

OFFER, ACCEPTANCE, AND NEGOTIATION

Contract law focuses on the manifestation of mutual assent between two (or more) parties to the contract. The party's actual subjective intent almost always does not matter for formation; it is the expression of the party's objective intent that counts.

But what, exactly, do the parties have to manifest in order to form a contract? The common law of contract has settled on the idea of an "offer" and an "acceptance," both being necessary for the formation of a contract. An offer proposes the specific contractual agreement by laying out all of the necessary terms, and the acceptance agrees to those terms. Contract law views the formation of the contract as something of a magic moment, a flip of a switch—when an acceptance meets a valid offer, the contract is formed. Before formation, there is no contractual obligation, and afterwards, there is no room for second thoughts.

As we explore the world of formation, which includes offers and acceptances as well as counteroffers, rejections, revocations, and terminations, we will find a number of set rules establishing when the "magic moment" of formation has happened, and when it has not. As we will see, those rules are somewhat different when the transaction involves a sale of goods and thus governed by the UCC. Moreover, there is a fair degree of uncertainty about certain aspects of contract formation that depend on contextual determinations. This uncertainty can be frustrating but is perhaps inevitable given the vagaries of intention and communication.

Sometimes, parties might exchange communications that, on their face, look like a valid offer and acceptance, but the law does not consider them as such and holds that a contract was never formed. That can happen when the parties misunderstand the nature of the transaction, when their communications are too vague, which the law calls indefiniteness, or when they leave too much discretion to a party, making their promises illusory.

We will also discuss the negotiation process itself. As noted, contract law generally perceives the moment of acceptance as a "magic moment" where all the contract obligations are created. However, in some cases, certain obligations can be created even before that moment and even if the parties fail to reach a final complete agreement. Parties might create those obligations by entering separate agreements, such as option agreements, but, in some cases, they might also be bound even without reaching a final agreement.