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CONTRACT WATCH

PURCHASING PITFALLS: HOW TO AVOID SUPPLIER CONFLICTS AND LEGAL PROBLEMS

by Richard M. Apkarian, Jr.

In the automotive industry, customers deal with supplier problems every day. Most such problems are resolved at the business level, but when they escalate, legal issues of contract formation and interpretation inevitably play a central role. *CONTINUED ON PAGE 2*

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PRUDENT PROCESS FOR ADMINISTERING YOUR BENEFIT PLANS

by Deborah L. Grace

Fee disclosure rules issued recently by the Department of Labor signal that it is time for plan sponsors and responsible plan fiduciaries to review and update their processes for selecting and monitoring plan service providers and the investment options offered under their plans. *CONTINUED ON PAGE 2*

NEW COURT DECISION REGARDING VALIDITY OF LIEN ASSERTED UNDER MICHIGAN'S MOLDER'S LIEN ACT

by Dawn R. Copley

Michigan's *Ownership Rights In Dies, Molds and Forms Act*, commonly known at the Molder's Lien Act (MCL 445.611 *et seq.*) allows moldbuilders to assert liens on the molds and dies they fabricate. *CONTINUED ON PAGE 3*

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PURCHASING PITFALLS: HOW TO AVOID SUPPLIER CONFLICTS AND LEGAL PROBLEMS

Mistakes made at contract formation can be harmful to a company trying to maintain consistent supply and avoid production shutdowns. A properly structured contract can help customers avoid these "purchasing pitfalls."

First and foremost, a supply contract should clearly state that the customer's terms and conditions govern the supply relationship. Failure to do so can result in a "battle of the forms," in which the terms of the supply contract are ambiguous and a court is left to decide which terms are part of the contract.

One of the key terms is quantity. The Uniform Commercial Code provides that a contract for the sale of goods will only be enforced to the quantity stated. Whether the contract states a specific quantity or sets forth quantity as a percentage of requirements, the parties' intent should be clearly expressed. Another common area of dispute is raw material costs. When such costs rise, suppliers typically seek to pass those rising costs on to customers. A contract that specifically addresses raw material costs may avoid many of these disputes.

Finally, the supply contract should clearly set forth the parties' rights regarding termination and their obligations in the event of termination. For example, what is the customer's obligation to pay for the supplier's raw material and work in process? A supply contract that specifically answers this question provides clarity when the contract is terminated.

Not every supplier dispute can be foreseen, but careful drafting of the supply agreement puts the customer in the best position to prevail when disputes arise.

For more information, please contact:

Richard Apkarian, who has years of experience litigating contract disputes between suppliers and customers as well as drafting contracts, terms and conditions and related documents, are assisting several Dickinson Wright clients with such matters. He also recently presented a litigation avoidance seminar in connection with Automation Alley, based in Troy, Michigan. The seminar is expected to be repeated throughout the year and provides practical advice while also allowing for open discussion on how to avoid legal issues and problems during contract formation, how to deal with unexpected problems during the life of a contract, including increased raw material costs, and how to properly terminate supply contracts and business relationships.

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PRUDENT PROCESS FOR ADMINISTERING YOUR BENEFIT PLANS

Fee disclosure rules issued recently by the Department of Labor signal that it is time for plan sponsors and responsible plan fiduciaries to review and update their processes for selecting and monitoring plan service providers and the investment options offered under their plans. ERISA Section 408(b)(2) provides that a contract between a plan and its service provider is not a prohibited transaction if the contract is reasonable and only reasonable compensation is paid for services. The goal then of the process is for the responsible plan fiduciary to be able to assess the reasonableness of the compensation paid for services and the conflicts of interest that may affect a service provider's performance of services. By instituting and documenting its processes, a plan fiduciary should be able to demonstrate that it acted prudently when selecting a service provider for its 401(k) or other retirement plan.

Recognizing that arrangements with service providers can be varied, and the manner in which they are paid is not always evident, in July 2010, the Department of Labor issued detailed rules describing the information that service providers must disclose to the responsible plan fiduciary. For current contracts, service providers must provide the required information to the responsible plan fiduciary no later than January 1, 2012. If the plan fiduciary does not receive this information, then it must request such information in writing. If such information is not received within 90 days of the request, then the fiduciary must notify the Department of Labor.

The first step in the process is to identify the "responsible plan fiduciary" who has authority to hire plan service providers. This fiduciary may be a committee appointed under the plan document or through resolutions by the company's board of directors. If no such committee has been appointed, then the plan sponsor, acting through its board of directors would be the responsible plan fiduciary.

As part of the process, the responsible plan fiduciary may want to ask its current or potential service provider the following questions:

- What compensation do you, your affiliates, or any subcontractor reasonably expect to receive directly from our plan?
- What compensation will you or any other affiliate or entity receive from any source other than our plan or the plan sponsor ("indirect compensation") that relates to services provided to our plan? The covered provider should identify the services for which the indirect compensation will be received and payer of the indirect compensation.

- If you are providing recordkeeping services without explicit compensation for such services (i.e., you are receiving payment through charges at the plan investment level or through revenue sharing), have you provided a good faith estimate of the cost to provide such services to our plan?

- Have you provided us with all the information that must be disclosed to have a reasonable agreement under ERISA section 408(b)(2)?
- Will you provide us will all the information necessary to complete the new participant fee disclosure statement that we must provide to our plan participants starting with plan years beginning after November 1, 2011?

Once the responsible plan fiduciary receives the information from the service provider, it must decide whether it has enough information about the services to determine whether the cost of such services to the plan is reasonable, and if not, it must request additional information. Even with full disclosure of the fees charged for the services provided, a prudent fiduciary may need to engage an independent third party to perform a benchmarking survey before it can be satisfied that the fees are reasonable. Any benchmarking survey should consider the size of the assets under investment, the number of plan participants and their average account balance size, and the company's industry.

Once a fiduciary has completed the process, don't forget to document the decisions, set up a process to monitor the service providers, and set a future date to again review the contracts for their reasonableness.

Prior to the issuance of this interim final rule, the only formal guidance explaining whether a contract between a plan and a service provider was "reasonable" addressed the question of when could the contract be terminated. Now that the fee disclosure rules have been issued, responsible fiduciaries will want to establish processes to evaluate their arrangements with services providers, keeping in mind that plan fees must be disclosed to 401(k) participants in plan years beginning after November 1, 2011.

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NEW COURT DECISION REGARDING VALIDITY OF LIEN ASSERTED UNDER MICHIGAN'S MOLDER'S LIEN ACT

In order to properly assert a lien under the Molder's Lien Act, a moldbuilder must do two things: (1) file a UCC financing statement in accordance with Michigan's Uniform Commercial Code; and (2) "permanently record on every die, mold or form . . . the moldbuilder's name, street address, city, and state." MCL §§ 445.619(1) & 445.619(2). The purpose of these provisions of the Molder's Lien Act is to provide notice of the moldbuilder's lien.

A recent opinion by the Michigan Court of Appeals, *C.G. Automation & Fixture, Inc. v. Autoform, Inc.,* 2011 Mich.App.Lexis 89, clarified the provisions of the Molder's Lien Act by holding that in order to have an enforceable lien on dies, the moldbuilder must affix "permanently recorded information" to each die, on the actual body of the die itself. In this case, identification tags affixed to removable risers that were mounted to the dies were insufficient.

Chrysler LLC contracted with Autoliv A.S.P., Inc. (**"Autoliv"**) to manufacture spoke covers for the JS41 vehicle platform. The manufacture of the spoke covers required the use of specialized production molds and metal trim dies. Autoliv contracted with Key Plastics, LLC (**"Key Plastics"**) to produce the spoke covers and fabricate, or cause to be fabricated, the necessary molds and dies. Key Plastics contracted with Autoform, Inc. (**"Autoform"**) to fabricate the molds and dies. Autoform, in turn, contracted with C.G. Automation & Fixture, Inc. (**"C.G. Automation"**) to produce the required molds and dies. The dispute before the Court involved only the dies.

In September 2006, C.G. Automation shipped the dies to Autoform. C.G. Automation placed an identification tag on the risers mounted to the dies. (A riser is a metal bar that is machined or bolted to the bottom of the die to establish the height of the die in the shut or closed position.) C.G. Automation also filed the requisite UCC financing statement.

Autoform never paid C.G. Automation and entirely ceased operations in 2007. However, before Autoform ceased operations it sold the dies to Key Plastics. (Key Plastics and Autoform fought a separate legal battle, resulting in Key Plastics agreeing to pay Autoform for the molds and dies.) At the time that Key Plastics received the dies from Autoform, the original risers mounted to the dies by C.G. Automation had been removed.

C.G. Automotive sued Autoform, Key Plastics, Autoliv and Chrysler to enforce its lien and take possession of the dies. The Michigan Court of Appeals held that C.G. Automation did not have an enforceable lien on the dies because it had failed to "permanently record" the required information on the dies when it affixed the information to the risers, "an object readily removable from the die." The Michigan Court of Appeals reversed the trial court's ruling that C.G. Automation was entitled to take possession of the dies.

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ACCESS TO BANKRUPTCY COURT FUND, EASTERN DISTRICT OF MICHIGAN

Dickinson Wright attorneys are playing an integral part in the creation of a new nonprofit organization focused on making bankruptcy relief more accessible to residents in Michigan that have been severely impacted by the economic downturn. Several Dickinson Wright attorneys have been commended for their financial contributions and pro bono legal services provided to the new organization. Jim Plemmons in particular has been active in the formation of the Access to Bankruptcy Court Fund and serves as a Board member. He also is the Practice Department Manager for the Automotive and Product Liability Litigation Groups at Dickinson Wright PLLC and is available to assist with any automotive, restructuring or bankruptcy matters. Jim can be reached at 313.223.3106 or jplemmons@dickinsonwright.com.

DICKINSON WRIGHT PLLC EXPANDS ITS TORONTO, ONTARIO AFFILIATION THROUGH COMBINATION WITH AYLESWORTH LLP

Through an affiliation with Aylesworth LLP, Dickinson Wright PLLC announced its expansion of its existing Ontario affiliate, Dickinson Wright LLP, through a combination with the established Toronto firm Aylesworth LLP. The combination was effective January 1, 2011, and broadens our North American footprint while also giving a full-service component to our affiliate in Ontario.

Our Ontario affiliate has experience assisting auto manufacturers and suppliers with issues such as enforcement of contracts, maintaining the supply chain, recovering tooling, and collecting overdue payments. For more information, please see our Ontario affiliate's website at www.dickinsonwright.ca.