TERMS AND CONDITIONS: HOW SELLERS CAN AVOID GETTING INJURED IN A “BATTLE OF THE FORMS”

In an ideal world, parties involved in the sale and purchase of goods would have a signed contract to establish the terms and conditions of the sale. A well-drafted, signed contract confirms the parties’ intentions to create a contract and clearly articulates its material terms in a single document. If a dispute arises, the parties can refer to that contract to determine each side’s rights and obligations.

More often than not, though, companies conduct business via purchase orders and acknowledgments without ever signing a separate contract. In such cases, how do you determine the governing terms of the agreement or whether a contract has actually been formed?

This article answers these critical questions by providing an overview of contract formation and discussing the rules and laws that govern contracts when disputes occur. Particular attention is focused on the “Battle of the Forms,” which arises when there is no signed contract between buyers and sellers and each party refers to their own standard terms and conditions. Although this battle puts sellers at a distinct disadvantage, there are steps that sellers can take to protect themselves if such a battle arises.

Contract Formation Overview

Common law and the Uniform Commercial Code (the “UCC”) are the two bodies of law that govern the creation, performance, and enforcement of contracts. Common law applies to contracts relating to services, real estate, insurance, and intangible assets, while the UCC covers contracts for the purchase and sale of goods. If a contract contains both goods and services, then whichever transaction is dominant dictates the applicable body of law.

Under both bodies of law, a contract is created by an offer and its acceptance (plus consideration, but that’s not of issue here). However, the laws diverge when it comes to defining the actions that constitute “acceptance.”
Let’s take a look at these differences.

Acceptance: Common Law

Under the common law, a contract is valid only if the offer and acceptance mirror each other. In other words, when a party accepts an offer it must be on the exact same terms as the original offer. If the terms differ, a rejection, not an acceptance, has occurred and no contract

is formed. This is called the “mirror image rule.”

If a party accepts an offer but attaches different terms to the offer, common law views the acceptance as a counter-offer instead. The original offeror may then accept the counter-offer or make a counter-offer of its own. If this back-and-forth continues on the terms, but the goods are eventually sent, then the terms contained in the last document apply. This is known as the “last shot rule.” Obviously, this rule gives an enormous advantage to whomever sends the last document.

Acceptance: The UCC

The UCC modifies both the mirror image rule and the last shot rule. Under Section 2-207 of the UCC, a binding contract may arise even if an offeree’s acceptance makes changes to the terms of the original offer, excluding a few specific situations. In addition, to avoid the last shot rule, Section 2-207 has special rules that dictate how the law handles conflicting terms and conditions. To best understand how Section 2-207 works, let’s examine its application in the formation of different sales contracts.

Signed Contract

Section 2-207 does not apply to signed contracts. Accordingly, a written and signed contract setting forth the agreed upon terms and conditions is the best scenario for both sellers and buyers. While there may be a dispute regarding interpretation of the contractual language, Section 2-207 would not come into play in this scenario. Section 2-207 thus does not apply to signed contracts.

Contract by Exchange of Forms: Battle of the Forms

When a seller and buyer create a contract through an exchange of forms, a Battle of the Forms is inevitable. A contract by exchange of forms usually occurs as follows: A buyer and seller negotiate and agree on main points such as price, quantity, quality and time for delivery. The buyer then submits a purchase order with pro-buyer boilerplate terms and conditions. The seller responds with an acknowledgement containing equally strong pro-seller terms and conditions. Following the exchange, performance occurs and the seller ships the goods and the buyer accepts them.

If a dispute arises, one party may argue that there was no agreement on certain terms because such terms were additional terms prohibited by the UCC. Under Section 2-207, if an acceptance or confirmation includes additional terms, those extra terms will become part of the contract unless:

- the offer expressly limits acceptance to the terms of the offer;
- the additional terms materially alter the offer; or

- notification of objection has been given or is given within a reasonable time after the additional terms are received.

Conflicts often arise over whether an additional term is a material alteration such as:

- Changes to price, quantity, delivery;
- Warranty disclaimers;
- Limitations on liability;
- Limitation on time for bringing claims;
- Choice of law or forum provisions; or
- Attorneys' fees provisions.

Sellers are in a precarious position in a Battle of the Forms. Most of the protections a seller would include in its acknowledgement to a buyer would be considered material alternations. As a result, those protections would not become a part of the contract between seller and buyer.

Contract by Conduct

Now, let's imagine that there's been a Battle of the Forms with material alterations included in the acknowledgment, but the buyer and seller have performed despite the differences. A subsequent dispute arises over the terms. How does the UCC determine the applicable terms?

Section 2-207 dictates that terms in both forms that do not clash become part of the contract. The remaining terms, however, are supplied by the UCC. These are called "gap fillers" and are very buyer friendly. They include:

- Implied warranties of merchantability and fitness;
- No limitation on seller's liability;
- Consequential damages;
- Four-year statute of limitations;
- Payment due on delivery;
- Insurance risk remains with the seller until delivery of goods; and
- Additional buyer and seller remedies.

Advice for Sellers

As previously stated, it's best to always operate with a signed agreement. Unless you have a signed contract, you will likely be dealing with the Battle of the Forms. Given the pro-buyer nature of the UCC, sellers are at a distinct disadvantage in this battle, even with well-drafted terms and conditions. If UCC gap fillers are used, the seller is subject to much additional risk.

So what's a seller to do?

- Never assume that your terms and conditions will automatically be applied.
- Never sign a buyer's form unless key issues have been addressed and resolved.
- Reference and attach your terms and conditions early, often and every single time there's an exchange.
- Attempt to have the buyer accept and sign the seller's terms and conditions.
- Carefully review the terms and conditions in the buyer's forms and respond with express objections prior to commencing performance.
- Get the buyer to modify its standard terms and conditions to include the seller's key protections.
- Always include certain non-negotiable terms in your terms and conditions.
- Attempt to negotiate a master contract with the buyer that lays out all of the applicable and acceptable terms and conditions for contractual dealings with one another moving forward.

Also note that certain protections in a seller's terms and conditions should be considered to be non-negotiable, including:

- Payment provisions;
- Disclaimer of implied warranties;
- Limitations of buyer's remedies to repair or replace at seller's option;
- Limitation on seller's liability;
- Limitation on period to bring claims;
- Protections of seller's intellectual property;
- Disclaimer of consequential damages; and
- Specifying what law applies and what courts have jurisdiction.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST REVIEW THEIR BACKGROUND CHECK PROCESSES TO ENSURE COMPLIANCE WITH NEW RULES

The Fair Credit Reporting Act ("FCRA") requires that employers who request "consumer reports," which include background checks, criminal histories, driving records, and credit reports, from a third-party service about employees and applicants follow certain rules. These rules contain specific requirements for notice, disclosure, and consent both in conjunction with obtaining a report and taking adverse employment action because of information in the report.

One requirement is that an employer must make certain disclosures **before** the employer takes an adverse action based on information discovered in the consumer report. This includes providing the employee or applicant with a written summary of consumer rights under the FCRA. Recently, the Bureau of Consumer Financial Protection updated its model disclosure to reflect recent legislative changes to the FCRA, such as the consumer's right to place a security freeze or fraud alert on their credit report. The new model form can be found here.

Employers must ensure that their authorizations and disclosures meet all FCRA requirements and that they are providing the correct notifications, including the updated summary of rights.

OCHDL PROUDLY SPONSORS ANNUAL MILWAUKEE ARCHBISHOP'S CRS RECEPTION

Earlier this month, for the third consecutive year, O'Neil, Cannon, Hollman, DeJong and Laing S.C. proudly sponsored the Catholic Relief Services (CRS) reception at the Wisconsin Club, downtown Milwaukee. Attendance was the highest it has been in years, making the event one of the most successful that CRS has ever held in Milwaukee.

Catholic Relief Services is one of the largest international aid organizations in the world. It is also one of the most efficient and effective, with 97% of its expenditures going directly to programs that benefit individuals overseas. CRS works to alleviate suffering and provide assistance to more than 100 million people in need who live in some of the most impoverished places in over 100 countries.

O'Neil Cannon is honored to have been a part of such a meaningful event.
Read more about CRS >>

TAX AND WEALTH ADVISOR ALERT: HOW TO MAKE SPENDTHRIFT TRUSTS WORK FOR YOU

When we think of children blowing through trust funds, we often envision the rich and famous. The reality, though, is that everyday folks waste vast inheritances, too. Take, for

example, Mary McClelland who, throughout her 20s, squandered her tri-annual $5,000 and $10,000 payments from her grandfather's investments on traveling and shopping and ran out of money by age 30.

Unfortunately, McClelland's story is far from unique. The Williams Group wealth consultancy estimates that 70% of wealthy families lose their fortune by the second generation; that percentage rises to 90% by the third generation.

If these cautionary tales and statistics scare you, they shouldn't—but they are excellent reminders of what could happen if you don't plan to pass down your wealth in a smart way. The good news is that if you'd like to pass down your wealth to your heirs but also want to make sure they won't fritter away your hard-earned assets, you have options, and spendthrift trusts just may be the answer.

What are spendthrift trusts?

Merriam-Webster defines "spendthrift" as "a person who spends improvidently or wastefully." Not surprisingly, this textbook definition is the origin of the name of the legal concept of "spendthrift trusts."

With spendthrift trusts, you as the creator can protect the trust's assets from creditors as well as from your heirs' potentially dangerous spending habits by placing certain conditions on the distribution of funds.

At its initial set-up, a spendthrift trust works like any other trust. You choose assets to place in the trust—money, property, etc.—and transfer them into it. You name a beneficiary, who is the person who will benefit from the trust. You must also name a trustee to manage the trust's assets.

With a spendthrift trust, you would include in the trust document certain restrictions on the beneficiary's receipt of trust assets. These conditions may involve the beneficiary having to reach a minimum age or achieving a life event, such as graduating college, before receiving trust property. Alternately, you may decide that doling out smaller amounts of trust property at specified times (monthly, bi-monthly, bi-annually) may make the most sense for your situation.

The late actor and comedian Robin Williams, for instance, had set up spendthrift trusts for his children before his death. Under the conditions of the trusts, each of Williams' children is scheduled to receive shares of the trust at specified intervals: one-third at age 21; one-half of what remains at age 25; and the rest at age 30.

In any event, a spendthrift trustee has a fiduciary duty to the trust and is also obligated to act in the best interests of the beneficiary. The trustee acts as protector of the trust's assets

both from creditors and the potential wasteful behavior of the beneficiary as well.

You may also choose to have the trustee make direct payments such as tuition and rent for the benefit of the beneficiary; this may be the best idea if you have serious reservations about how your heir will handle even periodic, smaller monetary distributions. After all, once the beneficiary receives the funds, there isn't a whole lot you can do to make sure they use the funds wisely. Indeed, once the money is out of the trust, it is no longer protected from creditors.

While you're still alive, though, you can discuss financial responsibility with your heirs to help ensure that your family avoids becoming part of the dire statistic of families who lose their wealth by the second or third generations.

DEAN P. LAING NAMED 2019 BEST LAWYERS "LAWYER OF THE YEAR®"

O'Neil Cannon is pleased to announce that Attorney Dean Laing was recently selected as the 2019 "Lawyer of the Year" for Product Liability Litigation–Defendants in the Milwaukee area. This is the third time that *Best Lawyers* has recognized Dean as the "Lawyer of the Year." In 2016 he was selected for the honor in Product Liability Litigation–Defendants, and in 2012 he was selected for the honor in Personal Injury Litigation. Dean is believed to be the only attorney in Wisconsin to receive "Lawyer of the Year" as both a plaintiff's attorney and a defense attorney.

Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year," making this accolade particularly significant. These lawyers are selected based on particularly impressive voting averages received during the peer-review assessments.

Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity.

In addition to the Lawyer of the Year award, Attorney Laing was also listed in the 2019 Edition of *The Best Lawyers in America* in three categories: Commercial Litigation, Personal Injury Litigation–Plaintiffs, and Product Liability Litigation–Defendants.

Since the list was first published in 1983, *Best Lawyers* has become universally regarded as

the definitive guide to legal excellence.

#METOO: SEXUAL HARASSMENT CLAIMS AND MISCONDUCT

Wisconsin attorneys Sara Geenen and Erica Reib discuss the duties and risks for both employers and employees seeking to protect themselves.

FAMILY SECURES LARGE SETTLEMENT IN CONTENTIOUS INHERITANCE DISPUTE

The extended family of a reclusive millionaire secured a large settlement on the eve of trial. As reported by the Milwaukee Journal Sentinel, when LeRoy Ern died at the age of 92, he purportedly left his entire $1.6 million estate to his financial advisor. At the time of the changes, Mr. Ern suffered from dementia and lived the life of a hermit. According to the allegations, soon after meeting the financial advisor, Mr. Ern nominated the financial advisor as his financial and health care power of attorney. Eventually, the financial advisor obtained an interest in 100 percent of Mr. Ern's estate upon Mr. Ern's death.

As is often the case in disputes such as this, the purported transfers to the financial advisor to take place upon Mr. Ern's death occurred through a series of different mechanisms. Here, it involved a revised will identifying the financial advisor as the personal representative and sole beneficiary as well as changes to the beneficiary designation on multiple annuity policies. Other common mechanisms may include the retitling of accounts from the name of the decedent or his or her trust into a joint account, payable-on-death account, or transfer-on-death account to the alleged wrongdoer or a change in beneficiary designation on a life insurance policy.

After Mr. Ern died, the financial advisor filed the will and sought to serve as the estate's special administrator. Mr. Ern's family members objected to the will on the basis the financial advisor obtained a 100 percent interest in the estate in bad faith. As the newspaper points out, the family and the financial advisor settled on the eve of the scheduled trial that was set to begin this week. As part of the settlement, the family will receive the bulk of Mr. Ern's

estate. It is evident that had Mr. Ern's family not taken court action to assert their rights, they would have received nothing. Instead, they secured a settlement worth almost $1.5 million.

If you would like more information on this topic, you are welcome to call Trevor Lippman at 414-276-5000 or trevor.lippman@wilaw.com.

OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY JESSICA K. HASKELL HAS JOINED THE FIRM

Attorney Jessica K. Haskell, a graduate of the University of Wisconsin Law School, has joined the Milwaukee law firm O'Neil Cannon Jessica will join the firm's Banking and Creditors' Rights Practice Group. Jessica comes to us after clerking for the Honorable G. Michael Halfenger of the U.S. Bankruptcy Court for the Eastern District of Wisconsin. Her experience is a welcomed addition to the firm's Banking and Creditors' Rights Practice Group, which provides legal services for court-appointed receivers, secured and unsecured creditors, financial institutions, and corporations in a wide range of state and federal court matters. We are very pleased to have Jessica join OCHDL.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.

---

20 OCHDL ATTORNEYS NAMED 2019 BEST LAWYERS IN AMERICA

O'Neil Cannon is pleased to announce that 20 lawyers have been named to the 2019 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the

profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

“For more than a third of the century,” says CEO Steven Naifeh, “Best Lawyers has been the gold standard of excellence in the legal profession.” President Phil Greer adds, “We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals.”

Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

O’Neil Cannon would like to congratulate the following attorneys named to the 2019 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Mergers and Acquisitions Law, Corporate Law, Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- Peter J. Faust – Mergers and Acquisitions Law, Corporate Law
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Real Estate Law, Construction Law, Commercial Litigation, Corporate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Trusts and Estates, Corporate Law
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation – Insurance
- Gregory S Mager – Family Law
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- Steven J. Slawinski – Construction Law
- John Schreiber – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation – Bankruptcy

Additionally, Attorney Dean P. Laing has been named the 2019 Milwaukee Lawyer of the Year in Product Liability Litigation–Defendants.

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities

of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* "the most respected referral list of attorneys in practice."

SIX QUESTIONS EVERY FAMILY BUSINESS OWNER SHOULD BE ASKING

If you own a family business, you should be thinking about your succession plan, whether you plan to sell the business to fund your own retirement or pass it on to your descendants or other key employees. To get you started, below are six questions to ask yourself. We answer each in our book, *The Art, Science and Law of Business Succession Planning*.

1. Am I prepared to consider transferring ownership of my business during my lifetime? If you ever plan to retire—if you don't intend to die at your desk —you should already be thinking about this. Will you retain ownership in the business, draw retirement or hand it over completely?

2. Am I prepared to consider transferring control of my business during my lifetime? Ownership and control are different things. Do you have mechanisms in place so the business can run effectively in your absence?

3. Have I made sure that the transition of my business will be orderly? If the answer is currently "no," expect chaos during the transition, unless you make a plan.

4. Is there a logical successor to me in the management of the business? Who among your family members or employees has the qualifications to lead the business when you leave it? If no one comes to mind, whom could you groom to take over?

5. Are my key employees comfortable with my plans for business continuation, and will they stay with my firm rather than seeking more secure employment? If you don't want your best employees working for your competitors—or becoming your competitors—down the road, you need to take appropriate steps to answer this question in the affirmative.

6. Is my estate sufficiently diversified so that children who are not active in the business may be treated fairly alongside those receiving an interest in the business? Not all your children will want a role in your company, but you want all of them to benefit from your wealth. How will you structure your estate to accomplish this goal?

Click here to get a free copy of *The Art, Science and Law of Business Succession Planning* mailed to you. You can also buy a copy of our book on Amazon, both in print and through the Kindle e-book service.