

## MEMORANDUM

TO: Lawyer  
FROM: Lexadigm Solutions LLC  
DATE: April 11, 2005

RE: **X v. A – Battle of the Forms Issues under Indiana Law**

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### I. INTRODUCTION AND BACKGROUND

The dispute arises from the underlying contract between ABC Corporation (“A”) and XYZ Tool (“X”), in which X manufactured a ‘mold’ for A. At the commencement of the parties’ business relationship, A provided X with a copy of its procedural guidelines for procurement of a mold, ‘Mold Construction Manual;’ however, it itself failed to follow its own guidelines. For instance, contrary to its own guidelines, A failed to make a formal “Request for a Quote” and to demand a “Quote” from X. It appears that the contract was orally negotiated and reached between the parties, followed by A’s submission of its purchase order to X.<sup>1</sup>

This memorandum addresses whether X could avoid application of the 36-month<sup>2</sup> warranty and indemnification clauses, both of which are provided in A’s purchase order.

### II. DISCUSSION

X could raise two alternative arguments against A. First, it could argue that A’s purchase order, if signed, was a written acknowledgement of an oral contract between A and X, which contained two additional terms—the 36-month warranty clause and the indemnification provision. Neither of these provisions became part of the contract because they represent material alterations to the contract. Second, assuming that X did not sign and return A’s purchase order, it could argue that there was no contract based on the writings between the parties but a contract based on the conduct, i.e. performance. Under §2-207(3), there was no written agreement as to the warranty clause, so A’s 36-month warranty clause does not apply and the UCC gap fillers apply. Under the UCC’s default rule, the warranty was valid for a reasonable period, which it could be argued has elapsed in this case. In addition, the indemnification provision did not become part of the oral contract.

*A. A’s 36-month warranty clause and indemnification provision were material alterations to the contract which did not become part of the contract.*

*1. UCC 2-207, battle of the forms provision, is applicable in the present case.*

Section 2-207 of the Uniform Commercial Code (UCC), as adopted in Indiana, provides:

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<sup>1</sup> The parties are unsure whether X ever signed the purchase order and returned it to A.

<sup>2</sup> Though the client’s letter references a 24-month warranty, the warranty contained in paragraph 6 of the purchase order is 36 months.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

IC 26-1-2-207. This section abrogates the common law mirror image rule, which required an acceptance to be a carbon copy of the offer. *Cont'l Grain Co. v. Followell*, 475 N.E.2d 318, 322 (Ind. App. 1985). Hence, even if there are discrepancies between the offer and acceptance, there could be a valid contract. *Id.* It must be noted that § 2-207(1) also applies in situation of a written confirmation of an oral contract. 475 N.E.2d at 322; *see* IC 2-1-2-207(1), comment 1 (§2-207 is applicable in situations “where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.”) Furthermore, the written confirmation may contain additional terms which would become part of the contract between merchants, unless one of the exceptions enumerated in §2-207(2) is applicable.<sup>3</sup> *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 512 (Ind. App. 1978).

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<sup>3</sup> If the warranty provision in A’s purchase order is considered as a *different* term, in contrast to as an additional term, then the Indiana courts are silent as to whether §2-207(2) would be applicable. The warranty provision in A’s purchase order, which extends the warranty period to 36 months, could be considered as a discrepancy to what the parties otherwise understood the warranty to be, which is 6 months—as per §7.1.2 of A’s ‘Mold Construction Manual.’ It appears that in that case the court would apply the rule in majority jurisdictions that discrepant terms drop out and the UCC gap fillers apply. *See Northrop Corp. v. Litronic Ind.*, 29 F.3d 1173, 1178-1179 (7th Cir. 1994) (the Seventh Circuit applied the majority rule where the Illinois law was silent on this issue reasoning that Illinois courts would follow the majority rule and that uniform nationwide application of the Code is encouraged); *see also Zemco Mfg. Inc. v. Navistar Int’l Transp. Corp.*, 186 F.3d 815, (7th Cir. 1999) (while dealing with contract extension where the Indiana law was silent, the court comments “when a state has tended to follow majority rules and because there is an interest in uniform nationwide application of the Uniform Commercial Code, we start with a presumption that the state would adopt the majority position.”) Therefore, in that case the different warranty clauses will cancel each other and the UCC gap fillers would apply. *See infra.*

In the case at hand, it could be argued that the parties formed an oral contract, which X partially performed before even receiving A's purchase order. IC 26-1-2-204; *Continental Grain Co.*, 475 N.E.2d at 321 (a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct of the parties); *Uniroyal*, 177 Ind. App. at 518 (performance by both parties sufficient to form a contract where no agreement on the writings exchanged between the parties). This oral contract was followed by a confirmation/acknowledgement in form of a purchase order from A. See *Luedtke Eng'g Co. v. Indiana Limestone Co.*, 592 F. Supp. 75, 79 (S.D. Ind. 1983) (purchase order sent by the buyer in response to seller's quotation held as an acceptance of the offer); cf. *I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1035 (Ind. App. 1998) ("While a price quotation or bid, if detailed enough, can amount to an offer creating the power of acceptance, the submission of a purchase order by a buyer in response usually constitutes an offer.") Therefore, the purchase order constituted as a written confirmation of an oral contract to which § 2-207(1) applies. A's purchase order contained additional terms, including the warranty clause and indemnification provision, which, as argued in the next section, did not become part of the contract because they materially altered the contract.

**2. Neither the warranty clause nor the indemnification provision became part of the contract because they materially altered the contract.**

An additional term contained in the written confirmation/acceptance would become part of the contract between merchants<sup>4</sup> under §2-207(2), unless one of the exceptions enumerated in the section applies. The only exception that would be applicable in this case would be §2-207(2)(b)—the material alteration exception.<sup>5</sup> Under §2-207(2)(b), an additional term would not become incorporated in the contract between merchants if it "materially alters it." IC 2-1-2-207(2)(b). The test to determine whether a provision materially alters a contract is whether its "incorporation into the contract without express awareness by the other party would result in surprise or undue hardship." *Wilson Fertilizer & Grain, Inc. v. ADM Milling Co.*, 654 N.E.2d 848, 850 (Ind. App. 1996) (internal citations omitted). The court further comments: "[H]ardship or surprise may be created by terms that deviate from customary trade standards and practices, but may not be created by terms that operate within the accepted norms of the parties's particular trade." *Id.* at 852. Furthermore, materiality of a provision is a question of fact to be determined based on facts of each case. *Id.*; *Luedtke Eng'g Co.*, 592 F. Supp. at 80 (additional term regarding per-day shipping rate, which was previously mentioned but not negotiated between the parties, materially altered the contract in light of trade, prior dealings, and reasonable expectations of parties.)

In the present case, it could be argued that A's 36-month warranty clause was a material alteration to the contract. See *Northrop Corp.*, 29 F.3d at 1173 (where buyer's warranty as stated in its purchase order was intended to be indefinite in length, any limitation on length of warranty

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<sup>4</sup>'Merchant' is defined in IC 26-1-2-104 as a "person who deals in goods of the kind or otherwise by his occupation holds himself out as having the knowledge or skill peculiar to the practice or goods involved in the transaction..." It is safe to assume here that both parties would be 'merchants' and the underlying contract was 'between merchants.'

<sup>5</sup> The other two exceptions in §2-207(2) are not applicable because there was no express limitation on acceptance on terms of the offer, see §2.207(2)(a), and X did not give notification of objection to the additional terms in A's purchase order, see §2-207(2)(c).

in seller's offer was a materially different term). Incorporation of a 36-month warranty clause into the contract without express awareness of X unduly and reasonably surprised X. This conclusion is supported by the fact that X could have reasonably expected a 6-month warranty period based on representations made by A in its 'Mold Construction Manual.' See A Mold Construction Manual, §7.1.2 ("The performance warranty period shall consist of 6 months of active production mold operation or 150,000-mold cycle's minimum.") Even though there is no prior course of dealings between the parties, A's 'Mold Construction Manual' establishes its course of dealings with the mold manufacturers, in which it expects a 6-month production warranty or 150,000 mold cycles. Therefore, the 36-month warranty provision clearly deviates from A's prior course of dealings between the parties. Additionally, allowing enforcement of A's 36-month warranty would cause undue hardship to X because such a term was not bargained for between the parties, X manufactured the mold in a workmanship quality, and the mold has been successfully used by A over a year-and-a-half to run over 150,000 mold cycles. X cannot be expected to read the fine print boilerplate in A's standard terms and conditions. See *Northrop Corp.*, 29 F.3d at 1178 ("Judges are skeptical that even business people read boilerplate, so they are reluctant, rightly or wrongly, to make a contract fail on the basis of a printed condition in a form contract.")

Likewise, the indemnification provision in Paragraph 9 of the purchase order was a material alteration to the contract. *Maxon Corp. v. Tyler Pipe Indus., Inc.*, 497 N.E.2d 570, 576 (Ind. App. 1986) (a broad indemnity clause constitutes a material alteration as a matter of law because "a clause which shifts liability from a negligent party to an innocent party imposes hardship.") A's indemnification provision is similarly broad as it requires the seller to indemnify buyer, its employees, and other agents and assigns "from and against all loss, damage, liability, cost, and expense (including reasonable attorney's fees) arising out of any injury or death to any person or damage to any property, including damage to or failure of the goods furnished hereunder or damage to other components..." X was undoubtedly unaware of such an indemnification provision, and it would "impose serious hardship if incorporated." *Id.*

***B. A contract based on performance was formed between the parties and neither the 36-month warranty clause nor the indemnification provision become part of the contract under UCC §2-207(3).***

If an acceptance differs significantly on the material term(s), then no contract is formed, unless there is performance. IC 26-1-2-207(3); *Cont'l Grain Co.*, 475 N.E.2d at 322. Furthermore, a contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct of the parties. IC 26-1-2-204; *Cont'l Grain Co.*, 475 N.E.2d at 321. Therefore, a contract can be formed based on performance even though there is no writing showing agreement of the parties. *Uniroyal*, 177 Ind. App. at 518 (performance by both parties sufficient to form a contract where no agreement on the writings exchanged between the parties).

In the case at hand, if X did not sign A's purchase order, then there is no writing sufficient to form a contract between the parties.<sup>6</sup> Both parties, however, have fully performed

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<sup>6</sup> A may argue that even if X did not sign the contract, its conditional acceptance language deemed all its terms to be accepted by X when it commenced performance on the contract. This argument is without merit because courts narrowly construe the conditional assent language against the drafter. See, e.g., *Challenge Mach. Co. v. Mattison*

and such conduct would be sufficient to form the contract under UCC §§ 2-204 and 207(3). Provisions to which the parties have not agreed, including A's 36-month warranty and indemnification provisions, did not become part of the contract. So, guidance should be sought from the other gap filling provisions of the UCC. *Uniroyal*, 177 Ind. App. at 518 (in case the writings exchanged between the parties insufficient to form a contract and the contract is found based on performance, the terms of the contract are those on which the parties agree in writing, as supplemented by applicable Code provisions.)

In absence of a warranty period provided in the contract, the UCC provides for a reasonable time period for a warranty. IC 2-1-2-607. Section 2-607(3)(a), in its pertinent part provides that “[w]here a tender has been accepted..., the buyer must, *within a reasonable time* after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy.” IC 26-1-2-607(3)(a) (emphasis added). Therefore, if the offered goods have been accepted, and the buyer discovers or should have discovered any breach in warranty related to performance or quality, the buyer must inform the seller thereof in a timely fashion. What constitutes “reasonable time” within which buyer is required to notify seller of breach of warranty, depends upon particular circumstances, including existence of course of dealing between the buyer and seller. *Paper Mfrs. Co. v. Rescuers, Inc.*, 60 F. Supp.2d 869, 881 (N.D. Ind. 1999).

In *Courtesy Enterprises, Inc. v. Richards Laboratories*, the Indiana appellate court made the following observations:

In determining whether a disgruntled buyer gave timely notice of an alleged breach of warranties, one must examine previous dealings between that buyer and that seller... In addition to factual circumstances such as a course of dealing between the parties, there are specific policy considerations which determine the timeliness of notice.

What runs throughout all these considerations is the *seller's right to rely upon the finality of a transaction after the elapse of a particular period of time*. The buyer is not barred from asserting a breach if he does so before the seller may reasonably expect that the transaction has ceased to be problematic. *The premise is balancing fairness to the buyer, who may encounter defective merchandise, with fairness to the seller, who is entitled to rely upon the conclusiveness of a sale at some point*. In determining whether the requirement has been met, the facts of the particular case are especially important. ... If buyer within short time after acceptance of merchandise knew of alleged defect and notified seller with some expedition of his dissatisfaction, he would be acting as reasonable merchant, but if

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*Mach. Works*, 138 Mich. App. 15, 19-22 (1984) (while commenting that conditional assent provisions are narrowly construed by courts, refused to give effect to conditional assent language); *St. Charles Cable TV, Inc. v. Eagle Elec., Inc.*, 687 F. Supp. 820, (S.D. N.Y. 1988) (“Once the parties have reached an oral agreement, one party cannot unilaterally alter the terms of their agreement by subsequently sending written form that purports to be conditioned on acceptance of the alterations.”); *Idaho Power Co. v. Westinghouse Elec. Corp.*, 596 F.2d 924 (9th Cir. 1979) (while applying Idaho law, held that where purchase order stated: “acceptance of this order shall be deemed to constitute an agreement to the conditions named hereon and supersedes all previous agreement...,” such clause did not clearly reveal buyer’s unwillingness to proceed unless the seller assured its consent to additional terms.)

he knew of existence of alleged defects within reasonable period of time and did not notify seller of his dissatisfaction for some time after that, his actions would not be those of reasonable merchant within purview of statute governing assertion of breach of warranties.

457 N.E.2d 572, 577-579 (Ind. App. 1983) (emphasis added); *D'Arcy Spring Co. v. Ansin*, 146 N.E. 214 (Ind. 1925) (purchaser failing to exercise right of rejection within stipulated time cannot sue for breach of warranty).

In the case at hand, it could be argued that the facts and equities of this case strongly call for a finding of lapse of reasonable time period of warranty before A notified X about the breach of warranty. The mold has been used by A to its satisfaction for over a year-and-half and over 150,000 mold-cycles. A's satisfaction with the workmanship and quality of the mold is further evident from the fact that A ordered another mold to be manufactured by X about 15 months after production of the previous mold. In fact, A thanked X in writing for a good job on production of the second mold almost two years after the production of the first mold, which appears to further suggest that A did not have any complaints with the first mold. Therefore, elapse of at least 15 months after tender of mold should be sufficient time for X to rely on the finality of the transaction. Such an outcome is fair to even A because 15 months and/or 150,000 mold cycles is sufficient time for it to recognize any potential defects with the mold. In fact, A showed its bad faith by automatically setting off its alleged repair costs for the first mold against the payment for the second mold. At very least, A should have notified X of its intention to do so in advance.

### **III. CONCLUSION**

A's purchase order was a written acknowledgement to the oral contract between A and X, which contained additional terms—a 36-month warranty clause and an indemnification provision. Neither the 36-month warranty clause nor the indemnification provision became part of the contract because they are material alterations. Alternatively, it could be argued that the writings exchanged between the parties were insufficient to form a contract, and a contract was formed based on conduct (performance) of the parties. In that case, under the UCC's default rule, a reasonable time period for the warranty has elapsed and A is foreclosed from raising a warranty claim against X.

Lexadigm Solutions LLC