

Law School Survival Guide

VOLUME I of II

Outlines and Case Summaries for:

Torts • Civil Procedure
Property • Contracts and Sales

 TellerBooks

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Outlines and Case Summaries for:

Torts • Civil Procedure
Property • Contracts and Sales



LAW SCHOOL SURVIVAL GUIDE
Outlines and Case Summaries
Volume I of II
2016 Edition

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ABBREVIATIONS

| | | | |
|-------------------|---|-------------------|--|
| 3PP..... | Third-party plaintiff | JNOV..... | Judgment <i>non obstante veredicto</i> |
| 3PD..... | Third-party defendant | J/SL..... | Joint and several liability, or jointly and severally liable |
| A..... | The grantee of a present estate or future interest | JT..... | Joint tenant/tenancy |
| AP..... | Adverse possession | K..... | Knowledge (criminal law) or Contract (all other law) |
| A/R..... | Assumption of the risk | KSC..... | Knowledge to a substantial certainty |
| B..... | Buyer | L..... | Loss in value |
| BFP..... | <i>Bona fide</i> purchaser or <i>bona fide</i> purchase | L1..... | First landlord |
| C..... | Constitution | Lat..... | Latin |
| CIF..... | Cause-in-fact | LE..... | Life estate |
| Cl..... | Clause | LED..... | Life estate determinable |
| CLEO..... | State Chief Law Enforcement Officer | LLC..... | Limited liability company |
| Court (cap.)..... | The United States Supreme Court | LLP..... | Limited liability partnership |
| CR..... | Contingent remainder | LRM..... | Least restrictive means |
| CSD..... | Common Scheme of Development | MPC..... | Model Penal Code |
| CSI..... | Compelling state interest | MSAJ..... | Motion to set aside the judgment |
| Ct..... | Court | N..... | Negligence |
| ED..... | Emotional distress | <i>N.B.</i> | <i>Nota bene</i> |
| EI..... | Executory interest | NIED..... | Negligent infliction of emotional distress |
| ES..... | Equitable Servitude | O..... | Original owner, or grantor (in present estates and future interests) |
| FI..... | false imprisonment | OLQ..... | Owner of the <i>locus in quo</i> |
| FLSA..... | Fair Labor Standards Act | OO..... | Original owner |
| FMLA..... | Family and Medical Leave Act | P..... | Purpose or purchaser |
| FQJ..... | Federal question jurisdiction | PE..... | Privity of Estate |
| FRAP..... | Federal Rules of Appellate Procedure | PJ..... | Personal jurisdiction |
| FRCP..... | Federal Rules of Civil Procedure | PJI..... | Pattern Criminal Jury Instruction |
| FRCrP..... | Federal Rules of Criminal Procedure | PK..... | Privity of Contract |
| FRE..... | Federal Rules of Evidence | R..... | Recklessness |
| FS..... | Fee simple absolute (fee simple) | RAP..... | Rule against perpetuities |
| FSCS..... | Fee simple on condition subsequent | RC..... | Real Covenant |
| FSD..... | Fee simple determinable | Restatement..... | Restatement (of Contracts, Torts, Judgments, etc.) |
| FS EL..... | Fee simple on executory limitation | RFRA..... | Religious Freedom Restoration Act of 1993 |
| FT..... | Fee tail | RIL..... | <i>Res ipsa loquitur</i> |
| IIED..... | Intentional infliction of emotional distress | RPP..... | Reasonable prudent person |
| IT..... | Intentional tort | Rule..... | Federal Rule of Evidence or Federal Rule of Civil Procedure |
| JMOL..... | Judgment as a matter of law | §..... | Section |

ABBREVIATIONS

S Sub-lessee or seller
SF Statute of Frauds
SJ Summary judgment
SL Strict liability, or statute of
 limitations
SMJ Subject matter jurisdiction
SP Specific performance
T1 First tenant

TE Tenant/tenancy by the
 entireties
TO True owner
UCC Uniform Commercial Code
USC United States Code
VR Vested remainder
VR SD Vested remainder subject to
 divestment

**CHAPTER 1.
CONTRACTS AND SALES**

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I. INTRODUCTION

A. DEFINING CONTRACTS

1. The Restatement (Second) of Contracts § 2 establishes the following definitions:
 - a. *Promise*: a manifestation of intention to act or refrain from acting so made as to justify a *promisee* in understanding that a commitment has been made.
 - b. *Promisor*: the party making the promise.
 - c. *Promisee*: the party receiving the promise.
 - d. *Beneficiary*: the party that will benefit from a performance, when this person is not the promisee.
2. “A contract is a promise or set of promises, for breach of which the law gives remedy, the fulfillment of which is a legal duty” (§ 1 Restatement).
3. “An agreement is a manifestation of mutual assent by two or more persons. A bargain is an agreement to exchange promises or exchange a promise for a performance or to exchange performances” (§ 3 Restatement).
4. A contract can be made orally or in writing, or inferred from conduct (§ 4 Restatement).

B. SOURCES OF THE LAW ON CONTRACTS

1. The case law, which can vary from state to state.
2. In the sales of goods, the Uniform Commercial Code (UCC).
 - a. This is a uniform law that that all of the states have adopted.
 - b. However, Louisiana has not adopted the UCC in all of the ways suggested its drafters.
 - c. The UCC applies to contracts for the sale of goods (art. 2) and for leases (art. 2A).
 - d. The UCC also deals with negotiable instruments (art. 3), bank deposits (art. 4), letters of credit (art. 5), investment securities (art. 8).
 - e. The present text will limit itself to discussing sales of goods and will make some mention of the UCC provisions with respect to leases.
3. Furthermore, secondary sources such as the Restatement (Second) of Contracts, legal treatises, and scholarly articles may apply.

C. CLASSES OF CONTRACTS

1. Bilateral contracts are accepted by return promise.
 - a. Example: a contract in which A promises to sell B land at a particular price if B promises to purchase the land at that price.

2. Unilateral contracts are accepted by performance.
 - a. Example: A promises to pay \$10 to whoever finds and brings him his lost dog.
 - b. The person who finds and brings the dog, without notifying A of his acceptance or promising to bring A the lost dog, is entitled to the \$5 at the time he brings the lost dog.

II. MUTUAL ASSENT

A. THE OBJECTIVE THEORY OF ASSENT

1. An Objective Meeting of the Minds: the Reasonable Person Standard
 - a. For there to be a valid contract, there must be a “meeting of the minds.”
 - b. *Actual mutual assent* is not required; it is the *expression* of assent through behavior that matters.
 - c. What is important in the objective theory of assent is not the inner motives of the parties, but rather, their outward expressions.
 - d. Determining the “secrets of the mind” is thus not necessary in determining mutual assent.
 - i. *See Embry v. Hargadine, McKittrick Dry Goods Co.*, where the defendant acted as though the plaintiff had his job contract back, but then fired him after two months. The court ruled in favor of the plaintiff, since the defendant expressed his assent through behavior and whether he intended to renew the contract was irrelevant.
 - e. One must determine whether a *reasonable person* in the offeree’s position would come to conclude that an offer or assent to an offer is being made.
 - f. Even if the offeror is joking or intoxicated, if his outer conduct would lead a reasonable person to conclude that there was an agreement, then the promise is enforceable.
 - i. *See Lucy v. Zehmer*, where a court held that if the defendant were sober enough to spend forty minutes discussing the terms of an agreement, then regardless of whether he was intoxicated, that promise was enforceable because of the manifestation of assent.
2. A Written Contract
 - a. The commitment does not need to be memorialized as a written contract.
 - b. A contract is enforceable as soon as there is a meeting of the minds.
 - i. *See Sanders v. Pottlitzer Fruit Co.*, where after much negotiation, the plaintiff sends a letter offering apples, the defendant says it will take apples only if conditions are met, and the plaintiff accepts. The defendant then asks for the written contract to be sent, which it tries

to change. The plaintiff refuses to change it and sues to enforce the original contract. The court held that an agreement in the prior correspondences; a formally written contract is not required. Judgment for the plaintiff.

B. THE OFFER

1. Definition

- a. An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his *assent* to that bargain is invited and will conclude it (§ 24 Restatement).

2. The Four Elements of an Offer

a. A Commitment

- i. There must be a promise to enter into a contract, not an invitation to negotiate.
- ii. Language such as “I offer” or “I promise” tends to indicate commitment; language such as “I consider” or “I quote” tends to indicate an invitation for offers.
- iii. If offeror did not intend to make the offer, the objective test will be used: “would a reasonable person in the offeree’s position know or should he have known that there was an offer?”
- iv. To answer this question, the following will be considered:
 - 1) Industry practices and prior practices between the parties.
 - 2) Circumstances: was the offer made in jest? If so, would a reasonable person have construed it to be an offer?
 - a) *See Zehmer*, where the defendant said he was joking about selling his land, but the court held there was a commitment because a reasonable person would not have understood that he was joking.

b. Communicated

- i. The offeree must have knowledge of the offer before being able to accept it.
- ii. Example: A offers to buy B’s car for \$5,000. B, before he finds out about the offer, says that he will give A his car for the same price. Since A’s offer was not communicated to B, B’s communication is merely another offer; it does not constitute acceptance.

c. To an Identified Offeree

- i. An offer is always personal; it cannot be transferred to a third party.
- ii. The broader the medium for communicating the offer, the more likely the courts will construe the communication to be an advertisement.
- iii. Advertisements are not offers, but rather, invitations to negotiate or make offers.

- 1) *See Nebraska Seed Co. v. Harsh*, where a farmer invited a company to buy about 1,800 bushels of seeds for \$2.25 each, and the company accepted. When the farmer did not deliver, the company sued for breach of contract. The court held that there was never an offer, since the communication was not made to an identified offeree, but rather, to several. Furthermore, the delivery time and subject matter (“about” 1800 bushels) was indefinite.
 - 2) *See also Leonard v. Pepsico*, where an advertisement was held not to be an offer, and furthermore, tested by the reasonable person standard, the content of the advertisement was an obvious joke, not a real offer.
- iv. However, the Restatement (Second) of Contracts allows offers to be made to more than one person (§ 29 Restatement). The communication would be a valid offer if it can only be construed as being open to a single offeree.
- 1) For example, if a subject offers a reward to whoever finds and returns his lost dog, a court would treat the communication as an offer, since it is implicitly being communicated to an identified offeree: the first and only person to return the dog.
- d. With Definite Terms
- i. For an offer to be enforced, it must contain definite terms.
 - ii. Each category of contracts calls for different terms to be specified.
 - 1) For contracts of *realty*, the **price** and the **land to be sold** (the amount and location) must be specified.¹
 - a) The land must be identified as to both the amount and the location to be sold.
 - 2) For employment contracts, the **duration** must be determined.
 - a) The duration may be manifested as a period of time (*e.g.*, a one year employment contract) or as a task (*e.g.*, a contract to repair a computer).
 - b) If the duration is not specified, the offeree is considered hired at will and can quit or be fired at anytime without being able to enforce any time provision.
 - 3) For contracts for the sale of goods under the UCC, only the **quantity** must be described (UCC Official Comment 1, § 2-201).
 - a) The indicated quantity need not be accurate, but the contract cannot be enforced beyond this quantity.

¹ With respect to the description of the land, the test turns on whether a court can identify the land to be sold in order to enforce the contract.

- b) Other terms, such as the price, place of delivery, or time of delivery, can be determined by the UCC gapfillers.²
- c) There are two exceptions to this rule:
 - i) Requirements contracts (*e.g.*, “I will buy as many units as I need”); and
 - ii) Output contracts (*e.g.*, “I will buy as many units as you produce”).
- d) If terms, such as place of delivery and time of delivery, are left unspecified, the court can fill these in with what is reasonable.
- e) If the price is unspecified, the court can fill it in when:
 - (i) there is no mention of price in the negotiation; (ii) the price was left to the parties to agree upon but they did not; or (iii) the price was left to be determined by the market.
 - i) For example, if A offers to sell B ten widgets “for the price we agree to,” the price can be determined by the court, since the price was left to the parties to agree upon.
 - ii) However, if A offers to sell B ten widgets “for a reasonable price,” a court cannot fill in the price because the offer does not fit into one of the three circumstances defined above.
 - iii) Since price is not determined, it is not a valid offer and the agreement is unenforceable; the court is not going to try to determine what a reasonable price is.

3. Terminating an Offer

- a. The offeree’s power of acceptance is terminated in the following circumstances (§ 36 Restatement):
 - i. The offeree *rejects* the offer or makes a *counteroffer*;
 - ii. There is a *lapse of time* (must be reasonable);
 - iii. The offeror directly or indirectly *revokes* the offer:
 - 1) The offer is considered to be indirectly revoked if the offeree receives reliable information that would lead a reasonable person to conclude that it has been revoked (*e.g.*, when the offeree learns that the offeror is searching for other purchasers).
 - 2) *See Dickinson v. Dodds*, where Dodds, the defendant, gave the plaintiff an option not bearing consideration that would remain open for two days to buy his house for 700 pounds.

² In the case of an open price term, see § 2-305 UCC; for the absence of a specified place of delivery, see § 2-308 UCC; for the absence of specific time provisions, see §2-309 UCC.

The plaintiff heard of Dodd's intent to sell the land to another purchaser, even though he never communicated a formal, direct revocation. The plaintiff then accepted the offer and sued for specific performance when the land was not delivered. Held: although Dodd's revocation was not directly communicated to the plaintiff, the offer was terminated the moment that the plaintiff heard about it indirectly.

- a) *N.B.:* if there had been any consideration on the option, real or recited, the offer would have been irrevocable until the agreed-to termination.
- iv. The offeror or offeree *dies* or is *incapacitated*.
 - 1) If the offeror dies before the offeree accepts the offer, the offeree's power of acceptance is terminated and no contract is formed.
 - 2) However, if the offeree accepts just prior to the offeror's death, an enforceable contract is formed. Once there is a meeting of the minds, the death of either party does not invalidate the contract.
- b. Exception: Options Contracts
 - i. If an options contract is supported by consideration (or, in many courts, by recital thereof), the offeree's power of acceptance is not terminated through his rejection of the offer, counteroffer, death or incapacity, or through the direct or indirect revocation by offeror.
 - ii. However, if there is no consideration, an options contract can be terminated in the same way that a regular offer can be terminated (rejection, lapse of time, revocation or death or incapacity).
 - c. Revocation of Unilateral Contracts
 - i. In the case of unilateral contracts, where the offer is accepted by performance, the offeror may revoke the offer at any time before the offeree completes performance.
 - ii. However, where there is a *tender* (unconditioned willingness to perform immediately coupled with a manifest ability to perform) or a *beginning of performance* (more than just preparation to begin performance), a binding option contract is formed that the offeror is unable to revoke.
 - iii. The offer expires on its own if the offeree leaves the job uncompleted and a reasonable time lapses.
 - iv. Examples
 - 1) Suppose A offers to pay B \$50 to shovel his driveway. If B shows up at A's home with a shovel and indicates that he is ready to begin performance, has a contract been formed?
 - a) Since B tendered performance, a valid option contract is formed.

- 2) If B arrives at A's home and begins performing without informing A, has a contract been formed?
 - a) A valid options contract is formed from the moment that B begins performance until he completes it.
 - 3) If, without completing the job, B takes off, leaving the job incomplete, can A sue for breach of contract?
 - a) No; since B can only accept A's offer by complete performance, no acceptance was ever made, and therefore, no contract exists.
 - 4) What if B arrives at A's home, and, just before tendering performance, A shouts out that he revokes the offer. Is there nevertheless a contract?
 - a) No; B's power of acceptance expires if A revokes before B tenders or begins performance.
 - b) *See Petterson v. Pattberg*, where the defendant offered the plaintiff the opportunity to obtain full title to the plaintiff's home by selling the plaintiff the mortgage to the home in exchange for \$4,850 to be paid to the defendant before a certain date. The plaintiff sold the title to third party, expecting to use the funds obtained to pay the defendant \$4,850 to purchase the mortgage. The plaintiff went to the defendant's home, but before he could accept the offer and tender payment, the defendant revoked the offer. The court held that no contract was formed, since the defendant had revoked his offer just before tender had been made.
- v. Thus, the defendant's obligations depend on whether the plaintiff has prepared for, tendered, begun, or completed performance.

| Time | <i>Preparation of Performance</i> | <i>Tender or Beginning of Performance</i> | <i>Completion of Performance</i> |
|-----------------------------|--|---|---|
| The Contract Formed | There is no contract. | There is a valid option contract from this moment to the moment in which performance is completed. The offer is irrevocable. | There is a valid contract; the offeree must fulfill his contractual obligation. |
| The Offeror's Duties | Specific performance, if there is an options contract. If there is no options contract, the offeror may be liable for damages through promissory estoppel if his revocation causes detrimental reliance on the offeree. | The offeror may not revoke the offer at any time. The offeree may, however, decide not to complete performance, at which point the option contract expires after reasonable time. | The offeror is obligated to pay the offeree. |

C. ACCEPTANCE

1. Introduction

- a. There are three kinds of contracts, each of which requires a different kind of acceptance:
 - i. Unilateral contracts, which are constituted through performance by the offeree;
 - ii. Bilateral contracts, which are created through a return promise;
 - iii. Contracts for the sale of goods, which are governed by the UCC, whether they are unilateral or bilateral.

2. The Four Elements of Acceptance

a. Commitment

- i. As with offers, acceptance must involve a commitment.
- ii. The primary issues raised involve the objectivity test.

b. Communicated

- i. For determining if an acceptance is communicated, an objective standard is applied; the subjective state of mind of the parties is irrelevant.

ii. The Mailbox Rule

- 1) An acceptance is effective upon *proper dispatch* (when it is *sent*, not received), unless:
 - a) The offer stipulates that acceptance is effective when received; or
 - b) There is a valid option contract (having real or recited consideration), in which case there is acceptance only through receipt (§ 63(b) Restatement).
- 2) Suppose A offers to sell B his car on January 1. On January 2, B sends a properly addressed letter accepting the offer, but revokes on January 3. On January 4, A receives the letter. Is there a contract?
 - a) A valid contract is formed the moment B sent the letter on January 2. At that moment, revocation was no longer possible.
- 3) Since it is the dispatch of the acceptance, not its receipt that counts, an offer is properly accepted even if the acceptance is lost in the mail and is never received by the offeror.

iii. Acceptance by Silence (§ 69 Restatement)

- 1) When an offer is made, the offeree's silence cannot be construed as acceptance, *unless*:
 - a) The offeree puts himself within the duty of needing to speak up in order to reject an offer (*e.g.*, if he states, "unless I say something by Friday at noon, I accept

this offer,” *not* when the offeror puts the offeree in this position, by stating, for example, “unless you say something by Friday, you will have accepted”).

- 2) When industry standards or prior dealings establish acceptance by silence.
 - a) *See Hobbs v. Massasoit Whip Co.*, where the plaintiff, Hobbs, sues Massasoit for failing to have paid for eel skins that the plaintiff had shipped. The defendant argues that it had never accepted the offer, an argument rejected by the court, which holds that, given trade practices and prior dealings, it was reasonable to conclude that the defendant had in fact accepted the plaintiff’s offer.
 - 3) When the offeree silently accepts the offered benefits.
 - a) The offeree’s benefiting from the proposed services are enough to constitute acceptance and create a contract.
 - b) For example, if a book club mails the offeree a book of the month, which the offeree reads, he will be considered to have accepted it. If he does nothing with it or throws it away, acceptance by silence will not be presumed.
- c. Communicated in the Right Way
- i. The offeror is the “master of the offer” sets the terms under which acceptance can be properly made.
 - ii. If he asks for for acceptance by mail, acceptance cannot be transmitted fax, for example. If he states acceptance is rendered by performance, a return *promise* will not suffice.
 - iii. If the way in which communication should be made is not stipulated by the offeror, the courts will presume it to be any method that is not slower or less legally reliable than the way that the offer was made.
- d. Unequivocal Acceptance that Does Not Vary the Terms
- i. Minority Approach
 - 1) This is the older common law approach known as the “Mirror Image Rule.”
 - 2) To be valid, the acceptance must be *identical* to the offer.
 - 3) Any response varying the terms of the offer would be a counteroffer, not acceptance.
 - ii. Modern Restatement Approach
 - 1) Some slight changes of the offer are tolerated if they do not set up a condition to the acceptance. Otherwise, they will be construed as counteroffers.

- 2) *See Ardente v. Horan*, where the plaintiff made a bid to buy the defendant's house for \$250,000. The defendant accepted and sent the plaintiff a purchase and sales agreement, which the plaintiff signed and sent back with a letter asking for the furniture in addition to the house. The court held that the offer was the purchase and sales agreement. The plaintiff's signing it did not constitute acceptance, since the letter sent along with it constituted a condition and therefore, a counteroffer.

iii. UCC Approach

- 1) Change or modification does not constitute rejection and counteroffer, but rather, it is an acceptance (unless it is made expressly contingent on the offeror's acceptance of the new terms) (UCC § 2-207(1)).
- 2) Assuming that a contract is formed and the acceptance is not expressly conditional on offeror's acceptance of new or different terms, the following happens to the new terms in the acceptance:
 - a) When *both parties are merchants*, the new terms become part of the accepted offer *unless*:
 - i) The original offer limited itself to its terms;
 - ii) The new terms materially alter the original offer; or
 - iii) The offeror already has rejected or rejects the new terms within reasonable time (UCC § 2-207(2)).
 - b) When one or both parties are *non-merchants*, the terms common to the offer and acceptance become part of the contract and the new terms become "proposals for addition to the contract." (UCC § 2-207(2)).

iv. Last Shot Rule

- 1) The last shot rule is used to determine which terms to apply when there is a contract in which the terms of the offer were different from those of the acceptance.
- 2) Under the last shot rule, the terms of the "last shot" or last counteroffer apply whenever it is determined that there is a contract.

3. Acceptance by Performance in Unilateral Contracts

- a. A unilateral contract is contemplated when language in the contract or custom, trade practices, or tradition require acceptance via performance.
- b. Interpreting Ambiguities in a Contract

- i. When it is ambiguous whether the offeror intended acceptance by performance or by return promise, the courts will read the offer as creating a bilateral contract, inviting acceptance via return promise or performance (Restatement § 32, UCC § 2-206)
 - ii. If the offeror states, for example, that B may purchase his car *only* if he comes to the offeror's home on a particular day and pays him, a unilateral contract is contemplated and acceptance can only be made if the offeree shows up in person and pays. A return promise will have no effect.
 - iii. However, if the word "only" is removed, it will no longer be unequivocally clear that acceptance can be made only by performance. A court will therefore interpret the contract to be bilateral and inviting acceptance via promise or performance.
- c. It may be easy to confuse acceptance in a bilateral contract with performance in a unilateral contract. In a unilateral contract, after the offeree accepts, he has no other obligations to discharge. In a bilateral contract, however, he has not yet performed, even though he has accepted.
- i. For example, if one party offers to sell his car for \$5,000 and stipulates that the only way the offeree can accept is by doing a cartwheel, the offeree has not performed until he has paid the \$5,000. The cartwheel is merely a way of manifesting acceptance.
 - ii. In contrast, if the first party offers to give to the second his car, with the only way of acceptance being doing a cartwheel, there would be a unilateral contract where the offer is accepted by performance, since doing the cartwheel is the only duty mentioned.
- d. In unilateral contracts, there is no duty to give notice of acceptance.
- i. *See Carlill v. Carbolic Smoke Ball Co.*, where Carbolic offered a reward to any users of its product who might become ill. The court held that the offer was to be accepted by performance and did not require notice of acceptance. A contract was therefore formed upon Carlill's using the product, becoming sick, and thereafter notifying Carbolic and demanding 100 pounds. Carbolic was obligated to pay her.
 - ii. Thus, although in bilateral contracts, notification of acceptance is required to create the contract, in unilateral contracts, no such notice is required, *unless*:
 - 1) The offeror requests notice of performance. Restatement § 54(1); or
 - 2) The offeree knows that the offeror will not have knowledge of his performance in reasonable time. In this case, if the offeror does not find out, his obligations are dismissed, *unless*:
 - a) The offeree, under due diligence, tried to inform him;

- b) The offeror finds out about the offeree's performance on his own in due time; or
 - c) The offer indicates that notification of acceptance is not required. Restatement § 54(2).
- iii. For example, if A offers B \$20 to shovel his driveway over the weekend, and then indicates that he will be out of town for a week, notification of B's performance will be required, since A will not find out about B's performance in reasonable time.
- e. Acceptance by performance to an offer done in jest does not create a contract if a reasonable person, in the place of the offeree, would have known that an offer was made in jest.
- i. *See Leonard v. Pepsico*, where the court held that a valid offer was never made and therefore, no contract was formed by acceptance via performance.

D. E-COMMERCE AND MUTUAL ASSENT

1. Rules Applied

- a. The same rules that apply to traditional cases also apply to e-commerce cases.
- b. However, courts are challenged as to how to *apply* traditional rules to cases involving the internet and other new phenomena.
- c. In some cases, opening up a package constituted acceptance to terms and conditions of an agreement when a notification was included on the package.

2. End User License Agreements (EULA's)

- a. In e-commerce, acceptance can be made by agreeing to the terms of a pop-up window from a web-site publisher warning end-users that entering a web-site or purchasing a program constitutes acceptance of a contract.
 - i. *See Caspi v. Microsoft*, where the plaintiff brings a class action lawsuit against Microsoft for breach of contract and fraud. The defendant moves to dismiss the action, on the basis that the plaintiffs signed a EULA and thereby agreed that the courts of Washington would have personal jurisdiction and venue. The court held that the forum selection clause that the plaintiffs agreed to when downloading the software was valid, since it was not fraudulent or based on undue bargaining power or forced litigation in a forum inconvenient to the parties. Motion to dismiss granted.
 - ii. *Compare Ticketmaster v. Tickets.com*, where the plaintiff sued the defendant for having violated the EULA on the plaintiff's homepage by copying information onto the defendant's web site. The court held that the EULA was not enforceable as it was, since: (i) agreeing to the EULA was never required by users of the web site (as it was in *Caspi*); and (ii) the EULA was located in a part of the