MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 23, 1985

The twelfth meeting of the Senate Judiciary Committee was called to order at 10:12 a.m. on January 23, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present, with the exception of Senators Daniels and Galt, who were excused.

Chairman Mazurek turned the chair over to Senator Blaylock in order that he might present SB 60 to the committee.

CONSIDERATION OF SB 60: Senator Joe Mazurek, sponsor of SB 60, stated this is an act to replace the Uniform Gifts to Minors Act (hereafter UGMA) with the Uniform Transfers to Minors Act (hereafter referred to as UTMA). Senator Mazurek testified that back in 1956, the Uniform Law Commissioners proposed the UGMA. It dealt with some limited forms of personal property whereby adults could transfer property to custodians and hold that property for the benefit of minors. They could do it without having to establish a trust or elaborate tax device. The UGMA was adopted in all of the states beginning in the mid-50s. Some problems arose. Many states started broadening the types of property that could be given. This bill just replaces the UGMA with the UTMA. Before very limited types of property could be given; this bill broadens the means by which you can transfer property. It expands the flexibility people would have to give property to minor children. Under the uniform act, a person is defined as an adult at 21 and now Montana defines them as 18. Senator Mazurek proposed the committee adopt an amendment to change that (see Exhibit 1). He has discussed this with the State Bar of Montana probate committee. They have given initial approval of it in large, but have not met since to give final approval. Many states have adopted amendments to the UGMA to broaden the scope similar to that in the UTMA. This act would protect the validity of transfers made under the former act.

PROPONENTS: Dave Roberts, Chairman of the Trust Division of the Montana Bankers Association, testified they would like to give their support for SB 60, the UTMA. It expands the property that can be put into custodianship to cover real property. In the past, this has been limited to financial items. This allows them to do this without a complicated trust document. It is a uniform act, and the people of Montana would

benefit from this fact because people tend to move between different states and would, therefore, not be subject to different laws.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Crippen stated he has no objection to changing the adult from 21 to 18 but questioned what happens if you have a generous parent who would like to give a gift of a proportion of his business to an 18-year-old son and would we have a conflict. Senator Mazurek responded if you are 18, you would give an outright gift. Under this bill, if you give it to an adult at 18, this bill wouldn't apply. Senator Mazurek stated yes, we would have a conflict; we would have a potential constitutional problem. If they don't want to go through the trust process, they can use the custodian process of the UTMA or you could leave it at 21 and face constitutional problems down the road. Senator Towe stated he was concerned about the provision on page 7, lines 6 and 22, that transfers must be authorized by the court if they exceed $10,000 in value. He questioned whether you had to go to court every time we exceed this limit. Senator Mazurek stated if your father gives you a promissory note, it could be paid to a custodian, but if it is over $10,000, it requires court approval. Senator Towe asked what are you transferring, the debt, the credit, or something else. Senator Towe asked if in section 11, the manner creating custodial property, the paperwork were really any different than under the UGMA. Senator Mazurek responded no; that is virtually identical to that provided under the UGMA.

CLOSING STATEMENT: None.

Hearing on SB 60 was closed.

CONSIDERATION OF SB 87: Senator Joe Mazurek, sponsor of SB 87, testified Montana adopted the Uniform Limited Partnership Act (hereinafter referred to as ULPA) in the last legislative session. Two problems have arisen with this act, and questions have been raised by the Internal Revenue Service (hereafter IRS). The Uniform Law Commissioners have proposed two revisions to satisfy the objections by the IRS. The IRS thinks a withdrawing limited partner should be required to execute and file in the office of the Secretary of State a document declaring formally that they have withdrawn. Section 2 is intended to clearly state what the liabilities of a general partner are in a limited partnership. These are fairly technical amendments. They were drafted by the Uniform Law Conference Committee on the ULPA.

PROPONENTS: None.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked that Senator Mazurek explain page 2, line 21, through line 5 on page 3. Senator Mazurek stated the only difference is on page 1, line 25, persons other than the partnership. On page 2, it specifies what his liabilities to the partnership are. It specifically states what the liabilities are to people other than the partnership and to the partnership. Senator Crippen asked if a general partner in a limited partnership is treated as a general partner in a general partnership. Senator Mazurek responded affirmatively. He stated a general partner in a limited partnership has the same liabilities both to the partnership and third parties as a general partner in a general partnership except as provided in this chapter. Senator Crippen asked if it will increase any liability a limited partner will have to third parties other than the general partners or general partnership. Senator Shaw stated these amendments came up because of the IRS and questioned whether this will give the IRS a little more bite or does it limit their bite. Senator Mazurek stated it limits their bite; you are trying to protect the status of limited and general partners. Senator Crippen asked how you treat a partnership where the same individuals are both general and limited partners. Senator Mazurek responded they would have the liabilities of both.

CLOSING STATEMENT: None.

Hearing on SB 87 was closed.

CONSIDERATION OF SB 89: Senator Joe Mazurek, sponsor of SB 89, stated this bill was introduced at the request of a local attorney in Helena who pointed out a problem in the garnishment statutes. The present garnishment statute allows a debtor, if there is a levy of execution against his or her wages, to file an affidavit stating his wages are necessary for the common necessities of life. The problem is there is no procedure for a creditor to challenge that affidavit. The purpose of the bill is to provide that once that affidavit is filed by the debtor, this will gives the judgment creditor the ability to say, I am not sure all of those wages are necessary for the necessities of life. Senator Mazurek proposed SB 89 be amended as shown on Exhibit 2. If the creditor does nothing, the wages cannot be garnished. It affords the creditor the opportunity to challenge the affidavit. We appear to have stricken the provision that only one-half of the earnings can be subject to exclusion; but that is misleading because the federal law preempts here. The federal law establishes how much of a person's wages can be subject to execution. This bill doesn't attempt to change the garnishment statutes in any way except the mere fact of filing an affidavit cannot stop execution in and of itself.

PROPONENTS: Louise Kunz, representing the Montana Low Income Coalition, appeared in support of SB 89 (see witness sheet attached as Exhibit 3).

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe stated page 2, lines 1-5, is a separate paragraph in the existing law, but it is being blended into paragraph 2 of this bill. Paragraph 2 says earnings for personal services are exempt according to the federal law. He questioned whether we were effecting a change by combining the two and saying it is all under just one exemption, the federal. Senator Mazurek stated he does not think that is the intention. He doesn't think we have done that. His intention is not to change anything that is current practice; his only intention is to provide the hearing process. He thinks the bill request may have been used to clean up some language in the existing law. Senator Towe asked Mr. Petesch to look into the federal law. Senator Mazurek stated Mr. Petesch has it with him and he is looking into that.

CLOSING STATEMENT: None.

Hearing on SB 89 was closed. Senator Mazurek resumed the chairing of the committee.

ACTION ON SB 60: Senator Mazurek stated he thinks we should change the age limit to 18 years old. Parents can make transfers by will if they don't want to give it or do it another way. Senator Towe asked why there are two pages of applicability dates. Senator Mazurek stated if we repeal the UGMA, we want to make sure any transfers that have been made under that are valid. Mr. Petesch stated the only other thing in the bill the committee needs to look at is on page 21, termination of the custodian. Section 2503(c), U.S.C, indicates we may want to retain that 21 years there. Senator Towe questioned if a debt over $10,000 is owed to a minor, in order to pay it, you have to get the court's approval if a custodianship is created. Senator Mazurek stated any time a debt is paid to a minor for any reason, you have to go through court for approval, even without the $10,000 limit (such as in an insurance settlement). Senator Towe moved the amendments submitted to SB 60 (see Exhibit 1) be adopted. The motion carried unanimously. Senator Shaw moved SB 60 be recommended DO PASS AS AMENDED. The motion carried unanimously.

ACTION ON SB 87: Senator Shaw moved SB 87 be recommended DO PASS. The motion carried unanimously.

FURTHER CONSIDERATION OF SB 89: Senator Shaw suggested Senators Crippen and Towe and Mr. Petesch go through this bill to speed up the process. Senator Pinsoneault stated SB 89 is a good bill, but he agrees it needs to be looked at. Senator Mazurek stated he also wants to be sure we are not fundamentally changing what has been said. Senator Towe stated he

has a question why in the amendment if no motion is filed, levy of execution upon the earnings is automatically stayed. He questioned why we did not say levy upon that portion of the earnings that is exempt is stayed. Senator Mazurek stated the federal requirement says 50% is exempt. An employer takes 50% pursuant to the levy. The employee finds out when it is not in his check. An employee files the affidavit that stops the delivery of the money to the creditor. As it stands now, there is no provision to challenge the affidavit. With the amendments, notices of the affidavit would be given to the creditor. Senator Towe stated you levy the attachment. The employee finds out and files the affidavit. In the attachment you are only going to ask for one-half. When the affidavit is filed, the court shall on motion of the creditor set the matter for hearing. The court is mailed a copy. If no motion is filed, levy of execution upon the earnings is automatically stayed, which means the money is returned to the wage earner. The issue is the other one-half. Senator Mazurek stated the affidavit stops the execution whether it is valid or not. Senator Towe stated the procedure is great, but the thing that throws you is the exemption. Senator Mazurek asked Mr. Petesch to take a look at this. Senator Towe asked what final order of the court meant in (3). Senator Mazurek stated it should be tied into final order of the hearing in the case. He asked that Mr. Petesch take note of this. Senator Mazurek stated he is not sure the concerns of Ms. Kunz are within the scope of this bill. Senator Towe stated we could build into section 2 simply that no execution against earnings take place unless the debtor has first been notified and given an opportunity for hearing. Senator Yellowtail stated he would be interested in that. Senator Pinsoneault stated regarding paragraph 5, as far as the sheriff is concerned, they are reticient to help without a final order of the court directing disposition.

FURTHER CONSIDERATION OF SB 66: Senator Halligan's proposed amendments to SB 66 were distributed to the committee (see Exhibit 4). Mr. Petesch explained the first amendment is a recommendation from the insurance commissioner's office which removes the reference to life insurance policy loans because those are covered under insurance plain language act. Number 2 was Professor Burnham's suggested amendment that would cover the warranties that are not signed. Numbers 3, 4, and 5 add new subsection 3 and excludes from plain language the provisions of public utility service to tariffs approved by the Public Service Commission as they are not written in plain language. Number 6 is intended to address the good faith/bad faith points that were raised as punitive damages are assessed in bad faith actions. Senator Towe asked about the laundry list on page 3. Mr. Petesch stated a consumer contract must be written in plain language, and these should be left in. Copies of the Flesch test that is contained in the insurance law were distributed to the committee (Exhibit 5). Mr. Petesch stated this was in the bill last year, but he feels the Flesch test flunks the Flesch test, although it

is contained in the insurance plain language law. Another possibility that was discussed was having an agency pre-approve contracts. Senator Halligan is not in favor of that because of the cost. Senator Mazurek stated the committee should look at the New York statute (Exhibit 6). Senator Blaylock asked if there were money to be made in obfiscation. Senator Shaw thinks we need to get contracts into plain language and try to eliminate some of the legal jargon. Senator Towe moved the amendments attached as Exhibit 4 be adopted. The motion carried unanimously. Senator Mazurek stated the New York language would delete line 11 on page 2 through line 3 on page 3. The New York statute says every agreement in which a consumer is a party must be (a) written in a clear and coherent manner using words with common and everyday meanings, and (b) be appropriately divided and captioned by its various sections. Senator Mazurek noted that excludes realty, which he liked because he has concerns about the landlord-tenant area. Senator Blaylock stated as a layman, he thinks if the New York idea could be worked in, it would be better than trying to come up with a laundry list. Senator Towe moved that we replace the laundry list with the New York language suggested by Senator Mazurek. Senator Yellowtail stated he thinks "clear and coherent manner" is open to interpretation and much argument while these tests aren't. He believes the existing language in this bill is much the same but clearer, and if someone wants to examine his contract, this gives much better guidelines. Senator Brown asked if anyone is aware of whether this laundry list of tests is in effect in any other state. Mr. Petesch stated it is a compilation of laws of other states, but this specific list may have come out of a proposed model act. Senator Brown asked how long the amendment has been in effect in New York. Senator Pinsoneault responded since 1978. Senator Brown stated he speaks in favor of the amendment because we have six years of experience in a big state like New York to go by. He believes when you get unnecessarily verbose, you leave more terms subject to interpretation, so the best thing to do is keep the bill clean and in plain language. The motion to adopt the amendment carried with Senators Pinsoneault and Yellowtail voting in opposition. Senator Towe asked what it applies to. He likes the New York limitation primarily for personal, family, or household purposes. His suggestion is that we redefine consumer on page 1, line 20, and say consumer means an individual who enters into a transaction that is primarily for personal, family, or household purposes. Mr. Petesch stated that restriction is in the consumer contract definition. Senator Mazurek stated he is not certain how broad or how narrow the definition under consumer contract is. What we are trying to get at here are the preprinted forms that are used over and over. Senator Towe stated he does not like the definition of consumer contract. Consumer contract means an agreement dealing with personal property primarily for personal, family, or household purposes. Mr. Petesch stated page 5, subsection 6, precludes a consumer from bringing an action under this section if he were represented by an attorney at the time of signing it.

Senator Yellowtail stated he would like to see this bill have as broad an application as possible. If we start cutting out this special interest and that special interest, we might as well have killed it. Senator Towe moved that SB 66 be further amended by exempting transfers of real estate. The motion carried (see roll call vote attached as Exhibit 7). Chairman Mazurek stated that although the motion carried, it may have to be reconsidered, since it did not represent a majority of the committee. Senator Pinsoneault asked if we could get a grey bill on what we have done so far on plain language. Senator Mazurek asked Mr. Petesch to instead write the amendments on a clean copy of the bill.

There being no further business to come before the committee, the meeting was adjourned.

Committee Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 012385

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt			X
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels			X
Chairman Senator Joe Mazurek	X		

DATE January 23, 1985

COMMITTEE ON Judiciary

VISITORS' REGISTER SB 60, 87, 89

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Dave Robert	Montana Bankers Assn - Trust Div	60	✓	
Louise Kuntz	MT Low Income Coalition	89	✓	
Julie Dabbagio	MontPIRG			

(Please leave prepared statement with Secretary)

PROPOSED AMENDMENTS TO SB 60:

1. Page 1, line 20.
Following: "of"
Strike: "21"
Insert: "18"

2. Page 2, line 25.
Following: "of"
Strike: "21"
Insert: "18"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 012385
BILL NO. SB 60

PROPOSED AMENDMENT TO SB 89:

1. Page 3, line 8.
Following: "shall"
Insert: "upon motion of the judgment creditor"

2. Page 3, line 12.
Following: "attachment."
Insert: "If no motion is filed, levy of execution upon the earnings is automatically stayed."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 012385
BILL NO. SB 89

(This sheet to be used by those testifying on a bill.)

NAME: LOUISE KUNZ DATE: 1/23/85

ADDRESS: 107 LAWRENCE

PHONE: 449-8801

REPRESENTING WHOM? MT. Low Income Coalition

APPEARING ON WHICH PROPOSAL: SB 89

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS: We ask THAT THE HEARING BE BEFORE THE ATTACHMENT OR GARNISHMENT.

IF THAT ISN'T POSSIBLE WE ASK THAT HEARING BE WITHIN 5 DAYS - NOT 14 -

AT TIME OF ATTACHMENT OR GARNISHMENT THE CLIENT SHOULD BE NOTIFIED OF HIS/HER RIGHT TO A HEARING - THIS SHOULD BE DEFINED - PERHAPS TWO NOTICES - ONE TO EMPLOYER TO BE GIVEN TO EMPLOYEE TO BE ATTACHED OR GARNISHED ONE TO THE LAST KNOWN ADDRESS OF INDIVIDUAL

IT IS NECESSARY TO PROTECT MONIES FROM SOURCES THAT ARE EXEMPT FROM BEING EVEN TEMPORARILY ATTACHED OR GARNISHED

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 012385
BILL NO. SB 89

SENATOR HALLIGAN'S PROPOSED AMENDMENTS TO SB 66:

1. Page 1, line 25.
Following: "purposes."
Strike: remainder of line 25 through "policy." on line 4, page 2

2. Page 3, line 5.
Following: "agreement"
Strike: "signed"

3. Page 3, line 16.
Following: ";"
Strike: "or"

4. Page 3, line 18.
Following: "instrumentality"
Strike: "."
Insert: "; or"

5. Page 3, line 19.
Following: line 18
Insert: "(e) the provision of public utility service under tariffs approved by the public service commission."

6. Page 5, line 6.
Following: line 5
Insert: "(7) Punitive damages may not be assessed in an action brought under (this act)."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 012385
BILL NO. SB 66

(2) The Flesch readability test is applied as follows:

(a) For the basic formula:

(i) W = average number of words per sentence;

(ii) S = average number of syllables per word; and

(iii) the Flesch readability score is R = 206.835 - [((1.015)W) + ((84.6)S)].

(b) Only the running text is counted. Headings, tables, section numbers, and other parts of the contract not written in complete sentences are not counted. Except for purposes of agency compliance with [section 4], sentences required by law or regulation are not counted. Sentences that contain individual words or phrases required by law or regulation are counted.

(c) For the Flesch test:

(i) a sentence is considered any full unit of speech ending with a period, colon, semicolon, dash, question mark, or exclamation;

(ii) a contraction, hyphenated word, abbreviation, or single group of numbers, letters, and symbols is considered one word;

(iii) an abbreviation or single group of numbers, letters, and symbols is considered one syllable. For a word with more than one accepted pronunciation, use the pronunciation with the fewest syllables.

Section 9. Remedies. (1) A person who is a party to a

special promise to answer for the debt, default or miscarriage of another person" required to be in writing under statute of frauds, or whether father in fact thereby became principal debtor primarily liable. (Per opinion of Silverman, J., dissenting in part, in the Appellate Division, 92 A.D.2d 478, 459 N.Y.S.2d 68.) Four Winds Hosp. v. Keasbey, 1983, 59 N.Y.2d 943, 466 N.Y.S.2d 300, 453 N.E.2d 529.

316. Estoppel

New York's statute of frauds would be severely undermined if a party could be estopped from asserting it every time a court found that some unfairness would otherwise result; for this reason, the doctrine of promissory estoppel is properly reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which plaintiff has relied. Philo Smith & Co., Inc. v. USLIFE Corp., C.A.N.Y.1977, 554 F.2d 34.

Complaint by plaintiff alleging breach of oral contract for "finder's fee" lacked any allegation that defendant or its agents concealed facts or made false representations, and failed to allege that plaintiff incurred any detriment in relying upon promise made by defendants, therefore, neither equitable nor promissory estoppel applied so as to prevent defendant's assertion of this section declaring as void, oral contracts to pay compensation for services rendered in negotiating a business opportunity. Power East Ltd. v. Transmerica Delaval Inc., D.C.N.Y.1983, 558 F.Supp. 47.

Letter in which defendant said that a written agreement would be superfluous and unnecessary did not mislead plaintiff into believing that defendants would abide by a particular contract, especially in view of plaintiff's later insistence on a written contract, so that defendant was not estopped from using the statue of frauds as a defense to an action based on the alleged five-year contract. Marcraft Recreation Corp. v. Francis Devlin Co., Inc., D.C.N.Y.1981, 506 F.Supp. 1081.

The doctrine of promissory estoppel set forth in section 139 of the Restatement of Contracts Second, providing that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee is enforceable notwithstanding the statute of frauds if injustice can be

avoided only by enforcement of the promise, is only applicable, if embraced by New York law, to a limited class of cases where the promisee, in reliance upon a promise, has suffered unconscionable injury. D & N Boening, Inc. v. Kirsch Beverages, Inc., 1984, 99 A.D.2d 522, 471 N.Y.S.2d 299.

Distributors were not precluded by doctrine of promissory estoppel from pleading the statute of frauds as a defense to the subdistributor's attempted enforcement of alleged franchise agreement where the acts were alleged to have taken place over a 27-year period during which the subdistributor's and its predecessors' agreement with the distributors and their predecessor remained in effect and where the subdistributor and its predecessors derived a substantial income from the agreement during that time and did not suffer unconscionable injury. D & N Boening, Inc. v. Kirsch Beverages, Inc., 1984, 99 A.D.2d 522, 471 N.Y.S.2d 299.

Sellers of business were not estopped from relying on statute of frauds as defense to purchasers' action for breach of contract where alleged injuries were not so egregious as to render assertion of defense unconscionable and where purchasers' hiring various professionals to evaluate the business was not unequivocally referable to the alleged oral agreement. Long Island Pen Corp. v. Shatsky Metal Stamping Co., Inc., 1983, 94 A.D.2d 788, 463 N.Y.S.2d 39.

Oral promise cannot be relied upon to estop plea of statute of frauds unless circumstances are such as to render it unconscionable to deny oral promise upon which promisee has relied. Ginsberg v. Fairfield-Noble Corp., 1981, 81 A.D.2d 318, 440 N.Y.S.2d 222.

Where plain writing is inconsistent with alleged prior oral agreement, there is no basis for claim of estoppel. Id.

Employer was not estopped from asserting statute of frauds to escape liability to employee under alleged oral employment agreement where employee, a sophisticated businessman, admitted he read and understood written employment agreement providing for at-will employment, even though employee asserted that employer had induced him to change jobs by promise of entering into written contract guaranteeing one year employment. Id.

317. Stipulations

Statute of frauds did not apply to contract created when creditors, by their silence and by their cashing of checks tendered by debtor, accepted debtor's previously rejected but renewed offer of "stipulation," with terms, respecting partially paid debt. Josephine & Anthony Corp. v. Horwitz, 1977, 58 A.D.2d 643, 396 N.Y.S.2d 53.

318. Summary judgment

Clear issue of fact as to whether parties intended corporation's director to be independently and primarily liable for legal costs rendered by attorney, or merely secondarily liable, thereby subjecting director's oral promise to statute of frauds, precluded summary judgment in attorney's suit to recover fee and disbursements from director. Rowan v. Brady, 1983, 98 A.D.2d 638, 469 N.Y.S.2d 711.

Genuine issue of material fact remained as to whether there was an original promise on part of bank to pay plaintiff for services rendered to third party, and thus not subject to this section, or a collateral promise to respond only in event of default by third party, and therefore subject to this section, precluding summary judgment in favor of bank in suit by plaintiff against bank bottomed on original promise to pay. Decision Concepts, Inc. v. Citibank, N.A., 1983, 91 A.D.2d 965, 458 N.Y.S.2d 586.

In breach of contract action, whether employment agreement was one that was removed from operation of statute of frauds since it was one that might be terminated within one year by defendant should plaintiff fail to correct a breach of agreement and whether circumstances were so egregious as to render it unconscionable to prevent defendant to invoke statute of frauds were questions that should not be determined on pleadings, but should await a full determination of facts upon trial. Buddman Distributors, Inc. v. Labatt Importers, Inc., 1982, 91 A.D.2d 838, 458 N.Y.S.2d 395.

Reading liberally the allegations in corporate defendant's combined fifth defense and first counterclaim which asserted that a third party had borrowed $12,500 from the corporate defendant which sum was to be paid back by plaintiff, the Appellate Division was unable to conclude that, as a matter of law, plaintiff's alleged oral promise was not an original promise, which would be outside the statute of frauds; accordingly, absent clarifying evidence in the record, a trial was necessary to determine the nature of plaintiff's alleged promise, precluding summary judgment. Slavenburg Corp. v. Rodes, 1982, 86 A.D.2d 517, 445 N.Y.S.2d 759.

With respect to alleged creditor's counterclaim to recover moneys allegedly loaned to debtor but not repaid, substantial fact issue existed as to whether statute of frauds applied to alleged loan, precluding summary judgment. McDaniel v. Sangenino, 1979, 67 A.D.2d 698, 412 N.Y.S.2d 400.

320. Reformation

Statute of frauds did not bar reformation of written employment contract where employee alleged that the parties failed to include clause limiting his employment to the New York area due to mutual mistake, even though the contract could not be varied by parol evidence. Katz v. American Technical Industries, Inc., 1983, 96 A.D.2d 932, 466 N.Y.S.2d 378.

§ 5-702. Requirements for use of plain language in consumer transactions

a. Every written agreement entered into after November first, nineteen hundred seventy-eight, for the lease of space to be occupied for residential purposes, or to which a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes must be:

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

2. Appropriately divided and captioned by its various sections.

Any creditor, seller or lessor who fails to comply with this subdivision shall be liable to a consumer who is a party to a written agreement governed by this subdivision in an amount equal to any actual damages sustained plus a penalty of fifty dollars. The total class action penalty

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

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

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

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

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

(L.1963, c. 576, § 1, formerly § 5-701(b), (c); amended L.1977, c. 747, § 1; renumbered § 5-702, and amended L.1978, c. 199, § 1.)

1978 Amendment. Subd. a. L.1978, c. 199, § 1, eff. May 31, 1978, in opening clause substituted "November" for "June" and "and" for "wherein", in par. 1 deleted "non-technical language and in" following "Written in", in sentence beginning "Any creditor, seller" deleted "the foregoing provisions of" following "to comply with", substituted "this subdivision" for "the provisions thereof", deleted "the sum of" following "amount equal to", and inserted "a penalty of", in sentence beginning "The total class" inserted "in any class action or series of class actions arising out of the use of a creditor, seller or lessor of an agreement which fails to comply with this subdivision", in sentence beginning "No action under" substituted "No action under this subdivision" for "These penalties", "brought" for "enforced only in a court of competent jurisdiction, but not", "shall" for "against", and "subdivision be liable for such penalties" for "section", and in sentence beginning "This subdivision shall" inserted "nor prohibit the use of words or phrases or forms of agreement required by state or federal law, rule or regulation or by a governmental instrumentality".

Subd. b. L.1978, c. 199, § 1, eff. May 31, 1978, in opening clause, substituted "subdivision a" for subdivision "b".

Subd. c. L.1978, c. 199, § 1, eff. May 31, 1978, added subd. c.

Practice Commentary

By Richard A. Givens

Member of the New York Bar*

New York General Obligations Law Section 5-702, popularly known as the "plain language" law, sponsored by Assemblyman Peter M. Sullivan,[1] was signed by Governor Carey on August 5, 1977 as L.1977, ch. 747.[2] The law generated large-scale compliance efforts by major industries resulting in introduction of many new forms, both by these industries and form preparing firms. There has been little litigation, partly as a result of the law's deliberate choice not to provide the incentive of attorney's fees, the limitation of class actions, and the good faith defense to statutory penalties. The law was amended in 1978 based upon extensive controversy over the provisions of the original law. The 1978 revisions fixed a November 1, 1978 effective date, replacing the original June 1, 1978 deadline.

* Adapted in part from Practising Law Institute, Drafting Documents in Plain Language (Course Handbook Series #203) (1979).

The law as amended requires that each written agreement for a residential lease or loan of money, property or services for personal, family or household purposes involving less than $50,000 must be:

"1. Written in a clear and coherent manner using words with common everyday meanings;

"2. Appropriately divided and captioned by its various sections."

A creditor, seller or lessor who fails to comply is made liable to the consumer for actual damages plus $50; the total class action "penalty" (which would appear to refer to the aggregate liability for the statutory $50 damages) is limited to $10,000. This ceiling applies "in any class action or series of class actions arising out of the use" of a non-complying agreement. The penalty is not enforceable where both parties have fully performed their obligations under the contract or against a party who "attempts in good faith to comply with this section."

A violation does not render any agreement void or voidable, or constitute a defense to an action to enforce the agreement or for breach thereof.

The Act grew out of concern over consumer credit contracts couched in language understandable only by those versed in the arcane subtleties of creditor remedies, or in what Sylvia Porter has called "bafflegab." (Sylvia Porter's "Money Book," 1976). Also influential was Citibank's simplification of its consumer loan forms, as proof that it could be done.[3] The "plain language" movement as to governmental documents undoubtedly also contributed to concern as to private documents to be enforced in the courts.

The 1978 amendments deleted an earlier requirement that contract terms be "non-technical," and added in express provision that the law does not "prohibit the use of words or phrases or forms of agreement required by state or federal law, rule or regulation or by a governmental instrumentality." The latter was intended to refer to requirements imposed as a precondition to tax benefits, eligibility for governmental credit insurance, or purchase of the instrument by a governmentally created institution such as FNMA, GNMA, and the like.

Common Law Principle

The basic principle underlying the Sullivan Act is the common law doctrine that a party cannot be held bound by contract provisions not likely to have been comprehended (and thus agreed to) by the party.[4]

Also relevant as background is the concept that documents drafted by one side are to be most strongly construed against that party.[5] This is based part on an imbalance in bargaining power where a "contract of adhesion" is a "take-it-or-leave it proposition."[6] And the drafting party is responsible for any ambiguity in the document.[7] Where one party has counsel and the other does not, special care is often exercised by the courts to protect the latter.[8] These principles are always applicable to some extent because every document is ambiguous to one degree or another.[9] Few documents can be absolutely clear in their application to particular facts which were not yet in existence when the document was drawn.[10]

General Obligations Law Sec. 5-702 is, of course, relevant to consideration of the common law principle which it recognizes, even where the statute in terms does not apply.[11] There is also an overlap between the Act and the concept of unconscionability. This unlike the new law, may be a defense, under Uniform Commercial Code Sec. 2-302.[12] The official comment to this UCC section states that ". . . the principle is one of the prevention of oppression and unfair surprise . . ."[13]

The statute in not making a violation of defense to an action to enforce or for breach of an agreement, does not, of course, affect the fact that violation of the underlying common law principle might constitute such a defense.

Where a statute creates a remedy, in addition to a common law remedy, for the protection of a right, but contains no language barring the common law remedy, it is not construed to have removed the common law remedy.[14]

Furthermore, a claim for actual damages because one was subject to adverse consequences by a contract that did not comply with the new law, might be asserted as a counterclaim in an action to enforce the contract or for its breach. This would not necessarily contravene the purpose of the provision that violation of the new law does not create a defense; that provision was intended to avoid the disproportionate result of cancelling an entire debt because some of its provisions were not written in plain language.

The 1978 amendment also added a provision (§ 5–702(c)) that ". . . whenever the attorney general finds that there has been a violation of this section, he may proceed" under New York Executive Law § 62(12). This allows the Attorney General to obtain injunctive relief against persistent patterns of illegal conduct. Whether the persistent illegality requirement applies to cases brought under the quoted provision has not been decided. Violations of injunctions obtained at the suit of the Attorney General under Executive Law Sec. 63(12), are subject to contempt penalties as set forth in Judiciary Law Sec. 751(4), (4), added by L.1975, ch. 440.

Good Faith Defense

The Legislature included a number of provisions in the law to limit the risk that it might create large unforeseen liabilities or losses to legitimate business. It should be noted that the "good faith" defense applies only to "penalties" (i.e., $50 statutory damages or any class action for them) and not to "actual damages sustained . . ."

In order to show good faith, proof that a party had instructed its attorneys to simplify its documents and that changes were made, or that an outside firm specializing in simplification of documents was consulted, would be relevant. The use of experts, while helpful in cases where they are needed, should not be required in all instances, either to comply or to show good faith. "Plain language" ought to be common property. That only experts can write it is an idea whose time, hopefully, will never come.

Likewise, the idea that contracts must be written to be read at a relatively low level of literacy is nowhere in the New York law. Indeed, an express "average person" test was deleted from earlier versions of the bill to avoid a need to use experts in drafting agreements or testifying as to compliance. Contracts should be written to be understood by the target group to which they are addressed. And both understandability and good faith are ordinary "non-technical" concepts a court or jury can understand.

The burden of going forward with evidence of good faith would, of course, be on the party asserting the defense as the one having relevant information.[15]

Coverage Issues

The Act, while clearly covering ordinary consumer credit contracts, does not appear to have been intended to apply to specialized contracts subject to separate regulatory schemes, like insurance, securities or securities brokerage agreements.[16] However, its language is unclear on this point. While the separate regulation of these type of agreements obviously would not in and of itself negative the applicability of § 5–702, it may do so when combined with the traditional separateness of these areas from what are normally considered consumer transactions.[17] On the other hand, consumer-type loans such as small loans or loans to buy consumer goods are obviously covered.[18]

As to coverage of real estate other than residential leases, the following arguments can be made: (1) express coverage of residential

leases would have been unnecessary if real estate contracts in general were covered;[19] (2) the General Obligations Law treats real estate separately in its other provisions, as in subdivision 10(f) of § 5–701 or § 5–703, but (3) the Legislature failed to grant a separate longer extension for real estate compliance as sought in the original Senate version of the 1978 amendments. It would appear wisest to assume for compliance purposes that consumer real estate transactions involving under $50,000 are covered.

Compliance Challenge

The first step in seeking to comply with the "plain language" law is to see what existing contract provisions can be dropped. Many complex contract provisions are rarely invoked and can simply be dropped with no substantial adverse effect on either party. Indeed, ". . . once a man starts thinking up unhappy contingencies and sets about the careful legal covering of himself against each of them, he has embarked upon a course which ends only with the incorporation of a fifteen volume encyclopedia of law and procedure, or else with plain exhaustion."[20]

In many cases, court decisions or statutes supply answers to contingencies which cannot practicably be covered in contract language suitable for comprehension by the general public. Thus, a check does not contain a description of all legal consequences which apply to various situations contemplated by the Negotiable Instruments Law or the Uniform Commercial Code. Instead, use of certain language automatically triggers legal provisions deemed by the courts or the Legislature to be fair to all parties. The triggering of consequences by the use of the term "full" or "limited" warranty under the Magnuson-Moss Warranty Act is analogous.[21]

Where specific language is mandated by state or Federal law, its use is necessarily permissible. Use of terms required by any other applicable state or Federal law or regulation would be a good defense to a charge of violation of the Sullivan law, both based on the 1978 amendment and on general principles. In the case of a state requirement this would be due to the principle that the more specific provision overrides the more general absent a contrary expression of intention.[22] In the case of a Federal requirement, this would be so by virtue of the Supremacy Clause of the Federal Constitution.

Despite its burdens, "plain language" can help both the business community and consumers to reap the benefits of understandability. This will bring with it, of course, greater respect for the "sanctity"[23] of contractual agreements.

The effort to achieve simplified contracts requires work by state and federal legislators and agencies to bring their own requirements into line with the simplification concept. One example of legalese which must continue to be used is the Federal Trade Commission's required "Holder in Due Course"[24] disclosure which states:

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.
>
> —or—
>
> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

A simplified version might read something like this:

"TO THE DEBTOR: YOU CAN ASSERT AGAINST ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT, ANY CLAIM OR DEFENSE YOU WOULD HAVE AGAINST THE SELLER OF ANY GOODS OR SERVICES BOUGHT WITH THE CREDIT EXTENDED UP TO WHAT YOU PAID."

Another example of an area where lawmakers must do more if the "Plain language" movement is to make headway is N.Y.Real Property Law § 254, written on the assumption that specified technical language will be used.

An important issue is how to refer to complex legal concepts which are cumbersome to spell out in full. An example is the creation of a "security interest", or the "Rule of 78" for computing prepayment refunds. The latter is in some instances mandated by statute.[25]

One approach is to mention these concepts in simple language and define their general thrust without trying to define them in full. This is in line with the concept of the late Karl Llewellyn that legal concepts drawn from the general law outside of the terms of a document should not have to be set forth in the document.[26] This conflicts, of course, with the notion that "full disclosure" of everyone's rights under all circumstances in complete detail is required. But "full" disclosure, if carried to an extreme, is impossible. We constantly use shorthand terms which people who are involved in the type of transaction in question are expected to understand. This practice cannot realistically be rooted out, nor should it be. Such terms as "Pay to the Order of", "C.O.D." and numerous others are useful and do not hurt the public.

A problem does arise, nevertheless, where the meaning of a term such as "Rule of 78" may be unknown to the signing party. One solution is to indicate how the term could be tracked down—such as by reference to a specific statute where applicable or to industry practice. Even though few consumers are likely to consult the source, at least the possibility exists.

The reasonableness of referring to a concept, without an explanation or reference to readily available materials, may depend on whether the result called for by the terms used in the contract is *in line with ordinary expectations and experience.* If the result triggered by the contract language is what the customer would normally expect, there may be no need to spell it out in detail. If *everything* is spelled out in detail, *nothing* may be clear because everything is lost in a mass of detail, whether or not stated in simplified English.[27] This seems to be a fault of some Truth-in-Lending interpretations which require a great deal of specificity even as to minor points.

The best approach is often to explain the meaning of a phrase such as "security interest" in general terms through a statement such as "this means that the property can be sold or used to pay my debt if I do not pay on time". This does not set forth in full all of the legal incidents of a security interest nor would it be practicable to do so. But it may provide more information than would be reference to the term with no explanation.

If the technical detail contained in the general law is reasonable in light of the limited description given in the contract, this approach may be reasonable and perhaps the best possible. In mathematical terms, if the technical material in the general law not set forth in full, is a "subset" of the overall concept in everyday language which *is* set forth in the contract, this may fit with the ordinary expectations of the parties and should be upheld.

Another option would be to replace the technical term involved with a full description.

Another option would be to make up a work booklet showing in the manner of an arithmetic book. Where applicable such an item could be made available on request.[28]

The desirability of simplifying form contracts for consumer transactions or other transactions with the public is not limited to legal requirements. On the contrary, it has independent value in several respects. Consumers who understand contracts will be more likely to live up to their part of them. Good will will be generated. And understandable contracts can be a selling tool. Contracts should be for the parties, not merely for construction or enforcement in the courts.

Proposed Federal Law

As a consequence of the adoption of L.1977, ch. 747, variations of legislation have been enacted in a number of states. See generally Practicing Law Institute, Drafting Documents in Plain Language (1981). H.R. 12212, 95th Cong., 2d Sess. (1978) introduced in Congress by Representative Spellman of Maryland and a substantial number of co-sponsors, would have enacted a new provision of the Truth in Lending Act based to the requirements of the original New York law as passed in 1977 prior to the 1978 amendments. A nationwide uniform standard might well have important benefits from the compliance standpoint as well as for consumers, but there are several serious problems with H.R. 12212 as drafted.

Unless such federal legislation eventually pre-empts overlapping state requirements, the benefits of uniformity will be lost. State enforcement of the federal law or of identical state laws could be allowed, of course, even if different requirements were precluded. With or without federal legislation there is, of course, also a question of the extent to which extra-territorial application of individual state laws or the aggregate burden of conflicting state provisions may constitute an undue burden on interstate commerce.

Several aspects of H.R. 12212 should be given further consideration:

(a) By including the new provisions in the body of the Truth in Lending Act, the rulemaking authority of the Federal Reserve Board might be called into play, contrary to the thinking underlying the 1977 New York law and its 1978 amendments of avoiding adding a further layer of rules to the requirements of the law itself. Criticism of the complexities of Truth in Lending might suggest the undesirability of adding implementation of a "plain English" requirement to the tasks undertaken by Regulation Z.

(b) Adding the proposed federal "plain language" law to the Truth in Lending Act would also automatically trigger the remedial provisions of the existing Truth in Lending Act, including class actions, minimum statutory damages and the like. These subjects received separate consideration in the New York law, and presumably should receive the same at the federal level.

(c) Preemption of different as well as strictly inconsistent state requirements in the field of language simplicity in contracts should be considered as discussed above.

Many of the coverage issues arising under the New York law would, of course, be resolved by using Truth in Lending coverage definitions even if other aspects of Truth in Lending were not automatically carried over.

Wider Implications

The enactment of the new law mandating the use of "plain English" in consumer contracts was in part an indirect result of campaigns for simplification of governmental regulations in the 1970's.[29]

Although the "plain language" law itself is according to many not entirely clear even as amended in 1978,[30] it represents a response to deeply felt public perception: that the entire legal system is becoming such too complex and its intricacies are beyond public understanding.[31]

The desire for simplification extends beyond consumers and includes the business community and all who must deal with areas of the legal system that have become overgrown.

The desire for simplicity takes several forms.

1. *The most obvious type of simplicity is of course merely the desire for simple language.* This can be accommodated by provisions worded with Spartan simplicity, such as those of the Sherman Act,[32] the interstate commerce clause,[33] equal protection clause, and due process clauses.[34] However, such provisions in turn require interpretation which can become just as detailed as a complex document. The path to simplicity is not simple.

Complex documents, on the other hand, do not guarantee simplicity of construction once one finds the right paragraph number.[35] On the contrary, the more complex a document, the more interaction may arise between different sections which conflict frontally or in their radiations or objectives.[36] Moreover, the more detailed a document, the more exceptions may be necessary because more decisions have been made about situations that have not arisen yet,[37] which turn out to be different than contemplated.[38]

Consequently, the objective of simplifying language leads to a second independent goal.

2. *Simplification of steps which might be taken by the citizen or business to comply with the law or contract in question.* Plain English may be attainable only where this second goal is achieved or approached. Citibank, for example, dropped many arcane provisions from its consumer note at the same time as simplifying its language.

Understandability also requires a willingness *not* to disclose *all* conceivable consequences which may flow from a transaction. Completely "full" disclosure would be endless. Rules complex if fully stated can in some cases be easy to comply with, and even to explain, for 99 percent of situations. The complexities may be explored in case law, formal rules, both—or neither. But they are always there—whether in law or in physics.[39]

A check is simple and is couched in plain English, and its use is also simple for most transactions. But behind it is an incredibly complicated legal structure which defines what happens in various contingencies that do not have to be explained on the face of the check, nor could they well be.[40] A car that is simple to drive is not necessarily simple under the hood.

A similar idea is implicit in the Magnuson-Moss Warranty Act which utilizes the designations of "Full" or "Limited" warranty[41] to describe various types of promises made by warrantors. At present various kinds of additional disclosures are required.[42] Perhaps eventually where a "full" warranty is given, this will itself convey the necessary information that the consumer should be well protected if the terms are lived up to, without the need for a great deal of additional printed information.[43] Similarly, if no written warranty at all is given, certain implied warranties automatically exist (unless properly disclaimed, possible under the Act only in limited circumstances).[44] Thus, even silence creates certain legal obligations that need not be wholly spelled out, and in the case of silence obviously are not spelled out at the time of the transaction.[45]

Simplicity of compliance can thus be the result of a complex "hidden" structure with which the person seeking to comply does not ordinarily need to be concerned. This effect may be heightened by establishing additional alternative means of compliance, which may lengthen the "English" in governing documents but simplify the practical task of compliance.

3. *A third type of simplicity is in the procedures necessary to resolve problems or disputes.* Here, the number of steps involved to obtain a decision is of critical importance. The greater number of levels which must be brought into play in a particular instance, the greater the delay and expense, probably by a large geometric factor.[46] The use of charts showing the structure of a department or agency is

fairly common, but flow charts showing the actual steps which must be followed to obtain a final resolution of a presently common situation are still rare.[47] This aspect is just as important to the simplicity of the operation of the legal system from the point of view of the "consumer of justice"[48] as is the simplicity or understandability of language.

An important aspect of the simplicity of the operation of a procedural system is the degree of emphasis placed on jurisdiction of each element within the system. Where these are potentially overlapping and where the choice of the proper tribunal is given predominant weight, a great amount of time is necessarily expended by the system (and is imposed on the "consumers" of the system) in determining exactly which tribunal should have handled the matter. This can sometimes seem to the public about as significant as the counting of angels on the head of a pin. There are indications that the level system may have the capability of reversing this trend.[49]

Reasons For Complexity

The automatic tendency of a legal system is not toward simplicity, but toward greater complexity, for a number of reasons:

(a) Those aspects of the system which do not work well always invite further elaboration to correct the deficiencies. As these in turn show deficiencies, they can also be further elaborated until a multilayered cheesecloth is created with exceptions, exceptions to the exceptions, and so on.

(b) There is an automatic tendency of the experts within any particular field to use jargon that they understand. This has the advantage of condensation and time-saving for them, and also establishes a feeling of superiority over the rest of the public who do not understand the secret code involved.[50]

(c) Those within any institution generally wish to preserve or advance their position and can often do so best by further complexification of the system, thus requiring more staff and placing them "on the ground floor" of an even larger institutional structure.[51] The "insiders" in such a structure can always come up with valid arguments as to why any change is impossible or impractical. Since they are by definition more expert than anyone else in the intricacies of the system they will usually win. Indeed, efforts to simplify may sometimes themselves merely add another level of complexity.

Can any of this be changed? In the past, the availability of seemingly limitless resources meant that the waste created by a more and more complex legal system was simply another part of the cost of doing business, which could be carried or charged off, and ultimately passed on like everything else to the consuming public. Now a new attitude is possible. For it to become effective, a number of pre-conditions are necessary:

(i) A convergence of interest on the part of business, consumer representatives, and others who see a common interest in reducing complexity.[52]

(ii) An enhancement of the perception that "less can be more"—that ceasing to do the wrong thing can add as much or more as seeking complex solutions. This is the hidden notion behind the success of such advertising as for the "Uncola".[53]

(iii) Study of how to simplify compliance requirements and the flow of decision patterns.[54]

For consumers, simplicity can mean ability to deal with problems which they cannot now handle effectively at all, because of the time and expense involved.[55] For business, it can mean greater respect for contracts[56] and more workable, hence better compliance procedures to meet legal requirements. Because all can gain, a coalition is possible.

[1] The original law added a new Gen. Obligations Law § 5-701(b) and (c), renumbered in 1978 to be § 5702. See comment, "Let the Buyer Be

Aware." 23 N.Y.Law School L.Rev. 824 (...). The original law was sponsored by Assemblyman Sullivan as A. 5338A; the 1978 amendment was A 17218 introduced by Assemblyman Sullivan, and became L.1978, ch. 199.

[2] For background see Safire, "Legalese Does It," N.Y. Times, 7/28/77, p. A19; Cerra, "Controversial State Bill Mandates A Curb on Legalese in Contracts," N.Y. Times, 8/8/77, p. 27. See also Goldstein, The Plain Language Movement is Gaining," N.Y. Times, 8/21/77, Section 4, p. 8; "Porter, How to Baffle Legal Bafflegab," N.Y. Post, 9/9/77; Slawson, "Standard Form Contracts," 84 Harv.L.Rev. 529, 566 (1971).

[3] See Siegel, "To Lift the Curse of Legalese—Simplify, Simplify," 14 Across and Board: The Conference Board Magazine No. 6, p. 64 (June 1977).

[4] Cf. Sandler v. Commonwealth Station Co., 307 Mass. 470, 30 N.E.2d 389 (1940); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) and authorities cited. Compare also Jones v. Great No. Ry., 68 Mont. 231, 217 Pac. 673 (1932); Lambert v. California, 355 U.S. 225, 228, 229 (1957).

[5] E.g. Rentaways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 348, 126 N.E.2d 271, 273 (1955); Taylor v. United States Casualty Co., 269 N.Y. 360, 364, 199 N.E. 292, 293 (1936); Bay State Smelting Co. v. Ferric Indus., Inc., 292 F.2d 96 (1st Cir. 1961); Matter of Davis, 147 Misc. 96, 98, 263 N.Y.Supp. 482, 484 (Surr.Ct.1933); Restatetracts Contracts Sec. 236(d) & Comment (d) (1932); 3 Corbin, Contracts Sec. 559, p. 262 (rev.ed.1960); Patterson, "The Interpretation and Construction of Contracts," 64 Colum.L.Rev. 833, 854 (1964).

[6] See Patterson, "The Interpretation and Construction of Contracts," 64 Colum.L.Rev. 833, 855–862 (1964); Ehrenzweig, "Adhesion Contracts in the Conflict of Laws," 53 Col.L.Rev. 1072 (1953); Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract," 43 Colum.L.Rev. 629 (1943); Llewellyn, "Book Review," 52 Harv.L. Rev. 700 (1939); cf. Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 204–06 (2d Cir. 195–5) (Frank, J., dissenting).

[7] Rentaways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 126 N.E.2d 271 (1955); Bay State Smelting Co. v. Ferric Indus., Inc., 292 F.2d 96 (1st Cir. 1961) discussed in Patterson, "The Interpretation and Construction of Contracts," 64 Colum.L.Rev. 833, 854 & n. 83 (1964). ". . . If there is any doubt as to the meaning of the terms employed, the [party presenting the language] is responsible for it as the language is wholly [his] own . . ." Gillet v. Bank of America, 160 N.Y. 549, 554, 55 N.E. 292, 293 (1899).

[8] See Ryon v. John Wanamaker, New York, Inc. 116 Misc. 91, 190 N.Y.Supp. 250 (Sup.Ct.1921), aff'd, 212 App.Div. 848, 194 N.Y.Supp. 977 (2d Dep't 1922), aff'd, 235 N.Y. 545, 139 N.E. 728 (1923); In re Vaupel's Estate, 37 N.Y.Supp.2d 853, 856 (Surr.Ct.1942), aff'd, 266 App.Div. 723, 40 N.Y.Supp.2d 956 (1st Dep't 1943).

[9] Cf. Dickerson, "Statutory Interpretation: Core Meaning and Marginal Uncertainty," 29 Mo.L.Rev. 1 (1964).

[10] Cf. Curtis, "A Better Theory of Legal Interpretation," in Jurisprudence in Action 131–170 (N.Y.C.B.A.1953); Jones "Statutory Doubts and Legislative Intention," 40 Colum.L.Rev. 957 (1940). "The same words, in different settings, may not mean the same thing." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 678 (1950); cf. R. H. Johnson & Co. v. SEC, 198 F.2d 690, 696 (2d Cir.), cert. denied, 344 U.S. 855 (1952).

[11] E.g., Comm'r v. LoBue, 351 U.S. 243, 249 (1956); United States v. Hutcheson, 312 U.S. 219, 234–35 (1941); Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 569, 161 N.E.2d 197, 204, 190 N.Y.Supp.2d 977, 987 (1959); Schuster v. City of New York, 5 N.Y.2d 75, 85–86, 154 N.E.2d 534, 540, 180 N.Y.Supp.2d 265, 273–74 (1958); Stone, "The Common

Law in the United States," 50 Harv.L.Rev. 4, 12–18 (193...); Ellsworth, "Implied Warranties of Quality in Non-Sales Cases," ... Com. L.Rev. 653, 654 (1967); Comment, 59 Colum.L.Rev. 487, 494 (1959); cf. Parker v. Brown, 317 U.S. 341, 367 (1943); Southern Pacific Co. v. Arizona, 325 U.S. 761, 773 (1945). Compare also Fuld, J. in Zendman v. Harry Winston, Inc., 305 N.Y. 180, 189 n. 3, 111 N.E.2d 871 (1953) (persuasiveness of UCC prior to adoption as reflecting modern thinking on commercial transactions.)

[12] On Sec. 2-302 generally see American Home Improvement, Inc. v. MacIver, 201 A.2d 886 (N.H.1964), 78 Harv.L.Rev. 865 (1965).

[13] Cf. Patterson, "The Interpretation and Construction of Contracts," 64 Colum.L.Rev. 833, 854 & n. 83 (1964) and cases cited. Compare also Williams v. Walker Thomas Furn. Co., 350 F.2d 445 (D.C.Cir. 1965).

[14] See Odorn v. East Avenue Corp., 178 Misc. 363, 54 N.Y.S.2d 312, 317 (Sup.Ct. 1942); aff'd, 264 App.Div. 985, 37 N.Y.S.2d 491 (4th Dept. 1942); Brewster v. J. and J. Rogers Co., 169 N.Y. 73, 80, 62 N.E. 164 (1901). In Schuster v. City of New York the court stated:

"The existence of section 1848 of the Penal Law does not defeat plaintiff's common-law cause of action. In the contrary, it reflects a public policy that municipalities shall respond in damages to private citizens or their estates who have been injured and killed as a result of aiding in law enforcement. This statute contains no language barring plaintiff's common-law remedy. The rule is that '[a] statute in the affirmative, without any negative expressed or implied, takes away no preexisting rights or remedies; as a general rule, it operates merely to furnish an additional remedy for the enforcement of a right . . .' (McKinney's Cons. Laws of N.Y., Book 1, Statutes, Sec. 34).

"In other words, where a remedy existed at common law for the wrong or injury against which a remedial statute is directed, if such a statute provides a more enlarged or a summary or more efficient remedy for the party aggrieved, but does not in terms or by necessary implication deprive him of the remedy which existed at common law, the statutory remedy is considered as merely cumulative, and the party injured may resort to either at his election." 5 N.Y.2d 75, 85, 180 N.Y.S. 265, 273, 154 N.E.2d 534 (1958). See also Norton v. the State of New York, 53 Misc.2d 495, 279 N.Y.S.2d 309, 313 (Ct. of Claims, 1967); Taylor v. Mayor of City of New York, 82 N.Y. 11 (1880); Seligman v. Friedlander, 199 N.Y. 373, 92 N.E. 1047 (1910); Lobett v. Galpin, 228 App.Div. 65, 239 N.Y.S. 76, 79 (4th Dept. 1930); Pound, "Common Law and Legislation," 21 Harv.L.Rev. 383, 385-397 (1908); Stone, "The Common Law in the United States," 50 Harv.L.Rev. 4, 13 (1936).

[15] Compare Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225–26 (1939); United States v. Costello, 275 F.2d 355, 358 (2d Cir. 1960), aff'd, 365 U.S. 265 (1961); 3 Wigmore, Evidence Sec. 1042 at p. 733 (3d ed. 1940).

[16] As to insurance, see specialized provisions in General Business Law Art. 23, 23-A, 23-B, 23-C, Sec. 350 to 359-W; as to securities, 15 U.S.C.A ch. 2A, 2B-1, 2D, Sec. 77a-78aaa, 80a-1.

[17] Compare generally Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Note, 58 Colum.L.Rev. 673 (1958).

[18] As to the latter, compare Federal Trade Commission Trade Regulation Rule, Preservation of Buyer's Claims and Defenses, 16 C.F.R. Part 433, Federal Register May 14, 1976.

[19] Cf. Train v. Colorado Public Interest Research Group, 426 U.S. 1, 22 (1976); Brown v. GSA, 425 U.S. 820, 828 (1976).

[20] See Llewellyn, "Meet Negotiable Instruments," 44 Colum.L.Rev. 299, 312 (1944).

[21] Public Law 93-637 (1974), 88 Stat. 2187, Section 104, 15 U.S.C.A. § 2304. Cf. New York State Bar Association, Banking, Corporation

and Business Law Section, Address from Fall Meeting, Oct. 9–12, 1975, Saratoga Springs, p. 11–14.

[22] Compare Morton v. Mancari, 417 U.S. 535, 550–51 (1974); Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976); Silver v. New York Stock Exchange, supra note 27; Note, 58 Colum.L.Rev. 673 (1958).

[23] Cf. Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir. 1978) (en banc). See also Slawson, "Standard Form Contracts", 84 Harv.L. Rev. 529 (1971).

[24] 40 F.R. 53506 (11/18/75), 16 C.F.R. § 433.2(a), (b).

[25] E.g. N.Y. Personal Prop. Law § 305, N.Y. Banking Law § 108(4)(c).

[26] See Llweellyn, "Meet Negotiable Instruments", 44 Colum.L.Rev. 298 (1944). In the case of the Rule of 78, under the Truth in Lending Act, compare Gantt v. Commonwealth Loan Co., 573 F.2d 520 (8th Cir. 1978) with Ballew v. Associates Fin. Ser. Co. of Neb., Inc., 450 F.Supp. 253 (D.Neb. 1976).

[27] Cf. Cary, "Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal", 60 Colum.L.Rev. 259 (1960). Many grounds for decision in our society are not contained in written rules and may indeed be deeper than those rules. Cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944). "Full" disclosure of the consequences of a transaction would involve discerning and describing all of these as well.

[28] Still another option is to replace the concept in question, such as the Rule of 78, by a new one having a similar substantive impact, e.g. an actuarial refund computation but allowing a greater minimum finance charge to be imposed by the creditor.

[29] Regarding some possible implications, cf. Note, "Violations by Agencies of Their Own Regulations," 87 Harv.L.Rev. 629 (1974); see also Illinois H.B. 2509 (1977); Vermont Proposed Rule 77–P146.

[30] Committee on State Legislation, Report No. 309, Bulletin of Ass'n of the Bar of the City of New York on State Legislation 961 (1977); Tyler, Letter to the Editor, "Sullivan Bill: A Sledgehammer Blow for Clarity," N.Y. Times, 8/5/77, p. A20; compare Goldstein, "The Plain-Language Movement is Gaining," N.Y. Times, 8/21/77, § 4, p. 8; Blumenthal, "Plain-Language Law Facing Amendatory Relegislative Proceeding," N.Y. Times, 2/4/78, p. 21.

[31] See also Friedman, Letter to the Editor, N.Y. Times, 2/17/78, p. A26; Business Week, 1/23/78, p. 112; but see Editorial, N.Y. Times, 2/15/78.

[32] 26 Stat. 209 (1890), as amended 15 U.S.C.A. §§ 1–7 (1970). "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions". Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) (Hughes, C. J.).

[33] See generally Raymond Transp., Inc. v. Rice, 434 U.S. 429 (1978); Hunt v. Washington State Apple Advertising Comm'n, 97 Sup.Ct. 2434, 432 U.S. 333 (1977) and cases cited; Dowling "Interstate Commerce and State Power: Revised Version", 47 Colum.L.Rev. 547 (1947). On state enforcement of federal law, cf. Comment, 24 Case—Western Reserve L.Rev. 144, 152–56 (1972).

[34] The equal protection principle applies to the Federal Government by virtue of the Fifth Amendment due process clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

[35] Llewellyn, "Meet Negotiable Instruments", 44 Colum.L.Rev. 298, 322 (1944). Cf. Cary, "Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea For A Moratorium and Reappraisal," 60 Colum.L.Rev. 259 (1960).

[36] See Mellinkoff, The Language of The Law, Ch. XIV (1963). Cf. Silver v. New York Stock Exchange, 373 U.S. 341 (1963); United States v. Hutcheson, 312 U.S. 219 (1941); and see Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) United States v. NASD, 422 U.S. 694 (1975).

[37] Compare, for example, the New York State Constitution with the Federal Constitution, properly called our "great instrument of government, intended to endure for unnumbered generations . . . concerned with substance and not with form." Dimick v. Schiedt, 293 U.S. 474, 490 (1935) (Stone, J. dissenting).

[38] Cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944).

[39] Cf. Gerald Feinberg, What is the World Made Of? (1977).

[40] Cf. Llewellyn, supra note 20.

[41] Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, P.L. 93–637 (1975), Section 103, 15 U.S.C.A. § 2303.

[42] These are defined by regulations codified in 16 C.F.R. as amended.

[43] See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, P.L. 93–637 (1975), Section 104(e), 15 U.S.C.A. § 2804(e). Business & Corporation Law Section, N.Y. State Bar Ass'n, Addresses from Fall Meeting, October 9–12, 1975.

[44] 15 U.S.C.A. § 2308. Formerly express warranties could exclude all implied warranties, sometimes leaving less total coverage than the latter alone would have offered.

[45] See Farnsworth, "Some Considerations in the Drafting of Agreements: Problems in Interpretation and Gap-Filling", 23 Record of The Ass'n of the Bar of the City of New York 105 (1968); Farnsworth, "Meaning In the Law of Contracts," 76 Yale L.J. 939 (1967); Patterson, "The Interpretation and Construction of Contracts", 64 Colum.L.Rev. 833 (1964); Young, "Equivocation In the Making of Agreements," 64 Colum.L.Rev. 619 (1964); Farnsworth, "Disputes Over Omission in Contracts", 68 Colum.L.Rev. 860 (1968); Cf. Krause, "Letter of Intent—An Agreement to Agree," 50 N.Y. State B.J. 474 (1978).

[46] Cf. Antony Jay, Management and Machiavelli (1968); Peter Drucker, Concept of the Corporation (1960); C. Northcote Parkinson, Parkinson's Law (1957); Robert Townsend Up the Organization (1970); R. Alec Mackenzie, The Time Trap, ch. 7 (1972); Peter & Hull, The Peter Principle (1969); Jane Jacobs, The Economy of Cities (1969). "If too many approvals are required before an idea can be born, the probabilities are overwhelming against it." Trebus, "Applying Science to Industry," U.S. News & World Report 35 (Jan. 8, 1971).

[47] See H.Rep. No. 95–575, 95th Cong., 1st Sess. (1977). Presumably this technique is not more widely used because too dangerous to present way of doing things. See generally Janis & Mann, Decision Making (1977); Cf. Gall, "Why Nothing Works The Way It's Supposed To," N.Y. Times Magazine, 12/26/76, p. 10.

[48] For this concept, cf. Cahn, "Fact Skepticism, An Unexpected Chapter," 38 N.Y.U.L.Rev. 1025 (1963).

[49] Cf. Davis v. Department of Labor, 317 U.S. 249 (1942).

[50] Compare generally Special Committee on Consumer Affairs, "Licensing As A Consumer Protection Measure," 28 Record of The Ass'n of the Bar of the City of New York 646 (1973). That language can be a weapon was pointed out by George Orwell in 1984 (1946) and "Politics and the English Language," in A Collection of Essays by George Orwell (1945) (p. 162 in Anchor Doubleday ed. 1954).

[51] Cf. Robert Kharasch, The Institutional Imperative (1973); Hermann Hesse, Magister Ludi (The Glass Bead Game) (1943).

[52] This kind of combination proved effective in other legislative initiatives in New York State, e.g., Penal Law Sections 190.60, 190.65

(prohibiting schemes to d[illegible]; Judiciary Law Section 217a [now CPLR 5015(c)] (supervisio[illegible]ault judgments).

[53] Compare Advertisement, N Y. Times, 10/10/77, p. 29: "In Technology, Simplicity is the Ultimate Sophistication".

[54] When the external pressure for results is sufficient it can be, has been, and is done. Cf. Peter Drucker, Concept of the Corporation (1960).

[55] Cf. Committee on Legal Assistance, "Providing Legal Services to Persons of Moderate Means," 28 Record of The Ass'n of the Bar of the City of New York 226 (1973).

[56] See Slawson, "Standard Form Contracts," 84 Harv.L.Rev. 529, 566 (1971). Compare generally Farnsworth, "The Past of Promise: An Historical Introduction to Contract," 69 Colum.L.Rev. 576 (1969); Horwitz, "The Historical Foundation of Modern Contract Law," 87 Harv.L. Rev. 917 (1974).

Cross References

Contracts in small print, see CPLR 4544.

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws Forms under section 5-702 of the General Obligations Law:

Consumer Note and Security Agreement (Plain Language Law), see Form 1.
Plain Language Forms Relating to Real Property (Cross Reference), see Form 2.

Law Review Commentaries

On legalities and linguistics: plain language legislation. Ross. 30 Buffalo L.Rev. 317 (1981).
The "plain english" law. 50 N.Y.S.B.J. 479 (1978).

Library References

Landlord and Tenant ⇐24(1).
C.J.S. Landlord and Tenant § 203 et seq.

Notes of Decisions

---

1. Indemnification agreement

In the case of indemnification agreements which can be viewed as merely allocating risk of liability to third parties, essentially through employment of insurance, party may be relieved from consequences of his own negligence on strength of broadly worded clause framed in less precise language than would normally be required, but agreement must still evince unmistakable intent of the parties. Gross v. Sweet, 1979, 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 206.

2. Negligence disclaimer clause

To insulate party from liability for his own negligent acts, it must appear plainly and precisely that limitation extends to negligence or other fault of party attempting to shed his ordinary responsibility, and such an agreement must be not only unambiguous but must be understandable in its terms, such provisions being clear and coherent. Gross v. Sweet, 1979, 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306.

"Responsibility Release" which provided that undersigned waived any and all claims that he or his heirs or assignees might have against parachute center, jumpmaster and pilot operating aircraft when used for purpose of parachute jumping for any personal injuries or property damage releasor might sustain or which might arise out of his learning, practicing or actually jumping from aircraft could be taken as merely excusing parachute center from responsibility for injuries that ordinarily and inevitably would occur without fault on part of

center, and release would not be taken as excusing a defendant from consequences of his own negligence. Id.

To extent that agreement purported to grant exemption for liability and willful or grossly negligent act, it was not effective. Id.

3. Leases

This section requiring that every agreement entered into after November 1, 1978, for [illegible]ase o[illegible]ace to be occupied for [illegible]ntial purposes be written in a clear and coherent manner using words with common and every day meanings and be appropriately divided and captioned by its various sections was applicable to renewal leases for rent stabilized tenants. Newport Apartments Co. v. Collins, 1980, 103 Misc.2d 994, 431 N.Y.S.2d 231.

§ 5-703. Conveyances and contracts concerning real property required to be in writing

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws Forms under section 5-703 of the General Obligations Law:

Affidavit in Support of Motion to Dismiss Complaint and for Summary Judgment on Ground of Statute of Frauds in Action for Specific Performance of Alleged Agreement of Sale of Real Property, see Form 4.
Affidavit in Support of Motion to Dismiss Complaint in Action for Specific Performance of Three Year Lease on Ground of Statute of Frauds, see Form 6.
Affirmative Defense of Statute of Frauds in Relation to Conveyance of Real Property-General Form, see Form 1.
Affirmative Defense of Statute of Frauds Involving Sale of Real Property and Negative Easement, see Form 2.
Notice of Motion to Dismiss Complaint and for Summary Judgment on Ground of Statute of Frauds in Action for Specific Performance of Alleged Agreement of Sale of Real Property, see Form 3.
Notice of Motion to Dismiss Complaint in Action for Specific Performance of Three Year Lease on Ground of Statute of Frauds, see Form 5.

Notes of Decisions

---

5. Nature and scope of section

Distinction between first and second subdivisions of the statute of frauds is the traditional one between a statute codifying the common-law rules of conveyance, which merely require the writing to be signed by the party creating the interest, and a true statute of frauds, which applies only to contracts and requires a writing signed by the party to be charged. Geraci v. Jenrette, 1977, 41 N.Y.2d 660, 394 N.Y.S.2d 853, 363 N.E.2d 559.

Oral contract within this section is not absolutely invalid but is only voidable and unenforceable at election of party to be charged or his successors in interest and election of party entitled to invoke this section must be manifested in some affirmative way in trial court in accordance with established procedure. Raoul v. Olde Village Hall, Inc., 1980, 76 A.D.2d 319, 430 N.Y.S.2d 214.

8. Persons entitled to invoke section

This section precluded party from claiming interest in real property despite claim that he paid real estate taxes, all carrying charges, and made repairs in exchange for promise that new deed would be prepared and executed transferring to him a share in interest of title

(Type in committee name) secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 012385 Senate Bill No. 66 Time 11:55

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown		X
Senator Bruce D. Crippen	X	
Senator Jack Galt		
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw		
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		
Chairman Senator Joe Mazurek	X	
	(4)	(3)

Secretary Chairman

Motion: Amend SB 66

(f) a transfer of real estate

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 012385
BILL NO. SB 66

STANDING COMMITTEE REPORT

January 23 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 60

first reading copy (white color)

REPLACE UNIFORM GIFTS TO MINORS ACT WITH UNIFORM TRANSFERS TO MINORS ACT

Respectfully report as follows: That SENATE BILL No. 60

be amended as follows:

1. Page 1, line 20.
Following: "of"
Strike: "21"
Insert: "18"

2. Page 2, line 25.
Following: "of"
Strike: "21"
Insert: "18"

AND AS AMENDED

DO PASS

~~DO NOT PASS~~

Chairman.

STANDING COMMITTEE REPORT

January 23 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 87

first reading copy (white color)

LIABILITY OF PARTNERS AND OTHERS UNDER UNIFORM LIMITED PARTNERSHIP ACT

Respectfully report as follows: That SENATE BILL No. 87

DO PASS

~~RECOMMITTED~~

Chairman.