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AVOID THE BATTLE, WIN THE WAR: Why What You Say, How You Say It, and When You Say It Matters

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“Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win.” Sun Tzu, The Art of War.

From handshake deals to seemingly perfectly papered transactions, the steel business is still the Wild West in terms of the variety of ways in which we see multimillion dollar deals being done. Although the configuration of any given deal varies, a vast amount of business is conducted via an exchange of formal and informal communications including emails, telephone calls, requests for quotes, quotes, purchase orders, order confirmations and invoices, all without signed a contract. And in some cases, a deal is simply done on a handshake or written down on a bar napkin. But while the expression, “a man is only as good as his word” may have governed the steel business for years, litigation is at an alltime high. And the cold hard truth is that the company who did everything right, sent or received a formal purchase order, its riskshifting terms and conditions and sent or received an order confirmation is likely no better off than the company who relied solely on a handshake. How can that be, you say?

Take a typical transaction for the sale of steel between a distributor and manufacturer: (1) a distributor sends a request for quote to a manufacturer; (2) the manufacturer sends the distributor a quote, including the price and other material sales' terms with or without the manufacturer's terms and conditions attached; (3) the distributor then sends the manufacturer a purchase order with the distributor’s terms and conditions attached; and (4) finally, the manufacturer sends the distributor an order confirmation with the manufacturer’s terms and conditions attached, or simply performs in response to the purchase order and then sends an invoice to the distributor with the manufacturer’s terms and conditions attached. The competing terms and conditions are often one-sided boilerplate terms and conditions, printed in small print on the back of the document and neither party signs the other party’s document, much less bothers to read it.

Here’s the rub, if there is no signed contract, whose terms and conditions govern the parties’ transaction? If a dispute arises, this can be a multi-million dollar question, and its answer hinges solely on the following question: When was the contract formed? (Commonly referred to as a “battle of the forms”).

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With the rapid expansion of interstate commerce, a need to regulate business transactions in a uniform way gave birth to the Uniform Commercial Code (the "UCC"). A joint effort by the National Conference of Commissioners on Uniform State Law and the American Law Institute, the UCC was a comprehensive effort to modernize the law governing commercial transactions designed to provide clarity, ensure uniformity in the adopting states, and to promote certainty and predictability in commercial transactions. It is the longest and most elaborate of the uniform acts and was written to address common law inequities of contract formation.

While largely successful at achieving this ambitious goal, one of the most confusing and fiercely litigated sections of the UCC is the battle of the forms. It has been described as a "miserable, bungled, patched-up job," and "arguably the greatest statutory mess of all time." In fact, due in part to the massive confusion the UCC's battle of the forms engendered, a revised version was offered in 2003, but the revision has never been enacted by any state.

So at least for now, we're stuck wading through the current statutory framework. To decide when the contract was formed, courts must determine which formal or informal communication constituted the offer, and which one created the acceptance.

At common law, to create a contract, it was necessary for the offer and the acceptance to reflect identical terms. If the acceptance included any term additional to or different than the terms of the offer, it constituted a counter-offer, not an acceptance. This was referred to as the "Mirror Image Rule." The common law also recognized, however, that a contract could also be formed by performance. In other words, an offer or counter-offer could be accepted by paying for or delivering goods. Accordingly, because it was rare in commercial transactions for an offer and an acceptance to contain identical terms, contracts were most often formed solely by the counteroffer and performance of the other party. In that scenario, the terms that governed the parties' transaction were only those contained in the counter-offer; the last party to send its terms and conditions before performance by the other party won the battle of the forms. This was referred to as the "Last Shot Rule." For example, even if you thought you sold material "as is, where is," thereby disclaiming any express or implied warranties, if you did not send your terms and conditions last, you might be stuck with terms and conditions that required you to warrant the material for a specific purpose or for a long period of time.

To combat the inherent unfairness of the Mirror Image Rule and the Last Shot Rule, the UCC endeavored to liberalize the formation of contracts so as to avoid frustrating the parties' intentions by attempting to fit the transaction into the common-law model of offer and acceptance. Unfortunately, and often because of inadvertent yet sloppy business practices, more problems were created than solved.

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Under the UCC a valid offer need only demonstrate that the offeror intended to make an offer, the terms of the offer were clear and definite, and the offeror communicated the essential terms of the offer to the offeree. For our purposes, the essential terms necessary for an offer are a description of the product and the price based on the quantity ordered. Additional terms such as the place and time of payment, shipment and delivery are not necessary to create a valid offer.

Vastly different than the common law's Mirror Image Rule, the UCC provides that any definite expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance, and not a counter-offer, even though it states terms additional to or different from those offered or agreed upon. Accordingly, more often than not, under a UCC battle of the forms, a seller's quote issued in response to a specific inquiry (usually a request for quote) that simply identifies the product and price, is an offer that is capable of acceptance and the buyer's purchase order is the acceptance (not the offer).

Once a court determines which communications are the offer and acceptance, the court must decide whose terms and conditions apply. Under the UCC, the terms of a contract are those contained in the offer plus any additional or different terms contained in the acceptance unless: (1) the offer expressly limits acceptance to the terms of the offer, (2) the additional or different terms materially alter any term or condition in the offer, or (3) the offer contains an objection to any additional or different terms that could be contained in an acceptance. To put it bluntly, under the UCC, all of the offeror's terms and conditions, along with any unimportant or immaterial terms and conditions provided by the offeree govern the transaction.

Thus, while the UCC overrules the Mirror Image Rule and the Last Shot Rule, it simply swaps the Last Shot Rule for what could be coined as the First Shot Rule. The bottom line? Unless you want to risk being the biggest loser in a battle of the forms you must make sure that: (1) you are the offeror; (2) you send your terms and conditions with each and every quote; and (3) in the event you are not the offeror, your terms and conditions contain the magic language making your acceptance of any offer expressly conditional on the other party's acceptance of your terms and conditions.

For a more in-depth analysis on how to protect yourself from losing a battle of the forms and to hear war stories of real life consequences for losing one, join us in Philadelphia at the NASPD Summer Conference Program, "The Slow Death of the Handshake: Best Practices from a Litigator's Perspective."

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