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THE PLAIN ENGLISH MOVEMENT

PANEL DISCUSSION

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The Plain English Movement in the United States*

Carl Felsenfeld†

Nature of the Plain English Movement

One of the dominant events between 1975 and today in United States consumer law was the birth of what has become known as the “plain English movement”. For centuries lawyers have been derided for the nature of their prose. A word will not suffice where two or even three can take its place; long sentences are preferable to short ones; Latin, or perhaps medieval French, are preferable to English. The plain English movement is the name given to the first effective effort to change this and to write legal documents, particularly those used by consumers, in a manner that can be understood, not just by the legal technicians who draft them, but by the consumers who are bound by their terms.

Signs of the movement surround us. Seven states have, in one manner or another, required that consumer-oriented contracts be written in an understandable way.¹ Most of the states that have not passed legislation have had bills to similar effect introduced.² Two bills have been introduced in Congress mandating plain

* The following paper by Mr. Felsenfeld and the accompanying two commentaries by Professor Cohen and Mr. Fingerhut were presented at the Eleventh Annual Workshop on Commercial and Consumer Law held at The Faculty of Law, University of Toronto, on October 23-24, 1981.

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¹ New York, Gen. Obl. Law, Sec. 5-701; Connecticut, Pub. Act 79-532 (1979); Maine, Laws 1979, Ch. 483; Hawaii, Act 36, 1980 Reg Sess.; New Jersey, Ch. 125, Pub. L. 1980, N.J.S. 56:12-1; Minnesota, Laws 1981, Ch. 274; West Virginia, Laws 1981, S. B. 361.

² Summaries of these bills appear in Felsenfeld and Siegel, *Simplified Consumer Credit Forms* (Boston, Warren, Gorham & Lamont, 1980), Supplement No. 2, Introduction.

English on a national level.³ Some 26 states have enacted legislation specifically requiring plain English in insurance policies.⁴ Where there are no statutes, we have seen a burgeoning voluntary effort by businesses, particularly the larger ones, to rephrase their contracts in clearer language. (The voluntary effort has actually sparked legislatures in various states to consider more seriously the need for statutes mandating the new expression.)

Plain English has also made its presence known outside the contractual area. Executive Orders, both on the Presidential⁵ and gubernatorial⁶ levels have required that regulations be better written. Other agencies, not subject to Executive Orders of this sort, have undertaken voluntary efforts at considerable expense and with laudatory results.⁷

One can date the beginning of the plain English movement with some accuracy. On January 1, 1975, Citibank of New York introduced a plain English consumer promissory note. A team of businessmen, lawyers and language consultants had stripped the prior version, a dense and essentially unreadable document, of many substantive provisions and cleansed the remaining verbiage. Citibank knew it was on to something. The form was introduced at a major press conference which received television coverage. The note did indeed hit a responsive chord. It received national, and even international, attention. It was particularly welcomed by consumer activists who saw it as a major breakthrough in terms of consumer communication. Senator William Proxmire, Chairman of the Senate Banking Committee, read the note on the floor of the Senate into the Congressional Record.⁸

It is worth noting that this note was the result of an entirely voluntary effort. Senator Proxmire, when he first saw the note, asked an insightful question: "Did the Truth in Lending Act (legislation designed to inform consumers of certain credit terms⁹) make this note more difficult to draft?" The answer was yes.

³ H. R. 12212, 95th Cong.; H. R. 251, 97th Cong.

⁴ *Supra*, footnote 2.

⁵ Pres. Exec. Order No. 12044.

⁶ New York Governor Carey's Executive Order No. 100, April 8, 1980.

⁷ See Federal Home Loan Bank Board Regulations, 43 F.R. 14505, April 6, 1978; Federal Reserve Board project, as reported in Washington Financial Reports, June 6, 1978.

⁸ Congressional Record, February 2, 1975.

⁹ P.L. 90-321, 82 Stat. 146.

There was, however, little other legislation that affected the drafting process. Citibank has consistently maintained since then that only in a relatively free atmosphere could this kind of accomplishment have been achieved.

Inevitably, a bill was introduced in the New York legislature requiring that Citibank's contribution be mandated as a matter of law. The bill, in fact, referred only to promissory notes and provided that all such obligations would have to be written in the form of the Citibank note. Citibank, understandably flattered, nevertheless opposed the bill. Happily, it was not passed. It was, however, soon replaced by what was subsequently enacted as the country's first plain English law. It required that every contract of \$50,000 or less "primarily for personal, family or household purposes" be:

1. Written in a clear and coherent manner using words with common and every day meanings; and
2. Appropriately divided and captioned by its various sections.¹⁰

Taking the two requirements in reverse order, the mandate that contracts be divided and captioned was clearly a derivation from the Citibank promissory note which was set up in that form. A disadvantage of this approach to legislation is that it makes what worked in one case a model for all others. No evidence was produced demonstrating that all consumer contracts should be in this format. Not surprisingly, experience under the New York law has strongly suggested that some contracts, particularly those written in letter form, will have a lower communicative content when captioned. (We will not return to the issue of division and captions in order to dwell on the first aspect of the New York test.)

The first requirement of the New York test is, clearly, the more important. The bill and then the law were highly criticized, indeed ridiculed, for the vagueness of the language standard. How can a draftsman know what is clear or coherent or common or everyday? What is clear to one (a lawyer, for instance) may well not be clear to another. If the standard were related to the understanding of a specialized group, the law could undercut its own purpose. Surely an already overburdened court system would become immobilized testing whether the words in consumer contracts were common and everyday. Thus did the

¹⁰ N. Y. Gen. Obl. Law 5-702.

critics attempt to make a mockery of the statute and reduce what was at least the germ of a good idea to nonsense. Why the statute did not glut the New York courts and how New York converted its contracts from legalese to plain English with minimal turmoil we will address at a later point.

The Movement in Context

The plain English movement of 1975-80 may be usefully thought of as part of a longer evolution in consumer protection. There have always been consumers and one can find statutes protecting them back to the usury provisions of the Code of Hammurabi. The concept of protecting the consumer through the flow of information is probably a 20th century idea. One can point to a number of statutes enacted within the last half century reinforcing the concept that "the best equipped consumer is the well informed consumer." The securities laws of the 1930's¹¹ dictated that a company in which a person might invest fully disclose its affairs to the public. The Retail Instalment Sales Acts of the 1950's¹² mandated disclosures to those who buy on time. More recently, the Truth in Lending Act of 1969 required that a uniform set of disclosures be given for all consumer credit transactions.¹³

The thrust of these statutes was informational. That is, they required that facts be given so that a consumer about to enter into a transaction could do so with understanding. What the statutes lacked was a delivery mechanism. There was no assurance that the information would arrive at and be appreciated by its intended object. Increasingly, we have been observing a disillusionment with these informationally-oriented statutes. The accumulation of information was no guarantee of its ultimate usefulness. In fact, as the goal of these statutes was served with the accumulation and disclosure of more information, its very volume made it less available to the typical consumer. The concept became known as "information overload".¹⁴ Too much

¹¹ See Securities Act of 1933, as amended, and 12 CFR 226.5 (a), a regulation thereunder, requiring that all disclosures "shall be made clearly."

¹² B. A. Curran, *Trends in Consumer Credit Legislation* (Chicago, 1965), chapter IV.

¹³ *Supra*, footnote 9.

¹⁴ See Felsenfeld and Siegel, *Writing Contracts in Plain English* (St. Paul, West Publishing Co., 1981), p. 41.

information can be as bad as too little. Experts went to work on these statutes (many are still at work) to see what could be done.¹⁵

The plain English movement concentrated on a different issue. It provided a mechanism whereby information that starts here could actually go there. The emphasis shifted from information to communication. This is the key quality of the plain English movement and, in all probability, the reason for its warm reception. The movement, however, immediately raised major problems.

Issues of the Movement

The first question was whether traditional lawyer language could be accurately rephrased in plain English, however that may be defined. Lawyers' words were used, the argument ran, because they produced a predictable result. If the predictability of other words was of a lower order, lawyers understandably would not want their clients to sustain the greater risk. Much of the Bar was emphatic about this. While we cannot resolve all the language issues within the space of this paper, it might be useful to divide those issues into two parts: just bad writing and technical writing.

By just bad writing, I mean that traditional form of lawyer-like expression that has nothing to do with technical concepts. It is a manner of speech that lawyers learn first in law school, reinforce through the use of "precedent" forms in their practice and pass to the succeeding generations as the way one "writes like a lawyer". We can think of many examples. Sentences are simply longer than they have to be. Words are used where they add no meaning: witnesseth, herein, duly. Words and phrases are used where better English equivalents are immediately available: said or such (to indicate that a word has been used before), hereinabove, undersigned. Strings of words are used where one would do: force and effect, sell, assign and convey, will and testament.

All of these are easily corrected. The resulting product immediately starts to look like English and is more available to the lay reader. It is not easy, however, for the lawyer to do because it

¹⁵ The Truth in Lending Simplification and Reform Act, Title VI of P.L. 96-221, March 31, 1980 was the result of considerable research done into distinctions between disclosure and communication. See Senate Report No. 95-720, 95th Congress, 2nd Sess.

means shaking the effects of a linguistic tradition professionally reinforced over centuries. Most lawyers do not, in fact, know they are writing legalese even when they do. (Lawyers have two common failings. One is that they do not write well and the other is that they think they do.)

Next, in dealing with lawyers' language, we face a series of words and phrases that are technical in nature. Generally of old English, French or Latin derivation, they stand for concepts that lawyers, through their particular training, understand and that laymen generally do not. The field of real estate law is particularly replete with them.¹⁶ Possibly for this reason, one finds the real estate Bar at the forefront of opposition to the plain English movement. One can think of such real estate words as *seisin*, *fixtures*, *appurtenances*, *hereditaments*, among many more. From other fields, we find *parol evidence*, *per stirpes*, *demurrer*, etc., etc. Can these words be conveyed in a plain English manner? Or is their meaning so particular that either they would lose their effect if paraphrased or a small tome would be required to express them?

Professor David Mellinkoff of the University of California at Los Angeles Law School has done the most extensive research into this subject.¹⁷ His conclusion is that most of the words are not nearly as precise as they appear to be. To use his metaphor, most of the words, like soldiers, may have been in a war but not specifically in battle. That is, most of the cases dealing with those words deal with issues surrounding them rather than with the specific meanings of the words themselves. Research that I have done tends to support Professor Mellinkoff's conclusion with one qualification. Where the technical words have actually been in battle, courts tend less to look to a technical meaning in a difficult case than to the intent of the parties as embodied in the technical words. In a consumer context, this leads to a dilemma. If a party to a contract does not understand what a word means, how does one construe his intent in using it? We know the judicial devices for finding this: nature of the transaction, objective of the parties, reasonable expectations etc. The technical word itself will add little. If anything, it may be a kind of magical incantation

¹⁶ See E. Brown, "ABC's of Language Simplification", *American Banker*, August 14, 1978.

¹⁷ D. Mellinkoff, *The Language of the Law* (Boston, Little, Brown & Co., 1963).

indicating that the consumer intended this transaction to go about the same way as similar transactions went in the past.

This difficult subject cannot be fully resolved here, nor can we expect full resolution elsewhere until the plain English movement has extended its span. Some additional observations may, however, be made. First, the plain English movement is most appropriate for consumer agreements. Thus, the technical terms that lodge in litigation documents (demurrer, parol evidence) as well as those that have their place in technical agreements among corporations with legal counsel can be retained. In the consumer context, one's conservative fears must necessarily reduce. Experience in New York has proven that consumer agreements can be written in a more available language and still serve their intended goals. Even real estate documents for consumer transactions in amounts below \$50,000 (clearly the low end of the real estate scale) have been effectively translated into plain English without unexpected consequences.

One may speculate whether, in interpreting these new forms, courts may go farther than they have in the past in looking to the essence of an agreement and honouring the expectations of the parties with perhaps less regard to the fine points of technical language.¹⁸ May we even be seeing the development of two laws of contracts, one for commercial agreements and one for consumers? This is actually not so great a departure from existing law which in many contexts (usury, for example¹⁹) distinguishes the commercial from the consumer transaction.

Assuming for the nonce, which we shall do from this point on, that agreements can be written in "better" language, we face next the question of whether this should be mandated by statute. We have seen how the Citibank promissory note directly led to statutory change in New York State. On the other hand, we have seen that only six states have followed New York's lead. Most still permit a free market in draftsmanship. Which route is preferable?

The case made in favor of the statutes where they have been enacted is that, first, plain English contracts are a good idea and,

¹⁸ See *Martinez v. Idaho First National Bank*, No. 79-1104, D. Id. (February 11, 1981), where a court gave some words their obvious meaning despite claims that a "technical" interpretation might have other results.

¹⁹ The chart in *CCH Consumer Credit Guide*, Par. 510 graphically shows distinctions made for corporate loans.

second, business has been too slow in adopting them. There is much to be said for this.

The case against the statutes is somewhat more complex. The traditional argument is that one cannot define a language standard with sufficient clarity to measure compliance. All contracts will be thrown into question and the courts will eventually bog down deciding between understandability and complexity. We have noted that this does not happen in New York and we will return to that subject again. In my own view, a better argument against a statutory mandate is the lawyers' unfortunate use of precedent. We do not yet know the best form of language and we probably should encourage a period of experimentation until we do. Statutes tend to freeze the law. Judges interpret them in cases and a library of what is legal and what illegal rapidly develops. Plain English, required by statute, thus risks becoming a new form of expression that, as interpreted by the courts, can be as mechanical and unyielding as the language it replaced. One would hate to see a good idea perverted in this manner.

Another argument against the statutes is the general argument for freedom from law. There is a sense that business is over-regulated. We have come to believe that less law is better law. We must not forget that the first great strides in the plain English movement were achieved largely in the absence of controlling law. It would be ironic if tighter regulation resulted from the intelligent use of freedom. I will not cast my ballot in this dispute, but rather pass to the next question: if there should be statute, what form should it take?

A Statutory Approach

We will discuss three aspects of possible plain English legislation: language standards, government intervention and penalties. As we shall see, the three are interrelated. An understanding of that interrelationship and a balancing of the three elements may be the keys to a workable plain English statute.

As to standards, they basically divide into two types. First, best exemplified by the New York plain English law, is the so-called "subjective" standard. This consists of words with essentially vague meanings that may be interpreted differently by different people in different situations. In addition to the New York words

(clear, coherent, common, everyday), other statutes and draft bills use a series of other descriptive words: readable, laymen's English, reasonable men shall be able to understand, without any need for interpretation, easily understandable, calculated to promote understanding.

As we have already suggested, probably the most vehement opposition of the Bar to plain English legislation was based upon the use of standards such as these. It struck me as strange that lawyers had apparently forgotten the myriad uses of terms like these throughout the statutes and cases that comprise the common law. The law of torts is based upon the concept of "reasonable" behavior. The securities laws impose the duty of "material" disclosure. Pleadings require "sufficiency" and evidence "relevance". The use of these words in fundamental law has resulted in the development of techniques for their application. The competent lawyer is trained in analyzing the objectives of a statute or the principles of a case and using them to give meaning and application to vague words in specific situations. One wonders whether the problems of the objecting Bar may not have had other roots.

In contrast to the New York approach are the so-called "objective" standards. Through other disciplines and for other purposes, a series of language tests have been devised to analyze the complexity of language mathematically. Some 75 reputable tests exist.²⁰ The most famous of these is the Flesch Reading Ease Test devised by Dr. Rudolph Flesch (incidentally, one of the consultants on the original Citibank promissory note).²¹ The test extracts a representative sample from the text to be measured and computes the number of words in a typical sentence. Through a relatively simple formula, it reduces this to a number between zero, representing the most difficult form of expression, to 100, representing the easiest. A score of 85 for example, means that the text is very easy; 15 represents great difficulty. Most of the insurance statutes already referred to incorporate the Flesch test as a standard and typically require a reading score of between 40 and 60.

Other tests use other ingredients of the text. Some are based

²⁰ G. A. Klare, *The Measurement of Readability* (Iowa State University Press, 1963), and "Assessing Readability", 1 *Reading Research Q.* 63 (1974-5).

²¹ R. Flesch, *The Art of Readable Writing* (Harper & Row, 1949).

upon syllables; some relate words used to a given vocabulary list and design scores based upon the difficulty of those words.

There are several problems with the language tests. One is that they were really devised for reading materials in the elementary schools and no systematic study has been done on their applicability to such materials as contracts or, for that matter, the reading ability of mature adults.²² Second, under most of the tests, gibberish can score as well as clear writing. For example, the following two sentences would have identical Flesch scores:

I went to the park.

Park I to the went.

Writing with a Flesch or other score as a standard, rather than simply seeking understandability, creates its own problems. One can try to squeeze words, like Cinderella's sisters' feet, into shoes of unyielding size. Testing language after it is written may have its benefits. Using a test in the writing process is a very different matter. Some who have done this reported to me that it was occasionally necessary to reduce clarity in order to fit sentences into the confines of a language score. The testing system does, however, seem advantageous to those who are looking for security.

Another method of achieving certainty brings us to the second element of a possible language statute, government intervention. Particularly where the subjective standard is used, it has become a popular proposal that contracts should be submitted to some government agency for pre-approval.²³ Once blessed, the contract would automatically be deemed in compliance with the plain English statute. (It is usually proposed that there be no requirement that forms be so submitted; those who elect to use contracts not pre-approved are free to do so at their own risk. One must assume that the risk of not obtaining such approval could be very great indeed.)

While security can be gained from this kind of clearance, the very process raises some fundamental risks to the attainment of clear writing. Even more than the standardization that can result from judicial precedent, one may fairly assume that government

²² See J.C. Redish, "Readability" in D. Felker, ed., *Document Design: A Review of the Relevant Research* (Washington, D. C., American Institute for Research, 1980).

²³ See s. 105 of the Truth in Lending Act, 15 U.S.C. 1605, as amended by the Truth in Lending Simplification and Reform Act, Title VI of P.L. 96-221.

agencies, by their very nature, will develop fixed concepts of what is meant by plain English. The process of experimentation and creativity, so essential at this point in our understanding of plain English, could well grind to a halt. In addition, one must seriously, or perhaps not seriously, question whether the bureaucracy is really the place to go for good writing standards. Efforts in the United States to bring government into the writing process have not led to optimism.²⁴

Third, we turn to the question of penalties. Often insufficiently studied when civil statutes are drafted, a proper penalty structure may be a core element in achieving a workable plain English law. When Assemblyman Peter Sullivan drafted the New York law, he appreciated the problems inherent in a statute of this type. He frequently said that his goal was to create a "climate" in which better contracts would be written. At the same time, he wanted to avoid the threatened torrent of litigation in which courts would sit like English instructors grading papers. For this reason, he deliberately inserted a low penalty structure into the New York statute. Individual violations cost \$50; maximum class action penalties are \$10,000; violation of the statute does not void the contract; perhaps most important of all, there is no award of costs or attorney's fees to a successful consumer plaintiff. In the eyes of many, including myself, Sullivan achieved his goal. Virtually all contracts in New York were rewritten as of November 1, 1978. Since then, there has been almost no litigation. Undoubtedly, the low penalties have provided insufficient incentive to bring the nuisance cases. There are those who believe this is not entirely desirable and that many justified cases have also not been brought.²⁵ This may be true. Nevertheless, lawyers writing consumer contracts in New York today do so with simplicity and communicativeness as prime goals. Many companies employ language consultants and, as we shall see, even the design of contracts has become significant. This is a major step in the right direction and perhaps that is enough to ask of a statute of this type.

²⁴ The effective date of New Jersey's plain English law was deferred pending decisions by the state agencies on how they will measure compliance. See Newark Star-Ledger, August 25, 1981.

²⁵ The Committee on Consumer Affairs of the Bar Association of the City of New York recognized this as a potential problem in its review of the New York law, March 1978, but believed that the novel and experimental law was acceptable in this form.

Real Plain English

Having participated in the early efforts to achieve plain English, I regret that it has become principally an exercise in language. In drafting the early forms, it was apparent that good language was only part of the process. Actually, the achievement of plain English consumer contracts really involved three separate steps.

The first was an analysis of substance. We know that rarely is a contract drafted solely for the specific transaction in which it is used. Lawyers regularly start with forms either from their files, from a law book or purchased from a printing company. The traditional process is then to add to these forms whatever is required for the transaction at hand. Writing in this way, lawyers are more skilled at addition than subtraction. It is both easier and safer to have more rather than less. The process results in longer forms and longer forms are harder to read. The first step in rewriting the Citibank promissory note and the good plain English contracts that followed it was a close analysis of the substance of the form and a determination of what was really needed and what could be considered surplus in the particular transactions for which the form would be used. This was not an easy process. It required the collaboration of lawyers (to analyze legal implications) and businessmen (to confirm practical need). Reasonable risk taking had to be evaluated. Naturally, judgments differed. Business officers responsible for marketing often had different views from those responsible for the collection process. The difficult process, however, yielded results. Without elimination of well over half the form, simplification could not have been achieved.

Language, of course, was the second step in the exercise. The third, however, proved equally important. To deliver its message most forcefully, the document had to be well designed. Professionals were used for this purpose. Upon reflection, the lawyers realized that design was actually a traditional element of contract law. Many cases refused enforcement of contractual provisions, even well written, when buried in fine print or located in unlikely places.²⁶ It may be that design has always been an element of contract law although it has not been so identified in the treatises.

²⁶ See J.D. Calamari, "Duty to Read — a Changing Concept", 43 *Ford. L.R.* 341 (1974).

Unfortunately, it is difficult for plain English statutes to control what exists in the substance of a contract. We hope, however, that the message of the early forms will not be lost. We do see elements of design creeping into the enacted statutes and proposed bills. Even the caption-and-division provision of the New York statute is really a design direction. Other statutes and bills contain provisions as to type size, contrasts, margins etc.²⁷

The Future of Plain English

One may fairly anticipate that the number of statutes requiring, in one form or another, the use of plain English will increase. Whether legislation will go much beyond the seven states which have already passed laws is difficult to say. One can also anticipate that the use by business of better language, better analyzed substance and better designed contracts will also increase. Perhaps the most interesting question is what the effect of all of this upon the consumer body will be.

Ultimately, the goal of plain English should be to change behavior. If the clearer, briefer and more attractive contracts simply lead to the same consumer behavior as the older, less understandable forms, one cannot be sure that the game has been worth the candle. It must be acknowledged that little change in consumer behavior has yet been perceived as a result of the new forms. But this may be too much to ask at this early point. There have, however, been other discernible results. The older contracts tended to contain provisions that even the businesses using them, upon examination, agreed were excessive. Displayed in plain English they had to go. Businesses that nurtured their images through carefully written advertisements and customer programmes could not risk those images through the now visible terms of their agreements. The most important single effect of the plain English movement has, therefore, probably been the general amelioration of consumer contracts.

That we have not yet seen a change in actual consumer behavior may be disappointing but it is also understandable. Consumers have been well trained not to read the contracts they

²⁷ Type size requirements appear in many states' laws. See N.Y. C.P.L.R., s. 4544; Ill. Retail Installment Sales Act, 111. Rev. Stat. Chapter 121½, s. 503. A conspicuousness requirement appears in the Uniform Commercial Code, s. 2-316 (2) and a ten point type size requirement in Securities Act Regulations 230.425.

sign. Not only did the appearance of the contracts repel the ordinary reader but the usual language defied understanding by all but experts. Even for them, reading was a difficult chore. As the language of contracts becomes more available to the lay reader there is reason to believe that this will change. One may imagine a new generation of consumers, looking at a store's revolving credit contracts for information in the same way that they examine the store's catalogues. Bank agreements may be read as often and as intelligently as the bank's advertisements. Then, there must be reactive behaviour. If this occurs, the great benefit of the plain English movement will be in its power to redress the imbalance so often noted between consumers and the companies that supply them with their goods and services.

Comment on The Plain English Movement

*David S. Cohen**

On first impression, the private and social benefits of plain English contracts and perhaps of plain English legislation seem obvious. Theoretically, by using contracts drafted in simple language we may increase consumer comprehension of contractual terms, engender more accurate contract decision-making, and promote more precise pricing of contract goods. Perhaps consumers who understand their contractual obligations will be more likely to fulfil them. Commercial goodwill may flower, and the use of plain English contracts has been advertised as a selling tool.¹ This approach to plain English, which reflects the views of Mr. Felsenfeld, fails to address or to analyze thoroughly several major assumptions and implications of plain English contracts.

The purpose of this comment is to demonstrate that plain

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¹ The argument has been made that the voluntary decision by many commercial enterprises to adopt plain English contracts is a thinly disguised attempt to increase their respective market shares. See Black, "A Model Plain Language Law", 33 *Stan. L. Rev.* 255 (1981), at pp. 263-4.