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IGNORE THE "BOILERPLATE" AT THY OWN PERIL

Introduction

If you work with contracts at all, you've heard it many times before: "Don't worry about it! It's boilerplate language." So-called boilerplate provisions are the "standard" clauses often lumped together at the end of a contract. The language is often ignored, assumed to be the same in every contract. Provisions embedded in "boilerplate" language govern issues ranging from contract dispute resolution, warranties, force majeure, and contract assignment clauses. However, often the language dismissed as "boilerplate" is anything but. What one party might want you to believe is fixed, "standard" language is in fact important, can and should be modified, and should definitely not be ignored. An unpublished 2017 Minnesota Court of Appeals decision, *Bertsch v. Ehlen,* demonstrates the importance of giving attention to all contract language, even the provisions some might persuade you to believe are "standard, boilerplate" provisions.

Bertsch v. Ehlen

Bertsch v. Ehlen involved the assignment of a purchase agreement for a partial interest in real property located in Hawaii. When the purchaser of the interest decided he no longer wanted to own an interest in the real estate, he assigned his right to purchase the property under the agreement to another party. The purchase agreement contained two provisions related to contract assignment:

> *No Third Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any person other than the parties hereto and their respective successors and permitted assigns.*
>
> *Succession and Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.*

The seller under the purchase agreement did not consent to assignment, objected to it, and refused to transfer the title to the property. The third-party assignees of the purchase agreement sued the sellers under the purchase agreement. A Minnesota district court ruled that the phrase "permitted assigns" was unambiguous and required the consent of both parties to the purchase agreement. The district court invalidated the assignment.

The assignees of the purchase agreement appealed the district court decision to the Minnesota Court of Appeals which reversed, holding that the term "permitted assigns" was ambiguous because the term was susceptible to two different meanings. On one hand, the term could be interpreted to require the written consent of both parties to the purchase agreement prior to assignment of the contract. On the other hand, the term could be interpreted to allow an assignment of the contract if permitted *by law*. The court held that the assignment language in the contract did not itself "manifest the parties' intent to restrict assignability." The Court of Appeals upheld the assignment of the purchase agreement.

While the Minnesota Court of Appeals did not discuss the "boilerplate" nature of the contract language in question in *Bertsch*, it does not require much imagination to understand how the parties arrived at the predicament which led them into litigation. It seems likely the parties ignored the "standard" contract language until it became important after the contract was executed. Had either party addressed the "boilerplate" language when the purchase agreement was being drafted or negotiated, or had either party researched case law opining about the sufficiency of the term "permitted assigns" to effect a transfer of a contract, perhaps the actual intent of the parties with respect to assignment of the contract could have been adequately manifested in the language of the contract.

The case is an excellent lesson for attorneys and non-attorneys who negotiate and draft contracts. If you ignore boilerplate language, you do so at you or your client's peril.