House
Legislative
Analysis
Section
Romney Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

MICHIGAN PLAIN ENGLISH LAW

House Bill 4028 (Substitute H-1)
First Analysis (12-4-97)

Sponsor: Rep. Nick Ciaramitaro
Committee: Consumer Protection

THE APPARENT PROBLEM:

Consumers sign many contracts in the course of normal household business, covering a wide variety of routine transactions from simple credit-card purchase agreements to complex insurance policies. Whether by design or out of long-standing habit, many contracts contain language that the average consumer cannot understand. When people misunderstand the contracts they sign, they do not know what they are obligated to do or what they have asked others to do for (or to) them. Thus, conflicts arise, and consumers must either accept the conditions of the contracts as interpreted by purveyors of goods and services, or resort to costly lawsuits. In order to reduce problems caused by arcane contractual language, many states, including New York, New Jersey, Pennsylvania and Minnesota -- often with the cooperation of businesses -- have adopted laws and rules requiring that some kinds of consumer contracts meet standards of readability. Some state laws apply only to insurance contracts. Generally, state regulations have followed two models, one involving an objective test of readability, the other a subjective test (or else have combined them). (For more information about the types of tests used in determining readability see BACKGROUND INFORMATION.)

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

THE CONTENT OF THE BILL:

House Bill 4028 would create the Michigan Plain English Law, which would require most consumer contracts between customers and businesses to be written in "plain language." This means that the agreement would have to be "written in a clear and coherent manner using words and phrases with common and everyday meanings, (and be) appropriately divided and captioned by its various sections."

The bill would apply to contracts for the purchase, lease, or financing of goods, property, and services substantially for personal, family, or household purposes, but not for commercial purposes. The bill would not apply to insurance and annuity forms; legal descriptions of real

property; contracts written in language prescribed by state or federal laws or regulations; and contracts or contract provisions drafted solely by the consumers entering into them, as long as they indicate they were so drafted. A violation of the plain English law would not affect the enforceability of a contract, but the contract would be interpreted to conform with the reasonable expectations of the consumer. The bill would take effect one year after being enacted into law and would not affect provisions of contracts that were executed before the effective date. However, modifications of contracts that occur after the effective date would be subject to the act.

Specifically, the bill would:

** Prohibit a commercial preparer of contract forms from selling or furnishing a form for use in the state as a consumer contract unless the form was written in plain language.

** Permit a seller, lessor, or creditor to submit a contract to the attorney general for review to see if it complied with the plain language standard. Within 60 days, the attorney general would have to: 1) certify the contract was in compliance; 2) decline to certify it and note the objections; or 3) decline to review the contract. The attorney general could decline to review a contract because it was not subject to the plain language requirement or because it was the subject of pending litigation, and could otherwise decline by referring the party who submitted the contract to other previously certified contracts of the same type. The attorney general could charge up to $50 for a contract review. The action of the attorney general could be appealed under the Administrative Procedures Act. The certification of a contract would apply only to its compliance with plain language requirements and would not otherwise attest to its legality or legal effect. The failure to submit a contract for review would not show a lack of good faith nor would it raise a presumption that the contract violated the provisions of the bill. The same assumption would apply to the failure to use a previously certified contract.

** Allow the attorney general (or a local prosecutor) to seek a restraining order in circuit court if it appeared probable that someone had violated or was about to violate the plain English requirement. Unless waived by the court for good cause shown, a restraining order could only be sought after the party had been properly notified and offered the opportunity to confer with the attorney general in person or through counsel or other representative. The notice could be made by postage prepaid mail sent to the defendant's usual place of business, last known address, or if the defendant were a corporation, to an officer of the corporation or to the corporation's resident agent. The attorney general could accept "an assurance of discontinuance" of an alleged violation, which would not be considered an admission of guilt and could not be used in another proceeding except to show the existence of a persistent and knowing violation. An assurance of discontinuance could be accompanied by restitution for an aggrieved person, the voluntary payment of the costs of an investigation, or an amount to be held in escrow pending the outcome of an action. A prosecuting attorney could conduct an investigation and institute and prosecute actions in the same manner as the attorney general. The attorney general or prosecuting attorney would not be required to pay a filing fee to commence an action under the act or for motions made during such an action.

** Create a rebuttable presumption that a consumer contract is written in plain language if it achieves a score of 50 or more points using the Flesch test (see BACKGROUND INFORMATION). When making this calculation a contraction, a hyphenated word, and a combination of numbers and letters designating a finite number would each be counted as a single word. Furthermore, words and phrases required by state or federal statute or rules promulgated under state or federal statutes would not be considered in the calculation, nor would legal descriptions of real property. Calculations for contracts of not more than 10,000 words would be examined in their entirety, while contracts with more than 10,000 words could be calculated in not less than two 200-word samples per page instead of as a whole. The presumption could be rebutted by evidence establishing that the contract was not written in a clear and convincing manner.

** Authorize a civil fine of up to $10,000 to be assessed by a circuit court for each "persistent and knowing" violation of the law. Such a violation would require a finding that the defendant had knowingly violated the act on more than one occasion, or the defendant had either violated an assurance of discontinuance, or the court determines that the defendant is in violation of the act and a final judgement that is not subject to a claim of appeal has been entered against him or her for a previous violation of the act.

** Allow a consumer to bring an action to enjoin a person violating the act, whether or not the consumer also sought monetary damages, and allow a consumer who suffered a loss due to a violation to bring a class

action on behalf of injured consumers. A class action suit could be brought for actual damages or $10,000, whichever is less; other suits involving consumers who had suffered losses could be brought for actual damages and a penalty of $50, together with attorneys' fees. Any action under the act could not be brought more than three years after the contract that was the subject of the action had been offered for signature or signed by the consumer, or after the contract had been fully performed, whichever was later. A defendant could require a person who had prepared, sold, or furnished the form in question to join in defending an action. A defendant who attempted in good faith to comply with the bill would not be liable for more than actual damages in any action.

** Prosecuting attorneys and law enforcement officers who received notice of an alleged violation of the act, or of an order or assurance related to the act, would be required to notify the attorney general in writing immediately, and court clerks would be required to send the attorney general copies of complaints and of orders and judgments stemming from actions under the bill.

BACKGROUND INFORMATION:

The most popular standard for determining whether a document is written in "plain language" derives from a test of writing (devised by Rudolph Flesch) that takes into consideration the number of words in a sentence and the number of syllables in each word. The lower the number of words per sentence and syllables per word, the higher the readability score. A piece of writing must average about 8.5 words per sentence and 1.64 syllables per word to be considered "plain English," which according to Flesch, means scoring from 60 to 70 on a scale of 100 points. Scores from 50 to 60 mean that the writing is "fairly difficult" to understand, and those from 30 to 50 mean it is "difficult". [Specifically, the test requires that the total number of words be divided by the total number of sentences; the result is multiplied by 1.1015. The total number of syllables is divided by the total number of words and the result is multiplied by 84.6. Both of the results are subtracted from 206.835. The resulting number is the score.]

Other states have modeled their readability standards on New York's Sullivan Act, which requires (among other things) that every agreement for renting a residence and for other consumer purposes be "written in a clear and coherent manner using words with common and everyday meanings" and be appropriately divided and captioned.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bill would require that consumer contracts be written in language that can be understood, and would therefore help ensure that citizens are not deprived of their rights because they fail to understand technical and legal jargon. This can be done. In fact, many businesses have already improved their contracts, both in response to the "plain language" movement and because experience shows it to be a good business practice. Ridding contracts of unnecessary legalisms and jargon is a matter of attitude and habit, say plain language proponents, and can be accomplished without affecting "terms of art", those expressions that have special, perhaps untranslatable, meanings in a legal or commercial sphere. These are far fewer than commonly thought: a bar association study of real estate contracts discovered that only about three percent of the terms used in such contracts had been litigated. The experience of other states has been very positive. New York's statute was adopted in 1977, and has resulted in very little litigation. Minnesota passed its plain language law in 1981 and it went into effect in 1983. The Minnesota act included a provision for review of contracts by the attorney general's office. According to a representative from the Minnesota attorney general's office, the act's provisions have not proved unduly burdensome for their office. During the 12 years since the act's implementation, about 500 contracts have been submitted for review, most of those during the first six to eight months. According to testimony, the experience of most states indicates that these laws do not produce much litigation.

For:

The bill would give businesses an entire year from the date of enactment to revise their contracts where necessary to conform to the readability standards. The attorney general would have that time to test and approve new contracts voluntarily submitted by businesses. Thus, businesses and sellers of contract forms should have little difficulty adjusting to the bill's requirements. Use of the certification process by companies that market standardized forms commonly used by businesses and lawyers will in and of itself make for widespread compliance with plain language standards. Further, the bill provides a safe haven for businesses through the use of the Flesch test to determine for themselves whether or not a contract meets the bill's requirements. This allows a business to

run a calculation (which is included in many word processing programs) and if the contract achieves an acceptable score under that test it is presumed to be written in plain language.

Against:

While the bill has a laudable goal, it is flawed in several ways. It provides a subjective standard for judging the readability of contracts ("clear and coherent" to whom, phrases with "common and everyday meanings" in whose life?) and then gives the attorney general enormous power to apply this subjective standard to unsuspecting, well-meaning businesses. These businesses could face harassment and severe penalties for unintentionally offending the linguistic sensibilities of someone in the attorney general's office.

Many so-called legalisms are valuable because they have court-tested, stable meanings. Often there are not good alternatives to legal phrases. Some "clear phrases" using words "with everyday meanings" lack the necessary precision to protect the parties in complicated transactions. By and large, the courts have in recent years protected the interests of consumers in cases involving misleading or deceptive contract language. This, combined with the existing safeguards in the Consumer Protection Act, makes the broad scope and arbitrary powers in the bill unnecessary.

Against:

The bill is unnecessary, as most businesses are already creating readable contracts for their customers wherever possible. Businesses have no desire to trick customers into signing something they do not understand; it makes the customer angry and can lead to litigation. Further, the supporters of the bill have no idea how much work implementing the bill could create for businesses. For example, according to testimony from a representative of the banking industry, banks use over 4,000 different types of contracts. The cost of merely reviewing these contracts to see if they meet the requirements of the law is potentially extraordinary, not to mention the cost of drafting changes to these contracts where they don't meet the bill's requirement.

POSITIONS:

A representative of the Plain English Committee of the State Bar of Michigan testified in support of the bill. (12-3-97)

The Michigan State AFL-CIO submitted testimony in support of the bill. (12-3-97)

Michigan Citizen Action indicated its support of the bill. (12-3-97)

The Michigan Consumer Federation indicated its support of the bill. (12-3-97)

A representative of the Real Property Section of the State Bar of Michigan testified in opposition to the bill. (12-3-97)

The Michigan Bankers Association submitted testimony in opposition to the bill. (12-3-97)

The Michigan Retailers Association indicated opposition to the bill. (12-3-97)

The Michigan Association of Realtors indicated opposition to the bill. (12-3-97)

The Michigan League of Savings Institutions indicated opposition to the bill. (12-3-97)

The Michigan Financial Services Association indicated opposition to the bill. (12-3-97)

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.