

CREDIT APPLICATIONS - FROM THE BASICS TO HOT TOPICS

- I. What is a contract?
 - A. A contract is a promise or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
 1. Types of Contracts
 - A. Express Contract: oral or written contracts
 - B. Implied Contract: contracts formed by the conduct of the parties
 - C. Quasi-Contract: contracts constructed by the courts in order to avoid unjust enrichment
 2. Elements of a Contract
 - A. Offer: The offer creates a power of acceptance. The offer must be communicated to create a reasonable expectation in the offeree that the offeror is willing to enter into a contract on the basis of the offered terms.
 - B. Acceptance: The acceptance is a manifestation of assent to the terms of an offer in the manner prescribed or authorized in the offer.
 - C. Consideration: Enforceable contracts contain a bargained-for change in legal position between the parties.
 3. The Legal Forms of Businesses and How to Deal with Them
 - A. Corporations and Limited Liability Companies
 - B. Partnerships
 - C. Sole Proprietorships

D. Joint Ventures

B. Agents and Principals

1. Overview of Agency

Generally speaking, a person may do by agent any act which he might do himself. An agent represents his principal for all purposes within the scope of his *actual or ostensible authority*, and all rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

2. What types of Agency Are There?

A. Actual Authority

(1) that expressly given by the principal

B. That given by the law and not denied by the principal

C. Ostensible or Apparent Authority

1. Representation or conduct of the principal, followed by dealing with the agent as thus apparently authorized; and

2. A change in position by a third party in reliance upon the ostensible authority (or an estoppel)

3. Ratification where Authority Did not Exist

A. Formal Acceptance
Limitation - Equal Dignities Rule

B. Voluntary acceptance of benefits

C. Bringing suit based thereon

4. Legal consequences of Principal-Agent Relationship

- A. Rights and Responsibilities regarding Third Parties
 - B. Right to Hold Third Person Liable on Contract
- II. Statute of Frauds: Certain agreements must be evidenced by a writing signed by the parties sought to be bound.
 - A. Contracts which need to be in writing:
 - 1. Executor or administrator promises personally to pay estate debts
 - 2. Promises to pay debt of another (suretyship promises)
 - 3. Promises in consideration of marriage
 - 4. Interest in land
 - 5. Performance not within one year
 - 6. Goods priced at \$500 or more
- III. Signature, Notice and Changing of the Terms
 - A. Principles under the Uniform Commercial Code.
 - 1. The Signature Requirement.
 - A. A contract for a sale of goods for the price of \$500.00 or more is NOT enforceable unless there is "some" writing sufficient to indicate that a contract for sale has been made between the parties.
 - B. To satisfy the statute with a writing a party need only:
 - 1. Produce a writing, and;
 - 2. That shows a contract has been made, and;
 - 3. Signed by the party to be charged and;
 - 4. Which recites a term.

- C. The writing MUST be signed by the party by whom enforcement is sought. The Uniform Commercial Code §1-201 defines signed as:
 - 1. Including any authentication, which identifies the party to be charged.
 - 2. The UCC deformalizes the signature requirement, i.e. letterhead.
 - 3. A writing is not insufficient because it omits or incorrectly states a term beyond the quantity of goods shown in the writing.
 - D. Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it has reason to know of its contents, it satisfies the requirements above, against the party, unless written notice of objection to its contents is given within 10 days after it is received.
 - E. Mere silence and inaction constitute consent and assent to an offer. Whether or not additional terms will become part of the agreement depends if they materially alter the original agreement, or notice of objection from the grieving party is received or is given within a reasonable time.
- B. Battle of the Forms or UCC 2-207
- 1. When one party begins to perform or starts to perform, and a dispute breaks out, each party will review their forms and learn that these forms or the terms have diverged from its original agreement. UCC 2-207 states:
 - A. A definite and seasonable expression of acceptance or written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional or different.
 - B. The additional terms are to be construed as proposals for additions to the contract, and between merchants

such terms become part of the contract unless:

- i. The offer expressly limits acceptance to the terms of the offer;
- ii. The terms materially alter it;
- iii. Notification of objection to them has already been given within a reasonable time after notice of such terms are received.

C. Conduct of the party, which recognizes the existence of a contract.

IV. Credit Application Checklist

A. Applicant's Business Description

1. Applicant's full firm name, trade names and other business names used to obtain credit
2. Telephone numbers, Fax numbers and E-mail addresses
3. FEIN number
4. Address(es), billing addresses
5. Description of Business
6. Is Applicant sales tax exempt? If yes, have applicant complete the sales tax exemption certificate attached to the credit application.
7. Number of years applicant has operated (Include at current address)
8. Owns or Rents its present place of business
9. Business Credit References (If none, substitute personal credit references)
 - A. Bank (Names, addresses, loan officers, telephone numbers, account names and numbers)
 - B. Suppliers (Names, addresses and telephone numbers)
 - C. Credit card company statements

D. Customer Base

10. Bankruptcy, Assignment for the benefit of creditors or other insolvency proceedings.
11. Current financial statement (Attach to the credit application)
12. Are Applicant's accounts receivable, inventory and/or equipment encumbered by a present lien or security interest? If yes, obtain names, addresses and telephone numbers of secured parties.
13. Are there any outstanding loans made to applicant? If yes, obtain the name of creditors, loan officer, type of loan, original amount due, present amount due, monthly payment and collateral.

B. Sole Proprietor

1. Name
2. Social Security Number
3. Home Address(es)
4. Home Telephone Numbers

C. Partnership

1. Partners' Names
2. Partners' Social Security Numbers
3. Partners' Home Addresses
4. Partners' Home Telephone Numbers

D. Corporation or Limited Liability Company

1. State and date of Incorporation (or Organization)
2. Names of all Officers and Directors (Managers)

E. Approximate Initial Amount of Credit Applicants Requires Per Month (Make sure applicant's request is not binding on Seller-Creditor and Seller-Creditor incurs no liability by granting, reducing, increasing

or refusing applicant's request.)

1. Debtor's equal credit opportunity act notice
2. Record Retention (At least 1 year)

F. Applicant's Certification

1. Truth and accuracy of applicant's statements in the credit application and information furnished to seller-creditor.
2. Statements and information was provided to seller-creditor to induce seller-creditor to extend credit to applicant.
3. Applicant's acknowledgment that seller-creditor intends to reply upon the statement and information.
4. Applicant agrees to be bound by the terms incorporated on the credit application and on seller-creditor's invoices and other documents.
5. Applicant agrees to advise seller-creditor to any material changes in the statements and information provided to seller-creditor pursuant to or with the credit application.

G. Applicant's Authorization

1. Seller-Creditors may check and confirm applicant's credit history and trade and bank references.
2. The release of information to or by other creditors regarding applicant's credit experiences.

H. Terms and Conditions

1. Applicant agrees to pay all charges according to the payment terms established in seller-creditor's invoice.
2. Applicant agrees to assume all state sales taxes
3. Applicant agrees to seller-creditor specified interest rates
4. Applicant agrees to pay all costs of collection

(Attorneys' fees and court costs)

5. Applicant agrees to the specified governing law

I. Personal Guaranty on the Credit Application

1. Absolute, Unconditional and continuing guaranties

2. Guarantor (s) agrees to seller-creditor's specified interest rates

3. Guarantor(s) agrees to pay all costs of collection (Attorney's fees and court costs)

4. Guarantor(s) agrees to the specified governing law

5. Guarantors agree to be joint and severally liable to seller-creditor

6. Guarantor's(s) consent to jurisdiction (optional)

7. Guarantor's(s) waiver of jury trial (optional)

8. Signature(s) of Guarantor(s)

9. All blanks on the credit application should be filled-in

J. Signature of Applicant and Seller-Creditor (Duly Executed and Properly Authorized)

K. New Issues

1. Update credit applications

2. Successor companies

3. New entities (Limited Liability Company; Limited Liability Partnership)

V. The Electronic Signature in Global and National Commerce Act

A. The Writing Requirement: The E-Credit Application

1. The Statute of Frauds

2. Posting forms on web pages for retrieval by customers

- a. Putting forms on your web site: OmniForm, www.caere.com; WebCom Forms, www.webcom.com; Cabinet Next Generation, www.cabinetng.com
 3. Posting trade references on your website: any liability?
- B. The Signature Requirement: Electronic, or digital, signatures
 1. What is a digital signature?
 - A. Stylus pads, biometrics, fingerprint scans, encryption keys and smart cards
 - B. Creating a digital signature: visit the Web site of a digital signature issuer and provide data. Data is validated and a proprietary signature resides in browser of applicant's computer.
 2. Verifying a digital signature: Reliability of e-authentication
 - A. Digital certificates encrypted with coding that only the issuer of the key can read.
 3. An e-signature is superior to ink and paper signature as it confirms the document and identifies the signer. Generally no way to take a signature and affix it another statement. A change in a signed document causes the e-signature verification process to fail.
 4. Using a e-certificate or ID confirmed by a third party provider, a party has the ability to e-sign documents and e-mails, confirming that the e-document has come from only the intended party and has not been altered.
- C. Federal and State Digital Signature and Electronic Record Keeping Legislation: The Law Attempting to Catch Up with Technology
 1. The Electronic Signatures in Global and National Commerce Act
 - A. Any Internet transaction validated by a digital signature will have the same legal

standing as a paper document carrying a signature. Makes digital, or online, signatures as legally binding as ink-and-paper signatures:

"a signature, contract or other record relating to [any transaction in interstate commerce] may not be denied legal effect, validity or enforcement solely because it is in electronic form."

- B. Uniform and nationwide legal recognition: Vendor may engage in e-credit transactions across state lines and contract is valid with all states
- C. Broadens the growth of e-commerce and eliminates paperwork arising out contracts between businesses
- D. Technology neutral: Parties decide form of digital signature technology to validate contract. Whether a named typed at the bottom of an e-mail may qualify under the E-Sign Act, a court may still refuse to give the signature legal effect because it may raise doubts about whether the parties signed the contract or altered the contract.
- E. Two clicks to close a contract: Businesses using digital signatures must require parties to the contract to make at least two clicks of a computer must to complete a deal:
 - (1) The first mouse click tests the electronic link between the businesses to ensure that the digital signature technology works; and
 - (2) At least one other mouse click to close the deal
- F. Special issues with consumer internet transactions:
 - (1) Consumer has to give consent before receiving bills and other documents only in electronic forms

- (2) Cancellation and foreclosure notices must be sent on paper
 - (3) Conduct test e-mailings before sending out subsequent e-mail notifications
 - (4) Does not allow e-signatures on adoptions, wills, and product safety recalls
- G. Elimination of buyer's remorse with consumer transactions as the consumer no longer waits for paperwork to close transaction
 - H. Supercedes state laws for use of digital signatures to validate e-documents, which Congress believed were not uniform
 - I. Effective October 1, 2000
 - J. Electronic record keeping: Records of e-contracts may be stored electronically, effective March 1, 2001

VI. The Equal Credit Opportunity Act and The Credit Application

- A. Disclosures. The credit application should provide for statement of the vendor's compliance with ECOA. See Exhibit A. The credit application should not include any language or seek information that may lead an applicant to believe that the information sought would be used to discriminate. See Exhibit A.
- B. Cosigners or guarantors. ECOA does not permit a credit grantor to require a spouse to sign a personal guaranty if that spouse is not directly involved with the applicant. Can be required only when an applicant does not meet the creditor's underwriting standards for individual credit.
 - 1. If the business owner's spouse is not involved in the business and does not hold a position with the corporation, a personal guarantee that includes the spouse is discriminatory.
 - 2. Seeking a guaranty from a spouse is also prohibited where the applicant is qualified without considering the guaranty, i.e., meets the creditor's underwriting standards. In other words ECOA permits a spouse to sign a personal guaranty, if verified that the participant spouse does not

have the financial wherewithal to support a guaranty. After this credit determination, and the credit were then to be turned down because of lack of sufficient creditor worthiness of the guarantor, the spouse's guaranty may then be required.

- C. Language for Credit Application. The Equal Credit Opportunity Act (ECOA) prohibits credit grantors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age. The Federal Trade Commission administers compliance with ECOA.

VII. The Fair Credit Reporting Act and The Credit Application

- A. FRCA Authorization Contained in Credit Application
 - 1. A separate form, or addendum to accompany the credit application.
 - 2. The party that the credit professional seeks authorization may not be the same party that signs the credit application.
 - 3. A credit application that provides general authority for the credit professional to pull a consumer credit report on a corporation's officers may be insufficient.

The undersigned consents to [*insert: Name of Your Business*] obtaining a consumer credit report on _____ [*insert—name of the sole proprietor/ President/Officer of corporation, LLC, partnership*] for the purpose of evaluating the creditworthiness of _____ [*insert—name of the sole proprietor/ President/Officer of corporation, LLC, partnership*], in connection with this Application.

Signed By:

[*name of sole proprietor/President/ Officer of corporation/LLC/partnership*]

B. FCRA Authorization Contained in Personal Guarantee

The undersigned consents to [*insert: Name of Your Business*] obtaining a consumer credit report on _____ [*insert—name of the guarantor*] for the purpose of evaluating the creditworthiness of _____ [*insert—name of the guarantor*], in connection with an application for business credit.

Signed By:

[*type name of guarantor here*]
[*Social Security Number and home address*]