

Plain English in Contract Recitals and Boilerplate

By George H. Hathaway

The Michigan Institute of Continuing Legal Education has recently published an excellent book, *Michigan Contract Law*, edited by John Trentacosta. The book discusses the substantive law of contracts in Michigan in a clear, easy-to-read style. Chapter 16, "Drafting Contracts," discusses clear writing in recitals and boilerplate.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. The Committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For information about the Plain English Committee, see our web site—www.michbar.org/committees/penglish.

Recitals (from Section 16.19):

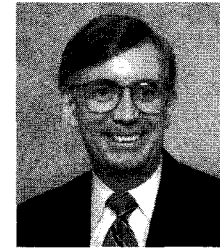
"Traditionally, recitals start with a 'Whereas.' However, the trend toward the use of plain English has led many drafters to delete this archaic word and simply use a heading called 'Recitals' or an introductory statement, such as: 'This contract is made with reference to the following facts.'"

Boilerplate (from Section 16.37):

"The peripheral or 'general' clauses that are found near the end of an agreement are often referred to as 'boilerplate' clauses. Unfortunately, these clauses are often given little thought. The drafter should not blindly include the 'standard boilerplate' without considering whether each clause helps or hurts the client's position."

Most boilerplate clauses are so intimidating that few practitioners have time to simplify them. Most practitioners simply copy existing boilerplate and justify the wordiness on the basis of complexity

and case precedent. However, everything changes once someone does all the hard work in organizing, clarifying, and publishing boilerplate clauses so that they are easy to analyze. Critics then step in like auditors who come in after the battle is over and kill all the wounded. To illustrate, I reprint the 21 boilerplate clauses published in *Michigan Contract Law* with my edited versions. Of course, my versions then become fair game for all others to further critique. ■



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From <i>Michigan Contract Law</i> , Sec. 16.37—Boilerplate	As edited by the author of this article.
<p>Clause No. 1: Integration This Agreement, together with any affixed schedules and exhibits, constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings.</p>	<p>Entire Agreement This Agreement and its attachments contain the entire understanding between the parties.</p>
<p>Clause No. 2: Choice of Law This Agreement will be governed and controlled in all respects by the laws of the State of Michigan, including interpretation, enforceability, validity, and construction.</p>	<p>Applicable Law This Agreement will be governed and interpreted by Michigan law.</p>
<p>Clause No. 3: Choice of Forum The parties submit to the jurisdiction and venue of the Circuit Court for the County of {name}, State of Michigan or, if original jurisdiction can be established, the United States District Court for the _____ District of Michigan with respect to any action arising, directly or indirectly, out of this Agreement or the performance or breach of this Agreement. The parties stipulate that the venues referenced in this Agreement are convenient.</p>	<p>Jurisdiction and Venue Any lawsuit arising directly or indirectly out of this Agreement will be litigated in the Circuit Court for _____ County, Michigan, or, if original jurisdiction can be established, in the United States District Court for the _____ District of Michigan.</p>
<p>Clause No. 4: Notice All notices and other communications required or permitted under this Agreement will be in writing and will be deemed given when delivered personally or by registered or certified mail, return receipt requested, addressed as follows (or any other address that is specified in writing by either party):</p> <p>If to Seller: With a copy to:</p> <p>If to Purchaser: With a copy to:</p>	<p>Notices All required notices must be in writing and will be considered given when delivered (1) personally, or (2) by registered or certified mail, return receipt requested, addressed as follows (or any other address that is specified in writing by either party):</p> <p>If to Seller: With a copy to:</p> <p>If to Buyer: With a copy to:</p>

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From <i>Michigan Contract Law, Sec. 16.37</i> —Boilerplate	As edited by the author of this article.
<p>Clause No. 5: Waiver Seller's failure to exercise a right or remedy or Seller's acceptance of a partial or delinquent payment will not operate as a waiver of any of Seller's rights or Purchaser's obligations under this Agreement and will not constitute a waiver of Seller's right to declare an immediate or a subsequent default.</p>	<p>Waiver A waiver of a breach of any term in this Agreement will not be considered (1) a waiver of a further breach of the same term, or (2) a waiver of a breach of any other term, or (3) a waiver of Seller's right to declare an immediate or a subsequent default.</p>
<p>Clause No. 6: Severability Whenever possible, each provision of this Agreement will be interpreted in such a way as to be effective and valid under applicable law. If a provision is prohibited by or invalid under applicable law, it will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.</p>	<p>Severability Each provision of this Agreement must be interpreted in a way that is valid under applicable law. If any provision is held invalid, the rest of the Agreement will remain in full effect.</p>
<p>Clause No. 7: Amendments The terms of this Agreement may not be varied or modified in any manner, except in a subsequent writing executed by an authorized representative of both parties.</p>	<p>Amendments The parties can amend this Agreement only by a written document signed by both parties.</p>
<p>Clause No. 8: Assignments No assignment of this Agreement or of any right or obligation under this Agreement will be made by either party without the prior consent of the non-assigning party.</p>	<p>Assignments A party cannot assign this Agreement or any right or obligation under the Agreement without the prior consent of the other party.</p>
<p>Clause No. 9: Remedies Cumulative The remedies provided in this Agreement will be cumulative, and the assertion by a party of any right or remedy will not preclude the assertion by such party of any other rights or the seeking of any other remedies.</p>	<p>Cumulative Remedies The remedies provided in this Agreement are cumulative. A party who asserts a right or seeks a remedy may also assert other rights or seek other remedies.</p>
<p>Clause No. 10: Successors and Assigns In the event of a proper assignment, this Agreement will be binding upon and inure to the benefit of the parties' successors and assigns.</p>	<p>Successors and Assigns If this Agreement is properly assigned, then it will bind and benefit the successors and assigns of the parties.</p>
<p>Clause No. 11: Risk of Loss Risk of loss concerning the goods sold under this Agreement will pass upon the occurrence of the following event: _____</p>	<p>Risk of Loss The risk of loss of goods sold under this Agreement will pass when: _____</p>
<p>Clause No. 12: Confidentiality The parties agree that the existence of this Agreement and the specific terms of this Agreement will remain confidential and will not be disclosed to third parties.</p>	<p>Confidentiality The parties must keep this Agreement confidential, and must not disclose either the existence or the terms of the Agreement to third parties.</p>
<p>Clause No. 13: Relationship of Parties In its relationship with Party A, Party B is an independent contractor. Nothing in this Agreement will be construed such that Party B will be considered an employee, agent, or partner of Party A.</p>	<p>Relationship of Parties Party B is an independent contractor for Party A, and is not an employee, agent, or partner of Party A.</p>
<p>Clause No. 14: Counterparts This Agreement may be executed in one or more counterparts, each of which will be deemed an original agreement, but all of which will be considered one instrument and will become a binding agreement when one or more counterparts have been signed by each of the parties and delivered to the other.</p>	<p>Counterparts This Agreement may be signed in one or more counterparts, and each counterpart will be considered an original Agreement. All of the counterparts will be considered one document and become a binding agreement when one or more counterparts have been signed by each of the parties and delivered to the other.</p>
<p>Clause No. 15: Injunctive Relief The parties acknowledge that irreparable injury will result from the failure of either party to comply with the terms of this Agreement. In the event of any actual or threatened default or breach of any of the provisions of this Agreement, the aggrieved party will have the right to specific performance or injunctive relief, as well as monetary damages and any other appropriate relief.</p>	<p>Injunctive Relief If either party breaches this Agreement, then the other party will be irreparably injured. Therefore, if one party breaches or threatens to breach the Agreement, then the other party has the right to specific performance or injunctive relief, including money damages and any other appropriate relief.</p>
<p>Clause No. 16: Survival Clauses The following paragraphs of this Agreement will survive for a period of _____ years subsequent to the termination of this Agreement.</p>	<p>Survival Clauses Paragraph numbers _____ of this Agreement will survive for _____ years after the end of the Agreement.</p>
<p>Clause No. 17: Force Majeure Seller will not be deemed to be in default or otherwise responsible for delays or failures in performance resulting from acts of God; acts of war or civil disturbance; epidemics; governmental action or inaction; fires; earthquakes; unavailability of labor, materials, power, or communication; or other causes beyond Seller's reasonable control.</p>	<p>No change</p>
<p>Clause No. 18: Titles Titles and headings to articles, sections, or paragraphs in this Agreement are inserted for convenience of reference only and are not intended to affect the interpretation or construction of the Agreement.</p>	<p>Titles and Headings Titles and headings are inserted in this Agreement for reference purposes only, and must not be used to interpret the Agreement.</p>
<p>Clause No. 19: Attorney Review The parties represent that they have carefully read this Agreement and have consulted with their attorneys. The parties affirmatively state that they understand the contents of this Agreement and sign this Agreement as their free act and deed.</p>	<p>Attorney Review The parties (1) have consulted with their attorneys, (2) have read and understood the Agreement, and (3) sign the Agreement on their own free will.</p>
<p>Clause No. 20: Third-Party Beneficiaries This Agreement will not confer any rights or remedies on any third party, other than the parties to this Agreement and their respective successors and permitted assigns.</p>	<p>Third-Party Beneficiaries This Agreement confers no rights or remedies on any third party, other than the parties to this Agreement and their respective successors and permitted assigns.</p>
<p>Clause No. 21: Attorney Fees In the event of a dispute arising out of this Agreement, the prevailing party will be entitled to actual attorney fees and costs.</p>	<p>Attorney Fees If a dispute arises out of this Agreement, then the prevailing party will be entitled to actual attorney fees and costs.</p>