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TERMS AND CONDITIONS: HOW SELLERS CAN AVOID GETTING INJURED IN A "BATTLE OF THE FORMS"

In an ideal world, parties involved in the sale and purchase of goods would have a signed contract to establish the terms and conditions of the sale. A well-drafted, signed contract confirms the parties' intentions to create a contract and clearly articulates its material terms in a single document. If a dispute arises, the parties can refer to that contract to determine each side's rights and obligations.

More often than not, though, companies conduct business via purchase orders and acknowledgments without ever signing a separate contract. In such cases, how do you determine the governing terms of the agreement or whether a contract has actually been formed?

This article answers these critical questions by providing an overview of contract formation and discussing the rules and laws that govern contracts when disputes occur. Particular attention is focused on the "Battle of the Forms," which arises when there is no signed contract between buyers and sellers and each party refers to their own standard terms and conditions. Although this battle puts sellers at a distinct disadvantage, there are steps that sellers can take to protect themselves if such a battle arises.

Contract Formation Overview

Common law and the Uniform Commercial Code (the "UCC") are the two bodies of law that govern the creation, performance, and enforcement of contracts. Common law applies to contracts relating to services, real estate, insurance, and intangible assets, while the UCC covers contracts for the purchase and sale of goods. If a contract contains both goods and services, then whichever transaction is dominant dictates the applicable body of law.

Under both bodies of law, a contract is created by an offer and its acceptance (plus consideration, but that's not of issue here). However, the laws diverge when it comes to defining the actions that constitute "acceptance."
Let's take a look at these differences.

Acceptance: Common Law

Under the common law, a contract is valid only if the offer and acceptance mirror each other. In other words, when a party accepts an offer it must be on the exact same terms as the original offer. If the terms differ, a rejection, not an acceptance, has occurred and no contract is formed. This is called the “mirror image rule.”

If a party accepts an offer but attaches different terms to the offer, common law views the acceptance as a counter-offer instead. The original offeror may then accept the counter-offer or make a counter-offer of its own. If this back-and-forth continues on the terms, but the goods are eventually sent, then the terms contained in the last document apply. This is known as the “last shot rule.” Obviously, this rule gives an enormous advantage to whomever sends the last document.

Acceptance: The UCC

The UCC modifies both the mirror image rule and the last shot rule. Under Section 2-207 of the UCC, a binding contract may arise even if an offeree’s acceptance makes changes to the terms of the original offer, excluding a few specific situations. In addition, to avoid the last shot rule, Section 2-207 has special rules that dictate how the law handles conflicting terms and conditions. To best understand how Section 2-207 works, let’s examine its application in the formation of different sales contracts.

Signed Contract

Section 2-207 does not apply to signed contracts. Accordingly, a written and signed contract setting forth the agreed upon terms and conditions is the best scenario for both sellers and buyers. While there may be a dispute regarding interpretation of the contractual language, Section 2-207 would not come into play in this scenario. Section 2-207 thus does not apply to signed contracts.

Contract by Exchange of Forms: Battle of the Forms

When a seller and buyer create a contract through an exchange of forms, a Battle of the Forms is inevitable. A contract by exchange of forms usually occurs as follows: A buyer and seller negotiate and agree on main points such as price, quantity, quality and time for delivery. The buyer then submits a purchase order with pro-buyer boilerplate terms and conditions. The seller responds with an acknowledgement containing equally strong pro-seller terms and conditions. Following the exchange, performance occurs and the seller ships the goods and the buyer accepts them.

If a dispute arises, one party may argue that there was no agreement on certain terms

because such terms were additional terms prohibited by the UCC. Under Section 2-207, if an acceptance or confirmation includes additional terms, those extra terms will become part of the contract unless:

- the offer expressly limits acceptance to the terms of the offer;
- the additional terms materially alter the offer; or
- notification of objection has been given or is given within a reasonable time after the additional terms are received.

Conflicts often arise over whether an additional term is a material alteration such as:

- Changes to price, quantity, delivery;
- Warranty disclaimers;
- Limitations on liability;
- Limitation on time for bringing claims;
- Choice of law or forum provisions; or
- Attorneys' fees provisions.

Sellers are in a precarious position in a Battle of the Forms. Most of the protections a seller would include in its acknowledgement to a buyer would be considered material alternations. As a result, those protections would not become a part of the contract between seller and buyer.

Contract by Conduct

Now, let's imagine that there's been a Battle of the Forms with material alterations included in the acknowledgment, but the buyer and seller have performed despite the differences. A subsequent dispute arises over the terms. How does the UCC determine the applicable terms?

Section 2-207 dictates that terms in both forms that do not clash become part of the contract. The remaining terms, however, are supplied by the UCC. These are called "gap fillers" and are very buyer friendly. They include:

- Implied warranties of merchantability and fitness;
- No limitation on seller's liability;
- Consequential damages;
- Four-year statute of limitations;
- Payment due on delivery;
- Insurance risk remains with the seller until delivery of goods; and
- Additional buyer and seller remedies.

Advice for Sellers

As previously stated, it's best to always operate with a signed agreement. Unless you have a

signed contract, you will likely be dealing with the Battle of the Forms. Given the pro-buyer nature of the UCC, sellers are at a distinct disadvantage in this battle, even with well-drafted terms and conditions. If UCC gap fillers are used, the seller is subject to much additional risk.

So what's a seller to do?

- Never assume that your terms and conditions will automatically be applied.
- Never sign a buyer's form unless key issues have been addressed and resolved.
- Reference and attach your terms and conditions early, often and every single time there's an exchange.
- Attempt to have the buyer accept and sign the seller's terms and conditions.
- Carefully review the terms and conditions in the buyer's forms and respond with express objections prior to commencing performance.
- Get the buyer to modify its standard terms and conditions to include the seller's key protections.
- Always include certain non-negotiable terms in your terms and conditions.
- Attempt to negotiate a master contract with the buyer that lays out all of the applicable and acceptable terms and conditions for contractual dealings with one another moving forward.

Also note that certain protections in a seller's terms and conditions should be considered to be non-negotiable, including:

- Payment provisions;
- Disclaimer of implied warranties;
- Limitations of buyer's remedies to repair or replace at seller's option;
- Limitation on seller's liability;
- Limitation on period to bring claims;
- Protections of seller's intellectual property;
- Disclaimer of consequential damages; and
- Specifying what law applies and what courts have jurisdiction.