

20TH ANNUAL
**Electrical
 Safety, Reliability and
 Sustainability**
 Conference &
 Exhibition

April 6-9, 2017
 Island Hotel
 Newport Beach
 Newport Beach, CA
www.pearl1.org




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**MAXIMIZING SUCCESS AND
 MINIMIZING EXPOSURE IN A
 LITIGIOUS ENVIRONMENT**
AKA SWIMMING WITH THE SHARKS




**Avoiding liability and legal
 entanglements** (in 50 minutes)

- Purchase and Sale
- Product Liability
- Warranties
- Risk of Loss
- Insurance Coverage
- Battle of the Forms



Sales of Goods: UCC or Contract

- UCC Article 2 governs
- Contractual terms govern, and may trump statutory law
- Acceptance of Goods
 - *Per contract or actions*
- Rejection of Goods
 - *Standards*
- Revocation of Acceptance
 - *Timeliness; Ignorance of grounds for revocation*



Sales of Goods: Reclamation Right in Bankruptcy

Federal statute - 11 U.S.C. § 546(e).

- If you sell goods and the buyer files bankruptcy you may be able to recover your goods **if you act quickly**.
- Make written demand for the return of the goods within **45 days** after the buyer receives them.
- If buyer files bankruptcy, you have **20 days** after the bankruptcy was filed to make your demand.
- If buyer or bankruptcy trustee do not return the goods, file an action in bankruptcy court as soon as possible. If successful, the costs involved in the action are recoverable against the bankruptcy estate.
- This is a right to be exercised with speed, or not at all.

Product Liability Exposure

- Proliferation of claims
- Standard procedure to include every manufacturer and supplier up and down the chain of production and installation
- Is the product defective
 - *Manufacturing defect (the "oops" cases)*
 - *Design defect (bad decision or bad execution?)*
 - *Warning defect (missing or inaccurate?)*



How to decrease the impact of your worst nightmare



Warranty Issues



- Express
 - *Affirmation of fact or promise becomes part of the "basis of the bargain"*
- Implied
 - *UCC: merchantability and fitness for particular purpose*
 - *Case law has extended beyond immediate "vertical" relationship between seller and buyer, and "horizontal" privity that plaintiff be the buyer*

Avoiding Warranty Claims

- Limiting risks
 - Transfer risk – get hold harmless / indemnification from suppliers
 - Ensure your products meet standards
 - ✓ PEARL standards
 - ✓ US or state regulations
 - ✓ OEM manuals (?)
 - Safety reviews
 - Keep good records
 - Provide warning labels if needed
 - Double check your documentation, including warranties

GL Exclusions

- “Expected” or “Intended” Harm
- “Insured Contract”- Insured assumes the liability of a third party
- Effect of your product being modified or included in other product – This is part of the impaired property theory.
- “Business Risk”
 - *“your product” – damage arising out of your product*
 - *“impaired property” – defective products are used to build other products*
 - *“SisterShip” Exclusion – product has been removed from the market.*

Issues Affecting Insurer’s Obligations

- Notice by Insured of Event
- “Claims made” or “occurrence” policy
- Number of Occurrences
 - *Substantially contemporaneous?*
- Arising over multiple years
- Coverage Territory



Contracts, Forms, and Lawyers (your 3 favorite things)

- Evolution of commerce and technology
- Informality of communications
- Email, social media
- Contract amendment via Email? Via IM?
- Changes in statute and case law
 - *The old rule that “two officers must sign” may be replaced by a tweet*
 - *Case law evolves to meet changing conditions*

Uniform Electronic Transmissions Act

- *Goal is to standardize law and case outcomes nationwide*
- *UETA establishes the legal equivalence of electronic records and signatures with paper writings and manually signed signatures, removing barriers to electronic commerce.*
- *Parties to electronic transactions come under UETA, but they may also opt out. They may vary, waive or disclaim most of the provisions of UETA by agreement, even if it is agreed that business will be transacted by electronic means.*

UETA Fundamental Rules

- "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form."
- "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."
- any law that requires a writing will be satisfied by an electronic record.
- any signature requirement in the law will be met if there is an electronic signature.

Electronic Signatures

An **electronic signature**, or e-signature, is any electronic means that indicates either that a person adopts the contents of an **electronic message**, or more broadly that the person who claims to have written a message is the one who wrote it (and that the message received is the one that was sent). By comparison, a **signature** is a stylized script associated with a person. In commerce and the law, a signature on a document is an indication that the person adopts the intentions recorded in the document.

ESIGN

▪ Electronic Signatures in Global and National Commerce Act

- Federal law validating electronic communications: applies to interstate commerce
- Provides that a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

▪ Retention of contracts and records

Section 101(d) provides that if a law requires that a business retain a record of a transaction, the business satisfies the requirement by retaining an electronic record, as long as the record "accurately reflects" the substance of the contract and is "accessible" to people who are entitled to access it "in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing or otherwise."

Battle of the Forms

Common Law Background

- **Mirror Image Rule:** In order to have a contract, the acceptance has to be a mirror image of the offer (if not mirror image, treated as a counter-offer)
- **Last Shot Rule:** If you have a counter-offer, and acceptance of the counter-offer by performance, then the terms last sent terms should control.

UCC (Uniform Commercial Code – contracts for the sale of goods (>\$500))

- UCC Section 2-207 overrules the mirror image and last shot rule
 - ❖ If parties exchange writings, differences in "boilerplate" terms won't prevent formation of contract
 - ❖ UNLESS acceptance is expressly made conditional on assent to additional or different terms
 - ❖ Situation arises where you start with a document (say a PO) and then get a second document (different PO) exchanged
 - ❖ Are the terms "additional" or "different"

Just when you thought it was safe to doze off: more on the

Battle of the Forms

- Between merchants, proposed revisions become parts of contract unless:

- Offer *expressly* limits acceptance to terms of offer;
- They *materially* alter it; OR
- Notification of objection has already been given or is given within reasonable time after additional terms are proposed

- Conduct by parties that recognizes the existence of contract is sufficient (such as partial or full performance)

- *Even though writings don't establish a contract*
- *In this instance, terms are those that are consistent between parties based on writings*
- *With supplementary terms incorporated under UCC*

Dangers of Using Social Media for Business Purposes

✓ Example: CX Digital Media, Inc. v. Smoking Everywhere, Inc.

(S.D. Fla. 2011)

- *Court held that a formal written agreement could be modified online*
- *During an instant message session*
- *Written agreement limited compensation to 200 sales per day. In the message session, one party said "NO LIMIT"*
- *Court found that the IM was a "writing" that amended the agreement*

Nightmare Cases

Mabus v. General Dynamics C4 Systems, Inc. (Fed. Cir. 2011)

- ✓ *DOD contract provided that can't electronically transmit orders*
- ✓ *Parties negotiated to modify contract terms*
- ✓ *DOD/Navy began issuing orders via email*
- ✓ *Court of Appeals found the email orders binding*

Bazak International Corp. v. Tarrant Apparel Group (N.Y. 2005)

- ✓ *NY Court held that the emails between parties provided objective indication of existing agreement between parties*
- ✓ *Court held that emails/ letters formed contract*
- ✓ *Contract was originally oral; confirmed via email*
- ✓ *Under the UCC, e-mail can satisfy the writing and confirmation requirement*

Bottom Line Lessons #1: Avoid Disputes and Litigation

- ❖ Consider putting some sort of qualifying language into PO's and other communications to avoid the Battle of the Forms. Example: prohibit modification except by express written agreement

- ❖ Anti-modification language:

These terms may not be modified or supplemented through future communications or proposals from vendor (or customer). Any such communications or proposals are rejected, null and void. Such communications or proposals include, but are not limited to, terms stated in invoices, emails, web pages, product packaging, shipping documentation, or terms incorporated onto or into product itself, such as label or click-wrap agreement.

Bottom Line Lessons #2:
Avoid Disputes and Litigation

- ❖ Always state terms
 - ❖ If you are silent, you are more likely to lose
 - ❖ State terms often and clearly
 - ❖ Make sure terms on PO's/contracts aren't contradicted by website terms
- ❖ Consider bold underlined provision that agreement and any modifications require approval by Sales Manager or Officer (VP or above)
 - ❖ That way an email doesn't create a binding contract
 - ❖ Limit the damage that a sales associate can do

Anti-Modification Language

This transaction is governed by the terms and conditions set forth herein, and may not be modified except by authorized representatives of the parties, with handwritten signatures on paper or by fax.



The Path to Litigation or Worse:
A Top Five List

1. Not including protective language (such as: "no modifications without written approval of Officer or Sales Manager")
2. Not insisting upon your own terms
3. Not reading thoroughly and correcting misstatements by the other side
4. Rapid fire communications
5. Failing to think through effects of what you say, when you say it, and what you don't say

Heed these lessons; be paranoid at all times; call me when you need me. Or you will look like this:



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