

Plain English in Consumer Finance and Other Contracts

By the Plain English Committee

This month we begin our review of contracts (other than real estate contracts and insurance contracts, which we reviewed in earlier columns). We separated these remaining contracts into seven types—consumer finance, construction, sales of goods, sales of services, employment, corporations, and investments. See Figure 1.

Consumer Finance

Consumer finance was one of the first subjects of the plain English movement in the early 1970s. Citibank of New York led the way with a simplified loan note. And a Citibank Vice President, Carl Felsenfeld, wrote several excellent books on plain English in consumer finance forms and other contracts.¹ Consumer finance is normally subdivided into closed-end agreements such as a new car loan, and open-end agreements such as a credit card or line-of-credit agreement.

We reviewed a typical agreement of each kind from the largest bank in Michigan—NBD Bank. The NBD Motor Vehicle Installment Sale Contract & Security Agreement (NBD 2316 Rev 1/94) is written in short sentences, with strong, active-voice verbs and few unnecessarily long words. However, the form also contains an assignment paragraph with at least one 124-word sentence and the archaic words “herein” and “hereinafter.”

The NBD Credit Card Application (AD #122B Rev 6/94) and NBD Credit Card Agreement—Disclosure Statement (39010

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Figure 1

Type of Contract	Specific Type	Specific Contract Reviewed
Consumer Finance	closed-end finance agreement	NBD Bank Motor Vehicle Installment Sale Contract & Security Agreement
	open-end finance agreement	NBD Bank credit card agreement
Construction	new-home construction contract	American Institute of Architects Form A101
	home improvement contract	American Institute of Architects Form A107
Sales of Goods	new-car sales contract	Michigan Automotive Dealers Association Vehicle Purchase Agreement
	personal computer warranty	Apple Computer warranty
Sales of Services	maintenance (warranty) contracts	Sears Maintenance Agreement
	transportation contracts	Federal Express Airbill
Employment	collective bargaining agreements	1990 General Motors-United Auto Workers Contract Settlement Agreement
	individual employment contracts	ICLE Mich. Closely Held Corporations, Employment Agreement Form 19.2
Corporations	articles of incorporation	Michigan Department of Commerce, Corporations and Securities Bureau, Articles of Incorporation Form C&S 500 (Rev 6-92)
	by laws	ICLE Michigan Business Formbook: Corporations, Bylaws Form 5.3
Investments	brokerage contract	Fidelity Investments Brokerage Account Application
	securities prospectus	Fidelity Magellan Fund Prospectus

TC 7/93) are both written in clear language without legalese. They contain no formalisms, archaic words, redundancies, or Latin words. Furthermore, they contain relatively short sentences; strong, active-voice verbs; and no wordy phrases or unnecessarily long words. For example, the Disclosure Statement section entitled “Using Your Card” consists of nine sentences with an average of 25 words a sentence. This is one of the first documents we have ever reviewed that actually meets the guideline of no more than 25 words a sentence, on average, that most legal writing instructors recommend. And again, most of the nine sentences contain strong verbs such as “use,” “request,” “agree,” and “obtain.”

Construction Contracts

Construction contracts are usually for new homes or for home improvement. The

contract forms of the American Institute of Architects (AIA) are a primary reference source for these contracts. We reviewed the Standard Form of Agreement Between Owner and Contractor, A101; the General Conditions of the Contract for Construction, A201; and the abbreviated agreement for projects of “limited scope,” A107.

In a word, the forms are impenetrable. The AIA betrays its recognition of impenetrability by also providing a plain English “Instruction Sheet.” The standard construction contract has two components. First, A101 provides a series of blanks for specific information on a specific project. It is written in fine print which, in places, extends for about 130 spaces a line. This is more than the optimum 50 to 70 spaces a line. Second, this form incorporates the more lengthy and cumbersome “General Conditions,” A201, where trouble abounds.

written paragraphs contain strong, active-voice verbs, paragraphs 4 through 10 contain an average of 72 words a sentence. And although the new paragraphs contain no formalisms, they still contain many archaic words such as "hereinafter," "hereto," "hereby," "hereafter," "herein," "hereon," "therein," "thereon," and "thereof," and redundancies such as "null and void," "each and all," and "terms and conditions."

On the other hand, Lou Kasischke's *Michigan Closely Held Corporations* (Institute of Continuing Legal Education, 1987) contains an excellent example of an individual employment agreement form, Form 19.2—Employment Agreement (Long Form). The form contains no formalisms or archaic words, and only one redundancy ("terms and conditions"). The sentence length is about 35 words a sentence, and most of the verbs are strong, active-voice verbs. The introductory Comments on page XV of the book state:

The sample forms in this book look and read much different from forms in the typical form book. They are short, flexible, and free of the usual legalese, Latin phrases, and ancient words. Most clients can understand them. The forms look extraordinarily simple and probably superficial to draftsmen of the old school.

Some lawyers may find the sample forms unacceptable as a practice aid. Some critics will say that the language does not look and sound like the language of lawyers. For example, the usual and tiresome "Witnesseth," "Whereas," and "Now therefore" are missing.

Some lawyers will even feel that it is harder to justify their fees if they draft short and simple documents. Just the opposite is becoming true, however. Many clients feel that lawyers overdo many legal assignments, especially the drafting of legal documents. The attorney who overdoes documentation risks frustrating the proposed business transaction, running up unjustifiable time charges, and losing a client whose patience runs out. Lawyers must learn that clients will no longer tolerate legal documents written in legalese and covering a seemingly endless stream of remote contingencies.

In drafting documents, do not incorporate every intellectual nicety and cover every detail or contingency you can think of. Concentrate on the risks that you and your client believe most likely in a realistic business context. Use thoughtful judgment about where to stop. Do not worry about leaving some things general and open-ended. This presents some risks, but so does drafting against every contingency except the one that may eventually occur.

Some of the sample forms adopt the format of a personally addressed letter. Letter

agreements are as valid as formal agreements and are often preferable because certain benefits can be achieved. For example, the pronouns "you" and "I" can be used in many cases. This helps to simplify the agreement, which pleases clients. Clients appreciate every effort to make a business agreement easier to read and more understandable. Some clients view the effort as efficient and economical and have more respect for the lawyers. A letter agreement can also add a friendly conversational tone that is lacking in a formal agreement. This also pleases clients who want the agreement to have a "softer" feeling. This feeling cannot be achieved when lawyers use the ritualistic phraseology found in the typical form book. Many types of commercial agreement lend themselves to letter form. When to use it depends upon the lawyer's instinct and judgment.[2]

Corporations

From the Michigan Department of Commerce, the Corporations and Securities Bureau's Articles of Incorporation Form C&S 500 contains no formalisms or archaic words, and only one redundancy ("all or any"). But its main paragraphs (VI and VII) contain 56 words a sentence and mostly passive voice verbs such as "is proposed," "may be taken," "shall be effective," and "shall be given."

ICLE's *Michigan Business Formbook: Corporations*, Bylaws Form 5.3 contains no formalisms, archaic words, or redundancies. However, the form contains about 48 words a sentence, and about as many passive verbs as active verbs. These are bad signs.

Investments

Brokerage Account Application

We reviewed an application to open a brokerage account with Fidelity Investments. It contained a number of legalistic terms, such as "and/or," "heretofore," "hereby," and "undersigned." The form was somewhat confusing and overly formal, requiring a higher reading level than seemed necessary.

Mutual Fund Prospectus

In contrast to the brokerage account application, the prospectus for the Fidelity Magellan Fund, one of the oldest and most popular mutual funds, revealed an obvious effort to make a legally mandated document easier for average investors to understand. Only one legalism, the word "herein" on the cover, crept into this document. Some effort was made to clarify legal terms,

such as the parenthetical comment explaining that "incorporated by reference" meant another document "is legally a part of" the prospectus. But the overall reading level was probably still too high for the target audience of average investors.

Clarity Awards

We give two Clarity Awards from our review of contracts. One award goes to Lou Kasischke of Dykema Gossett, in Detroit, for Employment Agreement Form 19.2 in *Michigan Closely Held Corporations*, published by ICLE. This form, and many of the other reference forms in the book, prove that corporation contracts can be written in plain English.

The other award goes to NBD Bank (Carl Good,³ Deborah McCormick, and Michele Mulder of the Law Department) for their work in developing a plain-language credit card application and disclosure statement. These Clarity Award documents prove that contracts do not have to contain formalisms, archaic words, redundancies, Latin words, long sentences, passive-voice verbs with nominalizations, wordy phrases, and unnecessarily long words.

Legalese List

We add the following archaic "here-" and "there-" words to our list: herein, hereinafter, hereof, hereon, hereto, heretofore, therein, thereof, and thereon.

Conclusion

Most consumer-finance and other contracts are still poorly written. Two gearing problems are archaic words (primarily the "here-" and "there-" words) and long sentences. The best way to stop this type of writing is by interactive plain English—identify well-known examples of contracts, go to the people who write these contracts, and convince them to stop using archaic language and needlessly long sentences. ■

Footnotes

1. Felsenfeld and Siegel, *Simplified Consumer Finance Forms* (Warren, Gorham & Lamont, 1978); Felsenfeld and Siegel, *Writing Contracts in Plain English* (West, 1981).
2. See also Mr. Kasischke's Plain Language Column, *Business Agreements in Letter Form*, 65 Mich B J 212 (February 1986).
3. See also Mr. Good's Plain Language Column, *Plain English in Consumer Credit Contracts*, 68 Mich B J 994 (October 1989).