

Contracts I
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Sample Exam Question #10 - Model Answers

On September 1, 2003, Mercury Rising (“Mercury”) mailed a purchase order to the Glass Manufacturic (“GM”) for precision glass tubing to be used in the manufacture of indoor and outdoor thermometers. Mercury ordered 5,000 1-foot lengths of glass tubing, at a price of \$5.00 per foot. Mercury’s purchase order also indicated that GM should deliver the glass tubing at GM’s expense no later than October 1, 2003. After receiving Mercury’s purchase order, GM mailed a written acknowledgment, agreeing to all of Mercury’s terms. GM’s acknowledgment also contained a disclaimer of all implied warranties and a provision that limited Mercury’s remedies to replacement of any tubing that was broken or otherwise lost in transit. GM delivered the tubing and Mercury accepted it and paid for it. Later, Mercury determined that a significant portion of the shipment was of inferior quality and unfit for the use for which Mercury bought it. Assume that, in the absence of an effective waiver or disclaimer of implied warranties, the inferior tubing would violate one or more Article 2 implied warranties.

A. Did Mercury and GM have an enforceable contract? Please explain.

Yes. At common law, an acceptance that adds qualifications or conditions or that varies in any way the terms of the original offer is treated as a counteroffer, not an acceptance. However, this contract is for the sale of goods; and, therefore, is governed by Article 2 of the UCC. Article 2 rejects the common law “mirror image” rule. Under § 2-207(1), a contract is formed even though the acceptance or confirmation contains additional or different terms, as long as the offeree’s intent to accept the offer is definitely expressed and the offeree’s acceptance is not expressly conditioned on the offeror’s assent to the additional or different terms. Here, there was a contract despite the additional, material terms. Mercury’s purchase order constituted an offer. GM’s acknowledgement was an acceptance, despite the additional terms, because it was not made expressly conditional on Mercury’s agreement to the additional terms. Article 2 does not expressly require consideration. Nonetheless, Mercury’s promise to pay and GM’s promise to ship or GM’s shipment (depending on whether we construe Mercury to have offered a bilateral or unilateral contract) are consideration for one another.

Because this contract was for the sale of goods in an amount greater than \$500, there must have been one or more writings, signed by the party against whom enforcement is sought, evidencing the contract, identifying the goods, and stating the quantity to be sold. UCC § 2-201. Here, Mercury’s purchase order and GM’s acknowledgment should collectively satisfy the requirements of § 2-201(1). Each identified the goods to be sold as one-foot lengths of glass tubing and stated a quantity of 5,000 and a price of \$5.00 per foot. Collectively, they evidence the parties’ agreement. “Signed” for purposes of UCC § 2-201 includes most things that identify the sender. Therefore, if Mercury’s purchase order had its name and address on it, or was on

Mercury's letterhead or a Mercury form, or was accompanied by a fax cover sheet with Mercury's name on it, or it displayed Mercury's name on the "banner" at the top or bottom of each faxed page, it should satisfy UCC § 2-201(1). Similarly, if GM's acknowledgment had its name and address on it, or was on GM's letterhead or a GM form, or was accompanied by a fax cover sheet with GM's name on it, or it displayed GM's name on the "banner" at the top or bottom of each faxed page, it should satisfy UCC § 2-201(1). Moreover, in the event there is no writing sufficient to satisfy § 2-201(1) as against GM, the "partial performance" exception of § 2-201(3)(c) clearly applies against GM, given that Mercury made and GM accepted payment for the tubing.

B. Assuming, for purposes of subparts B-D, that Mercury and GM had a contract, would Mercury's contract with GM permit Mercury to sue GM for breach of one or more Article 2 implied warranties? Please explain.

Yes. We must refer to § 2-207(2) to determine the terms of the contract. Certainly, the agreed terms are "in." So, we know quantity (5,000 ft.), price (\$5.00/ft.), delivery deadline (10/1/2003), and who bears the cost of delivery (GM). What about the disclaimer of implied warranties in GM's acknowledgment? Because both parties are merchants, § 2-207(2) presumes that GM's additional term is included unless one of the exceptions in § 2-207(2)(a)-(c) excludes it. If it "materially alters" the offer, it will not become part of the contract. § 2-207(2)(b) & cmt. 3. If it does not "materially alter" the original bargain, then it will become part of the contract unless (i) Mercury's offer expressly limited GM's acceptance to the terms of the offer, § 2-207(2)(a), which it did not; or (ii) Mercury objected to the additional terms within a reasonable time, § 2-207(2)(c), which it did not. The disclaimer of warranties was a material alteration, per § 2-207 cmt. 4 and *Falconer Glass*, and will not become part of the contract. Therefore, it will not become a part of the GM-Mercury contract and is not an effective waiver or disclaimer of the implied warranties provided in Article 2.

C. Suppose that Mercury's purchase order specifically stated: "All warranties set forth in Article 2 of the Uniform Commercial Code apply to this transaction." Would Mercury's contract with GM permit Mercury to sue GM for breach of one or more implied warranties? Please explain.

Yes. GM's acknowledgment disclaims all implied warranties. If Mercury's PO claims all implied warranties, then the "knockout rule" eliminates both GM's term and Mercury's term, and substitutes the UCC "gap-filler" – which, in this case, is the implied warranty mentioned above.

D. Suppose, instead, that GM's acknowledgment clearly stated that it would accept Mercury's purchase order only on the condition that Mercury agree to all terms set forth in GM's acknowledgment. Would Mercury's contract with GM permit Mercury to sue GM for breach of one or more implied warranties? Please explain.

Yes. GM's acknowledgment disclaims all implied warranties. If GM's acknowledgement makes its acceptance expressly conditional on Mercury's assent to GM's new terms, GM's acknowledgement is not an acceptance, but a counteroffer. § 2-207(1). Because

Mercury did not expressly accept GM's counteroffer, in order for Mercury to have a valid implied warranty claim against GM, we must find that a contract was formed under § 2-207(3) – that is, by the parties' actions, rather than their correspondence. Here, GM shipped the tubing without having received either an assent or objection from Mercury, and Mercury took delivery of and paid for the tubing, despite being aware of GM's warranty disclaimer. These actions are “[c]onduct by both parties which recognizes the existence of a contract ... although the writings of the parties do not otherwise establish a contract.” § 2-207(3). Therefore, the terms of the contract are those on which the writings agree – here, price, quantity, identity of the goods, and delivery deadline – plus any necessary UCC “gap-fillers.” One such gap-filler is the implied warranty mentioned above.