

The Search for Legalese "Required by Case Precedent"

By George H. Hathaway

The answer is case precedent. The questions are:

1. On what general principle is the English common law based?
2. On what general principle does a court base its decisions?
3. Why do lawyers use true legal terms of art such as "res judicata" for about 1% of the words they write?
4. What false excuse do lawyers give for the legalese that they write?

The "required by case precedent" fallacy is the second most favored rationale¹ that lawyers give for using legalese.² Nevertheless, this rationale is never supported by an example of the specific words of legalese that are supposedly required or a cite of a specific case that supposedly requires the specific words of legalese.

Insurance Law

We first started asking for specific words of legalese that were required by case precedent, and their respective cites, when we were soliciting articles on plain English in insurance policies for the Plain Language Column. The conversations would usually go like this:

Insurance Company lawyer: At first we didn't want to change the traditional language (legalese) in our policies to plain English. The language in our policies had been interpreted by the courts and we wanted to keep this same language to be sure of the interpretation of our policies.

Question: Can you give me a specific example of the traditional language in your old policy and a specific case cite that interprets that traditional language?

Insurance Company lawyer: (long pregnant pause) followed by... Well... no, not right now, but if you talked to mumble mumble mumble I'm sure they could give you some cites because mumble mumble mumble I think there was a case mumble mumble mumble a few years back mumble mumble mumble California.

All our attempts ended the same way—the person could not give us the language or the cite, but they *knew* there were some *and* they always tried to put the burden on us to contact some vaguely described person about some vaguely described case in some vaguely described year from California. (California always got blamed for everything.)

To this day we have never found any insurance company lawyer who could give us specific legalese and a specific cite that interpreted that legalese in their old policy. I'm not talking about the one, two or three word terms of art such as "negligence," "res judicata" or "due on sale." These are true legal terms of art that have case precedent. They are not considered legalese. They are included in the definition of plain English. What are not included are the four or more word phrases,

clauses and complete sentences of legalese that have no case precedent (e.g., In the event that the aforesaid, hereinafter referred to as...). I can therefore understand why almost all consumer insurance policies (life, health, car, home) have been written in plain English for the last ten years with no problems about the "greatly anticipated" differences in court interpretations between the old legalese language and the new plain English language.

Real Estate Law

The same thing happened for real estate documents. Here the only answer we got was that there were no written case opinions that discussed specific language. Instead there was only judge's chamber law. The reason was that most real estate cases were settled in the judge's chamber and never got to the point of written appellate court case precedent. In real estate cases neither side could afford the time required for lengthy litigation and appeals that tied up valuable property. The problem with this explanation is that unless its written it isn't case precedent. Furthermore, it's unusual to get all judges to completely agree on any one issue. Therefore, it's impossible that there is verbal judge's chamber case precedent for language that you can depend on for certainty of interpretation. In looking further into three types of real estate documents we found the following:

Sales Contracts

A residential real estate sales contract (also referred to by many other names such as sales agreement, preliminary purchase agreement, buy-sell

"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 H. 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

agreement, etc.) is one of the most important contracts that many people sign in their lifetimes. It is therefore reasonable to ask that this contract be written in plain English to increase the chances that the parties understand what they are signing. However, 99% of the sales contract forms in use in Michigan are still written in hard to understand legalese. The reason given for this is case precedent. Yet here are the facts:

- Most residential home sales in Michigan are made through realtors who are members of the Michigan Association of Realtors (MAR).

- The MAR has 22,000 members in 3,000 real estate companies in 51 geographically arranged local real estate boards (e.g., Macomb County Board of Realtors, etc.).

- Most boards have their own "board form," which is different from any other board's form.

- But many real estate companies within most boards use a form that is different not only from the "board form" but also from the form used by any other company in that board.

- The result is that there are over 1,000 different forms, all in legalese, in use in Michigan for the same thing.

This in itself makes a mockery of the case precedent argument—there can't be case precedent when just about everyone uses a different form. Second, none of the lawyers or realtors who use one of the many legalese filled versions ever cite a) a specific language of their form and b) a case precedent that requires that language.

In 1985 Wayne State Law School and the Plain English Committee of the State Bar of Michigan did a brief computerized legal research project for case precedent language in real estate sales contracts in Michigan. The study was reported in the October 1985 Plain Language Column entitled "Legalese and the Myth of Case Precedent." The study found that there was case precedent for the substantive topics that should be included in a sales

contract, but there was case precedent for only about 1% of the specific words in a sales contract. These words were the true legal terms of art. These terms of art were composed of either one (e.g., easement), two (e.g., warranty deed) or three words (e.g., due date basis).

In 1987 the Standard Forms Committee of the MAR, with the Plain English Committee of the State Bar of Michigan, developed a plain English Sales Contract form. This form is now published by the MAR and used by about 25 out of the 3,000 MAR real estate companies. The companies that use the form like the form, and their clients like the form. The MAR plain English real estate Sales Contract form proves that a real estate sales contract form can be written in plain English. But the other 2,975 MAR real estate companies don't want to use the MAR plain English form. Furthermore, they don't want to develop their own plain English form. They say that one of the reasons they don't want to change is case precedent...not because they can give any specific language or specific cites, but just because of a general feeling that they can't define.

Mortgages

Most first mortgages, and some secondary mortgages, are sold in the secondary (national) market. To qualify for the secondary market the mortgage must be on a Federal National Mortgage Association/Federal Home Loan Mortgage Corporation (FNMA/FHLMC) form. These national mortgage forms are not yet in plain English. FNMA says that they haven't written these forms in plain English because they wanted to preserve the case precedent traditional language of the old forms. Yet no one from FNMA is able to give a specific example of the traditional language and a case precedent cite to support that language.

Apartment Leases

An apartment lease is the most common consumer contract. Most apart-

ment leases in Michigan are written in legalese. The reason for this, according to many of the people who write the leases, is case precedent. Yet every apartment lease is different. There are over 10,000 differently worded apartment leases in Michigan. And there isn't case precedent for the legalese in any of them.

Consumer Finance Contracts

Consumer finance contracts (closed ended contracts such as Car Loan Agreements, and open ended contracts such as Credit Card Agreements) are usually written by banks. Most banks are now writing these contracts in plain English. But the process is slow. Bank personnel explain that they want to keep the traditional language (legalese) because of case precedent—yet they can't give an example of the



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traditional language and a case precedent that supports that language.

Conclusion

Since the first Plain Language Column in May 1984, no one has ever identified or sent in specific words of legalese and a cite that requires the

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specific words of legalese. But there is a first time for everything. So, if you think there is a four or more word phrase, clause or sentence of legalese that is required by case precedent, we ask that you send in that four or more word phrase, clause or sentence of legalese and the cite that requires it. No one was able to send in a complete sentence that was "too complex for plain English." Therefore, we've purposely made this request for legalese "required by case precedent" easier. First, you don't have to send in a complete sentence. You can send in a clause or phrase. Second, we've lim-

ited the definition of "true legal terms of art" to one or two or three word terms. There may or may not be more than three word terms of art out there. But the object is 1) to get you to send in your responses (we received 40 for the too complex search) and 2) to get you to actually look up purportedly case precedent legalese to see if it really is required by case precedent before you automatically send in "hereinafter referred to as." We agree that there is case precedent for true legal terms of art that consist of one word (e.g., negligence) or two words (e.g., res judicata) or three words (e.g., due on sale), so don't send in any one, two or three word examples. What we request is a specific example from as short as a four word phrase to as long as a complete sentence. We're not going to give any hints. But please send in your responses as soon as you can, because time is of the essence. Also, make sure you only send in examples required by cases, not statutes. We'll analyze the "legalese required by statute" fallacy in another article. To make it simple, please fill out the following survey. We'll discuss the results of this survey in a future Plain Language column. ■

To: Plain Language Column Survey
Michigan Bar Journal
306 Townsend Street
Lansing, Michigan 48933-2083

From: _____
(optional)

Please choose and complete one of the four alternatives below:

I believe some legalese is required by case precedent, and I submit the following four or more word phrase, clause or sentence of legalese and the case cite that requires this phrase, clause or sentence, to support this belief. (Please submit only *one* phrase, clause or sentence.)

I believe that some legalese is required by case precedent, but I'm not able to submit an example phrase, clause or sentence and the case cite that requires it.

I believe that legalese is not required by case precedent.

Other _____

Thank you for your time and interest in participating in this survey.

Footnotes

- 1 The most favored rationale is "too complex for plain English." But see "The Search for the Sentence Too Complex for Plain English" in the June 1989 *Michigan Bar Journal*, pp. 522-523, and "Results of the Too Complex for Plain English Search" in the December 1989 *Michigan Bar Journal*, pp. 1194-1196.
2. Legalese and plain English both refer to the style of writing, not to the substance of the writing. Legalese is the opposite of plain English. Legalese consists of ten items, five items on sentences (sentence structure) and five items on words (word usage). The five items on sentence structure are long average sentence length, predominant use of passive instead of active voice verbs, predominant use of weak instead of strong verbs, negative form and non-parallel form. The five items on word usage are obsolete formalisms, old English words, redundant phrases, word clusters and use of a long word instead of a short synonym (e.g., utilize instead of use).