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Should Severability Clauses Be Standard, Boilerplate Provisions?

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Introduction

Boilerplate language. We see certain types of standardized terms and provisions contained in almost every document. Severability clauses, also known as savings or invalidity clauses, are almost always considered boilerplate.

There are instances where a court may find a provision to a contract to be unenforceable due to unconscionability, illegality, or because it violates a statute or public policy. The finding of a single unenforceable provision may render a contract or agreement void in its entirety. To avoid this result, parties often incorporate a severability clause to ensure that even despite a ruling that a provision is invalid or otherwise unenforceable, the rest of the contract or agreement will be preserved.

Parties may believe that severability clauses will salvage their agreement and sustain the overall objective of the document. Theoretically, this sounds like a "lifesaving" provision. But is the document really preserved if a bargained for provision is uprooted due to invalidity? In actuality, has the document lost its purpose?

Severability clauses can have consequences parties must consider before reflexively inserting them into a document. There are also dangers lurking behind the way in which severability clauses are drafted and the specific phrasing selected. Maybe it is time to consider a severability clause as a bargained for term, as opposed to pro forma.

What is a Severability Clause?

The purpose of a severability clause is to "sever" an otherwise unenforceable provision from a contract and allow the rest of the contract to remain in effect. Severability clauses appear in a variety of documents, including settlement agreements, real estate contracts, commercial contracts, arbitration agreements, loan agreements, construction contracts, and promissory notes. In a study of 500 commercial contracts conducted in 2019, seventy-one percent (71%) included a severability clause while only twenty-nine percent (29%) did not.[1]

There are various ways to draft a severability clause. A typical severability clause reads as follows: *Should any provision contained in this Agreement be declared or determined by any court to be illegal, invalid, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions of the Agreement shall not be impaired or affected thereby. The unenforceable provision shall be severed, and the remaining parts, terms, or provisions shall remain operative and binding upon the Parties*.

However, severability clauses come in many types and sizes. In Benoliel's study, the severability clauses analyzed ranged from bare provisions containing a mere twenty-two words to robust 230-word clauses.[2] Depending on the wording of the clause, it may have wide-ranging and often unanticipated consequences on the agreement.

What is the Effect of a Severability Clause?

If a provision is unenforceable in a contract without a severability clause, a court may analyze the contract using a contextualist approach. This method allows a court to consider the context in which the agreement was made, including the parties' negotiating history as well as post-contractual conduct, to determine if the unenforceable provision was an essential term of the contract.[3] An essential term of a contract is a term that goes to the heart of the agreement. Described another way, absent that term, the parties would not have made the agreement.

If a court finds the unenforceable provision contained an essential term of the contract, it may invalidate the entire remaining contract. If the provision is not found to contain an essential term of the contract, a court may invalidate the single provision and allow the remainder of the contract to stand.[4]

If a provision is unenforceable in a contract with a severability clause, a court will likely use one of two approaches. First, a court may read the severability clause literally, and sever any unenforceable provision regardless of whether the removal of that provision renders the contract unbalanced. Courts routinely give great deference to the intentions of the parties who executed the agreement.[5] Thus, if a severability clause is present in a contract, a court will presume that the parties intended for the remainder of the contract to be in effect despite the loss of the unenforceable provision. This may lead to undesired results. In a blog written in National Lien & Bond, the author provided an "extreme example" of why parties should be cautious of severability clauses:

A provision of the contract detailing fees and compensation for the contractor's labor costs is found to be invalid. The contract contains a standard severability clause which states that any unlawful or invalid term of the contract shall be deleted, but the rest of the contract shall be preserved as is. This may potentially lead to a situation where the contractor is still bound by their contractual obligations to perform the work as agreed while no longer being entitled to payment. This is a position no one wants to find themselves in.[6]

Under the second approach, a court may ignore the severability clause altogether and apply the contextualist approach discussed above to determine whether the unenforceable provision contained an essential term.[7]

Should Severability Clauses Be Pro Forma?

Severability clauses should not be automatically inserted into an agreement without the parties understanding the ramifications of its inclusion. By incorporating a severability clause, parties are asking a court *not* to review the circumstances surrounding the contract. They are requesting that a court blindly sever the unenforceable term and leave the remainder of the contract untouched.

Before including such a provision, the parties should discuss whether they would want the contract to remain in effect if certain portions of the agreement were no longer incorporated. Without "Provision X," does the integrity of the agreement remain? Does the absence of "Provision Y" cause the agreement to become one-sided and unfair?

While there may be benefits to making severability clauses commonplace in contracts to avoid the risk of an entire agreement falling because of one invalid provision, there are numerous instances in which severability clauses "can do more harm than good."[8] Such harm is especially likely within a contract that "is of rather limited scope and contains no provisions likely to be challenged as unenforceable other than provisions that are essential to the parties' bargain."[9]

Another instance where severability clauses should be utilized with caution are in settlement agreements. Consider a scenario where the release provision of a settlement agreement is deemed unenforceable. That provision is then severed, and the rest of the settlement agreement remains effective and enforceable, including the terms relating to payment of settlement funds. The party responsible for payment no longer receives the benefit of the assurances set forth by the release provision. Conversely, consider the impact if the payment provision of the settlement agreement is rendered invalid and the result that the releasing party is still bound by the remainder of the agreement.[10]

Alternatives to Broad Severability Clauses

Given the pitfalls of broad severability clauses, it is imperative to contemplate the options to such provisions. One option is to add a conditional component to a severability clause, *i.e.*, allow the remainder of the agreement to be effective subject to the parties' consent or subsequent negotiation as to whether the unenforceable provision should be replaced or whether portions of the agreement should be modified.

An alternative is to include a conditional severability clause that specifies which nonessential terms it applies to, *i.e.*, state that if "Provision X", "Provision Y" and "Provision Z" are invalidated, the balance of the agreement remains in place. This prevents the entire agreement from being voided due to the unenforceability of one nonessential term. However, if an essential term not named in the severability clause is found to be unenforceable, a court may still look to the surrounding circumstances to determine whether or not to void the contract.

Finally, parties may not want to include a severability clause of any form if each provision is pivotal to the purpose of executing the agreement. Instead, the parties may prefer to allow the agreement to fail if any provision is rendered unenforceable. If the inability to enforce even just one provision of an agreement subverts

the parties' intentions and goals, then what would be the benefit of keeping the parties bound by the remaining enforceable provisions? This, too, has risks, since the agreement may have already been partially performed by the time it is invalidated and may not be capable of remedy.

Conclusion

While severability clauses are often viewed as boilerplate provisions, they should be utilized with caution. It is questionable whether they should be given the reverence of tried-and-true provisions due to the varying importance of each provision in an agreement. Selecting a one-size-fits-all approach may be harmful in the end.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions or any other aspect of bankruptcy law, please contact Bonnie Pollack at 516.296.9143 and/or Amanda Tersigni at 516.357.3738.

Footnotes

[1] Uri Benoliel, *Contract Interpretation Revisited: The Case of Severability Clauses*, 3:1 The Bus. & Fin. L. Rev. 90, 107 (2019).

[2] *Id.* at 107.

[3] *Id.* at 96.

[4] Restatement (Second) of Contracts § 184(1) (1981); Restatement (Second) of Contracts § 208 (1981).

[5] For example, according to courts in New York, "[w]hether a contract is entire or severable generally is a question of intention, to be determined from the language employed by the parties, viewed in light of the circumstances surrounding them at the time they contracted." *Christian v. Christian*, 42 N.Y.2d 63, 73 (1977) (citing 5 Williston, Contracts § 767 [3d ed], p 629).

[6] Blog, *Everything You Need to Know About Severability Clauses in A Construction Contract*, Nat'l Lien & Bond (Mar. 5, 2019), https://mechanicslien.com/severability-clause-construction-contract/.

[7] Nick Fay, *The Unintended Consequences of a Severability Clause*, 3 Transactional Law. 3, 4 (2013).

[8] Carl Cico, *Why Is This Boilerplate in My Real Estate Contract?*, 2005 Ark. L. Notes 1, 19 (2005).

[9] *Id.*

[10] Bradford S. Babbitt, *Tips on Drafting Severability Provisions in Settlement Agreements*, Am. Bar Ass'n (Dec. 27, 2017), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2017/tips-drafting-severability-provisions-settlement-agreements/.

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