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# Did I Sign That?

## Key Terms in a Contract

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# Contracts - Generally

- Definition (Black's Law Dictionary, 9<sup>th</sup> Edition) An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law
- Types
- Terms

# Duty of Good Faith and Fair Dealing

- Applies to all contracts
- Implied covenant on the part of each party to cooperate
- Examples of bad faith

# Contracts of Adhesion

- Definition (Black's Law Dictionary, 9<sup>th</sup> Edition):  
“A standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.”
- High pressure situations
- Unequal bargaining power

# Statutory Issues

- Generally parties are free to contract and agree to terms
- Gap-fillers - UCC
- Contracts may need to adhere to certain ancillary laws

# Structure of a Contract

- A. Parties/Date
- B. Background
- C. Definitions
- D. Agreement
- E. Miscellaneous Clauses
- F. Signatures
- G. Exhibits
- H. Amendments/Addendums/Change Orders

# Boilerplate Terms

1. Fixed or standardized contractual language
2. Proposing party
3. Relatively nonnegotiable



# Scenario

Supplier is the owner of large orange grove in California. The California corporation supplies oranges nationally and internationally. The Buyer is small corporation (or LLC?) with a few retail grocery stores on the east coast. The parties enter into a distribution agreement for the supply/purchase of oranges. The parties have been working on an informal trial basis without a written agreement. The parties now wish to enter into a formal written agreement. Supplier has gone ahead and requested its attorney draft the agreement. Buyer, the non-drafting party, received the Supplier's agreement and is expected to sign this agreement as drafted. Essentially, Buyer the non-drafting party in our scenario, must react to this agreement and determine how to proceed moving forward.

# Contract Clauses

- 1) Parties
- 2) Change on Order Quantity/Price
- 3) Risk of Loss
- 4) Termination
- 5) Cure
- 6) Confidentiality/Non-Solicitation/Non-Compete
- 7) Indemnification
- 8) Attorneys' Fees & Costs
- 9) Integration
- 10) Assignment

# Parties

Authority to Bind: Who has the authority on behalf of the Parties to enter into a binding contract.

## Clause:

**AGREEMENT** made this \_\_\_ day of October, 2009, by and between Grocery Store, Inc., a Pennsylvania Corporation having its principal offices at 41 E. Orange St., Lancaster, Pennsylvania 17601 (hereinafter referred to as “Buyer”) and California Orange Grower, Inc. having its principle offices at Sunny California (hereinafter referred to as “Supplier”).

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement as of the day and year first above written.

Buyer: Grocery Store, Inc.

By: \_\_\_\_\_  
President

Seller: California Orange Grower, Inc.

By: \_\_\_\_\_  
President

# Parties

## Issue in Question:

Supplier's marketing manager receives a request from Buyer for an additional 1000 pounds of oranges at the same price per pound that Buyer is currently purchasing oranges at. Marketing manager generally does not deal with these types of requests. Marketing manager agrees thinking that he has benefited Supplier. Buyer faxes confirmation of the additional order and marketing manager signs it and returns it to the Buyer. Unbeknownst to marketing manager, Supplier, that same day, entered into another commitment with another retail operation. Supplier is unable to fulfill the promise made by the marketing manager. The only way that Supplier can do so is to purchase oranges from another supplier and resell to Buyer-at a financial loss to Supplier. Buyer takes the position that Supplier is bound by the contract. Supplier takes the position that marketing manager was not able to bind Supplier.

# Change in Order Quantity/Price

## Clause:

“Buyer shall maintain at all times an adequate stock of oranges to meet Buyer’s trade requirements. For all purchases of oranges from Supplier, Buyer shall give a minimum of 30 days' advance notice of quantity increases, and a minimum of 60 days' advance notice of quantity decreases. Suppliers may change orange prices at any time, upon 30 days’ advance notice.”

# Change in Order Quantity/Price

## Issue in Question:

Buyer's high season occurs November 30 through December 31 every year. Buyer fails to inform Supplier that Buyer's quantity needs will decrease dramatically in January. Buyer receives more oranges in January than Buyer can possibly sell. During a single three-month span, Supplier makes price increases of five percent each month, for a total of 15 percent.

# Risk of Loss

## Clause:

“The parties acknowledge that this Agreement relates to the price and service features relating to BROKER, as a BROKER, arranging for the transportation of a shipment for some third party shipper or consignee. With respect to cargo liability, CARRIER, as a motor CARRIER, is responsible to the shipper or consignee, as the case may be, for cargo loss or damage. CARRIER assumes full and complete responsibility, and shall be liable to the BROKER and the shipper for any and all loss, damage or spoilage to, or delay of, any shipment of property while in its possession or control. The liability of CARRIER under this Agreement for lost, damaged, delayed, spoiled or destroyed property shall be for the full value of the property, meaning its replacement cost as established by trade sale or other invoice documentation, plus any additional transportation costs that may be required, together with other consequential damages. In the event that a bill of lading, manifest or other form of freight receipt or contract is utilized in a shipment (Other Document), any terms, conditions and provisions (collectively, Terms) of such Other Document shall be subject and subordinate to the Terms of this Agreement. In the event of a conflict between the Terms of such Other Document and the Terms of this Agreement, the Terms of this Agreement shall control.”

# Risk of Loss

## Issue in Question:

In contracts for a sale of goods, Article 2 of the UCC contains shipping provisions – FOB, CIF, etc., which also serve to mark the shift of risk of loss for the shipment. In real estate transactions, the agreement will invariably provide that risk of loss stays with the seller. Whoever bears the risk of loss, the protection is to buy insurance.



# Termination

## Termination Clause:

180 days per extension. Seller shall have the right to grant temporary extensions of this Contract of up to 180 days per extension. Any such extension shall not be considered a renewal of this Contract. At the expiration date of this Contract, Seller will have the right of first refusal to enter into an additional supply contract with Purchaser. Seller will be awarded such additional supply contract if the Seller matches the terms of the written bona fide offer.

## Issue in Question:

Supply contracts and service contracts are notorious for having vague or one-sided termination provisions. Some form contracts contain no term or termination provisions. A buyer needs to make sure there is an exit to a relationship that becomes unprofitable.

# Cure

## Cure Clause:

Purchaser understands and agrees that, in the event of a default or breach of this Contract for any reason, Seller shall have to right to exercise Seller's rights under any and all instruments executed by Purchaser to secure Purchaser's obligations under this Contract. In the event of a default or breach of any obligations of Purchaser to make payments hereunder or under any other agreement related to the purchase and sale of product under this Contract between Seller and Purchaser, Seller shall have the right to remove all products from Purchaser's Premises or lock same. Seller shall credit the sale of such products against any indebtedness of Purchaser due and owing to Seller in an amount equal to the invoice price of such products to Purchaser (less Seller's cost to remove and restock such product).

...

Subject to any other requirements of law, at the option of Seller, this Contract may be terminated without further notice, (i) upon the failure of Purchaser to desist from any such acts or conduct prohibited under this Contract after written notice from Seller to do so, or (ii) upon Purchaser's failure to pay any amount when and as due, and no forbearance, course of dealing, or prior payment shall affect these rights of termination.

# Cure

## Issue in Question:

It is a general principal of contract law that a defaulting party has the right to cure (if possible). Many contracts of adhesion expressly withhold the right to cure. It is not necessarily mandatory to include cure provisions, but it is always easier to have cure provisions incorporated into the writing, to avoid a dispute about whether one has the right to cure.

# Confidentiality/Non-Disclosure/ Non-Compete

## Clause:

“The Parties agree to treat all Confidential Information of each in a secret and confidential manner at all times during and after the termination of this Agreement. The Parties further agrees not to make use of or disclose any Confidential Information, directly or indirectly, for any purpose whatsoever, to any person or entity outside of the Buyer or Supplier. The Parties further agrees that, upon the request of the other or upon termination of this Agreement, each Party will turn over to the other all Confidential Information belonging to the other and shall not keep any duplicates or copies of any Confidential Information.”

# Indemnification

## Clause:

“Buyer shall be responsible for defending any claim, suit or proceeding arising from or relating to Buyer’s negligence or malfeasance in the course of carrying out Buyer’s business relative to this Agreement, and all loss, expense or costs related thereto. Buyer shall indemnify, defend and hold the Supplier harmless from any and all such controversy, complaint, proceeding, claims and suits. To the extent the provisions of this Agreement are not in accord with the provisions of any other agreement to which the Company and Seller are a party; the provisions of this Agreement shall control.”

# Indemnification

## Issue in Question:

Buyer hires temporary workers who fail to keep the oranges cool by resetting the thermostat on the cooler after a delivery. Furthermore, the temporary workers fail to clean out the storage areas in the cooler where the oranges were placed, and the oranges were exposed to salmonella. Some customers purchased rotten oranges, while others purchased oranges that had salmonella contamination. Customers were outraged and sick. Buyer hopes to bring Supplier into the lawsuits, to help Buyer pay the damages that may otherwise bankrupt Buyer.

# Attorneys' Fees and Costs

Clause:

“Supplier shall be entitled to its attorneys’ fees and costs if it is the prevailing party in any legal proceeding with respect to this Agreement or any transaction contemplated hereby.”

**Issue in Question:** Supplier sues Buyer for breach of contract, asserting Buyer disclosed confidential information regarding the growing process of Supplier’s orange. Buyer is stunned, as these details are public knowledge and the information is already in the public domain. Buyer wins. Despite this victory, Buyer had to pay \$60,000 in attorneys’ fees and costs to defend itself in this lawsuit. Buyer desires to understand whether Supplier is obligated to pay its attorneys’ fees and costs.

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# Integration

Clause:

“This Agreement and the exhibits referenced herein represent the entire agreement between Supplier and Buyer with respect to the transactions completed hereby and supersede all prior agreements, whether written or oral, with respect thereto.”



# Integration

## Issue in Question:

The Buyer agrees to enter into a 1 year written agreement with Supplier. The agreement provides that Buyer would be able to preserve the price it paid for oranges before entering into the written contract only if Buyer makes a minimum purchase order. A pricing sheet was attached to the agreement and made part of it reflecting this price increase if a minimum purchase order was not made. A few months pass, and Buyer does not make the minimum purchase order. So, Supplier charges Buyer the higher price per orange as set forth in the pricing sheet. With this price increase, Buyer will no longer make a profit unless it, in turn, increases the price paid by its customers.

# Assignment

## Clause:

“This Agreement shall not be assignable and the performance of the duties hereunder may not be delegated by Buyer without prior written consent of Supplier. Supplier may assign any of its rights as well as delegate any of its duties and/or obligations under this Agreement in whole or in part to any affiliate or entity owning or acquiring a significant portion of the Supplier’s stock or assets.”

# Assignment

## Issue in Question:

Supplier has agreed to permit another company, the Fruit Grove Company, to acquire a significant portion of Supplier's assets in exchange for payment. Supplier assigns the agreement to the Fruit Grove Company. Buyer has learned that the Fruit Grove Company had multiple food safety infractions over the last few years and in the first month of dealing with Supplier, one of Buyer's customers has fallen ill immediately after eating a Fruit Grove Company orange. Buyer does not desire to deal with Fruit Grove Company going forward and has questioned the assignment by Supplier.

# Importance of Contract Review

Does the contract contain clauses never discussed?

Do the contract terms adequately reflect the agreement?

Is the contract comprehensive?

Does the contract contain inconsistencies?

Are the contract terms mutual or one-sided?

Have the parties anticipated scenarios that could arise and drafted the contract accordingly?

Does the contract contain vague or undefined terms?

Do the contract terms make sense?

Does Federal or State law speak to the contract topic?

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QUESTIONS & ANSWERS

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