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Battle of the Forms

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THE BATTLE OF THE FORMS

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Most purchases and sales of standard items by corporations originate with a purchase order from the buyer. This form is carefully devised to contain the protective clauses most beneficial from the buyer's point of view. The seller responds by sending the buyer an acknowledgment of order form containing terms and conditions designed with equal care to protect the seller. Naturally the terms are usually in conflict and if a dispute arises the question is immediately presented as to which terms govern. This dispute is sometimes referred to as the "battle of the forms." It can be resolved only through the application of basic concepts of the law of contracts. Perhaps the easiest way to present and understand the problems is by a series of suppositious cases.

Let us first assume that on receipt of the purchase order the seller ships the goods without employing any acknowledgment of order form. Here, of course, the contract is made on the terms contained in the purchase order. It is most desirable, from the buyer's point of view, to get the seller's written acceptance of the buyer's terms. Hence, purchase orders sometimes contain a space for the seller's signature and a request that he sign the purchase order and return it. Where he does this, once again the contract is on the buyer's terms, and by later sending the buyer an acknowledgment of order the seller is powerless to change the terms to which he previously agreed.

In many industries it is not customary for the seller to sign the buyer's purchase order and if he refuses to do so and sends an acknowledgment containing different terms he is thereby rejecting the buyer's offer and making a counter-offer on his own terms.[1] If, after receipt of the acknowledgment, the buyer accepts the goods, he is deemed to have done so on the seller's terms and the acknowledgment will govern the contract.[2] No contract is made, however, until the goods are accepted, and therefore the result is that although the acknowledgment provides that the material is at buyer's risk on delivery to a carrier, this provision will be ineffective since the contract is not in force at that time. To clinch the effect of acceptance of the goods as an agreement to seller's terms, it is recommended that the following clause be included in the acknowledgment:

> This agreement constitutes the entire contract for the material and is not an acceptance of buyer's purchase order or subject to buyer's delivery order unless the terms of buyer's purchase and delivery orders do not differ from those contained herein.

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1 See WILLISTON, CONTRACTS §§ 51, 77 (Rev. ed. 1938).

2 Lubell v. Rome, 243 Mass. 13, 136 N.E. 607 (1922); C.P. Ray & Co. v. LaRue & Barron, 237 S.W. 336 (Tex. Civ. App. 1922). See WILLISTON, *op. cit supra* note 1, §§ 90E and 91D; RESTATEMENT, CONTRACTS § 21.

If the buyer does not wish to be bound by the terms of the acknowledgment, he must either reject the goods or immediately communicate to the seller that he is holding them subject to agreement on satisfactory terms.

It not infrequently happens, however, that the goods are received by the buyer before the seller's acknowledgment arrives. In this event the seller is deemed, by delivering the goods, to have manifested his assent to the terms of the buyer's order, and the later arrival of the acknowledgment of order will not alter the situation. Sometimes, in a competitive market, the ability to make speedy delivery is the determining factor in getting the business; and often this is accomplished by providing local warehouses in distant cities from which quick deliveries can be made. If acknowledgments of order continue to be sent from the home office, the goods are almost sure to arrive before the acknowledgments. To guard against this situation it may be found helpful to send a circular letter to all regular customers after receipt of their first order, enclosing a copy of the acknowledgment of order form and stating that its terms will govern all rush orders. An example of such a letter is as follows:

> Gentlemen:
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> We are pleased to comply with our customers' requests for rush delivery service on products generally available from our various terminals. In many instances, however, we make deliveries more promptly than the United States mails can carry to you the Acknowledgment of Order form outlining the terms and conditions of sale. In order that you may be aware of these terms and conditions prior to delivery of rush orders, we are enclosing for your information and records a sample Acknowledgment of Order form containing our standard terms and conditions.
>
> This standard Acknowledgment will be mailed as promptly as possible to cover each future order. Unless you write or wire us to the contrary, we will assume that you approve these terms and conditions covering all rush orders accepted by us. It is understood that such orders are accepted at our then current prices as supplemented by information from us concerning nature of the product and quantity shown on the bill of lading accompanying delivery of the material.
>
> Very truly yours,

First orders of new customers can be covered by a telegram, which might read as follows:

> SHIPPING YOU TODAY PER YOUR ORDER. .....LBS..... AT $..... PER LB. ON TERMS AND CONDITIONS CONTAINED IN OUR STANDARD ACKNOWLEDGMENT OF ORDER TO BE MAILED YOU SHORTLY.

One difficulty in using this system is that it may provoke a great many objections to the contents of the acknowledgment of order form.

The extreme nature of the exculpatory provisions, sometimes included in the "fine print," may on occasion cause courts to deviate from established principles of contract law in order to avoid having to give effect to these harsh conditions. This is especially true where the effect of the contractual language is to exempt a party from the consequences of his own negligence. While such contracts are valid in some states if the agreement is clear and unequivocal,[3] it must be shown that the party to be bound had knowledge of

the provision and assented to it.[4] According to the Restatement of Contracts, while a bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law is legal, a bargain for exemption from liability for willful breach of duty is illegal.[5] The same appears to be true as to provisions exempting a person from liability for gross negligence. Even bargains against liability for simple negligence are not favored.[6]

It is probable that these considerations affected the court's reasoning as to the applicability of the defendant's acknowledgment of order form in the case of *Celanese Corp. of America* v. *John Clark Indus., Inc.*[7] In this case, defendant was sued for fire losses to plaintiff's dye casting plant resulting from the ignition of a fire-resistant hydraulic fluid sold the plaintiff by defendant for $239. Plaintiff claimed that the salesman had represented the fluid as "non-flammable," had been negligent in various respects and therefore that defendant was liable for the loss caused when the fluid escaped through a pipe leak and ignited when it sprayed on the hot furnace. Plaintiff ultimately received $146,000 despite the provisions of defendant's acknowledgment of order, which included the following:

> The terms and conditions set forth on the face and back hereof constitute the entire agreement between us with reference to this sale. Seller makes no warranty of any kind, express or implied, except that the materials sold hereunder shall be of Seller's standard quality, and Buyer assumes all risk and liability whatsoever, resulting from the use of such materials, whether used singly or in combination with other substances. Within twenty (20) days after any shipment hereunder reaches its destination (but in no event later than ninety (90) days after shipment leaves Seller's plant), the materials shall be examined and tested, and promptly thereafter and before the materials are used, Seller shall be notified in writing or by telegram in case the materials are found defective or short in any respect. Failure to so notify Seller shall constitute a waiver of any and all claims with respect to the materials, and in any event the use of the materials shall be deemed to mean that the Seller has satisfactorily performed. No claim of any kind shall be greater in amount than the purchase price of the materials sold hereunder with respect to which any damages are claimed.

Without discussing the facts, the Court of Appeals simply delivered its *coup de grace* with the following observation: ". . . the 'acknowledgment' relied on was not contractual, the contract having already been made before the acknowledgment was sent to plaintiff's office. . . ."[8] The basis for this conclusion is hard to understand in view of the facts in the record. The uncontroverted facts included the following:

On July 29, 1949 the plaintiff wrote, "Please send us a quotation on Lindol HF-M." On August 5th the defendant's salesman telegraphed the

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3 Paddle v. Atlantic Basin Iron Works, Inc., 91 N.Y.S. 2d 336 (1949), *aff'd* 276 App. Div. 921 (1950).

4 See 6 WILLISTON, *op. cit, supra,* 5169, fn. 8.

5 See 6 WILLISTON, *op. cit. supra,* § 1751-B.

6 *Ibid;* 17 C.J.S. *Contracts* § 262.

7 214 F.2d 551 (5th Cir. 1954).

8 *Id.* at 554.

plaintiff, "Lindol HF-X Hydraulic Fluid tests complete. Offer at $2.30 per gallon freight allowed to Mississippi River. Submitting full data the 10th." On August 13th the plaintiff sent defendant an order for 104 gallons of Lindol HF-X, "Terms COD." On August 16th defendant mailed its acknowledgment of order form and on the same day its salesman wrote the plaintiff, "We certainly appreciate receiving your order . . . our factory advises that shipment will take place August 17th." The next day, August 17th, the salesman telegraphed the plaintiff, "Sorry, slight delay. Shipping material first of next week." On or about September 1st the Lindol was received and accepted by the plaintiff.

The plaintiff's first contention was that the telegram of August 5th was an offer to sell at $2.30 per gallon and that plaintiff's purchase order was an acceptance of that offer, which constituted a binding contract on the terms of the purchase order. The law is reasonably clear, however, that where the original inquiry does not specify the quantity desired, a price quoted by the seller is not an offer but a mere price quotation or invitation for an offer.[9] Hence, the purchase order is in fact the offer and no contract is made until it is accepted by mailing an acknowledgment of order or delivering the goods. In view of the *Clark Industries* case, it would seem wise to instruct salesmen not to use the word "offer" but rather the phrase "We quote you. . . ."

The plaintiff's next contention was that if defendant's receipt of the purchase order did not create a contract, the salesman's letter of August 16th, or his telegram of August 17th, certainly did. It is true, of course, that no matter how carefully the lawyer may plan his acknowledgment of order form for the purpose of having it constitute the contract, his plans go awry if the salesman or another in his organization shortcuts the procedure by writing the buyer a letter to the effect that the order was received and the goods were being shipped. If the letter is of such a nature as to constitute a written acceptance of the buyer's purchase order, it will create a contract and render superfluous any acknowledgment of order later sent. Since in the *Clark Industries* case, however, the letter and the acknowledgment were sent simultaneously, it seemed clear that the letter and acknowledgment should be read together as one instrument and, therefore, that the letter did not prevent the acknowledgment from being a rejection of the purchase order and a counteroffer.

It may often be harmful to customer relations for salesmen to await the sending of the acknowledgment of order before acknowledging the order in any way. Where the salesman feels that some acknowledgment must be sent at once, he should be instructed to state on the telephone or in writing, if necessary, that the order has been received and when it has been confirmed at the head office an acknowledgment of order will be sent containing the terms

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9 Moulton v. Kershaw, 49 Wis. 316, 18 N.W. 172 (1884); Allen v. Kirwan, 159 Pa. St. 612, 28 Atl. 495 (1894); Beaupre v. Pacific & Atlantic Telegraph Co., 21 Minn. 155 (1874); State v. Peters, 91 Me. 31, 39 Atl. 342 (1897); Smith v. Gowdy, 90 Mass. (8 Allen) 566 (1864); Nebraska Seed Co. v. Harsh, 98 Neb. 89, 152 N.W. 310 (1915); Cherokee Tanning Extract Co. v. Western Union Telegraph Co., 143 N.C. 376, 55 S.E. 777 (1906); Watkins Land Mortgage Co. v. Campbell, 100 Tex. 542, 101 S.W. 1078 (1907). See WILLISTON, *op. cit. supra*, § 27.

and conditions of the sale. If the customer has received the standard acknowledgment in the past, it may be sufficient for the salesman simply to state:

> We accept your order on our usual terms and our Acknowledgment of Order will follow.

Orders often are given orally or over the telephone, in which event the buyer may well claim that the seller accepted the order and made a contract on the spot. To avoid this, salesmen should be instructed, in taking orders orally from a customer for the first time, to state that the order is subject to confirmation at the head office since salesmen are not authorized to bind the company. After the first order it may be sufficient for him merely to state that orders are accepted on the company's usual terms and that the acknowledgment of order will follow. Furthermore, it should be provided on the acknowledgment of order that all sales are subject to confirmation at the head office and that no salesman is authorized to bind the company. Once the customer has received an acknowledgment containing this statement, it will be possible to show that he is on notice thereafter that the salesman's acceptance does not create a contract. It will be necessary, however, when such a clause is used, to be sure that the acknowledgment of order is mailed from the head office in order that it be an effective counteroffer.

The plaintiff's next contention in the *Clark Industries* case was that the acknowledgment of order was received by a clerk and immediately filed without ever being brought to the attention of the president of the company or of any responsible officials. For this reason, plaintiff contended, it was not bound by the terms of the acknowledgment. Under the law this was clearly bad, since there is no requirement that a buyer should read or know the contents of an acknowledgment of order form which he actually receives before he will be bound by it. If the acknowledgment is addressed to the corporation and received by an employee designated by the corporation for that purpose, the corporation is bound regardless of who reads it.[10] Since this point can be embarrassing in the trial courts, however, it is recommended that acknowledgments of order be marked for the attention of the purchasing agent or other individual in the buyer's organization who was responsible for the order.

It not infrequently happens that typewritten material on the acknowledgment of order differs from printed material on the same acknowledgment. In this event the typewritten material governs.[11] This suggests a method of causing the seller's acknowledgment to govern the contract when the buyer insists on the seller signing the purchase order. This is done by inserting in the purchase order a typewritten provision that the terms of the seller's acknowledgment returned with the purchase order will govern. If the buyer accepts this, the typed insertion will take precedence over the printed portion of the purchase order.

The location on the form of printed provisions is of utmost importance. Printed material at the foot of a letter, for example, has been held not to be

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10 Hand & Johnson Tug Line v. Canada S.S. Lines, Ltd. 281 Fed. 779 (6th Cir. 1922); Morrison v. Insurance Co., 69 Tex. 353, 6 S.W. 605 (1887); Musick v. Muecke, 243 S.W. 2d 594 (Tex. Civ. App. 1951); Casey v. Gibson Products Co., 216 S.W. 2d 266 (Tex. Civ. App. 1948). See WILLISTON, *op. cit. supra*, § 89; RESTATEMENT, CONTRACTS § 69.

11 Heyn v. New York Life Ins. Co., 192 N.Y. 1 (1908).

part of the contract, especially where a page number was typewritten over it.[12] Similarly, fine print in a small box to the left of the signature line has been held to be no part of the contract because not in the body above the signature or referred to therein.[13] Likewise, printing in the upper left corner in brackets, in fine print, has been held to be no part of the contract.[14] It is also most important to have a provision in bold type on the front of the acknowledgment to the effect that the terms on the reverse side are a part of the contract. This should also be above the signature and preferably not in a box. It should be so written as to appear in the body of the terms on the front of the form.

Size and legibility of the print is important. Courts and juries are notoriously prejudiced against fine print which is difficult to read although, theoretically, it governs if adequately referred to on the front of the form. There is a provision in the Virginia Code[15] that unless contracts for sale and future delivery of personal property are in a type not less than ten point, the buyer may introduce in evidence any collateral agreement or oral modification. This statute, however, merely abrogates the Parol Evidence Rule.[16]

While it is undoubtedly the duty of company lawyers to try to obtain compliance with forms, methods and procedures designed to improve the prospects of winning the "battle of the forms," these objectives must often give way to the practical requirements of the market place in the interests of retaining customer good will and promoting sales. The wise company lawyer will not permit himself to be deluded into winning the "battle of the forms" at the expense of losing the competitive war.

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12 B. F. Sturtevant Co. v. The Fireproof Film Company, 216 N.Y. 199 (1915).
13 Sitterley v. Gray Co., 199 Minn. 475, 272 N.W. 387 (1937).
14 May Hosiery Mills v. G. C. Hall & Son, 246 Pac. 332 (Calif. 1926).
15 VA. CODE ANN. § 11-4.
16 Piedmont Mt. Airy Guano Co. v. Buchanan, 146 Va. 617, 131 S.E. 793 (1926); Whaley Bros. v. Stevens, 159 Va. 388, 165 S.E. 645 (1932); Hogue-Kellogg Co. v. G. L. Webster Canning Co., 22 F. 2d 384 (4th Cir. 1927).