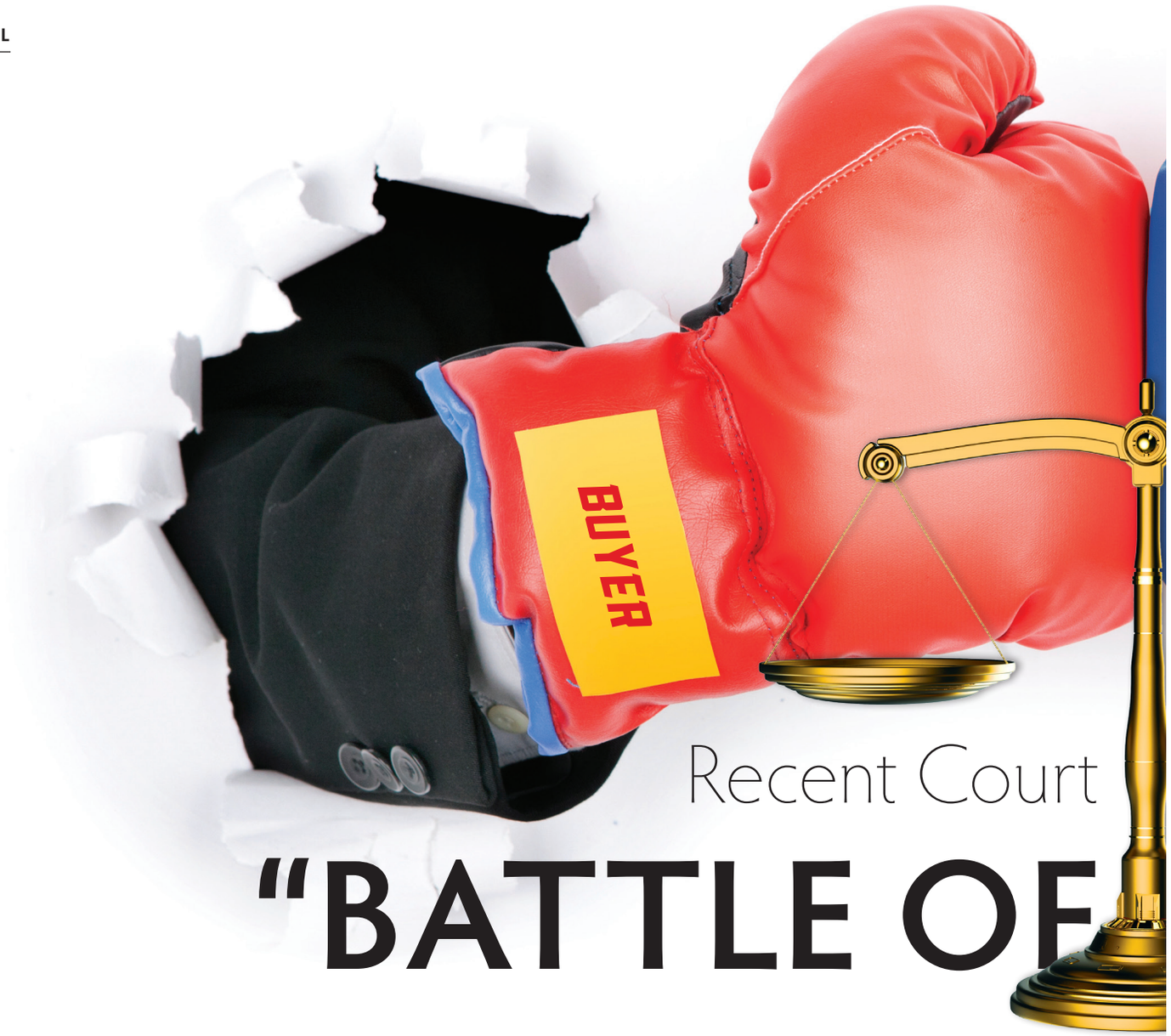

Recent Court "BATTLE OF

A SELLER AND BUYER SEEKING TO MINIMIZE LEGAL UNCERTAINTIES REGARDING THEIR BUSINESS RELATIONSHIP SHOULD ENTER INTO A SINGLE, FULLY SIGNED CONTRACT THAT CLEARLY SETS FORTH THE VARIOUS TERMS AND CONDITIONS OF THEIR TRANSACTIONS. IN REAL-WORLD SUPPLY CHAINS, HOWEVER, CONTRACTS FOR THE SALE OF GOODS ARE MORE OFTEN FORGED THROUGH LANGUAGE BAKED INTO THE PARTIES' RESPECTIVE PURCHASE ORDERS, ACKNOWLEDGMENTS AND INVOICES.

This often results in a "battle of the forms," where the buyer's and seller's respective transaction documents contain competing terms—and a court applying the Uniform Commercial Code (UCC) becomes the referee. A recent decision of the United States District Court for the District of Massachusetts, in *Optim LLC v. Freeman Manufacturing LLC*, offers another instructive look at how a court applies the UCC to resolve a battle of the forms.

SOME BACKGROUND ON UCC ARTICLE 2 AND THE "BATTLE OF THE FORMS"

Article 2 of the Uniform Commercial Code (UCC) governs the sale of goods, including the formation of a contract for the sale of goods. A contract is generally formed via an offer by one party (such as a buyer's purchase order) and acceptance by the other party (such as a seller's acknowledgment or confirmation). However, a "battle of the forms"

Decision on the THE FORMS"

ensues when a party's acceptance includes additional or different terms in response to an offering party's terms. UCC § 2-207 establishes the following guidelines for determining the terms of a contract where there is a battle of the forms:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, *unless acceptance is expressly made conditional on assent to the additional or different terms.*

(2) **The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:**

a. ***the offer expressly limits acceptance to the terms of the offer;***

b. they materially alter it; or

c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.[1]

In the *Optim* case, the court applied UCC § 2-207(1) and (2), as adopted by the Commonwealth of Massachusetts, to address a battle of the forms that arose from competing terms in the buyer's purchase orders and seller's invoices.

A "BATTLE OF THE FORMS" ENSUES WHEN A PARTY'S ACCEPTANCE INCLUDES ADDITIONAL OR DIFFERENT TERMS IN RESPONSE TO AN OFFERING PARTY'S TERMS.

BUYERS AND SELLERS OF GOODS SHOULD CLOSELY SCRUTINIZE THE LANGUAGE CONTAINED NOT ONLY IN THEIR OWN TRANSACTION DOCUMENTS, BUT **ALSO IN THEIR COUNTERPARTIES' TRANSACTION DOCUMENTS THEY MAY RECEIVE.**

RELEVANT BACKGROUND REGARDING THE OPTIM CASE

Optim LLC is a Delaware company operating in Massachusetts that manufactures medical devices, including the "X-7" tube—a medical insertion tube used by physicians to transmit images of the heart. Freeman Manufacturing LLC produced specialized plastic sheathing that Optim had used to create its X-7 medical insertion tubes. For more than a decade, Optim had purchased sheathing from Freeman by sending purchase orders ("POs") that contained the quantities of sheathing being ordered by Optim, the total costs for the sheathing and Optim's standard terms and conditions. Freeman then fulfilled accepted POs.

In early 2021, Optim began issuing revised PO forms, which included robust express warranties—such as warranties of merchantability, fitness and freedom from defects. The relevant warranty provision in Optim's PO stated:

- In addition to all other express or implied warranties, seller represents and warrants that any materials (including packaging) provided under this purchase order shall: (1) conform to the description in the purchase order; (2) be free from defects in materials and/or workmanship; (3) conform to buyer's instructions, specifications, drawings and data; (4) be merchantable; (5) be free from defects in design and be fit for the purpose intended; and (6) conform to all warranties, express or implied by law. Seller warrants all materials furnished and/or installed hereunder to be new and not used or reconditioned (unless otherwise specified in this purchase order). Seller warrants that it will perform this purchase order with the degree of skill and judgment which is normally exercised by recognized firms with respect to materials of a similar nature, and this will be provided in a good, competent and workmanlike manner. These warranties, and all other warranties, express or implied, shall survive delivery, inspection, acceptance and payment.

Critically, Optim's purchase orders also contained terms stating that acceptance of the purchase order was expressly limited to the terms and conditions of the PO, stating as follows:

- **Acceptance of Purchase Order:** Acceptance of this purchase order by seller is expressly limited to the terms and conditions contained in this purchase order. Any term of condition stated by the seller in any prior proposal, on Seller's acknowledgment form, or in otherwise acknowledging or accepting this purchase order is deemed by buyer to be a material alteration of this purchase order and is hereby rejected unless buyer specifically agrees otherwise in writing.

In addition, Optim's PO stated that:

- Acceptance of the materials covered by this purchase order will not constitute acceptance by buyer of seller's terms and conditions. Any of the following acts by seller will constitute acceptance of this purchase order and all of its terms and conditions: signing and returning a copy of this purchase order, delivering any of the materials ordered, commencing performance or informing the buyer in any manner of commencement of performance, or returning seller's own form of acknowledgment.

Freeman continued to fill Optim's POs, shipping the sheathing and sending invoices to Optim for the goods Freeman had sold and delivered to Optim. Freeman's invoices disclaimed warranties, stating that "Freeman is not liable and does not guarantee yield, quality or any production of any material." Significantly, Freeman's invoices also did not state that Freeman's acceptance was expressly conditioned on Optim's assent to all additional and different terms contained in Freeman's invoices.

THE PARTIES' BATTLE OF THE FORMS

A dispute arose in 2022, when Optim's customer reported that numbers and hash marks painted on the finished tubes that Optim had sold to the customer were flaking off. Optim traced the issue to allegedly excessive moisture in Freeman's extrusion process, and ultimately sued Freeman for breach of contract, breach of express and implied warranties, negligent misrepresentation, and negligence. Optim thereafter moved for summary judgment, relying on its POs as the binding contract between the parties in support of its breach of contract and breach of warranty claims.

Freeman instead argued that the court should disregard the terms of Optim's POs, contending that the parties' eight-year course of dealing had

already established a "contract" between the parties. Freeman also argued that even if Optim's POs constituted a binding contract, the POs' terms should still be ignored because Freeman did not assent to these new terms and its invoices contained contradictory terms.

This was a classic battle of the forms, where Freeman as seller and Optim as buyer sought to enforce contradictory terms with respect to their contract. The Court applied the three-part test in UCC § 2-207(2) to determine which terms control.

THE COURT'S DECISION

The Court sided with Optim on the threshold issue of contract formation. The court concluded that Optim's revised purchase orders "undercut the parties' prior course of dealing," referencing Massachusetts precedent that later-issued forms can override earlier informal understandings. The Court found that Freeman had accepted Optim's POs by shipping plastic sheathing to Optim, resulting in a binding contract pursuant to UCC § 2-207(1). The court then relied on UCC§ 2-207(2)(a) in holding that the disclaimers in Freeman's invoices did not become part of the parties' contract, because Optim's PO (i.e., the offer) expressly limited acceptance to the POs' terms). As such, the parties were subject to a binding contract, with that contract limited to the terms of Optim's POs.[2]

TAKEAWAYS FROM THE DECISION

The *Optim* decision highlights several important lessons for buyers and sellers of goods:

- The use of clear "expressly limits acceptance" language in a purchase order is a powerful tool. By including such magic words, Optim ensured that its terms, rather than Freeman's disclaimers, controlled the contract. Sellers who wish to have their own terms prevail should make their acceptance "expressly conditional on buyer's assent."
- A long-standing course of dealing does not necessarily govern the parties' contractual relationship once one of the parties, like Optim, issues a materially new document (Optim's revised PO) to its counterparty (here, Freeman). A court may view that document as a fresh offer subject to UCC § 2-207, rather than as a mere continuation of past practice.
- Invoice disclaimers may ultimately be unenforceable if they lack language stating that acceptance of a PO is "expressly conditional" on the buyer's assent to the seller's terms.

Buyers and sellers of goods should closely scrutinize the language contained not only in their own transaction documents, but also in their counterparties' transaction documents they may receive. Of course, it may be impracticable (or at least, highly inefficient) to closely review the fine print of every invoice and PO in real-time—and it may be difficult to determine with certainty which terms control in the event that documents have competing provisions. In light of this, trade creditors seeking clarity on the terms of their dealings with a given counterparty should consider entering into a written agreement—preferably with creditor-friendly terms and conditions—that is signed by both parties. BC

1 *UCC § 2-207 (emphasis added).*

2 *After resolving the battle of the forms (i.e., after having concluded Optim's POs constituted a binding contract), the court: (i) denied summary judgment with respect to Optim's breach of contract and certain of Optim's warranty claims, finding genuine disputes over whether the sheathing was actually defective and, if so, whether the defect was attributable to Freeman or to Optim's own post-extrusion processes, and (ii) granted summary judgment* against *Optim on its implied warranty of merchantability claim because paint adhesion was a* particular *rather than an* ordinary *use of the sheathing. The Court held the remaining claims may proceed to trial.*

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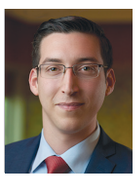

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TRADE CREDITORS SEEKING CLARITY ON THE TERMS OF THEIR DEALINGS WITH A GIVEN COUNTERPARTY SHOULD CONSIDER ENTERING INTO **A WRITTEN AGREEMENT—PREFERABLY WITH CREDITOR-FRIENDLY TERMS AND CONDITIONS—THAT IS SIGNED BY BOTH PARTIES.**

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