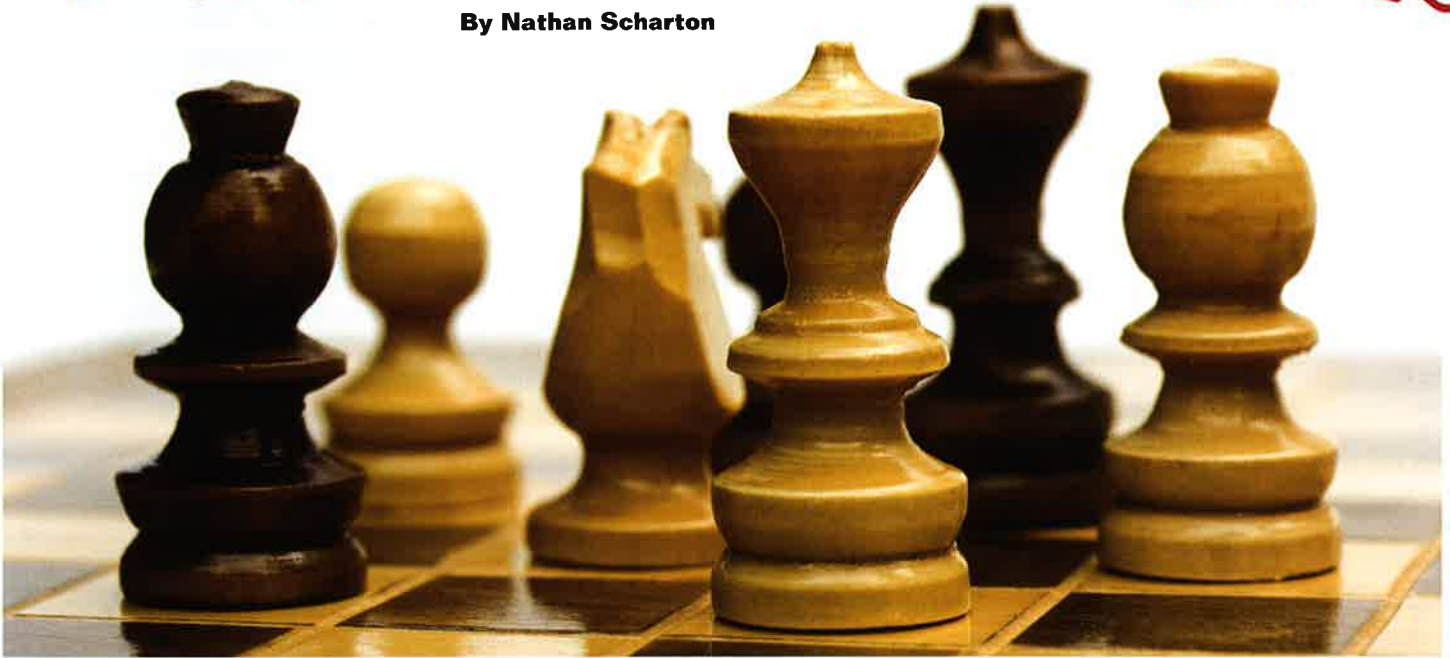


“THE VOICE OF INDUSTRY”

How to Win the BATTLE of the FORMS

By Nathan Scharton



When a company wants to order goods from a supplier, often it uses its own form purchase order to order them, with various terms and conditions included on the form. However, when the supplier receives the order, it frequently sends out a confirmation of the order on its own form, often with differing terms and conditions. What happens if the forms differ in what they say? Whose terms are controlling? Has a contract even been formed?

These are the questions the drafters of the Uniform Commercial Code (the body of law governing the sale of movable goods, referred to herein as the “UCC”) attempted to answer in Section 2-207 (Utah Code 70A-2-207) of the UCC. Generally speaking, the UCC is “pro-commerce” and attempts to provide resolutions for questions such as these by making it easier for parties to contract with each other, but the language of Section 2-207 has proven confusing and may have created more problems than it solved. The result is a great deal of ambiguity about whose terms would control the transaction

in the example set forth above, resulting in a conflict often termed the “battle of the forms”. It is important to understand what the UCC says about this issue so buyers and sellers of goods can plan accordingly.

Section 70A-2-207-(1) of the Utah Code states as follows:

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.

If one were to attempt to summarize this Section, it would appear to say the following: Buyer sends Seller a purchase order for 100 widgets. The fine print on the back of Buyer’s purchase order states that it requires the Seller to ship in 5 days, provide a 90-day full refund warranty on the widgets, submit itself to arbitration in the event of a conflict, and payment will be sent 60 days from receipt of

the widgets. 27 days later, Seller responds by sending 100 widgets with a packing form enclosed. The packing form also has fine print on the reverse side which states that warranty is limited to repair or replacement of a faulty widget, the parties must submit to arbitration in the event of a conflict, and payment is required in Net 30 Days.

Do Buyer and Seller have a contract, and if so, is payment required in 30 days or 60 days? Is there a warranty on the widgets, and if so what are the terms of the warranty? In the event of a conflict, can the parties proceed directly to litigation or must they arbitrate their claims? A casual reading of Section 2-207 would seem to suggest that although the terms and conditions on each form were different, the Seller’s act of sending off the 100 widgets constituted an acceptance of Buyer’s offer to purchase 100 widgets, and therefore a contract has been formed imposing the obligation upon Buyer

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to pay for the widgets. However, this answer may be premature because several items are unclear from Section 2-207. For example, the Section states that the acceptance must be sent within a reasonable time. Is 27 days a “reasonable time”, particularly given the fact that the purchase order requested a 5 day shipment? And what exactly is a “definite and seasonable expression of acceptance”? Does the mailing of the widgets with differing terms constitute an acceptance of the offer to purchase or a counteroffer to sell, and therefore a rejection of the offer to purchase? The code provides no clues to these mysteries.

The code is equally unclear in how it deals with the additional or differing terms in the two forms. Section 2-207-(2) states as follows:

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.

Again, Seller presumably wants to be the master of his own bargain, but what does Seller have to do to make its terms control? Assuming both Buyer and Seller are merchants (another confusing issue created by the UCC, inasmuch as the common definition of “merchant” may or may not have any relationship to the UCC definition), is a statement on the packing form that the Buyer can only keep the widgets if it accepts the packing form terms sufficient to “expressly limit acceptance to the terms of the offer”? Many courts have reached differing conclusions on this point. One court has held that the terms must be disclosed in a manner calculated to bring a reasonable recipient to the understanding that no deal has been concluded unless there is a favorable response to the new terms.

Section 2-207-(3) continues to confuse the issue as follows:

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 provisions of this act.

By this Section, even if the two writings are so different as to make it impossible to find a written contract between the parties,

the UCC may impose a contract if the Seller sends the widgets and the Buyer keeps the widgets, because the conduct of the parties appears to recognize the existence of a contract. In this case, since the only common term between the purchase order and packing order is the arbitration requirement, Seller and Buyer would have a contract for arbitration with all other terms regarding the sale of the widgets to be provided by the UCC.

To make matters even a bit more complicated, Utah courts have held that Section 2-207 is only useful to identify the terms of a contract, not the existence of a contract. See *Herm Hughes & Sons, Inc. v. Quintek*, 1992, 834 P.2d 582 (Utah App., 1992).


Admittedly this examination of Section 2-207 raises many questions and provides few answers. While it is unlikely that any form will offer a guarantee of success, it is clear that some methods offer better chances than others in assuring that your form will control the terms of a purchase. It is important to work with your attorney from time to time to review the terms and conditions on your standard forms to improve your chances of success. A careful review now can avoid an unpleasant surprise later.

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