UNIT 1 PRIMER: FOUNDATIONS FOR THE STUDY OF CONTRACT LAW

1) WHAT IS A CONTRACT?

A contract is a legally enforceable promise.

In Contracts I, we will discuss the formation of contracts. We will explore which promises a court will enforce and why it will enforce those promises and not others.

2) WHY DO WE WANT TO MAKE PROMISES LEGALLY ENFORCEABLE?

You may have never thought about the necessity of contract law, or even of its existence. You simply assume that contractual promises are legally binding and can be enforced in court. However, there are strong policy reasons why we, as a society, have decided that certain promises are legally binding. You, the lawyer, must understand these reasons if you want to be able to effectively advise clients and persuade judges.

The reasons we choose to make promises legally enforceable are:

1. Exchanges between parties are beneficial to society; and
2. Legally enforcing promises is beneficial to exchanges

We explore these reasons in Items 3 and 4, below.

3) WHY ARE EXCHANGES BETWEEN PARTIES BENEFICIAL TO SOCIETY?

One of the reasons we enforce promises is that exchanges between people are good for society and, as a policy matter, we want to encourage exchanges.

Exactly, how do exchanges benefit society? Consider the following example:

Sally has a laptop, but would rather have cash. Betty has cash, but she would rather have a laptop. Sally sells the laptop to Betty for $100.
This exchange between Sally and Betty results in a **net benefit to society**. In other words, the world is a better place after the transaction between Sally and Betty.

You might argue that society is no better off because the exchange did not create a net **increase in wealth**. Before and after the exchange, society had the same amount of wealth – a laptop and $100 in cash. The exchange merely effected a redistribution of wealth between the two parties.

However, you can see the net benefit to society if you look at the transaction using a standard other than wealth. If you examine the transaction using **utility** as your standard, you will see that society is indeed better off after the transaction.

*Utility focuses on each of the party’s subjective measurement of her gain from the transaction, instead of measuring benefit using an objective standard like dollars or wealth. Economists tend measure benefit in terms of utility.

Using utility as the standard, we can see that society is better off after the exchange between Sally and Betty because each of them is better off after the exchange.

Sally is better off because she began with a laptop, but valued $100 cash more than the laptop. After the exchange, she has the $100 cash instead of the laptop. Sally has increased her utility through the exchange.

Betty is also better off because she began with $100 cash, but valued the laptop more. After the exchange, she has the laptop instead of the cash. Sally has increased her utility through the exchange.

You might have noticed that there is actually only a net benefit to society after the exchange if certain conditions are met. It is important for you to understand these conditions because most, if not all, of the law of contracts addresses these conditions in one form or another. An exchange between parties will only result in a net benefit to society if . . .

**. . . the parties voluntarily participated in the exchange.**

We are relying on the parties’ subjective measures of value. Only when the transaction is voluntary can we legitimately presume the parties each believed the transaction increased her utility. We will discuss how contract law addresses transactions that were not voluntary (see, for example, assent in Unit 2 or duress in Unit 8).
. . . the parties were informed about the exchange. If a party does not have the relevant information she needs to make an informed decision about the transaction, it may turn out that the transaction does not increase her utility. We will discuss how contract law addresses transactions that were made under informational asymmetries (i.e., where one party has better information than the other party) (see, for example, misrepresentation in Unit 8).

. . . the exchange does not harm a third person. Remember, we said that the transaction between the two parties benefited society because the transaction increased the utility of both parties. However, what if the transaction injured a third party? We often refer to this as a negative externality. If the harm to the third person outweighs the increased utility of the contracting parties, society suffers a net loss. Generally, laws other than contract law address harm to third parties (for example, tort law, criminal law, environmental laws, etc.). Contract law also addresses harm to third parties, but to a lesser extent (see, for example, contracts that are illegal or violate public policy in Unit 8).

4) How do legally binding promises benefit exchanges?

In Item 3, above, we established that exchanges between people contribute positively to society’s overall wellbeing. The next question we must explore is, how do legally binding promises contribute positively to society’s overall wellbeing?

First, let’s take another look at the exchange between Sally and Betty that we introduced in Item 2, above.

Sally has a laptop, but would rather have cash. Betty has cash, but she would rather have a laptop. Sally sells the laptop to Betty for $100.

Nothing in these facts indicates any promises between Sally and Betty. Instead, the facts indicate a straight exchange of property (cash for the laptop). Because there are no promises, the transaction is more a matter of property law than contract law. Of course, we might argue that there are implicit promises, in which case contract law would apply to those promises, but for the fact pattern more strongly implicate contract law, we would need to change the facts to include promises, such as:

“Sally agreed to sell the laptop to Betty for $100, and Betty promised to buy the laptop from Sally for $100.”
Now, we have unambiguous promises from both Sally and Betty. Please note that there is no need for contracting parties to actually use the word “promise.” A promise is fairly understood from any number of words, including, without limitation:

“I promise”
“I agree”
“I will”
“I shall”
“Yes”
“Okay”

To best understand why we make promises legally binding, let’s engage in a thought experiment: **Consider a world where the law does not enforce promises.** In a world where promises are not legally binding, exchanges would completely stop? No. We would still see contemporaneous exchanges. For example, Sally and Betty could still exchange the laptop for the cash.

However, we would see fewer exchanges that involve any type of future performance by one of the parties because of the uncertainty that the party would actually perform. For example, if Betty needed the laptop today, but could not pay Sally the $100 until next week, it is much less likely the parties will enter into the exchange in a world where promises are not enforceable. Sally would be very reluctant indeed to give the laptop to Betty today without some certainty that Betty would pay in one week. If the law does not bind Betty’s to her promise to pay, her promise is less certain. If Betty is bound by law to her promise, her promise is more certain.

In short, if Betty wants the laptop today, she has to give Sally something of value in return today. A bald promise that is not legally binding has very little or no value. **Legally binding promises increase the certainty of promises, which makes them more valuable.**

There are ways Betty can increase the value of a promise that is not legally binding. The law is not the only force that can increase the certainty of promises. Some promises have a high degree of certainty regardless of the law. A promise from a family member or trusted friend has a high degree of certainty not because of the law, but because of the relationship the parties.
Similarly, a promise from someone who hopes to do business with you in the future has a high degree of certainty, not because of the law, but because she will lose your business in the future if she breaches her current promise. Indeed, in a world where information travels at lightning speed, many businesses are more concerned with how their reputations will be affected by breaching a contract than they are about potential lawsuits.

Although Betty can do certain things to increase the certainty of her non-binding promise, it highly likely that these actions will increase the costs of the transaction. To illustrate this point, let’s look at the transaction from Betty’s perspective. Betty needs the laptop today, but will not be able to pay until next week. If her promise is not legally binding, Betty bears the costs of the uncertainty of her promise. If she really wants the laptop today, she could increase the certainty of her promise by giving Sally something of value to hold as security for Betty’s promise to pay in one week. This security arrangement results in an additional cost for Betty. Similarly, if Betty had had the foresight, she would have spent time cultivating a relationship of trust with Sally. Cultivating such a relationship has costs for Betty.

In contrast, if the law binds Betty to her promise, her promise has increased in value at a relatively low cost. The most significant cost for Betty is the risk that she will later change her mind about the exchange or that she will not have the ability to perform her promise when the time comes. This cost is relatively easy for Betty to control.

If we were to lay out the costs and benefits of the two possible alternate rules, it might look something like this:

<table>
<thead>
<tr>
<th><strong>THE LAW: PROMISES ARE NOT LEGALLY BINDING</strong></th>
<th><strong>THE LAW: PROMISES ARE LEGALLY BINDING</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Benefits:</strong> I can elect not to fulfill my promise if I later regret it.</td>
<td><strong>Benefits:</strong> It is easier for me to get something in exchange for my promise.</td>
</tr>
<tr>
<td><strong>Costs:</strong> It is very difficult for me to get anything in exchange for my promise.</td>
<td><strong>Costs:</strong> I will not be able to extricate myself from my promise if I later regret it.</td>
</tr>
</tbody>
</table>

Now, that you have articulated the benefits and costs, you must make certain judgments about which rule provides the greatest net benefit (benefits minus costs = net benefit). It might seem like an impossible task because you cannot assign an objective weight or value to any of the
costs or benefits. However, you can carefully look at the costs and benefits to see if they can be reduced or mitigated.

For example, one of the benefits of non-binding promises is that I will be able to renege on my promise, but this benefit is not as absolute as it seems. It might be unlikely for me to renege on my promise, even if the law allows me to do so, because it would violate my moral principles, subject me to social sanctions, or cause harm to my business reputation.

Similarly, one of the benefits of legally binding promises is that I will be able to exchange my promise for something of value, but this benefit is also not as absolute as it seems. If I have bad credit or the other party simply does not know me well enough, I still might not be able to get the exchange I want even though I would be legally bound to my promise.

5) **IF CERTAINTY OF PROMISES IS GOOD, WHY NOT IMPRISON PROMISE-BREAKERS?**

We do not imprison people for breach of contract. Instead, we merely require the party in breach to compensate the other contracting party for the injury caused by the breach.

If we threatened to imprison people who breached their promises, we would most likely increase the certainty of promises. After all, very few people would breach their promises knowing that it would result in time behind bars. However, the increase in certainty would come at cost: fewer people would make promises because of the harsh penalty for breaching a promise.

As we said, exchanges and promises are beneficial to society. If we reduce the number of promises, we reduce a socially beneficial activity.* We might also reduce the overall certainty of promises because in order to protect themselves, people would place so many conditions and provisos on their promises, the promises would lack any real commitment.

*Note: Economists call this phenomenon an “activity level effect”. If the law causes an increase in the level of activity (e.g., more promise-making), it has a **positive activity level effect**. If the law causes a decrease the level of activity (e.g., less promise-making), it has a **negative activity level effect**.
6) **Why Not Enforce All Promises?**

We define “contract” as a legally enforceable promise. This definition implies that not all promises are legally enforceable. Why don’t we enforce all promises?

Consider this example: Let’s say we agree to meet for dinner at 7:30 p.m. and I never show up. Should I be liable for breach of contract? If such a promise was legally enforceable, what would the consequences be?

1. It would have a **negative activity level effect** – fewer people would agree to meet for dinner.

2. It would create **administrative costs** – lawsuits would increase, exhausting the valuable and limited resources of the judicial system.

Thus, there are costs to making promises legally enforceable. As a policy matter, the benefits of making promises legally enforceable should exceed the costs. There is a very strong argument that there is no significant benefit to making some promises legally enforceable because it would not enhance their certainty. These promises are already sufficiently certain because they are policed by forces other than the law, like social and moral forces.

For example, if I do not show up for dinner, I will be subject to a social sanction: you will punish me in some way or our common friends and acquaintances will punish me. I might also be subject to a moral sanction – I will feel guilty if I do not show up.

As we go through Contracts I, **remember that there are forces other than the law that contribute to the certainty of promises, such as social forces, moral principles, and in the case of commercial transactions, there are market forces that enhance the certainty of promises.**

7) **What Are Default Rules and Mandatory Rules?**

Contract law generally provides **default rules** for contracting parties. If the parties do not like a default rule, they can agree to a different rule for their transaction.

We discuss default rules of contract law in more detail in Item 8, below.
Contract law also has mandatory rules, which parties may NOT change in their agreement.

We discuss mandatory rules of contract law in more detail in Item 9, below.

8) **DEFAULT RULES OF CONTRACT LAW:**

The vast majority of contract law consists of default rules. If the parties do not like a particular default rule, they can agree to a different rule for their transaction.

**Illustration:** One default rule is that mere silence does not constitute assent to a contract.¹

As an example, imagine someone sends you an e-mail saying:

“Unless you expressly state otherwise, you are deemed to have agreed to purchase my car for $10,000.”

If you do not respond to the e-mail, are you bound to purchase the car? If you apply the default rule above, the answer is no – you are not bound. Your mere silence is not assent to the contract.

However, you may choose to draft around this rule and create a rule that binds you when you are silent. Common examples are monthly DVD, CD, or book clubs. Each month the club sends you an e-mail stating that if you do not respond, you have agreed to purchase this month’s DVD/CD/book.

You are only bound by your silence in this case because when you joined the club, you agreed that your silence in response to the club’s e-mail notification would bind you to purchase the product for that month. Because you have agreed to change the default rule, your mere silence will be deemed to be assent.

Default rules save time for the contracting parties. The parties do not need to draft every little detail into their contract. They can simply agree to the most basic terms of their transaction, like subject matter and price, knowing that default rules will often provide solutions for the issues they did not explicitly address in their agreement or issues they did not even contemplate when they made the agreement. Even when

¹ The rule is a bit more nuanced than as stated here, but for our purposes this rule will suffice. The Restatement (Second) of Contracts §69 provides a longer, more complete statement of the rule.
the parties enter into a very detailed contract, default rules will still be relevant because it is virtually impossible to draft a contract that addresses every possible contingency.

**How do we determine if a default rule is a good rule?** Normally, when we analyze whether a contract rule is “good,” we ask whether it is **efficient**. As you begin your law-school career, you will be tempted to ask yourself whether a law or a court’s decision is fair. Resist the temptation. **“Fair” is the F-word** in contracts class. Fairness, as a standard, is too subjective. Please avoid dropping the F-bomb in class.

Contract law is concerned with efficiency. We want to enable parties to structure their transactions in the most efficient manner possible. If their transaction is efficient, they maximize their increase in utility and, consequently, overall social utility is increased.

That does not mean that fairness is completely irrelevant to contract law. It simply means you should be very cautious about using fairness as a standard to evaluate whether the law is good or bad.

To determine whether a rule of contract law is efficient, we generally ask **whether the default rule is one that contracting parties in a majority of transactions would have agreed to ex ante.**

*“Ex ante” means before the fact, when they enter into the contract, not afterwards [i.e., ex post], when it has already become clear that something has happened in the performance of the contract to adversely affect one or both parties.*

Of course, trying to determine the preference of contracting parties in a majority of transactions necessarily involves some speculation and conjecture, but there are principles we follow to reduce the speculative nature of our analysis. We will discuss these principles as the course progresses.

You will notice that even with an efficient default rule, the parties in a minority of transactions would not choose the rule. In these situations, the default rule will not be efficient and **we would expect the parties to opt out of the default rule and draft one that better suits their circumstances.**

What do courts do when the parties fail to draft out of the default rule when the default rule was not the most efficient rule for the transaction? There are three possibilities:

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2 As we said earlier, we are assuming the negative externalities of their transaction do not outweigh the benefits of their increase in utility.
1) The court will apply the default rule, but the decision will seem inefficient to you;

2) The court will apply the default rule, but it will bend the rule and twist the facts to come out to decision that seems efficient to you; or

3) The court will create a new default rule (or sub rule) if the situation is sufficiently common and sufficiently distinguishable from most circumstances, thereby justifying a new rule.

You will read many cases throughout your law school career and beyond. You will see courts do all of the above.

9) **Mandatory rules of contract law:**

Although the vast majority of contract law is default rules, there are also many mandatory rules, which the parties may not alter in their agreement.

*Illustration:* One mandatory rule of contract law provides that a court will not enforce a contract for the sale of real property unless the agreement is evidenced by a written and signed contract.

Imagine that Sally orally agreed to sell her house to Betty, and Betty orally agreed to buy it. They also agreed that the oral agreement will be binding.

A court will not enforce this contract because it is not in writing and Sally and Betty could not change the rule that required the contract to be in writing.

**How do we determine if a mandatory rule is an efficient rule?** We generally go through the same analysis for default rules – asking if the rule is one that a majority of contracting parties would have agreed to *ex ante* – but we also ask whether the benefits of the policy goal we are trying to achieve through the mandatory rule outweigh the costs of preventing the parties from agreeing to another rule.

Of course, we have to determine what policy justifies the mandatory rule.

Can you think of a policy that would justify a mandatory rule that requires all contracts for the sale of real property to be in writing (i.e., oral contracts for the sale of real property are not enforceable)?
10) **WHAT ARE THE DIFFERENT TYPES OF CONTRACTS?**

We generally categorize contracts into two broad categories:

1. **Express contracts** versus **implied contracts**

2. **Bilateral contracts** versus **unilateral contracts**

We explore these categories in greater detail in Items 11 and 12, below.

11) **EXPRESS CONTRACTS** versus **IMPLIED CONTRACTS:**

An **express contract** is one where the parties use written or spoken words to express their agreement.

An **implied contract** (also called a **contract implied-in-fact**) is one where assent by one or both of the parties is implied by the conduct of the parties.

**Illustration:** Perry walks into a dentist’s office. After the receptionist takes his information, the dentist performs a routine exam. Prior to the examination, Perry never expressly agreed to pay the dentist. Is Perry bound by contract to pay for the examination? The answer is, yes, most likely. Perry’s conduct evidences his implicit assent to be bound to a contract.

An implied contract requires some conduct by the parties under circumstances where a reasonable person would believe that the conduct shows assent to a contract.

12) **BILATERAL CONTRACTS** versus **UNILATERAL CONTRACTS:**

In a **bilateral contract**, each party makes a promise.

**Illustration:** Susan promises to sell her car to Barry for $5,000 and Barry promises to buy Susan’s car.

In a **unilateral contract**, only one party makes a promise.

**Illustration:** Mary’s cat, Fluffy, is missing. Mary promises to pay $100 to Bob if he can bring Fluffy home safe and sound. Bob finds Fluffy and returns her to Mary, safe and sound. Only Mary made a promise. Bob never promised to find Fluffy.
13) **QUASI-CONTRACTS: (not really a “contract”)**

A quasi-contract is not really a contract, but we teach it in a course on contract law because of the close relationship between the two concepts.

A quasi-contract is also known as a **contract-implied-in-law**, which means the law implies an obligation even though the parties did not expressly or implicitly assent to a contract.

**A quasi-contract is not a contract** because a contract requires mutual assent, which means assent by both parties. To recover under a theory of quasi-contract, however, one does not need to show mutual assent.

The doctrine of quasi-contract addresses the situations that fall in the land of limbo **somewhere between obligations based on contract and obligations based on tort**. Consider the following illustration:

Contractor agrees to build a permanent storage shed on Homeowner A’s land for $3,000. Contractor gets the address wrong and builds the shed on Homeowner B’s land instead.

Contractor wants Homeowner B to pay for the shed. Homeowner B refuses.

Could Contractor argue that Homeowner B is liable for the shed under a theory of contract? No – the facts do not indicate any kind of assent on Homeowner B’s part.

Could Contractor argue that Homeowner B is liable under a theory of tort? No – the facts do not indicate any kind of wrongful conduct by Homeowner B.

Contractor’s best argument is quasi-contract. A party can recover under quasi contract if:

1. She **confferred a benefit** on the other party; and

2. It would be **inequitable under the circumstances** for the other party not to pay for the benefit.

These are the two “**elements**” of quasi-contract (benefit and inequitable).

Contractor will most likely be able to show she conferred a benefit on Homeowner B. She provided Homeowner B with a shed that is worth $3,000, as evidenced by the contract price. She might be able to show that the value of Homeowner B’s land increased because of the addition of the storage shed.
The more difficult element for us to analyze is whether, under the circumstances, it would be inequitable if Homeowner B does not pay Contractor for the shed.

“Equitable” is the legal word for expressing the concept of fairness.\(^3\) The fact pattern is short on details, so it is difficult to determine what is fair and equitable in this situation. If Homeowner B had watched Contractor build the shed and said nothing, we might lean towards saying it would be inequitable for Homeowner B not to pay Contractor. On the other hand, if Homeowner B returned from vacation, surprised to find a new shed in his backyard, we might lean toward saying it is equitable for Homeowner B not to pay Contractor.

There are two things you should always consider when trying to determine what is inequitable under the circumstances in a fact pattern that implicates quasi contract:

1. Did the claimant confer the benefit \textit{gratuitously}? If Contractor intended to make a gift to Homeowner B, it would not be inequitable to allow Homeowner B to keep the benefit without paying.

   Do you think the facts indicate that Contractor acted with the intent to make a gift to Homeowner B?

2. Did the claimant confer the benefit \textit{officiously}? If Contractor had acted in an intrusive manner by conferring a benefit on Homeowner B it would not be inequitable to allow Homeowner B to keep the benefit without paying.

   Do you think the facts indicate that Contractor acted officiously?

Note: In the \textbf{rule} for quasi-contracts, we said that “inequitable” was one of the \textbf{elements}. We then introduced a \textbf{sub-rule} that explained how to interpret the element “inequitable” by looking at whether the benefit was gratuitous or officious.

\(^3\) Please excuse the use of the F-word. You should only use the F-word when the rule expressly requires you to consider fairness.
14) **WHAT ARE THE SOURCES OF CONTRACT LAW?**

Contract law comes from three main sources:

(1) the common law;

(2) Article 2 (and 2A) of the Uniform Commercial Code; and


This course will focus mainly on the common law and Article 2 of the Uniform Commercial Code.

Because the default and mandatory rules of the common law, Article 2, and UN Convention sometimes differ, it is important for you to determine which one of these laws applies in any particular situation.

A. **Common Law** (state law)

Common-law contract rules apply to service contracts, real estate contracts, intellectual property contracts, and everything not covered by UCC Article 2 or the CISG, discussed below.

The common law is judge-made law. Over the years, court decisions on contract matters have developed into a body of law we call the common law. The common law is a somewhat strange phenomenon – it takes a while to become accustomed to it.

For example, I know the common law rule: “mere silence is not assent to a contract.” However I cannot turn to the Kentucky or Ohio statutes to show you this rule on the books. It’s just not there. Instead, I need to find an authoritative judicial opinion that applies the above rule. It is often a difficult process to go through.

Over 100 years ago, a private organization, the American Law Institute (ALI), wanted to make the common law rules more accessible for judges and lawyers. It created the “restatements” of the law including the Restatement of Contracts.

The restatements are not law. They are an attempt to write down what the common law rules are. A restatement rule does not become law until a court cites to it and applies it in a judicial opinion.

You can think of the restatements as very persuasive authority on what the common law rules are. For the purposes of our course, however, you may assume that the rules in the
Restatement (Second) of Contracts are accurate articulations of the common law of contracts.

B. **Uniform Commercial Code (UCC) (state law)**

UCC Article 2 applies to **contracts for the sale of goods**. Goods are all things that are **moveable**. You will become intimately familiar with the provisions and the organization of Article 2.

The UCC was created jointly by the ALI and another organization: the Uniform Law Commission (ULC). Because both the ALI and ULC are private organizations, not state legislatures, the UCC does not have the effect of law until adopted by a state legislature. In fact, the legislatures of forty-nine states have adopted the UCC, so it is the law in virtually every jurisdiction in the U.S.

**Article 1 of the UCC** has general principles and definitions that apply to Article 2 as well as the other articles of the UCC. You will only need to become familiar with a few provisions of Article 1 for the purposes of this course.

**Article 2 of the UCC** has the substantive provisions that govern contracts for the **sale of goods**. You will become very familiar with the structure and provisions of Article 2 in this course.

**Article 2A of the UCC** applies to the **lease of goods**. Not all states have adopted Article 2A. We will not spend any time on Article 2A in this course. You simply need to know of its existence and that its rules are very similar to those of Article 2.


The CISG applies to the international sale of goods. You will become familiar with the Articles 1-3 of the CISG in this course.

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4 Formerly known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

5 Louisiana is the only state that has not adopted UCC Article 2.
15) **Can a contract implicate both the common law and the UCC?**

*Applying the common law to UCC cases:*

As we said above, the provisions of UCC Article 2 apply to contracts for the sale of goods. Keep in mind, however, Article 2 is not as comprehensive as the common law.

For example, Article 2 does not address whether a contract with a child or a mentally ill person is enforceable, but the common law has a plethora of case law on the subject of capacity to contract.

UCC 1-103(b) expressly states that **the common law supplements UCC Article 2** when the UCC is silent on an issue. This relationship between the common law and the UCC means that **there will be times when you will apply the common law to a contract for the sale of goods, but only when the UCC is silent on the issue.**

*Hybrid contracts:*

In addition, there are some contracts that would appear to implicate both the UCC and the common law. Consider the following contract:

Pool Store and Customer agree to the sale and installation of an above-ground pool and deck for $5,000.

Does the UCC or common law apply? This question is important because sometimes the common law rules with respect to a particular issue are different from the UCC rules.

Because the above-ground pool is moveable at the time it is identified to the contract, it is clearly a “good.” This conclusion would lead to the application of UCC Article 2 to any issue that may arise under the contract. However, installation is clearly a service, which would lead to the application of common law contract rules to any issue that may arise between the parties.

This type of contract is called a **hybrid contract** or **mixed contract**. A hybrid/mixed contract involves **goods** and some other non-goods element, usually **services, real property, or intellectual property**.

Article 2 does not specifically address whether its rules or the common law will apply to hybrid contracts. Courts have developed two main approaches to solve this problem:
**Approach 1 – the predominant factor test:**

Some courts adopt the predominant factor test. Under this approach, the court determines whether the goods or non-goods element was the predominant factor/purpose of the contract.

If the goods were the predominant factor of the contract, with services/intellectual property/real property incidental, UCC Article 2 applies to the contract.

If the non-goods element (i.e., services, intellectual property, or real property) was the predominant factor of the contract, with goods incidental, the common law applies to the contract.

**Approach 2 – the gravamen of the action test:**

Some courts adopt the gravamen of the action test. Under this approach, the court determines whether the goods or non-goods element is the main focus of the lawsuit.

If the lawsuit is about the goods, the UCC will apply.

If the lawsuit is about the non-goods element (i.e., services, intellectual property, or real property), the common law will apply.

**Which approach should you take?**

**We will apply the predominant factor test in Contracts I.** Contracts I addresses the formation of contracts – i.e., whether the parties have a valid and enforceable contract. With respect to questions of contract formation, a court would most likely apply the predominant factor test because application of the gravamen of the action test would simply not fit the situation: When you are arguing for or against the formation of a hybrid contract, neither the goods element nor the non-goods element is the gravamen of the lawsuit.

Finally, there are two situations that do not implicate hybrid contracts, even though at first blush they may appear to:

1) Sale of goods plus delivery.

2) Sale of goods that the seller will manufacture for the buyer.

These types of contracts are both governed by the UCC, not the common law.
16) **Contracts I – Contract Formation (the big picture)**

**Mutual Assent:**

Assent is a willingness to be bound. Both parties must manifest a willingness to be bound for their contract to be enforceable.

**Consideration or Promissory Estoppel:**

In simplified terms, the doctrine of consideration provides that a promise will not be enforceable unless the promisee (the person receiving the promise) gives something in exchange for the promise. In other words, the recipient of the promise must pay for the promise if she wants it to be legally enforceable.

The doctrine of promissory estoppel is a narrow exception to the doctrine of consideration. It focuses on whether the promisee relied on the promise, not whether the promisee gave something in exchange for the promise.

**Definiteness (reasonably certain material terms):**

The material terms of a contract must be reasonably certain otherwise a court will not enforce the contract.

**Defenses to Formation:**

You can think of these as affirmative defenses – i.e., the party admits she entered into a valid contract (there was assent, consideration, and reasonably certain terms) but the court should not enforce the contract because . . .

*Statute of Frauds*

Some types of contracts are not enforceable unless they are evidenced by a signed, written contract.

*Incapacity*

The law protects minors and people with certain conditions that affect their ability to reason.

*Duress* (also called “coercion”)

The law protects a person who assents to a contract in response to a wrongful threat (easiest example “If you do not promise to sell your car to me for $100, I will burn your house down”).
Undue influence

The law protects a person who assents to a contract when the other party abuses her relationship of trust or dominance, inducing the weaker party to enter the contract.

Misrepresentation or fraud

The law protects a person who assents to a contract based on untrue information the other party provided.

Unconscionability

A court might protect a party when it feels the terms of the contract are grossly unfair to that party.

Illegal or against public policy

A court will refuse to enforce a contract when the subject matter or purpose of a contract is illegal (e.g., murder-for-hire) or against public policy.
EXERCISES – UNIT 1:

1) Thought experiment: In a world where . . .

Refer to: Items 2-4, above.

Developer was planning to build a 15-story, high-rise apartment complex with 200 units. Developer wants to hire Contractor to construct the building.

In a world where promises are NOT legally binding, what are the major obstacles for the potential transaction between Developer and Contractor?

How could the parties structure the transaction to try to overcome these obstacles?

2) What type of contract is this?

Refer to: Items 10-12, above

What type of contract is implicated by the following transaction?

The law school posted a notice:

“All students who achieve a GPA of 3.9 or better in their first year will receive a $10,000 scholarship for their second year.”

Annabelle was a first-year law student. After she saw the notice, she succeeded in earning a GPA of 3.95 in her first year.

3) What law applies?

Refer to: Items 14 & 15, above

Tjock is a Swedish furniture chain store that is very popular in the United States.

Mary went to Tjock looking for a kitchen. At Tjock Mary saw the kitchen of her dreams. It was called the Blomma kitchen. It had beautiful cabinets, spectacular appliances, wonderful fixtures; everything she ever
Mary wanted two choices with respect to purchasing the kitchen:

Choice 1: She could purchase all the hardware, appliances, cabinets, etc. from Tjock as a set. She would need to hire a contractor on her own to complete the installation. Price: $10,000

Choice 2: She could purchase the complete kitchen set with installation from Tjock. Under this choice, Tjock would demolish her old kitchen and install her new kitchen. The work would take at least 4 weeks and involve over 300 person-hours of work. Price: $19,000.

Mary wanted choice 2, full installation.

Consider the following two alternate scenarios. Under each scenario, which law would apply, the UCC or the common law?

Scenario 1:

Tjock prepared a written offer sheet for Mary that detailed the price, the products, and the work for choice 2, full installation. It also clearly stated:

“Take this offer sheet home and consider it. We will keep this offer open for a week. If you decide you want to make the purchase, please sign this offer sheet and return it to us by fax or e-mail attachment.”

The next day, before Mary had a chance to sign the offer sheet, Tjock’s sales manager, Gerda Karlsson, called Mary and said:

“I am sorry, we must revoke our offer. We can no longer provide the Blomma kitchen at that price. Jag är ledsen. But please stop by our store for some complimentary meatballs.”

Mary wants to know if Tjock is legally bound to honor the offer sheet. Under the common law, the answer is most likely no. However, under UCC Article 2, the answer is most likely yes. We will learn why later in the semester.

Does the common law or UCC Article 2 apply?
**Scenario 2:**

Mary and Tjock entered into a contract for choice 2, full installation. Tjock installed Mary’s new Blomma kitchen. A week later, the refrigerator malfunctioned. Mary was injured when the ice dispenser started shooting sharp icicles around the kitchen like little missiles.

UCC Article 2 has a very favorable remedy for Mary. Under the common law, the remedy for Mary is less favorable. Under the common law, Mary would have to sue under tort law, not contract law. Moreover, the tort law claim is harder for Mary to prove than the UCC claim. (this is an issue for next semester, so don’t try too hard to understand the details).

**Does the common law or UCC Article 2 apply?**

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4) **Would the UCC apply to the following contracts?** Feel free to note where you need more information to perform a complete analysis.

Refer to: Items 14 & 15, above; UCC 2-102, 2-105(1)-(4), 2-106(1), 2-107(1)&(2)

- A professor selling a used boat to a student
- A manufacturer selling a boat to a Kentucky family that plans to use it at its lake house
- The sale of a large cargo ship from the manufacturer to a shipping company
- The sale of a large cargo ship for scrap
- The sale of a cup of coffee at the local coffee shop
- The sale of a bowling ball sold at a yard sale
- The sale of a ticket to a baseball game next month
- The sale of corn that is still attached to the land at the time of contracting
- The sale of coal that is still in the ground at the time of contracting
- The sale of a storage shed that is attached to the land at the time of contracting
- A contract for the sale of software
- A sale of an airplane
- A sale of a 10 sports cars from a manufacturer to a car dealer
- A sale of one red sports car from a manufacturer to a middle-aged law professor having a mid-life crisis
- A sale of “10% of the pile of coal located on Miller’s land”
- The sale of electricity
- The sale and installation of an above-ground swimming pool
- The sale and installation of an in-ground swimming pool
- The sale and delivery of a refrigerator
- The manufacture and sale of 50,000 smart phones according to buyer’s specifications
- A contract to design and build a prototype home espresso machine for a client

5) **Would the CISG apply to the following contracts, assuming one party has its place of business in the U.S. and the other has its place of business in the People’s Republic of China (both countries are “Contracting States”)?**

Refer to: Item 14, above; CISG Articles 1-3

- A manufacturer selling a boat to a Kentucky family that plans to use it at its lake house
- A sale of an airplane
- A sale of a 10 sports cars from a manufacturer to a car dealer
- A sale of one red sports car from a manufacturer to a middle-aged professor having a mid-life crisis
- The manufacture and sale of 50,000 smart phones according to buyer’s specifications
6) What law do you apply?

Refer to: Item 15, above; UCC 1-103(b)

In a contract for a sale of a guitar, Seller told Buyer the guitar was once owned by Elvis. It turns out that Elvis never owned this guitar.

The UCC has no provisions on fraud or misrepresentation, but the common law does.

What law applies? Explain your answer.

7) Is it a good default rule?

Refer to: Item 8, above

The following is a default rule of contract law that we will discuss in more detail in Unit 2:

“A person who assents to a contract as a joke will be bound to the contract if the other person was reasonable in believing the assent was serious.”

Is this a good default rule? To give some context to your analysis of the default rule, consider the consequences of the rule under the following fact pattern:

Bob was next-door neighbors with Marvin. Bob and Marvin were very close friends. The often played childish practical jokes on each other.

Marvin owned a classic car. The car was not in running condition, but it was still worth about $50,000 in its current condition. He parked it in his driveway. The driveway was between his house and Bob’s house. Because the houses in this neighborhood were so close, an outsider would not be able to tell whether the driveway belonged to Marvin’s house or Bob’s house.

Bob had a great idea as a practical joke. He would pretend to sell the car to an unsuspecting buyer, and then watch as Marvin somehow dealt with the ensuing confusion with the buyer. What fun it would be!!!!

Bob placed a classified ad for the sale of the car, with his contact number, under the “for sale by owner” category. Mary saw the ad and called Bob. Bob made arrangements for Mary to see the car when Marvin was not home.
Mary came to see the car in the driveway between the two houses. She looked it over, kicked the tires, and offered Bob $20,000 for the car. Bob accepted. Bob and Mary signed a simple written contract and made arrangements for Mary to return a few days later with a check to pay for the car and to discuss how they would move it to Mary’s house. Bob agreed to a date and time when he knew Marvin would be at home.

At the agreed date and time, Mary came to pay for the car. Bob told Marvin to come out of his house. The look of confusion and fright on Marvin’s face when it was revealed to him that Mary thought she was buying the car caused Bob to laugh uncontrollably. Bob thought that this was his best practical joke ever. When has was able to recover from his laughing fit, Bob apologized to Mary for making her an unsuspecting foil in his great scheme and offered to treat her to a dinner.

Mary stormed off. She eventually sued Bob for breach of contract. When Bob received notice of the lawsuit, he became very worried. If he were found liable for his promise to sell the car to Mary, he would have to pay Mary $30,000 in damages. This result would ruin him – he would lose his house and he would have to drop out of law school after already enduring two years of torture at the hands or cruel law professors.

**You are the judge.** Bob does not dispute any of the above facts. His only arguments are that it was a harmless joke and that he will be ruined by an adverse court decision. What is your decision? Is Bob liable?

Here is a second interesting question that deals with ethics and professionalism: **You are a struggling lawyer** with your own practice. Bob comes to you and asks for representation. You are not in a position to do work for free. You would charge Bob at least $3,000, which would be the standard rate any lawyer would charge for the amount of work you anticipate for this case. Do you take the case (and Bob’s $3,000) or do you refuse the case because Bob has little chance of being successful in court?

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8) **Is it a good mandatory rule?**

Refer to: Items 4 & 9, above

Assume that contract law has a following mandatory rule:

“A minor under the age of 18 will not be bound by her contracts.”
Is this a good mandatory rule? Try to articulate the costs and benefits for the rule and its alternative.

To help you develop your thoughts, envision three different scenarios. In each of these scenarios, a minor wants to purchase a car from Honest Oliver, the local car dealer, with a small down payment and a promise to pay off the balance in monthly installments over the next five years:

**Brenda** is 16 years old. She is a spoiled, rich kid. In a rare instance of parental discipline, her parents have forbidden her from using any of the family vehicles because they caught her driving under the influence last week. Brenda does not have enough cash to buy a car outright, but she does have enough for a down payment and her generous weekly allowance would more than cover monthly installment payments.

**Claire** is a 16 year-old single mother of one. She has moved out of her parents’ house because they are heroin addicts. Her parents provide her no support. Claire manages to work and go to high school, but has little time to run between home, school, and work, which makes public transportation impractical for her. She has enough cash to make a down payment and her income would allow her to make monthly installment payments without any problem.

**Dexter** is a 16 year-old high school football star, but he looks like he is 30 years old. He just got his driver’s license and wants to buy his first car. He has enough cash in his personal bank account to purchase the car outright, but he thinks it would make more sense to make a small down payment and pay the installments from the money he makes as a catalog model.

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9) **Can Bob recover from Mary?**

Refer to: Item 11-13, above

Bob lives in a rural setting. One day when he was out for a walk, he found a stray horse trotting down a road near his house. The horse was clearly well-cared for, but had no marks to indicate who owned it.

For six months Bob stabled the horse, fed it, gave it exercise, and paid for its medical care.

When Mary heard that Bob had the horse, she immediately went to see it. It turns out that the horse is Mary’s. Bob returned the horse to Mary, but he wanted Mary to compensate him for the expenses he incurred taking care of the horse for six months. Mary refused.
What is his Bob’s best legal argument if he wants to recover from Mary?

**Can Bob recover from Mary redux:**

Bob is a licensed physician. He finds Mary lying by the side of the road unconscious. Apparently she has fallen from the horse that was in the field about 20 yards from where Bob found her.

Bob phones for an ambulance and administers emergency care to Mary that saves her life.

Can Bob recover from Mary?

**Here is some extra information you will need:**

The common law provides that volunteering emergency services to a third party is presumed gratuitous, UNLESS

- You are qualified to provide the services by the nature of your profession or otherwise; and
- You had the intent to charge for the services

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**10) Predicting the possible contract-law approaches**

Refer to: Item 3, above

Right now, you do not know the specific contract-law doctrines that we will explore in this course, but you can better prepare yourself for your studies by getting a sense of what issues the law addresses and what approaches it may take to resolve those issues.

For each of the following fact patterns, try to predict how the law will resolve the issue (by choosing one of the two choices). **Try to articulate why you made your choice** (without dropping the F-bomb).

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**Scenario 1:**

Mary and Bob agreed that Mary would paint Bob’s house for $5,000. Five seconds after they agreed, Bob changed his mind and said, “On second thought, I’d better not. My child is beginning law school this
month and she is going to need me to help her pay for her textbooks; they are ridiculously expensive.”

Mary said, “Too bad. We already agreed.”

**Choose one of the following:**

Bob is legally bound to a contract with Mary.

Bob is NOT legally bound to a contract with Mary.

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**Scenario 2:**

Mary and Bob are negotiating the sale of Mary’s house to Bob. Bob asked Mary if the house had any termite damage. Mary said that it did not, but she was not telling the truth. She knew that there were areas of the house where termites had caused damage.

Soon after, Mary and Bob entered into an agreement for the sale of Mary’s house to Bob for $200,000. Before the closing of the sale, Bob discovered that the house had extensive termite damage when the chandelier suddenly fell to the floor.

Bob told Mary that he wanted out of the deal.

Mary said, “Too bad. We already agreed.”

**Choose one of the following:**

Bob is legally bound to buy the house.

Bob is NOT legally bound to buy the house.

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**Scenario 3:**

Bob hired Mary to murder his father-in-law. He paid Mary $2,000 up front and promised to pay another $10,000 when Mary finished the job.

One day later, before Mary had performed her part of the bargain, Bob told her that he had a change of heart.

Mary said, “Fine. I won’t kill him, but you still owe me the $10,000.”

**Choose one of the following:**

Bob is legally bound to pay the $10,000 to Mary.
Bob is NOT legally bound to pay the $10,000 to Mary.

___________

**Scenario 4:**

Mary had a popular 1970’s muscle car that she was trying to sell. Bob saw the car and thought he could easily re-sell it for $20,000. He offered Mary $15,000 for the car, and Mary accepted. She promised to deliver the car to Bob in two days, and Bob promised to pay her upon delivery.

Bob went home. He was very excited, but when he got online to do research about the car, he discovered that this particular muscle car was not nearly as valuable as he thought. He could probably only sell the car for around $13,000.

Bob called Mary and said that he wanted out of the deal.

Mary said, “Too bad. We already agreed.”

**Choose one of the following:**

- Bob is legally bound to purchase the car.
- Bob is NOT legally bound to purchase the car.

___________

**Scenario 5:**

Bob and Mary negotiated the terms of a large commercial transaction. When they had finished negotiating the most important aspects of the deal, Bob said, “It looks like we see eye-to-eye on things. If you send me a written contract, I will sign it and send it back to you.”

Mary had her lawyer draft up a detailed contract and send it to Bob. The draft contract faithfully reproduced the terms that Bob and Mary had negotiated, but it also included some boilerplate terms that they had never discussed. One of the terms was a choice-of-jurisdiction clause where the parties agreed that Ohio courts would have the exclusive jurisdiction for any lawsuit about the transaction.

Bob signed the contract without reading it carefully and sent it back to Mary.

A few months later, Bob and Mary had a major dispute about the transaction. Bob sent a letter to Mary threatening to sue her in Kentucky.
Mary said, “You can’t. You can only sue me in Ohio.”

Bob replied, “I never agreed to that.”

**Choose one of the following:**

- Bob is legally bound to bring the lawsuit in Ohio if he wants to sue Mary under the contract.
- Bob is NOT legally bound to bring the lawsuit in Ohio if he wants to sue Mary under the contract.

**Scenario 6:**

Bob was in desperate need of cash to pay for an operation for his child. He owned a painting by a renowned American artist. Recently, an appraiser had told Bob, “I have no doubt that at an auction in front of collectors, this painting would fetch no less than $100,000, and might even go for as much as $300,000.”

Unfortunately for Bob, this type of auction only happened once every two years, and he needed the money immediately. Mary knew that Bob needed the money and she knew that within two years, she would be able to sell the painting for at least $100,000.

Mary offered Bob $30,000 for the painting. After much discussion and haggling, Bob reluctantly agreed to sell for $30,000.

One day before Mary was scheduled to pick up the painting a pay the $30,000, Bob received an offer out of the blue from a collector. The collector offered Bob $200,000 for the painting.

Bob immediately called Mary and told her he wanted out of the deal.

Mary said, “Too bad. We already agreed.”

**Choose one of the following:**

- Bob is legally bound to sell the painting to Mary.
- Bob is NOT legally bound to sell the painting to Mary.

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End of Unit 1 Primer
UNIT 2 PRIMER:

MUTUAL ASSENT I

1) MUTUAL ASSENT – INTRODUCTION:

Mutual assent is one prerequisite to a legally enforceable contract. Assent means that a party expresses a willingness to be bound to the agreement.

For a bilateral contract, both parties express a willingness to be bound to their respective promises.

Illustration: Bob offers to sell his car to Mary for $3,000. Mary accepts. Bob is contractually bound to sell his car to Mary. Mary is contractually bound to buy Bob’s car. Each party makes a promise.

Please note that in bilateral contract situations each party is both a promisor (i.e., the maker of a promise) and promisee (the recipient of a promise).

For a unilateral contract, only one party, the promisor, expresses a willingness to be bound to her promise. In return, the promisee does not promise to perform as her manifestation of assent; rather her actual completion of performance constitutes her assent.

Illustration: Employer announces a $1,000 bonus for the salesperson with the most sales for the month. Elaine achieves the most sales for the month. Employer is contractually bound to pay Elaine the $1,000 bonus. If Elaine had not achieved the most sales, Employer would not be bound to pay her.

Please note that in unilateral contract situations, one party is the promisor and the other party is the promisee. Neither party serves both roles. In the above example, Elaine was a promisee – she never promised to make the most sales.

Assent is often manifested through communications we call “offer” and “acceptance.” If one party makes an offer (the “offeror”), there will be a legally enforceable contract at the moment the other party (the “offeree”) accepts the offer.

Illustration:
Alice: “I offer to sell my car to you for $4,000”.

Betty: “I accept”

Upon Betty’s acceptance, the parties are now both legally bound by their promises (i.e., they have entered the world of “contract”)

However, please note that it is not necessary for the parties to use the terms “offer” and “accept.” Indeed, most manifestations of assent in real life do not use “offer” or “accept,” but still operate as offers and acceptances nonetheless.

Please also note that there are many times when it is not clear who made the offer or who made the acceptance. For example, mutual assent might take the form of the parties signing a contract after a series of negotiations. Clearly we have assent in that situation – the signing of the contract – but it is not clear if there was an actual offer or acceptance.

Finally, in other situations, we cannot always spot the precise moment a contract is formed even though the parties’ subsequent performance of their respective promises is clear evidence of mutual assent.

2) **Asent Communications:**

Each of the following communications has legal consequences in the assent process:

- **Offer** (aka “bids”, “orders”): The offeror will be legally bound upon acceptance by offeree [Please read Rest 2d § 24]

- **Acceptance:** When the offeree accepts the offer, we have a legally binding contract [Please read Rest 2d § 63(a)]

- **Rejection** (you “reject” an offer): When the offeree rejects an offer, she “kills” the offer (i.e., the offer terminates and she can no longer accept the offer if she later changes her mind). [Please read Rest 2d § 36]

- **Counteroffer:** When offeree responds to an offer with a counteroffer, she is rejecting the offer and making a new offer. [Please read Rest 2d § 39]

- **Revocation:** When an offeror revokes her offer, the offeree no longer has the power to accept the offer (i.e., the offeror has “killed” the offer). [Please read Rest 2d § 42]
Please note that a revocation can be direct or indirect. An indirect revocation is where the offeror takes action inconsistent with the offer still being open and the offeree obtains reliable information to that effect. [Please read Rest 2d § 43]

Illustration: I own the Mona Lisa. I offer to sell it to you for $500 million. While you are considering my offer, you find out from a respected and well-informed art dealer that I have sold the Mona Lisa to another buyer. You can no longer accept the offer.

The following communications have NO legal consequences (i.e., they are not “assent communications” – they do not manifest assent, nor do they operate as counteroffers, rejections, or revocations):

- Invitations (e.g., “I am accepting offers for my car”)
- Queries (e.g., “Would you take $4,000 for your car?”)
- Expressions of intent (e.g., “I want to sell my car for $2,000”)

[this is not an exhaustive list, but these are the most helpful ones]

3) **Objective Approach to Assent and Contract Formation:**

Contract law takes an **objective approach to assent**. This means that in determining whether a party assents to a contract, you determine if there was a “manifestation” of assent. The law is not concerned with whether a party had the subjective intent to be bound by her actions and/or communications. We look **objectively** at her actions and communications.

The standard the law uses to determine if one’s conduct or express communication constitutes a manifestation of assent is **whether a reasonable person in similar circumstances would understand it to be a manifestation of assent** (applicable to either an offer or acceptance). [Rest 2d §§ 19(2), 24]

4) **The Offer:**

An offer is a **manifestation of willingness to be bound immediately upon offeree's assent** [Rest 2d § 24]
“Bids” and “orders” are common types of offers. When a contractor makes a “bid” for a contract, she is making an offer she hopes the offeree accepts over other bids. If you make a “bid” at an auction, you are hoping the auctioneer accepts your bid. When you “order” something online, you are making an offer to the seller of the goods, which the seller may accept or reject.

5) **Acceptance:**

An acceptance is a manifestation of willingness to be bound to the terms of an offer. [Rest 2d § 50]

A *qualified acceptance* is NOT an acceptance – it is a counteroffer.

**Example:**

“Yes, I will buy your car for $4,000 if you also throw in your bicycle.”

[Please read Rest 2d § 59 and comment b to Rest 2d § 39]

A *grumbling acceptance* is an acceptance.

**Example:**

“Yes, I will buy your car for $4,000, but I think is only worth $3,000.”

6) **Acceptance must occur while the offer is still effective:**

An offeree may not accept an offer if the offer is no longer effective. An offer is no longer effective if any of the following occurs *before offeree’s acceptance* [Please read Rest 2d § 36]:

- The offer has *expired by its terms* (e.g., “This offer is open until Sept 22, 2016”) [Please read Rest 2d § 41(1)]

- The *passage of a reasonable time* (i.e., the offer has “lapsed”) – when the offer has no express expiration date, it is open for a reasonable duration, not indefinitely. Please note that offers made through instantaneous communications (e.g., telephone, face-to-face, etc.) expire when the conversation ends unless the offeror expressly or implicitly indicates otherwise. [Please read Rest 2d §§ 41, 64]
**Revocation** – the offeror can revoke her offer at any time before the offeree has accepted it, even if the offeror has set a date that has not yet expired. You will understand this better when we discuss the doctrine of consideration later in the semester. [Please read Rest 2d § 42]

**Rejection** – the offeree “kills” the offer by rejecting it [Please read Rest 2d § 38]

**Counteroffer** – a counteroffer operates the same as a rejection – it kills the offer (i.e., offeree rejects the offer and makes a new offer) [Please read Rest 2d § 39]

**Death/incapacity of offeror** – the offer dies when the offeror dies or becomes incapacitated before acceptance. [Please read Rest 2d § 48]

**Death/incapacity of offeree** – if the offeree dies or becomes incapacitated, her estate or guardian cannot accept the offer.

**Crossed offers:** If Alice and Betty coincidentally send offers to each other with the same terms, there is NO contract.

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7) **The offeree is the only person who can accept the offer:**

Only the offeree can accept the offer, but some offers may have numerous offerees. A reward offer, for example, has many offerees. If I offer a $500 reward for the return of my lost cat, Fluffy, anyone who is aware of the reward offer is an offeree.

In addition, an offeror may expressly or implicitly direct an offer to a class of offerees, and not an individual offeree. Any person in that class may accept the offer. [Please read Rest 2d § 52, 29]

An offeror may make the same offer to two or more offerees, but in such a case, the offeror puts herself at risk that both offerees will accept the offer.

Consider the following illustration:

Sam wants to sell his house. Both Betty and Bob are very interested in buying the house, but are unaware of each other’s interest. To induce the potential buyers to buy the house, Sam separately sends each of them the following offer by e-mail:

“I offer to sell you my house for $500,000.”
Betty and Bob were unaware that Sam made the same offer to each of them.

Betty responds at 10:00 am the next day:

“I accept”

Bob also responds the next day at 10:01 am:

“I accept”

Sam is now contractual bound to sell his house to Betty. He is also contractually bound to sell his house to Bob. Sam will have to breach one of those contracts and pay damages to either Betty or Bob.

Some offers that are made to the public or a large group of people implicitly (and sometimes explicitly) limit acceptance to the first offeree to accept. The language of the offer and the circumstances are very important to the legal analysis.

8) **Manner of acceptance vs. medium of acceptance:**

“Manner of acceptance” usually means acceptance by promise or performance.

We discuss acceptance by promise or performance in more detail in Items 9-16, below.

“Medium” usually means the medium offeree uses to communicate acceptance to the offeror (e.g., fax, letter, e-mail, face-to-face communication, telephone, text message etc.)

We discuss the medium of acceptance in more detail in Item 16, below.

9) **Manner of acceptance - promise or performance:**

The older common law approach classified an offer as either (1) an offer seeking to form a unilateral contract; or (2) an offer seeking to form a bilateral contract. You should already be familiar with these terms (see Item 1, above).

The more modern approach classifies an offer as either:
An offer seeking a return promise from the offeree as the manner of acceptance (which is effectively the same as an offer seeking to form a bilateral contract); or

An offer seeking return performance from the offeree as the manner of acceptance (which is effectively the same as an offer seeking to form a unilateral contract)

Whether you use the older terminology or the more modern terminology, the important issue is the same: You need to determine whether the offeror is seeking a return promise or return performance from the offeree.

Here are the basic rules:

If the offeror is seeking a return promise, the offeree may NOT accept by return performance.

If the offeror is seeking return performance, the offeree may NOT accept by return promise.

If the offeror is indifferent about whether the offeree accepts by promise or performance (or if offeror’s language is ambiguous about the manner of acceptance), the offeree may accept by either promise or performance.

The offer controls the manner of acceptance. We often say the offeror is the master of the offer. She can demand any manner of acceptance she wants.

Thus, to determine whether the offeror is seeking acceptance by promise or performance, we must look to her manifestation of assent. Specifically, we look at the express language of the offer and the context of the offer. Remember to use the objective approach ("would a reasonable person understand the offer to require acceptance by promise/performance/either?")

AN OFFER SEEKING ACCEPTANCE BY PERFORMANCE – DETAILS:

If an offer seeks acceptance by performance exclusively (either expressly or implicitly):

Offeree’s acceptance by complete performance binds the offeror. Offeree cannot accept by promise.

To bind the offeror, the offeree must have knowledge of offer before she completes performance. If the offeree performs without
knowledge of the offer, her performance is NOT acceptance of the offer.

*Illustration:* You offer a reward for return of your lost cat, Fluffy. I am unaware of the reward offer. After I find your cat and return it to you, I discover that you had a reward offer outstanding. You are not legally bound to pay me the reward because I never accepted your offer – i.e., I performed before I knew of the offer.

An offeree’s mixed motives for performing are irrelevant. As long as she had knowledge of the offer, her performance is considered acceptance.

*Illustration:* I am playing golf in a tournament. The organizers have a sign on the 15th hole that says “Hit a hole-in-one on the 15th and win a car.” I see the sign before I take my swing. I get a hole in one. The organizers argue that I was trying to get a hole-in-one regardless of the offer. Even if their argument is true, the organizers will likely lose in court simply because my mixed motives are irrelevant. My performance is acceptance as long as I have knowledge of the offer.

The offeree is never bound because she never promised to perform.

The offeree’s **completion of performance (full performance) is acceptance.** Part performance is not acceptance. HOWEVER, the law provides protection to the offeree who has begun performance: The offeror cannot revoke her offer once offeree has begun performance.

*Illustration:*

A fierce wind blew my hat into a tree. I offer you $100 if you retrieve my hat.

[I have made an offer seeking return performance.]

You say “I’ll do it.”

[You have NOT yet accepted my offer – I was seeking performance as acceptance, not a promise.]

You begin to climb the tree.

[You have still NOT accepted my offer – you accept when you complete performance. Here you have only begun performance.]
When you are halfway up the tree, I say “Never mind.”

[I have attempted to revoke my offer, which I can usually do any time before you accept the offer. HOWEVER, Section 45 of the Restatement provides that I cannot revoke my offer once you have begun performance – I must give you’re a reasonable time to complete the performance.]

Read Rest 2d § 45. It uses unfamiliar terms like “option contract,” but it is simply saying that in this situation, the offer must keep the offer open for a reasonable time once the offeree has begun performance.

*Note: when applying §45, courts often struggle to determine whether offeree’s actions constitute beginning/tender of performance, which prevents offeror from revoking the offer, or merely preparation for performance, which does not offeror from revoking the offer.

**Illustration:**

I say to you: “I want my house painted by next week. If you can do it, just show up and paint it before next week. If you can’t, don’t worry about it.”

You go out and purchase paint.

Do your actions constitute beginning performance, or just preparation for performance? If they constitute a beginning of performance, I may not revoke my offer. If they do not, I may revoke my offer.

Read the comments to Restatement §45 to see if they give any guidance.

Although the offeror may expressly require performance for any type of transaction, there are generally only a limited number of transactions where, without express language in the offer, the law will say the context objectively indicates the offer implicitly limited acceptance to performance. The following are those transactions:

**Reward offer**

(“If you find my lost cat, I will pay you $100)

**Contest**

(“If you write the best essay, I will pay you $100”)

**Bonus/incentive contract**
(“If you reach your sales targets for this year, I will pay you $100”)

**Insurance contract**

(“If you pay your premiums, I will indemnify you upon the occurrence of a certain event.”)

**Guaranty contract**

(“If you lend money to my friend, I will repay you if my friend does not repay you.”)

**Employee manual**

If an employee does not have a contract for a specific duration, she is an **employee-at-will**. An employee-at-will can be fired for a good reason, a bad reason, or no reason. She also has the right to resign for a good reason, a bad reason, or no reason.

Sometimes employers will create an employee manual that creates disciplinary procedures for violations of the rules in the manual. A court might find that the disciplinary procedures in an employee manual are binding on the employer and restrict the employer’s right to fire an employee for a good reason, a bad reason, or no reason at all. Typically, however, the employees do not promise to continue working for the employer. They can quit their jobs for a good reason, a bad reason, or no reason at all.

If the employer is bound to follow the employee manual and the employee can leave at any time, it must be a unilateral contract (i.e., only one party is bound). I suppose the employer’s implied offer is “If you begin work here or continue to work here, I will follow the disciplinary procedures in the employee manual.”

Please note that not all courts consider employment manuals to be offers to contract. We will explore this issue in further detail in Unit 3.
11) **An Offer Seeking Acceptance by Promise – Details:**

If an offer seeks *acceptance by promise exclusively* (either expressly or implicitly)

- Only a return promise is acceptance (part or full performance is not acceptance).

- The acceptance binds both offeror and offeree.

12) **An Offer That Is Indifferent or Ambiguous Regarding Acceptance by Promise or Performance – Details:**

If an offer is *ambiguous or indifferent regarding acceptance by promise of performance*:

- Offeree may accept in any reasonable manner (promise, beginning performance, or completion of performance)

- Offeree’s acceptance by promise means both offeror and offeree are bound – it is a bilateral contract.

- Offeree’s beginning of performance or tender of performance* has the same effect as acceptance by promise – both offeror and offeree are bound (it is an implicit bilateral contract).

  *Note: Courts often struggle to determine whether offeree’s actions constitute beginning/tender of performance, which is acceptance, or merely preparation for performance, which is not acceptance. This is the same issue court’s struggle with when applying Section 45 is the case of a pure unilateral contract situation (see Item 10, above).

13) **The UCC Approach to Acceptance by Promise or Performance:**

When the proposed contract involves a sale of goods, UCC Article 2 does not differ significantly from the common law with respect to whether an offeree may accept by promise or performance. The UCC addresses the issue in general terms only:

UCC 2-206(1)(a) provides:

- Unless otherwise unambiguously indicated by the language or circumstances... an offer to make a contract shall be construed
as inviting acceptance in any manner . . . reasonable under the circumstances.

You should be able to see how this rule is consistent with the objective approach to contract formation.

The interesting issue with acceptance by promise or performance under the UCC involves an order where buyer requests *prompt or current shipment* by seller.

**The set up:** Imagine the buyer needs widgets urgently. She sends an order to seller.

“Please immediately ship 1,000 x-12 widgets @ $10.00 per widget FOB.”

If the seller responds by saying “Yes, I will ship them to you immediately,” does that operate as an acceptance? Or, is seller only permitted to accept by actually shipping the goods?

**UCC 2-206(1)(b)** solves the problem by providing:

Unless otherwise unambiguously indicated by the language or circumstances . . . an order or other offer to buy goods for prompt or current shipment shall be construed as *inviting acceptance by either a prompt promise to ship or by the prompt or current shipment of . . . goods . . .* .

In other words, when the buyer’s order requests prompt or current shipment, the seller may accept the buyer’s offer by either promising to ship the goods or by actually shipping them.

There is **one more wrinkle** to this rule. Imagine the seller has no more x-12 widgets in stock. However, the seller has the new and improved x-13 widgets, which she reasonably believes will suit buyer’s needs. She ships the x-13 widgets to the buyer. When the buyer receives the widgets, she realizes that she cannot use them because they are slightly different from the x-12 widgets that she ordered.

The seller was trying to help the buyer by shipping the x-13 widgets, but in doing so, she fell into a trap: shipping the goods had two legal consequences:

(1) Shipping the x-13 widgets operated as an acceptance of the buyer’s order, so there is a contract between the parties.

(2) Shipping the x-13 widgets also operated as a breach of contract. The x-13 widgets were non-conforming goods because they did
not conform to the contract specifications (i.e., the contract required x-12 widgets).

Fortunately, the UCC protects sellers in situations where the buyer requests prompt or current shipment. The drafters of the UCC created the following provision in 2-206(1)(b):

... 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.

14) **MUST OFFEREES PROVIDE NOTICE TO OFFEROR OF HER ACCEPTANCE?**

**Acceptance by promise:** The offeree must provide notice to offeror (of course, she must: the offeree cannot say “I accept” to herself in the mirror and expect it to bind offeror) [Rest 2d § 56]

**Acceptance by performance:** Notice of acceptance is unnecessary unless offeree has reason to know that offeror will not learn of performance within reasonable time. [Rest 2d § 54]

**UCC approach** – Read 2-206(2)

15) **SILENCE AS ACCEPTANCE:**

In Unit 1, we discussed a well-known common law default rule, but we simplified it a bit:

Mere silence is not assent to a contract unless the parties agree otherwise.

A better statement of the rule might be:

An offeree’s silence or inaction in response to an offer will not operate as an acceptance unless the parties have previously agreed otherwise or the circumstances give offeror reason to believe offeree’s silence or inaction operates as an acceptance.

Please remember that the rule merely restates the common law’s **objective approach** to contract formation. Under normal circumstances, the offeror is not reasonable in believing that an offeree intended her silence or inaction to be an acceptance.
If silence or inaction were deemed to be assent, the only way for an offeree to prevent herself from being contractually bound to every offer would be to actively reject every offer. The costs of such a rule would be extremely high.

However, an offeror would be reasonable in believing the offeree intended her silence or inaction to be an acceptance if the parties already had an agreement to that effect. In addition, prior dealings between the parties, or customary practice in the industry or community to which offeror and offeree belong might make offeror’s belief reasonable.

16) **Medium/Mean of Acceptance:**

The offeror is the master of the offer. She can require acceptance by any medium she desires [Please read Rest 2d §§ 58, 30(2), 60]

*Illustration 1:* “I offer to sell you my 1998 Toyota RAV 4. To accept this offer you must dance the mambo while wearing a pink gorilla costume.”

In response, you send me the following e-mail: “I accept your offer.”

You have NOT accepted my offer – you did not dance the mambo while wearing a pink hat

*Illustration 2* (less ridiculous): “I offer to sell you my 1998 Toyota RAV 4. To accept this offer you must respond by e-mail.”

In response, you call me on the telephone saying: “I accept your offer.”

You have NOT accepted my offer – you did not use e-mail.

If the offeror does not require a specific medium of acceptance, the offeree may accept by any medium that is reasonable under the circumstances [Rest 2d § 30(2), 65 and UCC 2-206(1)(a)].

Factors relevant to reasonableness of medium: speed, reliability, etc.

It is usually reasonable (but not always) for the offeree to use the same medium to communicate acceptance that the offeror used to transmit the offer.
17) **Acceptance, the Mirror-Image Rule and the Last-Shot Rule:**

**Mirror-image rule:**

Under the common law, a putative acceptance does not operate as an acceptance unless it is the mirror image of the offer. If the acceptance has terms that are different from or additional to the terms of the offer, it is not an acceptance, but a counteroffer.

*Illustration:* Client sends an order to Cleaning Company for cleaning services. Client uses its own standard order form. The bottom of the order form states:

> “Any disputes regarding the services shall be governed by the laws of Ohio.”

Cleaning Company expressly “accepts” Client’s order using its own standard acknowledgment form. The bottom of the acknowledgement form states:

> “Any disputes under this contract shall be governed by the laws of Kentucky.”

Applying the mirror image rule, Cleaning Company’s putative “acceptance” does not operate as a legal acceptance because it has terms that are different from Client’s order. It is not the mirror image of Client’s offer.

**Last-shot rule:**

The original offeror might fall into the trap of the last-shot rule. After receiving the “acceptance” from the offeree with different or additional terms, the offeror might not notice the different or additional terms. If the offeror then performs her promise, she will be bound by offeree’s terms. Why? Because of the mirror image rule, the “acceptance” was really not an acceptance, but a counteroffer. When the original offeror performed in response to the counteroffer, she was manifesting assent to the term of the counter offer.

Thus, whoever gets off the last shot (i.e., the last communication before performance) will get the terms she wants.

*Illustration:* Client sends an order to Cleaning Company for cleaning services. Client uses its own standard order form. The bottom of the order form states:

> “Any disputes regarding the services shall be governed by the laws of Ohio.”
Cleaning Company expressly “accepts” Client’s order using its own standard acknowledgment form. The bottom of the acknowledgement form states:

“All disputes under this contract shall be governed by the laws of Kentucky.”

We already concluded that under the mirror image rule, these communications do not result in a contract. What if the Cleaning Company goes to Client’s building and Client allows Cleaning Company to actually perform the cleaning services it ordered. Performance indicates there was a contract between the parties, but will their contract be governed by Client’s terms (i.e., Ohio law as the governing law) or Cleaning Company’s terms (i.e., Kentucky law as the governing law)?

The last shot rule means that Cleaning Company’s “acceptance” was a rejection of Client’s offer and a counteroffer. Client’s conduct of allowing Cleaning Company to perform the services was an implicit acceptance of Cleaning Company’s counteroffer. The parties have a contract, the terms of which are those terms in Cleaning Company’s putative acceptance.

The UCC changes the common law mirror-image and last-shot rules for contracts involving transactions in goods [we will study this in detail in Unit 3 when we take a careful look at UCC 2-207].

18) Acceptance and the Mailbox/Dispatch Rule:

We know that an offeror can revoke her offer at any time before offeree accepts the offer (see Item 6, above). The mailbox rule addresses situations where the offeree has accepted the offer by notice of some kind – usually a letter, but maybe by e-mail – but the offeror has not yet received the notice of acceptance.

The mailbox rule provides: An acceptance is effective upon dispatch, which means the offeror can no longer revoke her offer, even if she has not received the acceptance.

The word dispatch means the communication is removed from immediate control of the offeree.

Illustration 1: Offeree places her acceptance in the mailbox. This action constitutes dispatch and the offeror can no longer revoke her offer.
Illustration 2: Offeree places her acceptance in the hands of her employee. This action does NOT constitute dispatch because she controls her employee. The offeror may still revoke her offer.

For an acceptance to be effective upon dispatch, it must be made through a reasonable medium and it must be properly dispatched. If the acceptance is not made through a reasonable medium or if it is not properly dispatched, the acceptance is not effective until received by the offeror unless the acceptance arrives as quickly as it would have through a reasonable medium and proper dispatch. [Please read Rest 2d § 67]

Illustration:

October 10: Offeror sends offer, by mail, to offeree.

October 12: Offeree sends acceptance by mail. Offeree wrote the proper address on the envelope, affixed proper postage, and placed the acceptance in an official mailbox.

October 13: Offeror calls offeree by phone to revoke the offer.

October 20: Offeror receives offeree’s acceptance in the mail.

Is there a contract between the parties?

Analysis:

An acceptance is effective upon dispatch if it is made through a reasonable medium and properly dispatched. An offeror may not revoke her offer after the acceptance has become effective.

It is most likely that offeree’s acceptance was via a reasonable medium. The offeree made her acceptance by mail. The offeror transmitted the offer by mail and the acceptance employed the same medium as the offer. Without other facts or circumstances that indicate the acceptance should be communicated more quickly than the offer, acceptance by mail is most likely reasonable.

It is most likely that offeree’s acceptance was properly dispatched. The facts say that the offeree addressed the letter properly, with the proper postage, and mailed it in an official mailbox.

The offeror attempted to revoke her offer after the acceptance became effective. The facts say that offeree mailed the acceptance on October 12, but offeror did not call to revoke the offer until October 13. Because the acceptance was effective on October 12,
offeror’s attempt to revoke the offer on October 13 had no legal effect.

**Change the following facts:**

**October 12:** Offeree sends acceptance by mail, but affixed the wrong postage and wrote the address incorrectly.

**Analysis:**

Your analysis would change because the acceptance was not properly dispatched. Under these new facts, the acceptance would not be effective on October 12 unless it arrived as quickly as it would have had offeree addressed it properly and affixed the proper postage. The facts say the acceptance arrived on October 20. When would it have arrived if it had been properly dispatched? We need more facts for a complete analysis.

**The mailbox rule is a default rule,** which means the parties can change it. Remember, the offeror is the master of the offer, so she may expressly state in her offer that she will not be bound until she actually receives the offeree’s acceptance.

Please note that the dispatch/mailbox rule only applies to the acceptance. **All other “assent communications”** (e.g., offers, revocations, rejections, and counteroffers) are **effective upon receipt.**

There is one more interesting and confusing issue with respect to the mailbox rule: What happens if the acceptance is lost in the mail?

**Illustration:**

Oct. 1: Offeror mails an offer to sell his car to Buyer.

Oct 3: Offeree receives the offer and immediately mails an acceptance to Offeror.

Unfortunately, the acceptance letter gets lost in the mail, through no fault of Offeree, and Offeror never receives it. Because Offeror never received the acceptance, he thought Offeree was uninterested. After the offer had lapsed, Offeror sells the car to someone else. When Offeree finds out, she sues.

Under strict application of the mailbox rule, it looks like Offeror will be liable to Offeree because a contract was formed as soon as Offeree mailed the acceptance, even though Offeror never received the acceptance.

However, most courts would likely follow the Restatement approach and protect the offeror in such a situations. Under the Restatement (see §63
cmt. b), the offeror’s obligations are implicitly conditioned on receipt of the acceptance. In other words, when the offeree mails the acceptance, a contact is formed, but offeror will only be obligated to perform if she actually receives notice of the acceptance.

This reasoning might seem strange to you, but it makes sense if you consider the purpose of the mailbox rule: the mailbox rule was intended to prevent offeror from revoking her offer after the offeree had dispatched the acceptance. Indeed, the mailbox rule is poorly articulated. Instead of stating “an acceptance is effective upon dispatch,” a more accurate formulation of the rule would be “an offer may not revoke her offer after the offeree has dispatched the acceptance.”
EXERCISES – UNIT 2:

1) Is there a contract between Bob and Mary?

Refer to: Item 2, above; Rest 2d § 61 and Rest 2d § 39 comment b

Bob: “I offer to sell you my car for $10,000. How about it?”

Mary: “Yes, I will buy your car for $10,000, but will you also throw in your unicycle?”

Is there a contract? Explain

2) Which of the following is most likely an offer? Be prepared to explain.

Refer to: Item 2, above

"I am thinking about selling my house for $150K."

"Do you want to buy my house for $150K."

"I will sell my house to you for $150K."

"I want to sell my house for $150K."

"I want to sell my house to you for $150K."

"We are authorized to offer you full car loads (80-95 barrels per carload) of Michigan salt, delivered to your city, at 85 cents per barrel. We would be pleased to receive your order."

3) Timely acceptance, or not?

Refer to: Item 6, above; Rest 2d §§ 41, 64

Bob and Mary were having a conversation over the telephone. During the course of the conversation, Mary offered to sell her car to Bob. They discussed it briefly, but Bob did not reject or accept the offer, and Mary did not revoke her offer. They continued to talk on the telephone for another 15 minutes without mentioning the potential sale of the car.

The next day, Bob called Mary and said “I accept your offer.”
Is there a contract between the parties?
Would your answer be different if they has been chatting by text messaging, rather than on the telephone?

4) Does Mr. Trump have a good argument?

Refer to: Items 1, 3, and 9 above

Comedian and political commentator Bill Maher made the following statement as a guest on the Tonight Show with Jay Leno:

_"I am willing to offer $5 million to Donald Trump, to donate to the charity of his choice – the Hair Club for Men, the Institute for Incorrigible Douchebaggery – if he proves he is not the illegitimate spawn of an orangutan."_ [paraphrased and not an exact quote]

Mr. Trump produced his legal birth certificate showing he was the legitimate “spawn” of his father and mother; neither of them was an orangutan.

Mr. Trump sues Mr. Maher for $5 million under a theory of contract.

_What type of contract is Mr. Trump alleging?_

_Is Mr. Trump’s argument a good one? Explain._

5) Silence as acceptance, or not?

Refer to: Item 15, above; Rest 2d § 69

I send a book to you by mail that was completely unsolicited. Along with the book, I send the following note:

"If you keep the book, you must pay $50 for it. If you return it, you will not be charged."

You keep the book. You read it, dog-ear its pages, and lend it to friends. I demand $50 from you.

_What is the common law’s approach to the problem?_ Read Rest 2d and § 69(2) [often referred to as “act of dominion”].

_Do does federal law change the common law?_ Read the following relevant federal provision.

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, “unordered merchandise” means merchandise mailed without the prior expressed request or consent of the recipient.

6) Whose terms control if we applied the common law?

Refer to: Item 17, above; Rest 2d § 59

Buyer sent a simple order form to Seller:

“100 bar stools (item #34567) @ $30 per stool FOB.”

Seller replied with its own standard acknowledgment form, which said:

“We happily accept your order for 100 bar stools (item #34567) @ $30 per stool FOB.”

The back of Seller’s form had the following clause:

“All disputes under this transaction will be resolved by binding arbitration between the parties.”
Seller delivers the barstools. Buyer accepts delivery and eventually pays.

*Is the arbitration clause part of the agreement between the parties? Explain. Please pretend the common law would apply, even though it would not.*

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7) **Is there a contract between the parties?**

Refer to: Item 18, above; Rest § 63

Contractor sent the following offer to Motel:

“As we discussed earlier in the day, we will paint the exterior of your motel for $25,000, beginning the first of next month. We will keep this offer open for a week. Please let us know within the week.”

Motel manager drafted the following message:

“Yes. We accept. Please begin work on the first of next month.”

Motel manager asked her day-shift clerk to hand-deliver the message to the Contractor on his way home from work.

At 9:00 pm the same night, Contractor called Motel manager and said:

“Sorry, we cannot do the painting work for you. A large project came up at the last minute and we need to focus all our resources there.”

It turns out that the clerk did not deliver the message that night. Because the manager did not indicate any urgency, he decided to deliver it the next morning on his way to work instead.

*Is there a contract between the parties? Explain*

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8) **The customer who is a law professor:**

Refer to: Item 12, above

Professor Gugle loved his iced lattes. He was a frequent customer of a small coffee shop. The coffee shop had a rewards program for customers. Each time a customer bought a cup of coffee, the barista would punch a hole in the customer’s rewards card. When the customer
had reached a certain number of punch-holes, she would receive a free coffee drink of her choice.

Professor Gugle kept two rewards card. He kept one in his wallet, which he used when he went to the coffee shop for lunch or after work. He had a second card in his fanny pack, which he used when he stopped by the coffee shop after his morning walk.

One day, Professor Gugle, went to the coffee shop during lunch. He had not been there for a month because he was travelling the world during his excessively generous summer vacation. He was very excited because he had the requisite number of punch-holes on his card to get a free iced latte. When he presented his card, the barista said: “Sorry, we have changed our rewards program and are no longer honoring those old rewards cards.”

Is the coffee shop legally obligated to honor the card he presented?

His other card only had only half the number of punches required for a free coffee. Is the coffee shop legally obligated to honor that second card?

9) How should Mary revoke her offer?

Refer to: Item 10, above; Rest 2d § 46

Mary’s dog Buffy was been missing for a full day. Desperate to find her beloved dog, she placed a posting on her town’s internet community bulletin board offering a $2,000 reward for the safe return of Buffy.

Her neighbor, Bob, saw the posting and said to her:

“I am good at finding lost pets. I do it all the time. There is a little bit of Ace Ventura in me. Ha ha ha. I’ll look for Buffy. I could use the $2,000.”

A day later, Mary’s daughter gave her a new puppy. Mary immediately fell in love with the new puppy and decided she no longer cared about whether Buffy returned.

How should Mary revoke the offer? Explain.

10) Has Elaine accepted the offer?

Refer to: Item 10, above; Rest 2d § 51
Elaine was walking on a hiking trail when she came across a friendly dog. She looked at the dog’s collar and saw the name and address of the dog’s owner, Mary. Elaine was not aware that Mary had offered a $2,000 reward for the return of her beloved Buffy.

Elaine put Buffy in her car and began to drive to Mary’s house. On the way, she stopped at a red light and saw a poster on a nearby telephone pole offering a reward for the return of Buffy.

Elaine then continued on to Mary’s house and returned Buffy, safe and sound. Elaine wants the $2,000.

**Is Mary bound to give Elaine the $2,000 reward? Explain**

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11) **Did Homeowner revoke his offer?**

Refer to: Item 10, above; Rest 2d § 45

Homeowner sent an e-mail to Painter:

“Painter, I am going to be in Italy on vacation for 2 weeks. I would like you to paint my house that standard red you showed me. I know you told me that you are very busy this time of year, so I won’t ask for a commitment from you, but if you paint my house while I am away, I will pay you $10,000. See if it fits into your schedule. Arrivederci!”

Painter bought the standard red paint for homeowner’s house. It was a color he had used a hundred times before and would use a hundred times again. He loaded the paint into his truck that evening, planning to go to Homeowner’s house the next morning to start work. When he woke up the next day, he had a text message from Homeowner:

“Ciao from Italy! I’ve decided I don’t want my house painted anymore. Don’t do anything to it.”

**Did Homeowner revoke the offer? Explain**

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12) **What is your advice to Seller?**

Refer to: Item 13, above; UCC § 2-206

Seller received the following order from Buyer:
“We are in desperate need of coal for our furnaces. Please immediately send 10 tons of coal with sulfur content below 1% at your listed contract price.”

Seller only had five tons of coal with sulfur content below 1% available for immediate shipment. Seller had another five tons with sulfur content of 1.7%. Seller knew that Buyer often used coal with a sulfur content of up to 2.0% in its furnaces.

Seller plans to ship ten tons to Buyer immediately (five tons under 1% and five tons of 1.7%).

What is your analysis of the situation and your legal advice to Seller?

13) Double dipping:

Refer to: Item 12, above

Mary was a professional long-distance runner. An athletic shoe company wanted to sponsor her for a marathon in Cincinnati. Mary agreed. She signed a contract with sponsor. Mary promised to run in the Cincinnati marathon and the sponsor agreed to pay her $10,000. In addition, the sponsor promised to pay her a $20,000 bonus if she won the race.

A few weeks later, the organizers of the marathon announced for the first time that they would reward the winner of the race with a $10,000 prize.

Mary ran the race and won.

She demands the $10,000 prize from the organizers. The organizers refused to pay her because she received a $20,000 bonus from her sponsor.

Is Mary entitled to the $10,000 prize?

14) The claim check:

Refer to: Item 3, above

Seller sent an offer to Buyer by mail:

Bob drove to the local multiplex theater and parked in the theater’s large parking garage. When he entered the parking garage, he was given a ticket. The back of the ticket read:
“This is not a contract for bailment. You park at your own risk. We are not responsible for any damage or theft.”

Bob never looked at the back of the ticket, so he was unaware of what was written there. In addition, the attendant never told Bob to look at the back of the ticket when he handed it to him.

Someone broke into Bob’s car when he was watching the movie. The thief stole his GPS system.

**Bob wants to sue the theater. Is he bound by the terms on the back of the ticket?**

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**15) Is there a contract between the parties?**

Refer to: Item 18, above

Seller sent an offer to Buyer by mail:

“I know you have had your eye on my 1966 Chevy Impala. I will sell it to you for $8,000.”

**On September 1,** Buyer sent a letter of acceptance that was properly addressed and had the proper postage.

**On September 2,** Buyer had second thoughts and called Seller to say he would not buy the car.

**On September 3,** Seller sold the car to another person.

**On September 4,** Seller received the letter of acceptance that Buyer mailed on September 1.

**On September 5,** Buyer calls Seller to say he changed his mind again and wants the car for $8,000 “as we already had agreed.”

**Is Seller obligated to sell the car to Buyer? Explain. How do you feel about this result?**

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**16) Comparative law: a different approach?**

Refer to: Item 18, above; Rest 2d § 63

The Contract Law of the People’s Republic of China has the following provisions:
Article 17: An offer may be withdrawn. The withdrawal notice must reach the offeree before or at the same time as the arrival of the offer at the offeree.

Article 18: An offer may be revoked. The revocation notice must reach the offeree before the dispatch of an acceptance notice by the offeree.

Is our law the same? Is it functionally the same?

End of Unit 2 Primer
UNIT 3 PRIMER:  
MUTUAL ASSENT II

1) ADVERTISEMENTS, PRICE QUOTATIONS, CATALOGS, ETC.:

The general rule is that advertisements, catalogs, and price quotations are not offers. They are merely invitations to bid. In other words, they are communications that are intended to solicit offers from the other party.

2) PRICE QUOTATIONS:

Sellers and service providers often provide potential customers with price quotations, such as “We can paint your house for $5,000” or “We can get you the parts you need for $12 each.” These price quotations might be oral or written. In either case, the issue is the same – is the price quotation an offer that the other party can accept, thereby binding the person making the price quotation?

The general rule is that price quotations are not offers. They are invitations to bid.

In other words, the person receiving the price quotation is not reasonable in believing a price quotation is an offer. The reason for this rule is the customary way we do business. The seller displays her wares and expects potential buyers to make offers. The same applies to the service provider and her potential customers. Of course, sellers and service providers can change this paradigm by clearly indicating that the price quotation is an offer. In addition, circumstances, industry practices, or prior dealings between the parties might make it reasonable for the recipient to believe the price quotation is an offer.

3) CATALOGS:

Catalogs, whether in print or online, are just price quotations distributed to a wider audience.

The general rule is that catalogs are not offers. They are invitations to bid.

Indeed, as compared to price quotations, one is even less reasonable in believing a catalog is an offer. If a catalog were an offer, any and all
recipients of the catalog could bind the seller by placing an order. This would expose the seller to potentially unlimited liability.

For example, if my catalog offers a particular wristwatch for $100, could I fill 1,000 orders if I received that many responses accepting my offer? 10,000 orders? 100,000 orders? Because no one would be reasonable in believing that a seller would expose herself to this type of potentially unlimited liability, a catalog is not an offer.

4) **Advertisements:**

Similar to catalogs, advertisements are just price quotations distributed to a wider audience.

The general rule is that advertisements are not offers. They are invitations to bid. The reason for this rule is the same as the reason for the rule that catalogs are not offers.

Advertisements are generally not considered offers. An advertisement may be an offer if (1) its terms are reasonably certain [clear, definite, and specific] and (2) it limits the potential liability of the advertiser. [Under those circumstances a person would be reasonable in believing the advertisement was an offer.]

There are two situations where courts will often say advertisements are offers:

**Situation #1:** The plain advertisement that removes the possibility of potentially unlimited liability. First, let’s explain what we mean by the “plain advertisement.” Here is the paradigmatic example:

*See next page*
If I show up at the store and tender my two dollars, is Northern Electronics bound by contract to sell the product to me? The answer is no, because I am not reasonable in believing that the advertisement was an offer.

But, if we change the ad somewhat, we make it look more like an offer.

Now I have a much better argument that I am reasonable in believing the advertisement is an offer that I can accept by tendering my two dollars. The advertiser has eliminated the possibility that it will be exposed to potentially unlimited liability by:

(a) limiting **who** can accept the offer,

(b) limiting **how many items** are available under the offer, and
(c) limiting how many items each offeree may purchase.

Generally courts will only say the advertisement is an offer if the advertisement expressly has all three elements. In other words, if the advertisement has only one or two of the above elements, courts will not say the remaining element(s) are implicit.

**Situation #2:** The true unilateral contract offer – the advertised reward, contest, or incentive.

As we have seen in Unit 2, if I place an advertisement announcing a $100 reward for the safe return my lost cat, Fluffy, I have made an offer seeking performance as acceptance. There is no doubt that this type of advertisement is an offer.

The same is true for the advertisement for a contest or incentive –

**Examples:**

*The best essay on free speech will win its author a $2,000 scholarship*

*The first team to achieve suborbital spaceflight will win $10 million.*

*A finder’s fee of $50,000 to the person who introduces us to a company suitable for a merger with us, conditioned on the eventual successful occurrence of the merger.*

On the other hand, there are times when an advertised contest or reward might not be considered an offer. When a reward or contest would expose the advertiser to potentially unlimited liability it may not be an offer.

In our three examples, above, the offeror is not exposed to potentially unlimited liability. In each case, only one person can accept the offer – the person who wrote the best essay, the team that first achieves sub-orbital spaceflight, and the person who introduces the proper merger target.

But what about the broader contest that is open to everyone, not just the first person or the best performance?

**Example:**

“Buy our soft-drink products, collect the points on the bottle caps, and receive a pair of sunglasses for 100 points, a trip to France for 10,000 points, etc.”
You can see how this could open the offeror to potentially unlimited liability. Everyone is eligible to collect points and claim the “prizes.” Does this mean that if I collect 10,000 points and try to redeem them for a prize, the advertiser can refuse, claiming the advertisement was not an offer? Or, am I reasonable in believing that it was an offer because advertiser was willing to assume the risk of potential unlimited liability? If so, what makes my belief reasonable? Why would someone be willing to assume the risk that anyone and everyone could redeem points and claim prizes? How is this different from the Situation 1, plain advertisement?

5) **Auctions:**

The auction is a special type of contract formation situation. In the auction there are bidders, who make offers to purchase the goods at specific prices. The bids might take the form of very subtle winks, nods, hand gestures, shouts, raising paddles, etc. The auctioneer represents the seller and is authorized to accept the highest bid on behalf of the seller. The auctioneer’s acceptance might take the form of a hammer swing, a fist against the palm, a simple announcement of “sold” or any other similar manifestation of assent.

There are some other contract formation issues and rules that are unique to auctions. Exercises #1 and #2, below, gives you an opportunity to become familiar with these issues and rules.

6) **Intent to Memorialize:**

Often parties will “agree” to terms under circumstances where they contemplate reducing the agreement to writing. We often refer to this writing as a “memorialization.” The question that these fact patterns raise is whether the parties assented when they first “agreed” to the terms or whether they were withholding assent until the writing was completed and signed.

The applicable rule, of course, is merely the objective approach to contract: **When a formal written agreement is contemplated by the parties, was one of the parties reasonable in believing that the other party assented to the contract terms before they were reduced to writing?**

The fact patterns that implicate intent to memorialize usually fit within one of the following two paradigms:

**Paradigm 1:**
During negotiations, parties will often **orally indicate agreement** to proposed terms by saying “OK” or “yes” or “agreed” under circumstances **where the parties are contemplating a written memorial of their agreement** (i.e., a written contract). The issue in these situations is whether: (1) the parties were withholding assent until their agreement was reduced to writing; or (2) their oral agreements were manifestations of assent, with the subsequent writing a mere formality.

In the typical fact pattern, one party backs out before the written agreement is completed and signed and the other party sues based on the promises and agreements made during negotiations.

**Paradigm 2:**

The parties sign a “Letter of Intent” (“LOI”) or a Memorandum of Understanding (“MOU”) that contemplates a later, more detailed written agreement. The issue in these situations is whether: (1) the parties were withholding assent until their agreement was reduced to a more detailed written agreement; or (2) their original LOI or MOU was binding.

In the typical fact pattern, one party backs out before the detailed written agreement is completed and signed and the other party sues based on the promises and agreements made in the LOI or MOU.

Lawyers understand that there is a question about whether LOIs and MOUs are documents of assent. When they draft these documents, they carefully spell out which parts are legally binding and which parts are not.

**The law:** Contract law’s approach to both intent to memorialize paradigms is merely the objective approach to contract formation: was one party reasonable in believing that the other party’s initial agreements were her assent, and that she was not withholding her assent until the final written document was completed and signed.

*Read Restatement Section 27, and its comments,* to understand what facts one should consider in determining the reasonable belief of the parties in intent-to-memorialize situations.

7) **Battle of the Forms – UCC 2-207:**
The battle of the forms (or the “battle of terms”) usually refers to the following situation (although actual fact patterns may vary somewhat):

**Buyer sends an “order”** (offer) to purchase certain goods from Seller. When Buyer is a merchant, she will often use her own **order form**, which has **important terms** in fine print at the bottom of the form or on the back.

Let’s say the relevant term on the back of Buyer’s order form is a choice of jurisdiction clause:

“All legal proceedings with respect to disputes under this transaction shall take place in **Kentucky**”

**Seller replies to Buyer’s order with an “acknowledgement”** (acceptance). When Seller is a merchant, she will often use her own **acknowledgement form**, which also has **important terms** in fine print at the bottom or on the back.

Let’s say the relevant term on the back of Seller’s acknowledgment form is also a choice of jurisdiction clause:

“All legal proceedings with respect to disputes under this transaction shall take place in **Ohio**”

Under the **common law mirror image rule**, we would not have a contract in this situation; Seller’s acceptance would not operate as an acceptance because it had a different term.

**BUT,** **UCC 2-207(1)** changes the **common law mirror image rule** (see Item #8, below, for details).

In addition, under the **common law last shot rule,** if the parties had performed the transaction, the terms of Seller’s acceptance (Ohio as the choice of jurisdiction) would be the terms of the contract.

**BUT,** **UCC 2-207(2)** changes the **common law last shot rule**.

**8) UCC 2-207(1) CHANGES THE COMMON LAW MIRROR IMAGE RULE:**

2-207(1) answers the question – was there assent to a contract when the acceptance had terms that were different from or additional to the terms of the offer?

2-207(1) provides that **an acceptance with different or additional terms will still operate as an acceptance** if it was (1) a definite expression of acceptance and (2) a seasonable expression of acceptance.
You should be able to see how this provision changes the mirror image rule.

However, 2-207(1) also clarifies that the offeree’s definite and seasonable expression of acceptance **will not operate as an acceptance if it is expressly conditioned on offeror’s assent to the additional or different terms.**

How would such an express condition look? In a perfect world, the offeree’s acceptance/acknowledgement form would have a conspicuous statement that tracks the language of the statute, such as:

“This acceptance of your order is *expressly conditioned* on your assent to the terms on this form.”

Unfortunately, businesses do not always draft their forms that clearly. For example, offeree’s acceptance/acknowledgment form might have the following clause:

“We accept your order, **subject to** the terms of our form.”

This acceptance seems like a definite expression of acceptance, but does the clause “subject to . . .” make it expressly conditioned on offeror’s assent to the terms of the acceptance?

Some courts have held that “subject to . . .” does not expressly condition the acceptance to offeror’s assent to the new terms because it **does not clearly indicate that the offeree will not go through with the transaction unless offeror assents to the new terms.** This standard is a useful one to help you determine whether offeree’s acceptances is expressly conditioned on offeror’s acceptance of the additional or different terms in the acceptance:

Did the offeree clearly indicate she would not go through with the transaction unless offeror assents to the new terms?

**What happens if offeree’s acceptance is expressly conditioned on offeror’s assent to the additional or different terms and the parties go ahead with the transaction anyway?**

You might think that under these circumstances, the offeree’s terms control, but that result would be inconsistent with the purpose of the rule because it would simply revive the last shot rule. The purpose of 2-207 is to do away with the last shot rule. Most scholars and courts agree that if offeree’s acceptance is expressly conditioned on offeror’s assent to the additional or different terms, there is no contract based on offer and acceptance.
But if the parties go ahead with the transaction anyway, there is a contract based on conduct. To determine what the terms of this contract is, we go to 2-207(3). More on that in Item #10, below.

9) **UCC 2-207(2) changes the common law last shot rule:**

If, based on your analysis of 2-207 sub (1), you answered “yes, offeree’s acceptance operates as an acceptance,” you now may move on to 2-207 sub (2). [Note: If you answered “no” to that question, do not move on to sub (2).]

In our example above, Buyer sent an offer with Kentucky jurisdiction as one of the terms. Seller sent an acceptance with Ohio jurisdiction as one of the terms. Assuming that under our analysis of sub (1) we determine there is a contract, we now have to determine under sub (2) whether Kentucky jurisdiction or Ohio jurisdiction controls in the contract between the parties.

2-207(2) tells us whether offeror’s or offeree’s terms control. As a good rule of thumb, think of 2-207(2) as a first shot rule – meaning the offeror’s terms will control in most cases.

2-207(2) treats a contract between two merchants differently from a contract where one of the parties is not a merchant.

UCC 2-104(1) defines a merchant as someone who regularly deals in goods of the kind or otherwise holds herself out as having such knowledge.

**Situation 1:**

If either the offeree or offeror is NOT a merchant, 2-207(2) provides that offeree’s additional terms are considered proposals for addition to the contract. Effectively, this rule means that offeree’s additional terms will not become part of the contract unless the offeror expressly agrees to accept them as part of the contract. In addition, most court’s and scholars agree that offeror’s performance of the contract does not constitute implicit acceptance of offeree’s additional terms because the opposite result would revive the last shot rule. Thus, this is a first shot rule – offeror’s terms would control (unless offeror expressly accepts offeree’s terms).

In our example above, offeree responded with a different term, not an additional term. When offeree’s term contradicts an express term of the offer, it is a different term.
When offeree’s term addresses an issue that the offer was silent on, it is an additional term.

So, let’s imagine that Buyer’s order form was silent about jurisdiction and Seller’s acceptance provided for Ohio jurisdiction. In this case, Ohio jurisdiction is an additional term because the offer was silent about jurisdiction. Under 2-207(2), if either one of the parties is not a merchant, the addition term is merely a request to amend the contract, which does not become part of the contract unless the Buyer expressly agrees to it.

**Situation 2:**

If BOTH the offeree and offeror are merchants, 2-207(2) provides that offeree’s additional terms automatically become part of the contract unless one of the following applies:

(a) offeror’s original offer expressly limited acceptance to the terms of the offer;

(b) offeree’s additional terms materially alter the contract (i.e., materially alter the terms of offeror’s offer); or

(c) offeror gives notification within a reasonable time that she objects to offeree’s additional terms.

Once again, let’s imagine that Buyer’s order form was silent about jurisdiction and Seller’s acceptance provided for Ohio jurisdiction, which means Ohio jurisdiction is an additional term. If both Buyer and Seller are merchants, sub (a) and sub (c) make it very easy for Buyer (the offeror) to prevent offeree’s additional terms from becoming part of the contract, either before or after the acceptance.

In any case, because of sub (b), the additional terms will only become part of the contract if they only make a minor or insignificant change to the offer. If they make a material change to the terms of the offer, they will not become part of the contract.

**What kind of change is material?**

The comments to UCC 2-207 suggest that a material change is one that would result in surprise or hardship for the offeror. Comment 4 also gives some examples of material changes.

Effectively, under 2-207(2), the additional term will only become part of the contract between merchants when it is not a very important term.
What about different terms?

You might have noticed that 2-207(2) expressly mentions additional terms, but does not address different terms. What happens to offeree’s different terms? Unfortunately, the UCC is silent on the matter. There are two approaches that courts have adopted to address different terms in offeree’s acceptance:

**Approach #1 for different terms:** Treat them the same as additional terms. In other words, apply the provisions of 2-207(2), which will generally result in offeror’s terms controlling (i.e., a first shot rule).

In our example above, where Buyer’s offer provides for Kentucky jurisdiction and Seller’s acceptance provides for Ohio jurisdiction, application of 2-207(2) would most likely result in Buyer’s terms (Kentucky) controlling the contract between the parties. This analysis assumes that offeree’s term of Ohio jurisdiction is a material change to offeror’s offer, although it may not be if the parties live on the border of Kentucky and Ohio.

**Approach #2 for different terms:** The parties’ different terms knock each other out. In other words, neither offeror nor offeree’s terms control (i.e., a “knock out rule”)

In our example above, where Buyer’s offer provides for Kentucky jurisdiction and Seller’s acceptance provides for Ohio jurisdiction, application of the knock out rule results in a contract between the parties that is silent on jurisdiction – neither seller nor buyer gets her term as part of the contract (default legal rules will control which state’s courts have jurisdiction).

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6 This approach is based on the theory that the failure to mention different terms in 2-27(2) was a drafting error. Indeed, comment 3 to UCC 2-207 indicates that different and additional terms should be treated the same way, but the comments do not become part of the law when a state legislature adopts the UCC as the law of the state.
10) **When Do I Apply 2-207(3)?**

Remember, we said that if you answered “no” to 2-207(1), there has been no acceptance and, thus, there is no contract. But, if the parties perform the transaction anyway (i.e., seller ships the goods and buyer accepts the shipment), we need some sort of standard to determine the terms of the contract. That standard is found in 2-207(3). DO NOT analyze sub 3 if you are certain the answer to sub (1) is yes, we have an acceptance.

Effectively, 2-207(3) tells you to take Buyer’s order form and Seller’s acknowledgement/acceptance form, compare them, and find all the terms they have in common. Only these common terms become the terms of the contract between the parties, plus any default terms the law provides when the contract is silent on a matter.

11) **Rolling Contracts – Clickwrap and Shrinkwrap Agreements:**

Imagine you buy a box of software that you plan to use for commercial purposes. You pay for the box at your local computer store, take it home, open the box and discover terms inside the box that say “not for commercial use.” This is sometimes called a “shrinkwrap agreement.”

Are you bound by those terms? You never agreed to them. Is the licensor of the software reasonable in believing you assented to the terms within the box when you purchased the software even though you did not know what those terms were when you bought the item?

What is the软件 had a click-through that would not let you complete installation unless you agreed to certain terms? This is sometimes called a “clickwrap agreement.” This time, you expressly agreed to the terms, but not when you entered the contract – i.e., when you purchased the software. Can these terms that come later be part of the contract?

Imagine you purchase a computer by phone. The only terms that are expressly discussed over the phone are the specifications for the computer, the price and the shipping costs. When your computer arrives, there are terms inside the box that say you agree arbitrate any disputes, and if you do not agree to arbitration, you can return the computer. Are you bound to these terms if you keep the computer?

We call these types of contracts **pay now, terms later** contracts or **rolling contracts**. The courts struggle with whether the later terms are binding on the parties.

Some courts will apply 2-207 to these types of contracts, which means it is unlikely that the buyer will be bound by the later terms. Under a 2-
207 analysis, the later terms are additional terms that do not become part of the contract under application of 2-207(2).

Some courts apply the “rolling contract” analysis. Under this approach, the buyer is expected to understand that there will be additional terms that come with the product, even if the seller does not expressly mention it to buyer at the time she accepts buyer’s order. Under this view, the seller is reasonable in believing that buyer has assented to pay now, terms later.

The rolling contract approach leaves many questions unanswered, such as:

- When there is a battle of terms, UCC 2-207 should apply. It is the default rule. How can a court apply a pay now, terms later rule and not UCC 2-207?

- Is the seller required to give the buyer an option for return and refund if she does not agree with the terms?

- Are there any limits to the terms the seller can add? Must the terms be within the reasonable contemplation of the buyer?
EXERCISES – UNIT 3:

1) Auction basics:

Refer to: UCC 2-328

With reserve and without reserve – what do these terms mean?

What is the default rule for an auction that does not expressly provide notice of whether it is with reserve or without reserve?

What is the manner of assent at an auction?

Can a bidder revoke a bid? Will a revocation of a bid revive earlier bids?

Can the seller bid on its own goods?

2) Seller’s secret bid

Refer to: UCC 2-328

At an auction, the seller of an item did not give notice that she would bid on her own item. She asked Sally to bid on her behalf.

The bidding proceeded as follows:

Bid 1 - Astrid: $100
Bid 2 - Betty: $110
Bid 3 – Candace: $120
Bid 4 – Sally (seller’s agent): $130
Bid 5 – Astrid: $140
Bid 6 – Candace: $150
Winning bid – Betty: $160

Betty later discovers that Sally was bidding for the seller? What are Betty’s rights?

3) An offer?
A retailer of widgets received the following communication from a widget supplier:

Dear valued customer,

Here is our latest offer: 10,000 widgets for $20,000.

Place your order before October 1 and receive delivery by October 5.

The retailer contacted supplier, saying, “We accept your offer.” The supplier responded: “Sorry, we cannot fill your order. We did not anticipate the response that our offer has generated.”

**Is the supplier bound to deliver 10,000 widgets to the retailer?**

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### 4) The battle of the terms – part 1:

Refer to: Items 7-10, above; UCC 2-207

(a) Review Buyer’s order and Seller’s response, below. Please assume that the Seller has not shipped any goods yet. What are the different terms? What are the additional terms?

(b) Carefully go through 2-207(1) to determine whether there is a contract between the parties.

(c) Please assume, for this question only, there is a contract between the parties. Carefully go through 2-207(2). What are the terms of the contract, assuming that both parties are merchants? What if one of the parties was not a merchant.
Fax Transmission

Buyer
526 Nunn Drive
Highland Heights, KY 41099

PURCHASE ORDER (16-127):
Date: Oct. 1, 2016
TO: Seller
212 45th Avenue
Flushing, NY 11367

Please provide us the following:
10,000 widgets (model # xyz-1)
@ $20 FOB per widget

Please see reverse for additional terms.

ACKNOWLEDGMENT

Seller
212 45th Avenue
Flushing, NY 11367

10/2/2016
Via facsimile

Pursuant to your PO 16-127 of 10/1, we will ship the following to you on the terms stated herein:
10,000 widgets (model # xyz-1)
@ $20 FOB per widget

This acknowledgement is expressly subject to the terms on the reverse.

[Reverse side of buyer’s order]

Any disputes with respect to this transaction shall be settled in the courts of the Commonwealth of Kentucky.

The terms of this purchase order are the exclusive terms of this transaction.

[Reverse side of seller’s acknowledgment]

The laws of the State of New York shall govern this transaction.

All disputes shall be settled by arbitration in accordance with the rules of the American Arbitration Association.

Seller expressly disclaims any warranty of merchantability or other implied warranty to the extent the law allows.

5) The battle of the terms – part 2:

Refer to: Items 7-10, above; UCC 2-207, 2-206(1)(a)

Buyer ordered five generators from Seller. Buyer’s order form expressly provided for a “5-year warranty.”
Seller responded to the order by immediately shipping the five generators to Buyer. Attached to the generators was Seller’s acknowledgment form that expressly stated “no warranty.” Seller’s form also had the following clause:

“This acceptance of your order is expressly conditioned on your assent to the terms herein.”

Buyer received the generators with the Seller’s acknowledgement form attached. Buyer must decide whether to accept or reject the generators.

**Buyer needs the generators badly. If they accept the generators, will they get (a) a 5-year warranty; (b) no warranty; (c) the default warranties under the UCC? Explain.**

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### 6) The battle of the terms – part 3:

Refer to: Items 7-10, above; UCC 2-207

Kentucky Lube Co. provided 15-minute oil changes for its customers. It wanted to buy a television for its waiting room. The company had never purchased a television or any other consumer electronics in the past.

Kentucky Lube’s manager sent an e-mail to the electronics store located in the strip mall across the street:

“We would like to order a 55-inch Sony TV. Willing to pay $1,000. Please deliver at your earliest convenience.

The electronics store sent the following response:

“Confirmed. Will deliver 55-inch Sony tomorrow. NO WARRANTY OF MERCHANTABILITY.”

The following day, the electronics store delivered as promised. Kentucky Lube paid at delivery.

Two weeks later, the new television caught fire because of its defective wiring. The fire caused damage to Kentucky Lube’s waiting room.
Kentucky Lube wants to sue the electronics store under the UCC’s implied warranty of merchantability. The electronics store argues that they disclaimed the warranty of merchantability and that Kentucky Lube agreed to the disclaimer when they accepted delivery and paid for the TV.

**Is the disclaimer of the warranty of merchantability part of the agreement between the parties?**

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**7) Battle of the terms – part 4:**

Refer to: Item 11, above.

Consumer was watching a home shopping channel. She saw a smart phone that she liked. The smart phone came with 2,000 minutes and 2,000 text messages for $99.99.

Consumer called the shopping channel, ordered the phone, and paid by credit card over the phone. Five days later, she received the phone. When she went through the process of activating the phone and the service, the phone would not allow her to continue until she agreed to the “terms of service.” The terms of service included an arbitration clause and permission for the service provider to track her phone use for use in research and development.

Consumer clicked on “I agree” and continued to set up her phone.

**Is consumer bound by the terms of service?**

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End of Unit 3 Primer
UNIT 4 PRIMER:

INDEFINITENESS

1) INDEFINITENESS – IN GENERAL

When a contract is not complete regarding a material term, we must consider whether a court would say that the contract is unenforceable because of indefiniteness.

Illustration:

Homeowner and Painter agree for Painter to paint Homeowner’s house, but they never agree to a price.

It would be difficult for a court to enforce such a contract.

What terms are material terms? Theoretically, material terms vary from contract to contract. However, as a practical matter, the following terms are the material terms you should consider when you do an analysis about the possible indefiniteness of a contract:

- Subject matter
- Price
- Duration
- Time
- Quantity
- Quality

No contract is complete. No contract can realistically address all possible contingencies that may occur during the performance of a contract. Please do not think a contract is unenforceable simply because the parties have not agreed to some terms, even if those terms are important.

Please remember, the issue of indefiniteness in this unit involves a situation where the parties do not agree to material term.

Indefiniteness does not involve a situation where the parties orally agree to a material term, but do not write it in the written contract. In this
second situation, there is an enforceable contract - the material term is definite, but it may be difficult to prove.

In contrast, when parties actually do not agree to a material term, there are two possible tracks of analysis:

**Track 1 – no assent:**

There was no intent to enter into a binding contract. Because a material term was missing, neither party was reasonable in understanding there was assent. This is an assent issue that belongs to the discussions we had in Unit 2; or

**Track 2 – not a valid contract (unenforceable):**

When it is clear the parties assented to a contract, but did not agree on one or more material terms, the court may find the contract unenforceable because of indefiniteness. *This second track is the subject of this Unit 4.*

2) **The various indefiniteness scenarios:**

There are four indefiniteness scenarios:

**Scenario 1 – Silence:**

The parties are *silent* as to a material term – i.e., they simply left it out.

*Illustration:*

Mary agrees to sell her car to Bob. Bob agrees to buy Mary’s car. They shake hands on it, but they never agreed on a price.

**Scenario 2 – Vagueness:**

The parties are *vague* as to a material term – i.e., they used vague terms.

*Illustrations:*

Each party will receive a *fair share* of the profits

Contractor shall charge a *reasonable price* for its service

Developer shall build a *first-class* hotel on the premises
**Scenario 3 – Agreement to agree:**

The parties **agree to agree** on a material term later – i.e., they recognize that they do not agree on it now, but they both promise to agree on it later. For example:

**Illustrations:**

Bob and Mary agree to the sale of a specific house “at a mutually acceptable price.”

Bob agrees to sell widgets to Mary at $10 per widget “for a quantity to be agreed upon by the parties.”

**Scenario 4 – Agreement to negotiate:**

The parties **agree to negotiate** a material term in good faith later.

**Illustration:**

Painter agrees to paint homeowner’s house “for a price to be negotiated between the parties later.”

3) **The Common Law Approach to Indefiniteness:**

The general rule: **A court will not enforce a contract unless its material terms are reasonably certain.**

The traditional common law approach was very rigid. Courts were unwilling to enforce contracts where the material terms were not certain.

The more modern approach, as reflected to the Restatement (Second) is more flexible: **A contract must be reasonably certain to “provide a basis for determining the existence of a breach and for giving an appropriate remedy.”** [Rest 2d § 33(2)]

Courts need to make a difficult choice when deciding whether to enforce a contract with an indefinite material term. Either choice runs the risk of defeating the will of the parties.

If the court decides **not to enforce** the contract, the court is defeating the parties’ intention that the contract would be legally binding.

If the court **decides to enforce** the contract by supplying the indefinite term, the court is defeating the parties’ rights to refuse to enter transactions other than on the terms they negotiate.
Courts might treat the various indefiniteness scenarios differently:

**Silent as to material term:**

Courts will supply a term if language or circumstances allow.

When a court supplies a term, they are engaging in a legal fiction – essentially, they are saying “the parties would have agreed to this term had they considered it.”

**The language** of the contract might give the court enough information to fill in the material term the parties omitted.

**Trade usage** (i.e., custom in the industry), might give the court enough information to fill in the material term because we assume that what is normally done in their industry was part of the understanding between the parties.

**Illustration:**

A five-year lease of a supermarket retail space for $10,000 per month gives the lessee-supermarket an option to renew the lease for another two years at the end of the lease term. The parties did not agree to a rental price for the two-year renewal period.

Lessee wants to renew the lease at the end of the five-year term. Lessor wants to lease to a new tenant, and claims the option is unenforceable because of indefiniteness.

If there is a **trade usage or custom**, for example, that the rental for similar renewal options is a 5% increase on the original rental, the court might enforce the option for a $10,500 rental per month.

**Course of dealings** (i.e., prior transactions between the parties) might give the court enough information to fill in the material term because we assume that the **parties’ experience in the past with similar transactions** (i.e., **past contracts**) was part of their understanding for this current contract.

**Illustration:**

A five-year lease of a supermarket retail space for $10,000 per month gives the lessee-supermarket an option to renew the lease for another two years at the
end of the lease term. The parties did not agree to a rental price for the two-year renewal period.

Lessee wants to renew the lease at the end of the five-year term. Lessor wants to lease to a new tenant, and claims the option is unenforceable because of indefiniteness.

If under previous lease agreements between the parties, the parties renewed for a 5% increase on the original rental, the court might enforce the option for a $10,500 rental per month.

Course of performance (i.e., how the parties have performed previously under this contract) might give the court enough information to fill in the material term because we can assume that the experience of the parties under this contract was part of their understanding.

Illustration:

A five-year lease of a supermarket retail space for $10,000 per month gives the lessee-supermarket an option to renew the lease for three additional, successive two-year periods. The parties did not agree to a rental price for the renewal periods.

Lessee wants to renew the lease for a second time. Lessor wants to lease to a new tenant, and claims the option is unenforceable because of indefiniteness.

If under the current lease agreement between the parties, the parties already renewed the lease once for a 5% increase on the original rental, the court might enforce the option for a second renewal at $11,025 rental per month. 7

Vague as to material term:

Courts have historically been unwilling to supply a term.

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7 We assume the rental for the first renewal was a 5% increase on 10,000 – i.e., 10,500 per month. If so, a 5% increase on 10,500 would mean 11,025 per month for the second renewal.
When the parties are vague about a material term, a court cannot say "the parties would have agreed to this term had they considered it" because the parties had actually considered it.

**But some courts may approach this issue like they approach silence as to a material term** – i.e., they will look for something to give them a basis to supply a term (see above).

In addition, some courts will enforce the contract where it is **important to protect one party that has already relied on the contract** to her detriment.

*Illustration:*

A five-year lease of a supermarket retail space for $10,000 per month gives the lessee-supermarket an option to renew the lease for another two years at the end of the lease term. The parties agreed a "fair rental" for the two-year renewal period.

Lessee assumed she would be able to lease the space for another two years and made a significant investment in renovating the space near the end of the lease.

A court might enforce the option, even though it is vague, to protect Lessee’s reliance interest.

**Agreement to agree on a material term:**

Courts have historically been unwilling to supply a term.

When the parties agree to agree on a material term, a court cannot say "the parties would have agreed to this term had they considered it" because the parties had actually considered it.

**Some courts may require the parties to negotiate in good faith**, but will not require them to actually come to an agreement on the material term.

**Other courts may treat agreements to agree like they treat silence** as to a material term – i.e., they will look for something to give them a basis to supply a term.

Finally, some courts will **enforce the contract where it is important to protect one party that has already relied on the contract** to her detriment.

**Agreement to negotiate a material term:**
A court will enforce the promise and require the parties to negotiate in good faith, but it will not force the parties to actually come to an agreement. In other words, if a party negotiates in good faith, but does not agree to the other party’s terms, she has fulfilled her obligations under the contract.

4) **EMPLOYMENT-AT-WILL:**

An employment “contract” without a duration is not a contract at all – it is employment-at-will. Employment at will is a special category of indefiniteness. A court will not supply a duration.

Employment-at-will, the rule:

*When an employer and employee do not agree to a specific duration of employment, the employer can terminate the employee at any time for a good reason, a bad reason, or no reason at all. Similarly, the employee can resign at any time for a good reason, a bad reason, or no reason at all.*

The vast majority of workers in the U.S. are employees-at-will. Only a small percentage of employees has an individual employment contract or is covered by a union collective bargaining agreement.

There are several exceptions to employment-at-will. I tend to think of these exceptions as **limitations on an employer’s right to terminate the employee for a bad reason**, but you may conceptualize them in any way that makes it easier for you to understand.

**Statutory exceptions to employment-at-will:**

*“Whistleblower” statutes:*

There are state and federal statutes that protect employees if they report their employer’s illegal conduct to the authorities. The statutes typically prohibit an employer from taking retaliatory action (e.g., firing the employee) for reporting the employer’s misconduct as contemplated under the statute.

**Anti—discriminations statutes:**

There are various state and federal statutes that protect employees from discrimination based on race, religion, gender, sexual orientation, age, etc. An employer could not terminate an employee-at-will in violation of these statutes.
Anti—sexual harassment statutes:

There are various state and federal statutes that protect employees from sexual harassment in the workplace. An employer could not terminate an employee-at-will in violation of these statutes.

Workers’ compensation claim:

States typically have a mandatory workers’ compensation insurance regime that employers are required to participate in. If a worker is injured on the job, she can file a claim to receive benefits. The law normally prevents employers from taking retaliatory action against employees for filing workers’ compensation claims.

Union organizing:

Federal law prohibits employers from taking retaliatory action against employees for engaging in union-organizing activities. The definition of union-organizing activities is quite broad. In fact, an employee complaining about her supervisor to another employee might be a protected activity, even if it is unconnected to other current or imminent concrete union-organizing activities.

Common law exceptions to employment-at-will:

The public-policy exception:

Quite a few courts have held that an employer cannot terminate an employee-at-will if the termination would violate public policy.

What type of termination would violate public policy? As you might have guessed, courts have differing opinions, but you should look for the following fact patterns:

Common law “whistleblower” protection: Where state or federal statutes do not protect an employee-at-will who reports her employer's illegal conduct, the court might protect the employee by prohibiting an employer from firing her in retaliation.

Illegal activities: A court might protect an employee for refusing her employer’s request to perform an act that would violate the law.

Immoral/unethical activities: A court might protect an employee for refusing her employer’s request to perform an act that society considers immoral or unethical.
Please keep in mind that we are looking for something that is public policy, **not a matter of individual conscience**. Consider the following illustration to help you discern between a matter of public policy and a matter of individual conscience.

**Illustration:**

Attorney is an employee-at-will at a large law firm. Her firm asks her to defend a pharmaceutical company that is a defendant in a lawsuit. The lawsuit claims the pharmaceutical company manufactured and sold a drug for pregnant women that caused severe birth defects.

Attorney’s friend is one of the children who suffered these birth defects. Attorney refuses to represent the company. Her law firm fires her because she refused to take the case.

The matter involves Attorney’s individual conscience, not public policy. It is unlikely that a court would invoke the public-policy exception to the at-will employment doctrine to protect Attorney.

**The good-faith exception:**

Very few courts, if any, adopt the good-faith exception to employment-at will. Those that do, narrowly apply it to situations where an **employer terminates an employee to avoid giving her a benefit she has already earned**.

**Illustration:**

Salesperson works on commission. When she makes a sale, her commission pool is credited with the commission. Each week she takes a draw on the commission pool at a set percentage.

Salesperson has a large commission pool. Her employer decides to fire her to avoid paying her the commission.

5) **THE UCC APPROACH TO INDEFINITENESS:**

The UCC is much more liberal in supplying a term when a contract is not certain with respect to a material term.

UCC 2-204(3) provides
“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.”

The UCC has default gap fillers when a material term is indefinite:

- When the parties leave the price term open – 2-305(1)(a) provides the price is a reasonable price.

- When the parties agree to agree on price, but ultimate do not agree – 2-305(1)(b) provides the price is a reasonable price.

- If the parties use a price formula based on external standard but that standard fails for some reason – 2-305(1)(c) provides the price is a reasonable price.

- When the parties leave the delivery time open – 2-309(1) provides the delivery time is a reasonable time.

- When the parties leave the payment term open – 2-310(a) provides that payment is due when the buyer receives the goods.

- When the parties leave the place of delivery open – 2-308(a)&(b) provides that the place of delivery is the seller’s place of business or residence (or the place where the goods are located for identified goods).

**What about an open quantity term?**

Most scholars say that without a quantity term, a sales agreement is unenforceable under the UCC, except in the case of output contracts or requirements contracts:

**Output contracts** are enforceable [2-306(1)]

**Illustrations:**

Seller: “I promise to sell to you all the widgets I produce [this year/quarter/etc.].”

Buyer: “I promise to buy all the widgets you produce [this year/quarter/etc.].”

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8 You may have noticed that this rule is very similar to the Restatement provision on indefiniteness. The UCC has been very influential on the development of the common law and the second Restatement.
Requirements contracts are enforceable [2-306(1)]

Illustrations:

Buyer: “I promise to buy from you all the widgets I need [this year/quarter/month/etc.].”

Seller: “I promise to sell to you all the widgets you need [this year/quarter/month/etc.].”

Could the parties “game” the output or requirements? For example, if Buyer promises to buy all the widgets Seller produces in a year, could Seller ramp up production from 100,000 widgets per month to 1,000,000 per month just to increase its sales?

Even though output and requirements contracts seem to have no restrictions on quantity except “all that Seller produces” or “all that Buyer needs,” the UCC provides some limits on the quantity in requirements contracts or output contracts in 2-306(1):

Good faith – Seller’s output or buyer’s requirements must be made in good faith. UCC1-201(b)(20) defines good faith as (1) honesty in fact (i.e., subjective good faith) and (2) observance of reasonable commercial standards of fair dealing (i.e., objective good faith).

In addition, the quantity produced or required may not be unreasonably disproportionate to any stated estimate or to normal prior output or requirements.
EXERCISES – UNIT 4:

1) What type of indefiniteness?

Refer to: Items 1 through 3, above

State whether the fact pattern is one of silence on a material term, vagueness of a material term, agreement to agree on a material term, or agreement to negotiate on a material term.

State the possible approaches a court might take to each scenario.

(a) Sally Seller promises to sell her house (115 Drury Lane, Applewood Township) for a good and fair price. Betty Buyer promises to buy the house for a good and fair price. Delivery and payment on May 15.

(b) Sally Seller promises to sell her house (115 Drury Lane, Applewood Township). Betty Buyer promises to buy the house at a price to be agreed upon. Delivery and payment on May 15.

(c) Sally Seller promises to sell her house (115 Drury Lane, Applewood Township). Betty Buyer promises to buy the house. Delivery and payment on May 15.

(d) Sally Seller promises to sell her house (115 Drury Lane, Applewood Township). Betty Buyer promises to buy the house at a price to be negotiated by the parties. Delivery and payment on May 15.

____________________________________________________________________________

2) Indefiniteness and performance:

Owner and Contractor entire into an agreement for Contractor to build a house on Owner’s land – the parties agreed to detailed specifications for the house. The parties agreed that Owner would pay Contractor a fair price based on Contractor’s expenses and end product.

Contractor builds the house. Owner refuses to pay. Contractor sues.

Predict what a court might do?

____________________________________________________________________________

3) The sale of goods and indefinite material terms:

Refer to: Item 4, above

What is the UCC approach to indefinite terms if Seller and Buyer agree to . . .
“The sale of 500 model xyz widgets, at a price satisfactory to both parties, FOB [Buyer’s address], delivery by May. 1, payment within 30 days of delivery.”

“The sale of model xyz widgets @ $20 per widget FOB [Buyer’s address], delivery by May. 1, payment within 30 days of delivery.”

“The sale of 500 model xyz widgets @ $20 per widget FOB [Buyer’s address], delivery by May. 1.”

“The sale of 500 model xyz widgets @ $20 per widget, delivery by May. 1, payment within 30 days of delivery.”

Make sure you provide the specific citation of the relevant UCC provision to support each of your answers.

4) **Output and Requirements:**

Refer to: Item 4, above, and UCC 2-306(1)

**Scenario 1:**

Buyer and Manufacturer entered into a two-year contract where Manufacturer agreed to sell of the widgets it produced each month to Buyer for $5 per widget FOB Buyer’s warehouse, and Buyer agreed to buy the same. Buyer is a retailer of widgets, selling them to widget users across the world.

During the first 11 months, Manufacturer produced and sold to Buyer 10,000 to 12,000 widgets per month. In the 12th month, the market price of raw materials for widgets dropped. Manufacturer recognized that the contract with Buyer could help finance and expansion of its operations and factory during the market downturn in the price of raw materials. Thus, in the 13th month, Manufacturer produced 100,000 widgets.

Buyer does not need 100,000 widgets. **Is Buyer required to take and pay for 100,000 widgets?**

**Scenario 2:**

Buyer and Manufacturer entered into a two-year contract where Manufacturer agreed to sell to Buyer all the widgets Buyer needed each month for $5 per widget FOB Buyer’s warehouse, and Buyer agreed to
buy the same. Buyer is a retailer of widgets, selling them to widget users across the world.

Before the contract, Buyer had a relatively small operation that required about 4,000 to 5,000 widgets per month. Manufacturer had a capacity to produce about 20,000 widgets per month and was at near capacity with Buyer’s contract and other orders from other customers.

Halfway through the contract, the retail price of widgets doubled. In order to take advantage of the low contract price, Buyer expanded its operations and increased its widget requirements to 6,000 widgets per month.

Seller does not want to sell the extra 1,000 to 2,000 widgets per month to Buyer. **Is Seller required to do so?**