

Magic Language For Your Sales Order Form

By Raymond P. Kolak

Do you sell a product? What are your terms of sale? Have you ever read the fine print on the backside of your sales order form? (Or even less likely, the fine print on the backside of your *customer's* purchase order form?).

You receive a purchase order which specifies that your product must carry a warranty unlimited in time. You respond with your sales order form, in which you give your standard 90-day warranty. I assume that the forms simply pass in the mail, and neither of you sign each other's form. Your product fails in 180 days. Do you have to replace or repair it? Do your customer's terms govern, since your customer sent his purchase order form first? Do your warranty terms apply, because you set the terms as the seller?

The terms of sale of products in the United States are governed principally by two sets of rules: the terms in the purchase order and sales order forms, and by a set of laws called the Uniform Commercial Code, or UCC. The UCC was written by law professors in the 1950s, and intended to be a model code governing the sales of goods and other commercial matters. It has been adopted, not by Congress, but by the legislatures of all 50 states and the District of Columbia. It is for the most part uniform, though each state has chosen to make small modifications in various parts of it.

Prior to adoption of the UCC, the courts imposed a "mirror image" rule for the offer (in most cases, the purchase order), and the acceptance (usually the sales order). In order for a valid contract to be formed, the purchase order and sales order had to be mirror images. In the case of your warranty dispute, no contract would even be formed, since you and your customer never agreed on the terms of the warranty.

The UCC wisely rejected the mirror image rule in favor of a more pragmatic test. If the conduct of both parties recognize the existence of a contract, then the law will say that a contract has been formed, even if the writings do not agree on every term. In other words, the law professors who wrote the UCC knew that you don't compare the fine print on your sales order form against the fine print on each of your customer's purchase order forms; at most you check the obvious matters on the front side like SKU, quantity, price, delivery date, and payment terms. Even if the fine print is conflicting, if you manufacture and ship the goods, and your customer accepts delivery, then a contract is formed.

But whose terms apply? The UCC gives a complicated answer. The contract formed consists of the terms on which the writings of the parties agree (assume this means SKU, quantity, price, delivery date, and payment terms). As a general rule, any additional terms also become part of the contract, unless the additional terms "materially alter" the contract. What does "materially alter" mean? Examples include a clause negating standard warranties given in the industry, or a clause requiring 100% on-time

deliveries in an industry which allows greater leeway. Non-material alterations include a clause fixing a time period for complaints within customary limits, or a clause imposing interest for late payments. Unfortunately, the UCC leaves most of the interpretation of this section up to the courts to decide on a case-by-case basis. What is a “material alteration” to one judge may be non-material to the next.

So your contract consists of the terms in your sales order form and your customer’s purchase order form which are in agreement, plus any additional terms which do not materially alter the contract. The conflicting terms and the materially altering terms are thrown out. They are replaced by the “gap-fillers” found in the UCC.

The UCC requires only that the parties agree on the goods to be sold and the quantity of goods. All other terms - price, delivery date, payment terms, warranties, and so on - will be provided by the UCC if the parties don’t specify them or can’t agree to them. For example, if price is not specified, then the price is supposed to be a reasonable price at the time for delivery. In the case of your dispute over the length of the warranty, an Illinois court held that you must give and your customer must accept a warranty of “reasonable duration”, whatever that means.

For the most part, the gap-fillers supplied by the UCC are fair to both seller and buyer. The law professors who wrote the UCC wanted a code that would be adopted by all states, and would receive the support of both sellers and buyers throughout the nation. Now, we lawyers, being advocates for our clients, don’t want to stop at a set of rules which are merely fair to our client; we want the rules to favor our client to the extent possible. Thus is generated the fine print which you never bother to read.

Your goal should be to try to apply the set of rules in your sales order (or purchase order) form if possible. If not, then you want a court interpreting your contract to default to the gap-fillers in the UCC, which are basically fair. You want to avoid having the other party’s fine print hoisted upon you, because their fine print gives the other party the advantage.

Here is where I see problems. We know that conflicting terms basically cancel each other out, but suppose there is no conflict? I sometimes see bare-bones sales order forms with no fine print at all on the back (take yours out now and look at it - am I talking about you?). Suppose your sales order form has no warranty term, and your customer’s purchase order has an warranty with an unlimited duration. In that case, the UCC says that if adding an unlimited warranty is a “material alteration”, it is thrown out, but that decision is up to a judge. There is a better way, a sure way, to make certain that at minimum, you end up with the UCC’s “gap-fillers”, instead of the other party’s slanted terms.

This is to put the “magic language” in your sales order and purchase order forms. The magic language says that you expressly limit your acceptance of the deal based on the terms in your sales (or purchase) order form, and reject any other conflicting or additional terms in the other party’s form. If this magic language is present in your form,

then the UCC says that all conflicting terms are thrown out, and all additional terms are thrown out, whether or not the additional terms materially alter the contract or not. You don't have to worry or guess whether the additional term is a material alteration, since it goes out automatically.

With the magic language, if the other party does not have a well-drafted form, you may indeed get the advantageous terms that your attorney drafted for you. If the other party has an equally strong form, then at minimum you get the standard terms under the UCC, which are not too bad. The magic language is so simple, yet so often not used. If you sell products and don't have the magic language, get it immediately.

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