

Battle of the Forms: The Importance of Legal Training for Sales Professionals



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Unlike HR professionals, who routinely attend legal training as part of their continuing education requirements, sales professionals receive such training much less often. As the manufacturer and seller of goods, however, the importance of training for your sales and marketing team cannot be overstated.

In the United States, sales of goods are governed by the Uniform Commercial Code (“UCC”). Very often the documentation exchanged between the parties never reaches complete agreement, but the parties nevertheless proceed as if a contract had been formed. The UCC recognizes this as a contract. In fact, the UCC requires very little to form an

enforceable agreement — simply a specified quantity and the subject matter. Any open terms, including price, will be filled in by the terms set forth in the UCC — so-called “gap fillers.”

The UCC’s gap fillers are also applied when a seller and buyer exchange conflicting terms and conditions. In that case, the UCC provides that the conflicting terms knock each other out. Such a situation is commonly described as the “battle of the forms.” Below is an example of a contract term that could be implied into a contract by UCC gap fillers when conflicting terms and conditions result in the application of the UCC “knock out” rule:

Seller warrants to Buyer and any covered third parties that the goods are fit for their ordinary purposes as well as for any unique purpose for which Buyer is relying on the goods. If there is a breach of warranty, Buyer may, in its sole discretion, cancel the contract and recover the price that has been paid; hire another company to repair or replace the defective goods at Seller’s expense; recover damages for non-delivery,

including incidental and consequential damages, including lost profits; and deduct any damages from the price due Seller under the contract. Buyer may bring any contract claim, including for breach of warranty, within four years of delivery.

As is shown in the above example, the UCC’s gap fillers are very buyer friendly. In particular, there are no limitations of remedies and no limitations of liability. Quite literally, the failure of a 10 cent widget could result in a claim for millions of dollars in damages under the UCC.

Moreover, the rules governing the battle of the forms heavily favor the buyer. As a result, in a battle of the forms, the seller almost invariably loses if the buyer has a carefully drafted set of purchase order terms and conditions. Thus, in order to “win” the battle of the forms, the seller needs to avoid such a battle altogether. In other words, the burden is on the seller to make certain that critical terms, such as limitations of liability, get into the contract.

Recognizing when a battle of the forms is occurring and how to deal with it requires training regarding the boilerplate terms of purchase order terms and conditions, your own company’s terms and conditions, negotiable and non-negotiable terms, and the strategies your team may employ to avoid onerous terms imposed by buyers or the UCC gap fillers.

Contracting is, in many respects, an exercise in risk management. Your sales team needs to understand the risks involved in the battle of the forms, how to avoid the battle of the forms, and, when it cannot be avoided, how to knowingly assess the risks at hand. ■

If you have any questions regarding the battle of the forms or other legal issues facing your company, or if you would like to conduct training of your sales professionals, contact Brian Cressman or another MacDonald Illig attorney at 814/870-7600.