



## Website Terms of Use

The terms for using websites, often taking the form of legalese to which many users pay little attention, are more important than they are interesting to read. The terms restrict how the public can use a website to obtain information, purchase goods and services, or take part in web based social networking. Largely because of the federal Computer Fraud and Abuse Act (CFAA), the terms of use can now be used offensively either by prosecutors charging individuals with wrongdoing emanating from a violation of the terms, or by website owners themselves seeking civil remedies for legal injuries to them from what amounts to a breach of contract.

The growing and evolving body of court decisions concerning terms of use and the CFAA should prompt owners of websites to adopt and regularly review the terms for using their sites, giving special attention to the following considerations:

- Instead of using just any boilerplate legal language, the terms of use should be tailored to fit the particular risks posed to the business and users of the site;
- The terms of use must be easily seen and understood to have their intended effect. This means that they should be conspicuous on the site and written so as to clearly indicate conduct that is and is not authorized. There may be no one fail safe approach, but one court has said that there is adequate communication of the terms of use if the terms can be accessed from all pages on the site;
- Website owners may want to make explicit the agreement to abide by the terms of use by including “clickwrap” or “browsewrap” agreements that make consent to the terms a condition of using the site. If the user clicks on “I accept,” but then violates the terms of use, this essentially nails down the fact, which may be pivotal in later criminal or civil court cases, that the user lacked the necessary authorization for his actions. For example, in a recent criminal case in which

a university student secured access to a university computer site and stole Social Security numbers and other confidential data, the prosecution was aided by the fact that the student had signed an “acceptable use” computer policy that prohibited the very actions which led to the criminal charges;

- Putting the terms of use in place is one thing, but then monitoring compliance and notifying users of suspected or confirmed violations result in enhanced protection. In the case of the university student who was improperly gathering sensitive personal information, the university had on three occasions detected that the student’s computer was performing unauthorized and suspicious functions, and had informed him of its discoveries. When the student nonetheless continued to scan and infiltrate computers without authorization, adding to his database of stolen information, his fate in the ensuing criminal case was sealed.

• *SGK*

## Announcements

### Associates named “Rising Stars” for 2008

Sherrard German & Kelly, P.C. is pleased to announce that three of its attorneys, Jennifer R. Applegate, Sharon M. Menchyk and Erin E. Milliken, were recently named as Pennsylvania Rising Stars for 2008 by Philadelphia Magazine. The complete list of Pennsylvania Rising Stars was included in a special December issue of Philadelphia Magazine, published by Law & Politics. The award recognizes just 2.5 percent of Pennsylvania attorneys.

Ms. Applegate is a senior associate at the firm, practicing in the Corporate Services Group. She represents clients in the areas of corporate law, including matters such as mergers and acquisitions, contract preparation and negotiation, real estate transactions and entity formation, dissolution, and reorganization.



Jennifer R. Applegate

Ms. Menchyk is an associate at the firm, practicing law in the Corporate Services, Financial Services and Litigation Services Groups.

Ms. Milliken is an associate at the firm, practicing in the Insurance Coverage Services Group. She represents primary and excess insurance carriers in various complex insurance coverage matters involving professional lines of insurance including, fiduciary liability, directors and officer’s liability and professional errors and omissions liability.



Erin E. Milliken

## Barbara L. Bower joins Sherrard, German & Kelly, P.C.

Sherrard, German & Kelly, P.C. is pleased to announce that Barbara L. Bower has joined the firm. Ms. Bower’s practice is devoted exclusively to immigration matters, with primary emphasis on business-related nonimmigrant and immigrant visas. Her clients range from large, publicly-traded multinational corporations to small start-up companies and private individuals engaged in the following industries: manufacturing, engineering/construction, information technology, finance, healthcare, higher education, consulting, and film/media. Ms.

Bower’s cases have included B, E, H, L, and O nonimmigrant visas, labor certification, multinational manager, and extraordinary ability LPR, J-1 waiver, special immigrant religious workers, various family-based categories and naturalization. She has also advised clients on immigration issues related to corporate reorganizations, I-9 compliance, and the potential impact of criminal conduct on immigration status.

Ms. Bower serves as pro bono counsel on immigration-related matters to Catholic

Charities and the Jewish Family & Children Services’ Pittsburgh Regional Immigrant Assistance Center. Ms. Bower was selected by her peers for inclusion in The Best Lawyers in America in the field of Immigration (2003-Present). She also received the American Immigration Lawyers Association President’s commendation for service as Chair of the 2000 Annual Conference Committee and the Catholic Charities Caritas Award for Service in 2003.



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## Considerations in Downsizing a Workforce

In these difficult economic times, the downsizing of a workforce is becoming more common and necessary in order for a business to continue to compete. However, in making the decision to make reductions in a workforce, companies must take care to comply with various federal and state employment and wage laws including, though not exclusive, the Worker Adjustment and Retraining Notification Act, the Fair Labor Standards Act, the Older Workers Benefits Protection Act, the Employee Retirement Income Security

Act and the Pennsylvania Wage Payment and Collection Law. Under these various statutes, employers may be required to follow certain procedures in providing notice prior to the separation of employment, requiring releases from older workers in connection with paying severance benefits, or correctly calculating wages for final pay periods.

It is important to keep in mind that not all employers are subject to all of these statutes or all of the requirements set forth in a particular

statute. In the event a reduction in workforce must occur, a review of the plan of reduction should occur before any action is taken by the employer.

*The content of this article is intended to provide a general guide to the subject matter. Please contact Sherrard, German & Kelly, P.C. for advice about your specific circumstances.*



Report from Counsel - Insights and Developments in the Law

## Recession and Contracts for the Sale of Goods: A Seller’s Perspective

By: Gary Philip Nelson

Recently, we were advised that the United States economy has been in a recession for the last year, and to expect the recession to continue for another year. We were not advised whether the recession would be a mild one, or the worst since the recession of the early 1980s. Other reports speculate that the recession will be a deep, serious financial downturn. Even if the general depth of the recession is not as deep as predicted, specific markets, such as the auto industry and its suppliers, are certain to be challenged to an extent never seen before.

It is time, therefore, to consider what steps a seller should consider taking to protect itself against the prospective non-payment by a buyer? Does the seller know how its customers are doing? Has the seller recently obtained credit reports? Does it make sense to target specific customers for frequent credit checks? The present economic conditions call for increased scrutiny. None of us like bad news, but bad news that surprises us is, somehow, even worse.

### Review Contracts

All sellers should review their contracts, particularly if there is a risk that the buyer will file for bankruptcy. Sellers with long-term obligations need to review the contracts to determine whether the contracts provide for an opportunity to cancel or restructure those contracts, keeping in mind the terms of credit

insurance or other guaranties, if any, covering the seller’s accounts receivable, which should also be reviewed.

### The Contract

What should the seller be looking for when it reviews contracts with the troubled buyer? First, what kind of contract is it: a long-term contract, a contract with open and continuous purchase orders, or a single purchase order? Second, does the contract have a force majeure clause, clauses specifying what will be a default, or clauses specifying or limiting damages?

A force majeure clause will excuse performance of the buyer’s obligation to buy for so long as a condition or event specified in the clause exists. These specified events typically are of types that make performance impossible or impractical for reasons outside of the control of the buyer. These provisions, however, are not intended to protect the buyer from the normal risks of a contract or the market. While a seller can expect to hear a buyer claim a force majeure has occurred, it is important to remember that these clauses are interpreted narrowly. Default clauses provide the right to enforce the buyer’s obligations under the contract. Often, buyers would prefer to negotiate to cancel or amend the contract, rather than to defend against a lawsuit. Before declaring a default, however, it is important for the seller to have reviewed its ... *continued on page 2*

## Springer and SGK to Receive Hearth Dreammaker Award

Sherrard, German & Kelly, P.C. and attorney Eric Springer are to be awarded its Dreammaker Award at HEARTH’s Dreammaker Recognition Award Dinner on June 15th. The Dreammaker Award is given to those who have made a significant impact and financial contribution to HEARTH. HEARTH is a non-profit entity that runs Benedictine Place in the North Hills, a transitional housing program for homeless women and children providing a continuum of care that empowers participants to become independent and economically self-sufficient. The focus of Benedictine Place is to provide the necessary support for families to enable mothers to complete educational or training programs, all while parenting their children and maintaining jobs. Mr. Springer has been on the board for the past ten years and has served in numerous positions including serving on its Finance, Executive, Community Housing Development, Board Development and Golf Event Committees. He has served as chairman of the Annual Golf Event for the past five years which has helped to raise hundreds of thousands of dollars for this innovative and award-winning charity. His long-time friend and Co-Chair, Dr. Matthew DiAndreth and his wife Carmela will also be receiving the Dreammaker Award. Dr. DiAndreth is the owner of Precision Endodontics. The Dreammaker Award Dinner follows HEARTH’s Fourteenth Annual Golf Outing held at Sewickley Heights Golf Club. SGK will again be a Gold Sponsor for the Event.



## Recession and Contracts for the Sale of Goods: A Seller's Perspective ... continued

account history with its buyer. For example, has the buyer routinely made late payments, or otherwise breached the contract without objection or action by the seller. If so, then it will be necessary to consider whether there has been a waiver of existing or future defaults, and how to be able to assert the existence of a default notwithstanding that waiver.

Why does a seller need to have reviewed its own behavior before declaring a default? If a court were to determine the buyer's default has been waived, then it would be the seller that would be in default under the contract rather than the buyer. What damages would a seller be exposed to? At a minimum, a seller should expect to address a claim for damages measured by the difference, if any, between the contract price and the price the buyer would have to pay to buy replacement goods on the open market.

Contracts often exclude "consequential" and/or "incidental" damages, limiting the potential recovery available in an action for breach of contract. "Consequential" damages include lost profits and can be quite significant. "Incidental" damages are damages incurred incident to the breach. These exclusions of "consequential" and/or "incidental" damages operate to limit the recovery of the non-breaching party to the items specified in the contract, or provided for in the Uniform Commercial Code.

### The Uniform Commercial Code (UCC) Demands for Adequate Assurance of Future Performance

Every contract for the sale of goods is subject to the provisions included in the contract, and, in the US, to the provisions of the UCC, which do not conflict with the contract's terms. One provision of the UCC, Section 2-609, permits a party to a contract for the sale of goods to demand "adequate assurance of future performance" if it has "reasonable grounds for insecurity" with respect to the other party's performance. Section 2-609 permits that party to suspend performance until it receives assurance, where it is commercially reasonable to suspend performance. When is a seller reasonably insecure about its buyer's future performance? The court will ultimately make that determination based on customary commercial standards, which calls for a fact-specific inquiry.

Examples of reasonable grounds include:

- Mounting debt to the seller, or a general downgrade of the buyer's credit
- Increasing time for the buyer to have made payment, or failing to take advantage of a payment discount as it had done for many years
- Buyer's insolvency
- Changes in the buyer's financing; or

• The buyer suddenly begins using credit more than it had been doing so. Courts do not, however, favor requests that seem to be taking advantage of a buyer. Once again, the account history is relevant, since it could be unreasonable for a seller who has repeatedly accepted late payment to request assurance after receiving a late payment. Section 2-609 requires the demand for adequate assurance of future performance to be in writing, specifying the reason for the demand, requiring assurance, and giving notice that buyer will be in default if such assurance is not received. Accordingly, sellers should consult with counsel before requesting adequate assurance of future performance. A buyer who does not respond to a seller's request for adequate assurance within a reasonable time of 30 days, or less, is likely to have repudiated the contract. Similarly, a response to the demand for adequate assurance of future performance in a manner that offers less assurance than demanded by the seller in its notice, is likely to be a repudiation of the contract. The seller would no longer have an obligation to perform its duties under a contract that has been repudiated by the buyer. But, if a court were to find that the seller did not have the right to request adequate assurance of future performance or that the buyer provided adequate assurance, then the seller may be held liable for the buyer's damages, if any.

### Rights Where Buyer Is Insolvent

The provisions of Section ... continued on page 4

## Recession and Contracts for the Sale of Goods: A Seller's Perspective ... continued

2-609 are available whether or not a buyer is insolvent. Section 2-702 of the UCC, however, provides a seller with additional rights upon its discovery that its buyer is insolvent. That seller may refuse to continue to deliver goods except in exchange for cash (practical note: cash really means cash, or a wire transfer, in advance of delivery, and does not include a check upon delivery), including payment for all goods in transit. Another UCC provision, Section 2-705, permits a seller to stop delivery of goods in transit upon discovering a buyer's insolvency. While it can be difficult to determine whether or not a buyer is insolvent, a bankruptcy filing will almost certainly permit a seller to stop goods in transit.

### Addressing Default and Bankruptcy

Even though the contract is in default or a reasonable ground for insecurity exists, circumstance may permit or compel the seller to continue to do business with a buyer. It should do so, however, under circumstances where the default would not be waived, or without restructuring the contract. That would be the time for the seller to consider re-pricing to take into account the increased credit risk; limiting the buyer's damages for the seller's breach; revising default provisions; shortening credit terms or requiring the buyer to pay cash in advance of shipment; obtaining a letter of credit, a UCC security interest, or a guaranty from another party; shortening the term of the contract; or reducing the quantity of goods being sold.

But if circumstances favor cancelling the contract, then it would be better to do so sooner rather than later, and in any event before the buyer files for bankruptcy. A bankruptcy filing prevents cancellation of a contract (which is different from stopping goods in transit, which is permitted), even one in default, without bankruptcy court authorization. Cancellation before filing bankruptcy will eliminate the need to obtain court authorization. Even where

a seller cancels a long-term contract, the seller and the debtor-buyer may choose to do business on individual, distinct purchases. During the immediate period of the bankruptcy filing by the debtor-buyer, a seller has the right to stop goods in transit; to demand reclamation of goods recently delivered to the debtor-buyer, which are still in its possession and have not been sold; and to ask the bankruptcy court to allow an administrative expense payment for goods delivered to the debtor-buyer during the 20-days before the date the bankruptcy is filed.

Where the seller and the debtor-buyer do business on individual, distinct purchases, a seller whose products are critical to the success of the buyer's bankruptcy might be eligible for "critical vendor" status for the seller. In some bankruptcy cases, critical vendors have been able to negotiate for payment of any pre-bankruptcy claim it may have against the buyer or for protection from preference suits, in exchange for agreeing to selling goods to the debtor-buyer on specified, open-credit terms, as an administrative creditor.

If a long-term contract has not been cancelled before bankruptcy, then the debtor-buyer in a Chapter 11 bankruptcy case may continue to buy goods under it. The debtor-buyer is required to pay for the goods received under the contract and otherwise perform its obligations under the contract following its bankruptcy, but if the debtor-buyer does not pay or perform, the seller must go to bankruptcy court for relief. Even if the debtor-buyer is performing, it has until confirmation of its plan of reorganization to decide whether to assume or to reject the contract. Therefore, the seller cannot be certain whether the contract will continue. This leaves the seller exposed to losing the contract and favorable pricing, if prices are declining or likely to decline. Accordingly, the seller under a long-term contract will need to consider seeking a bankruptcy court order requiring the debtor-buyer to decide in advance of confirmation of

its plan of reorganization whether to assume or to reject the contract.

### Summary

It has been more than 25 years since we have been confronted with economic conditions as challenging as the economic conditions are likely to face in 2009. In the current market, sellers should aggressively take steps to understand which of their buyers are at risk of presenting a credit problem, and what actions are available to them when a buyer cannot, will not, or does not pay for its goods. Strategy based on frequent credit checks, the terms of contracts and applicable law, and preserving options to enforce or renegotiate contracts, will mitigate losses and leave a seller in the most favorable position to address a buyer's default or bankruptcy. It will also position a seller to be ready to take advantage of the eventual rebound in the economy, which is certain to follow these challenging times. • *SGK*

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

### About the Author

Our shareholder, Gary Philip Nelson, has been practicing law for over three decades, earning a national reputation in the Creditors Rights practice area for his work in complex reorganization cases, and other sophisticated corporate and commercial transactions. During that time he has been recognized as one of the Best Lawyers in America (White-Woodward) and as one of the Pennsylvania Super Lawyers (Law & Politics) (being voted one of "The Top 50 – Pittsburgh," the 50-lawyers receiving the highest point total cast for Pittsburgh lawyers). Mr. Nelson can be contacted at 412-258-6720 or [gpn@sgkpc.com](mailto:gpn@sgkpc.com).



Gary Philip Nelson



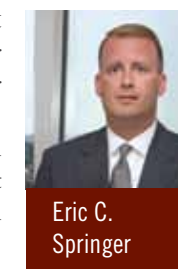
## Announcements

### Financial Industries Network Event Sponsorship

Sherrard, German & Kelly, P.C. was a sponsor of the Financial Industries Network Event held on November 18, 2008. The FIN Event featured a panel discussion on the current credit crisis and the outlook for the financial industry. Speakers at the Event were Paul H. Dimmick, Managing Director of the Federal Home Loan Bank, Brian J. Koble, Senior Research Analyst for Hefren-Tillotson, Inc. and Robert A. Dye, Ph.D., Vice President and Senior Economist of PNC Financial Services Group.

Sherrard, German & Kelly was also a sponsor of FIN's recent Dinner Event held on April 22, 2009 involving a panel discussion on President Obama's tax legislation and its potential impact. Speakers of the Event were Charles Smith, Principal and Chief Investment Officer of Fort Pitt Capital Group, Thomas L. Bakaitus, Partner and Operating Officer of Herbein & Co, Inc. and Robert D. Spears, CPA, JD, Principal of Hill, Barth & King, LLC.

The Financial Industries Network is a non-profit organization of senior-level managers from a variety of regional companies, including banking and finance-related industries, accountants, investment advisors, securities



Eric C. Springer



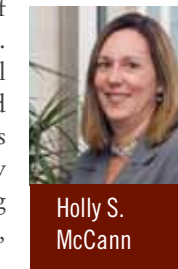
brokers, business consultants, attorneys and other professionals. SGK attorney Eric C. Springer has served on the Board for many years and recently completed his two year term as President.

### Benet Woods Housing Corp.

Sherrard, German & Kelly, P.C. is pleased to have worked with local non-profit entities Benet Woods Housing Corp. and HEARTH to assist in the formation of the first permanent, affordable rental housing community created for working families in northern Allegheny County. The development is the result of a partnership between Benet Woods Housing Corp. and TREK Development and years of work for those involved. The development will consist of 11 two- and three-bedroom units (along with a community room) for families earning \$24,800 to \$37,200, depending on family size. SGK attorneys Robert J. Courie and Holly S. McCann acted as counsel to Benet Woods as to its' formation, transaction structure and financing issues, as well as tax exemption and low-income housing tax credit issues relating to the development. The project is the product



Robert J. Courie



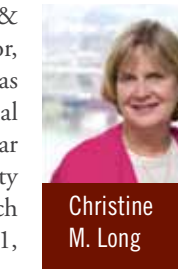
Holly S. McCann



of years of work and planning by its affiliated non-profit, HEARTH. HEARTH operates Benedictine Place, a transitional housing program for women and children.

### Christine M. Long Speaks at Limited Liability Company Seminar

Sherrard, German & Kelly, P.C. Director, Christine M. Long was a speaker at a National Business Institute seminar on Limited Liability Companies ("LLC") which was held on April 21, 2009. Ms. Long spoke on how to comply with applicable state law in creating and operating an LLC as well as how to create practical operating procedures.



Christine M. Long