

Question 5

Box Co. manufactures cardboard boxes used for storing household goods during moves. On February 1, Moving Co. telephoned Box Co. and said it needed 5,000 boxes from Box Co.'s catalogue at the price listed in the catalogue. Moving Co. asked that each box be imprinted with Moving Co.'s address in black ink, and that the boxes be delivered to Moving Co. on May 1. Because this was to be the first transaction between the parties, Moving Co. asked Box Co. to send it a box for inspection. The catalogue contains a provision that "because of variations in pigments, seller cannot guarantee the color of imprint on any product." On February 15, Box Co. delivered to Moving Co. a box with the requested black ink imprint.

On February 16, Moving Co. sent its order form for 5,000 boxes to be delivered on May 1. The following was printed at the bottom of the order form: "Strict adherence to terms and sample is required."

Box Co. delivered 4,500 boxes on May 1 and the remaining 500 on June 1. The imprint on most of the boxes was a murky gray. Moving Co. refuses to pay for any of the boxes.

Box Co. sues for breach of contract.

What are the rights of the parties? Discuss.

ANSWER A TO QUESTION 5

1. Contract Formation

Contract formation requires mutual assent, consideration and no defenses.

This involves the sale of goods so the UCC applies - Article 2.

Mutual assent includes offer and acceptance. An offer is a communicated commitment to an identified offeree with definite terms. An acceptance must be unequivocal.

The UCC allows the formation of a contract even if some terms are missing. These terms may be supplied by prior dealing between the parties, trade usage, etc. The UCC does require, however, that quantity be included -- otherwise, the contract fails for indefiniteness.

A crucial issue here is determining when the contract was formed.

- a. It could be argued that the catalogue and sample were the offer, and the February 16 order by Moving Co. was the acceptance.

A catalogue or price list is usually just an offer to negotiate. An exception is where the buyer requests the catalogue. Here, the moving company already had the catalogue, so this exception does not apply.

If it did apply, there would be a problem of battle of the forms because the offer (the catalogue) contains a disclaimer as to quality of the printing, while the order form of February 16 specifies "strict adherence to terms and sample is required."

In such a case where there are terms in the offer which conflict with terms in the acceptance, the conflicting terms will drop out and there is still a contract unless the acceptance requires that the offeror assent to its terms. The phrase: "Strict adherence to terms and sample is required" could be construed as requiring positive assent to that term before a contract is formed, but the UCC requires that such language be specific as to requiring such assent.

- b. It also could be argued that the phone call of February 1 by Moving Co. was the offer and the sending of the box was acceptance.

The oral offer contains all terms required by the UCC, that is, quantity, parties, etc. The problem is that if it is oral and, as in the case of this contract, probably for more than \$500, it is required by the UCC to be in writing.

An exception to the statute of frauds is where goods are specially manufactured. That is the case here because the Box Co. did specially manufacture the boxes.

Another exception to the Statute of Frauds is where the contract is fully executed. The facts do not say whether Moving Co. rejected or accepted the goods. If Moving Co. accepted the goods (that is, did not make an effective rejection), the contract is executed and there is no Statute of Frauds defense.

- c. The best argument is that the order of February 16 is the offer and that the Box Co. accepted by delivering the boxes.

This is a writing which contains the subject matter of the contract (5,000 boxes) and is signed by the party which the plaintiff is seeking to charge with the contract. Any other inconsistent prior agreements are barred by the parol evidence rule. The actual sample is admissible because it is not inconsistent with the contract and is indeed referred to by the contract.

Even though the catalogue contained a disclaimer the catalogue was not the offer, using this approach. The offer of February 16 required strict adherence. The offeree, Box Co., could have objected to the terms in this offer but did not.

Instead, Box Co. accepted by sending the boxes. Under the UCC, the shipment of nonconforming goods is acceptance of the offer.

The February 16th letter then was the offer and the shipment was the acceptance.

2. Box Co.'s nonconforming tender

Box Co.'s tender was nonconforming in two ways.

a. Quantity

The perfect tender rule required that the Box Co. deliver 5,000 conforming boxes on May 1st.

Box Co. will be given a chance to cure a nonconforming tender, even if beyond the contract period, if Box Co. had reasonable belief that original tender would be acceptable.

The cure in this case was beyond the contract period. Performance was due May 1st. There was no more time provided by the contract for performance.

b. Quality

- (1) A sample, under the UCC, is an express warranty that the goods later delivered will conform with the quality of the tender.

Also, the offer of February 16 required that the boxes conform with the sample. It was important to Moving Co. that the boxes be printed in black ink and not "murky gray."

- (2) The tender of the "murky gray" imprinted boxes, then, -was nonconforming. As said before, even a shipment of nonconforming goods is an acceptance and there is a contract.

An exception to this is where the seller states that it is sending the nonconforming goods as an accommodation to buyer. Then the shipment is a counter offer, but the facts do not indicate this.

But, whether the nonconforming goods were an acceptance or a counteroffer, Moving Co. had to make an effective rejection, otherwise it has accepted the goods and is liable in the contract.

After receiving the goods, the Moving Co. had a reasonable amount of time to inspect the goods. Then it should:

- Notify the seller that it is accepting the conforming goods or accepting the nonconforming goods; or,
- Notify the seller it is rejecting the goods.

If Moving Co., does not effectively reject the goods -- that is, notify Box Co. it is rejecting the goods, this is deemed an acceptance and Moving Co. is liable for the goods.

Also, if the Moving Co. uses the goods in any way deemed inconsistent with the Box Co.'s ownership of the boxes, this is acceptance. That is, if Moving Co. is using the boxes in its business, this is acceptance.

Also, Moving Co. could have notified the Box Co. of the quality problem and given Box Co. a chance to cure. In this case, however, the contract period has expired and the Box Co. had no reasonable belief that "murky gray" boxes would be satisfactory because of the express warranty and the provision in the offer.

At any rate, if Moving Co. did not reasonably notify the Box Co. that it was rejecting the goods, this is acceptance of_ the goods and Moving Co. has to pay. Moving Co., however, can counterclaim that there was a minor breach by Box Co., in that the goods did not conform and have the value of this nonconformity deducted from the amount owed to Box Co. Acceptance of nonconforming goods does not prevent a buyer from making a claim against seller for breach of warranty.

ANSWER B TO QUESTION 5

Uniform Commercial Code (UCC)

The UCC applies to transactions between merchants involving the sale of goods. Here, we have Moving Co. and Box Co. Both would be considered merchants under the UCC. Their transaction consists of the sale of the boxes. The boxes would be goods under the UCC. This transaction would be covered by, and subject to, the UCC.

Formation of the Contract

The activities which occurred between February 1 and February 15 would be deemed to be preliminary negotiations. Moving Co.'s telephone call would be an offer to open negotiations only, and would not be binding on either party.

Offer

The initial offer to contract would be Moving Co.'s February 16 letter ordering "5000 boxes to be delivered on May 1."

Acceptance

Moving Co.'s offer invited an acceptance to bargain in a unilateral contract. That is, Moving Co. offered to buy 5000 specially imprinted boxes at Box Co.'s catalogue price if Box Co. would deliver the boxes by May 1.

Under the UCC, an offer to bargain in the Unilateral Mode may be accepted by a promise to ship or prompt shipment of conforming goods.

Alternative: Bilateral Contract

The deal here could also be deemed a bilateral contract. The offer would be Box Co.'s promise to ship 5000 boxes by May 1 and the acceptance would be Moving Co.'s order for 5000 and implied promise to pay.

The more likely view is the first mentioned Unilateral Contract for sale of goods.

Was a Contract Formed?

The UCC requires that a sale of goods for greater than \$500 must conform to the Statute of Frauds. Here, it is assumed that the sale of 5000 boxes exceeds \$500.

The Statute of Frauds can be satisfied by any written memo signed by the party being sued and containing the material terms of the contract. The order form from Moving Co. would satisfy these requirements. The missing price term would be filled in by the UCC's "gap-filler" sections and would be Box Co.'s catalogue price.

If the memo above were deemed not to fulfill the Statute of Frauds, the exception for specially manufactured goods would allow the statute to be met. In this case; goods which are manufactured to the specifications of the orderer are deemed to meet the requirements of the Statute of Frauds.

Additional Terms

The next problem to formation of a valid contract is the problem of the additional terms added by the parties. In order for a contract to be formed at common law, both parties had to strictly adhere to the Mirror-Image Rule. This meant that an acceptance had to strictly conform to the terms of the offer and any alteration would result in a rejection and a counteroffer by the offeree. Under the UCC, this rule has been relaxed.

UCC 2-207

If the contract were deemed bilateral, then Moving Co.'s addition of the "strict adherence" term could create a problem in acceptance. The UCC allows any additional terms to become incorporated into the contract so long as they do not materially alter the contract, or if they do materially alter the contract, then they will become part of the contract if the offeror assents to them.

Here, Box Co. did not object to the term and it does not materially alter the contract, so it would become part of the bilateral contract.

Perfect Tender Rule

Assuming that a valid bilateral contract were formed, then the next problem arises at Box Co.'s delivery of the boxes (which also constitutes acceptance of the unilateral contract).

The contract terms called for 5000 boxes strictly conforming to the sample which was sent. Box Co. delivered only 4500 boxes.

The UCC operates with the Perfect Tender Rule. This rule states that delivery of goods must strictly conform to the order or the seller is at risk of non-acceptance by the buyer. A buyer need not accept less than perfectly tendered goods, that is, goods strictly conforming to its order.

Here, Box Co. has failed with regard to the Perfect Tender Rule. Moving Co. may validly reject the whole shipment. The shipment did not conform in quantity or quality to the order.

Quantity

An express condition precedent to Moving Co.'s duty to accept and pay for the boxes was that there would be 5000 boxes conforming to the sample. When this condition precedent did not occur, all duties were discharged and no contract was formed.

Also, under the UCC, when there is still time left to perform, the buyer must allow the seller time to cure his defective tender. Here, there was no time left to perform and Box Co.'s "cure" was not seasonable; it was more than one month later.

Moving Co. was within its rights to refuse delivery of the 4500 boxes and terminate the contract based on the 4500 box delivery.

Quality

A problem arises with the objection to the "murky gray" imprints. Box Co. will assert that their catalogue disclaimer would be effective. It would make any contract based on that catalogue subject to the disclaimer and thus not subject to refusal simply because of the printing.

The sample which Box Co. sent would operate as Moving Co.'s defense to this argument. Moving Co. would state that the sample was acceptable and that by providing a good sample, Box Co. warranted that all further shipments would conform to that sample. Further, their offer of acceptance was conditioned on delivery of boxes conforming to the quality of the sample.

Box Co.'s Case

Box Co. would argue that its tender of 4500 imprinted boxes resulted in substantial performance of its obligations under the contract. It would also argue that by allowing the boxes to be delivered and not saying it would not accept the boxes until after the June 1 cure delivery, the Moving Co. implicitly accepted the delivery.

Acceptance can occur when one party fails to notify the other party of defects within a reasonable time. Here, it is assumed that Moving Co. did not notify Box Co. of its non-acceptance until after the June 1 cure delivery.

This would not be a seasonable notification. A buyer who takes possession of goods and maintains possession without notifying the seller that he is not accepting them, runs the risk of having the seller rely on his silence as if it were an acceptance.

Box Co. did, in fact, detrimentally rely on Moving Co.'s silence. Evidence of this is its good faith attempt at cure on June 1. Moving Co. may therefore be liable as if it had accepted conforming goods.

Remedies

While Box Co.'s delivery was not a Perfect Tender, Moving Co. did not act reasonably under the circumstances. Moving Co. was under a duty to seasonably notify Box Co. of the non-conforming delivery and to reject the delivery.

By not seasonably rejecting, Moving Co. made Box Co. detrimentally rely on its silence. Box Co. went ahead and delivered the remaining 500 boxes on June 1 in reliance on Moving Co.'s silence.

Moving Co. would be liable for the cost of the boxes as if they had accepted them. They will be allowed a discount for the non-conforming boxes in the initial shipment of 4500 boxes but will have to pay full contract price for the second shipment of 500 because the silence of Moving Co. kept Box Co. from effectively curing.

Had Moving Co. seasonably rejected the shipment, the contract would have been at an end and no further rights or duties would have attached.