# Plain Language

### Legalese and the Myth of Case Precedent

by Benson Barr, George Hathaway, Nancy Omichinski and Diana Pratt

#### Introduction

ase precedent is the number one rationale that lawyers give for using the traditional language of the law (legalese). Lawyers say that over the years, hundreds and hundreds of legal cases have been decided that have interpreted legal language. Although the language may be different from common everyday English, lawyers use this language to obtain certainty in the interpretation of their legal documents.

If lawyers were to use different language, such as everyday plain English, there could be uncertainty over how courts would interpret the language in the documents. If the courts interpreted this new plain English differently than the drafter had intended, the drafter's client might lose money and sue the drafter for malpractice.

To avoid these occurrences, lawyers feel that it is better to use the tried and true court tested legalese. This argument or rationale is absolutely foolproof when given by a lawyer to a non-lawyer. The lawyer speaks from

"Plain Language" is a regular monthly column of the Michigan Bar Journal. It is edited by the Chairperson of the Plain English Committee of the State Bar, George H. Hathaway, The Detroit Edison Company, Room 688 WCB, 2000 Second Avenue, Detroit, MI 48226. Through this column the Plain English Committee hopes to publicize and promote the use of plain English in the law. Groups, committees and individuals are invited to contribute articles. For a copy of the publication guidelines and to discuss topics, contact Mr. Hathaway at the above address.

experience and with confidence. The non-lawyer, knowing little about the existence or non-existence of precedential cases, has no chance of refuting this argument.

However, to lawyers who advocate plain English, the case precedent rationale has many critical flaws, the most important of which are the following:

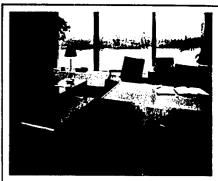
- 1. Most lawyers who use the case precedent rationale never offer even one case citation in support of it. The reason they can't cite a case is that they don't know of any cite. They simply assume that there must be some case precedents somewhere, or at least they hope there are.
- 2. Some lawyers who use the case precedent rationale actually do cite an example case. However, when the case is read, it turns out that although the court referred to the language in the document, the court didn't interpret the language. And even more important, the holding of the case had absolutely nothing to do with the specific language that the court discussed.
- 3. Although some specific language may have case precedent, it may have too much case precedent. There may be a large number of cases with conflicting interpretation of the same language.
- 4. Finally, although the common law is built on case precedent, most case precedents concern the elements of a cause of action, not specific language of a document.

Therefore to test the case precedent rationale, Wayne State Law School, the Plain English Committee and the Legal Forms Committee of the Real Property Law Section performed a brief research project.

#### Legal Research Project

The project was this — take a typical real estate document and do a computer search of all the words and phrases in the document to see which words and phrases were covered by case precedent and which words were not.

Form 2.3 Agreement of Sale (Shown in Figure 1), was selected from Ralph Jossman's Michigan Real Estate



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600 Renaissance Center, Suite 1400 Detroit, Michigan 48243 (313) 259-4800 Formbook as an example of a typical form used in real estate transactions. [Figure 1] Words and phrases that were considered likely to have case precedent were circled and chosen for computer research on LEXIS. The Supreme Court file of the Michigan library was used for all searches. At the time the search was conducted in May, 1985, this file included cases from 7/37 (283 Mich.) to April, 1985 (Vol. 421 No. 1 Advance Sheets for 4/11/85).

The initial group of searches included "land or real estate or real property" in addition to the word or phrase from the Agreement of Sale being researched in order to limit the cases-retrieved. The cases were scanned in the KWIC (Key-Word-In-Context) format which displays the language of the opinion that deals with the subject of the search by highlighting the search words on the screen in a context of 25 words on either side.

When a case seemed relevant, the format was changed to VAR KWIC (variable KWIC) to double the number of words in the context. Occasionally, if necessary to determine the relevance of a case, the FULL format was then used to read the full text of a case. If a word or phrase appeared to be at issue or important to the holding, the case was considered to be relevant and the important page(s) printed. All cases of every search were researched in this fashion.

#### Results

The total number of words in the Agreement of Sale is approximately 1820 based on 70 lines of type multiplied by 26 words per line. Fifteen words and phrases were discussed as significant issues in cases (Table 1). Twenty-four words and phrases appear in cases that may be precedent (Table 2). Eleven words that were not researched may have case precedent or at least may not be substituted with any other words. Thus, a total of 50 words or phrases have a possibility of case precedent. This is about 3% of the words in the Agreement of Sale.

#### Conclusion

This short project can hardly be considered a conclusive study. The intent of the project was not to satisfy a burden of proof but to satisfy a burden of going forward. The intent was to take a first step in exploring the rationale of case precedent in support of legalese. Regardless of whether the results had been that 1% or 3% or 5% or even 10% of the words had been supported by case precedent, the point

would have been made — only a small percentage of legalese is supported by case precedent.

Lawyers who use this rationale to justify the use of legalese are grossly overstating and misrepresenting the situation. Lawyers who use this rationale are trying to use a reason that is



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valid in less than 3% of the words to cover the remaining 97% of the words. The rationale isn't even a half truth, it's more like a three one-hundreths truth.

The study results strongly suggest that the case precedent rationale is like the Emperor's new clothes - never questioned but very little there.

#### TABLE 1

#### WORDS DISCUSSED AS SIGNIFICANT ISSUES

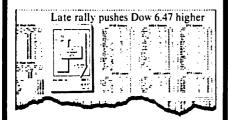
Marketable Title (323 Mich 87, 92) easement (328 Mich 42, 51) Warranty Deed (355 Mich 337, 338) penalty (321 Mich 492, 496) liquidated damages

(314 Mich 568, 575) deliver/delivery (359 Mich 376, 381) lien (396 Mich 192, 196) commitment (for a mortgage)

(314 Mich 364, 367) occupy (313 Mich 181, 185) option (345 Mich 698, 708) declare/declaration (of forfeiture)

(294 Mich 160, 164) forfeiture (360 Mich 237, 243) offer (381 Mich 23, 30) agree/agreement (to purchase) (381 Mich 23, 31)

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#### TABLE 2

#### WORDS WITH POSSIBLE PRECEDENT

appurtenances (410 Mich 428, 471) execute/execution

(375 Mich 323, 326) null and void (314 Mich 364, 369)

consummate/consummation (294 Mich 675, 679)

closing (355 Mich 540, 542) accept possession (405 Mich 51, 57) remedy (title) (342 Mich 457, 459) privilege (323 Mich 607, 610) security (298 Mich 577) retain (289 Mich 577) earnest money (313 Mich 111, 112) bind (354 Mich 263, 270)

Act No. 112, P.A. of 1960 Sec.

13(j) (414 Mich 603, 610) evidence (of title)

(299 Mich 116, 128)

assignment (and conveyance) (352 Mich 189, 195)

zoning ordinance

(395 Mich 539, 546) assume and pay (287 Mich 202, 204)

covenant (401 Mich 252, 260) existing building and use restrictions

(419 Mich 719, 731) inure (299 Mich 116, 126) benefit (299 Mich 116)

due date basis (MCL 211.2) (420 Mich 246)

due and payable (316 Mich 174, 180)

improvement (321 Mich 632, 629) vendee's interest (in the land contract) (373 Mich 315)

#### TABLE 3

#### WORDS NOT SEARCHED THAT MAY HAVE CASE PRECEDENT

escrow executors administrators assigns mortgage "as is condition"

recorded condition contingent title contract (see Fig. 1 next pg.)

Benson Barr is a partner in Gourwitz & Barr, PC and the chairperson of the Legal Forms Committee of the Real Property Law Section of the State Bar of Michigan.

George Hathaway is a staff attorney at Detroit Edison and the chairperson of the Plain English Committee of the State Bar of Michigan.

Nancy Omichinski is a second-year law student at Wayne State Law School.

Diana Pratt is Director of the Legal Writing Program at Wayne State Law

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#### AGREEMENT OF SALE

restrictions, eatements, and zoning ardinances, if any, upon the following conditions: THE SALE TO BE CONSUMMATED BY:  A. Delivery of the usual Warranty Deed conveying a marketable title. Payment of purchase maney is to be made in cash or certified check. This Agreement is CONTINGENT upon Purchaser securing, at Purchaser's expense a commitment for a martgage in the amount of \$\frac{\text{down plus mortgage}}{\text{constant}}\$ and adjustments in cash (or such other mortgage loan as Purchaser accepts). Purchaser agrees to execute the mortgage as soon as the mortgage application is approved and a closing date obtained from the lending institution. If Purchaser is unable to secure such a commitment this agreement shall become null and vold, and the deposit as indicated below Paragraph 9 shall be refunded EXCEPT for any expenses incurred by broker on behalf of Purchaser related to the placing of the mortgage.  B. Delivery of the usual Warranty Deed conveying a marketable title, subject to mortgage to be deducted from the purchase price. Payment of the purchase money is to be made in cash or certified check less the amount owing upon an existing mortgage row on the premises, with accrued interest to date of upon which there is unpoid the sum of approximately  Dollars	THE UNDERSIGNED hereby affers and agrees to purchase the following la County, Michigan, described as follows:	and situated in the City, Township, Village of
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in in which the property it located, interest, rents and water bills shall be prorated and adjusted as of the date of closing in accordance with due date basis of the municipality or taxing in consideration of the Broker's effort to obtain the Seller's approval, it is understood that this offer is irrevocable for five (5) days from the date rest, and it not accepted by the Seller within that time, the deposit shall be returned forthwith to the vertherser. If the offer is accepted by the Seller within that the rest, the deposit of the property within the time indicated in proragraph 3.  Dollars shall be held by him under to No. 112, P.A. of 1960 Sect. 13 (i) and applied on the purchase of the deposit of the No. 112, P.A. of 1960 Sect. 13 (ii) and applied on the purchase price if the sale is consummated.  APPLICABLE TO F.H.A SALES ONITY: It is exprestly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be bliggated to complete the purchase of the property described herein or to incur any pencity by forfeiture of cornest money deposits or otherwise unless the bliggated to complete the purchaser of the property described herein or to incur any pencity by forfeiture of cornest money deposits or otherwise unless the property excepted to the Purchaser of the property which statement its sold and the property of the pr	ue him and returning to the Seller the unused portion as determined by date	property is vacated and keys surrendered to Broker.
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The Broker is hereby authorized to make this offer and the deposit of the No. 112, P.A. of 1960 Sect. 13 (i) and applied on the purchase price if the sole is consummated.  APPLICABLE TO F.H.A. SALES ONLY: It is expressly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be digated to complete the purchase of the property described herein or to incur any penalty by forfeiture of corners managed deposits or otherwise values the liter has delivered to the Purchaser a witten statement issued by the Federal Housing Commissioner setting forth the opprised value of the property representation of the property representation of this contract without regard to the Everation of the property representation of this contract without regard to the amount of the approxised valuation made by the Federal Housing Commissioner.  It is further understood between Purchaser and Seller that the additional personal property listed herein had a value of \$\frac{1}{2}\$.  The covenants herein shall bind and inure to the benefits of the executors, administrators, successors and assigns of the respective parties. By the execution of this instrument the Purchaser acknowledges THAT HE HAS EXAMINED THE ABOVE described premises and is solistified with the videolocal form of structures thereon and purchases said property in an "as is condition", also acknowledges the receipt of a copy of this offer.  Address  THE ABOVE NAMED PURCHASER AND BROKER: The foregoing is accepted in accordance with the terms stated, and upon consummation. Seller very agrees to pay the Broker for services rendered a commission of \$\frac{1}{2}\$ per cent of the price, which shall be due and payable at the time set in said offer for the consummation of the sale, or il unconsummated, at the time of the Seller's or purchaser's affirm, inability or refusal to perform the conditions of this affect, however, that if deposit is forfeited under the terms of said offer, the Seller agrees that one-hall of such deposit (but not in excess of th		
D. APPLICABLE TO F.H.A. SALES ONLY: It is expressly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be beligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the effect of the Purchaser and selective of the property of mortgage insurance purposes of not less than \$ which statement that the Seller hereby agrees to deliver to the Purchaser promptly after the approximation of this contract without regard to the amount of the approximation of this contract without regard to the amount of the approximation of this contract without regard to the amount of the approximation of this contract without regard to the amount of the approximation of the security of the purchaser shall, however, how the privilege and applian of proceeding with the commodition of this contract without regard to the amount of the approximation made by the Federal Housing Commissioner.  It is further understood between Purchaser and Seller that the additional personal property listed herein has a value of\$  It is covenants herein shall bind and inure to the benefits of the executors, administrators, successors and assigns of the respective parties. By the execution of this instrument the Purchaser acknowledges THAT HE HAS EXAMINED THE ABOVE described premises and is satisfied with the visical condition of structures thereon and purchases said property in an "as is condition", also acknowledges the receipt of a copy of this offer.  PRESENCE OF:  LS.  LS.  LS.  LS.  LS.  LS.  LS.  LS	The Broker is hereby authorized to make this after and the deposit of	College shall be believed a
eller has delivered to the Purchaier a written statement issued by the Federal Housing Commissioner setting forth the oppraised value of the property is mortgage insurance purposes of not lets than \$ which statement the Seller hereby agrees to deliver to the Purchaier promptly after the appraised value statement is made available to the Seller. The Purchaier shall, however, have the privilege and option of praceeding with the commodition of this contract without regard to the amount of the oppraised valuation made by the Federal Housing Commissioner.  It is further understood between Purchaier and Seller that the additional personal property listed herein has a value of \$ 1. The covenants herein shall bind and inure to the benefits of the executors, administrators, successors and assigns of the respective parties. By the execution of this instrument the Purchaier acknowledges THAT HE HAS EXAMINED THE ABOVE described premises and is solistified with the hydrocondition of structures thereon and purchases said property in an "as is condition", also acknowledges the receipt of a copy of this offer.  PRESENCE OF:  L.S.  Led.  Address  THE ABOVE NAMED PURCHASER AND BROKER: The foregoing is accepted in accordance with the terms stated, and upon consummation. Seller reby agrees to pay the Broker for services rendered a commission of ( Dollars) ( per cent of the price) which shall be due and payable at the time set in sald offer for the consummation of the seller, provided, however, that if deposit is foreliand by the Broker in the Broker in full payment for services rendered.  L.S.  L.S.  L.S.  L.S.  L.S.  L.S.  L.S.  L.S.  Seller	D. APPLICABLE TO F.H.A. SALES ONLY: It is expressly govern that notice	differentiate was after monitoring of all to the second with the second
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The covenants herein shall bind and inure to the benefits of the executors, administrators, successors and assigns of the respective parties By the execution of this instrument the Purchaser acknowledges THAT HE HAS EXAMINED THE ABOVE described premises and is satisfied with the psycial condition of structures thereon and purchases said property in an "as is condition", also acknowledges the receipt of a copy of this offer.  LS.  Received from the above named Purchaser the deposit money above mentioned, which will be applied as indicated in paragraphs 8 and 9 above, or will returned forthwith after tender if the foregoing offer and deposit is declined.  By  THE ABOVE NAMED PURCHASER AND BROKER: The foregoing is accepted in accordance with the terms stated, and upon consummation. Seller reby agrees to pay the Broker for services rendered a commission of (  Dollars) (  per cent of the price), which shall be due and payable at the time set in said offer for the consummation of the sale, or if unconsummated, at the time of the Seller's deposit is forfeited under the terms of said offer, the Seller agrees that one-hall of such deposit (but not in excess of the amount of the full comston shall be paid to or be retained by the Broker in full payment for services rendered.  PRESENCE CF:  LS.  LS.  Seller  Address  Seller	mmation of this contract without regard to the amount of the appraised valu	iser shall, however, have the privilege and aption of proceeding with the con-
PRESENCE OF:  Received from the above named Purchaser the deposit money above mentioned, which will be applied as indicated in paragraphs 8 and 9 above, or will returned forthwith after tender if the foregoing offer and deposit is declined.  By  THE ABOVE NAMED PURCHASER AND BROKER: The foregoing is accepted in accordance with the terms stated, and upon consummation. Seller reby agrees to pay the Broker for services rendered a commission of (  Dollars) (  per cent of the price), which shall be due and payable at the time set in said offer for the consummation of the sale, or if unconsummated, at the time of the Seller's or purchaser's failure, inability or refusal to perform the conditions of this offer; provided, however, that if the price of the services is all offer, the Seller agrees that one-half of such deposit (but not in excess of the amount of the full comstoned in this instrument, the Seller acknowledges the receipt of a copy of this agreement.  PRESENCE OF:  LS.  Seller  Address  Seller	The revenants berein shall hind and laure to the benefits of the contract of t	
Received from the above named Purchaser the deposit money above mentioned, which will be applied as indicated in paragraphs 8 and 9 above, or will returned forthwith after tender if the foregoing offer and deposit is declined.  By	hysical condition of structures thereon and purchases said property in an "as i	
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THE ABOVE NAMED PURCHASER AND BROKER: The foregoing is accepted in accordance with the terms stated, and upon consummation. Seller reby agrees to pay the Broker for services rendered a commission of (	returned forthwith after tender if the foregoing offer and deposit is declined.	
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Form 2.3