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ACPC 2010 Workshop

“Using Your Commercial Documents to
Get the Best Deal Possible”

Sunday, August 15th: 09:00-09:55



Workshop Goals

- Understand how your commercial documents are treated under the law
- Learn tips on agreement terms that serve your best interests
- Identify features of well-drafted documentation that protects your business interests

Warning

- The law is constantly changing
- This presentation is meant to provide some guidelines, but does not purport to be a complete method for compliance with the law
- If you have particular legal issues then you should seek the assistance of an attorney

At the Gates of Heaven

- George Washington: “How dare you try to destroy the nation I helped conceive!”
- Patrick Henry: “You wanted to end our liberties but you failed.”
- James Madison: “This is why I allowed our government to provide for the common defense!”
- Thomas Jefferson: “It was evil men like you that provided me the inspiration to pen the Declaration of Independence!”

Lesson One

- Read documents carefully
- Make sure you understand the terms and conditions of your agreements

What Do We Want to Avoid?

- Lost profits
- Unrealized commercial expectations
 - Especially disappointments that yield no remedy
- Unwanted litigation
 - Especially litigation that ends in a loss

Contract Law

- Knowing the law can help **KEEP YOU OUT OF COURT**
- Much of it is common sense
 - If you make a promise, you may have to make good on the promise
 - If you give something to someone, then you may be entitled to get something in return

Basic Contract Law

- **RULE:** Contracts must have an offer, acceptance and consideration
- **WHAT DOES IT MEAN?**
 - Offer - could be a Purchase Order or a telephone inquiry

Basic Contract Law

- **RULE:** Contracts must have an offer, acceptance and consideration
- **WHAT DOES IT MEAN?**
 - Acceptance – by statement or by deed
 - Mirror image rule applies to service agreements under the common law
 - For agreements for the sale of goods, an acceptance with differing terms forms a contract on the harmonious terms (UCC)

Mixed Sales-Service

- What about contracts for sales of both goods and services?
- **RULE: Predominant purpose test**
 - What is the predominant purpose of the contract?
 - Courts will look at:
 - The nature and language of the contract
 - Nature of the business of the buyer and seller
 - Price allocation between the goods and services in the contract
 - The issues involved in the dispute

Basic Contract Law

- **RULE:** Contracts must have an offer, acceptance and consideration
- **WHAT DOES IT MEAN?**
 - Consideration – something that you give in return (like payment given for a part, or a promise to pay when credit is extended)

Sample Agreement Source

- Buyer calls and asks about component
- Seller quotes a price (could be an OFFER)
 - Price quotations are generally not considered offers, but viewed as an invitation to an offer
 - Determining if a quote is an offer depends on the details of the offer, completeness of terms, and number of people receiving quote
- Buyer asks to review documentation
- Seller faxes documentation (fax cover and docs may all be part of the contract) and formally OFFERS to sell
- Buyer submits purchase order and ACCEPTS the offer (PO is part of contract)

What Does That Tell Us?

- Every communication is important to the contract, and potentially an element of the contract
- Every communication poses:
 - An opportunity (for your terms and conditions)
 - A challenge (for the other party to offer terms and conditions)

Sales Among “Merchants”

- **RULE:** The Uniform Commercial Code establishes different rules for “merchants”
- **WHAT DOES IT MEAN?**
 - A merchant is someone who regularly deals in the sort of good that is the subject of the agreement
 - A contract between merchants is subject to the battle of the forms
 - Battle of the forms: an acceptance with additional terms *MAY* form a contract *on the proposed terms*

The Battle of the Forms

- RULE: The “Battle of the Forms”
- WHAT DOES IT MEAN?
 - Battle of the forms: an acceptance with additional terms MAY form a contract *on the proposed terms*
 - *Exceptions:*
 - Original offer limited acceptance to only the proposed terms
 - Explicit rejection of the proposed terms within a reasonable time
 - Proposed terms alter basic nature of the contract

Black Magic

- Standard terms and conditions
 - These may become additional terms in the contract unless you reject them
- What if someone sends standard terms and conditions **AFTER** the contract is consummated?

An Actual Case

- Northrop Corporation v. Litronic Industries,
U.S. Court of Appeals for the Seventh Circuit,
1994
- Different terms in the acceptance

Offer and Acceptance

- Northrup asked for bids to produce printed wire boards
- Litronics made an OFFER to Northrup to produce Boards subject to a 90-day warranty in lieu of any other warranties
- Northrup ACCEPTED the Litronics offer by telephone, and advised Litronics that Northrup would be following-up with a formal purchase order

Warranty Period Discrepancy

- A month after acceptance, Northrup sent a ‘turn-on’ letter, authorizing Litronics to begin production
- Three months after that, the formal purchase order arrived – it provided for a warranty with NO time limit

Are they Under Warranty?

- Northrup took five or six months to test the boards, and eventually found them defective
- Northrup attempted to return the boards
- **QUESTION:** Are they under warranty?

There is a Contract, but...

- The existence of a contract was evident by the conduct of the parties – CONTRACT FORMED
- The Northrup ACCEPTANCE of the Litronics OFFER was not conditioned on the unlimited warranty (nor on acceptance of all terms in the PO)

Different Terms

- Battle of the Forms says *additional* terms become part of the contract
 - E.g. the seller states an offer with no payment due date, and the buyer's acceptance states payment net 90
- What if there are *different* terms?
 - E.g. the seller states an offer with payment net 30, and the buyer counters with an acceptance that includes payment net 90

Does it Have to be in Writing?

- **RULE:** Not all agreements have to be writing
- **WHAT DOES IT MEAN?**
 - Oral contracts are enforceable
 - Obviously, oral contracts can pose evidentiary problems

Statute of Frauds

- **RULE:** But some agreements DO have to be writing – “Statute of Frauds”
- **WHAT DOES IT MEAN?**
 - Statute of Frauds requires certain agreement to be in writing to be enforced
 - Contracts for sale of goods for \$500 or more
 - Contracts for the sale of an interest in land
 - Contracts for a surety
 - Contracts that cannot be completed within a year

Quantum Meruit

- **RULE:** A “Statute of Frauds” transaction that is not in writing can not lead to unjust windfalls
- **WHAT DOES IT MEAN?**
 - If you sell a part (reasonable value = \$1,000) on the phone (oral contract) for \$1,000, and send the part to the customer, then the customer cannot raise the statute of frauds as a defense to the payment of the reasonable value
 - But if you sold the same part for \$5,000 to an AOG customer without a written contract, then you may still only sue for reasonable value

Practical Advice

- Express that the your offers are conditioned on acceptance only under the terms stated
- If you make an offer and the acceptance includes terms additional to the offer, explicitly reject those additional terms if they are objectionable
- If your acceptance includes different (changed) terms from the offer, you should make your acceptance conditional on acceptance of the additional terms by the offeror

One Final Case

- Corporate Air v. Edwards Jet Center Montana, Inc., Supreme Court of Montana, 2008
- Unclear terms in the contract
- One mistake can doom an otherwise well-written contract

The “Magic Words” are there...

- Corporate Air explicitly and obviously disclaimed all warranties not found in contract
- Corporate Air explicitly and obviously stated that Edwards Jet was buying the aircraft “AS IS”
- Corporate Air explicitly and obviously stated that Edwards Jet had an opportunity to “FULLY INSPECT” the aircraft
- **Everything looks good so far...**

But there's a fatal flaw

- The contract stated that the deal would close “no later than 14 days after” the execution of the contract
- All of Corporate Air’s disclaimers of warranty and other “magic words” were preceded by the “at the time of closing” language
 - This suggested that Edwards Jet was taking the aircraft “as is” at the time of closing but had the right to fully inspect the aircraft and inform Corporate Air of any nonconforming issues up until the time of closing

Circumstances Undermine the Legal Protection

- The date of closing was pushed back by a series of letters between the parties
- Some of the letters suggested that the closing date was pushed, other letters suggested that Corporate Air already considered Edwards Jet to be in default of the contract after the initial 14 day period to close expired

Wait, it gets messier...

- Edwards Jet discovered a portion of the log book was missing for one plane; the other plane had prior wing damage
- After finding out this information, Edwards Jet rejected both planes and refused to pay
- Corporate Air sued over breach of contract, claiming that Edwards Jet had agreed to take the aircraft “as is” and had to pay

There is a Contract, but...

- Due to the lack of clarity in the contracts, the parties spent over five years litigating the case
- The Montana Supreme Court found the contract language ambiguous and remanded to the trial court with orders to look at the intention of the parties in making the agreements
- So, in the end, the final outcome came down to the Judge's impression of the intent of the parties

–Clarity is important!!

Clarity

- Keep sentences simple and short
- If you must include modifiers, like adjectives or adverbs, use only one per sentence
- Multiple modifiers raise the ambiguity of whether the second modifier modifies the entire sentence or just the first modifier
 - Ambiguous sentences may not be enforceable!
 - *Contra Proferentem* – the document will be interpreted against the drafter

Questions?

Thank You

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