

A seller and a buyer entered into a written agreement providing that the seller was to deliver 1,000 cases of candy bars to the buyer during the months of May and June. Under the agreement, the buyer was obligated to make a selection by March 1 of the quantities of the various candy bars to be delivered under the contract. The buyer did not make the selection by March 1, and on March 2 the seller notified the buyer that because of the buyer's failure to select, the seller would not deliver the candy bars. The seller had all the necessary candy bars on hand on March 1 and made no additional sales or purchases on March 1 or March 2. On March 2, after receiving the seller's notice that it would not perform, the buyer notified the seller of its selection and insisted that the seller perform. The seller refused.

If the buyer sues the seller for breach of contract, is the buyer likely to prevail?

- A. No, because a contract did not exist until the buyer selected the specific candy bars, and the seller withdrew its offer before selection.
- B. No, because the buyer's selection of the candy bars by March 1 was an express condition to the seller's duty to perform.
- C. Yes, because the delay of one day in making the selection did not have a material effect on the seller.
- D. Yes, because upon the buyer's failure to make a selection by March 1, the seller had a duty to make a reasonable selection.

Explanation:

Contracts for the sale of goods (eg, candy bars) are governed by Article 2 of the Uniform Commercial Code (**UCC**). When a sale-of-goods **contract fails to specify the assortment of goods** to be delivered (eg, the quantities of various candy bars), the UCC imposes a **duty on the buyer** to select the assortment of goods.* If the buyer **fails to timely do so** AND the delay **materially impacts** the seller's performance, then the seller can:

proceed in any reasonable manner (eg, choose a reasonable assortment of goods) *or* treat the buyer's non-selection as a breach (**Choice D**).

Here, the parties agreed that the buyer would select an assortment of candy bars by March 1. Although the buyer made the selection on March 2, the delay did *not* materially impact the seller's performance. That is because the seller had all the necessary candy bars on hand and had entered into no new contracts at that time. As a result, the seller unjustifiably refused to accept the buyer's selection, and the buyer will likely prevail.

*In contrast, arrangements relating to shipping are the seller's duty to specify.

(Choice A) The UCC *rejects* the idea that a contract must specify the assortment of goods to be valid. Here, the contract stated the buyer could select the assortment later.

(Choice B) Absent language requiring strict compliance, the buyer's selection of the candy bars was a *constructive or implied* condition to the seller's duty to perform, which could be satisfied by substantially complying (eg, selecting a day late).

Educational objective:

If the buyer fails to timely select the assortment of goods for delivery and the delay materially impacts the seller's performance, then the seller can (1) proceed in any reasonable manner or (2) treat the failure as a breach.

References

UCC § 2-311 (Am. Law Inst. & Unif. Law Comm'n 2020) (options and cooperation respecting performance).

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Contract not specifying assortment of goods (UCC § 2-311)

