

A HISTORY OF THE NEW JERSEY PLAIN LANGUAGE STATUTE

*by Mark F. Hughes, Jr.**

Cleansed of words without reason, much of the language of the law need not be peculiar at all. And better for it.¹

Introduction

Until very recently, attempts at putting clear prose into legal documents had been sporadic. Contracts resplendent with qualifying phrases were laymen's nightmares. With the advent of the consumer movement, legislation forced simpler prose into consumer contracts.

This process and the status of "plain language" are the subject of this article. As is often the case with developments in the law, agitation for change generally came from outsiders, such as newspapers, rather than from insiders, such as attorneys.

The New Jersey plain language law was created through the influence of a similar plain language movement in New York, and through the efforts of three notable New Jerseyans: former *Star-Ledger* columnist Franklin Gregory, New Jersey Assemblyman Christopher Jackman, and Jersey City attorney Francis X. Hayes. All three of these men were the instrumental movers in the evolution of New Jersey's plain language law.

Early Plain Language Efforts

A. New York

The origins of the plain language movement began in New York. In the mid-1970s, Citibank of New York simplified its consumer loan forms. This gave credence to the argument that simplifi-

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¹ D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 454 (1963).

ation was possible.² During this time the Citibank forms came to the attention of Assemblyman Peter M. Sullivan, who introduced a bill in the New York Assembly that required the use of plain language in consumer contracts. This law was effective on November 1, 1978,³ and "became the model for a groundswell of legislative concern and action in the area of consumer contract and insurance policy readability."⁴

B. *New Jersey*

The plain language movement in New Jersey began under the guidance and matured through the perseverance of Francis X. Hayes, Esq. After observing the experience in neighboring New York, Hayes, who has often been referred to as the "father" of plain language,⁵ decided to champion the plain language movement in New Jersey. With frequent and emphatic letters to newspaper editors, he was able to enlist *Star-Ledger* columnist Franklin Gregory in his campaign. More importantly, Hayes interested Christopher Jackman, then Speaker of the New Jersey Assembly, in the plain language movement.

On September 12, 1977, the Speaker introduced A. 3465.⁶ The bill was described as "[a]n Act to require the use of readily understandable language and meaningful sequence in agreement forms in certain instances."⁷ The measure applied to

[e]very standard form agreement entered into by a consumer for the sale or lease of real property to be occupied for residential purposes, or wherein the money, property or service which is the subject of the agreement is primarily for personal, family or household purposes, or which is subject to the disclosure provisions of the Federal Consumer Credit Protection Act and the regulation thereunder (U.S.C.A. Title 15, Section 1601), as that Act and the regulation thereunder may be amended. . . .⁸

² *Legislation Requiring Plain Language*, STATE LEGISLATIVE REPORT, July 15, 1979, at 1.

³ N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1983-84).

⁴ *Legislation Requiring Plain Language*, STATE LEGISLATIVE REPORT, July 15, 1979, at 2.

⁵ Schwaneberg, *Plain Language Bill May Expire*, The Newark Star-Ledger, Jan. 22, 1980, at 19.

⁶ A. 3465, 197th N.J. Leg., 2d Sess. (1977).

⁷ *Id.*

⁸ *Id.* § 1.

The bill required that these agreements be written in "understandable language," which was defined as "language which can be understood at least by a person of average intelligence."⁹ The bill also mandated that these agreements be "presented in such a way to insure that within each aforementioned section each provision shall have a logical and easily comprehensible relationship to the provisions which precede or follow it."¹⁰

Under the bill, any creditor, seller, or landlord failing to comply with the Act was liable for any actual damages, plus \$1,500. If the action was successful, a plaintiff could also recover the cost of the action, and a court-determined attorney's fee.¹¹ "Punitive" damages in class actions were limited to recoveries of \$10,000. These penalties were not enforceable if the alleged violator had attempted to comply in good faith with the provisions of the Act, or if the parties had fully performed their obligations under the contract.¹² Contracts "involving amounts in excess of \$50,000.00" were excluded from the Act's coverage.¹³ The law was to take effect one year after enactment, but unfortunately, the bill died in committee.¹⁴

The bill did, however, catch the media's attention, and newspapers began to discuss the plain language concept. The newspapers reported both support for and opposition to the movement in New Jersey and in New York. A *New York Times* article discussed the potential amendment of New York's plain language law in order to make the law less sweeping in nature.¹⁵ The article noted that the major criticisms of the law were that it was overly broad, ambiguous, and generally vague.¹⁶ The conclusion of the article stated that some insurance companies and other businesses had decided to use their own simplified consumer contracts.¹⁷

In response to the *New York Times* article, Wilbur H. Friedman, Chairman of the Special Committee on Consumer Agreements of the New York County Lawyer's Association, wrote to the *Times* to express his views on the major problems with plain language. He observed that

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* § 2.

¹² *Id.*

¹³ *Id.* § 3.

¹⁴ 64 N.J. LEGIS. INDEX No. 24, at A79 (March 6, 1978).

¹⁵ Blumenthal, *Plain-Language Law Facing Amendatory Relegislative Proceeding*, N.Y. Times, Feb. 4, 1978, at 21, col. 1.

¹⁶ *Id.*

¹⁷ *Id.*

the New York law did not exempt agreements requiring language dictated by federal or state law, or rulings or regulations of federal or state agencies. The law, he said, because of the lack of express guidelines, left creditors, sellers, and landlords at the mercy of judges' subjective determinations. Friedman further contended that, because of its vagueness, the law was likely to produce an avalanche of litigation, straining the already overburdened New York courts.¹⁸ The New Jersey State Bar Association echoed Friedman's concerns.¹⁹

Almost immediately thereafter, New Jersey newspapers began to print articles advocating plain language. One article stressed the need to "demystify the law," and wryly suggested that it might be in the legal profession's "self-interest" to maintain the "mystery of the laws."²⁰ The *Star-Ledger* continued to report on the New Jersey movement, and a May 18th, 1978 article noted the introduction of a second bill, A. 536.²¹

A. 536 - The Next Step

Undaunted by the failure of A. 3465, Assemblyman Jackman quickly introduced an identical bill, A. 536, on January 30, 1978.²² A. 536, after undergoing considerable revision, was passed by the Assembly as a substitute measure on September 18, 1978.²³ This bill was more precise than the broadly worded original. It required language consistent with a twelfth grade reading level. Agreements had to be understandable to those who were not professionals or special-

¹⁸ Friedman, *Plain-English Law: In the Matter of Mr. Brown's Mortgage*, N.Y. Times, Feb. 17, 1978, at 27, col. 4.

¹⁹ N.J. State Bar Ass'n, News Report (March 13, 1978). Emanuel A. Honig, Chairman of the Plain Language Committee, stated that

[t]he State Bar Association agrees that a consumer should know what a contract means before signing it. . . . However, the public must also be protected from contracts which appear to use simple language but actually endanger consumer rights by using imprecise words. . . .

Ironically, we are concerned because the bill is so poorly written. . . . We fear that [the bill] will fail to accomplish the goal of consumer protection and may force a great increase in the number of lawsuits over contract interpretation.

Id.

²⁰ Cohen, *Letters of the Law: Jackman, Bar at Odds Over Clarity*, The Newark Star-Ledger, March 17, 1978, at 19, col. 1.

²¹ *Plain English Measure Is Rewritten for Clarity*, The Newark Star-Ledger, May 18, 1978, at 15.

²² A. 536, 198th N.J. Leg., 1st Sess. (1978).

²³ 66 N.J. LEGIS. INDEX No. 21, at A15 (March 3, 1980).

ists in the particular field. However, "necessary" technical specifications for a product or service were permitted. To comply with the mandate of clear composition in all future documents, the bill specified that sections of the relevant documents were to be appropriately divided and captioned. Additionally, text was to be in ten point type and sentences of unnecessary length or complexity were to be excluded. Finally, unnecessarily confusing cross references, definitions contradicting generally understood meanings, double negatives, exceptions to exceptions, or a confusing sequence of sentences and sections were not permitted.²⁴

The Act was to apply only to standard form agreements in which the subject of the transaction was primarily for personal, family, or household purposes.²⁵ The Act's coverage in these matters was limited to real estate transactions, rental agreements for residences on premises which included more than three rental units, and transactions for money, personal property, or a product or service, including insurance, involving less than \$50,000.²⁶

The Act did not apply to language defined, required, or permitted by federal or state law or regulation. Also excluded from the Act's coverage was language which was drafted as a result of bona fide negotiations between the parties to the agreement, or for sole use in one agreement.²⁷ That Act did not apply to agreements made by creditors, sellers, or lessors in businesses grossing less than \$100,000 annually, or in nonbusiness uses.²⁸ The final exemption applied to borrowers, purchasers, or tenants represented by attorneys, where the attorney's signed statement appeared on the agreement.²⁹

Violators were liable for actual damages, punitive damages limited to \$500, the costs of the action, and reasonable attorney's fees.³⁰ The rights and remedies under other laws were to continue, and punitive damages in class actions were limited to \$50,000.³¹ Punitive damages would not be enforced against any person who had at-

²⁴ Assembly Commerce, Industry and Professions Comm. Substitute for A. 536, 198th N.J. Leg., 1st Sess. §§ 2-3 (Adopted June 22, 1978) [hereinafter cited as *Assembly Comm. Substitute*].

²⁵ *Id.* § 4.

²⁶ *Id.* § 4(a)-(c).

²⁷ *Id.* § 5.

²⁸ *Id.* § 6.

²⁹ *Id.*

³⁰ *Id.* § 7.

³¹ *Id.* § 8.

tempted in good faith to comply with the Act, or where the text of the agreement was rated at a minimum *Flesch* reading score of 50.³² Performance of the contract was also a defense against punitive damages. Violation of the Act did not render any agreement void or voidable, nor did it constitute a defense in any other action or proceeding for enforcement or breach of agreement.³³ Finally, no provision for renewal of an agreement was rendered invalid because compliance with the Act changed the form of the renewal agreement.³⁴

Continuing Controversy

The clamor over plain language continued after the introduction of A. 536. The Governor's office received numerous letters from insurers and bankers lobbying against the bill.³⁵ CBS editorialized in favor of Jackman's proposal on November 21, 1978.³⁶ Its comments were addressed by Joseph H. Rodriguez, then President of the New Jersey State Bar Association. He advised viewers of the protective benefits derived from technical language, and warned of the danger in eliminating such language.³⁷ Joel L. Shain, writing for the Banking Law Section of the New Jersey Bar Association, conveyed to the Legislative Counsel of the New Jersey Bar Association that the Banking Law Section maintained a favorable opinion of the plain lan-

³² *Id.* § 9; see R. FLESCHE, A NEW WAY TO BETTER ENGLISH 163-74 (1958). Flesch developed a formula for evaluating the readability of written materials. He determined that plain English has been achieved when a piece of reading has a minimum score of 60 on his readability chart. "The chart has a scale from 0 to 100, zero means positively impenetrable and 100 means even Johnny can read it." The score itself is based on the number of words per sentence, the number of syllables per word, and the number of prefixes, suffixes, and dependent clauses in the sentence. Cleveland, *Why Consumers Can't Read*, COLUMBIA, at 33-34 (Winter 1979).

³³ *Assembly Comm. Substitute, supra* note 24, § 10.

³⁴ *Id.*

³⁵ Letter from Stephen T. Whelan to Daniel J. O'Hern, Counsel to the Governor (Nov. 20, 1979) (expressing concern of client insurance companies over A. 536); Letter from William L. Lincoln, American Council of Life Insurance, to Daniel O'Hern, Counsel to the Governor (Nov. 20, 1979) (recommending that life insurance policies covered by the Model Life and Health Insurance Policy Language Simplification Act, A. 3008, be excluded from the coverage of A. 536); Letter from Wilbur H. Friedman to Arthur Silverman, Office of the Counsel to the Governor (Sept. 4, 1979) (recommending changes to A. 536 in the areas of damages, approval times, and defenses).

³⁶ Kohler (Director of Editorials, WCBS-TV New York), *Plain Language*, Nov. 20, 1978, at 6:55 p.m.

³⁷ Rodriguez (President of N.J. Bar Ass'n), *Plain Language R-1*, Reply to WCBS-TV New York Editorial, Dec. 20, 1978, at 6:55 p.m.

guage bill. The letter requested that the Bar Association refrain from opposing the passage of this legislation.³⁸ This letter revealed a growing rift within the Bar Association concerning the plain language issue.³⁹

The State Bar Association's Special Committee on Plain Language advocated passage of A. 536, provided it was amended in certain respects. The Committee wanted model forms to be used so that excessive litigation over interpretation of the bill could be avoided. The Committee also requested that another committee be appointed to draft the standard forms.⁴⁰

After numerous revisions, the Senate adopted a substitute for A. 536 on May 24, 1979.⁴¹ This substitute differed substantially from the Assembly's substitute in several respects. Under the Senate substitute, the Act would not apply to consumer contracts involving amounts of \$50,000 or more, but would apply to real estate or insurance contracts of any amount.⁴² It reduced violators' liability for punitive damages from \$500 to \$50 in individual actions, and from \$50,000 to \$10,000 in class actions.⁴³ The substitute bill also permitted the Commissioner of Banking to render an opinion to any bank-

³⁸ Letter from Joel L. Shain (Banking Law Section of the New Jersey Bar Ass'n) to Richard H. Steen (Legislative Counsel of the New Jersey Bar Ass'n) (Feb. 7, 1979). (The letter referred to a resolution that had been adopted by the Banking Section on Jan. 4, 1979. The resolution requested that the State Bar Association not take any position in opposition to the passage of legislation by the State of New Jersey, either encouraging or mandating the use of plain language in consumer contracts.)

³⁹ *Id.* The letter further stated that

[w]e are extremely concerned that any efforts by the Association to oppose the passage of plain language legislation will damage its credibility as the organization of professionals engaged in the processes of justice, but may also fail to serve the best interests of many of our clients.

Id.

⁴⁰ SPECIAL COMM. ON PLAIN LANGUAGE, N.J. STATE BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON PLAIN LANGUAGE IN CERTAIN LEGAL DOCUMENTS (May 9, 1979). The report candidly stated that

[a] substantial majority of the members of the Committee feel that the proposed legislation is extremely complex and is fraught with many potential difficulties which justify delay in consideration of the legislation, if not total rejection of legislation of this character.

Id.

⁴¹ Senate Labor, Industry and Professions Comm. Substitute for Assembly Comm. Substitute for A. 536, 198th N.J. Leg., 2d Sess. (Adopted May 24, 1979) [hereinafter cited as *Senate Comm. Substitute*].

⁴² *Id.* § 9.

⁴³ *Id.* §§ 3, 4.

ing institution with a federal charter.⁴⁴ The bill further provided that there would be no liability for an individual if the parties had performed under the contract, or if the creditor, seller, or lessor had attempted in good faith to comply with the Act.⁴⁵ In contrast, the Assembly Committee substitute for A. 536 only excluded punitive damages under these circumstances, rather than complete liability.⁴⁶

The Senate bill also excluded liability where the contract had been drafted in conformance "with a rule, regulation, or opinion of a State official" who had been authorized to issue approvals under the Act.⁴⁷ Another absolute defense existed where the contract could be understood by a person with an eighth grade reading level. In such cases, the *Flesch Readability Test* and other similar tests were permitted to be used in judging a contract's conformity with the terms of the Act.⁴⁸

The state regulator was required to process a contract within a reasonable period of time, or he could refuse to render an opinion in writing, stating the reasons for the refusal. The failure of a party to submit a contract for approval was not evidence of a violation of the Act.⁴⁹

Hayes quickly expressed his displeasure with the bill, and contended that it contained unnecessary legal jargon.⁵⁰ Despite Hayes' objections, the amended bill was finally approved by the Legislature on November 19, 1979,⁵¹ and was sent to the Governor's office for his signature.

⁴⁴ *Id.* § 8.

⁴⁵ *Id.* § 5.

⁴⁶ *Assembly Comm. Substitute, supra* note 24, § 9.

⁴⁷ *Senate Comm. Substitute, supra* note 41, § 6.

⁴⁸ *Id.* § 11.

⁴⁹ *Id.* § 8.

⁵⁰ Schwaneberg, *Plain Language Bill Amended for Clarity*, The Newark Star-Ledger, June 26, 1979, at 23. As an example of the confusing legal jargon used in the bill, Mr. Hayes explained that, as rewritten, the bill applied to "personal lines insurance coverage," a term the bill was aimed at eliminating. Mr. Hayes claimed the definition could be used in court as a basis for a claim that the bill did not include life and health insurance, because the only reference to "personal lines insurance" in state regulations defines it as including automobile and homeowners' policies. ("Personal lines insurance" was later deleted by the Senate Amendments to *Senate Comm. Substitute, supra* note 41).

⁵¹ 66 N.J. LEGIS. INDEX No. 21, at A15 (March 31, 1980).

Insurance Industry Opposition

The initial and strongest opposition to the plain language movement came from the insurance industry. Insurers had an immense dread of Jackman's vague proposal. They alleged that the newly interpreted legal meaning of key phrases, simplified by this Act, portended their financial ruin. To minimize the danger, insurers began to compose their own bill for the Assembly.

A. A. 1474

By June 8, 1978, the insurance industry had completed and introduced their bill.⁵² It was introduced by Assemblyman Bornheimer and was touted as "[a]n act concerning minimum standards in the form, content and sale of health insurance."⁵³ It offered easier and more objective standards than did A. 536, and mercifully provided a longer time for compliance.⁵⁴

A. 1474 passed the Assembly on October 16, 1978,⁵⁵ the Senate on January 22, 1979,⁵⁶ and was signed into law on April 15, 1979.⁵⁷ The law provides that the Commissioner of Insurance shall issue regulations as he deems necessary or desirable in order to establish minimum standards for full and fair disclosure for the form, content, and sale of individual health insurance.⁵⁸ Of the six legislative purposes to be served by the minimum standards, only two address plain language concerns.⁵⁹

B. A. 3008

A more comprehensive insurance bill, A. 3008, was introduced by Assemblyman Burns on January 11, 1979.⁶⁰ After it passed the

⁵² A. 1474, 198th N.J. Leg., 1st Sess. (1978).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 66 N.J. LEGIS. INDEX No. 21, at A41 (March 3, 1980).

⁵⁶ *Id.*

⁵⁷ Act of April 15, 1979, ch. 78, 1979 N.J. Sess. Law Serv. 141 (West) (codified at N.J. STAT. ANN. § 17B:26-45 (West 1983)).

⁵⁸ *Id.*

⁵⁹ *Id.* The two standards addressed to plain language are: "(1) reasonable standardization and simplification of language, terms and coverage to facilitate understanding and comparisons; (2) elimination of provisions which may be misleading or unreasonably confusing in connection with either the purchase of such insurance or the settlement of claims. . . ." *Id.*

⁶⁰ A. 3008, 198th N.J. Leg., 2d Sess. (1979).

Legislature on June 14, 1979,⁶¹ Governor Byrne signed it into law on August 6, 1979.⁶²

The purpose of this Act is to "establish minimum standards for language used in policies, contracts and certificates of life insurance, health insurance, annuity, credit life insurance and credit health insurance, delivered or issued for delivery in this State, to facilitate ease of reading by insureds."⁶³ The Act requires all insurance companies to use ten point type and a table of contents for lengthy documents.⁶⁴ It also requires all documents to be written in language that could earn a 40 on the *Flesch* reading ease test.⁶⁵ The Commissioner of Insurance is put in charge of reviewing the forms, and insurers are given five years in which to comply.⁶⁶

While this law is certainly a step in the right direction, it has several drawbacks. First, the Commissioner of Insurance can permit complicated terms, and can extend revision deadlines indefinitely.⁶⁷ Second, Assemblyman Jackman and associate Francis X. Hayes had pushed for a score of 50 or 55 on the *Flesch* test, rather than this Act's *Flesch* score of 40.⁶⁸ Finally, the Act asserts that "[n]o other law of this state [which sets] language simplification standards shall apply to any policy form."⁶⁹ The loopholes are quite substantial.

Byrne's Stance on A. 536 and Plain Language

The Legislature's optimism that Governor Byrne would sign A. 536 was misplaced. The Governor initially took no action on the bill. Then, on January 1, 1980, he released a statement that he would file A. 536 in the State Library.⁷⁰ This was, in effect, a pocket veto of the

⁶¹ 66 N.J. LEGIS. INDEX No. 21, at A53 (March 3, 1980).

⁶² Life and Health Insurance Policy Language Simplification Act, ch. 167, 1979 N.J. Sess. Law Serv. 414 (West) (codified at N.J. STAT. ANN. §§ 17B:17-17 to -25 (West 1983)).

⁶³ N.J. STAT. ANN. § 17B:17-18 (West 1983).

⁶⁴ *Id.* § 17B:17-21.

⁶⁵ *Id.*

⁶⁶ *Id.* § 17B:17-25.

⁶⁷ *Id.*

⁶⁸ For comparison, the Harvard Law Review has a Flesch Score of 43, the New York Review of Books' score is 35, a standard auto insurance policy score is 10, and the Internal Revenue Code scores a minus 6. Cleveland, *Why Consumers Can't Read*, COLUMBIA, at 33-34 (Winter 1979).

⁶⁹ N.J. STAT. ANN. § 17B:17-19 (West 1983).

⁷⁰ Governor's Message to General Assembly on Senate Comm. Substitute for Assembly Comm. Substitute for A. 536, 198th N.J. Leg., 1st Sess. (filed Feb. 29, 1980).

bill. In his filing message, he suggested that A. 536 not apply to mortgages, real estate deeds, or insurance policies. Documents relating to securities transactions were also to be exempted. He argued that since a lawyer would translate such contracts for his client anyway, there was no need for A. 536.⁷¹ Of course, the clear intent of the bill was to enable consumers to understand contracts *without* counsel. Byrne also argued that the bill conflicted with A. 3008 as it pertained to insurance policies.

The Governor suggested that damages for obscure language be limited to those actually suffered by the consumer, and that punitive damages for individuals be raised to \$100. He also wanted the bill amended so that consumer contracts in excess of \$50,000 would be exempted from the Act's coverage.⁷²

The Governor preferred that the defense of performance of the contract be omitted. In its place, three new defenses were suggested. The first defense was that the consumer understood the contract when he signed it. The second defense was that the consumer was to supply the contract, and the third defense was that counsel for the consumer had examined the document before the endorsement.⁷³

The *Star-Ledger* quickly alerted the public to Byrne's pocket veto, and to Jackman's refusal to adopt the Governor's amendments in a future version of the bill.⁷⁴ The risk, as the headline read, was that "the plain language bill might expire."⁷⁵ The fear that the bill would expire materialized when it remained unsigned by Byrne on the February 29th deadline.

Passage

A new version of the plain language bill soon emerged. A. 1860⁷⁶ was passed by the Assembly on June 23, 1980⁷⁷ and by the Senate on June 26, 1980.⁷⁸

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Schwaneberg, *Plain Language Bill May Expire*, The Newark Star-Ledger, Jan. 22, 1980, at 19. Mr. Hayes' reaction to the amended version was that "[i]f it were half a loaf, fine. . . . But we can't take a crumb."

⁷⁵ *Id.*

⁷⁶ A. 1860, 199th N.J. Leg., 1st Sess. (1980).

⁷⁷ 68 N.J. LEGIS. INDEX No. 19, at A47 (March 5, 1982).

⁷⁸ *Id.*

Byrne conditionally vetoed the bill on September 22, 1980.⁷⁹ He asked for two more years for insurers to comply with the bill, and he also wanted sellers to be given additional defenses where the consumer supplied the contract.⁸⁰

The Assembly concurred with Byrne's recommendations, passing the bill a second time and sending it on to the Senate which gave a 34-0 approval on October 9, 1980.⁸¹ The Governor signed the bill on October 16, 1980.⁸²

Liability is precluded under the Act where:

both parties to the contract have performed their obligations under the contract, the creditor, seller, insurer or lessor attempts in good faith to comply with this act in preparing the consumer contract, the contract is in conformity with a rule, regulation, or the opinion or interpretation of the Attorney General or the Commissioner of Insurance, . . . or the consumer supplied the contract or the portion of the contract to which the consumer objects.⁸³

The Act excluded insurance policies covered by the "Life and Health Insurance Policy Language Simplification Act"⁸⁴ from its coverage.⁸⁵ Guidelines for determining whether a consumer contract has

⁷⁹ Weissman, *Plain Language Signed by Byrne*, The Newark Star-Ledger, Oct. 17, 1980, at 26.

⁸⁰ *Id.*

⁸¹ 67 N.J. LEGIS. INDEX No. 25, at A47 (Dec. 11, 1980).

⁸² Act of Oct. 16, 1980, ch. 125, 1980 N.J. Sess. Law Serv. 491 (West) (codified as amended at N.J. STAT. ANN. §§ 56:12-1 to -18 (West Supp. 1983-84)).

⁸³ N.J. STAT. ANN. § 56:12-5 (West Supp. 1983-84).

⁸⁴ *Id.* §§ 17B:17-17 to -25 (West 1983).

⁸⁵ *Id.* § 56:12-1 (West Supp. 1983-84):

As used in this act: "Consumer contract" means a written agreement in which an individual:

- a) Leases or licenses real or personal property;
- b) Obtains credit;
- c) Obtains insurance coverage, except insurance coverage contained in policies subject to the "Life and Health Insurance Policy Language Simplification Act";
- d) Borrows money;
- e) Purchases real or personal property;
- f) Contracts for services including professional services, for cash or on credit and the money, property or services are obtained for personal, family or household purposes. "Consumer contract" includes writings required to complete the consumer transaction. "Consumer contract" does not include a written agreement involving a transaction in securities with a broker-dealer registered with the Securities and Exchange Commission, or a transaction in commodities with a futures commission merchant registered with the Commodities Futures Trading Commission.

been written in a simple, clear, understandable, and readable manner are provided within the Act.⁸⁶ Additionally, the use of specific language which is required, permitted, or approved by a law, regulation, or rule of a state or federal agency does not violate the Act.⁸⁷ Finally, the *Flesch* readability score test was not included within the Act.⁸⁸

Amendment

Congress chose to rewrite its Truth in Lending Act⁸⁹ at the same time that New Jersey's plain language law was enacted.⁹⁰ Arguably, New Jersey's Plain Language Act now conflicted with the standards

Id. The exclusion of consumer contracts in securities transactions was added in 1982. Act of Jan. 11, 1982, ch. 464, 1981 N.J. Sess. Law Serv. 1745 (West); Act of Dec. 8, 1982, ch. 195, 1982 N.J. Sess. Law Serv. 847 (West).

⁸⁶ N.J. STAT. ANN. § 56:12-10 (West Supp. 1983-84):

To insure that a consumer contract shall be simple, clear, understandable and easily readable, the following are examples of guidelines that a court or the Attorney General or the Commissioner of Insurance in regard to contracts of insurance provided for in subsection c. of section 1 of this act (C. 56:12-1c), may consider in determining whether a consumer contract as a whole complies with this act:

- (1) Cross references that are confusing;
- (2) Sentences that are of greater length than necessary;
- (3) Sentences that contain double negatives and exceptions to exceptions;
- (4) Sentences and sections that are in a confusing or illogical order;
- (5) The use of words with obsolete meanings or words that differ in their legal meaning from their common ordinary meaning;
- (6) Frequent use of Old English and Middle English words and Latin and French phrases.

The following are examples of guidelines that a court, the Attorney General or the Commissioner of Insurance in regard to contracts of insurance . . . may consider in determining whether the consumer contract as a whole complies with this act:

- (1) Sections shall be logically divided and captioned;
- (2) A table of contents or alphabetical index shall be used for all contracts with more than 3,000 words;
- (3) Conditions and exceptions to the main promise of the agreement shall be given equal prominence with the main promise, and shall be in at least 10 point type.

Id. In 1982, the Commissioner of Insurance was added as a reviewing authority with regard to contracts of insurance that are exempt from the coverage of N.J. STAT. ANN. §§ 17B:17-17 to -25 (West 1983). Act of Jan. 11, 1982, ch. 464, 1981 N.J. Sess. Law Serv. 1745 (West).

⁸⁷ N.J. STAT. ANN. § 56:12-6 (West Supp. 1983-84).

⁸⁸ *Id.* §§ 56:12-1 to -18 (West Supp. 1983-84).

⁸⁹ 15 U.S.C. §§ 1601 to 1700 (1982).

⁹⁰ Schwaneberg, *State Agencies Allowed More Time for Plain Language Contracts*, The Newark Star-Ledger, Aug. 25, 1981, at 14.

and compliance dates of the Truth in Lending Act. Banks would have been forced to adopt new forms in October 1981, only to replace them in April of the next year, unless the state law was amended.⁹¹ Assembly Speaker Jackman proposed an amendment that would remedy this problem by permitting bank contracts, covered by the Truth in Lending provisions, to be exempted from the plain language law until after the change in federal regulations.⁹² A broader amendment, which was contrary to Jackman's wishes, gave state agencies the right to suspend the plain language law indefinitely. The latter amendment, A. 3474, was signed into law on August 24, 1981.⁹³

The effective date of the plain language law was also postponed when the New Jersey Supreme Court granted the State Bar Association's request for suspension of the plain language law as it pertained to retainer agreements. The court suspended the effective date until April 15, 1982 to permit the plain language committee of the State Bar Association to draft model retainer agreements.⁹⁴

A. 3601, which set a deadline for compliance, was signed into law on January 11, 1982.⁹⁵ The law required that by April 15, 1982, landlords, professionals, banks, and businessmen had to put most of their consumer contracts into simple, clear, and understandable English.⁹⁶ Insurance companies, however, had until October 16, 1982 to conform their contracts of insurance to the requirements of the Act.⁹⁷ An exception to this compliance date was established for consumer contracts which were subject to the Truth in Lending Act. Such con-

⁹¹ *Id.*

⁹² Diamond, *Assembly Speaker Trying to Save Plain Language Act*, N.Y. Times, Oct. 4, 1981, at 1, col. 1.

⁹³ Act of Aug. 24, 1981, ch. 274, 1981 N.J. Sess. Law Serv. 766 (West), amended by Act of Jan. 11, 1982, ch. 464, 1981 N.J. Sess. Law Serv. 1745 (West) (codified as amended at N.J. STAT. ANN. §§ 56:12-1 to -18 (West Supp. 1983-84)).

⁹⁴ *Supreme Court Suspends Plain Language Law*, 108 N.J.L.J. 357 (1981).

⁹⁵ Act of Jan. 11, 1982, ch. 464, 1981 N.J. Sess. Law Serv. 1745 (West), amended by Act of July 23, 1982, ch. 88, 1982 N.J. Sess. Law Serv. 361 (West) (codified as amended at N.J. STAT. ANN. §§ 56:12-1 to -18 (West Supp. 1983-84)). The only change the Act of July 23, 1982, ch. 88, 1982 N.J. Sess. Law Serv. 361 (West), had on the Act of Jan. 11, 1982, ch. 464, 1981 N.J. Sess. Law Serv. 1745 (West), is that the Commissioner of Insurance, with regard to contracts of insurance exempt from N.J. STAT. ANN. §§ 17B:17-17 to -25 (West 1983) coverage, is added to the role the Attorney General has in determining whether the contract was written in a simple, clear, understandable and easily readable manner.

⁹⁶ Act of Jan. 11, 1982, ch. 464, 1981 N.J. Sess. Law Serv. 1745 (West).

⁹⁷ *Id.*

tracts were to comply with the plain language law within sixty days after the next revision of regulations under the Truth in Lending Act.⁹⁸ This compliance requirement became effective on November 30, 1982.⁹⁹

Operation of the Statute

The New Jersey Plain Language Statute generally has worked well and has not caused a flood of litigation.

A. Submission to the Division of Consumer Affairs

Since the enactment of the law in 1980, the Division of Consumer Affairs has approved approximately 2,000 forms. About 60 percent of those forms were approved on their first submission. Of the rejected forms, the draftsmen made the suggested changes, and the great majority of those forms were approved on their second submission to the Division.

From September of 1981 to about November of 1982, the Division had to pass on the initial flood of about 620 submissions per week, many of which contained several forms. Now the Division receives about six submissions per week, most of which contain more than one form. There is currently only a two-week backlog at the Division on these submissions. Jeanne F. Pasmantier, Esq. and her staff reviewed those submissions, and she is to be complimented for her excellent job.

The New Jersey Bankers Association drafted its own Plain Language forms, most of which were submitted to and approved by the Banking Department. Later on, other bank forms were submitted to the Division of Consumer Affairs. Some bank counsel feared that the imprimatur of the State Agency would be difficult to obtain or, once obtained, would be difficult to change. Those fears have not flowered into fact.

Many landlords now submit their leases and rules. Major car rental companies have not submitted their forms for review; their present forms would probably fail. Forms are submitted by only a few nursing homes, caterers, photographers, or cemeteries.

⁹⁸ *Id.*

⁹⁹ N.J. Att'y Gen. Formal Op. 1-1982.

B. *Litigation*

The Attorney General recently instituted the case of *Kimmelman v. A.G. King Tree Surgeon Co.*¹⁰⁰ under the statute, and has obtained an injunction against the exterminator of gypsy moths who was using an obscure form.

Private litigants have rarely sued under the statute because the lid on punitive damages and class action recovery makes it uneconomical to do so. There are no reported decisions construing the statute.

C. *Recommendations re Amendments*

The statute should be amended to give an attorney the right to submit his or her forms for approval. At present, an attorney may submit a form only if he or she represents a seller or other person designated in the statute; purchasers are not included.¹⁰¹

Conclusion

The Plain Language Statute has been successful and has caused industry to spend millions of dollars to eliminate archaic and complex language. The revised forms, if read by the consumers, will help them realize their obligations. While the average consumer rarely reads a contract at the time of sale, such reading does occur when trouble is afoot.

Plain Language also helps attorneys speed up their advice to clients about complex documents. For example, the reading of an insurance policy is often time-consuming and difficult work. Reviewing a Plain Language insurance policy or mortgage is much easier and faster for an attorney, and attorney review of these simplified documents will cost a client much less.

Let us hope that the Plain Language attitude spills over and begins to affect such areas as indentures, complex contracts, court orders, and the prose of medical doctors.

¹⁰⁰ No. C-689-83E (N.J. Ch. Div. 1984).

¹⁰¹ N.J. STAT. ANN. § 56:12-8(a) (West Supp. 1983-84).