

## **McJunkin Corporation v. Mechanicals, Inc.**

United States Court of Appeals, Sixth Circuit, 1989  
888 F.2d 481

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**FACTS** Emery Industries (Emery) contracted with Mechanicals, Inc. (Mechanicals) to install a pipe system to carry chemicals and fatty acids under high pressure and temperature. The system required stainless steel "stub ends" (used to connect pipe segments), which Mechanicals ordered from McJunkin Corporation (McJunkin).

McJunkin in turn ordered the stub ends from the Alaskan Copper Companies, Inc. (Alaskan). McJunkin's purchase order required the seller to certify the goods and to relieve the buyer of liabilities that might arise from defective goods. After shipment of the goods to McJunkin, Alaskan sent written acknowledgment of the order, containing

terms and conditions of sale different from those in McJunkin's purchase order. The acknowledgment provided a disclaimer of warranty and a requirement for inspection of the goods within ten days of receipt. The acknowledgment also contained a requirement that the buyer accept all of the seller's terms.

The stub ends were delivered to Mechanicals in several shipments over a five-month period. Each shipment included a document reciting terms the same as those on Alaskan's initial acknowledgment. Apparently, McJunkin never objected to any of the terms contained in any of Alaskan's documents.

After the stub ends were installed, they were found to be defective. Mechanicals had to remove and replace them, causing Emery to close its plant for several days. McJunkin filed a complaint alleging that Mechanicals had failed to pay \$26,141.88 owed on account for the stub ends McJunkin supplied. Mechanicals filed an answer and counterclaim against McJunkin, alleging \$93,586.13 in damages resulting from the replacement and repair of the defective stub ends. McJunkin filed a third-party complaint against Alaskan, alleging that Alaskan was liable for any damages Mechanicals incurred as a result of the defective stub ends. The district court entered a \$68,000 judgment for Mechanicals against McJunkin (\$87,000 in damages minus \$19,000 owed McJunkin on its account). The court granted Alaskan a judgment against McJunkin based on Alaskan's liability limitation provision. McJunkin appealed the judgment in favor of Alaskan.

## **DECISION** Judgment for Alaskan vacated and remanded.

**OPINION** Engel, J. To determine the contractual obligations of McJunkin and Alaskan, we consider both the parties' actions and the forms exchanged, viewing the totality of circumstances surrounding the transaction. [Citation.] We must determine: (1) whether McJunkin and Alaskan assumed any contractual obligations; (2) how such obligations arose; and (3) the nature of those obligations.

There are several possible interpretations of Alaskan's and McJunkin's contractual relationship. First, by shipping the stub ends, Alaskan accepted McJunkin's offer (made in McJunkin's purchase order) and therefore was bound by the terms of McJunkin's offer, with any remedy limitation contained in Alaskan's acknowledgment being excluded from the contract. Second, McJunkin's acquiescence to the shipments and failure to object to the terms in the acknowledgment constituted an acceptance of Alaskan's terms contained in the acknowledgment, thereby giving effect to Alaskan's remedy limitation under Ohio Rev.Code § [2-207(2)(C)]. Third, Alaskan's acknowledgment was a reasonable, yet conditional, response to McJunkin's purchase order, thereby vitiating formation of a contract based

upon the forms alone, although the conduct of the parties may have established a contract under Ohio Rev.Code § 2-207(3). We now address these contentions.

\* \* \*

First, Alaskan's shipment of stub ends prior to acknowledgment might be considered an acceptance upon McJunkin's terms alone. \* \* \* Nevertheless, although Alaskan's acknowledgment was sent five days after the initial shipment, we hold that the more reasonable interpretation of the parties' actions is that Alaskan, through its shipment and transmission of an acknowledgment within a few short days, did not intend to bind itself to McJunkin's terms, but instead sought to incorporate its own terms into a contract with McJunkin. \* \* \*

[Secondly,] [i]t is urged that McJunkin's failure to object to the remedy limitation [in Alaskan's acknowledgment forms] indicates that McJunkin accepted that limitation. § [2-207(2)(C)] (additional or different terms become part of contract between merchants unless objection made within reasonable time). Although Alaskan's contract terms might indicate that McJunkin's failure to object within a reasonable time constituted McJunkin's acceptance of Alaskan's terms, we find that McJunkin did not accept Alaskan's terms. McJunkin never explicitly accepted the terms of Alaskan's acknowledgment. Given McJunkin's silence in the face of Alaskan's acknowledgment, McJunkin was not bound by those terms. [Citations.]

Instead, under Ohio Rev.Code § 2-207(l), a reasonable expression of acceptance, such as that made by Alaskan, does not create a contract based upon the terms contained in the forms if "acceptance is expressly made conditional on assent to the additional or different terms." It is clear that Alaskan's acknowledgment expressly conditioned Alaskan's acceptance upon McJunkin's assent to Alaskan's terms of sale: \* \* \*

However, although we find that no contract was created by virtue of the exchanged document, "A contract for sale of goods may be made in any manner sufficient to show agreement, *including conduct* by both parties which recognizes the existence of such contract." Ohio Rev.Code § [2-207(l)]. Moreover, under Ohio Rev.Code § 2-207(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 [Article 2]."

Abundantly clear from McJunkin's and Alaskan's actions is that they had entered a contract within the meaning of Ohio Rev.Code §§ [2-207(l) & 2-207(3)]. Alaskan sent numerous shipments of stub ends, and McJunkin paid for them before they were shipped directly to Mechanicals. Indeed, both Alaskan and McJunkin do not dispute that

they had contracted; instead, they disagree about who should be obligated to bear the loss for the defective stub ends. We can thus say with confidence that McJunkin's and Alaskan's course of conduct established a contract enforceable under Ohio law.

Under Ohio Rev.Code § [2-207(3)], the terms of McJunkin's and Alaskan's contract "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [Article2]." Because the remedy limitation was contained only in Alaskan's form and not agreed upon by both parties' documents, Alaskan's remedy limitation did not bind McJunkin, and, contrary to the district court judgment, Alaskan could not take advantage of this provision.

[We conclude] that the remedy limitation was unenforceable.

**INTERPRETATION** Subsection 3 of Section 2-207 deals with those situations in which the writings do not form a contract but the conduct of the parties recognizes the existence of one: the contract consists of the written terms to which both parties agreed, together with supplementary provisions of the UCC.

**CRITICAL THINKING QUESTION** Do you agree with the Code's approach to dealing with the battle of the forms? Explain.