

## Business Law 210: Unit 4 – Chapter 11: Agreement in Traditional and E-Contracts

Law and the Legal Environment of Business

[Professor Scott Bergstedt]

**Slide #: 1**

**Slide Title:** Chapter 11: Agreement in Traditional and E-Contracts

Chapter 11: Agreement in Traditional and E-Contracts

**Audio:**

Chapter 11. Agreement.

**Slide #: 2**

**Slide Title:** Introduction

Introduction

- Agreement = offer and acceptance.
- Parties must show mutual assent to terms of contract.
- Once an agreement is reached, if the other elements of a contract are present, a valid contract is formed.

**Audio:**

An essential element for contract formation is agreement. The parties must agree on the terms of the contract and manifest to each other that mutual assent or agreement. Mutual assent is divided up into two events: one is offer and two is acceptance.

**Slide #: 3**

**Slide Title:** § 1: Requirements of the Offer

§ 1: Requirements of the Offer

- Offeror's serious intention. →
- Definiteness of terms. →
- Communication to Offeree. →

**Audio:**

First of all, we'll go over the requirement of an offer. An offer is a promise or a commitment to do or refrain from doing some specified thing in the future. Under common law, three elements are necessary for an offer to be effective. One, offeror must have a serious intention to become bound by the offer. Two, the terms of the offer must be reasonably certain or definite so that the parties in the court can ascertain the terms of contract. Three, the offer must be communicated by the offeror to the offeree, resulting in the offeree's knowledge of the offer.

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**Slide Title:** Offeror's Serious Intention

Offeror's Serious Intention

- Contract is judged by what a reasonable person in the Offeree's position would conclude about the offer.
  - **CASE 11.1** *Lucy v. Zehmer* (1954). *Under the facts, did the Zehmers have a serious intention? What factors did the court consider?*

**Audio:**

So, first of all we'll deal with intention. It has to be serious in the sense that it's not frivolous, it's not intended as make-believe, it's not a half-hearted offer, the person is serious in intending to make a contract. Offers made in anger, in jest, undue excitement may not meet the test of a reasonable person standard as to whether, in fact, there actually was an offer. That brings us to our first case 11.1, *Lucy v. Zehmer*. This is a great case. These two guys have been friends forever, living next to each other. Lucy has been trying to buy this property from Zehmer for the longest time and Zehmer has refused to sell it. Finally after they've had quite a few drinks, Lucy says, "I bet you wouldn't take \$50,000 for that property." Zehmer, not to be outdone in a dare, says, "Yes, I would too," and they sat down and wrote an agreement out. They had to revise the agreement, get Zehmer's wife to sign it too. They may have made other revisions to it. It was signed and now Lucy is suing Zehmer for Zehmer to give him title to the property and Zehmer is arguing that he had been too drunk to actually enter into the contract – that it was made in gest and hence unenforceable. So what did the court do with this? Well, first of all factually, Zehmer claimed that they were "as high as a Georgia pine" and the transaction was just a bunch of two doggone drunks bluffing to see who could talk the biggest and say the most. But, what did the court see? The appearance of the contract, the fact that it was under discussion for 40 minutes or more, that it was signed, Lucy's objection to the first draft because it was written in the singular and he wanted Mrs. Zehmer to sign it also, the rewriting to meet the objection and the signing by Mrs. Zehmer, the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the Defendants that he give it back are facts which furnished persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as Defendants now contend. In the field of contracts, as generally elsewhere, we must look to the outward expression of a person as manifesting his intention rather than his secret and unexpressed intention, and thus it was not a bluff. It was a real contract.

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**Slide Title:** Offeror's Serious Intention

Offeror's Serious Intention

- Expressions of Opinion: not offers.
- Statements of Future Intent: not offers.
- Preliminary Negotiations or Invitations to Negotiate: not offers.
- Advertisements: not offers (invitations to negotiate).

**Audio:**

Expressions of opinion do not make an offer. Expressions of an interest to enter into a contract

in the future usually do not make a contract. Preliminary negotiations are usually only an invitation to enter into a contract and not a binding contract themselves.

**Slide #: 6**

**Slide Title:** Offeror's Serious Intention

Offeror's Serious Intention

- Auctions: not an offer, but invitation for offers through auctioneer.
- Auctions with and without reserve.
  - With reserve: can withdraw goods.
  - Without reserve: cannot withdraw goods.

**Audio:**

[No audio]

**Slide #: 7**

**Slide Title:** Offeror's Serious Intention

Offeror's Serious Intention

- Agreements to Agree: modern view, can be enforceable if parties intended to be bound.

**Audio:**

Now there can be an agreement to agree. Parties can agree that they have a contract, but the specific terms will be worked out according to some formula at a future date at which point there is a valid contract. Advertisements are generally considered an invitation to negotiate and then in auction, the offer is accepted when the auctioneer strikes the hammer. Before the fall of the hammer, a bidder may revoke, or take back, his or her bid and reject that contract.

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**Slide Title:** Definiteness of Terms

Definiteness of Terms

- Terms (expressed or implied):
  - Identification of the parties.
  - Object or subject matter of the contract.
  - Consideration to be paid.
  - Time of payment, Delivery, or Performance.

**Audio:**

A contract itself must have definiteness of terms. This is the second requirement for an effective offer. Generally a contract must include the following terms either expressed in the contract or capable of being reasonably inferred from it: 1) the identification of the parties, 2) the identification of the object or subject matter of the contract, 3) the consideration to be paid, and the time of payment, delivery, or performance.

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**Slide Title:** Definiteness of Terms

Definiteness of Terms

- An offer can require specific terms to make the contract definite.
- A court can supply missing terms if the parties intend to form a contract.

**Audio:**

Courts are sometimes willing to supply a missing term in a contract when the parties have clearly manifested an intent to form a contract, although still all of the elements of a contract must be present for the court to consider supplying some missing term as noted above under Definiteness of Terms. The next case, Case 11.2 *Baer v. Chase*, is a good discussion of definiteness of terms and when there is a contract and when there isn't. The contract in this case was Chase would take care of Baer and renumerate Baer in a manner commensurate to the true value of his services. The court determined this was too vague, ambiguous, and lacking in essential terms to be enforceable.

**Slide #: 10**

**Slide Title:** Communication of Offer

Communication of Offer

- Offeree's knowledge of the offer:
  - Directly by the Offeror, or
  - Use of agents.

**Audio:**

The third requirement of an effective offer is communication. The offer must be communicated to the offeree or there is no contract.

**Slide #: 11**

**Slide Title:** Termination of the Offer

Termination of the Offer

- An offer may be terminated prior to acceptance by either:
  - Action of the parties →  
*or by*
  - Operation of law. →

**Audio:**

Now section two deals with termination of an offer. An offer can be terminated by the action of the parties in any of three ways: 1) revocation, 2) rejection, and 3) counteroffer. And it is important to note that a counteroffer is a termination of the existing contract and an offer to enter into a new contract.

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**Slide Title:** Termination of the Offer by Action of the Parties

### Termination of the Offer by Action of the Parties

- Revocation of the Offer by the Offeror:
  - Offer can be withdrawn anytime before Offeree accepts the offer.
  - Effective when the Offeree or the Offeree's agent receives it. →

#### **Audio:**

So first, revocation of the offer by the offeror. The offeror usually can revoke the offer as long as the revocation is communicated to the offeree before the offeree accepts. Once the offeree has accepted an offer, then it cannot be revoked; it cannot be changed. The general rule followed by most states is that a revocation becomes effective when the offeree or the offeree's agent actually receives it. Next, we cover detrimental reliance or promissory estoppel. It is covered both here and later on in the subsequent chapters. Promissory estoppel comes into play. To estop means to bar, impede, or preclude someone from doing something. Thus, promissory estoppel means that the promisor, the offeror, is barred from revoking the offer. In this case, because the offeree has already changed her actions in reliance on the offer. Many courts will not allow the offeror to revoke the offer after the offeree has performed some substantial part of his or her duties.

#### **Slide #: 13**

#### **Slide Title:** Termination of the Offer by Action of the Parties

### Termination of the Offer by Action of the Parties

- Irrevocable Offers. Courts are generally unwilling to allow revocation when Offeree has changed position based on justifiable reliance on the offer.
  - Option Contract: Promise to hold an offer open for a specified period of time in return of consideration.

#### **Audio:**

Concerning the rejection of the offer by the offeree, any subsequent attempt by the offeree to accept will be construed as a new offer giving the original offeror – now the offeree – the power of acceptance. A rejection is ordinarily accomplished by words or conduct, evidence seen in intent not to accept an offer. As with revocation, rejection of an offer is effective only when it is actually received by the offeror. A little bit later we'll go into the Mailbox Rule which covers acceptance of an offer.

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#### **Slide Title:** Termination of the Offer by Action of the Parties

### Termination of the Offer by Action of the Parties

- Rejection of the offer by the Offeree:
  - Rejection by the Offeree (expressed or implied) terminates the offer.
  - Effective only when it is received by the Offeror or Offeror's agent.

#### **Audio:**

A counteroffer occurs when the offeree rejects the offer and simultaneously makes a new offer.

If the offeree makes any change to the offer, it becomes a counteroffer and he has not accepted the first offer. At common law, the Mirror Image Rule requires the offeree's acceptance to match the offeror's offer exactly. The Mirror Image Rule is applicable to common law contracts; it is not applicable to Uniform Commercial Code contracts. This first section on contracts deal with common law contracts. There are substantial differences between a common law contract and a Uniform Commercial Code contract, which we'll get into a little bit later. Concept summary 11.1 provides...

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**Slide Title:** Termination of the Offer by Action of the Parties

Termination of the Offer by Action of the Parties

- Counteroffer by the Offeree.
  - Rejection of the original offer and the simultaneous making of a new offer.
  - Mirror Image Rule: At common law, any change of terms automatically terminates the offer and substitutes the counteroffer.

**Audio:**

...a nice table with a succinct statement as to the method of termination...

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**Slide Title:** Termination of the Offer by Operation of Law

Termination of the Offer by Operation of Law

- Lapse of Time.
  - Offer terminates by law when the period of time specified in the offer has passed.
  - If no time period for acceptance is specified, the offer terminates at the end of a reasonable period of time.
- Destruction of the Subject Matter: before acceptance of offer, terminates the offer.

**Audio:**

...and the basic rules that are applied...

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**Slide Title:** Termination of the Offer by Operation of Law

Termination of the Offer by Operation of Law

- Death or the Incompetence of the Offeror or Offeree: automatically terminates unless irrevocable offer.
- Supervening Illegality of the Proposed Contract: legislation or court decision automatically terminates offer or renders contract unenforceable.

**Audio:**

...regarding contracts.

**Slide #: 18**

**Slide Title:** Acceptance

Acceptance

- Acceptance is the:
  - Voluntary Act (expressed or implied);
  - By the Offeree that;
  - Shows assent (agreement);
  - To the terms of an offer.
- Unequivocal: The “Mirror Image” Rule.

**Audio:**

Section three, acceptance. Acceptance is a voluntary act that acceptance must be unequivocal and must be communicated to the offeror. To exercise the power of acceptance effectively, the offeree must accept unequivocally. This is, effectively, the Mirror Image Rule as we previously discussed. If the acceptance is subject to new conditions or if the terms of the acceptance materially change the original offer, the acceptance may be deemed a counteroffer that implicitly rejects the original offer.

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**Slide Title:** Silence as Acceptance

Silence as Acceptance

- General Rule: Offeree should not be legally obligated to affirmatively reject an offer.
- When Offeree has Duty to Speak:
  - He takes benefit of services with opportunity to reject.
  - Prior dealings with Offeror.

**Audio:**

In some situations, silence can be considered an acceptance, but ordinarily silence is not acceptance. There must be a meeting of the minds and one must acknowledge their acceptance through word or deed.

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**Slide Title:** Communication of Acceptance

Communication of Acceptance

- Bilateral Contract: communication of acceptance is necessary because of mutual exchange of promises.
  - Not necessary if offer does not require.
- Unilateral Contract: acceptance is evident, notification not necessary.

**Audio:**

In a bilateral contract, communication of acceptance is necessary because acceptance is in the form of...

**Slide #:** 21

**Slide Title:** Mode and Timeliness of Acceptance

Mode and Timeliness of Acceptance

- General Rule: in bilateral contracts, acceptance is timely if made before offer is terminated.
- Mailbox Rule. →

**Audio:**

...a promise and the contract is formed when the promise is made.

**Slide #: 22**

**Slide Title:** Mailbox Rule

Mailbox Rule

- General Rule: acceptance is effective when Offeree uses authorized means of acceptance.
  - If U.S. Mail, acceptance upon dispatch.
  - Does not apply to instantaneous communications.

**Audio:**

And now we get into the Mailbox Rule. 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. This is known as the Mailbox Rule. What does it mean? It means that when an offeree puts his acceptance in the mailbox, it is accepted; that's when there is a valid contract. Not when the acceptance is received by the offeror. It is a valid contract as soon as the offeree no longer has possession or the ability to change his acceptance, and that can be by email, that can be by any other method of transmission, but once it's out of his hands then it is an effective contract regardless of when it is received by the offeror.

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**Slide Title:** Mailbox Rule

Mailbox Rule

- Exceptions to Mailbox Rule:
  - If acceptance is not properly dispatched by the Offeree.
  - If Offeror specifies that acceptance will not be effective until it is received.
  - If acceptance is sent after rejection, whichever is received first is given effect.

**Audio:**

There are three exceptions to this principle. One, if the acceptance is not properly dispatched by the offeree. In most states, it will not be effective until it is received by the offeror. Or two, the offeror can stipulate in the offer that an acceptance will normally not be effective until it is received by the offeror. And three, sometimes an offeree sends a rejection first, then later changes his or her mind and sends an acceptance. Obviously, the contract no longer exists



once the rejection is sent, thus there is no contract to accept.

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**Slide Title:** Mode and Timeliness of Acceptance

Mode and Timeliness of Acceptance

- Authorized Means of Acceptance: offer specifies (expressly or impliedly) how acceptance should be made.
  - No acceptance if authorized means is not used.

**Audio:**

[No audio]

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**Slide Title:** Mode and Timeliness of Acceptance

Mode and Timeliness of Acceptance

- Substitute Method of Acceptance:
  - Effective if the substitute serves the same purpose (Fed-Ex vs. UPS).
  - Not effective on dispatch.
  - Effective when received by the Offeror.

**Audio:**

[No audio]

**Slide #: 26**

**Slide Title:** § 2: Agreement in E-Contracts

§ 2: Agreement in E-Contracts

- Online Offers.
  - Displaying the offer. Seller's website should include hyperlink to page with full contract.
  - Provisions to include. →

**Audio:**

[No audio]

**Slide #: 27**

**Slide Title:** Online Acceptances

Online Acceptances

- Click-on Agreements.
  - Courts have concluded a binding contract can be formed by clicking on a box indicating "I Accept" or "I Agree." Contract can be formed via website or software.
  - Law does not require parties read all the terms.

**Audio:**

[*No audio*]