

Contracts I
Professor Keith A. Rowley
William S. Boyd School of Law
University of Nevada Las Vegas
Fall 2003

Sample Exam Question #5 - Model Answers

On March 1st, Buyer called Seller and placed an order for 100 juniper saplings at a price of \$5 per sapling, with delivery to be made by Seller no later than June 15th. On March 15th, Seller sent Buyer a written “Confirmation” of Buyer’s order, reciting that Seller would deliver to Buyer, no later than June 15th, 100 juniper saplings at a price of \$5 per sapling, “[s]ubject to the Terms and Conditions stated on the reverse side of this Confirmation.” On the back side of the Confirmation, Seller set forth a series of standard terms and conditions including the following:

11. In the event that any of the products covered by the Confirmation fails to satisfy the Buyer identified herein, Buyer must notify Seller in writing not later than ten (10) days following receipt of said product, and briefly explain the nature of the defect or nonconformity of which Buyer complains. Failure to so notify Seller constitutes a waiver by Buyer of any claim related to said product except for claims for physical damage to the product negligently or intentionally caused by Seller or Seller’s agent(s) or employee(s).

Seller delivered the trees to Buyer on June 15th. Buyer accepted the shipment and wrote Seller a check for \$500.

On June 25th, Buyer noticed that several of the saplings delivered by Seller have large brown splotches on them. After consulting a licensed horticulturist, Buyer concluded that these saplings were suffering from “Juniper Rot,” a condition that, at best, would cause the saplings to grow into stunted, discolored adult Junipers and, at worst, would cause the saplings to die in a matter of weeks. The horticulturist further informed Buyer that Juniper Rot is genetic, and that the saplings must have had the condition before Seller delivered them to Buyer.

On June 26th, Buyer called Seller to complain that, all totaled, 9 of the 100 saplings are suffering from Juniper Rot. Buyer asked Seller to replace the diseased saplings at no extra charge; or, in the alternative, to refund Buyer \$45 of the purchase price, representing the portion of the total price Buyer paid for the 9 defective saplings. Seller refused. On June 30th, Buyer filed suit in small claims court seeking to recover the purchase price of the diseased saplings (\$45).

A. On these facts, who should win and why?

There are four threshold questions. (1) What body of substantive law will govern this transaction? (2) Despite the varying terms in Buyer's order and Seller's Confirmation, did Buyer and Seller agree sufficiently to give rise to a contract? (3) Were the terms and conditions contained in Seller's Confirmation – including, but not limited to, the one quoted above – additional or different terms for purposes of § 2-207 of the UCC? (4) Are both Buyer and Seller “merchants,” as that term is defined in § 2-104 of the UCC?

(1) *Governing Law*

Absent a contrary agreement between the parties, UCC Article 2 governs the transaction between Buyer and Seller, because the juniper saplings were goods when Buyer and Seller entered into the contract. UCC § 2-105(1) defines “goods” to include “growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).” UCC § 2-107(2), in turn, provides that “[a] contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto ... or of timber to be cut is a contract for the sale of goods within [Article 2].” Therefore, even if the saplings were growing on real property, Article 2 would govern this sale. If the saplings were growing in movable planters, then we would not even need to look at UCC § 2-107 to decide that the saplings were goods.

(2) *Contract Formation*

Section 2-207 gives us two “hooks” on which to hang our hats. First, § 2-207(1) permits us to find an agreement, despite the presence of additional or different terms, unless Seller's acceptance was made expressly conditional to Buyer's assent to the additional or different terms. Merely stating on the face of the Confirmation that it is “subject to” the terms and conditions on the reverse side is not enough to make Seller's acceptance “expressly conditional.” So, then, all we need ask did the parties “understand” there to be an agreement? If so, § 2-207 will presume a contract, leaving us only the issue of its terms. *See* § 2-207 cmt. 2. Even if Buyer's order and Seller's Confirmation did not satisfy § 2-207(1) – which they almost certainly would – § 2-207(3) permits us to find an agreement based on the conduct of the parties. Here Buyer never responded to Seller's Confirmation, and we might argue that the variance in the terms would defeat the presumption of agreement in § 2-207(1). But when Buyer accepted and paid for the trees, its conduct “recognized the existence of contract” for purposes of § 2-207(3).

(3) *Additional vs. Different Terms*

The 10-days' notice provision is almost certainly an “additional” term. It does not conflict with any term in the offer; and, therefore, is not within our understanding of a “different” term for purposes of § 2-207.

(4) *Merchant Status and Its Consequences*

If Buyer, Seller, or both is/are not merchants, then Seller's additional terms and conditions – including, but not limited to, the one quoted above – will constitute proposals for addition to the contract, which Buyer could agree to or refuse as Buyer saw fit. If both Buyer and Seller are merchants, then Seller's additional terms and conditions – including, but not limited to, the one quoted above – are a part of Seller's contract with Buyer unless (i) Buyer's offer expressly prohibited Seller from accepting anything other than the terms of Buyer's offer; (ii) Seller's additional terms "materially alter" the terms of Buyer's offer; or (iii) Buyer notified Seller of its objections to the additional terms either prior to Seller's Confirmation or within a reasonable time thereafter. Here, Buyer's offer did not expressly limit acceptance to its own terms and conditions. Nor do Seller's terms appear to materially alter the basic deal – 100 juniper saplings, \$5 each, delivered by June 15th. Nor did Buyer object prior to or within a reasonable time of receiving the Confirmation.

So, if Buyer and Seller are both merchants, Seller should prevail. Its terms and conditions are additional terms which become part of the contract under § 2-207(2). If either is not a merchant, then Buyer should prevail. Seller's terms and conditions are additional terms which would only become part of the contract under § 2-207(2) if Buyer agreed to them. Buyer has not agreed.

B. If Buyer and Seller are both merchants, what could Buyer have done differently in order to avoid the effect of Paragraph 11?

If Buyer and Seller are both merchants, then Buyer could have (i) expressly limited Seller's acceptance of Buyer's offer to the terms of Buyer's offer and/or (ii) notified Seller that Buyer objected to this particular term and condition "within a reasonable time" after Buyer received Seller's Confirmation.

Notice that § 2-207(2)(c) requires notice of objection after receipt of the additional term, not after receipt of the goods. Thus, Buyer most likely could not have waited until the trees were delivered to object.

C. Suppose that, instead of calling in its order, Buyer sent Seller a written purchase order for 100 juniper saplings at a price of \$5 per sapling, with delivery to be made by Seller no later than June 15th, and that the written purchase order did not contain any provision requiring Buyer to give Seller written notice of any defect in the goods. If all other facts remain the same and Buyer and Seller are both merchants, who should win and why?

For purposes of § 2-207, the distinction between an oral and written order by the Buyer is without a difference – either one will suffice to find an agreement under § 2-207. As discussed in subpart "B," if Buyer and Seller are both merchants, then Seller's additional terms and conditions – including, but not limited to, the one quoted above – are a part of Seller's contract with Buyer unless (i) Buyer's offer expressly prohibited Seller from accepting anything other than the terms of Buyer's offer; (ii) Seller's additional terms "materially alter" the terms of

Buyer's offer; or (iii) Buyer notified Seller of its objections to the additional terms either prior to Seller's Confirmation or within a reasonable time thereafter. Here, Buyer's offer did not expressly limit acceptance to its own terms and conditions. Nor do Seller's terms appear to materially alter the basic deal – 100 juniper saplings, \$5 each, delivered by June 15th. Nor did Buyer object prior to or within a reasonable time of receiving the Confirmation. So, if Buyer and Seller are both merchants, Seller should prevail. Its terms and conditions are additional terms which become part of the contract under § 2-207(2).

D. Same facts as “C,” except Buyer is not a merchant. Who should win and why?

For purposes of § 2-207, the distinction between an oral and written order by the Buyer is without a difference – either one will suffice to find an agreement under § 2-207. This is true regardless of the parties' merchant status. Therefore, as discussed in subpart “B,” if Buyer or Seller is not a merchant, then Seller's additional terms and conditions – including, but not limited to, the one quoted above – will constitute proposals for addition to the contract, which Buyer could agree to or refuse as Buyer saw fit. Buyer has not agreed. So, if one or both is/are not merchants, then Buyer should prevail.