WINNING THE BATTLE OF THE FORMS

It is common in modern sales transactions for parties to exchange pre-printed forms long ago drafted with the intention of either insulating the party from devastating liability and damages or arming it with all of the conceivable rights and remedies available.

For many companies who find themselves in litigation, it is a sobering reality that, after an exchange of forms, their form is often a flaccid and ineffective weapon against its counterpart. This discussion addresses the statute which governs such a "battle of the forms" and provides some suggestions on how your company can end up on top.

In Michigan, transactions involving the sale of goods over $500.00 are governed by Michigan's Uniform Commercial Code, commonly known in legal circles as the "UCC." Michigan's UCC is practically identical to the UCC adopted by most other states, and one purpose in drafting uniform state laws, especially those affecting commercial dealings, is to provide a measure of certainty and stability to interstate contractual transactions. The section of Michigan's UCC which addresses the battle of the forms is Section 2207 (MCL § 440.2207; MSA § 19.2207).

In its entirety, Section 2207 provides as follows:

> (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 provision of this act.

As is evident from the provision's text, it is as one commentator generously put it – "a murky bit of prose." Less respectfully, it is fair to say that since its adoption this section of the UCC has given judges, lawyers, and juries fits across the country.

In 1968, one future Michigan Supreme Court Justice exercised the opportunity to discuss the policy behind Section 2207 as it is applied under Michigan law:

> The policy of section 2207 is that the parties should be able to enforce their agreement, whatever it is, despite discrepancies between the oral agreement and the confirmation (or between an offer and acceptance) if enforcement can be granted without requiring either party to be bound to a material term to which he has not agreed.[1]

This policy must be considered within the context of the UCC's general framework. The UCC was drafted and enacted by the Michigan Legislature to foster a more accurate and commercially reasonable identification of the parties' contractual bargain.[2] The UCC is designed to facilitate that determination without the constraints formerly imposed by the tenets of classical common law contract principles. The UCC encourages recognition of a deal where the parties evidence an intent to be bound by

[1] *American Parts Co., Inc. v. American Arbitration Assoc.*, 8 Mich. App. 156, 167-168 (1968) (J. Levin).

[2] For a more thorough discussion of the concepts discussed in this paragraph, see John E. Murray, Jr., The Chaos of the 'Battle of the Forms': Solutions, 39 Vanderbilt Law Review 1307, 1311-1312 (1986).

the product of their negotiations. Missing terms such as price, delivery date, or quantity will not bar formation of a contract, provided there is an intention to be bound and a reasonable basis to provide a remedy. In addition, with few exceptions, the parties are free to contract around the provisions of the statute. Further, formalities give way to practicalities in recognition of the exigencies and pace of modern commercial transactions.

Consistent with that framework, in a departure from common law contract principles, Section 2207 is designed in part to recognize the parties' mutual understanding, even though the writings exchanged between them are not the "mirror image" of themselves and contain some additional, different, or missing terms.[3] The drafters of this section were also cognizant of the modern practices: 1) of company representatives reaching oral understandings that are not signed or reduced to writing; 2) of one or both of the parties follows up by confirming that agreement in writing; 3) of the writings containing different terms; and 4) of the parties nevertheless commencing performance of the agreement.[4]

While there is a multitude of situations in which Section 2207 can be applied, there are three in which it is most commonly applied. The first, touched on above, occurs when both offer and acceptance are reflected in exchanged writings which have terms that differ from, are additional to, or are missing from each other. The second involves the exchange of written confirmations after formation of an oral agreement. The third situation, governed by subsection (3), involves situations where the writings of

[3] At common law, a response which did not perfectly mirror the offer constituted a counter-offer.
[4] *American Parts Co.*, at 167.

the parties fail to form a contract, but the parties nevertheless perform or otherwise act in a manner which demonstrates the existence of a contract.

Starting with the latter example where writings do not evidence a contract but the parties still perform, application of Section 2207 would consist of those terms common to both writings, coupled with terms known as "gap-fillers" which are supplied by the UCC where there is an absence of agreement on such issues as delivery, price, warranties, and remedy for breach.

In *American Parts*, Justice (then Judge) Levin succinctly explained how Section 2207 of Michigan's UCC normally applies in both of the first two situations:

> Section 2207 provides, Inter alia, that an acceptance or a written confirmation operates as an acceptance even though it states terms additional to or different from those previously offered or agreed upon. The additional or different terms do not become a part of the contract unless agreed to by the other contracting party, except that between merchants additional, but not different, terms become part of the contract if they do not materially alter it and the other contracting party does not, within a reasonable time, object to the additional terms. [Emphasis added.]

In other words, absent some objection, different terms, such as one which provides for expansive warranties and another which disclaims warranties, will cancel each other out and only non-material additional terms will become part of the contract. The materiality of certain terms is another issue often litigated, but one example of a non-material term would be one calling for payment to be made in a certain currency or sent to a certain address. One notable exception occurs in the context of an exchange of forms which constitute offer and acceptance. Pursuant to subsection (2)(a), if the "offer expressly limits acceptance to the terms of the offer," neither different nor additional terms become part of the contract.

The bottom line is that if you want the terms on your company's form to trump those of an opposing form, whether they are contained in an offer, acceptance, or confirmation, you are going to have to take "additional steps to obtain the [opposing party's] consent to those terms."[5]

This, of course, begs the question of what kind of "additional steps" can be taken to improve your company's position at the negotiating table, long before litigation is even contemplated. Without discussing the drafting and content of specific terms (which should be tailored to your specific needs by competent counsel familiar with the UCC), there are two measures that are likely to prove very helpful in that effort:

1. Take Your Standard Terms Out of Form Format

For reasons discussed above, the UCC, judges, and juries are loathe to force one party to be bound by material terms which were never brought to its attention and to which it never agreed. Fine print crammed onto the back of a purchase order or other standard form, which often requires a magnifying glass to read, only reinforces the opposing party's likely argument – that the material terms you would like enforced were never read or agreed to.

A better approach is to set forth the desired terms in a clear and legible format with specific reference to the goods, invoice, purchase order number, or the like which demonstrate that the terms are specifically tailored to the sale at issue. In short, move away from a form as much as possible and toward a sale-specific contract which looks and acts more like a traditional negotiated agreement. While at first blush this may appear to be an onerous burden, with the word processing software available today,

[5] *Challenge Machinery Co. v. Mattison Machine Works*, 138 Mich. App. 15, 26 (1984).

drafting a sale-specific set of favorable terms is largely a clerical task in which a salesman or clerical assistant need only insert the details specific to that particular sale.

This step will make acceptance of the argument that the opposing party agreed to your terms much more palatable than if they were printed in an illegible format on the back of a form.

2. Establish and Enforce a Policy of Requiring a Signature on Your Standard Terms Demonstrating Acceptance

This second step is closely related to the first. The best and most effective way to win the battle of the forms is to avoid it entirely. Once the opposing party signs the term sheet attached to your purchase order or confirmation, Michigan law provides that it has expressly assented to each and every term therein, material or not. What's more, once an individual (or company representative) signs an agreement, unless that party makes a showing of fraud or mutual mistake, he may not seek to avoid it by arguing that he did not read it or that he thought the terms were different. For that reason, strict adherence throughout your company to a policy of requiring a signature on your term sheet demonstrating the opposing party's cognizance and acceptance of those terms will produce significant dividends if a legal dispute ever arises.

To the extent the opposing party objects to signing your standard terms and "kicks it upstairs," which may be a real concern for you or some of the employees who would have to carry out the policy, the worst that is likely to happen is that representatives of both companies will be required to sit down and negotiate which terms are acceptable and which are not before they commence performance of the contract. If that appears too much of a bother, consider the effect of paying consequential damages in the tens of millions of dollars for breach of a contract in which

your company only sold $100,000 worth of goods. In certain circumstances that is a very real possibility, and you may want to weigh the long-term future of your company against the effort it takes to get an agreement to those terms which your company absolutely cannot live without (such as an exclusion of consequential damages). If you cannot get an agreement to those terms, the best course of action may be to walk away.

In summary, Section 2207 of Michigan's UCC generally operates to cancel out differing provisions in exchanged forms and it supplies gap-fillers for any missing or differing terms. Rarely will one form vanquish another. Consequently, the best strategy is to stop outside the box, change your form to more resemble a traditional contract, and emplace a policy of requiring signature acceptance of your terms. At worst, you will be forced to actually negotiate, but you will maintain control over your exposure to liability or the availability of rights and remedies you feel essential. Follow these suggestions and you will be well armed the next time you are forced to engage in a battle of the forms.