Pirates, Roverts, Thieves and Boilerplate

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Gregory Klass, *Boilerplate and Party Intent*, 82 Law & Contemp. Probs. no. 4, 2019, at 105.

In *Boilerplate and Party Intent*, just out in Law and Contemporary Problems, Greg Klass unearths the following lovely piece of boilerplate from an insurance contract:

> "Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Roverts, Thieves, Jettisons, Letters of Mart and Counter-mart, Suprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People…"

Roverts! Counter-marts! Oh my. As Klass observes, this sort of clause is an example of non-negotiable boilerplate, which propagates in part because no one would dream of altering such hoary text. But it is also an exemplar of a type of contractual clause that is interpreted without regard to the parties' intent, even if what particular signatories wanted "Suprisals" to mean could be ascertained.

Non-negotiable boilerplate can arise from the passage of time—the Adventures and Perils clauses joins other grotesques (*pari pasu!*) in the category of too hard to change. But so too can boilerplate arise from mandatory clauses which the law requires to be inserted into contractual writings. Such mandatory clauses include, for example, uniform covenants that the FHA and HUD mandate in federally-insured mortgages. For language inserted by time and by the government, stating that the goal of interpretation is to effect intent is clearly incorrect. Rather, as Klass observes, courts may be seeking to give life to the government's meaning, or that of the shared community of jurists and lawyers who have interpreted and parsed these clauses over time. Klass thus distinguishes the author of clauses from the *authorizer*. When the two are different, it is the authorizer's intent, not the drafter, that ought to control. (This argument has particular weight in the insurance market, where the regulator's interpretation perhaps is more important than the parties to the insurance contract itself.)

Klass also includes a very interesting discussion of Restatement 2nd 212(2). He describes a set of procedural decisions about class certification in adhesive consumer contracts that are likely not on the radar of contract scholars. Courts, it seems, have used Section 212 to certify classes against defendant objections that extrinsic evidence would preclude Rule 23 certification. Plaintiffs have responded, mainly successfully, that Section 212 precludes evidence of the parties' *actual* intent in such boilerplate examples. Why? Because only such uniform interpretations give life to non-drafting parties' rights in the micro-harm setting present in most class adjudication. That is, ignoring the actual parties' reasonable understandings is necessary to vindicating their global rights.

Though Klass does not quite say so, his approach to boilerplate interpretation can be usefully counterpoised to two recent attempts to bring contract interpretation forward from the dark days of Latin canons to the golden dawn of big data. Recent work by Omri Ben-Shahar and Lior Strahilevitz (arguing for surveys) on the one hand, and Stephen Mouritsen (corpus linguistics) on the other both argue that better data can get us more precise answers to what boilerplate meant to the parties. Klass offers a sophisticated and nuanced challenge to that goal. Sometimes, he argues, boilerplate should be

interpreted in ways *contrary to party intent*, facts (and Pirates, Roverts and Thieves) be damned. This is a counterintuitive thesis, supported with a wealth of examples, and written in an engaging style. I recommend it to you.

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