Vallario
Contract Formation
Course Materials
Fall 2020

Table of Contents

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INTRODUCTION

Contract formation focuses on the process of making an enforceable agreement between two parties. This process involves preliminary negotiations, an offer, and its acceptance. Once the contract is formed determining its enforceability requires an examination of whether or not the contract was supported by adequate consideration or its substitute, promissory estoppel. Finally, after the contract is formed, if it is determined to have been supported by adequate consideration, certain contracts are governed by the statute of frauds, requiring a writing. Thus, the statute of frauds is a defense to the enforceability of a formed contract. Finally sometimes there are non-contracting persons involved known as third parties whose interests and rights will be examined.

Sources of Law

There are several sources of law, including primary and secondary sources. In contracts we learn both primary and secondary sources of law.

- Primary sources, like cases and statutes are binding authority. You will be required to read cases, which is common law, and the Uniform Commercial Code (UCC), which is the statutory authority used for this course. The UCC is a model law proposed by the Uniform Law Commissioners. Each State adopts the model or a variation thereof. Maryland's adoption of the UCC is in the Commercial Law Article of the Maryland Annotated Code. The assigned cases are on Sakai through the Lessons Menu and Files Directory under "cases". Article 2 of the UCC will serve as the primary statutory authority for contract formation.
- Secondary sources are persuasive authority and are not binding, but are often times addressed in cases. We will examine the Restatement (Second) of Contracts (RS). The RS are the summary of the majority rule of the common law and found in the text.

Which primary source of law applies?

There are two primary sources of law that govern contract formation: the common law and the Uniform Commercial Code (UCC). Common law applies for services, land and anything that is not a transaction of goods. For example, employment agreements, contractor services like painting or plumbing. If the contract involves a transaction in goods, then the UCC applies. However, if there is not statutory authority, common law is the default for issues not addressed by the UCC. For example, there is no UCC provision defining offer, so the common law rules apply. The first question to address in a contract formation questions is "which law (common law or UCC) applies?" When there is a combination of goods and non-goods, use the predominate factor test.

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Common law

Common law comes from England and is US judge-made law, the law that is developed from cases. One of the first skills you will learn as a law student is how to brief a case. Case briefing requires much more than understanding facts and outcome. Instead it is important that you understand, issues, procedure, holding, dicta and more. The following mini brief format should be used for this course. There is a case brief template provided for your convenience. You should expect to read and re-read the assigned cases as you develop case-briefing skills.

Case briefing

1. Parties- identify the parities by character. Do not identify them as plaintiff/defendant. Get to know them by characterizing them as buyer, seller, employee, and employer. Who wins?

2. Relevant Facts- these are the facts that are relevant to the court's holding. If these facts were modified there would be an argument for a different result? Relevant facts are important to the court's resolution of the issue at hand. For contract formation, pay particular attention to DATES and QUOTES. Who did what first, then who responded and how?

3. Procedure- what court, what year, what stage in the litigation is this case. This matters because under *stare decisis,* courts must follow the precedent of higher courts (i.e. a trial court must make decisions according to what appellate courts have held in the past). Did the appellate court affirm (agree) or overturn (disagree) the lower court?

4. Issue- before court that we care about. Try to understand why this case was assigned? Why did Vallario want us to read this case, and what does it add to my knowledge of the topic assigned?

5. Rule of Law - what is the rule of law that was developed by this court? In looking at the holding, make sure you document the arguments on each side, and which one the court supported. This is where you are taken out of your comfort zone and forced to examine carefully both sides. For example, what are the buyer's arguments, what are the seller's arguments?

These arguments that the respective sides are making are the way you should respond to the Problems. As a prospective attorney start early at seeing both sides of the equation. Don't explain only the winner's side, look at both sides, and thus understand the strengths and weaknesses of each party.

Legal analysis and IRAC

How lawyers explain the answer to a proposed fact pattern. Key is making arguments on both sides as part of the analysis. According to the Perfect Practice Exam, organize your answers to the midterm and final using IRAC. Your ILS professors may suggest CREAC or rule-based reasoning as ways of organizing your legal analysis.

ISSUE- state the issue raised by the facts. The issue will NEVER be is there a contract. That is too broadly stated for this course. Instead, when buyer stated "I want to sell you my car" is that an offer may be a better way to state the issue for this course.

RULE- state the rule that you know that will resolve the issue. I do not expect you to cite cases, or RS. You will be given a copy of the UCC for the midterm and final, so it would be very helpful for you to cite the section and subsection of the statute if relevant. For example, an offer creates the power of acceptance in the offeree would be how you might state the rule for defining offer.

ANALYZE (APPLY) - the facts from both points of view. Make arguments for both parties. This is the analysis that is required for most law school exams. Force yourself to make the argument for the weaker side to the best of that party's ability. The A can also expect a simple application for the facts to the law. Not every issue warrants arguments on both sides for its resolution. Some facts may simply be applied to the law.

CONCLUDE- conclude based on the arguments presented. A conclusion is important even it if is not the same conclusion I would make. The key is that your conclusion is supported by the analysis.

The Uniform Commercial Code (UCC) NOTE: Articles 1 and Articles 2 of the UCC are applicable on the bar exam. The statutory primary law source for contract formation is Article 2 of the UCC. There are additional courses such as Secured transactions (Article 9) and Commercial Law (Article 3 and Article 4). Article 2A covers leases which may be addressed in Property.

UCC § 2-102 SCOPE; CERTAIN SECURITY AND OTHER TRANSACTIONS EXCLUDED FROM THIS ARTICLE

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

The UCC applies to transactions in goods. The UCC further defines a good as something that is movable at the time of identification to the contract. For example, when you order food at a restaurant that is a good governed by the UCC.

UCC § 2-105. DEFINITIONS: "GOODS"

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid…. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.

The UCC does not require the involvement of a merchant, yet the UCC sometimes provides special rules for merchants. A merchant is an expert in the subject matter, like a car dealer who is selling a car. However, the sale of a car between two consumers is governed by the UCC. The UCC is a statute so, to the extent that a particular statute applies, the analysis may in fact be the statutory construction of the statutory language.

The UCC also has a number gap-filling provisions that are default provisions to the extent the contract does not address the missing terms. For example, if parties fail to agree to a price, a reasonable price at the time of delivery is used.

The Restatement of the Law, Second Contracts – created by the American Law Institute (professors, judges and practitioners). The current Restatement (Contracts) was published in 1981. It represents an attempt to "re-state" or summarize the common law of contracts. It is persuasive authority, yet courts use it frequently.

Predominant factor test

If the contract involves both a good and non-good, then then the predominant factor test is used to determine whether or not common law or the UCC governs. The predominant factor test analyzes the components of the contract, like the final product, main reason, and determines which predominates. Some examples include a contract dealing with the installation of carpet or building a fence.

Contract defined

A contract is an enforceable promise. All contracts must have at least one promise.

RS § 1 CONTRACT DEFINED

Promise or set of promises for the breach of which the law gives a remedy, or performance of which the law in some way recognizes as a duty

RS § 2 PROMISE; PROMISOR; PROMISEE; BENEFICIARY

(1) A promise is a manifestation of intention to act or refrain from acting in a specified way so made as to justify a promise in understanding that a commitment has been made.
(2) The person manifesting the intention is the promisor.
(3) The person to whom the manifestation is addressed is the promise.

(4) Where performance will benefit a person other than the promisee that person is a beneficiary.

UCC § 1-201. GENERAL DEFINITIONS

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law.

Types of contracts

Most contracts are express either by words or writing, however contracts can also be implied based on conduct (implied-in-fact) or fairness (implied-in-law).

Express contracts are either unilateral or bilateral. A unilateral contract involves one promise made in exchange for performance, whereas a bilateral contract is formed as a result of a mutual exchange of promises.[1] Under the UCC, there is no distinction between unilateral and bilateral contracts.

Implied contracts are contracts where mutual asset is not expressed, but may result from actions only, known as a contract implied-in-fact, or because it would be so unfair for the courts to not impose a contract, one can be implied-in-law also referred to as a quasi-contract.[2] A quasi contract (implied-in-law) is not a contract at all instead is the result of such unfairness with some intervention by the court. There is a damage limitation of restitution that is not imposed on the other contracts. An example of the quasi-contract is where a doctor tries to save someone who is injured, there is no mutual assent, and instead there may be a quasi-contract in which the doctor is reimbursed for the fair value of his services, regardless of the outcome.

Mutual Assent

Mutual assent is the initial stage of contract formation: the offer and acceptance. It requires a meeting of the objective minds. Where the objective theory of contracts is used in determining whether or not the parties have accomplished mutual assent.

RS § 18 MANIFESTATION OF MUTUAL ASSENT

Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

Objective theory of contracts is the doctrine used to evaluate whether or not a contract is formed. Intent is determined objectively. It examines facts/actions/writings from a reasonable person's perspective. The subjective intent of the parties is irrelevant. What is important is the

[1] Davis v. Jacoby
[2] Baily v. West

objective mutual asset. What would a reasonable person standing in the shoes of another think one's actions or words meant?[3]

Agency Rules

A principal may designate a third party as his agent. The agent represents the principal in contract formation as long as the agent is acting within the scope of the authority and may bind the principal. For example, if seller hires a real estate agent and a prospective buyer submits an offer which is accepted by the agent that will bind the principal. For purposes of contract formation, an agent acting within the scope of the agency relationship stands in the shoes of the principal.

MODULE ONE: OFFER

Issue spotting: Have the actions/words risen to the level that one party has created a power of acceptance in another?

A. Offer

An offer is where contract formation begins. The offeror makes the offer. The offeror is the master of the offer, which is directed to the offeree. Shows a willingness to enter into a bargain. The offeror's words and actions create the power of acceptance in an offeree, so that the offeree's assent will conclude the deal. The use of the word "offer" between parties does not necessarily mean that the offeror has created the power of acceptance. An offer is valid upon receipt.

RS § 24 OFFER DEFINED (Power of Acceptance)

An offer is the manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Parties to an offer

The offeror is the master of the offer, creating the power of acceptance in the offeree. The offeror engages with the person or persons with whom the offeror wishes to deal. The offeree is the person or persons to whom the offer is made, and whose assent can conclude the deal. An offer may create the power of acceptance in more than one offeree. However, if the offeror expresses the same information to multiple potential offerees, yet there is only one item that is unlikely an offer.

RS § 29 TO WHOM AN OFFER IS ADDRESSED

[3] Lucy v. Zehmer

(1) The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.
(2) An offer may create a power of acceptance in a specified person or in one or more of a specified group or class of persons, acting separately or together, or in anyone or everyone who makes a specified promise or renders a specified performance.

Creating the power of acceptance

In contract formation, the first question is whether an offer has been made. In determining whether express offer is made, examine the words and conduct between the parties. If initial words and actions do not create a power of acceptance, then likely nothing more than preliminary negotiations.

Preliminary negotiations are not offers, because a preliminary negotiation, the acting person has not provided sufficient details for the offeree's assent to conclude the deal. For example, seller may say "I'm thinking about selling this car" has not risen to the level of an offer because the person to whom that statement was made will need more before objectively there could be a meeting of the minds.

RS § 26 PRELIMINARY NEGOTIATIONS
A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

An advertisement is generally not an offer, but instead an invitation to make an offer, unless it is definite, clear, and leaves nothing for negotiation.[4] Other interactions between prospective buyers and sellers include price quotes, inquiries, invitations, and form letters,[5] which are generally not offers. Order forms,[6] for-sale signs, internet purchases, and catalogs are generally not offers.

Reward offers are generally unilateral offers, potentially creating a unilateral contract. For example, a reward for the apprehension and conviction of a criminal allows the offeree to act, and form a contract upon satisfying those actions prior to the revocation of the offer. No notice of performance by offeree is required.[7] **Auctions** generally create offers from the bidder which the offeree may accept or reject.

RS § 30 FORM OF ACCEPTANCE INVITED

[4] Lefkowitz v. Great Minn. Surplus Store
[5] Lonergan v. Scolnick
[6] Leonard v. Pepsico Inc.
[7] *See infra* Section, Acceptance by Performance.

(1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.
(2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

RS § 32 INVITATON OF PROMISE OR PERFORMANCE
In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

B. Destruction of the Offer

An offer may be accepted from the time it's made until its termination**.** Once an offer is created, there are multiple ways in which it can be destroyed prior to acceptance. An offer is destroyed by revocation, rejection, lapse of time, or death of the offeror. Once the offer is terminated it may no longer be accepted.

RS § 35 THE OFFEREE'S POWER OF ACCEPTANCE
(1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.
(2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in § 36.

RS § 36 METHODES OF TERMINATION OF THE POWER OF ACCEPTANCE
(1) An offeree's power of acceptance may be terminated by
- **(a) Rejection or counter-offer by the offeree, or**
- **(b) Lapse of time, or**
- **(c) Revocation by the offeror, or**
- **(d) Death or incapacity of the offeror or offeree.**

(2) In addition, an offeree's power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.

1. **Revocation** is an action taken by the offeror, in which the offeror attempts to take back the offer, and terminate the offer. An offer may be revoked any time prior to acceptance.[8] The offeror may communicate revocation by telling offeree the offer no longer exists, or the offeror may take actions that are inconsistent with the offer being open like making an offer to another offeree, and that information becomes known to the first offeree. Revocation becomes valid upon receipt of notification of the revocation. The notice may be oral, written, or by conduct. If the offer provides that acceptance may be received within a given period of time, for example let me know by 1:00pm tomorrow. However, the offer is freely revocable during the given time.[9]

[8] Peterson v. Pattenburg
[9] *But See*, Section C Irrevocable Offers

Revocation may come directly from the offeror, or indirectly by the offeree learning from a reasonable source that the offeree is taking actions that are inconsistent with the offer.[10] Direct revocation is when the offeror communicates directly to the offeree that the offer is revoked, which can be done any time prior to the offeree's acceptance. Indirect revocation is also referred to as implied revocation and is an effective method of revoking an offer with the offeree become reasonably aware of actions taken by the offeror that are inconsistent with the offeror forming mutual assent with the offeree. For example, if the offeree learns from a reliable source that the offeror has entered into a contract for the sale of the offeror's principal residence, which was also offered to the offeree.

RS § 42 REVOCATION BY COMMUNICATION FROM OFFER RECEIVED BY OFFEREE

An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.

RS § 43 INDIRECT COMMUNICATION OF REVOCATION

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.

RS § 46 REVOCAION OF GENERAL OFFER

Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available.

2. **Rejection** is an action taken by the offeree, which terminates to the offer. For example, the offeree may indicate the offeree is not interested in the offer made by the offeror, or if offeree makes a counter offer to the offeror that terminates the offer. A rejection is valid upon receipt, and must be brought to the attention of the offeree. For example, if the offeree rejects the offer, the offeree may communicate acceptance before the offeror receives the rejection.

RS § 38 REJECTION

(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.
(2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

The mirror image rule provides that an acceptance deviating any term, however slight, from the original offer amounts to a rejection and counteroffer. Any addition or difference from the

[10] Dickenson v. Dodds

original offer amounts to a rejection by the offeree, and potentially a counter offer with the offeree becoming the new offeror.[11]

A **counter offer** constitutes a rejection by the offeree, and destroys the power of acceptance, thus terminating the offer. A counter offer is an attempted acceptance with any deviation (addition or change) in the offer's terms. Once a counter offer has been made, the parties change, and the offeree becomes the offeror and the original offeror becomes the offeree. Any inquiry or request for a deviation from the offer is not a counter offer. For example, would you consider an earlier settlement date?

RS § 39 COUNTER OFFER

(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.

(2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

RS § 40 TIME WHEN REJECTION OR COUNTER-OFFER TERMINATES POWER OF ACCEPTANCE

Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.

3. **Lapse** in accordance with the terms of the offer or reasonable time, terminates the offer. When an offer by its terms terminates on a certain day or time, (although the offer may be revoked before said time) the offer automatically terminates in accordance with those terms. If the offer does not have a specified date or time for termination, then it will terminate after the passage of a reasonable time under the circumstances. For example, I offer you an ice cream for $.25, said offer will terminate quickly because of the subject matter.

Face-to-Face offer - when an offer occurs during a face-to-face conversation, when the conversation terminates without an acceptance, the offer is revoked.[12]

RS § 41 LAPSE OF TIME

[11] *See supra* on mail box rule

[12] Akers v. J.B. Sedberry

(1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.
(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

4. **Death or incapacity of the offeror** prior to acceptance terminates the offer even if death or insanity is unknown to the offeree.

RS § 48 DEATH OR INCAPACITY OF OFFEROR OR OFFEREE
An offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

5. **Illegality of the subject** matter or its destruction before acceptance terminates the offer.

C. Irrevocable Offers

Generally, an offer is freely revocable up until the moment of acceptance, and the formation of mutual assent. There are special circumstances in which an offer is irrevocable; 1) when the offeree detrimentally relies on the offer; 2) unilateral part-performance, or when; 3) consideration is given.

RS § 25 OPTION CONTRACT
An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

Detrimental Reliance[13] will make an otherwise revocable offer irrevocable. When the offeree has reasonably relied to his detriment on the offer and the offeror is aware of the offeror's reliance or it is customary in the industry then the offer is irrevocable, even though acceptance is not required.

Consideration[14] if the offeree pays consideration to offeror to keep offer open for a specified period of time, then the offeror may not revoke the offer during the option period. This is known as an option contract.

RS § 87 OPTION CONTRACT
(1) An offer is binding as an option contract if it
- **(a) Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or**
- **(b) Is made irrevocable by statute.**

[13] Drennan v. Starr Paving Co.
[14] Humble Oil v. Westside Investments

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

A unilateral contract in the commencement of performance with the intention of completion will create an option contact. For example, the offeror offers $100 to offeree to walk to the other side of the bay bridge, once offeree starts walking, with the intent to complete walking, the offer is irrevocable, offeror can't revoke before offeree completes performance.

MODULE TWO: COMMON LAW ACCEPTANCE

Issue spotting: After identifying an offer, has the offeree's assent concluded the deal? Has the offeree complied with the mirror image rule, accepted an offer that has not been terminated; accepted in accordance with the offer using reasonable means unless otherwise indicated?

Defined

Acceptance is the second part of mutual assent, and if accomplished will conclude the deal. It is the offeree's assent to the exact terms of the offer made by the offeror. Acceptance must be made by offeree to the terms of the offer, and communicated to the offeror. The offeree must know he is accepting. For example, offeree loses her wallet and posts a reward for its return, with instructions that it be brought to the security desk of her apartment. Good Samaritan finds wallet and turns it in to security desk. Good Samaritan has not accepted because he was not aware of the offer when he completed the acts.

RS § 50 ACCEPTANCE OF OFFER DEFINED; ACCEPTANCE BY PERFORMANCE; ACCEPTANCE BY PROMISE

(1) Acceptance of an offer is manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.
(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.
(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

Methods of Acceptance

There are 4 methods of acceptance, promise, performance, part-performance, or silence. Generally, the offeree must accept with the same means or sooner than the means of the offer and use a reasonable means of communicating the acceptance.

1. Acceptance by Promise: where the offeror is seeking a promise as acceptance thus creating a bilateral contract the offeree may accept by promise.[15] The objective theory of contracts is used to determine if acceptance has been made. One's subjective intent to accept is not acceptance.[16] The offeree must generally notify the offeror of acceptance.

RS § 56 ACCEPTANCE BY PROMISE; NECESSITY OF NOTIFICTION TO OFFEROR
Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably.

2. Acceptance by Performance: offeror is seeking acceptance by performance thus creating a unilateral contract.[17]

RS § 53 ACCEPTANCE BY PERFORMANCE; MANIFESTATION OF INTENTION NOT TO ACCEPT
(1) An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance.
(2) Except as stated in § 69, the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance.
(3) Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.

RS § 54 ACCEPTANCE BY PERFORMANCE; NECESSITY OF NOTIFICATION TO OFFEROR
(1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.
(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless
- **(a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or**
- **(b) the offeror learns of the performance within a reasonable time, or**
- **(c) the offer indicates that notification of acceptance is not required.**

[15] LaSalle National Bank v. Vega
[16] Hendricks v. Behee
[17] Carlill v. Cabolic Smoke Ball

Generally, no notification of acceptance is required unless the offer requests notice or performance is not likely to come to the attention of the offeror.

3. Acceptance by part-performance: the performance does not have to be complete performance for acceptance to occur. Part-performance with the intention to complete performance will constitute sufficient acceptance.[18]

RS § 62 EFFECT OF PERFORNACE BY OFFEREE WHERE OFFER INVITES EITHER PERFORMANCE OR PROMISE

(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.

(2) Such an acceptance operates as a promise to render complete performance.

RS § 45 OPTION CONTRACT CREATED BY PART PERFORMANCE OR TENDER

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

RS § 51 EFFECT OR PART PERFORMACE WITHOUT KNOWLEDGE OF OFFER

Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.

4. Acceptance by Silence: generally, acceptance cannot occur by silence unless the silence is implied acceptance because of prior dealings.[19]

RS § 69 ACCEPTANCE BY SILENCE OR EXERCISE OF DOMINION

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

[18] Ever-Tite Roofing v. Green

[19] Amons v. Willson

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

Time When Acceptance is Effective

Once acceptance occurs by the offeree, the offer may not be destroyed.[20] An acceptance is generally valid upon receipt, unless the mailbox rule applies in which case the acceptance is valid upon dispatch.

Mailbox Rule if mail is an authorized means of acceptance, acceptance occurs upon dispatch. The mailbox rule requires: 1) proper address, 2) proper stamp and 3) outside the control of the offeree. It does not matter whether the acceptance is received. The burden is on the offeree to prove property dispatch.[21]

RS §63 TIME WHEN ACCEPTANCE TAKES EFFECT

Unless the offer provides otherwise,

(a) An acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession without regard to whether it ever reaches the offeror; but

(b) An acceptance under an option contract is not operative until received by the offeror.

Mirror Image Rule under common law, the acceptance must mirror the image of the offer. Any deviation in the terms constitutes a rejection.[22]

MODULE THREE: OFFER AND ACCEPTANCE UNDER THE UCC

[20] *See infra* on destruction of the offer.

[21] Adams v. Lindsell

[22] Minneapolis St. Louis Railroad

Vallario
Contract Formation
Course Materials
Fall 2020

A. Offer and Acceptance under UCC

There is no UCC provision defining offer and therefore common law rules apply.

UCC § 2-204 FORMATION IN GENERAL

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
(3) 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.

Acceptance is easier under the UCC, and may be made by any reasonable means under the circumstances.[23]

UCC § 2-206 OFFER AND ACCEPTANCE IN FORMATION OF CONTRACT

(1) Unless otherwise unambiguously indicated by the language or circumstances
(a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
(b) An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming 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.
(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

B. Battle of the Forms

The UCC deviates from the mirror image rule and a counter offer may still be an acceptance.[24]

Acceptance under the UCC represents a sharp change from common law's mirror image rule. The UCC 2-207, known as the battle of the forms, deals with mismatching documents between the parties. When the buyer and seller forms don't agree, the first question is to consider whether there is a contract based on the writings. If so, what are the terms?[25]

[23] Corinthian Pharmaceutial v. Lederle
[24] *Idaho Power v. Westinghouse*.
[25] *DTE Energy Technology v. Briggs*.

UCC § 2-207 ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of Titles 1 through 10 of this article.

If there is no contract formed by the parties, yet the parties' actions demonstrated a contract, then there will be a contract by conduct.[26]

When a contract is formed by conduct, the terms are those agreed upon and gap-filling provisions.[27]

C. Irrevocable Offer

A firm offer is a signed promise by merchant to keep offer open which is enforceable up to 90 days.[28]

UCC § 2-104 DEFINITIONS: "MERCHANT"; "BETWEEN MERCHANTS"

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

…

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

UCC § 2-205. FIRM OFFERS

[26] *Textile Unlimited, Inc. v. BMH and Company*.

[27] *Standard Bent Glass v. Glassrobots*.

[28] Mid-South Packers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

MODULE FOUR: INDEFINITENESS

The indefiniteness doctrine may be used as a defense to contact formation. For example, the party seeking to get out of the contract may argue the contract is too indefinite to enforce because there is no way for a court to impose a remedy. A contract must be sufficiently definite, so that in the event of breach, a court can fashion a remedy with reasonable certainty. The more definite the preliminary negotiations the more likely it will amount to an offer. For example, generally an advertisement is not an offer, however when clear and definite it can create a power of acceptance. (Lefkowitz). If the preliminary negotiation spells out the essential terms (subject matter, quantity, price, time of performance, place of delivery and payment terms) then it will more likely be an offer, with the offeree's assent concluding the deal.

RS § 33 CERTAINTY

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

Letter of intent to be bound could be an enforceable contract if parties express an intent to be bound and parties have agreed to essential terms. In order to be an enforceable contract, the promises and performances to be rendered by each party must be reasonably certain. (Academy Chicago Publishers v. Cheever)

RS § 27 EXISTENCE OF CONTRACT WHERE WRITTEN MEMORIAL IS CONTEMPLATED

Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

Missing essential term-in the absence of an express term, the courts may inquire into the intent of the parties and supply the missing term if it may be fairly and reasonably fixed by the

surrounding circumstance and the parties' intent.[29] Even though one or more terms are left open, a contract does not fail for indefiniteness if the parties have intended make a contract, and there is a reasonable certain basis for giving an appropriate remedy. A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract. (Academy citing Champaign National Bank v. Landers, RS 33**).**

Ambiguity- if the contract is ambiguous, such that the court cannot fashion a remedy, it will fail for indefiniteness.[30]

Agree to agree- since courts interpret contracts, they don't make them, so when the contract term is based on a future agreement between the parties, the courts will not typically force the parties to come to an agreement. In contract formation, parties have the right to contract or not. Courts will not force parties to form contracts, thus when parties merely agree to agree in which material terms are left for future negotiations, no contract is formed.[31]

The enforceability of a contract where the parties agree to agree examines the following factors:
1. intent to be bound- courts will not frustrate the intention if it is reasonably possible to fill in some gaps that the parties have left and reach a fair and reasonable result;
2. parties can't agree on price then price shall be reasonable price;
3. Courts use equitable powers.[32]

Contracts are more easily formed and less likely to fail for indefiniteness under the UCC. The UCC has a number of gap-filling provisions (default provisions) that are applied when the parties fail to agree otherwise.

Gap-filling provisions

UCC § 2-305(1) OPEN PRICE TERMS
§ 2-204(3)
§ 2-307 DELIERY IN SING LOT OR SEVERAL LOT
§ 2-308(a) ABSENCE OF SPECIFIED PLACE FOR DELIVER
§ 2-309(1) ABSENCE OF SPECIFIC TIME PROVISION; NOTICE OF TERMINATION
§ 2-310(a) OPEN TIME FOR PAYMENT OR RUNNING OF CREDIT; AUTHORTY TO SHIP UNDER RESERVATION

MODULE FIVE: CONSIDERATION

[29] *MGM v. Scheider*
[30] Varney v. Ditmars
[31] *Martin Delicatessen v. Schumacher*
[32] *Olgebay Norton v. Armco*

Issue spotting: In analyzing whether there is sufficient consideration, look for the broken promise. Who is not keeping the promise? Was the promise supported by adequate consideration?

A. Consideration

Defined

Every contract must contain at least one promise. Consideration is what makes promises enforceable, in examining consideration as an "exchange" each party to the contract must be providing consideration. This for that, requiring a mutual exchange between the parties. Legal detriment is required. Consideration is what is given in exchange for the promise in question. Was that what the promisor bargained for in exchange for his promise, and was that what was received?

RS § 71 REQUIREMENT OF EXCHANGE; TYPES OF EXCHANGE

(1) To constitute consideration, a performance or a return promise must be bargained for.
(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
(3) The performance may consist of
- **(a) an act other than a promise, or**
- **(b) a forbearance, or**
- **(c) the creation, modification, or destruction of a legal relation.**

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Parties

Instead of addressing the parties as offeror/offeree we move to promisor/promisee because in addressing consideration, mutual assent has allegedly occurred and now we are further examining the components of mutual asset to determine whether the underlining promise (which could be from offeror or offeree) are legally enforceable.

Promisee must promise to do something that he is not legally required to do, or forebear something that he has the right to do.[33] Consideration can be a return promise, for example in a bilateral contract, exchange of promises constitutes consideration.

RS § 72 EXCHANGE OF PROMISE PERFORMANCE

Except as stated in §§ 73 and 74 (see Waiver of Claims on following page), any performance which is bargained for is consideration.

[33] Langer v. Superior Steel Corp

RS § 73 EXCHANGE OF PROMISE PERFORMANCE

Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

RS § 75 EXCHANGE OF PROMISE FOR PROMISE
Except as stated in §§ 76 and 77, a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.

Gift promises are not consideration because there is no exchange, instead it is gratuitous, and are not legally enforceable because they lack consideration.[34] Conditions to make a gift are also not consideration. For example, stop by my office and I promise to give you my book, is not consideration.

Past consideration is something that the promisor completed prior to the promise and is not consideration because it is not the required bargained for exchange.[35] For example, thanks you for taking me to the airport, I promise to buy you lunch.

B. Special rules

Forbearance of right is consideration. Refraining from doing something you have the legal right to do is consideration.[36] The adequacy of consideration is generally irrelevant (too difficult to measure), but merely nominal consideration is not consideration. False recitals of consideration are not consideration unless actually given. For example, $1 and other valuable consideration" needs to be paid and there needs to be other valuable consideration. A contract under seal is not consideration.

C. Waiver of claims

Waiving your right to sue, can be consideration.[37] Waiver of an invalid claim is consideration provided that at the time of waiver there was an honest belief or right to sue or doubtful claim.[38] If someone threatens to sue knowing there is no claim whatsoever against the other, this waiver of claim is not adequate consideration.

[34] Kirksey v. Kirskey
[35] Jara v. Supreme Meats
[36] Hammer v. Sidway
[37] In Re Green
[38] Fiege v. Boehm

RS § 74 SETTLEMENT OF CLAIMS

(1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
  (a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
  (b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.

(2) The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

D. Modification

Pre-existing Duty-if someone has a pre-existing duty to do something, then agreeing to do that what they are already bound is not consideration.[39] The policy behind the pre-existing duty rule is to avoid the hold-up game.[40]

Debtor/Creditor-paying a lesser amount of an agreed upon, currently owed debt is not consideration. An accord and satisfaction is when parties agree to take a lesser mount when there is a good-faith dispute over amount owed, in which case the lower amount is binding on creditor.

Modification of a contract requires support by additional consideration. If the parties agree to modify the contract, the new (modified) contract needs to be supported by new consideration by both parties. There are exceptions to the new consideration, if the parties rescind the old contract, and replace it with a new one; or if there is unforeseen hardship on the part of one party.

RS § 89 MODIFICATION OF EXECUTORY CONTRACT

A promise modifying a duty under a contract not fully performed on either side is binding
(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
(b) to the extent provided by statute; or
(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

E. Illusory promises

Illusory promises are not sufficient consideration because they are not promises at all. For example, I will mow your grass if I feel like it. An illusory promise is when the promisor has

[39] *Levin v. Blumenthal*
[40] *Alaska Packers v. Domenico*

complete discretion in determining whether or not to keep promise, or promisor has a free way out with no consequence. In order to be consideration, the promise must be more than a mere illusion. An illusory promise received/given is no promise at all. Courts will implied duty of good faith and best efforts to find consideration.[41]

RS § 77 ILLUSORY AND ALTERNATIVE PROMISES

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

- **(a) each of the alternative performances would have been consideration if it alone had been bargained for; or**
- **(b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.**

Mutual obligation-each party to the contract must be obligated in some way to give consideration.

RS § 79 ADEQUACY OF CONSIDERTION; MUTUALITY OF OBLIGATION

If the requirement of consideration is met, there is no additional requirement of

(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or

(b) equivalence in the values exchanged; or

(c) "mutuality of obligation."

UCC § 2-103(1)(b) Definitions: Good Faith

- **(c) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.**

F. Relief of Moral Obligation

Although someone is not legally obligated to do something the relief of moral obligation is sometimes sufficient consideration. Generally, past consideration is not sufficient, but in certain circumstances a promise made for a previous action taken by another is consideration when the promisor has received a material benefit.[42]

If the promise is made for a benefit received by another then relief of moral obligation may not be sufficient consideration.[43]

[41] Wood v. Lucy, Lady Duff-Gordon

[42] Webb v. McGowan

[43] Mills v. Wyman

RS § 86 PROMISE FOR BENEFIT RECEIVED

(1) A promise made in recognition of a benefit previously received by the promisor from the promise is binding to the extent necessary to prevent injustice.
(2) A promise is not binding under Subsection (1)
   (a) If the promise conferred the benefit as a gift or for the other reasons the promisor has not been unjustly enriched; or
   (b) To the extent that its value is disproportionate to the benefit.

G. Modification under UCC

Output and requirement Contracts. (see UCC 2-306)
Requirements contract-a contract to purchase all of buyer's requirements from a particular seller. Consideration implicit is the promise not to buy from another seller.
Output contract by seller to sell its entire output to a particular buyer, consideration implicit promise to not sell to another buyer.[44]

Modification generally additional consideration is required for a contract modification, but not under the UCC.[45] The UCC dispenses with the requirement of consideration for an agreement modifying a contract for the sale of goods as long as the modification is done in good faith.

UCC § 2-209 MODIFICATION, RECISSION AND WAIVER

(1) An agreement modifying a contract within this Article needs no consideration to be binding.
(2) A signed agreement which excludes modification ore rescission except by a signed writing cannot be otherwise modified or rescinded, by the merchant must be separately signed by the other party.
(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.
(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

MODULE SIX: PROMISSORY ESTOPPEL

Issue spotting: If after consideration analysis you have an unenforceable promise, can the equitable doctrine be sued to avoid injustice.

[44] Rehm-Zeiher v. Walker
[45] Angel v. Murray

The doctrine of promissory estoppel (detrimental reliance) is used to enforce a promise when there is no real exchange, based on foreseeable, detrimental reliance of the promise amounting to an injustice. Damages are limited to reliance damages.[46] The doctrine of promissory estoppel is generally used to enforce a clear and unambiguous promise, when promisee has reasonably and foreseeably relied on it.

RS § 90 PROMISE REASONABLY INDUCING ACTION OR FOREBEARANCE

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(1) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

(2) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(3) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Past consideration is not sufficient consideration to enforce a promise, but when the promisee, reasonably and detrimentally relies on the promise the courts will enforce the promise to avoid an injustice.[47] Gift promises are not legally enforceable due to the lack of consideration, but reasonable and detrimental reliance will allow courts to enforce the promise to avoid an injustice.[48] Any promise made without consideration should examine whether or not promissory estopple can provide some remedy.[49]

MODULE SEVEN: STATUTE OF FRAUDS

Issue spotting: Is this the kind of contract that is governed by the statute of frauds? If so, is the contract evidenced by a memorandum? If the party did not comply are there any equitable doctrines?

A. Requirements

[46] Citiroof v. Tech Contractiong
[47] Feinberg v. Pfeifer
[48] Rickets v. Scothorn
[49] Blinn v. Beatrice Community Hospital

Only certain kinds of contracts must be evidenced by a memorandum; a writing, they include contracts in contemplation of marriage; contract where performance is not possible within a year; contracts that deal with the sale of land; contracts signed by an executor; contracts for the sale of goods in excess of $500 (UCC); and a surety. The purpose of the statute of frauds is to prevent perpetration of fraud by perjury. The statute of frauds is an affirmative defense to contract formation.

RS § 110 CLASSES OF CONTRACTS COVERED

1**. Marriage- contracts in where the consideration is marriage or promise to marry must be evidenced by a memorandum. For example, father promises to make prospective son-in-law CEO of family business in exchange for son-in-law's marriage to daughter.**
2. Year-performance cannot be possible within a year. The period begins when the contract is formed. The requirement is construed very narrowly.
3. Land contracts are governed by the statute of frauds, including leases easements and purchases.
4. Executor's agreement to pay the debts of the decedent must be in writing. This type of agreement is so unlikely that it must be evidenced by a memorandum.
5. Goods over $500.
6. Surety is an agreement by one person to be financially responsible for another's debt and must be evidenced by a memorandum. There is an exception known as the main purpose rule. If the main purpose of the contract is to advance the surety's own economic interest, then the contract need not be evidence by a memorandum.

RS § 130 CONTRACT NOT TO BE PEFROMED WITHIN A YEAR.

Where performance is possible, even though it is an alternative performance, it is not governed by the statute of frauds.[50]

RS § 131 GENERAL REQUIRMENTS OF A MEMORANDUM

Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
(a) reasonably identifies the subject matter of the contract,
(b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
(c) states with reasonable certainty the essential terms of the unperformed promises in the contract.

It is possible to piece together the memorandum requirements by tacking together the multiple documents.[51] The memorandum may consist of multiple writings that are tacked together

[50] *Professional Bull Riders v. Autozone*
[51] *Crabree v. Elizabeth Arden*

provided the writings; 1) relate to the same transaction; 2) refer to the other writings; and 3) signed by the party to be charged. [52]

Signature is any mark made with the intent to authenticate. For example, initials or "X" can constitute a signature. In is also possible to argue letterhead constitute a signature.

Party to be charged is the person who is seeking to avoid the statute of fraud as a defense. An agent's signature who is signing within the scope of his or her authority will be imputed to the principal. If all parties have not signed it will be enforceable against those that did.

Essential terms include: 1) identification of the subject matter; 2) indication that a contract has been made between the parties; 3) reasonable certainty, the essential terms and conditions.

RS § 132 SEVERAL WRITINGS

The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction.

RS § 135 WHO MUST SIGN

Where a memorandum of a contract within the Statute is signed by fewer than all parties to the contract and the Statute is not otherwise satisfied, the contract is enforceable against the signers but not against the others.

B. Exceptions

RS § 139 ENVORCEMENT BY VIRTURE OF ACTION IN RELIANCE

Although certain contracts must be evidenced by a writing, there are exceptions to the Statue of Frauds.
Partial Performance Doctrine issued to get around the Statute of Frauds.
Promissory Estoppel (action in reliance)
Like RS 90, and the requirements of promissory estoppel this doctrine is an exception to the statute of frauds requirements. Similarly, the damages are limited to reliance damages.[53]
Equitable estoppel – misrepresentation, like promissory estoppel, this equitable remedy is used to allow an enforceable agreement to be enforced despite its lack of writing.

C. Statute of Frauds under UCC

UCC § 2-201 FORMAL REQUIREMENTS: STATUTE OF FRAUDS

[52] *Snyder v. Snyder*
[53] *Sullivan v. Porter*

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $ 500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.
(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable.

(a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods for which payment has been made and accepted or which have been received and accepted (§ 2-606).

Memorandum requirements are relaxed under the UCC and must include 1) that a contract has been made 2) quantity and 3) signed by the party to be charges.

Merchants must read their mail. When both parties are merchants, and a memo is sent and the party receiving it has reason to know it contents the memo is sufficient against the parties unless there is written notice of objection within 10 days.

Exceptions to Statue of Frauds
Specially manufactured goods not suitable for sale to others
Goods received and accepted
Payment made and accepted
Admission in pleading

MODULE EIGHT: THIRD PARTIES

Most contracts involve the offeror and offeree, however in some cases one of the parties bargains for a promise which benefits someone who is not a party to the contract. Initially this

third party could not bring an action because that third party was not in privity with the promisor, but those rules have changed.

Non-contracting party issues arise as a result of a third-party beneficiary[54] or as a result of an assignment and delegation.[55]

[54] Lawrence v. Fox 20 N.Y 268 (1859).

[55]