Plainly Ambiguous: Have Plain English Laws Made Insurance Policies Less Ambiguous?

David Rossmiller
Dunn Carney Allen Higgins & Tongue LLP

"Plain English" is like health, money and beauty: no one is against it and everyone wants more of it. Especially when it comes to insurance contracts, long a focal point of consumer mystification and rage, more plain English would seem to be much-needed medicine for an old ailment—no one can understand what insurance policies say. After all, even claims adjusters, lawyers and judges who are indoctrinated to insurance policy argot are often stumped by its meaning.

Plain English laws for consumer contracts have been enacted in some 35 states, including Oregon. Typical of these kinds of laws is ORS 180.545, which says that a contract—such as an insurance policy—must use "primarily simple sentences," present tense and active voice whenever possible, "words that convey meaning clearly and directly," adequate margins for ease of reading, and frequent section headings.

The Plain English movement for legal prose grew out of the work and advocacy of such people as Rudolf Flesch, who fled to the United States in 1938 from Austria when it was annexed by Nazi Germany. After World War II, Flesch became an enormously influential writer on readability and use of clear, precise language. His many books include one that has entered English as a stock phrase, *Why Johnny Can't Read*, and also *How To Write Plan English: A Book for Lawyers and Consumers*. Law professors like Fred Rodell,

David Mellinkof and Joseph Kimble have also argued powerfully and convincingly that lawyers and other drafters of legal language need to clean up their acts.

There can be no doubt that the Plain English movement confronted real problems of a massive, even pervasive scale. An important study, by Forrest E. Harding in the *Journal of Risk and Insurance* in 1967, found that a specimen auto policy was substantially more difficult to read than Albert Einstein's *The Meaning of Relativity*.[1] The study recommended steps like simplifying how policies are physically arranged, making policy provisions apply to the whole policy rather than individual sections, and creating standard definitions within policies. In response to urging by consumer groups, Plain English advocates, and regulators, insurance companies began to revise and simplify their contracts as far back as the 1970s—some voluntarily, some in response to state laws.

But that begs the question: Are policies any easier to understand than they once were? If the success of the Plain English movement is measured not by the number of states with Plain English laws, or by marginal gains in readability, but instead by the amount of insurance litigation over the ambiguity of terms, the movement has not been a success. In fact, although scholarly studies on the issue seem to be relatively rare, there is little evidence that insurance consumers can better understand policies now than they could at the time of the Harding study, or that they even read the policies at all. Do they fail to read because the contracts are too opaque, even with Plain English improvements? Or would they fail to read insurance policies no matter how simply the policies are written?

Again, although academic literature on the subject is not as frequent as one might expect, industry studies consistently show that people have at best a very imperfect idea of what their policies cover. For example, a 2007 consumer survey conducted by Zogby International for MetLife Auto & Home[2] found widespread misconceptions about homeowners and auto coverage. Among the misconceptions include:

- Most Americans vastly underestimate how much they might owe if their vehicles are totaled, and only 40 percent of those polled knew that it was possible that they could owe more on their vehicles than they were actually worth at the time of a crash.

- More than seven out of ten Americans thought homeowners insurance would pay for the full cost to rebuild from a natural disaster or fire. In fact, most insurance companies no

Continued on next page

PLAIN ENGLISH
continued from page 9

longer offer automatic full replacement value for homes, and leave it up to homeowners to determine the value of their homes and to insure them accordingly. This lack of knowledge became evident after extensive wildfires in 2003 near San Diego destroyed hundreds of homes. Residents found themselves underinsured as their homes rapidly increased in value, but found that insurers had long since removed full replacement value from coverage.

■ Almost seven out of ten Americans believed their homeowners policy would pay for upgraded wiring or plumbing in the event of a loss. But standard homeowners insurance excludes from coverage the cost to repair and replace burst plumbing or inadequate wiring.

■ More than six out of ten Americans believed their homeowners policy would cover damage from the backup of sewers, sump pumps and drains. In fact, almost all policies exclude coverage for this damage.

■ More than one-third of Americans did not know that their homeowners policy covered them from lightning damage, although like other forms of accidental direct physical loss to property, it may be expressly excluded.

Part of the reason for widespread misunderstanding is probably that consumers simply do not bother to look at their policies at all. Many consumers view insurance in general as a rip off and think about it as little as possible. Insurance can best be viewed as an economic transfer from yourself in the present, with no problem, to a future you with a loss or liability claim against yourself. Future you gets perhaps 70 percent of the transfer, while the insurer takes the other 30 percent as a premium for the risk it takes on and for the administrative costs of doing business.[3] Of course, you may arrive safely in the future without any problem, and many people would see this as wasted money, a necessary evil at best, and would be disinclined to learn more about the coverage for which they are actually paying. Others would not buy into any theory of future transfer to themselves, but instead see insurance payments only as present transfers to insurance companies, which they hate. Rather than trying to read the policy to form ideas about coverage, their expectations of coverage often are "resentment based"—because it hurts to pay out the money, many consumers expect the policy should cover whatever problem occurs.

Another feature of insurance contracts invites consumer disinterest. Almost all insurance contracts are standard form—little to no bargaining is permitted over the terms—and people don't get them until after they have already paid and the policy has gone into effect. In that case, why bother to read them at all? These assumptions cast serious doubt, then, on whether making insurance policies more compatible with Plain English has any effect on consumer understanding or expectations.

But what of courts? Haven't Plain English laws made it easier for them to read and interpret contracts? On the surface, one would think courts carry a heavy stick that forces insurers to come up with clear language. In every jurisdiction in this country, the rule of *contra proferentem*—deciding against the drafter in event of ambiguity—holds sway and is applied with particular vehemence against insurance companies. Doesn't the threat of being hammered again and again for bad policy language send insurers running back to the drafting table with a copy of *How to Write Plain English* in hand? No, it does not.

Before examining why, let's take a look at some of the features of the Oregon Plain English law. Consumer contracts, according to the law, should be submitted to the appropriate state agency for approval, yet the law reads more like the Ten Suggestions than the Ten Commandments. Has the law made insurance policies any easier to read? Perhaps in some ways it has, although empirical evidence is lacking that gains in readability have led to any greater comprehension or any greater rate of policy reading by consumers. Why is this?

For example, consider State Farm's anti-concurrent-cause provision, which is included in all its homeowners policies. During the thousands of homeowner lawsuits that grew out of Hurricane Katrina's destruction of the Louisiana and Mississippi coasts in 2005, this policy provision was attacked again and again as hopelessly convoluted and 100 percent incomprehensible to the layman. There is no doubt that it is hard to fully understand, even for insiders, the way the clause functions in case of a loss. In appeals of Katrina litigation before the U.S. Fifth Circuit, several different panels of the court went through varying degrees of struggle with the provision. In one case[4] the court applied the provision even more broadly than insurance companies had been applying it throughout Katrina claims adjusting.

In a 1985 article about the drafting of State Farm's anti-concurrent-cause provision, Michael E. Bragg, an in-house lawyer with the insurer, said drafters made attempts to reduce the clause to language the layperson could understand, but they failed. When the drafters made the language understandable to the average person, they considered the language insufficiently precise to do what it was intended to do, which was (1) to contractually overturn the so-called "efficient proximate cause" analysis, a common law default rule that almost all jurisdictions use to analyze first-party property loss in the absence of a different, contractually mandated analysis; and (2) to stop the spread of new, judicially created causes of loss,

Continued on next page

PLAIN ENGLISH
continued from page 10

and confine covered causes of loss only to those that companies intended to insure.[5] This is important to remember because it is the key to the limits of Plain English laws.

As the Bragg article shows, simplified language was unsuitably risky because it did not address the court precedents that insurers wanted to cancel out. It did not contain the terminology and phrases used by the courts, nor did it accurately state the jargon of insurance causation, where words like "concurrent" and "sequential" have meanings far different and more complicated than their meanings in common parlance.

Insurers, then, do not write for consumers, they write for courts. Insurers win some, they lose some, but once a policy provision has been interpreted in one jurisdiction, it is precedent and acquires actuarial value as a known quantity. Even if the ruling was adverse, insurers can charge premiums accordingly. Coming up with new language, in contrast, is risky because it wipes out previously calculated chances of loss. The court and the insurer, then, are like chess players at a tournament, moving their pieces across the board, trying to understand the meaning of each other's moves in the context of chess theory. But in this scenario, the audience at the tournament—consumers—knows how to play checkers only. The consumers are neither part of the game nor does anyone really expect them to understand it or pay attention to it.[6] ✪

Endnotes

1 See The Standard Automobile Insurance Policy: A Study of Its Readability, Journal of Risk and Insurance, Vol. 34, No. 1 (March 1967), pp. 39-45. Available at www.jstor.org.

2 I wrote about this survey on my legal blog at http://www.insurancecoverageblog.com/archives/miscellaneous-another-survey-finds-consumer-misperceptions-about-auto-home-insurance.html.

3 I explain this transfer mechanism through the example of crop insurance in a post at my blog at http://www.insurancecoverageblog.com/archives/first-party-insurance-farming-your-insurance-and-growing-a-bumper-crop-of-subsidies.html.

4 Leonard v. Nationwide, 499 F.3d 419 (5th Cir. 2007).

5 Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 Forum 385 (1985).

6 The best explanation of the phenomenon of insurers' drafting for courts and not consumers is by Prof. Michelle E. Boardman in Contra Proferentem: The Allure of Ambiguous Boilerplate, 104 Mich.L.Rev. 1105 (March 2006). This is one of a very few law review articles that generally adheres to Plain English theory, and it is destined to become a classic work on the reasons for continued ambiguity in policy drafting.