

Managing Risk

Your Pre-Inspection Agreement: **SEVERABILITY**

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Sometimes, courts can take issue with one or multiple provisions in a business contract. If the court decides that a clause in your agreement is unfair to your client or is contrary to local or federal laws, they can invalidate one or more provisions in your contract. They can even dismiss your agreement altogether.

That's where the severability clause comes in. The clause's "saving" language protects the rest of your contract when a court voids a portion of it by arguing that the agreement's terms are independent of one another. In so doing, a severability provision can keep the rest of your contract in force even if a court voids a part of it.

Additionally, severability clauses may use "reformation" language to describe what you'd like done with the unenforceable portions of your agreement. You can either explain how you wish to modify those parts or you can ask to delete them. Most pre-inspection agreements state that the unenforceable portion should be "severed" or removed while the rest of the contract should stay intact.



Note: The Managing Risk column with InspectorPro Insurance provides home inspectors with tips to protect their businesses against insurance claims and examines best practices for crafting effective pre-inspection agreements.

MOST PRE-INSPECTION AGREEMENTS STATE THAT THE UNENFORCEABLE PORTION SHOULD BE “SEVERED” OR REMOVED WHILE THE REST OF THE CONTRACT SHOULD STAY INTACT.

WHAT DO SEVERABILITY CLAUSES LOOK LIKE?

The following is an example of a severability provision written by our claims team:

If at any time subsequent to the date hereof, any provision of this Agreement shall be held by any court of competent jurisdiction to be illegal, void, or unenforceable, such provision shall be of no force and effect, but the illegality or unenforceability of such provision shall have no effect upon and shall not impair the enforceability of any other provision of this Agreement.

In this example, notice how the clause both addresses the unenforceable sections and the rest of the contract. As is typical in inspection contracts, this clause opts to sever any problematic provisions and protect the rest of the agreement.

WHY ARE SEVERABILITY CLAUSES NECESSARY?

Protecting your pre-inspection agreement is essential. As discussed in this Managing Risk column in previous issues of the *ASHI Reporter*, your contract is your first line of defense. When confronting allegations, claims professionals often use signed pre-inspection agreements to defend your case. By emphasizing provisions like your limitation of liability and statute of limitations, claims adjusters can dismiss allegations against your business.

Some might argue that severability provisions aren't necessary. After all, if you worked with an attorney to write your agreement and they made sure each clause abided by the law, what are the chances of having a court deem a portion of your contract unenforceable?

THE LAW IS DYNAMIC AND CHANGING. A CONTRACT PROVISION THAT THE PARTIES BELIEVED WAS ENFORCEABLE MIGHT LATER BE CHANGED BY A STATUTE OR COURT DECISIONS.

In her blog post “Severability Clauses: To Sever, Modify, or Invalidate?” attorney Elizabeth A. Whitman explains why severability clauses are important:

“The law is dynamic and changing. A contract provision that the parties believed was enforceable might later be changed by a statute or court decisions. Other times, the line between an enforceable and unenforceable provision may be blurry. Or the factual context may change so that a contract term, which on its face is acceptable, is unenforceable as applied to a particular situation.”

WHAT ARE THEIR LIMITATIONS?

Like all pre-inspection agreement provisions, severability clauses aren’t bulletproof. In their 2013 article for *Corporate Counsel* titled “Drafting a Better Severability Clause,” attorneys Eric Fishman and Robert James explained that, depending on the claim, legislation may exist that dictates what will happen if a portion of a contract flounders:

“In many special cases, there is a fallback provision provided by law when a term in a contract fails. If... a limited and exclusive remedy ‘fails of its essential purpose’—as when a seller’s warranty is limited to repair, but the warranted good cannot, in fact, be repaired—the law permits the buyer to resort to any other available remedy. (See, e.g., UCC § 2-719). In these types of situations, the severability clause really serves no purpose.”

However, you cannot predict what claims you’ll receive before you receive them. As such, you cannot rely on the allegations against you falling neatly into a piece of legislation that already exists. Therefore, it’s important that you take the time to include a severability clause in your pre-inspection agreement.

Another potential limitation of the severability clause is how much of your agreement it can protect. In *Glassford vs. BrickKicker*, plaintiffs appealed a summary judgment in favor of the home inspector based on the contract’s arbitration clause.

The appeal argued that, because requiring arbitration would cost more than the limitation of liability, both clauses were unconscionable. Thus, even with a severability clause in place, the court struck both the arbitration and limitation of liability provisions from the pre-inspection agreement.

To avoid multiple provisions of your contract from being dismissed, consult with your attorney to both draft your severability clause and ensure that your clauses don’t disagree with one another.

MANAGE YOUR RISK AGAINST POTENTIAL CLAIMS.

Don’t let a court discard your entire pre-inspection agreement over one bad provision. Consult your attorney on how you can include a severability clause to protect your inspection contract.

To learn more about pre-inspection agreements, read this column next month when we explore the importance of signatures prior to the inspection.

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