MBE Strategies for Contracts and Sales

1. Introductory tips:

- Contracts and Sales is one of the hardest subjects for students to master. There are many topics and sub-topics within this subject. In order to do well on Contracts and Sales problems, you must be committed to memorizing the nuances of the law. So, if you are struggling to answer questions correctly, rather than increasing the quantity of questions you answer each day, increase the time you spend memorizing and actively reviewing your outline.
- If you are having trouble mastering Contracts and Sales, it is worth it to consider making your own outline (or your own charts and diagrams for concepts you have trouble with). Many students feel much more "in control" of the material after they make and memorize their own Contracts and Sales outline.
- If an MBE question quotes the language of a contract, pay attention to it! The question is using quotes because it *needs* them. That means the language is important. It could be raising a UCC 2-207 "battle of the forms" issue, a parol evidence rule issue, an interpretation issue, a contract formation issue, among a variety of other issues. Pay special attention to quoted language.
- If an answer choice asks you to make a judgment you are not qualified to make, it cannot be correct. Sometimes, for example, an answer choice for a Sales question regarding UCC 2-207 will say that a shipping term "materially alters" the contract. Even if it sounds right, it's probably not since the answer choice asks you to make an assumption you are not qualified to make. *(A tip is to look for the word "if". If the question states in a widget-shipping contract, "The shipping term won't be a part of the contract because it materially alters the contract," that answer is not as good as, "The shipping term won't be a part of the contract* ***if*** *it materially alters the contract." The word "if" recognizes that soon-to-be-lawyers are not expected to know if a shipping term on a box of widgets materially alters a contract.)*

2. Be aware of the differences between performance obligations under common law and the UCC.

Common Law Performance Obligations:
Under common law (e.g., service contracts), "substantial performance" is required in order for the other party's duty to arise. Thus, if there is a **minor breach** by one party, the other party must still perform his duty (but can also sue for breach of contract or deduct damages for the breach). (An exception to this is if there is an express condition, but these conditions are not covered here. Please review your outline.)

Problem:
A homeowner and a cleaning company entered into an agreement whereby the cleaning company agreed to clean the homeowner's house over the course of a weekend. The contract detailed a long list of specific tasks that the cleaning company would undertake. One of the tasks that the cleaning company agreed to undertake was dusting the tops of the chandeliers and replacing broken light bulbs. Nevertheless, the cleaning company neglected to replace two broken light bulbs in the living room. After two full days of cleaning, the cleaning company asked for full payment from the homeowner.

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What are the obligations of the homeowner?
(A) The homeowner is not obligated to pay anything to the cleaning company because the cleaning company breached an express condition of the contract.
(B) The homeowner is not obligated to pay the contract price to the cleaning company; rather, the homeowner must only pay the reasonable value of the work completed.
(C) The homeowner is obligated to pay the full contract price to the cleaning company because the cleaning company substantially performed its duties.
(D) The homeowner is obligated to pay the cleaning company but may deduct the damages for the minor breach from the total amount it pays the cleaning company.

The correct answer is (D). The homeowner must pay the cleaning company pursuant to the contract because the cleaning company "substantially performed" under the contract. The cleaning company did breach the contract, but its breach was minor. Thus, the homeowner must perform and may simply deduct the damages for the minor breach. (A) is incorrect because despite the fact that the cleaning company breached the contract, it was a minor breach. There would be an extreme injustice if the cleaning company was not paid anything. (B) is incorrect because the court will look to the contract. There is no reason to find an alternative non-contractual theory here as the parties had a contract. (C) is incorrect because the homeowner may deduct damages for the minor breach.

UCC (Sale of Goods) Performance Obligations:

One-shot Deals:

The "perfect tender" rule is required for "one-shot" deals. (A one-shot deal exists when a buyer orders goods that come in one shipment rather than in installments.) Pursuant to the perfect tender rule, if the buyer receives *anything other than exactly what he ordered, he can reject the goods*.

If you order a black coat and get a navy blue coat, you can reject the navy blue coat. If you order 100 blue bicycles and receive 99 blue bicycles and 1 red bicycle, you have three options. First, you can reject all 100 bicycles. Second, you can accept all of the bicycles. Third, you can reject the commercial unit that the 1

MBE Tip: A note on "curing" an incorrect shipment: There are two scenarios where the seller can "cure" his defective shipment and send the right goods even if he initially sends the wrong goods in one-shot deals.

- First, if the seller still has ***time to perform*** under the contract (e.g., if the bicycles were due to be shipped by July 1 and the seller sent them early – for example, June 1), then the seller can "cure" and send the proper goods so long as he does so by the deadline.
- Second, if the seller ***thought the buyer would accept the nonconforming goods*** (e.g., maybe he shipped a <u>better</u> model of the bicycle, thinking the customer would be thrilled to receive the upgraded model for the same price, when in reality the customer wanted the model it ordered). Other than those two scenarios, there is not a right to cure in a one-shot deal!

Keep this in mind, because a lot of students erroneously believe that there is always a right to cure.

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red bicycle was a part of but accept the rest of the bicycles. It is your call. But if it is an order that comes in one shipment and it is not perfect, you can reject the goods!

Installment contracts:
The UCC does not follow the perfect tender rule for **installment contracts.** (An installment contract is one that requires or authorizes the delivery of goods in separate lots to be separately accepted. Basically, it is when, pursuant to the contract, the buyer is not getting all of the goods at once. They are delivered in separate shipments or "installments.") The buyer can only reject an installment when the **nonconformity substantially impairs** the value of that installment *and* **cannot be cured**. The buyer can only reject the entire contract when the **nonconformity substantially impairs** the value of the **whole contract.** The buyer must **seasonably notify** the seller of cancellation.

The standard for rejecting goods under an installment contract is much higher than the standard for one-shot deals as courts want to "keep installment contracts going." Generally, businesses enter into installment contracts and courts do not want a business to use any minor breach to "get out of" an installment contract. So, the UCC states that the nonconformity must *substantially impair* the value of the contract and *must not be able to* be cured for a business to reject an installment.

Let's say a grocery store enters into a contract with a farmer to ship it 50 gallons of 2% milk. The farmer sends the store 48 gallons of 2% milk and 2 gallons of whole milk, due to an oversight. The grocery store can accept all 50 gallons, reject all 50 gallons, or reject the defective commercial units (i.e., the 2 gallons of whole milk). That is because this is a one-shot deal so the perfect tender rule applies. The goods were not perfect. (And note, unless the farmer sent the goods early under the contract and still has time to perform, there is no automatic right to cure for the farmer!)

Let's change the facts and say that the contract was an *installment* contract. So, for example, the grocery store agreed to buy 50 gallons of milk every other week for 6 months. This makes it an installment contract because the goods are not all being shipped at once.

If the grocery store receives 48 gallons of 2% milk and 2 gallons of whole milk, can the grocery store reject all 50 gallons? No. The nonconformity can be cured. Here, the farmer could simply say "sorry, I'll ship the

Summary of Performance Obligations

- At **common law**, if one ***substantially performs*** her duties under the contract, then the other party must perform. (The exception to this is if there is an **express condition**, in which case exact performance is required.)

- Under the **UCC**, the seller has to provide ***perfect tender*** to the buyer unless an exception applies (e.g., an **installment contract**). If a buyer receives imperfect goods in a "one-shot" deal, then he may **accept** or **reject** those goods. If he rejects, the seller has a right to cure only if there is time for performance left or if the seller reasonably believed the imperfect goods would be accepted. If he accepts the goods, he can no longer reject. However, he may still be able to **revoke** his acceptance (discussed below).

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2 gallons of 2% milk right away." Also, there is a good argument that shipping two gallons of whole milk does not substantially impair the value of the contract.

3. Revocation of acceptance of goods is a much higher standard than rejection.

Remember that normally under the UCC, for one-shot deals you can reject goods if they are not "perfect". However, what if you already accepted the goods and only then do you realize they are defective? You can no longer reject goods once you accept them. However, you may be able to *revoke your acceptance* of the goods.

If you have already accepted the goods and want to revoke your acceptance of them, the perfect tender rule does *not* apply! You must show much more than simply showing the goods are not "perfect"! This is a highly tested principle on the MBE and many state essay exams.

So, what is the standard? What does a buyer have to show in order to revoke his acceptance of goods? The buyer can revoke his acceptance of goods when:

- the nonconformity **substantially impairs the value to him**,
- he accepted it because he had a **reasonable belief that the nonconformity would be cured** (and it was not) *or* he did not discover the nonconformity because **the nonconformity was difficult to discover** or **because of the seller's assurances**,
- he revokes within a **reasonable time after** he discovers or should have discovered the nonconformity, and
- before any **substantial change in condition of the goods which is not caused by their own defect**.

MBE Tip: Do not confuse revocation of *goods* with revocation of an offer. Revoking one's acceptance of goods occurs *after a contract is already formed* and goods are delivered then accepted. Later, for whatever reason, the buyer decides he wants to revoke that acceptance.

Revoking an offer occurs before an offer is *accepted*. Remember that contract formation requires an offer, acceptance, and consideration. So if one revokes his offer, a contract has not even been formed, as there is no offer to accept.

Students mix up these two types of revocation, but if you recognize how different they are in terms of the timeline when they take place, you will keep them straight!

For example, let's say you buy skis on sale in the summer and the skis are supposed to be adjustable to fit a variety of ski boot sizes. You try on the skis and everything seems to be fine. However, when you go skiing six months later you notice that the ski boots are constantly becoming disconnected from the skis. Can you *reject* the goods? No. It is too late to reject the goods as you have had them for six months. (So, the perfect tender rule would not apply!)

However, you could likely *revoke your acceptance* if the nonconformity substantially impaired the value to you (i.e., you could not use the skis), you did not discover the nonconformity because it was difficult to discover (i.e., you had to go skiing to discover it and you bought the goods in the summer), you revoked within a reasonable time after going skiing, and you revoked before a substantial change in condition of the goods not caused by their own defect (i.e., you didn't otherwise damage the goods before revoking your acceptance).

Below is a chart that summarizes rejection and revocation of goods.

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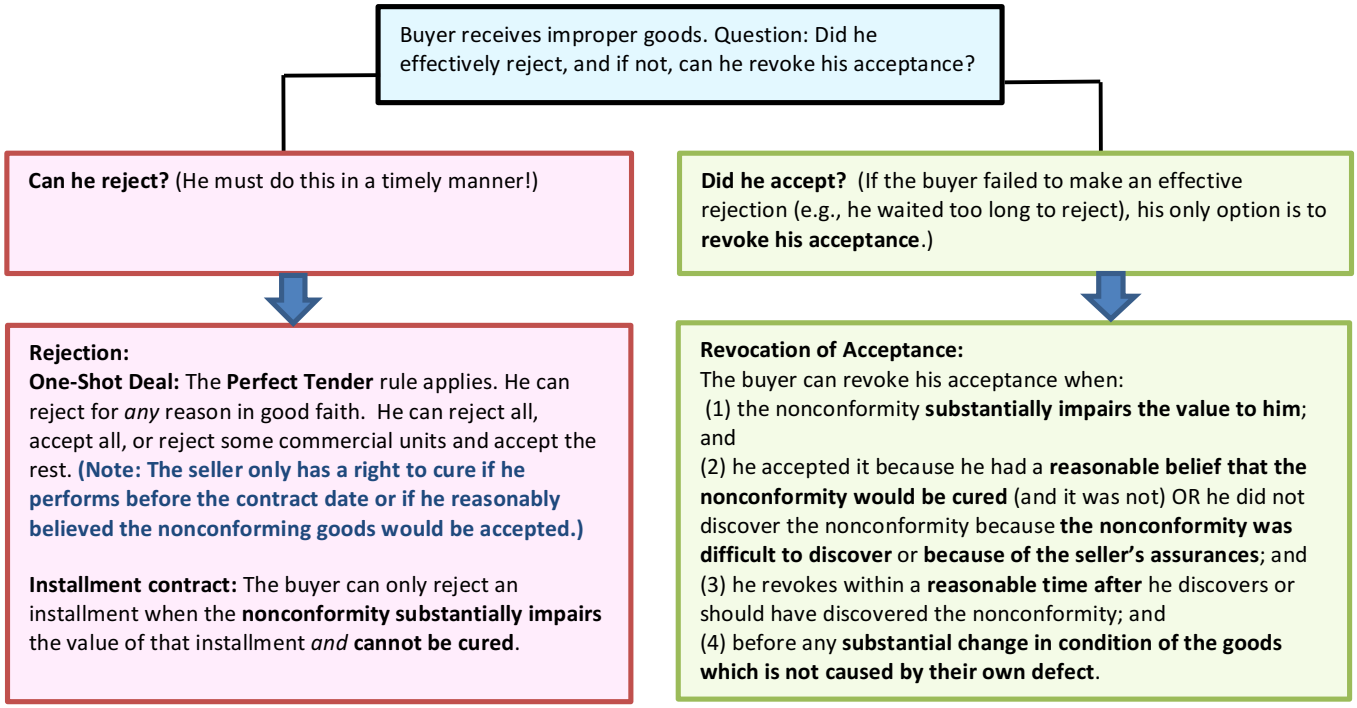

Problem:

One winter, a man purchases swimming goggles from a nearby dive shop. The man does not use the swimming goggles until a couple months later when the weather gets warmer. Upon using the swimming goggles, he discovers that there is a defect in the lens that causes water to flood the goggles, rendering the goggles effectively useless. The next day, the man brings the goggles back to the store and demands his money back.

The man's best argument to receive his money back is:
(A) the swimming goggles are defective so he is rejecting them.
(B) the swimming goggles are defective so he is revoking his acceptance of them.
(C) the store breached the implied warranty of fitness for a particular purpose.
(D) the harm suffered by the man was a foreseeable result of the store's negligence.

Here, the facts specifically tell us that "the man does not use the swimming goggles until a couple months later" – thus, it is too late to "reject" the goods. Rejection must take place sooner. However, the buyer may still be able to revoke his acceptance of the goods. Here, all above elements of revocation are present. The defect poses a substantial impairment to him as he cannot use the goggles. The defect was difficult to discover right away because he bought the goggles in the winter. He revoked his acceptance right after he discovered the defect (the next day) and the facts do not indicate any substantial change in the condition of the goods. Thus, (B) is the answer.

(A) is incorrect because rejection must take place sooner. Here, he held on to the goods for a long enough time (a couple months) that he likely "accepted" the goods. (C) is incorrect because while the store may have breached the implied warranty of merchantability (by selling goggles that did not keep water out),

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there are no facts that indicate the implied warranty of fitness for a particular purpose was breached. That warranty is only invoked when the buyer relies on the seller to select goods to fit a particular purpose. Here, there is no indication that the buyer relied on any statement by the seller to meet some particular purpose of his. (D) is incorrect as there are no facts indicating that the store was negligent. (He could potentially have a strict liability tort claim but (D) only discusses negligence. Further, be aware of any answer choice that seems to discuss a totally different area of law – they are often wrong.)

4. Know the intricacies of UCC 2-207 ("battle of the forms") and how it differs from the common law "mirror image" rule.

These issues come up when there is a written offer and a written acceptance that is somehow different than the offer (i.e., it has a different or additional term).

Common Law Mirror Image Rule:
This common law "mirror image" rule applies when there is a contract for services. It says that in order for an acceptance to be a valid acceptance, the acceptance must be the **mirror image** of the offer. Otherwise, it operates as a counteroffer and rejection. So the acceptance cannot contain a different or additional term in order to be a true acceptance! If there are additional or different terms in the "acceptance," then the "acceptance" is actually a rejection and counteroffer and no contract is formed by the papers alone.

The **last shot rule** states that if the parties proceed to act like a contract was formed, look who sent the last piece of paper before performance to see what the terms are. This is explained below.

Let's say that Alan agrees to provide landscaping for Bob. Alan says, "For $1,000, I will purchase flowers, three fruit trees, four rose bushes and plant them in accordance with a detailed design plan." Bob says, "I accept your offer except I require five rose bushes to be planted."

Alan made an offer in this case. Was Bob's "acceptance" a real acceptance? No, it was not because Bob's acceptance was not the "mirror image" of the offer. It had a different term. So, instead, it is a rejection and counteroffer.

But let's say that Alan starts to landscape anyway. He purchases the flowers, three fruit trees, and four rose bushes and begins landscaping. Now, a *contract has been formed* because Alan is *acting* like a contract has been formed. So, does Alan have to plant five rose bushes or can he get away with planting four? He must plant five. Under common law, always look to see who sent the *last piece of paper*. Those terms are part of the contract. What happened in this case was that Alan made an offer. Bob rejected that offer and made a counteroffer when he slightly changed the terms. Then, Alan accepted Bob's counteroffer by performance (that is, by beginning landscaping). In other words:

- Alan: "For $1,000, I will purchase flowers, three fruit trees, four rose bushes and plant them in accordance with a detailed design plan." **This is an offer.**

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- Bob: "I accept your offer except I require five rose bushes to be planted." **This is a rejection and counteroffer.**
- Alan begins performing. **Alan has accepted Bob's counteroffer and a contract is formed according to Bob's terms.**

Uniform Commercial Code (UCC) Battle of the Forms 2-207:

The Uniform Commercial Code 2-207 applies whenever there is a *sale of goods* and whenever the *offer and acceptance look different from one another.*

Note that there are three types of scenarios to be aware of:

- The first is when the offeree sends a "fake acceptance." Here, a contract is not formed by writings, but the parties' actions could still create a contract.
- The second is when the offeree sends an acceptance with an additional term that was not found in the offer. Here, a contract is formed by the parties' writings.
- The third is when the offeree sends an acceptance with a term that is *different* from a term in the offer. Here, a contract is formed by the parties' writings.

MBE Tip: A general rule to remember for MBE purposes is that **common law** applies to service contracts. The **Uniform Commercial Code (UCC)** applies to the sale of goods. So if you are getting your yard landscaped, hair cut, or car serviced, common law applies because these are all services. If you are buying books, a new laptop, or groceries, the UCC applies because these are all tangible objects that you are buying.

Note: The UCC applies *regardless of whether the parties are merchants* and *regardless of the price of the contract*.

We will discuss these three scenarios below. Make sure to consult the chart at the end of this section as well.

First question to ask: Does the UCC apply?

Make sure that the contract is for a sale of goods before applying these nuanced rules!

Second Question: Was the purported acceptance a "real acceptance" or a "fake acceptance"?

I say: "I offer to sell you my car for $10,000." You reply: "I accept your offer but my acceptance is *expressly conditioned* on you replacing the tires and the headlights."

Is your "acceptance" a real acceptance? No. You said "I accept…but only if…" Basically, you are not accepting the offer and you are making your acceptance conditional on me doing something (replacing the tires and headlights). If you see this "conditional" language, then our writings do *not* form a contract! I simply made an offer and you rejected it and made a counteroffer. (We call this a "fake acceptance" because it *looks* like an acceptance but it is not—but don't say the words "fake acceptance" on the bar exam!)

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But what if we act like a contract exists?
What if you give me $10,000 and I give you my car? Whose terms control? Do I have to replace the tires and headlights? If we act like a contract exists, the law will find a contract to exist. However, the UCC states that the terms of the contract are the *writings that both parties agree upon* and *UCC gap fillers*. So because our writings do not "agree" on the provision that I have to replace the tires and headlights, I will not have to replace them.

"Gap fillers" are standard terms that the UCC will imply if nothing is otherwise stated. For example:

- If we do not state the time for delivery, the UCC will imply a *reasonable time*.
- If we do not state the price or our method of deciding the price, the price is a *reasonable price at the time for delivery*.
- If nothing is said about when payment is due, payment is due at the time and place that the buyer receives the goods.

So in this case, our writings do not form a contract. However, our actions do. The terms of the contract will be the ones we "agree upon" (which is basically that I will give you my car for $10,000), plus any gap fillers (e.g., you pay me at the time you receive the car). The term regarding the replacement of the tires and headlights *will not* be part of the contract. In summary, here is what happened:

- Me: "I offer to sell you my car for $10,000." **This is an offer.**
- You: "I accept your offer but my acceptance is *expressly conditioned* on you replacing the tires and the headlights." **This is a rejection and counteroffer because of the "expressly conditioned" language. The acceptance was conditional upon agreeing to a term, so it is not a real acceptance.**
- We exchange the car and the $10,000. **Our writings do not form a contract but our *actions do*. The terms of the contract are the terms found in *both* of our writings and gap-fillers.**

Third Question: If there is a "real acceptance," whose terms are in?
Additional Term:
I say: "I offer to sell you my car for $10,000." You reply: "I accept your offer. However, if there is any dispute as to this contract, we are required to resolve the dispute using arbitration."

Is your "acceptance" a real acceptance? Yes. There is no language that says "I accept but only if…" or "My acceptance is expressly conditioned on…" Here, there is a plain acceptance. There is simply an *additional term* (an arbitration clause) added to the acceptance. Is this additional term a part of the contract?
Are we both merchants? If we are not, the answer is *no*, the term is not part of the contract. (It is merely a "proposal" which can be accepted or rejected.)

If we *are both merchants*, then ask three questions:

- **Does the offer expressly limit acceptance to the terms of the offer?** (Does the offer say, for example, "Acceptance is expressly limited to the terms of this offer"? In this case, it does not. If

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the offer did "expressly limit" acceptance to the terms of the offer, a court would honor that clause and limit acceptance to the terms of the offer. After all, the offeror is master of his offer.)

- **Do the additional terms materially alter the contract?** If a term materially changes the contract, it will not control. For example, if I said, "I offer to sell you my car for $10,000" and you said "I accept. Also, you have to give me your truck too." This additional term materially alters the contract! Does an arbitration clause materially alter the contract? There is a split of authority but most courts say it would materially alter the contract.
- **Did the offeror object within a reasonable time?** If I called you soon after receiving your acceptance and I said "I object to the arbitration clause," then it would not be part of the contract.

If any of these above three things occurred, then the additional term is *not* part of the contract. Otherwise, if both parties are merchants, it is part of the contract. So, here is what happened:

- Me: "I offer to sell you my car for $10,000." **This is an offer.**
- You: "I accept your offer. However, if there is any dispute as to this contract, we are required to resolve the dispute using arbitration." **This is an acceptance that adds an additional term. Thus, a contract is formed at this point. Whether the additional term is part of the contract depends on whether we are both merchants (if we are not, it is not). If we are, then it still depends on the answers to the above three questions.**

***Different term*:**
I say: "I offer to sell you my car for $10,000. Pick it up at my house." You reply: "I accept your offer. Deliver the car to my house."

These are *different terms* (rather than additional) because it is impossible for both terms to control. That is, I cannot have you pick the car up at my house and deliver it to your house! Thus, these terms contradict one another.

Here, we have a contract (because there is a "real acceptance"—that is, we do not see any language making your acceptance conditional on me agreeing to the additional terms). The question is: Whose terms are in? The UCC follows the "knockout" doctrine for different terms. It will knock out both terms and use gap fillers to "fill in the gap." What do the UCC gap fillers say about delivery? They say: If it is not specified in the contract, the place for delivery is the ***seller's*** place of business or home (unless the goods have been identified and the parties know they are in a different place, then that is the place of delivery).

Thus, both of our terms would be "knocked out" and the UCC would fill in the gaps with a provision stating you have to pick up the car from my home (as I am the seller). So, here is what happened:

- Me: "I offer to sell you my car for $10,000. Pick it up at my house." **This is an offer.**
- You: "I accept your offer. Deliver the car to my house." **This is an acceptance that contains a different term. Thus, a contract is formed at this point. The UCC will "knock out" our different terms and then fill in the gap with the UCC gap filler that controls delivery.**

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Problem:
On July 1, a grocery store sent an order to a candy company to purchase 500 bags of candy for the price of $1,000, which was the price quoted on the candy company's website. On July 7, the candy company mailed the grocery store a form which stated "We are pleased to accept your offer. However, we condition our acceptance on your agreement to pay for the goods five days before delivery." The form was otherwise identical with respect to the quantity, price, and the product ordered.

As of July 7, which of the following is an accurate statement concerning the relationship between the grocery store and the candy company?

(A) There is a contract that includes the term regarding prepayment so long as it does not materially alter the contract.
(B) There is a contract that does not include the term regarding prepayment as that term is merely a proposal, which the grocery store can choose to accept or reject.
(C) There is no contract because the candy store expressly conditioned its acceptance on the grocery store's acceptance of an additional term.
(D) There is no contract because the candy store's purported acceptance contained a term that was not found in the offer letter.

The answer is (C). Here, no contract is formed by the writings alone because the acceptance was a "fake acceptance"—that is, it was expressly conditioned on the grocery store agreeing to an additional term. Thus, it served as a rejection and counteroffer. (Note, if the parties *acted* like a contract existed, then a court would find that a contract did, in fact, exist. The contract would not contain the delivery term, though, as "both writings" did not agree to it, and the UCC gap fillers would not require prepayment.) (A) is not correct because in this case, no contract exists at all. (B) is not correct for the same reason. (D) is not correct because it applies the common law mirror image rule. In this case, the UCC 2-207 rule would apply as the contract is for a sale of goods (candy).

Problem:
A teacher agreed to sell his car to his neighbor. The teacher wrote the neighbor a letter that stated, "I offer to sell you my car for $15,000." It had various other terms. The neighbor wrote the teacher a reply that stated, "I accept your offer." The reply was identical to the offer; however, it also had a term that stated, "The seller agrees to purchase new tires prior to delivering the vehicle." There was no further correspondence between the parties.

Which of the following is an accurate statement concerning the legal relationship between the teacher and the neighbor?

(A) There is a contract between the teacher and the neighbor that does not include the term regarding the tires if the term materially alters the contract.
(B) There is a contract between the teacher and the neighbor but it does not include the term regarding the tires, as that term is merely a proposal that the teacher can accept or reject.
(C) There is not a contract between the teacher and the neighbor because the neighbor's purported acceptance contained an additional term not found in the teacher's offer.

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(D) There is not a contract between the teacher and the neighbor unless the parties' actions show that they intended a contract to exist.

The answer is (B). The UCC applies because this is a sale of goods (a car). However, the parties are not merchants. So, the additional term is merely a proposal that can be accepted or rejected by the teacher. The parties have a contract but the term is not automatically included. (A) is incorrect as this only applies if both parties are merchants. Here, we have a teacher and his neighbor. The facts do not indicate that either party is a merchant. (C) is incorrect because an additional term in the acceptance would not automatically preclude contract formation in a contract for the sale of goods. (D) is incorrect because there is a contract based on the writings, as the acceptance was not expressly conditioned on assent to the additional term.

There is a chart on the next page that summarizes UCC 2-207. On the following page, there is a blank chart. Since UCC 2-207 is commonly tested on the MBE (and since it is so nuanced!), we recommend you memorize the chart. One way to "actively" do this is to make copies of the blank chart and keep filling it in until you are able to fill in the entire chart by memory.

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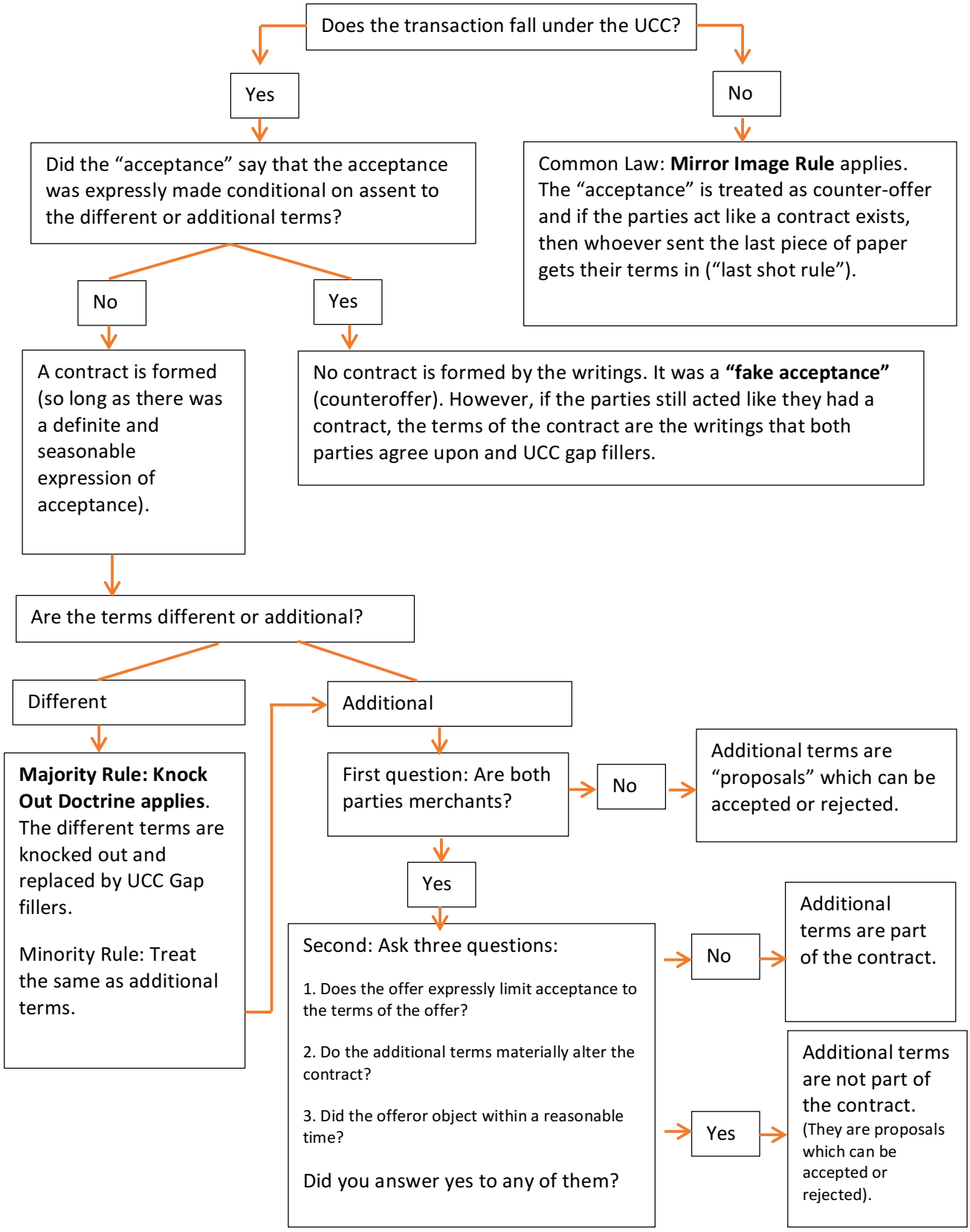
Different or Additional Terms in the Acceptance or Confirmation



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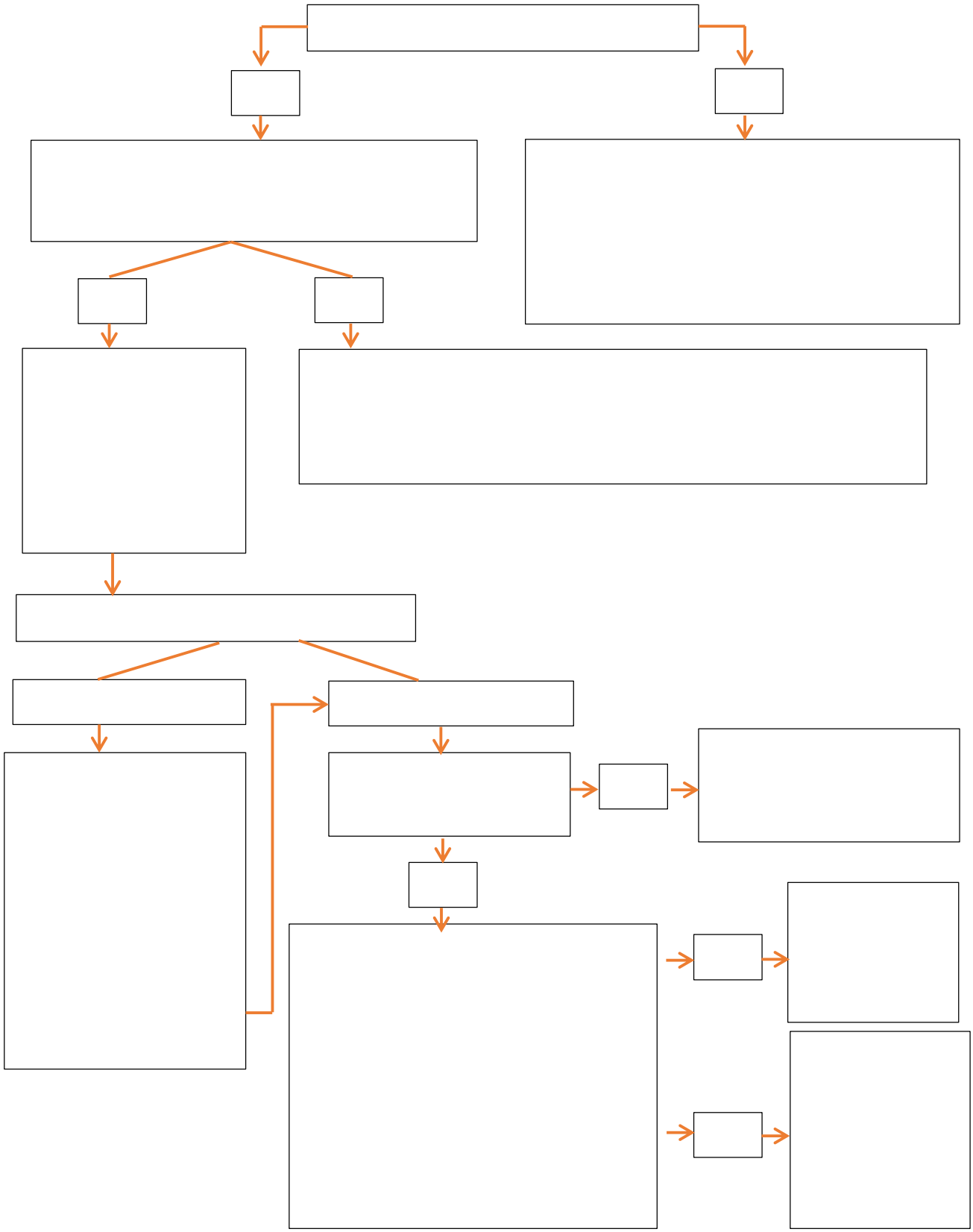
Different or Additional Terms in the Acceptance or Confirmation – Blank Chart



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