

A bottling company sent a purchase order to a wholesaler that stated, "Ship 100,000 empty plastic bottles at the posted price." Two days after receipt of this purchase order, the wholesaler shipped the bottles and the bottling company accepted delivery of them. A week after the bottles were delivered, the bottling company received the wholesaler's acknowledgment form, which included a provision disclaiming consequential damages. After having used the wholesaler's bottles in its bottling operations for two months, the bottling company discovered a defect in the bottles that caused liquids to leak from them. The bottling company recalled 10,000 of the bottles that had been filled, incurring lost profits of \$40,000.

Assuming that all appropriate defenses are timely raised, will the bottling company likely succeed in recovering \$40,000 in consequential damages from the wholesaler?

- A. No, because buyers are generally not entitled to recover consequential damages.
- B. No, because the bottling company's acceptance of the goods also constituted an acceptance of the terms included in the wholesaler's acknowledgment.
- C. Yes, because the disclaimer of consequential damages is unconscionable.
- D. Yes, because the wholesaler's acknowledgment did not alter the terms of an existing contract between the parties.

## Explanation:

### Seller's acceptance of buyer's offer

(UCC § 2-206)

Method	Effective	Contract terms
<b>Promise to ship</b>	When oral promise made OR When written promise sent	All parties are merchants terms of offer + terms added by battle-of-forms rule ≥1 party is nonmerchant terms of offer new terms are merely <i>proposed</i> additions
<b>Shipment of goods</b>	When goods shipped	Terms of offer

UCC = Uniform Commercial Code.

Under the **UCC**, a seller can accept an offer (eg, purchase order) by shipping or promising to ship the ordered goods. **Acceptance by shipment** is **effective immediately** and creates a contract with terms identical to those of the offer. Once created, the contract **cannot be modified** unless both parties agree to this. And if either party **breaches**, the other party can recover **consequential damages** (eg, lost profits).

Here, the wholesaler received the bottling company's purchase order and shipped the bottles. That shipment—since it was sent before the acknowledgment form—created a contract on the purchase order's terms. And since the bottling company did not agree to a modification that disclaims consequential damages, the acknowledgment did not alter the terms of the existing contract. Therefore, the bottling company will likely recover \$40,000 in consequential damages for its lost profits caused by the wholesaler's breach in sending defective bottles.

**(Choice A)** Either party to a sale-of-goods contract (ie, buyer or seller) can recover consequential damages for breach as long as those damages were foreseeable when the contract was created.

**(Choice B)** The bottling company's acceptance of the bottles could *not* have constituted an acceptance of the terms included in the wholesaler's acknowledgment since the bottles were delivered and accepted before the acknowledgment was received.

**(Choice C)** A contract can limit or disclaim (ie, exclude) consequential damages unless doing so is unconscionable because it leaves no reasonable remedy for breach. But here,

whether the disclaimer of consequential damages is unconscionable is irrelevant since that term did not become part of the contract.

**Educational objective:**

Under the UCC, a seller can accept an offer to buy goods by shipping *or* promising to ship the goods. Acceptance by shipment is effective immediately and creates a contract with terms identical to those of the offer.

**UCC** = Uniform Commercial Code

**References**

U.C.C. § 2-206 (Am. Law Inst. & Unif. Law Comm'n 2020) (explaining that an offer to buy goods can be accepted by shipping or promising to ship the goods).

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