

It's Time to Get Rid of the "Successors and Assigns" Provision

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Because a new transaction will generally resemble previous transactions, lawyers don't draft contracts from scratch. Instead, they copy, making whatever adjustments are required to reflect the new transaction. And generally they're willing to rely on the verbiage they find in precedent contracts, the assumption being that if it worked in previous transactions, it must be acceptable.

But if you take a closer look at the words and phrases that make up traditional contract language, you'll find much dysfunction. That's also the case when it comes to some of the standard components of contract boilerplate.

A good example is the "successors and assigns" provision. Here's a representative example:

This agreement is binding upon, and inures to the benefit of, the parties and their respective permitted successors and assigns.

Although the "successors and assigns" provision is utterly standard, the fusty language — use of "inures," meaning "to take effect, to come into use," and use of "assigns" rather than "assignees" — suggests that it's something of a fossil. In fact, close scrutiny shows that it performs no useful function; you should delete it from your contracts.

Consider the following seven functions that the "successors and assigns" provision could conceivably perform. The first five are suggested in *Negotiating and Drafting Contract Boilerplate* (Tina L. Stark ed. 2003), referred throughout this article as simply "*Boilerplate*."

(For purposes of the following discussion, bear in mind that an assignment occurs when one party transfers to a nonparty its right to receive the other party's performance. The transferring party is the assignor; the nonparty to whom the right is assigned is the assignee; and the party who must perform in favor of the assignee is the nonassigning party.)

1. To Bind an Assignee to Perform. According to *Boilerplate*, some courts

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have held that a "successors and assigns" provision in a contract binds the assignee of any rights under that contract to perform the assignor's obligations under that contract. But that's contrary to accepted law, which holds that the assignee assumes the assignor's obligations only if the assignee agrees to do so.

2. To Bind a Nonassigning Party. *Boilerplate* says that a second purpose of the "successors and assigns" provision is to restate common law to the effect that after an assignment, the nonassigning party is under an obligation to perform in favor of the assignee. But why restate the common law? If a party may assign its rights under a contract, it follows that the nonassigning party must perform in favor of the assignee — otherwise, the right to assign would be worthless. Sometimes it's useful to state in a contract what would apply anyway — particularly when the parties might otherwise be unaware — but doing so in this case seems excessive.

3. To Determine Whether Rights Are Assignable. According to *Boilerplate*, some courts have relied on a "successors and assigns" provision to determine whether a party may assign its rights under a contract. It's standard practice to address that issue directly; if you do so, you certainly wouldn't need the inscrutable "successors and assigns" provision, too. And if you don't address assignment directly, it would be best to dispense with the "successors and assigns" provision, lest a court look to it for guidance on assignment.

4. To Determine Whether Performance Is Delegable. And according to

Boilerplate, some courts have relied on the "successors and assigns" provision to determine whether a party may delegate its obligations under a contract. The same considerations apply in this context as apply to whether rights are assignable.

5. To Bind the Parties to the Contract. The "successors and assigns" provision could be read as indicating that the parties intend to be legally bound. Such a statement would be ineffective, as it isn't a condition to enforceability of a contract that the parties have, or explicitly express, an intention to be legally bound.

6. To Ensure That If a Party Sells Its Assets, the Buyer Will Perform Under the Contract. If online commentary is any guide, some lawyers are of the view that the "successors and assigns" provision could help a contract party if the other party sells its assets and excludes from that deal its contract with the first party. But that's not so. The general rule is that if one company sells or transfers assets to another, the second entity isn't responsible for the debts and liabilities of the transferor. That rule has developed exceptions under which a predecessor's liabilities could be imposed upon a successor. See Byron F. Egan, *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 Penn. St. L. Rev. 913, 931–48 (2012). But none of those theories relies on the "successors and assigns" provision.

7. To Establish That a Contract Is Supported by Consideration. Generally, a contract promise isn't enforceable unless the promisor receives con-

sideration — in other words, receives something of value in exchange. It's a basic principle of contract law that a false recital of consideration cannot create consideration where there was none, but not all judges are aware of that. In particular, the Illinois Appellate Court has suggested that presence of a recital of consideration is all that's required to establish that a contract is supported by consideration. See *Urban Sites of Chicago, LLC v. Crown Castle USA*, 979 N.E.2d 480, 493 (2012). Just as bizarrely, the court also pointed to "successors and assigns" language in the contract to support its conclusion. Nothing in contract law suggests that the "successors and assigns" provision has any bearing on consideration.

So, to summarize, here's the effect of the "successors and assigns" provision with respect to its seven ostensible functions: (1) ineffective; (2) needlessly states the obvious; (3) is the wrong place to address this issue; (4) is the wrong place to address this is-

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sue; (5) ineffective; (6) ineffective; and (7) ineffective.

Boilerplate suggests that the traditional "successors and assigns" provision is "so truncated that its objectives are veiled." But a simpler explanation is that it's a useless provision that survives because drafters are unsure what function it serves and so are loath to get rid of it. And it's sufficiently obscure that one can project onto it all sorts of unlikely meanings.

It's high time that drafters stop giving "successors and assigns" provision the benefit of the doubt. Purge it from your contracts.

About the Author

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