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Plain English Statutes

Long overdue or underdone?

Legislators have tried to prohibit the use of legalese. Will the language of law ever be simple?

By Michael S. Friman

Introduction

The language of the law, also known as legalese, lawpeak and lawyerism, has routinely evoked such praise as wordy, unclear, pompous and dull.¹ To illustrate this description, consider the following classic anecdote entitled *Gift of an Orange*:

If a man would, according to law, give to another an orange, instead of saying: - "I give you that orange," which one should think would be what is called in legal phraseology "an absolute conveyance of all right and title therein," the phrase would run thus: - "I give you all and singular, my estate and interest, right, title, claim, and advantage of and in that orange, with all its rind, skin, juice, pulp and pits, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A.B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind soever, to the contrary in any wise, notwithstanding."²

Why is it that lawyers "cannot write plain En-

glish[.]. . . use eight words to say what could be said in two[, and]. . . use old, arcane phrases to express commonplace ideas"³ The theories expounding on that issue abound, but most justify (or apologize for) legal language on the basis of judicial jargon set by precedent, status as a member of "the club," power and money, durability, impressiveness, and a need for precision.⁴ However, rather than reiterating the obvious (*e.g.*, legal jargon is incomprehensible!), legislators have made positive efforts over the past nineteen years to rectify the situation with plain English statutes that mandate the use of plain and clear language, largely in consumer contracts.⁵

This article will explore legislative statutory reform of legalese and consider whether these efforts have been successful. Part I will examine the Plain English Movement and the policy reasons behind it. Part II will further analyze these statutes and will examine the standards used to judge plain language in consumer contracts. Part III will examine the effectiveness of the statutes.

I. The Plain English Movement

"Ask the public: The first thing they associate with professors is tweed; the first with doctors (a tie here) is lots of

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money or bad handwriting; and the first with lawyers, written language that is impossible to understand.”⁶

According to George Hathaway, chairperson of the Plain English Committee of the Michigan State Bar, plain English is defined as:

the writing style that (1) all legal writing textbooks recommend, (2) the ABA Committee on Legal Writing recommends, (3) all law students study in their law school course in legal writing, and (4) many law students and lawyers give lip service to, but often ignore for the rest of their law school and entire legal careers.⁷

He further points out that plain English should consist of tables of contents and headings, concise and simple words, short sentences, and active voice.⁸ Among the evils to avoid are: long pages of text without headings, overuse of complex sentences, passive voice, unnecessary legalese, and multisyllabic words.⁹

A common scenario in which plain English is beneficial is in standard apartment leases. The usual lease form might contain the following confusing language:

Tenant has not at any time heretofore made, done, committed, executed, permitted or suffered any act, deed, matter or thing whatsoever, whereby or wherewith, or by reason or means whereof the said lands and premises hereby assigned or surrendered, or any part or parcel thereof are, or is, or may, can, or shall be in any wise impeached, charged, effected or incumbered.¹⁰

Hathaway suggests the following equally effective, yet far more understandable plain English revision: “Tenant has done nothing which would give anyone a claim against the leased premises.”¹¹

Many observers, however, have criticized Hathaway’s suggestions and the Plain English Movement in general as being overly critical.¹² For example, not all short sentences are coherent, and the passive voice is perfectly acceptable when used properly.¹³ Some commentators assert that lawyers must write in a complex fashion because they are required to link complex conceptual thoughts to develop legal theories. Therefore, they may not utilize language as representation, as in literature, but must use language as concepts. These concepts are inherently difficult.¹⁴ For example, in law the word “contract” consists of all the principles and rules of contract formation and performance, not simply a piece of paper with

signatures and illegible fine print.¹⁵ While the good intentions of the Plain English Movement are certainly evident, some of the principles on which it is based are tenuous. However, it is still a positive step to remedy an ageless problem.

A. History

I know you Lawyers can, with Ease,
Twist Words and Meanings as you please;
That Language, by your Skill made pliant,
Will bend to favour ev’ry Client; . . .

Hence is the Bar with Fees supply’d.
Hence Eloquence takes either Side.
Your Hand would have but poultry gleaning;
Could every Man express his Meaning.¹⁶

The earliest known plain language statute was the English Statute of Pleading of 1362, requiring all oral pleadings to be in English and not in Law French.¹⁷ Throughout history, many famous scholars and lawyers have voiced their concern with legalese, including Sir Edward Coke, Thomas Jefferson, Jeremy Bentham, and John Adams.¹⁸

The American movement to regulate the unclear use of English words developed in this century at the common law level.¹⁹ Courts of equity formulated rules for resolving private party disputes involving misuse of language. For example, when disputed language in a contract is ambiguous, the terms will be resolved against the drafter.²⁰ Also, where the injured party has not been at fault, that party “cannot be held bound by contract provisions not likely to have been comprehended (and thus agreed to) by the party.”²¹

Occasionally, the courts were kind enough to engage in plain English when drafting opinions. Benjamin Cardozo exemplified judicial plain English in *Palsgraf v. Long Island Railroad Co.*²²

Plaintiff was standing on a platform of defendant’s railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package,

jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. . . . [I]t contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.²³

Cardozo's opinion uses precise words and efficient sentences. Rather than having stated "despite the fact that the train was already moving," he instead wrote "though the train was already moving." Furthermore, he did not use abstractions, archaic lawyerly phrases, or ambiguities.²⁴

American statutory measures moving towards plain English began in the 1930s with the federal securities laws. These laws required all publicly traded companies to disclose material information to investors.²⁵ Next, the Retail Installment Sales Acts of the 1950s were designed to provide disclosure of terms to parties buying on time.²⁶ Also, the Truth in Lending Act of 1969 mandated uniform disclosure for all consumer credit transactions.²⁷ These statutes, however, were all aimed at disclosure, not comprehensibility. Therefore, the information disclosed was not always ultimately useful and often was excessive, resulting in an "overload" of information.²⁸ Thus, the "real" Plain English Movement began in the private sector and was designed to provide a mechanism for effective communication, rather than just disclosure of information.²⁹ In 1974, two major insurance companies required the use of clear, precise language in auto and home policies.³⁰ The most notable move in the private sector, however, occurred in 1975 when Citibank of New York adopted the use of plain English in its consumer promissory notes.³¹ The event generated favorable publicity and was welcomed by consumer activists who viewed it as a major breakthrough in consumer communication.³² Other lending institutions followed suit inevitably. The practice eventually formed the basis of New York's plain English statute in 1978.³³ However, while the private sector's efforts were encouraging, there was simply not enough incentive (or disincentive) to trigger widespread use of plain English contracts.³⁴

B. Federal Attempts

For that reason, the federal government decided to intercede. It focused its efforts on the language used between the parties in consumer transactions.³⁵ The Employee Retirement Security Act of 1974, for example, provided that members of covered employee plans be given a description of such plans "written in a manner calculated to be understood by the average plan participant."³⁶ In 1975, the Magnuson-Moss Warranty Act required that written warranties for consumer products be written in "simple and readily understandable language."³⁷ Also, the Electronic Fund Transfer Act of 1978 required that terms in consumer accounts be in "readily understandable language."³⁸ Additional federal attempts included President Carter's Executive Order in 1978 that declared all federal regulations "shall be as simple and clear as possible."³⁹

Unfortunately, the federal pronouncements all failed to provide a mechanism to determine what was meant by "readily understandable" and "as clear as possible."⁴⁰ In other words, these statutes failed to provide a target group with which to gauge the clarity of the written terms. Was a contract to be "readily understandable" to a nuclear physicist or someone with a sixth grade education? Efforts to establish a federal uniform standard have yet to materialize.⁴¹

C. State Attempts

Recognizing the inability and reluctance of the federal government to take a firm stand, some state governments decided to act and drafted statutes aimed at deceptive contract negotiations.⁴² In 1977, Minnesota and Maryland led the way in reforming traditional legalese in contracts.⁴³ These early state attempts required insurance contracts to be written in language understandable by the average consumer.⁴⁴ By mid-1986, twenty states had enacted legislation requiring plain English in insurance policies, and nearly thirty-nine states had considered some form of plain language legislation.⁴⁵

It was not until 1978, however, that New York mandated boldly that all consumer contracts be written in plain English.⁴⁶ Influenced by Citibank's earlier development, Assemblyman Peter Sullivan sponsored a bill requiring that written residential leases and written consumer contracts primarily for personal, family, or household purposes for a value of \$50,000 or less be "[w]ritten in a clear and coherent manner using words with common and

every day meanings."⁴⁷ An original provision requiring that these contracts also use nontechnical language was removed, indicating the intent of the New York act is to employ a subjective test of plain English, based on the parties involved in the transaction.⁴⁸

In order to avoid a flood of litigation and large unforeseen liabilities over the law, the act not only limits application of the law to contracts with a maximum value of \$50,000, but also provides a penalty of \$50 plus actual damages.⁴⁹ Furthermore, the penalty does not apply where the contract has been performed or against a party who "attempts in good faith to comply with this subdivision."⁵⁰

While the drafters were initially correct that there would not be much litigation over the act,⁵¹ New York's Act has generated some litigation, which has aided those who wish to better understand the meaning and application of its terms. For instance, in *Filippazzo v. Garden State Brickface Co.*, the court held that an arbitration agreement in a consumer contract written in technical language violated the New York act's Section 5-702, but that violation did not affect the provision's enforceability.⁵²

Additionally, in *New York v. Lincoln Savings Bank*, the state argued that the defendant bank's safety deposit box agreement did not comply with Section 5-702 in that it was "not clear" or of "readable size," because it was composed of over 1200 printed words crammed into 104 lines, using a four or five point type print.⁵³ Similarly, in *Gross v. Sweet*, a private action for damages allegedly caused by a company's negligence, the plaintiff used the statute's criteria successfully against an exculpatory clause in a consumer contract.⁵⁴

One of the most common private causes of actions arising under the New York act has come from tenants seeking to reform or invalidate their leases. For instance, in *Francis Apartments v. McKittrick*, a defendant tenant successfully used Section 5-702 to defend himself against the plaintiff landlord in a non-payment proceeding.⁵⁵ There, the court held that the lease was invalid under the New York act and ordered that the plaintiff rewrite the lease in compliance with the plain language requirements.⁵⁶ In addition, in *Balram v. Etheridge*, the court held

that defendant landlord, a successor-in-interest to the leased property, could not enforce a jury waiver provision in the lease because the provision failed to comply with consumer laws regarding legibility of consumer contracts.⁵⁷

Maine, Hawaii, and Connecticut soon followed New York's example and enacted plain English statutes for consumer contracts.⁵⁸ Connecticut's law, passed in 1979, applies to consumer contracts for less than \$25,000 and any residential lease, excluding mortgages, deeds of real estate, documents relating to securities transactions, and insurance policies.⁵⁹ The Connecticut law also provides for penalties of up to \$100 and attorney's fees "not to exceed one hundred dollars."⁶⁰ Similar to New York's law, the Connecticut statute limits enforcement to executory contracts and provides a good faith defense.⁶¹ However, the Connecticut statute differs from the New York statute

The Connecticut law also provides for penalties up to \$100 and attorney's fees "not to exceed one hundred dollars."

in the standards applied to test the consumer contract language. While New York applies a subjective test of "plain English," Connecticut uses two alternative objective tests of readability.⁶² The elements of these tests will be discussed in the

following section. To date, at least eleven states have adopted plain English laws for all consumer contracts.⁶³

II. Analyzing state statutes

While most state statutes differ in the exact language used, penalties applied, and coverage, they all tend to employ either a subjective standard, an objective standard, or both.⁶⁴ The subjective tests, such as that found in the New York law, frequently use terms such as "reasonable," "clear," and "common," while the objective tests rely on mechanical, precise formulas to determine "reading ease."⁶⁵

A. Subjective standards

A good example of a subjective standard to determine "readability" in a consumer contract is found in the New York statute, which requires such contracts be written in a "clear and coherent" manner.⁶⁶ Subjective tests allow words to have meanings that can be interpreted differ-

ently depending upon the nature of the parties involved. While these tests have been attacked as vague and ambiguous,⁶⁷ especially by bar associations, one commentator noted that the common law has always used terms such as “reasonable” and “material,” with little or no opposition from the same bar associations.⁶⁸

Another area in which subjective plain language statutes have been used is in statutes regarding legislation and rule-making.⁶⁹ These statutes allow the governmental bodies to set their own standards, adapting and modifying them as needed.⁷⁰ Furthermore, subjective tests allow for flexibility and interpretation dependent upon the particular parties involved.⁷¹ This inherent flexibility, however, has the disadvantage of requiring judicial interpretation to determine “reasonableness” in light of the parties’ subjective knowledge. On the other hand, very little litigation has developed over these statutes.⁷²

B. Objective standards

At the other extreme, many plain English statutes, such as Connecticut’s, utilize objective standards to analyze contractual language.⁷³ Objective tests are “not based on the comprehension of the target group in light of the purpose of the legal act but only on the nature and length of the words and sentences used.”⁷⁴ Specifically, the objective portion of the Connecticut statute requires such technicalities as: “(1) the average number of words per sentence is less than twenty-two;⁷⁵ and (2) [n]o sentence in the contract exceeds fifty words . . . (5) [t]he average number of syllables per word is less than 1.55 . . . and (8) [i]t allows at least three-sixteenths of an inch of blank space between each paragraph and section. . . .”⁷⁶ Incidentally, the Connecticut General Assembly counsel concluded that this plain English statute, were it part of a consumer contract, would violate its own provisions because it contains a fifty-four word sentence.⁷⁷

The advantages and disadvantages of objective standards are readily apparent. First, a positive aspect of objective tests is that they are precise.⁷⁸ It does not take a judge to determine that a sentence contains less than fifty words. Also, these statutes set out specific guidelines that any contract drafter can follow, regardless of one’s knowledge of “reasonableness” in light of the circumstances.

On the other hand, the preciseness of objective tests will probably prove too tedious for most drafters.⁷⁹ Because objective tests are intrinsically inflexible and technical, application of them can be difficult and time con-

suming.⁸⁰ Also, objective reading tests were really designed to evaluate elementary school reading materials, and no study has demonstrated their application to complex legal transactions.⁸¹ Moreover, requirements for shorter sentence length and syllables per word do not guarantee coherence. For example, both of the following sentences would pass an objective test of “readability”: “I went to the park” and “Park I to the went.”⁸² Obviously, the latter sentence makes no sense, yet both contain the same amount of words and syllables and would rate equally in an objective test.

Two common fallacies have been pointed out regarding the basic principles on which objective tests are based.⁸³ The first is that “clarity is verbal brevity.”⁸⁴ In other words, clear sentences and words are short sentences and words. The problem with this belief is that longer sentences may help to clarify the action.⁸⁵ For example, “Bob Smith the lumberjack went to work” is clearer than “Bob went to work.” The first sentence clarifies which Bob “went to work.”⁸⁶

The second fallacy, known as the “mirror fallacy,” says that “verbal complexity reflects conceptual complexity.”⁸⁷ This concept means that when the words on the page are simple, the underlying concepts will be simple. However, this concept is false because there are many times when a simple word will not suffice. For example, the phrase “holder in due course” necessarily requires a somewhat technical explanation of the rights and liabilities underlying that designation. Merely saying “holder in due course” does not begin to reduce the vast complexity of that law. Thus, “clarity does not automatically follow verbal brevity.”⁸⁸

C. Flesch tests

While there are approximately seventy-five objective tests of readability,⁸⁹ most statutes utilize aspects of the Flesch Reading Ease Test developed in 1949 by Dr. Rudolph Flesch.⁹⁰ Using the formula, a score from 0 to 100 is determined to measure reading ease and human interest, with 100 being the most “readable.”⁹¹ For instance, comic books generally receive a score of 90-100, while scientific theories are in the 0-30 range.⁹² Most state statutes using the Flesch Test require a score of 40,⁹³ although Dr. Flesch defines Plain English statutes as a score of 60 or better.⁹⁴

The basic presumption of the Flesch Test is that longer words and sentences mean more difficult material.⁹⁵ How-

ever, this basic premise is not always correct. For example, using the Flesch test, the words “probed,” “deemed,” and “pledged” are considered easier than the words “acted,” “added,” and “hated” because the latter words have more syllables.⁹⁶ Thus, the test says nothing at all about content, grammar or interest level. Nor does it exclude communications not easily understood.⁹⁷

Because of these drawbacks, the Flesch Test and other objective tests often condemn clear cases of good legal writing.⁹⁸ For example, even though the opening sentence of the Declaration of Independence is considered one of the greatest political statements ever written, it receives a ridiculously low Flesch Test score of 8.4!⁹⁹ Thus, the “sophisticated” Flesch Test is far from infallible

III. Are statutes effective?

Overall, Plain English statutes have met with both praise and opposition. However, as indicated above, not all states have completely supported the movement.¹⁰⁰ On the positive side, Plain English statutes, where in effect, have encouraged businesses to revise and simplify their documents. This, in turn, has benefited consumers by providing them with readily understandable contract terms.¹⁰¹

New York reported that its Plain Language Law has achieved many of its major objectives. Large numbers of firms have revised their printed forms to comply with the statute and have experienced no adverse impact. There has been no flood of litigation as initially feared. New York’s action has influenced other states to follow suit.¹⁰² Contrary to earlier predictions, there have been no mass efforts to amend the existing laws.¹⁰³

Opposition to Plain English statutes is largely concerned with the increased costs on businesses to revise their old contracts and implement the new ones.¹⁰⁴ Another argument against Plain English statutes is that some legal documents require complexity.¹⁰⁵ One reason asserted for the complexity of contracts is that they provide for possible problems during the contracting period and specify the rights and remedies of the parties. Plain English statutes that provide for “streamlining” of contracts require drafters to eliminate these contingencies from the contract, thus increasing the risk of liability for the parties.¹⁰⁶ Even when a contract is streamlined and simplified, the resulting document may be even more complex than the original.¹⁰⁷

Moreover, the Plain English laws themselves often are technical and complex, and raise complicated issues for

those who attempt to comply with them.¹⁰⁸ Variance among the specific requirements for plain language in state statutes may lead to the disruption of interstate insurance and banking business.¹⁰⁹ In addition, plain language statutes raise ethical concerns for lawyers who must assume responsibility for the failure to comply with the applicable laws in drafting legal documents.¹¹⁰

Another problem encountered by the Plain English laws is that they only cover a small segment of contract law.¹¹¹ While insurance contracts are generally covered by special statutes, instruments such as investment contracts and negotiable instruments are not covered by plain English laws and could benefit by simplification.¹¹²

As an empirical matter, studies suggest that market forces can bring about most necessary changes in contract language without the aid of these statutes.¹¹³ In fact, plain English statutes may even inhibit innovation in simplifying contract language.¹¹⁴ Finally, some commentators have pointed out the possible First Amendment issues involving freedom of speech which may be violated by these statutes.¹¹⁵

Conclusion

I do not hold much hope for the future of legal writing in America. Because few sources remain for the widespread infusion of conceptual understanding into legal education, I suspect that each generation of lawyers will write at least as badly as its predecessor. Legal writing will become increasingly technocratic as prescriptions generated by unexamined premises are continually applied to misperceived situations.¹¹⁶

The famous satirist Jonathan Swift called the language used by lawyers “a peculiar Cant and Jargon of their own that no other Mortal can understand.”¹¹⁷ The Plain English Movement has attempted over the years to alleviate the complexities which lawyers place on innocent laypersons. Through the use of statutory reform, both the federal and state governments have sought to reduce the problem by providing subjective and objective measures with which to gauge contractual language. While not yet widely adopted, these statutes have had some degree of success but have also been the subject of severe criticism. It is difficult to say whether the Plain English Movement will grow or fade away.

In any event, while plain English statutes are a definite step in the right direction, achieving plain English will require more than just legislation. It will require a

good faith effort on the part of contract drafters to provide coherent language and to comply with the ordinary rules of English grammar that have always produced clear writing.¹⁸ Perhaps the following exchange exemplifies what many believe to be the true reason for incomprehensible legalese:

"But surely, you say, there must be some reason for using all this jargon to obfuscate what seems to

be simple enough concepts?"

"Of course there is, and it goes far beyond the words themselves, straight to the core of the profession: *acquisitive circumlocution in gross*."

"What's that mean?"

"Why, the longer the words, the higher the fee, of course."¹⁹

E N D N O T E S

¹ DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 24 (1963).

² ROBERT E. MEGARRY, *A SECOND MISCELLANY-AT-LAW* 285 (1973) (quoting A. SYMONDS, *MECHANICS OF LAW-MAKING* 75 (1835)).

³ Richard C. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 727 (1978).

⁴ See, e.g., George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 335-45 (1987). See also George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J. 945, 946 (1983).

⁵ See, e.g., N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1989 & Supp. 1994) ("Requirements for the use of plain language in consumer transactions. . .").

⁶ Gopen, *supra* note 4, at 333. "[T]he ability of the lawyer to confuse others by the use of words has long been the subject of proverbs." *Id.* (quoting Urban A. Lavery, *The Language of the Law: Defects in the Written Style of Lawyers, Some Illustrations, the Reasons Therefor, and Certain Suggestions as to Improvement*, 7 A.B.A. J. 277, 277 (1921)).

⁷ Hathaway, *supra* note 4, at 945.

⁸ *Id.* Hathaway lists the ten typical elements of Plain English as:

- (1) a clear, organized, easy-to-follow outline or table of contents,
- (2) appropriate captions or headings,
- (3) reasonably short sentences,
- (4) active voice,
- (5) positive form,
- (6) subject-verb-object sequence,
- (7) parallel construction,
- (8) concise words,
- (9) simple words and
- (10) precise words. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See, e.g., Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 601-08 (1986).

¹³ See D. Baron, *The Passive Voice Can be Your Friend*, in *DECLINING GRAMMAR* 17 (1989). See also David S. Cohen, *Comment on the Plain English Movement*, 6 CANADIAN BUS. L.J. 421, 422 (1981-82); Gopen, *supra* note 4, at 349-51.

¹⁴ Hyland, *supra* note 12, at 614-15.

¹⁵ *Id.* at 614; See also Committee for Plain Language Conveyancing, *Report of the Committee for Plain Language Conveyancing*, 16 HAW. B.J. 91 (1981) (arguing that technical legal terms are "shorthand," which reduce the length of documents and add exactness in meaning).

¹⁶ Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain Nonsense?*, 78 LAW LIBR. J. 683, 683 (1986) (quoting BENJAMIN FRANKLIN, *2 THE PAPERS OF BENJAMIN FRANKLIN* 254 (Leonard W. Labaree, ed., 1960)).

¹⁷ *Id.* at 684 n.7. Other statutes were passed in England during the 1500s, 1700s and 1800s that required statutes, written pleadings, and law reports to be in English. However, use of technical words was allowed. *Id.*

A subsequent interesting development in the history of plain English occurred in 1566 when an English chancellor, irate at the audacity of an attorney to file a 120-page pleading which subsequently required only 16 pages, ordered a hole cut through the center of the document. He then demanded that the author's head be stuffed through the hole and ordered the man to be paraded

around Westminster Hall while court was in session! Wydick, *supra* note 3, at 727 (citing *Mylward v. Welden*, 21 Eng. Rep. 136 (Ch. 1596)).

¹⁸ Hathaway, *supra* note 4, at 948. Lord Westbury described title documents as being "difficult to read, disgusting to touch, and impossible to understand." JOHN WILLOCK, *LEGAL FACETIAE* 420 (1887). See *Wroth v. Tyler*, 2 W.L.R. 405, 426 (1973).

¹⁹ Lloyd, *supra* note 16, at 684-85. See also, Stephen M. Ross, *On Legalities and Linguistics: Plain Language Legislation*, 30 BUFFALO L. REV. 317, 353 (1981) (stating that the Plain Language Movement sought to extend common law principles designed to protect weaker parties against the imposition of unfair practices).

²⁰ Lloyd, *supra* note 16, at 685. Moreover, equity and the Uniform Commercial Code give the courts wide latitude to refuse to enforce unconscionable contracts. *Id.*

²¹ Richard A. Givens, *The New York 'Plain English' Law*, in *DRAFTING DOCUMENTS IN PLAIN LANGUAGE* 53, 57 (Practicing Law Institute Commercial Law and Practice Course Handbook Series No. 203, (1979)).

²² 162 N.E. 99 (1928).

²³ *Id.*; Wydick, *supra* note 3, at 728.

²⁴ *Id.*

²⁵ Albert J. Millus, *Plain Language Laws: Are They Working?*, 16 UCC L.J. 147, 147 (1983).

²⁶ Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CANADIAN BUS. L.J. 408, 411 (1981-82) [hereinafter Felsenfeld, *Plain English Movement*].

²⁷ *Id.*

- ²⁸ The net result was that "[t]oo much information [could] be as bad as too little." *Id.* at 411-12.
- ²⁹ *Id.*
- ³⁰ Hathaway, *supra* note 4, at 946. The two companies were Nationwide Mutual Insurance Co. and Sentry Life Insurance Co.
- ³¹ Carl Felsenfeld, *The Future of Plain English*, 62 MICH. B.J. 942, 942 (1983) [hereinafter Felsenfeld, *Future of Plain English*]. Incidentally, Mr. Felsenfeld was a vice president of Citibank and had general legal supervision over its consumer-related operations.
- ³² Felsenfeld, *Plain English Movement*, *supra* note 26, at 409.
- ³³ Felsenfeld, *Future of Plain English*, *supra* note 31 at 942; *See also* Ross, *supra* note 19 at 318 (stating that many other lending institution mimicked Citibank's use of personal pronouns in consumer loan documents).
- ³⁴ Felsenfeld, *Plain English Movement*, *supra* note 26, at 414. Most states still allow a free market in draftsman-ship.
- ³⁵ Lloyd, *supra* note 16, at 686.
- ³⁶ 29 U.S.C. § 1022 (a)(1) (1985).
- ³⁷ Millus, *supra* note 25, at 148 (citing 15 U.S.C. §§ 2301-2308 (1975)).
- ³⁸ Lloyd, *supra* note 16, at 686 (citing 15 U.S.C. § 1693b (1982)).
- ³⁹ *Id.* at 686-687 (citing Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *revoked* by Exec. Order No. 12,291, 3 C.F.R. 127, 134 (1982)).
- ⁴⁰ *See, e.g.*, Gertrude Block, *Plain Language Laws: Promise v Performance*, 62 MICH. B.J. 950, 952 (1983).
- ⁴¹ Millus, *supra* note 25, at 148.
- ⁴² Lloyd, *supra* note 16, at 687.
- ⁴³ *See* Gopen, *supra* note 4, at 347; Readability of Insurance Policies Act, MINN. STAT. §§ 72C.01-72C.13 (1977); MD. CODE ANN., COM. LAW § 14-1906 (1987).
- ⁴⁴ Other states followed shortly thereafter in passing laws requiring plain language in insurance contracts. *See* Life and Disability Insurance Policy Language Simplification Act, ARK. CODE ANN. § 23-80-201 (Michie 1979); Insurance Plain Language Act, CONN. GEN. STAT. § 38a-295 (1979); DEL. CODE ANN. tit. 18, §§ 2740 - 2741 (1976); FLA. STAT. § 627.4145 (1979); Insurance Policy Language Simplification Act, ME. REV. STAT. ANN. tit. 24A, §§ 2438 - 2445 (1979); Readability of Insurance Policies Act, MINN. STAT. §§ 72C.01 - 72.13 (1977); Readable Insurance Policies Act, N.C. GEN. STAT. §§ 58-38-1 to 58-38-40 (1979); OHIO REV. CODE ANN. §§ 3902.01 - 3902.08 (Anderson 1980); OR. REV. STAT. §§ 180.540 - 180.555 (1985); R.I. GEN. LAWS § 27-5-9.1 (1979); S.C. CODE ANN. §§ 38-61-30, 38-61-40 & 38-61-50 (Law. Co-op. 1987); Easy to Read Life and Health Insurance Policy Act, TENN. CODE ANN. § 56-7-1601 (1981); Life and Accident and Sickness Insurance Policy Language Simplification Act, W. VA. CODE § 33-29-1 (1981); WIS. STAT. § 631.22 (1979).
- ⁴⁵ This list of states includes Arizona, Arkansas, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington and Wisconsin. Gopen, *supra* note 4 at n. 16; Ross, *supra* note 19, at 319 (citing MARYLAND PLAIN LANGUAGE STUDY COMMITTEE, *Plain Language Legislation in the United States*, in REPORT OF THE PLAIN LANGUAGE STUDY COMMITTEE (1980)).
- ⁴⁶ Lloyd, *supra* note 16, at 687. The new law passed as New York's Sullivan Act of 1978, N.Y. GEN. OBLIG. LAW § 5-702.
- ⁴⁷ *See*, Givens, Supplementary Practice Commentaries, N.Y. GEN. OBLIG. LAW § 5-702. (McKinney Supp. 1990) [hereinafter Givens, Supplementary Commentaries]. Moreover, the agreements covered by this act must be "[a]ppropriately divided and captioned by its various sections." § 5-702 (a)(2).
- ⁴⁸ Lloyd, *supra* note 16, at 687-88. Although the language of the Act refers to "common and every day meanings", that provision has been interpreted as a subjective test based on the nature of the parties involved. *Id.* Objective tests, on the other hand, are based on the nature and length of the words and sentences used. *Id.* at 689 n.42.
- ⁴⁹ § 5-702(a)(2); *See also* Ross, *supra* note 19, at 328-29 (arguing that the Sullivan Act's relatively mild penalty provisions emphasize state action, and maintains the statute's purpose to aid in reform rather than to punish offenders).
- ⁵⁰ *Id.* at 327 n.55
- ⁵¹ Givens, Supplementary Commentaries, *supra* note 47 and text accompanying.
- ⁵² 502 N.Y.S.2d 258 (N.Y. App. Div. 1986).
- ⁵³ (Sup. Ct., N.Y. County 1980)(dismissed), quoted in Ross, *supra* note 19, at 328 (stating that the case was dismissed when the Bank rewrote safety box rental contract to comply with the statute).
- ⁵⁴ 49 N.Y.2d 102 (1979).
- ⁵⁵ 429 N.Y.S.2d 516 (N.Y. Civ. Ct. 1979).
- ⁵⁶ *Id.* Moreover, the court's decision in *Francis Apartments* rejected the position taken in *Newport Apartments v. Collins*, decided only ten days earlier by a different judge of the same Civil Court, which held that the Sullivan Act did not encompass renewal leases, reasoning that landlords would be put under an excessive burden. Ross, *supra* note 19, at 322-323, citing *Newport Apts.*, N.Y.L.J., May 16, 1979, at 13, col 3 (Civ. Ct. N.Y. April 11, 1979), *rev'd*, 431 N.Y.S.2d 231 (N.Y. App. Term 1980).
- ⁵⁷ 449 N.Y.S.2d 389, 391 (N.Y. Civ. Ct. 1982) (citing *Sorbonne Apartment v. Kranz*, 410 N.Y.S.2d 768, 769 (N.Y. Civ. Ct. 1978) ("[a] jury waiver clause in a lease that does not conform with . . . (the) minimum size print for consumer contracts and leases is unenforceable . . ."); *Koslowski v. Palmieri*, 414 N.Y.S.2d 599 (N.Y. App. Div. 1979)("[i]f we were to hold to the contrary, then a tenant would be bound by a provision, which although of the proper type size, is nevertheless illegible and such a strained and ludicrous interpretation cannot be sustained").
- ⁵⁸ Lloyd, *supra* note 16, at 688, citing HAW. REV. STAT. §§ 487A-1 to 487A-4 (1981); CONN. GEN. STAT. §§ 42-151 to 42-158 (1979); ME. REV. STAT. ANN. tit. 10, §§ 1121 - 1126 (West 1979 & Supp. 1985).
- ⁵⁹ CONN. GEN. STAT. §§ 42-151 to 42-158 (West 1987). The Connecticut Citizens Action Group called this new law "the most important piece of consumer legislation passed in this session." Block, *supra* note 40, at 952.
- ⁶⁰ CONN. GEN. STAT. § 42-154 (West 1987).
- ⁶¹ CONN. GEN. STAT. § 42-155 (West 1987).
- ⁶² Lloyd, *supra* note 16, at 689. *But see* Block, *supra* note 40, at 952. Block interprets the Connecticut statute as allowing the contract drafter to choose between either a subjective test (sub-

section (b)) or an objective test (subsection (c)). The abundance of articles pertaining to plain English which appeared in the *Michigan Bar Journal* were instigated by an effort to convince Michigan legislators to adopt plain English laws. These efforts, however, were ultimately unsuccessful.

⁶³ Connecticut, Hawaii, Maine, Minnesota, New Jersey, New York and West Virginia. Hathaway, *supra* note 4, at 947; *See supra* notes 5 and 45 (discussing New York plain language statute regarding consumer transactions); *supra* notes 59 and text accompanying (discussing Hawaii, Maine, and Connecticut statutes); *See also* Plain Language Contract Act, MINN. STAT. ANN. §§325G.31 - 325G.37 (1985); Truth-in-Consumer Contract, Warranty and Notice Act, N.J. STAT. ANN. §§ 56:12-2 to 56:12-18 (West 1981); Consumer Credit and Protection Act, W. VA. CODE § 46A-6-109 (1981).

In addition, Montana, Pennsylvania, and Oregon have passed plain language statutes for consumer contracts. *See* Plain Language in Contracts Act, MONT. CODE ANN. §§ 30-14-1101 to 30-14-1113 (1985); Plain Language Consumer Contract Act, 73 PA. CONS. STAT. ANN. §§ 2201 - 2212 (Purdon Supp. 1993); OR. REV. STAT. §§ 180.540 - 180.555 (1985); N.H. REV. STAT. ANN. § 420-D:12 (1988); *See also* V.I. CODE ANN. tit. 12A, §§ 251 - 261 (1985).

⁶⁴ Felsenfeld, *Plain English Movement*, *supra* note 26, at 415-16.

⁶⁵ *Id.*

⁶⁶ The New York statute provides, in relevant part:

"Every written agreement . . . for the lease of space to be occupied for residential purposes, or to which a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes must be:

1. Written in a clear and coherent manner using words with common and every day meanings. . . ."

N.Y. GEN. OBLIG. LAW § 5-702 (a).

Furthermore, other states have used New York's "clear and coherent" standard in their plain language statutes. *See*, COLO. REV. STAT. § 2-2-801 (1994); HAW. REV. STAT. § 487A(a)(2) (1981); ME. REV. STAT. ANN. tit. 10, §

1124(1)(West 1979 & Supp. 1985); MINN. STAT. § 325G.31 (1985); MONT. CODE ANN. § 30-14-1103 (2)(a) (1985); W.VA. CODE § 46A-6-109 (a)(1)(1981).

⁶⁷ Block, *supra* note 40, at 953.

⁶⁸ Felsenfeld, *Plain English Movement*, *supra* note 26, at 415-16.

⁶⁹ *See, e.g.*, CAL. GOV'T CODE § 6215 (Deering 1982) (requiring the use of plain language in state agency documents, including regulation, licenses, and announcements); CAL. GOV'T CODE § 11343.2 (Deering Supp. 1993) (requiring the use of plain language in small business regulations); COLO. REV. STAT. § 2-2-801 (Supp. 1993) (requiring plain language in state laws); New York State Administrative Procedure Act, N.Y.A.P.A. LAW § 201 (McKinney 1975 & Supp. 1992) (requiring that state agency's rules, regulations and related documents be written in plain English). *See also* Lloyd, *supra* note 16, at 694 (predicting that plain language statutes would become useful in this area).

⁷⁰ Lloyd, *supra* note 16, at 695. In addition, Lloyd supplies the following test for lawmakers drafting statutes: "Use the simplest formulation (or one of the equally-simplest formulations) of a rule that achieves the purpose of the rule, that deals adequately with the concepts underlying the rule, and that provides the desired guidance for those meant to use the rule. Simplicity refers both to word and sentence complexity and technicality. The test for adequate simplicity under this rule is whether it can actually be read in the way desired by the group to be regulated." *Id.*

⁷¹ One commentator argues that the flexible "clear and coherent" standard is more useful for protecting consumers than more precise standards because it can be applied to a variety of language uses and gives the state or private claimants the ability to obtain relief for abuses of form, as well as intent and effect. Ross, *supra* note 19, at 339.

⁷² *See* Givens, Supplementary Commentaries, *supra* note 47; *See also, supra* notes 51 - 57 and text accompanying (discussing the limited caselaw regarding this issue).

⁷³ The Connecticut statute provides in relevant part: "Every consumer contract entered into after June 30, 1980, shall be written in plain language. A consumer contract is written in plain lan-

guage if it meets either the plain language tests of subsection (b) [arguably subjective tests] or the alternate objective tests of subsection (c)." CONN. GEN. STAT. § 42-152 (a) (West 1987).

⁷⁴ Lloyd, *supra* note 16, at 689 n.42.

⁷⁵ CONN. GEN. STAT. § 42-152 (c)(1) (West 1987). Section 42-158 establishes an elaborate set of procedures to follow to determine compliance with the rules set out in subsection (c) of § 42-152.

⁷⁶ CONN. GEN. STAT. § 42-152 (c) (West 1987).

⁷⁷ Block, *supra* note 40, at 953.

⁷⁸ Millus, *supra* note 25, at 154.

⁷⁹ *Id.* at 155.

⁸⁰ Lloyd, *supra* note 16, at 692.

⁸¹ Felsenfeld, *Plain English Movement*, *supra* note 26, at 417.

⁸² *Id.*

⁸³ The basic principal of objective tests is that "conceptual simplicity can be obtained by limiting words or collections of words." Lloyd, *supra* note 16, at 691.

⁸⁴ *Id.*

⁸⁵ MELLINKOFF, *supra* note 1, at 401.

⁸⁶ *See, e.g.*, Lloyd, *supra* note 16, at 691. "Whether a longer or shorter sentence is clearer depends upon one's purpose and the underlying ideas one wishes to convey." *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* *See also* Cohen, *supra* note 13, at 422. Cohen states that under objective tests the "conceptual complexity of a great deal of contractual information" will stay the same, and the only result of using such tests will be the "transfer of paper bearing simple language." *Id.*

⁸⁹ Felsenfeld, *Plain English Movement*, *supra* note 26, at 416.

⁹⁰ Millus, *supra* note 25, at 154. The Flesch test has been used largely in the insurance industry. *Id.* At 155. Incidentally, Flesch served as one of the consultants on the original Citibank promissory note. Felsenfeld, *Plain English Movement*, *supra* note 27, at 416. States that use the Flesch test in their plain language in insurance contract statutes include Maine, Minnesota, North Carolina, and Ohio. ME. REV. STAT. ANN. Tit. 24A, § 2441 (1)(a) (West 1979); MINN. STAT. 672C.09 (1977); N.C. GEN. STAT. §§58-38-25C (1979); OHIO REV. CODE ANN. §§ 3902.04A1 - 3902.04C (Anderson 1980).

⁹¹ Block, *supra* note 40, at 954. The Flesch formula is calculated as follows: Flesch score = 206.835 - [1.015 * (words/sentences)] - [84.6 * (syllables/words)]. Lloyd, *supra* note 16, at 689.

⁹² Millus, *supra* note 25, at 156. Dr. Flesch also determined that "pulp" fiction rates between 80-90; "slick" fiction received 70-80; digests rate 60-70; and academic texts receive 30-50. *Id.*

⁹³ *Id.*

⁹⁴ Lloyd, *supra* note 16, at 689.

⁹⁵ Millus, *supra* note 25, at 156.

⁹⁶ Block, *supra* note 40, at 954.

⁹⁷ Millus, *supra* note 25, at 157.

⁹⁸ Lloyd, *supra* note 16, at 691.

⁹⁹ Millus, *supra* note 25, at 157.

¹⁰⁰ See *supra* notes 51 - 57 and text accompanying (discussing the limited caselaw regarding plain language legislation).

¹⁰¹ See Ross, *supra* note 19, at 359 (citing Davis, *Protecting Consumers from Overdisclosure and Gobbledy-*

gook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 VA. L. REV. 841, 876-77 (1977) (showing consumers' comprehension increased when a simplified contract is used); See also Rosemarie Park & Ruth M. Garvey, *The Plain Language Contract Act*, 42 BENCH & BAR 15, 19 (1985) (arguing that clients benefit when they view contracts as understandable and nonthreatening); Millus, *supra* note 25, at 151.

¹⁰² Givens, *supra* note 47.

¹⁰³ Millus, *supra* note 25, at 151.

¹⁰⁴ Lloyd, *supra* note 16, at 693. Lloyd emphasized the disproportionate impact on smaller companies with fewer resources to cover the plain language requirements. *Id.*

¹⁰⁵ Millus, *supra* note 25, at 157.

¹⁰⁶ *Id.* at 152-53.

¹⁰⁷ Cohen, *supra* note 13, at 422.

¹⁰⁸ Millus, *supra* note 25, at 154.

¹⁰⁹ Ross, *supra* note 19, at 337 n. 95.

¹¹⁰ Committee for Plain Language Conveyancing, *supra* note 15, at 92 (stating that professional liabilities may arise, because attorneys implicitly warrant that the documents they draft comply with the applicable law, which may include plain language statutes).

¹¹¹ Millus, *supra* note 25, at 153.

¹¹² *Id.* at 154.

¹¹³ Lloyd, *supra* note 16, at 692. Common law principals such as unconscionability in ambiguous contracts may also encourage revisions in contract language. *Id.*

¹¹⁴ *Id.* Citibank claimed that it would not have been able to draft its "revolutionary" new promissory note in the face of governmental restrictions. *Id.*

¹¹⁵ *Id.* at 694 n.74.

¹¹⁶ Hyland, *supra* note 12, at 625 (footnote omitted).

¹¹⁷ Lloyd, *supra* note 16 at 683 n.2.

¹¹⁸ Block, *supra* note 40, at 954, 957.

¹¹⁹ RALPH WARNER & TONI IHARA, 29 REASONS NOT TO GO TO LAW SCHOOL 58 (1984).