
Plain Language

Legalese and the Myth of Case Precedent

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

Introduction

Case 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

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.

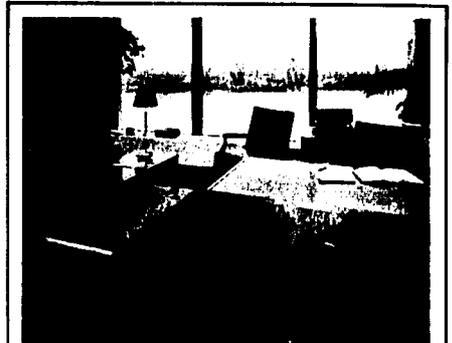
4. Finally, although the common law is built on case precedent, most case precedents concern the elements of a cause of action, not specific language of a document.

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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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-hundredths 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)

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	recorded
executors	condition
administrators	contingent
assigns	title
mortgage	contract
"as is condition"	(see Fig. 1 next pg.)

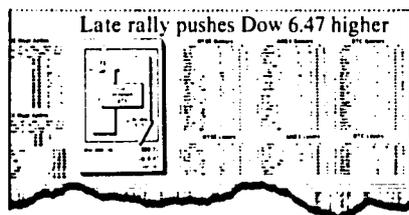
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AGREEMENT OF SALE

1. THE UNDERSIGNED hereby offers and agrees to purchase the following land situated in the City, Township, Village of County, Michigan, described as follows:

being known as _____ street, together with all improvements and appurtenances, including all lighting fixtures, shades, Venetian blinds, curtain rods, traverse rods, storm windows and storm doors, screens, awnings, TV antenna, incinerator,

if any, now on the premises and to pay therefore, the sum of _____ Dollars subject to the existing building and use restrictions, easements, and zoning ordinances, 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 money is to be made in cash or certified check. This Agreement is CONTINGENT upon Purchaser securing, at Purchaser's expense a commitment for a _____ mortgage in the amount of \$ _____ and pay \$ _____ down plus mortgage costs, prepaid items 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 void, 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 now on the premises, with accrued interest to date of consummation, held by _____ upon which there is unpaid the sum of approximately _____ Dollars with interest at _____ per cent, which mortgage requires payments of _____ Dollars on the _____ day of each and every month, which payments DO, DO NOT include prepaid taxes and insure. If the Seller has any accumulated funds held in escrow for the payment of any prepaid items, the purchaser agrees to reimburse the seller upon proper assignment of same. The purchaser agrees to assume and pay said mortgage according to the terms thereof.

C. Payment of the sum of _____ Dollars, in cash or certified check, and the execution of a Land Contract acknowledging payment of that sum and calling for the payment of the remainder of the purchase money within _____ years from the date of Contract in monthly payments of not less than _____ Dollars each which include interest payments at the rate of _____ % per annum, and which Do, Do not include prepaid taxes and insurance. If the Seller's title to said land is evidenced by an existing Land Contract with unperformed terms and conditions substantially as above and the cash payment to be made by the undersigned on consummation hereof will pay out the equity, an assignment and conveyance of the vendee's interest in the land contract, with an agreement by the undersigned to assume the balance owing thereon, will be accepted in lieu of the contract proposed in the preceding paragraph. If the Seller has any accumulated funds held in escrow for the payment of prepaid taxes or insurance, the purchaser agrees to reimburse the seller upon proper assignment.

2. As evidence of title, Seller agrees to furnish Purchaser as soon as possible, a Policy of Title Insurance in an amount not less than the purchase price, bearing date later than the acceptance hereof and guaranteeing the title in the condition required for performance of this order.

3. If this offer is accepted by the Seller and if title can be conveyed in the condition required hereunder, the Purchaser agrees to complete the sale within _____ days after delivery of the abstract or policy of title insurance; however, if the sale is to be consummated in accordance with paragraph A, then closing will be governed by the time there specified for obtaining a mortgage. In the event of default by the Purchaser hereunder, the Seller may, at his option, elect to enforce the terms hereof or declare a forfeiture hereunder and retain the deposit as liquidated damages.

4. In the event of default by the Seller hereunder, the Purchaser may, at his option, elect to enforce the terms hereof or demand, and be entitled to, an immediate refund of his entire deposit in full termination of this agreement.

5. If objection to the title is made, based upon a written opinion of Purchaser's attorney that the title is not in the condition required for performance hereunder, the Seller shall have 30 days from the date he is notified in writing of the particular defects claimed, either (1) to remedy the title, or (2) to obtain title insurance as required above, or (3) to refund deposit in full termination of this agreement if unable to remedy the title or obtain title insurance. If the Seller remedies the title or shall obtain such title policy within the time specified, the Purchaser agrees to complete the sale within 10 days of written notification thereof. If the Seller is unable to remedy the title or obtain title insurance within the time specified, the deposit shall be refunded forthwith in full termination of this agreement.

5. The Seller shall deliver and the Purchaser shall accept possession of said property, subject to the rights of the following tenants:
 If the Seller occupies the property it shall be vacated on or before _____ days after closing. From the date of closing to the date of vacating the property as agreed, SELLER SHALL PAY the sum of \$ _____ per day. THE BROKER SHALL RETAIN from the amount due Seller at closing the sum of \$ _____ as security for said occupancy charge, paying to the Purchaser the amount due him and returning to the Seller the unused portion as determined by date property is vacated and keys surrendered to Broker.

7. All taxes and assessments which have become a lien upon the land, whether recorded or not recorded, at the date of this agreement shall be paid by the Seller. Current taxes, if any, shall be prorated and adjusted as of the date of closing in accordance with due date basis of the municipality or taxing unit in which the property is located. Interest, rents and water bills shall be prorated and adjusted as of the date of closing.

8. 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 hereof, and if not accepted by the Seller within that time, the deposit shall be returned forthwith to the Purchaser. If the offer is accepted by the Seller, the Purchaser agrees to complete the purchase of said property within the time indicated in paragraph 3.

9. The Broker is hereby authorized to make this offer and the deposit of _____ Dollars shall be held by him under Act No. 112, P.A. of 1960 Sect. 13 (j) and applied on the purchase price if the sale is consummated.

10. APPLICABLE TO F.H.A SALES ONLY: It is expressly agreed that, notwithstanding any other provisions of this contract, the Purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Purchaser a written statement issued by the Federal Housing Commissioner setting forth the appraised value of the property for mortgage insurance purposes of not less than \$ _____ which statement the Seller hereby agrees to deliver to the Purchaser promptly after such appraised value statement is made available to the Seller. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of the appraised valuation 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 \$ _____

11. 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 physical condition of structures thereon and purchases said property in an "as is condition", also acknowledges the receipt of a copy of this offer.

Additional conditions, if any:

IN PRESENCE OF: _____ L.S.
 _____ L.S.
 Dated _____ Address _____

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 be returned forthwith after tender if the foregoing offer and deposit is declined.

By _____
 TO THE ABOVE NAMED PURCHASER AND BROKER: The foregoing is accepted in accordance with the terms stated, and upon consummation. Seller hereby agrees to pay the Broker for services rendered a commission of (_____ Dollars) (_____ per cent of the sale 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 election to refund the deposit, or of Seller's or Purchaser's failure, inability or refusal to perform the conditions of this offer; provided, however, that if the deposit is forfeited under the terms of said offer, the Seller agrees that one-half of such deposit (but not in excess of the amount of the full commission) shall be paid to or retained by the Broker in full payment for services rendered.
 By the execution of this instrument, the Seller acknowledges the receipt of a copy of this agreement.

IN PRESENCE OF: _____ L.S.
 _____ L.S.
 Dated _____ Address _____
 _____ Seller

The undersigned Purchaser hereby acknowledges the receipt of the Seller's signed acceptance of the foregoing Offer To Purchase.
 Dated _____ L.S.
 _____ Purchaser