



BEYOND BOILERPLATE: THE IMPORTANCE OF “STANDARD” CONTRACT PROVISIONS

Jeffrey D. Bukowski

Julie E. Ravis

STEVENS & LEE
LAWYERS & CONSULTANTS

A STEVENS & LEE/GRIFFIN COMPANY 

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Presenters

- Jeffrey Bukowski, Litigation Shareholder, Stevens & Lee
- Julie Ravis, Litigation Shareholder, Stevens & Lee

Goals for Today

- Contract provisions should be carefully considered and tailored to the situation and not viewed as “boilerplate”
- Common contractual terms that can create issues (i.e., lawsuits)
- Best practices and takeaways

Litigators Presenting on Contract Language?

- An ounce of prevention is worth a pound of cure
- Litigation is unpredictable, disruptive, and difficult to accurately budget
- After a dispute arises, inevitably the language that was clear two years ago has multiple meanings – or worse, unintended consequences

Form vs. boilerplate

- Form is not a problem!
- However, the form needs to be tailored to the particular circumstance and type of contract

Basic Contract Interpretation Principles

- The fundamental rule is to ascertain the intent of the contracting parties. But when the contract is in writing, and the writing is clear and unambiguous, the best evidence of the parties' intent is the contract itself.
- The language used in the agreement is given its commonly accepted and plain meaning.
- The contract is construed as a whole, with all provisions read together instead of in isolation.
- “Parol evidence,” or documents relating to the negotiation of the contract, is admissible only if the contract is ambiguous.
- Ambiguity does not exist simply because the parties disagree on the language; instead, there must be two equally reasonable interpretations.
- A contract is construed against the drafter if ambiguous.

Common “Standard” Contract Provisions

- Arbitration
- Forum selection clause
- Choice of law
- Non-compete / non-solicitation
- Indemnification
- Release
- Limitation of liability
- Confidentiality

Arbitration

- Should we include one?
 - Benefits
 - No jury
 - Some ability to select the Panel
 - Often quicker resolution
 - Can have limited discovery
 - Downsides
 - May be contested
 - Limited ability to dismiss a claim prior to a hearing
 - Very limited right to appeal
 - Can be expensive (particularly AAA)
 - Discovery may not be limited depending on forum
 - “Replacement” arbitrators
 - “Split the baby” awards

Arbitration

- What claims are included?
 - Broad clause: You agree that any controversy arising out of our business or this agreement shall be submitted to arbitration conducted before the American Arbitration Association and in accordance with the rules of that organization.
 - Narrow clause: You agree that any breach of contract action between the parties will be submitted to arbitration conducted before the American Arbitration Association and in accordance with the rules of that organization.
 - Potentially ambiguous clause: You agree that any controversy arising out of this agreement shall be submitted to arbitration”
- What parties are bound?

Forum Selection Clause

- Contractual provision that identifies a particular jurisdiction for any lawsuit.
- This can be as broad as an entire state, or as narrow as a particular county within a state.
- Considerations:
 - Home court advantage
 - Costs or burden
 - Connection to the location
 - Enforceability

Forum Selection Clause

ABC Company consents to exclusive jurisdiction and venue in the Court of Common Pleas of Cumberland County, Pennsylvania, or the United States District Court for the Middle District of Pennsylvania.

Choice of Law

- Allows the parties to specify the law to be applied regardless of choice of law principles
- Considerations
 - Understand the law of the state – any peculiarities or limitations?
 - Protection of employees or other rights (i.e., California or Michigan)
 - Defenses to claims in one jurisdiction vs. another
 - Limits on punitive or treble damages
 - Enforceability
 - Scope – breach of contract or all claims?

Non-compete / Non-solicit Provisions

- Contractual provision that prevents a former employee from competing with the business for a particular time period in a particular geographic region
- Non-solicitation provision can apply to either employees of the business, or to customers of the business
- Different rules apply, with non-solicitation provisions in general construed less strictly

Non-compete / Non-solicit Provisions

- Considerations
 - Jurisdiction
 - Business purpose
 - Geographic scope
 - Time period
 - Related contractual provisions
 - Employee agreeing the provisions are reasonable to protect the good will and proprietary rights of the company
 - In the event the provisions are in any way deemed unenforceable, the Court can amend to “apply as to such maximum time and territory and to such other extent as the court may judicially determine or indicate to be reasonable.”

Non-compete / Non-solicit provisions

“I agree that during my Employment by Manitowoc and for a period of two years from the date my Employment by Manitowoc ends for any reason, including termination by Manitowoc with or without cause, I will not (either directly or indirectly) solicit, induce or encourage any employee(s) to terminate their employment with Manitowoc or to accept employment with any competitor, supplier or customer of Manitowoc.”

- *Manitowoc Co., Inc. v. Lanning*, 906 N.W.2d 130 (Wis. 2018) – Applies the WI restrictive covenant statute to the non-solicitation provision and finds it invalid and unenforceable.

Indemnification

- Who is being indemnified - company, employees, officers, affiliates?
- What is the scope of indemnification?
 - Does it include a duty to defend?
- Sole and exclusive remedy
- Time limitations to assert a claim
- Survival after agreement termination
- Attorneys' fees and costs

Indemnification

“The Selling Group jointly and severally agrees to indemnify and hold harmless Company and affiliates against any losses, claims, damages, or liabilities to which the Company may become subject . . . Insofar as such losses, claims, damages, or liabilities arise out of or are based upon: (1) any unauthorized use of sales materials or any oral or written misrepresentations or unlawful sales practices concerning a Contract; or (2) failure by agents or employees of the Selling Group to comply with all applicable state insurance laws and regulations.”

Release

- Contractual provision that foregoes particular claims and the right to assert such claims in the future
- As with any contract, must be supported by valid consideration (typically payment of money or other agreements).
- Interpreted the same as any other contractual provision (including read in the context of the entire agreement).

Release

- Broad vs. narrow
 - All claims from the beginning of time to the present
 - All claims that were raised or could have been raised in the lawsuit
 - All claims relating to employment
 - Is there an ongoing relationship?
- Who is being released – affiliates, parents, subsidiaries, officers, employees
- Who is providing the release
- Other related contractual provisions
- Joint tortfeasor release

Release

- Unknown claims – know your jurisdiction

With respect to any and all released Claims, the Parties stipulate and agree to expressly waive the provisions, rights, and benefits under or equivalent to California Civil Code Section 1542 (to the extent it applies to the Arbitration and the Lawsuit). The Parties expressly waive the rights and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, that is similar, comparable, or equivalent in effect to California Civil Code Section 1542.

Limitation of liability

- Sets a ceiling for the amount of recoverable damages, typically to a defined sum (the purchase price, the amount paid for services, etc.).
- Alternatively, it can limit the remedy to a non-monetary remedy, such as repair.
- The contract can disclaim certain types of damage (i.e., punitive, exemplary, or consequential).
- It can disclaim implied warranties.
 - Commercial lease
 - Sale of goods under the UCC

Limitation of liability

- Defenses

- Sole and exclusive remedy vs. permissible remedy
- Failure of essential purpose
 - “Where circumstances cause an exclusive or limited remedy to fail its essential purpose, remedy may be had as provided in this title.” 13 Pa. C.S.A. § 2719(b).
 - As long as the buyer has the use of substantially defect-free goods, the limited remedy is typically given effect. But when the seller is unwilling or unable to conform the goods to the contract, the remedy fails.
 - Unreasonable or unexplained delay can also cause the remedy to fail its essential purpose.
- Not clear and conspicuous

Confidentiality

- Considerations
 - Right to know / public access if dealing with a public entity
 - Regulatory restrictions and requirements
 - Can a company agree not to disclose information learned during a lawsuit if that information is otherwise required to be disclosed to its regulators?
 - Enforcement
 - Application after term of contract
 - Return of documents after litigation

Best Practices and Takeaways

- Understand the law in the applicable jurisdiction.
- Tailor your form language for the particular contract and situation.
- Review your form contract provisions to make sure they still meet your company's needs.
- If including disclaimers, arbitration clauses, or other limited remedy provisions, make them clear and conspicuous.
 - Consider separate initials by those provisions.
 - Consider related provisions.
- Consider consulting with your litigation counsel during contract negotiation.

Questions and comments

Thank you for your attention