

A national distributor of windows selected a retailer to sell its windows in a specified geographic area. The parties negotiated a written distribution agreement, which stated that any order for windows placed by the retailer would be binding on the distributor "only when expressly accepted by the distributor."

For the next two years, the retailer forwarded orders to the distributor, and the distributor always filled the orders. In the third year, the distributor accused the retailer of overcharging customers to install the distributor's windows. The retailer responded that the distributor had no control over the retailer's installation prices. When the distributor received the retailer's next order for windows, it refused to fill the order.

If the retailer sues the distributor for breach of contract, will it be likely to prevail?

- A. No, because the retailer's forwarding of orders to the distributor did not give rise to an obligation on the distributor's part to fill the orders.
- B. No, because the retailer's practice of overcharging customers excused the distributor's refusal to fill the order.
- C. Yes, because the distributor's claim regarding overcharging customers is independent of its obligation to fill the retailer's order.
- D. Yes, because the parties' course of dealing binds the distributor to fill the retailer's order.

Explanation:

Elements of valuable consideration

Bargained-for exchange Each party's willingness to enter agreement must be induced by other party's act/promise

Legal detriment Each party must relinquish legal right by either:

performing (or promising to perform) act that is not legally required *or*
refraining (or promising to refrain) from performing legally permissible act

At common law and under the UCC, **contractual obligations** must be supported by **valuable consideration**—i.e., a bargained-for exchange of promises or performance. This requirement is not met if either party makes an **illusory promise**—i.e., one that essentially **pledges nothing** because it is vague or because the **promising party can choose** whether to honor it. In that case, there is no contract—and so there can be no breach.

Here, the distribution agreement provided that orders placed by the retailer would be binding on the distributor only when expressly accepted by the distributor. Since the distributor can *choose* whether or not to accept the orders, its promise was illusory. Due to this lack of consideration, the distribution agreement did not create an enforceable contract. This means that when the distributor received the retailer's final order, the distributor was not obligated to fill it. Therefore, the retailer is unlikely to prevail in a breach of contract suit.

(Choices B & C) If there had been an enforceable contract limiting the retailer's installation charges, the retailer's alleged practice of overcharging would be a breach that entitled the distributor to refuse additional orders. But since there was no such contract, the retailer's charging practices are irrelevant.

(Choice D) Under the UCC, the parties' course of dealing (e.g., filling orders for two years) is relevant to interpreting their agreement. But the express terms of the agreement prevail if they are inconsistent with the parties' course of dealing. Therefore, the parties' course of dealing here does not bind the distributor to fill the retailer's order.

Educational objective:

An illusory promise—i.e., one that essentially pledges nothing because it is vague or because the promisor can choose whether to honor it—cannot supply the necessary consideration for contract formation.

UCC = Uniform Commercial Code

References

Restatement (Second) of Contracts § 2 cmt. e (Am. Law Inst. 1981) (explaining that there is no promise when performance is entirely optional).

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