

A buyer and a seller entered into a written contract for the sale of a copy machine, using the same form contract that they had used a number of times in the past. The contract stated that payment was due 30 days after delivery and provided that the writing contained the complete and exclusive statement of the parties' agreement. On several past occasions, the buyer had taken a 5% discount from the contract price when paying within 10 days of delivery, and the seller had not objected. On this occasion, when the buyer took a 5% discount for paying within 10 days, the seller objected because his profit margin on this particular machine was smaller than on his other machines.

If the seller sues the buyer for breach of contract, may the buyer introduce evidence that the 5% discount was a term of the agreement?

- A. No, because the seller timely objected to the buyer's proposal for different terms.
- B. No, because the writing contained the complete and exclusive agreement of the parties.
- C. Yes, because a modification made in good faith does not require consideration.
- D. Yes, because evidence of course of dealing is admissible even if the writing contains the complete and exclusive agreement of the parties.

## Explanation:

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 the **following evidence can be used to *explain or supplement*** those terms, regardless of whether the agreement is **completely or partially integrated**:\*

- **Course of performance** – sequence of conduct that is relevant to understanding an agreement between the parties if (1) the agreement involves repeated occasions for performance by a party and (2) the other party accepts performance without objection
- **Course of dealing – sequence of conduct** concerning **previous transactions** between the parties that establishes a common basis of understanding for interpreting their conduct
- **Trade usage** – any practice or method of dealing in the parties' business or industry that is practiced with enough regularity to justify an expectation that it will be practiced in the instant case

Here, on several past occasions, the buyer had taken a 5% discount from the contract price when paying within 10 days of delivery, and the seller had not objected. This established a course of dealing between the parties that can be used to supplement the contract at issue, which was silent regarding discounts for early payment. Therefore, evidence of the 5% discount is admissible even if the writing contains the complete and exclusive agreement of the parties (ie, even if the writing is completely integrated) **(Choice B)**.

\*Priority is given as follows: (1) express contractual terms prevail over all others, (2) course of performance prevails over course of dealing and trade usage, and (3) course of dealing prevails over trade usage.

**(Choice A)** There was an established course of dealing between the parties, so the seller's objection to the 5% discount—after the buyer had acted in accordance with the course of dealing—was ineffective.

**(Choice C)** Under the UCC, a good-faith modification is enforceable without consideration. But the enforceability of a modification is not at issue here.

## Educational objective:

The UCC parol evidence rule always allows course of performance, course of dealing, and trade usage to be used to explain or supplement the terms of a final written agreement—even one that is completely integrated.

## References

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

## UCC evidence hierarchy



**UCC** = Uniform Commercial Code