

A seller and a buyer have dealt with each other in hundreds of separate grain contracts over the last five years. In performing each contract, the seller delivered the grain to the buyer and, upon delivery, the buyer signed an invoice that showed an agreed-upon price for that delivery. Each invoice was silent in regard to any discount from the price for prompt payment. The custom of the grain trade is to allow a 2% discount from the invoice price for payment within 10 days of delivery. In all of their prior transactions and without objection from the seller, the buyer took 15 days to pay and deducted 5% from the invoice price.

The seller and the buyer recently entered into a contract for a single delivery of wheat at a price of \$300,000. The same delivery procedure and invoice were used for this contract as had been used previously. The seller delivered the wheat and the buyer then signed the invoice. On the third day after delivery, the buyer received the following note from the seller: "Payment in full in accordance with signed invoice is due immediately. No discounts permitted. s/Seller."

Which of the following statements concerning these facts is most accurate?

- A. The custom of the trade controls, and the buyer is entitled to take a 2% discount if he pays within 10 days.
- B. The parties' course of dealing controls, and the buyer is entitled to take a 5% discount if he pays within 15 days.
- C. The seller's retraction of his prior waiver controls, and the buyer is entitled to no discount.
- D. The written contract controls, and the buyer is entitled to no discount because of the parol evidence rule.

Explanation:

Course of performance, course of dealing & trade usage

Course of performance	Sequence of conduct that is relevant to understanding agreement between parties if: <ul style="list-style-type: none">• agreement involves repeated occasions for performance by one party AND <ul style="list-style-type: none">• other party accepts performance without objection
Course of dealing	Sequence of conduct concerning previous transactions between parties that establishes common basis of understanding for interpreting their conduct
Trade usage	Practice or method of dealing in parties' business or industry that is observed with enough regularity to justify expectation that it will be observed in instant case

Under the **UCC parol evidence rule**, evidence of a prior agreement (or contemporaneous oral agreement) cannot be used to *contradict* the terms of a final written agreement. But evidence of the parties' **course of performance**, the parties' **course of dealing**, or **trade usage** can always be used to **explain or supplement** those terms. If the evidence is inconsistent, **priority** is given as follows:

- Express terms prevail over all others
- Course of performance prevails over course of dealing and trade usage
- Course of dealing prevails over trade usage

Here, the contract at issue was silent regarding discounts for prompt payment. However, in all of their hundreds of prior transactions and without objection from the seller, the buyer had taken 15 days to pay and deducted 5% from the invoice price. This established a course of dealing that can be used to supplement the terms of the contract **(Choice D)**. And although the custom of the trade is to allow a 2% discount for payment within 10 days, the parties' course of dealing controls **(Choice A)**. Therefore, the buyer is entitled to a 5% discount if he pays within 15 days.

(Choice C) Waiver (or retraction thereof) is not an issue in this question because the contract was silent regarding discounts for prompt payment. In other words, there was no relevant term capable of being waived.

Educational objective:

Express contractual terms prevail over all others, the parties' course of performance prevails over their course of dealing and trade usage, and their course of dealing prevails over trade usage.

UCC = Uniform Commercial Code

References

- U.C.C. § 2-202 (Am. Law Inst. & Unif. Law Comm'n 2020) (parol evidence rule).

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