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Plain Language in Pennsylvania: Fading Issue or Development on the Horizon?

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Plain Language in Pennsylvania: Fading Issue or Development on the Horizon?

> Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason.

Fortescue, C.J.[1]

Languages grow and adapt as much as the human beings who speak them. A constant characteristic of language is change. The English language has steadily advanced from its Anglo-Saxon origins to the version which Americans speak today, and it continues to evolve in order to meet the needs of modern society.

One area in which growth of the English language has slackened is the language of law. Lawyers seek certainty and precision. Once they develop fit and proven means of expression in terms which have become well defined over time, they are reluctant to abandon them. Consequently, the language of the law has remained stagnant while the general body of English language has matured, and a gulf has developed between the language of lawyers and the language of laymen. One result of this chasm is that ordinary consumers, who lack expertise needed to interpret "legalese," find the language of legal documents foreign.

Plain language laws address this problem.[2] They attempt to simplify consumer contracts and make them as understandable as possible to consumers.[3] Drafting a plain language law and getting a state legislature to approve it, however, are not simple tasks. Political and pragmatic hurdles abound.

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1. Y.B. 36 Hen. VI, ff. 25b-26 (1458); transl., 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 626 (3d ed. 1923).

2. For a compilation of plain language literature published between 1963 and 1983, see Hathaway, *Bibliography of Plain English for Lawyers*, 62 MICH. B.J. 989 (1983). Most of this issue is devoted to the plain language debate in Michigan. For examples of contracts written in plain language, see generally J. JOSEPH & J. HILLER, LEGAL AGREEMENTS IN PLAIN ENGLISH (1982). For a manual on how to draft documents in plain English, see generally AMERICAN INSTITUTES FOR RESEARCH, GUIDELINES FOR DOCUMENT DESIGNERS.

3. The aim of plain language laws depends on each situation. Making every contract perfectly clear to every consumer is impossible. Plain language laws do not, therefore, attempt to eliminate ambiguity from consumer contracts entirely, but they do try to enhance clarity.

Pennsylvania's experience with plain language legislation exemplifies the difficulties entailed. The Pennsylvania Legislature struggled long and fought hard over the Plain Language Consumer Contract Act.[4] Lobbying groups from a variety of factions pressured the Legislature for so many changes that the proposal ultimately became amorphous. The bill died in the Senate Appropriations Committee at the end of the 1983-84 legislative session,[5] but its supporters are already kindling a revised version of the Act.[6] When a new legislative session convenes in 1985, it must decide whether to begin the plain language crusade anew.

This comment will examine the merits of reintroducing plain language legislation in Pennsylvania. Section I will explore plain language laws generically and will analyze what other states have done. Section II will trace the legislative and political history of Pennsylvania's Plain Language Consumer Contract Act. Section III will address the arguments for and against passage of a plain language law in Pennsylvania. Finally, Sections IV and V will offer suggestions on drafting a plain language bill for Pennsylvania which would be both feasible and politically palatable.

I. Plain Language Laws in the Abstract and in Practice

The term "plain language law" is a misnomer. It names this type of legislation by its principal medium rather than its purpose. The goal of plain language laws is to make consumer contracts as comprehensible as possible. Since plain language is merely a means to that end, "clear contract laws" would perhaps be a more appropriate title.[7]

Proponents of plain language laws claim that consumer contracts are written for lawyers, not consumers.[8] They maintain that drafters of consumer contracts concern themselves only with protecting their clients and fail to consider consumers' ability to understand legal documents.[9] Complicating this situation is that many consumer contracts are standard form contracts offered on a take-it-or-leave-it basis. The superior bargaining position of creditors furnishes them

4. H.R. 538, 167th Gen. Assembly, 1983-84 Sess. (Printer's Nos. 605, 1806, 2674, 2740, and 3157).

5. Telephone interview with Virginia Snyder, History Room, Pennsylvania House of Representatives (Jan. 16, 1985).

6. Interview with Representative Allen Kukovich, prime sponsor of the Plain Language Consumer Contract Act (Aug. 29, 1984) [hereinafter cited as Kukovich interview].

7. Out of deference to common usage and for the sake of consistency, this comment will continue to use the term "plain language law(s)."

8. The Pittsburgh Press, June 3, 1984, at B8 (statements of Atty. Jeff Friedman, who assisted Rep. Kukovich in drafting the Plain Language Consumer Contract Act) [hereinafter cited as Pittsburgh Press].

9. C. FELSENFELD & A. SIEGEL, WRITING CONTRACTS IN PLAIN ENGLISH 26 (1981) [hereinafter cited as WRITING CONTRACTS].

with "a frightening degree of license."[10] Moreover, a consumer's needs cannot always wait; necessity may force him to bind himself under a contract containing impenetrable language. When a consumer signs a contract which he is unable to interpret, the basic contractual element of mutual understanding is missing.[11]

Plain language laws do not attempt to reverse or even equalize bargaining positions of creditors and consumers, but they do try to illuminate the disparity.[12] They make no substantive revisions in contract law; rather, they address the imbalance in bargaining position by making contracts more comprehensible to consumers.[13] Plain language laws are premised on the theory that the more consumers understand contracts, the more they are able to guard against unfair terms and make reasoned decisions.

Plain language laws have an impact upon the market place. They eliminate concealed contract provisions and provide new areas of competition for creditors.[14] The plain language movement has also encouraged creditors to offer more than goods and services to their customers. As a result of the plain language movement, many businesses have begun to view their contracts as related to their products.[15]

A. History of the Plain Language Movement Outside Pennsylvania

The private business sector provided the impetus for the plain language movement. In 1975, Citibank of New York embarked upon an experiment to simplify its consumer loan forms.[16] Citibank revised its consumer loan note by reorganizing the sequence of ideas, eliminating "boiler plate" provisions, using personal pronouns to refer to the parties, simplifying language, eliminating unnecessary technical terms and explaining those which had to be retained, shortening sentences, utilizing contractions, employing verb forms when possible, dividing the text into a series of subsections with headlines, and increasing type size to make the document more visually appealing.[17]

Citibank's action prompted Assemblyman Peter Sullivan to in-

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10. *Id.* at 34.

11. Ross, *On Legalities and Linguistics: Plain Language Legislation*, 30 BUFFALO L. REV. 317, 354 (1981) [hereinafter cited as *Legalities and Linguistics*].

12. Ferry & Teitelman, *Plain Language Laws: Giving the Consumer an Even Break*, 14 CLEARINGHOUSE REVIEW 522, 522 (1980) [hereinafter cited as *Plain Language Laws*].

13. *Id.*

14. *See* WRITING CONTRACTS, *supra* note 9, at 239.

15. *Id.*

16. *See* Millus, *Plain Language Laws: Are They Working?*, 16 U.C.C. L.J. 147 (1983) [hereinafter cited as *Are They Working*].

17. *See* WRITING CONTRACTS *supra* note 9, at 28.

troduce a plain language bill in the New York Legislature.[18] The proposal passed in 1977 with little opposition.[19] When the Sullivan Act went into effect in 1978, it became the first plain language consumer contract statute in the country.[20] A flurry of plain language activity followed in other state legislatures. Over thirty states considered plain language consumer contract proposals.[21] Connecticut,[22] Maine,[23] New Jersey,[24] Hawaii,[25] Minnesota,[26] and West Virginia[27] adopted plain language laws between 1979 and 1981.

But enthusiasm among state legislatures for the plain language movement has dwindled. No state has enacted a plain language statute since 1981. By August 1983, only Michigan and Pennsylvania were considering plain language proposals for consumer contracts.[28] Mirroring the fate of Pennsylvania's Act, Michigan's plain language consumer contract bill died when the Michigan Legislature failed to pass it by the end of 1984.[29]

B. Scope of Coverage

When a plain language bill is in its drafting stages, one of the most important considerations is its scope. The potential for opposition steadily increases as the bill's scope broadens.

There are two ways to limit coverage of plain language laws. One method is to establish a monetary maximum.[30] Any consumer contract which involves an amount in excess of the monetary ceiling, excluding interest and finance charges, is not subject to plain language requirements. The other method is to limit the types of documents subject to plain language laws.[31] These laws frequently cover contracts for buying goods on time (particularly automobiles and household appliances), borrowing money, leasing goods and housing facilities, and buying insurance.[32]

In practice, plain language statutes usually use both monetary

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18. *See Legalities and Linguistics*, *supra* note 11, at 318.
19. *Id.*
20. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985).
21. *See Legalities and Linguistics*, *supra* note 11, at 320.
22. CONN. GEN. STAT. ANN. §§ 42-151 to 158 (West Supp. 1984).
23. ME. REV. STAT. ANN. tit. 10, §§ 1121-1126 (1980 & Supp. 1984-1985).
24. N.J. STAT. ANN. §§ 56:12-1 to 13 (West Supp. 1984-1985).
25. HAWAII REV. STAT. §§ 487A-1-487A-4 (Supp. 1983).
26. MINN. STAT. ANN. §§ 325G.29-.37 (West 1981 & West Supp. 1984).
27. W. VA. CODE § 46A-6-109 (Supp 1984).
28. 32 SIMPLY STATED 4 (1983) (monthly newsletter of the Document Design Center, American Institutes for Research, 1055 Thomas Jefferson Street, N.W., Washington, D.C. 20007).
29. Telephone interviews with Sheila Faunce, Aide to Consumer Affairs Committee, Michigan House of Representatives (Sept. 26, 1984 and Jan. 16, 1985).
30. *See Legalities and Linguistics*, *supra* note 11, at 320.
31. *Id.*
32. *See Plain Language Laws*, *supra* note 12, at 523.

maximum and type of document limitations. The laws may specifically exclude certain documents, such as mortgages, deeds, and securities transactions. Such exclusions probably stem from a need for traditional, arcane language in these documents and from a realization that these transactions typically do not involve unwary consumers without legal counsel.[33]

Monetary ceilings in states which have plain language laws range upwards from $25,000.00. The ceilings are as follows: New York, $50,000.00;[34] Connecticut, $25,000.00;[35] Maine, $100,000.00;[36] New Jersey, $50,000.00, with no limit on contracts for real estate or insurance;[37] Hawaii, $25,000.00;[38] and Minnesota, $50,000.00.[39] West Virginia has no monetary maximum.

Plain language laws apply only to consumer contracts. They do not cover government contracts, business contracts, commercial contracts, and all other contracts to which a consumer is not a party. Plain language statutes universally stipulate that the subject matter of a consumer contract must be used primarily for personal, family or household concerns.[40] Several states further restrict coverage of their plain language laws by explicitly exempting a number of ordinary consumer transactions.[41] Although consumer contracts represent only a narrow range of contract law, the potential impact of plain language legislation is still considerable because of the sheer volume of transactions affected.[42]

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33. *See Legalities and Linguistics*, *supra* note 11, at 321. For a discussion recognizing the difficult nature of these transactions but nevertheless maintaining that plain language rules should apply, *see Are They Working*, *supra* note 16, at 154.

34. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985).

35. CONN. GEN. STAT. ANN. § 42-151 (West Supp. 1984).

36. ME. REV. STAT. ANN. tit. 10, § 1123 (1980).

37. N.J. STAT. ANN. § 56:12-9 (West Supp. 1984-1985).

38. HAWAII REV. STAT. § 487A-1 (Supp. 1983).

39. MINN. STAT. ANN. § 325G.30 (West 1981 & West Supp. 1984).

40. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985); CONN. GEN. STAT. ANN. § 42-151 (West Supp. 1984); ME. REV. STAT. ANN. tit. 10, § 1122 (1980); N.J. STAT. ANN. § 56:12-1 (West Supp. 1984-1985); HAWAII REV. STAT. § 487A-1 (Supp. 1983); MINN. STAT. ANN. § 325G.30 (West 1981 & West Supp. 1984); W. VA. CODE § 46A-6-109 (Supp 1984).

41. Connecticut explicitly exempts mortgages, deeds of real estate, insurance policies, documents relating to securities transactions, and legal descriptions of property. SEE CONN. GEN. STAT. ANN. §§ 42-153, 155 (West Supp. 1984). New Jersey excludes certain securities and commodities transactions; its law does not cover securities transactions with brokers registered with the Securities Exchange Commission or commodities transactions with merchants registered with the Commodities Futures Trading Commission. *See* N.J. STAT. ANN. § 56:12-1 (West Supp. 1984-1985). Hawaii excuses wills, trusts, legal descriptions of real property, and insurance contracts. HAWAII REV. STAT. §§ 487A-1, A-4 (Supp. 1983).

42. New York limits the scope of its law by requiring plain English only in residential leases and consumer contracts for money, property or services. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985). Connecticut covers consumer loans, leases of personal property or services, and leases of residential dwellings. *See* CONN. GEN. STAT. ANN. § 42-151 (West Supp. 1984). Maine's plain language requirements apply only to consumer loans. *See* ME. REV. STAT. ANN. tit. 10, § 1123 (1980). New Jersey's version embraces situations in which consumers lease real or personal property, obtain credit or insurance, borrow money,

C. *Requirements*

In general, the easier it is to satisfy plain language requirements, the less they protect consumers. Conversely, the more difficult it is to comply with such requirements, the more they burden creditors and stimulate opposition.

Plain language laws attempt to clarify consumer contracts by addressing three considerations.[43] One is legibility, consumers' ability to see print on a piece of paper. Another is semantic clarity, the ease with which consumers can understand words in a contract. The third is coherence, the manner in which various parts of a document relate to each other.

One effect of the plain language movement has been to elevate the importance of document design. Elements once thought of as pure aesthetics have taken a consequential place in contract law; the printing of contracts has become too important to leave to printers.[44]

Legibility requirements tend to be objective, and compliance is usually easy to measure. Factors affecting visual appearance of consumer contracts which may be subject to regulation include: page layout, type character (type face), type size, use of capital letters, leading (the space between the lines), line length, margins, color of ink and paper, text arrangement, and headings.[45]

Three of the seven plain language states have adopted legibility requirements. Connecticut has both subjective and objective legibility requirements, and compliance with either set of standards satisfies the statute.[46] Connecticut's subjective legibility provisions call for readable size type, ink which contrasts with the paper, section headings and other subdivisions with boldface captions, and layout and spacing which separate paragraphs, sections, and borders.[47] Connecticut's objective legibility standards require type face of no less than eight points, a three-sixteenths inch space between paragraphs, a one-half inch border around each page, and section captions in twelve-point boldface type.[48] By contrast, New Jersey

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purchase real or personal property, or contract for services. *See* N.J. STAT. ANN. § 56:12-1 (West Supp. 1984-1985. Hawaii covers the same items as New York, with the exception that Hawaii does not require plain English in leases that exceed five years in duration. *See* HAWAII REV. STAT. § 487A-1 (Supp. 1983). Minnesota requires plain language in contracts for services or personal property, transfers or authorizations of a security interest on personal property, and residential leases for a term no longer than three years. *See* MINN. STAT. ANN. 325G.30 (West 1981 & West Supp. 1984). West Virginia's plain language law applies to residential leases and sales of goods or services. *See* W. VA. CODE § 46A-6-109 (Supp. 1984).

43. *See Legalities and Linguistics*, *supra* note 11, at 329.
44. *See Writing Contracts*, *supra* note 9, at 183.
45. *Id.* at 184.
46. *See* CONN. GEN. STAT. ANN. § 42-152 (West Supp. 1984).
47. *Id.*
48. *Id.* Captions of typed contracts should be underlined.

furnishes legibility "guidelines"[49] which call for a table of contents, an alphabetical index for contracts with more than 30,000 words, and ten-point type for all conditions and promises. In addition, all collateral promises and conditions must be as prominent as the main promise.[50] All seven plain language states demand that drafters logically divide consumer contracts and caption them by section.[51]

Unlike legibility standards, semantic clarity and coherence requirements do not readily lend themselves to objective, verifiable rules. As a result, most of the debate over plain language requirements has focused on nonvisual considerations. Two contrary standards have emerged.[52] One is the "clear and coherent" approach. The Sullivan Act of New York, for example, states that consumer contracts must be "written in a clear and coherent manner using words with common and every day meanings."[53] Each state which enacted a plain language statute after New York had ratified the Sullivan Act also adopted the "clear and coherent" standard or a variant thereof.[54]

The "clear and coherent" approach is a subjective, descriptive, verbal standard. It is a concession to the difficulties involved in drafting intricate rules. Instead of mandating specific words and phrases which drafters of consumer contracts must use, the "clear and coherent" approach merely provides guidance. It opts for generality over particularity and flexibility over rigidity.

Nonvisual requirements of a plain language statute can also be based upon objective standards. Such objective standards usually center on one of a number of readability formulas. Rudolf Flesch developed the most famous and widely-used readability formula. The "Flesch Test" determines the comprehensibility of a writing on the basis of word and sentence length.[55] To apply the test, a reader must count the number of syllables, words, and sentences in a document.[56]

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49. The Attorney General and the Commissioner of Insurance must use the guidelines during their review of consumer contracts, a process which will be discussed later in this section. *See infra* note 83 and accompanying text.

50. *See* N.J. STAT. ANN. § 46:12-10 (West Supp. 1984-1985).

51. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985); CONN. GEN. STAT. ANN. § 42-152 (West Supp. 1984); ME. REV. STAT. ANN. tit. 10 [[1124 (1980 & Supp. 1984-1985); N.J. STAT. ANN. § 46:12-10 (West Supp. 1984-1985); HAWAII REV. STAT. § 487A-1 (Supp. 1983); MINN. STAT. ANN. 325G.31 (West 1981); W. VA. CODE § 46A-6-109 (Supp. 1984).

52. *See Legalities and Linguistics*, *supra* note 11, at 215.

53. N.Y. GEN. OBLIG. LAW. § 5-702 (McKinney Supp. 1984-1985).

54. *See* CONN. GEN. STAT. ANN. § 42-152 (West Supp. 1984); ME. REV. STAT. ANN. § 1124 (1980 & Supp. 1984-1985); N.J. STAT. AN.. 56:12-2 (West Supp. 1984-1985); HAWAII REV. STAT. § 487A-7 (Supp. 1983); MINN. STAT. ANN. § 325G.31 (West 1981); W. VA. CODE § 46A-6-109 (Supp. 1984).

55. *See Plain Language Laws*, *supra* note 12, at 523-24.

56. Periodic random samplings of approximately 100 words can be used to determine the readability of longer documents.

He must then determine the average number of syllables per word and the average number of words per sentence. A readability score between zero and one hundred is obtained by applying a mathematical formula[57] to the average word and sentence lengths.[58] The higher the score is, the more readable is the passage.[59] A score of at least 60, which is equivalent to 20 words per sentence and 1 ½ syllables per word, signifies that the document is written in plain English.[60]

So far, Connecticut is the only state to implement a readability formula.[61] Like its visual requirements, Connecticut's nonvisual standards are divided into subjective and objective groups, and compliance with either set of rules satisfies the statute. The objective, nonvisual standards mandate an average word length of fewer than 1.55 syllables, an average sentence length of fewer than 22 words, and an average paragraph length of fewer than 75 words. No sentence in the contract may exceed 50 words, and no paragraph may surpass 150 words. Connecticut's plain language statute also contains elaborate rules governing the counting process.[62]

Plain language laws designed specifically for the insurance industry likewise use readability formulas. In contrast to the dearth of general plain language legislation, nearly half of the states have enacted some type of plain language insurance law,[63] and a majority of these laws implement the Flesch readability formula.[64] In fact, the National Association of Insurance Commissioners drafted a Model Life and Health Insurance Policy Language Simplification Act which requires policies to achieve a minimum Flesch Test score of 40.[65]

Whether a plain language statute utilizes an objective standard, a subjective standard, or both, it may also contain a list of prohibited or encouraged drafting techniques. For example, New Jersey's statute counsels against confusing cross references; lengthy sentences; sentences containing double negatives and exceptions to exceptions; sentences or sections with an illogical or confusing order; words with

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57. The averge sentence length is multiplied by 1.015, and the average word length is multiplied by 84.6. The two products are added, and the sum is subtracted from 206.835.

58. R. FLESCH, HOW TO WRITE PLAIN ENGLISH 20-25 (1979) [hereinafter cited as R. FLESCH].

59. *Id.* at 24-25.

60. *Id.* at 24.

61. *See* CONN. GEN. STAT. ANN. § 42-152 (West Supp. 1984).

62. *Id.* § 42-158.

63. *See Legalities and Linguistics*, *supra* note 11, at 320. Connecticut, Maine, and New Jersey have separate insurance statutes in addition to their plain language laws. *Id.*

64. *See Are They Working*, *supra* note 16, at 156. Typically, insurance statutes provide for a Flesch Test score of not less than 40 but add that if a policy is understandable in the judgment of the insurance commissioner, the score is not determinative, suggesting that legislators have some doubts about the Flesch readability formula.

65. *See Writing Contracts*, *supra* note 9, at 276.

obsolete or unusual meanings; and Old English, Middle English, Latin, and French terms.[66]

D. Remedies

A plain language statute is meaningless without effective remedies for noncompliance.[67] Potential remedies include: statutory damages, attorneys' fees and court costs, class actions, state action, private injunctive relief, contract revision, and small claims court jurisdiction.[68]

Statutory damages are punitive and are awarded to claimants in addition to actual damages. New York,[69] New Jersey,[70] and Hawaii[71] provide for statutory damages of $50.00. Connecticut sanctions statutory damages of $100.00.[72]

Availability of attorneys' fees encourages both consumers and their lawyers to take legal action when faced with possible plain language infringements. For a consumer, the ability to recover attorneys' fees may make it affordable to initiate a law suit. For a lawyer, availability of attorneys' fees may influence his willingness to represent consumers. From a broader perspective, availability of attorneys' fees may determine whether consumers as a class are adequately represented by the legal profession.[73]

Three states authorize recovery of attorneys' fees in plain language lawsuits. Connecticut limits such awards to $100.00.[74] New Jersey permits recovery of attorneys' fees up to $2,500.00 in class actions.[75] Minnesota provides for attorneys' fees if the creditor is unable to prove he acted in good faith and limits recovery to $10,000.00 in class actions.[76]

New York,[77] New Jersey,[78] Hawaii,[79] and Minnesota[80] explicitly permit class actions. Each of these states limits the penalties which courts can impose on creditors to $10,000.00, but none places any ceiling on actual damages recoverable. Connecticut specifies that plain language violations do not subject creditors to class action

66. *See* N.J. STAT. ANN. § 56:12-10 (West Supp. 1984-1985).
67. *See Plain Language Laws*, *supra* note 12, at 524.
68. *Id.* at 524-25.
69. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985).
70. N.J. STAT. ANN. § 56:12-3 (West Supp. 1984-1985).
71. HAWAII REV. STAT. § 487A-1 (Supp. 1983).
72. CONN. GEN. STAT. ANN. § 42-154 (West Supp. 1984).
73. Rodriguez, *Recovery of Attorneys' Fees in Consumer Contract Actions in Connecticut*, 1 U. BRIDGEPORT L. REV. 55 (1980).
74. CONN. GEN. STAT. ANN. § 42-154 (West Supp. 1984).
75. N.J. STAT. ANN. §§ 56:12-3, 12-4 (West Supp. 1984-1985).
76. MINN. STAT. ANN. § 325G.34 (West 1981).
77. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985).
78. N.J. STAT. ANN. § 56:12-4 (West Supp. 1984-1985).
79. HAWAII REV. STAT. § 487A-1 (Supp. 1983).
80. MINN. STAT. ANN. § 325G.34 (West 1981).

liability.[81]

Enforcement of the plain language requirements through state action is another alternative. New York,[82] New Jersey,[83] Hawaii,[84] Maine,[85] and Minnesota[86] provide for some type of enforcement by state officials. New Jersey and Minnesota established review processes through which creditors can submit consumer contracts to the state attorney general or insurance commissioner for approval. If the Attorney General or Insurance Commissioner determines that a contract complies with his state's plain language standards, his certification protects the creditor from liability under his state's plain language law. Each state charges a review fee of $50.00 to creditors using the service.

Maine also provides for a review process. Under its plain language law, creditors can submit consumer loan forms to the Bureau of Consumer Protection for approval. Once the Bureau certifies a document, legal action based on plain language violations is barred. If the Bureau fails to act within forty-five days, the document is deemed certified. The Sullivan Act authorizes New York's Attorney General to seek injunctive relief and administrative costs from violators. In Hawaii, either the Attorney General or the Director of the Office of Consumer Protection may bring an action to restrain or prevent any plain language transgression.

Another consideration with regard to enforcement is the effect that violations of plain language rules will have on the validity of consumer contracts. Plain language proponents argue that an unreadable contract should be void because mutual understanding between the parties is impossible.[87] Plain language laws, however, usually avoid dismantling contractual obligations.[88] Only New Jersey grants private individuals a right to seek injunctions against credi-

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81. CONN. GEN. STAT. ANN. § 42-155 (West Supp. 1984).

82. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985).

83. N.J. STAT. ANN. §§ 56:12-8, -8.2, and -12 (West Supp. 1984-1985). New Jersey permits its Attorney General, Insurance Commissioner, or "any interested person" to seek injunctive relief. *Id.*

84. HAWAII REV. STAT. § 487A-3 (Supp. 1983).

85. ME. REV. STAT. ANN. tit. 10, § 1126 (1980 & Supp. 1984-1985).

86. MINN. STAT. ANN. § 325G.35 (West Supp. 1984).

87. *See Plain Language*, *supra* note 12, at 525. New York, Connecticut, New Jersey, Hawaii, Minnesota and West Virginia stipulate that a violation of plain language requirements does not render a consumer contract void or voidable and that a violation is no defense for a consumer in an action brought by a creditor. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985); CONN. GEN. STAT. ANN. § 42-157 (West Supp. 1984); N.J. STAT. ANN. § 56:12-11 (West Supp. 1984-1985); HAWAII REV. STAT. § 487A-2 (Supp. 1980); MINN. STAT. ANN. § 325G.34 (West 1981); W. VA. CODE § 46A-6-109 (Supp. 1984). New Jersey and Minnesota authorize courts to reform or limit provisions in consumer contracts under certain circumstances in order to avoid unfair results. Both states caution that consumers suing for plain language violations are not entitled to withhold performance of a contract. *See* N.J. § 56:12-4.1; MINN. § 325G.33.

88. *See Legalities and Linguistics*, *supra* note 11, at 325-26.

tors.[89] No state specifically addresses the question of small claims court jurisdiction.

E. Defenses, Exempted Language, and Prohibitions

Plain language laws may enumerate defenses, exempted language, and prohibitions. Possible defenses include showing that: the consumer was represented by counsel when he entered the contract; the consumer prepared the contract;[90] the consumer understood the contract when he entered into it; the creditor made a good faith attempt at compliance with the plain language law; and all parties fully performed their contractual obligations.[91] Language exempted from plain language requirements may include words, phrases, or forms which are required by state or federal law, rule, regulation, or governmental body.[92] Technical terms and terms of art may also be excluded.[93] The only potential prohibition which does not address language usage or visual appearance is a provision which invalidates any waiver of plain language requirements.[94]

II. Pennsylvania's Plain Language Consumer Contract Act

Representative Allen Kukovich (Democrat, Westmoreland County) introduced the Plain Language Consumer Contract Act in

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89. N.J. STAT. ANN. § 56:12-12 (West Supp. 1984-1985).

90. Only Connecticut recognizes the defenses that the consumer was represented by counsel or that the consumer prepared the contract. *See* CONN. GEN. STAT. ANN. § 42-155 (West Supp. 1984).

91. *See Legalities and Linguistics*, *supra* note 11, at 325. New York, Connecticut, New Jersey, Hawaii and Minnesota authorize good faith defenses. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 1984-1985); CONN. GEN. STAT. ANN. § 42-155 (West Supp. 1984); N.J. STAT. ANN. § 56:12-5 (West Supp. 1984-1985); HAWAII REV. STAT. § 487A-1 (Supp. 1983); MINN. STAT. ANN. § 325G.34 (West 1981). New York, Connecticut, New Jersey, and Hawaii provide that full performance of a consumer contract is a defense to plain language claims. *See* N.Y. § 5-702; CONN. § 42-155; N.J. § 56:12-5; HAWAII § 487A-1. New Jersey's decision to shield creditors from liability once a contract is fully performed may put consumers in a difficult position because New Jersey's plain language law states that initiation of suit does not entitle consumers to withhold performance. N.J. § 36:12-5.

No state allows the defense that a consumer understood the contract when he entered into it, probably because of difficulties inherent in proving such a charge.

92. All seven states that enacted plain language laws have exempted any words, phrases, and forms required by law, regulation, rule or governmental body. *See* N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1984-1985); CONN. GEN. STAT. ANN. § 42-156 (West Supp. 1984); ME. REV. STAT. ANN. tit. 10, § 1123 (1980); N.J. STAT. ANN. § 56:12-6 (West Supp. 1984-1985); HAWAII REV. STAT. § 487A-1 (Supp. 1983); MINN. STAT. ANN. § 325G.32 (West 1981); W. VA. CODE § 46A-6-109 (Supp. 1984).

93. New Jersey and Minnesota provide that technical terms and terms of art do not violate plain language requirements. *See* N.J. STAT. ANN. 56:12-2 (West Supp. 1984-1985); MINN. STAT. ANN. § 325G.32 (West 1981). Minnesota adds a proviso that exempted technical terms and terms of art must be customarily used in connection with the services or property which are the subject of the consumer contract. MINN. § 325G.32.

94. Connecticut, New Jersey, Minnesota and West Virginia hold that any waiver of a consumer's plain language rights is void. *See* CONN. GEN. STAT. ANN. § 42-157(West Supp. 1984); N.J. STAT. ANN. § 56:12-11 (West Supp. 1984-1985); MINN. STAT. ANN. § 325G.36 (West 1981); W. VA. CODE § 46A-6-109 (Supp. 1984).

the Pennsylvania House of Representatives on March 21, 1983.[95] Originally the proposal was broad in scope, contained strict requirements, and provided stiff penalties. The bill soon caused an uproar among bankers, retailers, realtors, and insurers, and a surge of lobbying ensued.[96] Among the groups taking part in the debate were the Pennsylvania Bankers' Association, the Pennsylvania Retailers' Association, the Pennsylvania Association of Realtors, the National Federation of Independent Business, and the Pennsylvania Citizens' Consumer Council.[97] The Pennsylvania Bar Association took no stand on the plain language issue.[98]

Opponents of Representative Kukovich's proposal succeeded in altering its terms. In fact, the Plain Language Consumer Contract Act underwent a total of over eighty revisions and compromises.[99] The House of Representatives formally considered the proposal on three separate occasions[100] and ultimately passed a version which differed substantially from the original.[101] The Senate made additional amendments[102] before the bill was buried in the Senate Appropriations Committee.

A. The Kukovich Proposal

As originally introduced, the Plain Language Consumer Contract Act covered any situation in which a consumer borrows money; buys, leases, or rents personal property, real property, or services; or obtains credit or insurance. It included a standard provision of plain language legislation requiring that goods or services which are the subject of the consumer contract be used for personal, family, or household purposes. The bill excluded property descriptions in deeds and mortgages; real estate certificates of title and title insurance contracts; contracts to buy securities; and contracts between "people who are not acting in the usual course of business."[103]

The Kukovich proposal set forth strict rules governing legibility, semantic clarity, and coherence. With regard to visual standards, it required type at least ten-point in size; line length, column width, margins and spacing between lines and paragraphs which "make the

95. H.R. 538 (1983) (Printer's No. 605).

96. The bill's sponsor claims to have rarely witnessed such intense lobbying in response to other proposals submitted to the Pennsylvania Legislature. *See* Kukovich interview, *supra* note 6.

97. *Id.*

98. Telephone interview with spokesperson, Harrisburg Office of the Pennsylvania Bar Association (Sept. 5, 1984).

99. The Pittsburgh Press, June 3, 1984, at B8 (Statements of Assistant to Representative Kukovich).

100. *See* COMMONWEALTH OF PA. LEGIS. J. 525 (Mar. 27, 1984).

101. H.R. 538 (1983) (Printer's No. 2740).

102. *Id.* (Printer's No. 3157).

103. *Id.* (Printer's No. 605).

contract easy to read;" sections captioned with twelve-point type or underlined; and ink which "contrasts sharply" with the paper.[104]

The bill also contained nonvisual requirements, including a subjective rule that all consumer contracts be "easy to read and understand."[105] Beyond this general exhortation, the bill incorporated nonvisual standards based on an objective readability formula. This readability test mandated that each consumer contract as a whole contain sentences averaging no more than 20 words in length and words averaging no more than 1.5 syllables.[106] The bill made no reference to length of paragraphs.

The readability formula was in reality a mutant of the Flesch Test. Like the Flesch Test, the Kukovich proposal attempted to determine readability according to sentence and word length, but the proposal avoided the complicated mathematical formula of the Flesch Test; instead, it imposed an average sentence length of 20 words and an average word length of 1.5 syllables. This simplified formula equates to a Flesch Test score of 60, the level recommended for plain English by Rudolf Flesch.[107] The original version of the Plain Language Consumer Contract Act, then, called on drafters to write consumer contracts with readability levels slightly more difficult than *Seventeen*, *Reader's Digest*, and *Sports Illustrated*; on a par with the *New York Daily News*; and slightly easier than *Time* and *Newsweek*.[108]

The Kukovich proposal also supplied a detailed list of specific plain language rules. Under these rules, consumer contracts could not contain technical terms, Latin words, "archaic English," words specifically defined in the contract,[109] or common words used in a particular legal sense.[110] The rules compelled drafters to employ second person pronouns when referring to consumers and first person pronouns when referring to creditors, lessors, insurers, or sellers. They prohibited double negatives; exceptions to exceptions; and references to other provisions of the contract, outside documents, or laws, unless the references clearly describe their substance.

The Kukovich proposal further required that each consumer contract include a statement in ten-point boldface type within a box on its front page. This statement would begin with the caption

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104. *Id.*

105. *Id.*

106. The Kukovich proposal did not permit the use of 100-word samples but required the reader to count every syllable, word, and sentence in a consumer contract.

107. *See* R. FLESCH, *supra* note 58, at 24.

108. *Id.* at 26.

109. The apparent logic behind this rule is that if a word requires definition, it is too complicated to use in consumer contracts.

110. *See* H.R. 538 (1981) (Printer's No. 605).

"PLEASE READ THIS" printed in 12-point boldface type.[111] The caption would be followed by highlights of: limitations on claims, lawsuits, and types of relief or warranties available; waivers or limitations of rights; exclusions; and property which would not be affected if the consumer failed to meet his obligations under the contract. Failure to highlight any of these terms would render the nonhighlighted provisions void.

The remedies section of the Act provided that a creditor, lessor, insurer, or seller who failed to comply with the bill's plain language standards could be liable for actual damages; statutory damages of $500.00;[112] court costs and "reasonable" attorneys' fees; and any equitable or other relief which a court "thinks necessary and proper."[113]

The bill enabled the Attorney General and district attorneys throughout Pennsylvania to enforce its plain language requirements and authorized them to seek equitable and legal relief, orders to have consumers' money returned, and statutory damages. In addition, the bill allowed the Attorney General and district attorneys to accept written assurance of compliance from any person who may have already committed or who may be about to commit a violation of plain language standards. This written assurance would be filed with a Court of Common Pleas or with the Commonwealth Court. Once filed, the assurance would have the same force and effect as a court order.[114]

The Kukovich proposal did not apply to situations in which all parties had fully performed under a consumer contract or in which the consumer had drafted the agreement. A good faith defense was available to creditors, sellers, lessors, and insurers if they could show that their unintentional violation resulted from clerical error. This provision is unique; none of the five plain language states which allow good faith defenses for violations of plain language requirements limits those defenses to clerical errors.[115]

The Kukovich proposal also diverged significantly from existing plain language laws by making all sections of consumer contracts which violated its readability standards[116] void[117] against consumers.

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111. See *id.*

112. If the total original amount of a consumer contract was less than $500.00, statutory damages would equal that total amount. *Id.* Note that the statutory damages provision in the Kukovich proposal was $400.00 more than the Connecticut permits, and Connecticut's $100.00 award is the largest among those states that enacted plain language laws and provided for statutory damages. *See* CONN. GEN. STAT. ANN. § 42-154 (West Supp. 1984).

113. *See* H.R. 538 (1983) (Printer's No. 605).

114. *Id.*

115. *Id.*

116. Tests for average sentence and syllable length were not to be used in determining whether a consumer contract is void.

117. The proposal emphasized that contractual provisions which violated plain language

Had the original version of the Plain Language Consumer Contract Act become law, consumers would have been able to escape contractual obligations when those obligations, as they appeared in the contract, failed to comply with plain language criteria.

The original version also provided certain protections for potential defendants. The bill limited liability for plain language violations by requiring every lawsuit to be initiated within four years from the date on which the contract was signed. The bill further exempted language required by any federal or state statute, regulation, or rule. It declared, however, that all waivers of consumers' plain language rights are invalid.

Opponents of the bill frequently pointed out that the Kukovich proposal contained a number of sentences exceeding twenty words, a host of polysyllabic terms, and an abundance of vague expressions.[118] Even Representative Kukovich acknowledged that several linguistic changes in his proposal were needed "to bring it into conformity with itself."[119]

B. The House Version

In the Spring of 1984, the House of Representatives finally passed the Plain Language Consumer Contract Act. As passed, the bill was very different from the original version.

The delays and revisions which the bill experienced in the House were politically motivated. For example, the Kukovich proposal was not assigned to the House Consumer Protection Committee, which probably would have arranged quick public hearings on the bill; instead, it went to the House Business and Commerce Committee, whose chairman, Representative L. Eugene "Snuffy" Smith (Republican, Jefferson County), has a probusiness reputation among consumer advocates.[120]

Almost immediately, the House narrowed the scope of the act. The revised bill no longer expressly covered insurance contracts; yet, the House version did not specifically exclude them either. Although the House had expressly exempted insurance contracts during its initial consideration of the proposal, the House in its final version deleted the insurance exemption, perhaps to ensure death of the Plain Language Consumer Contract Act in the Senate[121] while garnering

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requirements would be "void, not just voidable." *See* H.R. 538 (1983).

118. Telephone interview with Fred Brown, lobbyist for the Pennsylvania Realtors' Association (Sept. 7, 1984) [hereinafter cited as Brown interview].

119. Philadelphia Inquirer, Nov. 26, 1981, at 29 [hereinafter cited as Philadelphia Inquirer].

120. *Id.*

121. *Muddying Contracts*, Pittsburgh Post-Gazette, Apr. 13, 1984, at 6 (Editorial) [hereinafter cited as *Muddying Contracts*].

consumer votes for legislators who supported the move.[122]

By the time it passed the House, the bill included a monetary maximum of $20,000.00. The House version also changed the types of transactions covered by exempting deeds, mortgages, mortgage bonds and notes, real estate certificates of title, and title insurance contracts. In contrast, the Kukovich proposal had excluded only property descriptions contained in some of those documents. The House made visual guidelines less specific by requiring only that type size, line length, column width, margins, and spacing "make the contract easy to read;" that sections be appropriately captioned; and that ink contrast with the paper.[123]

The greatest change occurred in the area of nonvisual requirements. The House kept the subjective "easy to read and understand" rule, but it completely abandoned the objective readability test.[124] It attempted to compensate for the lack of objective standards by issuing a series of "guidelines."[125] These guidelines called for use of short words, sentences, and paragraphs; use of active verb forms; avoidance of technical terms, other than "commonly understood legal terms" such as "mortgage" and "warranty;" avoidance of Latin and "foreign" words and terms with "obsolete meanings;" defining complex terms in "commonly understood" words; referring to parties through personal pronouns, shortened names, or the labels "seller" and "buyer" or "lender" and "borrower;" avoidance of sentences with more than one condition, unless numbered; and avoidance of cross references, unless they state the subject to which they refer.[126]

The House also made significant alterations in the Act's enforcement mechanisms. The House lowered statutory damages available to individuals to $100.00. It added a provision for statutory damages in class actions but limited those damages to $10,000.00. Finally, it eliminated awards of attorneys' fees.

Furthermore, the House revised restrictions on liability. It removed the clerical error limitation from the good faith defense and substituted a requirement that creditors, sellers, or lessors prove by a preponderance of evidence that their unintended violations occurred despite use of reasonable procedures designed to avoid plain language violations. The House reduced the time limit for initiating lawsuits from four years to two years from the date on which the parties signed the contract. Under the House's revision, a violation of the Act no longer voided a consumer contract or any part of it, and a

122. *See* Kukovich interview, *supra* note 6.
123. *See* H.R. 538 (1983) (Printer's No. 2740).
124. *Id.*
125. *Id.*
126. *Id.*

violation could not constitute a defense in an action to enforce a contract. Lastly, the House exempted language recommended by any federal or state agency, including the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government National Mortgage Association.

The House added two new defenses. A creditor could defend an action on the basis that the consumer had received advice from counsel before signing the contract. Alternatively, the creditor could assert that the Attorney General had certified the contract as complying with the Act, for the House set up a procedure under which creditors, sellers, lessors, or persons who prepare and sell consumer contract forms could submit consumer contracts to the Attorney General for review. Under this procedure, the Bureau of Consumer Protection of the Attorney General's Office, using the plain language "guidelines" presented in the Act would have 120 days to examine each document submitted. The Bureau could certify a document, decline to certify it, or decline to issue an opinion if the contract was the subject of pending plain language litigation or was not covered by the Act. Failure to submit a contract for review would not constitute lack of good faith or raise a presumption of plain language violations. Although certification would protect creditors against liability under the Act, it would not mean that certified contracts satisfied other legal requirements. The Act authorized the Attorney General to charge a "reasonable fee" for the review.[127]

C. *Senate Amendments*

In general, the Pennsylvania Senate has been unsympathetic to the Plain Language Consumer Contract Act. The Senate made few changes to the House version, but it let the bill sit undisturbed in committee while the legislative session waned.

The few changes which the Senate did make were important. Apparently unsure of the status of insurance contracts, the Senate expressly excluded them. It further exempted contracts which are both used by financial institutions and subject to examination by state or federal authorities. Finally, the Senate prohibited class actions and limited the Attorney General's review fee to $100.00.

D. *Overview of Pennsylvania's Plain Language Consumer Contract Act*

The Plain Language Consumer Contract Act started out as an inclusive, specific, and forceful measure. Its history from that point

127. *Id.* The House version contained no clues indicating what a "reasonable" attorney's fee might be.

is one of constant bickering and sabotage. By the time of its death, most of its original provisions had been emasculated. Representative Kukovich admitted that the original bill "was probably too new."[128] He added, "Most legislators didn't want to go that far."[129]

The impact of the original proposal rippled beyond the Pennsylvania Legislature. The original bill covered many creditors. Its strict requirements and stiff penalties hardened a large number of these creditors and their representatives against the plain language movement. The Pennsylvania Bankers' Association, for example, felt that the original bill was over-inclusive and potentially disasterous for business and economic sectors.[130] Bankers resented the fact that the financial community in Pennsylvania played no role in framing the bill.[131]

The lesson from Pennsylvania's first experiment with plain language legislation is two-fold. First, it may now be harder than ever to get a plain language law passed in Pennsylvania because the very suggestion of such legislation evokes scorn in the minds of many people who associate plain language attempts with the Kukovich proposal. Second, legislators cannot draft any future plain language proposal solely from the perspective of consumers but must realistically attempt to deal with concerns of bankers, retailers, realtors, and insurers. In short, Pennsylvania needs a plain language law that satisfies both consumers and creditors.

III. Should Pennsylvania Enact a Plain Language Law?

Any discussion of arguments for and against plain language laws should recognize that support in the abstract for plain language is easy to find.[132] Nonetheless, difficulties inevitably arise whenever a concrete plain language proposal is presented.

A. Constitutional Concerns

Opponents of plain language laws challenge the desirability of such legislation on grounds ranging from constitutionality to practicality.[133] The major constitutional arguments focus upon the first and fourteenth amendments. In a biting attack on plain language legislation, William C. Prather, General Counsel of the United

128. The Pittsburgh Press, June 3, 1984, at B8 (Statements of Assistant to Representative Kukovich).

129. *Id.*

130. Telephone interview with Louise Rynd, member of the legal staff of the Pennsylvania Bankers' Association (Sept. 4, 1984) [hereinafter cited as Rynd interview].

131. The New York Legislature consulted the New York financial community before passing the Sullivan Act. *Id.*

132. *See Plain Language Laws*, *supra* note 12, at 527.

133. *See Legalities and Linguistics*, *supra* note 11, at 340.

States League of Savings, stressed constitutional problems with these laws. He set forth an objection under the first amendment by remarking, "To abridge the freedom of selecting which words to use to communicate is to abridge the freedom of speech, which is to abridge the constitutional rights of any person to speak and to communicate the thoughts of his choice in any forum. This, incidentally, includes the freedom to contract."[134] He added that legislatures should not attempt to simplify communication but should leave that decision to the free choice of individuals. Prather concluded, "If two parties, or one of the parties to an understanding wants to communicate and couch that communication or that contract of agreement in the most complex convoluted terms, I believe that as Americans they have that constitutional right."[135]

But Prather's analysis overlooks numerous state and federal statutes that already dictate the manner in which parties to consumer contracts must communicate.[136] The Federal Truth in Lending Act,[137] which requires "a meaningful disclosure of the terms of leases of personal property for personal, family or household purposes,"[138] is the most commonly cited example.

Adding weight to the freedom of speech objection is the criticism that plain language laws generally are not well tailored to their objectives. Both existing plain language statutes and the various versions of Pennsylvania's Plain Language Consumer Contract Act are over-inclusive.[139] Although plain language laws are aimed at abuses that occur when creditors have superior bargaining positions over consumers, the laws typically encompass other situations as well. They impinge on consumer contracts of very small operations, one-time contracts between individuals not engaged in an ongoing business of selling or leasing real or personal property, and contracts relating to luxury items.[140] The Kukovich proposal attempted to address this problem by excluding "contracts between people who are not acting in the usual course of business," but the House deleted that exemption.[141]

Opponents of plain language have also mounted a void-for-vagueness argument under the fourteenth amendment. Plain lan-

134. Prather, *In Defense of the People's Use of Three Syllable Words*, 39 ALA. LAW. 394, 399 (1978) [hereinafter cited as Prather]. Prather is perhaps the most outspoken and recognized critic of plain language on the national level.

135. *Id.*

136. For a compilation of federal laws affecting communication between parties to consumer contracts, see Hathaway, *An Overview of the Plain English Movement for Languages*, 62 MICH. B.J. 945, 947 (1983).

137. 15 U.S.C. § 1601 (1968).

138. *Id.* § 1601.

139. *See* Rynd interview, *supra* note 130.

140. *Id.*

141. *See* H.R. 538 (1983) (Printer's Nos. 605 and 2740).

guage laws are susceptible to such an attack because they tend to use subjective criteria. The broad dictates of plain language laws are subject to diverse and conflicting interpretations. Pennsylvania's Plain Language Consumer Contract Act serves as an example. At various stages throughout its development, it employed the standards "easy to read and understand," "archaic English," "commonly understood" legal terms, and "foreign" words with "obsolete meanings."[142] Interpretation of such phrases is necessarily relative. As Prather pointed out, "What is plain, every day, non-technical, and mainly, what is clear talk is in the eye of the beholder. It is for the sayer and for the listener to say."[143]

Stiff penalties imposed for violations of plain language laws have made the vagueness of their terms even more objectionable. In Pennsylvania creditors were particularly worried about potential class action liability because it would engender increased legal exposure and encourage attorneys to promote consumers' plain language lawsuits.[144] Through the combination of vague standards, severe penalties, and class action liability, an inadvertent plain language violation on a commonly used form contract could force even the most financially-sound enterprise out of business.[145]

Ironically, plain language laws can also hurt consumers by reducing the availability of credit. The increased risks which plain language laws impose on creditors will invariably result in increased costs to consumers.[146] No matter what type plain language law a state enacts, all costs, ranging from increased risks for creditors to redrafting and reprinting expenses, will ultimately be passed to consumers.[147]

B. Pragmatic Considerations

The leading practical objection to plain language laws is that prohibition of technical terms and foreign derivatives would destroy the precision and certainty which those phrases have acquired over time. Prather emphasized this point by exclaiming, "Two hundred years of word-and-term definition by the courts can go down the drain. For with new, substituted language it would take a deluge of court litigation and another two hundred years of *stare decisis* to get back to where we were."[148] Default, security, fee simple, landlord

142. *Id.* (Printer's Nos. 605, 1806, 2674, 2740, and 3157).
143. *See* Prather, *supra* note 134 at 397.
144. *See* Rynd interview, *supra* note 130.
145. *Id.*
146. *Id.*
147. Telephone interview with Louis Biacchi, lobbyist for the Pennsylvania Retailers' Association (Sept. 11, 1984) [hereinafter cited as Biacchi interview].
148. *See* Prather, *supra* note 134, at 396.

and tenant, lessee and lessor, month-to-month tenancy, negotiable instrument, and principal and surety are just a minute sampling[149] of common legal language which might have to be replaced.

Critics of plain language legislation also contend that some technical concepts are just too complicated to convert into simple expressions.[150] Proponents of the plain language movement refute this charge by de-emphasizing the importance of "legalese." Rudolf Flesch boldly challenges the sacrosanctity of legal language. He commented, "Any kind of legalese can be translated into plain English . . . . The superiority of 'clear, unambiguous' legal language is sheer myth and . . . virtually all traditional legalisms are unnecessary."[151]

An apparently viable middle-ground is to retain technical terms in consumer contracts but to briefly explain them in simple English.[152] Critics counter that this approach actually makes consumer contracts more difficult to understand. A paradox of plain language laws is that they require additional verbiage to replace or explain technical phrases. Clusters of new words are needed to supplant terms like "collateral," "pledge," "finance charges," and "security."[153] Indeed, simple English can become complicated English.[154]

Jim Biery, lobbyist for the Pennsylvania Bankers' Association and outspoken critic of the Plain Language Consumer Contract Act, articulated a number of objections to Pennsylvania's proposed plain language legislation. First, he maintained that a plain language law would invite frivolous lawsuits by consumers. Second, he complained that such a law would be expensive and contrary to the current deregulatory climate. Finally, he asserted that plain language legislation is generally unsupported by the public.[155]

In response to the first criticism, proponents of plain language laws dismiss the threat of frivolous lawsuits and counter that fewer disputes arise when contracts are straightforward. States that have

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149. For examples of common words with uncommon meanings; old French, Middle English, Latin, and Anglo-Norman words; terms of art; argot; formal words; expressions with flexible meanings; and mannerisms, which are frequently used (and abused) by lawyers, see D. MELLINKOFF, THE LANGUAGE OF THE LAW 11-29 (1963).

150. *See Writing Contracts*, *supra* note 9, at 26.

151. *See* R. FLESCH, *supra* note 58, at 114.

152. When Citibank revised its loan note, for example, it provided the following definition of default:

> *Default.* I'll be in default:
>
> 1. If I don't pay an installment on time; or
> 2. If any other creditor tries by legal process to take any money of mine in your possession.

Writing Contracts, *supra* note 9, at 29.

153. *See* Prather, *supra* note 134, at 396.

154. *Id.*

155. *See* Pittsburgh Press, *supra* note 8 (statements of Jim Biery).

enacted plain language laws have experienced very little litigation.[156] For example, Gene Pasnantier, consumer affairs attorney with the New Jersey Attorney General's Office, noted that only two cases and one district attorney's action arose since New Jersey passed its plain language law. One of these cases involved a questionable mortgage-loan contract; the other concerned a lease agreement with a 197-word sentence. The district attorney's action was directed against a tree spraying business whose contract included a clause for continuous service until the consumer furnished a written request for discontinuance.[157]

In support of the second criticism, opponents of plain language laws argue that one measure of the cost of such legislation for Pennsylvania would be the amount banks would have to spend to expand their legal staffs to ensure that their documents comply.[158] Proponents of plain language legislation answer that these costs would be minimal because creditors in other states have already implemented prototype contracts.[159]

Plain language proponents also reverse the argument that plain language laws are inappropriate in a deregulatory era. They claim that plain language laws actually permit financial institutions to offer more services to customers in a competitive environment. They add that plain language laws promote direct communication between creditors and borrowers and thus diminish the need for governmental oversight.[160]

Responding to the alleged nonexistent demand for a plain language law in Pennsylvania and to the question: "Where are the resounding cries from the public that we pass a plain language statute?"[161], Lou Meyers, President of the Pennsylvania Citizens' Consumer Council, answers that Pennsylvanians did not voice their support for the Plain Language Consumer Contract Act because, they were, to a large extent, uninformed about the bill. Myers believes that Pennsylvania's consumers would not have been apathetic to the Act had it been brought to their attention. He designated future passage of a plain language law for Pennsylvania as one of his organization's top priorities.[162] An additional reason for consumers' silence might have been their inability to generate the cohesive co-

156. Hayes, *Coping With the Plain English Law: A Lawyer's Bookshelf*, 107 N.J.L.J. 115 (1981). This article provides a worthwhile summary of literature on the plain language debate across the United States.

157. *See Muddying Contracts*, *supra* note 121.

158. *See* Pittsburgh Press, *supra* note 8.

159. *See Muddying Contracts*, *supra* note 121.

160. *Id.*

161. *See* Pittsburgh Press, *supra* note 8.

162. Telephone interview with Lou Meyers, President of the Pennsylvania Citizens' Consumer Council (Sept. 25, 1984).

ordination, which characterized the bill's opponents.[163] Finally, editorials in the *Philadelphia Inquirer*,[164] the *Pittsburgh Post-Gazette*,[165] and the *Harrisburg Patriot-News*[166] supporting the Plain Language Consumer Contract Act might stimulate public interest in a future proposal.

An argument advanced by bankers is that plain language legislation is particularly inappropriate for Pennsylvania because this state is a large financial center.[167] This contention appears questionable when one considers that New York, New Jersey, and Connecticut have plain language laws. Bankers also maintain that a plain language law would cause Pennsylvania's financial forms to diverge from the norm across the country and that this diversity might discourage out-of-state parties from dealing with Pennsylvania's financial institutions, making Pennsylvania a "financial island."[168] It is difficult, however, to conceive of Pennsylvania as a financial island. Three plain language states—New York, New Jersey, and West Virginia—border Pennsylvania, and a fourth—Connecticut—is separated from Pennsylvania by New York. The potential for conflicting standards between plain language and nonplain language states and among plain language states themselves has caused some commentators to suggest a uniform plain language statute at the federal level.[169]

Pennsylvania retailers contend that there is less need for plain language legislation in Pennsylvania because bordering states have plain language laws. They reason that standard form contracts of multi-state retailers already must comply with plain language requirements of neighboring states and that smaller retailers buy their contracts from printing houses which likewise must adhere to existing plain language laws.[170] Retailers also claim that current consumer contract statutes, such as the Truth in Lending Act,[171] further decrease the need for a plain language law in Pennsylvania.[172] These current laws, however, are aimed at disclosure, not at clear communication. They address the problem of what information must be brought to consumers' attention, not whether a contract as a whole must be written in plain English.

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163. *See* Kukovich interview, *supra* note 6.
164. *Pass the Plain-Language Bill*, The Philadelphia Inquirer, Apr. 20, 1984, at 6.
165. *See Muddying Contracts*, *supra* note 121.
166. Brutto, *Claptrap? Incontrovertibly Affirmative*, The Sunday Patriot-News, Apr. 29, 1984, at 194.
167. *See* Rynd interview, *supra* note 130.
168. *Id.*
169. *See Are They Working*, *supra* note 16, at 148.
170. *See* Biacchi interview, *supra* note 147.
171. 15 U.S.C. § 1601 (1968).
172. *See* Biacchi interview, *supra* note 147.

The existence of plain language guidelines[173] and a regulation[174] governing the insurance industry in Pennsylvania has led insurers to argue that they should not be covered by any plain language statute. The Insurance Department issued the guidelines to assist insurers in preparing and revising their forms. The Department expressed its intention to use the guidelines in reviewing policy forms for approval. These guidelines require short sentences, simple words, proper definitions, and simple formats. They include suggestions on how to achieve these goals, and they recommend implementation of the Flesch Test.[175]

The regulation applies only to private passenger automobile insurance policies. It mandates short sentences, simple words, a limited number of definitions, an index, an introduction, separation of coverages, strict legibility requirements, section headings, incorporation of conditions into applicable sections and a minimum Flesch Test score of 40.[176] In view of this regulation, insurers maintain that inclusion under a plain language statute would expose them to a double standard of plain language requirements and would subject their contracts to review by more than one state department.[177]

The potential for contradictory standards is not as dire as insurers claim because the plain language regulation applies only to private passenger automobile policies. In addition, the regulation's requirements are minimal. A document with a readability score of 40 requires a collegiate reading level and compares in difficulty to the *New York Times* and the *Harvard Business Review*.[178] Furthermore, the Pennsylvania Legislature could solve the problem of multi-department review by giving the Insurance Department complete control over enforcement of plain language laws within the insurance industry. The New Jersey Legislature chose this approach when it modified its plain language law.[179]

Plain language advocates charge that insurance policies in Pennsylvania are still not written in plain English because both insurers and the Insurance Department ignore the Department's guidelines.[180] In general, commentators have concluded that plain language insurance laws throughout the country have been ineffective because insurers "are going through the motions but not making any real progress."[181] When insurance contracts and mortgages were

173. 3 PA. ADMIN. BULL. 2937 (1973).
174. 31 PA. ADMIN. CODE §§ 64.1-.14 (Shepard's 1975).
175. 3 PA. ADMIN. BULL. 2937 (1973).
176. 31 PA. ADMIN. CODE §§ 61.1-.14 (Shepard's 1975).
177. *See* Kukovich interview, *supra* note 6.
178. *See* R. FLESCH, *supra* note 58, at 26.
179. *See* N.J. STAT. ANN. § 56:12-2 (West Supp. 1984-1985).
180. Telephone interview with Atty. Jeff Friedman (Aug. 30, 1984).
181. *See Are They Working*, *supra* note 16, at 155.

eliminated from Pennsylvania's Plain Language Consumer Contract Act,[182] many observers concluded that the bill's effectiveness was sharply reduced because those documents represent transactions in which consumers can suffer significant harm.[183]

Plain language critics have observed that legislators have not set good examples in the plain language arena. The Sullivan Act, for instance, sought clear language and forbade technical terms in consumer contracts, but the Act employed phrases such as "meaningful sequence," "party to a written agreement governed by the provisions thereof," "actual damages sustained," "court of competent jurisdiction," and "render such agreement void or voidable."[184] Such inconsistencies between legislative aims and practices have stirred plain language critics to call upon legislators to practice what they preach.[185]

C. *Results of Plain Language Attempts*

The best argument for enacting a plain language consumer contract law in Pennsylvania is the experience of private businesses which voluntarily implemented plain language standards[186] and of states which embraced such standards through statutes. In the private realm, companies which simplified their consumer contracts have had much success.[187] In 1974, Sentry Insurance, then a relatively small automobile insurance company, hired the polling firm of Lou Harris & Associates and the Wharton School of Economics to conduct a national opinion poll on policyholders' views concerning automobile and homeowners policies. The consultants discovered that consumers wanted their insurance policies written in plain English. Sentry responded with its "Plain Talk" automobile policy which it marketed and advertised across the country.[188]

Citibank's efforts to simplify its consumer loan forms proved advantageous for everyone involved. After conducting a survey of 101 individuals who had obtained a loan other than a mortgage from a commercial bank, the Batten, Barton, Durstine and Osborn Research Department found that the respondents favored Citibank's new loan note over its old version because the former was comprehensible and precise. The respondents claimed that the old note was difficult to read and understand, too lengthy, contained small print,

182. *See* H.R. 538 (1983) (Printer's No. 3157).
183. *See* Brown interview, *supra* note 118.
184. *See Prather*, *supra* note 134, at 397.
185. *Id.* at 399.
186. For a list of private businesses, including banks and insurance companies, which voluntarily adopted plain language standards, see Hathaway, *supra* note 136, at 946.
187. *See, e.g., Writing Contracts*, *supra* note 9, at 232.
188. *Id.* at 46.

and had a confusing format. Over half had no criticism of the new loan note, while all expressed a strong dislike of the old version.[189] The study further disclosed that the respondents felt positively toward a bank which used simplified forms and that they preferred to do business with this type of bank. The lesson is obvious — consumers prefer plain English documents. This discovery explains why some businesses are voluntarily beginning to offer contracts written in plain English.[190]

Plain language laws have produced other worthwhile results. Proponents cite three bases for their conclusion that plain language laws have been effective.[191] First, the dire consequences predicted by opponents never materialized. There has been no flood of litigation or overwhelming hardship for creditors. Second, there has been no mass effort to amend plain language laws, and proponents interpret this as a sign that the laws are workable and useful. Finally, large businesses and producers of legal forms have made progress in revising and simplifying their documents. Overall, plain language legislation has focused attention on the need for reform. It has provided a necessary impetus to spur legal and business communities into action and has compelled them to use ingenuity and common sense to achieve goals envisioned by the plain language movement.[192]

Plain language laws, however, have not been a panacea.[193] Six months after the Sullivan Act took effect in New York, the marketing research firm of Audits and Surveys conducted a study on the Act's impact by interviewing over 200 retailers, commercial and savings banks, savings and loan associations, credit unions, finance companies, and real estate firms. The survey found that the respondents were not ignoring the law. Seventy-five percent had revised or were revising their documents to comply with it. Banks and savings institutions headed the list, with over 90% of them implementing simpli-

189. *Id.* at 29.

190. *Id.* at 29-30. Carl Felsenfled, Vice-President of Citibank and a leading authority in the plain language movement, described Citibank's change of loan forms as "without blemish." *See* Pittsburgh Press, *supra* note 8. He commented, "We felt it was a desirable thing to do for our customers. It was a basic sense of fair play that when people enter into something, they should know about it." *Id.* Another advantage was that some of Citibank's own employees read the forms for the first time. *See id.*

In Pennsylvania, Equibank of Pittsburgh has been attempting to simplify some of its consumer contracts and application forms. Mike Kelly of Equibank's Media Relations Department explained, "It is basically easier, not only for the customer to understand, but for us to explain." *Id.*

191. *See Are They Working*, *supra* note 16, at 151.

192. *Id.* at 151-152.

193. After the Sullivan Act had been in effect for one year, the Executive Director of the New York State Consumer Protection Board disclosed, "Leases, despite being revised since the law took effect, are still couched in 'legalese' incomprehensible to most tenants." *See* Block, *Plain Language Laws: Promise v. Performance*, 62 MICH. B.J. 950, 951 (1983). She claimed that lawyers were "still attached to their 'hereunders' and 'thereofs' and seemingly endless sentences." *Id.*

fied forms. On the other end of the list, only 36% of the real estate firms had made any changes.[194]

Although the respondents were attempting to comply, the Sullivan Act was not achieving all of its intended goals. Seven out of ten respondents said they would not have made any plain language revisions without the law. This suggests that the main motivation was compliance, not meaningful consumer communication. The respondents' reflected their insouciance in the manner in which they reformed their documents. Although they sought less technical language and shorter sentences and paragraphs, they virtually ignored elimination of superfluous material, organization of information, visual elements, and use of active voice and personal pronouns. Many respondents simply rephrased old forms into simpler language and added captions. Thirty-two percent admitted that they were not pleased with the results.[195]

The lesson is that voluntary plain language attempts made by private businesses are more effective than statutorily-motivated efforts. Creditors who choose to change their contracts are genuinely trying to communicate with consumers, and their forms are naturally more readable and creative.[196] Any plain language endeavor in Pennsylvania must consider not only goals of plain language laws but also experiences of other states and objections of bankers, retailers, realtors, and insurers. Whether Pennsylvania should enact a plain language law depends on the type of plain language legislation proposed.

IV. Suggestions for a Plain Language Law in Pennsylvania

Critics of the plain language movement do not claim that the movement's goal is insignificant or that consumer contracts are without communication problems. Plain language in the abstract is frequently applauded. Opponents and even some proponents of the movement, however, maintain that legislation is an inappropriate vehicle to spur plain language reform. Inspired by Citibank's success in voluntarily adopting a plain language policy, Carl Felsenfeld favors voluntary plain language experiments. He echoes the concern of many when he warns that plain language laws ultimately may reduce freedom and creativity.[197]

Yet, results from other states demonstrate that although the effectiveness of plain language laws is limited, they do encourage plain language in consumer contracts. Representative Kukovich remarked,

194. *See Writing Contracts*, *supra* note 9, at 234.
195. *Id.* at 234-35.
196. *See Writing Contracts*, *supra* note 9, at 235.
197. *Id.* at 232-33.

"Having any bill on the books is going to help the matter."[198] Felsenfeld admitted, "In general, creditors, particularly the larger ones, and form printers will attempt to comply with the law. However grudging the efforts may be, contracts will improve."[199] Thus, exploring an alternative between existing plain language laws and the various versions of Pennsylvania's Plain Language Consumer Contract Act on the one hand and no plain language law on the other appears justified.

A. Subjective Standards Are Imperative for Non-Visual Elements

Any plain language law in Pennsylvania should rely on subjective instead of objective requirements. Subjective standards permit flexibility in drafting legal documents, and comprehensive lists of specific "guidelines" can supplement subjective standards to prevent vagueness. Widespread use of the "reasonable man" standard in tort law demonstrates that subjective standards are workable in the law.[200]

Pennsylvania's experience with the Plain Language Consumer Contract Act exposed difficulties inherent in imposing objective standards while attempting to retain the flexibility necessary for drafting legal documents. The Kukovich proposal violated its own objective standards in some places.[201] After several redrafts, Representative Kukovich could finally state, "We proved that it could be done,"[202] but he also proved that it can be a strenuous task.

In addition, objective readability tests provide only a limited amount of guidance. The problem is that readability formulas, aside from being awkward and tiresome, examine only word and sentence length.[203] They completely ignore content, grammar, cohesiveness, interest level, and familiarity with the subject matter. In short, readability formulas fail to measure comprehension which is the goal of the plain language movement.[204] For example, "Write down your first initial" and "Write down your gross income" have approximately the same readability score, but familiarity with more complex concepts is required to understand the second phrase.[205] "Write down your pen" has the highest readability score of all three phrases, indicating that readability formulas cannot distinguish be-

198. *See* Pittsburgh Press, *supra* note 8.
199. *See Writing Contracts*, *supra* note 9, at 238.
200. *Id.* at 217.
201. *See supra* note 118 and text accompanying notes 95-131.
202. *See* Philadelphia Inquirer, *supra* note 119.
203. *See Are They Working*, *supra* note 16, at 157.
204. *See Writing Contracts*, *supra* note 9, at 226-27.
205. *Id.* at 226.

tween sense and nonsense.[206] The information furnished by readability formulas is very restricted, and the cost of applying readability formulas in terms of time and effort often exceeds the value of any increased comprehensibility.

B. Limit Penalties to Injunctive Relief

One way to forge an acceptable alternative may be to eliminate many penalties often included in plain language laws. Severity of penalties for noncompliance is a crucial factor in getting creditors and legislators to accept a plain language prposal. Legislators have been sensitized to the fact that for a large creditor utilizing standard forms, potential liability for even minor violations could be overwhelming.[207]

Penalties typically included in plain language laws could be eliminated without weakening the effectiveness of these laws. Statutory damages and attorneys' fees, for example, seem extreme. Punitive damages, the equivalent of statutory damages, are normally awarded only to victims of outrageous acts. The American legal system has traditionally looked with disfavor upon awards of attorneys' fees, regardless of the financial positions of the plaintiff and defendant.

Limiting enforcement provisions to injunctive relief[208] would achieve the aims of plain language legislation. A statute could expressly delegate to Pennsylvania's Attorney General and district attorneys power to seek injunctive relief to prevent use or enforcement of contracts with plain language violations until those violations are corrected. Such a provision would encourage creditors and printing houses to review their standardized contracts. The Attorney General and district attorneys could also seek injunctive relief against individually tailored contracts containing gross violations, such as the 197-word sentence and continuing service clause in the New Jersey examples.[209]

Keeping penalties mild by limiting enforcement provisions to injunctive relief would accomplish the goals of a plain language law without making it a scythe to creditors. Legislators should not design plain language laws to punish offenders; rather, they should frame

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206. *Id.* at 227.

207. *Id.* at 228.

208. Extending a right to seek injunctive relief not only to public officials but also to private citizens would not unfairly jeopardize creditors. Courts will not issue injunctions to consumers who present flimsy claims. In addition, the Attorney General and district attorneys may not possess the same motivation to act as consumers who face creditors enforcing ambiguous contracts.

209. *See supra* text accompanying notes 122-189.

them as regulatory acts to stimulate contract reform.[210]

Because plain language standards are necessarily vague and subjective, limiting penalties to injunctive relief would be appropriate. Apprehension of violating 'subjective' standards would be more modest if injunctions were the only penalty.[211] Fears of bankers, realtors, retailers, landlords, and other standardized-contract users of costly penalties for breaking amorphous rules cannot be ignored;[212] creditors' fears of excessive penalties for violations of indefinite standards appeared to be the major cause of opposition to Pennsylvania's Plain Language Consumer Contract Act. Enacting a plain language statute which provides only for injunctive relief would evade many political problems encountered by the Plain Language Consumer Contract Act. By limiting penalties to nonmonetary relief, the Pennsylvania Legislature could increase the scope of its plain language law and implement more comprehensive plain English guidelines.

Legislators should recognize that circumstances limit the guidelines which they can present in plain language laws. An exhaustive list of plain language guidelines, if such is possible, could fill volumes. To overcome many practical limitations on formulating guidelines, it might be practical for the Pennsylvania Legislature to delegate power to issue supplemental plain language guidelines to the Bureau of Consumer Protection of the Attorney General's Office.

Under the proposal to limit penalties for violations of plain language laws to injunctive relief, the value of a review process headed by the Bureau of Consumer Protection would not be diminished. Such a review process would still provide a method for creditors to obtain assurance that their contracts comply with plain language requirements. In fact, creditors could also use the Bureau's plain language certification for marketing purposes; they could advertise certified contracts as an extra advantage offered to their customers.

Finally, the Pennsylvania Legislature could authorize the Bureau of Consumer Protection to disseminate information about plain language contracts to both creditors and consumers. This information would make it easier for creditors to revise their contracts and would encourage good faith efforts exceeding minimum statutory requirements. The information would also make consumers aware of the benefits of plain language contracts and their rights under plain language laws. Once consumers become familiar with the plain language issue, they too can use it to their advantage in the marketplace.

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210. *See Legalities and Linguistics*, *supra* note 11, at 329.
211. *See Writing Contracts*, *supra* note 9, at 238.
212. *See Legalities and Linguistics*, *supra* note 11, at 333.

V. Conclusion

The upcoming session of the Pennsylvania Legislature should enact a plain language law. The statute should be based on subjective standards, and penalties should be limited to injunctive relief. Consumer advocates may argue that such a bill would be too weak. This type of bill would, however, provide sufficient incentive to creditors to comply with the statute's plain language standards. A stronger measure would be too punitive considering the inherent difficulties in complying with plain language laws. Instead of encouraging reform, a more forceful law would shackle contracting parties to rigid, impractical, and unenforceable linguisitc rules. In light of Pennsylvania's experience with the Plain Language Consumer Contract Act, it is doubtful that a stronger measure would stand any chance of passage. Limited penalties would also allow the Pennsylvania Legislature to give its plain language law a broad scope of coverage and detailed plain language guidelines.

A plain language law based on subjective standards and limited to injunctive relief for enforcement would satisfy all parties. It would protect consumers from plain language violations in standardized contracts and from gross violations in individual contracts and would shield creditors from excessive liability. Such a law would be both feasible and politically palatable. It is a rational alternative which would begin to bridge the gap between the language of lawyers and the language of laymen. This proposal calls for a mild measure because language usage can only be changed over many years, not instantaneously. The Pennsylvania Legislature should enact a law which seeks plain language through evolution, not revolution.

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is", said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be the master — that's all."

Lewis Carroll, *Through the Looking Glass*

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