

Fact Pattern:

On August 1, 2005, Schulze, the owner of a local computer store, telephoned Aaron Phan, the owner of Phantastic Computer Company regarding the purchase of 10 Phantastic notebook computers. During their conversation, Schulze indicated that in order to be competitive, the notebook computers had to be able provide users with a delay of no longer than 2 seconds when switching between programs. Schulze had done an extensive study and discovered that most users of notebook computers performed a lot of multi-tasking and that a delay greater than 2 seconds would aggravate the user. Phan indicated that he did not guarantee his machines, but he honestly believed that Phan computers would be satisfactory. Mr. Phan also offered to lend Schulze a Phantastic notebook computer for tests.

Schulze tested the notebook computer and found that the response time was adequate. Schulze then telephoned Mr. Phan and placed an order for 10 Phantastic notebook computers at \$2,000.00 each for delivery by December 1. After they ended their telephone conversation, Mr. Phan sent Schulze an order confirmation via US Mail. The order confirmation contained the following line-item:

“ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY EXCLUDED.”

Schulze received the order confirmation on August 17, 2005, read it briefly and filed it. Mr. Phan delivered the computers to Schulze’s store on November 30, 2005. Schulze unpacked the computers and tested each one. Schulze discovered that each computer took approximately 5 seconds to switch between programs. Comparable notebook computers with a 5 second delay were selling for \$1,100.00.

Schulze promptly called Mr. Phan about the problem. Mr. Phan indicated that he did not have any more computers in stock. Schulze said that she would keep the computers because of the upcoming holiday season, but that he would only pay \$1,100.00 for each of them because that was the going rate for computers of similar power. Mr. Phan insisted that Schulze pay full price because he had not guaranteed their performance and reminded Schulze that he had the opportunity to test a Phantastic computer.

Questions:

Mr. Phan has come to your law firm for legal advice. You as the junior associate have been asked to evaluate the strengths and weaknesses of his claims and discuss whether he should accept \$1,100.00 per computer.

Example Answer:

Applicable Law

A contract is a legally enforceable agreement. A contract can also be thought of as a promise or set of promises for breach of which the law gives a remedy or in performance of which the law, in some way, recognizes a duty. The first question you must ask in the analysis of any contracts question is the applicable law. The answer will be either the Uniform Commercial Code (UCC) Article 2 or the common law (C/L). The UCC applies to contracts involving the sale of goods. § 2-102. The Common Law applies to all other contracts, for example service contracts. “**Goods**” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. Notebook computers will qualify as goods and accordingly the contract between Schulze and Mr. Phan will be governed by the UCC. The UCC contains special provisions to deal with transactions where the seller is a merchant or both parties are merchants. A merchant is one who regularly deals in the goods of the kind sold. Schulze and Mr. Phan are both considered merchants under the UCC.

Statute of Frauds / Confirmation Memorandum

The Statute of Frauds provides that certain contracts are enforceable only if they are evidenced by a written memorandum. Specifically, contracts for the sale of goods for \$500.00 or more require a writing signed by the party to be charged (i.e., held responsible). Schulze did not sign the confirmation. However, the UCC recognizes certain additional tangible evidence to prove the existence of a contract for the sale of goods of \$500.00 or more. For example, in a contract between merchants, the UCC provides that, if a merchant received a signed, written confirmation within a reasonable time (i.e., a merchant’s confirming memo), the Statute of Frauds is satisfied, if the receiving merchant had reason to know of the memo’s contents and does not object to it within 10 days.

The confirming memo sent by Mr. Phan is sufficient to bind Schulze because Schulze has reason to know of it because the facts indicate that he read it before filing it away and because Schulze did not object within 10 days after receiving the confirmation. Consequently, Schulze will not be able to assert a Statute of Frauds defense.

Terms – UCC § -207

The UCC departs from the C/L, which provides that an acceptance must be the mirror image of the offer. When both parties to a contract are merchants, additional or different terms included in an acceptance or confirmation will be included in the contract, unless: (1) they materially alter the original contract (i.e.,

would result in surprise or hardship if incorporated); (2) the offer expressly limits acceptance to the terms of the offer; or (3) the offeror has already objected to the particular terms or does so within a reasonable time after notice of them.

Here, Mr. Phan attempted to disclaim the implied warranties of merchantability and fitness for a particular purpose. This disclaimer will likely be excluded because it is a material term because it changes a remedy that would otherwise be available to Schulze.

Warranties and Disclaimer

A. Implied Warranties

In every contract there are implied warranties. An implied warranty of merchantability is given when the seller is a merchant. The seller/merchant warrants that the goods must be fit for their ordinary purpose and pass without objection in the trade under the contract description. An implied warranty of fitness for a particular purpose is given when the seller is a merchant and the seller/merchant has reason to know that: (1) the buyer has a particular use for the goods; and (2) the buyer is relying upon the seller's skill to select the goods.

Here, there is an implied warranty of both merchantability and fitness for a particular purpose. The warranty for fitness for a particular purpose arose when Schulze stated his needs to Mr. Phan and Mr. Phan sent Schulze a sample and also stated that the computers would be satisfactory.

B. Disclaimer of Implied Warranties

To disclaim the warranty of merchantability, the disclaimer must specifically mention merchantability. The disclaimer must also be conspicuous to a reasonable person.

Here, the disclaimer appears to have been conspicuous because it was in all capital letters, and it was bolded. Additionally, it expressly mentioned the word merchantability. Thus, the disclaimer of the implied warranties will be effective.

C. Express Warranties and Disclaimer

An express warranty may be created by sending a sample if it becomes the basis of the bargain. To be considered the basis of the bargain, it must occur when the buyer could have relied upon it when he entered into the contract and it is not necessary that the seller intended the sample to create a warranty. Disclaimers of express warranties will be enforced to the extent they are reasonable.

Schulze relied upon the sample sent by Mr. Phan in placing his order. Schulze's reliance on the sample made it part of the basis of the bargain and created an express warranty. Mr. Phan's written disclaimer did not address any express warranties. Although Mr. Phan expressly stated to Schulze that he did not guarantee his computers, he also told Schulze that he was sure that the Phantastic notebook would be satisfactory and the sample was satisfactory. Accordingly, a court would be inclined to find that Schulze has a claim for breach of an express warranty.

Revocation of Acceptance by Schulze

Schulze accepted the goods when he notified Mr. Phan that he would keep the goods in spite of the breach. In this situation, Schulze is entitled to damages if she notified Mr. Phan within a reasonable time after learning of the breach, and here she notified him promptly. Schulze will be entitled to get damages from Mr. Phan for the loss resulting in the normal course of events from the breach. This would generally be the difference in the value of the goods delivered and those ordered. Here, that would be \$900.00 per computer Mr. Phan wants Schulze to pay.

Consequently, I would counsel Mr. Phan to accept Schulze's payment of \$1,100 per computer.