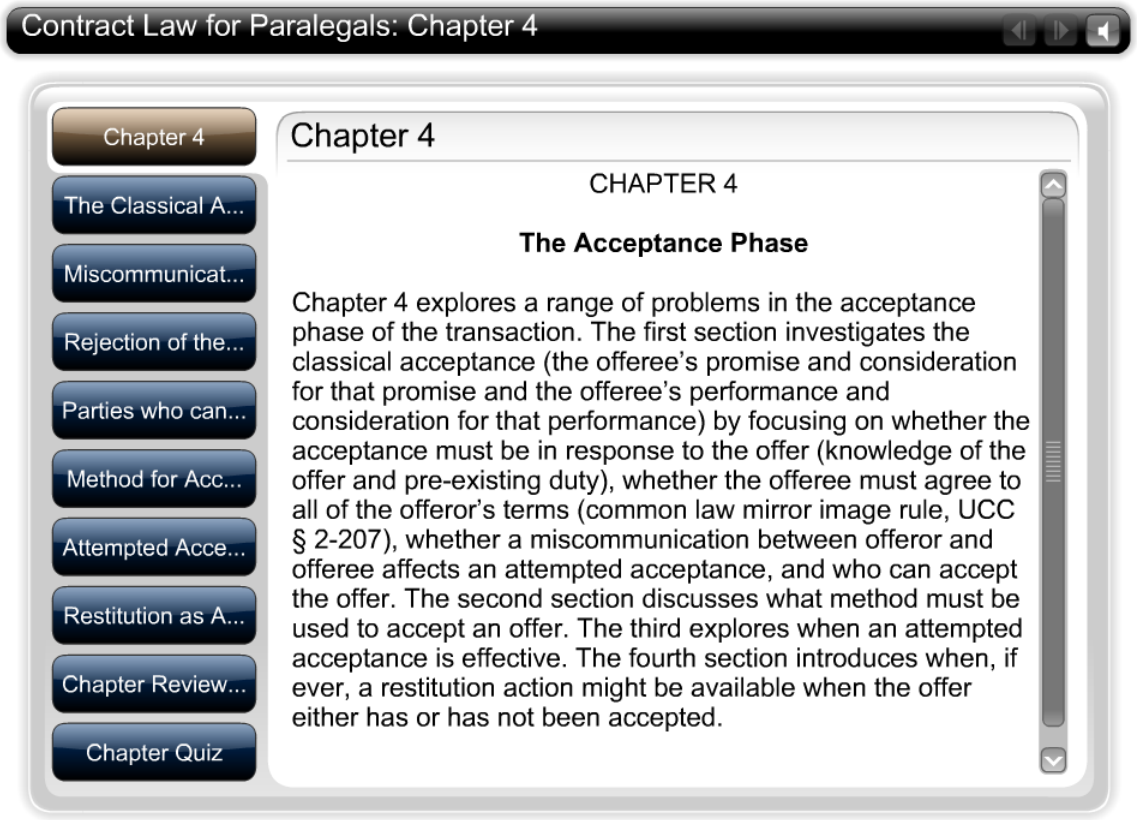
Contract Law for Paralegals: Chapter 4

Chapter 4



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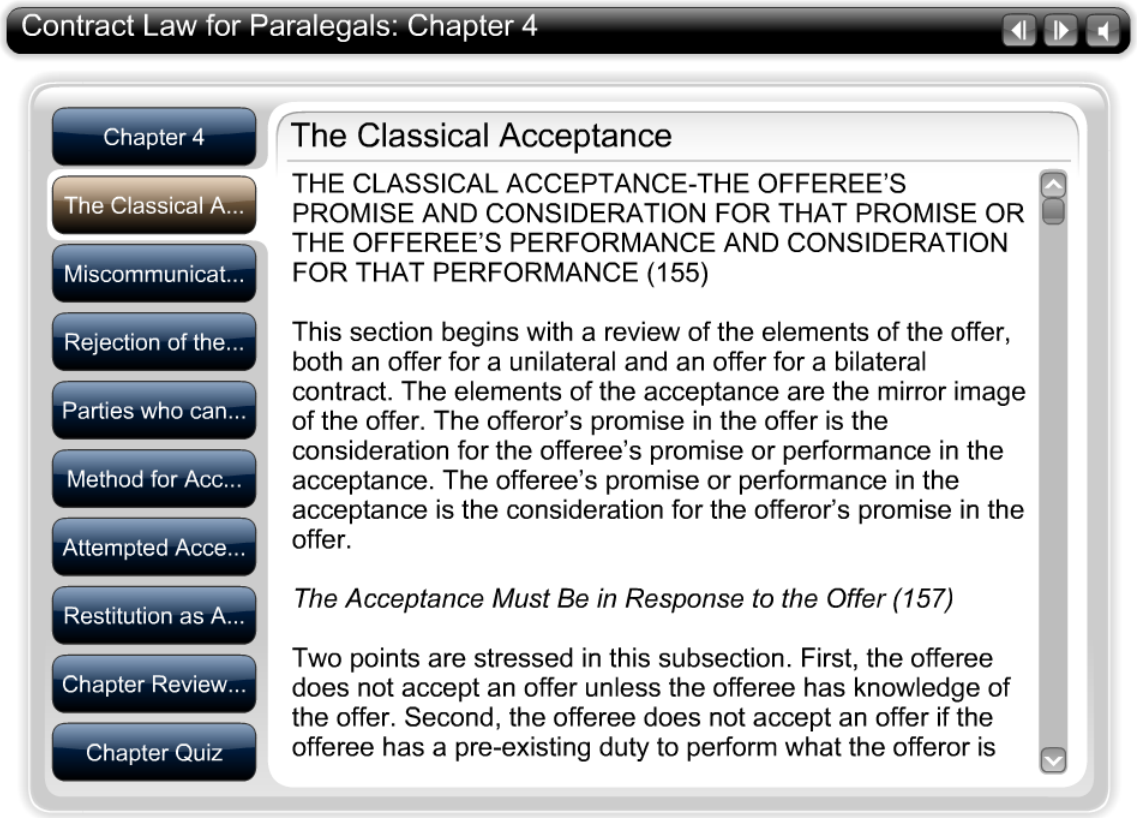
CHAPTER 4

The Acceptance Phase

Chapter 4 explores a range of problems in the acceptance phase of the transaction. The first section investigates the classical acceptance (the offeree's promise and consideration for that promise and the offeree's performance and consideration for that performance) by focusing on whether the acceptance must be in response to the offer (knowledge of the offer and pre-existing duty), whether the offeree must agree to all of the offeror's terms (common law mirror image rule, UCC § 2-207), whether a miscommunication between offeror and offeree affects an attempted acceptance, and who can accept the offer. The second section discusses what method must be used to accept an offer. The third explores when an attempted acceptance is effective. The fourth section introduces when, if ever, a restitution action might be available when the offer either has or has not been accepted.

The Road Map for the Acceptance Phase is Exhibit 4-1 (154).

The Classical Acceptance



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THE CLASSICAL ACCEPTANCE-THE OFFEREE'S PROMISE AND CONSIDERATION FOR THAT PROMISE OR THE OFFEREE'S PERFORMANCE AND CONSIDERATION FOR THAT PERFORMANCE (155)

This section begins with a review of the elements of the offer, both an offer for a unilateral and an offer for a bilateral contract. The elements of the acceptance are the mirror image of the offer. The offeror's promise in the offer is the consideration for the offeree's promise or performance in the acceptance. The offeree's promise or performance in the acceptance is the consideration for the offeror's promise in the offer.

The Acceptance Must Be in Response to the Offer (157)

Two points are stressed in this subsection. First, the offeree does not accept an offer unless the offeree has knowledge of the offer. Second, the offeree does not accept an offer if the offeree has a pre-existing duty to perform what the offeror is now requesting.

Knowledge of the Offer. PARALEGAL EXERCISE 4.1 (157) illustrates the requirement of knowledge of the offer when the offer is for a bilateral contract. Although David's March 1st letter is an offer, Susan's March 2d letter is not a response to David's letter. The fact that the terms in the two letters are the same is a coincidence.

Susan is not being induced by David's offer. Susan's March 2d letter is also an offer. If Susan does not write a second letter or telephone David, she has not accepted his offer and there would be no contract.

The discussion shifts to the offer for a unilateral contract. Under the Restatement (First) of Contracts § 53 knowledge is required before the offeree begins the performance.

Under the Restatement (Second) of Contracts § 51 knowledge is required only before the offeree completes the performance. Students could be asked which version they prefer and why.

PARALEGAL EXERCISE 4.2 (158) illustrates the requirement of knowledge of the offer when the offer is for a unilateral contract. (Paralegal Exercise 4.2 also illustrates an offer made to the general public rather than to a single offeree.) If the offer is for a unilateral contract, when must the offeree have knowledge of the offer? Must it be before the offeree begins the requested performance (i.e., apturing Bonney) or before the offeree completed the requested performance (i.e., returning Bonney)? Either
answer is correct depending on which version of the Restatement is used.

Pre-Existing Duty. Because the topic of pre-existing duty was raised during the discussion of offer, this subsection reviews the basic topic of pre-existing duty and applies it to the acceptance. Students should be aware that both the offer and acceptance should be evaluated for a "pre-existing duty."

PARALEGAL EXERCISE 4.3 (160) involves a pre-existing duty rule in the acceptance. The consideration for William's promise-the executor's promise to pay William his inheritance-was the executor's pre-existing duty. William's attempted acceptance lacks consideration and is, therefore, ineffective.

The Offeree Must Agree to All of the Offeror's Terms (160)
This section focuses on the offeror as the master of the terms that must be accepted.

Two topics are discussed: the common law mirror image rule and the UCC's modification
of the mirror image rule in sale of goods transactions.

Common Law Mirror Image Rule. Under the common law mirror image rule, the offeree must accept the exact terms stated by the offeror. Any deviation would be a rejection of the offer and possibly a counteroffer (assuming the offeree's communication complies with the requirements of an offer). Example 4-5 demonstrates the mirror image rule.

PARALEGAL EXERCISE 4.4 (161) illustrates an attempted acceptance that does not mirror the offer. The offer states that filming is to begin on August 1st while the attempted acceptance states that filming could not begin until August 10th. The attempted acceptance is a rejection of the offer so no contract was formed. The remainder of this subsections deals with the common law mirror image rule and the last shot doctrine. Example 4-6 (161) is a simple mirror image. The terms in the acceptance match the terms in the offer.

Example 4-7 (162) demonstrates a non-mirror image situation. The attempted acceptance, which is not the mirror image of the offer, is a rejection of the offer and becomes a counteroffer.

The last shot doctrine takes the mirror image rule one step further. If the new offeree does a performance that implies the promise that was sought, the offeree's performance constitutes a mirror image acceptance of the counteroffer. Now that a contract has been formed, the terms are those of the offer, in this case, the terms of the counteroffer.

Example 4-8 (162) illustrates the last shot doctrine. The Seller's delivery is the performance that implies the promise and thus is the mirror image acceptance of the counteroffer.

Examples 4-9 and 4-10 (163) apply the last shot doctrine to commercial situations where the Buyer and Seller exchange preprinted forms. This discussion is the lead-in to the UCC § 2-207 (commonly known as the battle of the forms although the section never mentions forms).

The Uniform Commercial Code § 2-207. Because UCC § 2-207 applies only to transactions for the sale of goods, this UCC discussion can begin by relating back to the choice of law question in Chapter 1. Section 2-207 is quoted in the text. Note that Article 2 of the UCC has been amended by the ALI and the National Conference of Commissioners on Uniform State Laws although, at the time this edition of the text was written, the proposed Article 2 amendments had not been enacted by any state.

The proposed amendments to Article 2 of the UCC include a major revision to section 2-207. The title to section 2-207 would change from "Additional Terms in Acceptance" to "Terms of Contract; Effect of Confirmation." This amendment would expand the coverage of section 2-207 to all contracts for the sale of goods and would delete the contract formation aspects found in 2-207(1) and (3). The

proposed amended section 2-207 would only relate to identifying the terms of the contract.

For the proposed amendments to section 2-207, see the University of Pennsylvania Web site-http://www.law.upenn.edu/, or the Cornell University Web site-http://www.law.cornell.edu/. Students may also want to read the Official Comments to section 2-207, if available. The discussion following section 2-207 gives a brief overview of the section. The decision tree in Exhibit 4-6 (165) may be helpful when discussing the mechanics of section 2-207.

PARALEGAL EXERCISES 4.5, 4.6, and 4.7 (169-170) are section 2-207 problems.
Care must be taken not to get bogged down since section 2-207 is intricate. These problems are useful in contrasting the mirror image rule with Article 2 of the UCC.

In PARALEGAL EXERCISE 4.5, the Buyer's purchase order (offer) did not contain an express warranty. The Seller's acknowledgment form did not agree with the Buyer's offer as to bargained for terms and also included a disclaimer of warranty. Therefore, the Seller's form did not constitute an acceptance under 2-207(1). Under 2-207(3), the conduct of the parties indicated a contract so the terms would be those that agree in the forms supplemented by the gap fillers of the Code. This means that the disclaimer would be deleted and the terms in the agreement are supplemented with the implied warranties of 2-314 and 2-315.

In PARALEGAL EXERCISE 4.6, the Seller's acknowledgment form did not include the disclaimer. Because the bargained for terms did not agree, there is no contract under 2-207(1). Under 2-207(3), the conduct of the parties indicated a contract so the terms would be those that agree in the forms supplemented by the gap fillers of the Code. Since the acknowledgment form did not have a disclaimer, it need not be struck. The terms in the agreement are supplemented with the implied warranties of 2-314 and 2-315.

In PARALEGAL EXERCISE 4.7, the Seller's acknowledgment form included a mandatory arbitration clause. Because the bargained for terms did not agree, there is no contract under 2-207(1). Under 2-207(3), the conduct of the parties indicated a contract so the terms would be those that agree in the forms supplemented by the gap fillers of the Code. Since the Buyer's purchase order was silent as to arbitration, that term will be struck from the Seller's acknowledgment form. The terms in the agreement are supplemented with the gap fillers of the Code. Since the Code does not have an arbitration gap filler, the contract will be without arbitration.

The UCC § 2-207 Decision Tree is Exhibit 4-6 (165).

In PARALEGAL EXERCISE 4.8 (175), a timeline works well.

The offer is ABC's purchase order and the attempted acceptance is Quality's acknowledgment form. Under section 2-207(1), Quality's form was a definite expression of acceptance because the bargained for terms (price, quantity, and subject matter-those items that the parties fill in on the form blanks) agreed. Also, Quality's form did not contain a phrase such as "this is not an acceptance unless you agree to all of my terms." Hence there was no "unless" clause. Therefore, under 2-207(1) Quality's form constitutes an acceptance even though it contains "additional or different terms."

Once a contract has been formed under section 2-207(1), the two writings must be compared and the terms classified into one of three categories. Was the term in the first document and not in the second document? Was the term in the second document and not in the first document? Was the subject treated one way in one document and another way in the other? In Paralegal Exercise 4.8, the first document (ABC's purchase order) was silent as to warranty but the second document (Quality's acknowledgment form) stated a 90 day warranty. Since the warranty term does not appear in the first document but does appear in the second, the term is an additional term.

Whether an additional term is in the contract is governed by section 2-207(2). Applying the first sentence of section 2-207(2), the additional term (the 90-day warranty) is a "proposal for addition to the contract." This means that the additional term is not a term of the contract but rather is itself a counteroffer (which most likely will never be accepted). If the transaction is not "between merchants," the analysis is complete and the term is a proposal for addition to the contract.

If, however, the transaction is "between merchants," the second sentence of section 2-207(2) applies and the analysis continues. The first phrase of this sentence places the additional term in the contract ("Between merchants (§ 2-104) such terms become part of the contract"). This phrase is followed by an "unless" provision. If the term falls into "a," "b," or "c," the term is again outside the contract. Whether the 90-day warranty is a "material alteration" under subsection "b" will depend on whether the inclusion of the term will create hardships or surprise. (See section 2-207, comments 4 and 5.) If the term merely restates trade practice, then its inclusion will not create hardship or surprise. If the term deviates substantially from the trade practice, then its inclusion will create hardship or surprise and will constitute a material alteration. Without more information as to trade practice, the issue of material alteration cannot be resolved.

Another solution of PARALEGAL EXERCISE 4.8 (175) raises the question of whether this is an additional term problem or really a different term problem. The analysis is the same as before for finding a contract under section 2-207(1). But when classifying the term, the silence in the first document permits the inclusion

of UCC gap fillers, if the Code has a gap filler on the subject. In this case the Code has an implied warranty of merchantability (§ 2-314) and it is inserted in the first document.

Since the first document states a warranty (even though implied) and the second document states a 90-day warranty, the terms conflict and are classified as different. Unfortunately, not one but three competing solutions must be discussed here. One solution states that by using section 2-207, comment 3, the analysis should be handled by section 2-207(2) even though this is not an additional term problem. The second solution applies section 2-207, comment 6, by analogy and knocks out both terms. The Code then supplements what is left with gap fillers. The third solution merely drops out the second term and leaves the first. The answers under the second and third solutions would be a contract with an implied warranty (§ 2-314), although not for the same reasons.

Had this problem been pre-Code, the mirror image rule would have applied and the “last shot doctrine” would have governed. In the “last shot doctrine” the first form is the offer, the second form is a rejection counteroffer (no mirror image), and performance by the party who is not the counterofferor is the acceptance (promise implied from performance). Therefore, in Paralegal Exercise 4.8, ABC’s purchase order is the offer, Quality’s acknowledgment form is a rejection and counteroffer, and ABC’s acceptance is now the mirror image of Quality’s promise (the terms in Quality’s acknowledgment form), and all the terms in Quality’s acknowledgment form are the terms of the contract. Because Quality’s form had the 90-day warranty, that is a term of the contract. The warranty expired before the bricks cracked and, therefore, Quality did not breach the contract.

In PARALEGAL EXERCISE 4.9 (175) ABC’s purchase order states a price of $10 per 100 and Quality’s acknowledgment form states a price of $12 per 100.

Under section 2-207(1) Quality’s acknowledgment is not a “definite expression of acceptance” because the “bargained for terms” (those terms that the parties fill in on the form blanks) do not agree. If ABC had followed with another form, we would have evaluated that as a possible acceptance under section 2-207(1). Because there are no additional forms being sent, there is nothing further to do in section 2-207(1) and the analysis shifts to section 2-207(3), contract by conduct.

The first sentence of section 2-207(3) mandates a contract because the conduct of both parties recognizes a contract-Quality sends the bricks and ABC accepts the shipment and pays. The terms for all section 2-207(3) contracts are found by using the second sentence of section 2-207(3). Compare the writings (ABC’s purchase order and Quality’s acknowledgment form). A term in both forms is a term of the contract. All others are not terms of the contract. Because the dispute is over the warranty and disclaimer, compare the writings for warranty and disclaimer terms. Since ABC’s purchase order is silent as to warranty and disclaimer, the warranty and disclaimer are not in both forms and, therefore, are

not terms of the contract. Under section 2-207(3), sentence 2, the final step is to supplement the terms of the contract with Code gap fillers. The Code provides an implied warranty under section 2-314 and, therefore, it is a term in the contract.

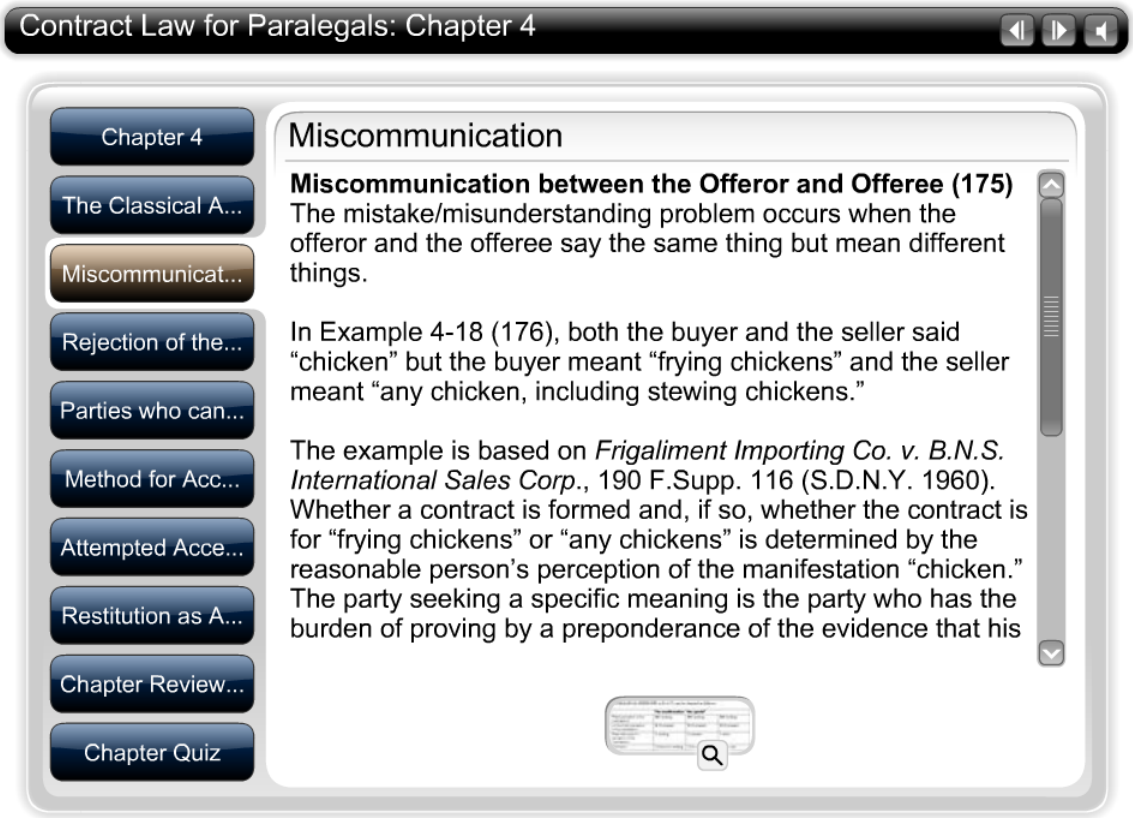
Had this problem been pre-Code, the mirror image rule would have been applied.

ABC's purchase order was the offer and Quality's acknowledgment form was the rejection and counteroffer. Quality's acknowledgment form was the last form or "last shot." When ABC accepted the shipment and paid, it implied acceptance of Quality's counteroffer and a contract was formed under Quality's terms. Because Quality's terms included only a 90-day warranty and the cracking of the brick occurred after 90 days, Quality did not breach the contract.

One final note since the following question might arise in class: "Does 2-207 apply only to pre-printed forms?" Section 2-207(1) does not expressly limit the section to pre-printed forms. If a party uses a letter, then all the terms in the letter would be "bargained for terms" and this may work the problem back to the mirror image rule even if the subject is a sale of goods.

For a detailed discussion of section 2-207, see J. White & R. Summers, Uniform Commercial Code, 5th ed. (West Group, 2000).

Miscommunication



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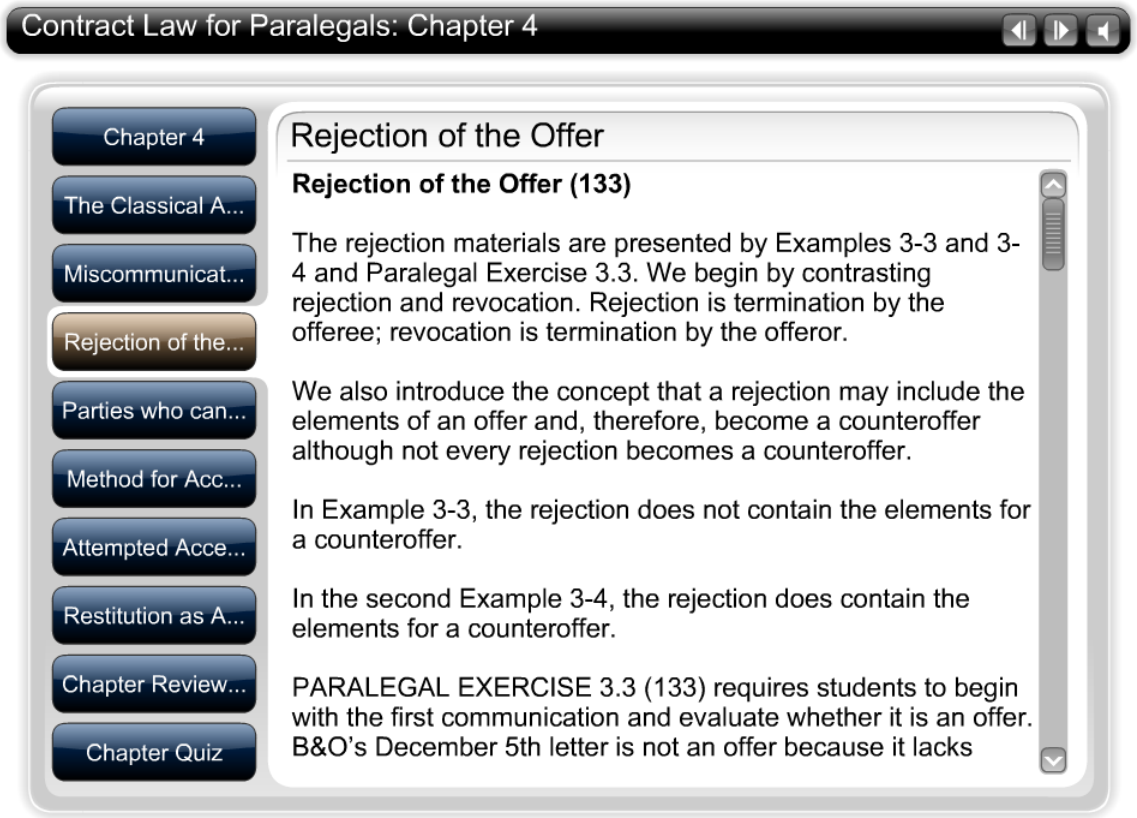
Miscommunication between the Offeror and Offeree (175)
The mistake/misunderstanding problem occurs when the offeror and the offeree say the same thing but mean different things.

In Example 4-18 (176), both the buyer and the seller said "chicken" but the buyer meant "frying chickens" and the seller meant "any chicken, including stewing chickens."

The example is based on *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F.Supp. 116 (S.D.N.Y. 1960). Whether a contract is formed and, if so, whether the contract is for "frying chickens" or "any chickens" is determined by the reasonable person's perception of the manifestation "chicken." The party seeking a specific meaning is the party who has the burden of proving by a preponderance of the evidence that his or her meaning is the reasonable meaning. All the other party needs to do is raise enough doubt so the party who is seeking a specific meaning cannot prove his or her meaning by a preponderance of the evidence. The party on the defense need not prove that his or her meaning was the reasonable meaning.

In Example 4-18, the parties' manifestation was "chicken."" The buyer's perception of "chicken" was "frying chicken." The seller's perception of "chicken" was "any chicken." If the reasonable person's perception by the preponderance of the evidence was "frying chicken," the buyer prevails and the contract is for "frying chicken." If the reasonable person's perception is other than a preponderance of the evidence for "frying chicken," the seller prevails.

Rejection of the Offer



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Rejection of the Offer (133)

The rejection materials are presented by Examples 3-3 and 3-4 and Paralegal Exercise 3.3. We begin by contrasting rejection and revocation. Rejection is termination by the offeree; revocation is termination by the offeror.

We also introduce the concept that a rejection may include the elements of an offer and, therefore, become a counteroffer although not every rejection becomes a counteroffer.

In Example 3-3, the rejection does not contain the elements for a counteroffer.

In the second Example 3-4, the rejection does contain the elements for a counteroffer.

PARALEGAL EXERCISE 3.3 (133) requires students to begin with the first communication and evaluate whether it is an offer. B&O's December 5th letter is not an offer because it lacks price. Mill's December 8th letter is an offer as to the

iron rails-price ($54/ton) quantity (2,000 to 5,000 ton), subject matter (iron rails). B&O's December 16th letter is not an acceptance since 1,200 tons is not in the 2,000 to 5,000 ton range. Because it is different from Mill's December 8th offer, it is a rejection.

(See Diagram Below)

Because it meets the requirements of an offer, it is a new offer (counteroffer). B&O's December 18th telegram is a rejection of Mill's counteroffer. When on December 19th B&O attempted to accept Mill's December 8th offer, it was too late because Mill's offer was previously rejected. No contract. Paralegal Exercise 3.3 is based on *Minneapolis & St. Louis Railway Co. v. Columbus Rolling-Mill Co*., 119 U.S. 149, 75 S.Ct. 168, 30 L. Ed. 376 (1886).

The text works with two general rules-an attempted rejection sent by the offeree is effective as a rejection when received by the offeror, although an attempted acceptance sent by the offeree is effective as an acceptance when sent by the offeree. Compare the Restatement (Second) of Contracts § 40 with § 63. Note the "but clause" in section 40 may apply when the attempted acceptance is sent after an otherwise effective rejection is sent.

Example 3-5 (134) involves a timing problem.

February 1 - Seller (Dan) makes an offer to sell.
February 5 - Buyer (Sara) sends letter rejecting the offer.
February 6 - Buyer (Sara) sends letter accepting the offer.
Seller receives February 6 letter (attempted acceptance).
Seller receives February 5th letter (attempted rejection).

This is the example of the overtaking acceptance. The general rule of acceptance in Restatement (Second) of Contracts § 63 and the "but clause" of Restatement (Second) § 40 apply. Acceptance was effective (when sent-February 6) (Restatement (Second) of Contracts § 63) before the rejection was effective (when received-after February 6) (Restatement (Second) of Contracts § 40). The "but clause" of section 40
applies but does not change this result because the acceptance was received before the rejection was received. Therefore, the Seller's offer was accepted and a contract was formed.

PARALEGAL EXERCISE 3.4 (135) changes the facts of Example 3-5 so the Seller received the rejection before receiving the attempted acceptance.

February 1 - Seller (Dan) makes an offer to sell.
February 5 - Buyer (Sara) sends letter rejecting the offer.
February 6 - Buyer (Sara) sends letter accepting the offer.
Seller receives February 5th letter (attempted rejection).

Seller receives February 6 letter (attempted acceptance).

The “but clause” of section 40 applies because the attempted acceptance was sent after the attempted rejection was sent. Under the "but clause," the attempted rejection was received before the attempted acceptance was received, and therefore the attempted acceptance would act as a counteroffer. The offeror would have seen the rejection before seeing the acceptance and therefore could have relied on the rejection. No contract was formed.

PARALEGAL EXERCISE 3.5 (135) changes the facts of Example 3-5 so the Buyer sends the attempted acceptance before sending the attempted rejection.

February 1 - Seller (Dan) makes an offer to sell.
February 5 - Buyer (Sara) sends letter accepting the offer.
February 6 - Buyer (Sara) sends letter rejecting the offer.
Seller receives February 5th letter (attempted acceptance).
Seller receives February 6 letter (attempted rejection).

The “but clause” of section 40 does not apply because the attempted acceptance was sent before the attempted rejection was sent. Therefore, only the general rules apply.

The attempted acceptance was sent before the attempted rejection was received and therefore the attempted acceptance was effective. A contract was formed. Note that the offeror would see the acceptance first and could rely on the acceptance and there being a contract.

PARALEGAL EXERCISE 3.6 (135) changes the facts of Paralegal Exercise 3.5 and has the attempted acceptance sent before attempted revocation is sent, with the Seller receiving the attempted rejection before receiving the attempted acceptance.

February 1 - Seller (Dan) makes an offer to sell.
February 5 - Buyer (Sara) sends letter accepting the offer.
February 6 - Buyer (Sara) sends letter rejecting the offer.
Seller receives February 6th letter (attempted rejection).
Seller receives February 5 letter (attempted acceptance).

The “but clause” of section 40 does not apply because the attempted acceptance was sent before the attempted rejection was sent. Therefore, only the general rules apply.

The attempted acceptance was sent before the attempted rejection was received, and therefore the attempted acceptance should be effective and a contract is formed.

The Seller, however, may have relied on the attempted rejection since the letter rejecting the offer was received first. If the Seller relies on the rejection, one could argue that the Buyer should be estopped from arguing the acceptance is effective when sent.

But should actual reliance be necessary for the estoppel argument or would the potential for reliance be enough? Note that in Restatement (Second) of Contracts § 40, actual reliance was not necessary for the acceptance that followed a rejection to be only a counteroffer. Why should the order of sending the acceptance and rejection be controlling?

PARALEGAL EXERCISE 3.7 (136) asks whether an offeree could raise questions with the offeror without rejecting the offer. Students are asked to compare the three responses. Which of the responses rejects the offer?

Parties who can Accept Offer

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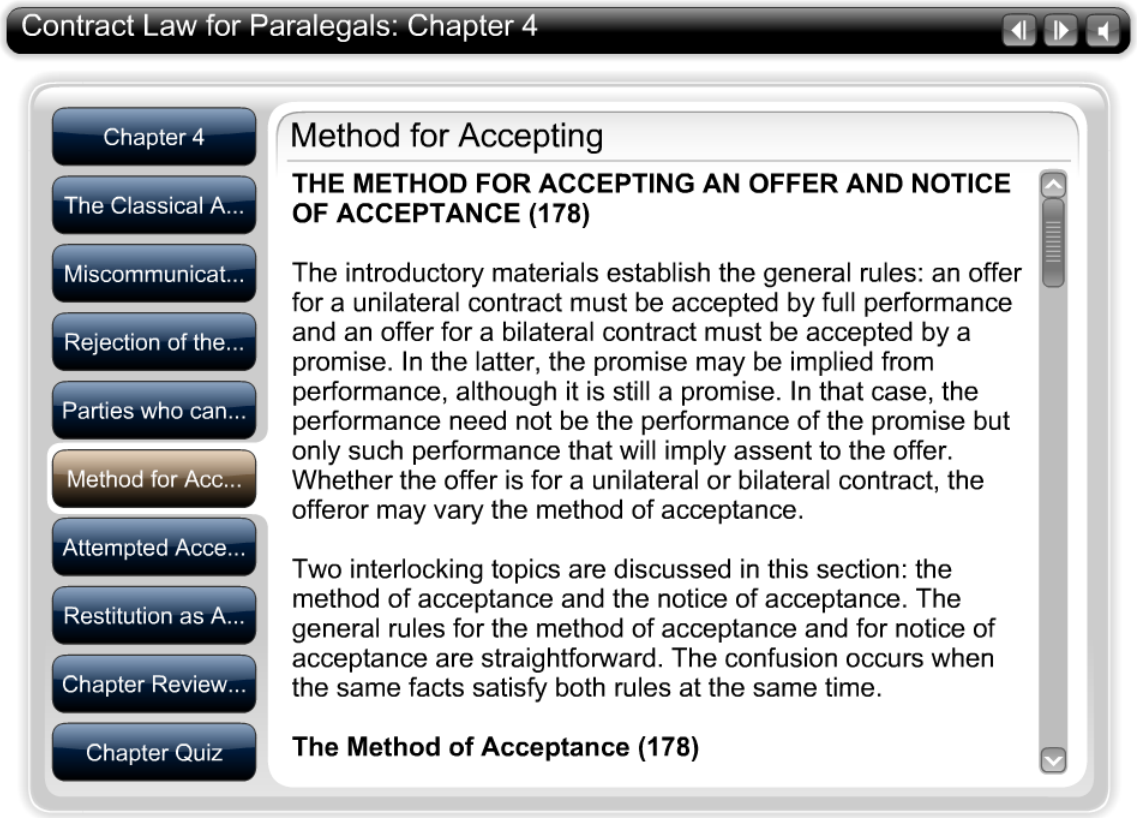
The Parties Who Can Accept the Offer (177)

Examples 4-19 through 4-21 (178) illustrate that an offer may be made to the public in general. The Examples deal with rewards, auctions, and advertisements.

Method for Accepting



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THE METHOD FOR ACCEPTING AN OFFER AND NOTICE OF ACCEPTANCE (178)

The introductory materials establish the general rules: an offer for a unilateral contract must be accepted by full performance and an offer for a bilateral contract must be accepted by a promise. In the latter, the promise may be implied from performance, although it is still a promise. In that case, the performance need not be the performance of the promise but only such performance that will imply assent to the offer. Whether the offer is for a unilateral or bilateral contract, the offeror may vary the method of acceptance.

Two interlocking topics are discussed in this section: the method of acceptance and the notice of acceptance. The general rules for the method of acceptance and for notice of acceptance are straightforward. The confusion occurs when the same facts satisfy both rules at the same time.

The Method of Acceptance (178)

An offer for a bilateral contract (i.e., the offeror's promise for the offeree's promise) must be accepted by the offeree promising (unless the offeror provides otherwise). The acceptance must be the mirror image of the offer. The offeree's promise may be either express or may be implied from the facts. The facts used to imply the offeree's promise are not necessarily the facts that would be the offeree's performance of his or her promise. [The offeror has the power to define the performance that implies the offeree's promise.]

An offer for a unilateral contract (i.e., the offeror's promise for the offeree's performance) must be accepted by the offeree's full performance (unless the offeror provides otherwise). The offeree's acceptance is the mirror image of the offer.

The confusion arises with the notice of acceptance. At times the offeree's performance may be the same facts that either imply the offeree's promise if the offer was for a bilateral contract or constituted the performance that was the consideration for the promisor's promise if the offer was for a unilateral contract. [The offeror may waive notice or may provide a different type of notice.]

PARALEGAL EXERCISES 4.11 through 4.14 are permutations of two variables:

(1) promise for a promise vs. promise for a performance;
and
(2) promise vs. part performance as an attempted method of acceptance. The series deals only with the method of acceptance.

PARALEGAL EXERCISE 4.11 (179) states the offer as a promise to pay for a promise to plan and execute (offer for a bilateral contract). Media's telephone call (express promise to plan and execute) is the mirror-image promise that Black Forest was requesting. Therefore, Media's telephone call is the acceptance (promise to plan and execute for the promise to pay) of the Black Forest offer.

EXERCISE 4.12 (179) has the same offer as Exercise 4.11. Media's beginning to plan was not an acceptance of Black Forest's offer (Black Forest was seeking a mirrorimage promise) unless this performance (beginning to plan) implies the promise to plan and execute.

EXERCISE 4.13 (179) changes the offer to a promise for a performance (promise to pay for planning and executing the plan) (offer for a unilateral contract). Media's promise ("I accept") was not the full performance (planning and executing) Black Forest was seeking when it made its offer. Therefore, Media's promise was not acceptance of the Black Forest offer.

PARALEGAL EXERCISE 4.14 (180) has the same offer for a unilateral contract as Paralegal Exercise 4.13. Media's beginning to plan was a part of the performance sought by Black Forest but was not the full performance. Therefore

Media's performance (beginning to plan) was not acceptance of the Black Forest offer.

Example 4-22 (180) adds another variation-the offeror specifying a method of acceptance but not mandating that method as the only method of acceptance. The offeror, in the example, has used the permissive "may." Therefore, the offeree may accept by the stated optional method (beginning performance) or by the general method (promising).

In PARALEGAL EXERCISE 4.15 (180), the offeror has provided the method of acceptance (by either notifying or by beginning the advertising campaign). By beginning the campaign, Media has accepted. It is irrelevant that Black Forest learned that Media was working on the campaign because the offer provided that a method of acceptance was beginning.

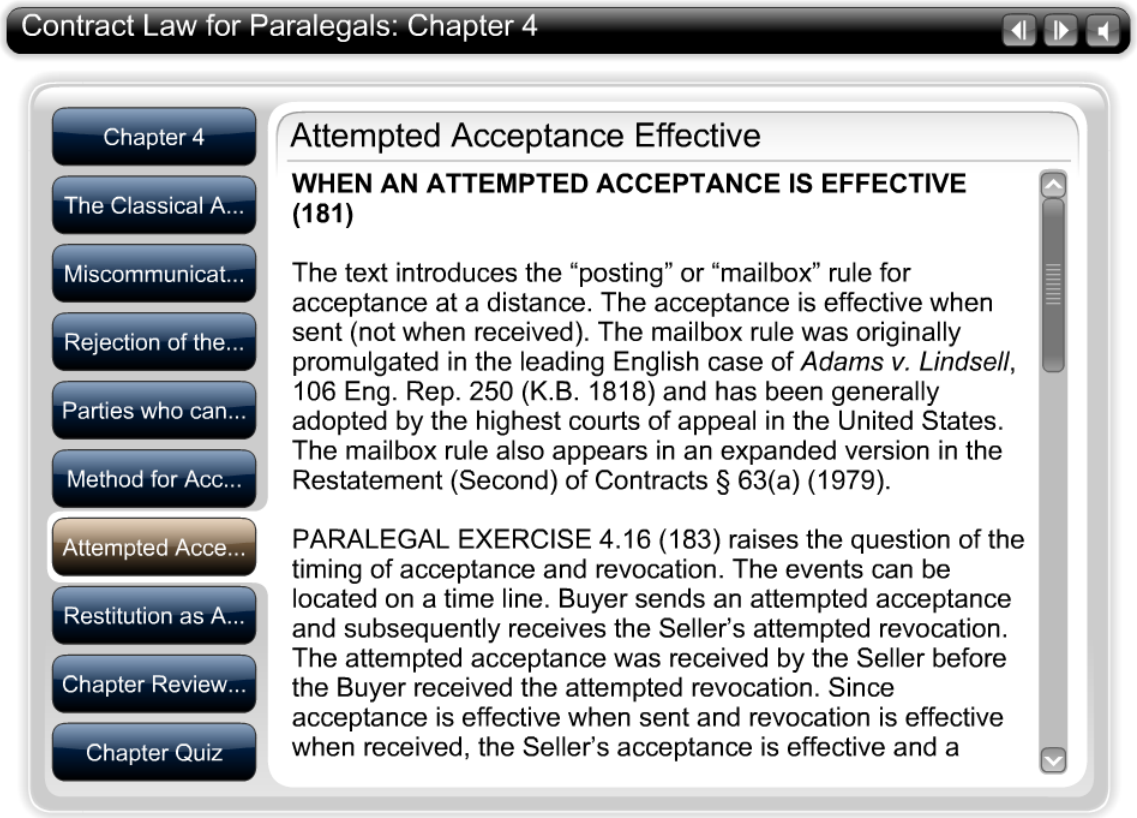
Notice to the Offerer That the Offer Has Been Accepted (180)
Notice of acceptance is required. Notice, however, may take different forms depending on the circumstances.

The notice for acceptance of an offer for a unilateral contract often is gleaned from the offeree's performance if performance is within the proximity of the offeror. The offeror sees the performance and therefore is notified of the offeree's acceptance. If performance were at a distance, then some other notice is required.

The notice for acceptance of an offer for a bilateral contract may occur face-to-face or at a distance. Saying "I accept" to the offeror when the offeror and offeree are in verbal communication will provide the offeror with notice of acceptance. When the parties are not in verbal communication, another form of notice may be required.

Naturally, since the offeror is the master of his or her offer, the offeror could declare in the offer that no notice is required or could dictate the type of notice required.

Attempted Acceptance Effective



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WHEN AN ATTEMPTED ACCEPTANCE IS EFFECTIVE (181)

The text introduces the “posting” or “mailbox” rule for acceptance at a distance. The acceptance is effective when sent (not when received). The mailbox rule was originally promulgated in the leading English case of *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818) and has been generally adopted by the highest courts of appeal in the United States. The mailbox rule also appears in an expanded version in the Restatement (Second) of Contracts § 63(a) (1979).

PARALEGAL EXERCISE 4.16 (183) raises the question of the timing of acceptance and revocation. The events can be located on a time line. Buyer sends an attempted acceptance and subsequently receives the Seller’s attempted revocation. The attempted acceptance was received by the Seller before the Buyer received the attempted revocation. Since acceptance is effective when sent and revocation is effective when received, the Seller’s acceptance is effective and a contract is formed.

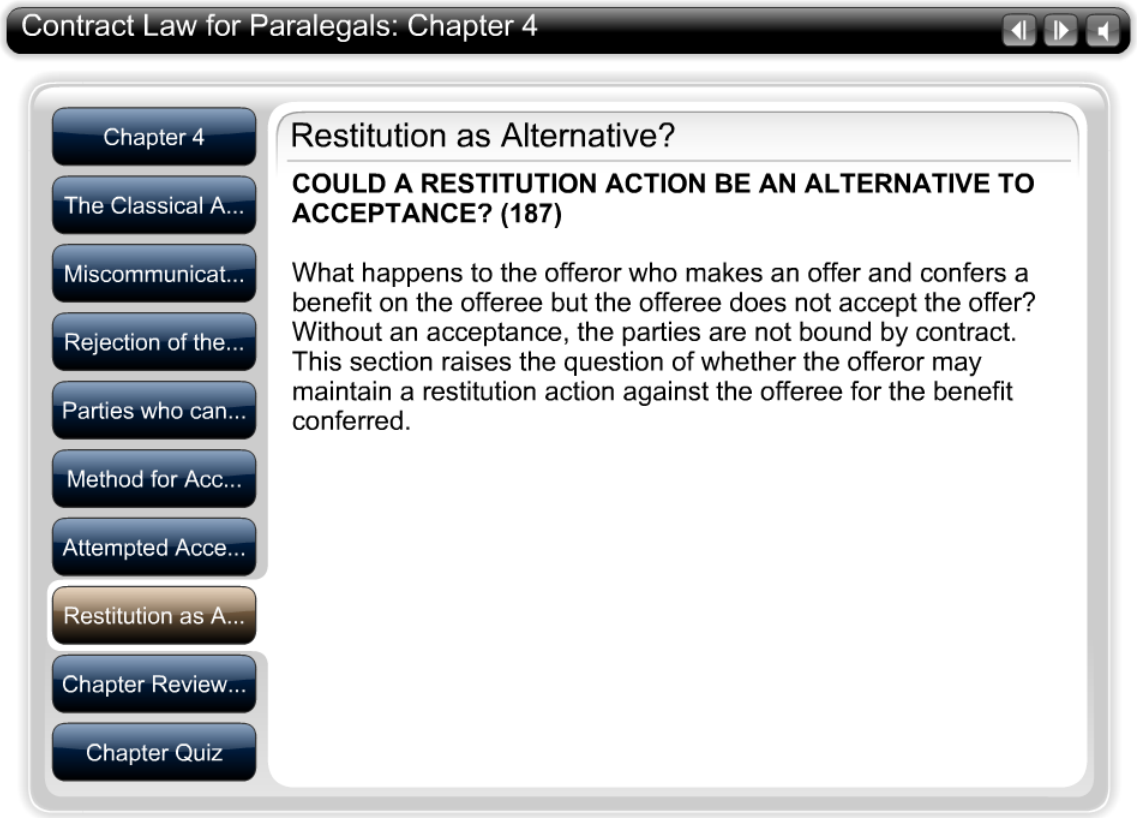
PARALEGAL EXERCISE 4.17 (184) raises the question of the timing of acceptance and rejection. In both situations, the Buyer sends an attempted acceptance and follows it with an attempted rejection. In the first situation, the Seller receives the Buyer's attempted acceptance before receiving the attempted rejection. In the second situation, the Seller receives the Buyer's attempted rejection before receiving the attempted acceptance. Only the first phrase in Restatement (Second) of Contracts § 40 applies since the remainder of section 40 deals with another situation-the rejection sent before the acceptance. Therefore, rejection is not effective until received and since acceptance was effective when sent, a contract is formed. In the latter, the Seller may find itself in a predicament since it may have acted on the Buyer's rejection. In that case, one might argue that the Buyer should be estopped from claiming no contract.

PARALEGAL EXERCISE 4.18 (185) is another acceptance/rejection problem but this time the Buyer sends its attempted rejection before sending its attempted acceptance.

Restatement (Second) § 40 would apply. If the acceptance is received before the rejection, the offer has been accepted. If the acceptance is received after the rejection, the attempted acceptance becomes a counteroffer.

PARALEGAL EXERCISE 4.19 (186) involves an option contract. The Seller's revocation is ineffective during the period of the option contract. Does it become effective after the option contract has expired? The attempted acceptance is sent within the period when the option contract is in effect but is received after the option contract has expired. Acceptance under an option contract is effective when received Restatement (Second) of Contract § 37. Since the attempted acceptance was received after the option contract has expired, does the attempted revocation not become effective so there is no contract?

Restitution as Alternative?



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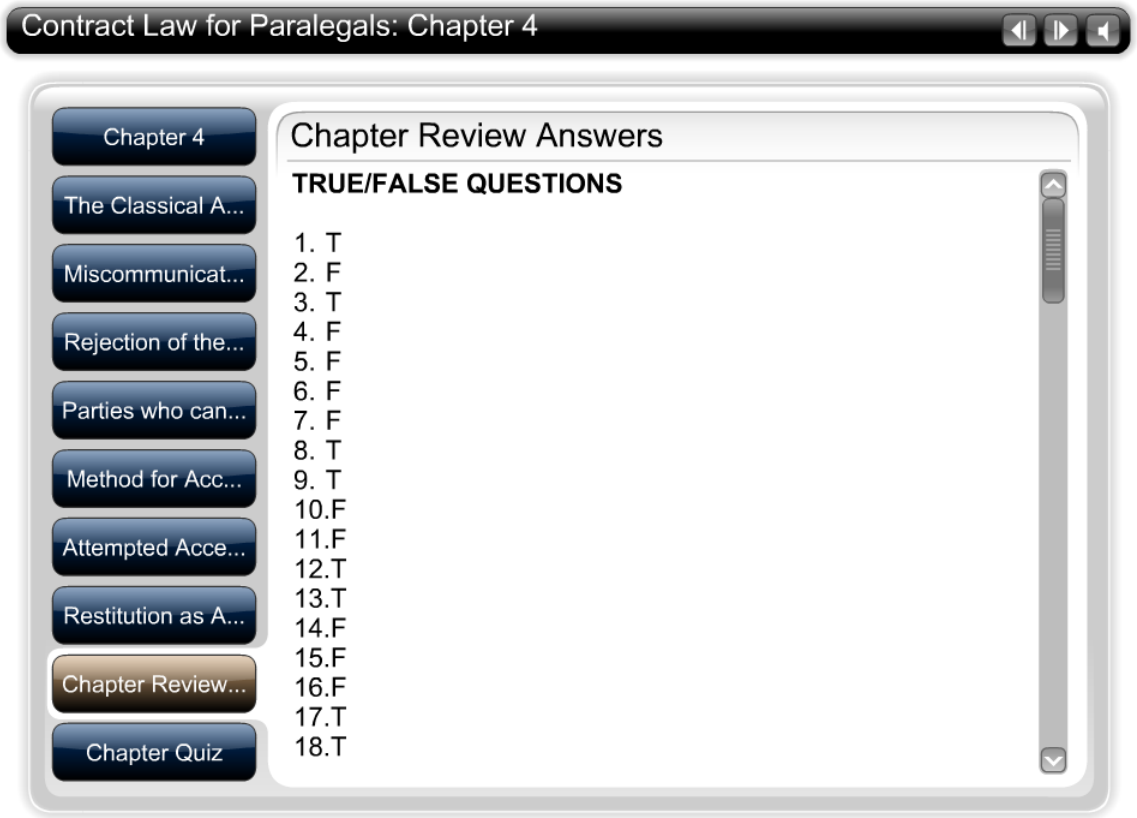
COULD A RESTITUTION ACTION BE AN ALTERNATIVE TO ACCEPTANCE? (187)

What happens to the offeror who makes an offer and confers a benefit on the offeree but the offeree does not accept the offer? Without an acceptance, the parties are not bound by contract. This section raises the question of whether the offeror may maintain a restitution action against the offeree for the benefit conferred.

Chapter Review Answers



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TRUE/FALSE QUESTIONS

1. T
2. F
3. T
4. F
5. F
6. F
7. F
8. T
9. T
10. F
11. F
12. T
13. T
14. F
15. F
16. F

17. T
18. T
19. T
20. F
21. F

FILL-IN-THE-BLANK QUESTIONS

1. Acceptance phase
2. Unilateral contract
3. Bilateral contract
4. Mirror-image rule
5. Pre-existing duty rule
6. Offeror
7. Boilerplate
8. “Mailbox” (posting) rule
9. Restitution action
10. Last-shot doctrine
11. A mistake in understanding the offer
12. Offeror
13. Acceptance

MULTIPLE-CHOICE QUESTIONS

1. c & d
2. c & d
3. c & e
4. a & e
5. c & d
6. a

SHORT-ANSWER QUESTIONS

1. Bernadette’s letter of March 1st was an offer. Agnes did not receive this offer, however, until March 4th. An acceptance must be in response to an offer so when Agnes wrote Bernadette on March 2d, she was not responding to Bernadette’s offer of March 1st and therefore could not accept that offer.

   Agnes’s letter of March 2d was itself an offer. Bernadette did not respond to Agnes’s offer so she did not accept this offer and no contract was formed.

2. Jose’s letter was an offer for a unilateral contract (a promise to pay for painting the portrait). An offer for a unilateral contract is accepted by full performance (the completed portrait). To accept the offer, however, the offeror must have knowledge of the offer.

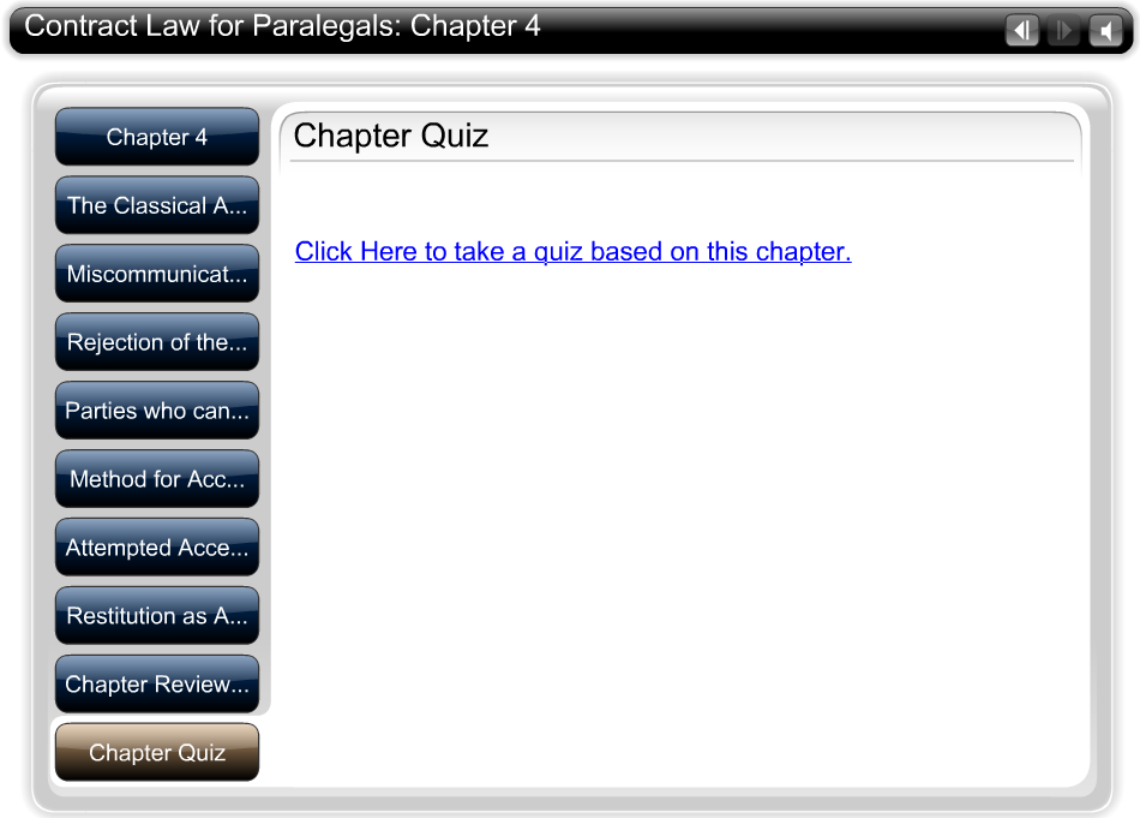
Under the Restatement (First) of Contracts § 53 (1932), the offeree must have knowledge of the offeror prior to the beginning of the requested performance. Therefore, since Charlene did not have knowledge prior to beginning to paint, her full performance would not be acceptance of Jose's offer.

Under the Restatement (Second) of Contracts § 51 (1979), the offeree must have knowledge of the offer prior to completing the requested performance. Therefore, since Charlene did have knowledge of the offer prior to completing the portrait, her full performance would constitute acceptance and a contract was formed.

3. John made an offer for a bilateral contract (John promised to support his daughter until she became 18 for his father's promise). The acceptance would be John's father's promise for John's promise to support his daughter. John, however, had a pre-existing duty to support his daughter until she became 18. Therefore, his promise to support her could not be consideration for his father's promise. Without consideration for John's father's promise, there could be no acceptance of John's offer. [The answer could also be "no offer by John" since he had a pre-existing duty to support his daughter and therefore his attempted promise was ineffective as a promise and John made no offer.]

4. Uncle Bob's offer is for a unilateral contract (Uncle Bob promised to pay $5,000 for Sam's refraining from smoking and drinking until he was 21). The method for accepting an offer for a unilateral contract is full performance. Therefore, Sam's promise is irrelevant because it is not full performance and therefore is not an acceptance.

Chapter Quiz



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Click Here to take a quiz based on this chapter.