

MEMO

To: Non-Compete Drafting Committee
From: Vince Cardi

Re: Highlighting Non-Compete Clauses in Employer-Drafted Employment Contracts

Two Methods Used in Article 2 of UCC To Alert a Contracting Party to Important Provisions in a Written Contract

At our December 2 drafting committee meeting we discussed ways to ensure that employees are aware of non-compete clauses in their employment contracts. Two mentioned were (1) requiring that such clauses be conspicuous, and (2) requiring that the clause be separately signed. The Uniform Commercial Code (UCC) employs both of these.

1. Require the proposed contract term to be conspicuous.

In employment law, when the employment ends the employee is free to work anywhere else unless the employment contract provides otherwise.

Similarly, in sale of goods law, a buyer from a merchant seller automatically receives a warranty that the goods are fit for the ordinary purpose for which such goods are used, unless the contract provides otherwise through an exclusion of warranty (UCC §2-314). To protect buyers against surprise exclusions in the contract, the UCC provides the following heightened notice provision.

§2-316 Exclusion or Modification of Warranties

To exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.

“Conspicuous” is defined in §1-201(b)(10) of the UCC.

- (10). “Conspicuous” with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:

- (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
- (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the

surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

The official Comments elaborate.

(10). “Conspicuous.” This definition states the general standard that to be conspicuous a term ought to be noticed by a reasonable person. Whether a term is conspicuous is an issue for the court. Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning function (giving guidance to the party relying on the term regarding how that result can be achieved). Although these paragraphs indicate some of the methods for making a term attention-calling, the test is whether attention can reasonably be expected to be called to it. The statutory language should not be construed to permit a result that is inconsistent with that test.

2. Require a party to “separately sign” the proposed contract term.

In contract law, when a party makes an offer it is free to revoke the offer at any time unless it binds itself to hold the offer open. Sometimes a merchant will supply a form order (offer) to prospective customers telling the customer that if they wish to make an order (offer) they must use the form supplied, and somewhere in the middle of the form is a promise that the order (offer) will be held open. Without noticing this the customer who uses the form to place the order (offer) will lose their right to revoke the offer before acceptance. The UCC attempts to make the customer aware of this by requiring the customer to sign the clause.

§2-205 Firm Offers

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration...but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

“Separately signed” is not defined in the UCC. Comment 4 to §2-205 states:

(4). Protection is afforded against the inadvertent signing of a firm offer when contained in a form prepared by the offeree by requiring that such a clause be separately authenticated. If the offer clause is called to the offeror’s attention and he separately authenticates it, he will be bound.