Why We Need a Plain English Law

By Joseph Kimble

Another legislative session closes, and once more the plain English bill probably dies in the Senate. But it will come around again.

I wrote this letter a year ago in response to a request from Representative Nick Ciaramitaro, who has for several sessions introduced the bill. Later, in the April and May 1988 issues of the ABA's ***Student Lawyer,*** *Mark Mathewson devoted his language column to celebrating the tenth anniversary of the plain language laws. Mathewson concluded that plain language laws have proved their worth. They have prodded businesses to produce clearer consumer documents. At the same time, the idea has taken root in the marketplace that legalese is no longer acceptable. So some companies (Ford, for instance, with a plain language warranty) have responded because the marketplace has changed.*

What's more, dire predictions about plain language laws have not been borne out. They have ***not*** *caused a flood of litigation. Business has* ***not*** *been disrupted. If anything, plain English should be good for business — as we have been saying.*

So play it again, Mr. Ciaramitaro.

Dear Representative Ciaramitaro:

You have asked for my opinion on whether the proposed Plain English Law (HB No. 4137) is already covered by other Michigan law. In other words, is the Plain English Law redundant?

In my opinion, the answer is no. The Plain English Law is significantly different from existing statutes, such as the Michigan Consumer Protection Act, MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* The Consumer Protection Act is probably the closest to the Plain English Law, so I will concentrate on distinguishing these two laws.

They are different for at least three reasons. First, the Consumer Protection Act looks more toward the mind of the drafter and requires bad faith. The Plain English Law looks at the words on the page and asks whether they are clear and plain. Second, the Consumer Protection Act is more punitive and meant to discourage. The Plain English Law is meant to be an incentive, an encouragement, to write in a way that consumers will understand. Third, the Consumer Protection Act simply does not require plain English; it will scarcely put a dent in traditional legalese.

Let me take these points one at a time.

"Plain Language" is a regular feature of the ***Michigan Bar Journal,*** *edited by Joseph Kimble for the State Bar Plain English Committee. Assistant Editor is George Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.*

Bad Faith vs. Plain Language

Obviously, bad faith and confusing language can go together. In fact, the Plain English Law, Sec. 3(2), provides that presenting to a consumer a contract not written in plain language is an unfair or deceptive trade practice. And the acts have a number of other parallel provisions, especially concerning enforcement and penalties.

The point, however, is that the Plain English Law has a different focus, a different emphasis.

The Consumer Protection Act, MCL 45.903(1); MSA 19.418(3)(1), prohibits practices that are "unfair, unconscionable, or deceptive." This section sets out a list of prohibited practices that one case describes as follows:

> "[T]he great majority of the specific prohibited practices enumerated in the statute . . . involve fraud. See MCL 445.903(1), subds (a)-(cc); MSA 19.418(3)(1), subds (a)-(cc)." *Mayhall v A H Pond, Inc,* 129 Mich App 178, 182; 341 NW2d 268 (1983).

Even the subsections that do not require fraud require something like an act of bad faith. Here's the practice prohibited by subsection (x):

> "Taking advantage of the consumer's inability reasonably to protect his interest by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability."

This does not reach the average consumer transaction. It requires disadvantage on one side and bad faith

on the other. In one case interpreting it, *In re Dukes*, 24 Bankr 404, 412 (ED Mich, 1982), the court found a violation not so much because of the language, but because the consumer was "presented with an incomprehensible number of additional forms to sign at closing," and because he was "an elderly man, recently released from the hospital and on continuing medication, who was untutored and naive as a result of having the benefit of only a 4th grade education."

In contrast, the Plain English Law does not require fraud or bad faith or special circumstances; it looks at the words on the page and asks, in effect, whether they are readable. It places an affirmative duty on the contract drafter to use plain language, defined as follows: "Plain language means written in a clear and coherent manner using words and phrases with common and everyday meanings, appropriately divided and captioned by its various sections."

This of course follows the New York model, which is more general than some of the other models. The Connecticut law, for instance, prescribes sentence length, verb forms, personal pronouns, typography, and other specifics. The different models have been discussed in the literature, and the commentators agree that the New York approach is best. Reed Dickerson, the leading authority on legal and legislative drafting, says in his *Fundamentals of Legal Drafting* (2d ed), pp 175-176

> "[The act] should be general, rather than detailed, and it should rely mainly on general performance standards of clarity and readability, bolstered, perhaps by suggested, otherwise neglected specifics to be taken into account . . . . Attempts to list the full range of professionally useful devices that improve clarity or readability would be cumbersome, controversial, and inevitably incomplete."

David Mellinkoff, another expert, agrees in his *Legal Writing: Sense and Nonsense*, p 217:

> "The ideal model has not been proposed. In that state of affairs, at the moment the New York pattern — for all its uncertainty — is a better, more flexible encouragement to self-improvement than the Connecticut pattern."

So again, the virtue of the Plain English Law is that it would direct attention to the general clarity, coherence, and simplicity of words on the page. ►

Deterrence vs. Encouragement

The Plain English Law is intended more to encourage change than to punish or deter. Although it does allow for fines of $10,000 for persistent and knowing violations, it is less punitive than the Consumer Protection Act in several ways.

First, the fines are generally less. Under Sec. 6, a consumer can recover actual damages and a penalty of $50 — compared with $250 under the Consumer Protection Act. Under Secs. 4 (actions by attorney general) and 6 (class actions), fines or damages of $10,000 are allowed — compared with $25,000 fines and unlimited damages under the Consumer Protection Act.

Second, under Sec. 11 of the Plain English Law, a seller, creditor, or lessor can avoid trouble by voluntarily submitting a contract to the attorney general for review. If the attorney general certifies the contract, it complies with the law.

Third, a defendant can avoid any fines by proving a good faith attempt to comply with the act. (Note the difference that under the Consumer Protection Act the *plaintiff* has to prove bad faith.)

All in all, I think no one expects a flurry of enforcement activity under the Plain English Law. It seeks to encourage voluntary compliance. This is a valid purpose, as the experts point out:

> *"The main value of the Plain English laws appears to be symbolic. Although New York's Sullivan law is probably in any serious sense unenforceable because of its "good faith" defense . . . , the results that it seems to have helped produce in that state are impressive. Decently readable insurance policies and consumer warranties are now common . . . . Without [a law] the organized bar is unlikely to initiate effective action to improve the clarity and readability of legal instruments." [Dickerson, p 165.]*

> "It would be better that legal writers mend their ways on their own; they can. But without the goad of some legislation, they won't. They need some encouragement, and not only on "consumer" agreements. The "plain language" movement may speed the disposal of much of the trash in the language of the law." Mellinkoff, p 218.

Practical Effect

The fact is that the Consumer Protection Act has not, and probably will not, touch the inflated, contorted, confused language of traditional legal documents. After all, it's hard to argue that the use of old forms and formalisms is an affirmative act of bad faith.

Take just one example.

> "Maker hereby acknowledges receipt of a completely filled in copy of this note and disclosure statement prior to execution hereof this _____ day of _____, 19____."

I doubt that a plaintiff could show that using such language was a deceptive or unfair trade practice. But it's sure not plain language. The Plain English Law would encourage something like this:

I received a completed copy of this note and disclosure statement before I signed the note.

I hope this answers your question. Let me know if I can help any further.

Yours truly,
Joseph Kimble
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Postscript

The other day I happened to notice the language that MCL 600.5041 (5); MSA 27A.5041(5) requires in medical malpractice arbitration agreements. It would not be covered by the Plain English Law, but it ought to be. The evil is the same: written mush.

"This agreement to arbitrate is not a prerequisite to health care or treatment and may be revoked within 60 days after execution by notification in writing."

In other words: ***"You don't have to sign this to get treatment here. And if you do sign, you can change your mind later. You can cancel within 60 days after you sign by writing to _____."***

Will we ever learn? Maybe not until people start challenging stuff like this on grounds of legalese.