Boilerplate language in business contracts, part 2 of 2

Eliminate ambiguity, include an Iowa governing law provision to prevent contracts from unraveling

*By Michael Dayton**

Last month, I wrote about the use of boilerplate language at the end of an agreement, and how it can be significant should the agreement be challenged in court. This article will complete the boilerplate "series" by discussing 1) "merger" aka "entire agreement" aka "integration" clauses, 2) severability clauses, 3) waivers and modifications in writing provisions, 4) anti-assignment provisions and 5) construction clauses.

As noted in my prior article, though boilerplate has been given a bad rap, when drafted properly, such provisions are not inconsequential and should be revised to fit a particular situation. That isn't necessarily true of a couple of these provisions, which, though unenforceable, find their way into many contracts.

When reading this article, please remember the following: 1) Iowa courts will generally construe an ambiguous boilerplate provision against the drafter (but see the fifth subsection below); and 2) the analysis of these provisions is under Iowa law, so include an Iowa governing law provision (which will usually be enforceable).

Merger/Entire Agreement/Integration Clauses.

Given the amount of time and effort a corporate attorney puts into drafting a contract, it sure would be nice if the fact finders in a given case looked at the contract — and only the contract — to determine the terms of the deal between the parties. Of course, sometimes the attorney doesn't put much time and effort into drafting (form users), sometimes the document through business-person-to-lawyer translation doesn't approximate the terms of the deal between the parties and sometimes the parties change the deal after the agreement has been penned. The gods of contracting invented your friend and mine, the parol evidence rule, for the first two of these issues. I discuss post-execution modifications below.

In Iowa, the court looks at the "totality of the evidence" to determine if the agreement is integrated (that is, whether it is actually the deal between the parties) and, if it is, any extrinsic evidence that is contradictory or supplements the agreement is inadmissible. Again, this only applies to prior and simultaneous documents and other agreements, not subsequent documents and agreements.

One of the facts the court looks at to determine integration is the presence of a merger, entire agreement or integration clause. In reality, however, the court is going to determine if that clause, together with the remainder of the agreement, is a dickered term; if it is not, and it is merely boilerplate in the pejorative, take-it-or-leave-it sense, don't count on the court enforcing it.

So why include the provision? First, if it is a negotiated agreement (or even a boilerplate agreement) it gives the court something to point to for excluding extrinsic evidence to determine the terms of the deal. Whether that will be in your favor or the other party's favor is anyone's guess at the time of drafting, unless you intentionally drafted the agreement incorrectly.

Second, and more important, a carefully crafted integration clause can actually tell the reader what other agreements are relevant to the deal. Was a prior agreement superseded by this agreement? What contemporaneous agreements are out there? If the agreement is one of a handful, the integration clause can tell a story so the fact finder isn't guessing.

Severability.

There are times when a provision of questionable enforceability makes its way into one of my agreements. When that happens I have a conversation with my client about it, and I make sure there is a severability clause. (Note that a severability clause is also appropriate where the parties intend in one agreement to have different groups of performances/promises in exchange for the other, the removal of any of which groups would not frustrate the purpose of the contract of the parties.) However, that is a fairly rare occurrence, most people use master agreements and separate statements of work for such things, so the discussion in this section relates to the inclusion of a severability clause to avoid invalidating the entire contract.

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"Iowa law permits unconscionable provisions to be severed from the remainder of the contract." Faber v. Menard, Inc., 367 F.3d 1048, 1054 (8th Cir. 2004). Often that makes sense — why invalidate an entire agreement when the court can "blue line" one unconscionable provision to strike it or make it enforceable?

One may argue that, depending on which provision is modified and how it is modified, it may frustrate the purpose of the contract for the other party. The contrary argument is, if the party was relying on an unconscionable provision to enter into and perform under this contract, what business did it have entering into the contract in the first place?

Of course, unconscionability is in the eye of the beholder. This is a common issue in drafting the scope and term of a noncompete clause. If the parties agreed the noncompete should be for three years and covering 2,000 miles, and the court finds it unconscionable, should the noncompete disappear or be for a more appropriate scope and length? The latter seems appropriate.

With those competing interests in mind, I often include a severability clause stating that the validity and enforceability of the agreement will not be affected by an unconscionable term. I also include a provision specifically requesting the court to blue line an otherwise unenforceable provision to make it enforceable. Finally, the provision may contain a savings clause that directs the court not to blue line where to do so would frustrate the purpose of the contract for the party.

The problem with such a provision is, if the court has already determined the provision to be unconscionable, it appears to be left with three options — invalidate the agreement altogether, take out the provision, or amend the provision. It seems in such cases that the party seeking to enforce the original provision would almost always want the agreement blue-lined as opposed to unwound.

Waiver; modifications in writing

It may come as a surprise to some contract drafters, but a provision stating that modifications and waivers to an agreement must be in writing isn't really enforceable. As with seemingly all contractual interpretation issues, whether a contract has been modified is a question of fact, and modifications and waivers can occur explicitly, implicitly, orally, in writing, through course of dealing or otherwise.

So why include them?

Maybe the court will look at the provision as one of the facts counting against modification. Maybe the court will change its mind as to the enforceability of such a provision (don't count on it). Maybe it just makes corporate attorneys sleep better at night.

Anti-assignment

Anti-assignment provisions are generally enforceable under Iowa law, but the drafter should be specific. The term "assignment" really means the transfer of the agreement, or the right to receive performance under the agreement, from one party to another person. Prohibiting the delegation of duties won't prohibit an assignment of rights. Further, prohibiting assignment will not prohibit the change of control of one of the parties, but might prohibit the transfer of an agreement in a merger depending on the circumstances.

As such, the most important thing in drafting an anti-assignment clause is to draft what you intend. If it is important that you deal with the same owners of the company throughout the term of the agreement, prohibit a change of control. If it isn't, perhaps prohibit assignment but permit assignment to a person that purchases substantially all of the assets of the other party.

Construction

Notwithstanding most of the provisions discussed in this article, generally an unambiguous contract will be enforced as written. If there are ambiguities, the court will construe them against the drafter, absent other facts showing the negotiation of the agreement and the participation of legal counsel for both parties.

Since it is a factual issue whether to construe a provision against the drafter, will the court rely on a provision that states the contract has been negotiated and should not be construed against the drafter? Don't count on it. But, you never know when a court might change its mind, and if it makes you feel better, put the provision in there and some self-serving facts too — it can't hurt.

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