

Renewal: Practical Considerations: Contract Corner Term (Part 2)

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Monday, October 3, 2016

In our earlier [post](#), we reviewed issues related to the term of a contract. In Part 2, we discuss considerations regarding renewal of that term.

Renewal: Practical Considerations

Many contracts contain no provisions regarding renewal, and the term simply ends after a specified period of time. Frequently, this is appropriate. For example, contracts will end when a specific project has been completed or by a specified date for reasons related to intellectual property, third-party agreements, or specific business requirements. On the other hand, renewal should not be overlooked. The parties may have incurred significant start-up costs (including negotiating efforts) and want to avoid repeating those costs. For customers, the goods or services (or the price or quality of such deliveries) may not be available from other vendors. For vendors, the customer may be an important client that competitors prize. Therefore, before finalizing the term of any contract, potential renewal provisions should be reviewed.

Automatic Renewal

Automatic renewal provisions (so-called “evergreen” clauses) are common, especially in form agreements provided by vendors of routine products or services. Without any action by either party, a contract automatically renews for the renewal period specified in the contract. Although such a clause can avoid the requirement

to renegotiate the original contract's language, the clause raises a number of important issues.

First, if either of the parties objects, the automatic renewal clause becomes a defined term contract, and the issues raised above regarding a contract without a renewal provision remain. If the customer needs to retain the vendor after the term, the vendor's objection to the automatic renewal may prevent that possibility or, more likely, give the vendor significant leverage to negotiate a new contract.

On the other hand, if the customer wants to change vendors (or at least explore other options or negotiate favorable renewal terms with the current vendor), the automatic renewal provision puts the onus on the customer to take appropriate action to terminate the contract. Unless the customer has a system to track termination dates and automatic renewal provisions, the customer may end up with an unwanted renewal on the same terms.

Evergreen clauses also raise legality issues. Although a court is likely to uphold an automatic renewal in a contract between two business parties, the answer is less clear in consumer contracts. For example, several states, such as [California](#), [North Carolina](#), and [Illinois](#), have enacted statutes that require consumer-based contracts that include automatically renewing charges be disclosed in a "clear and conspicuous" manner. The failure to comply with these statutory requirements may render an automatic renewal clause unenforceable.

Other Renewal Options

Besides automatic renewal, other provisions to consider include the following:

- Renewal if the parties take action to renew the agreement (if the parties do nothing, the contract ends). This provision avoids the missed notice deadline issue and can be a simple way to retain language from negotiated contracts—for example, the parties can agree on renewal by mutual email notice.
- A requirement that the vendor provide its renewal proposal well before the scheduled expiration date so there is time to negotiate the terms of the renewal.
- A short (typically one-year) renewal right for the customer to provide an extension to complete ongoing negotiations regarding a renewal term. This can provide the time necessary to determine whether the renewal offer is acceptable or provide time to transition to another vendor.
- Especially for product agreements, a last time buy opportunity for the customer to again provide time for renewal negotiations or transition to a new vendor.

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