Making Sense of the UCC Statute of Frauds

By Andrew Blum

Likely because of increased price volatility, general market pressures, and a greater reliance on just-in-time principles, litigation in Michigan involving the Uniform Commercial Code (UCC) statute of frauds for the sale of goods has exploded over the past two decades. Yet many Michigan businesses and even some Michigan attorneys remain unaware of the risk that a party's contract may not comply with the UCC statute of frauds.[1] Accordingly, this article begins with some basic principles regarding the statute and examines the issues created by its requirements. Except for very limited circumstances, under Michigan's statute of frauds, all contracts for the sale of goods priced above $1,000 (for example, raw materials and parts) are enforceable only if there is a sufficient writing signed by the party against whom enforcement is sought, stating a "quantity" of goods to be purchased.[2]

"We live in a rainbow of chaos." —Paul Cezanne

On its face, the UCC statute of frauds would appear so simple that it would be easily applied. However, that view is sadly mistaken. Instead, the requirements of MCL 440.2201 have spawned substantial litigation in Michigan and resulted in numerous decisions in the trial and appellate courts whose stated bases often conflict with each other. Thus, Cezanne's quote nicely sums up the current status of Michigan precedent interpreting MCL 440.2201. Because of these contradictory decisions, great uncertainty and significant hidden costs exist for Michigan businesses. This article addresses the sources of that uncertainty and offers practical suggestions to both practitioners and businesses on how to best minimize the resultant risks until the Michigan Supreme Court provides greater clarity. In light of this uncertainty, this article also humbly urges the Supreme Court to provide greater clarity to this key area of contracting for Michigan businesses.

Two contract forms satisfy the quantity requirement of the UCC statute of frauds

Among the myriad contract structures, two have been deemed sufficient to satisfy the quantity term requirement of this statutory provision rendering the contract enforceable. The first type of contract that has been found to satisfy MCL 440.2201 is the so-called *fixed quantity contract*. In this contract form, in a writing signed by both parties, a buyer agrees to buy and the seller agrees to sell a fixed numerical quantity (e.g., one million widgets or a million pounds of steel). Since both the buyer and seller have committed to a specific numeric quantity, the quantity terms of MCL 440.2201 are satisfied and the parties' signed contract would be enforceable.

The second type of contract found to contain a sufficient statement of quantity under the UCC is the written *exclusive requirements contract*. Under a written exclusive requirements contract, the buyer agrees to buy and the seller agrees to sell 100 percent of whatever part, raw material, or the like the buyer needs for a defined period. As long as the contract calls for in writing the exclusive purchase or sale of 100 percent of the buyer's requirements, courts have enforced such contractual arrangements.

Thus, if the objective is assuring enforceability of a contract for the sale of goods, one of these two contract forms should be used.

The risks associated with a nonexclusive requirements contract

At this point, the reader might wonder why this article is necessary since businesses can easily avoid the quantity term pitfalls of the UCC by using either the fixed quantity contract or the exclusive

requirements contract. However, Michigan practitioners and businesses often fail to use one of these contract forms, either because they are unaware of the UCC statute of frauds or because of a conscious desire to have more flexibility or perceived control in their business arrangements.

For example, some buyers may be concerned about having a sole source of supply for a designated period, while others may be concerned about committing to a fixed quantity for an extended period. As a result, businesses frequently enter into arrangements in which the buyers only purchase a portion of their requirements (e.g., 70 percent) from any one supplier for a given period. While such a flexible arrangement may have some business utility, this nonexclusive arrangement creates risks if one of the parties decides the relationship is no longer profitable and does not want to continue to either buy or sell the goods going forward. In that scenario, the buyer or seller may argue that the parties' requirements arrangement is unenforceable because it lacks exclusivity. The party taking that position would have precedent to support it[3] since some Michigan courts have refused to enforce "so-called requirements contracts" that do not require exclusivity.[4] At the same time, the party seeking to enforce a "contract" based on nonexclusive requirements would also have Michigan precedent favoring its position since other decisions applying Michigan law have enforced such nonexclusive arrangements.[5]

Thus, there is a direct conflict in Michigan between two competing lines of cases as to whether exclusivity[6] is required for the contract to be enforceable. This "unclear" and "not well settled"[7] state of Michigan law is arguably cause for Supreme Court intervention to provide clarity regarding whether exclusivity is required to create an enforceable requirements agreement. However, until the Supreme Court clarifies these competing lines of precedent, it is probably better practice to avoid using a nonexclusive business arrangement.

The risks of the blanket purchase order

Another type of alleged contract widely used in Michigan—the so-called "blanket purchase order"—also carries significant risks. A blanket purchase order is traditionally understood to be a purchase order issued by the buyer and often signed by the seller that does not contain a true measure of quantity in the quantity section but instead uses *blanket, 1.0, ex rel*, or other similar terms. However, despite its longstanding use,[8] both businesses and practitioners may want to consider moving away from the blanket purchase order in favor of either a fixed quantity contract or exclusive requirements contract. First, while it has been widely assumed that blanket purchase orders stated a sufficient quantity to assure enforceability under the statute of frauds,[9] recent Court of Appeals decisions like the *ACEMCO, Incorporated v Olympic Steel Lafayette, Incorporated* decision[10] as well as federal precedent applying Michigan law[11] have raised questions about the continued enforceability of blanket purchase orders here in Michigan. These problematic decisions have concluded (arguably erroneously) that a blanket purchaser order does not contain any "true" specific quantity nor any real commitment to purchase any quantity.[12] In light of these decisions, both practitioners and businesses may wish to avoid using this form of business arrangement until further clarity is provided by the Michigan Supreme Court.

The blanket purchase order contract form is a concern for another reason. Even courts that have decided that a blanket purchase order states a sufficient quantity for purposes of the statute of frauds[13] often have concluded that it is still up to the trier of fact to decide which quantities, *if any*, the parties intended under the blanket purchase order. Thus, a business using a blanket purchase order form could still be held to a higher or lower quantity than intended—or perhaps no quantity at all. As a result, businesses have more reason to avoid using a blanket purchase order if they want to ensure full enforceability.

Does a recent Michigan Supreme Court decision signal a less stringent approach to MCL 440.2201's quantity requirement?

While the Supreme Court has yet to provide meaningful clarity in the contexts of requirements contracts and blanket purchase orders, its recent opinion in *ACEMCO Incorporated v Ryerson Tull Coil Processing*[14] addressed alleged contracts that behave similarly to fixed quantity contracts but have some volume flexibility. Before this decision, courts had relied on the Michigan Court of Appeals unpublished decision in *Olympic Steel*[15] to conclude that the "quantity" stated in the contract must have a high threshold of specificity to be enforceable.[16] In *Ryerson Tull*, the

FAST FACTS

Many Michigan businesses and even some Michigan attorneys remain unaware of the significant pitfalls that result when a party's contract does not comply with Michigan's version of the UCC statute of frauds.

Smart practitioners and businesses should use the fixed quantity contract or the exclusive requirements contract to ensure that the agreement they draft will be enforceable under the UCC statute of frauds.

Supreme Court examined whether the Court of Appeals' more rigid application of the "quantity" requirement was proper in a fixed quantity range context.[17] In *Ryerson Tull*, the purchaser of steel asserted that a stated quantity range in a steel supply agreement (33,950,000 pounds plus or minus 20 percent) satisfied the quantity requirement of the statute of frauds and that recent Court of Appeals decisions were applying an overly rigid interpretation of the quantity requirement. The Michigan Supreme Court agreed with the purchaser's position and concluded that the fixed range language in the parties' agreement "unambiguously provides a quantity term" sufficient to satisfy the statute of frauds.[18] In light of the *Ryerson Tull* decision, the Michigan Supreme Court seems to be signaling its approval of a quantity range contract as setting forth a sufficient quantity under the statute of frauds. Moreover, the Court's decision could also be read as signaling a trend toward a less stringent and less demanding application of the quantity requirement of the statute of frauds that is more consistent with the nature of how businesses operate, characterized in earlier Court of Appeals decisions in *In re Frost Estate* and *Great Northern Packaging, Incorporated v General Tire and Rubber Company*.[19]

Whether the Supreme Court intended to send such signals to the Michigan courts remains an open question for two reasons. First, the Supreme Court has yet to follow the *Ryerson Tull* decision in any other statute of frauds case. Second, this decision has yet to be cited by any appellate court. Thus, whether *Ryerson Tull* represents a "sea change" in statute of frauds jurisprudence remains to be seen.

In light of the uncertainty with regard to how courts will interpret the quantity requirement of the UCC statute of frauds, practitioners should encourage their clients to conform to either a traditional fixed quantity contract or a written exclusive requirements contract to ensure the contract is enforceable. If a client insists on a different arrangement with more flexibility than either of these traditional forms, the practitioner should advise of the risk associated with this flexibility and urge the client to consider using a fixed quantity range contract like that approved in the Supreme Court *Ryerson Tull* decision. By following these relatively straightforward principles, practitioners will help clients minimize or avoid the pitfalls of the UCC statute of frauds and sidestep the "rainbow of chaos" currently present in Michigan law. ■

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ENDNOTES

1. See MCL 440.2201.
2. See MCL 440.2201 and Comment 1.
3. See, e.g., *Dedoes Indus, Inc v Target Steel, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 254413); *ACEMCO, Inc v Olympic Steel Lafayette, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2005 (Docket No. 250638) (both concluding that exclusivity is required to have an enforceable contract).
4. See *id.*
5. See *Johnson Controls, Inc v TRW Vehicle Safety Systems, Inc*, 491 F Supp 2d 707, 720 (ED Mich, 2007) (concluding that "Michigan does not require that requirements contracts be exclusive to be enforceable"); *Plastech Engineered Prod v Grand Haven Plastics, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 31, 2005 (Docket No. 252532), citing *General Motors Corp v Paramount Metal Prod Co*, 90 F Supp 2d 861, 873 (ED Mich 2000) (holding that exclusivity is not required for an enforceable requirements contract).
6. There is one other closely related area that causes uncertainty because of a current conflict in Michigan. Even if exclusivity is required under Michigan law, a dispute currently exists whether exclusivity must be expressly stated in the writing or can be proven by parol evidence. See, e.g., *Olympic Steel, supra* at *8 (holding that exclusivity must be present in the written contract).
7. *Eberspaecher North America, Inc v Nelson Global Products, Inc*, unpublished opinion and order of the U.S. District Court for the Eastern District of Michigan, issued September 23, 2012 (Docket No. 12-11045) n 4 (stating that "Plaintiff correctly points out that Michigan law is unclear as to whether exclusivity is a mandatory characteristic of a binding requirements contract" because of these contradictory Court of Appeals' decisions); *GRM Corp v Miniature Precision Components, Inc*, unpublished order of the U.S. District Court for the Eastern District of Michigan, issued January 8, 2008 (Docket No. 06-15231) at *5 (concluding that "Michigan law is not well settled as to whether a requirements contract must be exclusive").
8. See, e.g., *In re Dana Corp*, unpublished memorandum decision of the U.S. Bankruptcy Court for the Southern District of New York, issued November 14, 2007 (Docket No. 06-10354) at *3 (blanket purchase orders "are commonplace in the automotive industry in Michigan"); see also *ACEMCO, Inc v Ryerson Tull Coil Processing*, 482 Mich 999; 756 NW2d 74 (2008) (discussing the enforceability of blanket purchase orders).
9. See, e.g., *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777, 787; 399 NW2d 408 (1987) (holding that a purchase order called a "blanket order" set forth a sufficient [albeit imprecise] quantity term for MCL 440.2201); *Johnson Controls, Inc v TRW Vehicle Safety Sys*, 491 F Supp 2d 707, 717–718 (ED Mich, 2007) (holding that a blanket purchase order using "ex rel" language was a sufficient quantity term in conjunction with the Global Terms and Conditions document).
10. See *Olympic Steel, supra* (distinguishing *Great Northern* and holding that a blanket purchase order incorporated into a supply agreement did not state a sufficient quantity).
11. See, e.g., *Advanced Plastics Corp v White Consolidated Indus, Inc*, 47 F3d 1167 (CA 6, 1995); *In re Dana, supra*; *Aleris Aluminum Canada LP v Valeo, Inc*, 718 F Supp 2d 825, 832 (ED Mich, 2010) (concluding that a blanket purchase order would not be enforced on an ongoing basis).
12. See *id.*
13. See, e.g., *Johnson Controls, supra*; *Great Northern, supra*.
14. *Ryerson Tull,* n 8 *supra*.
15. *Olympic Steel, supra*.
16. See, e.g., *ACEMCO, Inc v Ryerson Tull Coil Processing*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2008 (Docket No. 272491), reversed by 482 Mich 999; 756 NW2d 74 (2008); *Anaheim Indus, Inc v General Motors Corp*, unpublished memorandum opinion of the Texas Court of Appeals, issued December 20, 2007 (Docket No. 01-06-00440).
17. See *Ryerson Tull,* n 8 *supra*.
18. *Id.*
19. See, e.g., *In re Frost Estate*, 130 Mich App 556, 559; 344 NW2d 331 (1983) (applying the statute of frauds and concluding that the term "all" was a sufficient quantity term); *Great Northern, supra* (concluding that the statute of frauds was to be liberally continued in favor of validity, if possible, and that the term "blanket order" stated a sufficient quantity term).