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Protect Your Sales Transactions From “The Battle of the Forms”

A landmark Pennsylvania case knocks out conflicting sales contract provisions, leaving the parties to battle out the terms after the fact.

Imagine this scenario. You issue (or receive) a purchase order and then you receive (or issue) an invoice. Everything seems fine until you realize that the buyer and seller in this transaction had issued forms with different terms. You are now engaged in “The Battle of The Forms.” Instead of getting what you think you agreed to when you issued that PO or submitted that invoice, you’re going to end up with a court-determined hybrid – a scenario where it is likely that neither party is going to end up all that happy with the sales transaction.

In order to form a contract, one party must make an offer to a second party and the second party must accept the original offer. Simple enough, as long as both parties agree to identical terms. This is called the “mirror-image” rule. But what happens if Seller accepts Buyer’s offer, but includes different or additional terms as part of his acceptance?

The Uniform Commercial Code considers an offer accepted when the Seller sends a written confirmation of his acceptance to the Buyer, or performs a “definite and seasonable expression of acceptance,” such as delivering the goods that are the subject of the contract to the Buyer. If the written confirmation contains additional or different terms than those included in the original offer, it is still considered an acceptance unless Seller expressly conditions his acceptance on Buyer’s assent to such additional or different terms.

“Additional” terms are terms that were not discussed in the original offer. They are being *added*. “Different” terms are terms that were included in the original offer, but are being *changed*.

How do “additional” terms included in Seller’s acceptance affect the contract? Additional terms are considered proposals for addition to the contract which, between merchants, become part of the contract, unless the other party expressly conditions acceptance of the order on acceptance of his original terms, or the “additional” terms materially alter the contract, or the other party objects to the additional terms. The UCC does not clearly address the issue of “different” terms and states are divided as to how they handle the matter. A minority of states has

decided that “additional” includes “different,” even though the drafters of the UCC did not include it in the language of the statute. However, a strong majority of states have adopted the “knockout rule.” Under the “knockout rule,” conflicting terms in the offer and acceptance cancel one another, or are “knocked out.”

It sounds like the Buyer and Seller are left with half a contract. Not so. In this event, the UCC provides that the agreement that exists between the parties consists of the terms that *were agreed to*, along with supplemental terms provided by the UCC. This still leaves a lot of holes in the agreement. For instance, suppose the Buyer’s offer provides that any disputes between the parties will be submitted to arbitration in Vienna, Austria, because the Seller’s product would be used in a project overseas. But the Seller’s acceptance provides that exclusive jurisdiction and venue of any dispute will be vested in the Federal and/or State courts located in Chicago, Illinois. The result is that the two conflicting terms will be “knocked out,” and the UCC does not include a provision dealing with how or where disputes will be handled. Therefore, there is no term in the contract dealing with this issue.

Just how contracts with conflicting terms are to be handled in Pennsylvania was recently decided in a case litigated by Nick Krawec, a partner with the Bernstein Law Firm. In this landmark case, Flender Corporation v. Tippins International, Inc., (from which the facts in the preceding paragraph were taken), the Superior Court of Pennsylvania adopted the majority view. In earlier cases, the United States Court of Appeals for the Tenth Circuit and the United States District Court for the Eastern District of Pennsylvania both previously had predicted that Pennsylvania courts would adopt the “knockout” rule. The seller/creditor successfully avoided a distant arbitration in Austria, and kept the litigation in the United States, in the county where the buyer/debtor is located and where the seller/creditor had sued the buyer/debtor. The debtor has petitioned for leave to appeal to the Pennsylvania Supreme Court.

To avoid having terms “knocked out” of your agreements, or to avoid having your contract dispute litigated in a distant forum, read the terms and conditions in small print on the back of purchase orders, invoices and other business forms. If you disagree with any of them, contact the other party immediately, preferably in writing.

For more information on how you can protect your interests, please contact Nick Krawec or Bob Bernstein at the Bernstein Law Firm, P.C. at 412-456-8100 or toll free at 1-800-927-3197; email: nkrawec@bernsteinlaw.com or rbernstein@bernsteinlaw.com.

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