending a telegram. The rule seems principally due to historical accident, in the form of some early-nineteenth-century cases, including *Adams v. Lindsell*.

(See C&P, pp. 106-07.)

c. Applies only to acceptances by promise, not by performance: The mailbox rule applies only to acceptances by ***promise***, ***not acceptances by performance.*** That is, all of this material relates to acceptances dispatched by mail, telegram, etc., not acceptances which occur through either part or full performance. As we said above, the commencement of performance may constitute an acceptance (in the case of so-called offers for unilateral contracts). Here, we are concerned with the time at which a *promissory* acceptance becomes effective.

d. Faxes and e-mails: In discussing the mailbox rule, we use examples of acceptances sent by mail, telegram and telegraph, since these were the methods of communication that gave rise to the doctrine. However, there is no reason to believe that the rules would be any different with respect to more modern methods of communication, such as ***facsimiles*** and ***e-mail*** messages. For example, an acceptance sent by e-mail presumably would be effective as soon as the offeree hits the "send" button on her computer, even if the offeror did not download the e-mail from his Internet provider until much later.

3. Acceptance followed by rejection: In *Adams v. Lindsell*, *supra*, the result of the court's adoption of the "mail box" rule was to bind the offeror. However, the mail box rule is also applied to ***bind the offeree.*** That is, once the offeree has placed his acceptance in the mail, he cannot thereafter change his mind and send a rejection, even if the rejection is received by the offeror before the acceptance is received. This issue is discussed more extensively *infra*, p. 62.

4. Exception where offer provides otherwise: The mailbox rule does not apply if the offer ***provides otherwise.***

> **Example:** *A* sends *B* a letter containing an offer and stating "this offer will be accepted when and if your letter of acceptance is personally received by me." The acceptance is not effective until it is received by *A*.

C. Misdirection of acceptance: The "acceptance effective upon dispatch" rule always applies where the offeree has chosen a reasonable manner of sending his acceptance, and has not behaved negligently. But what if he

has used a ***slow means*** of communication where the offer indicates the necessity for haste? Or what if he has carelessly ***misaddressed*** the envelope? Is the acceptance still effective upon dispatch?

1. **General view:** Most courts, and the Second Restatement, take the view that even if an unreasonable means of communicating the acceptance is used, or the acceptance is misaddressed, it is still effective when dispatched ***if it is received within the time in which a properly dispatched acceptance would normally have arrived***. See Rest. 2d, §§ 67 and 68. See also UCC § 1-201(36). If it is not received within this time, it is effective only as of the time it is actually received.

   Example: On July 1, *A* sends an offer letter to *B*, and says that *B* should "give me your answer in writing by July 10." On July 8, *B* mails an acceptance letter, but uses a slightly wrong address for *A*. Assume that a properly addressed letter would have been delivered on July 10. *B*'s letter arrives on July 11. Meanwhile, *A* revokes by phone on the evening of July 10.

   B's letter is not effective upon dispatch, because it did not arrive within the same time in which a properly addressed letter would have arrived. (But if the misaddressed letter had arrived on July 10, at the same time as a properly-addressed letter, it would have been retroactively deemed to have been effective upon dispatch, and a revocation by *A* on July 9 would have been too late.)

D. Acceptance lost in transmission: If the acceptance is properly dispatched, the mailbox rule applies, and the acceptance is effective at the time of dispatch ***even if it is lost and never received by the offeror at all***.

1. **Loss of acceptance may discharge offeror:** Although the acceptance becomes effective upon a proper dispatch, even if it never reaches the offeror, courts will frequently ***discharge*** the latter from his contractual obligation if he never receives notice of the acceptance. As Comment b to Rest. 2d, § 63, puts it, "The language of the offer is often properly interpreted as making the offeror's duty of performance conditional on receipt of the acceptance. Indeed, where the receipt of notice is essential to enable the offeror to perform, such a condition is normally implied."

   Example: *A* has a limited supply of widgets in stock, and sends a letter to *B* offering to sell and ship them to *B*. The offer states that *A* will sell the widgets to someone else if he does not hear from *B* within a reasonable time. *B* promptly mails a properly-addressed acceptance, but the letter is delayed, and is not delivered to *A*

until after an unreasonably long time, by which point *A* has sold the widgets to *C*.

Although acceptance became effective upon dispatch, and there was a contract between *A* and *B*, *A* is *discharged* from the contract due to the failure to seasonably receive the notice he needed to perform (i.e., an order to ship). If by the time *A* finally received the acceptance, he had not already sold the widgets to someone else, but he wished to escape from the contract because their value had increased, he would be less likely to be discharged from the contract.

E. Where offeree sends both acceptance and rejection: Suppose the offeree sends an acceptance followed by a rejection, or vice versa. Since a rejection terminates the power of acceptance (see *supra*, p. 47) it is important to know at what time a rejection becomes effective.

1. Rejection sent before acceptance: Initially, let's consider the scenario in which the offeree ***first*** dispatches a ***rejection***, then dispatches an acceptance.

a. Effectiveness of rejection: Here, the Second Restatement applies the following rule: a rejection does not terminate the offeree's power of acceptance until it is received, but any acceptance dispatched by the offeree after she has dispatched the rejection is ***not effective unless the acceptance is received by the offeror before he receives the rejection.*** Rest. 2d, § 40. In other words, the acceptance has no effect unless it ***overtakes*** the previously-dispatched rejection.

Example: *A* makes *B* an offer by mail. *B* mails a letter of rejection. Then, still within the period for acceptance, *B* changes his mind and telegraphs an acceptance. This acceptance creates a contract only if *A* receives it before he receives the rejection. See Rest. 2d, § 40, Illustr. 1.

b. Rationale: This rule is ***necessary to protect the offeror.*** If the acceptance was effective upon dispatch, and the rejection not effective until receipt, then the offeror might receive and ***rely*** upon the offeree's rejection, not knowing that the offeree had subsequently changed his mind and sent a binding acceptance before the offeror had received the rejection.

2. Acceptance dispatched before rejection: The rule stated above only applies if the rejection is dispatched ***before*** the acceptance is dispatched. What happens if the offeree ***first sends an acceptance***, and then sends a rejection?

a. Formally binding contract: In this situation, the contract is ***binding as soon as the acceptance is dispatched,*** and the subsequently-dispatched revocation of acceptance ***does not undo the acceptance***, whether it is received by the offeror before or after his receipt of the acceptance.

> **Example:** Buyer signs a contract for the purchase of real estate. He mails the contract to Seller. Seller signs the contract, and puts it in the mail to Buyer. After Seller has mailed the contract, but before it has been received by Buyer, Seller calls Buyer's lawyer and repudiates the contract. Buyer attempts to enforce the contract.
>
> *Held*, a contract came into existence as soon as Seller put the contract in the mail, and thus Seller's attempt to get out of the contract failed. Good arguments can be made either for or against the mailbox rule in this situation. However, since the rule has tradition behind it, and no compelling argument can be made against it, the court will apply it. *Morrison v. Thoelke*, 155 So. 2d 889 (Fla. App. 1963).

b. Estoppel: However, if the revocation-of-acceptance is received by the offeror before he receives the acceptance, and he ***relies*** upon the revocation, the offeree may be "***estopped"*** from enforcing the contract. See Rest. 2d, § 64, Illustr. 7.

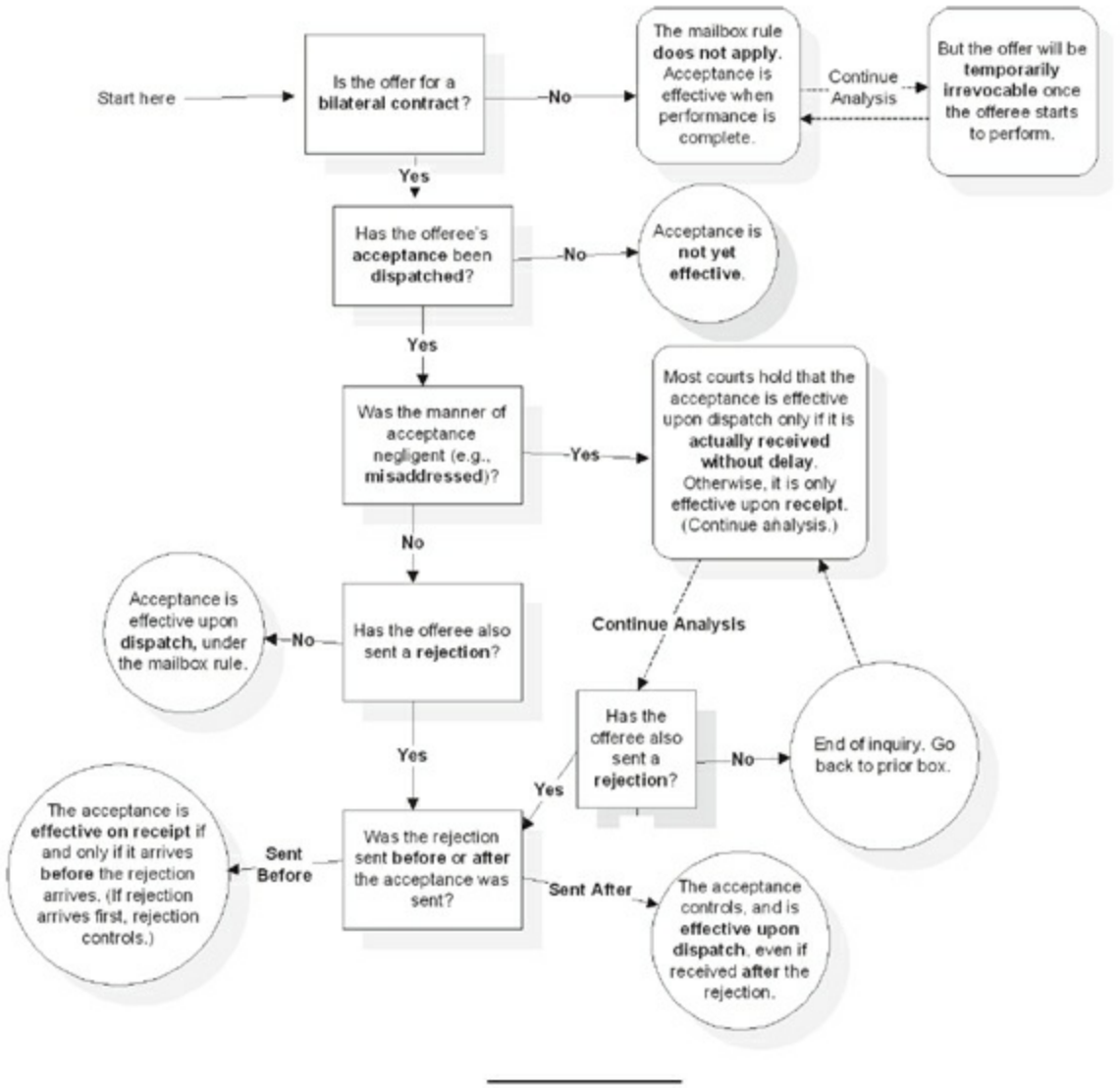
F. Acceptance of option contracts: The acceptance of an ***option contract*** (i.e., an irrevocable offer; see *supra*, p. 52) is effective ***not upon dispatch, but upon receipt by the offeror***. Rest. 2d, § 64(b).

> **Example:** For consideration, Owner grants Buyer an option to acquire Blackacre for $100,000, the option to be valid "for 30 days." The document says that the option shall be exercised by "Buyer's payment of a non-refundable $2,000 deposit." The document does not say whether exercise will be deemed to have occurred when Buyer sends the $2,000 deposit or only when Owner receives it. On the 30th day, Buyer sends a letter with the check, but Owner doesn't receive it until the 34th day. A court would likely hold that the option was not timely exercised, because an acceptance of an option (i.e., exercise) is effective only upon receipt, not dispatch.

1. Rationale: The general rule that an acceptance is effective upon dispatch is designed to protect the offeree against revocation while his acceptance is in transit. (See Rest. 2d, § 63, Comment a.) Since an offer in an option contract is irrevocable, this protection is not required. Furthermore, business custom dictates that unless otherwise specified, an option is exercised only upon notification to the offeror. See Rest. 2d, § 64, Comment f. See also C&P, p. 113.

Figure 2-2

The Mailbox Rule: Determining When an Acceptance Becomes Effective



G. Effective date of revocation of offer: By way of review, recall that a ***revocation*** by the offeror is treated essentially like a rejection: the revocation is ***not effective until it is received*** by the other party (the offeree). See *supra*, p. 49.

Quiz Yourself on
TIMELINESS AND EFFECTIVENESS OF ACCEPTANCE

12. On Feb. 10, Chris Columbus offers to sell his powerboat, the Santa Maria, to Leif Ericson, and tells Leif that Leif has until March 1 to decide. On Feb. 20, before Leif has responded, Chris sells the boat to Isabella instead. On Feb. 25, Leif overhears of the sale from two strangers at the local tavern, Newe Worlde. On Feb. 26, Leif sends an email to Chris, "I accept your offer, here's my credit card number." Is there a contract between Leif and Chris?

13. Washington decides he wants his new house at 1500 Pennsylvania Ave. painted barn red. On June 20, he send a letter to Potomac House Painters that says, "I'd like you to paint my new house. If you're willing to do the work for $1500, just show up and start painting by July 4. No written contract necessary."

(A) Assume that on June 30, Potomac buys (expressly for this job) the requisite red paint, at a cost to it of $500. On July 3, Washington decides he likes the mansion in its present color (white), and sends Potomac a telegram, "I revoke my offer." Potomac would have made a profit of $750 on the job (it would have had to spend $250 more in labor charges to finish the job). The red paint is valueless to Potomac if the paint won't be used on this job. Is there a contract in force, and if so, how much may Potomac recover?

(B) Same basic facts. Now however, assume that Washington waits until Potomac arrives at the house and spends one day sanding it (a necessary part of the painting job); Washington then says, "I revoke." Is there a contract in force, and if so, how much may Potomac recover?

14. Jessica Rabbit's Microbrewery sends the following letter to Toontown Tavern: "We hereby offer to sell you 50 kegs of beer at a price of $40 per keg. This offer shall remain open for 2 months from the date of receipt." Toontown does not give or promise anything of value in return for this offer. After six weeks, Jessica Rabbit's Microbrewery sends another letter that says, "As we have not heard from you in all this time, we revoke our offer." A week later, Toontown Tavern faxes a letter to the Microbrewery saying, "We accept your offer of 50 kegs at $40 per keg." Is there a contract?

15. The Founding Fathers select Ben Franklin to choose a king for the newly-formed United States. He sends an offer in the mail to Prince

Henry of Prussia.

(A) Assume for this part that a few days after the offer is sent by Ben, the Founding Fathers decide that having an American king isn't such a hot idea after all. They therefore tell Ben to send a revocation of the offer. Ben mails the revocation on July 4. Prince Henry mails an acceptance on July 6. The Prince receives the revocation on July 7. Ben receives the acceptance on July 8. Is there a contract?

(B) Assume for this part that Ben never sends a revocation. The Prince mails an acceptance on July 4 (while the offer is still open). He then changes his mind, and mails a rejection on July 7. Due to the vagaries of the Pony Express, the rejection arrives at Ben's house on July 10, and the acceptance arrives on July 11. Is there a contract?

(C) Same basic facts as (B). Now, however, assume that the Prince mails a rejection on July 4, then changes his mind and mails an acceptance on July 6. The rejection arrives on July 8, and the acceptance arrives on July 10. Is there a contract?

16. Selznick, a film producer who is looking for a female lead in his new Civil War picture, mails an offer for the role to Esther Plotkin. Plotkin is overjoyed, and immediately mails back her acceptance, properly addressed. The postal service loses the letter, and, alas, Selznick never receives it. Is there a contract?

Answers

12. No. An offer is terminated when the offeree learns of an act by the offeror that is inconsistent with the offer. Selling the subject of the offer to someone else would certainly qualify as a revocation (though merely looking for other potential buyers would not). Consequently, Chris' offer was revoked at the moment Leif learned of the sale. Therefore, there was no live offer for Leif to accept as of the moment he sent his "acceptance" telegram, and that telegram had no effect.

13. (A) No conventional contract is in force, but Potomac can recover its $500 reliance damages, since this sum will be needed to avoid injustice. First, notice that the offer by Washington was for a ***unilateral*** contract (since it was to be accepted by Potomac's performance, not by

its promising to perform.) Under Rest. § 45, once Potomac started to actually perform on a unilateral contract, it would have had a temporary option to enter into a fully-binding contract (see part (B) below). But the buying of the red paint would probably be held to be a mere ***preparation*** to perform, not the commencement of performance; in that case, § 45 wouldn't apply. However, under Rest. 2d § 87(2), "an offer which the offeror should reasonably expect to induce action … of substantial character on the part of the offeree before acceptance and which does induce such action … is binding as an option contract to the extent necessary to avoid injustice." This would apply here. Since giving Potomac the $500 it spent on paint would be enough to "avoid injustice," this is all the court will do — Potomac won't be entitled to true enforcement of the contract (i.e., to recover the $750 it profit it would have made on top of the $500 it spent).

(B) Yes; Potomac can recover $1250. Once the offeree under an offer for a unilateral contract commences ***actual performance***, the offer gives rise to an option contract, i.e., it becomes ***temporarily irrevocable*** for the time needed for the offeree to promptly performance in accordance with the terms of the offer. Rest. 2d § 45. The sanding represented a true commencement of performance (not just preparations to perform), so the offer became temporarily irrevocable when the sanding was done. Consequently, Washington lost the ability to revoke. Potomac will be entitled to full contract damages of $1250, which is the sum needed to give it the profit it would have made had the job been completed (i.e., the $1500 contract price less the $250 cost saved by Potomac in not having to perform.)

The key point is that in part (A), Potomac didn't have a true contract, and gets only its reliance damages to avoid injustice; here, since performance began, Potomac gets true contract remedies.

14. Yes. At common law, there would be no contract, because the Tavern gave no consideration for the promise of irrevocability — at common law, offers are revocable even if they say otherwise, unless separate consideration has been given for an option. But the UCC provides for what it calls ***"firm offers"***; under UCC § 2-205, a merchant will be held to have made an irrevocable offer — even though no consideration is given by the offeree — if the merchant makes the offer in writing and

with explicit assurances that the offer will remain open for a specified period of time. That's what the Microbrewery did here. Therefore, the Microbrewery had no ability to revoke its offer before the two-month time period had lapsed, and the offer was still open when Tavern accepted.

15. **(A) Yes.** Under the mailbox rule, the acceptance was ***effective upon dispatch*** (July 6), provided that at the time it was dispatched, the offer was still open. A revocation does not become effective until it is received by the offeree; so the revocation could not have become effective until July 7. By then, the contract was already in force (it came into force on July 6), and the revocation was of no effect.

    (B) Yes. Again by the mailbox rule, the acceptance became effective on dispatch, July 4. The subsequently-dispatched rejection did not change this, even though Ben received that rejection before he received the acceptance.

    (C) No. Where a rejection is dispatched before an acceptance, there is an exception to the usual mailbox rule for acceptances: in this situation, the acceptance is effective if and only if it ***overtakes the rejection***, which did not happen here. (This makes sense — once Ben got the rejection, he ought to have been entitled to assume that the deal was dead, and to make other arrangements.)

16. **Yes.** Under the mailbox rule, an acceptance is effective when it is sent. This is true even if the offeror never actually receives it, provided it was properly dispatched in the first place (i.e. correct address and amount of postage). However, Selznick would be entitled to be discharged (excused) from performance, if he reasonably believed that Plotkin wasn't interested, and made other arrangements before learning that Plotkin had accepted.

VIII. INDEFINITENESS

A. **Problem of indefiniteness generally:** Even though two parties who are negotiating with each other may intend to make a contract, and indeed think that they have made a contract, there is no contract if the terms of their "agreement" are unduly ***indefinite***. A proposed agreement whose terms are too uncertain to form a contract is said to be ***"void for***

***indefiniteness*.”**

B. Modern view more liberal: Although older common-law cases tended to require a high degree of specificity in the terms of the contract, the Second Restatement and the UCC tolerate much more uncertainty before voiding a contract for indefiniteness.

1. **Restatement test:** The Second Restatement states that the terms of a contract are sufficiently definite “if they ***provide a basis for determining the existence of a breach*** and for ***giving an appropriate remedy.***” Rest. 2d, § 33(2). Thus as long as the agreement is definite enough to allow the court to determine whether one party has breached it, and to award some kind of reasonable damages to the wronged party, the contract is not void for indefiniteness.

2. **UCC test:** The UCC applies a similar test: “Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have ***intended to make a contract***, and there is a ***reasonably certain basis for giving an appropriate remedy***.” UCC § 2-204(3).

C. Necessary terms: There are four ***essential elements*** which an agreement must cover (either expressly or impliedly) in order for it to be enforceable:

□ ***parties*** to the contract;

□ ***subject matter*** of the contract;

□ ***time*** for performance and

□ ***price***.

1. **Court may supply missing term:** However, if the parties fail to make an explicit statement as to one or more of these essential elements, there are nonetheless several kinds of situations in which the court will attempt to ***supply the missing term***. These situations include the following:

   a. Where parties intend to leave term to reasonable implication: It may be the case that although the parties fail to state explicitly a term of their agreement, both parties manifest an ***intent that a reasonable term will apply***.

Example: Consumer telephones Storekeeper, and orders 10 pounds of potatoes. Storekeeper agrees, and has them sent over. The absence of any discussion of price does not make the agreement void for indefiniteness. A court would probably hold that Consumer had impliedly agreed to pay whatever Storekeeper's current price for potatoes was.

b. Agreement to agree: The parties may have left certain terms (e.g., price or time for performance) to be determined by a ***future mutual agreement.*** In this situation, the UCC and the Second Restatement may authorize the court to supply the missing term, if the parties fail to reach agreement.

c. Indefiniteness cured by performance: An agreement which is too indefinite for enforcement at the outset may later ***become sufficiently definite*** through the ***actions*** of one or both parties. If so, the court may hold that such action filled the missing term.

Note: Before we examine each of the kinds of situations listed above, you should note that the question is always whether the ***contract*** is too indefinite, not whether the ***offer*** is too indefinite. An offer which does not by itself contain sufficient detail for enforceability may solicit the requisite details from the offeree. For instance, if *A* offers to sell *B* any quantity of widgets that *B* wishes, at $10 per widget, the offer itself does not contain all requisite details; obviously, a quantity term is needed. But if the quantity is supplied by the acceptance, the contract is sufficiently definite. Therefore, in all of the situations described below, the words and actions of *both* parties must be examined to determine whether all necessary terms have been expressed or may be implied.

2. Implication of reasonable terms, generally: If the parties have omitted any attempt to express an intention regarding a particular term, the court will frequently fill the gap by supplying a ***"reasonable"*** term.

a. UCC approach: The UCC has led the way for supplying "missing terms." Provided that the parties "have ***intended to make a contract*** and there is a ***reasonably certain basis for giving an appropriate remedy,"*** (§ 2-204(3)), the court is authorized to fill in a number of terms if the parties have omitted to specify these terms. The terms which may be filled in include ***price, place for delivery, time for shipment or delivery, time for payment,*** etc.

i. **Open price term:** § 2-305(1) allows the parties to form a contract in some situations even though the ***price term*** is not decided on. For there to be a contract, the parties must ***intend***

that one be formed, and in addition one of the three following things must be so:

- □ ***nothing is said*** in the contract as to price; or
- □ the price is ***left to be agreed upon*** by the parties and they ***fail to agree;*** or
- □ the price is to be "fixed in terms of some agreed market or other ***standard*** as set or recorded by a third person or agency and it is not so set or recorded."

If the relevant conditions are met, the price is "a ***reasonable price at the time for delivery.***"

As an example of the third category above, if the parties agree that a particular price will be adjusted to reflect changes in the federal government's ***Consumer Price Index***, and the government stops publishing the *Consumer Price Index*, the court would supply a reasonable price or a reasonable substitute standard.

ii. **Absence of specified place for delivery:** If the contract does not specify ***where the goods are to be delivered***, the place for delivery is the ***seller's place of business*** or, if he has none, her residence. (§ 2-308(a)). The only exception to this rule is that if at the time of contracting the goods are known by the parties to be somewhere other than at the seller's business or residence, that place is the place of delivery. (§ 2-308(b)). In other words, where the contract is silent, the court will construe the contract so as to require ***the buyer to pick up the goods***.

iii. **Time for shipment or delivery:** If the contract is silent as to the ***time*** for shipment, for delivery, or for any other action under the contract, that time shall be "a ***reasonable*** time." (§ 2-309).

iv. **Time for payment:** If the contract does not specify whether the buyer is to have credit, payment is due at ***the time and place at which the buyer is to receive the goods***, even if this place is the seller's place of business. In other words, the buyer is ***not entitled to credit unless the contract says so.*** (But he apparently does have the right to pay by check unless otherwise agreed.) (§ 2-310(a)).

Note: These UCC "gap filler" provisions only come into play when the parties'

agreement (defined broadly to include "course of performance," "course of dealing" and "usage of trade") is silent in a particular term. These gap-fillers are based on the assumption that these are the terms that most parties would have agreed on if they had focused on the issues in advance.

3. **Implied obligation of good faith:** In both UCC and non-UCC contracts, courts find an implied obligation of ***good faith*** and ***fair dealing***. Thus Rest. 2d § 205 says that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Similarly, UCC § 1-304 says that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." (UCC § 1-201(19) then defines good faith as "***honesty*** in fact and the observance of ***reasonable commercial standards of fair dealing***.")

   a. **Consistency with other party's expectations:** An important aspect of this duty of good faith is that a party is required to behave in a way that is consistent with the other party's ***reasonable expectations*** about how the contract will work. Thus the Restatement says that "good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and ***consistency with the justified expectations of the other party***[.]" Rest. 2d § 205, Comment a.

      Example: Insurer writes a homeowner's policy on Owner's home. The policy says that in the event Owner suffers a loss, Owner must report the loss "in detail" and in writing to Insurer within 30 days. 28 days after Owner's home is burglarized, he submits a one-sentence description of the loss to Insurer. Insurer says merely, "Your description is not specific enough," but refuses to tell Owner what type of detail must be added. (Assume that Insurer's evasiveness is an intentional attempt to prevent Owner from submitting a claim meeting the requirements of the policy.) The deadline passes without Owner's rewriting the description, and Insurer refuses to pay to the claim.

      A court would probably find that Insurer's intentionally evasive behavior violated the implied duty of good faith, because it was an attempt to deprive Owner of his reasonable expectation that his loss would be covered by the policy. Cf. Rest. 2d § 205, Illustr. 7.

   b. **Interference with or refusal to cooperate in other party's performance:** A common type of bad-faith conduct consists of *A*'s ***interference with***, or ***refusal to cooperate with***, *B*'s performance. This is especially likely where *B* must perform an act in order to satisfy a "condition" to *A*'s duty. (Conditions are discussed *infra*, p.

203.) If *A*'s non-cooperation or interference with *B*'s attempt to satisfy a condition to *A*'s duty is in bad faith, then *A* will be found in breach. Thus on the above example, it was a condition of Insurer's duty to pay the claim that Owner have submitted a timely detailed notice of loss; Insurer's refusal to help Owner understand what was required — made with an intent to deprive Owner of the fruits of the contract — was a refusal to cooperate with Owner's performance, and thus a breach of Insurer's implied duty of good faith.

c. Output and requirements contracts: One situation in which the obligation of good faith becomes important is in so-called ***"output"*** and ***"requirements"*** contracts (discussed *infra*, p. 115). Such contracts (which call for the buyer to buy all of his needs from the seller, or provide that the buyer will buy the seller's entire output) were formerly sometimes held to be too indefinite for enforcement, since they did not specify quantity. Under UCC § 2-306(1), however, such output and requirements contracts are explicitly authorized, and are construed to involve "such actual output or requirements as may occur ***in good faith***, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirement may be tendered or demanded." (§ 2-306(1)).

d. Good faith irrelevant where clause explicit: But the obligation of good faith will generally ***not*** be employed to override a ***specific contractual clause***.

> **Example:** Suppose that P is a franchisor for D, a fast-food chain. The franchise agreement expressly says that the agreement may be terminated "at any time, for any reason, by either party upon 10 days written notice to the other." After P has successfully run his restaurant for 10 years, X is appointed president of D. X unreasonably dislikes P from prior business dealings they have had that are unrelated to the restaurant industry. X causes D to terminate the franchise agreement with P because "I don't believe you are the kind of operator we want."
>
> Even though this termination might otherwise have constituted a violation of the duty of good faith and fair dealing, a court would probably not void the termination (or award damages for it), because the duty of good faith will generally not be found to override an express contractual provision, such as the termination provision here.

4. **Trade usage or other external evidence:** In attempting to make what appears to be indefinite sufficiently definite, the court will look to ***"trade usage"*** (i.e., industry custom), ***"course of dealing"*** between the parties to the contract, or other external evidence. Such evidence may be consulted either on the theory that it shows that the parties had already in fact reached an agreement on the term (but had simply neglected to make that agreement explicit in the contract), or on the theory that this evidence helps show what the parties would have agreed upon had they focused on the issue. (The former rationale really uses this evidence in order to "interpret" the contract; see *infra*, p. 192.)

   Example: P, a textile company, makes a "forward" contract to buy cotton from D, a cotton ginner. The contract fixes a price and delivery date, but does not specify the number of pounds to be sold; rather, it specifies a certain number of acres, and provides that all cotton produced on that acreage is to be sold under the contract. Between the signing of the contract and the time for delivery, the price of cotton more than doubles, and D attempts to escape from the contract by claiming that the quantity term is unenforceably vague. If P can show that it is common in the cotton trade to use acreage figures as a quantity term, the contract will be found to be sufficiently definite to be enforced.

5. **Need for an intent to contract:** The court will supply the missing terms ***only if the parties have manifested an intention to create a binding contract***. Indeed, the fact that one or more terms are missing — especially if they are important ones — will often itself be *evidence* that the parties did not intend to bind themselves until later. Thus the Second Restatement cautions that "the fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance." (Rest. 2d, § 33(3).) The more terms that are left unresolved, the more likely it is that the parties were only negotiating, and did not intend to be bound.

   a. **Duration of employment:** For instance, most courts have been unwilling to supply a term to set the ***duration of an employment contract***. Courts generally hold that if an employment contract does not contain a length-of-employment term, the arrangement is merely a series of offers, each for one day's employment, and that it may be terminated, at any time, by either party, with no liability except for services that have already been performed. Murray, p.

51. But some courts have placed limits on when and how such an "at will" employment arrangement may be terminated (e.g., that it may not be terminated for a bad faith reason). See the fuller discussion of this topic *infra*, pp. 197-198.

6. **Agreement to agree:** The parties may form a contract with an essential term unfilled, intending to ***agree upon that term in the future.***

   a. **Common-law view:** Until the enactment of the UCC, such "agreements to agree" were usually held to be fatally indefinite.

      Example: Seller and Buyer agree that Buyer will sell a certain quantity of newsprint each month to Seller. Their agreement specifies the price per ton for the first four months of the contract; it says that after this period, the price for each upcoming month's shipment shall be "as agreed upon by the parties in the last week of the prior month." Assume that there is evidence that the parties intended themselves to be legally bound by the agreement.

      Under the pre-UCC approach, the parties' "agreement to agree" on the price would render their arrangement fatally indefinite, and thus unenforceable.

   b. **UCC approach:** The UCC, however, provides that as long as the parties ***intend*** to make a binding contract, their "agreement to agree" does not make the contract fatally indefinite, at least if it is the price term that is left open. UCC § 2-305(1)(b) allows the court to supply a reasonable price term if "the price is left to be agreed by the parties and they fail to agree.…"

      Example: Thus in the above Example of the contract for newsprint, the contract would probably be valid under UCC § 2-305(1)(b).

   c. **Unilateral concession:** Also, if the term to be agreed upon is one which is subject to ***complete concession*** by the party seeking enforcement of the contract, he will usually be able to obtain enforcement by making this complete concession.

      Example: D gives P an option to buy particular real estate at a particular price. The option contract provides that the "manner and form" of payment are to be left to later agreement. When P wishes to exercise the option, D refuses to negotiate with respect to how payment should be made (since he does not want to honor the option). If P shows that he is willing to make payment either in all cash (probably the most favorable to D) or on any other terms specified by D, the court will enforce the agreement. (It will probably make P's complete concession on the terms-of-payment issue part of the contract to be enforced.) See Farnsworth, pp. 219-220.

d. Non-UCC cases — court supplies a missing term: In non-UCC cases, modern courts have tended to follow the liberal approach suggested by UCC § 2-305(1), and have grown increasingly willing to ***supply a reasonable term*** for the issue on which the parties were unable to agree. (But courts in non-UCC situations have insisted, just as does UCC § 2-305(1)(b), that a court may supply the missing term only if there is evidence that the ***parties themselves intended to make a binding contract***.)

i. **Lease renewals:** One situation, however, in which many courts have been reluctant to follow the UCC lead is that in which a tenant and landlord agree that the tenant shall, at the end of the lease term, have the option to ***renew it*** at a rental "to be agreed upon." Some courts have been willing to supply a "reasonable" rental figure, but many, perhaps most, have refused to do so. See, e.g., *Joseph Martin, Jr. Delicatessen v. Schumacher*, 417 N.E. 2d 541 (N.Y. 1981), where the court refused to supply a "reasonable rent," on the grounds that "[T]here is not so much as a hint at a commitment to be bound by the 'fair market rental value' … [N]owhere is there an inkling that either of the parties directly or indirectly assented … to subordinate the figure on which it ultimately would insist, to one fixed judicially…." See Farnsworth, p. 217-218, n. 4 and 5, for cases on both sides.

e. Damages for failing to make good-faith efforts to agree: Instead of supplying a missing term, a court may hold a party liable for ***failing to make good-faith efforts to reach agreement*** about the missing term.

i. **Agreement-to-agree contained in other agreement:** For instance, suppose the parties execute one clearly-binding agreement, and in it they agree to negotiate a ***second, related agreement*** in the near future. The court may well hold that this ***promise to negotiate*** is binding, and imposes a ***duty to bargain in good faith***.

7. Contracts where terms are left to one party's specifications: The parties may agree that ***one*** of them has the ***right to determine a***

particular term of performance at a subsequent date. While pre-UCC cases often found that this kind of "term to be specified later by one party" arrangement was fatally indefinite, the UCC takes a different approach.

a. UCC view: UCC § 2-311(1) provides that as long as the parties intend to make a contract, and there is a ***reasonably certain basis for giving an appropriate remedy*** (see § 2-204(3)), the contract "is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in ***good faith*** and within ***limits set by commercial reasonableness***." (§ 2-311(1)). If the party who has the right to make such a specification fails to do so, the other party may treat this failure as a breach of contract.

i. **Seller may perform:** If it is the buyer who has the right and obligation to set the specification, and she does not do so, § 2-311(3)(b) gives the seller the right to "perform in ***any reasonable manner.***"

> **Example:** Buyer agrees to buy a certain tonnage of motor oils from Seller, with Buyer to select, prior to shipment, how many cans of oil in each of various weights it wishes to buy. Buyer then refuses to make the selection. Seller may make a reasonable selection of weights, deliver them to Buyer, and oblige him to accept them. Seller may then recover the full purchase price, rather than merely his lost profits (which is what he would recover if he merely declared a breach and made no shipment).

8. Indefiniteness cured by part performance: Even if an agreement is too indefinite for enforceability at the time it is made, the ***subsequent performance*** of the parties may cure this indefiniteness. See Rest. 2d, § 34(2).

> **Example:** *A* promises to make a tailor-made suit for *B* for $500. The initial agreement does not specify the kind of material to be used. If *B* changes his mind before *A* has started to work, and indicates he does not wish to continue the agreement, it will probably be held void for indefiniteness. But if *A* begins making the suit with cotton cloth, and *B* knows this and raises no objection, the indefiniteness will be deemed cured by this part performance. See C&P, p. 52.

IX. MISUNDERSTANDING

A. Misunderstanding generally: For there to be a contract, there must of course be a "meeting of the minds." (See *supra*, p. 5.) That is, both

parties must be agreeing to a deal. It may happen, however, that although both parties ***think*** that they are agreeing to the same terms, each has a different subjective belief about what the deal is. If this discrepancy in subjective belief (traditionally called ***"misunderstanding"***) is sufficiently major, it may ***prevent a contract from existing at all***.

1. **Material term, and no fault:** If the misunderstanding concerns a ***material term***, and ***neither party*** knows or has reason to know of the misunderstanding, ***there is no contract***. Rest. 2d, § 20(1).

B. Ambiguity: The most common cause of such a misunderstanding is that a term used in the agreement is ***"ambiguous."*** An ambiguous term is one which has two, inconsistent, meanings. If the ambiguous term is a major one, and the two parties do not attach the same subjective meaning to it, there will be ***no meeting of the minds and thus no contract.***

> **Example:** *A* offers to sell *B* goods shipped from Bombay on the steamer *Peerless*. *B* accepts. There are in fact two steamers each named *Peerless* in Bombay at the time of contracting; one is scheduled to leave much later than the other. *A* subjectively intends to ship on the later *Peerless*; *B* subjectively intends to accept an offer of shipment on the earlier *Peerless*. *B* expects the earlier shipment, does not get it, and then refuses the later shipment.
>
> *Held*, there is no contract, because *A* and *B* were in subjective disagreement as to the meaning of the term "Peerless," and neither had reason to know of the disagreement. *Raffles v. Wichelhaus*, 2 H&C 906 (1864). Cf. Rest. 2d, § 20, Illustr. 2.

1. **Where both parties have identical subjective understanding:** Of course, the fact that a term used in the offer or acceptance is ambiguous does not matter as long as both parties have the same subjective understanding with respect to it. For instance, in the *Raffles* case, *supra*, the fact that there were two ships named *Peerless* would not have made any difference had both parties understood that shipment was to be made on the first Peerless. Thus in the context of "ambiguity," ***the objective theory of contracts does not strictly apply***. In order to determine whether or not there is a contract, it is necessary to ascertain whether the subjective intent of both parties was the same. (Obviously, this subjective intent can only be gauged with respect to the parties' actions. But the point is that these actions may

be taken as evidence of subjective intent even if they were never communicated to the other party.)

2. **Where one party knows or should know the meaning understood by the other:** If a term in the offer or acceptance is ambiguous, and one party ***knows*** that she has a different understanding as to the meaning of that term than does the other party, a contract will be formed ***on the term as understood by the other (unknowing) party.***

> **Example:** Assume the same situation as in Example 1, *supra*, p. 74. *A* knows that there are two ships named *Peerless*, and he also knows that *B* thinks the contract is for shipment on the first *Peerless*. *A* subjectively intends to ship on the second *Peerless*. Because *A* knows that he and *B* subjectively disagree as to which *Peerless* shipment is to be made on, a contract is formed for shipment on the first *Peerless* (i.e., the *Peerless* understood by *B*, the "innocent" party). See Rest. 2d, § 20, Illustr. 3.

   a. **Where one party has reason to know of ambiguity but does not:** Essentially the same rule applies if one party ***should*** know of the ambiguity, but does not, and the other party neither knows nor should know. As in the previous Example, the party who is "more at fault" is bound by a contract on the other party's terms.

   b. **Fault system:** Thus in determining whether there is a contract in such cases of ambiguity, a ***"comparative fault"*** system applies. As Comment d to Rest. 2d, § 20, puts it, "no contract is formed if neither party is at fault or if both parties are equally at fault." If one party is more at fault than the other, she is bound by the other's understanding.

C. UCC approach: The UCC has no provisions dealing directly with the consequences of misunderstanding; this area is thus left to case law.

D. Misunderstanding as to minor term: The situations discussed thus far involve a misunderstanding which goes to an important, essential, term of the bargain. If the misunderstanding, however, involves only a ***minor*** aspect of the deal, the court will not usually conclude that no contract was formed, or that either party may avoid the contract. Instead, the court will usually attempt to choose the more reasonable, or fairer, of the meanings, and will enforce the contract on that basis.

E. One party's waiver of the misunderstanding: Even if there is the sort of misunderstanding that in a case like *Raffles v. Wichelhaus*, *supra*, p.

74, might constitute a failure of mutual assent and therefore a failure to contract, one party may ***waive*** the misunderstanding and enforce the contract in accordance with the understanding of the other party. See Rest. 2d, § 201, Comment d, last sentence.

> **Example:** In the *Raffles* situation, *B*, the buyer, could have learned of the mistake, then decided to wait for the second *Peerless* steamer and to accept the goods on it. If *A* (the seller) later discovered that *B* had originally expected shipment to take place on the first Peerless, *A* could not demand the goods back and escape from the contract on the grounds of a misunderstanding. Similarly, once *B* learned that the goods were coming on the wrong ship, if he did not seasonably object, he too would be held to have "waived the misunderstanding." See Rest. 2d, § 201, Comment d.

F. Other types of mistake: The topic of "misunderstanding," examined here, is related to the topic of "mistake." We discuss the general problem of "mistake" in a separate chapter devoted solely to the subject, beginning *infra*, p. 155. There is a key difference between the types of mistake covered in that chapter, and "misunderstandings," covered here. This difference is that a misunderstanding, if it is related to a material term, ***prevents a contract from ever existing*** at all. The consequence of other types of "mistake," by contrast, is that the contract exists, but may be ***avoided*** by the mistaken party.

Quiz Yourself on
INDEFINITENESS AND MISUNDERSTANDING

17. Samantha's House of Magic agrees to buy 50 silk top hats from Esmerelda's Supply.

    (A) Assume that the parties never discuss the time for shipment. Is there a contract? If so, for what time of shipment?

    (B) Assume instead that Samantha's order form says that shipment will be made in 5 days, and Esmerelda's acknowledgment form recites that shipment will be made in 90 days. Neither party notices the discrepancy until one month after Samantha receives Esmerelda's acknowledgment form, when Samantha wonders where the shipment is. Is there a contract? If so, for what time of shipment?

18. The Lucrezia Borgia Exterminating Company decides to buy rat poison

from the Rodent-A-No Manufacturing Company. Rodent-A-No sends out its list of terms (price, shipping, etc.) and Borgia wires back, "We will order most of our rat poison from you for next year, at your stated price and shipping terms." Is there a contract?

19. Tweedle Dee enters into a contract with Mad Hatter Catering to purchase some pies for a party he is giving. The contract specifies that Mad Hatter will provide 10 "moon pies" for the occasion. Prior to the contract, Tweedle Dee was at a friend's house and was served an unusual pie made out of chocolate and green cheese, and the friend told him it was a moon pie — this is what Tweedle Dee meant to be ordering. Unbeknownst to Tweedle Dee, the pie Mad Hatter calls "moon pie" is made with ollaliberries and tang. The night of the party, Mad Hatter delivers his version of moon pies. Tweedle Dee is stunned when he sees the fruity concoction and refuses to accept them.

(A) Assume Mad Hatter had no reason to know that Tweedle Dee thought moon pies were made out of cocoa and green cheese, and Tweedle Dee had no reason to know that Mad Hatter thought moon pies were made with fruit. What result?

(B) Now assume that, just prior to their first meeting, Mad Hatter had heard Tweedle Dee tell Cheshire Kitty, Mad Hatter's receptionist, about the delicious chocolatey-cheesy moon pies he was hoping to serve at his party. What result?

Answers

17. (A) Yes, for shipment at a "reasonable" time. There is a contract because the UCC will provide a "gap filler" to complete a contract when it is otherwise clear that the parties intended to be bound. Here, the time for shipment will be a "reasonable time" (§ 2-309(1). What is a reasonable time will be determined based upon looking at the parties' prior course of dealing, if there is any, or by looking at trade usage (what is customary in the industry).

(B) No, probably. The fact that the order and acceptance (or, more generally, the parties' beliefs about the deal) diverge somewhat does not prevent a contract from coming into existence. But if the parties are in

substantial disagreement about an essential term of the contract, their expressions of intent to contract will be deemed to be so divergent that no contract was ever formed (i.e., there never was a "meeting of the minds.") A discrepancy between 5 days and 90 days on the shipment date would probably be found to be major enough to block formation of a contract.

18. **No, because there's no quantity term, making the contract too vague to enforce.** This is true even under the UCC rules for contracts between merchants, where "gap filling" occurs more readily. Note that the contract *looks* like a requirements contract — but it's not. That's because for a requirements contract to be valid, the buyer must agree to buy *all* of her requirements of a stated item from the seller, not *most*. Unless a buyer agrees to buy all of an item from the seller, her discretion hasn't been diminished at all, making her promise illusory and unsupported by consideration (as you'll see in the next chapter).

19. **(A) There is no contract, so Tweedle Dee can refuse to accept the pies.** When the parties to a contract have a misunderstanding about a material term in the contract and neither party knows or has reason to know of the misunderstanding, there is no "meeting of the minds" and therefore no contract.

    (B) There is a contract, on the terms as understood by Tweedle Dee, and Mad Hatter is liable for breach. Unlike the facts in (A), here Mad Hatter *did* know that the parties had different interpretations of the term "moon pie." Where one party knows that his interpretation of a term is different from that of the other party, he is considered to be more "at fault" for not clearing up the misunderstanding. In that event, a contract will be found to exist and it will be on the terms understood by the *other* party. So there was a contract for the chocolate-style pies, which Mad Hatter breached by preparing fruity ones. Mad Hatter not only can't get the contract price from Tweedle Dee, but he's liable to Tweedle Dee for consequential damages for the non-delivery (e.g., damage to the quality of the party, stemming from the lack of appropriate food).

EXAM TIPS ON OFFER AND ACCEPTANCE

Offer

- **Identifying an offer:** Many essays require you to determine initially whether a valid offer has been made. Remember that this ***question of fact*** is analyzed from the viewpoint of a ***reasonable offeree.*** Ask yourself: Has the party ***exhibited a willingness to be bound without further action on her own part***?
  - Distinguish offers from mere ***inquiries*** or expressions of ***interest***, which are not offers because they don't indicate a willingness to be immediately bound:

    Example: "Will $2,000 buy your piano?" is a mere inquiry, not an offer.

  - *Trap:* Don't be misled by a party's own characterization of a statement as an "offer." Analyze the relevant statement yourself from the perspective of a "reasonable offeree" — something the speaker (or listener) refers to as an "offer" may not be one.
  - Look out for circumstances and words indicating that the person speaking retains the right to give final approval to the deal — these indicate that the speaker is not making an offer, because the speaker doesn't intend to give the other person the power to seal the seal by "accepting."

    Example: After months of negotiation over a proposed contract, *A* sends *B* a draft, with a cover email saying, "I've put in the terms you wanted. Let's discuss this document." Since the email indicates that *A* believes a further discussion will be needed, the sending of the draft cannot be an offer, and *B* cannot cause the contract to be formed even if he emails back, "I accept the deal on exactly the terms proposed in your draft."

  - Look out for the following special situations which frequently appear on exams:
    - **Quotations**: A price quotation is usually construed as an invitation, but may be considered an offer if it's ***specific***

enough that the offeree is reasonable in perceiving it as an offer.

- **Advertisements**: These are usually considered invitations unless they include sufficient promissory language. (*Example:* "Ten pearl necklaces on sale for $300 to the first ten cash buyers" would qualify.) Language such as "while they last" probably does *not* indicate an intent to be bound.

- **Solicitations for bids**: These are usually mere invitations, with the responding bids considered offers.

  Example: X sends a letter to A, B, C and D which states: "I need to sell my heart-shaped diamond ring by January 15 for $1,500. If interested, please contact me before January 15." On January 14, X receives a letter from A agreeing to pay $1,500. X doesn't respond. On January 17, X receives a letter from B agreeing to pay $1,700. X responds to B: "I agree to the terms of your letter." A can't sue X for breach because X's letter was not an offer (just an invitation to make an offer), so A's letter was an offer that X never accepted.

  - *Exception:* ***Words of commitment.*** Watch for a solicitation that includes words indicating a commitment to sell to the highest bidder by a certain date. In this case, the solicitation becomes an offer and the solicitor is bound to the person fulfilling the stated conditions.

- ***Exam-writing tip***: Remember that since questions involving offers should be viewed from the perspective of the reasonable offeree (an objective standard), most questions will present gray-area fact patterns. ***Don't forget to argue both sides***. (But be sure to point out the one you think would prevail.)

Acceptance

Here are things to look out for when you analyze something that might be an acceptance**:**

- Just as an offer must contain language of commitment, an acceptance must be ***unequivocal***.

  - But keep in mind that acceptance may be ***implied through conduct***, such as shipment of the items, payment for the items, or the offeree's later statement (to the offeror or to a third

party) that a contract exists.

- **Manner of acceptance:** Make sure that the ***manner*** of acceptance was one that the offer allowed (or that was reasonable if the offer didn't say what manner was acceptable).
  - Remember that where the offeror is ***indifferent*** as to the ***manner*** of acceptance, the offer can be accepted ***by performance or promise.*** (*Example:* Under the UCC, the seller can usually accept *either* by shipping or promising to ship.)
  - Also, remember that even without an explicit acceptance, the ***parties' conduct can give rise*** to an ***"implied-in-fact"*** contract. (*Example: A*, a professional music teacher, gives music lessons to *B*'s child, while *B* stands silently by, knowing that *A* expects payment. *B*'s silent acquiescence gives rise to an implied-in-fact contract to pay *A*'s standard rate.)

Unilateral Contracts

- Offers for unilateral contracts appear often on exams. Look for a situation where an offeror is requesting the performance of a particular action. Most common: offers of an ***award*** or ***reward***.
  - **Offeree aware:** Remember that ***the offeree must know about the offer*** in order to accept it. Common scenario: A reward is offered for a lost possession and somebody returns it without knowing that the owner has offered a reward — not an enforceable contract.
  - ***Trap:*** Remember that ***promises are irrelevant*** if the offer is truly for a unilateral contract. Don't get sidetracked by a party who promises to perform the act requested. The promise doesn't transform the agreement into a bilateral contract. The offer may be revoked even after such a statement has been made.

    Example: H announces to a group in a bar: "I'll pay $1,000 to anyone who tells me the name of the thief that stole a hand-carved stool out of my garage last night." This is an offer for a unilateral contract, which can be accepted only by supplying the name, not by promising to tell the name.
  - **Revocation**: It's important to note when performance has occurred,

because the acceptance of the offer ***prevents revocation*** by the offeror.

> *Example:* P is about to enter law school and plans to marry during winter break. His father offers him $1,000 if he postpones his wedding plans until after he has completed his first year. P postpones the wedding as requested, and shortly thereafter his father dies. The father's death does not terminate the offer because P already accepted the offer prior to the father's death by postponing the wedding. P is therefore entitled to the $1,000.

- Also remember that under the Restatement, an offer for a unilateral contract becomes ***temporarily irrevocable*** if the offeree has ***commenced but not yet completed performance*** (recall the "Brooklyn Bridge" hypo — If P starts to cross the Bridge, D can't revoke).
  - Make sure, however, that the party has already begun the actual ***performance*** requested, not just made mere ***preparations*** to perform.

Acceptance Varying from Offer

- **Battle of the forms:** Be prepared for "battle of the forms" problems, such as where buyer's purchase order and seller's acknowledgment contain different or conflicting terms.
- **No deal:** First, make sure that the two forms agree on the basic terms (price, quantity, delivery date) well enough that they form a contract. If they don't, then there's ***no agreement*** unless the subsequent actions of the parties (e.g., seller ships, buyer accepts the goods) is enough to form a contract.
- **Material alteration:** Remember the basic rule that an additional or different term in the second form is merely a ***proposal for addition*** to the contract.
  - That term ***doesn't*** become part of the contract if:
    - one or both parties is ***not a merchant***; or
    - the term ***materially alters*** the deal. *Example:* Arbitration clauses, and disclaimers of warranties, are usually held to be material alterations, so they don't become part of the contract

unless the other party agrees to them.

- If the term in the second form ***directly conflicts*** with a term in the first form, probably the two ***"knock each out."*** Then, any relevant Code "gap filler" can be used.

  Example: Buyer's p.o. says, "You warrant that the machine you're selling us is fit for use in our manufacturing operation, and that it will perform properly for 10 years." Seller's acknowledgment says, "No warranties, express or implied." Since the Seller's clause materially alters the deal, the two clauses cancel each other. But the Code's implied warranty of merchantability would "fill the gap."

Duration of the Power of Acceptance

- Make sure that the moment at which "acceptance" occurred was a moment at which the ***offer was still open.***
  - **Mailbox rule:** Remember that an acceptance is ***effective upon dispatch***, provided it is communicated by a method specified in the offer (or by a reasonable method, if none is specified).
    - **Offeror can suspend:** But also keep in mind that the offeror, as "master of the offer," can ***suspend*** the mailbox rule (e.g., by saying "I must receive your acceptance by 5 p.m. Tuesday").
- **Counter-offer**: Remember that a counter-offer effectively terminates the power to accept just as if there was an outright rejection of the offer.
- **Lapse of time:** Determine whether an acceptance has been communicated in time:
  - If the offer specifies when an offer lapses, it lapses automatically on that date. *Tip:* Watch for an offer sent by mail. Unless otherwise specified, the time begins to run from the date the offer is ***received***.
  - If the offer doesn't specify when the offer lapses, it expires within a ***reasonable amount of time***. Look at the nature of the contract to determine what would be considered a reasonable amount of time. In a land sale deal, for example, six days' time would probably not be considered an unreasonable amount of time in which to accept, but one month probably would.
- **Revocation**: Be sure that the offer wasn't revoked before it was

accepted. Here are the two methods of rejection:

- An unequivocal statement of revocation (e.g., offeror says, "The deal is off").
- Revocation by an ***indirect*** communication. This is the most frequently tested mode of revocation. Look for an offeror who behaves in a way that is ***inconsistent with the intention of entering into the proposed contract***, where the ***offeree learns*** of the inconsistency.

  Example: X, who has offered to buy Y's garden tractor, learns from Z that Y has already sold the tractor to Y. Once X gets this knowledge, the revocation has occurred.

Firm Offers and Option Contracts

When you analyze an offeror's ***promise to hold an offer open***, it's key that you start with deciding whether the UCC applies:

- **UCC Transactions:** If the offer involves the sale of goods (i.e., it's a UCC Article 2 transaction), here's a recap of the main rules:
  - An offeror who is a ***merchant*** — one who deals professionally in the kind of goods in question — may extend an irrevocable ***firm offer***, even without consideration, as long as the writing is ***signed***.
  - A firm offer for which no consideration is given ***cannot be made irrevocable*** for a period ***longer than three months***.
    - If the offer purports to be irrevocable for longer than three months, it ***becomes revocable*** after the passage of three months, but can then ***still be accepted*** if nothing has caused it to terminate.
  - A ***non-merchant*** who gratuitously (i.e., without consideration) promises to hold an offer open is ***not*** held to that promise.

    Example: *A*, a non-merchant, posts a message on e-bay.com saying, "I offer to sell my 1953 Barbie & Ken set to highest bidder over $100. This offer is firm, and I won't revoke it before 11:59 p.m. March 17." *B* makes a $150 offer, which is the highest as of 11 p.m. on March 17. *A* revokes at 11:45. There's no contract, because *A* could revoke any time he wanted

even though he said he wouldn't, since: (1) he's a non-merchant; and (2) offers by non-merchants aren't irrevocable without consideration.

- **Non-UCC transactions:** For non-UCC transactions (sales of realty and services), there's just one rule:
  - An offer that purports to be irrevocable for a certain period is ***not irrevocable***, unless the offeree gives ***consideration*** for the irrevocability. This is true even if the offeror is a businessperson (i.e., would be a "merchant" if this were a sale of goods).

    Example: On the facts of the above e-bay example, suppose *A* were a professional developer who offered to sell Blackacre to the highest bidder, with a promise that the offer wouldn't be revoked before conclusion of the auction. *A* could revoke anyway, since no offeree is giving consideration for the promise of irrevocability.

    - But remember that consideration can be ***non-monetary***.

      Example: *A* offers to sell Blackacre to *B* for $100,000. *B*, who lives 150 miles from the property, wants to inspect it but doesn't want to take the trip if *A* might sell to someone else in the interim. Therefore, *A* promises to hold the offer open for one week, in return for *B*'s promise to visit the property during that week. *A*'s offer is irrevocable for the week, because *B*'s return promise to travel is consideration.

- For both UCC and non-UCC contracts, remember that the acceptance of an option contract is effective not upon dispatch, but upon ***receipt by the offeror***.

Temporary Irrevocability

- Look for instances where an offer is ***temporarily irrevocable***, such as the following:
  - Where a party has ***commenced performance of a unilateral contract***.
  - Where a ***sub-contractor*** submits a bid to a general contractor. If the sub-contractor's bid is relied upon by the general contractor when he submits his overall bid to the customer, it is irrevocable for the time necessary for the general contractor to receive the job and accept the sub-contractor's bid.

- ☞ However, in this sub-contractor-bid situation, what's being applied is in effect ***promissory estoppel***, so the sub's offer is only irrevocable to the extent needed to ***avoid injustice.*** (*Example:* If the general contractor still has time to amend his own bid after receiving the news that the sub has revoked his sub-bid offer, enforcement of the sub's bid won't be necessary to avoid injustice.)

Indefiniteness

- ☛ Agreements with indefinite terms appear quite often in fact patterns. When analyzing an agreement, look for the ***four essential elements****:* Parties to the contract, subject matter, time for performance, and price. But don't automatically void an agreement for indefiniteness if one of these terms is missing.
  - ☞ **UCC test:** Under the UCC, the agreement is not void if it expresses an intention by both parties to be bound and there is a ***reasonably certain basis for giving an appropriate remedy***. (Most courts today apply pretty much the same approach in non-UCC cases.)

    Example: If the items to be supplied (e.g., name of product) or the quantity are missing, and there's no way for a court to know reliably what was intended, the contract will be void for indefiniteness.

  - ☞ **Missing terms:** Be sure to fill in any omitted terms. Most fact patterns will present a situation where the essential terms are specified, so then the court (i.e., you, the exam writer) may supply a reasonable term. Be on the lookout for these common contexts where terms are omitted:
    - ☞ **Real estate transactions**. The same general rules apply, even in a non-UCC context. *Examples of terms whose omission would probably* ***not*** *be fatal:* Type of deed, type of title or type of warranty, dates of tendering of down payment and completion of transaction.

      Example: X agrees in writing to sell to Y a property called Farmland for $8 an acre. X later claims that the agreement is void for indefiniteness. Several details are missing from this contract: the total price (because the aggregate number of acres is unknown), the time for performance, the type of deed and condition of title Y will receive. *Solution:* Aggregate acres could be ascertained by a survey,

and the total price could then be calculated by multiplying the acres times $8. The other terms could be implied from what is customary in the area.

□ ***Remember that price is an essential term in a realty contract and its absence violates the Statute of Frauds***.

☞ **Sale of goods**. The most commonly omitted terms in this type of transaction are the manner of payment (cash or credit), the place of delivery, total contract price and type of warranties. If the contract doesn't otherwise specify, delivery is at the seller's place of business, a cash payment is due at that time and the normal implied warranties will accompany the sale. If there's no price specified, the court can supply a "reasonable" one, provided that the parties intended to be bound even though no price was set.

☞ **Past performance:** Watch for a situation where the parties have already been conducting business under an agreement that one party is now claiming is void because it is "indefinite." The parties' ***past performance*** may show that there is mutual agreement regarding the supposedly indefinite term.

☞ **Open term:** Don't worry if the contract indicates that a term will be specified by one of the parties (or agreed on by both) in the future: the contract will still be enforceable if there is a reasonable way for a court to fill the gap and to determine damages.

Example: A purchase agreement reads in part: "*B* Aircraft Company agrees to sell and *A* agrees to buy 50 planes to be delivered as ordered within the next year at these prices: Gulls — $100,000 each; Terns — $200,000 each. *A* to specify shipping dates. Number of each type wanted on each shipment to be specified by *A* at least thirty days before each shipping date." After *A* places and receives an order of 10 planes, he refuses to place an order for any more. Although the quantity of each type of plane isn't specified, there is a reasonably certain basis for awarding damages by figuring that the least *A* would have bought prospectively was 40 Gulls (the least expensive plane).

Misunderstanding

☛ **Ambiguous term:** Where a contract term is ambiguous and one party should know the meaning understood by the other party, a contract is formed based on the other party's understanding.

Example: In October, *C*, an art collector, telephones *A*, an artist, and says, "In February I saw your painting of Sunflowers. Is it still available, and, if so, how much do you want for it?" The contract they later sign states: "*A* hereby sells to *C* *A*'s sunflower painting..." *C* was referring to a painting entitled "Sunflowers." In July *A* had painted another picture of sunflowers entitled "Sunflowers II," and *A* subjectively was referring to this painting in the contract. *C* had the first "Sunflowers" in mind. Since *C* mentioned that he had seen the painting in February, *A* should have known that *C* was referring to the first "Sunflowers." Therefore, a contract exists, and for the first Sunflowers.

On the other hand, if neither party was at fault in the misunderstanding, the lack of agreement on which painting was intended would be great enough to cause the contract to be void for misunderstanding.

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1. For a more detailed discussion of the facts of the case, see *infra*, p. 165.

2. In non-UCC cases, most modern courts (and the Second Restatement) follow the general approach of § 2-207. See p. 44.

3. We are putting aside for the moment, until *infra*, p. 36, the situation in which the additional term so drastically changes the deal the offeror had in mind that it prevents the offeree's response from being a "definite and seasonable expression of acceptance" under § 2-207(1).

4. You may want to review the text of § 2-207, and our discussion of the section, beginning on p. 29 *supra*.

5. The record was unclear about whether the transaction was an in-person transaction at a retail store or a phone or mail order, and the court did not decide. However, the court's conclusion about whether the arbitration clause ever became part of the contract did not depend on the precise method by which a contract was reached.

6. By "must," I mean that the website was constructed in such a way that the terms scrolled onto the buyer's screen before she confirmed the order, and the buyer was asked to acknowledge that she saw these terms and knew that her order was contingent upon her acceptance of them. This is now the standard "clickwrap" format for order-entry screens.

EXAMPLES & EXPLANATIONS

Contracts

Seventh Edition

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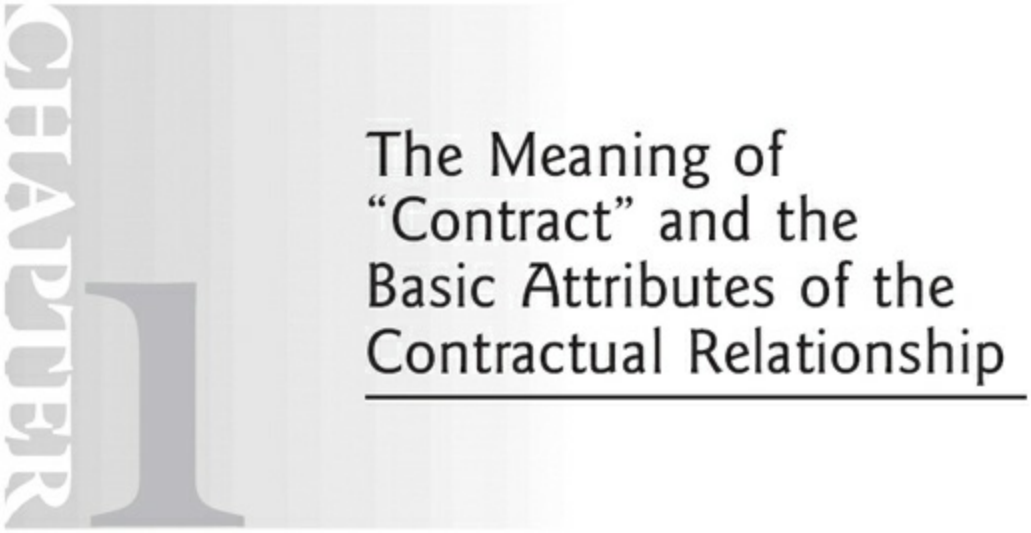
Contracts



§1.1 INTRODUCTION

Some contracts courses may begin with material that provides students with background information on the law of contracts. Others may launch immediately into the study of substantive principles of contract law. Whatever form your contracts course takes, you may find it helpful to read the first three chapters of this book at the beginning of your course. They introduce and articulate basic concepts about contract law and our legal system that you will find very helpful as you begin your studies. Many of the principles and concepts introduced in these three initial chapters appear frequently throughout the book, so this will not be the only time that you read about them. However, this first encounter will set the stage for your studies and will enable you to begin to understand legal analysis and identify themes that run through contract law. You will find immediately that the discussion goes well beyond the exposition of rules of law. Even if one assumes that it is possible to articulate a clear and settled body of rules (an assumption that you will quickly find to be false), the rules are just one component of what needs to be studied in learning the law. Rules do not exist in a vacuum but must be

understood in light of historical perspective, public policy, legal theory, and the legal process.

We begin our introductory survey in this chapter by defining what is meant by a contract. This discussion gives you a brief overview of a number of the central themes of contract law, and it broadly sketches the contractual relationship. Chapter 2 describes some of the fundamental concepts and distinctions that are essential to a comprehension of contract law in the context of our legal system as a whole. It explains the importance of historical perspective and legal theory, describes the nature of our common law system, and introduces the crucial distinction between judge-made law and statutory law, with particular reference to the statute that pervades contract law, Article 2 of the Uniform Commercial Code (UCC). Chapter 3 concentrates on the nature and composition of judicial opinions and on the method of analyzing and gleaning legal rules from them. Its primary purpose is to explain the doctrine of precedent as it applies in contract law and in our legal system as a whole. The Examples in Chapter 3 offer a specimen opinion, constructed to provide an exercise in reading, understanding, and applying the precedent of a judicial decision. Because contract law is commonly taught through the study of court decisions, you will become familiar with the methodology of case analysis as you use it throughout the contracts course. However, Chapter 3 provides an early opportunity for you to focus on and begin to understand how to approach caselaw and case analysis.

§1.2 THE LEGAL MEANING OF "CONTRACT"

By the time they reach law school, most people have a good idea of what a contract is. Nevertheless, lay usage of a legal term such as "contract" is likely to be less exacting than the legal definition, and so we must begin by defining and describing the elements of contract. It is not easy to provide a simple and accurate definition of a legal relationship as complex as contract, and the following definition is necessarily an oversimplification. However, it serves as a starting point for discussion and allows us to focus on the crucial elements of the relationship.

A contract may be defined as an exchange relationship created by oral or

written agreement between two or more persons, containing at least one promise, and recognized in law as enforceable. This definition reflects several essential elements:

1. An oral or written agreement between two or more persons
2. An exchange relationship
3. At least one promise
4. Enforceability

The central concept of each of these elements is introduced below and will be returned to in greater detail later in the book.

§1.2.1 An Oral or Written Agreement Between Two or More Persons

a. A Voluntary, Consensual Relationship, Objectively Determined

Probably the most important attribute of contract is that it is a voluntary, consensual relationship. There need only be two parties to a contract, but there is no limit on the number of parties that could be involved in the transaction. A contract is created only because the parties, acting with free will and intent to be bound, reach agreement on the essential terms of their relationship. It is the element of agreement that distinguishes contractual obligation from many other kinds of legal duty (such as the obligation to compensate for negligent injury or to pay taxes) that arise by operation of law from some act or event, without the need for assent.

Although voluntary agreement between the parties is essential to the creation of contract, "agreement" in the legal sense is subject to an important qualification. The law does not require that the parties reach true agreement, in a subjective sense—that their minds are in accord. It is enough that the words and conduct of a party, evaluated on an objective standard, would lead the other party reasonably to understand that agreement was reached. (The reason for using this objective standard is explained in sections 1.4.3 and 4.1.) Also, volition should not be taken too literally. We assume that a party may not be acting with completely free will in entering into a contract. He may feel some compulsion to make the contract as a result of market forces, the persuasiveness of the other party, necessity, or the lack of a more attractive alternative. However, volition does at least mean that a party cannot

be improperly coerced or tricked into making a contract, and the law has principles and standards (covered in Chapter 13) to distinguish when pressure to make a contract is no longer acceptable, and has so undermined the party's will as to defeat his volition.

b. Standard Contracts

You will quickly notice, as you proceed through your contracts course, that many contracts do not involve an actual negotiation between the parties, but are based on standard terms that have been drafted in advance by one of the parties and which are designed to cover all transactions of the type involved. You probably enter into such standard contracts regularly, when, for example, you enter into transactions on the Internet and click an "I agree" box, or you apply for a credit card, rent premises, receive medical treatment, and so on. You will find that although there is seldom, if ever, an opportunity to negotiate the terms of the contract, a party who enters a transaction subject to the other party's standard terms is likely to be bound by them on the basis of an objective manifestation of assent.

c. Oral and Written Agreements

Note that our definition refers to an oral or written agreement. In common terminology, people often use the word "contract" to refer to a written document that records the parties' agreement. However, it is important to understand that "contract" describes a relationship that may or may not be recorded in a document. As a general rule, a contract does not have to be in writing to be a binding and enforceable legal obligation. (Under a legal rule called the statute of frauds, there are some types of contract that must be recorded in a signed writing to be enforceable. This is discussed in Chapter 11. However, most contracts are not covered by the statute of frauds, and are binding as soon as oral agreement has been reached.) Of course, it may be harder to prove an oral contract than one that has been recorded in writing, but do not confuse problems of proof with the more fundamental question of enforceability.

d. Contracts Distinguished from Nonbinding Agreements

Although contract requires a voluntary agreement between the parties, this does not mean that all voluntary agreements are contracts. People make all kinds of agreements that do not rise to the level of contract. For example, social agreements (the acceptance of a dinner invitation or a commitment to go together to see a movie), a politician's campaign promises, and a spouse's promise to clean out the attic next weekend are not contracts. Courts sometimes describe promises of this kind as moral or ethical obligations, rather than legal ones. The distinction between a legally binding contractual obligation and moral obligation is not always easy to draw, but often this question is settled by determining the intent of the parties (measured objectively). In some cases there may be other indications that the agreement creates only a moral obligation. For example, the requirement of exchange, discussed in section 1.2.2, may be missing. For this reason (as explained in Chapter 7), a promise to give a gift or to make a contribution to charity may create a moral obligation, but it does not qualify as a legally binding contractual obligation.

§1.2.2 An Exchange Relationship

As mentioned earlier, a contract is a relationship. By entering into the agreement, the parties bind themselves to each other for the common purpose of the contract. Some contractual relationships last only a short time and require minimal interaction. For example, a contract for a haircut involves a fairly quick performance by the hairdresser, followed by the fulfillment of the customer's payment obligation. Other contractual relationships, such as leases, construction contracts, or long-term employment contracts, could span many years and require constant dealings between the parties, regulated by detailed provisions in the agreement.

The essential purpose of the contract relationship is exchange. The trade in property, services, and intangible rights is fundamental to our economy and society, and the primary function of contract is to facilitate and regulate these exchanges. The concept of exchange (discussed more fully in Chapter 7) means that the very essence of contract is a reciprocal relationship in which each party gives up something to get something. These "somethings" are as varied as one could imagine: The owner of a car could sell it for cash or barter it for other goods; a celebrity's butler may promise to reveal his employer's dark secrets to a tabloid for cold hard cash; an inventor may trade

the rights to her idea for a promise by a manufacturer to develop the idea for mutual profit; a fond uncle may promise his nephew money in exchange for an undertaking not to drink, smoke, and gamble. These situations vary greatly. Some involve tangible things, others intangible rights. Some of the promises have economic value, others do not. Yet their basic format is the same—a bargain has been reached leading to a reciprocal exchange for the betterment (real or perceived) of both parties.

As discussed in Chapters 7, 8, and 9, the modern concept of contract embraces some transactions in which exchange in the traditional sense is tenuous. Nevertheless, exchange continues to be the principal motivation for contracting and the guiding rationale for the rules of contract law.

§1.2.3 Promise

A contract is a relationship that can be enforced by legal process. Therefore, if the parties simply enter into an instantaneous exchange (say, an exchange of goods for cash, without any warranty relating to the goods) neither makes any commitment, and there is no role for contract law to play in enforcing the exchange. It is therefore usually said that there must be some promise made by at least one of the parties for a contract to exist.

The concept of promise or commitment needs explanation and refinement. A promise is an undertaking to act or refrain from acting in a specified way at some future time. This promise may be made in clear and express words, or it could be implied—that is, inferred from conduct or from the circumstances of the transaction. A contractual promise is sometimes called a covenant. However, “promise” is the more common word and is less subject to confusion because “covenant” is sometimes used as a synonym for “contract.”

Notice that the definition of “contract” indicates that only one promise needs to be made for an enforceable contract to come into existence. This concept may be puzzling at first impression because the definition also characterizes contract as an exchange relationship, so one would expect reciprocal promises. In most cases, contracts do contain reciprocal promises — the parties exchange promises, so that each makes a promise to the other. However, an exchange relationship also exists if one of the parties makes a promise of future action in exchange for an instantaneous performance by the other.[1]

The following illustration shows the distinction between an instantaneous exchange (also called an executed exchange) and a contractual obligation: Rocky Rapids decided to sell his kayak. He placed it on the sidewalk in front of his house with a sign that read "For sale, without any warranties. $400."[2] Eddy Undertow saw the sign and decided to buy the kayak. He handed over $400 in cash to Rocky and took the kayak away. This is an instantaneous exchange and therefore not a contract. Eddy paid cash and made no promise to do anything else. Rocky's legal obligation was completely performed as soon as he let Eddy take the kayak. He also made no promises.

However, the transaction would have been a contract either if Eddy had given a check to Rocky for $400 instead of cash, or if Rocky had not sold the kayak "as is," but had instead assured Eddy that it was in good condition and watertight. In each of these situations, at least one of the parties would have made a promise. Eddy's check would be a promise because a check is not an immediate payment, but a short-term credit transaction in which Eddy, in effect, promises Rocky that his bank will pay Rocky the $400 on presentation of the check. Likewise, had Rocky given a warranty, he would have made a future commitment relating to the kayak.

§1.2.4 Legal Recognition of Enforceability

a. The Legal Right to Enforcement

Once the parties have entered into an exchange relationship that qualifies as a contract, they commit themselves to perform the promises that they have made in the contract. Contracting is often described as an act of private lawmaking by which the parties create a kind of personalized "statute" that governs their transaction. The law so created by the terms of the contract is binding on the parties. It is a hallmark of a contractual promise that if it is broken, the party to whom the promise was made can enforce it by initiating suit in court, thereby invoking the power of the government to uphold the other party's commitments. This does not mean that every breach of contract will end up in litigation. In most cases the parties have strong incentives to avoid a lawsuit. Litigation is expensive and time-consuming, and legal action might damage the parties' long-term commercial relationship as well as tarnish the breaching party's business reputation. Therefore, if there is a

reasonable prospect of persuading the breaching party to perform or of otherwise settling the contractual claim informally, the parties are likely to pursue that avenue before resorting to litigation. Even where the parties cannot resolve their dispute by negotiation, their agreement may preclude litigation in court by binding them to resolve the dispute by arbitration. Arbitration provisions are included in many contracts and are generally upheld. Although a contractual claim may not reach the stage of formal resolution by a court or arbitrator, the power to use a binding legal process to enforce the contract gives the parties confidence in their contractual relationship, provides a deterrence to breach, and assures a means of compelling performance or recovering compensation for failure of performance.

b. The Process of Judicial Enforcement, Usually by a Judgment for Damages

Although a detailed discussion of the process of enforcement of a contract through litigation is beyond the scope of this book, it is helpful to outline the procedure that a party must follow to assert a contractual claim in court. The victim of the breach institutes action in court by filing a summons and a complaint. If the other party defends the suit, it will file an answer. Various other pleadings and processes follow as the parties prepare for trial. It often happens that the case is settled or disposed of by a summary process before it reaches trial. If not, the case proceeds to trial. Unless the parties have elected a trial by judge alone, factual questions are usually decided by a jury, and legal issues are decided by the judge. In the first instance, the role of the court is to adjudicate any questions concerning the existence of a valid contract and to resolve any disputes over its terms and their breach. Once it is established that a contract was entered into and breached, the court will enforce it by giving a remedy for the breach.

The most obvious form of remedy may seem to be for the court to force the breacher to do what was promised. For example, say that Rocky and Eddy entered into a contract under which Rocky agreed to sell the kayak to Eddy for $400. The contract provided that Rocky would deliver the kayak to Eddy the next day in exchange for $400 in cash. The next day, when Eddy arrived with the $400 in hand, Rocky said he had changed his mind and refused to go through with the sale. This is a breach of the contract. If Eddy sued Rocky,

one might assume that the primary mode of legal enforcement of the contract would be a court order compelling Rocky to hand over the kayak against payment of the $400.

However, it is a firm principle of contract law (for reasons explained in Chapter 18) that the primary remedy for breach of contract is not such specific enforcement of the promise. An order compelling performance is available in only exceptional situations. Rather, it is a judgment awarding compensatory damages to the disappointed party. That is, the disappointed party must prove that the breach caused financial loss, and the court will award judgment against the breacher to compensate for that financial loss. Thus, Eddy would have to show that he had lost money or suffered some other kind of quantifiable economic harm as a result of the breach. For example, he may testify that following Rocky's refusal to deliver, he sought to buy another kayak of a similar type and condition, and could not find one of equivalent quality for less than $450. Eddy's damages are $50. The court will award him a money judgment in this amount. If Rocky fails to pay the judgment voluntarily, Eddy will attempt to recover the debt through a process called execution. Under this procedure, a court official (usually called a sheriff) is commanded by the court (in a document called a writ) to try to seize property of Rocky's and to sell it at public auction to raise the money needed to satisfy the judgment. If the sheriff is unable to find any property, the judgment debt remains unsatisfied. There is little further that can be done.

The purpose of sketching this enforcement process here is to make the point that legal enforcement seldom entails judicial compulsion of performance. In most cases, the plaintiff's victory in court is nothing more than a determination that the defendant owes him a stated amount of money. This does not end the matter because the plaintiff now has to collect the debt. If the breacher has no means of paying the judgment, the process of trying to enforce the contract could involve additional cost and inconvenience and still end in frustration. This is an important perspective to take with you as you begin to study the law of contracts.

c. The Widespread Use of Arbitration as a Means of Enforcing Contracts

Finally, on the subject of legal enforcement, it is helpful to outline the arbitration process that is alluded to above. As noted earlier, many contracts provide that any disputes arising out of the contract must be resolved by

arbitration or by some other process of extra-judicial dispute resolution. Arbitration provisions in contracts, especially in standard contracts, have become very common and are generally enforceable unless a party can show some clear basis in contract law for invalidating the provision. There is a general public policy in favor of arbitration, which is perceived as a speedier and less formal means of resolving disputes than litigation. While this is generally true, it is not always so, and arbitration does have its own shortcomings that call into question whether it is always the best means of resolving disputes. We consider these questions later.

If the parties have validly agreed to arbitration, the case is heard and disposed of by an arbitrator (or panel of arbitrators), a private person (or persons) selected by the process specified in the contract. Although an arbitrator's decision may be appealable to a court on narrow grounds, the arbitrator's determination is usually final and binding on the parties and may be enforced in the same way as a judgment of a court. If a party who entered into an arbitration agreement commences suit in court, the other party will likely move to dismiss or stay the suit and compel arbitration. If the court finds the arbitration agreement to be valid, it will grant the motion.

§1.3 CONTRACT AS A GENERAL BODY OF LAW APPLICABLE TO DIVERSE TRANSACTIONS

Contract law covers a wide range of very different transactions—leases and sales of real and personal property, employment, credit, insurance, construction, and so on. These many and diverse types of contract each have their own attributes and concerns, so it stands to reason that there cannot be a single and uniform body of legal rules that applies to all of them. With each type of contract, special rules have been developed to respond to distinct features of the transaction or particular needs or issues in the commercial context. For example, a whole body of law has developed to protect consumers who purchase goods or seek credit and is not applicable when the purchaser or borrower is a commercial entity; employment contracts are subject to rules designed to regulate the employment relationship, and many of them focus on the protection of employees; a construction or procurement contract with the government is subject to regulations not found elsewhere;

insurance and banking contracts are also controlled by specific regulations. This recital could continue for some length. Although each of these categories of contract has its specialized rules, they all share common ground and are based on similar general principles that are encompassed within a general law of contracts.

The law of contracts is the common core of rules and principles applicable to all contracts and it governs except to the extent that it has been varied by laws specific to the transaction. This specific law may have been created by statute or by judicial decision, or both. You will therefore find, as you read through this book and your class materials, that all kinds of different contracts are considered. In most cases, because we are considering this common core of rules and principles, the type of contract involved is not of overwhelming significance. The law discussed is usually relevant to other types of contract. However, this is not always so, and one must always be on the lookout for variations, whether statutory or judge-made, based on the particular features of the contract in issue.

§1.4 THE FUNDAMENTAL POLICIES AND VALUES OF CONTRACT LAW

The rules of contract law are based on well-established values and public policies. An understanding of the law's basic goals and assumptions is essential to a full appreciation of legal rules and so it is useful to identify and articulate significant policy themes from the outset. This section introduces them briefly.

§1.4.1 Freedom of Contract

a. Individual Autonomy

The consensual and voluntary nature of contract was stressed in section 1.3. The power to enter contracts and to formulate the terms of the contractual relationship is regarded in our legal system as an exercise of individual autonomy—an integral part of personal liberty. The converse is also true: Because contracting is an exercise of personal liberty, no one may be bound

in contract in the absence of that person's assent. In the United States, the power of contracting has been elevated to a status higher than that accorded it under English common law because it is guaranteed by the Constitution. (The due process clause, U.S. Const. amends. V and XIV, and the contracts clause, U.S. Const. art. 1 §10, provide the constitutional safeguards of liberty of contract.)

Liberty of contract is augmented by another right protected by the due process clause—the right to hold and deal with property. Contracts involve the exchange of economic values, whether in the form of tangible property, services, or intangible rights. These are property rights and the power to use or dispose of them or to choose not to do so necessarily brings into play their constitutional protection. Furthermore, where the contract involves the rendition of personal services by an individual, that person's right to dispose of her labor or to withhold it unless she wishes to dispose of it is protected by the prohibition on involuntary servitude in the Thirteenth Amendment. The ideological basis of contract freedom is reinforced by the pragmatic consideration that economic intercourse is most efficient when its participants desire it and are free to bargain with each other to reach mutually desirable terms.

Although freedom of contract is an important value, it is not the only value that courts seek to uphold in adjudicating contract disputes. Where other public policies are implicated in the contract dispute, the court must take them into account and must balance them against the policy of protecting freedom of contract. For example, policies prohibiting criminal enterprise, protecting the environment, or forbidding anticompetitive behavior may restrict the right to make certain contracts, or may prohibit certain terms in a contract. Once again, these issues are discussed in detail later. For the present it is enough to note that while contract liberty is an important value, it is subject to a variety of limitations that are justified either by the protection of corresponding rights in other persons or by the demands of other public interests.

b. Imbalance of Bargaining Power and Adhesion

While freedom of contract is a fundamental value, the exercise of this freedom by one person cannot be untrammelled. Like other liberties, it is delimited by corresponding rights held by other persons, and by the state's

legitimate interest in appropriate regulation. In an ideal situation, a contractual relationship involves an equal exercise of autonomy by both parties. Each enters the transaction voluntarily and has the knowledge and ability to negotiate its terms. However, in many transactions, this equality does not exist. One of the parties has greater sophistication and bargaining power than the other. In some cases this imbalance of bargaining power is so great that the stronger party is able to insist that it will only contract on its own terms. If the other party wants the contract, it has no choice but to accept the terms, even if they are one-sided and drafted to favor the interests of the dominant party. For example, a consumer who buys an insurance policy, an airline ticket, or a software program may have some limited ability to select among alternative terms but is otherwise unable to negotiate much of the content of the standard contract used by the dominant party; a small business that buys inventory from a large supplier may have insufficient market power to insist on a change to terms that the supplier has chosen to include in its standard contract.

Contracts of this kind, proffered on a "take-it-or-leave-it" basis, are known as contracts of adhesion because the less powerful party has no choice but to adhere to the proffered terms. (Contracts of adhesion are discussed more fully in Chapter 13.) Although significant imbalance in bargaining power does diminish the contractual autonomy of the weaker party, the general approach of the law is to recognize that such an imbalance is an inevitable feature of a market economy and that it precludes the exercise of a pure and unrestricted freedom of contract by both parties in many transactions. The general policy of contract law is therefore not to interfere with contracts merely because one party had the power to formulate and impose its terms on the other. However, to prevent the abuse of this power, contract law contains many doctrines, some developed by courts and others enacted by legislation, that regulate it and allow judicial intervention when a party's conduct or the imposition exceeds the bounds of hard bargaining and becomes unfair bargaining or improper imposition. You will find these doctrines referred to in many parts of this book, but we focus on them in Chapter 13.

§1.4.2 The Morality of Promise—*Pacta Sunt Servanda*

The Latin maxim *pacta sunt servanda* (agreements must be kept) comes from

Canon law.[3] It reflects a longstanding moral dimension of contract in our law—that there is an ethical as well as a legal obligation to keep one's contractual promises. Contracts should be honored not only because reliability is necessary to foster economic interaction, as discussed in section 1.4.3, but simply because it is morally wrong to break them. The role that this basic moral value plays in contract law is subtle. You will see later that courts and scholars often underplay the moral aspect of keeping promises and deal with breach of contract in purely economic terms. It is often suggested, for example, that breach of contract is an acceptable economic choice, provided that the breacher pays monetary compensation. Nevertheless, it would be a mistake to assume that society or courts are indifferent to the ethical implications of dishonoring contracts. Where a party has breached a contract deliberately, unethically, or in bad faith, this may have an impact on the disposition of the case or the remedy. In some cases, the court expresses its disapproval of the conduct and its adverse consequences. However, even where moral condemnation is not articulated, the choice of applicable rules sometimes reflects disapprobation of wrongful conduct. Outside the realm of litigation, social pressure and business relationships frequently provide disincentives to treat contractual undertakings in a cavalier fashion.

§1.4.3 Accountability for Conduct and Reliance

The objective test of assent was introduced in section 1.2. In determining whether or not a person agreed to a contract or specific contractual terms, the person's manifested conduct by words or action is given more weight than her testimony about her actual intentions. An emphasis on the objective appearance of assent is important not only because of evidentiary considerations (that is, it is easier to prove because it is observable) but also because one of the fundamental values of contract law is that a person should be held accountable for words or acts reasonably manifesting intent to contract, and that the other party, acting reasonably, should be entitled to rely on that manifestation of assent. (Note that the perception of the conduct by the other party is also subject to an objective test of reasonableness. Contract law does not seek to protect the unreasonable reliance of a party who places an idiosyncratic or irrational interpretation on conduct.) Thus, the principles of accountability and reliance qualify the value of voluntariness—volition is not measured by the true and actual state of mind of a party, but by that state

of mind as made apparent to the other contracting party. Even if a person does not really wish to enter a contract, if she behaves as if the contract is desired and intended, that conduct is binding, and evidence of any mental reservation is likely to be disregarded. (Of course, this rule is not absolute. As we see later, where the manifestation of assent is induced by trickery, coercion, or other illegitimate means, there are grounds for going behind it.)

The value of protecting reasonable reliance is pervasive in contract law. It has both a specific and a general aspect. It is specific in that a person who has entered a contract has the right to rely on the undertakings that have been given. If they are breached, the law must enforce them. It is general because when parties in numerous specific situations feel secure in relying on promises, the expectation arises in society as a whole that contracts can be relied on, and that legal recourse is available for breach. This general sense of reliance, sometimes called "security of contracts" or "security of transactions," is indispensable to economic interaction. If it did not exist, there would be little incentive to make contracts.

In summary, accountability for conduct that induces reasonable reliance is a vital goal of contract law. This is tempered by the consideration that in some cases manifested conduct is induced by illegitimate means, and one who uses such means cannot truly be regarded as having relied on the apparent assent.

§1.4.4 Commercial and Social Values

Because most contracts are concerned with economic exchanges, contract law is quintessentially economic in its purpose. Its goal is to facilitate trade and commerce, to regulate the manner in which people deal with each other in the marketplace, and to enforce commercial obligations. Contract law reflects the prevailing economic philosophy of the United States, which is capitalist and oriented toward a market economy. However, there is an ongoing debate among scholars, reflected also in differences in the judicial philosophy of judges, over the extent to which the rules of contract law should emphasize economic or commercial considerations at the expense of other important social values. At one pole of this debate, it is argued that the role of contract law is to facilitate transactions on a free market. In this view, great store must be placed in free market mechanisms; the law should facilitate, rather than regulate, market activity; and economic efficiency should be the most

important goal of contract law. That is, the rules of contract law should aim to encourage commercial interaction that creates the greatest economic value for the parties and society. At the other pole, it is argued that an important function of contract law is to regulate free market forces to promote other values such as fairness in transactions and the protection of weaker parties.[4] Most courts hover somewhere between these two poles, and as you read contracts cases, you will find many in which the court articulates the economic basis of contract law. In other cases, you will find that the court seeks to achieve a result that advances other values such as fairness in contract terms, doing justice between the parties, avoiding undue hardship to one of the parties, or furthering the public interest. In some of these cases, the court will deliberately weigh and balance economic and social values. You should be aware at all times that contract law is not merely a set of rules but is an instrumentality for achieving social policy.

Examples

1. Liquidators, Inc., held a liquidation sale of the inventory of a furniture store that had gone out of business.[5] Employees of Liquidators, Inc., placed price tags on all the items offered for sale and posted a large sign on the premises that stated "Liquidation sale! All sales are final. All items sold without any warranty." The sign was prominent and was undisputedly seen and understood by all buyers before they made their purchases. At the sale, a customer bought a sofa priced at $400. He gave Liquidators, Inc., $400 in cash, loaded the sofa onto his pickup, and drove away. Did Liquidators, Inc., enter a contract with the customer?
2. Would the answer to Example 1 change if the customer had given Liquidators, Inc., a check for $400 rather than cash?
3. Another customer at the liquidation sale wished to buy a table for $300. She had no means of transporting the table herself, so she agreed with Liquidators, Inc. that it would deliver the table to her home the next day and would collect payment on delivery. Do the parties have a contract?
4. Maggie Zine owns a newsstand. She needed to visit the dentist one morning. On the night before, she asked her brother if he would take care of the stand during the morning. Her brother agreed to do it if Maggie paid him $50 in advance. She agreed and gave him $50 in cash.

Did Maggie and her brother enter into a contract that evening?

5. In March Harry asked Tom, his oldest friend, to be his best man at his wedding on June 1. Harry told Tom that if he would agree to be his best man, Harry would buy him a new suit to wear at the wedding. Tom agreed. On May 25, Tom told Harry that he had decided to leave on a two-week vacation the next day, so he would not be able to attend Harry's wedding or to be his best man. Is Tom's commitment to Harry contractual? If it is, can Harry obtain an order of specific performance, compelling Tom to be his best man?
6. May LaDroit was browsing through an antique store. Prominent signs were posted in several places throughout the store: "Please be careful in handling the merchandise. If you damage merchandise, you will be responsible to pay for it." May picked up a porcelain figurine to examine it. The figurine slipped out of her fingers and smashed into pieces on the floor. It bore a price tag of $1,500. Does May have a contract with the store under which she is committed to pay it $1,500?

Explanations

1. Both the customer and Liquidators, Inc., have performed instantaneously —delivery of the goods was exchanged for payment of the cash. Because there are no outstanding obligations at the time of agreement, there is nothing to enforce as a contract. Liquidators, Inc., would have assumed an obligation if it had warranted the sofa or had given any other undertaking. However, the sign on the premises made it clear that Liquidators, Inc. did not undertake any such future commitment.[6]
2. The answer would change if the customer had paid by check. Unlike cash, a check is not a completed act of payment but merely an instruction by the customer to his bank to pay Liquidators, Inc., upon presentation of the check. In other words, although people may think of payment by check as a form of cash transaction, Liquidators, Inc. is actually giving the customer short-term credit. The customer's check constitutes a promise by him that the check will be paid by the bank when it is deposited. The customer has therefore made a future commitment, which makes this a contract.
3. Liquidators, Inc., entered into an agreement with the customer for the

sale of the table. Under the agreement, both parties have made promises that will be performed in the future, so this agreement does qualify as a contract.[7]

4. Maggie's agreement with her brother satisfies all the attributes of a contract: They agreed to enter into a commercial relationship under which Maggie exchanged money for her brother's promise to provide services the next day. It does not matter that they are family members; nor is it necessary that the arrangement comply with any formalities. Although Maggie's performance appears complete, her brother has a promise outstanding at the time of the agreement.
5. When Tom accepted Harry's invitation to be his best man, they made an agreement under which they exchanged promises—Tom promised to perform the duties of best man, and Harry promised him a new suit. (These are the principal promises. There were probably others implied in the relationship as well.) This may therefore appear to have the hallmarks of a contract. However, where the commitments are social in nature, a court is likely to find that they are not contractual because the parties did not reasonably intend them to be so. This distinction does not mean that a contract must necessarily have a commercial purpose. It is possible for parties to make a contract that does not have a commercial goal. However, the lack of a commercial purpose, the presence of apparent noncommercial motives for the agreement, and the general societal expectation that promises of this kind do not create legal relationships are strong indictors that the parties did not intend to enter into a legally enforceable relationship. Although Tom's breach of his commitment was morally reprehensible, he will not be held to account by the legal system. This answer disposes of the second part of the question. However, even if a court had found a breach of contract here, it would not have issued an order of specific performance, compelling Tom to perform his duties as best man. The remedy of specific performance is not readily granted, especially where the performance would involve the rendition of personal services by an individual.
6. The first lesson introduced by this Example is that a contract can arise by implication from conduct, and it need not be spelled out in express terms. The second point to note is that terms of a contract do not necessarily have to be contained in a document or spoken. A contract

could include terms that are posted or otherwise made conspicuously part of the contract at the time that the contract is entered. (A similar situation occurrs in Example 1. There we accept that the sign stating that the goods were sold “as is” was effective, which led to the conclusion that the seller made no warranties, and the transaction was therefore an instantaneous exchange.) It is therefore possible that a contract was created under which the store allowed May to handle the merchandise in exchange for her promise to pay for anything that she broke. Another point introduced by this Example is that one should always be on the lookout for alternative theories under which to claim relief. Even if the store cannot establish a contract here, it may be able to claim damages from May in tort because her negligence resulted in damage to the store’s property.

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1. Where at the instance of contracting, promises remain outstanding on both sides, the contract is called bilateral. If one of the parties has already fully performed at the instant of contracting, and all that remains is a promise by the other, the contract is called unilateral. Do not worry about this distinction now. It is explored in section 4.12.
2. For this example to work, you must assume that the disclaimer of warranties is completely effective to eliminate all warranties, so that Rocky makes no promises as to the condition and quality of and title to the goods. We will not examine whether such a disclaimer is effective—the complexities relating to the creation and disclaimer of warranties are beyond our scope.
3. Canon law is a system of ecclesiastical law developed from Roman law by the medieval Catholic Church. Although it is not part of the English common law, it existed as a parallel system in England, governing matters within the Church’s jurisdiction, until the English Church broke away from Rome. As a result of their long period of coexistence, many principles of Canon law influenced the common law.
4. The various philosophical views of the role of contract law are discussed further in section 2.3.
5. This transaction involves a sale of goods. It would therefore be subject to Article 2 of the Uniform Commercial Code. This statute is introduced in section 2.7 and is referred to frequently throughout the book. However, you do not need to apply it or to know about it to answer this Example or any other Example in this set that involves a sale of goods.
6. The possibility of a warranty and its disclaimer was also raised in the illustration in section 1.2.3 involving Rocky’s sale of his kayak to Eddy. Assume here, as you did there, that the disclaimer effectively excluded any warranty.
7. Note that in both Examples 1 and 3 the transaction is a sale of goods. As we see in Chapter 11, a sale of goods for over $500 must be evidenced by a writing or other record to be enforceable. (This is known as a statute of frauds.) However, because both these sales were for under $500, there is no need for a writing or record of the transaction and an oral agreement is sufficient.

§2.1 THE PURPOSE OF THIS CHAPTER

Chapter 1 introduces the legal concept of contract and outlined the policies and values of contract law. This chapter covers some more fundamentals. Although much of what is said here will slowly become apparent as you study contracts, it is very helpful to have these basics explained before you begin to encounter them in cases and other materials. The chapter begins in sections 2.2 and 2.3 with a little history and theory. Sections 2.4, 2.5, and 2.6 have a brief discussion of the source of contract law and some of the structural and conceptual aspects of the legal system of which it forms a part. Section 2.7 introduces Article 2 of the Uniform Commercial Code (UCC), a statute that governs contracts for the sale of goods. Sales of goods are very common contracts, so Article 2 comes up constantly in the rest of this book. Section 2.8 introduces and explains the role of the Restatement, Second, of Contracts, an influential compilation of the rules of contract law that have been generally applied by courts. Section 2.9 is one of many similar sections that you will find in most chapters of this book. It introduces a transnational perspective on contract law. Although the focus of the contracts course and

this book is on domestic (that is, American) contract law, these brief notes on the transnational perspective have the modest aim of giving you some idea of how the concepts and principles of our law of contracts might comport with or differ from those that might be found in other legal systems.

§2.2 THE HISTORICAL PERSPECTIVE OF CONTRACT LAW

The primary purpose of the contracts course is to teach you the contemporary law of contract. However, you cannot fully appreciate the current law without some sense of its history. Indeed, the very process by which the law is decided involves some degree of historical analysis, as the discussion of precedent in Chapter 3 shows. Most of the rules and principles of contract law were developed in the past. Some of them have remained relatively unchanged while others have been adapted or overruled as they have become superannuated. These changes tend to be evolutionary and incremental, built on a traditional framework that is still apparent. In this respect, contract law is like a great and ancient cathedral, whose contemporary appearance reflects millennia of building, destruction, rebuilding, and addition.

Therefore, although the contracts course is not a course in legal history, modern doctrine must be studied and evaluated in its historical perspective. It is only in this way that current law can be fully understood, and a reasonably reliable prediction of the future course of the law can be made. Because a lawyer’s work often centers on a prediction of how a court may decide an issue that could arise in the transaction, the ability to gauge the direction of the law is invaluable.

Although an understanding of the substantive law is one of the principal purposes of studying cases through the historical spectrum, this is not the only insight to be gained. The historical progression of caselaw is at the very heart of our common law system of jurisprudence. By tracing the development of legal rules over time, the student learns about the process of legal evolution. Familiarity with this process is essential to the analysis of court opinions and other legal materials. The common law and its rulemaking process are examined in section 2.4 and Chapter 3.

§2.3 CLASSICAL AND CONTEMPORARY CONTRACT LAW

§2.3.1 Classical Contract Law

Although the common law of contracts is many centuries old, it did not become a systematic, interwoven body of doctrine until relatively recently. Prior to the eighteenth century the law of contracts was seen not so much as a cohesive system of rules, linked by general principles, but as a collection of discrete rules, each specifically applicable to various particular types of transactions. From the eighteenth century, English legal scholars began to think of contract law in more systematic terms. They began to recognize that the specific rules reflected a general approach to contracts that could be identified and formulated as broader doctrine. This trend developed further in both England and America during the nineteenth century, at a time when economic and industrial expansion called for a more sophisticated and comprehensive system of contract law. It reached its zenith in what is referred to as the classical period. While one could quibble about the exact dates, the classical period can be thought of as spanning the last decades of the nineteenth century and the beginning of the twentieth. The Restatement, Contracts, published in the 1930s (introduced in section 2.8) reflects the mature thinking of the classical school, but by that stage the classical conception had already begun the process of change that leads into the contemporary period.

To find a general doctrine of contract, the classicists examined decided cases, extracting from them a set of coherent and well-defined rules, which they then used as the basis for constructing more abstract general principles. The general principles formed a framework for organizing and linking the rules into a body of doctrine. Some classicists went so far as to conceive of law as a science in which certain and consistent results could be achieved in the resolution of cases by the rather mechanical process of selecting the right rule from the body of doctrine and applying it to the facts.

The classical school reflects the priorities of its age, which greatly valued free enterprise, private autonomy, and a laissez-faire approach to economic activity. Classical theory therefore stressed the facilitation of contractual relationships and favored a strictly objective approach. If parties

manifested contractual intent, the classicists favored enforcement of the transaction. They were not inclined to probe the actual state of understanding of either party. This meant that they were not especially sensitive to the impact that enforcement of an apparent contract might have on a party whose exercise of free will may have been impaired by economic impotence or lack of sophistication.

The classical approach was also heavily influenced by the legal philosophy of positivism, which stressed the primacy of legal rules and considered the court's principal role to be finding and applying those rules to the facts of individual cases. Because of its emphasis on clear rules and its belief in a scientific approach to adjudication, classicism tends to be relatively formalistic and rigid, which has led to an alternative label for the approach—formalism.

§2.3.2 Contemporary Contract Law

By the late nineteenth century, some legal scholars began to challenge the formalism and rule orientation of the classical approach. As the twentieth century wore on, the classical conception of contract law eroded further. Enthusiasm for the free market was tempered by a growing recognition of the need to regulate the freedom of powerful contractors, to safeguard the rights of weaker parties, and to affect social policy concerning matters such as consumer protection, employee rights, and business ethics. The formalism of the classical approach came to be perceived as too rigid and too heavily biased in favor of dominant contracting parties. The idea that law could be treated as a science sounded more and more naive as insight into human interaction grew, and it was realized that the creation and resolution of contract relationships is too complex and variable to admit of "scientific" determination.

Succeeding schools of legal philosophy turned away from heavy reliance on rules, which may create the illusion of certainty, but do not in fact adequately reflect what really occurs in the resolution of cases. Instead, law came to be studied in a multidisciplinary way, taking into account its social context and the actual workings of the legal system. While many different approaches to contract law can be identified during this century, the two most influential schools were the sociological jurisprudents, who studied the relationship between law and society, and the legal realists, who stressed the

dynamics of the legal process, challenged the preeminence of rules, and advocated a looser, more flexible approach to legal analysis. Many of the once-radical ideas of the legal realist movement have become widely accepted and commonplace today. For example, it is now regarded as self-evident that law should reflect social policy, it should evolve as society evolves, and it should be grounded on the factual investigation of practices in the marketplace.

Today, legal realism (also called neoclassicism) is the prevalent legal philosophy. In fact, it is conventional enough that it is sometimes labeled as traditionalist. We have become used to thinking about law in a broader context and to considering not merely what the doctrine says, but also how it actually works in light of such factors as the makeup and philosophy of the judiciary, the use of legal tactics, and the social goals to be achieved. In this, we are indebted to the insights of the legal realists who forever changed our way of thinking about law. Although legal realism permeates the current approach to the law, other schools of thought continue to evolve as scholars and judges build on or challenge the realist tradition. It is not possible, in this short introduction, to identify and describe all the strains of modern contract theory. However, it is at least worth mentioning some of the jurisprudential writing that has made an impact on the way in which we think of contract law. The promissory theory of contracts emphasizes the morality of keeping promises and argues that the sanctity of promise is the core justification of contract law. The consent theory of contract focuses on the assent of the parties as the primary value to be served and protected by the rules of contract law. The relational theory criticizes traditional contract theory for not sufficiently taking into account that many contracts involve ongoing relationships between the parties, which affect their contractual behavior and expectations. The critical legal studies movement explores the doctrines of contract law from the perspective of groups that have historically been excluded from power, and criticizes traditional contract rules as instruments of the dominant economic class. This movement argues, in essence, that although rules may appear to be neutral, they have come about as a result of political choices, made by persons who hold political power to serve the interests of their class. The critical legal studies movement has generated other movements that explore this theme in relation to particular groups, such racial minorities and women. Perhaps the most influential of the post-realist philosophical trends has been the Law and Economics movement. Although

the movement consists of scholars who have differing views, the common thread of the scholarship is to examine law from the perspective of economic principles, and to be concerned with the economic efficiency of legal rules. Commonly, those who advocate the economic analysis of law urge that laws should be primarily concerned with the facilitation of exchanges on the free market, and should not seek to regulate conduct as a means of social engineering. Particularly in recent times, and in part as a reaction to the economic modeling of the law and economics movement, a number of scholars have applied principles of behavioral economics to the study of contract law. These scholars examine the psychological reaction to legal rules and the interaction between the law and the behavior and perceptions of the persons affected by it. Finally, some scholars and judges adopt an approach that has been described as neoformalist. They believe that the law has drifted too far away from the rule-orientation of the classical period, so that judges have too much discretion and the law has become too uncertain and unpredictable. They advocate a stronger emphasis on rules and at least a partial return to a more formalistic approach to the application of legal rules.

In sum, we are left with a contemporary contract law that is a mix of doctrine, policy, and process, at a stage of sophistication that goes beyond that of the classicists. Nevertheless, one must acknowledge the importance of the classical period. The classicists' quest for a comprehensive body of clear and certain rules was a milestone in the evolution of contract law. Many of our current rules and principles were formulated during the classical period and modern developments have proceeded from that base. Our law still reflects the tension between the classicists' desire for certainty and formality (an orientation toward clear rules) and the need to understand the legal process and to develop flexible rules that accommodate and correctly describe that process.

§2.4 THE MEANING OF "COMMON LAW"

The "common law" is often referred to in legal writing. This term is confusing to the uninitiated because its meaning varies depending on the context in which it is used.

§2.4.1 "Common Law" Used to Designate Our Legal System as a Whole

In early times, much of English law was based on local custom, applied in local courts. As the centralized Royal Courts began to increase in importance, their decisions formed the basis of a national law that gradually overshadowed local law. This national law, common to all of England,[1] came to be called the "common law." When Britain established colonies around the world the settlers transplanted English law into these foreign territories. In most of the ex-colonies, including those that became the United States, the common law of England has remained the basic legal system. Therefore, the term "common law" used in the broadest international sense, designates a country whose legal system is based on the common law of England. These countries share a legal heritage and an approach to legal analysis even though they may have widely different political, economic, and social structures and may have diverged in their rules of substantive law.

Most other countries in the world have legal systems derived from Roman law, as developed in continental Europe. Because the source of Roman law was the *Corpus Juris Civilis* of the emperor Justinian, these systems are called civilian. Cross-pollination and the unifying pressure of international commerce have reduced the differences between the civil law and the common law, but each system continues to have a distinctive approach to legal analysis. In the present context, probably the most striking difference is that civilian systems have a long tradition of comprehensive codification and tend to focus on their codes and scholarly commentary as a source of law. By contrast, common law systems tend to emphasize more strongly the role of the judge in the development of the law.

§2.4.2 "Common Law" Used to Denote the Judge-Made Component of Our Legal System

When the focus moves from the international (i.e., characterizing the legal system as a whole) to the domestic (i.e., examining the components of the system), "common law" takes on a different meaning. It refers to those portions of our law based on decisions of the courts, as distinct from those created by legislation. Contracts is described as a common law subject because most of its rules have been developed over the years by judges rather than by legislators. (This process of development is described in Chapter 3.)

This does not mean that there is no statute law governing contracts. Even in early times, the English parliament enacted some laws concerning contracts which became part of the received common law. In the modern period, legislative action has increased considerably, and there are many areas of contract law that have been legislated on. Some of these statutes codify the common law. That is, they take rules and principles already developed by judges and put them into statutory form. The purpose of this may be to reinforce or clarify the law or to make it more accessible. A statute may do more than codify, though. It may reform, alter, or modernize common law rules; it may intervene to hasten or mold the development of doctrine; it may be enacted with the express purpose of changing legal rules developed by courts; or it may create new rules designed to deal with a problem not yet addressed by courts. As noted in section 1.3, some statutes are confined to particular contracts while others are of general application. Because contracts are governed by state law, as explained in section 2.6, some states have more extensive statutory treatment of contract than others. Although legislatures have, over the years, enacted many laws that relate to contracts, the field is still regarded as part of the common law, because judge-made rules continue to predominate.

§2.4.3 "Common Law" Used to Denote a Process or Approach to Legal Analysis

The prior two meanings of "common law" are relatively easy to spot, but the term is also used in a more subtle sense. It is sometimes used to describe the mode of legal thinking and the process of judicial development inherent in a common law system.

As mentioned before, the common law develops through the decisions of judges in actual cases. Whether a rule's origin is the common law or statute, it will ultimately be applied by a judge in a specific case. In deciding the case, the judge interprets and may embellish the rule. Over time, as courts apply the rule in more and more cases, it acquires a judicial gloss that becomes part of the law. Therefore, in using patterns of thinking and modes of analysis molded by the common law tradition, judges continue to develop the law, even if the source of law is statutory. This process is as much part of the common law as the judicial creation of rules. In a civilian jurisdiction, by contrast, the judicial application of statutory rules tends to be more confined

to the case under decision, and is less likely to be influential in the development of legal doctrine.

§2.5 THE DISTINCTION BETWEEN LAW AND EQUITY

The distinction between law and equity permeates the common law system, and you will find discussion of it throughout this book. An early explanation will help you to understand the distinction when you encounter it. In everyday usage, “equity” simply means fairness. In law, it is sometimes used this way as well. However, it also has a more technical meaning.

Sections 2.4.1 and 3.2 briefly discuss the way in which the Royal Courts developed the common law. As practiced in the Royal Courts during its formative period, the common law was a rigid system. It was based on forms of action called writs. A litigant seeking a remedy applied to court for a writ (a written order calling on someone to do something) compelling the performance claimed. The writs were narrow, specific, and formalistic. Although new writs were developed as the need arose, it often happened that a person who needed relief could not fit the case into a recognized writ, and could therefore not obtain relief at law. The Monarch had the prerogative to do justice between his or her subjects, and if the court could not give a remedy, the Monarch had the power to intervene. The Monarch did not deal with these matters personally but delegated them to the chancellor, the highest royal officer. Over time, the chancellor had more and more of these cases in which relief was given on the basis of fairness (equity in the usual sense) in the absence of a remedy at law. This eventually led to the growth of a court of chancery, which had jurisdiction over all those claims for relief that were equitable in nature. The court of chancery developed its own rules and principles and became something of a competitor of the courts of law.

This dual system of jurisdiction lasted for many centuries. Over time, it became a matter of established practice that certain claims and remedies were legal in nature and others were equitable. For example, a claim for damages for breach of contract was within the jurisdiction of the law courts, but law courts had no power to order a party to perform the contract. Therefore, a claim for specific performance of a contract or for an injunction prohibiting breach could only be granted by the equity court. Furthermore, the equity

court would not assume jurisdiction unless the plaintiff could show that the legal remedy of damages was not an adequate remedy under all the circumstances of the case. Thus, the common law system, in its broad sense, incorporated a jurisdictional division between the courts of common law (used here in a narrower sense) and equity. This dual system was part of the common law of England adopted by American jurisdictions, and so it entered our legal system. It is even embodied in the U.S. Constitution. For example, Article III §2 extends the judicial power of the United States to all cases in law and equity arising under the Constitution or the laws of the United States. Amendment VII preserves the right to a jury trial in suits at common law but does not mention equitable suits because courts of equity did not have juries when the Constitution was drafted.

Since the nineteenth century the distinction between law and equity has been eroding both in England and in the United States. Separate courts of equity have been abolished in the federal system and in most states. Courts of general jurisdiction now hear both legal and equitable suits. Also, the substantive distinction between law and equity is fading as many principles of equity gradually become incorporated into the law as legal principles. However, the distinction is not entirely dead, and it has an impact in many areas. For example, the availability of remedies is still influenced by the rule that a party who claims equitable relief must show that the legal remedy is inadequate; the right to a jury trial is confined to actions at law and is not available in equity suits; an appellate court has a much wider scope of review in an equity suit; and some courts still confine equitable defenses and doctrines to suits in equity and do not recognize them in actions at law. Again, it must be stressed that none of these distinctions are applied with the same rigor as they used to be, and there are many cases in which courts have moved away from them. Nevertheless, the tradition is strong and its breakdown is gradual and uneven, so it must be taken into account even in modern cases. We return to the law-equity distinction periodically as it comes up in different areas of contract law.

§2.6 STATE LAW GOVERNS CONTRACTS

The common law of contract (as well as much of the statutory law governing

contracts) is state law. Although there is some federal law applicable to contracts, it is limited to federal concerns such as the regulation of interstate commerce or to contracts entered into by the federal government. Because contracts are within the realm of state law, most contracts cases are decided by state courts. However, because federal courts sometimes acquire jurisdiction over cases that involve issues of state contract law (for example, because there is diversity of citizenship, or because the contract dispute may arise in a bankruptcy case under federal law), it is not uncommon to find a federal court deciding a state law contracts issue. Where a federal court hears a state law contracts case, it applies the law of the state whose law governs the transaction, and is bound by state law precedents. (*See* section 3.2.2.)

It is therefore not, strictly speaking, correct to talk of *the* law of contracts. There are in fact 50 different bodies of state contract law in this country, as well as those in U.S. territories and the District of Columbia. Each one of the states, except Louisiana, has adopted the common law of England as its basic legal system. (Louisiana adopted the civilian system, in the form of the French Code Napoleon during the short period that it was a French possession.) However, although each state has its own contract law, there is a significant degree of similarity in the laws of the states. Not only does the law of every state (except Louisiana) derive from the common law, but also, as the law develops, state courts and legislatures are influenced by each other. This makes it possible to study a generalized law of contract in law schools, and to select cases based not on the state from which they emanate, but on the quality of their facts and legal exposition. Therefore, while you should always bear in mind that a particular rule of law may not be followed in every state, you can be confident that you are studying broadly accepted principles and are learning the reasoning and analytical skills that will enable you to find the answer to a legal question wherever you end up practicing.

You will find that it is sometimes convenient, particularly when comparing our law to that of another country, to use the term “American law of contract.” This term is awkward because it inaccurately suggests that the law of contract in the United States is a single body of law.[2] Nevertheless, it is sometimes the easiest and crispest way to refer to the general principles of contract law that are widely recognized in the many state jurisdictions within the United States.

§2.7 THE UNIFORM COMMERCIAL CODE (UCC)

§2.7.1 The UCC as a Uniform Model Statute and State Legislation

a. The Creation and Purpose of the UCC

As mentioned earlier, contracts are generally governed by common law except to the extent that legislation has been enacted to codify, change, or add to it. The UCC is such a statute. Although all of contract law is, in a sense, commercial, the UCC is not applicable to all contracts. It covers only certain specific types of commercial transactions. Each type of transaction is provided for in a separate article of the UCC. In the contracts course, we are concerned with only one of the types of transactions covered by the UCC—sales of goods, governed by UCC Article 2. We also deal with some of the provisions of UCC Article 1, which contains general provisions that apply to all articles of the UCC, including Article 2. While some contracts courses focus only on the common law and have a separate course devoted to the sale of goods, many contracts courses include the basic principles of the sale of goods. This book follows that approach because sales of goods are such commonplace contracts and because there is a close relationship between Article 2 and the development of the common law. The other types of commercial transaction, covered by the remaining articles of the UCC (as well as some of the more specialized and complex principles regarding sales of goods) are left for courses on commercial law.

The UCC was promulgated in the mid-twentieth century. Some of its provisions were innovative, but others were based on earlier statutes or on principles and rules that were already established in common law. That is, the purpose of the UCC was in part to modernize the law and to bring it into accord with contemporary commercial practice, and in part to codify and clarify existing legal doctrine. Apart from codifying and reforming commercial law, the other goal of the UCC is to unify it throughout the country. Like the law of contracts generally, commercial law is state law. There is, therefore, no national legislature that can enact a single commercial statute with nationwide application.[3] The only way to create uniform commercial law among the states is to draft a model statute and to persuade the legislature of each state to enact it. This task was undertaken jointly by

two very influential national law reform organizations: the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (NCCUSL or ULC), and the American Law Institute (ALI). Their work resulted in the completion of a model code during the 1950s. (The model code as promulgated by NCCUSL and ALI is called the "Official Text.") The aim of having this model code adopted by state legislatures was fully successful, and it has been enacted in every state except Louisiana. (As noted in section 2.6, Louisiana has a civilian system, and the enactment of the UCC as a whole was not appropriate. Louisiana has enacted some portions of the UCC.) Of course, the law of the states can never be entirely uniform. Some states have made legislative variations from the standard model provisions. Even when states have enacted the same uniform provisions, courts in different states often reach divergent interpretations of the code provisions.

b. Revisions of the UCC

The process of reform and updating did not end with the enactment of the original draft of the Code. Shortly after the completion of the model code, a Permanent Editorial Board was set up to review the Code and propose amendments. The process of amendment is slow because the drafters take many years to develop recommendations for change, and after the proposed changes are promulgated by NCCUSL and ALI, they still have to be adopted by state legislatures. Nevertheless, since the enactment of the UCC, changes have been proposed by NCCUSL and ALI to various Articles of the UCC, and those revisions have generally been adopted by state legislatures.

Articles 1 and 2 have been reviewed periodically since their original enactment. Most recently, NCCUSL and ALI completed a revision of Article 1 in 2001, which has been widely adopted by the states. NCCUSL and ALI also proposed an extensive revision of Article 2 in 2003, but this attempt to update Article 2 was controversial and not well received. As a result, the revision was not adopted by the states, and it never became law.

c. Citations to the UCC

When the UCC is cited in this book and in other texts (including your casebook), the citation is to the model code—that is, to the Official Text as

promulgated by NCCUSL and ALI. For example, section 102 of Article 2 is cited as §2.102. However, when a UCC section is cited in a case, the court usually cites the state statute in which the Code was enacted in the court's jurisdiction. For example, a Connecticut court would cite section 102 of Article 2 as Conn. Gen. Stat. §42a-2-102, and an Oregon court would cite it as Or. Rev. Stat. §72-1020. As you can see, it is usually not that difficult to identify the model code section because it is typically incorporated into the statutory citation. As noted before, most sections of the UCC have been enacted by states in exactly the same form as they appear in the Official Text. However, it occasionally happens that a state deviates from the Official Text in enacting a particular provision. This occurrence is not of concern to us, and you can assume that the Official Text reliably represents the actual law as enacted by the states. Of course, a practitioner in a state that has made a nonuniform change must be aware of that change because the language enacted by the state legislature, not the Official Text, is the law in that state.

d. The Official Comments to the UCC

When NCCUSL and ALI drafted the original Code (and when they drafted revisions) they included a commentary after each section to explain and expand on the provisions of the section. This commentary, called the Official Comments, is typically not part of the statute as enacted by the states. It is therefore not binding law, as the text of the actual enacted section is. However, the commentary is very important because it reflects the intentions of the drafters. Courts treat the Official Comments as highly influential and often rely on them in interpreting the Code. You will frequently see them mentioned in cases.

§2.7.2 The Use and Application of UCC Article 2

As mentioned already, the UCC covers a variety of different types of commercial transactions, and each type of transaction is contained in a separate, self-contained article. The only articles that concern us in the contracts course are Article 2, governing the sale of goods, and Article 1, which has general provisions applicable in all articles, including Article 2.

a. The Scope of Article 2: When Does It Apply?

UCC §2.102 states that Article 2 applies to "transactions in goods." Although the word "transaction" is broader than the word "sale," you should not be concerned about this. You can assume for all purposes in the contracts course that if the contract is a sale of goods, Article 2 governs and must be applied. This is an important point that often confuses students, so it is worth emphasizing strongly. When you are dealing with a contracts issue, the first thing you should do is determine whether or not the transaction is a sale of goods. If it is, you must apply Article 2, which is the governing law. If it is not, you must not apply Article 2 but must apply principles of common law. (*But see* section 2.7.3 for an explanation of how Article 2 may be used indirectly as persuasive authority in a common law case.)

Although Article 2 must be applied to a sale of goods, this does not mean that Article 2 comprehensively contains every rule of law that may be applicable to the transaction. There are many issues that could arise in a sale of goods that are not covered by the provisions of Article 2. Where those issues arise, UCC §1.103(b) states that unless the Code displaces them, principles of law and equity supplement the provisions of the Code. The Code was drafted with the intention that common law principles will complement the Code provisions and will be used in conjunction with them to cover any areas that are not provided for in the Code. As the contracts course proceeds, you will see many areas of contract law in which Article 2 does not have specific provisions, so that UCC §1.103(b) incorporates common law rules and makes them applicable to the sale of goods.

b. What Is a Sale?

UCC §2.106(1) states that "a sale consists in the passing of title from the seller to the buyer for a price." As this definition indicates, there are two essential characteristics of a sale. One is that title (ownership of the goods) must pass from the seller to the buyer, and the other is that the buyer must pay for them. The price paid for the goods is usually money, but it need not be. UCC §2.304 states that the price may be payable in money or otherwise.

Because the passage of title is an element of a sale, Article 2 does not apply to a transaction in which the owner of property merely leases it for a period of time. In a lease, the owner retains title of the leased goods, which

must be returned at the end of the lease period. (Leases of goods are dealt with separately in the UCC, by Article 2A. Article 2A is not covered in the typical contracts course and is not mentioned again in this book.) Likewise, if the owner of property donates it to another person, the gift is not a sale of the goods, so it is governed by common law, not Article 2.

The grant of the right to use intellectual property, such as software, is difficult to characterize, both because it is not clear whether software is goods (as discussed below) and because it is not clear if a software license is a sale. The copyright in the software is held by its creator, and when the creator "sells" the software to a user, she does not transfer title to the software or the copyright. The holder keeps the copyright and merely conveys to the user a right to use the software (a license). A number of courts have recognized the ambiguity of transactions involving the grant of a license to use intellectual property, and have struggled with both the questions of whether a sale has occurred and whether the object of the sale is goods.

c. What Are Goods?

Goods are defined in UCC §2.105(1) as movable things, including manufactured goods, livestock, and growing crops. The definition expressly excludes money and various intangible rights. In many cases, it is relatively easy to tell whether a contract involves a sale of goods. For example, a customer's purchase of clothing from a department store is obviously a sale of goods. Conversely, a contract with a laundry to clean clothes, while relating to goods, is for the provision of a service. Similarly, the purchase of a house, while a sale transaction, involves real property, not goods. The purchase of shares in a corporation or of coverage under a life insurance policy is likewise a sale, but the subject of the sale is intangible rights, not goods.

Transactions involving the sale of copyrighted creative work embodied in a physical form, such as a painting, a book, a music CD, or a DVD, are sales of goods, even though the real value of the object is in its content, and even though the creator's copyright may restrict the use of the object. However, the proper characterization of sales of this kind of intellectual property is less clear where the intellectual property is purchased on the Internet without any physical object changing hands. Where music, books, movies, and games are sold online and downloaded directly from the seller's

website to the buyer's computer, it is more difficult to conclude with confidence that the transaction is a sale of goods, and it could be seen as a sale of intangible rights or the licensing of rights to intellectual property.

As mentioned above, the licensing of software and similar intellectual property is ambiguous in relation to both the question of whether the transaction is a sale, and the question of whether intellectual property qualifies as goods. The issue of whether licensing is a sale of anything at all is discussed in (b) above. Even if it is a sale, software may or may not properly be characterized as goods. By "buying" the software, the buyer gains the right to access and use its content, which remains the intellectual property of the creator. It therefore could be argued that the transaction really involves the transfer of an intangible right, rather than a physical object. Nevertheless, where the software has been incorporated into a physical medium that is sold as a tangible object (such as a disk), some courts treat the sale of the object as a sale of goods, even though its real value is not in the physical item itself, but in its content. (In this respect it may be seen as analogous to the purchase of a book or CD.) However, where the software is downloaded from the Internet, without any physical object changing hands, the characterization of the software as goods is more tenuous. There is no general agreement among courts as to whether such transactions should be treated as sales of goods. In *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*, 906 N.E. 2d 805 (Ind. 2009), the court rejected the notion that the means of delivering software—whether by tangible medium or electronically—should make a difference to its characterization as goods or an intangible right.

d. What Law Applies to Hybrid Transactions?

It is quite common to have a hybrid transaction that includes both a sale of goods and a component that is not a sale of goods. For example, a contract to repair a car may include both the supply of parts (a sale of goods) and the provision of labor. When such a hybrid transaction is in issue, most courts use a "predominant purpose" or "predominant factor" test to decide whether to apply Article 2. If the sale of goods is the more significant aspect of the transaction, and the nonsale component is incidental to the sale, Article 2 applies. However, if the sale of goods is ancillary, and the other component is predominant, Article 2 does not apply and the transaction is governed by

common law. Some courts favor a different approach, known as the "gravamen" test. Under this test the court does not attempt to classify the contract as a whole one way or the other, but applies Article 2 if the controversy in question relates to the sales component, and applies common law if the issue arises out of the services component. The problem with the gravamen test (and the reason why most courts do not follow it) is that it is often problematic, and sometimes even impossible, to divide a contract into different components and to apply different legal rules to its different parts. For example, say that a homeowner buys a carpet from a store. As part of the deal, the store undertakes to deliver and install the carpet on April 15. Assume that the predominant purpose of the contract is a sale of the carpet and that delivery and installation are incidental. The store fails to deliver and install the carpet on April 15, but its workers arrive with the carpet a day later, on April 16. If the common law applies to the transaction, the buyer is obliged to accept the late delivery unless she can show that delivery on April 15 is a material (important and central) term of the contract, so that the delay in delivery is more than a trivial breach. However, if Article 2 applies, the buyer may reject the carpet, even without showing that the breach is material.[4] Under the predominant purpose test, because the sale of goods predominates, Article 2 applies, and the buyer can reject on the grounds of late delivery without showing that the breach was material. However, the gravamen test would be difficult to apply because it would provide conflicting resolutions: Article 2 would allow the buyer to reject the carpet, even if late delivery is not material. But the common law would require the buyer to show materiality to refuse its installation.

e. What Is the Importance of Deciding the Question of Scope Correctly?

I mentioned earlier that many provisions of Article 2 are codifications of common law—that is, they did not change the common law rule, but merely reduced it to statutory form. In addition, I explained earlier that because Article 2 is not comprehensive, UCC §1.103(b) incorporates many principles of common law to supplement the provisions of the Code. Because there is so much congruence between Article 2 and the common law, there are many issues that would be answered the same way, irrespective of whether one applied Article 2 or the common law. That is, there are certainly many situations in which a struggle with the question of scope is just not practically

significant, because the decision on whether Article 2 should or should not be used makes no difference to the end result. Notwithstanding this, there are also many situations in which Article 2 and the common law diverge, so deciding whether Article 2 applies is crucial. One example is given above. A few further examples illustrate other situations in which scope may be important: an implied warranty may exist if the transaction is a sale of goods, but may not exist if it is not; the contract may have to be recorded in a signed writing if it is a sale of goods, but may not need to be if it is not; and the statute of limitations (the period within which a party must commence suit) may differ depending on whether the transaction is a sale of goods. These are just a few examples. You will encounter other situations in which the legal rules applicable to a sale of goods differ from those under common law.

f. Must the Parties Be Merchants for Article 2 to Apply?

This question is intended to raise and clarify a perennial source of confusion to students. The simple answer is that if the contract is a sale of goods, Article 2 applies, irrespective of who the parties to the contract may be. It is the nature of the transaction, not the attributes or occupation of the parties, that is determinative. However, the confusion arises because there are some provisions of Article 2 that have special rules that apply to parties that satisfy Article 2's definition of a "merchant." This term is defined in UCC §2.104(1) to include persons who deal in goods of the kind involved in the transaction, or who, by their occupation, have knowledge or skill relating to the practices or goods involved in the transaction. In short, a merchant is an experienced professional buyer or seller, rather than a casual or occasional buyer or seller. As you proceed through the contracts course, you will encounter some of the Article 2 provisions that contain special rules for merchants. The important point to note, for now, is that Article 2 applies to everyone who enters into a contract for the sale of goods. It is only in those narrow situations that specifically impose different rules for merchants that the question of whether a party meets the definition of merchant is relevant. Do not make the mistake of thinking that Article 2 does not apply unless the parties are merchants.

§2.7.3 The Influence of Article 2 in Cases Involving Contracts Other than Sales of Goods

After Article 2 was enacted in the mid-twentieth century, it had a significant impact on the development of the common law, beyond transactions involving the sale of goods. Of course, it is not directly applicable outside sales of goods. However, it was a modern, reform-minded statute, and its provisions relating to sales of goods have often been seen by courts as worth adopting in the development of the general common law of contract. Courts have therefore tended to consult Article 2 as a resource for resolving analogous questions in other contracts. The result of this trend is that in many areas, differences between Article 2 and the common law have diminished over the years. This trend was reinforced by the Restatement (Second) of Contracts, which deliberately adopted many provisions of Article 2 in formulating its rules of the common law of contracts. This does not mean that one can ignore the distinction between the common law and Article 2. There are still many Article 2 provisions that have not been generalized into common law. However, these differences are not as widespread as they were when Article 2 was first adopted.

§2.8 WHAT IS THE RESTATEMENT (SECOND) OF CONTRACTS?

You will find constant reference in this book, in other contract texts, and in cases, to the Restatement (Second) of Contracts (referred to from now on as Restatement, Second). The Restatement, Second, looks like a statute. It has numbered sections that set out rules in statutory style, followed by comments and illustrations. However, unlike the UCC, the Restatement, Second, is not a statute. It is a secondary authority[5]—a textbook setting out the rules of the common law of contract as its drafters find them to be, or sometimes, would like them to be. It is created by the American Law Institute (which, as you may recall from section 2.7.1 is one of the organizations involved in drafting the UCC).

As its title suggests, the Restatement, Second, is the second edition of the Restatement of Contracts to be published. The original was produced in the 1930s. It was the first thorough systematization of American contract law and the first comprehensive attempt to give coherent form to American contract doctrine. As such, it was immensely important in the development of

the modern common law of contracts. As mentioned in section 2.3.1, it was strongly influenced by classical thinking, and reflects the formalism and objectivism of the classical school. However, legal realism was becoming influential at that time and also had an impact on the drafting. By the 1960s, the Restatement had become outdated, and a revision was begun, culminating in the Restatement, Second, published in final form during the 1980s. The Restatement, Second, reflects the post-classicist thinking described in section 2.3.2, and is also heavily influenced by the UCC, which had been enacted by the time that work was begun on the Restatement, Second. As mentioned before, its adoption of rules and concepts from Article 2 has helped to generalize the innovations of that statute.

The rules in the Restatement, Second, are largely extracted from cases that had been decided at the time that it was drafted, but this does not mean that they actually represent what the majority of courts had held. Despite its name, the Restatement, Second, does not necessarily "restate" the settled law. Indeed, given the number of jurisdictions involved, it is often not possible to find a settled law. Also, because it seeks to offer guidance on the direction that its drafters believed the law should take, it sometimes favors a legal rule that had only minimal acceptance in decided cases. The Restatement, Second, is now about 30 years old, so there have been many cases decided since its publication. As a general matter, courts have embraced the rules as articulated in the Restatement, Second, thereby reinforcing the drafter's exposition of the law. However, there are some rules set out in the Restatement, Second, that have not gained widespread judicial recognition, so that its account of those rules is not a reliable indicator of the law. Therefore, the best approach to the Restatement, Second, is to recognize that it is a very important and influential account of the law, frequently relied on by courts, but not binding on courts and not necessarily a reflection of what courts in a particular jurisdiction may have decided.

§2.9 A TRANSNATIONAL PERSPECTIVE ON CONTRACT LAW

The contracts course focuses on domestic contract law (that is, the law applicable within the United States to contracts entered into in the United

States). However, many contracts are entered into between parties in the United States and parties in foreign countries. Although it is beyond the scope of a first-year contracts course to delve into issues of transnational contracts, many professors feel that it is important for students to at least have some sense of what may lie beyond the borders of domestic law. To that end, most chapters of this book include a brief transnational perspective. The purpose of these notes is not to present detailed or comprehensive information on foreign or transnational contract law but merely to keep you mindful of the fact that other legal systems may sometimes have rules that are similar to those of American domestic law, but may sometimes approach issues quite differently.

Commonly, the law applicable to contracts across national boundaries is the domestic law of one of the countries whose citizen or resident is a party to the contract or the domestic law of the place where the contract was formed. This is because the parties may select the law of that jurisdiction as the law governing their contract or because international rules of choice of law determine that it is the applicable law. It is therefore possible that one would find, for example, that New York law governs a contract entered into in New York between a U.S. company and a German company. Where the law of a foreign country governs the transaction, one may expect to find that law to have some similarities to our domestic law of contracts (many basic principles of contract law are quite universal), but also to have some notable differences. Just to give one example: The distinction between law and equity, described in section 2.5, is a creation of English law and is not found in countries that have a civilian legal system. As a result, the preference for damages over specific performance, described in section 1.2.4, which is based on the law-equity distinction, is not typically found in civilian systems.

The term comparative law is used to describe a comparative study of the law of two nations (for example, a study of American and French law relating to the formation of contract). Comparative law is distinct from international law, which is the law governing the relationship between nations and, in some situations, applicable to citizens of nations in the international sphere. For the most part, comparative law—the comparison of our system to that of other countries—is of greatest interest and relevance in the field of contracts. However, the examination of the laws of multiple nations would be difficult and exhausting. Therefore, where contracts courses offer a transnational perspective, they do so by referring to two documents that provide a

reasonable insight into principles of transnational law. One is the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), and the other is the United Nations Convention on Contracts for the International Sale of Goods (CISG).

The UNIDROIT Principles are a set of principles first promulgated in 1994 and updated in 2004 and 2010. This document is not a treaty but a compilation of general rules that are recommended as applicable to transnational commercial transactions. The status of this document is similar to that of the Restatement, Second: It is not binding law but is an influential scholarly publication. The authors studied the law of many countries and sought to distill them into a set of broadly accepted common principles. Although the UNIDROIT Principles are not binding rules, parties can adopt them in a contract, or they could have persuasive force in the adjudication of transnational contracts.

The CISG is a treaty. It has been ratified by the United States (as well as about 70 other countries), so it is binding law in transactions that fall within its scope. As its title indicates, it applies to sales of goods, so you can think of it as a kind of international version of Article 2. Like Article 2, its scope is confined to sales of goods, but its applicability is more restricted than Article 2. Under CISG Article 1, it applies only if both parties' places of business are in signatory states, the transaction is not a consumer sale, and the parties have not excluded its application in their contract.

Examples

1. As mentioned in section 2.7, UCC Article 2 is directly applicable only to sales of goods, even though it may have persuasive influence in cases involving other contracts. Students studying contract law often overlook this and become muddled, forgetting about Article 2 when the contract is a sale of goods or citing it as the governing law when the contract does not involve a sale of goods. These simple questions on the scope of Article 2 are included early in the book to emphasize the distinction between sales of goods and other contracts. Which of the following contracts would be governed by Article 2?
   a. The sale of a condominium
   b. A contract to employ someone as a sales clerk in a department store
   c. The sale of a cow
   d. The sale of food in a restaurant

2. Buyer bought a mePhone (a state-of-the-art “smart” phone) by going to the manufacturer’s website and ordering it online. The mePhone performs multiple functions such as phone, text, e-mail, Internet browser, camera, and game player. Its electronic innards are encased in a small rectangular plastic box with a screen in the front. The mePhone sells for $300. The physical product costs $40 to make, and the value of the instrument lies in its electronic functioning. Is the purchase of the mePhone a sale of goods?
3. Mark N. Tile is a wealthy merchant. He recently discovered that St. Francis of Assisi is the patron saint of merchants, so he decided to honor the saint by placing a large sculpture of him in the lobby of his building. He entered into a contract with Chip Chisel, a sculptor, under which Chip agreed to carve a 15-foot-high marble sculpture of St. Francis for a price of $100,000. (The piece of marble cost Chip $15,000. The rest of the price for the sculpture represents his labor in executing the sculpture.) Is this a sale of goods? Would your answer change if Mark, not Chip, supplied the piece of marble?
4. Sally bought a new car, so she advertised her old car for sale. Ben responded to the advertisement, and on May 1, Sally and Ben made an oral agreement that Ben would buy the car for $6,000. The parties arranged that delivery and payment would take place on May 5. On May 3, Sally called Ben and canceled the sale. This is a breach of contract, and Ben has suffered damages of $500 (the additional cost of buying an equivalent car on the market). If Article 2 applies, Ben cannot sue Sally because under the Article 2 statute of frauds, the oral contract is unenforceable. However, if Article 2 does not apply, Ben can enforce the contract, because the common law does not have a statute of frauds applicable under these circumstances. Ben argues that Article 2 does not apply because neither he nor Sally is a merchant. Is he right? Would he be right if Sally were a used car dealer?

Explanations

1. a. Although this is a sale, a condominium is not goods but real property. The concept of movability distinguishes tangible personal property that is capable of being moved (even if machinery is needed to move it) from land and structures on land that are so incorporated into the

land as to become united with it. Article 2 does not govern the sale.

b. Although the clerk will be selling goods in the course of his employment, the contract to employ him is not a sale of goods but a contract for labor (services).
c. Although the cow is a living animal, not an inanimate object, it still qualifies as goods. Livestock and crops (including unborn animals and growing crops) are specifically included within the definition of goods in UCC §2.105.
d. The sale of food in a supermarket is a sale of goods subject to Article 2. However, a restaurant meal involves both the sale of the food and the provision of services associated with it, such as cooking it; serving it; and providing a table, silverware, and all those other little touches that enhance the dining experience. To establish whether Article 2 applies to this hybrid transaction, one must apply either the gravamen test or the more widely used predominant purpose test. Under the gravamen test, the question would be whether the issue in the case related to the food itself or the service aspect of the meal. Under the predominant purpose test, the court evaluates what the predominant purpose of the contract is. In making this decision, it looks at all the circumstances of the transaction. The relative value of the sale and nonsale aspects of the contract is important, but the court also takes into account other factors, such as the language used by the parties in the agreement and their reasonable expectations based on the nature of the transaction and the commercial context.

2. The purchase of the mePhone is a sale of goods. The device is a movable physical object. It does not matter that the ability to use it is dependent on software that itself may not be goods. Although the purchase and downloading of software from the Internet may not qualify as a sale of goods, this is not what occurred here. The buyer bought the mePhone, and the software incorporated into it is an integral component of the phone and is necessary to enable it to function. The fact that the buyer bought the phone from the manufacturer’s website is not relevant to its classification. (In Chapter 5 we will discuss contracts entered into on the Internet.)
3. Although the sculpture is large and probably needs heavy machinery to move it, it is tangible, movable property, and therefore goods. You may

be tempted to characterize this as a hybrid transaction, and to apply the predominant purpose test. That would likely lead you to the conclusion that the predominant purpose of the transaction is the work of executing the sculpture, and that the goods component—the marble—is incidental to that purpose. You would therefore conclude that this is not a sale of goods. However, this would be wrong. It is not enough merely to evaluate the relative cost of the materials and labor that go into the fabrication of goods. If this was the approach, a vast percentage of the sales of manufactured goods would not fall within UCC Article 2 because most goods have to be fabricated or processed before they are sold. Remember that a sale involves transfer of title from the seller to the buyer, so the correct approach is to ask whether the end product, on which the labor has been expended, is the object of the transfer of title. If it is, the transaction is a sale of goods, even though the process of manufacture involves labor as well as materials, and even if the value of the labor greatly exceeds that of the materials. Therefore, if the seller's labor is entirely employed in the creation of the tangible, movable end-product that is sold, the transaction is properly treated as a sale of goods.

The answer would change if Mark supplied the marble because Chip would then be supplying no goods at all and there is no transfer of title to the physical object, which was owned by Mark at all times. Chip would therefore be performing labor on Mark's chunk of marble. The transaction would not be governed by Article 2.

4. Ben would be wrong in both cases. This Example is intended to emphasize what was said in section 2.7.2(f): Article 2 applies if the transaction qualifies as a sale of goods, which this does. It applies to all sales of goods irrespective of whether one or both parties are merchants. Although there are some provisions of Article 2 that are expressly stated to be applicable only if one or both parties are merchants, the absence or presence of this status makes no difference in the rest of Article 2. Ben cannot enforce the oral contract against Sally because it is subject to Article 2 and the statute of frauds applies.

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1. Note that the text refers to English, not British, common law. The United Kingdom does not have a unitary legal system. English common law applies in England and Wales. Northern Ireland's law is based on English law, but has its own variants. Scots law is quite distinct from English law. It draws its legal tradition from both English and civil law.

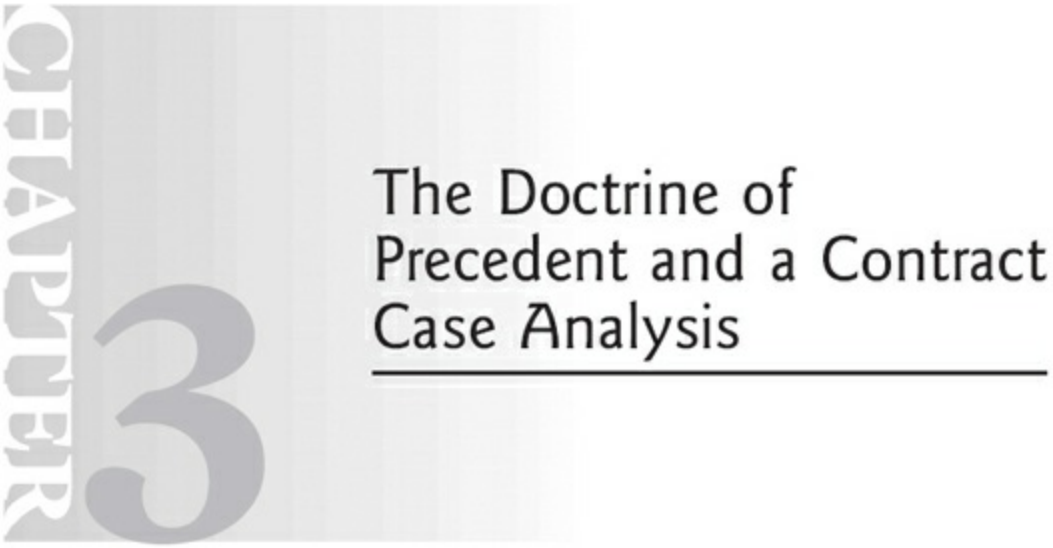
2. Also, it is awkward to equate "American" with "United States" because there are so many other nations on the American continents. Nevertheless, this is a common usage, and it is followed in this

book for convenience where a general comment is made about contract law in the United States.

3. Of course, Congress has enacted a considerable amount of commercial legislation under the commerce clause (U.S. Const. art. 1 §8 cl. 3), which gives Congress power over interstate commerce. However, Congress has not sought to enact a federal statute governing general commercial law. It has treated general commercial law as the law of a particular jurisdiction, which is reserved to the states under the Constitution.

4. The principles relating to breach and the concept of material breach are commonly not covered until near the end of the contracts course and are dealt with in Chapter 17. For now, just accept that the common law and Article 2 have these different approaches, so that deciding which applies has a significant result.

5. The term "secondary authority" refers to legal writings like textbooks, law review articles, and commentaries that lack the binding force of official sources of law—such as statutes and court decisions (called "primary authority"). To the extent that a secondary authority is reliable and persuasive, it could be influential, but it never binds a court.



§3.1 STUDYING CONTRACT LAW THROUGH APPELLATE CASES

This chapter is primarily concerned with case analysis and the doctrine of precedent. Because the analysis of cases is so central to the study of contract law, it is worth spending some time at the outset on the techniques and principles of reading, understanding, and applying caselaw. It is likely that you will receive instruction on this skill in your legal writing and research class, and you will also begin to develop it as you proceed through your contracts course and other substantive law courses. This chapter, which ends with an Example based on a fictional court opinion in a contract dispute, should help you gain some early insight into the process of working with caselaw.

The study of case reports has been the standard teaching methodology in law schools since the latter part of the nineteenth century. In its initial use, the casebook reflected the classical conception described in section 2.3. It was thought that students could "find" the law in the cases, using the scientific

approach to the study of law. While the focus of casebooks has changed to reflect the broader and more flexible post-classical view of law, case analysis is still largely used in teaching contracts. This is appropriate because case analysis is an important skill for lawyers, and the study of cases allows exposure to the common law method described in section 2.4.3. Case reports also serve as illustration of what would otherwise be abstract principles. Some casebook authors love to throw in weird cases or misguided opinions to challenge the students' critical faculties or to provoke debate.

As valuable as this learning process is, it is helpful to approach it with a recognition of some of its shortcomings. First, a collection of cases seldom produces a nice, concise and organized discourse on the law. That is why books like this one are needed. Second, the emphasis on caselaw gives students a rather skewed perspective because they are constantly exposed to transactions that have gone wrong—indeed, so irreconcilably wrong that the parties have felt it necessary to litigate, usually all the way to the appellate level, rather than to compromise. It is important to remember that only a fraction of contracts end up in litigation and fewer still reach the highest courts without being settled along the way. A related problem with the case method is that it focuses too strongly on contractual disputes at the expense of other lawyering skills such as counseling, drafting, and negotiation. Although there is an unavoidable emphasis on litigation when law is studied through cases, this problem can be ameliorated by paying attention to formation and negotiation issues whenever they are raised in the cases.

State court cases in casebooks are mostly decisions of appellate courts. In fact, trial court opinions are not binding precedent, and only a few states publish them.[1] States typically have two levels of appellate courts. Appeal from the trial court is usually made first to an intermediate court of appeals. Thereafter, there is the possibility of a further appeal to the state's supreme court. Unlike trial courts, which consist of a single judge (with or without a jury), an appellate court sits in panels consisting of several judges. The exact size of the panel varies from one jurisdiction to another. If all the judges on the panel agree on the result and its rationale, the court is able to render a unanimous decision. However, it is common for members of an appellate panel to disagree on the proper disposition of the case. When that happens, the decision of the court is that adopted by the majority of judges on the panel. (The majority opinion is written by one of them and is joined by the other judges who support it.) A judge who disagrees with the reasoning of the

majority but agrees with the result writes a concurring opinion (or, if more than one judge concurs, they may join in a concurring opinion or write separate concurring opinions). A judge who disagrees with the resolution reached by the majority writes a dissenting opinion (or, if there is more than one dissenting judge, they may join in a dissenting opinion or write separate dissenting opinions). Sometimes a panel is so badly divided that no majority of its judges sign onto any opinion. In that case, the opinion with the most votes becomes the plurality opinion of the court.

§3.2 HOW JUDGES MAKE CONTRACT LAW: JUDICIAL PRECEDENT

§3.2.1 What Is Precedent?

As mentioned in section 2.4.1, the common law developed in the Royal Courts of England. Although the Monarch was the font of justice, he or she could not deal personally with disputes between subjects, so this task was delegated to judges. As these judges decided cases over time, they recognized the value of deciding similar cases in the same way. This allows for efficiency in the administration of justice, it enables people to predict case outcomes more accurately, and it serves one of our fundamental conceptions of justice: the equal treatment of people in like situations. As the common law developed, it became established practice for court decisions to be recorded so that they could be used as the basis of resolving later cases. This meant that a decision no longer only settled the dispute between the immediate parties. It formed a rule to be followed in the next case involving similar facts. As the number of recorded decisions grew to cover a greater variety of cases, the collection of legal rules expanded to create a compendious body of law. The principle that a judicial decision creates a rule of law, binding on later cases with similar facts, is known as the doctrine of precedent or, in Latin, *stare decisis* (roughly translated “the decision stands”).

§3.2.2 Who Is Bound by Precedent?

Obviously, the parties to a case are bound by the judicial determination of

their suit. However, the doctrine of precedent deals with the binding effect of the decision beyond the parties, on later cases between other litigants. The first general rule of the doctrine has already been alluded to: The rule of a case is only binding on later cases with substantially similar facts. If there is a material factual difference between the cases, the earlier decision is not on point. You will often see passages in opinions in which the court declines to follow a case cited as precedent by one of the parties on the grounds that the facts of the prior case are distinguishable. Of course, no two cases are likely to have exactly the same facts, so the issue is one of substantial similarity—whether the crucial factual elements are sufficiently similar that the second case comes within the rule of the first. Even when there are notable factual differences, the later court may find the circumstances of the cases to be analogous, so that the rule may be treated as governing the second case as well.

The factual similarity between the current case and an earlier case is an important factor in deciding whether the prior case binds the court as a precedent. This can be a subtle and difficult inquiry. However, it is not the only consideration. The precedential weight of the prior case may be affected by other factors, such as the procedural context in which the court rendered its decision or the court's purpose in dealing with that point of law. Quite apart from this, judicial opinions are not always completely clear and unambiguous, so a later court may have to interpret the prior opinion to decide on its scope and meaning. As a result, the precedential value of a prior opinion could be unclear and disputed, giving the court some flexibility in deciding whether to apply or distinguish it. If the court does not agree with the disposition in an earlier case, there are often distinguishing features that allow the court to find the decision in the earlier case inapplicable. Conversely, if the court favors the earlier decision, there are often ways to find the facts to be close enough or analogous.

Precedents are not universally binding on every court. The binding force of a precedent depends on the seniority of the court and the jurisdiction in which it sits. The court that decided the case should follow its own precedents. This is true even where the membership of the court changes, so that different judges hear the later case. Therefore, for example, the state supreme court will usually consider itself bound by a precedent that it set in an earlier case. However, a court cannot be absolutely bound by its own precedents, and may depart from them where the court concludes that the

precedent is wrong or no longer tenable. A court's decision to overrule its own precedent is not taken lightly. The court weighs the need for flexibility and development in the law against the policies of predictability and fairness that motivate the doctrine of precedent.

A precedent is absolutely binding on courts of inferior rank in the same judicial hierarchy. Unlike the court that decided the prior case, a lower court cannot simply refuse to follow a precedent because it considers it to be wrong. (However, as noted above, the lower court may find a basis for distinguishing a prior case if it wants to avoid following the precedent.) As explained in section 2.6, the judicial hierarchy that usually deals with contract cases is the state court system. Therefore, if the state supreme court decides a case, the rule of that case binds every other court in that state. If a case is not appealed to the state supreme court, the intermediate appellate court makes the final decision in the case. Its decision binds all courts in the state except for the supreme court, which is senior in the judicial hierarchy. If, later on, a different case with substantially similar facts does reach the supreme court, the court may find the earlier decision of the intermediate appellate court persuasive, and may decide to adopt it. However, it is not bound to do so. A case decided, even by the highest court, in one judicial hierarchy (that is, the supreme court of one state) is of no binding force on any court in another judicial hierarchy (another state). Again, however, it could be of persuasive weight because courts often look to the cases decided in other states for guidance in resolving issues of first impression in their own jurisdictions.

The relationship between state and federal courts is too complex for discussion in any depth here. As a broad rule, when a federal court decides a matter of state law, it must follow precedents established by the courts of that state. If the superior courts of the state have not yet had occasion to decide the particular legal issue, the federal court must try to determine from analogous or related caselaw how the state courts would decide the matter if presented with it. Because a federal court is outside the state's judicial hierarchy, its decision on a matter of state law does not absolutely bind the courts of the state, but it is persuasive authority.

Finally, it is important to recognize the relationship between judge-made law and legislation. Unless the court has pronounced on a matter of constitutional interpretation that cannot be overturned by legislation, the legislature may enact a statute that overrides a judicial precedent, even by the state's highest court.

§3.2.3 The Drawbacks of the System of Precedent

The advantages of the system of precedent—efficiency, predictability, and fairness—have already been alluded to. The system also has some drawbacks. First, it can perpetuate unsound or unfair rules when a later court is bound by a poor or outdated earlier decision. As just mentioned, there are means of avoiding this problem by making factual distinctions when possible, by overruling if the court is of sufficient rank or by legislation. However, the inertia inherent in both the legislative and judicial processes often allows unsatisfactory rules to remain in force.

Second, rulemaking through court decisions tends to be sporadic and disorganized. When a legislature decides to enact a law, it can proceed in an orderly way to address the problem comprehensively. It can hold hearings, order staff research, and engage in debate. A statute can then be fashioned that is designed to deal with all the issues involved and to set out all the applicable rules. Caselaw develops more spasmodically. Courts have no control over the order in which cases arise, and they can respond only to the immediate issues involved in each case. They cannot legislate broadly but must confine themselves to resolving the dispute at hand. The rules that they create are very specifically tied to the facts in the case. As a result, judicial development of doctrine is haphazard. Some areas of law may be covered thoroughly because they are litigated frequently, while others may languish for decades. Some areas of the law may thus be regularly refined and updated while others are neglected. It sometimes happens that a major issue remains unresolved for years, because no party has wished to pursue it to the point of a definitive appellate pronouncement. Again, sometimes these gaps may be filled by legislative action, but they often are not.

Third, it is often harder to find the legal rule in a judicial opinion than in a statute. Statutes usually simply state their rules. Judge-made rules are contained in opinions, which can be dense, detailed, and lengthy pieces of writing. An opinion sets out the facts of the case, contains an often extended dissertation on the law, and finally reaches a decision or judgment resolving the issues between the parties. Somewhere in this body of writing, there are legal rules that serve as precedent. It is not always obvious what these rules are. To find them, the lawyer must study and interpret the case. To make matters worse, if the case has been decided by a divided appellate court, it can be harder still to determine the precedential weight of a majority or

plurality opinion, called into question by concurrence or dissent.

§3.3 THE ANATOMY OF A JUDICIAL OPINION

§3.3.1 *Ratio Decidendi* (Rule or Holding) and *Obiter Dictum*

As mentioned before, the opinion states the facts of the case, as determined by the factfinder (the jury, or in non-jury cases, the judge) after weighing the evidence and resolving conflicts in testimony. The factual conclusions reached at trial are not disturbed on appeal unless they are so unreasonable that no support can be found for them in the evidence. Therefore, the recital of facts in an appellate opinion is based on the findings at trial. As the previous discussion indicates, the factual basis of the opinion is very important because the rule of the case can only be determined with reference to it.

Having laid the factual foundation for its decision, the court proceeds to resolve the legal issues. The judge could simply state the rule to be applied and give judgment. However, in most cases that involve significant legal issues, the judge justifies and articulates the rationale for the rule and its application in the case. The statement of the rule and its reasoning are the portion of the case that constitutes the precedent. This part of the opinion is called the rule or the holding or, in Latin, the *ratio decidendi* (roughly translated as “reasoning for the decision”).

Frequently, the opinion does not confine itself to matter that is directly related to the resolution of the dispute before the court, but ranges beyond this to deal with ancillary or collateral matters on which the judge considers it necessary to express a view. These collateral discussions may be included, for example, to further explain and qualify the holding or to give guidance in future cases on how this court will view variations of the factual circumstances. This collateral matter is called *obiter dictum* (“said in passing”) or simply dictum. As stated before, because it is not necessary to the disposition of the case, it is not binding precedent and has only persuasive value. Its persuasive value depends on the seniority of the court that issued the opinion. For example, a dictum in a unanimous supreme court opinion strongly signals how the court will likely decide that question, so it is highly

influential to a lower court. A simple exercise in identifying the rule of a case and distinguishing it from dictum can be found in the Examples.

§3.3.2 The Process of Inductive and Deductive Reasoning in the Creation and Application of Legal Rules

When a general rule is applied to a particular case, a process of deductive reasoning is followed. The general rule, accepted as true, serves as the major premise. The particular facts to which it will be applied are the minor premise. Provided that there is a necessary connection between these two premises, a conclusion is produced that must also be true. For example:

Major premise (the generally applicable rule of law): The contract of a minor is voidable at the instance of the minor.
Minor premise (the particular facts): June Nior is a minor who entered a contract and now seeks to avoid it.
Conclusion June has the right to avoid the contract.

Deductive reasoning, therefore, allows a rule of law to be applied in a particular case.

But where did this major premise, the rule of law, come from? In the common law, it has been created by precedent through a process opposite from deductive reasoning: The ruling in a particular case is generalized to create a rule of law applicable beyond the case. This is called inductive reasoning. In an earlier case another minor, Joe Venile, had entered into a contract with May Jore that he sought to avoid. In that case the court ruled that Joe, as a minor, had the power to avoid the contract. This rule then becomes generalized by the doctrine of precedent, so that it declares that not simply Joe but all minors may avoid contracts. The next time a minor, such as June, seeks to avoid a contract in a case with substantially similar facts, the general rule is applied by deductive reasoning to resolve it.

It must be stressed again that the pertinent facts in the subsequent case (the minor premise[2]) must be substantially the same as in the prior case, otherwise there is no connection between the major and minor premise necessary to reach a conclusion. As stated earlier, material rather than absolute similarity is required. But even when there is a notable difference in the facts, the rule could serve as persuasive precedent and could be applied

by analogy if the rationale motivating the first decision is equally applicable in the second. For example, say in the next case the issue arises whether a mentally impaired adult has the power to avoid a contract. The rationale for the decision in the first case was that when a person requires protection from bad judgment and exploitation resulting from youth, the values of freedom of contract and the protection of reasonable reliance in the marketplace must be weighed against the need to protect the minor. The court in the second case may find that the rule should be applied to a mentally impaired adult too, because this rationale is equally compelling in this case.

§3.3.3 The Use of Authority and Supporting Rationale in Judicial Opinions

Much has been said already on the use of precedent and legal exposition to justify the court's conclusion. The strength and extent of precedential authority and the force of the court's reasoning must be evaluated critically by one who wishes to interpret the opinion and to evaluate its worth as precedent. It is therefore useful to take a little more time to point out some of the elements that constitute the rationale in an opinion.

When the decision is based on a prior case that serves as precedent, the earlier case is cited with some explanation of why it is controlling. The same is true if a rule of statute law is applicable. In some cases, this citation of authority may be the only justification advanced by the court for the rule. That is, in deciding in a particular way, the court may rely solely on an established rule and advance no explanation of its own. For example, "The contract of a minor is avoidable at the instance of the minor. See *Joe Venile v. May Jore*."

However, if there is no controlling precedent or statutory provision, the court cannot simply rely on some authoritative source for its rule. It has to develop the rule itself and must explain why it does so. Even when there is authority, the court may consider it useful to bolster that citation to authority by explaining why the rule makes sense. Most policy rationales for a rule fit into one or more of the three related but distinct classes listed below. As you read opinions, take note of their structure. You will find that one or more of these justifications appears in most of them.

1. A rule may be justified on the basis of public policy goals. The court

feels that some particular social, economic, or political policy is served by the rule. For example, the court may discuss how it balanced countervailing public policies where the policies of freedom of contract and the protection of reliance have to be weighed against the policy of protection of a minor.

2. A rule may be grounded in ethics or fairness. For example, the court may justify the minor's power of avoidance by arguing that an adult should not contract with a minor, because this is exploitive. It may also focus on the injustice of holding a person of tender years to a contractual commitment. The unfairness to the minor, combined with the unethical conduct of the major party and the likelihood that that party could tell by appearances that the other was under age, justifies the minor's power of avoidance.
3. Courts sometimes rationalize results on the basis of institutional efficiency. For example, the court may concede that some minors are more sophisticated than others, so that some may indeed be able to make a mature judgment. However, the court may conclude that a clear rule setting a definite age for contractual capacity is efficient because it is certain and avoids litigation over the question of actual competence.

§3.4 A TRANSNATIONAL PERSPECTIVE ON THE DOCTRINE OF PRECEDENT

The doctrine of precedent is a central feature of the common law system, but court decisions do not carry the same weight in civilian systems. Although civilian systems accord some weight to judicial precedent, they rely primarily on comprehensive codes and scholarly commentary as the source of legal rules. Civilians typically see the role of courts as dispute resolution, not lawmaking—the court's job is to apply the law to the facts of the case for the purpose of settling the immediate dispute between the parties, and not to establish legal rules that will be applicable to later cases. With the exception of certain high courts and constitutional tribunals, court decisions in civilian countries are short, not very analytical, and fact-based.

Examples

1. This Example provides a simple illustration of case analysis and the operation of the doctrine of precedent. It is based on an opinion in a fictitious case involving a minor's contract. Although the substantive law of contractual capacity is not discussed until Chapter 14, the principles of substantive law are not difficult to grasp and the focus is on the analysis in the opinion rather than on the rules of law. The case is decided by the Supreme Court of Savannah, which consists of nine justices. Seven joined the majority opinion, one concurred, and one dissented. Read the opinions and consider the questions that follow them.

Supreme Court of Savannah, 2017
LORNA GREEN, Plaintiff
v.
MO MEADOWS, Defendant

VERDANT, Chief Justice, delivered the opinion of the court.

Plaintiff, Lorna Green, owns a golf practice putting course. On February 1, 2015, she entered into an agreement with defendant, Mo Meadows, doing business under the name "Mo's Mowing Services." In terms of the agreement, defendant agreed to mow the plaintiff's course bi-weekly during the period March 1 to October 31, 2015, for a total price of $20,000, payable in weekly installments. At the time of the agreement, defendant was 17 years old and just two weeks short of his 18th birthday. Plaintiff did not know or even think about his age. He was of mature appearance, operated his own business, and approached plaintiff to solicit the work. Although plaintiff was unaware of defendant's domestic circumstances, he had in fact been living on his own for some time and was financially independent of his parents. Two days after entering into the agreement with plaintiff, defendant accepted a more lucrative business opportunity that precluded him from performing the mowing services for plaintiff. He therefore called plaintiff and told her that he was no longer able to mow her course. At this stage the contract was fully executory—that is, no services had been performed under the contract, and no payments had been made.

After trying in vain to persuade defendant to honor his undertaking, plaintiff made inquiries and found another person to perform the same

services for a fee of $30,000. This was the cheapest substitute available. Plaintiff then sued defendant for $10,000, the difference between what the services would have cost her under her contract with defendant and what they cost under the substitute transaction. This is the correct measure of damages because it compensates plaintiff for her disappointed expectation and places her in the position that she would have been in had the contract been performed. However, these damages are only recoverable if defendant's refusal to perform was an actionable breach of contract.

None of the above facts were disputed at trial. Defendant admitted entering into and subsequently refusing to perform the contract. The sole defense that he raised was that he was a minor at the time of contracting and therefore had the right to avoid the contract, which he did a couple of days later. The trial court found in favor of defendant on this issue of law and granted judgment in his favor, dismissing plaintiff's claim. The court of appeals affirmed.

On appeal to this court, plaintiff concedes that defendant was a minor both when entering and terminating the contract. However, plaintiff urges us to hold defendant bound to the contract under the circumstances of the case: Defendant was almost 18, operated his own business, looked mature, lived independently of his parents, and fully understood the nature of the transaction. Plaintiff dealt fairly with defendant and had no knowledge of his age. In effect, while plaintiff acknowledges that a minor's contract is normally avoidable, she contends that the application of that rule in the present case would be highly technical and unfair. While this argument has some appeal, it is contrary to the law and policy of this state and must fail.

At common law, a person attained the age of majority at 21. However, in 1960 the legislature of this state changed the age of majority to 18. The statute expressly states that "until midnight on the day preceding a person's 18th birthday, that person shall be a minor for all purposes in law." Clearly, then, defendant was a minor both when he contracted and disaffirmed his contract.

The law of this state on minors' contracts was first pronounced on by this court in *Senex v. Youngblood*, 50 Savannah Reports 100 (1908), in which we held that a contract entered into by a minor may be avoided by the minor, either expressly or by implication, at any time before

attaining majority or within a reasonable time thereafter. As we explained in *Senex*, this rule is intended to protect minors from improvidence and bad judgment and to prevent advantage-taking by adults. This rationale is as applicable today as it was when first advanced, and the rule has been followed consistently ever since. Plaintiff refers us to *Teenbride v. Groanup*, 150 Savannah Reports 200 (1945), in which we recognized an exception to the rule where a minor had become fully emancipated from her parents as a result of marrying and setting up her own home. However, the marital status of the minor was a material element of that case and distinguishes it from the situation before us today. Given the law's purpose of affording protection to minors, we are not inclined to broaden the rule in *Teenbride*.

It may be true, as plaintiff argues, that it is technical and unfair to allow an independent and mature minor to avoid a contract entered into so close to majority. However, this argument invites the court to abandon a clear and definite rule in favor of a case-by-case investigation into the minor's circumstances. While it may be arbitrary to fix contractual capacity as arising at a precise hour on a person's 18th birthday, this rule is at least predictable and easy to apply. A fact-based analysis of a minor's actual ability to use mature judgment would create uncertainty in the law and would surely encourage litigation. The arbitrary rule does not really impose great hardship on the major party who has the opportunity to demand proof of age whenever dealing with a person of youthful appearance. In any event, even if plaintiff's argument has merit, it is better addressed to the legislature than to the courts, because the legislature has spoken on this matter and we have no authority to disregard a clear statutory provision.

Finally, we note in passing that plaintiff has referred us to several decisions from other states in which it has been held that a minor loses the right to disaffirm a contract where he or she has misrepresented his or her age. The wisdom of such decisions may be called into question, given the policy of protecting minors from improvident and irresponsible behavior. Nevertheless, we need not pass on this question here, because there is no evidence that defendant affirmatively misrepresented his age. It is not enough to constitute a misrepresentation that a minor simply appears to be over 18 and says nothing to counter

that impression.

We find, therefore, that the courts below did not err in giving judgment for the defendant and we affirm.

TURF, Justice, concurring.

I agree with the conclusion reached by the court on the facts of this case. However, I write separately to emphasize that I take the majority's opinion to be confined to a wholly executory contract. Had the contract been performed in whole or in part, it would have been appropriate for the court to take this into account in deciding whether to exercise its discretion to enforce the contract. In this respect, I take a more expansive view of the court's discretion than the majority seems to assert.

WEED, Justice, dissenting.

In allowing defendant to avoid this contract, the majority adopts an absurdly rigid approach. While it is true that minors need protection from improvident action and exploitation by adults, there is no evidence in this case to suggest that any such factors were present. Rather, defendant unscrupulously and cold-bloodedly reneged on his contractual promise purely for the sake of exploiting more profitable economic opportunities. Given the age and independence of defendant, he was in fact emancipated. His situation is really indistinguishable from that of the married minor in *Teenbride*, and the rule in that case should have been followed. By refusing to extend that rule and narrowly confining the *Teenbride* decision, the majority allows defendant to escape his undertaking with impunity and teaches young people a very poor lesson on business ethics. The advantage of legal certainty is greatly outweighed by the need to do justice between the parties in specific cases.

Furthermore, the majority's claim that its hands are tied by statute is misconceived. The statute simply fixes the age of majority. It says nothing of the court's power at common law to recognize appropriate exceptions to the general rule concerning the avoidability of minors' contracts. Indeed, the rule in *Teenbride* was already in existence at the time that the statute was enacted, and no one has suggested that the statute was intended to overrule it.

For the above reason, I dissent from the majority opinion and would reverse the decision of the lower courts, awarding judgment to plaintiff.

Consider the following questions based on this opinion:

a. What is the holding of the case?
b. What nonbinding dicta can you find in the majority opinion?
c. What is the precedential effect of the dissenting opinion?
d. It is easy to see why a judge who disagrees with the majority's disposition would be motivated to write a dissenting opinion. But why would a judge who agrees with the majority's conclusion feel the need to write a concurring opinion? What purpose does the concurring opinion serve in this case?
e. Bearing in mind the discussion of judicial rationale in section 3.3.3, identify the rationales used to support the majority opinion and the dissent.
f. Consider the differing treatment of the *Teenbride* decision in the majority and dissenting opinions. What does this tell you about the process of following precedent?
g. What lessons do the majority and dissenting opinions teach on the role of courts and the relationship between judicial and legislative rulemaking?

2. After *Green v. Meadows* was decided, the supreme court of another state has to resolve a case with substantially similar facts. The case is one of first impression in this other jurisdiction (that is, there is no judicial precedent in the state on this issue). What impact will the *Green* decision have in the resolution of this subsequent case?

3. After *Green v. Meadows*, a trial court in Savannah is dealing with a case in which a minor deliberately and expressly misrepresented to the major party that she was 20 years old and bolstered this misrepresentation by producing a forged driver's license. Is *Green* binding authority in this case? If not, does it offer the court any guidance on how to dispose of the case?

4. In another subsequent case before a trial court in Savannah, the facts are almost identical to those in *Green v. Meadows*. The only material difference is that the contract was entered into three days before the

minor's eighteenth birthday. One week after his birthday, before the services had been delivered or paid for, the minor disaffirmed the contract. How does *Green* affect the disposition of this case?

Explanations

1. a. The holding of the case is the legal rule of the case that becomes binding precedent. It is narrowly confined to those pronouncements of law necessary to resolve the factual issues in the case. The rule in this case may be formulated as follows: A person is a minor until midnight of the day before his or her 18th birthday. A wholly executory contract[3] entered into by a minor at any time before reaching majority is avoidable by the minor if expressly disaffirmed by the minor prior to majority. This right of avoidance continues to exist even if the minor lives apart from and is financially independent of his or her parents. A minor has no duty to disclose his or her age, and the minor's physical appearance and the major party's lack of knowledge of the minor's age are not relevant to the right of avoidance.

   Notice that the holding is considerably narrower than the court's discourse on the law. For example, although the court says disaffirmance can occur expressly or by implication, before or within a reasonable time after reaching majority, the facts in the case are that disaffirmance was express and occurred before majority. Therefore, the court's recognition of implied and post-majority disaffirmance are dicta, not part of the holding. Also, it is a significant fact that the contract was wholly executory, so this should be reflected in the formulation of the holding. The absolute tone of the opinion suggests that the same rule may apply even if one or both parties had performed wholly or in part. However, this is dictum at best, and may not even rise to that level because the opinion does not address the question of whether the result might have been different had there been some performance. The concurring judge focuses on the fact that the contract is executory, and she makes it clear that her judgment is based on that fact.

   b. There are a number of dicta in the majority opinion. Remember that a dictum is a statement on the law that is not necessary for the resolution of the case but is pronounced on by the court in passing. A

dictum is not binding precedent, but it has persuasive value. It allows the court to expound on legal doctrine and policy and provides guidance on how the court would be likely to deal with a later case that presents the issue covered by the dictum. Apart from the two dicta mentioned in Explanation 1(a) concerning implied and post-majority disaffirmance, the majority opinion contains the following dicta:

i. The discussion of plaintiff's damages is dictum because plaintiff lost the case on the issue of capacity, making the issue of remedy moot.
ii. The court's recognition of the exception regarding emancipation in the *Teenbride* case is dictum because the defendant in this case was not married. Note, however, that the court hints that it is not particularly well disposed to the precedent, and this may undermine its value, as discussed in 1(f) below.
iii. The discussion of misrepresentation of age is holding to the extent that the court states that physical appearance combined with nondisclosure does not constitute misrepresentation. This aspect of the opinion does address facts in issue in the case. The remainder of the court's observations on this question are dicta at best. Their import is discussed in Example 3.

c. The dissenting opinion is merely the view of this individual judge. No part of it, whether directly related to the facts or not, is the holding of the case. It is not binding precedent. However, a dissent can be influential, particularly when it is the well-reasoned opinion of a respected jurist. When a court in another jurisdiction seeks persuasive authority, a dissenting opinion may be preferred to the majority approach. Even in this jurisdiction, the dissent may in time persuade the majority of the court to move away from the position adopted in this case. Alternatively, as the court's composition changes, successors to the current majority may be more sympathetic to the dissent's view. Dissents do not always have these beneficial effects. Sometimes the existence of dissent on the court can undermine the force of the majority opinion or cause confusion for lawyers trying to interpret the case.
d. Most commonly, a judge is motivated to write a concurring opinion

when she agrees with the judgment of the court (so she does not dissent) but reaches the conclusion on a different basis. A judge may also decide to write a concurring opinion when, as here, the judge feels that the majority opinion should express a qualification or limitation that the majority has declined to articulate. Although the majority mentions in passing that the contract was wholly executory, its opinion does not expressly indicate if it considered this fact significant, or if it might have decided the case differently had the contract been performed fully or in part. The concurring judge therefore feels the need to articulate that she considers this to be a pertinent fact, relevant to her decision to affirm the lower courts' judgment. The concurring judge also makes a point of distancing herself from the majority's suggestion that courts have no discretion to depart from the clear language of the statute.

e. The majority opinion uses all the elements referred to in section 3.3.3. The authoritative basis for the decision is the *Senex* case and the state statute. This recourse to authority is bolstered by rationale based on public policy, fairness, and institutional efficiency: The protection of minors from improvidence and exploitation serves the ends of both public policy and fairness; the preference for the arbitrary but certain rule is justified with reference to the goal of institutional efficiency; and the court's deference to the legislature is based on both policy and institutional grounds.

    As the dissent shows, the court is not unanimous in the perception of how these different rationales come into play. The dissenting opinion finds the *Teenbride* case to be applicable authority and the statute not to be on point. It considers that the majority opinion does not serve the goals of public policy and fairness, and finds the goal of institutional efficiency to be outweighed by the policy of fairness.

f. The treatment of the *Teenbride* case in the majority and dissenting opinions highlights the point that a precedent is binding only when the facts of the cases are substantially similar. It seldom happens that a later case is identical to an earlier one, and it is often difficult to know whether factual differences between them are material enough to disqualify the earlier case as binding precedent. Sometimes the court's view of this issue is colored by its desire to follow or depart

from the earlier decision. The majority apparently does not like the rule in *Teenbride* and does not wish to use it, so it finds the case distinguishable on the ground that the minor in the earlier case was married. The dissent feels that the independence, not necessarily marriage, of the minor is the crucial consideration and therefore feels that *Teenbride* should be followed. The dissenting judge therefore refuses to find the fact of marriage to be a material difference between the cases.

g. One of the perpetual issues confronting courts is the relationship between the judicial and the legislative role. While judges clearly do make law through the common law process, this function is circumscribed by the predominant lawmaking authority of the elected legislature. Therefore, if a statute deals with an issue, the judge must apply the statute and not disregard it. In this case there is a statute prescribing the age of minority. The difference between the majority and dissenting opinions reflects a different view on the scope and intended meaning of the statute. The majority interprets it as providing authority for a rigid rule on contractual capacity; the dissent sees it merely as altering a common law rule on age, while preserving judicial discretion to deal with the actual effect of minors' contracts. The issue of statutory interpretation can be difficult, and the extent to which the court is willing to defer to perceived legislative intent is often influenced by the judge's broad or narrow view of the court's rulemaking function.

2. This decision is not binding precedent in another judicial hierarchy. When a court deals with an issue of first impression in its jurisdiction, it is likely to seek guidance by consulting the decisions in other jurisdictions and will be influenced by the persuasiveness of supporting rationales in decided cases which should have been brought to its attention by one or the other party during the course of argument. Because the court of another state is not bound by the majority opinion, it could find the qualification in the concurring opinion or the different approach of the dissent to be more compelling and may decide to use it as persuasive authority.

3. As noted in Explanation 1(b), *Green* is only of binding authority in its holding that physical appearance plus nondisclosure is not

misrepresentation. Beyond that, the court's observations on misrepresentation are no more than dictum. In fact, the court does not even provide clear dictum on this question. It merely refers to decisions in other states that recognize an exception for misrepresentation and then calls into question the wisdom of those decisions. Therefore, although the decision does not give clear guidance to the trial court in the later case, it does hint that if the judge recognizes the misrepresentation exception, the decision may be overturned on appeal. This signals to the judge (and to the attorneys in the case) that some careful and thorough argument should be prepared if reliance is to be placed on the misrepresentation.

4. As noted in Explanations 1(a) and (b), the holding of *Green* is confined to disaffirmance by the minor before reaching majority. In the later case, disaffirmance occurred after the age of majority, so it is not within the rule of *Green*. However, *Green* has a very clear dictum that post-majority disaffirmance is also effective if within a reasonable time. (The earlier case of *Senex* said the same thing, but we do not know if it was dictum or holding in that case. If it was holding, that case is binding precedent. If it was dictum, the fact that it was reinforced by later dictum in *Green* strengthens its persuasive force.) Therefore the trial court should take the pronouncement in *Green* very seriously. Of course, *Green* does not say what a reasonable time after majority would be, and the trial court will have to resolve that issue.

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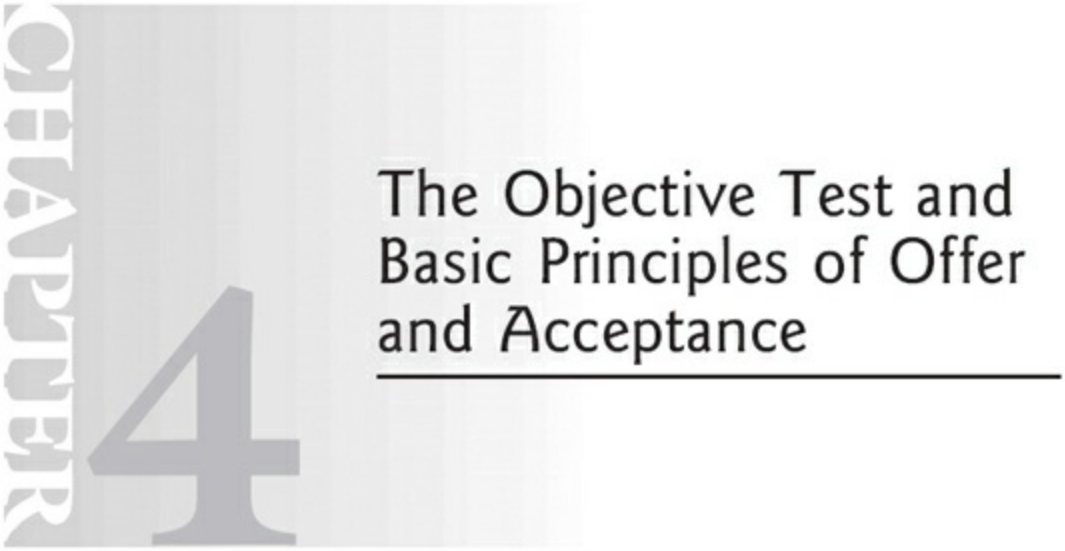
1. As noted in section 2.6, federal courts do sometimes deal with contracts cases. In the federal system, trial court decisions are published and are often included in casebooks.
2. This is not a pun.
3. As explained in the majority opinion, a wholly executory contract is one in which neither party has begun to perform its obligations under the contract.



§4.1 INTERPRETATION AND THE OBJECTIVE TEST

§4.1.1 Introduction

For a contract to be formed, the parties must intend to enter a contractual relationship, and the terms of the contract are those on which they have mutually agreed. This sounds simple and straightforward, but it is complicated by the fact that the parties must communicate their intentions to each other, and this communication could be poorly expressed or incorrectly understood. Where a dispute arises between the parties over whether they entered a contract at all, or over the terms that they agreed to, their communications must be interpreted to resolve this dispute. Interpretation of the parties' words and actions is therefore a pervasive theme in the area of contract formation, as it is throughout contract law. One of the fundamental principles of modern contract law is that where a court seeks to ascertain the intent of the parties, it does not focus on what each party may have thought or believed he was agreeing to (that is, his subjective intent) but on the

reasonable perception of that intent, as conveyed by his words or actions (his objective intent).

§4.1.2 The Communication of Contractual Intent

Agreement requires communication—the intent to enter into the contract must be signaled by each of the parties through words and actions that are observed and given meaning—that is, interpreted—by the other. Often, this interaction does lead to true assent on a subjective level. Each party uses clear and unambiguous signals that accurately convey intent, and these signals are fully and correctly understood by the other. Where this happens, there really is a "meeting of the minds" in which perceived intent corresponds to what each party had in mind. But this is not always so. Communication can be fouled by so many different causes: A poor choice of words or actions may obscure intent; a manifestation of intent may be perceived differently or misconstrued by the person to whom it is addressed; or secret reservations or deviousness may result in deliberate obfuscation. In addition, in so many transactions, the one party manifests assent to standard terms presented by the other. It is quite common, in these standard transactions, for the nondrafting party to signify assent without reading or fully understanding the standard term. Therefore, while contracts are consensual relationships and in many contracts there is a genuine "meeting of the minds," some transactions end up in litigation because it turns out that the minds of parties were not in true accord, even though their manifestations of assent appear to be congruent.

§4.1.3 Assent and Accountability: Subjective and Objective Tests of Assent

When imperfect communication leads to a dispute about the existence or terms of a contract, two fundamental contract policies must be accommodated. The assent policy dictates that contractual obligation should not be imposed on a person who did not in fact agree to be bound. However, if the need for true assent is too heavily stressed, the policy of protecting reliance is undermined. If no one could rely on words or conduct that indicate assent, it would be difficult for anyone to have confidence in the system of commercial exchange. Therefore, the assent policy must be tempered by the

goal of protecting the expectations of one who reasonably relied on the appearance of assent. A person must be held accountable for behavior that signifies assent.

Court opinions prior to the classical period[1] suggest that contract was seen as requiring a real "meeting of the minds," in the sense that there could be no contract unless the parties' subjective intent coincided on the creation and terms of the relationship. Classicists felt that a subjective approach was wrong in principle because it made transacting less dependable. It was also not workable because it placed too much store on obviously unreliable (and not easily rebuttable) self-serving testimony of actual intent. Classical contract law therefore moved toward the opposite pole, refusing to see any relevance in the subjective state of mind of the parties and employing a strict objective or external test for assent. If agreement was apparent from the manifestations of assent, reasonably interpreted, a contract had been formed on the terms reflected in the manifestation. It was neither necessary nor permissible to receive testimony on what either party actually thought or believed.

A complete disregard of the actual state of mind of the parties gives too little weight to the assent policy and could lead to injustice where subjective evidence could cast some light on the meaning of a manifestation. For example, evidence of a party's subjective understanding could provide an alternative explanation of the meaning of words or actions, or it could indicate justifiable misapprehension induced by the other party's unfair bargaining methods. Recognizing this, modern law has moved away from the strict objectivist approach of the classical period, and is not as absolute in its focus on the manifestation of assent. It is now accepted that evidence of a party's state of mind may sometimes be helpful in interpreting or giving a context to words or conduct, provided that the subjective evidence is credible and compatible with the overt behavior. Although less rigid than it used to be, the objective test is firmly established and a subjective "meeting of the minds" is not required for contract formation. In the absence of compelling contrary indications, assent is legally sufficient if each party, by the deliberate use of words or conduct, manifested agreement to be contractually bound.

The contemporary approach is reflected in several sections of the Restatement, Second. In defining a promise, §2 speaks of a manifestation of intent by the promisor that justifies the promisee in understanding that a

commitment has been made; §3 describes "agreement" as a manifestation of mutual assent; §§19 and 20 stress the accountability principle by holding a party liable for deliberate manifestations by words or conduct, made with reason to know that they will create a reasonable impression of assent. Uniform Commercial Code (UCC) Article 2 does not specifically address the objective test, which is therefore governed by the general principles of common law by virtue of §1.103(b).[2]

§4.1.4 The Substantive and Evidentiary Aspects of the Objective Test

Having introduced the objective test, we now look more carefully at its operation and implications. The test may be thought of as having both a substantive aspect (that is, it prescribes a legal standard for determining assent) and an evidentiary aspect (that is, it regulates what evidence is admissible to prove intent). Although these aspects are closely interrelated, it aids understanding of the objective test to articulate and describe them separately.

a. The Substantive Aspect of the Objective Test

Manifestations of assent are interpreted, not in light of what the utterer actually meant or the other party actually understood, but from the standpoint of what that utterance reasonably meant in the entire context of the transaction. That is, we ask not what the words or actions actually meant to either party but how they should have been meant and understood if interpreted reasonably under the circumstances of the transaction. The reason for this, of course, is that the objective test is aimed at balancing the requirement of assent with the protection of reasonable reliance. It is therefore not based on any actual perception of meaning that may form in the mind of either party, but with the rational meaning that should have been placed on it by the parties. How do we find this reasonable person? In essence, this is a construct meant to represent the community standard, as identified by the trier of fact.

An example may help to illustrate the way in which the "reasonable person" construct focuses the inquiry: Lender lent Borrower $10,000. Under the loan agreement, Borrower promised to repay the loan "with interest at the market rate within one year of the date of receiving the advance." At the time

that the contract was executed, the market interest rate was 4 percent. At the time of the repayment date, the market interest rate was 5 percent. This led to a dispute between Lender and Borrower about the meaning of "interest at the market rate." Lender contends that the market rate must be measured at the time of repayment of the loan and interest, while Borrower contends that it is fixed at the rate prevailing at the time the loan was made. To establish the meaning of "market rate," the factfinder is not so much concerned about what either Lender or Borrower thought it meant. Rather, he or she will seek to determine what reasonable people in their position would have understood the term to mean under all the circumstances of the transaction. To make this determination the factfinder must focus on objective evidence—that is, observable significations of intent—to establish contractual intent. This evidence consists of the language used by the parties in the agreement, as well as any other communications between them or any other overt behavior. It also covers any custom or usage in the marketplace, as well as any generally accepted meaning of the language used in the parties' communications.

b. The Evidentiary Aspect of the Objective Test and the Relevance of Subjective Evidence of Intent

A rigid objective test would confine evidence to these objective sources, and would treat as irrelevant any subjective evidence of what either party may have thought the words meant. This approach is summed up by a famous passage from the opinion of Judge Learned Hand in *Hotchkiss v. National City Bank of New York*, 200 F 287, 293 (S.D.N.Y. 1911):

> A contract has, strictly speaking, nothing to do with the personal or individual intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.[3]

Modern courts are not generally as rigid as this about the absolute exclusion of subjective evidence. Although they focus strongly on objective manifestations of intent, they are usually willing to admit subjective evidence of what a party thought or intended to the extent that this evidence is congruent with the objective manifestations of intent, it is relevant to provide

insight into those manifestations, and it is credible. Therefore, in our example, evidence of each of the parties' actual understanding of "interest at the market rate" should be admissible, merely as pieces of relevant evidence. To the extent that the subjective understanding of a party is plausible and consistent with the objective evidence, it may reinforce the court's determination of the reasonable meaning of the language. Even on this more tolerant approach to subjective evidence, a court is not likely to admit evidence of a party's intent that is implausible and not reconcilable with the objective indicia of assent. For example, a claim by Borrower that she thought that the loan was interest-free could not be squared with her manifestation of intent to pay interest at the market rate.

A modern court's approach to the admission of subjective evidence under the objective test is well illustrated by *SR International Business Insurance Co., Ltd. v. World Trade Center Properties, LLC*, 467 F.3d 107 (2d Cir. 2006). Various insurance companies had issued binders (commitments to insure pending the execution of a final insurance policy) on the World Trade Center. The binders provided for coverage of $3.5 billion "per occurrence." The question of interpretation in dispute was whether the terrorist attack on the twin towers on September 11, 2001, in which two planes were crashed into the towers, constituted a single occurrence, for which total indemnification under the policies would be $3.5 billion, or two occurrences, which would increase the maximum coverage amount to $7 billion. The trial court admitted testimony of the insurers' witnesses about what they thought the policies meant. On appeal, the insured parties argued that the trial court should have excluded this subjective evidence. The court of appeals found no error in the admission of the evidence. It expressed the established principle that a contract must be interpreted objectively, based on the parties' manifested intent, rather than their actual intent. Therefore, although uncommunicated subjective intent cannot supply the meaning of a contract, it could be relevant and admissible to cast light on the meaning of the objective manifestations. This is particularly true where there is some ambiguity or lack of clarity in the objective manifestations.

§4.1.5 The Duty to Read

Because the objective test binds a party to his manifestation of assent, he is accountable for reading and understanding the terms of a contract before he

signifies assent to them. If he fails to do that, he will not likely succeed in arguing that he is not bound to the contract because he did not actually agree to it. That is, under the objective test, a party is bound by his objective indication of assent to a contract despite a lack of subjective agreement caused by his failure to read and understand its terms. Courts often express this approach by saying that a party has a duty to read a document before signifying assent to it.

The problem of a party not being fully aware of the terms to which he indicated assent arises most commonly with standard contracts drafted by the other party. People presented with standard contracts quite commonly do not read them well or at all before indicating agreement to them by signing the form or clicking an "I agree" button on a website. A person who does that may find that he has manifested agreement to terms that he did not expect and that are contrary to his interests. However, in most cases, unless the terms are unusually harsh and one-sided, or they were unfairly inconspicuous, the manifestation of assent binds the party and precludes an argument that he did not actually agree to them.

We return to the duty to read in Chapter 5, in the context of standard contracts entered into in writing or via an electronic medium. However, it is helpful to anticipate that discussion here by using a couple of examples involving standard form contracts to illustrate the duty to read. In *Morales v. Sun Constructors, Inc.*, 541 F.3d 218 (3d Cir. 2008), the court held that an employee was bound to his manifested assent to a standard arbitration agreement even though it was clear that he did not read or understand what he was signing. At the time that he was hired Morales, a Spanish-speaking employee, was required to attend an employee orientation, during which he signed a standard employment agreement containing an arbitration provision. The orientation was conducted in English and the agreement was written in English, which Morales did not understand. The employer knew this and asked another new employee, who was bilingual, to translate what was said at the orientation and to help Morales with the agreement form. However, this employee did not explain the agreement form, and Morales did not ask about it. Morales later sought to sue the employer for wrongful termination and claimed that he was not bound to the arbitration clause because he did not actually agree to it. The court of appeals rejected that argument and found that Morales had bound himself to arbitrate the dispute. It held that under the objective test, Morales had the obligation to ensure that he read and

understood what he was signing. If he could not understand English, he should have made sure that someone translated the agreement form for him. This result may seem harsh, but the case does show just how difficult it can be for a person to overcome the duty to read.

Morales involved a standard agreement printed on paper, but much standard contracting is conducted on the Internet. The same principle applies to electronic significations of assent. Consider the following familiar situation: Don Loader visits the website of SoftWary.com and decides to buy a video game, to be downloaded onto his computer. He places the game in his virtual shopping cart and proceeds to order it. Just before he submits his order, a box appears on his computer screen headed "Terms and Conditions of Sale." The box contains several pages of standard terms that can be read by scrolling down the text in the box. Don cannot be bothered to read all that stuff, so he just clicks the "I accept" button at the bottom of the box. Even though Don has no idea what he agreed to, the objective test binds him to his signification of assent.[4]

§4.1.6 Lack of Serious Intent: Jokes and Bluffs

As mentioned in section 4.1.2, miscommunication of intent can result from many different causes. Most commonly, the problem is inadvertent failure to express intent clearly. However, there are some cases in which a party who claims lack of contractual intent alleges that he was not serious about making a contract, but was joking or bluffing, and that the other party should have realized it. Although this does not happen very often, there are a few well-loved cases that involve this situation, and that serve as good examples of the application of the objective test.

One of these is *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954). Zehmer, the owner of property, contended that his offer to sell it to Lucy was a bluff. The alleged contract was made under most unbusinesslike circumstances while the parties sat drinking one evening in a restaurant operated by Zehmer. The memorial of the alleged contract was written in very sketchy terms on the reverse side of a restaurant guest check. When Lucy sought to enforce the sale, Zehmer claimed that it was not intended seriously. He testified that he and Lucy had been drinking too much, and he was just calling Lucy's bluff because he did not believe that Lucy had the money to buy the property. Whatever Zehmer's actual intent may have been, the court found that Lucy

was in earnest and under the objective test, had no reason to believe that Zehmer was not. (The court also declined to allow Zehmer to avoid the contract on grounds of mental disability caused by intoxication because it did not believe that Zehmer was drunk enough.)

More recently, in the rather wacky case of *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd* 210 F.3d 88 (2d Cir. 2000), the court found that an alleged offer really should have been reasonably understood as a joke. Pepsi conducted a promotional campaign in which buyers of Pepsi products could earn "Pepsi points" that could be redeemed for prizes listed in a catalog. The points did not all have to be earned by consuming soft drinks. As long as 15 actual points were submitted with the redemption form, the remaining points required for the prize could be purchased for ten cents a point. Pepsi aired a television commercial to promote the campaign. The commercial centered on a teenager flying to school in a Harrier Jet. Although the commercial showed various prizes that could be won (such as T-shirts and sunglasses) and the number of points needed to win them, it also suggested that the jet might be a prize. This is because as the commercial ended with the teenager landing the jet on the grounds of his high school, the words "Harrier fighter, 7,000,000 points" appeared on the screen. Leonard submitted a redemption form claiming the jet. He included the 15 original Pepsi points and a check for just under $700,000 to buy the balance of the 7 million points needed. Pepsi refused to award the jet to him on a number of theories. One of them was that the jet was used in the commercial merely for humor and entertainment, and could not reasonably have been understood as a real prize. (The other theories are discussed in Example 10.) The court agreed. It found that no reasonable person could have understood the commercial to be a serious offer of a jet, but would have realized that the use of the jet was just to add an absurd comic touch and to exaggerate the excitement of the drink. Furthermore, the fact that a Harrier is a fierce war machine unsuitable for consumer use and costing some $23 million would alert the reasonable viewer that it could not possibly be offered in exchange for about $700,000.

§4.2 THE PURPOSE AND APPLICATION OF THE RULES OF OFFER AND ACCEPTANCE

§4.2.1 Introduction

The formation of the contract is the beginning of the parties' legal relationship, but it is also the culmination of a process of bargaining. This is reflected in the expression that parties "conclude a contract," which means not that they have finished performing but that they have completed the interaction leading up to the execution of a contract.

In some cases, a deal may be struck very quickly, with a minimum of bargaining: One party may make a proposal that is accepted without qualification by the other. In other cases the path to contract formation may be long and arduous. Initial proposals may lead to counterproposals, negotiations, and compromise. If the transaction is complex, each step in the process may require consultation with different corporate departments, technical experts, and attorneys. In either event, where this interaction is successful, there comes a time when the parties reach agreement and bind themselves to the relationship—a contract comes into being.

Sometimes the creation of a contract is marked by the signing of a written or electronically recorded memorial of the agreement.[5] When this happens, it is relatively easy to fix the time of formation and the exact terms of the contract. However, this helpful indicator of formation is not always present because the parties may have formed a contract without recording it in a formal comprehensive writing. A contract could be contained in a series of correspondence or in some other collection of interrelated documents; it could have been made orally with the intention of later drafting and signing a written memorial or it may be partly written and partly oral or entirely oral.[6] Such circumstances may create uncertainty and disputes over the question of whether a contract was formed at all, and if so, whether certain terms became part of it. The rules of offer and acceptance provide a framework for resolving these questions.

The offer and acceptance model conceives of a process of bargaining between the parties that leads to the formation of a contract. It developed in the context of person-to-person interaction in which the parties dicker over the terms of their relationship. It is sometimes said that this model is too old-fashioned and rudimentary to be helpful in an age in which so much contracting is done on standard terms, or through electronic media. However, the model has proved to be remarkably durable, and courts continue to apply the well-established rules, sometimes with an adjustment or modification, to

transactions that were not conceived of when the rules were first developed. (We deal specifically with standard forms and contracting via electronic media in Chapter 5.)

§4.2.2 When Are Offer and Acceptance Issues Presented?

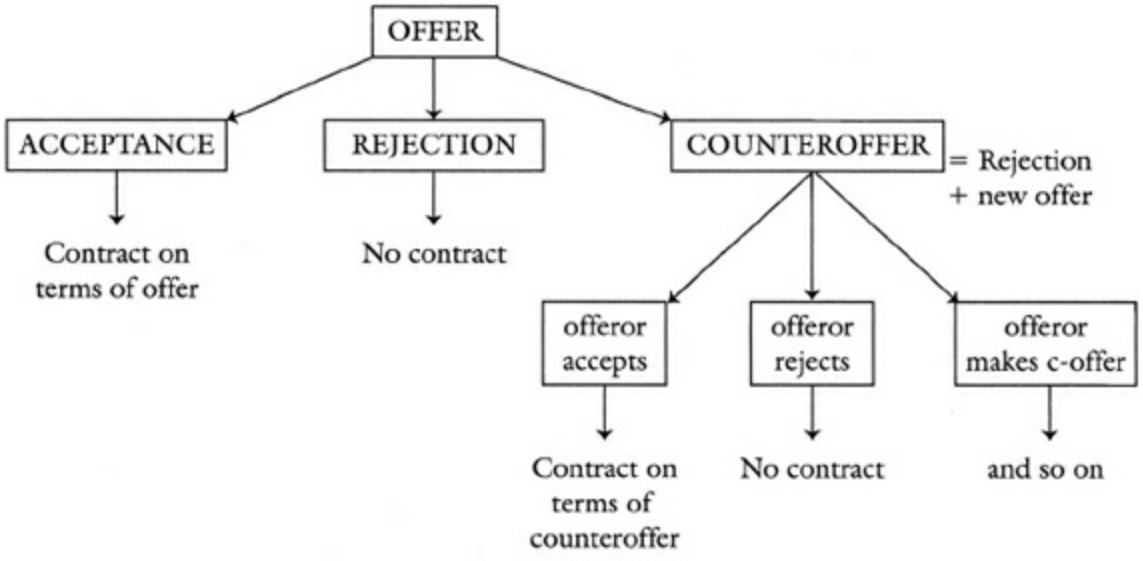
Upon learning the rules of offer and acceptance, an inexperienced student may be tempted to waste time and effort in trying to unravel the sequence of offer and acceptance in every case or problem. However, not every contract dispute raises formation issues, because the parties may not be in disagreement over the facts of formation. The rules of offer and acceptance tend to be relevant in three types of dispute: First, the rules of offer and acceptance may be used to determine if a contract came into existence at all where the parties dispute whether their communications resulted in the formation of a contract. Second, even if it is settled that a contract was formed, a determination of which communication constituted the offer, and which was the acceptance, can resolve a dispute about the content of the contract. Third, the rules of offer and acceptance can be relevant to the determination of which state's law governs the contract or which state's courts have jurisdiction to hear a dispute over the contract. This issue may arise where the parties are located in different jurisdictions and communicate across state lines, so that the point of contract formation becomes relevant to choice of law and jurisdiction. This third situation is merely noted here and is not discussed further. The remainder of this chapter is confined to the application of offer and acceptance rules to resolve questions about the existence and terms of the contract.

§4.2.3 The Basic Offer and Acceptance Model at Common Law

The rules of offer and acceptance are based on a particular conception of how contracts are formed. In the simplest terms, they envisage that one person (called the offeror) makes an offer to another person (the offeree) to enter into a contract on specified terms. (Note that the legal meaning of the word "person" includes not only individuals but also incorporated organizations such as corporations, partnerships, associations, and government bodies. When an organization contracts, it is represented by an authorized officer who acts as its agent.)

The offer creates a power of acceptance in the offeree so that she can bring the contract into existence by signifying acceptance of the transaction on the proposed terms. If the offeree rejects the offer either expressly or simply by not accepting it within a particular time, the offer lapses and no contract arises. If the offeree is interested in forming a contract, but not on the exact terms proposed, the offeree may respond by making a counteroffer, which has the effect of terminating the original offer and reversing the process: The original offeror now becomes the offeree with the power of acceptance. This could go on several more times until the parties reach accord or tire of trying. There are some variations and complications that could arise, as the following sections show. The basic offer and acceptance model is represented in Diagram 4A.

Diagram 4A



When you first approach the subject of offer and acceptance, you may have the impression that it consists of a set of firm, even technical rules that can be applied quite mechanically. This may create a sense of certainty and order that can be deceiving. As usual, courts do not completely agree on what the rules are. Even where courts apply the same rule, factual circumstances, considerations of fairness, and issues of interpretation often lead to variations in result. In addition, as pointed out in section 4.3, modern courts generally disfavor a rigid and technical approach to offer and acceptance and try to give effect to commercial practice and the reasonable intent of the parties. The

discussion in this chapter is centered on the offer and acceptance rules formulated in the Restatement, Second. Remember, however, that while the Restatement, Second's formulation of the rules is persuasive and generally representative of the caselaw, it does not bind courts and is not always followed by them.

§4.3 THE RULES OF OFFER AND ACCEPTANCE APPLICABLE IN SALES OF GOODS UNDER UCC ARTICLE 2

Recall from section 2.7.2 that where a transaction is a sale of goods, UCC Article 2 governs and must be applied. Recall, also, that §2.105(1) defines goods to include movable things other than money and various intangible rights; under §2.106(1) a sale consists of the passing of title from the seller to the buyer for a price; and under §2.304, the price paid for the goods may be payable in money or otherwise.

Because Article 2 must be applied to a sale of goods, it is important to determine, before proceeding to analyze the legal issues raised by a transaction, whether the transaction constitutes a sale of goods. In the area of offer and acceptance, there are some questions that Article 2 resolves differently from common law,[7] so a correct determination of the nature of the transaction could have significant consequences. However, for the most part, you will find that the same rules apply to common law transactions and sales of goods. This is because Article 2 has very few specific provisions that cover offer and acceptance principles, so that most offer and acceptance issues in sales of goods are resolved under principles of common law. The basis for applying common law rules where Article 2 does not provide its own rules is §1.103(b), which states that unless they are displaced by particular provisions of the Code, the general principles of common law apply to transactions governed by the Code. Therefore, as you read about the common law principles of contract formation in this chapter, you should assume that they apply equally to sales of goods unless stated otherwise.

While Article 2 defers to the common law on most offer and acceptance issues, it does strongly encourage courts to be realistic and to keep an eye on business practice in resolving formation disputes. When Article 2 was first

enacted in the 1950s, this flexible approach was a notable difference from the common law. However, during the years since it was enacted, it has influenced courts to adopt the same attitude toward contracts under common law, and is now generally reflected in the modern common law approach to offer and acceptance as well.

The two Code sections that most directly address general formation issues are §§2.204 and 2.206. The fundamental point made by §2.204 is that the court should focus on the existence of agreement between the parties, whether shown by words or conduct, and if agreement is apparent, the court should not be concerned about technicalities but should do what it can to uphold and enforce the contract. Section 2.206 eschews technical rules on the manner and medium of acceptance and emphasizes that an offer should be interpreted as inviting acceptance by any reasonable mode unless the offer or circumstances make it clear that the mode is restricted.

§4.4 THE NATURE OF AN OFFER, AS DISTINCT FROM A PRELIMINARY PROPOSAL

§4.4.1 Distinguishing an Offer from a Solicitation

Restatement, Second, §24 describes an offer as a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." This definition identifies the hallmarks of an offer. The offer must contain these elements either expressly or by implication:

1. Because an offer must be manifested, it must necessarily be communicated to the person to whom it is addressed.
2. The offer must indicate a desire to enter into a contract. To do this it has to specify the performances to be exchanged and the terms that will govern the relationship. It is important to remember that as the creator of the offer, the offeror has control over what its terms will be. (The traditional maxim is that the offeror is "master of the offer.") In addition to proposing the terms of the exchange, the offer may also prescribe the manner and time for an effective acceptance.

3. The offer must be directed at some person or group of persons. Although an offer is usually addressed to a specific person, it is legally possible to make an offer to a defined or undefined group. Where this happens, it is a question of interpretation if it contemplates multiple acceptances or may be accepted only by the first person to reply.
4. The offer must invite acceptance. It may or may not indicate how and by what time this acceptance is to be communicated. If a mode and time for acceptance are prescribed, they must be followed. If the mode and time of acceptance are not set out in the offer, the court must decide whether the acceptance was reasonable and timely.
5. The offer must engender the reasonable understanding that acceptance will create the contract. That is, upon acceptance, a contract will arise without any further approval being required from the offeror.

The last hallmark distinguishes an offer from a proposal intended as nothing more than an overture—that is, a tentative expression of interest in transacting, an invitation to make an offer, or a request for information that may lead to an offer. To be an offer, the communication must convey the reasonable understanding (note the objective standard) that the offeror intends a contract to arise and expects to be committed upon acceptance. The offeror thus confers on the offeree the power to decide whether or not a contract will come into being. (As mentioned earlier, this is known as the power of acceptance.) If the proposal reserves to the proponent the final say on whether to be bound, it is not an offer but merely a preliminary communication.

Of course, it is up to the person initiating contractual negotiations to choose whether the communication is to be an offer or merely a preliminary nonbinding proposal, and careful choice of language eliminates or at least reduces the risk that the communication may be misunderstood. However, when intent is not clearly expressed, the communication must be interpreted objectively. The question is whether, taking into account the entire context of the communication, the addressee was justified in understanding that the proponent intended to be bound on acceptance.

For example, if the owner of property wishes to make an offer to a prospective buyer, she may write:

> I offer to sell you my farm “Bleakacre” for $2 million cash. If you wish to buy this property,

> you must deliver your written acceptance to me by midnight on Wednesday, October 13, 2017.

The strong wording (including the use of the terms “offer” and “acceptance”) leave little doubt that an offer is intended. If, on the other hand, the owner wanted to make it clear that this is not an offer, she may couch the letter something like this:

> I wish to sell my farm “Bleakacre” and will consider an offer of not less than $2 million. I invite you to make an offer if you are interested in purchasing it.

However, if the owner is less precise in her choice of language, she may come up with something like this:

> I am willing to sell my farm “Bleakacre” to you for $2 million cash. If you are interested, please let me know as soon as possible.

This flabby language does not make the offeror’s intention clear. It could lead the addressee to understand the communication to be an offer, whether or not the owner meant it as such. The ambiguity could keep a couple of lawyers happily employed for some time as the parties litigate over its meaning.

One cannot be sure who will win the last Bleakacre dispute because I have not provided any contextual information that may clarify the ambiguity in the owner’s letter. In trying to resolve disputes like this, one must weigh all the facts of the case. Courts have identified some general indicia that help to distinguish an offer from a preliminary proposal:

1. The words used in the communication are always the primary indicators of what was intended. Even where the language of the communication does not make its import absolutely clear, clues to reasonable meaning may be found in what was said. The use of terms of art, such as “offer,” “quote,” or “proposal,” may be helpful but are not conclusive if the context indicates that they were not used in their legal sense. (For example, signs erected on real property sometimes announce that the property is “offered for sale,” yet no one would seriously argue that the seller thereby makes an offer in the legal sense.)
2. Because an offer is intended to form a contract upon acceptance (and as discussed below, an offeree is not usually permitted to accept in terms that go beyond the offer), a communication that omits

significant terms is less likely to be an offer. Therefore, the comprehensiveness and specificity of the terms in the communication are an important clue to its intent.

3. The relationship of the parties, any previous dealings between them, and any prior communications in this transaction may cast light on how the recipient reasonably should have understood the communication.
4. Where parties are members of the same community or trade, they are or should be aware of any common practices or trade usages, so these practices and usages are taken into account in determining reasonable understanding of a communication.

It must be stressed that these are just factors to be considered. This is not a list of firm rules and it is not exhaustive. The facts of each case must be evaluated to decide on the reasonable meaning of a communication.

§4.4.2 Offers or Solicitations to Multiple Parties and Advertisements

In most transactions, a proposal to make a contract is directed to a specific, identified person. This is what happened in all the Bleakacre examples. However, an offeror could communicate a desire to enter a contract with multiple persons. The addressees could be a defined group or the public at large. Most commonly, this occurs where a person places an advertisement in a newspaper, catalog, website, or other medium of mass communication. The question of whether an advertisement is an offer or merely an invitation to make an offer must be resolved by the usual process of interpreting its apparent reasonable intent in light of its language in context. If it is an offer, the advertiser is bound to a recipient of the communication as soon as that recipient signifies his assent to its terms. If it is not an offer, but merely a solicitation, a recipient makes an offer by responding and the advertiser has the discretion to accept or reject that offer. Therefore, the question of whether or not an advertisement is an offer can have serious consequences if the advertiser did not expect to be committed to multiple contracts. In addition to the language used in the advertisement, common practice in the marketplace can play an important role in deciding whether a reasonable person would understand that the advertisement or other generally disseminated proposal is an offer or merely a solicitation.

One of the best-known cases that found an advertisement to be an offer is *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn. 1957). The store published a newspaper advertisement that read, "Saturday 9 A.M. Sharp 3 Brand New Fur Coats Worth to $100 First Come First Served $1 Each" (lack of punctuation in the original). Although the plaintiff was the first person at the store on Saturday morning and he tendered the $1, the store refused to sell a coat to him on the grounds that it was a "house rule" that the offer was intended for women only. The next week the store placed a similar advertisement in the newspaper in which three items were listed for $1 each, "First Come First Served." One of the items was a "Black Lapin Stole Beautiful, worth $139.50." The plaintiff was again the first to show up at the store, but his tender of the $1 was again refused. The plaintiff sued for damages for breach of contract based on the difference between the value of the garments and the $1 price. The store contended that the advertisements were not offers but merely invitations to the public to make offers to the store. The plaintiff made an offer, which it declined. The court agreed that this may often be true, but the legal effect of the advertisement depends on its apparent intent as reasonably understood by the plaintiff. The terms of the advertisements were clear, definite, explicit, and left nothing open for negotiation. They therefore qualified as offers. The store's "house rule" did not restrict the power of acceptance to women because it was not expressed in the offer.[8]

Lefkowitz involved a communication in a newspaper, but today a public communication can be accomplished in so many different ways. People who make postings offering transactions on electronic media have to be careful about trapping themselves into contractual relationships. For example, in *Augstein v. Leslie*, 212 WL 4928914 (S.D.N.Y 2012), Leslie, a singer-songwriter, posted a video on YouTube in which he advertised a reward of $1 million for the return of his laptop (containing valuable intellectual property, such as his music). Augstein found the laptop and returned it. The court held that the YouTube video was clearly intended to induce performance—the return of the video—and it was therefore an offer for a unilateral contract, which Augstein accepted by performance. The court dismissed the argument that a YouTube video could not constitute an offer, pointing out that it is the reasonable meaning of the communication that is crucial, not the medium in which it is conveyed.

§4.5 THE EXPIRY OF THE OFFER BY PASSAGE OF TIME

§4.5.1 The Specified or Reasonable Duration of the Offer

An offer does not last forever. It has a limited duration and lapses if not accepted in time. As the creator of the offer, the offeror is entitled to specify the time within which the acceptance must be made. If the offeror does not state the duration of the offer, it must be accepted within a reasonable time. The offeror takes a risk by not specifying a time for acceptance because the question of what period is reasonable for acceptance may be unclear until settled by litigation. To decide what is a reasonable time, the factfinder must ask what amount of time would be needed to receive, consider, and reply to the offer under all the circumstances of the transaction. Where the parties are in each other's presence, the reasonable time for acceptance might conclude as soon as they part company, but if they communicate at a distance by mail or similar noninstantaneous means, the time for transmission must be taken into account. Other factors relevant to this question include the nature of the transaction; the relationship of the parties; any course of dealing, custom, or trade usage; the means of communication used; and the stability of the market.

An offeror who uses very precise and clear language in specifying the lapse date of the offer can eliminate the risk of uncertainty. However, an offeror who is less precise may find that ambiguity in the lapse date leads to a dispute. For example, if the offer requires acceptance by 5 P.M. Pacific Daylight Time on Friday, October 15, 2017, there can be no doubt as to the exact time that the power of acceptance ends. However, an acceptance required "within five days" is ambiguous because it does not indicate if the five-day period runs from the date of the writing or receipt of the offer, or whether the offer can be accepted after business hours on that final day.

§4.5.2 The Effect of a Late Attempt to Accept

If the offeree attempts to accept the offer after the period for acceptance has expired, the legal effect of this late communication may be difficult to decide and depends on the circumstances and the language used. It could be a legally meaningless act. Alternatively, the course of dealings between the parties and

the language of the late acceptance could create the reasonable understanding that it is a new offer by the former offeree, creating a power of acceptance in the original offeror. In some cases, especially where there is doubt about the exact duration of the offer, the offeror's failure to object to a late acceptance may suggest either that it was not late at all, or even if it was late, that the offeror acquiesced in the delay, making the acceptance effective despite its tardiness. There is thus no hard-and-fast rule on the treatment of a late acceptance, and its effect must be determined on the facts of each case.

§4.6 TERMINATION OF THE OFFER FOR REASONS OTHER THAN EXPIRY BY LAPSE OF TIME

The stated or reasonable duration should be thought of as the longest period that an offer could remain open. It may terminate even before that under the following four circumstances identified in Restatement, Second, §36.

§4.6.1 Rejection

The offeree does not have to take positive action to reject an offer. Except in unusual circumstances (discussed in section 4.10.2), an offeror cannot set up an offer so that the offeree is deemed to accept it by failing to respond. That is, in most situations, silence or inaction cannot constitute acceptance. Therefore, rejection occurs as a matter of course simply if the offeree fails to respond to the offer before it expires. However, an offeree may choose to communicate rejection of the offer before it expires by lapse of time, and if she does so, the offer lapses immediately on communication. Once rejection has been communicated, the offeree cannot recant the rejection and accept, because the offer has come to an end. A purported acceptance after rejection could, of course, qualify as a new offer by the former offeree.

§4.6.2 Counteroffer

An offeree may wish to enter the transaction proposed by the offeror, but on terms different from those set out in the offer. To qualify as an acceptance, the response to an offer must agree to the offeror's terms. If it expresses

agreement to the transaction, subject to some change in the terms, it is not an acceptance, but a counteroffer. A counteroffer is defined in Restatement, Second, §39 as an offer by the offeree to the offeror, relating to the same matter as the original offer and proposing a different substitute bargain. The counteroffer is therefore both a rejection of the offer and a new offer by the former offeree for a contract on different terms. It thus terminates the original offer and creates a power of acceptance of the counteroffer in the original offeror. Because the counteroffer is a rejection of the original offer, the offeree loses the power to accept the original offer once he has made the counteroffer. He cannot go back to it and accept it if the original offeror rejects the counteroffer. In some cases it is obvious that a response is a counteroffer, but in others, the meaning of language used by the offeree in response to an offer may be less clear and harder to determine. This is discussed in section 4.8.

§4.6.3 The Offeror's Death or Mental Disability

The traditional rule, included in Restatement, Second, §36, is that the offer lapses automatically if the offeror dies or becomes mentally incapacitated before the offer is accepted. Death of the offeror terminates the offer only if it occurs before acceptance. If the offeror dies after acceptance, the contract remains in force and becomes an asset and obligation of the offeror's estate.

Similarly, if the offeror becomes mentally incompetent between the time of making the offer and the time of acceptance, the offer lapses. But if the mental disability arises after acceptance, it does not affect the formation of the contract. Note, however, that the offeror's mental incapacity before the time of acceptance could be analyzed on a different basis. Instead of treating it as a lapse of the offer (resulting in no contract), it could be seen as creating a contract by a mentally incompetent person. As is explained in Chapter 14, the effect of this is to create a voidable contract (one that exists but can be voided by the offeror) rather than to preclude formation at all.

§4.6.4 Revocation

Unless the offer qualifies as an option or as a firm offer under UCC Article 2 (discussed in section 4.13), an undertaking to keep it open for a particular period is not binding on the offeror. The offeror therefore has the power to

revoke the offer at any time before its acceptance, whether or not the offer states that it will be held open for a stated time.

Revocation only becomes effective when it is communicated to the offeree. This usually means either that the offeree has received notice of revocation from the offeror or that the offeree has learned from other reliable sources that the offer has been withdrawn. The offeror therefore bears the risk that the offeree may have accepted the offer, thereby creating a contract, before receiving notice of revocation. (The mechanics of acceptance are explained in the following sections of this chapter. For now, merely take note that it is possible for an acceptance to take effect even before the offeror hears about it.) The effect of this is that the offeror has the responsibility to withdraw the manifestation of contractual intent created by the offer and, until he does so, must assume that it could still be acted on. The distinction between direct and indirect revocation requires some expansion:

As indicated above, revocation can take effect either where the offeree receives notice of revocation from the offeror (called direct revocation) or where the offeree has learned indirectly of the withdrawal of the offer. For direct revocation to be effective, the offeree must receive notice of revocation that clearly indicates on a reasonable interpretation that the offeror is no longer willing to enter the contract. As with other communications, obscure or ambiguous language could give rise to a dispute over meaning and to interpretational difficulties.

The legal concept of receipt requires that the notice becomes available to the offeree so that if acting reasonably, the offeree would be aware of its contents. The nature of an effective receipt depends on the circumstances of the offer. For example, if a written offer was made to a specific offeree, a written notice of revocation is deemed to be received when the writing is delivered into the possession of the offeree or his authorized representative or it is deposited in an authorized place, even if the offeree fails to handle it physically or to read it. By contrast, if the offer was made to multiple persons in some publication, a revocation published in the same way as the offer is effective, whether or not a particular offeree actually read it.

Although the offeror may have failed to give direct notice of revocation, or something may have gone wrong with the communication, an offer is nevertheless revoked indirectly if the offeror takes action clearly inconsistent with the continued intent to enter a contract, and the offeree obtains reliable information of this action. For example, the offeree would be taken to know

that the offer to sell Bleakacre has been revoked if, while considering the offer, the offeree learns reliably that the property has been sold to someone else. This conclusion would not be reached if the information is uncertain (for example, the offeree had merely heard rumors to this effect), or the action is not clearly inconsistent with the continued existence of the offer (for example, if the offeree was aware that the offeror was negotiating the sale but had not yet committed to sell to someone else).

The classic case establishing the principle of indirect revocation, decided by the Chancery Division of the English Court of Appeal, is *Dickenson v. Dodds*, 2 Ch. D. 463 (1876). Dodds made an offer to sell real property to Dickenson. The offer specified that it was open for acceptance until Friday 9 A.M. On Thursday, Dickenson heard from a third party that Dodds had been "offering or agreeing to sell" the property to someone else. Immediately after hearing this, and before the deadline, Dickenson communicated his acceptance to Dodds. Dodds declined it, saying that it was too late because he had already sold the property. The court found that although Dodds had not communicated his revocation, Dickenson had indirectly obtained information that he no longer intended to sell the property to him. The court expressed its opinion in subjectivist terms, saying that as Dodds had changed his mind before Dickenson accepted, there could be no meeting of the parties' minds. However, the case can be reconciled with the objective test because Dickenson reasonably knew that Dodds had changed his mind.[9]

§4.7 THE NATURE AND EFFECT OF ACCEPTANCE

Acceptance is the offeree's manifestation of assent to the offer. It is the event that brings the contract into existence because, as noted before, the offer necessarily contemplates that the parties will become bound immediately upon the offeree's exercise of the power of acceptance.

Acceptance must be a volitional act, performed freely, deliberately, and with the intent to enter a contract on the terms of the offer. Like the intent to make an offer, intent to accept is determined objectively. The question is not whether the offeree actually intended to accept, but whether a reasonable person in the offeror's position would have understood the manifestation as an acceptance. As always, the objective standard is not rigid, so that a

manifestation of acceptance does not bind the offeree if coerced or induced by fraud. Similarly, as discussed in section 4.10.2, the offeror cannot structure the offer in a way that traps the offeree into inadvertent acceptance.

Only the offeree may accept the offer. The offeree is, of course, the person whose acceptance is invited by the offer. This is most commonly a single specific person, but an offer could be made to several identified persons or even to a broad or unidentified group. Unless the offer indicates otherwise, or is clearly open to anyone who sees it, it is regarded as personal to, and can only be accepted by, the person or persons to whom it is addressed. An identified offeree cannot transfer the power of acceptance.[10]

As stated earlier, the offeror, as the proponent of the transaction, has the power to set out not only the terms of the proposed contract itself but also the requirements for an effective acceptance. To validly accept the offer, the offeree must acquiesce in the offeror's terms and must manifest this agreement in the manner and within the time prescribed. If either of these two conditions are not satisfied, the attempted acceptance may be ineffective. Time for acceptance has already been discussed. We now examine the content and mode of acceptance.

§4.8 THE EFFECT OF INCONSISTENCY BETWEEN THE OFFER AND THE RESPONSE: COUNTEROFFER

To be an acceptance, the response to the offer must conform to the offer. An acceptance cannot qualify or change the offer or add new terms. If the response to the offer does this, it is not an acceptance. If it indicates interest in the transaction, proposes a contract on terms different from those in the offer, and expressly or impliedly gives the offeror the power to form a contract by accepting these new terms, it is a counteroffer.

Under classical common law, the acceptance must correspond exactly with the offer. This is sometimes called the "mirror image" or "ribbon matching" rule. A response is not an acceptance if the offeree imposes any conditions on the acceptance or seeks to change or qualify the terms of the offer in any way. Any variation in the response to an offer disqualifies it as an acceptance. Although some courts still apply the "mirror image" rule, modern courts tend to be somewhat more flexible and treat a response as a

counteroffer only if it has a material discrepancy from the offer. This approach has the disadvantage of adding the complication of trying to distinguish material and trivial alterations, but it has the benefit of enabling the court to find a contract despite a trivial or technical variation between the offer and response. If the court does find that a response with minor changes is an acceptance, this does not mean that the offereee's changes become part of the contract. The common law rule is that the response is treated as an acceptance on the offeror's terms. The variations from the offer in the response do not become part of the contract and simply fall away.[11]

Sometimes it is clear that the offeree's response to an offer is a counteroffer, but sometimes a response is ambiguous. It is clearly not an acceptance, but it may not be a counteroffer either. A few examples illustrate this issue of interpretation: The owner of Bleakacre offers to sell it to the offeree for $2 million. The offeree responds, "Thanks for your offer. I am interested in buying 'Bleakacre'; however, your asking price is too high. I offer to pay you $1.8 million for the property." This is clearly a counteroffer because it indicates interest in the transaction but proposes a different price (surely a material variation from the offer) and signifies intent to enter the contract if the original offeror agrees to that price. The response therefore rejects the original offer and substitutes a new offer to the former offeror. However, say that the response stated, "Thanks for your offer. Although I am interested in buying 'Bleakacre,' I cannot accept your offer because your asking price is too high." This cannot be a counteroffer because it does not propose a new price. However, it also indicates that the offeree does not intend to enter the transaction on the terms proposed by the offeror. It must therefore be reasonably understood as rejection with an explanation. Its legal effect is simply to terminate the offer. The effect of the offeree's response is even more ambiguous if he says, "Thanks for your offer. Would you accept $1.9 million?" This is not an acceptance, but it may not be a counteroffer either, which would terminate the buyer's power of acceptance. It may be merely a request for modification of terms, intended to keep alive the buyer's opportunity to accept the offer if the offeror sticks to the asking price.

In some cases, a response may seem to be a counteroffer, but the terms of the offer and response must be interpreted to ascertain whether it really is. For example, the response may seem to add terms that are not expressed in the offer but are implicit in the offer or would be incorporated into the offer by law or usage. If so, the response may appear superficially to be a

counteroffer, but it is in fact an unqualified acceptance, because it merely articulates what was inherent in the offer. For example, the owner of Bleakacre offers to sell the property to a prospective buyer for $2 million. The offeree responds, “I accept your offer, subject to your proof of clear title, payment to be placed in escrow and made to you against transfer of the deed.” The offer is silent on these points. It did not warrant good title and said nothing about payment being concurrent with transfer of the deed. However, common usage and accepted legal practice implies these terms in a contract for the sale of land, so they were part of the offer in the absence of language clearly excluding them. Articulating them in the acceptance does not harm its effectiveness.

§4.9 THE MODE OF ACCEPTANCE

An acceptance must be manifested and communicated. The offeror has control over the manner of acceptance, and, in addition to stipulating the terms of the proposed contract, the offeror may specify what the offeree must do to accept. To be an effective acceptance, the offeree’s response must be in conformity with these instructions. However, if the offer does not require acceptance to take a particular form, no special formalities are required for effective acceptance.[12] It may be signified in any manner reasonable under the circumstances, including spoken or written words or conduct, and conveyed by any reasonable means of communication. As explained in section 4.12, the acceptance may be a promise to perform the requested exchange or the actual performance of the offeree’s consideration.

To avoid confusion, it is important to distinguish the substantive terms of the offer (that is, the terms of the proposed contract itself) from the instructions concerning acceptance (that is, the procedure that must be followed by the offeree to accept). The substantive terms are central— they go to the very heart of the relationship and are the offeror’s dominant concern. The instructions for acceptance are ancillary to the offeror’s principal purpose of securing a contract. They are concerned only with the way in which the offeree communicates assent and are aimed at a communication process that the offeror considers most convenient and efficacious. Although the manner of acceptance is ancillary to the goal of

making a contract, the offeror may not be indifferent to controlling it. If the offeror is concerned about knowing of the acceptance as soon as it takes effect and of having written proof of it, the offer should prescribe an exclusive mode of acceptance that ensures acceptance only takes effect upon the offeror's personal receipt of a signed letter of acceptance. If the offeror does not care about the mode of acceptance and is willing to assume any risk of late or undelivered notice of acceptance,[13] the offeror may not specify a mode at all or may indicate a permissible but not exclusive mode. Factors such as the desire to accommodate the offeree's convenience, to encourage acceptance, or to maintain good relations with the offeree, may outweigh the offeror's desire for certainty and may dissuade the offeror from making too fine a point of the procedure for accepting. Taking this into account, the usual assumption of the law is that unless the offer clearly indicates otherwise, the offeror is more interested in attracting the acceptance than in being punctilious about the mode of acceptance.

In summary, the rules governing mode of acceptance are:

1. When the offer clearly manifests the intention that a prescribed mode of acceptance is mandatory and exclusive, the offeror's intent must be deferred to, and that particular manner of acceptance must be complied with exactly.
2. If a manner of acceptance is specified, but it does not reasonably appear intended as exclusive, any reasonable method of acceptance is effective provided that it is consistent with the prescribed mode and provides protection to the offeror equal to that of the stated mode. As always, the wording and circumstances of the offer must be interpreted to decide if a mode of acceptance is exclusive and, if not, whether the mode used is reasonably consistent with that specified.

   For example, say the offer states, "Please signify your acceptance by mailing your written and signed acceptance." The offer does not make it clear that mail is the only acceptable medium, so a written, signed acceptance by private courier is probably just as good. However, a faxed acceptance may not be, because the communication would be a copy rather than an original signature and possibly less verifiable as genuine.
3. If the offer does not specify any mode of acceptance, the test for the appropriateness of the communication is even less stringent. The

offeree may use the same mode as used by the offeror, or any other method of communication that is customary for transactions of that kind or is reasonable under the circumstances. For example, in *Ellefson v. Megadeth, Inc.*, 2005 WL 82022 (S.D.N.Y. 2005), the parties (a heavy metal rock band and one of its original members) entered into lengthy negotiations to settle various disputes. Much of the negotiation was by e-mail, culminating in a final version of the offered contract sent by fax. The offeree accepted by signing the offer and returning it by mail. After the acceptance was mailed, but before it was received, the offeror revoked the offer by e-mail. If mail was an effective means of acceptance, the acceptance took effect under the "mailbox" rule as soon as the acceptance was mailed. (*See* section 4.11.) The court rejected the offeror's argument that the offer had been revoked before effective acceptance because the use of regular mail was not a permissible mode of acceptance. It held that the use of e-mail and fax during the negotiations and leading up to the offer did not preclude acceptance by mail, because there were no express restrictions on the mode of acceptance and regular mail was a reasonable method of communication under the circumstances.

§4.10 INADVERTENT ACCEPTANCE AND SILENCE OR INACTION AS ACCEPTANCE

§4.10.1 Inadvertent Acceptance

Although the objective test is used to determine intent to accept, the offeree must at least know about the offer to accept it. To this narrow extent, the subjective state of mind of the offeree could take precedence over his apparent intention. It does not happen too often that an offeree inadvertently manifests intent to accept an offer that he does not know exists. However, this has come up in cases in which the offer is not communicated to the offeree, but the offeree's subsequent conduct creates the impression of acceptance. The best-known case involving such a situation is *Glover v. Jewish War Veterans of the U.S.*, 68 A.2d 233 (D.C. 1949). The association published an offer of reward for information leading to the arrest and

conviction of the murderer of one of its members. On being questioned by the police, the mother of the girlfriend of one of the culprits furnished information that led to his apprehension and ultimate conviction of the murder. The act of providing the information would have been the acceptance of the offer of reward.[14] However, when she gave the information to the police, she did not know of the reward and only found out about it afterward. The court held that she was not entitled to the reward. She could not have intended to accept an offer of which she was unaware.

The result of the case seems harsh and contrary to the purpose of the rule. The reason for requiring knowledge of the offer is to protect the offeree from being held to an inadvertent manifestation of acceptance, so this rationale does not apply when the offeree desires the acceptance to be effective. However, the result may be justified on a different ground—because the offeree did not know about the offer, she was not induced by it to furnish the information, and the court's refusal to find a contract did not defeat any reliance interest that she might have had. This argument did not persuade the court in *Anderson v. Douglas Lomason Co.*, 540 N.W.2d 277 (Iowa 1995). The court had to decide whether an employee was protected by a provision in the employees' handbook that required progressive discipline and precluded summary dismissal. When an employer adds provision to a handbook, this is treated as an offer which the employee accepts by continuing in employment. However, the employee in this case had not read the handbook and did not know of the provision. Therefore, if knowledge of the offer is required for an effective acceptance, this employee would not have been protected by the provision in the handbook barring summary dismissal. The court refused to follow the rule requiring knowledge of the offer for effective acceptance. It reasoned that a strong policy of treating employees evenhandedly would be defeated by distinguishing employees who had read the handbook from those who had not. In a subsequent case in Iowa (the same jurisdiction) involving a handbook that had not been read by the employee, the Iowa Court of Appeals distinguished *Anderson* and refused to find a contract. In *Poeckes v. City of Orange City*, 2005 WL 2508379 (Iowa App. 2005), the court noted that *Anderson* had created a narrow exception to the usual rule that an offeree must have knowledge of an offer to accept it. However, the court found a significant factual difference in the cases. In *Anderson* the employer actually gave the handbook to the employee, while in this case, the employer, although it never officially rescinded the

handbook, had discontinued using and distributing it. The employee had simply found it in her desk drawer. (That is, this seems to be a case in which both the offer and the acceptance were inadvertent.)

§4.10.2 Acceptance by Silence or Inaction

The offeror cannot impose a duty on the offeree to take some affirmative step to reject the offer, making failure to act an acceptance. For example, the offer cannot impose a duty on the offeree to speak by stating, "If you do not wish to accept this offer, you must deliver notice of rejection to me by Friday, failing which you are deemed to have accepted."

To illustrate further, in *Pride v. Lewis*, 179 S.W.3d 375 (Mo. App. 2005), a potential buyer of real property made a written offer to purchase it from the owner. The owner signed and returned the offer, signifying intent to accept it, but changed the closing date on the offer from May 15 to June 1. The court, applying the "mirror image" rule, found that the alteration of the closing date made the owner's response into a counteroffer. The buyer did not respond to the counteroffer, did not attend the closing, and never requested the return of his earnest money. The issue in the case was whether the buyer could be taken to have accepted the counteroffer by failing to object to the change in the closing date (of which he was aware) or to claim return of his earnest money. The court held that silence or inaction could not be an acceptance except in narrow circumstances where there is a duty to speak. Although it would have been courteous for the buyer to tell the owner that he rejected the counteroffer, there was nothing in the relationship that required him to notify the owner. Furthermore, there was no explanation on record of the buyer's failure to request the return of his earnest money, and that alone was not enough to signify assent to the counteroffer.

The rule that silence does not constitute acceptance is intended to protect the offeree from imposition. It therefore does not apply if the offeree does intend her silence to constitute acceptance. She may rely on the offeror's authorization of silence as a mode of acceptance, and the offeror cannot argue that this method of acceptance is ineffective. Therefore, an offeror who invites acceptance by silence assumes a risk of uncertainty. The meaning of the silence depends on the offeree's subjective intent, and the offeror cannot be sure if the failure to reject is an acceptance.

There are two situations in which silence binds the offeree, even in the

absence of intent to accept. First, silence operates as acceptance if the offeror proffers property or services with the offer, and the offeree, having a reasonable opportunity to return or refuse them, exercises ownership rights over the property or accepts the benefit of the service. For example, to promote a new wine, a local wine shop leaves a case of wine on the offeree's doorstep with an offer to sell the wine for $200. The offer ends with the statement, "You may refuse this offer by returning the wine to us within 24 hours of delivery. If you do not return it, you have accepted this offer and must mail your check to us within a week." The offeree is not required to return the wine, or to communicate with the offeror in any way to reject the offer. He can simply ignore the wine. However, if he drinks it or pours it down the sink, he does accept the offer.[15] (If the offeree does not want the wine on his doorstep indefinitely, he can call on the offeror to remove it, and if the offeror fails to do so within a reasonable time, the offeree can then dispose of it.)

Second, silence may operate as acceptance if prior dealings between the parties or other circumstances make it reasonable for the offeror to expect the offeree to give notice of rejection. For example, say that the offeree was a longstanding customer of the wine shop, which had regularly delivered cases of wine to the offeree whenever it had a new wine to promote. On receiving wine on previous occasions, the offeree had either returned the cases or paid for them.

Acceptance need not always be explicit, so there are some situations in which an offeree does not respond to an offer, but ongoing conduct is enough to signify acceptance. It can be difficult to know when conduct alone, without any expression of assent, constitutes acceptance. For example, in *Morvant v. P. F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012), P. F. Chang (the employer) implemented an arbitration policy in 2006, after Morvant had already started working for it. P. F. Chang gave copies of the agreement to its employees with a cover letter setting out the effective date of the policy and stating that "this policy applies to you." Morvant received but did not sign the agreement or otherwise indicate assent to it but continued working for P. F. Chang for a few months. When Morvant later sued P. F. Chang over alleged breaches of the conditions of employment, P. F. Chang moved to compel arbitration. The court denied the motion on the grounds that Morvant had never signified assent to the agreement. The court characterized the new arbitration policy as an offer, which Morvant did not accept merely

by continuing to work for P. F. Chang. However, the court noted (distinguishing other cases) that it would have reached the opposite result if the arbitration agreement or cover letter had specified that continued employment would constitute acceptance of the terms of the arbitration policy.

§4.11 THE EFFECTIVE DATE OF ACCEPTANCE AND THE "MAILBOX" RULE

§4.11.1 The Traditional Rule

The question of when acceptance takes effect is linked to but distinct from the method of acceptance. Where the parties are negotiating face to face or are otherwise in instantaneous communication and are able to hear or observe each other's manifestations immediately, there is no temporal separation between the offeror's expression of acceptance and its communication to the offeree, so there is no need to decide whether acceptance takes effect when it is uttered or when it is heard. Acceptance occurs as soon as it is manifested.

However, where the parties are at a distance and the means of communication entail a delay between the manifestation and the offeror's knowledge of it, there are two possible points at which we could treat the acceptance as becoming effective. It could take effect immediately upon its being dispatched or only upon its being received by the offeror. As with the mode of acceptance, the offeror has the right to specify when acceptance becomes effective. In many situations if a mode of acceptance is prescribed, this also implicitly establishes the effective point of the acceptance. For example, if the offeror requires acceptance to be only by the personal delivery of a signed, written acceptance, this covers both the mode of acceptance and the event (delivery) that brings it into effect. However, the offeror may not have specified a mode of acceptance or, even if having done so, may not fix the point at which the acceptance takes effect. For example, the offer may state that acceptance must be by mail but may not make it clear if a contract comes into being upon the acceptance being mailed or only upon its being received by the offeror.

In the absence of specification in the offer, the acceptance takes effect as

soon as it is put out of the offeree's possession, provided that the acceptance is made in a manner and via a medium expressly or impliedly authorized by the offer. Therefore, if acceptance by mail is permissible, acceptance occurs as soon as the offeree deposits a properly stamped and addressed acceptance in the mailbox. This is known as the "mailbox" rule or "deposited acceptance" rule. Because acceptance takes effect on depositing the acceptance in the mail, it does not matter if it was received after the offer terminated or was never received at all. The burden is on the offeree to prove proper dispatch, so the offeree should make a good record of the mailing to avoid evidentiary problems. The offeree must also ensure that the letter is correctly addressed, stamped, and otherwise properly prepared for delivery. This concept is illustrated by *Casto v. State Farm Mutual Automobile Insurance Co.*, 594 N.E.2d 1004 (Ohio App. 1991), in which an insurance company mailed an offer to the insured to renew a car insurance policy. The insured sought to accept the offer by mailing a check for the premium but forgot to put a stamp on the envelope. The post office therefore did not deliver the letter and the premium payment was never received. The insured did not discover this problem until the unstamped letter was returned by the post office. In the interim, the car had been damaged in an accident. The court found that although acceptance by mail was authorized, so that the mailbox rule would have applied to make acceptance effective on mailing the check, the mailbox rule cannot be applied where the offeree cannot show proper mailing.

There have been a number of rationales advanced for the mailbox rule. The most convincing is that the offeror could have allocated the risk of uncertainty, delay, or nonreceipt to the offeree. Because he did not do this, he assumes this risk, and the offeree gains the benefit of a reliable basis for establishing effective acceptance.

The mailbox rule does not apply if the acceptance follows a counteroffer or rejection—that is, the offeree initially mails a rejection and then changes her mind and mails an acceptance. To protect the offeror, who might receive the rejection before the acceptance, the acceptance only takes effect on receipt. Therefore, if it arrives before the rejection, the offer is accepted, and if it arrives afterward, it is ineffective.[16]

If the mailbox rule does not apply, acceptance takes effect only on receipt—the writing must come into the possession of the addressee or his authorized representative, or must be deposited in an authorized place.

(Provided this has happened, the addressee does not actually have to read it.) It is important to remember that the mailbox rule applies only to acceptances. A rejection or counteroffer sent by the offeree, and a revocation sent by the offeror, are effective only on receipt.

§4.11.2 Application of the Rule to Electronic Media

The mailbox rule is so called because it was established to deal with acceptance through the medium of the mail. However, today, offer and acceptance are commonly conducted via electronic media such as phone, e-mail, fax, or the Internet. Some forms of electronic communication are clearly instantaneous, so that even though the parties are not physically in each other's presence, there is no delay between the articulation and receipt of acceptance. Where this is so, the general rule, articulated in Restatement, Second, §64 is that acceptance "by telephone or other medium of substantially instantaneous two-way communication" is treated the same as if the parties are physically in each other's presence.

However, some forms of electronic communication are not substantially instantaneous, so that their use is more analogous to mailing. Matters are further complicated by the fact that, unlike mail, some of these forms of communication are sometimes instantaneous, and sometimes not. For example, a fax or e-mail must travel through a medium from the sender to the recipient, and the message may or may not be received immediately. There is also the possibility of significant disruption or delay in the transmission. Where there is a delay in delivery or service is disrupted so that the acceptance is not delivered at all, it may be important to decide whether the mailbox rule applies to make the communication effective on sending or receipt. The answer is not easy or obvious. There are a few cases in which the court has applied the mailbox rule to acceptance by fax. For example, in *Trinity Homes, L.L.C. v. Fang*, 2003 WL 22699791 (Va. Cir. Ct. 2003), the court said that the essence of substantially instantaneous communication is that transmission occurs within a minute or two at most so that the parties are able to determine readily that their communications are going through and the offeror will know exactly when the offeree has accepted. This was not how the fax transmission was set up in this case, so the court found that the mailbox rule applied. (The offeree nevertheless lost because his machine did not have a log and he could not prove when he sent the fax.)

§4.12 ACCEPTANCE BY PROMISE OR PERFORMANCE: BILATERAL AND UNILATERAL CONTRACTS

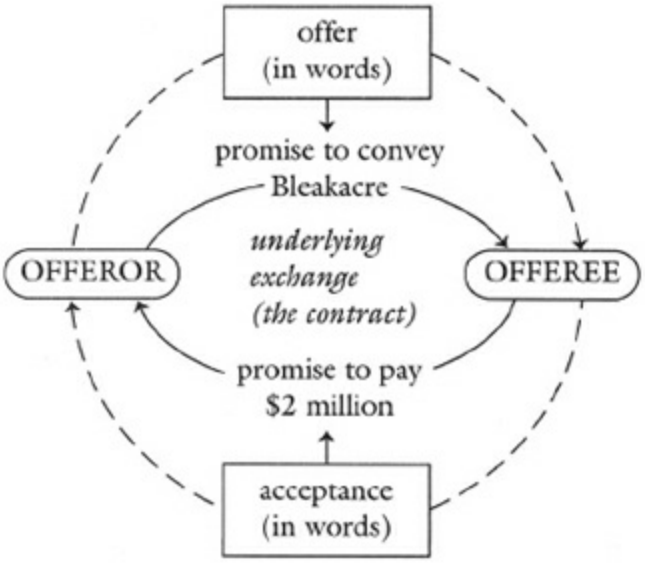
§4.12.1 The Distinction in Perspective

Students are often perplexed by the distinction between unilateral and bilateral contracts. A note on perspective may therefore be helpful before we become involved in the details of the distinction: Bear two things in mind. First, the bilateral-unilateral distinction is nothing more than a particular application of the general principles governing the proper mode of acceptance. Second, the distinction does not come up often because most contracts are clearly bilateral.

§4.12.2 The Offer for a Bilateral Contract

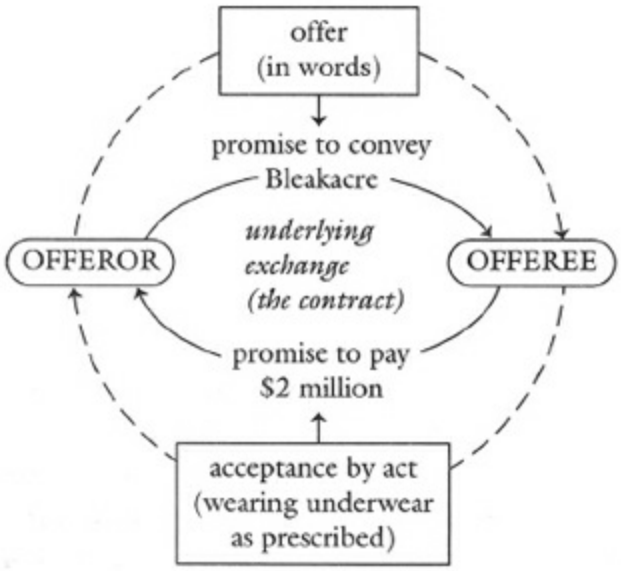
As stressed in sections 4.5, 4.9, and 4.11, the offeror has the power to prescribe the time, effective date, and method of acceptance. Included in this power is not only the ability to authorize or require a particular medium of acceptance (such as the mails, telephone, or personal delivery) but also a particular action to manifest acceptance. The most common action used to signify acceptance is the use of words, oral or written, to express assent. When words are used to accept, the acceptance invariably constitutes a promise of future performance. For example, if the owner of Bleakacre offers to sell it for $2 million and the offeree replies by expressing acceptance, a contract is created under which both the parties make promises of future performance: The offeror promises to convey the farm and the offeree promises to pay the price. Because, at the point of contract formation, both parties have outstanding promises to be performed in the future, the contract is said to be bilateral. This is represented in Diagram 4B.

Diagram 4B



Instead of authorizing acceptance in the form of words, the offeror could demand a nonverbal signification of acceptance. The offer could state, for example, "I offer to sell you 'Bleakacre' for $2 million. If you wish to accept this offer, you must stand in your underwear at the corner of Main and Broadway at 2 P.M. today. This is the only way that you may accept this offer." If the offeree complies with this request, the offer is accepted. At that point a contract comes into being under which the offeror promises to convey Bleakacre and the offeree promises to pay $2 million. Although this offer required the offeree's assent to be signified by conduct instead of words, this is still a bilateral contract. The prescribed act of acceptance has exactly the same legal effect as the delivery of a piece of paper on which the words "I accept" are written. By performing the act, the offeree signifies assent and impliedly promises to perform the consideration (payment of $2 million) demanded in the offer. This is represented in Diagram 4C.

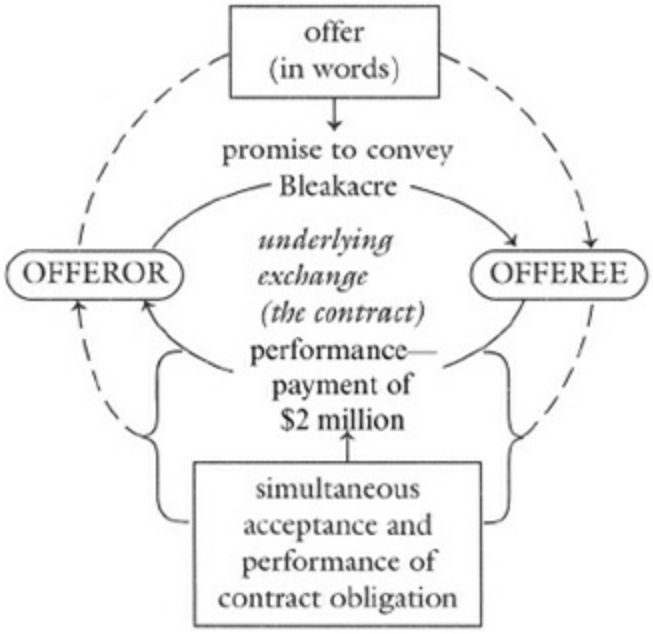
Diagram 4C



§4.12.3 The Offer for a Unilateral Contract

In the last example, the prescribed act of acceptance was merely intended to symbolize assent to the offer. It is nothing more than a mode of acceptance and has nothing to do with the actual performance—the exchange of detriments—called for by the contract. However, the offeror could have structured the offer so that the act of acceptance is not merely symbolical, but is at the same time also the performance of the offeree's side of the contract. For example, the offer could have stated, "I offer to sell you 'Bleakacre' for $2 million. To accept this offer you must come to my office today at 2 P.M. and pay me $2 million in cash. This is the only way that you may accept this offer." The act of acceptance is also the complete act of performance. The offeree's consideration under the contract is furnished in full immediately upon acceptance, and the offeree has no further duty under the contract. All that remains is for the offeror to perform the promise in the offer and to transfer title and possession of Bleakacre. Because, at the moment of formation, only one of the parties has a promise outstanding, the contract is said to be unilateral. This is represented in Diagram 4D.

Diagram 4D



Note, therefore, that "unilateral" does not mean one-sided, in the sense that only one party has given or done something. As explained in Chapter 7, a transaction in which one of the parties has made a promise and the other has given or promised nothing in return lacks consideration and is not a valid and enforceable contract. Rather, the word "unilateral" signifies that although both parties have given consideration, only one of them has made a promise as consideration. The other has furnished consideration by rendering the required exchange performance at the very point of contract formation.

§4.12.4 When the Offer Does Not Clearly Prescribe Promise or Performance as the Exclusive Mode of Acceptance

In the last example, the offeror made it clear that acceptance could only be made by performance of the offeree's consideration, so there is no doubt that a unilateral contract was called for. Similarly, the offer could use clear language that makes promise the only permissible means of acceptance. An offeror who really cares about prescribing either a promise or performance as the exclusive mode of acceptance should use clear language to this effect in the offer to remove any doubt as to her intent. However, even in the absence of such clear language, the nature of the contract itself may lead to the conclusion that acceptance has to be only by promise, or only by

performance. In most contracts, the performance is to take place some time after the prescribed or reasonable time for acceptance, so acceptance by promise is the only permissible mode. For example, an offer of employment, made on May 1, calls for the employee to begin work on June 1, but requires acceptance by May 7. In other cases, even in the absence of express language limiting acceptance to performance, the nature of the transaction makes it clear that the offer may be accepted only by performance. For example, a sign posted on a fence around a construction site reads, "$1,000 reward to anyone who reports theft of equipment or materials from this site." It is obvious that this offer does not contemplate formation of a contract by a promise to report theft but may be accepted only by the actual performance of reporting a theft.

However, there are situations in which neither the language of the offer nor its nature and circumstances clearly require either promise or performance to be the exclusive mode of acceptance. If the offer appears to be ambivalent on this question and acceptance by either promise or performance is feasible, the general approach, as reflected in Restatement, Second, §32 and UCC §2.206 (and discussed in section 4.9) applies: The preferred interpretation of the offer is that the offeree may choose to accept either by promise or by performance.

For example, the offeror delivers an offer to the offeree on Monday stating, "I offer to sell you 'Bleakacre' for $2 million. If you wish to buy it, you must pay me $2 million in cash at my office on Friday at 2 P.M." Clearly, it is a term of the proposed contract that the buyer's performance—the delivery of her consideration under the contract—must take place on Friday at 2 P.M. at the seller's office. However, although the offer is clear on the due date of the cash payment, it does not actually say that the only way that the offeree can accept is by making the cash payment on Friday at 2 P.M. The absence of clear language to this effect would likely be interpreted as giving the offeree the choice of accepting either by payment Friday at 2 P.M. (creating a unilateral contract) or by making a promise of payment at some time before Friday at 2 P.M. (creating a bilateral contract in which the acceptance is by promise to pay the $2 million by Friday at 2 P.M.). Therefore, if the offeree is anxious to close the deal immediately and to bind the offeror before Friday at 2 P.M., she could write to the offeror on Monday, stating, "I accept." A contract immediately comes into existence on dispatch of the letter. The offeree has accepted by making a promise on Monday to perform

as required on Friday, and the offeror's offer immediately becomes a promise to convey the property at some future (unspecified but reasonable) time. The early acceptance by promise creates a bilateral contract that binds both parties. The importance of this is that the offer has now become a contract, so the offeror is bound and has lost the right to revoke the offer. Alternatively, if the offeree chooses not to accept by promise before Friday at 2 P.M., she could show up at that time with the money and accept by performance. Diagrams 4E and 4F represent these alternative choices of acceptance. Diagram 4E represents the offeree's election to accept by promise on Monday, and Diagram 4F shows his election to accept by performance on Friday.

Diagram 4E. Acceptance by Promise on Monday

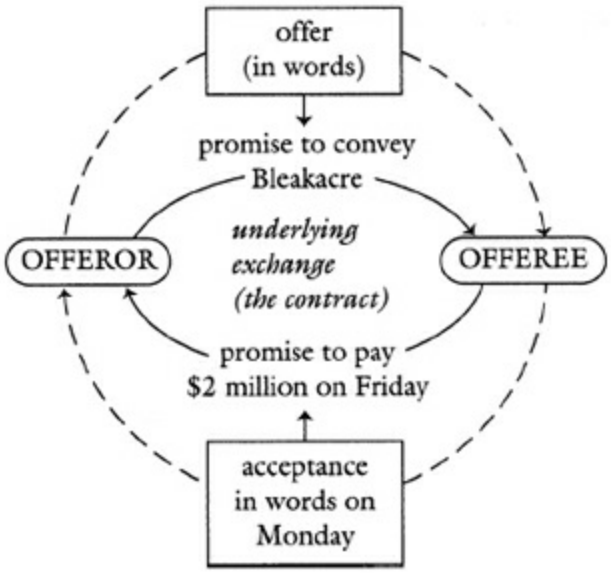
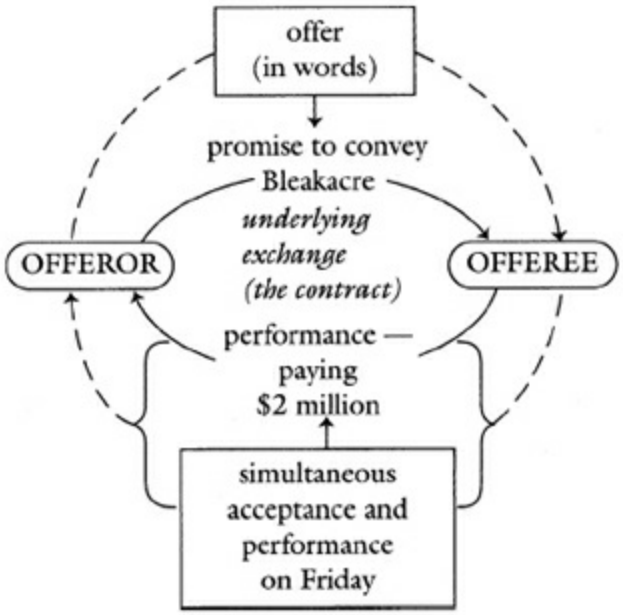


Diagram 4F. Acceptance by Performance on Friday



§4.12.5 Acceptance by a Performance That Cannot Be Accomplished Instantly

In the examples concerning the offer to sell Bleakacre, the offeree's contractual performance was cash payment, a single, relatively instantaneous act. However, some performances cannot be accomplished in one stroke. For example, Bleakacre is run-down and overgrown. The owner writes to her nephew, "If you come down and clean up the property for me this summer, I will pay you $2,000 when the work is complete. You need not make a decision now. If you wish to accept my offer, just come down this summer and do the work."

If the nephew did respond early by making a promise, and the aunt thereafter revoked before the summer, we would have to decide if the offer called for acceptance only by performance. We would probably conclude that it did not, because neither the language used nor the circumstances reasonably indicate that performance was intended as the exclusive mode of acceptance. However, assume that the nephew did not make an early promissory reply and that the aunt did not revoke before the summer. The nephew came down in early summer and began the work of clearing the property. Before he completed the task, the aunt changed her mind about cleaning up the property and revoked her offer.

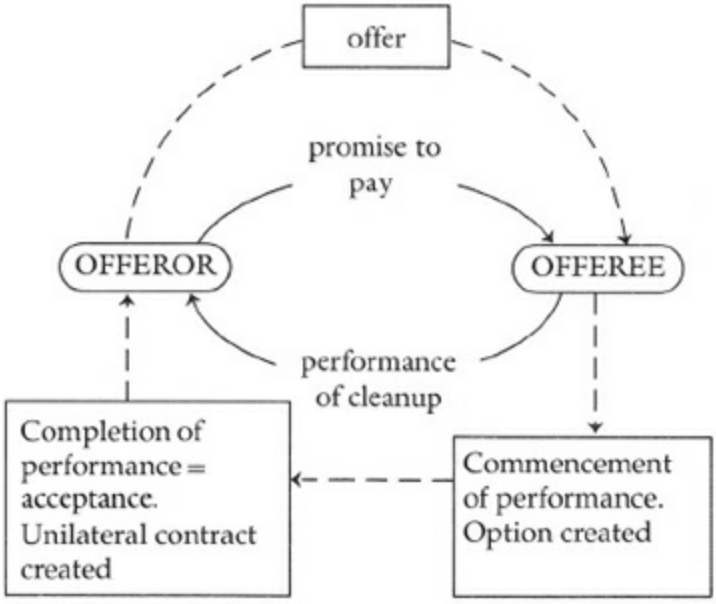
If acceptance only takes place on completion of performance, the nephew risks revocation while he is in the process of performing. To protect him from this risk, Restatement, Second, §§62 and 45 give legal effect to the commencement of performance. Section 62 applies where the offer does not mandate acceptance by performance, so that it can be accepted either by performance or promise. The commencement or tender[17] of performance constitutes an implied promise to complete the performance within the time called for by the offer. Therefore, the commencement or tender of the performance is, in effect, an acceptance by promise creating a bilateral contract. In the present example, as soon as the nephew began work, a bilateral contract came into being under which he was committed to complete the work by the end of summer, and the aunt was committed to pay him $2,000 on completion. The creation of an implied promise by beginning performance is represented in Diagram 4G.

Diagram 4G

Restatement, Second, §45 applies where the offer calls for performance as the exclusive mode of acceptance (that is, it is clearly an offer only for a unilateral contract), so that the commencement of performance cannot be an acceptance by promise, because such an acceptance is not authorized. Restatement, Second, §45 treats the beginning or tender of performance as creating an option in favor of the offeree, so that the offeror loses the right to

revoke once performance has been tendered or begun. To exercise the option, the offeree must complete the performance in the required time. If he fails to do so, the option is not taken up and the offer lapses. This means that the offeror is discharged from her own performance under the offer, so the offeree receives no contractual payment[18] for the incomplete work. The creation of an option by beginning performance is represented by Diagram 4H.

Diagram 4H



From the offeree's point of view, it is more advantageous to have commencement of performance treated as creating an option instead of an acceptance by implied promise. The latter approach brings the contract into existence as soon as performance begins, so the offeree is bound to complete the work and failure to do so not only precludes his contractual recovery but also makes him liable for damages for breach of contract. This is why the more favorable option approach is confined to the rarer cases where the offeror actually forecloses promissory acceptance.

The comments to Restatement, Second, §§45 and 62 emphasize that neither the promise nor the option arises merely when preparation for performance starts. The actual performance must be begun or tendered. In some situations it may be relatively clear where the dividing line between preparation and performance is to be drawn, but in others the line could be

fuzzy. For example, when the nephew packs his belongings in his car and sets off for the property this is probably preparation, but when he buys necessary tools and equipment for the specific task of clearing the property, this may be closely enough linked to his contract obligation to be actual performance.

§4.12.6 Notice When an Offer Is Accepted by Performance

As we have seen, when an offer is accepted by a promise, the offeree must communicate acceptance to the offeror. If an offer is accepted by performance, the acceptance normally comes to the offeror's attention as a matter of course, because the offeror receives the performance. Unless the offer requires notice of performance, the offeree ordinarily has no duty to take action to notify the offeror of acceptance. However, the offeree does have a duty of notification if the performance in question is not rendered directly to or in the presence of the offeror and the offeror has no reasonably prompt and reliable means of learning of it.

Say, for example, that the owner of Bleakacre does not live on the land but resides in a distant state. She has no contacts in the area and is not likely to visit the property because she is elderly and in poor health. If her nephew responds to her offer not by promise, but by commencing the clearing work, she is not likely to learn of his acceptance unless he tells her. Therefore, although the nephew may accept by performance and need not communicate with the aunt to accept, he is required to notify her within a reasonable time after commencing performance if he knows or should know that she has no means of learning of his acceptance with reasonable speed and certainty. This notice is not itself the acceptance, which occurred as soon as performance began, but if it is not given (and the aunt does not otherwise hear of the performance) within a reasonable time, the acceptance becomes ineffective and the aunt's contractual duty is discharged.

§4.12.7 Reverse Unilateral Contracts

A reverse unilateral contract comes about when the offeree accepts by promise, but the offeror's performance occurs and is completed at the instant of contract formation. This is also a unilateral contract because only one party —the offeree in this case—has a promise outstanding at the point of contracting. For example, hearing that his friend is in financial difficulty, the

offeror approaches the friend and holds out ten crisp $100 bills, saying, “Here, I’ll lend this to you for a year at 6 percent interest.” If the offeree accepts by taking the money, he thereby promises to repay the loan on the offeror’s terms. However, the offeror has no outstanding obligation because his performance was completed immediately upon acceptance.

§4.13 IRREVOCABLE OFFERS: OPTIONS AND FIRM OFFERS

§4.13.1 Introduction

As noted in section 4.6.4, an offer is revocable, even if it states that it will be held open for a stated term, unless it meets the legal requirements for an option under common law or a firm offer under UCC Article 2. We now look at these legal requirements. To understand options and firm offers, you need to know something about consideration doctrine, which is covered fully in Chapter 7. In the interim, the brief explanation of consideration doctrine in section 4.13.2 will provide enough background to enable you to understand options and firm offers.[19]

§4.13.2 Options and Consideration

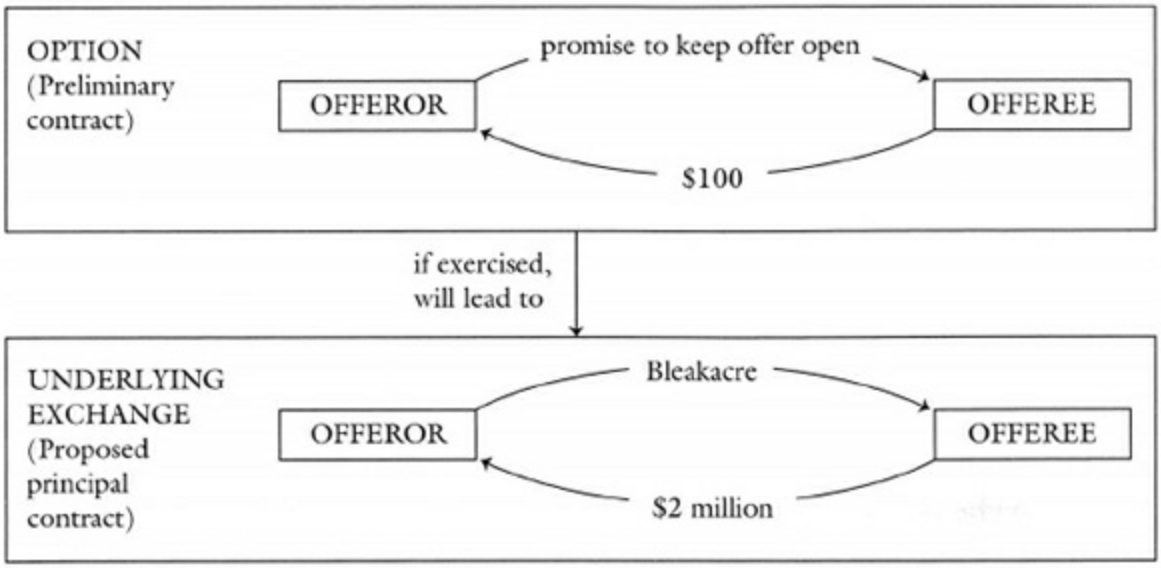
An option is a promise to keep an offer open for a stated period of time. By granting a valid option, the offeror makes a binding commitment not to revoke the offer for a specified period, so that the offeree is assured of a set time to consider and respond to the proposal without the risk of its being withdrawn before the expiry date. As we saw in section 4.6.4, under common law a promise to keep an offer open for a stated time is not binding on the offeror unless the offeree has given consideration for that promise. Recall that in *Dickenson v. Dodds*, 2 Ch. D. 463 (Court of Appeals, Chancery Division, 1876), the court held that Dodds was legally entitled to revoke his offer before its expiry date because Dickenson had not given consideration for Dodds’s promise to keep the offer open. As discussed in Chapter 7, the question of what constitutes consideration is complex. However, for present purposes, it is enough to understand that in exchange for the grant of an

option (the offeror's promise to keep the offer open and not revoke it for a designated period of time), the offeree has to give something to the offeror.

The most obvious "something" would be a cash payment or a promise to pay a specific sum of money for the option. But consideration for the option need not be in money. It could also be property or the relinquishment of some legal right. Whatever form the consideration takes, the basic legal requirement is that the grantee must "pay" for the option by transferring or promising money or other property or by sacrificing a legal right in exchange for the promise to keep the option open.

Because an option is a form of offer, it necessarily contemplates that, if accepted, a contract will come into existence involving the exchange of performances contemplated by the offer. For example, if the offeror writes to the offeree offering to sell Bleakacre to her for $2 million, and giving her until next Friday to accept, the offeror contemplates an exchange of the farm for $2 million. Upon acceptance of the offer, the offeree promises to pay the $2 million, and that payment is surely consideration given in exchange for the farm. However, this consideration, exchanged under the contract proposed in the offer, is distinct from and does not also support the option itself. To be valid, the option must have its own separate consideration— the offeree must, in effect, purchase the option by providing an additional consideration, tied to the promise not to revoke. In the above example, if at the time of receiving the offer the offeree had paid the offeror $100 in exchange for the promise to keep the offer open until Friday, the promise not to revoke would have qualified as a valid and binding option. Diagram 4I represents the distinction between the consideration for the option and the consideration under the underlying contract.

Diagram 4I

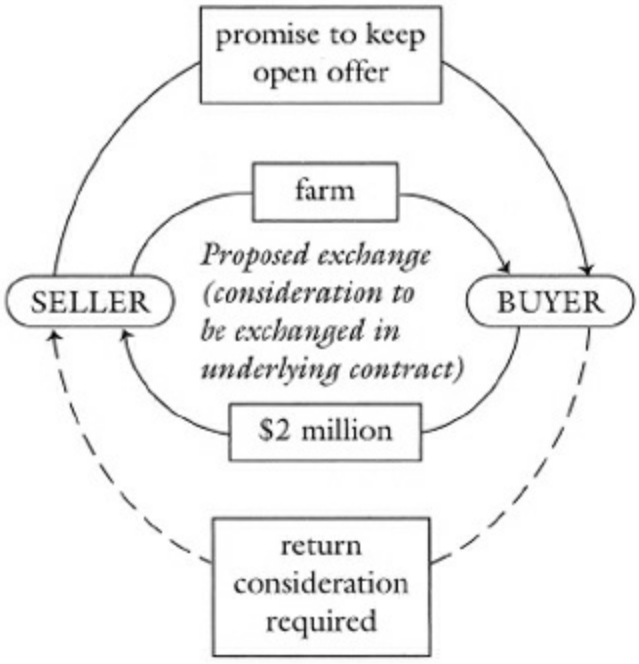


This rule requiring separate consideration for an option applies only in relation to the formation of a new contract—that is, when the option is a promise not to revoke an offer to enter into a contract. If an option is granted within an existing contract, it is part of the bundle of rights exchanged in the contract and is supported by the grantee's contractual consideration.

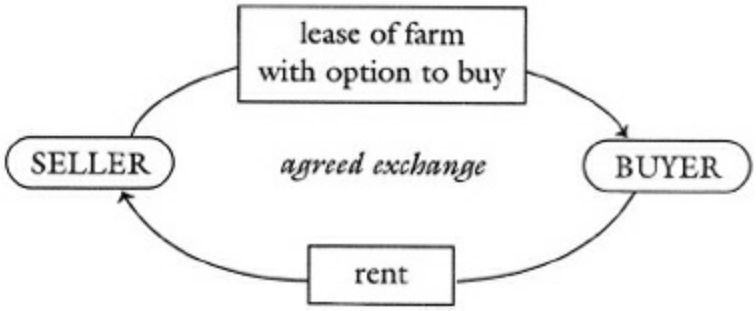
For example, no separate consideration would be required if Buyer is the tenant of Bleakacre under an existing lease, and the lease contains a term granting Buyer the option of purchasing the property for $2 million at any time before expiry of the lease. This option is simply one of the rights purchased by the lessee under the lease and is supported by the consideration given by the lessee under the lease (such as the payment of rent). It does not need separate consideration to bind the lessor. This distinction is shown in Diagram 4J.

Diagram 4J

OPTION IN THE FORMATION OF A NEW CONTRACT



OPTION AS PART OF THE DETRIMENT EXCHANGED IN AN EXISTING CONTRACT



As explained more fully in Chapter 7, one of the principal aims of consideration doctrine is to confine legal enforcement to those transactions in which the parties have actually exchanged promises or performances. It refuses legal enforcement of a gratuitous promise—one that is given as a gift without any return benefit. Options are not usually motivated by gratuitous intent. Their common purpose is commercial—by committing to give the offeree an irrevocable opportunity to accept, the offeror hopes to facilitate a desired economic exchange. For this reason, courts usually try to uphold an option if there is any basis for finding consideration for it. As long as the

option has been obtained by fair means, the length of the period for acceptance is not unduly long, and the parties have taken the trouble to formalize the grant in a writing that recites that consideration was given, a court is likely to uphold the option. Therefore, courts often accept nominal consideration (that is, a small payment or minimal performance that is patently not equivalent to the actual commercial value of the option) or even sham consideration (that is, consideration that is recited in the grant of the option purely for the sake of formality, but not actually given). This approach is reflected in Restatement, Second, §87(1)(a), which says that the grant of an option is valid if it is in writing, is signed by the grantor, recites a purported consideration for the offer, and proposes an exchange on fair terms within a reasonable time. (Of course, not all courts adopt this flexible attitude, and some may refuse to find an option to be valid if the consideration is nominal or a sham.)

§4.13.3 The Effect of an Option

As stated already, the principal effect of a valid option is to bind the offeror to keep the offer open for the stated period. The offeree's power of acceptance does not expire until the end of that period and is generally not cut short by action that would terminate an ordinary offer. Most importantly, this means that the offeror cannot lawfully revoke the option prior to its expiration. It also means, at least in cases when the offeree has given valuable consideration for the option (as opposed to nominal or sham consideration), that the option does not come to an end if the offeree rejects it (or makes a counteroffer, which is effectively the same as a rejection) before the end of the option period. If the offeree changes her mind she is able to countermand the rejection by communicating acceptance before the end of the period. This rule is based on the premise that the grantee has paid consideration to acquire the effective option, which is a valid contract in itself. If so, rejection before the end of the option period amounts to a waiver of contract rights by the optionee, and such a waiver is unenforceable if the optionee did not receive new consideration for it. (This principle is expanded on in sections 7.5 and 13.9, where modifications to an existing contract are discussed.) This rule is subject to a qualification: Although waiver needs consideration, the doctrine of estoppel may protect the offeror who reasonably relied on the rejection to his prejudice. Therefore, if the offeror has taken substantially detrimental

action in reliance on a rejection (such as contracting with someone else for the same performance), the offeree may not reverse the rejection by later acceptance.

To accept an irrevocable offer, the offeree must communicate acceptance to the offeror within the option period. This usually requires that the offeror actually receives the acceptance. Restatement, Second, §63(b) says that the mailbox rule does not apply to acceptance of a valid option, so that acceptance is effective only on receipt. Comment f to §63 justifies this distinction on the basis that irrevocability sufficiently protects the offeree, so the mailbox rule is not needed to safeguard the offeree's interests or to provide a dependable basis for knowing that the acceptance has occurred. Some courts are unconvinced by this reasoning and see greater merit in having a standard, predictable rule for all acceptances.

§4.13.4 Firm Offers Under UCC §2.205

In a sale of goods, §2.205 dispenses with the need for consideration to validate an option (called a "firm offer" in the section) provided that all of its prerequisites are satisfied—namely:

1. The offer to buy or sell goods must be made by a merchant. The merchant status under Article 2 was introduced in section 2.7.2. Recall that §2.104(1) defines a merchant as one who deals in goods of the kind involved in the transaction or who otherwise, by trade or profession, represents that he has skill or knowledge in regard to the goods or the transaction. In essence, a merchant, as distinct from one whose dealings in the goods is casual or inexpert, is a person who trades professionally in goods of that kind, either as seller or buyer, or is otherwise a professional in business who may reasonably be regarded as having familiarity with the goods or transaction. Although Article 2 does not in all cases provide different rules for merchants and casual buyers and sellers, there are some sections—§2.205 being one of them—that are applicable only to merchants or have stricter standards for them. Some of these sections are applicable only in transactions "between merchants"—that is, if both parties to the transaction are merchants—but others apply if only one of them is. Section 2.205 fits into the latter category. For the rule validating firm

offers to apply, only the offeror need be a merchant.
2. The offer must be in a signed writing. Although §2.205 refers to a writing, modern courts readily recognize that "writing" is not confined to hard copy on a tangible document but also extends to recording in electronic form.
3. It must give an assurance to the offeree that it will be held open. The offer will usually state the time during which it is held open. If it does not, §2.205 provides that it will remain open for a reasonable time.
4. If the assurance is contained on a form supplied by the offeree, the offeror must sign the assurance separately. The purpose of this is to ensure that the offeror was aware of the term and is not bound by an assurance of irrevocability hidden in the offeree's standard terms.
5. The period during which the offer is held open does not exceed three months. Section 2.205 limits the period of irrevocability to a maximum of three months, so that the period during which the offer is open cannot exceed that period. Therefore, if the option is intended to last more than three months, the offeree must give consideration to validate it.

§4.14 A TRANSNATIONAL PERSPECTIVE ON OFFER AND ACCEPTANCE

This brief note on perspective is not comprehensive. Its purpose is just to give you a flavor of how the formation of a contract might be approached in a transnational contract. It merely identifies some of the similarities in general approach and some of the differences between domestic American law and general principles of transnational law, as reflected in the UNIDROIT Principles and the CISG. (*See* section 2.9 for an explanation of the scope and purpose of the UNIDROIT Principles and the CISG.)

Broad general principles of offer and acceptance are expressed in both the UNIDROIT Principles and the CISG in a manner that would sound familiar to an American lawyer. (Remember that the UNIDROIT Principles are not binding law in any country, but rather set out a set of widely accepted general principles applicable to international contracts. In contrast, the CISG is a treaty, and is hence binding law in international sales of goods that fall

within its scope, provided that the parties have not excluded its application.) Both the UNIDROIT Principles and the CISG provide for the fundamentals of offer and acceptance in general terms and contain few specific or detailed rules.

Both the CISG and the UNIDROIT Principles adopt the kind of flexible, nontechnical approach to offer and acceptance that we find in UCC §§2.204 and 2.206: To constitute an offer, a proposal must be sufficiently definite and must indicate the offeror's intent to be bound upon acceptance. Acceptance is a statement or conduct indicating intent to assent to the offer. There are some differences from common law principles as well. For example, neither the CISG nor the UNIDROIT Principles recognize the mailbox rule, so acceptance is effective only on receipt unless the offer provides otherwise. Because consideration doctrine is confined to the common law (as explained in Chapter 7), it is not a prerequisite for the validity of an option in either the CISG or the UNIDROIT Principles. Instead, they recognize the validity of a promise not to revoke an offer if it expresses the offeror's intent to make it irrevocable.

Examples

1. To update its rooms, Plush Plaza Hotel, Inc., decided to replace the carpeting throughout the building. It asked Fuzzy Flooring Co. to come to the hotel and give it an estimate of what the recarpeting would cost. A Fuzzy Flooring sales representative came to Plush Plaza with carpet samples and the hotel's manager selected one. The Fuzzy Flooring representative then spent some time taking measurements and making calculations. After this, the representative left a document with the hotel manager headed "Estimate." It included details of the carpet selected, the quantity of carpet needed, a price for the supply and installation, an estimate of when the job could be started and completed, and a statement that payment was due on completion of the installation. At the end of the estimate there was a sentence that read, "This estimate is good for ten days." Is this an offer or a solicitation?

2. Professor Ivor E. Tower has spent the last three years working on his book titled *Foolproof Contracting: A Lay Person's Guide to Effective Dealmaking*. On completing the book, Ivor set about getting it published. On July 1, he sent an identical letter and a copy of the

manuscript to several publishers. The letter read, “I submit the enclosed manuscript for your consideration. If you would like to publish it, let me know by July 30. I want the book published as soon as possible, at least within this year. If you are willing to commit to this, I would be willing to give it to you on the customary terms and expect the usual royalty of 15 percent of sales.”

One of the publishers to whom he sent the book was Pro Se Prose, Inc. The editors at Pro Se read the book, which was a real page-turner. They decided that they would like to publish it. On July 24, Pro Se mailed a letter to Ivor, in which it accepted the book for publication, committed to have it published within the year, and enclosed its standard contract for Ivor to sign. The terms in the standard contract are those generally found in publishing contracts and included a royalty of 15 percent of sales. On July 25, before receiving Pro Se’s letter, Ivor signed a contract with one of its competitors for the book’s publication, and he immediately faxed a letter to Pro Se telling it that the book had been given to another publisher and was no longer available for publication by Pro Se. Ivor received Pro Se’s letter later that day. Is Ivor now in the uncomfortable position of having made two contracts for the same book?

3. Ann Teek is an antique dealer. Art Deco collects tableware from the 1920s and 1930s. He visited Ann’s store and saw a richly decorated platter made in 1935. It was marked with a $450 price tag. Art told Ann that he was interested in buying it but would like to take it home to see how it would look as part of his collection. Ann agreed to let him take it home for a day on the understanding that if he did not want it, he would return it the next day. Ann took Art’s credit card information so that if he decided to keep the platter, he could just call her and she would charge the price of the platter to his card.

   Ann had misgivings about selling the platter because she also collected tableware from that period, and it was a very attractive piece. She therefore decided, later that day, to call Art and to tell him that she had changed her mind and wanted the platter back. Ann called, and Art answered the phone. As soon as he heard that it was Ann calling, and before Ann could tell him that she wanted him to return the platter, Art said, “Hi, Ann. I have decided to take the platter. Debit my card.” Has Ann sold the platter to Art?

4. Kay Nine was going on an overseas trip for the month of July. She knew that her neighbor would keep an eye on her house and take care of her dog, Pettodor, but she preferred having someone live in the house. She had a cousin, Doug Sitter, who attended college in another city and would probably enjoy having a house to live in for part of the summer. On June 10, Kay wrote the following letter to Doug:

> Dear Doug,
>
> I am going to be away from July 1 to July 30. I had planned to have my neighbor take care of Pettodor, but it occurs to me that you may be free during July and may enjoy staying at my house for the month. You will just have to take care of Pettodor and keep an eye on things. In return, you will have free accommodation. Also, when I return from vacation, I will pay for your food and other expenses for the month of July. I don't need to hear from you right away. If you would like to spend July here, just come down on June 29. If you are not here by the end of that day, I will assume that you cannot do it and I will make arrangements with my neighbor to take care of the house and the dog.
>
> Best wishes,
> Kay

Doug received Kay's letter on June 12. He had nothing to do during July and liked the idea of an all-expenses-paid month in Kay's house. He wrote back immediately telling her that he would be down on June 29. Doug mailed the letter on June 13, but he wrote the wrong zip code on the envelope. The post office was able to deliver it anyhow, but it was considerably delayed and Kay received it on June 20. In the interim, Kay had remembered that Doug was a real slob, and she had changed her mind about having him live in her house. On June 21, she wrote back to him, telling him that she had made other arrangements and no longer needed him. Doug received the letter on June 23. Doug feels aggrieved because he believes that Kay cannot simply back out of their arrangement. Is he right?

5. Change the facts of Example 4: Doug did not write back to Kay. Instead, he arrived at her house on June 29. Kay had not made other arrangements, and she was happy to see him. Doug moved in and Kay left on her vacation on July 1. However, she got bored within a week and returned home on July 7. She wants Doug to leave and does not wish to pay his expenses for more than a week. May she revoke her offer?

6. Art Walls owns a building whose exterior has been spraypainted by vandals with infuriating regularity. In an attempt to put an end to this expensive nuisance, he placed an advertisement in the newspaper on January 15, offering a reward of $1,000 to "anyone who furnishes information leading to the conviction of those guilty of defacing the walls" of his building. On January 16, the police arrested Fresco Furtive, a young man who was caught in the act of spraypainting another building in the neighborhood. Fresco seemed to be quite proud of his handiwork, and upon being caught, he freely recounted his exploits to the police, detailing all the buildings he had sprayed, including Art's building. He was tried for all these acts of vandalism, convicted, and placed on probation.

   Although Fresco was not aware of the reward offer at the time of his confession, he found out about it later that day. He claims the reward. Upon hearing this, Art is outraged. He says that he never intended to pay the culprit himself, and in any event, when he said "conviction," he had a stiff jail term in mind and not some wimpy probationary sentence. Is Fresco entitled to the reward?

7. Assume that the police obtained no confession from Fresco Furtive. However, Fresco's nocturnal artistry had been observed by N. Former and I. Witness, two denizens of Art Wall's neighborhood who happened to be lurking separately in the area that night. Although neither of them are public-spirited enough to expose Fresco for free, they both happened to read Art's reward offer on January 15, and independently contacted Art to tell him who had vandalized his building. N. Former told him on the morning of January 16, and I. Witness told him that afternoon. As a result, Art filed charges and Fresco was arrested and tried. He was convicted of the offense and was sentenced to five years on a chain gang. Being completely delighted with this result, Art is happy to pay the reward. The problem is that both N. Former and I. Witness claim it. Art refuses to pay it twice and does not know who should receive the $1,000. To whom is he liable and for how much?

8. Efficient Enterprises, Inc. felt that its workers needed an incentive to be more productive, so in January it established a program under which all nonmanagerial workers would be evaluated annually on the basis of a set of stated criteria, and those who had satisfied those criteria over the

year would receive a bonus of 5 percent of their salary for that year. The incentive program was widely publicized to the employees through posters in the workplace, announcements, and flyers given to each employee, so all the workers knew about it. The management was to conduct the evaluation of workers in November. However, in August and September, Efficient's sales slumped, and its annual revenue projections dropped. The management decided that the company could no longer afford the incentive program and announced to its workers that it was terminating it. Did Efficient have the right to do this?

9. On April 10, Maggie Cumlaude, a bright and enterprising law student, wrote a note to one of her professors, Prof. Minnie Wage, and slipped the note under her door. The note stated, "I would love to be your research assistant this summer. I will be available to work 40 hours per week from June 10 through August 15 and would like to be paid $12 per hour. Please reply by April 16 if you are interested."

   On April 13, Minnie replied, stating, "I would like to have you work for me this summer, but $12 seems a little steep. I usually pay my research assistants $8 per hour. Tell me as soon as possible how you feel about this." She got Maggie's home address from the registrar and put the letter in the mailbox on her way home from work on April 13. Maggie received it the next day.

   When Minnie was sitting in the faculty lounge on the morning of April 16, her insufferable colleague, Professor Max E. Molument sidled up to her and gloated, "Your cheapness lost you a good research assistant. When Maggie Cumlaude told me a couple of days ago that you would only pay her $8 an hour, I outbid you and hired her for $10."

   Minnie rushed to her office and wrote another note to Maggie that read, "On thinking about this matter further, I have decided that $12 per hour is a fair rate, so I agree to pay what you ask. I look forward to having you work for me. I will be away at a conference until June 12. Please come to my office on June 13 to get instructions on your assignment."

   She mailed the note on April 16, and Maggie received it on April 17. Do Maggie and Minnie have a contract?

10. Flaky Cereal Co. manufactures "Flaky's Frosties" sugar-coated cornflakes. The logo for this product is a cute cartoon leopard named

“Frosty Fangs.” To promote the sale of its cornflakes, Flaky ran a competition, which it announced on the back of the cereal boxes. The competition was initiated in January 2017. Its simple point was that people could win various prizes by sending in the tops of cereal boxes accompanied by a form printed on the back of the box. The more tops that were collected, the bigger the prize. The box listed four categories of prizes: Four box tops earned a plastic “Frosty Fangs” pin, 10 earned a cuddly “Frosty Fangs” stuffed toy, 20 earned a “Frosty Fangs” watch, and 1,000 earned a real leopard cub. Each of the prizes was illustrated by a color photograph. The back of the cereal box proclaimed: “Boys and Girls, collect your box tops now and send them in by April 1, 2017, to claim your prizes! (Prizes limited to quantities on hand, so don’t delay.)”

Manny Eater owns “Carnivore Campground,” a safari park. He had been trying to obtain a leopard for some time, but leopards are very expensive (a good specimen can cost up to $500,000) and hard to get. Manny happened to buy a box of “Flaky’s Frosties” (his favorite cereal) in early June. When he read the back of the box at breakfast the next day, he had a brilliant idea. He went from one supermarket to another until he had bought 1,000 boxes of “Flaky’s Frosties.” (At an average of $4 a box, this cost him $4,000.) In mid-March 2017, he mailed the box tops to Flaky with the properly completed form and claimed his prize of a leopard cub.

Flaky refused to deliver a leopard club to Manny on several grounds. Consider each of these grounds and decide if any of them justify Flaky’s refusal to award the prize to Manny:

a. Flaky denied that it had any legal obligation to Manny because the back of the cereal box was merely an invitation to consumers to claim prizes and not an offer. Therefore, by submitting the box tops and form Manny made the offer, which Flaky rejected.
b. Even if Flaky did make an offer on its cereal boxes, the offer was open only to “boys and girls,” not to grown men. Manny therefore had no power of acceptance.
c. The leopard cub obviously was not intended as a prize but was just a bit of hyperbole to attract attention to the competition. This was obvious to any reasonable person because leopards do not make good pets, no consumer could reasonably be expected to consume 1,000

boxes of cereal in the few months before the expiry date of the competition, and no reasonable person would believe that a rare and expensive animal could be won for the cost of 1,000 boxes of cereal.

d. Even if Flaky did make an offer, it expressly stated that prizes were limited to quantities on hand, and Flaky never had a leopard cub.

11. Irvin Sprawl, a property developer, had been negotiating with Aggie Culture, a retired farmer, for the purchase of Blandacre, an old farm owned by Aggie that had become engulfed by suburban sprawl and was now zoned for housing development. By February 1, 2017, they had reached agreement in principle on the price and the other important terms on which the sale would be made, but Irvin could not decide if he really wanted the property. Aggie agreed to give him a few days to make up his mind, and on May 1, Aggie gave Irvin the following document:

> I offer to sell my farm "Blandacre" to Irvin Sprawl for $500,000, subject to the following terms [the note then set out the material terms of the sale]. If Irvin wishes to accept my offer, he must deliver his written acceptance to me by 5 P.M. on February 3, 2017. I undertake not to withdraw this offer before that date. (Signed) Aggie Culture.

a. On May 2, Irvin decided that he would accept the offer. However, before he could let Aggie know, he received a note from Aggie withdrawing the offer. Did Aggie have the legal right to withdraw the offer?

b. Would the result be different if the last sentence of Aggie's offer had instead stated, "In consideration for $1.00 received, I undertake not to withdraw this offer before that date," and upon receiving the document, Irvin handed a dollar bill to Aggie?

12. John Dear had leased his farm Blightacre to Al Falfa for the period of one year at a monthly rent of $1,000. One of the terms in the lease gave Al the option to purchase the property for $500,000. To exercise the option, Al had to "give written notice to John, to be received no later than 30 days before the expiry of the lease period."

On the fortieth day before the expiry of the lease, Al wrote to John stating that he did not intend to exercise the option. John received that letter two days later and immediately replied, acknowledging receipt and confirming that the option had lapsed. Al received that reply the following day. Later on that same day, Al changed his mind and decided that he did want to buy the property. He wrote a second letter to John,

countermanding the first and exercising his right to purchase the property. John received that letter 34 days before expiry of the lease. Has Al bought the property?

13. John Dear owned a tractor. Because he had leased his farm, he no longer needed the tractor, so he advertised it for sale. Harv Ester responded to the ad and came to see the tractor on February 1, 2017. He wanted a few days to decide whether to buy it, and John agreed. John gave Harv a signed note that stated, "To Harv Ester: I agree to sell you my tractor for $5,000 cash. If you decide to buy it, you must notify me in writing by 5 P.M. on February 4, 2017. I will not withdraw this offer before that date. (Signed) John Dear." On February 2, John sold the tractor to someone else and notified Harv that he withdrew his offer. Can Harv refuse to recognize the revocation and accept the offer, thereby creating a binding contract?

Explanations

1. Fuzzy Flooring's estimate includes both the sale of the carpet and its installation, so it is a hybrid transaction. Under the predominant purpose test, it would be treated as a sale of goods subject to Article 2, if the sale aspect predominates and the labor is incidental, but a common law contract if the opposite is true. We do not have enough facts to decide this question, but it does not matter because the question of whether Fuzzy Flooring made an offer would be resolved the same way under Article 2 and the common law.

   Where a party uses the heading "estimate" or "price quotation," this creates the initial assumption that the document is a solicitation rather than an offer. However, this initial assumption can be overturned if the language in the document, read in light of any relevant circumstances and usage, indicates a reasonable intent to make an offer. The example does not provide any information about circumstances and usage, so we need to determine intent from the language used in the estimate. It does set out all the relevant terms of the contract and appears to leave nothing open to be negotiated. In addition, it concludes with language stating that the estimate is good for ten days. This language serves no point if this is merely a solicitation, because Fuzzy Flooring would not have to protect itself from being bound to the price if this was merely a

solicitation. This language adds force to the argument that this is an offer, open for acceptance within ten days.

Bourque v. Federal Deposit Insurance Corp., 42 F.3d 704 (5th Cir. 1994), illustrates another situation in which the court had to decide whether an inappositely headed communication was an offer. The FDIC was liquidating a failed savings bank and selling its assets, including a piece of real property that Bourque wanted to buy. Bourque made the original offer to buy the property for $105,500, which the FDIC rejected in a letter stating, "FDIC's counteroffer is $130,000. All offers are subject to approval by the appropriate FDIC delegated authority. FDIC has the right to accept or reject any and all offers." Bourque replied, agreeing to buy the property at this price, but the FDIC sold it to someone else. Bourque claimed that the FDIC made a counteroffer, which he accepted. However, the court found that FDIC's letter was not a counteroffer. Even though it used the word "counteroffer" and specified clear terms, it was qualified by the language that made it clear that the FDIC retained the final say in deciding whether to form the contract.

2. If Ivor's letter of July 1 was an offer, Pro Se Prose's reply of July 24 could constitute an effective acceptance, as discussed below. If it was not an offer but merely an invitation to deal, Pro Se's letter of July 24 was itself an offer, which was not accepted. A communication is an offer if it manifests the maker's intent to invite acceptance and conveys the reasonable understanding to the addressee that, upon acceptance, the maker expects to be committed to a contract without any opportunity for further approval. The test of intent is objective, focusing on what Ivor apparently intended, as perceived by a reasonable person in Pro Se's position. The language of the offer is the most important indication of apparent intent, but the context of the transaction—including any prior dealings between the parties, usages that are or should be familiar to them, or other circumstances relevant to the transaction—can cast light on what must reasonably have been intended. No such contextual evidence is set out in the facts of this Example. (Ivor's reference to customary terms suggests that there are probably usages regarding book publication, but no usage is revealed relating to contract formation.)

   The language of Ivor's letter does not solidly convey his intent one way or the other. There are aspects of it that quite strongly suggest an

offer: He provides for a specific date for response, he states that he "would be willing" to give the book to Pro Se in exchange for the publication commitment, and he does set out the essential terms on which he would like to contract. The rather vague reference to "customary" terms may suggest that further negotiation is contemplated, but if publication contracts tend to follow a common and well-accepted format, even these terms may be sufficiently certain to be ascertainable. Had the letter indicated that the manuscript had been sent to several publishers, this would have given some indication to Pro Se that it may not have been intended as an offer. However, the letter gives no hint that it has been sent to multiple parties. Where a communication is phrased in the unclear way that Ivor has chosen, it is quite hard to predict how a court will decide what was intended. A person who does not clearly express intent in negotiations runs the risk of being held to an offer when none may actually have been intended.

If Ivor did make an offer, Pro Se's response is likely to qualify as an acceptance. By leaving it to Pro Se to formulate terms in accordance with custom, Ivor implies into his offer an intent to contract on terms that are standard and usual in the trade. Provided that the terms in Pro Se's standard contract are indeed customary, they would not conflict with or add to his offer. The response is entirely in accord with Ivor's proposal with regard to the publication date and royalties. Ivor did not stipulate a mode of acceptance and transmitted his offer by mail. Pro Se's response by mail was therefore authorized, and the mailbox rule would apply, making the acceptance effective upon mailing. As a result, the revocation of July 25 was too late.

3. This is clearly a sale of goods, so UCC Article 2 applies. Article 2 has very few specific offer and acceptance rules, and except to the extent that they are displaced by provisions of the Code, general principles of common law are applicable. UCC §2.204(1) and (3) provide a flexible test for deciding whether a contract was formed: It may be made in any manner sufficient to show agreement, including conduct. If the parties intended to contract, missing terms do not cause it to fail for indefiniteness if the court can find a reasonably certain basis for giving a remedy.

   The issue is whether Ann has made an oral contract with Art under which she has committed to sell the platter to him. Article 2 has a statute

of frauds (§2.201, discussed in Chapter 11) that requires an agreement for the sale of goods to be in writing where the price of the goods is $500 or more. However, as the price of the platter is under $500, the statute of frauds does not apply and will not preclude enforcement of the transaction merely on the grounds that there was no written and signed record of it. Ann's conduct in allowing Art to take the platter home is ambiguous. It could be an offer or merely an invitation to Art to make an offer. It is an offer if Art would be justified in understanding that his assent would conclude the bargain, without any need for further assent by Ann. It has sufficiently definite terms to qualify as an offer. The subject matter of the sale and the price are clear: Delivery is to be accomplished by Art retaining the plate, and payment is to occur upon delivery through a credit card debit. If Ann made an offer, §2.206 dispenses with technicality in the mode of acceptance. It presumes that unless a particular manner and medium of acceptance is clearly required, acceptance may be by any means reasonable in the circumstances, and may be either by promise or performance. The parties did contemplate acceptance by telephone as a permissive (although not exclusive mode), and this is how it occurred.

Although Ann called Art with the intent of revoking, revocation only takes effect when that intent is manifested to the offeree. Art accepted before Ann could express the revocation. Therefore, if Ann's conduct constituted an offer (which I think it does), Art accepted it and Ann is committed to the sale. (Of course, if Ann's conduct is not an offer, Art's words on the phone would be the offer, and Ann did not accept.)

4. Doug is probably right. Kay's letter is surely an offer. It sets out the terms of the proposed transaction and gives the reasonable impression that Doug's acceptance will create a binding contract. The question is whether the offer was for a unilateral contract prescribing that the rendition of performance was the exclusive mode of acceptance. If it was, Doug's letter was not an effective acceptance, and Kay's revocation was communicated to him before he had a chance to accept. Courts do not readily assume that an offer calls for performance as the exclusive means of acceptance. Therefore, unless an offer clearly prescribes performance as the exclusive mode of acceptance, a promise is permissible. There is no language in Kay's letter to signify that Doug

can accept only by showing up at the house on June 29. In fact, the very nature of a unilateral contract is inconsistent with her apparent intent. As she will be relying on Doug to care for the house and the dog, she could not reasonably have intended that his commencement of performance would merely give him an option, and would create no promise by him to continue to perform until her return.

As Kay's offer did not require performance as the exclusive mode of acceptance, Doug's promise in his letter of June suffices as an acceptance. Because Kay made the offer through the mail, an acceptance via the same channel of communication is authorized, and the mailbox rule would apply, provided that the mailing was proper. However, the mailbox rule presupposes proper mailing and does not apply if the acceptance is improperly mailed. Because Doug misaddressed the letter, the mailing was deficient and receipt was delayed, which deprives Doug of the protection of the mailbox rule. However, if a wrongly mailed acceptance does in fact reach the offeror, it is effective upon receipt. Kay received the offer before she communicated her intent to revoke, so the revocation is too late. A contract has been concluded, and Doug is justified in feeling aggrieved.

5. Where an offer requires or permits acceptance by performance, and the act of performance is instantaneous, acceptance occurs immediately upon performance of the act. However, where performance cannot be instantaneous, but will take time—as in this case, where it spans a full month—acceptance is not complete until the performance is finished (on July 30). In the interim, the offeree is protected from having his reliance on the offer defeated by a revocation. The nature of the protection depends on whether performance was the exclusive mode or a permissible mode of acceptance. If performance is the exclusive mode of acceptance, an option would have been created in law as soon as Doug showed up at Kay's house on June 29. If performance is not the exclusive mode of acceptance (as we conclude in Explanation 4), the commencement of performance constitutes an implied promise by Doug to complete performance, so a bilateral contract is created immediately on the beginning of performance on June 29. In either event, Doug is protected from revocation, because he has either an option or a contract. The difference between the option and the implied promise is that the implication of a promise binds both parties to a bilateral contract, so that

Doug is obliged to complete performance. However, an option would not have bound Doug, who would have had the right to cease performance at any time, thus terminating his act of acceptance and precluding the formation of a contract.

6. The advertisement clearly appears intended as an offer, so this issue does not require discussion. The most reasonable interpretation of public offers of reward is that they require acceptance, not by promise but by performance of the consideration called for—in this case, the furnishing of the information. If the confession qualified as an acceptance, it would have created a unilateral contract under which the only outstanding promise is Art's commitment to pay $1,000. As no time for acceptance was stated, the offer had to be accepted within a reasonable time. The amount of time reasonable for acceptance is a factual question, to be decided under all the circumstances of the case. A factfinder would surely find acceptance on the day after the offer to be within a reasonable time. It seems clear that by confessing, Fresco did furnish information that led to his conviction for defacing Art's walls. However, there are three arguments against treating the confession as a valid acceptance of Art's offer.

   First, Fresco was not aware of the offer when he provided the information. Even under the objective test, apparent acceptance cannot be treated as acceptance unless deliberate and made with knowledge of the offer. In this respect, Fresco's situation is similar to that of the plaintiff in the *Glover* case discussed in section 4.10. As noted in section 4.10, the rule requiring knowledge of the offer is intended to protect the offeree from being held to an inadvertent manifestation of assent. This rationale does not apply here because, like the plaintiff in *Glover*, Fresco desires the acceptance to be effective. Nevertheless, there may still be a good policy reason for applying the rule because Fresco's ignorance of the offer means that he has no reliance interest to protect.

   Second, even if Fresco made the confession with knowledge of the offer and intent to accept it, he has no power of acceptance unless the offer was addressed to him. The offer is addressed to "anyone" and is apparently aimed at the public at large, so on its face it is open for acceptance by any person who reads it and performs the requested act of furnishing the information. However, even though the offer expresses no restriction excluding the culprit as a possible offeree, the context of the

offer may lead to the reasonable construction that this restriction was implied. This argument might be bolstered by the public policy of not permitting a criminal to gain from his crime. (But it could be argued that considerations of public interest point in the opposite direction. The reward is for the information, not the crime, and it may encourage confessions.)

Third, Art's argument that "conviction" requires a prison sentence is unconvincing. In the absence of evidence of some special usage, language is interpreted in accordance with its plain meaning. The conviction of a criminal is the determination of guilt in a court proceeding, and is distinct from sentencing.

7. There are three possible resolutions of this issue: Both informants accepted the offer and Art is liable to each of them for $1,000; both informants accepted and must share the reward; or the reward is due to N. Former only, because the offer was no longer open when I. Witness sought to accept. Art's offer is not clear on what happens if more than one person seeks to accept, so its reasonable intent must be ascertained by interpretation.

   A person could make an offer in a way that permits multiple acceptances and thus many contracts. However, where it is clear from the offer that a single performance is all that the offeror needs, the more reasonable inference is that the offer is open to the first person who accepts by rendering the performance requested. Once that performance is given, the object of identifying and prosecuting the criminal is achieved, and it is no longer possible for another to give information that accomplishes the stated goal. If the condition of expiry is implicit in the offer, it is not necessary for the offeror to publish notice of revocation. Therefore, the best resolution is that the $1,000 must be paid to N. Former. The possibility of sharing may have been presented if each of the witnesses provided only part of the information needed to identify Fresco, but that did not happen here. Also, it does not matter if the testimony of both witnesses led to Fresco's conviction. The reward was for the information, not for the testimony.

8. This Example is based on *Storti v. University of Washington*, 330 P.3d 159 (Wash. 2014). The university established an incentive program for its faculty and then suspended the program when it had to reduce

expenses for budgetary reasons. In that case, the court held that the announcement of the incentive program was an offer of a unilateral contract, which could be accepted not by promises of faculty members to perform meritoriously but by actual meritorious performance. The acceptance by performance could not occur instantaneously but would take a full year to complete. However, as soon as the faculty began to work under the program, an option was created under Restatement, Second, §45, which precluded the university from revoking its offer. The resolution in *Storti* seems entirely correct. Once an employer creates an incentive program to encourage its workers to make efforts beyond those called for in the underlying employment contract, the employer should not be able to yank those benefits away after the employees have worked in reliance on the program.

9. If Maggie's initial note is not an offer, there is clearly no contract because Minnie's responses would themselves be nothing more than unaccepted offers. However, Maggie's letter can reasonably be interpreted as an offer. It contains a specific proposal and appears to contemplate that a positive response by April 16 would conclude a contract.

    Minnie's first response could be a counteroffer. If it is, it operates as a rejection, and the offer lapses so that there cannot be a later acceptance. However, the wording used by Minnie suggests that she did not intend an unequivocal rejection and counteroffer, but rather that she wished to explore the possibility of a change in terms. She appears to be negotiating an alternative while holding open the possibility of acceptance if Maggie refuses to budge on her initial demands. This being so, it would have been possible for Minnie to abandon her effort at securing more favorable terms and to accept the offer on April 16. Acceptance by mail would likely have been permissible because Maggie did not prescribe an exclusive medium of acceptance, and acceptance may be by any reasonable means. Also, as Maggie did not specify that acceptance would be effective only on receipt, the "deposited acceptance" or mailbox rule applies. The acceptance would have taken effect on April 16, as soon as Minnie deposited it in the mailbox, correctly addressed and stamped.

    However, there are two reasons why Minnie's letter of April 16 does not qualify as an effective acceptance. First, it may not be an

acceptance at all because it still does not completely correspond with the offer. It calls for Maggie to begin work two days after the date specified in the offer. Although this may be a minor variation, a strict application of the "mirror image" rule disqualifies it as an acceptance. The variation is less likely to be a problem if the less rigid "materiality" standard is used, because the change in dates may be too insignificant to be a material alteration of the offer's terms. (I stress the word "may" because it is a question of fact whether the change in dates would be a material departure from the terms of the offer.[20]) The problem created by the change in dates could also be overcome by interpreting the offer as impliedly authorizing Minnie to make minor adjustments in the dates.

A more serious problem is that the offer had been revoked before Minnie accepted it. Revocation is only effective when communicated to the offeree. However, even if, as happened here, the offeror fails to communicate the revocation to the offeree, the offer may be indirectly revoked when the offeree obtains definite and unambiguous information from a reliable source that the offer is no longer open for acceptance. (*See Dickenson v. Dodds* discussed in section 4.6.4.) Minnie did receive apparently reliable information from Max that Maggie has agreed to work for him and was no longer able to do research for Minnie. (There is no suggestion that Maggie has time to work for both of them.) Therefore, even if Minnie's response to Maggie on April 16 qualified as an acceptance, it was too late because it occurred after the offer had been revoked indirectly.

10. This transaction could qualify as a sale of goods even though no money was exchanged for the prize. The prizes offered (including the leopard cub) qualify as goods, and the exchange of the box tops could constitute a price. Regardless of whether this is a sale of goods, the issues in this Example would be resolved under principles of common law, which are not displaced by any Code provisions. Flaky's arguments should be resolved as follows:
    a. *The argument that the cereal box was a solicitation, not an offer*. The traditional common law assumption has been that advertisements (including competitions designed to promote products) are not offers but merely solicitations for offers from the public, so that the initial offer is made by the member of the public who responds to the advertisement. Some courts still make this assumption, while others

do not. Irrespective of whether the assumption is the starting point of analysis, courts examine the language of the advertisement in context (including the reasonable expectations in the marketplace) to decide if the advertisement is just a solicitation or if it has the hallmarks of an offer. Therefore, as the *Lefkowitz* case in section 4.4 shows, an advertisement could qualify as an offer if it is clear, definite, and explicit; leaves nothing open for negotiation; and makes it apparent to a reasonable person that a commitment is intended without further action by the advertiser. (*See* Restatement, Second, §26, Comment *b*.)

Although *Lefkowitz* is an old case, it continues to be influential. It was used by the court in *Harris v. Time, Inc.*, 191 Cal. App. 3d 449 (1987), to support the court's finding that Time made an offer to all recipients of a mailer that promised a free calculator watch "just for opening this envelope." (Time did not actually mean to offer the watch merely for opening the envelope, and the full text of the sentence made it clear that the recipient had to subscribe to *Fortune* magazine to get the watch. However, the first part of the sentence showed through the window in the envelope, and the qualification in the remainder of the sentence did not.) The court held the text of the mailer, as revealed through the envelope window, did constitute an offer to give a watch to the recipient for opening the envelope. Like the advertisement in *Lefkowitz*, it was clear in its terms, called for a specific act of acceptance (opening the envelope), and left nothing for further negotiation. The offer was therefore accepted by opening the envelope.[21]

Although cases like *Lefkowitz* and *Harris* are resolved by application of the mechanics of offer and acceptance, the opinions indicate that the courts were really motivated by the concern that advertisers should be held accountable for what they appear to promise.

Lefkowitz was also cited but distinguished by the court in *Leonard v. PepsiCo* (discussed in section 4.1.6 in relation to the objective test). Recall that one of the grounds for not finding a contract in *Leonard* was that the advertisement for the Harrier jet was a joke. However, the court also held that even had the TV commercial not been a joke, it would still not have been an offer because it was not specific or detailed enough. The catalog published by Pepsi,

listing the prizes and setting out the procedure for redeeming them, could clearly not be an offer of a Harrier jet because the jet was not listed as a prize in the catalog. However, the court went further and held that the catalog was also not an offer of the other prizes that it did list, because the catalog lacked words of limitation such as the phrase “first come, first served” used by the store in *Lefkowitz*, and no reasonable customer could have believed that PepsiCo intended to risk exposure to an unlimited number of acceptances. Note that this conclusion is not inevitable. If the prize offerings are specific, and nothing is left for negotiation, a catalog like this could be interpreted as an offer unless the catalog includes specific language stating that it is not an offer.

How should Flaky’s promotion be interpreted in light of these cases? The cases show that in interpreting advertisements courts weigh two factors: On one side is the usual market expectation that few advertisements are intended to give members of the public the power to bind the advertiser simply by responding to the advertisement. However, if an advertiser uses language that reasonably indicates a willingness to give potential customers the last word on forming a contract, it could be bound immediately upon the customer’s response. The crucial indicators of such an intent are clarity and completeness in the proposed terms of the transaction, and the absence of any language or circumstances that may suggest a reservation of the right to retain control over the process of contract formation. In addition, courts are mindful of the need to hold advertisers responsible to the public for promises made in their advertisements. Although false advertising is statutorily regulated, contract law can also serve as a means of policing misleading or extravagant assertions and imposing liability on those who make them.

Flaky’s promotion is fully set out on the backs of its cereal boxes, which seem to describe the prizes with particularity (including an illustration) and to set out in detail the mode of responding and the performance required in exchange for the prizes. The boxes also specify an expiry date for responses and contain a limitation to protect Flaky from having to award more prizes than it has on hand. There seems to be nothing left for future resolution, so all that is called for is

a response in the proper form. This may indeed be a case in which a court could find that Flaky's choice of language and format belies the normal expectation of a solicitation and creates an offer.

b. *Even if the box created an offer, it was open only to* "boys and girls." This is a better argument than the store's assertion in *Lefkowitz* that its undisclosed house rule was that the offer was open only to women. Here, Flaky at least has some basis for claiming that the limitation was expressed in the offer. However, even if "boys and girls" can be interpreted to mean "children," there is no language that restricts the offer to them or clearly excludes adults from claiming the prizes.

c. *A reasonable person would understand that the leopard cub was not a real prize but just a bit of hyperbole*. This argument is based on several grounds: the unsuitability of leopards as pets, the high number of box tops needed, and the huge discrepancy between the value of the cub and the cost of 1,000 boxes of cereal. These rationales are similar to those advanced by the court in *Leonard v. PepsiCo* to support the conclusion that the TV commercial could not reasonably have been understood as serious.

Flaky's joke is not as clearly tongue-in-cheek as PepsiCo's Harrier jet commercial. It could be that a reasonable cereal box reader would have understood that the leopard cub was not seriously intended as a prize, but Flaky took a risk in using deadpan humor that did not make its joke glaringly obvious. (Of course, even if Flaky is held to have made a serious offer, which Manny accepted, it would not necessarily have to deliver the cub to him.[22] However, it would be liable to him for damages measured as the difference between the value of the cub and the contract price.)

d. *Even if Flaky made an offer, prizes were limited to quantities on hand, and Flaky never had a leopard cub.* This interpretation of the qualification gives it an evasive meaning that the advertiser should not be allowed to advance. A more reasonable understanding of the qualification is that Flaky has stocks of all prizes, based on a fair expectation of responses, but that it will be released from supplying prizes once demand for an item exceeds these expectations. To allow Flaky to claim that the language permits it to begin with no prizes of a particular kind would be to condone deceptive advertising. As noted in the discussion of argument (a) above, courts are mindful of this

issue when interpreting advertisements.

11. a. Aggie's note is clearly an offer to sell the property to Irvin. She expressly states that it is an offer, it sets out all the material terms on which she intends to enter the contract, and it requires nothing more than a proper signification of acceptance to create a binding relationship. The offer contains an unequivocal promise that it will not be revoked. The problem is that Irvin has given no consideration to Aggie for the promise to keep the offer open. A promise not to revoke an offer is treated as distinct from the underlying contract that would come into existence upon valid acceptance, so it needs its own separate consideration to qualify as a binding option—the $500,000 to be paid for the farm, had a contract arisen, cannot serve as consideration for the promise not to revoke. Therefore, Aggie is not legally bound by her promise not to revoke, and she effectively revoked the offer when Irvin received notice of her intent to revoke before he had communicated his intent to accept.

    b. In this changed form, the grant of the option now records that consideration was given for it. We have no indication of what the actual economic worth may be of a three-day option to buy a piece of property for $500,000, but it is probably fair to assume that $1.00 does not and is not intended to bear any relationship to the option's actual value. Rather, it is inserted in the grant purely for the sake of formality. The parties know that consideration is required to validate the option, so they provide for it in a nominal amount for the purpose of showing their intent to create a legally binding promise. As discussed in Chapter 7, it is a general principle of consideration doctrine that as long as some consideration is given for a promise, a court will generally not inquire into the question of whether the consideration is equivalent or adequate. However, a court may not be willing to treat something as consideration if it is clearly nominal or a sham. Where options are concerned, courts are more likely to find token consideration to be legally sufficient to bind the offeror to the promise not to revoke.

    Note that Irvin did actually pay the $1.00 to Aggie. Had he not done so, it is possible that a court would find a lack of consideration because the recited payment was not even nominal, but was a complete sham. However, even under those circumstances, a court

that wishes to enforce the option could find an implied promise by the offeree to pay the $1.00 or estop the offeree from denying payment.

12. Here the option is not a self-standing promise by John to keep an offer open. Rather, it is one of the obligations he has assumed under the lease in exchange for Al's consideration under the lease—his promise to pay the monthly rent. It is part of the collection of rights that Al has purchased under the lease and is enforceable like any other term of the contract. It needs no separate consideration.

    In terms of the lease, Al had until 30 days before the expiry of the lease term to exercise his option. Ten days before this deadline, he sent a letter informing John that he did not intend to buy the property—in effect, rejecting the offer. John received the rejection and acknowledged it in writing. Had this been an ordinary offer, it would have been effectively terminated before Al changed his mind and decided to accept. However, when a grantee has purchased a valid option by giving consideration for it, the option qualifies as a contract in itself. Because it is a contract, the grantee's relinquishment of rights under it is valid only if the grantee receives consideration for giving up the rights, or the grantor takes detrimental action in reliance on the grantee's assertion that he will not exercise the option. If this sounds a bit complicated, do not worry about it for now. It is explained in sections 7.5 and 13.9. The simple point, for present purposes, is that because Al received no consideration for giving up his option, and John did not act in reliance on Al's rejection, Al is not bound by his notice that he does not plan to exercise the option. Therefore, he may still change his mind and accept the offer before the expiry of the option. His subsequent letter was an effective exercise of the option. Recall that some courts do not apply the mailbox rule to the acceptance of an option, but this does not matter on our facts because John received the letter exercising the option before the end of the option period.

13. Harv gave no consideration to John for John's promise to hold the offer open, so if this was a contract at common law, John's promise not to revoke would not bind him, and his revocation would be effective upon Harv's receipt of it. However, this is a sale of goods, so if the requirements of UCC §2.205 are satisfied, the promise is binding as a firm offer despite the lack of consideration.

Section 2.205 applies only if the offeror is a merchant. (It is not necessary that the offeree be a merchant as well.) There may be a basis for finding that John is a merchant with regard to the tractor sale, but whether he has sufficient work-related expertise in transactions of this kind to qualify as a merchant under §1.104(1) is a question of fact that cannot be finally decided on the scanty information furnished here. He had apparently been farming at some time in the past and had used the tractor for that activity. A farmer (even one who is disposing of the farm and its equipment) may qualify as a merchant with regard to farming implements, not necessarily because he deals in goods of that kind with any frequency, but because, by his occupation, he holds himself out as having knowledge or skill in relation to the goods or the transaction. The issue, in essence, is whether John has sufficient sophistication and knowledge in relation to the transaction to be subject to Article 2's more exacting rules for "professionals."

If John does satisfy the definition of a merchant, the offer is binding on him as a firm offer until its stated expiry time of 5 P.M. on February 4, because it meets the other requirements of §2.205: It is in a writing signed by John, and it gives assurance that it will be held open for a stated time, not exceeding three months. Harv may therefore ignore the attempted revocation and accept the offer before the time for acceptance lapses. This will create a binding contract. (Although Harv will probably not be able to compel John to deliver the tractor, he will be able to claim any money damages suffered as a result of the breach.)

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1. The classical period is described in section 2.3.1. Classical contract theory was dominant from about the late nineteenth to the early twentieth century.

2. As explained in section 2.7.2, §1.103(b) adopts the general principles of common law to the extent that they are not displaced by the particular provisions of the UCC.

3. Judge Hand's reference to "mutual mistake, or something else of the sort" points to an important qualification of the objective test that was mentioned earlier: A court will look behind a party's manifestation of assent if it appears that assent is not genuine because of some defect in the bargaining process, such as a mistake of fact or the other party's improper or unfair bargaining practices. For example, a person may not be held to a manifestation of assent if the other party coerced her into signifying assent, or she was acting in reliance on a fraudulent misrepresentation by the other party. This issue is just noted here. The doctrines governing improper bargaining are discussed in Chapter 13, and mistake is discussed in Chapter 15.

4. Again, this assertion should be qualified by noting that in some cases, a court may not bind a party to a standard term that is unconscionable or unfairly inconspicuous.

5. In colloquial speech, people often talk of "signing a contract." Strictly speaking, this is inaccurate terminology. The contract is the legal relationship between the parties, and the document that is signed is actually the record or memorial of that contract.

6. Under the statute of frauds (*see* Chapter 11), certain types of contracts are not enforceable unless

their essential terms are recorded either in a signed writing or in some other form (such as an electronic document). However, many contracts are not subject to this rule and are fully valid and enforceable in oral form. This does not mean that it is a good idea to dispense with a recorded memorial, even where the law does not require it for enforceability. If a dispute arises as to the existence or the terms of an oral contract, the lack of a record could make it harder to prove that the parties entered a contract at all or on the terms alleged.

7. For example, Article 2 differs from the common law in its treatment of irrevocable offers, as discussed in section 4.13.4, and it diverges from the common law in its approach to resolving disparities between writings exchanged by the parties, as discussed in Chapter 6. Also, a sale of goods for a price of $500 or more must be sufficiently recorded and signed to comply with Article 2's statute of frauds, discussed in Chapter 11.

8. Of course, the plaintiff had been told of the "house rule" before he accepted the second offer, but the court did not address this. Although the court found that both advertisements led to binding contracts, it only gave the plaintiff damages for the second contract, measured as the difference between the price of $1 and the advertised value of the stole, $139.50. The court said that damages under the first contract were too speculative because the advertisement stated only that the coat was worth "to $100," and it did not state a precise value. This seems unduly strict because the court could have used the maximum value asserted by the store as the best evidence of the coat's worth.

9. *Dickenson v. Dodds* also stands for the rule that a promise to hold open an offer for a stated time does not bind the offeror unless consideration is given for that promise. This is dealt with in section 4.13.

10. This rule only applies to offers. Once a contract has been formed, a party is normally allowed to transfer (assign) his or her rights under the contract. Assignment is discussed in Chapter 19.

11. When we deal with UCC §2.207 in Chapter 6, you will see that Article 2 has a special rule for handling discrepancies between the offer and the response where the parties exchange writings.

12. Subject to the qualification that if the statute of frauds applies, as discussed in Chapter 11, its requirements of writing and signature must be satisfied.

13. For example, under the "mailbox" rule, discussed in section 4.11, if it is reasonable to accept through the mail or a similar medium, the acceptance takes effect as soon as properly deposited in the post or introduced by the offeree into whatever other appropriate delivery system is used. It is therefore possible that the offeror will not know of the acceptance until some time after it occurred, and bears the risk of the acceptance never arriving. If the offeror does not wish to take this risk, the offer should either stipulate that acceptance is effective only on receipt, or exclude this mode of acceptance in favor of one (such as personal delivery by hand) that will ensure instantaneous knowledge of acceptance.

14. As explained in section 4.12, the offer in this case is for a unilateral contract, and so the giving of the information is both the act of acceptance and the performance required under the contract. That is, the only way that the offeree can accept is to render the requested performance.

15. To protect people from this kind of marketing practice, and to discourage merchants from using it, federal legislation varies this common law rule if the merchandise is sent through the mail. The recipient may keep and use the unsolicited goods without becoming obliged to pay for them. States may have similar laws relating to merchandise delivered otherwise than through the mail.

16. Section 4.13 deals with irrevocable offers (options). If an offer is irrevocable, some courts hold that the mailbox rule does not apply and acceptance is effective only on receipt unless the offer specifies otherwise. The reason for this variation is explained in section 4.13.

17. A tender is an offer of performance by a party who is willing and able to begin it.

18. Because the nephew's work may have resulted in an unpaid-for benefit to his aunt, he may be entitled to recover the value of this benefit on the ground that it would unjustly enrich his aunt to allow her to enjoy the benefit of his work without paying for it. That is, he may be entitled to restitutionary relief under the theory of unjust enrichment—a basis of relief distinct from contract. We do not consider this here but defer discussion of unjust enrichment to Chapter 9.

19. Some contracts courses defer coverage of options and firm offers until after consideration doctrine has been studied. If your course is structured in this way, you should return here when you reach this subject in class.
20. The concept of materiality is introduced more fully in section 6.5.2.
21. The suit was a class action that claimed significant compensatory and punitive damages on behalf of all recipients of the mailer. Although the court found the existence of a contract, and hence potential liability for damages, it dismissed the case on the maxim “de minimis non curat lex”—the law is not concerned with trifles. The court felt that the harm suffered by the recipients was trivial and did not merit a lawsuit. However, its finding that Time’s promotion was an offer recognized the important principle that advertisements of this type could be interpreted as offers.
22. As explained briefly in sections 1.2.4 and 2.5, and more fully in section 18.10, the common remedy for breach of contract is damages, and a plaintiff has to make a special showing to obtain a court order granting specific performance of a contract.