House Legislative Analysis Section

Washington Square Building, Suite 1025
Lansing, Michigan 48909
Phone: 517/373-6466

PLAIN LANGUAGE IN CONTRACTS

House Bill 4137 as introduced
First Analysis (3-3-87) Floor Copy

Sponsor: Rep. Nick Ciaramitaro
Committee: Consumers

THE APPARENT PROBLEM:

Consumers sign many contracts in the course of normal household business, covering a wide variety of routine transactions from simple credit-card purchase agreements to complex insurance policies. Whether by design or out of long-standing habit, many contracts contain language that the average consumer cannot understand. When people misunderstand the contracts they sign, they do not know what they are obligated to do or what they have asked others to do for (or to) them. Thus, conflicts arise, and consumers must either accept the conditions of the contracts as interpreted by purveyors of goods and services, or resort to costly lawsuits.

In order to reduce problems caused by arcane contractual language, at least 27 states — often with the cooperation of businesses — have adopted laws and rules requiring that some kinds of consumer contracts meet standards of readability. Some state laws apply only to insurance contracts. Generally, state regulations have followed two models, one involving an objective test of readability, the ‘her a subjective test (or else have combined them).

‹ne most popular standard derives from a test of writing (devised by Rudolph Flesch) that takes into consideration the number of words in a sentence and the number of syllables in each word. The lower the number of words per sentence and syllables per word, the higher the readability score. A piece of writing must average about 8.5 words per sentence and 1.64 syllables per word to be considered "plain English," which according to Flesch, means scoring from 60 to 70 on a scale of 100 points. Scores from 50 to 60 mean that the writing is "fairly difficult" to understand, and those from 30 to 50 mean it is "difficult."

Some states have modeled their readability standards on New York's Sullivan Act, which requires (among other things) that every agreement for renting a residence and for other consumer purposes be "written in a clear and coherent manner using words with common and everyday meanings" and be appropriately divided and captioned. The act makes people who fail to comply with that standard liable for actual damages and a penalty of $50, but sellers who attempt "in good faith" to comply are not liable for damages.

Many organizations representing consumers and business interests, as well as state officials, have suggested that Michigan should adopt a readability standard covering regular household contracts.

THE CONTENT OF THE BILL:

› bill would create the Michigan Plain English Law, which ‹ould require that certain written agreements between customers and businesses be in "plain language." This means each agreement would have to be "written in a clear and coherent manner using words and phrases with common and everyday meanings, (and be) appropriately divided and captioned by its various sections."

The bill would apply to contracts for the purchase, lease, or financing of goods, property, and services primarily for personal, family, or household purposes, but not for commercial purposes. The bill would not apply to insurance and annuity forms; legal descriptions of real property; contracts written in language prescribed by state or federal laws or regulations; and contracts drafted solely by the consumers entering into them, as long as they indicate they were so drafted. A violation of the plain English law would not affect the enforceability of a contract. The bill would take effect one year after being enacted into law and would not affect contracts executed before the effective date.

Specifically, the bill would:

- Make it an "unfair or deceptive method, act, or practice in the conduct of trade or commerce" for a seller, lessor, or creditor to execute a contract or present a contract to a consumer for signing that was not written in plain language.
- Prohibit a commercial preparer of contract forms from selling or furnishing a form for use in the state as a consumer contract unless the form was written in plain language.
- Permit a seller, lessor, or creditor to submit a contract to the attorney general for review to see if it complied with the plain language standard. Within 60 days, the attorney general would have to: 1) certify the contract was in compliance; 2) decline to certify it and note the objections; or 3) decline to review the contract. The attorney general could decline to review a contract because it was not subject to the plain language requirement or because it was the subject of pending litigation, and could otherwise decline by referring the party who submitted the contract to other previously certified contracts of the same type. The attorney general could charge up to $50 for a contract review. The action of the attorney general ‹ould not be appealed. The certification of a contract would apply only to its compliance with plain language requirements and would not otherwise attest to its legality or legal effect. The failure to submit a contract for review would not show a lack of good faith nor would it raise a presumption that the contract violated the provisions of the bill. The same assumption would apply to the failure to use a previously certified contract.
- Allow the attorney general (or a local prosecutor) to seek a restraining order in circuit court if it appeared probable that someone had violated or was about to violate the plain English requirement. Unless waived by the court for good cause shown, a restraining order could only be sought after the party had been properly notified and offered the opportunity to confer. The attorney general could accept "an assurance of discontinuance" of an alleged violation, which would not be considered an admission of guilt and could not be used in another proceeding. An assurance of discontinuance could be

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accompanied by restitution for an aggrieved person, the voluntary payment of the costs of an investigation, or an amount to be held in escrow pending the outcome of an action. A prosecuting attorney could conduct an investigation and institute and prosecute actions in the same manner as the attorney general.

- Authorize a civil fine of up to $10,000 to be assessed by a circuit court for each "persistent and knowing" violation of the law. Such a violation would require the existence of a prior final judgment finding the same language in violation of the bill. It would also require a prior final judgment against the defendant that was not subject to appeal, and the defendant would have to have violated the bill more than once or be found to be violating an assurance of discontinuance.
- Allow a consumer to bring an action to enjoin a person violating the act, whether or not the consumer sought damages or had an adequate remedy at law, and allow a consumer who suffered a loss due to a violation to bring a class action on behalf of injured consumers. A class action suit could be brought for actual damages or $10,000, whichever is less; other suits involving consumers who had suffered losses could be brought for actual damages and a penalty of $50, together with attorneys' fees. An action could not be brought more than three years after the presentation or signing of the contract that was the subject of the action nor after the contract had been fully performed, whichever was later. A defendant could require a person who had prepared, sold, or furnished the form in question to join in defending an action. A defendant who attempted in good faith to comply with the bill would not be liable for more than actual damages in any action.
- Require a court to construe a consumer contract to conform to the reasonable expectations of the consumer whenever a contract is found not to be written in plain language.
- Demand that prosecuting attorneys and law enforcement officers who received notice of an alleged violation of the act, or of an order or assurance related to the act, notify the attorney general in writing immediately, and that court clerks send the attorney general copies of complaints and of orders and judgments stemming from actions under the bill.

FISCAL IMPLICATIONS:

Fiscal information is not yet available (3-2-87).

BACKGROUND INFORMATION:

The bill's sponsor has said that a similar bill amending the Insurance Code will be introduced to apply readability standards to insurance contracts.

ARGUMENTS:

For:

The bill would require that consumer contracts be written in language that can be understood, and would therefore help ensure that citizens are not deprived of their rights because they fail to understand technical and legal jargon. This can be done. In fact, many businesses have already improved their contracts, both in response to the "plain language" movement and because experience shows it to be a good business practice. Ridding contracts of unnecessary legalisms and jargon is a matter of attitude and habit, say plain language proponents, and can be accomplished without affecting "terms of art", those expressions that have special, perhaps untranslatable, meanings in a legal or commercial sphere. These are far fewer than commonly thought: a bar association study of real estate contracts discovered that only about three percent of the terms had been litigated. As reported from committee, the bill closely resembles New York's successful statute, adopted in 1977. The experience in that state indicates that such laws do not produce much litigation.

For:

The bill would give businesses an entire year from the date of enactment to revise their contracts where necessary to conform to the readability standards. The attorney general would have that time to test and approve new contracts voluntarily submitted by businesses. Thus, businesses and sellers of contract forms should have little difficulty adjusting to the bill's requirements. Use of the certification process by companies marketing standardized forms in common use among businesses and lawyers will in and of itself make for widespread compliance with plain language standards.

Against:

While the bill has a laudable goal, it is flawed in several ways. It provides a subjective standard for judging the readability of contracts ("clear and coherent" to whom, phrases with "common and everyday meanings" in whose life?) and then gives the attorney general enormous power to apply this subjective standard to unsuspecting, well-meaning businesses These businesses could face harassment and severe penalties for unintentionally offending the linguistic sensibilities of someone in the attorney general's office. It is not fair to presume, as the bill does, that the use of a contract that does not meet a subjective plain language standard is an "unfair or deceptive" practice.

Many so-called legalisms are valuable because they have court-tested, stable meanings. Often there are no good alternatives to legal phrases. Some "clear phrases" using words "with everyday meanings" lack the necessary precision to protect the parties to complicated transactions. By and large, the courts have in recent years protected the interests of consumers in cases involving misleading or deceptive contract language. This, combined with the existing safeguards in the Consumer Protection Act, makes the broad scope and arbitrary powers in the bill unnecessary.

Against:

Bankers have urged that the Flesch standard be incorporated into House Bill 4137 on the grounds that meeting that test would offer them the certainty that their forms were presumed readable. They argue that Michigan should model its plain English law after Connecticut's act, which offers businesses the option of meeting the objective Flesch standard or the subjective New York test already in House Bill 4137.

POSITIONS:

The Michigan Consumers Council supports the bill (2-25-87).

The Michigan Merchants Council supports the bill (2-25-87).

The Michigan Citizens Lobby supports the bill, but believes penalties should conform to those in the Consumer Protection Act (2-25-87).

The State Bar of Michigan supports the bill (2-25-87).

The Michigan AFL-CIO supports the bill (3-2-87).

The Michigan Bankers Association opposes the bill (2-25-87).

The Michigan Association of Home Builders opposes the bill (2-25-87).

The Michigan Association of Realtors opposes the bill (2-25-87).

The Apartment Association of Michigan opposes the bill (2-2-5-87).