Winning the Battle of the Forms

Many business-to-business contracts are formed by the combination of price quotations, purchase orders, and invoices, each of which can contain terms that conflict with the others. This article reviews typical "battle of the forms" issues under the Illinois UCC and helps parties increase the chance that their terms will control.

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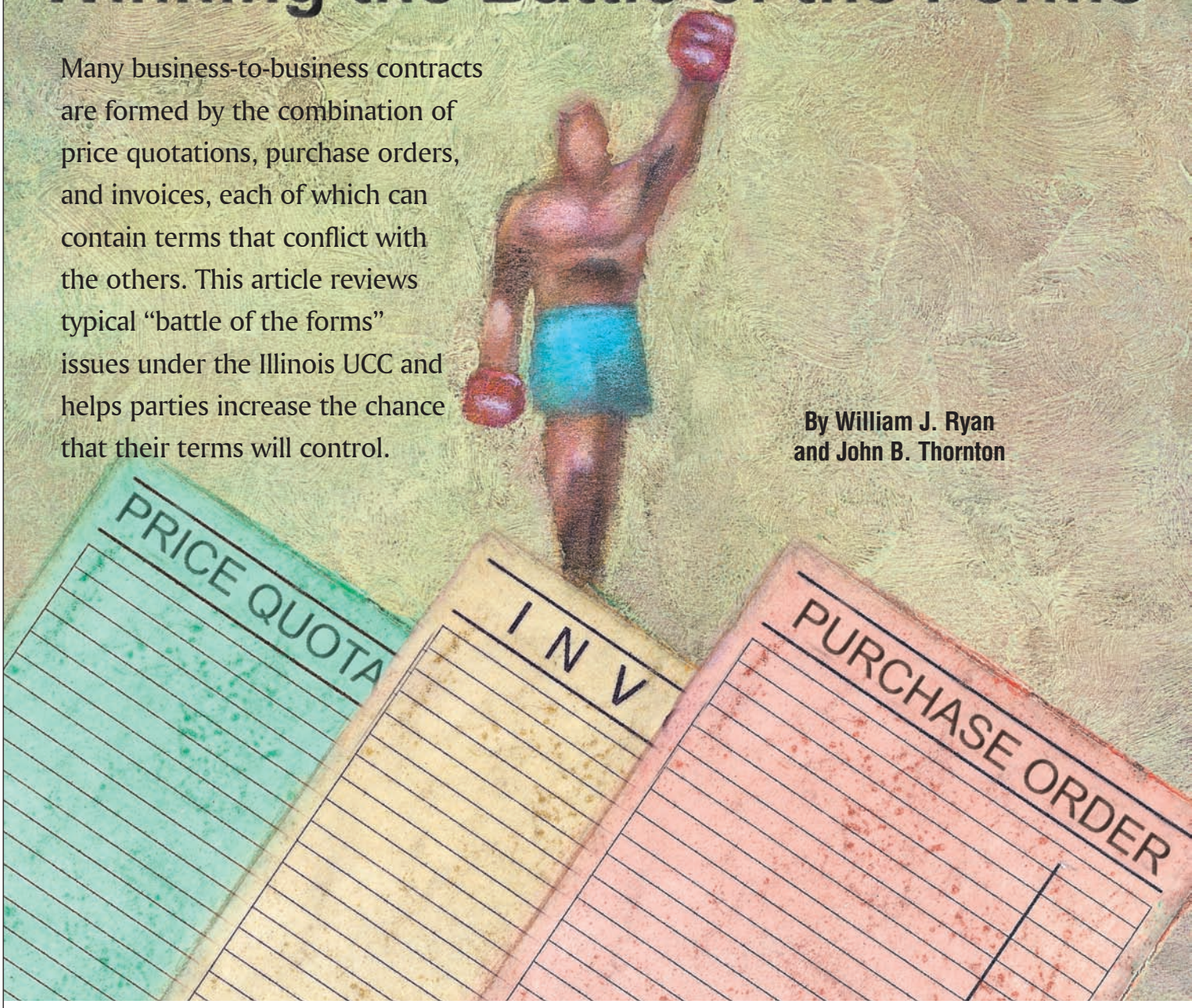

Consider the following scenario: You represent a parts manufacturer that sells a large quantity of parts to another manufacturer for inclusion in a final product. Your client, as is common in its industry, sends the buyer a price quotation listing a proposed price, quantity, and delivery dates. The buyer responds to your client's quotation by sending a standard purchase order that agrees with the quotation as to price, quantity, and delivery. Your client then ships the requested quantity of parts, and the buyer pays in full.

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Unfortunately, the story does not end there. The buyer manufactures its final products containing the part supplied by your client and discovers an unacceptably high failure rate. The buyer blames these failures on your client's component and demands reimbursement pursuant to the terms of the indemnity clause in the boilerplate terms and conditions printed on the back of its purchase order.

Your client denies liability and tells the buyer it never agreed to the terms and conditions on the back of the purchase order. Instead, it asserts that the boilerplate terms and conditions on the back of the *quotation* control the agreement and the buyer agreed to those terms by its communications and actions. (The boilerplate on the back of the price quote disclaims most warranties and has no indemnification provision.) The buyer denies that it ever agreed to the seller's terms and conditions and files a lawsuit, with various counts for breach of contract, express and implied warranties, and indemnification.

The seller consults you. Has a written contract been formed, and if so, what are its terms? If not, has the parties' conduct otherwise formed an agreement? Suppose your client orally rejected the seller's proposed terms. Could such express oral rejection of the other party's terms and conditions extinguish them – or did your client's shipment constitute acceptance despite any oral statements?

Finally, do any prior course of dealing and/or course of performance between the parties affect this analysis? Each of these issues is discussed below, including the implications for companies involved in such a "battle of the forms."

The battle of the forms

At common law, no contract would be formed under this scenario because any difference between the responsive purchase order and the initial quotation would constitute an outright rejection of that initial "offer."[1] Under the common law rule, the writings must form a "mirror image" of each other for a contract to exist. If there were differing terms and conditions, regardless of their materiality, there would be no contract.[2]

Although the "mirror image" rule had the advantage of being clear and easy to apply, it did not reflect the reality of modern day commercial transactions. Thus, in Article 2 of the Uniform Commercial Code, which pertains to sales transactions, the "mirror image" rule was replaced by section 2-207. That provision recognizes that a contract can exist even where the "offer" and "acceptance" were not identical.[3]

Under section 2-207, any definite and timely expression of acceptance will form a contract regardless of whether it contains different terms – unless acceptance is expressly made conditional on assent to the additional or different terms.[4] Moreover, even if the parties' forms are so completely at odds that no written contract is formed, section 2-207(3) recognizes that the parties' *conduct* may nevertheless form a contract.[5]

Section 2-207 represents an advance from the common law because it supports the ability of commercial parties to make contracts in ways that are convenient to them, and it provides courts with a flexible tool that may be used to analyze a broad range of fact patterns. The downside is that, unlike the common law "mirror image" rule that it supplanted, the application of section 2-207 can be difficult and confusing.[6] Among the questions that occur in analyzing a transaction under section 2-207:

1. In any given transaction, which writing constitutes the offer and which the acceptance?

2. If there is no express acceptance or rejection, but merely the exchange of forms followed by performance, are the offeree's terms additional to or different from those of the offer? If additional, do they constitute a material change?

3. Does the writing that constitutes the acceptance expressly require assent to any additional or different terms such that the acceptance *does not* constitute an acceptance, but is instead a counteroffer?

4. If the writing is a counteroffer, was it accepted, and if it was not accepted or explicitly rejected, was a contract formed nonetheless by the actions of the parties under section 2-207(3)?

5. Did the parties reject each other's terms orally or in writing? Did either party's actions in conformance with the agreement act as an acceptance of the terms at issue? Likewise, did a prior course of dealing or course of performance between the parties constitute an acceptance of said terms?

Each question will be analyzed in turn.

Which writing is the offer?

In a sales transaction having a price quotation and a purchase order, the first potential source of confusion is which writing is considered the "offer." In the scenario described above, it seems obvious that the price quotation constitutes an offer to sell a certain quantity of a part at a certain price, and that the purchase order agreeing to those terms constitutes the acceptance.

Including clauses limiting acceptance to the terms in the form and rejecting alternative terms unless assented to in writing increases the chance that your form will control the agreement.

However, that is not necessarily the case. In fact, the general rule is the opposite: Price quotations are seen as mere invitations to submit offers.[7] Despite the general rule, whether a price quotation is an offer to sell "is a question of fact that depends on the parties' acts, their expressed intent, and the circumstances surrounding the transaction."[8]

To be an offer, a price quotation must be "sufficiently detailed," and it must create a binding power of acceptance in the

1. *Northrop Corp v Litronic Industries*, 29 F3d 1173, 1174 (7th Cir 1994) (applying Illinois law).
2. Id; see also *Big Farmer, Inc v Agridata Resources, Inc*, 221 Ill App 3d 244, 246-47, 581 NE2d 783, 785 (3d D 1991).
3. 810 ILCS 5/2-207. The Uniform Commercial Code was enacted in Illinois as 810 ILCS 5/1-101 et seq.
4. 810 ILCS 5/2-207(1).
5. 810 ILCS 5/2-207(3).
6. The "mirror image" rule still applies in non-UCC cases, for example, where at least one party is not commercial. See, for example, *Finnin v Bob Lindsay, Inc*, 366 Ill App 3d 546, 548, 852 NE2d 446, 448 (3d D 2006) (holding that in suit between car dealer and two individuals, the acceptance must conform exactly to the offer in order to constitute contract by offer and acceptance.)
7. *Tibor Machine Products, Inc v Freudenberg-NOK General Partnership*, 967 F Supp 1006, 1016 (ND Ill 1997) (applying Illinois law).
8. Id at 1016, quoting *Rush-Presbyterian St. Luke's Medical Center v Gould, Inc*, 1993 WL 376163 at *2 (ND Ill).

offeree.[9] Importantly, if the price quote is subject to final acceptance or approval by the seller it will usually not be considered the "offer." Thus, companies intending their form to be the "offer" must avoid use of so-called "home office approval" provisions, which condition acceptance on the seller's final approval.[10]

The bottom line, however, is that there is no bright-line rule as to which writing constitutes the offer and which the acceptance. Whether a price quotation is an offer to sell is a fact question that focuses on the parties' acts, expressed intent, and the circumstances of the transaction. Thus, the resolution of this fact question may trump the language of the writings, even where the quotation has an "acceptance clause."[11]

Having to establish at trial that your client's employee orally rejected the other party's terms could lead to an unfortunate and costly outcome.

In *Alan Wood Steel Co v Capital Equipment Enterprises, Inc*, the court held that the seller's quotation was an offer even where the quotation stated that purchase orders received by the seller were not binding unless accepted by the seller in a written acknowledgment.[12] The parties' actions in that case indicated that both treated the quotation as an offer.[13] The safest course for a party intending its form to be the "offer," it seems, is for that party to be consistent – in its form and conduct – that it has made an offer granting the buyer the unconditional right of acceptance.

Whether additional or different terms in the acceptance apply

After the "offer" is identified, the next step is to consider the effect of subsequent forms on the formation of the contract. As is stated above, a commercial sales contract may be formed under section 2-207 of the Illinois UCC by any "definite and seasonable expression of acceptance," even if it contains additional or different terms.[14]

Under that section, if the acceptance contains additional or different terms, they become part of the contract if the alterations are not material or they are accepted, but those terms do *not* become part of the contract if the alterations are material, the offer expressly limits acceptance to its own terms and conditions, or the offeree rejects the offer's terms.[15] Moreover, if the terms of the offeree's response are very different or are vague and indefinite, there is no acceptance, and the response itself becomes a rejection.[16]

In agreements between merchants, section 2-207(2) shifts some of the control over the terms of the agreement from the offeror to the offeree. In the common situation where the parties exchange form quotations, purchase orders, and acknowledgments without careful review (and the offeror thus makes no objections to additional terms), the offeree's additional terms become part of the contract so long as the changes are not material and the offer did not expressly limit acceptance to the terms of the offer. Of course, whether or not a particular additional term constitutes a material alteration so that it does not become part of the contract is a matter for the courts to determine, and the result is not always predictable.[17]

Section 2-207(2) provides a rule for determining whether additional terms become part of the contract, but it is silent about *different* terms, and there is no overall consensus on this "hole" in the UCC.[18] Illinois has adopted the majority view, which holds that "where different terms are present in the acceptance and there has been no express provision by the parties to make acceptance conditional on assent to the different terms, the discrepant terms fall out and are replaced by suitable UCC gap-fillers."[19]

The ways for the offeror to retain control over the offer are (1) to include language that expressly limits acceptance to the original terms and states that any additional terms are rejected unless expressly agreed to or (2) to review the response carefully and expressly reject any new terms to which the offeror does not agree, preferably in writing.

It is, without doubt, prudent business practice to carefully review the terms of every proposed transaction. The fact, however, is that sales transactions between companies, even large transactions, occur so frequently that there is a good chance that the quotations, purchase orders, and acknowledgment forms at issue will be filled out and/or received by fairly low-level employees and that careful review of the terms will not occur. Therefore, language expressly making acceptance conditional on assent to the additional or different terms is highly advisable.

When the "acceptance" is actually a counteroffer

As is shown above, the offeree's response constitutes an acceptance under the UCC if "definite and seasonable," even where it contains additional or different terms, as long as acceptance is not "expressly made conditional on assent to the additional or different terms."[20] Such a proviso is construed narrowly and will apply only where the "acceptance" clearly shows that the offeree is *unwilling to proceed* without agreement to the additional or different terms.[21]

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9. *McCarty v Verson Allsteel Press Co*, 89 Ill App 3d 498, 506, 411 NE2d 936, 942 (1st D 1980).
10. Id at 508, 411 NE2d at 943 (holding that a price quotation cannot be an offer where it has an "acceptance" clause because such a clause "is not intended to give the so-called offeree the power to make a contract" by unilateral acceptance).
11. See *Alan Wood Steel Co v Capital Equipment Enterprises, Inc*, 39 Ill App 3d 48, 55-56, 349 NE2d 627, 634 (1st D 1976).
12. Id.
13. Id at 56, 349 NE2d at 634.
14. 810 ILCS 5/2-207(1).
15. 810 ILCS 5/2-207(1), (2).
16. *McCarty* at 510, 411 NE2d at 944-45.
17. See, for example, *Intrastate Piping & Controls, Inc v Robert-James Sales, Inc*, 315 Ill App 3d 248, 254-55, 733 NE2d 718, 723 (1st D 2000) (citing Comment 5 of section 2-207, which states that remedy limitation which provokes no objection becomes part of contract because it does not involve unreasonable surprise or materially alter contract); but see *Album Graphics, Inc v Beatrice Foods Co*, 87 Ill App 3d 338, 347, 408 NE2d 1041, 1048 (1st D 1980) (disclaimer of warranty *is* material change); *Southern Illinois Riverboat Casino Cruises, Inc v Triangle Insulation & Sheet Metal Co*, 302 F3d 667, 674-75 (7th Cir 2002) (applying Illinois law, resolving split between different divisions of first district in the absence of controlling supreme court authority, and agreeing with the holding in *Intrastate Piping*).
18. *Rush-Presbyterian-St. Luke's Medical Center v Gould Inc*, 1995 WL 340967 at *7 (ND Ill 1995) (applying Illinois law).
19. Id at *8 (citing *Northrop Corp v Litronic Industries*, 29 F3d at 1178).
20. 810 ILCS 5/2-207(1).
21. *McCarty* at 510, 411 NE2d at 945; *Album Graphics* at 347, 408 NE2d at 1048 (language requiring written confirmation insufficient to constitute clause expressly limiting acceptance to offer's terms).

For example, a purchase order was found not to be an acceptance where it stated in bold capital letters at the top that "THIS ORDER EXPRESSLY LIMITS ACCEPTANCE TO THE TERMS STATED HEREIN AND ANY DIFFERENT OR ADDITIONAL TERMS PROPOSED BY THE SELLER ARE REJECTED UNLESS EXPRESSLY ASSENTED TO IN WRITING."[22] Given the case law, and the fact-based nature of the law under the Code, anything short of this conspicuous statement may be insufficient.

The effect of this type of clause is dramatic: the "acceptance" is instead considered to be a counteroffer. Under both the common law and the UCC, a counteroffer operates as a rejection and a new offer, not an acceptance.[23] If the other party agrees to the terms of the counteroffer, there is a contract; if it rejects them or fails to respond, no contract is formed.[24]

When there is no acceptance but a contract is formed based on conduct

We have looked at different scenarios where competing "forms" create a contract. What about where the facts show that the forms do not make a contract? That is where section 2-207(3) comes in. As is shown above, this is the "emergency repair" provision that is used in certain situations to form a contract even where the parties have rejected each other's terms or otherwise failed to reach an agreement.

When an offer is expressly rejected, it is extinguished and cannot be subsequently "accepted" because it is legally inoperable.[25] If the parties subsequently perform under the non-existent "agreement," however, the UCC creates a contract by operation of law under section 2-207(3), which was expressly designed to address situations in which the parties each reject the other's written offers, but nevertheless proceed to do business together based on some common understanding.[26]

For section 2-207(3) to apply, both parties must demonstrate by their conduct that they recognize the existence of a contract.[27] Thus, if neither the quotation nor the purchase order forms the contract, it is section 2-207(3) itself that defines the contract terms.

Under section 2-207(3), the only terms that become part of the contract are "those terms on which the writings of the parties agree" and the "gap filling" provisions of the UCC.[28] Terms contained in only *one* of the parties' forms do not become part of the parties' contract.[29] In the scenario given above, the indemnity provision would not become part of the contract if section 2-207(3) applies because it is not in both parties' writings, nor is it a default or "gap filling" UCC term.[30]

Whether the contract is formed by offer and acceptance or by performance

If the parties perform, it is clear that there is *some* sort of contract, whether by offer and acceptance or by the operation of law under section 2-207(3), but it may be less clear which type of contract exists and what its terms are. If there is no express written acceptance or rejection of the offeror's terms by the offeree, a court may look at numerous modes of acceptance or rejection to aid it in determining whether there was acceptance of the offer by the offeree, such as oral or written communications between the parties, or even a party's admissions in a complaint or response to an Illinois Supreme Court Rule 216 Request to Admit.[31]

One method of acceptance involves conduct by the parties. When the parties ship, receive, and pay for goods *absent* an agreement, a contract is formed under section 2-207(3).[32] Where, however, a party responds to a purchase order constituting an offer with performance and there are no other indicia of rejection or limitation that would invalidate an agreement, courts have found acceptance.[33]

Also, where there is only partial rejection of terms, courts have been willing to find acceptance. For example, it has been held that where the buyer's counteroffer objected only to certain additional terms but not others, and the seller agreed to the requested changes, the acceptance formed a contract without resort to section 2-207(3).[34]

Acceptance may also be determined in certain situations by looking at the prior course of dealing between the parties, if one exists. Although Illinois case law is sparse on the subject, the Illinois UCC and UCC cases from other jurisdictions hold that evidence of "course of dealing" is applicable only where there is an applicable course of prior performance between the parties.

This is because "course of dealing" derives from the *conduct* of the parties with respect to a particular issue.[35] Course of dealing does not arise from the mere sending of forms or alleged prior agreements, even if repeated, as it is widely known that parties frequently do not pay attention to boilerplate form language until a problem arises. Thus, the repeated sending of forms containing standard terms without any action on the issues addressed by those terms does not constitute a course of dealing.[36]

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22. *Hays v General Electric Co*, 151 F Supp 2d 1001, 1008-09 (ND Ill 2001) (applying Illinois law).

23. *McCarty* at 511, 411 NE2d at 945; *Gord Industrial Plastics, Inc v Aubrey Mfg, Inc*, 103 Ill App 3d 380, 385, 431 NE2d 445, 449 (2d D 1982).

24. See *Gord* at 385, 431 NE2d at 449; *Album Graphics* at 347, 408 NE2d at 1048.

25. *Ebert v Dr. Scholl's Foot Comfort Shops, Inc*, 137 Ill App 3d 550, 559, 484 NE2d 1178, 1185 (1st D 1985); *Johnson v Whitney Metal Tool Co*, 342 Ill App 258, 267, 96 NE2d 372, 377 (2d D 1950) (later attempted acceptance of previously rejected offer was ineffective because rejection of initial offer left situation as if no offer had been made).

26. See *Gord* at 386, 431 NE2d at 449; *Big Farmer* at 246-47, 581 NE2d at 785.

27. *Tecumseh Intl Corp v City of Springfield*, 70 Ill App 3d 101, 106, 388 NE2d 460, 463 (4th D 1979) (holding that unilateral conduct by defendant city that recognized existence of conduct was insufficient to establish sales contract under section 2-207(3).

28. 810 ILCS 5/2-207(3); *Big Farmer* at 247, 581 NE2d at 785.

29. *McCarty* at 511, 411 NE2d at 945, citing *C. Itoh & Co (America), Inc v Jordan Intl Co*, 552 F2d 1228 (7th Cir 1977) (other citations omitted); see also *Album Graphics* at 348, 408 NE2d at 1048 ("Since the invoices do not contain a term which also appears as part of the alleged contract in a writing sent by plaintiff, the invoice terms cannot become part of the contract").

30. Gap-filling terms involve basic contractual issues, not limitations or material changes to the agreement. Some examples are: UCC §§2-305 (price); 2-306 (quantity); 2-308 (place of delivery); 2-309 (time of delivery); 2-310 (time and place for payment); 2-503 (tender by seller); 2-509 (risk of loss); 2-511 (tender by buyer); 2-513 (buyer's inspection).

31. *In re Estate of Rennick*, 181 Ill 2d 395, 406, 692 NE2d 1150, 1156 (1998) (defining judicial admissions as "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge."); *Roti v Roti*, 364 Ill App 3d 191, 200, 845 NE2d 892, 900 (1st D 2006) ("[A]llegations contained in a complaint are judicial admissions and are conclusive against the pleader.").

32. See *Itoh*, 552 F2d at 1237.

33. *Blommer Chocolate Co v Bongards Creameries, Inc*, 635 F Supp 919, 928 (ND Ill 1986) (applying Illinois law).

34. Id at FN1; *Construction Aggregates Corp v Hewitt-Robins, Inc*, 404 F2d 505, 510 (7th Cir 1969) (applying Illinois law).

35. For example, UCC §1-205 ("A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct"); *Step-Saver Data Systems, Inc v WYSE Technology*, 939 F2d 91, 103 (3d Cir 1991).

36. *Step-Saver*, 939 F2d at 103-04; accord *Maxon Corp v Tyler Pipe Industries*, 497 NE2d 570, 575-76 (Ind App Ct 1986) ("An exchange of identical forms on prior occasions does not, of itself, establish a common basis of understanding.").

Conclusion

When a sales transaction goes awry and the only evidence of the parties' agreement consists of form documents such as price quotations, purchase orders, and invoices or acknowledgments, the determination of what constitutes the agreement, and what its terms are, can be confusing. In such cases, the offer and acceptance will be determined by looking at the parties' acts, expressed intentions, and the circumstances of the transaction.

Nevertheless, the presence in form documents of clauses that expressly limit acceptance to the terms stated therein and that state that any alternative terms proposed by the other party are rejected unless expressly assented to in writing can greatly affect the determination of a putative contract under section 2-207. Their inclusion in a form document helps a party increase the chance that its terms will control the agreement.

Provided your party is careful not to express an acceptance that it does not intend, the use of such limiting clauses increases the likelihood of a favorable result because the other party is likely to either (1) accept your terms, which then control the contract, (2) expressly reject your terms so no contract is formed (but at least there is no contract with unfavorable terms supplied by the other party), or (3) reject your terms but then perform, creating a contract under section 2-207(3). Because a contract under section 2-207(3) is based upon the terms in the parties' documents that agree, combined with UCC gap-filling terms should they prove necessary, it is less likely to have "unpleasant surprises" that could lead to an undesired result in litigation.

Another lesson is that all rejections should be written and express. Having to establish at trial that a party employee made an oral rejection of the other party's terms can be difficult, and the results are uncertain, possibly leading to an unfortunate and costly outcome. Therefore, it is a best practice for a company to ensure that its rejections of contract terms and conditions are written and express. ■

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