

COMMERCIAL TRANSACTIONS LEGAL ALERT

**PURCHASING GOODS – GETTING THE BENEFIT
OF YOUR BARGAIN**

June 2009

The Buying Process

To gain the maximum benefit of your purchasing dollars, businesses should pay greater attention to the legal side of purchasing the resources necessary to do business. Surprisingly, many contracts for purchase of goods are made through a process that does not consider the legal impact of the purchase transaction documents.

During the typical process of purchasing goods or supplies, a person in the purchasing department, armed with a telephone and e-mail access and a stack of form purchase orders (or the electronic equivalent) interacts with a counterpart at the seller's business (or with the seller's website), with his or her own stack (or electronic version) of sales acknowledgement forms. Buyer's purchasing agent and seller's sales agent then arrive at an agreement as to the goods to be sold, quantity, price and delivery, and exchange "the paperwork," typically, a purchase order from the buyer and a sales acknowledgement from the seller.

What Can Happen If You Are Not Prepared

If your purchase order form does not contain appropriate protective legal terms and conditions, you could end up with a purchase contract that poses the risks such as:

- Having no warranty that the product "works" as well as similar products (called "merchantability" in legal jargon);
- Having no warranty that the product is fit for the purpose for which you intend to use it;

- The possibility that you could be required to quickly inspect purchased goods or be deemed to have accepted the goods as delivered;
- Having only limited rights against the seller if a problem with the goods arises – such as being limited to repair or replacement regardless of the damage caused to your business for things such as lost profits, damage to your reputation, or loss of important customers because of a defect in the goods purchased or a delay in delivery; and
- Being required to sue the seller for your loss in the seller's "back yard," perhaps thousands of miles away from your own business location.

Being Prepared

Typically, if there is a problem or dispute regarding purchase goods, only then will buyer and seller look at the "boilerplate" or "fine print" normally found on the reverse side of the buyer's purchase order and the seller's sales acknowledgement. When such a dispute occurs, a well-crafted set of terms and conditions on your purchase order is essential to ensure that the goods being purchased will do the job and provide you with reasonable recourse if the goods are defective or non-conforming to your specifications or not delivered on time.

You Can Win the "Battle of the Forms"

Even if both the buyer's purchase order and the seller's sales acknowledgement contain

appropriately protective legal terms, the Uniform Commercial Code (UCC) (which governs the purchase and sale of goods) gives the advantage to you as buyer. For example, well-prepared purchase order terms and conditions will provide extensive warranties of merchantability, fitness for use and will also allow the recovery of “consequential damages” (for example, loss of profits, damage to reputation, loss of customers). The well-crafted sales acknowledgement form from the seller will attempt to exclude each of those warranties and to limit warranties to a short period and to limit the scope of buyer’s remedies if there is a problem.

When those two conflicting sets of terms collide, under the UCC both sets of terms “drop out” of the contract and the UCC writes that portion of the contract for the parties by providing specific rules. Fortunately for you as buyer, the fallback UCC rules give you, among other things, extensive warranties and the right to pursue consequential damages against the seller. In this process, called the “battle of the forms,” a well-crafted set of terms and conditions attached to (or printed on the reverse of) your purchase order will assure you the benefit of your bargain and proper remedies if the bargain is not met.

We Can Help

The attorneys in our Commercial Transactions Practice Group are well-versed on the legal issues that affect purchases and sales of goods and other commercial transactions. We also understand how those legal issues impact business objectives. We work hard to know the nature of our clients’ businesses, to anticipate potential issues and to draft or revise agreements or terms and conditions so that our clients’ interests are protected, ambiguities are minimized and risks are identified and managed.

We also appreciate the value of relationships with customers and suppliers and we work diligently to preserve those relationships while serving our clients in protecting their vital interests. We have the expertise to apply our focused approach to your commercial transactions, including review of specific purchase agreements, formulating or reviewing the terms and conditions for your purchase orders, sales acknowledgements and invoices, including terms and conditions that you may be utilizing on your website. Our goal is to increase the prospect that you will receive the benefit of your bargain when you purchase goods or supplies.

This *Alert* was prepared by the Commercial Transactions Practice Group of Gallop, Johnson & Neuman, L.C. (www.gjn.com). If you wish to obtain further information regarding these matters, please contact either the Gallop, Johnson & Neuman attorney who normally provides or manages your legal services or a member of the Commercial Transactions Practice Group. Members include:

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