

The Search for Legalese "Required by Statute"

By George Hathaway

Nothing has a more chilling effect on the promotion of plain English than the two simple razor-like little words—"It's statutory."

The full conversation usually goes something like this: "Hey, don't get me wrong. I'm just as much in favor of clear writing as the next person. But we have to use this language even if it is legalese. There's nothing we can do about it. It's statutory." This conversation implies: 1) In the particular situation the traditional language of the law (legalese) is required by a federal or state statute, 2) It's no use even talking about plain English, 3) Case closed. You lose.

If you ask the speaker what statute they are talking about they always put the burden back on you by saying something like "Oh, I don't know the specific cite, but you can look it up." And if you do look it up you'll find that the statement that certain words of legalese are "statutory" is only a half-truth. The half-true part (which gives it an air of authority) is that the words of legalese might be stated in a statute. The half-false part (which gives it a tinge of misrepresentation) is that the statute does not require the use of the exact words of legalese. The statute does not say—you must use exactly these words. The statute always says something like "in substantially the following form." Let's look at some specific examples.

Federal Truth in Lending Act

The most well known of all consumer acts, the one that most bankers

believe requires exact words, is the federal Truth in Lending Act of 1968, which became effective on July 1, 1969. This Act is contained in the United States Code under the general title "Consumer Credit Protection" and subtitle "Consumer Credit Cost Disclosure," 15 USC 1601-1666. Section 1604 states, "The Board shall prescribe regulations to carry out the purpose of this title." The Federal Reserve System Board of Governors Regulations are alphabetically lettered, and the regulation that is prescribed for this Act is the famous Regulation Z, contained in 12 CFR 226.1-30. This regulation tells the banks what they have to tell you about the two types of credit, open-end credit (e.g., credit cards) and closed-end credit (e.g., new car loan). Appendix G of this regulation contains open-end model forms and clauses. Appendix H of this regulation contains closed-end model forms and clauses.

The model forms and clauses of Regulation Z are written in plain English. Therefore, for plain English purposes, it's a moot point whether the banks have to follow Regulation Z word for word. Nevertheless, for analytical purposes, the only exact words Regulation Z requires are four terms—finance charge, annual percentage rate, total of payments, and total sale price. Section 226.18(d) requires "finance charge, *using that term*," (e) requires "annual percentage rate, *using that term*," (h) requires "total of payments, *using that term*," and (j) requires "total sale price, *using that term*." But the rest of Regulation Z requires only "substantial similarity" to the model forms and clauses. Section 226.6(d) requires "A statement that outlines the consumer's rights and the creditor's responsi-

bilities . . . and that is *substantially similar* to the statement found in Appendix G." Section 226.9(a)(2) states that "the creditor may mail or deliver, on or with each periodic statement, a statement *substantially similar* to that in Appendix G." And Section 226.18(h) requires merely "a statement indicating whether or not a penalty may be imposed if the obligation is prepaid in full."

In practice, banks follow the forms and clauses word for word just to make sure they are in "substantial similarity." This then leads to the mistaken impression that every word in the model forms and clauses must be used because they are "statutory."

Michigan Licensing Act

The Michigan Licensing Act, MCL 339.2501-.2515, lists the requirements for licensing real estate brokers and salespersons. Section 2515 requires that a listing contract between a broker and a seller of a house shall "contain language that discrimination because of religion, race, color, national origin, age, sex, or marital status on the part of the real estate broker, real estate salesperson, seller, or lessor is prohibited." Note that the section simply says "shall contain language that." The

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section does not require exact words in an exact order. Nevertheless, since these words and the entire suggested statement is in plain English, it's again a moot point whether the listing contract must use these exact words. However, a typical listing contract states, "It is agreed by the Broker and Seller or Lessor, parties to this listing agreement, that as required by law discrimination because of race, color, religion, national origin, age, sex, marital status or mental or physical handicap by said parties in respect to the sale or lease of the subject property is prohibited." The tinge of misrepresentation arises when this 52 word sentence, containing terms such as "said parties," is said to be required because it is "statutory."

Michigan Construction Lien Act

This Act, MCL 570.1101-.1305, prescribes procedures and forms for filing a construction lien. The Act discusses the following eight forms.

1. Notice of Commencement—This is the only form for which the Act requires exact words. The Act requires ten specific sentences, all of which are written in plain English.

Section 108a(2)(f) requires "the following statement:"

WARNING TO HOMEOWNER

Michigan law requires that you do the following:

1. Complete and return this form to the person who asked for it within 10 days after the date of the postmark on the request.
2. If you do not complete and return this form within the 10 days you may have to pay the expenses incurred in getting the information.
3. If you do not live at the site of the improvement, you must post a copy of this form in a conspicuous place at that site.

You are not required to but should do the following:

1. Complete and post a copy of this form at the place where the improve-

ment is being made, even if you live there.

2. Make and keep a copy of this form for your own records.

And Section 108a(2)(g) requires "the following statement:"

To lien claimants and subsequent purchasers:

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

From: _____
(optional)

Please choose and complete one of the four alternatives below:

- I believe that some legalese is required by statute, and I submit the following words of legalese and the cite of the statute that requires these words to support this belief.

- I believe that some legalese is required by statute, but I'm not able to submit any words of legalese and the cite of a statute that requires these words.

- I believe that legalese is not required by any statute.

- Other _____
- _____

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

Take notice that work is about to commence on an improvement to the real property described in this instrument. A person having a construction lien may preserve the lien by providing a notice of furnishing to the above named designee and the general contractor, if any, and by timely recording a claim of lien, in accordance with law.

A person having a construction lien arising by virtue of work performed on this improvement should refer to the name of the owner or lessee and the legal description appearing in this notice. A person subsequently acquiring an interest in the land described is not required to be named in a claim of lien.

A copy of this notice with an attached form for notice of furnishing may be obtained upon making a written request by certified mail to the above named owner or lessee; the designee; or the person with whom you have contracted."

2. Notice of Furnishing—Section 109(4) requires that this form shall be "in substantially the following form."

3. Sworn Statement—Section 110(4) requires that this form shall be "in substantially the following form."

4. Claim of Lien—Section 111(2) requires that this form shall be "in substantially the following form."

5. Partial Unconditional Waiver

6. Partial Conditional Waiver

7. Full Unconditional Waiver

8. Full Conditional Waiver—Section 115(8) requires that the four waiver forms be used "in substantially the following format."

Michigan Uniform Recognition of Acknowledgment Act

MCL 565.261-.270 prescribes uniform procedures and forms for ac-

knowledgments. Section 5 states that "the form of the . . . acknowledgment . . . shall be accepted . . . if . . . (c) The certificate contains the words 'acknowledged before me,' or their substantial equivalent." Section 7 states, "The forms of acknowledgment set forth in this section may be used and are sufficient for their purposes. The authorization of the forms in this section does not preclude the use of other forms."

Conclusion

The only federal statute that we discussed was the Truth in Lending Act. This Act a) requires four specific terms and b) recommends but does not actually require word-for-word use of a number of model forms and clauses. One of the three state statutes that we discussed, the Michigan Construction Lien Act, requires ten specific sentences. Thus out of these four Acts we've found only four terms and ten sentences which are truly "statutory." Note, however, that these four terms and ten sentences are in plain English. Therefore, we still have not found any legalese that is "statutory."

But if you believe that there is a statute somewhere that actually requires legalese, please send us the words of legalese that are required and the citation to the statute that requires this legalese. To make it simple, please fill out the following survey. We'll discuss the results of this search in a future Plain Language Column. (Note: In June 1990 we asked for examples of legalese required by case precedent. But we didn't get any. All the people who replied said they believed that legalese was not required by case precedent.) ■

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George H. Hathaway is a senior attorney at the Detroit Edison Company and the chair of the Plain English Committee of the State Bar of Michigan. He received his B.E.E. and M.E.E. degrees from Cornell University in 1965 and 1968 and his J.D. degree from the University of Detroit School of Law in 1979.