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Manufacturer's Corner: Responding to Claims That Your Goods Do Not Conform to Contract Specifications

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It's inevitable: at some point, you will ship goods to your buyer, and the buyer will complain that they don't conform to the contract specifications. When you're dealing with a small shipment or a great customer, often the simplest solution is to accept the return and send replacement goods. Other times, however, you'll be dealing with a major shipment or a problem customer, and you must be certain that you protect yourself while responding to the customer's concerns.

Here's a short checklist of protective measures you can take. Note that these suggestions come with the assumption that you don't have contrary provisions in your contract with the buyer. As with many issues you will confront, your first step should be to consult your contract.

Additionally, be sure that your employees are well-versed in these steps, and conscientious that their communications with the customer are incredibly important. Often, the customer will complain to the sales representative with whom it has a relationship. Consider whether you should train sales representatives in these steps or, perhaps better, train sales representatives to refer the matter to management or a separate warranty department *before* making any comments or promises regarding the goods.[1]

Now, without further ado:

Measure 1: Demand a list of deficiencies.

Make a *written* demand that the buyer specify *in writing* all defects upon which the buyer bases its claim that the goods do not meet specifications. This is critical with merchant buyers,[2] because those buyers will be barred from complaining about any other defects in subsequent proceedings.[3] Trust me when I tell you that, absent making this demand, your buyer's complaint about one problem with the goods will suddenly blossom into a complaint about a dozen problems if litigation becomes necessary.[4] Cut that off immediately.

By the way, a demand like this does not need to be unpleasant. As a business matter, it is reasonable for you to want a complete list of the defects so you can take any appropriate remedial measures that may be necessary to prevent those problems going forward. So: no need to worry that protecting your interests must come at the expense of alienating a customer or encouraging a dispute.

Measure 2: Demand preservation of the goods.

Your buyer claims the goods you supplied don't conform to the contract. You'd like to see for yourself, wouldn't you? Demand that the buyer preserve the goods for inspection. Unless your contract specifically provides otherwise, this is a demand you arguably need to make to preserve your inspection right.[5]

Related: depending on the defects claimed, you may wish to suggest that a third party inspect the goods for conformity (and perhaps even suggest that the third party's findings will be binding). This is permitted, but only by consent.[6]

Measure 3: Instruct the buyer on what to do with the goods.

Does this sound a lot like Measure 2? Sure it does, but it's not the same! The UCC gives separate treatment to

AUTHORS

- Ryan C. Hardy

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preservation of evidence and instructions about how the buyer must handle the goods, so you should too.

Here are the instructions most often given: (1) have the buyer sell the goods on your account;[7] (2) have the buyer return the goods to you;[8] or (3) have the buyer store the goods until you can get them.[9] Those aren't the only instructions you can give, of course – according to the UCC, you can give "any reasonable instructions."[10] Understand, however, that for your instructions to be "reasonable," you must agree to indemnify the buyer for any costs associated with complying with the instructions, *provided the buyer demands indemnity*. Unless you have a business reason for doing so, I see no legal need to offer indemnity up front.

If you don't instruct the buyer on what to do with the goods, the buyer gets to decide whether it will sell the goods for your account, reship them, or store them. You may not like what the buyer decides, so give the instructions you want.

Measure 4: Inquire about discovery of the defects.

This is optional, and it depends on the circumstances. Speaking broadly, the UCC allows a buyer to accept or reject goods. A rejection must be made promptly upon tender of delivery. An acceptance occurs upon one of three events, but what's important for our purposes here is that an acceptance can be revoked under certain circumstances. ***But***, an acceptance can't be revoked unless it was "induced by the difficulty of discovery before acceptance."[11] If your buyer reveals that the defect was easily discovered, but that it nevertheless accepted the goods by, for instance, failing to make an effective rejection, the buyer is stuck with the acceptance. That acceptance in turn binds the buyer to paying the contract price.

As with the other demands listed here, this need not be a confrontational exercise. It is entirely reasonable for you to ask your buyer what leads it to believe the goods are non-conforming. Asking that question will typically prompt a response that discloses how the defect was discovered.

These are by no means all the steps needed to shore up a defense to a breach of contract action by your buyer. But, they are simple steps that can often be taken together in a single letter, and which should be taken as soon as possible.

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[1] I may as well come right out with it: sales people often say silly things that come back to haunt us later. It's hardcoded in their DNA.

[2] I wrote a bit about merchant status here.

[3] Provided those defects were reasonably discoverable.

[4] This is also useful in determining whether you need to "vouch in" someone who supplied inputs to you. I wrote about vouching in here.

[5] There's a UCC provision that suggests notification is required to preserve evidence. I'm not so sure that's the case anymore in most jurisdictions. Surely the buyer would be aware of a strong possibility of legal action as a consequence of its position – could the buyer credibly dispose of relevant evidence? Why would it want to if its claim was justified?

[6] Again, unless the contract provides otherwise.

[7] I don't recommend this unless you're dealing with perishable goods, and I sort of assume you're not since you're a manufacturer.

[8] Your contract should address who bears the cost and risk associated with return freight. If not, your buyer can rightfully demand that you indemnify it for those expenses.

[9] Again, the buyer can hold you liable for expenses associated with this.

[10] This assumes that you don't have an agent or place of business in the market where the goods are accepted. If you do, go pick those goods up.

[11] This assumes that the acceptance wasn't prompted by your promise to cure any defects.