



# KRING & CHUNG, LLP

## NEWSLETTER

March 2010

### Good Business Practices for Manufacturers - Standard Sales Terms and Conditions



**Laura C. Hess**

Kring & Chung is experienced at representing manufacturers. Often we are involved in lawsuits between merchants regarding claims of defective and nonconforming goods.

The scenario usually plays out something like this: a manufacturer calls us because it needs help collecting on outstanding invoices. The non-paying customer responds that it did not pay for the goods it received because there was some kind of a problem with the quality. The non-paying customer counter-sues the manufacturer for damage allegedly caused to its business as a result of having received allegedly poor quality goods, such as lost profits and its costs incurred to obtain replacement product elsewhere.

Disputes such as this can be avoided if the manufacturer provides its customers with well drafted terms and conditions at the time of sale. The manufacturer's sales order or invoice should contain provisions such as:

1. Limiting liability in the event the goods are defective and nonconforming (by, i.e., excluding liability for consequential damages, lost profits, or punitive damages). For instance, manufacturers may want to limit the buyer's remedies to obtaining replacement product or a refund of the purchase price.
2. Setting forth how long the buyer has to inspect and reject the goods after receipt. For instance, if the buyer does not notify the manufacturer in writing of any problems with the goods within 45 days of receipt, the buyer cannot then return the product, receive a credit, or assert any claim for damages.
3. Identifying when risk of loss for damage occurring during shipping will transfer from the manufacturer to the buyer.
4. Reserving the right to withhold filling other orders in the pipeline if the customer is in delinquent in payment.
5. Disclaiming liability for delivery delays.
6. Setting forth a choice of law (i.e. California) that will be applicable in the event of a dispute.
7. Selecting the forum in the event of a dispute (i.e. Orange County Superior Court in California). This is important so that you are not forced to bring or defend a lawsuit in an inconvenient forum, such as a foreign court.
- 8.

Expensive lawsuits can be avoided by providing your customers with comprehensive terms and conditions at the time of each sale. We can draft these for you.

*Ms. Hess is a partner with Kring & Chung, LLP's Irvine office. She may be reached at (949) 261-7700, or [lhess@kringandchung.com](mailto:lhess@kringandchung.com). Additionally, Ms. Hess provides legal information for companies that do business in California on her blog, "Hess on Business Law," at [www.hessbizlaw.blogspot.com](http://www.hessbizlaw.blogspot.com)*

### In This Issue

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### Our Offices

**Orange County**  
38 Corporate Park  
Irvine, CA 92606  
(949) 261-7700

**Sacramento**  
2620 J Street #1  
Sacramento, CA 95816  
(916) 266-9000

**San Diego**  
11622 El Camino Real, Ste 100  
San Diego, CA 92130  
(858) 436-0268

**Inland Empire**  
3602 Inland Empire Blvd., Ste A120  
Ontario, CA 91764  
(909) 941-3050

**Westlake Village**  
200 N. Westlake Blvd., Ste 207  
Westlake Village, CA 91362  
(805) 494-3892

**Las Vegas**  
7040 Laredo Street, Ste K  
Las Vegas, CA 89117  
(702) 260-9500

**Los Angeles**  
3600 Wilshire Blvd., Ste 1220  
Los Angeles, CA 90010  
(213) 384-1905



## Should You Become A Certified Minority Owned Business To Quality For Certain Government Contracts?

### Suzanne M. Rehmani

With the state of the current economy, government contracts may be an excellent source of business for minority owned business enterprises (MBE). Programs exist at the federal, state, and local levels, intended to increase the participation of minority owned businesses.

At the federal level, there are contract set-asides for companies certified under the Small Business Administration's 8(a) program, and also Small Disadvantaged Businesses (SDB). At the state level, each state and local transit agency must establish a goal for the participation of Disadvantaged Business Enterprises (DBE). Keep in mind that a goal is not the same thing as a quota, meaning it is something that cannot be legally enforced. Some agencies view their goals as a purely ministerial exercise, and fail to achieve their goals year after year. Others make a more sincere effort to meet their goals and are more aggressive in getting their contracting officers and prime contractors to increase DBE participation, especially on large construction projects. Many states, counties, and cities also have their own programs which are typically called Minority Business Enterprise (MBE) or Minority or Women Business Enterprise (MWBE) programs.

**Being a minority owned business does present some advantages in competing for contracts from the government and large corporations. Usually these advantages come in the form of goals established for minority owned business participation, either as a prime contractor or subcontractor.** In rare instances, contracts are set-asides for minority owned businesses and exempt from outside competition.

Most government agencies and many corporations require a minority owned business certification. Qualifying as a minority owned business is typically a fairly involved process that requires you to show that your company is both owned and controlled by minorities. And it should be noted that obtaining a minority owned business certification is NOT a guarantee of contracts from the government or corporate sector. How do you decide whether it is worth obtaining a minority owned business certification? Essentially the answer is the same as determining whether it is worth marketing to any large organization - it depends on how much business is there and your chance of getting some of it. Before expending a lot of time and money on certification, businesses should find out whether the government agency or corporation buys what they sell. If they do not, whether they have a minority owned business program (often referred to as a Supplier Diversity program) is irrelevant. Once you have determined that the business potential is there, then it may be worthwhile to become certified if it can help open doors and increase the odds of getting a contract. Kring & Chung is happy to assist businesses in this involved certification process, which may require restructuring and updating your corporation and facilitation of the certification process with the appropriate government agencies.

*Ms. Rehmani is a partner with Kring & Chung, LLP's Irvine office. She can be contacted at (949) 261-7700, or [rehmani@kringandchung.com](mailto:rehmani@kringandchung.com).*

## Our Attorneys

### Partners

Kyle D. Kring  
Kenneth W. Chung  
Paul T. McBride  
Robert P. Mouglin  
Kathleen Elder-Blakely  
Timothy J. Broussard  
David P. Ramirez  
Suzanne M. Rehmani  
Ronald J. Skocypec  
Ted A. Connor\*  
Shane Singh  
Laura C. Hess  
Han Joo Kim\*

### Associates

Roland J. Amundsen  
J. Christopher Bennington  
Scott M. Bonesteel  
Min K. Chai  
Brendan J. Coughlin  
June Yang Cutter  
Joanna L. Darvish  
Monica R. Dean  
Michael B. Efron  
Merielle R. Enriquez  
Christopher F. Geiger, Jr.  
Anna Greenstin  
Richard C. Hatem  
John A. Kaniewski  
Alyssa L. Morrison  
Allyson K. Myers  
Justin G. Reden  
Matthew A. Reynolds  
Arie L. Spangler  
Michelle L. Wiederhold

### Of Counsel

Timothy J. Schafer  
David M. Griffith  
Paul A. Rianda

\*A Professional Corporation



## The Need for Insurance Coverage Advice

### J. Christopher Bennington

Your business is sued for bodily injury or property damage. You tender the suit to your liability insurance carrier, only to have the carrier deny any obligation to defend or indemnify your company against the claim. What is your recourse?

Kring & Chung, LLP has a department dedicated to issues of insurance coverage, and we are in a position to help you determine if your carrier has fairly denied your request for coverage. Many times, a carrier's denial is inconsistent with the terms of the insurance policy it sold to you.

In a recent case, Kring & Chung represented a plumbing contractor that installed a toilet in a newly constructed home. Some ten years after installation, the plastic nut holding the water line to the toilet tank failed. This caused a second story flood in the house and significant damage to the home's walls, floors and ceilings. Our client tendered the claim to its insurance carrier, but was told that there was no coverage because the policy included an exclusion which eliminated insurance for claims arising out of the contractor's "completed operations."

When we reviewed the policy, however, we determined that the exclusion did not eliminate coverage for claims arising out of allegedly defective products supplied or installed by the insured. The exclusion only applied to the contractor's completed work. We were able to force the carrier to settle the suit against our client and pay the vast majority of the defense costs that our client incurred during the lawsuit. Without a coverage review, our client might have suffered the crippling cost of defending itself, and then paying a sizable judgment.

Not every coverage review will be as successful as this one. But almost every case justifies some investigation of the sources, types and amounts of coverage that should be available to defend your business against a lawsuit. Kring & Chung is ready and able to provide this kind of insurance review for your business. We are also available to advise you about your coverage and financial exposure when you are purchasing insurance.

*Mr. Bennington is an associate with Kring & Chung, LLP's Westlake Village office. He can be contacted at (805) 494-3892, or [cbennington@kringandchung.com](mailto:cbennington@kringandchung.com).*



## Initial Status Reports in Construction Defect Litigation

### Michelle Wiederhold

California Rules of Professional Conduct Rule 3-500 requires attorneys to "keep a client reasonably informed about significant developments relating to the employment or representation. . ." This communication should include a comprehensive initial status report ("ISR").

An ISR is an attorney's beginning guide for handling a case. An ISR should provide the basics including a case overview, parties, representation, and subject involved. An ISR should provide an attorney's analysis of pleadings, a client's scope of work, and analysis of any other valuable items, if available, such as cost of repairs, defect lists, destructive testing results, and visual inspection results. If sufficient information is available, an ISR should provide analysis of potential defenses and issues, such as whether homeowners have privity of contract, whether a subcontractor owes a duty to defend and indemnify a contractor, and SB800 Right-to-Repair, which gives a developer the right to elect the repair process in lieu of litigation on homes built after January 1, 2003.

All of these basic items combine to provide an in-depth overview of where the case is at, where it is headed, and how the litigation will be directed.

*Ms. Wiederhold is an associate with Kring & Chung, LLP's Sacramento office. She can be contacted at (916)266-9000, or [mwiederhold@kringandchung.com](mailto:mwiederhold@kringandchung.com).*

## Announcements

We are pleased to announce that [Laura Hess](#) was made a partner in January 2010. Ms. Hess has been with the firm for many years in our business and real estate departments in Irvine. Ms. Hess primarily represents manufacturers in litigation matters.

[Han Joo Kim](#) recently joined our firm as a partner to head up our new immigration department. Mr. Kim has over 14 years of experience as an immigration attorney. Mr. Kim will be working out of both the Irvine and Los Angeles offices.

We are also pleased to announce [Scott Bonesteel](#) has joined our firm as an associate with our San Diego office. Mr. Bonesteel has considerable trial experience handling serious personal injury and wrongful death cases.

## The Annual Kring & Chung Newport Beach Triathlon



**Sunday, April 11, 2010  
Newport Dunes,  
Newport Back Bay**

The race consists of a half mile swim in the Newport Beach Back Bay, a 15-mile cycle course around Fashion Island, and a 5K run along the Back Bay. The proceeds of this event will benefit the UCI Rowing Teams.

[Online registration](#) for the triathlon is still available.

### Attorney Spotlight

[Paul McBride](#) recently obtained a favorable judgment for a client in Immigration Court. The client was placed in removal proceedings by USCIS because she had turned 21 while her petition for a green card, based on her status as an alien fiancée's minor child, was pending before USCIS. Mr. McBride convinced the Immigration Judge that the client's age, for purpose of eligibility for a green card, should be measured as of the date she filed her petition, not the date USCIS acted on the petition. Accordingly, the Immigration Judge entered an order canceling the removal proceedings and directing USCIS to issue a green card to Mr. McBride's client.

We are pleased to announce that [Michael B. Efron](#) recently obtained a favorable trial result by reducing our client's long term permanent monthly spousal support obligation to zero. Our client had been previously ordered to pay \$1,800 per month and was no longer able to maintain that court ordered obligation.

Congratulations to [Scott Bonesteel](#) of our San Diego office, who recently concluded a lengthy, multi-million dollar soil contamination case in Los Angeles Superior Court. Mr. Bonesteel defeated plaintiff's Motion for New Trial, confirming the court's earlier defense verdict in favor of our client. The case involved allegations of significant soil contamination at a dry cleaning operation. The current owner/operator sued the insurers for the prior owners all of whom are now deceased) under provisions of the California Probate Code which permit suit directly against the insurers. After the insurers for the other defendants settled with plaintiff (settlements which totaled close to \$2 million,) Mr. Bonesteel handled the matter through an extensive jury trial, followed by a multi-stage bench trial wherein plaintiff claimed damages in excess of \$5 million. The court ultimately found in favor of our client, granting a complete defense verdict.

We are pleased to announce that [Anna Greenstin](#) recently obtained a ruling granting summary judgment in favor of our clients in a Breach of Contract, Conversion, Fraud, and Intentional Interference of Economic Relationship lawsuit. Our clients were sued by a disgruntled lessee who alleged our clients converted his business's good will by running a similar business after his lease expired. The court held that, absent a written agreement to the contrary, a lessee may not maintain an expectation of ownership rights, nor may the lessee preclude an owner of a commercial property from running a similar business.

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