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## New York's Plain English Law

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# NEW YORK'S PLAIN ENGLISH LAW

## I. Introduction

Legalese, the language found in most legal documents, has become a tradition and trademark of the legal profession. Legalese includes words whose meanings are not commonly understood, convoluted sentences, and shoddy organization. There are several reasons for the development of legalese. Each profession develops its own jargon. When use of the jargon is confined within the profession, it serves as a worthwhile device for condensation and precision.<sup>1</sup> When this language is extended to consumer contracts, however, a lawyer is needed to translate the contract. Another factor contributing to the development of legalese is overkill, that is, the excess of precision resulting from a desire to be unambiguous.<sup>2</sup> Overkill, however, often results in imprecision or obscurity to the ordinary consumer.<sup>3</sup> Lawyers may also derive a sense of superiority over laymen through the use of language understandable only to them.<sup>4</sup>

In recent years, there has been much concern over the abuse of the English language.<sup>5</sup> Legalese has not escaped criticism.<sup>6</sup> While the use of legalese may be justifiable within the profession in large business transactions, its use in consumer contracts and leases is now open to question. Given this concern with legalese, legislative action in the area of consumer contracts was inevitable. New York is the first state to pass legislation requiring plain language in consumer transactions.<sup>7</sup> Originally passed in 1977,<sup>8</sup> New York's Plain English Law was amended in 1978,<sup>9</sup> and became effective November 1, 1978.<sup>10</sup> This Note will examine New York's Plain English Law,

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1. Givens, *The "Plain English" Law*, 50 N.Y.S.B.J. 479, 512 (1978).

2. E. BISKIND, *SIMPLIFY LEGAL WRITING* 4 (2d ed. 1977).

3. *Id.* at 3. See Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1975).

4. Givens, *The "Plain English" Law*, 50 N.Y.S.B.J. 479, 512 (1978).

5. See, e.g., E. NEWMAN, *STRICTLY SPEAKING* (1974).

6. See, e.g., D. MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); E. BISKIND, *SIMPLIFY LEGAL WRITING* (2d ed. 1975).

7. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1978).

8. 1977 N.Y. Laws ch. 747.

9. 1978 N.Y. Laws ch. 199.

10. The statute reads:

a. Every written agreement entered into after November first, nineteen hundred seventy-eight, for the lease of space to be occupied for residential purposes, or to which

report on its effects and discuss the reception it has received to date.

## II. New York's Plain English Law

Influential in the origin of New York's Plain English Bill was Citibank's simplification of its consumer credit contracts in January 1975.<sup>11</sup> Citibank had found that a whole new approach to consumer contracts was required. Their contracts had been modeled on commercial contracts which are drafted to avoid all ambiguity and to foresee every possible contingency.<sup>12</sup> The result was incomprehensible to the average consumer. Citibank realized that important

a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes must be:

1. Written in a clear and coherent manner using words with common and every day meanings;

2. Appropriately divided and captioned by its various sections.

Any creditor, seller or lessor who fails to comply with this subdivision shall be liable to a consumer who is a party to a written agreement governed by this subdivision in an amount equal to any actual damages sustained plus a penalty of fifty dollars. The total class action penalty against any such creditor, seller or lessor shall not exceed ten thousand dollars in any class action or series of class actions arising out of the use by a creditor, seller or lessor of an agreement which fails to comply with this subdivision. No action under this subdivision may be brought after both parties to the agreement have fully performed their obligation under such agreement, nor shall any creditor, seller or lessor who attempts in good faith to comply with this subdivision be liable for such penalties. This subdivision shall not apply to agreements involving amounts in excess of fifty thousand dollars nor prohibit the use of words or phrases or forms of agreement required by state or federal law, rule or regulation or by a governmental instrumentality.

- b. A violation of the provisions of subdivision a of this section shall not render any such agreement void or voidable nor shall it constitute:

1. A defense to any action or proceeding to enforce such agreement; or

2. A defense to any action or proceeding for breach of such agreement.

- c. In addition to the above, whenever the attorney general finds that there has been a violation of this section, he may proceed as provided in subdivision twelve of section sixty-three of the executive law.

11. Telephone interview with Assemblyman Peter M. Sullivan, the sponsor of the bill (Sept. 18, 1979). Citibank hired Siegel & Gale, a New York based communications and design consulting firm, to redesign and consolidate their forms. Vice-President Carl Felsenfeld was in charge of the Citibank program and worked with Siegel on the revision process. Siegel & Gale's initial suggestion that the text be revised was met with opposition and severe trepidation. Siegel, *To Lift the Curse of Legalese—Simplify, Simplify*, 14 ACROSS THE BOARD 64, 69 (June 1977). Nevertheless, the forms were prepared and first put into use in January 1975. Alan Siegel, President of Siegel & Gale, says his objective was to make the forms comprehensible to the consumer without sacrificing the legal force of the original text. *Id.* at 66.

12. Siegel, *To Lift the Curse of Legalese—Simplify, Simplify*, 14 ACROSS THE BOARD 64, 66 (June 1977).

distinctions between commercial and consumer contracts deserved recognition at the drafting stage.<sup>13</sup> In large business deals, all foreseeable occurrences should be provided for, but in consumer contracts the danger of obscurity outweighs the protective value of these disclosures. Accordingly, Citibank found it could eliminate many protective clauses which were rarely, if ever, utilized,<sup>14</sup> as well as language which clarified meanings for lawyers but only baffled consumers.<sup>15</sup> The format of the contract forms was altered to facilitate reading by the consumer.<sup>16</sup> The contract finally drafted was designed to explain the consumer's obligation rather than to protect the creditor. Citibank's revised consumer contracts proved that legal documents could be simplified without impairing their validity or enforceability.<sup>17</sup> The New York Legislature thus realized that contracts written in plain English were not only desirable but also attainable.

The New York statute requires certain written agreements<sup>18</sup> to be written in a "clear and coherent manner" using words which are

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13. *Id.*

14. *Id.*

15. C. FELSENFELD & A. SIEGEL, *SIMPLIFIED CONSUMER CREDIT FORMS* ix-x (1978). To increase clarity and readability, Citibank also made significant changes in style. They switched to active verbs, employed a personal tone, and tried to shorten sentences and use contractions. An example is the substitution of "I'll be in default if I don't pay an installment on time," for the traditional:

In the event of default in the payment of this or any other Obligation or the performance or observance of any term or covenant contained herein or in any note or other contract or agreement evidencing or relating to any Obligation or any Collateral on the Borrower's part to be performed or observed; or the undersigned Borrower shall die; or any of the undersigned become insolvent or make an assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the Bank shall be attached or become subject to distraint proceedings or any order or process of any court; or the Bank shall deem itself to be insecure, then and in any such event, the Bank shall have the right (at its option), without demand or notice of any kind, to declare all or any part of the Obligations to be immediately due and payable.

Design improvements included large type size and divisions with headings in boldface type. *Id.*

16. *Id.* at x-xi.

17. According to Vice-President Felsenfeld, Citibank has not been involved in any litigation over the new contracts and has not lost any money. Siegel, *Plain English Results*, N.Y. Times, April 1, 1979, § 3 (Bus. and Fin.), at 1, col. 6.

18. The statute covers leases and consumer agreements for personal, family or household purposes. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney Supp. 1978).

commonly understood. Agreements also must be divided into sections and captioned where appropriate for clarity and readability. Violators are liable to the consumer for actual damages plus a fifty dollar penalty.

The statute contains provisions designed to protect businesses from large losses. The statute applies only to contracts involving less than fifty thousand dollars. The penalty for class actions is limited to ten thousand dollars. If both parties have performed their obligations fully, no suit lies under the statute. A good faith attempt to comply is a complete defense to penalties, but not to actual damages.<sup>19</sup> In addition, violations do not void the agreements and may not be used as a defense to actions for breach or for enforcement of the agreement.<sup>20</sup>

The 1978 amendments made several changes in the original law. The "non-technical language" requirement was removed allowing words technical in nature but commonly understood. The amendments specified that the statute does not forbid words required by other laws or regulations. The statute clarified the rule that the ten thousand dollar limit on class actions applies to multiple class actions for the same violation.<sup>21</sup> In addition, enforcement authority was given to the Attorney General of New York.<sup>22</sup>

It has been suggested that New York's statute is based on the common law. There must be mutuality of consent to form a contract under common law.<sup>23</sup> Therefore, courts have held that a party cannot be bound to terms of a contract which he does not understand.<sup>24</sup> This common law principle, however, is employed only after a misunderstanding has occurred.<sup>25</sup> The Plain English Law, on the other

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19. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney Supp. 1978).

20. *Id.* § 5-702(b).

21. *Id.* § 5-702(a).

22. *Id.* § 5-702(c).

23. 1 WILLISTON, CONTRACTS § 2 (1957).

24. *Sandler v. Commonwealth Station Co.*, 307 Mass. 470, 30 N.E. 2d 389 (1940); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960) and authorities cited. In both cases, the court refused to give effect to disclaimer clauses because they were not likely to have been understood by the consumers involved. The Restatement of Contracts states that consumers are not expected to understand or even read all the terms in a form agreement. RESTATEMENT (SECOND) OF CONTRACTS § 237 Comment b (1973). A court has the power to strike down unknown clauses which are unconscionable or beyond the range of reasonable expectation. *Id.* § 234.

25. 1 WILLISTON, CONTRACTS § 2 (1957).

hand, serves as a preventive measure. At common law, while the language of the contract may be some evidence of whether there has been comprehension, agreement, not comprehensibility is the ultimate issue.<sup>26</sup> The New York statute looks to the language used rather than at the absence of agreement. In this way the law seeks to avoid misunderstandings before they occur.<sup>27</sup> The objective standard allows any party to the agreement to sue<sup>28</sup> without any inquiry into the issue of agreement.

The New York law does not void the contract or restrict the seller's rights. Instead, it provides for a monetary penalty and damages.<sup>29</sup> The New York law could be considered an extension of the principle behind section 2-302 of the Uniform Commercial Code which gives courts the power to deny enforcement of "unconscionable" clauses or contracts.<sup>30</sup> The stated principle is "prevention of oppression and unfair surprise."<sup>31</sup> More closely akin to the statute is the Uniform Consumer Credit Code<sup>32</sup> which allows a court to enjoin "unconscionable" conduct and award damages and specifically includes "inability to understand the language of the agreement"<sup>33</sup> in the standards of unconscionability. Also related is section 235-c of New York's Real Property Law<sup>34</sup> which allows courts to invalidate all or parts of unconscionable leases. While there have never been any cases which declared legalese "unconscionable," it is arguable that the statutes lend themselves to this reading.

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26. *Id.*

27. By analogy, ticketing everyone who is caught running a red light is a much more effective means of accident prevention than the imposition of a steeper fine on those whose actions actually cause an accident.

28. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney Supp. 1978).

29. *Id.*

30. U.C.C. § 2-302 (1978).

31. *Id.* Comment 1.

32. First promulgated in 1968, the Uniform Consumer Credit Code has been revised and the original code has only been adopted by seven states. In the Spring of 1972, the New York Law Revision Commission rejected the Code for New York. Final drafts of the U.C.C.C. were released in 1974. D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION: TEXT AND MATERIALS 665 (2d ed. 1977).

33. UNIFORM CONSUMER CREDIT CODE § 5.108(4)(e) (1974).

34. N.Y. REAL PROP. LAW § 235-c (McKinney Supp. 1978). See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.303; Comment, *Leasehold Unconscionability: Caveat Lessor*, 7 FORDHAM URB. L.J. 337 (1978).

### III. Areas of Concern

#### A. Vagueness and Overbreadth of the Standard

The most frequently heard complaint about the Plain English Law is that the standard it sets is unreasonably vague and ambiguous.<sup>35</sup> The standard is "written in a clear and coherent manner using words with common and every day meanings," and "appropriately divided and captioned by its various sections."<sup>36</sup> Critics claim that this standard is too subjective and that businesses which make good faith efforts to comply will be liable for large penalties and unlimited damages.<sup>37</sup> It was feared that forms would become much more lengthy and unmanageable and might even lose enforceability when lawyers could no longer rely on "established" court meanings of terms of legalese.

The New York legislature chose a broad standard in enacting the Plain English Law on the assumption that the law's goals would thereby be more effectively implemented. Unlike a strict standard which sets specific guidelines,<sup>38</sup> a broad standard would permit courts to interpret the law according to the particular facts of each case.<sup>39</sup> Additionally, a broad standard would not require the delegation of a regulatory agency to approve forms which might be necessary if a strict standard was adopted.<sup>40</sup>

An illustration of the problems with a strict standard is the Federal Truth in Lending Act.<sup>41</sup> The Act governs all consumer credit transactions and was an attempt to assure a meaningful disclosure of credit terms so that consumers could compare various terms available to them, avoid the uninformed use of credit, and protect

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35. See Friedman, *The Plain English Law—Amended, But Not Improved*, N.Y.L.J., June 22, 1978, at 1, col. 1; Report of the N.Y. County Law. Ass'n, Special Committee on Consumer Agreements 1 (Nov. 7, 1977); Report of the N.Y.S.B. Ass'n, Banking Corp. & Bus. Law Section 1; Ass'n of the Bar of the City of N. Y., Committee on State Legislation, Bull. No. 8, Memo No. 309 at 961.

36. N.Y. GEN. OBLIG. LAW § 5-702(a)(1)(2) (McKinney Supp. 1978).

37. See reports cited in note 35 *supra*.

38. For example, specific guidelines could limit numbers of syllables per word, numbers of words per sentence, require specific language or require minimum scores on readability scales.

39. See Siegel, *Plain English Results*, N.Y. Times, April 1, 1979, § 3 (Bus. and Fin.) at 1, col. 6.

40. The Federal Reserve Board enforces the Truth in Lending Act.

41. 15 U.S.C. §§ 1601-1666 (1976).

consumers against unfair credit practices.<sup>42</sup> It requires the use of the terms "finance charge" and "annual percentage rate" and mandates disclosures about every aspect of the credit transaction.

This Act has been criticized as too complex<sup>43</sup> by both consumers and creditors. Consumers have found total disclosure to be more baffling than enlightening.<sup>44</sup> Creditors have complained about the ensuing flood of regulations, the resulting inflexibility of terms and burdensome lawsuits for minor infractions.<sup>45</sup> Furthermore, the Truth in Lending Act is concerned only with contracts for the extension of consumer credit. A Plain English Law with more precise standards would be even more complex because it covers such a broad range of contracts.

The standard chosen by the New York State legislature is beneficial for several reasons. The broad, imprecise standard is not a new concept in the art of drafting laws. Standards such as "reasonableness,"<sup>46</sup> "good faith,"<sup>47</sup> and "unconscionable"<sup>48</sup> are common in modern legislation. Most laws which establish a standard for language employ a broad standard.<sup>49</sup>

Furthermore, the broad standard can be adjusted to provide for justice in varying circumstances. Another vital feature of a broad standard is its ability to encourage compliance without stifling freedom and creativity. It affords maximum protection to the consumer without unduly interfering with freedom of contract. Fears of injustice in enforcement are not well founded. Judges are inclined to be hesitant to find violations, especially at the outset, while the con-

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42. 15 U.S.C. § 1601(a) (1976).

43. Siegel, *To Lift the Curse of Legalese—Simplify, Simplify*, 14 *ACROSS THE BOARD* 64, 69 (June, 1977).

44. *Id.*

45. Ass'n of the Bar of the City of N.Y., Special Committee on Consumer Affairs, *The Plain Language Law*, 33 *THE RECORD* 160, 161-62 (1978).

46. Magnuson-Moss Warranty Act, 15 U.S.C. § 2304(a) (1976); N.Y. PERS. PROP. LAW § 429(3) (McKinney 1976).

47. U.C.C. § 1-203 (1978); The Fair Credit Billing Act, 15 U.S.C. § 1666i(a) (1976); Consumer Credit Protection Act, 15 U.S.C. § 1640(f) (1976).

48. U.C.C. § 2-302 (1978); U.C.C.C. § 5.108 (1974).

49. See, e.g., The Employee Retirement Income Security Act of 1974 which requires plans to be "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a)(1) (1976). The standard of the Magnuson-Moss Warranty Act is "simple and readily understood language." 15 U.S.C. § 2302(a) (1976).



cept is new and untested.<sup>50</sup> Businesses that have made honest efforts to comply may rest with almost complete security that they will not be found in violation.

Lawyers need not worry about problems of court interpretation of the simplified language. If disputes do occur, judges should define terms on the basis of their everyday meanings. The outrage expressed by lawyers of the possibility that they will no longer be able to rely on "established" court meanings is based on an illusion because "with each change of circumstance, [court meanings] are prodded, stretched, squeezed and reshaped."<sup>51</sup>

Notwithstanding any vagueness in the standard of the language to be used, there are several provisions of the law which act as a safeguard against the risk of unjust harm to business.<sup>52</sup> In fact, the penalties and damages alone do not provide a sufficient threat to insure compliance. However, other motivations exist to encourage compliance. Most businesses are interested in obeying the law and fostering good will. Thus it seems safe to anticipate that the benefits of the broad standard will justify its implementation in the New York law.

## B. The Scope of the Law

There has been debate over which contracts are covered by the Plain English Law.<sup>53</sup> The law explicitly covers written agreements "for the lease of space to be occupied for residential purposes, or to which a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."<sup>54</sup> It is unclear whether this language should be construed to cover insurance and real estate contracts other than leases.

The debate hinges on legislative intent. It could be argued that real estate and insurance contracts are included by virtue of the fact that they are not excluded and that the statute was meant to be

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50. The court did not find violations in either of the first two Plain English cases although it seems that they easily could have. *Newport Apts. Co. v. Collins*, N.Y.L.J. May 16, 1979, at 13, col. 3; *Francis Apts. v. McKittrick*, N.Y.L.J. June 6, 1979, at 11, col. 5.

51. D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 375 (1963).

52. See text accompanying notes 19 & 20 *supra*.

53. See articles and reports cited in notes 5 & 35 *supra*.

54. N.Y. GEN. OBLIG. LAW § 5-702(2) (McKinney Supp. 1978).

interpreted broadly. On the other hand, by showing that New York has separate statutes covering these contracts<sup>55</sup> and that they have traditionally been regarded as separate from the area of consumer contracts, one could argue for the exclusion of real estate and insurance contracts. In his commentary to the statute, Richard Givens offers other arguments for the exclusion of real estate contracts. He states that express coverage of leases would have been unnecessary if all real estate contracts were covered and that real estate is treated separately in other sections of the New York General Obligations Law.<sup>56</sup>

It would be safer and more in keeping with the spirit of the law to assume coverage. An amendment to the New York Insurance Law which would require plain English and clear up any doubts is presently under consideration.<sup>57</sup>

### C. Conflicts With Other Laws

It has been claimed that the Plain English Law conflicts with other existing state laws.<sup>58</sup> Some statutes require the use of certain words or phrases which may or may not conform to the standard set forth in the Plain English Law.<sup>59</sup> It was feared that in complying with these laws, businesses would violate the new law. Although the amended version of the law clearly resolves this apparent conflict by specifically exempting words or phrases otherwise required,<sup>60</sup> it could have been resolved solely through the application of some basic legal principles. When two state laws conflict, the more specific law always takes precedence, absent a contrary expression of

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55. N.Y. INS. LAW (McKinney 1966); N.Y. REAL PROP. LAW (McKinney 1968).

56. N.Y. GEN. OBLIG. LAW § 5-702 commentary at 18 (McKinney Supp. 1978).

57. Telephone interview with Assemblyman Peter M. Sullivan (Sept. 18, 1979).

58. See articles and reports cited in note 35 *supra*. Friedman, *An Argument for Repeal of Plain English Law*, N.Y.L.J. March 7, 1978, at 1, col. 4.

59. Friedman mentions several laws which he felt conflicted with the Plain English Law. Our Real Property Law provides statutory constructions of clauses commonly contained in mortgages and deeds. N.Y. REAL PROP. LAW §§ 253, 254, 258 (McKinney 1968). Truth in Lending requires the use of the terms "annual percentage rate" and "finance charge" and allows the use of "Rule of 78." 15 U.S.C. §§ 1601-1666 (1976). The Internal Revenue Code requires specific technical terms. I.R.C. § 408(a). Insurance Law gives the superintendent of the Insurance Department jurisdiction to approve insurance policy language. N.Y. INS. LAW § 141 (McKinney 1966). See also Friedman, *An Argument for Repeal of Plain English Law*, N.Y.L.J. March 7, 1978, at 1, col. 4.

60. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney Supp. 1978).

intent.<sup>61</sup> The Supremacy Clause of the United States Constitution<sup>62</sup> resolves any conflict with federal laws. Hence, when certain words are required by law, the Plain English Law is rendered inapplicable. This limitation does not undermine the effectiveness of the law. Most laws which require specific words are aimed at clarity for the consumer, an objective in complete harmony with the Plain English Law. In any case, the law is aimed primarily at contracts whose language is not governed by other laws. The amended law does not exempt words "permitted" or "approved" by other laws from its requirements for the simple reason that the demands of both laws can be met.

The first case<sup>63</sup> dealing with the Plain English Law was a holdover proceeding in Queens Housing Court based on the tenants' refusal to sign a renewal lease. The tenants asserted the defense that they were entitled to a plain English lease. The court held that a landlord could not comply with both the Plain English Law and Section 60 of the Rent Stabilization Code<sup>64</sup> which requires that landlords offer renewal leases on the same terms and conditions as the previous lease.<sup>65</sup>

This uncertainty has now been clarified by an amendment to the Rent Stabilization Code<sup>66</sup> which states that tenants may receive renewal leases in plain English if they request them. The second

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61. N.Y. GEN. OBLIG. LAW § 5-702, commentary at 18 (McKinney Supp. 1978). *See also* Morton v. Mancari, 417 U.S. 535, 550-51 (1974).

62. U.S. CONST. art. VI, cl. 2.

63. Newport Apts. Co. v. Collins, N.Y.L.J. May 16, 1979, at 13, col. 3.

64. Sections YY51-1.0 to YY51-6.0.3 of the New York City Administrative Code are referred to as the "Rent Stabilization Law." Section YY51-6.0 of the Rent Stabilization Law authorizes the establishment of a real estate industry stabilization association. Pursuant to this section, the Real Estate Industry Stabilization Association of New York City, Inc. was created. This association was required to adopt a "code for stabilization of rents." (New York, N.Y. ADMIN. CODE § YY51-6.0(b)(2) (1974)). The Real Estate Industry Stabilization Association of New York City, Inc. has adopted such a code which is printed as an appendix to N.Y. UNCONSOL. LAWS § YY51-6.0 (McKinney 1974) (the "Rent Stabilization Code").

65. In his decision Judge Harbater stated that if the Legislature intended that plain English leases be allowed under section 60 of the Rent Stabilization Law, that should have been stated. *Newport Apts. Co. v. Collins*, N.Y.L.J. May 16, 1979, at 13, col. 3.

66. *See* 107 CTRY RECORD 966, 967 (April 6, 1979). The amendment was approved by the Department of Housing Preservation and Development. *Id.* The amendment provides that "upon the request of and with the consent of the tenant, the terms and conditions of a renewal lease entered into after Nov. 1, 1978 may be written in clear language and appropriately divided and captioned as required by Section 5-702 of the Gen. Oblig. Law." *Id.*

plain English case<sup>67</sup> was decided in accordance with the amendment but the judge did state that it was incumbent upon tenants to request leases in plain English.<sup>68</sup>

#### D. Enforcement

The provisions of the law which deal with enforcement have been subject to attack from both proponents and opponents of the law. Those opposed to the law fear that it will subject businesses to liability for large penalties and unlimited damages in addition to the costs of reviewing all their forms.<sup>69</sup> Although the law provides for a good faith defense to penalties, businesses may still be liable for damages despite honest efforts to comply. Some have called for extension of the good faith defense to suits for damages.<sup>70</sup> These fears, however, are unjustified. In addition to the good faith defense to penalties, in a class action, the total penalty imposed may not exceed ten thousand dollars.<sup>71</sup> Furthermore, violations will not render any agreement void or constitute a defense to actions for enforcement or breach of the agreement.<sup>72</sup>

At the same time, those in favor of the law argue that the limitations on its enforcement have rendered the law almost ineffectual.<sup>73</sup> They claim there is little incentive for a consumer to sue and the penalties for non-compliance are minimal in comparison to the amount most corporations spend on any given day. These are valid concerns, but considering the novel and untested nature of the law, the legislature was well-advised to aim the law more at encouraging

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67. *Francis Apt. v. McKittrick*, N.Y.L.J. June 6, 1979, at 11, col. 5.

68. *Id.* This case was a non-payment proceeding in which the tenant moved pursuant to the amended section 60 of the Rent Stabilization Code, requesting that the terms on a three-year renewal lease be rewritten in clear language. The court held that the Plain English Law mandates that the lease be rewritten, but only when the tenant exercises his option in requesting the lease. *Id.*

69. See Friedman, *The Plain English Law—Amended, But Not Improved*, N.Y.L.J. June 22, 1978, at 1, col. 1; Report of the N.Y. County Law. Ass'n, Special Committee on Consumer Agreements 1 (Nov. 7, 1977).

70. See note 69 *supra*.

71. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney Supp. 1978).

72. *Id.* § 5-702(b).

73. Biskind, *Write It Right, The Principle's The Thing*, N.Y.L.J. Oct. 20, 1977, at 2, col. 3. See Ass'n of the Bar of the City of N.Y., Special Committee on Consumer Affairs (March, 1978). The Committee feels that to be meaningful, the legislation must provide consumers with an incentive to enforce their rights. This does not exist because of the minimal penalties and limitations on enforcement. *Id.* at 8.

compliance than at punishing offenders. These fears may have been somewhat allayed by the amended law which grants the Attorney General the power to act on a violation.<sup>74</sup>

#### IV. A Year of Plain English

It has been a year since the Plain English Law was enacted. None of the predicted disasters have come to pass. There has not been mass confusion over the requirements of the law. Instead, there are widespread reports of compliance and most converts to Plain English are quite pleased with the results of revision.<sup>75</sup>

A survey of more than two hundred retailers, banks, loan associations, credit unions, finance companies, and real estate firms revealed that seventy-five percent of all respondents had revised or were revising their documents.<sup>76</sup> Revision rates varied from a high of ninety-seven percent for savings banks to a low of thirty-six percent for real estate firms.<sup>77</sup> Among the main reasons for non-revision were the simplicity of forms already in use and the use of forms supplied by regulatory organizations.<sup>78</sup> Although most firms would not have revised their forms if not for the Plain English Law, a large majority felt that their efforts were worthwhile.<sup>79</sup> Most firms accomplished the revision in less than three months.<sup>80</sup> Although almost half of the firms surveyed did not know how much the project cost them, twenty-nine percent spent under \$1,000 revising forms.<sup>81</sup> The features most desirable in the new forms were less technical/legal language, shorter sentences and paragraphs, and explanations of technical terms.<sup>82</sup>

Most firms that have revised their forms have done so chiefly to comply with the law. In the process the goal of simplification was subordinated to that of technical compliance and self-protection.<sup>83</sup>

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74. N.Y. GEN. OBLIG. LAW § 5-702(c) (McKinney Supp. 1978).

75. Siegel, *Plain English Results*, N.Y. Times, April 1, 1979, § 3 (Bus. and Fin.) at 1, col. 6.

76. AUDITS & SURVEYS, INC., *PLAIN ENGLISH LAW STUDY: SUMMARY REPORT 6* (March 1979).

77. *Id.* at 5.

78. *Id.*

79. *Id.* at 10.

80. *Id.* Tabular Appendix, Table 13.

81. *Id.* Tabular Appendix, Table 16.

82. *Id.* Tabular Appendix, Table 14.

83. Siegel, *Reaction to Plain English Law: Compliance Not Understanding*, Nat'l L.J., Sept. 10, 1979, at 21, col. 1.

As a result the revisions may have been undertaken half-heartedly and not everyone is entirely satisfied with the new forms.<sup>84</sup> Those who simplified their forms on their own initiative before the law was enacted are noticeably happier with the new forms.<sup>85</sup>

The response of consumers is more difficult to measure. Most firms have not noticed any strong reaction on the part of consumers.<sup>86</sup> It is difficult to determine what percentage of users of new forms has even been aware of the simpler language; many people no longer read contracts because they expect legalese. Also, gratitude is much harder to measure than anger. The law was drafted with the aim of encouraging compliance and discouraging law suits. The little case law on the statute suggests that there has been widespread compliance.

The benefits of contracts written in plain English are undeniable. For the consumer, the obvious benefits are the avoidance of frustration and unfair surprise. The benefits to business, while not so obvious, are equally worthwhile. Most importantly, the use of plain English is fundamental good business. The movement should generate good will and foster confidence and trust in business. Consumers are much more likely to abide by terms which they understood from the beginning. Businessmen and employees will spend less time explaining clauses, answering complaints and defending themselves in lawsuits. Businesses will be in a much stronger position to enforce contracts when the consumer's obligations have been clearly spelled out. The New York law has served as the impetus for a national movement. The Federal Government has repeatedly endorsed the aim of plain English.<sup>87</sup> Plain English bills have been passed in Connecticut<sup>88</sup> and Maine<sup>89</sup> and are under consideration in at least twenty-seven other states.<sup>90</sup> If significantly different bills are passed

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84. *Id.*

85. *Id.*

86. AUDITS & SURVEYS, INC., PLAIN ENGLISH LAW STUDY: SUMMARY REPORT 11 (March 1979).

87. On March 24, 1978, President Carter issued an executive order directing that government agencies adopt clear and simple regulations. Exec. Order No. 12044, 43 Fed. Reg. 58 (1978). The order applies to new regulations. The President also directed review of existing regulations. *Id.*

88. 1979 Conn. Pub. Acts No. 79-532.

89. 1979 Me. Acts § 483 (to be codified at 10 ME. REV. STAT. ch. 202) (consumer contracts); 1979 Me. Acts § 267 (to be codified at 24 ME. REV. STAT. § 2316) (insurance contracts).

90. Siegel, *Plain English Results*, N.Y. Times, April 1, 1979, § 3 (Bus. and Fin.) at 1, col. 6.

in various states, it could present serious problems for companies doing business in more than one state. Businesses could be required to use different forms for each different state if some statutes were more specific than New York's statute.<sup>91</sup> It has been suggested that this potential problem would be solved by the passage of a federal law mandating a uniform standard, if it specifically preempted overlapping state requirements.<sup>92</sup> Two such bills have been introduced but both would be amendments to the Truth in Lending Act and would only apply to credit transactions.<sup>93</sup>

## V. Conclusion

The Plain English Law is not perfect. There are real questions as to exactly what contracts are covered and how strictly the standard will be applied in courts. While this uncertainty is viewed as a weakness by many, the broad standard was intentional. It lends the law flexibility and the potential to be tailored to afford justice in varying situations.

The flaws of the Plain English Law are overshadowed by its triumphs. Its primary goal has already been achieved by virtue of overwhelming compliance. The most important function of the law is its recognition of a principle:<sup>94</sup> plain language is desirable and achievable in consumer contracts. This is no small accomplishment. It is hoped that the movement will spread to other areas of legal writing.<sup>95</sup>

Critics of the present law have not given up the battle to have the law repealed or amended. Several bills have been introduced into the legislature, but none have gone further than committees.<sup>96</sup> Although some of the recommendations seem worth considering, most

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91. See note 38 *supra*, for specific guidelines. The Connecticut Plain Language Bill offers a choice of either a general standard, very similar to New York's, or a specific standard which describes layout and sets guidelines on numbers of words and syllables. If the specific standard were mandatory, there could be conflicts with other state laws which adopted a specific standard.

92. N.Y. GEN. OBLIG. LAW § 5-702, commentary at 20. (McKinney Supp. 1978).

93. Siegel, *Plain English Results*, N.Y. Times, April 1, 1979, § 3 (Bus. and Fin.) at 4, col. 4.

94. Biskind, *Write It Right, The Principle's The Thing*, N.Y.L.J. October 20, 1977, at 2, col. 3.

95. One lawyer has conceived of and implemented a plain English will. See Cusack, *The Blue-Pencilled Will*, 118 TRUSTS AND ESTATES NO. 8 at 33 (August 1979).

96. Telephone interview with Assemblyman Peter M. Sullivan (Sept. 18, 1979).

have been trivial and overly technical.<sup>97</sup> The law is effective as it stands. Changes are not necessary and the confusion they would create would not be justified at this point.

While legal writing is and must continue to be an art of its own, there is no reason why lawyers should not adhere to and benefit from the age-old advice of respected English stylists such as William Strunk, Jr. who continually call for "cleanliness, accuracy, and brevity in the use of English."<sup>98</sup>

*Rosemary Moukad*

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97. Some of the suggestions of the Law Revision Commission are: replace "coherent" with "comprehensible"; require eight point type size; exempt language "approved" by other statutes; limit liability to those who knew or should have known that the transaction was for personal, family or household purposes; limit damages to those suffered from the non-compliance; and deny recovery to those who were not fooled by the language of the contract. Recommendation of the Law Revision Commission to the Legislature Relating to the Clarification of Plain Language Requirements for Certain Consumer Agreements, [1978] N.Y. LAW REV. COMM'N REP., reprinted in [1979] McKinney's Session Law News A-48.

98. W. STRUNK, JR. & E. WHITE, *THE ELEMENTS OF STYLE* vii (2d ed. 1972).



