



TOOL TALK

A Publication of the Michigan Tooling Association

From Rob's Roost

by: Rob Dumont, Managing Director



EXTRA, EXTRA, READ A BIT ABOUT IT - FCC ISSUES UNSOLICITED FAX RULES

The Federal Communications Commission (FCC) published its new regulations governing unsolicited fax advertisements in the Federal Register on Friday, July 25th. The rules are set to go into effect one month from the date of publication on Monday, August 25, 2003.

A lot of attention has recently been directed at the widely reported "do-not-call" list implemented under the federal Telephone Consumer Protection Act (TCPA) of 1991. The FCC, however, also made significant changes to the prior rules governing unsolicited faxes in the sweeping amendments of July 3, 2003.

Currently the TCPA prohibits *any* person or entity from sending any fax that contains an "unsolicited advertisement," which is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." Previously in 1992 the FCC ruled that an "established business relationship" (EBR) generally provided the necessary prior express invitation or permission to send such faxes. An EBR was defined

at substantial length; in short it means you have had business dealings, one with the other.

The new rules, effective August 25th, will require *signed written consent* in order to send faxes that contain unsolicited advertisements. For example, MTA cannot send a fax telling you that we are offering a seminar on XYZ topic, at a charge of \$25.00 for materials, unless we first have your signed written consent to do so. Of course, those of you who might be inclined to send similar offerings to customers or potential customers are going to be faced with the same concerns.

To understand how broad this prohibition is, suppose that you call MTA and ask to receive information about an upcoming seminar. MTA technically would be in violation of the TCPA if it sends you the information by fax *without first* getting a signed written consent. Similarly, if MTA sends a member a reminder by fax that it is time to pay membership dues, but does not have the signed consent from that member, it would again be in violation. Doing so would subject the Association to potential FCC enforcement, state enforcement, and more importantly, a private lawsuit for up to \$1500 (\$500 per violation, which can be trebled if the violation is knowing and willful). Although in most circumstances the risk of suit may be low, the potential damages and risk of abusive suits are high.

Given the pending Rule changes to be effective August 25, 2003 we are enclosing with this edition of Tool Talk a Consent Form that we would ask that you fax back to MTA at 248-488-0500, *if and only if you consent to having MTA send "marketing" information to you by fax* in the future.

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MTA Calendar of Events - August

NOTE: All seminars & training programs this month are being held at the MTA Training Center in Farmington Hills unless otherwise noted.

- 15 Deadline for sending in items for **Tool Talk**
- 20 MTA Board of Directors meets
- 20 Safety Seminar - Required MIOSHA Training
8:00 a.m. - 11:30 a.m.
- 21 MTA Workers' Comp Fund Board of Trustees meets

Law Talk

by: *George S. Fish and Casey J. Bear*
Raymond & Prokop, P.C.

“The Battle of the Forms”

In commercial transactions, parties often use “boilerplate” contracts to govern the terms of a sale. For instance, a buyer sends a purchase order to a seller containing the model number, quantity, price, and delivery date, along with a set of standard terms and conditions on the reverse side. In contract law, this is the “offer.” The seller responds with an invoice containing the same model number, quantity, price, and delivery date, but a completely different set of standard terms. In contract law this is the “acceptance.” Frequently, the offer and acceptance are not in accord, as the terms of the purchase order do not match the terms of the invoice. This situation is commonly referred to as “the battle of the forms.”

As a result, issues arise as to whether an enforceable contract was created and, if so, under what terms. This article highlights some of the key issues that arise and provides some starting points for protecting your rights in the contract formation stage.

The Law

The Uniform Commercial Code (the “UCC”) governs the sale of goods between merchants. UCC Section 2-207 addresses the issues raised above and attempts to answer the following three questions:

- 1) Do the conflicting writings create an enforceable contract?
- 2) If an enforceable contract exists, what are the terms of the contract?
- 3) If the conflicting writings do not create an enforceable contract, but the parties still perform, what are the terms of the contract?

Formation

UCC 2-207(1) provides that a contract may be formed even though the parties may have exchanged documents that are not identical. Under most instances UCC 2-207(1) provides that a definite expression of acceptance or written confirmation sent within a reasonable time operates as an acceptance even if there are additional or different terms

than those offered. An important exception occurs when the invoice makes acceptance expressly conditional upon assent to the additional or different terms. Thus, the result of UCC 2-207(1) is that conflicting documents are treated not as counteroffers, but as acceptances, unless the acceptance is expressly made conditional upon assent to the additional or different terms.

Additional Terms

UCC 2-207(2) generally provides an acceptance that contains additional terms is to be construed as a proposal for an addition to the contract. However, “between merchants” such terms automatically become part of the contract unless: 1) the offer expressly limits acceptance to the terms of the offer; 2) the additional terms materially alter the offer; or 3) the offeror objects to the terms within a reasonable time after notice is received. The UCC defines “between merchants” as any transaction with respect to which both parties are chargeable with the knowledge and skill of merchants. UCC 2-104(3). Transactions for the sale of goods between a supplier and a large automotive company would be characterized as a contract “between merchants.”

Different Terms

When the contract is between merchants and the acceptance includes different rather than additional terms, most courts follow the “knockout rule,” which ignores the conflicting terms and looks instead to the UCC gap-fillers. “Gap-fillers” are the supplementary terms incorporated under certain provisions of the UCC. They are essentially a set of default rules that provide for warranties, damages, and certain other basic contractual terms. Thus, when both the offer and acceptance explicitly address a particular issue in a contradictory manner, courts frequently determine that there is no agreement on the topic and thereby employ the “gap-filler.” However, to confuse matters, some courts simply hold that the different terms contained in the acceptance do not change the offer and therefore the language in the offer controls. To address this question, the law of the jurisdiction in question (generally, the state where the contract is formed) should be consulted, along with the circumstances surrounding the terms at issue.

Conduct

UCC 2-207(3) provides that conduct by both parties that recognizes the existence of a contract is sufficient to estab-



lish a contract for sale although the writings of the parties do not otherwise establish a contract. In these cases, the terms of the contract consist of those terms on which the writings of the parties agree, together with the UCC gap-fillers.

Fighting the “Battle of the Forms”

Drafting an agreement that will ensure a contract is formed, and that the contract consists of exclusively your own terms, is a difficult undertaking. You can, however, include language that will limit the likelihood that the other side’s boilerplate terms will be imposed on you. Offerors can limit the terms of their offer to the terms that are included within the offer, and also object in advance to any additional or different terms that the offeree might include in its acceptance. On the other hand, offerees can expressly condition their acceptance on the offeror’s assent to any additional or different terms that they have included in their acceptance. In many instances, the worst-case scenario if these recommendations are followed is having the UCC gap-fillers govern your arrangement.

Finally, whenever there is a critical contract term, it may be wise to explicitly negotiate that term with the adverse party. Explicit negotiation and a meeting of the minds will take the contract out of the scope of UCC 2-207. In such situations the most prudent course of action is to have your counsel independently review the contract.

Unemployment - Get Out of Line, Go Online

The State of Michigan has asked that we put this announcement in our newsletter. The state is dramatically changing the way in which it handles unemployment benefit claims. Now jobless workers have a more convenient and user-friendly way to apply.

Instead of driving to a local unemployment office and waiting in line to file a claim, jobless workers can apply with the ease of the Internet. Now available statewide, through the Bureau of Workers’ & Unemployment Compensation is “Internet Filed Claims” (IFC).

For workers, this service is fast, easy and secure, and the time they save by filing online can be used for other important matters. For employers who pay unemployment taxes, the service streamlines the manual claims taking process. This service will initially accept claims from anyone who has filed an unemployment claim within the past ten years. See their website for details - www.michigan.gov/bwuc/.

Legislative Update

by: *Judy Augenstein*
Legislative Consultant, Lansing



All budgets, except for Transportation and Capital Outlay, have been sent to conference committees, where the committees are charged with working out points of differences. The legislature and the governor still have differences over items dealing with road construction, merit scholarships and the disposition of any budget surplus.

The Blue Cross Blue Shield small group health insurance reform package has passed the legislature. Small business advocates fear the package will raise rates and narrow choices for small business.

The Mackinac Bridge package has passed the Senate and is being debated by the House. The bills dedicate \$5.9 million in state funding to the Mackinac Bridge Authority to cover capital improvement costs and offset the toll increase instituted on May 1st. The legislation provides toll exemptions for emergency vehicles.

Five bills in Governor Granholm’s tax loophole package have been signed into law. The bills boost the general fund by \$18 million, but the bulk of the package remains locked up in committee. The governor had proposed \$120 million in new revenues by closing what she identified as tax loopholes. Most of the proposals were viewed by Republican legislators and major business groups as tax increases.

MTA was requested by the Senate Finance Committee Chair, Senator Nancy Cassis (R-Nov), to testify on this critical package. Managing Director, Rob Dumont, testified that MTA opposes the tax loophole closure package because the tool, die and mold industry does not need increased taxes and/or changes in tax policy on top of the foreign competitiveness problem.

MTA continues to work with state legislative leaders and congressional leaders on developing a plan of action to address the foreign competition issue.

The Senate is in recess and will return in September. The House is scheduled to work through the summer.



From the Desk of Gary Wood

Administrator MTA Workers' Comp Fund

Dog Daze



August 2003, the summer continues into the “dog days.” I always wondered what that meant.

I went to a wedding over the weekend; it was the daughter of a local professional and the son of someone I did not know. I was a spectator-guest as opposed to someone that actually belonged there. I watched my manners and spent most of the time on the veranda with those that are still smoking and others like me trying to avoid dancing with someone’s Aunt Dora.

The youthful exuberance of the wedding celebrants was pleasant to watch and the long conversation with a local politician was interesting. This politician has not been in state office long and does not seem to have developed many bad habits. I admire someone that contributes of themselves to the general public; his exuberance for his job and his beliefs were uplifting. How long can that last?

In the last ten years public life has been exposed as not all we were led to believe it is or should be. We have been let down as a society by many of our elected and appointed government officials.

I am still amazed that a Rhodes scholar does not know the difference between the truth and a lie and does not understand the context of the word “is” in a sentence. How did we get from a nation based on moral character to a society that demands no moral character from those in the highest of elected offices?

Now the genie is out of the bottle; we have learned to accept nefarious actions as normal. The next step is to consider what message this gives to the next generation.

I know I have related the story of how I attended a business ethics seminar with my daughter. The question for discussion was: “Do you cheat to win?” Of the 125 people in the room, I was the sole dissenting vote! There were 124 people in that context that would cheat to win, if they felt reasonably sure they would not get caught.

How can we expect our children to differentiate between right and wrong? They certainly are not learning it in the public school system. The educators of today are afraid of the students; not physically any more than they were in the

past but, financially, should they be sued by an irate parent that has not learned the difference between right and wrong themselves. The bad lessons taught by the system move right on up the scale when those students of today become the world leaders and business persons of tomorrow.

From what I have seen, personal gain has become the overwhelming driving goal of this society. There is nothing more important than the big bonus, fancy car(s), new home(s), status job, trophy spouse, bigger boat, etc. When personal gain drives the economy, society looks to maximize the individual return.

If huge corporations have no concern for the well-being of their suppliers, there is no reason then to make decisions that will positively influence the survival of those suppliers. If you are a buyer and you save five cents on one million parts, you get a bonus. If that five cents savings has an impact on the margin of safety, is it worth it?

What if that five cents was the difference between someone down the street having a job or perpetuating the sometimes corrupt or communist government of a foreign country? Would it be worth it then?

Is it truly cheaper to have manufacturing conducted offshore? Foreign manufacturers frequently build plants here to make products they are selling in the United States market.

If we give up on manufacturing as a way of life, we better get our kids pretty darn good at excelling in the service sector. Statistically, the service sector works less hours for less money and fewer benefits than the manufacturing sector. You are going to have to be at the top of your game to continue the kind of lifestyle you currently enjoy if you are employed in the service sector versus manufacturing.

If you think the service sector is a safe haven for our kids, think again. If you have to call the 800 number on your credit card don’t be surprised, as I was, that you are talking to a resident of India to resolve your problem.

The cost of doing business in third world countries is so compelling to cost-cutting corporations that they just cannot resist. The idea of getting a graduate systems analyst with ten years experience for \$24,000 a year is addictive. How many parents in the United States are spending that much a year on college so their kids can learn to be systems analysts?

If there is one gift you can give a kid, it is the ability and

wisdom to learn how to be self-supporting and make their own way in the world. If they have no skills, they have no future; someone from another country will be willing to do their no-brainer job for a lot less money and be happy about it.

I hope we can endure the economic struggle that we will face if this society changes from manufacturing to service. I don't know that we want to make this change. If we don't accept this change as the destiny of our children (and retirement programs) we better do something about it now. Please support the MTA efforts to effectuate legislation to protect our future.

Epilogue:

I still wonder what the "dog days of summer" means. Yesterday afternoon I watched my dog and I think it means "hiding under the pick-up truck in the shade". Life should be that simple.

Success: "To laugh often and much; to win the respect of intelligent people and the affection of children; to earn the appreciation of honest critics and endure the betrayal of false friends; to appreciate beauty; to find the best in others; to leave the world a little better... This is the meaning of success." - Ralph Waldo Emerson



We have received several responses for a seminar in **Assets Management** that was outlined in last month's issue of **Tool Talk**. We are looking to plan a seminar for September, so if you are interested you can still fax over the interest form. If you need a form, please contact Pat by e-mail at pat@mtaonline.com or phone 248-488-0300, ext. 1305.

Fenton Chrysler Jeep & Dodge is a new participant in the MTA Auto Discount program. They are located at 15123 North Road in Fenton. Our contacts are Jeff Jones and Stephen Brown and they can be reached at 810-714-3300.

The **Member Services Directory for 2003** should be back from the printers shortly and will be mailed to all members later this month.

Dogs Days of Summer

"Only mad dogs and Englishmen go out in the noon-day sun." (Noel Coward from an Indian proverb)

In case you were also wondering where the dog days of summer originated, or if you are an amateur astronomer, here is a brief history.

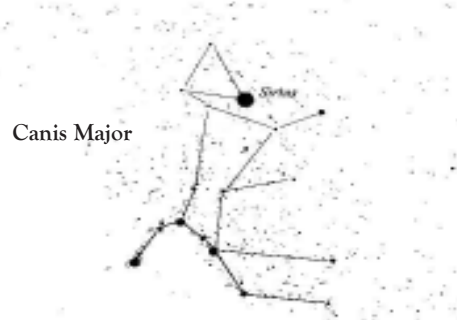
Dog days of summer occur during the hottest and muggiest part of the season, the period between early July and early September when the hot sultry weather of summer usually occurs in the northern hemisphere. But why the term "dog days"?

In ancient times, when the night sky was unobscured by artificial lights and smog, different groups of peoples in different parts of the world, drew images in the sky by "connecting the dots" of stars. These images, now called the constellations, were dependent upon the culture - Chinese, Native American, European. They saw images of bears (Ursa Major & Minor), twins (Gemini), a bull (Taurus) and dogs (Canis Major & Minor).

The brightest of the stars in Canis Major (the big dog) is Sirius, which also happens to be the brightest star in the sky. It is so bright that the ancient Romans thought the earth received heat from it. In the summer, Sirius, the "dog star," rises and sets with the sun. During late July, Sirius is in conjunction with the sun, and the ancients believed that its heat added to the heat of the sun, creating a stretch of hot and sultry weather. They named this period of time, from 20 days before the conjunction to 20 days after, the "dog days" after the "dog star".

And although this is certainly the warmest period of the summer, the heat is not due to the added radiation from a far-away star, regardless of its brightness. The heat of the summer is a direct result of the earth's tilt and some say now the hole in the ozone layer.

Anyway, be cool and try not to get injured, at work or elsewhere.



by: Mark Tyler, General Manager
MTA Insurance Agency



Smoke-free Workplaces Benefit Everyone

MEDJET - Take Trips, Not Chances

With summer in full swing, MEDJET Assistance, the medical evacuation service used by many of our members, is now offering a short term membership package to accommodate summer travel.

In an effort to respond to the needs of today's traveler and the changing travel marketplace, MEDJET introduces a new **Short Term Program** to accompany its annual membership program. Under this new program, which began in July, our members can purchase 7, 14 or 21-day travel protection plans, as well as annual memberships.

This program was developed to better suit the needs of today's traveling public and has been crafted for the member who may take only one trip per year, be it a business trip or an annual family vacation. With this program, our members will enjoy virtually the same benefits as with the basic annual membership program.

The short term program is available to individuals up to the age of 75, with protection provided 24 hours a day during the selected travel span. If you are ever hospitalized more than 150 miles from home, MEDJET will bring you back to the hospital of your choice. No travel insurance, assistance plan or platinum card program offers protection as comprehensive and unrestrictive as MEDJET Assistance.

This short term program was created because the travel market requested it. There are no health questions, deductibles, or claims forms required; no dollar limits; and medical evacuation/repatriation services only require that you be hospitalized as an inpatient and need hospitalization upon reaching your destination.

In today's uncertain international travel climate, MEDJET can offer you peace of mind and freedom from unnecessary worry.

Please contact Mark at the MTA Insurance Agency, at 248-489-8505 or e-mail to mark@mtaonline.com for more information.



On August 1, 2002, the tax on cigarettes increased by 50 cents a pack. According to Michigan health officials, this tax increase has inspired about 45,000 Michigan residents to quit smoking. Your company can help them along by instituting a smoke-free workplace policy. (*Editor's note: in our 2003 Annual Personnel Practices Survey, 51% of the companies responding allowed smoking in the production area anytime, and another 31% allowed it in limited areas.*)

Smoke-free policies not only provide a safe and healthful environment, they encourage smokers to choose to become nonsmokers; they reduce the number of cigarettes smoked by employees who continue to smoke; and they help former smokers to remain nonsmokers. A study by the University of California School of Medicine determined that people who smoked consumed 45 fewer packs of cigarettes per year if they worked in a smoke-free workplace. Another study found that smokers in work sites with a mandatory smoking ban reduced their total smoking by one pack a week on average (*American Journal of Public Health*).

Instituting a smoke-free workplace also makes economic sense. Eliminating smoking and environmental tobacco smoke may increase a company's bottom line. A smoke-free policy may reduce:

- ❖ Health and dental care costs;
- ❖ Maintenance costs;
- ❖ Absenteeism, tardiness, lost productivity;
- ❖ Air cooling, heating and ventilation costs;
- ❖ Disability, retirements and survivor's benefits;
- ❖ Health, life, property and fire insurance costs;
- ❖ Property damage, fires, accidents; and
- ❖ Litigation costs.

And according to the American Lung Association, a smoking employee costs an employer at least \$1,000 per year in total excess direct and indirect health care costs, compared to a similar nonsmoking employee.

How can you create a smoke-free workplace? Employers have a legal right to restrict smoking in the workplace or to implement a totally smoke-free workplace policy. Exceptions may arise in the case of collective bargaining agreements.

A number of resources are available to help you create a smoke-free workplace. For example, the Michigan Dept. of Community Health publishes a kit called "*The Dollars (and Sense) Benefits of Having a Smoke-free Workplace*," that contains a sample smoke-free policy. The kit can be ordered online at www.hpclearinghouse.org or by calling 800-537-5666. Also the Smoke-Free Environments Law Project, based in Ann Arbor, has links to sample smoke-free policies. You can find them at www.tcsg.org/sfelp/home.htm. You should be sure to consult your legal counsel before implementing a smoke-free policy.

Quit the Nic: Another way to help members quit smoking You can also remind your employees with Blue Cross about Quit the Nic, the Blues smoking cessation program. It is available to all BCBSM and BCN members through the Blue HealthLine. A person can call the Blue HealthLine at 800-811-1764, 24/7, to enroll in the Quit the Nic program. There is telephone counseling services with highly experienced registered nurses who will discuss the person's readiness to quit smoking and set an action plan, including a quit date and how to prepare, along with several educational items, including the booklet from the National Cancer Institute, "*Clearing the Air*."

- from BCBSM and BCN

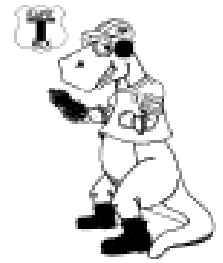
Welcome New Members!

We would like to take this opportunity to welcome the following new members in the Michigan Tooling Association.

- ❖ **Bradhart Products, Inc.** of Brighton, specializing in precision machining;
- ❖ **Burtek, Inc.** of Chesterfield, military sub-contractors;
- ❖ **Marsh Plating Corporation** of Ypsilanti, electroplating specialists;
- DSM of Michigan Inc.** of Ypsilanti, subsidiary of Marsh Plating;
- Finishing Services Inc.** of Ypsilanti, subsidiary of Marsh Plating; and
- ❖ **North Shore Machine Works Inc.** of Perrysburg, specializing in screw machines & CNC.



Safety Talk with Safe-T-Rex



by: Julie Callaway,
BDN Industrial Hygiene Consultant

Can you hear me now??

According to OSHA, approximately 30 million people in the U.S. are exposed to hazardous noise at work. About 10 million people have noise-induced hearing loss, with nearly all of these impairments caused by exposure to excessive noise occurring at the workplace.

Work-related hearing loss continues to be a critical workplace safety and health issue. The National Institute for Occupational Safety and Health (NIOSH) and the occupational safety and health community named hearing loss one of the 21 priority areas for research in the next century. Noise-induced hearing loss is 100 percent preventable but once acquired, hearing loss is permanent and irreversible.

Noise-induced hearing loss is one of the most common occupational diseases and the second most self-reported occupational illness or injury.

Does your workplace have potential for hearing loss?

While any worker can be at risk for noise-induced hearing loss in the workplace, workers in many industries have higher exposures to dangerous levels of noise. Industries with high numbers of exposed workers include: agriculture; mining; construction; manufacturing and utilities; transportation; and military.

What is hearing loss?

Occupational noise-induced hearing loss is hearing loss that develops slowly over a long period of time (several years) as the result of exposure to continuous or intermittent loud noise. Occupational acoustic trauma is a sudden change in hearing as a result of a single exposure to a sudden burst of sound, such as an explosive blast. The diagnosis of noise-induced hearing loss is made clinically by a medical professional and should include a study of the noise exposure history.

Noise pollution has a number of ill effects that impair

(continued on page 8)

