

Product Distribution and
Franchise Team

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You Sent a Proposal. I Returned a Purchase Order. What is Our Contract? Avoiding the "Battle of the Forms."

During tough economic times, you can't afford to play Russian Roulette with your contracts. But many companies do, without realizing it. By fax, e-mail and snail mail, they trade pre-printed terms in proposals, POs and acknowledgements. But buyers' and sellers' pre-printed contract terms rarely match. What, then, is their contract? That's for a judge or arbitrator to decide and it is rarely worth the price.

The only way to avoid this problem is to start with well-drafted terms and conditions and make sure they control. Second best, use terms that at least make sure the other party's terms can't trump yours. A recent case, *Curwood Inc. v. Prodo-Pak Corp.* 2008 WL 644884 (E.D. Wis. March 7, 2008) proves these points.

The case arose after a buyer and seller of equipment traded sales forms with terms that did not match. The seller's proposal required all disputes to be resolved in New Jersey. The buyer's purchase order was silent about that subject, but it did state that it was "SUBJECT TO THE TERMS AND CONDITIONS ON THE FACE AND REVERSE SIDE" and those terms and conditions included a provision stating that the purchase order was the "sole and entire agreement" between the parties.

Later, the seller agreed to repurchase the equipment and the parties signed a second "buy-back agreement." But the buy-back agreement was silent about where disputes had to be resolved and it made no reference to the terms of the earlier proposal or purchase order. This became important because a dispute arose between the parties concerning the equipment that had been the subject of their agreements.

Naturally, the buyer sued in Wisconsin, its home state, arguing that its purchase order terms let it sue anywhere. The seller objected to being sued in Wisconsin because its original proposal called for any litigation to occur in New Jersey. Starting to sound like a law school exam?

Both were partly wrong, according to the court. Because neither side's form expressly rejected any additional or different terms offered by the other side, nor demanded acceptance of its own terms, the buyer implicitly accepted the seller's selection of New Jersey by sending a PO that was silent about that subject. So the court said the seller's terms were controlling and, under normal circumstances, the buyer would have had to go to New Jersey to litigate the original purchase agreement.

But the parties' dispute also involved the buy-back agreement. The buy-back agreement said nothing about where disputes had to be resolved and failed to incorporate the terms of the earlier agreement. So the court allowed the buyer to litigate all of its claims in Wisconsin after all, since splitting the case in two would have been an even worse result for both.

All of the time and money spent arguing about these issues could have been avoided. The buyer should have made clear that it rejected the seller's terms and that it would not accept the seller's proposal unless its own terms governed the deal. The seller should have clarified that its choice of New Jersey courts for disputes applied to all agreements between

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the parties. And both of them should have been more cautious about whose terms controlled, especially if those terms really were important.

During tough economic times, you don't need sideshows that raise the cost of resolving disputes. Reinhart's Product Distribution and Franchise Team knows how to draft these kinds of agreements and can help you avoid these problems. Please feel free to contact a team member to discuss how we can help you.

This *Headlines in Product Distribution and Franchise Law e-alert* provides general information about product distribution and franchise issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.

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