Wither Whereas — The Legal Implications of Recitals

By J. C. Bruno and James S. Rosenfeld

"With all the 'whereases' and 'whatfors' I can't get through the documents."

Few words in the English language evoke as much anguish in laypersons as the signal of the recitals — the "Whereas." Slowly grind the wheels of justice and slowly change the benchmarks of good draftsmanship. Surely, any profession capable of relinquishing such marvels as "party of the first part" can find a good alternative to a string of "Whereases."

"Whereas" has traditionally been the first word of a recital, a factual statement which explains the reasons for a contract. Operative clauses (such as promises and conditions) are usually stated after the recitals.

Treatment of opening recitals has been changing slowly, but the recitals have not been eliminated. Drafters continue to use the recital for numerous purposes, such as providing background, explaining the parties' intent and defining terms. Consider the following, recently received from another attorney:

> This Amendment is entered into on _____, 1987, by THE ECONOMIC DEVELOPMENT CORPORATION OF THE TOWNSHIP OF ABC (the "Issuer") and LMN, INC., a Michigan corporation (the "Company").
>
> PREMISES:
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> The Issuer and the Company entered into a Loan Agreement dated July 1, 1982 (the "Agreement"), which required the Company to make Loan Repayments (as defined in the Agreement) in amounts necessary to pay principal and premium of and interest on the Issuer's Economic Development Revenue Bonds (LMN, Inc. Project) (the "Bonds"). The Company has requested that the Issuer amend the Agreement to provide for an additional source of "Eligible Funds" as defined in the Agreement. The Issuer is willing so to amend the Agreement provided that (a) RST National Bank (the "Trustee") and XYZ Bank consent and (b) the Company enters into this Amendment. All definitions in the Agreement shall apply to this Amendment.

The contractual interactions among the parties are complex. However, the "Premises" introduce the contracting and other interested parties and clarify their relationships. It is well written and in keeping with developing style. There is no need for a string of "Whereas" clauses.

The continuing evolution of a "client-friendly" format within the legal community affords attorneys a good opportunity to review the legal effects of the recital. At least four Michigan Supreme Court decisions establish the legal effects of recitals of fact.[1] Their holdings deserve great attention:

1) Recitals are not required, but introduce the subject of the contract and help indicate the reason for and intent of the operating clauses.

2) The entire document, including recitals and operative clauses, will be considered in determining the intent of the parties.

3) Recitals may be "particular" or "general." Particular recitals involving a statement of fact are admissible as conclusive evidence of the fact stated, while general recitals are not. What constitutes a particular or general recital is probably a question of law, but a recital which uses minute details to describe the differences between the parties usually is deemed particular.

4) A recital of a material fact is admissible as evidence to prove the fact and is conclusive unless the agreement can be set aside for fraud or reformed.

5) General and unlimited terms of a contract are restrained and limited by particular recitals when used in connection with them.

The significance of recital language becomes acutely visible when the parties disagree over the scope of a contract. Whatever facts are enumerated in the recital are subject to the long-standing rule of contract construction that:

> "The expression in a contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed."[2]

Thus when drafting introductory clauses, counsel must be extremely careful about either generalizing or specifying.

Consider a simple example, involving a marketing contract for all products of Supplier X for ten years. The agreement contains a recital which lists the individual products or product lines, but does not provide an additional clause covering future products. If Supplier X obtains new product lines within the ten-year period, the marketing firm, under the

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excluding rule of construction, may not be entitled to market the new merchandise.

Counsel wishing to avoid application of the above rules may use a caption which sounds less definitive than "Premises," such as "Introduction" or "Background." More effective would be to include recitals in the customary clause that strips section captions of legal significance.

Attorneys faced with claims based upon a specific recital should investigate to determine if it can be alledged that: The recital was "general" and not binding; the recital should be ignored; or traditional defenses to a contractual claim exist — such as fraud or misrepresentation, failure of consideration, frustration of the commercial expectations of the parties or a mutual mistake of fact.

These defenses have not been specifically eliminated by the cases cited in footnote 1, but it will be hard to argue their availability (except for the defense of fraud), given the holdings described above.

In conclusion, although changes in the *form* of some legalisms are desirable, their *functions* must still be performed. The recurring question is how to continue the trend toward simplifying language and yet maintain the precision that legal prose requires. "Plain English" is not "free form," nor is it a call to sloppiness or "Dick-and-Jane" expression.

Attorneys should draft recitals simply and clearly, with an appreciation of their legal significance, to ward off the ill effects of client frustration and contractual ambiguity.

The best medicine for outmoded legalese probably is preventative education. As proponents of plain English we should not only deemphasize stilted format and diction but also provide clear, descriptive and organized patterns of expression.

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Footnotes

1. *Thomson Electric Welding Co v Peerless Wire Fence Co,* 190 Mich. 496 (1916) (Enumeration of certain patents estops proof of others); *Acme Cut Stone Co v New Center Development Co,* 281 Mich. 32 (1937) (Recital that arbitrator to decide rights under "contractual relationship" precluded application of equity); *Detroit Grand Park Corp v Turner,* 316 Mich. 241 (1946) (Recital of claims to be "approximately $94,000" precluded proof of interest thereon); *Triphagen v Labbe,* 332 Mich. 583 (1952) (Recital, not in an introductory declaration, that $10,000 had been received was binding).
2. *Thomson Electric Welding Co, supra,* at 502.

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of this issue. There can be no observance of law without democracy. At the same time democracy cannot exist and develop without the rule of law, because law is designed to protect society from abuses and power and guarantees citizens and their organizations . . . their rights and freedoms."

If this law-trained Russian leader is a man of his word — and we all hope and pray that he is — even more profound changes may yet occur within our lifetime than we have seen thus far.

One of my predecessors in this office, George Roumell, had as his theme during the year he was president, that lawyers are and should be "ministers of justice and ministers of peace." The trip that 31 of us made in May, 1988 was only one of many to these countries, countries which until only a short time ago were "closed" in most respects to outside contacts.

I would like to think that in the contacts we made and the meetings we had with these lawyers and judges across the globe, we contributed in some small way to peaceful coexistence between our countries, and that we fulfilled our role as "ministers of justice and ministers of peace." I sincerely hope that in the months and years ahead many of you will have the same opportunity that we did. It is a worthwhile and unforgettable experience. And the words of President Eisenhower are as true today as they were when he first uttered them more than 30 years ago:

"There has never been a greater need for People-to-People than now."

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