Friday, May 18, 2012

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

ManagingRISK

Advice to help win the battle of the forms

Every day, merchants exchange work orders, purchase orders, confirmations, shipping documents and invoices. Typically, sophisticated business people have boilerplate terms and conditions inserted within those various documents. More often than not, these terms and conditions are contained on the reverse side of an order form or invoice.

The terms and conditions may impose additional delivery or payment requirements, may contain attorneys' fees or risk-shifting provisions, or may even limit damage claims in the event of breach. Any desired term sought to be included by a creative commercial seller or buyer of goods can be inserted, and, upon proper execution by both parties, becomes a term of the contract.

By LOUIS B. CRISTO
Daily Record Columnist

Problems, however, arise when both parties exchange documents that contain conflicting terms and also surface when documents are exchanged that do not possess the signatures of both parties to the agreement. In either case, the courts are called upon to determine whether a contract exists in the first instance and, if so, to establish the actual terms of the agreement. Unfortunately, these disputes arise because parties rarely consult the boilerplate terms of a document until a dispute arises.

These disputes have been described by the courts as the Battle of the Forms. As described by renowned legal scholar, Judge Dominick Gabrielli, it is a "conflict which arises as a result of the all too common business practice of blithely drafting, sending, receiving, and filling unread numerous purchase orders, acknowledgments, and other divers forms containing [myriad] discrepant terms," *Marlene Industries v. Carnac*, 45 NY 2d 327 (1978).

Historically, New York honored the old "mirror image" rule that declined to enforce agreements in their entirety when there was any deviation between the terms of the offer and acceptance, *Marlene Industries Corp. v. Carnac Textiles, Inc.*, 45 NY2d 327 (1978). The New York Legislature, however, softened the predictably harsh result of the mirror image rule by adoption of Section 2-207 of the Uniform Commercial Code. Now, under § 2-207, the courts will find the existence of an agreement notwithstanding certain terms contained in only one party's invoices or order forms.

The rules are different when non-merchant parties are involved. If you are a consumer who bought a defective lawnmower and need to know if the "fine print" terms on the reverse side of your receipt apply, ignore this advice. The rules differ for non-merchants, and generally speaking, it is more difficult to bind a consumer to additional boilerplate terms, but that is the subject of another article.

How do you protect yourself if you are a merchant and seek to avoid agreeing to terms that were not discussed upon placing (or receiving) an order for a product? Here is some practical advice that will allow you to more effectively manage your risk:

1. Preclude all other terms and conditions.

Generate a purchase order or sales order that prohibits "all other terms and conditions other than those stated herein unless agreed to in writing". The courts have stated that such a term prevents the other party from inserting additional conditions in its forms that may bind you without your knowledge, *Stemcor v. Trident Steel Corp.*, 471 F. Supp. 2d 362 (SDNY 2006).

2. Be careful of electronic communication.

In the age of electronic communication, people have become much more casual about the nature and effect of their transmittals. When, previously, signed letters confirming terms were the norm, now, simple emails may constitute tacit acceptance of unknown contract clauses, *Glencore Ltd. V. Degussa Engineered Carbons LP*, 2012 WL 223240 (SDNY Jan. 24). In New York, such writings do not have to be signed to constitute a contract, *God's Battalion of Prayer Pentecostal Church v. Miele Assoc. LLP*, 6 NY 3d 371 (2006).

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3. Know your industry.

The courts look to the common practices in a particular industry to supply missing terms in an agreement or to resolve disputed issues. For example, if it is commonplace in your industry to agree to arbitrate disputes, the court may impose that obligation upon you even if you never signed on to such a contract condition, *Aceros Prefabricados, S.A. v. Trade Arbed, Inc.*, 282 F. 3d 92 (2nd Cir. 2002).

4. Some contract terms require formal acceptance.

If your invoices or purchase orders contain terms that are so significant as to "materially alter" the parties' mutual understanding, it is required that those be formally accepted or the courts will decline to impose them. For example, you cannot waive your right to a jury trial without some written acknowledgment, *Hugo Boss Fashions, Inc. v. Sam's European Tailoring, Inc.*, 293 AD 2d 296 (2d Dept 2002). Similarly, a term known as a forum selection clause requiring a party to litigate disputes in a particular court is a material term and requires explicit consent, *General Instrument Corp. v. Tie Manufacturing, Inc.*, 517 F. Supp. 1231 (SDNY 1981).

5. Consent may be inferred from your conduct. If you accept an invoice or similar document and supply or receive the goods according to the invoice, and do not object in a timely manner you may be implicitly accepting some terms about which you were unaware. Send a notice of objection to those terms immediately once they are discovered, with the knowledge that the longer you wait, the more likely the court is to impose those terms upon you.

Clearly self-serving, but still warranted advice — if you have any doubts about the terms of a deal, contact an attorney to help sort through the forms, and to review your forms to ensure you are actually getting what you thought you bargained for.

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