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# Contracts

Steven L. Emanuel

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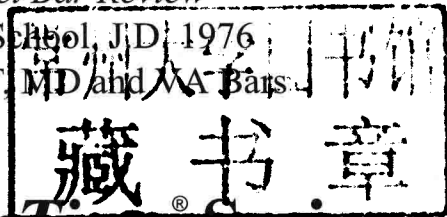
# CONTRACTS

FOURTH EDITION

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**The *CrunchTime*® Series**



**Wolters Kluwer**  
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## Preface

Thank you for buying this book.

The *CrunchTime* Series is intended for people who want Emanuel quality, but don't have the time or money to buy and use the full-length *Emanuel Law Outline* on a subject. We've designed the Series to be used in the last few weeks (or even less) before your final exams.

This book includes the following features, most of which have been extracted from the corresponding *Emanuel Law Outline*:

- **Flowcharts** — We've reduced most principles of *Contract* law to a series of 16 Flowcharts, created specially for this book and not published elsewhere. We think these will be especially useful on open-book exams. The Flowcharts begin on p. 1.
- **Capsule Summary** — This is a 96-page summary of the subject. We've carefully crafted it to cover the things you're most likely to be asked on an exam. The Capsule Summary starts on p. 41.
- **Exam Tips** — We've compiled these by reviewing dozens of essay and multiple-choice questions asked in past law-school and bar exams, and extracting the issues and "tricks" that surface most often on the exams. The Exam Tips start on p. 143.
- **Short-Answer** questions — These questions are generally in a Yes/No format. In the case of the present *Contracts* volume, they've been adapted from the *Law in a Flash* flash-card deck on *Contracts*. (We've re-written most answers, to better mesh with the *Emanuel* outline's approach). The questions start on p. 209.
- **Multiple-Choice** questions — These are in a Multistate-Bar-Exam style, and are taken from a book also published by Aspen Publishers called the *Finz Multistate Method*. They start on p. 265.
- **Essay** questions — These questions are actual ones asked on law school exams. They start on p. 291.

We hope you find this book helpful and instructive. Good luck.

Steve Emanuel  
Larchmont, NY  
September 2010

## TABLE OF CONTENTS

<b>PREFACE</b> .....	vii
<b>FLOWCHARTS</b> .....	1
<b>CAPSULE SUMMARY</b> .....	41
<b>EXAM TIPS</b> .....	143
<b>SHORT-ANSWER QUESTIONS</b> .....	209
<b>ANSWERS TO SHORT-ANSWER QUESTIONS</b> .....	237
<b>MULTIPLE-CHOICE QUESTIONS</b> .....	265
<b>ANSWERS TO MULTIPLE-CHOICE QUESTIONS</b> .....	281
<b>ESSAY EXAM QUESTIONS AND ANSWERS</b> ..	291
<b>SUBJECT MATTER INDEX</b> .....	303

# **FLOWCHARTS**

## TABLE OF CONTENTS TO FLOWCHARTS

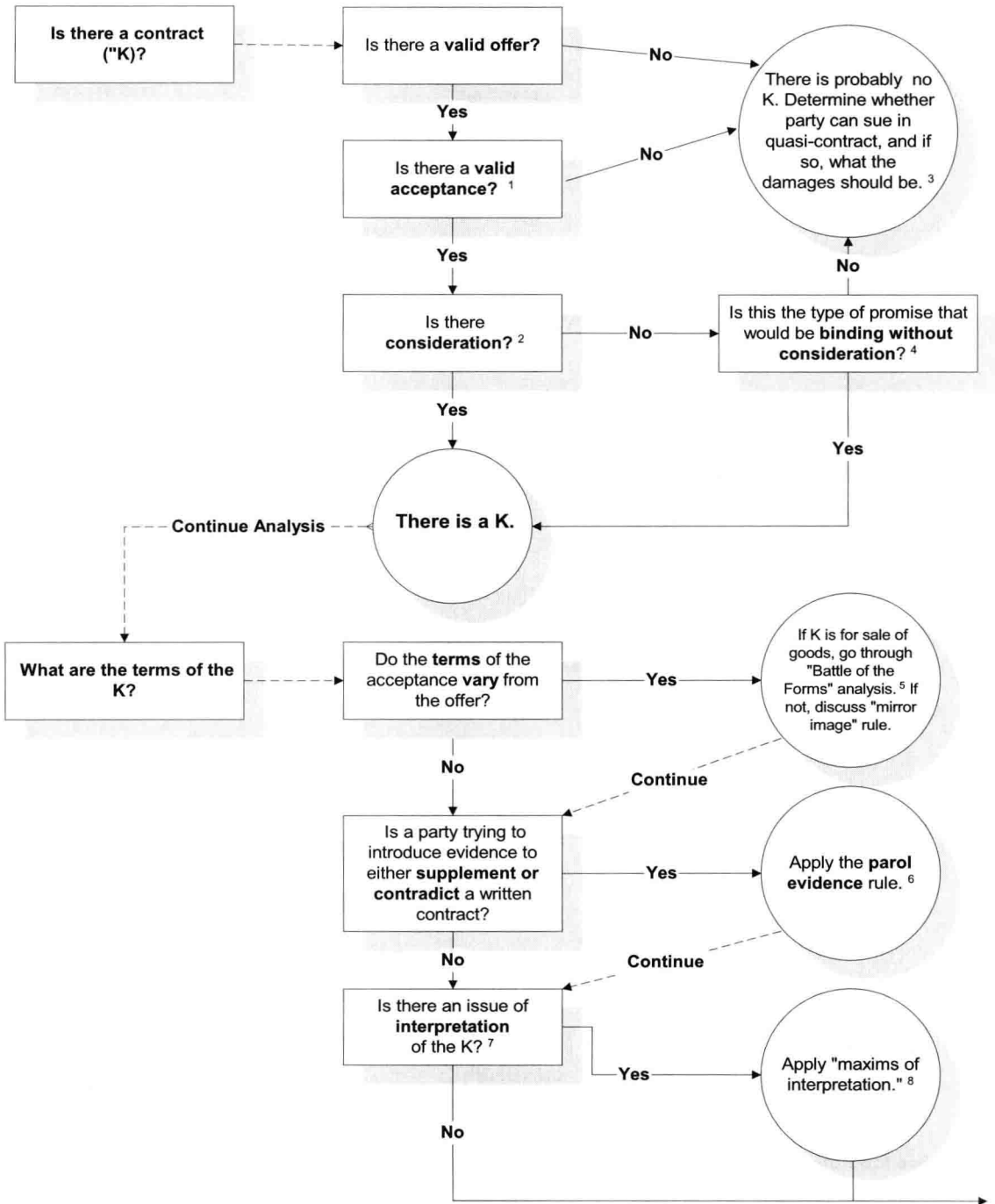
1-1	Analyzing Contracts Questions . . . . .	3
2-1	Offer And Acceptance #1 (The Offer) . . . . .	7
2-2	Offer and Acceptance #2 (The Acceptance) . . . . .	9
2-3	Battle of the Forms (Part I) . . . . .	11
2-4	Battle of the Forms (Part II): Confirmation of an Oral Agreement, Under UCC §2-207 . . . . .	14
2-5	The Mailbox Rule: Determining When an Acceptance Becomes Effective . . . . .	16
3-1	Consideration — An Overview . . . . .	18
3-2	The Bargain Element of Consideration . . . . .	19
3-3	The Detriment Element of Consideration . . . . .	21
3-4	Illusory and Alternative Promises . . . . .	24
4-1	Promises Binding Without Consideration . . . . .	26
6-1	The Parol Evidence Rule . . . . .	28
7-1	Breach Under the UCC, Where a Seller Ships Nonconforming Goods. . . . .	30
9-1	The Statute of Frauds . . . . .	33
10-1	Damages in Sales Contracts Under UCC: Buyer’s Remedies . .	36
10-2	Damages in Sales Contracts Under UCC: Seller’s Remedies . .	38

**Note:** The cross-references in the Flowcharts’ footnotes (e.g., “See Ch.6, V(B)”) are to the full-length *Emanuel Law Outline* on Contracts (9th Edition, © 2010, Aspen Publishers).



## Figure 1-1 Analyzing Contracts Questions

Use this chart to help you spot issues when analyzing any contracts exam question. Skim the questions along the far left for the general issues, and follow the body of the chart where needed for more detailed analysis.



See footnotes after 3rd page of chart.

Continue on next page

Figure 1-1  
Analyzing Contracts Questions (cont.)

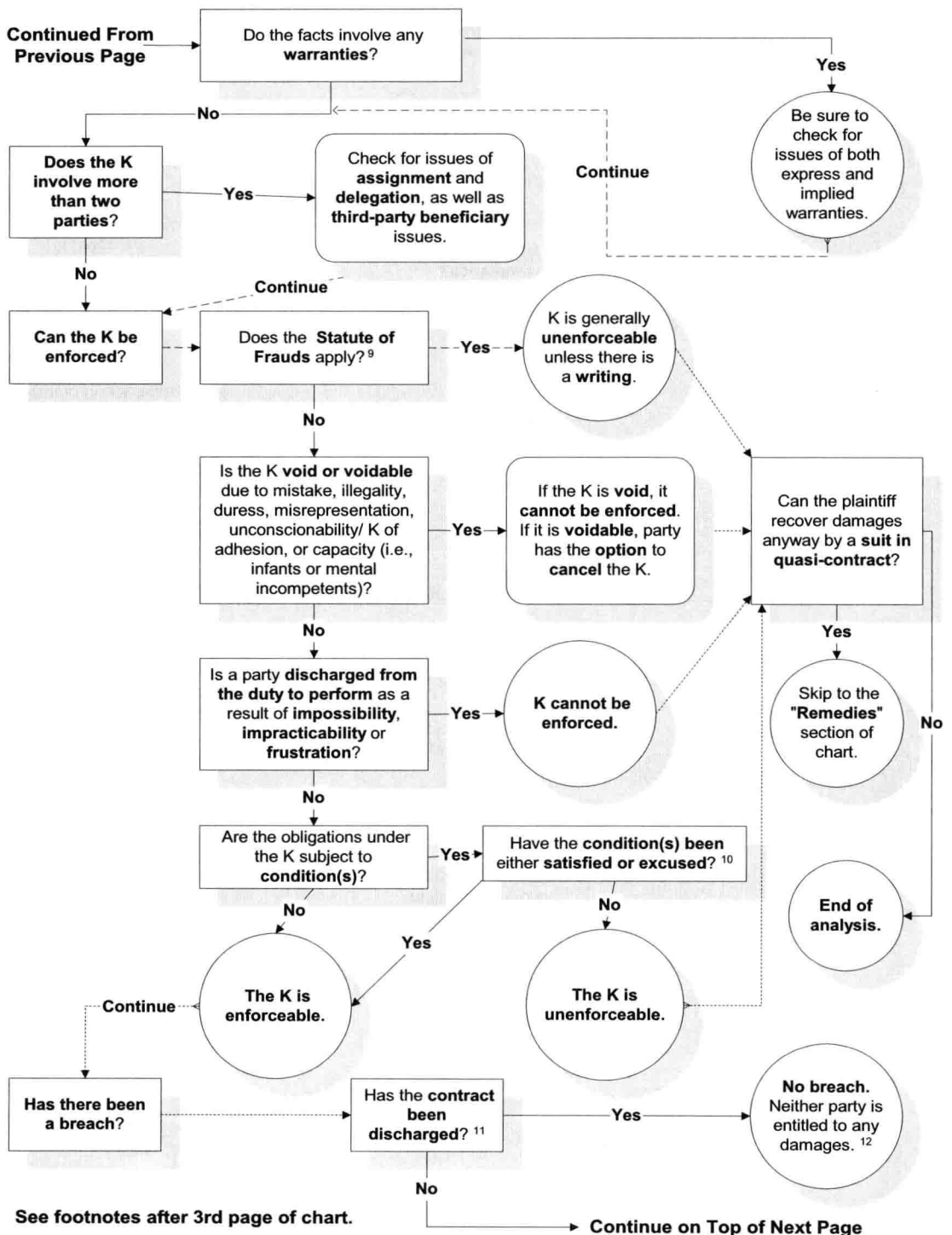
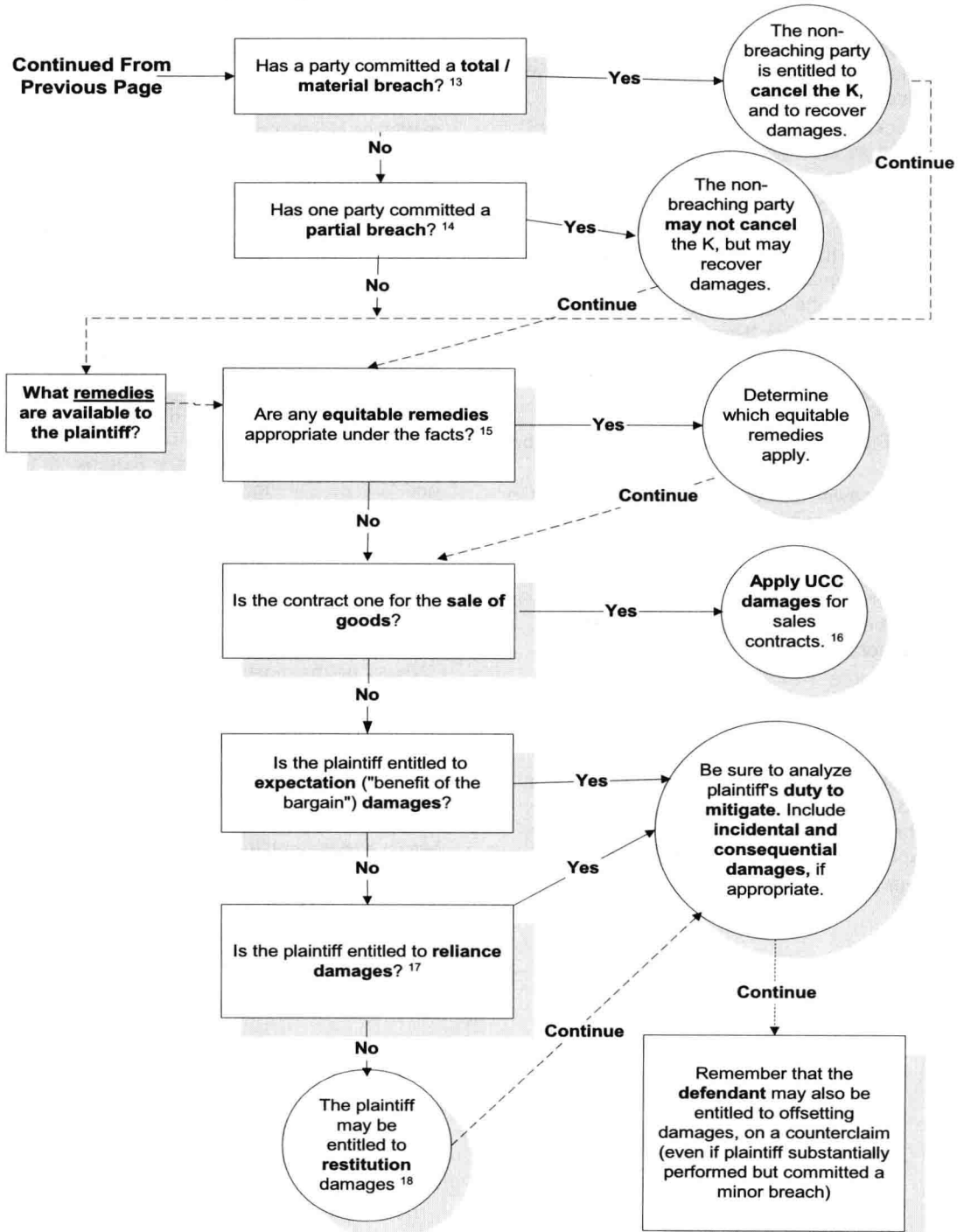


Figure 1-1  
**Analyzing Contracts Questions (cont.)**



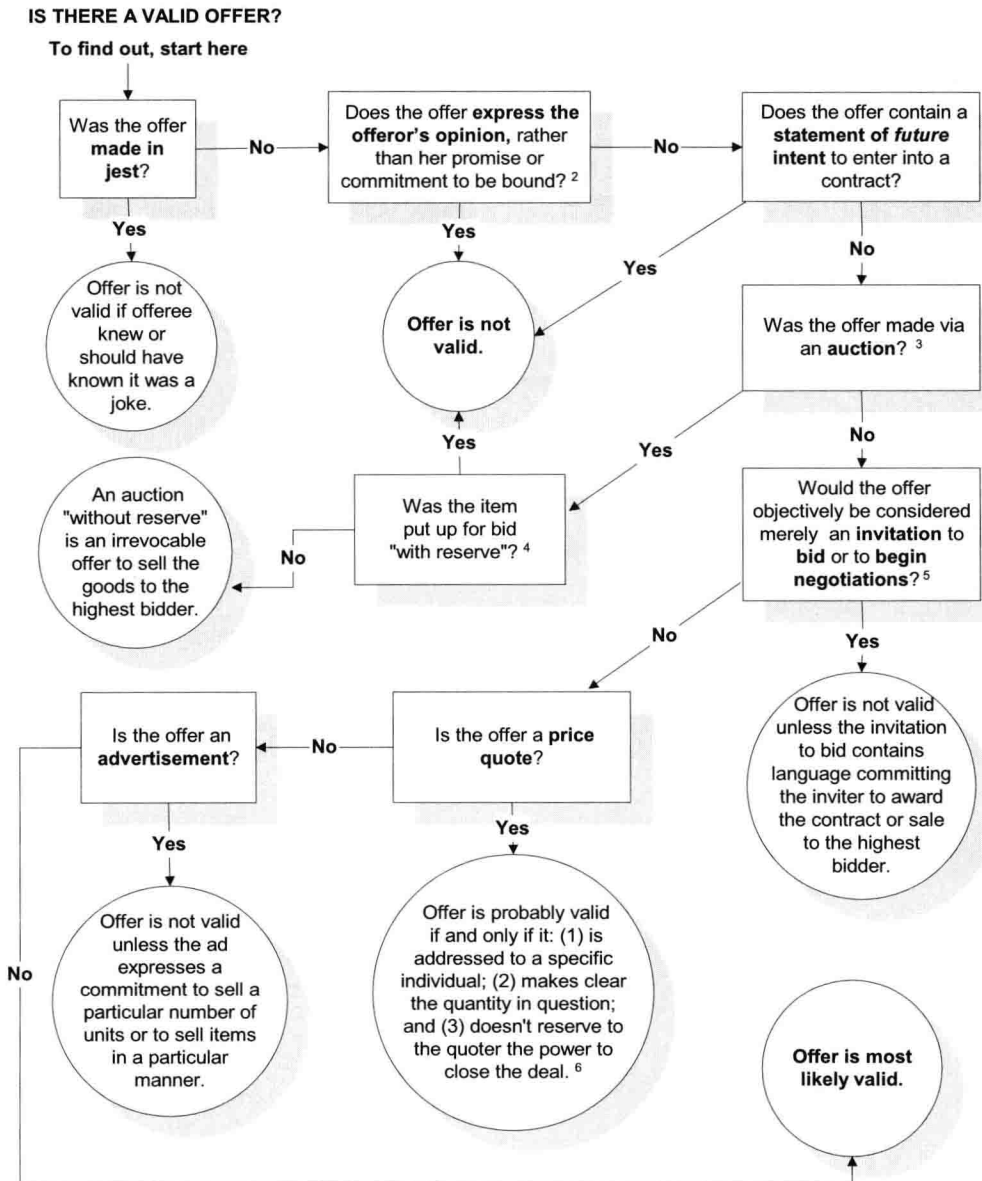
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## Notes to Figure 1-1 (Analyzing Contracts Questions)

- <sup>1</sup> Acceptance can be either by performance (in unilateral contract) or by promise to perform (in bilateral contract).
  - <sup>2</sup> Check for both the "bargain" and "detriment" elements. See also the "Consideration" flow charts, Figs. 3-1 through 3-4.
  - <sup>3</sup> But even in the absence of a specific valid offer and/or acceptance, consider the possibility that the parties' later actions may have recognized the existence of a contract, in which case the court will enforce that contract.
  - <sup>4</sup> See Figure 4-1 for "Promises Binding Without Consideration" flow chart.
  - <sup>5</sup> See Figures 2-3 and 2-4 for "Battle of the Forms" flow charts.
  - <sup>6</sup> See Figure 6-1 for "Parol Evidence Rule" flow chart.
  - <sup>7</sup> Your answer will be "yes" if a party is trying to show the meaning of a term contained in the writing.
  - <sup>8</sup> See Ch. 6, V(B). Remember that if the conflict concerns the meaning of a key term, it may be that there was no "mutual assent" and therefore no contract.
  - <sup>9</sup> See Figure 9-1 for "Statute of Frauds" flow chart.
  - <sup>10</sup> Check for: (1) "substantial performance" of the condition (that's enough, if the condition is constructive rather express) or (2) facts that show that the condition has been waived or otherwise excused (that's enough, for either express or constructive conditions).
  - <sup>11</sup> Your answer will be "yes" if, for example, there has been a rescission or an accord and satisfaction.
  - <sup>12</sup> Check for the possibility of a non-contractual restitution or reliance award (common where the contract was discharged for impossibility, frustration, etc.)
  - <sup>13</sup> Your answer will be "yes" if a party has not substantially performed her obligations. Be sure to include cases of anticipatory repudiation here.
  - <sup>14</sup> Your answer will be "yes" if a party has substantially performed, but nonetheless failed to comply perfectly with the contract's requirements. In that case, the other party will be entitled to damages to compensate for the non-conformity.
  - <sup>15</sup> See Ch. 10, sec. XIII. See also Figures 10-1 and 10-2 on Damages in Sales Contracts Under the UCC.
  - <sup>16</sup> These include specific performance and injunctions. Equitable remedies are rare in contracts cases. They are used most often in land sale contracts, and occasionally for sales of unique goods.
  - <sup>17</sup> This will be the most common form of damages in: (1) suits brought on the contract, where the plaintiff's lost profits (expectation measure) can't be shown with sufficient certainty; and (2) suits brought in quasi-contract.
  - <sup>18</sup> Restitution is used most often to prevent unjust enrichment, including cases in which both parties have been discharged (e.g., cases of impossibility or frustration).
-

## Figure 2-1 Offer and Acceptance #1 (The Offer)

A valid offer is one that instills in the offeree the power to enter into a contract simply by making his acceptance. Use the chart below to help determine whether or not there is a valid offer under your facts. (The chart uses the word "offer" to refer to expressions that may or may not be true offers. Where an expression is a true offer – i.e. a statement that if accepted will automatically form a contract – the chart calls that expression a "valid" offer.)



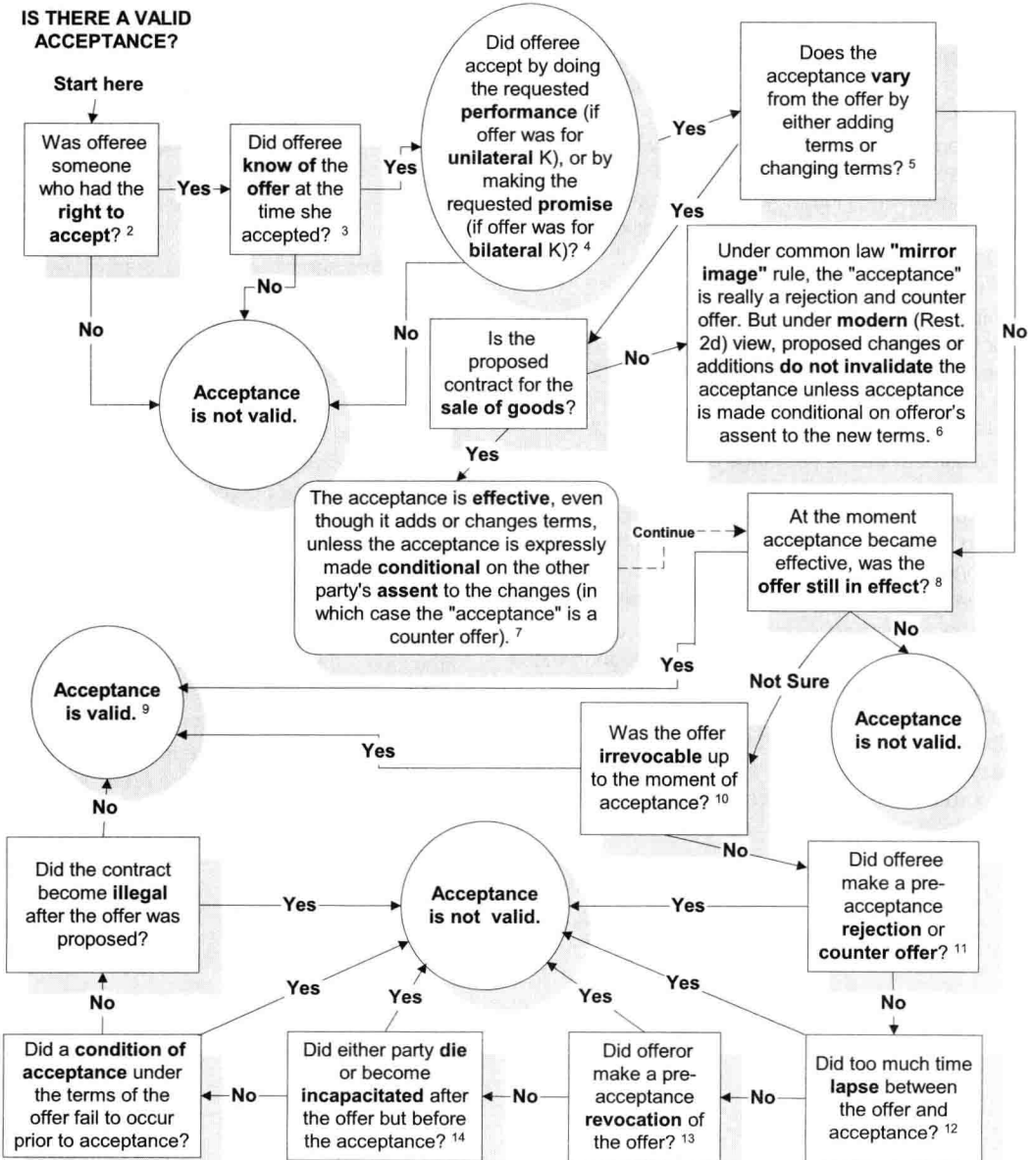
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## Notes to Figure 2-1 (The Offer )

- <sup>1</sup> This flowchart (and Figs. 2-2 through 2-5 below) will help you determine whether a contract can be based on the parties' respective offer and acceptance. However, keep in mind that sometimes the parties never make a true "offer" and/or a true "acceptance," but a contract is created anyway by their conduct. For instance, several UCC provisions allow the court to find a contract based solely on the parties' conduct. See Ch. 2, V(I).
- <sup>2</sup> For example, a surgeon's statement, "If I operate, it will take about four days for the boy's hand to heal" is an opinion, not a promise. See, e.g., *Hawkins v. McGee*.
- <sup>3</sup> This and the two succeeding auction-related boxes assume that you're analyzing whether the seller has made an offer. If you're analyzing whether a bidder (would-be buyer) has made an offer, the general rule is that the bidder has the right to withdraw his bid at any time before the gavel goes down. Therefore, the mere act of bidding involves no commitment and thus no valid offer.
- <sup>4</sup> "With reserve" means the auctioneer can withdraw the goods without consummating the sale to any bidder.
- <sup>5</sup> For example, "I would consider \$50 for this necklace" is an invitation to begin negotiations, not an offer.
- <sup>6</sup> An example of (3) might be a statement in the quote, "All orders are subject to seller's home-office approval." See Ch. 2, III(D), et seq. for more factors concerning quotes.
-

Figure 2-2  
**Offer and Acceptance #2**  
**(The Acceptance)**

In order for an acceptance to be valid: (1) it must be made to someone intended by the offeror to have the right to accept; and (2) it must become effective during the time in which the offeree still has the power to accept. Use the chart below to help figure out whether your facts fit these requirements. <sup>1</sup>



See footnotes on next page

## Notes to Figure 2-2 (The Acceptance)

- <sup>1</sup> In addition to the requirements stated in the flowchart, the acceptance will not be valid if: (1) the deal is void for indefiniteness; or (2) the parties have had a fatal misunderstanding about a key term. See Ch. 2, sections VIII and IX, for further discussion of these issues.
- <sup>2</sup> Use an objective test to determine whether the offeror meant for the person in question to be able to accept.
- <sup>3</sup> Use an objective test to determine whether the offeree had knowledge. His subjective knowledge is not relevant. Note however that "standing offer" rewards offered by governmental bodies do not require advance knowledge. See Ch. 2, IV(C)(2)(a).
- <sup>4</sup> If it is unclear whether the offer is for a unilateral or bilateral contract, acceptance can be either by performance or by promise to perform. (*Example*: A buyer's order for goods can usually be accepted either by shipping or by promising to ship.) Remember that acceptance can be implied through the offeree's actions (e.g., keeping goods), under the objective theory of contracts. Also, make sure the method of acceptance (e.g., phone, mail, etc.) is as allowed by the offer – the offeror is "master of his offer" in this sense.
- <sup>5</sup> This question assumes that the terms of the "acceptance" correspond closely enough to those of the offer that it's fair to say that there's been "mutual assent," i.e., a "meeting of the minds." If the two diverge so much that there's no mutual assent, then under both the UCC and the modern approach for non-UCC cases, the "acceptance" is not valid, and is at most a counter-offer.
- <sup>6</sup> See Rest. 2d, §§ 59 and 61, and V(N) of this chapter.
- <sup>7</sup> See Figures 2-3 and 2-4 for UCC "Battle of the Forms" issues, then return to this chart for further analysis.
- <sup>8</sup> Determine when acceptance became effective by referring to Figure 2-5, "The Mailbox Rule" flow chart.
- <sup>9</sup> But see Note 1, *supra*.
- <sup>10</sup> Note that an offer is still revocable even though it contains language like "I will hold this open for two weeks." True irrevocable offers include option contracts and "firm offers" by merchants under the UCC.  
Also, offers can become temporarily irrevocable as a result of the offeree's part performance or detrimental reliance. See Ch. 2, VI(J). For instance, sub-contractor bids are usually considered irrevocable during the reasonable time necessary for the general contractor to obtain the job and then accept the sub-contractor's bid.
- <sup>11</sup> Rejection or counter offer will not terminate the power to accept if offeror specifically indicates that the offer still stands, or if offeree says that although he does not now intend to accept he wishes to consider the offer further. See Rest. 2d, §§ 38(1) and (2).
- <sup>12</sup> If offeror did not set a time limit, a "reasonable" time limit will be implied. Also, a late acceptance can be treated as a counter offer which the original offeror can then accept or reject.
- <sup>13</sup> See Ch. 2, VI(G), for a discussion on revocation. Note that option contracts are irrevocable offers, even if the offeror purports to revoke.
- <sup>14</sup> See Ch. 2, VI(H), and Rest. 2d, § 48.
-



Figure 2-3  
**Battle of the Forms (Part I)**

Use this chart when the offer and acceptance for the sale of goods are communicated by way of **standardized forms** (i.e., purchase order for the offer and acknowledgment for the acceptance). The chart will help you most if the acceptance varies from the offer; in that situation, the chart will help you determine whether a contract has been formed, and if so, what its terms are under UCC § 2-207. (In cases involving a confirmation of an oral agreement, use Figure 2-4.)

