This document was prepared to support the August 2025 Consumer Liaison Presentation:

Don't Tell Me to Read My Policy

Presenters: Amy Bach (United Policyholders), Brenda Cude (Professor Emeritas, University of Georgia), Erica Eversman (Automotive Education and Policy Institute), Brent Walker (Coalition Against Insurance Fraud), Richard Weber (Life Insurance Consumer Advocacy Center)

Also Contributing: Brendan Bridgeland (Center for Insurance Research)

"Review your insurance policy to understand what is covered." "Read your policy." "Don't forget to review your insurance coverage and make sure you are familiar with your policies."

This well-intentioned advice is frequently heard from many, including state insurance departments. This presentation will outline reasons why the advice is likely to fall on deaf ears, including difficulties in both locating one's complete policy and reading it, with an emphasis on possible solutions. Improved understanding of insurance coverage is important as both the availability and affordability of homeowners insurance depend on a competitive marketplace in which there is transparency in both pricing and coverages.

Documents Included:

Bridgeland, Brendan. (2025, August). *Policy formatting issues*. Document created for NAIC Consumer Liaison Presentation.

Schwarcz, D., Logue, K.D., **Cude, B.J.,** & Alcala, G.M. (2025, February). *Read but not understood? An empirical analysis of consumer comprehension of homeowners insurance. U of Michigan Law & Econ Research Paper No. 24-043. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5120347*

Cude, B. J. (2024, March). *Readability standards in state insurance laws*. Presentation to NAIC's Market Conduct and Consumer Affairs Committee.

Blasie, M. A. (2023). Regulating plain language. *Wisconsin Law Review*. https://doi.org/10.59015/wlr.STSK3198

Eversman, E., & Ellsworth, E. (2022, Fall). *I bought auto insurance, but have no idea what it means or what is actually covered*. Presentation to NAIC Consumer Liaison Committee.

Policy Formatting Issues

Expecting a consumer to read, and then understand their insurance policy, is unreasonable if the content and formatting of the policy prevents orderly and logical review – which is typically the case with bloated and disorganized modern homeowner's policies.

- I put out a request to my fellow consumer representatives, asking for volunteers to provide me a copy of their homeowners insurance policies for review.
- A review of the formatting in two of those policies (Policy A from California and Policy B from Ohio) amply illustrates why a consumer cannot simply sit down and read through their policy to fully grasp its contents.

Policy A – California Homeowners Insurance Policy

- The first policy is 91 pages long and contains 32,365 words.
    - It would take an average adult two hours and 9 minutes to read that amount of text – potentially longer since it contains technical language.
    - The length of the policy exceeds several books: *Of Mice and Men; Breakfast at Tiffany's; Animal Farm; The Old Man and the Sea*; and *Charlotte's Web*.
- Policy A lists the attached Forms and Endorsements – 22 in total, including forms that date back to 2008 – 17 years ago. (The policy also lists 38 different Credit and Surcharge categories.)
- The actual policy itself is only 30 of the 91 pages, but does not begin until page 15 of the document.
- It includes 4 pages of definitions and Endorsements and later adds 10 more pages of definitions – there is a 30 page gap between these sections.
- Exclusions appear only in the back-half of the policy, but there is more than one category for exclusions (for different coverages) which are not contiguous.
- "Dwelling" is defined on p. 16, but deleted and replaced on p. 82 – 66 pages later. No page reference is provided and there are many similar revisions.
- A statement about flood damage being excluded is on p. 91, the last page.

Policy B – Ohio Homeowners Insurance Policy

- The policy is 69 pages and includes 47,007 words.
    - It would take an average adult three hours and 8 minutes to read that amount of text. (Policy B is in dual column format, putting twice as many words on each

page). Books of this length: *The Great Gatsby; Farenheit 451*; and the Apostle Paul's Epistles.

- Policy B does not have an index of forms/endorsements at the front and contains 7 pages of definitions (in dual column format).
- As with Policy A, there are significant gaps between policy provisions and revisions – with no page number indicators provided. A provision called “Guaranteed Replacement Cost – Coverage A” appears on p. 15, but is deleted and replaced with new text on p. 51 (36 pages later).

Policy Construction Take-aways

- Homeowners policies are not organized in an appropriate fashion for consumers to understand. Policies are novel-length and disjointed, requiring the shuffling of pages out of order to be read as a whole.
- The mixing of various policy forms, some of which are decades older than others, exacerbates this issue.
- A disorganized stack of documents, portions of which override earlier provisions, with no internal page references or other demarcation, discourage consumers from reading their policies. The NAIC frequently circulates red-line version of draft work product in order to make a constant stream of revisions intelligible, but consumers get no such assistance.

Brendan Bridgeland, NAIC Consumer Representative

August 2025

READ BUT NOT UNDERSTOOD? AN EMPIRICAL ANALYSIS OF CONSUMER COMPREHENSION IN HOMEOWNERS INSURANCE

Daniel Schwarcz, Brenda J. Cude, Kyle D. Logue & German Marquez Alcala[*]

Abstract

Modern contract law assumes that consumers meaningfully assent to the standard forms that govern their daily lives. However, this assumption is widely regarded as a legal fiction for two key reasons: first, most consumers do not read standard forms, and second, even those who do often struggle to fully comprehend their terms and implications. While the lack of consumer reading has been well-documented through empirical research, consumers' ability to comprehend standard form contracts has received surprisingly little attention.

This Article addresses the latter issue by empirically examining whether providing excerpts from the dominant standard form homeowners insurance policy improves consumer understanding of coverage. Through a series of survey-based experiments, we compare consumers' general beliefs about homeowners insurance with their beliefs when provided with key policy excerpts. Our main finding is that providing policy language only moderately improved consumer understanding in some scenarios, while affirmatively decreasing accuracy in others. Respondents often struggled with partial reading or misinterpretation of policy provisions, especially when broad coverage grants were later restricted by specific exclusions—a common structural feature of insurance policies.

These findings carry significant legal and regulatory implications. Even if most consumers do not read standard form contracts, improving the readability and comprehensibility of standard form terms can limit firms' discretion in disputes, enhance regulatory oversight of unfair provisions, and empower markets to penalize firms relying on excessively one-sided terms. This Article argues that addressing these challenges is essential to fostering fairer and more effective consumer protections.

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[*] Daniel Schwarcz is the Fredrikson & Byron Professor of Law at the University of Minnesota Law School. Brenda J. Cude is Professor Emerita in the Department of Financial Planning, Housing and Consumer Economics at the University of Georgia. Kyle D. Logue is the Douglas A. Kahn Collegiate Professor of Law at the University of Michigan Law School. German Marquez Alcala is the Research Associate for Empirical Legal Studies at the University of Michigan Law School. For helpful comments and suggestions, we thank Yonathan Arbel, Michael Blasie, David Hoffman, Roseanna Sommers, Jeffrey Sovern, Lior Strahilevitz, Sharon Tennyson, and Tess Wilkinson-Ryan.

Table of Contents

Introduction

A foundational premise of modern contract law is that consumers meaningfully assent to the boilerplate agreements that shape their daily lives.[1] Yet this premise is widely rejected by academic commentators, who routinely

[1] *See* RESTATEMENT OF CONSUMER CONTRACTS § 2 (AM. LAW INST. 2024); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

assail it as nothing more than a legal fiction.[2] These academic critiques typically rely on two key empirical observations. The first, which is often called the no-reading problem, is that most consumers accept the contracts they ostensibly agree to without attempting to read or understand them.[3] The second key observation is that even diligent consumers who attempt to parse standard form contracts often struggle to grasp their full implications.[4] We label this second critique the no-understanding problem.

Although the no-reading and no-understanding problems are closely related, they can lead to different conclusions about what legal and regulatory rules should apply to consumer contracts. For instance, consumers who do not even attempt to read their contracts can plausibly be deemed to be making a personal, entirely rational, choice.[5] So framed, the judicial doctrine imposing a "duty to read" on consumers is coherent, albeit contestable.[6] On the other hand, deeming consumers to have assented to contracts that they are predominantly unable to comprehend is not just unreasonable, but arguably illogical.[7] If even diligent consumers cannot understand the standard forms to which they supposedly assent, then the contract law foundations of modern consumer law become easier to supplement, or perhaps even replace, with more proactive legal and regulatory interventions.[8]

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[2] *See, e.g.*, RADIN**,** *supra* note 1; Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. 233, 236 (2019).

[3] *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW (2012); Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240–41 (1995).

[4] *See, e.g.*, Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1749 (2014); Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 436 (2002).

[5] *See, e.g.*, Avery Katz, *Your Terms or Mine? The Duty to Read Fine Print in Contracts*, 21 RAND J. ECON. 518 (1990); Omri Ben-Shahar, *The Myth of the 'Opportunity to Read' in Contract Law*, 5 EUR. REV. CONT. L. 1 (2009).

[6] *See, e.g.*, Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1085 (2015).

[7] *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

[8] *See* Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM & MARY L. REV. 1389 (2007); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Consumer Financial Protection Bureau, *CFPB Warns Against Deception in Contract Fine Print* (Jun. 4, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-warns-against-deception-in-contract-fine-print/; Susan Block-Lieb & Edward J. Janger, *Fit for its Ordinary Purpose: Implied Warranties and Common Law Duties for Consumer Finance Contracts*, 59 HOUS.

More prosaically, the legal and regulatory measures available to counteract the no-reading and the no-understanding problems in consumer contract law are often quite distinct. To encourage reading, regulations and judicial doctrines can push firms to draft shorter contracts,[9] highlight or capitalize key terms,[10] make contracts more accessible,[11] or require consumers to scroll through all terms or individually assent to specific terms before completing a transaction.[12] Conversely, improving consumer understanding of contracts requires a distinct set of potential legal and regulatory tools, including expanding and better enforcing quantitative and qualitative readability standards,[13] promoting technologies like "smart-readers,"[14] requiring effective disclosures,[15] or using interpretive principles to incentivize firms to craft less ambiguous or technical terms.[16]

Despite the differing theoretical and practical implications of the no-reading and no-understanding critiques of modern consumer contract law, there exists surprisingly limited empirical evidence focused exclusively on the latter question of how well consumers can understand typical consumer contracts when they affirmatively attempt to do so.[17] What is more, the

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L. REV. 551 (2022).

[9] *See* Cynthia Adams, *The Move toward Using Plain Legal Language*, 20 TYL 6 (2016).

[10] *See, e.g.*, Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. Empirical Legal Stud. 862 (2020); David A Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395 (2018).

[11] *See* Benedikt Schmitz & Charlotte Pavillon, *Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed*, 9 J. EUR. CONSUMER & MKT. L. 191, 191 (2020); George Milne & Mary J. Culnan, *Strategies for Reducing Online Privacy Risks: Why Consumers Read (or Don't Read) Online Privacy Notices*, 18 J. INTERACTIVE MARKETING 15, 25 (2004).

[12] *Cf.* Johnathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO. COMM. & SOC'Y 128, 140 (2020).

[13] *See* John Aloysius Cogan Jr., *Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93 (2010); Michael A. Blasie, *The Rise of Plain Language Laws*, 76 U. MIAMI L. REV. 447 (2022); Michael A. Blasie, *Regulating Plain Language*, 2023 WIS. L. REV. 687 (2023). *See also* Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075 (2010).

[14] *See* Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83 (2022).

[15] See Omri Ben-Shahar & Adam Chilton, *Simplification of Privacy Disclosures: An Experimental Test*, 45 J. LEGAL STUD. S41 (2016).

[16] *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 120–21 n.147 (1989).

[17] *See infra* Part I; Lior Jacob Strahilevitz & Matthew B. Kugler, *Is Privacy Policy Language Irrelevant to Consumers*, 45 J. LEGAL STUD. S69 (2016); Uri Y. Hacohen, Amit Elazari & Talia Schwartz-Maor, *A Penny for Their Creations - Apprising Users' Value of*

limited evidence that does exist suggests that the no-understanding critique may be overblown, at least when one focuses on the majority of consumers.[18] By contrast, an increasingly sizable literature confirms the widespread intuition that the no-reading problem is indeed real and pervasive.[19] Other important entries in the empirical literature document the combined effect of the no-reading and no-understanding problems, demonstrating that consumers often fail to appreciate the meaning of key terms like arbitration agreements and class action waivers that are contained within broader contracts with which they are supplied.[20] But because these studies focus on consumer comprehension of entire contracts, they cannot clearly differentiate between the no-reading and no-understanding critiques of modern consumer contract law.

For these reasons, this Article empirically assesses how well typical consumers can understand key terms in one particularly important and pervasive type of standard form consumer contract: homeowners insurance policies. Homeowners insurance provides a good setting to test consumer comprehension of contract language for several reasons.[21] First, a central goal of insurance law and regulation is to promote clear and comprehensible insurance policy language. [22] Toward this end, the primary rule of insurance

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Copyrights in Their Social Media Content, 36 BERKELEY TECH. L.J. 511 (2021). *See, e.g.*, Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 120 (2017).

[18] *See* Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments*, 92 N.Y.U. L. REV. 1753, 1754 (2017) (reporting the results of three surveys suggesting that, in the aggregate, surveyed consumers correctly alter their interpretation of contract terms that are redrafted to clarify the intended meaning).

[19] *See* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* 75 STAN. L. REV. 1631, 1648 (2005); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 94, 96–97 (2012).

[20] *See* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 3 (2015) (reporting that a majority of respondents believed that mandatory arbitration provisions contained within broader contract did not preclude them from litigating large disputes and that class action waivers did not prevent them from participating in a class action); Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, 19 PLOS ONE 1 (2024); Arbel & Toler, *supra* note 10.

[21] Because the terms of insurance policies, including homeowners insurance policies, are sometimes structured in ways that are unusual though perhaps not unique to the insurance context, our results may not be fully generalizable to all consumer-contract settings.

[22] *See* Kyle D. Logue, Daniel Schwarcz & Brenda J. Cude, *The Value of Understandable*

law is that ambiguities are interpreted against the drafter,[23] and virtually every state imposes readability requirements on insurance policies.[24] Second, comprehensible policy language can play a potentially vital role in promoting fair insurance markets even if consumers do not read their policies at the time of purchase.[25] For instance, comprehensible insurance policy language can discourage insurers from unreasonably denying claims by empowering consumers, insurance agents, and lawyers to detect and challenge such coverage denials.[26] Finally, the terms and structure of homeowners insurance policies are somewhat standardized across the country, allowing us to test widely-used policy language, as well as less common variants.[27]

To better understand how well consumers can comprehend specific insurance policy terms, we designed and deployed a series of survey-based experiments, which we administered to approximately 2,500 current U.S. homeowners who have previously been involved in the decision to purchase or renew a homeowners insurance policy. In these experiments, we asked a control group of respondents to evaluate the likelihood that a typical homeowners insurance policy would cover a variety of losses, described in vignettes we crafted for this research, without providing respondents with relevant insurance policy language. We presented the same coverage vignettes to a treatment group of respondents whom we provided with relevant excerpts from the most common template for homeowners insurance policies in the U.S.: the 2010 ISO HO3 policy.[28] By comparing the answers

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Consumer Insurance Contracts, 8 INT'L REV. FIN. CONSUMERS 1 (2023); Boardman, *supra* note 13, at 1077; Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing these Unique Financial Instruments*, 89 TEMP. L. REV. (2017); KENNETH ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION: CASES AND MATERIALS (7th ed. 2020).

[23] *See* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1997); Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U. L. REV. 305, 305 (2013).

[24] *See* Cogan, *supra* note 13. To be sure, readability requirements often apply to consumer contracts other than insurance policies. See Blasie, *Rise of Plain Language Laws*, *supra* note 13; Blasie, *Regulating Plain Language*, *supra* note 13.

[25] *See* Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457 (2017).

[26] Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394 (2014); Willem H. Van Boom, Pieter Desmet & Mark Van Dam, *"If It's Easy to Read, It's Easy to Claim"—The Effect of the Readability of Insurance Contracts on Consumer Expectations and Conflict Behaviour*, 39 J. CONSUMER POL'Y 187 (2016).

[27] *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011).

[28] *See generally* Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 BYU L. REV. 471 (2021).

to questions about coverage from respondents who were provided with the operative insurance policy language with answers from those who were not, we investigated the extent to which such language serves its central purpose of providing actual notice to policyholders of their coverage.[29]

We initially hypothesized that respondents provided with the relevant policy language would consistently offer more accurate answers about coverage than those who were not. An answer was deemed accurate if it aligned with our assessment of whether the loss described in the vignette was unambiguously covered by the policy language. However, our results contradicted this hypothesis and diverged from prior literature, which suggested that consumers, on average, correctly interpret unambiguous contract language.[30] Across the seven coverage vignettes we tested, respondents in two vignettes were less accurate when provided with the policy language than those who were not. The reduction in accuracy was substantial—approximately 24 and 33 percentage points—and statistically significant at the 1% level. In a third vignette, there was no significant difference in accuracy between those who received the policy language and those who did not. Even in the remaining four vignettes, where respondents with access to the policy language performed better, the accuracy improvements were inconsistent across the vignettes and smaller than might be expected.[31]

The variation in our results appeared to be best explained by the structure of the policy language provided to respondents. Specifically, in cases where the policy language was associated with lower accuracy in respondents' coverage assessments, the provisions were written in a way that could mislead readers who focused only on the first part of the excerpt. A careful reading of the initial portion often suggested one answer to the coverage question, whereas a thorough reading of the entire provision

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[29] In this article, we focused our analysis on vignettes that resulted in unambiguous coverage determinations under the ISO HO3 policy. But we also tested consumers' responses to ambiguous, atypical, and potentially unenforceable policy language. *Cf.* Ben-Shahar & Strahilevitz, *supra* note 18. Here too, our initial hypothesis – that providing ambiguous policy language would increase the likelihood that respondents would recognize that there was no clear answer to the coverage question – proved incorrect in at least some of the coverage vignettes we tested. These results are reported and discussed in Appendix C.

[30] *Cf.* Ben-Shahar & Strahilevitz, *supra* note 18.

[31] In particular, the percentage of respondents who provided accurate answers was higher by between roughly 13 percentage points on the low end and 35 percentage points on the high end across these four vignettes. In absolute terms, the percentage of respondents who received policy language and provided accurate answers to coverage questions ranged from between roughly 21% and 73%. See Part IV, *infra*.

revealed the opposite answer to be correct.[32] This pattern suggests the existence of a type of problem not previously identified in the literature—a partial-reading or partial-understanding problem. Even more importantly, it creates significant consumer protection concerns, as this contractual structure—in which broad coverage grants are later restricted by specific exclusions—is a pervasive structural feature of insurance policies.[33]

We found mixed evidence on whether consumer sophistication and confidence influence the extent to which providing relevant policy language enhances the accuracy of participants' coverage assessments. Respondents who reviewed policy language reported greater confidence in their coverage assessments than those who did not.[34] And some evidence suggested that highly confident respondents were more likely to provide accurate coverage assessments than their less confident peers.[35] But we found no statistically significant support to conclude that sophisticated consumers, higher-income consumers, or white consumers were more likely than their counterparts to provide accurate coverage assessments.[36] Nor did our results support a conclusion that seeing relevant policy language improved accuracy more for those in the selected subgroups than for their counterparts.[37]

Viewed as a whole, we interpret our results to have important theoretical and practical implications. On the theory side, they provide novel reason to question the cornerstone of modern consumer law, that consumers have a "duty to read." While it has long been evident that most consumers do not attempt to read standard consumer forms, our research indicates that even when they do, they often fail to fully grasp the terms. More concretely, our findings cast doubt on techniques aimed at increasing contract readability—such as highlighting key terms—when these measures are not accompanied

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[32] That is, with several of the coverage vignettes, it appears that the respondents read until they thought they understood the terms of the policy and then either stopped reading or stopped reading carefully Determining which of those it was—partial reading or partial understanding—is not possible from our data, and further examination of that question would likely require qualitative research with consumers. One technique to further investigate the partial-reading or partial-understanding question is one-on-one cognitive interviews with consumers. In a cognitive interview, the interviewer gives the consumer the relevant document and asks the consumer to verbalize what they see and think as they interact with the document. Another technique is a heat map, in which technology allows the researcher to see the portions of a document that a consumer views online.

[33] *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION (2020 7th ed.).

[34] *See id.*

[35] *Cf.* Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1285 (2008).

[36] *Id.*

[37] *Id.*

by efforts to improve consumer comprehension and engagement with all terms. Finally, because our results reveal that even consumers with higher levels of sophistication often struggle to understand complex commercial contract language, they cast doubt on efforts to tailor legal or regulatory interventions based on perceived consumer sophistication.

Our analysis is organized into five parts. Part I reviews the existing literature, highlighting the surprising lack of empirical evidence on consumers' ability to understand the terms of standard form contracts. In Part II, we outline our methodology for testing this issue, and in Part III, we describe the data employed in our study. Part IV presents our results, while Part V explores their broader normative and practical implications.

I. Surprisingly Limited Empirical Evidence for The No-Understanding Critique

An increasingly significant body of empirical research focuses on consumers' expectations and behaviors with respect to standard form contracts. Numerous entries in this literature convincingly demonstrate that consumer assent to standard form contracts is typically remarkably shallow. For instance, several studies empirically document the familiar reality that consumers routinely do not attempt to read the contract terms to which they ostensibly assent.[38] Other important entries in this literature document that consumers often have incorrect understandings of key terms contained within standard form contracts, such as arbitration clauses and class action waivers.[39] Even so, consumers often feel morally bound to terms within standard form contracts, irrespective of whether they view those terms as fair.[40] But despite an increasingly robust body of empirical contract literature, there exists surprisingly limited research evaluating how well typical consumers can understand specific contract terms in isolation.

This Part explains that assessment of the literature. Part A begins by describing the most closely related evidence on point, which reports how consumers interpret and respond to specific contract terms with which they are presented. Although highly relevant to the no-understanding critique,

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[38] *See* Bakos et al., *supra* note 19; Marotta-Wurgler, *supra* note 19. One recent study found that changing a paragraph within an end user license agreement to all-caps did not significantly improve respondents' ability to answer questions about that paragraph. Arbel & Toler, *supra* note 10. The most natural interpretation of this result is that all-caps does not impact the no-reading problem; by contrast, the study has limited implications with respect to the no understanding problem.

[39] Strahilevitz & Kugler, *supra* note 17.

[40] Wilkinson-Ryan, *supra* note 4; Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015).

most of this literature focuses on studying how consumers respond to potentially ambiguous or unenforceable contract terms. By contrast, limited work focuses specific attention on consumer understanding of the plain meaning of unambiguous contract terms. Part B then provides an overview of the increasingly expansive empirical literature examining related but importantly distinct issues, such as how well consumers understand entire contracts or tailored consumer disclosures, as well as what can be learned from objective readability assessments of consumer contracts and privacy policies.

A. Empirical Evidence Focused on Consumer Understanding of Specific Contract Terms

Although commentators frequently claim that most typical consumers would be incapable of understanding and appreciating the terms in standard form contracts, there is surprisingly limited empirical evidence testing this proposition. In fact, our research has located only a small handful of studies since the modern internet age that directly tested how typical consumers (who are not students)[41] understand specific contract terms rather than the entirety of a consumer contract. Each of the studies focused on testing consumer responses to ambiguous, unclear, or potentially unenforceable contract terms, rather than assessing consumers' capacity to correctly understand the unambiguous plain meaning of contract terms.[42]

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[41] One article reports a survey of 177 college students regarding the meaning of several different remedy clauses in real estate developer form contracts. Debra Pogrund Stark, Jessica M. Choplin & Eileen Linnabery, *Dysfunctional Contracts and the Laws and Practices That Enable Them: An Empirical Analysis*, 46 IND. L. REV. 797 (2013). According to the study, respondents' survey answers demonstrated "a widespread failure…to understand the impact of this type of clause on their rights after a breach." *Id.* at 799. We do not view this study to be terribly informative, however, given that the survey respondents were college students who could not be reasonably expected to be familiar with real estate developer form contracts.

[42] Another related, but ultimately distinct, recent study found that participants were less inclined to consider legal action when a $200 "processing fee" for parking violations was contained withing a standard form contract than when it was listed separately on a company's website. Wilkinson-Ryan, *supra* note 17. The article did not, however, focus on testing the capacity of consumers to understand potentially complex contract terms. Another study evaluated consumers' expectations of coverage based on simplified descriptions of insurance policy language crafted by the authors rather than the relevant policy language itself, finding that respondents significantly overestimated the likelihood that others would share their conclusions about coverage in each of the scenarios. Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1285 (2008).

The most directly related study we located is reported in a prominent recent article focused on testing consumer interpretations of potentially ambiguous contract terms for the broader purpose of describing and illustrating the authors' proposed "survey interpretation method" to resolve consumer contract interpretation disputes.[43] Despite this focus, the Article reports the results of three survey-based experiments testing consumer interpretations of ambiguous policy language and a simplified version of that same language– involving liability coverage under a homeowners insurance policy,[44] payment under a bonus agreement,[45] and coverage under a consumer-oriented aviation insurance policy.[46] In each of the three settings, providing survey respondents with simplified contract language altered respondents' survey answers in the predicted direction.[47] At the same time, the magnitude of the shift was often less than the authors anticipated, a result that they described as "admittedly disquieting" but ultimately dismissed because a "strong, statistically significant majority" supported an interpretation consistent with the plain meaning of the tested language.[48]

A second closely related recent study used survey techniques to assess consumer reactions to potentially ambiguous privacy policies. In particular, the article found that consumers who were provided with key excerpts from different firms' privacy policies were generally equally likely to believe they had consented to certain data collection practices irrespective of whether the excerpts they received were deemed excessively vague by courts.[49] The implication is that consumers and judges may understand the same contract language differently.[50] But whether this was a result of consumers' failure to

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[43] *See* Ben-Shahar & Stahilevitz, *supra* note 18, at 1785–88.

[44] *Id*. at 1787.

[45] *Id*. at 1791.

[46] *Id*. at 1794–95.

[47] *Id*. at 1785–97.

[48] *Id.* at 1791. Summarizing this evidence, the authors conclude that while "individual judgments and responses can be quirky and mystifying…majoritarian judgments about contractual meaning are comprehensible," as "respondents are good at identifying ambiguity when it clearly exists, and that they shift in the right direction when the language is made clearer through experimental manipulations." *Id.* at 1801.

[49] Strahilevitz & Kugler, *supra* note 17. In the underlying experiment, researchers randomly assigned respondents to receive either explicit privacy policy language that courts had found sufficient to authorize contested data collection practices, or vague privacy policy language that courts had found insufficient to obtain consent. Even though respondents often read these short excerpts closely, they generally believed they consented to the challenged data collection practice irrespective of whether they received the explicit or vague policy language. *See id.*

[50] The results of the study could reflect differing views between consumers and judges about the nature of consent, or it could instead reflect consumers' inability to appreciate the

understand the plain meaning of the tested privacy policies or instead was attributable to varying conceptions of contested normative concepts like "assent" was not the focus of the Article.

The only studies we located that focused on evaluating the capacity of consumers to understand specific and *unambiguous* contract text date from the pre-internet era, when both consumer contracting practices and consumer survey methods were of course quite different than they are today. For instance, one study published in 1994 asked students and clerical staff at a university to answer questions about hypotheticals based on excerpts from several contracts, including a mortgage, an agreement for sale of property, a bank loan, and a renewal of a lease.[51] It found that even the highest-performing respondents only answered about two-thirds of the questions correctly for simplified contracts, and that they achieved only about 50% accuracy with respect to questions regarding the original contract excerpts.[52] Another study dating from 1970 focused on how well tenants understood specific terms in their lease agreements, finding that about 70% of respondents thought most of their lease terms were "fairly easy to understand," even though only about 50% were able to answer simple questions about specific lease terms.[53] A third study asked undergraduate students to identify exculpatory clauses in two types of insurance contracts – a health club and an auto repair shop contract. For both types of contracts, about two-thirds of the participants correctly identified whether an exculpatory clause was present and the majority understood the clause might prevent their recovery in a lawsuit.[54]

B. Empirical Evidence Related to Consumer Understanding of Contracts and Disclosures

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nuances within the tested language. *See id.* A similar point applies to the small portion of an article evaluating consumer understanding of specific license terms, which is contained within a broader article on user-generated content licensing and user attitude towards those policies. Hacohen et al., *supra* note 17 (finding widespread misunderstanding of legal terms like "moral rights" and "derivative works" in licensing agreements).

[51] Michael E. J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8 APPLIED COGNITIVE PSYCHOL. 67 (1994).

[52] *Id.*

[53] Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970).

[54] Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: Preliminary Investigation of the Effects of Exculpatory Clauses and Consumers' Propensity to Sue*, 15 BEHAV. SCI. L 83 (1997).

An increasingly influential literature is focused on better understanding the content, implications, and practices of consumer contracting.[55] However, much of this literature illuminates issues related to, but distinct from, the no-understanding critique that is our focus.

First, numerous important entries in the literature evaluate consumer comprehension of contracts by asking study participants to answer questions after they are provided with the entirety of a consumer contract. Examples of studies falling in this category include studies evaluating predispute arbitration terms within broader contracts,[56] auto insurance policies,[57] travel insurance policies,[58] end user license agreements,[59] refrigerator purchase contracts,[60] and many others.[61] In general these studies find that consumers are typically unable to accurately answer basic questions about the contracts with which they are provided. Collectively, these studies provide invaluable

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[55] *See, e.g.*, Meirav Furth-Matzkin, *Consumer Contracts in Action*, 82 MONT. L. REV. 97 (2021); Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121 (2018); Danielle D'Onfro, *Error-Resilient Consumer Contracts*, 71 DUKE L.J. 541 (2021).

[56] *See* Sommers, *supra* note 20, at 1, 5 (providing respondents with a 28 page Bank Deposit Account Agreement and instructing respondents to read it as they would "normally read contracts in [their] everyday life," and finding that less than 5% of respondents recalled that the contract mentioned anything about arbitration, and less than 1% of respondents fully grasped the implications of the arbitration agreement); Sovern et al., *supra* note 20, at 3 (finding that the majority of survey respondents who were provided with a typical credit card contract containing an arbitration clause failed to recognize the existence of the arbitration clause, and even among those who did notice such a clause, the majority failed to appreciate that it would limit their ability to litigate a dispute in court).

[57] Van Boom et al., *supra* note 26 (finding that respondents who were provided with a relatively readable auto insurance policy that excluded coverage for "reckless driving," expected to receive a larger amount of compensation from their insurer as compared to the participants who received the less readable policy, but were not more likely to contest an adverse coverage determination).

[58] Kathy Conklin, Richard Hyde & Fabio Parente, *Assessing Plain and Intelligible Language in the Consumer Rights Act: A Role for Reading Scores?*, 39 LEGAL STUD. 378 (2019).

[59] Ayres & Schwartz, *supra* note 19 (reporting results of a survey regarding different terms in Facebook's end user license agreement for purposes of identifying what types of terms might helpfully be included in a proposed "warning box").

[60] Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977) (finding that respondents who received the entirety of a refrigerator purchase contract struggled to answer basic questions about its terms, including the cost of credit and the definition of default).

[61] Rishab Bailey, Smriti Parsheera, Faiza Rahman & Renuka Sane, *Disclosures in Privacy Policies: Does "Notice and Consent" Work?*, 33 LOY. CONSUMER L. REV. 1 (2021).

evidence regarding the combined impact of the no-reading and no-understanding problems in contract law, which has important implications for both the normative foundations of modern contract law and optimal regulatory strategies.

At the same time, however, these studies are generally limited in their ability to disentangle the no-reading and no-understanding critiques of modern contract law because it is difficult to know whether respondents' partial understanding is due to their decision not to read the relevant text or to their inability to understand text that is specifically brought to their attention. Several of the studies, moreover, suggest that the former (no-reading) explanation is dominant, both because consumers in these studies often report failing to notice relevant terms[62] and because some of the studies suggest that the best way to improve consumer understanding is to shorten the length of the contract with which consumers are provided.[63]

Another relevant branch of empirical research focuses on objectively assessing the readability of various different types of consumer contracts, but not testing how well consumers can actually understand these contracts. For instance, several studies assessed readability using quantitative scores such as the Flesch Reading Ease (FRE) and Flesch-Kincaid Grade Level (FKGL) tests applied to consumer-oriented contracts from retailers, digital companies, software companies, banks, and credit card companies.[64] The research generally has found that consumer contracts are typically written at a college level, which is significantly higher than the average American adult's reading level.[65] Although instructive, these results are constrained by

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[62] *See* Sommers, *supra* note 20.

[63] *See* Alexander J. Wulf & Ognyan Seizov, *How to Improve Consumers' Understanding of Online Legal Information: Insights from a Behavioral Experiment*, 56 EUR. J. L. & ECON. 559 (2023) (testing the impact of different terms and conditions in pre- and post-purchase settings, and finding that consumer accuracy was greatest with respect to simplified contracts in the post-contract setting); Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 Law & Hum. Behav. 293 (2012).

[64] *See* Michael L. Rustad, *Why a New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521 (2022); Benoliel & Becher, *supra* note 7; Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431 (2014); Shmuel I. Becher & Uri Benoliel, *Law in Books and Law in Action: The Readability of Privacy Policies and the GDPR, in* CONSUMER LAW AND ECONOMICS (Klaus Mathis & Avishalom Tor eds., 2021).

[65] U.S. Department of Education, National Center for Education Statistics. (July 2019). *Adult Literacy in the United States*, https://nces.ed.gov/pubs2019/2019179/index.asp. However, other work has described the claim that Americans cannot read beyond the eighth grade level as an 'unsubstantiated myth." See Yonathan A. Arbel, *The Readability of*

the well-known limitations of quantitative readability scores, which use average sentence length and number of syllables per word to score the readability of text.[66] By contrast, these scores ignore the number of sentences used to convey an idea, the organization and formatting of the language, the use of technical words or jargon (which need not contain an unusually large number of syllables), the ordering of words and concepts, and the extent to which words are put together in logical and clear sentences.[67]

A third relevant, yet distinct, strand of literature empirically examines the effectiveness of summary consumer disclosures that are not themselves contracts.[68] However, these studies offer limited insights into consumers' ability to understand specific contract terms. This limitation arises because consumer disclosures are designed to simplify or omit complex details, focusing instead on conveying a limited set of key features about another document, business practice, or risk.[69] By contrast, consumer contracts generally cannot simplify or disregard complex details without risking alterations to the legal rights and obligations of the parties or introducing unnecessary ambiguities and uncertainties.[70] While these complexities suggest that consumers are likely to find contracts harder to understand than disclosures, countervailing forces may improve contract clarity relative to the clarity of disclosures. For instance, firms often receive feedback from courts about the interpretation and clarity of their contract language, enabling them to revise ambiguous terms.[71] This iterative process, particularly for widely used contract language that is frequently litigated, has the potential to

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Contracts: Big Data Analysis, 21 J EMPIR LEG STUDS 927 (2024).

[66] George R. Klare, *Assessing Readability*, 10 READING RES. Q. 62 (1974–1975).

[67] *See* Janice Redish, *Readability Formulas Have Even More Limitations than Klare Discusses*, 24 ACM J. COMPUTER DOCUMENTATION 132 (2000).

[68] *See, e.g.*, BEN-SHAHAR & SCHNEIDER, *supra* note 3; Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197 (2008); James M. Lacko & Janis K. Pappalardo, *The Failure and Promise of Mandated Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment with Mortgage Borrowers*, 100 AM. ECON. REV.: PAPERS & PROC. 516 (2010); Ben-Shahar & Chilton, *supra* note 15; Roger A. Formisano, *The NAIC Model Life Insurance Solicitation Regulation: Measuring the Impact in New Jersey*, 48 J. RISK & INS. 59 (1981); Brenda J. Cude, *Insurance Disclosures: An Effective Mechanism to Increase Consumers' Insurance Market Power?*, 24 J. INS. REG. 57 (2006).

[69] Another reason companies provide such disclosures is to minimize their own risk of liability, regulatory intervention, or consumer complaints.

[70] *See* Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 SYRACUSE L. REV. 451 (2015).

[71] *See* ABRAHAM & SCHWARCZ, *supra* note 22; Mark A. Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371 (2015).

enhance the overall clarity of contracts.[72]

II. Methodology

In light of the surprisingly limited evidence in the literature about consumers' capacity to understand contract terms, we conducted a series of survey-based experiments designed to evaluate how well consumers understand homeowners insurance policy language.[73] What distinguishes our study from most of those described above is that, instead of giving the respondents the entire contract and hoping they would read all of the provisions (including the relevant ones), we gave them relatively short excerpts of text that contained only the key provisions relating to a specific coverage question with which they were presented. The idea was that, given the short and clearly relevant nature of the policy language provided, respondents could be counted on to read it. And, as discussed further below, there is ample evidence that they did in fact read the supplied policy language—or at least parts of it. Part A describes our methodology in more detail and addresses some methodological objections and limitations. Part B then details the specific vignettes and policy language we used in our surveys.

A. Experimental Design

1. Methodological Overview

The specifics of our methodology are straightforward. We selected four types of risks typically associated with homeowners insurance policies – three property-related (earthquake, deck collapse, and fire) and one personal liability. Next we found the policy language in the 2010 ISO HO3 policy most relevant to each type of risk. Then, two of the co-authors (Schwarcz and Logue) crafted three vignettes for each type of risk – one in which the policy language unambiguously indicated coverage ("clear coverage"), one in which the language unambiguously indicated no coverage ("clear non-coverage"), and one in which it was unclear whether the policy would cover the event described in the vignette ("unclear coverage"). All co-authors then workshopped the vignettes to confirm that they were clearly written.

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[72] *See* Michelle E. Boardman, *The Unpredictability of Insurance Interpretation*, 82 LAW & CONTEMP. PROBS. 27 , 28–29 (2019).

[73] We created the survey instrument, and all questions were original to the survey. Administration of the survey was deemed to be exempt from Institutional Review Board (IRB) review by the University of Minnesota's IRB office.

We randomly assigned respondents to a treatment or a control group.[74] Respondents in the control group were given the following general instructions:

> In this part of the survey, we ask specific questions about what you think homeowners insurance does and doesn't cover. We aren't giving you any specific insurance policy language to read, but want you to answer based on your existing understanding of this type of insurance. That might come from what you know about your own policy, from conversations you've had with an insurance professional, or from any other source you have previously consulted. Please do not conduct any new research to answer these questions.

Respondents in both the treatment and the control group were then presented with a subset of the four coverage vignettes. Both the specific vignettes they received and the order in which they received them were randomized, though every respondent received vignettes relating to one of the four sets of policy language that are described below.

After each vignette, control group respondents were asked two questions. The first was "Do you think a typical homeowners policy would cover [the loss described in the vignette]?" Responses were assessed on a 1–5 Likert scale anchored by "Definitely not covered" and "Definitely covered." To distinguish how definitive a respondent's coverage assessment was from how confident they were in that assessment, we also asked respondents a second question after each vignette: "How confident are you that your answer is correct?" Responses were again collected on a 1–5 Likert scale anchored by "Not confident at all" and "Extremely confident."

Treatment group respondents were presented with the same coverage vignettes as those in the control group, with the subset of vignettes and the order in which they received them was again randomized. However, the respondents were provided with the following initial set of instructions:

> In this part of the survey we ask specific questions about what homeowners insurance does and doesn't cover. Our goal in this section is to learn how well consumers who take the time to read carefully can understand common insurance policy language. You'll be given a series of hypothetical

[74] Because we were using the data for multiple purposes, we assigned roughly 60% of the sample to the treatment group to ensure sufficient statistical power to answer different questions.

> events (an earthquake, a deck collapsing, etc.) that homeowners insurance might cover. For each event, you'll be given part of a real-world insurance policy. Your task is to determine if you think the policy would cover the loss described in the event. **Please assume there's no other language in the homeowners policy that would prevent the policy from covering the loss.**

For each vignette, treatment group respondents saw the specific insurance policy language relevant to that vignette. The formatting of the online survey allowed participants to simultaneously review the coverage vignette and the relevant policy language. The policy language itself was edited only minimally to ensure that all relevant text to answer the coverage question was included in the excerpt without creating numbering or lettering discrepancies.

In the final section of the survey, all respondents were asked basic questions about their experience with homeowners insurance. They also were asked to provide key demographic and economic information.[75]

Our primary hypothesis was that respondents who saw relevant insurance policy language would be more likely to accurately assess coverage than respondents who did not receive this policy language. We also hypothesized that providing policy language would increase respondents' reported confidence in their perceptions of coverage, and that respondents who reported high levels of confidence in their coverage assessments would in fact be more accurate in those assessments, both in the control and treatment groups. Finally, we hypothesized that respondents who were more sophisticated as it relates to insurance, those with higher incomes, and whites would provide more accurate coverage assessments than their counterparts.[76]

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[75] With respect to demographic characteristics, we asked respondents about their age, gender, race or ethnicity, marital status, and geographic location. The economic characteristics were education, income, and employment status. To assess their experiences with homeowners insurance, we asked whether they had ever sold insurance, whether they had ever been the final decisionmaker in purchasing or renewing a homeowners insurance policy, whether they had attempted to read their own homeowners insurance policy, whether they felt that they understood the terms of their own homeowners insurance policy, whether they had previously switched insurance carriers, and whether they currently held negative views of insurers. We also asked them about factors important to them when they buy homeowners insurance and their past claims experience.

[76] This hypothesis parallels the work of many researchers. See, e.g., A. Lusardi & Olivia S. Mitchell, *Financial Literacy Around the World: An Overview,* 10 J. Pension Econ. & Fin. 497 (2011) (describing the characteristics of those who are more financially literate, a concept which parallels insurance sophistication)

Because our methodology used a randomized controlled experiment, many of our conclusions are evident from summary statistics. However, to confirm statistical significance and control for unintended variations in groupings of respondents, we also tested the first two hypotheses by estimating a series of logistic regressions in which the dichotomous outcome (accurate perceptions of coverage or confidence in coverage assessments) was a function of having received policy language, controlling for past experiences with insurance, and economic and demographic characteristics. Similarly, to test the final hypothesis, we estimated a series of logistic regressions in which accurate perceptions of coverage was a function of reporting high levels of confidence in coverage assessments, along with the same experiential, demographic, and economic controls used in previous analyses.

2. Methodological Objections and Limitations

One concern about our experimental design is the heightened cognitive load experienced by the treatment group relative to the control group. While we asked both the control and treatment groups to respond to the same number of insurance coverage vignettes, we also asked respondents in the treatment group to carefully read four policy excerpts of a combined length of 756 words. We did not ask the control group to read any additional materials. Thus, it is possible that the reliability of treatment group responses declined faster from the first-encountered vignette to the last-encountered vignette relative to control group response.[77]

We are confident, however, that cognitive load does not drive our study's results for two reasons. First, the control group and treatment group surveys were identical up until the first vignette, so there was no difference in cognitive load at the outset of the experiment. Second, our survey instrument was programmed to randomize the order in which the vignettes were delivered to respondents in both the treatment and control groups.[78] The randomization allows us to test whether the increased cognitive load on the treatment group explains our results by focusing on the first vignettes encountered by all participants. The results of this robustness test, which are

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[77] The most reliable way to counter this potential effect would have been to ask control group respondents to read unrelated excerpts of similar length and difficulty in between vignettes.

[78] Of our analysis sample of 2,440 respondents, 801 individuals first received one of the earthquake vignettes, 822 individuals first received one of the deck collapse vignettes, and 817 individuals first received one of the slip-and-fall vignettes. The electrical fire vignette was not part of the randomization algorithm, so all respondents received that vignette fourth.

reported in the Appendix, mirror those of our main analyses.[79]

B. Coverage Vignettes and Policy Language

We applied the methodology described above to seven different coverage vignettes (two earthquake, two deck collapse, two slip-and-fall, and one electrical fire) using four policy language excerpts from the ISO HO3 policy that applied to the chosen vignettes. In each of the vignettes, the policy language supplied to the treatment group unambiguously resolved the coverage question. As described in the Appendix, we also tested several vignettes in which the policy language provided to the treatment group did not clearly and unambiguously resolve the coverage question.[80]

1. Earthquake Policy Language: Clear Coverage Vignette and Clear Non-Coverage Vignette

The first pair of vignettes, described in Figure 1, focused on a loss involving an earthquake. In the clear non-coverage vignette in this pair, there was a direct loss to a home caused by an earthquake (a loss that the policy language unambiguously excludes). In the clear coverage vignette, the home was damaged by a fire that was triggered by the earthquake (a loss that the policy language unambiguously covers).[81] For both vignettes, the provided policy language focused on the earthquake exclusion in the ISO HO3 policy. The description of the loss scenario used in these two vignettes as well as the governing language from the ISO HO3 policy that the treatment group was

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[79] *See infra* Table A13 in Appendix B for results. In unreported analyses, we also compared outcomes from the first-encountered vignette for treatment-group respondents and the third-encountered vignette for control-group respondents (at which point control-group respondents have experienced a comparable or perhaps higher cognitive load than treatment-group respondents) and found that the results in those analyses are also consistent with our main results.

[80] *See infra* Appendix C.

[81] The loss is "clearly covered" because it is a "loss by fire" that results directly from the earthquake. To see how this works, note the structure of the provision: It first grants coverage. ("We insure against direct physical loss to covered property."). Then it excludes from coverage those losses resulting from certain causes. ("We do not insure for loss caused directly or indirectly by any of the following" causes; and it is lists "Earth Movement," which includes "Earthquake," as one of those causes). Finally, it carves out of the earth movement exclusion—and therefore provides coverage—for any "direct loss by fire…resulting from any of the above" including earth movement. The back-and-forth structure, while not necessarily easy to follow, produces a clear result in this case. It should also be noted that this back-and-forth structure is common in insurance policies. Whether it is common in other types of consumer contracts is unclear.

given are in Figure 1.

Earthquake Vignettes (Clear Non-Coverage and Clear Coverage)

Variations in Earthquake Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Clear Non-Coverage Scenario: A magnitude 6.0 earthquake strikes near your home. The shaking from the earthquake causes severe damage to your home's foundation. Major repairs are required.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	We insure against direct physical loss to covered property. We do not insure for loss excluded under the Exclusions Section. **Section I -- Exclusions** A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area. 1. Earth Movement Earth Movement means: a. Earthquake, including land shock waves or tremors before, during or after volcanic eruption; b. Landslide, mudslide or mudflow; c. Subsidence or sinkhole; or d. Any other earth movement including earth sinking, rising or shifting. This Exclusion A.1 applies regardless of whether any of the above, in A.1.a. through A.1.d., is caused by an act of nature or is otherwise caused. However, direct loss by fire, explosion or theft resulting from any of the above, in A.1.a through A.1.d., is covered.
Clear Coverage Scenario: A magnitude 6.0 earthquake strikes near your home. The shaking from the earthquake knocks down an electrical pole in front of your home, which triggers a fire. The fire spreads to your home. Major repairs are required		

Figure 1. Instruction and policy language distributed in earthquake clear coverage and clear non-coverage vignettes

2. Deck Collapse Policy Language: Clear Coverage Vignette and Clear Non-Coverage Vignette

The second pair of coverage vignettes we tested involved the collapse of a deck due to a termite infestation in the structural support beams of the deck. For both vignettes, the policy language involved the collapse coverage in the ISO HO3 policy. In the clear coverage vignette, the loss is covered because the homeowner only learned about the termite infestation after the collapse. Thus the damage could not have been "known to an 'insured' prior to the collapse." By contrast, in the clear non-coverage vignette, the homeowner first learned of the termite infestation before the collapse and then ignored warnings from a structural engineer to replace the damaged beams. The prior knowledge of the damage unambiguously prevents coverage under the policy language. Figure 2 contains the details of the two coverage vignettes as well as the policy language from the ISO HO3

pertaining to this issue, which was provided to the treatment group.

Deck Collapse Vignettes (Clear Non-Coverage and Clear Coverage)

Variations in Deck Collapse Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Clear Non-Coverage Scenario: Two large wooden beams support your home's deck. Termites have burrowed into the beams causing serious structural damage. You discover the termites and promptly consult a structural engineer, who tells you of the damage and says you must replace the beams right away or the deck likely will collapse. You ignore the engineer's advice and do nothing. As a result of the termite infestation, the deck collapses suddenly and is destroyed.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	We do not insure for loss involving collapse, except as provided in the Collapse Coverage. **Collapse** a. We insure for direct physical loss to covered property involving abrupt collapse of a building or any part of a building if such collapse was caused by one or more of the following: (1) Decay, of a building or any part of a building, that is hidden from view, unless the presence of such decay is known to an "insured" prior to collapse; (2) Insect or vermin damage, to a building or any part of a building, that is hidden from view, unless the presence of such damage is known to an "insured" prior to collapse; (3) Weight of contents, equipment, animals or people; (4) Weight of rain which collects on a roof; or (5) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation. b. Loss to an awning, fence, patio, deck, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under a.(1) through (5) above, unless the loss is a direct result of the collapse of a building or any part of a building. c. This coverage does not increase the limit of liability that applies to the damaged covered property.
Clear Coverage Scenario: Two large wooden beams support your home's deck. Termites have burrowed into the beams causing serious structural damage, but you're totally unaware of that fact because the support beams are not visible from the outside. As a result of the termite infestation, the deck collapses suddenly and is destroyed.		

Figure 2. Instruction and policy language distributed in deck collapse clear coverage and clear non-coverage vignettes

3. Slip-and-Fall Liability Policy Language: Clear Coverage Vignette and Clear Non-Coverage Vignette

In the third pair of vignettes, a homeowner is sued by an individual who sustained injuries in a slip-and-fall accident that occurs on the homeowner's front walkway. For both vignettes, the supplied policy language from the ISO HO3 policy excluded liability coverage for liability arising from a business conducted at one's home. In the clear coverage vignette, the accident takes place during a small social gathering of friends whom the homeowner hosts. Such an accident falls under the general liability coverage provided in the policy. For the clear non-coverage vignette, the accident victim is a customer of the homeowner's small business, which they operate from their home. The policy language unambiguously states that this liability is excluded from coverage. Figure 3 provides the language used for

these paired vignettes as well as the governing language from the ISO HO3 policy provided to the treatment group.

Slip and Fall Vignettes (Clear Non-Coverage and Clear Coverage)

Variations in Slip and Fall Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Clear Non-Coverage Scenario: Your primary income comes from a small bakery that you run out of your home. Customers place orders online and come to your front door to pick up the baked goods. The morning after a snowstorm, you shoveled your front walkway. But, you didn't shovel the steps leading up from the sidewalk to your front walkway. One of your customers slips on these steps, suffers a broken leg and concussion, and sues you for negligence.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will pay up to our limit of liability for the damages for which an insured is legally liable. **Exclusions** Liability Coverage does not apply to the following: (1) "Business" a. Bodily injury or property damage arising out of or in connection with a "business" conducted from an insured location or engaged in by an insured, whether or not the "business" is owned or operated by an insured or employs an insured. This Exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business". **DEFINITIONS** "Business" means: a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or b. Any other activity engaged in for money or other compensation, except the following: (1) One or more activities, not described in (2) through (4) below, for which no insured receives more than $2,000 in total compensation for the 12 months before the beginning of the policy period; (2) Volunteer activities for which no money is received other than payment for expenses incurred to perform the activity; (3) Providing home day case services for which no compensation is received, other than the mutual exchange of such services; or (4) The rendering of home day care services to a relative of an insured.
Clear Coverage Scenario: It snows the night before you are scheduled to host a small social gathering of friends and family at your home. Although you shoveled your front walkway, you didn't shovel the steps leading up from the sidewalk to your front walkway. One of your guests slips on these steps, suffers a broken leg and concussion, and sues you for negligence.		

Figure 3. Instruction and policy language distributed in slip-and-fall liability clear coverage and clear non-coverage vignettes

4. Electrical Fire Policy Language: Clear Coverage Vignette

For the final policy language excerpt we tested, we used only a clear coverage vignette, and did not test a clear non-coverage vignette involving the ISO HO3 policy language.[82] The policy language focused on the

[82] We initially planned to test a clear non-coverage vignette by using non-standard policy language that would have excluded the described loss. However, during data analysis we realized that the appropriate interpretation of this clear non-coverage vignette was complicated by the fact that we had specifically instructed the control group to supply answers based on "a typical homeowners insurance policy," and the policy language we used for the clear non-coverage vignette was decidedly atypical. It is therefore difficult to interpret the gap between the control and the treatment group as we did for the ISO HO3 policy language. For that reason, we report the results for this vignette in Appendix C, which describes the impact of providing policy language where the existence of coverage is potentially ambiguous. For completeness, however, we note that providing the non-standard

exclusion for the insured's neglect to minimize damage after a loss has occurred. The loss in the vignette involved a fire caused by a faulty electrical switch, which the insured had earlier decided not to use after observing the switch produce sparks. The vignette and the relevant policy language are described in Figure 4. While the policy states that losses arising out of neglect are not covered, the term "neglect" is defined to apply only to failure to take steps to "save and preserve the property at and after the time of loss." As such, the loss described in the vignette is unambiguously covered.

Electrical Fire Vignettes (Clear Coverage)

Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Clear Coverage Scenario: An electrical switch in your home's guest room starts to spark when you turn on the light. Instead of repairing the switch, you simply decide not to use the room. Two months later, however, you forget about the malfunctioning light switch, go into the room, and flip the switch on. The resulting sparks trigger a fire that burns down your home.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	We insure against direct physical loss to covered property. We do not insure for loss excluded under the Exclusions Section. **SECTION I -- EXCLUSIONS** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area. 1. Neglect Neglect means neglect of an insured to use all reasonable means to save and preserve property at and after the time of a loss.

Figure 4. Instruction and policy language distributed in electrical fire clear coverage vignette

III. Data

We recruited all survey respondents through Dynata, a large survey platform that maintains geographically and demographically representative panels of willing survey participants. Dynata takes a variety of measures to help ensure data quality, including vetting participants before they are allowed to join panels, monitoring their behavior across different projects, and evaluating their behavior within individual surveys.[83]

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policy language whose plain meaning appears to exclude coverage for the electrical fire did indeed have a large and statistically significant impact on respondents, who thought the loss would not be covered.

[83] *See generally* Dynata, *A Shared Vision for Data Quality*, https://www.dynata.com/a-

To participate in our surveys, respondents had to meet two conditions: (1) be at least 21 years old and (2) had previously been involved in the decision to purchase or renew a homeowners insurance policy for a home in the United States that they owned or in which they otherwise had a financial interest.[84] In total, we collected survey responses from 2,500 respondents who met these criteria. We asked Dynata to collect responses from participants who were diverse and well distributed across the demographic and economic variables we chose.[85]

To ensure the participants were attempting to read questions carefully, we excluded from our results any respondents who failed an attention-check question embedded within the surveys[86] as well as any incomplete responses, resulting in our final analysis sample of 2,440 individuals. Table 1 reports a breakdown of demographic and economic characteristics for our analysis sample and for the treatment and control sub-samples.

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shared-vision-of-data-quality/.

[84] For purposes of this screening question, we indicated that a renter's or condo policy is not considered a homeowners policy.

[85] Partway through data collection, we asked Dynata to oversample female, working age minority respondents to ensure balance in the demographic characteristics.

[86] This question asked: "Which of the following have you done in the last two years? (check all that apply) (1) Filed a homeowners insurance claim for damage caused by a lightning strike to your home; (2) switched homeowners insurance carriers more than five times in a single year; (3) Switched homeowners insurance carriers at least once (4) Filed complaints against a homeowners insurer with multiple regulators from different states; (5) Asked your homeowners insurer to defend you in a lawsuit alleging liability for an oil spill; (6) Purchased a homeowners insurance policy with no coverage limit (7) None of the above." We excluded from our sample any respondents who provided an answer other than (3) or (7), as all of the remaining options were either impossible or incredibly unlikely. In total, we excluded 21 respondents from our survey sample for failing the attention check.

Table 1. Sample Descriptive Statistics

		No Policy Language (Control Group) *N = 974*		Policy Language (Treatment Group) *N = 1,466*		Total Sample *N = 2,440*	
		N	*%*	*N*	*%*	*N*	*%*
Gender	Male	451	46.3	743	50.7	1194	48.9
	Female	522	53.6	717	48.9	1239	50.8
	Other	1	0.1	6	0.4	7	0.3
Age	21–34	122	12.5	209	14.3	331	13.6
	35–44	184	18.9	304	20.7	488	20.0
	45–64	406	41.7	567	38.7	973	39.9
	65 or greater	262	26.9	386	26.3	648	26.6
Race/ Ethnicity	White	666	68.4	978	66.7	1644	67.4
	Black	118	12.1	206	14.1	324	13.3
	Asian	110	11.3	145	9.9	255	10.5
	Hispanic	80	8.2	141	9.6	221	9.1
	Other	22	2.3	37	2.5	59	2.4
	White (without multiracial)	647	66.4	946	64.5	1593	65.3
	Nonwhite (with multiracial)	327	33.6	520	35.5	847	34.7
Household Income	$49,999 or less	296	30.4	366	25.0	662	27.1
	$50,000–$149,999	537	55.1	897	61.2	1434	58.8
	$150,000 or greater	141	14.5	203	13.8	344	14.1
Employment Situation	Self-employed	69	7.1	122	8.3	191	7.8
	Working full-time	391	40.1	653	44.5	1044	42.8
	Working part-time	83	8.5	102	7.0	185	7.6
	Temporarily unemployed	53	5.4	61	4.2	114	4.7
	Not working, not seeking work	80	8.2	113	7.7	193	7.9
	Retired	298	30.6	415	28.3	713	29.2
Education	Less than Bachelor's Degree	510	52.4	772	52.7	1282	52.5
	Bachelor's Degree	307	31.5	423	28.9	730	29.9
	Advanced Degree	157	16.1	271	18.5	428	17.5
Marital Status	Married	583	59.9	895	61.1	1478	60.6
	Divorced/Separated	113	11.6	159	10.8	272	11.1
	Widowed	57	5.9	86	5.9	143	5.9
	Never Married	187	19.2	269	18.3	456	18.7
	Other	34	3.5	57	3.9	91	3.7
Region	West	297	30.5	390	26.6	687	28.2
	Midwest	207	21.3	357	24.4	564	23.1
	South	305	31.3	462	31.5	767	31.4
	Northeast	165	16.9	256	17.5	421	17.3

There was a good distribution of respondents in both the treatment and control groups across most demographic and economic characteristics. Both groups were nearly equally distributed between males and females. The majority of those in both groups were between 21 to 64 years old, as was the majority (67%) of U.S. homeowners in 2020. About two-thirds (65% and 66%, respectively) of the treatment and control groups were non-Hispanic whites;[87] 73% of U.S. homeowners in 2020 were non-Hispanic whites.[88] The majority in both groups were married but nearly 20% were never married. All of the U.S. regions were represented in the sample, with the smallest proportion (17.3%) from the Northeast.

The sample was well educated; nearly half (48%) had completed at least a bachelor's degree; 18% had at least one advanced degree. By comparison, 40% of U.S. homeowners in 2020 had a bachelor's degree, and 70% had at least some college education.[89] Nearly two-thirds (63%) of the sample were currently in the labor market (including self-employed individuals, those employed full-time or part-time, and those who were temporarily unemployed and seeking work). More than half of the sample (59%) had annual incomes between $50,000 and $150,000 but 28% had incomes at the lower end of the distribution (below $50,000). Fourteen percent reported incomes above $150,000. The median household income of U.S. homeowners in 2020 was $81,400.[90]

We asked respondents about a variety of experiential factors relating to homeowners insurance. A small but nontrivial portion of the sample, 7% (6% in the control group and 8% in the treatment group), currently or previously sold homeowners insurance professionally. More than three-quarters (77% in the control group and 78% in the treatment group) identified as the final decisionmaker in their household's decision to purchase or renew a homeowners insurance policy.[91] The overwhelming majority (85% of the

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[87] Respondents were allowed to select any combination of race/ethnicity in the survey. Table 1 reports these non-mutually exclusive response frequencies for individual races and ethnicities. For our analysis, however, we identified non-Hispanic white people as those who only identified themselves as white; any respondent who reported a multiracial identity was considered nonwhite.

[88] U.S. Census Bureau, *Homeownership by Race and Ethnicity of Householder*, https://www.census.gov/library/visualizations/interactive/homeownership-by-race-and-ethnicity-of-householder.html (last visited Feb. 15, 2024).

[89] Alexandra Ciuntu, *Homeownership by Education: Degree-Holding Owners Surge as Those Without High School Drop 30%*, POINT2HOMES (Apr. 6, 2022), https://www.point2homes.com/news/us-real-estate-news/homeownership-by-education-us.html (summarizing U.S. Census data on U.S. homeownership by education).

[90] *Id.*

[91] The remaining 22% of the sample was also involved in the decision to purchase or renew their homeowners insurance policy, but reported that they helped with the process but

total sample, 84% of the control group, and 87% of the treatment group) claimed to have either briefly looked over or attempted to closely read the most relevant terms of any of their own homeowners insurance policies over the past few years. Notably, however, a much smaller but surprisingly large percentage (39%) claimed to have attempted to closely read the most relevant terms of their homeowners insurance policy. About one-fifth (21% for both control and treatment groups) had switched homeowners insurance carriers at least once. Finally, the majority (86% for both control and treatment groups) reported having positive or optimistic views about their own homeowners insurance company. The remaining 14% believed their own homeowners insurance company's approach to paying a claim is to work hard to find a reason to reject the claim.

IV. Results

This Part reports the results of our experiments. Our key finding, discussed in Section A, is that while providing relevant policy language improved the accuracy of coverage assessments in some scenarios, it decreased accuracy or had no effect in others. We interpret these results to suggest that many respondents struggled with partial-reading or partial-understanding of complex provisions, often misinterpreting critical details that could reverse an initial impression. Sections B and C report that, consistent with our expectations, providing policy language does indeed increase respondents' confidence in their coverage assessments; further, in both the control and treatment groups, respondents who were more confident in their coverage assessments were also more likely to be accurate, but we found no evidence that receiving policy language affected the likelihood of confident respondents' accuracy. Finally, Section D shows that insurance sophistication, income, and race did not affect the accuracy of respondents' understanding of homeowners insurance policy language.

A. The Impact on Accuracy of Providing Policy Language

In total, our results were only partially consistent with our hypothesis that providing relevant insurance policy language that unambiguously resolved coverage questions would increase the accuracy of respondents' coverage assessments. Figure 5 reports the rate of accurate responses by respondents in the treatment and control groups for each of the seven

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were not the final decisionmaker.

vignettes.[92]

As is evident in Figure 5, the results in four of the seven vignettes we tested were consistent with our initial hypothesis, as a larger proportion of respondents who received policy language (treatment group) accurately assessed coverage relative to the respondents who did not receive such language (control group). This effect varied substantially across the four vignettes, however. The increase in the accuracy of respondents' coverage assessments ranged from 13 percentage points (in the slip-and-fall clear coverage vignette) and 16 percentage points (in the slip-and-fall clear non-coverage vignette) to roughly 34 percentage points in the earthquake clear non-coverage vignette and 30 percentage points in the deck collapse clear coverage vignette. Notably, in each of these four vignettes, the absolute percentage of respondents who accurately assessed coverage when provided with the applicable policy language hovered between only 64 and 73%, meaning that even in the scenarios where respondents best grasped the implications of the policy language, more than a quarter still misinterpreted it.

Figure 5 also shows that the results in three of the seven vignettes we tested were inconsistent with our hypothesis, meaning that providing respondents with the key policy language pertaining to a vignette failed to improve the accuracy of their coverage assessment. Most starkly, in two of the vignettes, the treatment group's assessments of coverage were *less* accurate than the control group's. For these vignettes, providing the relevant and unambiguous policy language affirmatively decreased the accuracy of respondents' coverage assessments. Nor were these effects small or insubstantial: in the earthquake clear coverage vignette, supplying policy language decreased the accuracy of respondents' coverage assessments by 25 percentage points, and in the electrical fire clear-coverage vignette doing so decreased accuracy by 32 percentage points. In a third vignette – the clear non-coverage deck collapse – providing the relevant policy language had no meaningful impact on the accuracy of respondents' coverage assessments.

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[92] For the purposes of this analysis, we grouped together in the "accurate" category those respondents whose answers were either "definitely covered" or "probably covered," and we did the same with the clear non-coverage vignettes. Strictly speaking, there is no "accurate" or "inaccurate" answer to the coverage vignettes in the absence of governing policy language. We nonetheless labeled the answers supplied by respondents in the control group as "accurate" or "inaccurate" because we asked the respondents in the control group to answer the questions we provided to them based on what a "typical homeowners policy would cover." The ISO HO3 policy is the definition of a typical homeowners insurance policy, even though past research has demonstrated that specific insurers' homeowners policies vary in the language they use. *See* Schwarcz, *supra* note 27.

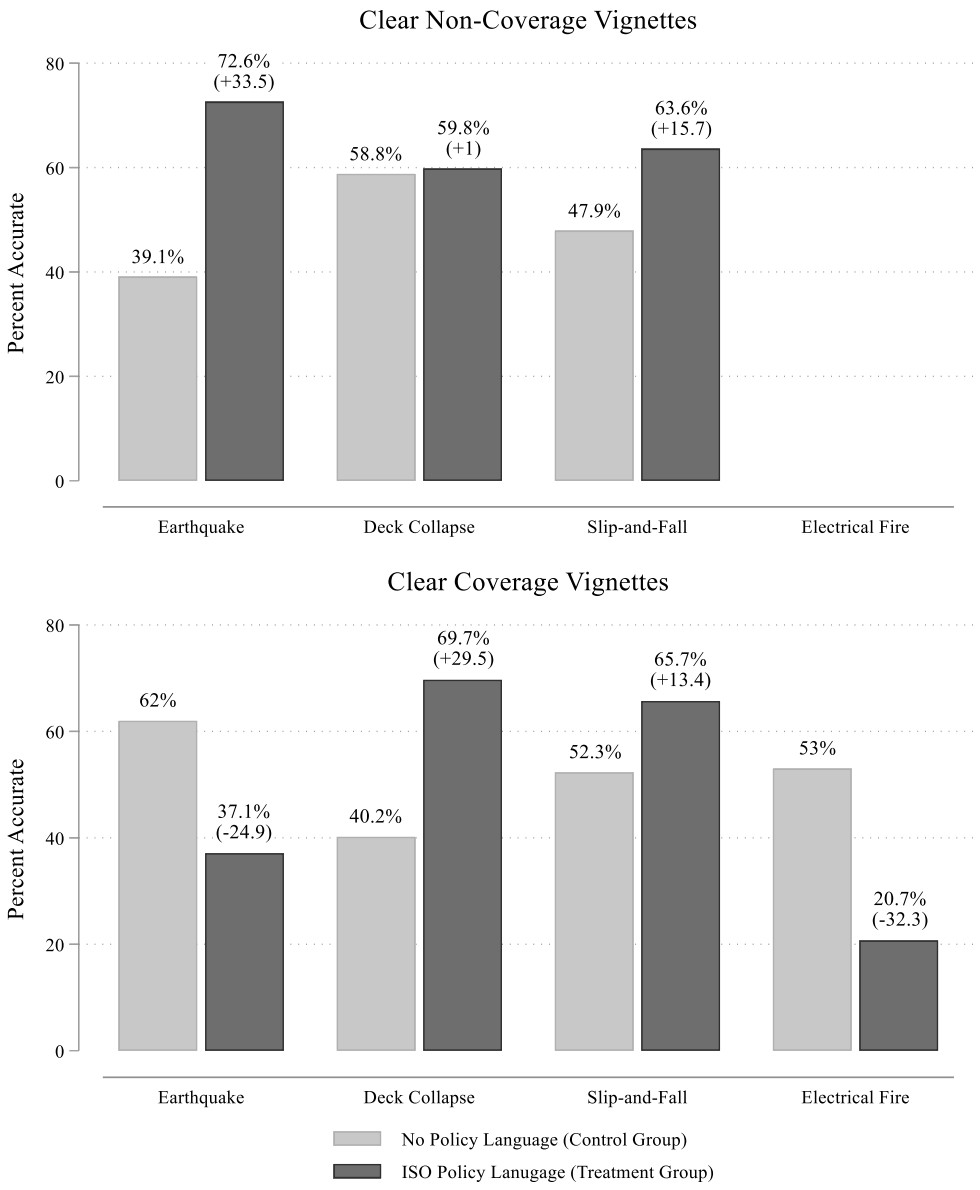

Figure 5. Accuracy of Respondents' Assessments of Insurance Coverage

Collectively, these results confirm that respondents did at least partially read the policy language given to them in at least six of the seven vignettes: otherwise, we would expect that providing policy language would have had little to no effect on respondents' coverage assessments, a result we found in only one of our vignettes. Moreover, given the similar structure of the vignettes and the policy language supplied, we are confident that most

respondents in fact read the provided policy language in the one vignette where doing so produced no statistically significant impact on their coverage assessments.

To test for the significance of these differences and account for observed differences between the groups, we used logistic regression analysis, controlling for respondents' experiential, demographic, and economic characteristics.[93] The dependent variable for this analysis was a dichotomous variable denoting the accuracy of the coverage assessments, equal to one if the respondents' perception of coverage is accurate and zero otherwise.[94] The primary independent variable of interest was a dichotomous variable indicating whether respondents received policy language.[95] The coefficients produced by that analysis are reported in the Appendix.[96] We

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[93] The experiential variables were dichotomous to indicate whether respondents reported any of the following: selling insurance professionally, being the main decisionmaker in their household's homeowners insurance purchasing decision, reading their own homeowners insurance policy, understanding what would and would not be covered under their own homeowners insurance policy, switching insurance carriers at least once, and having negative views of insurers' willingness to cover a hypothetical claim. (We intended to ask whether respondents had prior experience filing a homeowners insurance claim, but the question was only presented to the control group so we omitted it from our analysis.) Three demographic control variables also were dichotomous: gender, race (white vs. nonwhite,) and marital status, Age was a categorical variable, with ages 34 to 64 as the omitted category. Region also was a categorical variable, with West the omitted category. Among the economic factors, income was a categorical variable ($50,000 to $150,000 was the omitted category) ---as was education (bachelor's degree was the omitted category). Employment was a dichotomous variable with 1 indicating not currently in the labor force.

[94] Again, for our main analyses, we grouped together in the "accurate" category those respondents whose answers were either "definitely covered" or "probably covered" for clear coverage vignettes, and either "definitely not covered" or "probably not covered" for clear non-coverage vignettes. In Appendix B, we demonstrate that our results are not impacted by defining the correct answers in each pair of vignettes to be "definitely" covered or not covered, rather than also treating answers with "probably" as correct in each setting.

[95] We ran separate regressions for each coverage context (i.e., we analyzed responses from both earthquake damage vignettes in the same regression) and included a dichotomous variable denoting the non-coverage vignette. The aim was to capture the differences in respondents' accuracy between clear coverage and clear non-coverage vignettes in the same coverage context. We then interacted the variable denoting receipt of policy language with the variable denoting respondents who were given the non-coverage vignette to capture whether the effect of receiving policy language differed between clear coverage and clear non-coverage vignettes. We used this identification strategy in order to test whether respondents systematically lean toward coverage or non-coverage in their perceptions of coverage, regardless of the specific vignettes and policy language they were given. However, we found no clear evidence that such a phenomenon occurs in our data. We also controlled for the respondents' demographic, economic, and experiential characteristics; *see supra* note 93 for details.

[96] *See infra* Table A3 in Appendix A.

then used postestimation analysis of these regression outputs to calculate the predicted probability that respondents in the treatment and control groups had accurate perceptions of insurance coverage even after accounting for observable differences across these groups, reported in Table 2.[97]

[97] The predicted probabilities are predictive margins across two dimensions: vignette type (i.e., clear coverage versus clear non-coverage) and study subsample (i.e., control group versus treatment group). In other words, holding all other variables constant at their mean values, we estimated the likelihood of accuracy of insurance coverage perceptions for each respondent and reported the average likelihood for four groups: recipients of clear non-coverage vignettes in the control and treatment groups, respectively, and recipients of clear coverage vignettes in the control and treatment groups, respectively. For each vignette, we then calculated the average marginal effect of receiving policy language and reported it, along with the corresponding standard errors and markers of statistical significance, in Table 2. We used Stata's "margins" postestimation command to calculate predictive margins average marginal effects for each coverage vignette. *See* Richard Williams, *Using the Margins Command to Estimate and Interpret Adjusted Predictions and Marginal Effects*, 12 STATA J. 308 (2012). This is best practice when interpreting results involving interaction terms in nonlinear models. See Chunrong Ai & Edward Norton, *Interaction Terms in Logit and Probit Models*, 80 ECON. LETTERS 123 (2003).

Table 2. Predicted Probability of Accurate Coverage Assessments

Vignette	Predicted Probability		Average Marginal Effect
	No Policy Language	Policy Language	
Earthquake Damage			
Clear Non-Coverage	0.392	0.724	0.302** (0.025)
Clear Coverage	0.622	0.370	-0.241** (0.031)
Deck Collapse			
Clear Non-Coverage	0.581	0.598	0.017 (0.035)
Clear Coverage	0.402	0.702	0.279** (0.028)
Slip & Fall Liability			
Clear Non-Coverage	0.483	0.637	0.151** (0.033)
Clear Coverage	0.517	0.657	0.137** (0.033)
Electrical Fire Damage			
Clear Coverage	0.531	0.206	-0.325** (0.023)

Note: The table reports average predicted probabilities that respondents accurately assessed insurance coverage, conditioned on treatment, as well as the average marginal effect of treatment. All numbers calculated with the logit regression coefficients in Columns (3), (6), (9), and (10) in Table A3 in Appendix A, using Stata's postestimation "margins" command. Standard errors are reported in parentheses. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Not surprisingly given the number of respondents we surveyed and the randomized character of their assignments to the control and treatment groups, this analysis produces the same basic results as those reported in Figure 5: providing policy language improved the predicted accuracy of respondents for four vignettes, decreased respondents' predicted accuracy in two vignettes, and had no significant impact on accuracy in one of the vignettes. This analysis does confirm, however, that in all six of the vignettes where providing policy language impacted coverage assessments, this result was statistically significant at the 1% level.

This statistical analysis confirms that in both the earthquake and the

electrical fire vignettes, respondents provided with the actual policy language paradoxically arrived at less accurate conclusions, believing there was no coverage when there was. The most plausible explanation for these results lies in a "partial-reading" or "partial-understanding" problem, in which respondents read the supplied language carefully until they discover an initial indication about the coverage question, and then either stop reading or read less carefully any subsequent text.[98] Take the earthquake clear-coverage vignette: many respondents likely focused on the initial portion of the policy provision—specifically, the exclusions section's introduction and the definition of "earth movement," which explicitly states that direct losses caused by earth movement are not covered. Based on this, they may have concluded their loss was excluded and either stopped reading or continued with less attention, missing the crucial "direct loss" exception in the final line of the provision.

A similar pattern explains our results in the electrical fire clear-coverage vignette. Respondents may have read carefully until encountering the term "neglect." At that point, they likely applied their own understanding—associating neglect with failing to take reasonable precautions—and concluded there was no coverage. This conclusion was reinforced by the description in the vignette of the homeowner as having "simply forgotten" about a malfunctioning light switch, which may reasonably appear as neglect to an average reader. However, respondents may have missed the critical clarification at the end of the policy language: that neglect only precludes coverage if it occurs at or after the time of the loss.

A partial reading/understanding explanation also helps explain why supplying the relevant policy language did not negatively effect understanding in the other vignettes. For example, respondents in the slip-and-fall and deck collapse scenarios may have provided more accurate answers when presented with policy language because the policy provisions we supplied did not include exceptions or caveats. Consider the slip-and-fall vignette as an example. The policy language provided to the treatment group made it clear early on that losses arising from a "'business' conducted at an insured location or engaged in by the insured" were not covered. Crucially, nothing in the language that followed reversed or contradicted that initial conclusion. Even the definition of the term "business," which appeared later in the provision, contained no unexpected or counterintuitive elements from the perspective of the average reader. As a result, if a respondent carefully read only the first third of the policy language before letting their attention

[98] Given that the treatment groups in both earthquake vignettes were given exactly the same policy language, this variation in result cannot be explained by differences in the readability or length of the policy language.

wane, their coverage guess would still likely remain accurate. This was true for both the clear-coverage and clear-non-coverage versions of the slip-and-fall vignette.

A similar dynamic explains our results for the deck collapse vignettes. Respondents who received the policy language likely read carefully at least up to the second exception to the collapse exclusion, which addressed damage caused by insects or vermin. If they stopped reading at that point or merely skimmed the remainder of the policy language, their guesses about coverage would not have been significantly affected. This is because, beyond that point, the policy language contained no surprising or unexpected details that might mislead them. Consequently, in both the clear coverage and clear non-coverage versions of the deck collapse vignette, we found no statistically significant evidence that providing the policy language reduced the accuracy of respondents' coverage judgments.

It is unclear whether our results are generalizable to other forms of consumer contracts. Insurance policies are commonly written to include broad grants of coverage, followed by subsequent more specific exclusions, followed by later exceptions to those exclusions.[99] This sort of contractual structure, which is common in insurance policies, creates conditions that can create or worsen the partial reading problem. If other consumer contracts do not use this sort of back-and-forth structure, our results from this section may not be generalizable to that setting.

B. The Impact on Confidence of Providing Policy Language

Although our results were partly inconsistent with our primary hypothesis—that providing respondents with relevant insurance policy language would improve the accuracy of their coverage assessments—they were quite consistent with our second hypothesis that respondents who received relevant policy language would have greater confidence in the accuracy of their coverage assessments. Figure 6 reports the relevant responses for each of the seven vignettes.[100]

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[99] *See* ABRAHAM & SCHWARCZ, *supra* note 22.

[100] As above, we grouped together in the "Confident" category respondents who reported being very confident or extremely confident that their perceptions of coverage accuracy were correct, though our results are similar if we focus solely on respondents who reported being extremely confident in their coverage assessments.

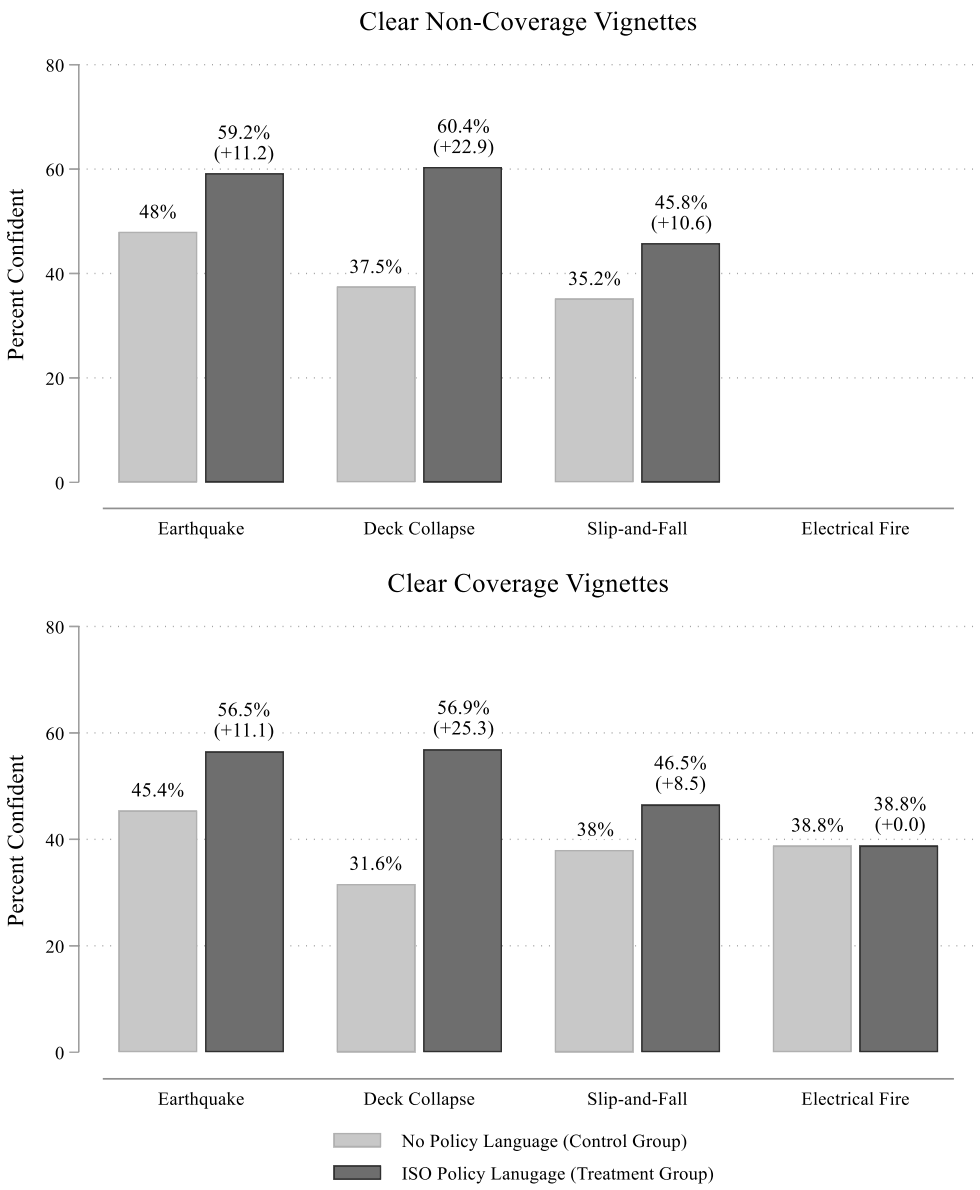

Figure 6. Perceptions of Confidence in Accuracy of Coverage Assessments

As shown in Figure 6, providing respondents with relevant policy language increased their confidence in coverage assessments in six of the seven vignettes we tested. This effect ranged from roughly 25 percentage points on the high end, to 9 percentage points on the low end. The one exception involved the electrical fire vignette, where there was no difference in the confidence levels between the treatment and control groups. Further analysis, which is reported in the Appendix, confirmed that these effects were statistically significant after accounting for observed differences between the groups.[101] Following a similar process to that which is described above, Table 3 reports the statistical significance of variations in the predicted probabilities, after controlling for observed differences, that respondents in the treatment and control groups reported confidence in their coverage assessments.

[101] Our identification strategy for this analysis was identical to the accuracy analysis, with the exception that the dependent variable in this case is a dichotomous variable for reported confidence, equal to one if respondents reported feeling "extremely confident" or "very confident" in the accuracy of their perceptions of insurance coverage in the respective coverage vignette, and equal to zero otherwise. (In Appendix B, we demonstrate that our results are not impacted by defining confident respondents in each pair of vignettes to be those who declared themselves as "extremely confident" rather than also treating answers with "very confident" as confident in each setting.) *See infra* Table A4 in Appendix A for key regression coefficients. We used those regression outputs, in turn, to calculate the predicted probability that respondents in the treatment and control groups reported feeling very confident or extremely confident that they had accurately predicted insurance coverage in each of the coverage vignettes.

Table 3. Predicted Probability of Confidence in Policy Coverage Assessments

Vignette	Predicted Probability		Average Marginal Effect
	No Policy Language	Policy Language	
Earthquake Damage			
Clear Non-Coverage	0.496	0.595	0.098** (0.033)
Clear Coverage	0.463	0.547	0.084* (0.033)
Deck Collapse			
Clear Non-Coverage	0.375	0.599	0.216** (.031)
Clear Coverage	0.323	0.572	0.241** (0.031)
Slip & Fall Liability			
Clear Non-Coverage	0.357	0.457	0.100** (0.033)
Clear Coverage	0.390	0.456	0.065* (0.033)
Electrical Fire Damage			
Clear Coverage	0.395	0.408	0.013 (0.020)

Note: The table reports average predicted probabilities that respondents report confidence in their assessments of insurance coverage, conditioned on treatment status, as well as the average marginal effect of treatment. All numbers calculated with the logit regression coefficients in Columns (3), (6), (9), and (10) in Table A4 in Appendix A, using Stata's postestimation "margins" command. Standard errors are reported in parentheses. The symbols * and ** represent significance at the 5% and 1% level, respectively.

One notable trend in these results is that respondents' increased confidence associated with receiving policy language was generally consistent across clear coverage and clear non-coverage vignettes. This result is most obvious in Table 3, which groups results by the policy language received rather than by whether the vignette involved clear coverage or non-coverage. In each grouping of vignettes in which respondents received the same policy language, the increase in confidence produced by supplying the policy language was similar in magnitude. This was true even though, as previously discussed with respect to respondents' accuracy, the effect of

providing policy language on coverage assessment accuracy often differed significantly depending on which vignette respondents received. Most starkly, supplying respondents with the earthquake coverage policy language produced radically different results for the clear non-coverage vignette (increasing accuracy by roughly 30 percentage points) and the clear coverage vignette (decreasing accuracy by roughly 24 percentage points). This suggests that providing contract language that tends to decrease consumers' understanding may also increase consumers' confidence in their mistaken interpretation, which is an unsettling conclusion.

C. The Relationship Between Confidence and Accuracy

Recall that our third hypothesis was that respondents who reported high levels of confidence in their coverage assessments would in fact be more accurate in those assessments. We hypothesized that this effect would apply to respondents in both the control and treatment groups.[102] Our results largely supported these hypotheses.

We estimated a series of logistic regressions, controlling for experiential, demographic, and economic factors, to identify whether respondents' confidence predicted a greater likelihood of accurate assessments of insurance coverage, and whether high-confidence respondents who received relevant policy language would be even more likely to accurately understand insurance coverage than their high-confidence counterparts who received no policy language.[103] (Key coefficients are reported in the appendix.[104]) As in our earlier analyses, we used the regression outputs to calculate the predicted probability that highly confident respondents in both the treatment and control groups accurately predicted insurance coverage in each of the vignettes. Table 4 reports those predicted probabilities, as well as the average marginal effects associated with the treatment (receiving policy language).

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[102] Previous research has demonstrated that lay individuals believe their interpretation of contract language is consistent with the interpretations of others due to false consensus bias. See Solan et al., *supra* note 42, at 1291–94

[103] Here, our identification strategy used the same dichotomous variable as in Section A, denoting accuracy of respondents' coverage perceptions, as the dependent variable. As independent variables, there were three dichotomous variables denoting treatment (receiving policy language), confidence, and coverage type (clear coverage versus clear non-coverage), as well as those variables' interactions. We also controlled for experiential, demographic, and economic factors as described in Section A.

[104] *See infra* Table A5 in Appendix A.

Table 4. Predicted Probability of Accurate Coverage Assessments by Confidence Level

Vignette	No Policy Language			Policy Language			Average Marginal Effects
	Predicted Probability		Average Marginal Effects	Predicted Probability		Average Marginal Effects	
	Not Confident	Confident		Not Confident	Confident		
Earthquake Damage							
Clear Non-Coverage	0.293	0.493	0.197** (0.050)	0.573	0.828	0.243** (0.036)	0.025 (0.053)
Clear Coverage	0.555	0.696	0.139** (0.052)	0.275	0.450	0.173** (0.042)	0.020 (0.059)
Deck Collapse							
Clear Non-Coverage	0.512	0.695	0.180** (0.051)	0.472	0.683	0.206** (0.042)	0.028 (0.069)
Clear Coverage	0.318	0.581	0.252** (0.051)	0.559	0.809	0.243** (0.038)	-0.023 (0.063)
Slip & Fall Liability							
Clear Non-Coverage	0.459	0.522	0.062 (0.058)	0.560	0.729	0.169** (0.041)	0.098 (0.066)
Clear Coverage	0.383	0.730	0.326** (0.043)	0.514	0.831	0.315** (0.037)	-0.032 (0.062)
Electrical Fire Damage							
Clear Coverage	0.442	0.670	0.222** (0.030)	0.142	0.311	0.158** (0.035)	-0.011 (0.046)

Note. The table reports average predicted probabilities that respondents accurately assessed insurance coverage, conditioned on confidence level and treatment, as well as the average marginal effect of high confidence in both treatment and control groups, and the average marginal effect of treatment on high-confidence respondents. All numbers calculated with the logit regression coefficients in Table A5 in Appendix A, using Stata's postestimation "margins" command. Standard errors are reported in parentheses. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Several conclusions emerge from Table 4. First, confidence predicted accuracy in six of seven vignettes in the control group. The smallest significant effect was a 14 percentage point greater likelihood of accuracy in the earthquake clear-coverage vignette. The largest significant effect was a roughly 33 percentage point greater likelihood of accuracy in the slip-and-fall clear coverage vignette. The one vignette in which there was no detectable difference between the accuracy of highly-confident respondents and all other respondents was in the slip-and-fall clear non-coverage vignette in the control group, which described an accident involving a customer of a small business operated from the homeowner's home.

Similarly, confidence predicted accuracy in all of the vignettes in the

treatment group. The smallest effect was a difference of roughly 16 percentage points in the likelihood of accuracy in the electrical fire clear coverage vignette. The largest effect was a difference of roughly 32 percentage points in the likelihood of accuracy in the slip-and-fall clear coverage vignette.

However, there was no detectable difference between the average predicted probability of accuracy of highly-confident respondents in the control group and that of highly confident respondents in the treatment group. That is, the average marginal effect in the rightmost column of Table 4, which denotes the marginal impact of introducing policy language on the accuracy probability of highly-confident respondents, was not statistically significant for any of the vignettes. In other words, we found no statistically significant evidence that the link between respondents' confidence and accuracy improved (or was worse for that matter) when they were given relevant policy language.

D. Results Among Sub-Populations of Respondents

Recall that we also hypothesized that, for both the control and treatment groups, the accuracy of respondents' coverage assessments would vary by their level of insurance sophistication, income, and race. Contrary to our expectations, none of these factors significantly predicted improvements in coverage accuracy for the treatment group who were provided with policy language. Furthermore, in the control group—where respondents did not receive any policy language—we found that income weakly correlated with the accuracy of coverage assessments, while sophistication and race did not.

1. Influence of Insurance Sophistication on Accuracy of Coverage Assessments

We predicted that sophisticated insurance purchasers would better understand complex insurance policy language than the average consumer. This prediction aligned with a key rationale for limiting consumer protection laws to individual consumers while excluding sophisticated commercial parties—the belief that consumers require special legal safeguards, whereas sophisticated parties do not, in part because they are more adept at interpreting complex commercial contracts.[105] This proposition, however,

[105] Some courts apply different doctrinal tools in disputes involving sophisticated and unsophisticated policyholders. *See* Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 834–43 (1993); Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL

has not previously been tested in insurance law.[106]

Contrary to our expectations, we found no statistically significant difference between the performance of sophisticated respondents and all other respondents, among both the groups who received the policy language and those who did not. We initially defined sophisticated respondents as those who both (a) had a bachelor's degree or higher and (b) met all of the following conditions: (1) reported having read the most relevant terms of their own homeowners policy, (2) reported having understood those terms "very well" or "completely," and (3) reported having "mostly" or "completely" understood what their homeowners policy does and does not cover. We also tested several alternative definitions of consumer sophistication, which produced similar results and are reported in the Appendix.[107] In total, 170 respondents (roughly 7% of the sample) met our primary definition of consumer sophistication; 73 of those respondents were in the control group

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& INS. PRAC. L.J. 85, 86 (2003); Jeffrey E. Thomas, *Insurance Law Between Business Law and Consumer Law*, 58 AM. J. COMPARATIVE L. 353, 363 (2010). *See generally* GEORGE A. AKERLOF & ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION 166–69 (2015); Wendy E. Wagner, *Rethinking Legal Requirements: A Case Study of Incomprehensible Consumer Contracts in the United States*, *in* RESEARCH HANDBOOK ON CONTRACT DESIGN 114, 117 (Marcelo Corrales Campagnucci, Helena Haapio & Mark Fenwick eds., 2022).

[106] While the Federal Trade Commission has long used a "reasonable man" standard to decide which members of the general public to protect (*See* Ivan L. Preston, *Reasonable Consumer or Ignorant Consumer? How the FTC Decides*, 8 J. CONSUMER AFFS. 131 (1974)) and the "reasonable investor" standard is used to determine materiality in securities law (*See* Alexandra Qingning Li, *The Unreasonableness of Reasonable: Rethinking the Reasonable Investor Standard*, 117 NW. U. L. REV. 1707 (2023)), this approach is less well represented in insurance-related studies. One study assumed insurance literacy was a measure of sophistication and measured it using a 10-question quiz comprised of questions from existing insurance exams. The study found that insurance literacy was overall low for all consumers. The characteristics synonymous with commercial sophistication—i.e., experience with insurance, expressing an interest in saving and investing, and subscriptions to financial publication(s)—were correlated with slightly higher insurance literacy scores, and the differences were statistically significant. Sharon Tennyson, *Consumers' Insurance Literacy: Evidence from Survey Data*, 20 FIN. SERVICES REV. 165, 169–73 (2011). Other research on consumers' sophistication and homeowners insurance has generally focused on the economic inefficiency of consumers' ill-calibrated, risk-averse preferences, but not specifically on whether consumers understand the policies themselves or whether their preferences were inefficient. *See* Justin Sydnor, *(Over)insuring Modest Risks*, 2 AM. ECON. J.: APPLIED ECON. 177 (2010) (finding that high-deductible, low-rate homeowners insurance policyholders are effectively subsidized by a much larger share of risk-averse consumers who opt for low-deductible, high-rate policies); Levon Barseghyan, Francesca Molinari, Ted O'Donoghue & Joshua C. Teitelbaum, *The Nature of Risk Preferences: Evidence from Insurance Choices*, 103 AM. ECON. REV. 2499 (2013).

[107] *See infra* Table A10 and surrounding text in Appendix B.

and 97 in the treatment group.

After identifying this sub-population of sophisticated respondents, we estimated a series of logistic regressions that aimed to capture whether these sophisticated respondents behaved differently from their unsophisticated counterparts, controlling for experiential, demographic, and economic factors as in previous analyses.[108] As before, we used these regression outputs[109] to calculate the predicted probability that sophisticated and unsophisticated respondents in the treatment and control groups accurately predicted insurance coverage in each of the coverage vignettes. Table 5 reports those predicted probabilities, as well as the average marginal effects associated with sophistication level and the treatment itself (receiving policy language).

Table 5. Predicted Probability of Accurate Coverage Assessments by Sophistication Level

Vignette	No Policy Language			Policy Language			Average Marginal Effects
	Predicted Probability		Average Marginal Effects	Predicted Probability		Average Marginal Effects	
	Not Sophisticated	Sophisticated		Not Sophisticated	Sophisticated		
Earthquake Damage							
Clear Non-Coverage	0.392	0.370	-0.023	0.719	0.786	0.072	0.057
			(0.105)			(0.089)	(0.078)
Clear Coverage	0.613	0.709	0.101	0.366	0.441	0.073	-0.024
			(0.105)			(0.078)	(0.112)
Deck Collapse							
Clear Non-Coverage	0.590	0.481	-0.106	0.602	0.556	-0.046	0.069
			(0.093)			(0.087)	(0.087)
Clear Coverage	0.400	0.433	0.033	0.691	0.829	0.160	0.061
			(0.110)			(0.098)	(0.130)
Slip & Fall Liability							
Clear Non-Coverage	0.480	0.489	0.009	0.647	0.499	-0.141	-0.154
			(0.120)			(0.083)	(0.149)
Clear Coverage	0.495	0.759	0.285*	0.655	0.684	0.030	-0.231
			(0.111)			(0.089)	(0.124)
Electrical Fire Damage							
Clear Coverage	0.522	0.643	0.123	0.198	0.304	0.093	0.008
			(0.064)			(0.061)	(0.081)

Note. The table reports average predicted probabilities that respondents accurately assessed insurance coverage, conditioned on sophistication level and treatment, as well as

[108] The identification strategy for this analysis is quite similar to that of the analysis in Section C, except that we replace the indicator for high confidence with an indicator for sophisticated respondents. We also remove any experiential controls used in our definition for sophisticated respondents. *See infra* Table A6 in Appendix A for key coefficients from these regressions.

[109] See Table A6 in Appendix A.

the average marginal effect of sophistication in both treatment and control groups, and the average marginal effect of treatment on sophisticated respondents. All numbers calculated with the logit regression coefficients in Table A6 in Appendix A, using Stata's postestimation "margins" command. Standard errors are reported in parentheses. The symbols * and ** represent significance at the 5% and 1% level, respectively

Sophistication was a significant predictor of accuracy in only one coverage vignette – the slip-and-fall clear coverage vignette in the control group. In this vignette, sophisticated consumers were more likely to accurately predict coverage than their unsophisticated counterparts, by a margin of 29 percentage points.

However, what stands out most in these results is that there were no statistically significant differences between the likelihood of accuracy of sophisticated respondents and unsophisticated respondents in any of the remaining vignettes—for either the control group or the treatment group. Further, none of the average marginal effects in the rightmost column of Table 5 are statistically significant, indicating that the accuracy of the sophisticated respondents' coverage assessments were not affected by the introduction of relevant policy language. Thus, we cannot say with any confidence that sophisticated consumers, as we defined them (either here, in our primary results, or using alternative definitions discussed in the Appendix[110]), are any better at making insurance coverage predictions than unsophisticated consumers.

2. Influence of Income on Accuracy of Coverage Assessments

We also predicted that higher-income respondents would, on average, be more likely to accurately assess insurance coverage than their lower-income counterparts. We defined higher-income respondents as those who reported annual gross household incomes of $150,000 or greater.[111] Once again, we also tested several alternative definitions of consumer income, which produced similar results and are reported in the Appendix.[112] Following a similar statistical approach to that described earlier, we calculated the predicted probability that income influenced the accuracy of coverage assessments in the treatment and control groups across the seven vignettes.[113]

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[110] *See infra* Table A10 and surrounding text in Appendix B.

[111] Using our primary definition of high-income respondents, we had roughly equal distributions of higher-income respondents in both the control and treatment groups (roughly 15% and 14%, respectively).

[112] *See infra* Table A11 and surrounding text in Appendix B.

[113] The identification strategy for this analysis is quite similar to that of the analysis in

Table 6, which reports the predicted probabilities emerging from this analysis, shows that the evidence did not support our hypothesis: higher-income respondents were generally no more accurate than their lower-income counterparts. In the control group, we found no evidence that the higher-income respondents were more likely to be accurate in six of the seven clear coverage vignettes.[114] In the treatment group, we found no evidence in any of the seven vignettes that higher-income respondents were more likely to be accurate than their lower-income counterparts when they received relevant policy language. Further, we found no statistical evidence that higher-income respondents who received policy language were more likely to assess coverage correctly than higher-income respondents who did not receive policy language (the average marginal effects of receiving policy language, located in the rightmost column of Table 6, were not statistically significant for any coverage vignette).

Section C, except that we replaced the indicator for high confidence with an indicator for high income. We also removed the income controls used in prior analyses. *See infra* Table A7 in Appendix A for key coefficients from logistic regressions used to calculate these predicted probabilities

[114] In the earthquake clear non-coverage vignette, we found a statistically significant difference of roughly 16 percentage points between higher-income respondents and their lower-income counterparts.

Table 6. Predicted Probability of Accurate Coverage Assessments by Income

Vignette	No Policy Language			Policy Language			Average Marginal Effects
	Predicted Probability		Average Marginal Effects	Predicted Probability		Average Marginal Effects	
	Not High Income	High Income		Not High Income	High Income		
Earthquake Damage							
Clear Non-Coverage	0.368	0.533	0.158*	0.714	0.786	0.076	-0.080
			(0.074)			(0.062)	(0.077)
Clear Coverage	0.617	0.651	0.035	0.373	0.359	-0.014	-0.042
			(0.080)			(0.063)	(0.083)
Deck Collapse							
Clear Non-Coverage	0.579	0.604	0.025	0.587	0.665	0.079	0.052
			(0.073)			(0.061)	(0.090)
Clear Coverage	0.391	0.468	0.076	0.695	0.746	0.053	-0.025
			(0.086)			(0.070)	(0.089)
Slip & Fall Liability							
Clear Non-Coverage	0.471	0.556	0.085	0.622	0.739	0.124	0.028
			(0.083)			(0.067)	(0.091)
Clear Coverage	0.498	0.625	0.128	0.665	0.614	-0.049	-0.173
			(0.079)			(0.060)	(0.097)
Electrical Fire Damage							
Clear Coverage	0.531	0.518	-0.013	0.210	0.196	-0.014	-0.004
			(0.047)			(0.057)	(0.069)

Note. The table reports average predicted probabilities that respondents accurately assessed insurance coverage, conditioned on household income level and treatment, as well as the average marginal effect of high income in both treatment and control groups, and the average marginal effect of treatment on high-income respondents. All numbers calculated with the logit regression coefficients in Table A7 in Appendix A, using Stata's postestimation "margins" command. Standard errors are reported in parentheses. The symbols * and ** represent significance at the 5% and 1% level, respectively.

3. Influence of Race on Accuracy of Coverage Assessments

In addition to insurance sophistication and income, we tested whether the respondents' race predicted accuracy of coverage assessments in the treatment and control groups. Both groups had roughly equal distributions of nonwhite respondents, including those who reported multiple racial or ethnic identities (roughly 34% and 36%, respectively). As above, we estimated a series of logistic regressions, controlling for potentially confounding

experiential, other demographic, and economic characteristics[115] and used these regression outputs to calculate the predicted probability that race influenced the accurate coverage assessment in the treatment and control groups across the seven vignettes.[116] Table 7 reports these predicted probabilities.

Table 7. Predicted Probability of Accurate Coverage Assessments by Race

Vignette	No Policy Language			Policy Language			Average Marginal Effects
	Predicted Probability		Average Marginal Effects	Predicted Probability		Average Marginal Effects	
	White	Nonwhite		White	Nonwhite		
Earthquake Damage							
Clear Non-Coverage	0.418	0.337	-0.082 (0.058)	0.738	0.700	-0.037 (0.042)	0.037 (0.052)
Clear Coverage	0.633	0.599	-0.034 (0.058)	0.343	0.421	0.076 (0.046)	0.098 (0.067)
Deck Collapse							
Clear Non-Coverage	0.610	0.520	-0.089 (0.057)	0.612	0.568	-0.043 (0.047)	0.046 (0.074)
Clear Coverage	0.392	0.425	0.033 (0.060)	0.661	0.776	0.120** (0.045)	0.058 (0.056)
Slip & Fall Liability							
Clear Non-Coverage	0.473	0.504	0.031 (0.059)	0.650	0.614	-0.036 (0.046)	-0.064 (0.071)
Clear Coverage	0.551	0.449	-0.101 (0.058)	0.700	0.583	-0.112** (0.041)	-0.012 (0.070)
Electrical Fire Damage							
Clear Coverage	0.522	0.547	0.025 (0.035)	0.212	0.196	-0.016 (0.040)	-0.038 (0.048)

Note. The table reports average predicted probabilities that respondents accurately assessed insurance coverage, conditioned on race group and treatment, as well as the average marginal effect of race in both treatment and control groups, and the average marginal effect of treatment on nonwhite respondents. All numbers calculated with the logit regression coefficients in Table A8 in Appendix A, using Stata's postestimation "margins" command. Standard errors are reported in parentheses. The symbols * and ** represent significance at the 5% and 1% level, respectively.

[115] Reported in Table A8 in Appendix A.

[116] The identification strategy for this analysis is quite similar to that of the analysis in Section C, except that we replaced the indicator for high confidence with an indicator for nonwhite respondents. We also remove the race/ethnicity control used in prior analyses. Key coefficients from these regressions are reported in Table A8 in Appendix A.

The data reported in Table 7 suggest there is, at most, only a limited relationship between respondents' race and the accuracy of their coverage assessments. The data revealed no statistically significant relationship between accuracy and race in the control group; in none of the seven vignettes did respondents' race predict accuracy with any statistical significance. The data point to largely the same conclusion for the treatment group (which received policy language): in five of the seven vignettes, race did not predict accuracy of coverage assessments. And while there were two statistically significant differences in coverage assessments in the treatment group, they point in opposite directions. In the deck collapse clear coverage vignette, nonwhite respondents were 12 percentage points more likely to be accurate than their white counterparts. However, in the slip-and-fall clear coverage vignette, nonwhite respondents were 11 percentage points less likely to be accurate than their white counterparts. In addition, the results in the rightmost column of Table 7, which reports the average marginal effects of the treatment on accuracy, indicate no significant difference in the effect on coverage assessment accuracy of receiving policy language by race.

* * *

To summarize, we found some evidence that reading relevant policy language was associated with improved accuracy in coverage assessments, although the impact was inconsistent across vignettes and smaller than expected. More disturbing was the evidence in some vignettes that reading relevant policy language was associated with less accurate coverage assessments. Also concerning was evidence that providing relevant policy language was positively associated with confidence in coverage assessments, even when that assessment was wrong. Our analyses indicate that sophistication as an insurance consumer, income, and race did not explain variations in the accuracy of coverage assessments.

V. Implications

Our results provide novel support for the critique that modern contract law fails to ensure consumers' capacity to understand their contractual rights and responsibilities. This critique matters because comprehensible contract terms are essential for consumer protection even if, as compelling evidence in fact shows, the vast majority of consumers do not read their contracts when they ostensibly assent to them.[117] Section A explains this oft-overlooked

[117] *See supra* Part I.

point. It highlights how comprehensible contracts can help inform consumers of their rights after contract formation if and when disputes arise. It also argues that comprehensible contracts heighten reputational risks for firms that include unfair terms in their contracts. More foundationally, it argues that consumers' opportunity to review contract terms prior to assent critically depends on those terms being comprehensible, meaning that blanket assent to consumer contracts should not extend to contract language that large swaths of consumers cannot understand even when they attempt to do so.

Section B examines strategies to address incomprehensible consumer contract terms. It suggests that courts could consider survey-based evidence to determine if the contract terms a firm seeks to enforce are understandable by a significant percentage of consumers, rooting this inquiry in the "reasonable expectations" doctrine of consumer contract law.[118] Section B also discusses options to require or incentivize firms to provide tools to help consumers understand contract terms, such as AI-based smart readers.

A. The Benefits of Understandable Consumer Contract Language

Understandable contract language is a key consumer protection, even though most consumers choose not to read their contracts when they ostensibly assent to them.[119] Subpart 1 highlights several practical consumer protection benefits of comprehensible contracts. Subpart 2 addresses the theoretical implications of contract terms that are incomprehensible to most consumers, arguing that consumer assent to such terms is highly questionable under prevailing contract law rules and theories.

1. The Practical Consumer Protection Benefits of Comprehensible Contracts

Few typical consumers read contracts when they ostensibly agree to them.[120] However, clear and comprehensible contracts nonetheless benefit consumers in at least three concrete ways.[121] First, comprehensible contracts help consumers identify and navigate legitimate disputes with businesses.

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[118] See Restatement of Consumer Contracts; David A. Hoffman, Consumers' Unreasonable Textual Expectations (draft, on file with author)

[119] *See* sources cited *supra* note 3.

[120] Bakos et al., *supra* note 19, at 3; Ayres & Schwartz, *supra* note 19; Marotta-Wurgler, *supra* note 19; Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DePaul Bus. & Com. L.J. 199, 206 (2010).

[121] *See* Logue et al., *supra* note 22.

During potential disputes, consumers have a compelling reason to understand their contractual rights and obligations.[122] Consumers are therefore more likely to read their contracts carefully when a potential dispute arises than at the time of contract formation.[123] This is particularly true when firms highlight specific contract language in response to consumer complaints or inquiries, as is sometimes legally required.[124]

Consumers who read the governing contract terms during disputes are more likely to receive fair treatment and avoid unproductive efforts if they correctly understand that contract language.[125] Most importantly, these consumers are more likely to be able to accurately assess whether a firm has honored its contractual commitments.[126] If so, then they can avoid prolonged and unproductive disputes.[127] And if not, then they can threaten remedial action unless the firm changes course. Although such remedies might include legal or regulatory actions in extreme cases, they more frequently will involve reputation-based sanctions, such as leaving negative reviews online or posting on social media.[128] Conversely, consumers who do not understand a firm's contractual commitments may be poorly positioned to assess whether their grievance is legitimate, and less likely to succeed in pursuing remedies

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[122] *See* Schwarcz, *supra* note 26; Boardman, *supra* note 13, at 1077; Van Boom et al., *supra* note 26.

[123] *See* Wulf & Seizov, *supra* note 63, at 559 (finding that in post-contract scenarios in which the consumer has a dispute with a business, "consumers do in fact read, retain and understand more when the attempt has been made to optimize disclosures"); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 315 (2008).

[124] *See* Schwarcz, *supra* note 25 (noting that state laws typically require insurers to quote the relevant policy language when denying a claim). See also Meirav Furth-Matzkin, On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market , 9 Journal of Legal Analysis 1 (2017).

[125] Van Boom et al., *supra* note 26.

[126] *Id*.

[127] An objection is that consumers may be more likely to accept unfair practices that are specified in contract terms because individuals believe these terms have legal and moral force. *See* Wilkinson-Ryan, *supra* note 4; Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 504 (2020). If so, then there is an argument that some consumers may be more likely to challenge firm practices that they perceive to be unfair when they cannot understand the governing contract language as compared to when they can. This problem is compelling with respect to unenforceable contract terms, which present unique problems that warrant distinct treatment. *See* Daniel Wilf-Townsend, *Deterring Unenforceable Terms*, 111 VA. L. REV. (Forthcoming 2025); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031 (2019). But most contract terms are indeed enforceable.

[128] All such remedies depend critically on consumers being able to explain how a firm has violated its contractual commitments.

from a firm. Consequently, many consumers who cannot make sense of a firm's contract language may feel too intimidated to challenge objectionable actions.

A second benefit of understandable contract language is that it increases the negative reputational consequences for firms that draft unfair terms. While most consumers may not read their contracts at the time of assent, some consumer markets are monitored by sophisticated consumers, journalists, regulators, academics, and market intermediaries.[129] These actors can help deter firms from drafting unfair terms and compel them to reverse course when they do.[130] Comprehensible contract language supports these market-based constraints on unfair terms in two ways. First, it helps market watchdogs identify unfair contract language. Although watchdogs tend to be more sophisticated than average consumers, their focus on market wide dynamics rather than individual firms makes it harder for them to spot unfair or atypical terms when that language is confusing. Second, clear contract language allows watchdogs to more easily communicate their concerns about specific firms' contract language to the public.[131] Instead of needing to explain both the meaning of a firm's provisions and why that meaning is unreasonable, clear language lets watchdogs address the issue directly, avoiding accusations of misinterpretation.

A final, perhaps more aspirational, potential benefit of comprehensible contract language is that it may, over time, increase the percentage of consumers who choose to read contracts. Many consumers avoid reading terms and conditions because doing so is difficult and time consuming.[132] Reducing the effort required to read contracts therefore has the potential to increase the percentage of consumers who read, especially if this improvement becomes widely known.[133] While the majority of consumers

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[129] *See* Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 853 (2006).

[130] *Cf.* Bakos et al., *supra* note 19, at 19 (suggesting that the informed minority argument is unlikely to work in settings like software licenses, where evidence suggests that one-tenth of one percent of consumers read terms).

[131] Schwarcz, *supra* note 25.

[132] *See, e.g.*, Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. Chi. L. Rev. 1181, 1185–87 (2010); Zev J. Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 124, 134 (2012); Hillman & Rachlinski, *supra* note 4, at 436.

[133] *See, e.g.*, Van Boom et al., *supra* note 26, at 194 (testing consumers' self-reported comprehension of two substantively equivalent insurance contract versions of different reading difficulty and finding "that participants who received the 'easy' version found it

are unlikely to read their contracts under any conditions, even small increases in the percentage of reading consumers could influence firms' incentives in drafting their contracts.[134]

2. Assent-Based Implications of the No-Reading Critique

In addition to the practical benefits of comprehensible contract language, evidence supporting the no-understanding critique has important theoretical implications for consumer law. A core principle of contract law is that consumers are bound to terms and conditions that they have actual or constructive knowledge of when they indicate assent.[135] A corollary, often labeled as the "the duty to read," is that the enforceability of a contract provision is not impacted by whether a consumer actually reads it at the time of assent.[136] As long as a consumer manifests assent to a proposed agreement, the agreement includes all terms a reasonable consumer would have understood to be part of the deal had they read it.[137]

Justifications for these principles vary, but most depend on the assumption that consumers have a realistic opportunity to understand the terms of a proposed deal at the time it is offered. Once provided with this opportunity, consumer acceptance of a deal includes "blanket assent" to the unread terms because the consumer had the opportunity to understand them.[138] This opportunity allows courts to interpret assent to encompass unread terms, as long as they do not undermine the basic spirit of the agreement as reflected in the "dickered terms."[139] In economic terms, the decision not to read can be understood as a voluntary assumption of risk by the consumer.[140] Just as tort law treats a knowing assumption of a risk as a legitimate defense to negligence, contract law treats assent to unread terms

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easier to understand . . . than participants who received the difficult version"). *See also* Ayres & Schwartz, *supra* note 19 (proposing a system of "term substantiation" in which unexpected, unfavorable contract terms are highlighted in contracts to increase reading).

[134] *See* Ayres & Schwartz, *supra* note 19, at 575.

[135] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW. INST. 1981); Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 20 (2d Cir. 2002).

[136] *See, e.g.*, Wilkinson-Ryan, *supra* note 4, at 1753; Knapp, *supra* note 6, at 1085; Rustad & Koenig, *supra* note 64, at 1451.

[137] *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW. INST. 1981).

[138] *See* Karl Llewellyn's conception of "blanket assent." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

[139] *See, e.g.*, Robert A. Hillman & Maureen O'Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 105 (2011) ("The opportunity to read a standard form is important in part because it substantiates assent to the form even if a party does not read it.").

[140] Ayres & Schwartz, *supra* note 19, at 549.

as a presumptively enforceable reflection of consumer preferences.

These conceptions of consumer assent to standard form contracts become incoherent if consumers are unable to understand contract terms even when they attempt to read them carefully.[141] In such cases, the consumer is not put on reasonable notice of those terms because they are not given a reasonable opportunity to understand them by reading. Instead, incomprehensible contract terms are functionally equivalent to contract language that is not physically accessible to consumers at the time of agreement. Courts consistently find such physically inaccessible language unenforceable. Examples include browsewrap terms hidden on websites and not prominently brought to consumers' attention[142] and non-contractual documents that are ostensibly incorporated by reference but not reasonably available to consumers at the time of assent.[143]

B. Improving Consumer Understanding of Contract Terms

Given the practical and theoretical problems created when consumer contract language is incomprehensible to a typical consumer, lawmakers and courts should consider options to improve the comprehensibility of these documents.

1. Judicial Solutions

One promising option to limit the risk of incomprehensible contract language is for courts to refuse to enforce consumer contract terms when survey evidence demonstrates that the language is not understandable. Advocates advancing this claim could use a similar methodology to that employed in this Article: surveying typical consumers about their expectations regarding a firm's contractual obligations, both with and without access to the relevant contract language. As some have argued regarding survey-based approaches to contract interpretation, surveys are regularly used in other areas of law where consumer expectations matter (such as trademark), and they are increasingly available at relatively low cost.[144]

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[141] *See* Benoliel & Becher, *supra* note 7.

[142] *See* Norcia v. Samsung Telecomms. Am., LLC, 845 F.3d 1279 (9th Cir. 2017); Specht v. Netscape Communications Corp., 306 F.3d 17 (2nd Cir. 2002).

[143] Walker v. Builddirect.Com Techs., Inc., 2015 OK 30 (Okla. 2015); Timmerman v. Grain Exchange, LLC, 394 Ill. App. 3d 189 (Ill. App. Ct. 2009); Hyde v. Humana Ins. Co., Inc., 598 So.2d 876, 879 (Ala. 1992). *See* Amy B. Monahan & Daniel Schwarcz, *Rules of Medical Necessity*, 107 IOWA L. REV. 423, 474 (2022).

[144] *See* Ben-Shahar & Strahilevitz, *supra* note 18.

Allowing litigants to advance this type of argument is thus reasonably feasible.

This approach aligns with the theoretical case for consumer assent to standard form contracts.[145] It also has reasonable doctrinal foundations beyond the cases refusing to enforce contract terms that are not physically reasonably available to consumers at the time of assent.[146] Several courts have recognized that consumer assent does not extend to contract language that typical consumers cannot understand. For instance, in *Gaunt v. John Hancock Insurance*,[147] the court refused to enforce the technical meaning of insurance policy language that it believed ordinary consumers would not understand.[148] More recent decisions continue to endorse the proposition that consumer contract language should not be enforced if it is so confusing or complicated that typical consumers would be unable to understand its meaning even if they attempted to do so.[149]

Admittedly, the logic that courts should not enforce contract language that typical consumers would not understand is often tied to the "reasonable expectations" doctrine, which many courts have rejected or largely abandoned.[150] Hostility to the doctrine is driven largely by its malleability

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[145] *See supra* Part A.

[146] *See id.*

[147] Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947).

[148] *Id*. at 599–600. The language stated that "if the Company is satisfied that on the date of the completion of Part B of this application I was insurable… and if this application… is, prior to my death, approved by the Company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B." According to the insurer, the plain meaning of this language was not, as the insured argued, that he was insured as of the completion of Part B of his application, but instead that his insurance would be retroactively treated as if it were in force as of the completion of Part B if and when his application was approved by its home office. The court admitted that "[a]n underwriter might so understand the phrase," but nonetheless rejected this interpretation because it is not what a typical consumer might understand after having read that phrase.

[149] *See, e.g.*, Zacarias v. Allstate Ins. Co., 775 A.2d 1262, 1262–63 (NJ 2001) (holding that "[i]n enforcing an insurance policy, courts will depart from the literal text and interpret it in accordance with the insured's understanding, even when that understanding contradicts the insurer's intent, if the text appears overly technical or contains hidden pitfalls, cannot be understood without employing subtle or legalistic distinctions, is obscured by fine print, or requires strenuous study to comprehend").

[150] Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 430 n.18 (1998) ("Some courts, of course, have rejected the [reasonable expectations] doctrine altogether on various grounds, including that existing equitable doctrines provide sufficient protection or that there is insufficient justification to depart from the usual rules that apply to all contracts."). *See, e.g.*, *id*. (quoting case opinions rejecting the reasonable expectations doctrine in Texas, Utah, and Washington); Deni Assocs. of Florida, Inc. v. State Farm Fire & Casualty Ins. Co., 711 So.2d. 1135, 1140 (Fla. 1998) ("We decline to adopt the doctrine of reasonable expectations.

and imprecision, which courts historically used to mandate coverage for losses excluded in clear policy language.[151] But a doctrine allowing consumer-litigants to show that the specific contract language relevant to their dispute with a firm is incomprehensible to consumers would be targeted and narrow. Moreover, it would focus on consumers' actual capacity to understand contract language, rather than judicial speculation; judges, as experts in contract interpretation, often fail to appreciate the limitations of non-experts.[152] Because it is the understanding of typical consumers that matters, courts should consider relevant survey-based evidence to judge the comprehensibility of consumer contract terms.

Of course, there are reasonable objections to this approach. First, it would increase uncertainty for firms about whether their contract terms would be enforced, as survey-based experiments can be manipulated to produce desired results. Also, surveys are difficult to design and it is increasingly difficult to recruit representative samples who are motivated to provide quality survey responses. However, firms could mitigate this risk by pre-testing contract language to ensure typical consumers can understand it. Many firms already conduct similar tests for consumer disclosures.[153] A second objection is that this approach would make it harder to resolve disputes early in litigation without extensive discovery. While this concern has merit, it could be addressed by placing the burden of providing relevant survey evidence on consumer-litigants.

2. Regulatory and Legislative Solutions

Lawmakers and regulators should also consider options to improve the comprehensibility of consumer contracts. One promising approach is enhancing the availability and usage of AI-powered smart readers.[154] These tools use advanced generative AI models, like GPT-4, to simplify and summarize complex contractual texts. A key benefit of such tools is that they can personalize text to the reader's preferences and benchmark contracts by comparing them to others. Although generative AI tools are prone to making

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There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged.").

[151] *See* Schwarcz, *supra* note 8; KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 100–32 (1986).

[152] *See* Solan et al., *supra* note 42, at 1291–94 (finding via experiments that judges overestimate the degree to which laypeople agree with their decisions).

[153] *See* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 263 (2002).

[154] *See* Arbel & Becher, *supra* note 14.

errors, this risk is significantly reduced when standardized prompting is used to summarize specific text. Lawmakers and regulators could encourage the use of smart readers by (i) requiring consumer contracts to be publicly available, (ii) urging regulated firms to make generative AI tools available to consumers, and (iii) facilitating their use within popular consumer platforms like Amazon or Yelp, or directly supplying these tools to potential consumers and market intermediaries.

A more traditional approach to improving consumer understanding of contract terms is imposing heightened quantitative readability standards on contracts. This approach has several potential benefits. First, quantitative readability scores already apply to many consumer contracts.[155] Second, evidence shows that most consumer contracts are written at complexity levels beyond the capacity of ordinary consumers to understand.[156] However, there are significant limitations to using readability measures to improve the comprehensibility of consumer contracts. Most notably, evidence indicates that improvements in readability scores often do not translate into better consumer comprehension.[157] In addition, research has demonstrated that there is a significant need to improve the reliability of existing readability measures or create new ones.[158] Thus, small changes in readability requirements may not produce meaningful improvements. While drafting contracts to match consumers' educational attainment might enhance comprehension, it could do so at the expense of contract detail and specificity, which also provide important benefit.

We could also imagine general warnings at the beginning of policies to help consumers understand policy terms. For example, homeowners insurance policies could have a prominent warning such as "This policy does not cover flood damage. It does cover some water damage. To learn what is covered, see Section xy of the policy." However, we have no evidence that such warnings would likely have much effect. More effective might be targeted warnings placed just before provisions that are found (through research such as ours) to be especially prone to produce misunderstandings owing to the partial-reading problem. For example, such a targeted warning might read: "Caution: You may not understand what this insurance does and

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[155] *See* Blasie, *Rise of Plain Language Laws*, *supra* note 13; Blasie, *Regulating Plain Language*, *supra* note 13.

[156] *See, e.g.*, Rustad, *supra* note 64; Benoliel & Becher, *supra* note 7.

[157] Conklin et al., *supra* note 58 (finding readability scores for travel insurance policies and consumer comprehension of these policies were not correlated, but suggesting that this result was likely driven by the high readability scores of all tested contracts).

[158] Yonathan A. Arbel, *The Readability of Contracts: Big Data Analysis.* 21 J EMPIRICAL LEG. STUD. 927 (2024).

doesn't cover unless you **read to the very end** of this section." Of course, while such a warning might result in more careful and complete reading of the provision at issue, it might also result in less careful reading of other provisions. That result, however, might well be an improvement over the current situation. While it may be reasonable to expect consumers to understand clearly worded language that they read carefully, they have limited attention. Directing them to spend their limited attention on the provisions that are likely to upset their prior expectations might improve consumer welfare. However, improving the readability of consumer contracts would not address other explanations for the no-reading problem, including mistrust that companies will not respect the terms of contracts and the sheer number of contracts most individuals would be expected to read.[159]

VI. Conclusion

This Article presents new empirical evidence that complicates long-standing assumptions about consumer comprehension of standard form contracts, particularly homeowners insurance policies. While our findings confirm that access to contract language can sometimes enhance understanding, they also reveal a paradox: providing contract language may, in some cases, impair consumers' grasp of their contractual rights and obligations. One likely explanation is a previously underexplored phenomenon—the partial-reading or partial-understanding problem—where consumers either misinterpret terms or disengage prematurely.

Even when respondents showed improved accuracy in coverage assessments after reviewing policy language, the gains were modest, and confidence remained low, underscoring the broader challenge of translating legal text into meaningful notice. Moreover, exposure to policy language increased confidence in coverage assessments, even when those assessments were incorrect. Analyses across subpopulations suggest that these comprehension difficulties are not confined to specific groups but are widespread among consumers.

These findings underscore the need for legal and regulatory reforms aimed at enhancing the clarity and accessibility of consumer contracts, as comprehensible contract language is an essential consumer protection even though most consumers do not read contracts at the time of supposed assent to their terms. To address these challenges, courts could refuse to enforce

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[159] See Arbel, *supra* note 139. One proposed solution to address the proliferation of contracts is to make low-stakes, written-form contracts unenforceable, thus reducing the number of contracts consumers are expected to read. David A. Hoffman, *Defeating the Empire of Forms*, 109 Va. L. Rev 7 (2023).

terms shown to be widely misunderstood, while regulators could promote AI-powered contract summarization tools, impose stricter readability standards, or require targeted warnings for particularly misleading provisions—ensuring that contracts are not just available, but truly accessible to consumers.

Appendix A. Additional Tables

Table A1. Accuracy of Respondents' Assessments of Insurance Coverage

Vignette	Coverage Context	No Policy Language (Control Group)			ISO Policy Language (Treatment Group)			Difference
		N	*Accurate*	*%*	*N*	*Accurate*	*%*	*PP*
Clear Non-Coverage	Earthquake	325	127	39.1	493	358	72.6	33.5
	Deck Collapse	328	193	58.8	485	290	59.8	1.0
	Slip and Fall	332	159	47.9	489	311	63.6	15.7
Clear Coverage	Earthquake	326	202	62.0	501	186	37.1	-24.9
	Deck Collapse	323	130	40.2	476	332	69.7	29.5
	Slip and Fall	329	172	52.3	490	322	65.7	13.4
	Electrical Fire	974	516	53.0	479	99	20.7	-32.3

Note. Percentages denote the proportion of the respective survey subsample that accurately predicted policy coverage. For the clear coverage vignettes, responses predicting that repairs are either probably covered or definitely covered were accurate; for the clear non-coverage vignettes, responses predicting that repairs are either probably not covered or definitely not covered were considered accurate.

Table A2. Perceptions of Confidence in Accuracy of Coverage Assessments

Vignette	Coverage Context	No Policy Language (Control Group)			ISO Policy Language (Treatment Group)			Difference
		N	*Confident*	*%*	*N*	*Confident*	*%*	*PP*
Clear Non-Coverage	Earthquake	325	156	48.0	493	292	59.2	11.2
	Deck Collapse	328	123	37.5	485	293	60.4	22.9
	Slip and Fall	332	117	35.2	489	224	45.8	10.6
Clear Coverage	Earthquake	326	148	45.4	501	283	56.5	11.1
	Deck Collapse	323	102	31.6	476	271	56.9	25.3
	Slip and Fall	329	125	38.0	490	228	46.5	8.5
	Electrical Fire	974	378	38.8	479	186	38.8	0.0

Note. Confident responses are from respondents who declared they were either very confident or extremely confident that their perceptions of coverage were correct.

Table A3. Logit Regression Analyses of Accuracy of Respondents' Assessments of Homeowners Insurance Coverage

	Earthquake Damage			Deck Collapse			Slip and Fall Liability			Electrical Fire
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Received policy language	1.172	1.173	0.352**	1.941**	1.942**	3.625**	1.887**	1.886**	1.842**	0.214**
	(0.121)	(0.123)	(0.053)	(0.207)	(0.207)	(0.565)	(0.202)	(0.202)	(0.279)	(0.029)
Clear non-coverage scenario		1.651**	0.387**		1.045	2.107**		0.892	0.868	
		(0.167)	(0.063)		(0.110)	(0.345)		(0.093)	(0.142)	
Clear non-cov. × Rec'd policy language			11.825**			0.296**			1.049	
			(2.538)			(0.063)			(0.223)	
Baseline odds	0.663	0.515*	1.088	1.181	1.152	0.810	0.705	0.751	0.762	0.571
	(0.168)	(0.134)	(0.307)	(0.312)	(0.311)	(0.228)	(0.190)	(0.207)	(0.217)	(0.163)
No. of observations	1,644	1,644	1,644	1,611	1,611	1,611	1,640	1,640	1,640	1,453
Pseudo R-squared	0.0116	0.0225	0.0836	0.0378	0.0379	0.0529	0.0465	0.0470	0.0470	0.108
Experiential controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting that they have read and understand their own policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Table A4. Logit Regression Analyses of Confidence in Accuracy of Coverage Assessments

	Earthquake Damage			Deck Collapse			Slip and Fall Liability			Electrical Fire
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Received policy language	1.498**	1.498**	1.448*	2.794**	2.799**	2.989**	1.457**	1.456**	1.345	0.953
	(0.159)	(0.159)	(0.216)	(0.308)	(0.309)	(0.473)	(0.158)	(0.158)	(0.204)	(0.112)
Clear non-coverage scenario		1.205	1.156		1.183	1.279		0.947	0.859	
		(0.126)	(0.187)		(0.126)	(0.220)		(0.100)	(0.145)	
Clear non-cov. × Rec'd policy language			1.071			0.880			1.174	
			(0.227)			(0.192)			(0.255)	
Baseline odds	0.486**	0.443**	0.453**	0.302**	0.274**	0.263**	0.302**	0.311**	0.327**	0.584**
	(0.127)	(0.117)	(0.124)	(0.084)	(0.078)	(0.077)	(0.085)	(0.090)	(0.098)	(0.112)
No. of observations	1,644	1,644	1,644	1,611	1,611	1,611	1,640	1,640	1,640	1,453
Pseudo R-squared	0.0686	0.0700	0.0701	0.0839	0.0850	0.0851	0.0752	0.0753	0.0756	0.0248
Experiential controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's confidence in their understanding of insurance coverage is high (i.e., very confident or extremely confident) and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they have read and understand their own policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Table A5. Logit Regression Analyses of Accuracy of Respondents' Confidence in the Accuracy of Their Coverage Assessments

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.299**	2.815**	1.743**	0.199**
	(0.065)	(0.576)	(0.342)	(0.038)
Clear non-coverage scenario	0.327**	2.310**	1.389	
	(0.075)	(0.477)	(0.289)	
Confident respondent	1.852*	3.084**	4.652**	2.680**
	(0.448)	(0.797)	(1.210)	(0.390)
Clear non-cov. × Rec'd policy lang.	11.042**	0.301**	0.874	
	(3.443)	(0.087)	(0.238)	
Confident × Rec'd policy lang.	1.178	1.119	1.066	1.047
	(0.366)	(0.372)	(0.360)	(0.290)
Clear non-cov. × Confident	1.283	0.723	0.279**	
	(0.430)	(0.256)	(0.099)	
Clear non-cov.× Confident	1.299	0.996	1.582	
× Rec'd policy lang.	(0.574)	(0.454)	(0.725)	
Baseline odds	0.928	0.629	0.488*	0.450**
	(0.283)	(0.190)	(0.148)	(0.131)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.115	0.0914	0.0953	0.140
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they have read and understand their own policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Table A6. Logit Regression Analyses of Respondents' Accuracy of Coverage Assessments by Sophistication Level

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.360**	3.468**	1.977**	0.215**
	(0.056)	(0.551)	(0.307)	(0.030)
Clear non-coverage scenario	0.403**	2.198**	0.938	
	(0.068)	(0.374)	(0.157)	
Sophisticated respondent	1.549	1.151	3.326*	1.677
	(0.706)	(0.539)	(1.602)	(0.450)
Clear non-cov. × Rec'd policy lang.	11.217**	0.304**	1.030	
	(2.485)	(0.067)	(0.225)	
Sophisticated × Rec'd policy lang.	0.885	1.910	0.345	1.071
	(0.500)	(1.286)	(0.216)	(0.499)
Clear non-cov. × Sophisticated	0.586	0.555	0.312	
	(0.372)	(0.340)	(0.216)	
Clear non-cov.× Sophisticated	1.791	0.674	1.481	
× Rec'd policy lang.	(1.522)	(0.586)	(1.312)	
Baseline odds	1.253	0.857	1.052	0.732
	(0.303)	(0.207)	(0.252)	(0.177)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.0829	0.0510	0.0451	0.103
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were employment and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Table A7. Logit Regression Analyses of Accuracy of Coverage Assessments by Income

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.299**	3.661**	1.743**	0.219**
	(0.065)	(0.604)	(0.342)	(0.031)
Clear non-coverage scenario	0.327**	2.181**	1.389	
	(0.075)	(0.386)	(0.289)	
High-income respondent	1.161	1.383	1.714	0.948
	(0.403)	(0.510)	(0.578)	(0.187)
Clear non-cov. × Rec'd policy lang.	12.026**	0.283**	0.921	
	(2.791)	(0.065)	(0.210)	
High income × Rec'd policy lang.	0.811	0.940	0.465	0.967
	(0.351)	(0.468)	(0.201)	(0.385)
Clear non-cov. × High income	1.705	0.805	0.831	
	(0.796)	(0.382)	(0.399)	
Clear non-cov.× High income	0.918	1.344	2.647	
× Rec'd policy lang.	(0.572)	(0.863)	(1.668)	
Baseline odds	1.109	0.788	0.717	0.518*
	(0.314)	(0.223)	(0.205)	(0.146)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.115	0.0530	0.0489	0.106
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they had read and understand their homeowners insurance policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education and employment. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Table A8. Logit Regression Analyses of Accuracy of Respondents' Coverage Assessments by Race

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.297**	3.127**	1.943**	0.230**
	(0.056)	(0.586)	(0.371)	(0.038)
Clear non-coverage scenario	0.410**	2.499**	0.721	
	(0.082)	(0.502)	(0.144)	
Nonwhite respondent	0.863	1.154	0.653	1.114
	(0.217)	(0.294)	(0.163)	(0.164)
Clear non-cov. × Rec'd policy lang.	13.510**	0.322**	1.097	
	(3.603)	(0.084)	(0.290)	
Nonwhite × Rec'd policy lang.	1.620	1.567	0.903	0.809
	(0.514)	(0.525)	(0.284)	(0.228)
Clear non-cov. × Nonwhite	0.814	0.592	1.745	
	(0.285)	(0.208)	(0.603)	
Clear non-cov.× Nonwhite	0.726	0.774	0.826	
× Rec'd policy lang.	(0.328)	(0.356)	(0.368)	
Baseline odds	1.104	0.765	0.802	0.562*
	(0.318)	(0.223)	(0.235)	(0.161)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.0862	0.0578	0.0494	0.108
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they had read and understand their homeowners insurance policy having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Appendix B. Robustness Checks

A. Definition of accurate responses

Comparing the results in Tables A3 and A9 indicates our results were not impacted by defining accurate responses in each vignette as "definitely" covered or not covered as opposed to "probably" or "definitely" covered or not covered as in the model reported in Table A3.

Table A9. Logit Regression Analyses of Accuracy of Respondents' Coverage Assessments Using Only "Definitely" Covered/Not Covered Responses

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.712	5.706**	1.475*	0.339**
	(0.124)	(1.180)	(0.263)	(0.066)
Clear non-coverage scenario	0.781	2.595**	0.915	
	(0.148)	(0.590)	(0.190)	
Clear non-cov. × Rec'd policy language	7.575**	0.419**	1.821*	
	(1.828)	(0.110)	(0.459)	
Baseline odds	0.198**	0.074**	0.114**	0.049**
	(0.062)	(0.025)	(0.040)	(0.020)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.116	0.0766	0.0580	0.0826
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they have read and understand their own policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

B. Definition of sophisticated respondents

Comparing the results in Tables A6 and A10 indicates the results were not impacted when we used an alternative definition of sophisticated respondents as those with bachelor's degrees or higher who had read the most relevant portions of their own homeowners insurance policy. Our primary definition required that respondents must also have reported (1) understanding their policy terms "very well" or "completely," and (2) "mostly" or "completely" understanding what their homeowners policy does and does not cover.

Table A10. Logit Regression Analyses of Respondents' Accuracy of Coverage Assessments Using Alternative Sophisticated Consumer Definition

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.354**	3.202**	1.847**	0.225**
	(0.060)	(0.546)	(0.307)	(0.034)
Clear non-coverage scenario	0.393**	0.990	1.159	
	(0.072)	(0.397)	(0.468)	
Sophisticated respondent	0.953	1.026	1.265	1.167
	(0.273)	(0.300)	(0.366)	(0.191)
Clear non-cov. × Rec'd policy lang.	10.779**	0.321**	1.149	
	(2.588)	(0.076)	(0.272)	
Sophisticated × Rec'd policy lang.	1.030	2.013	0.936	0.859
	(0.370)	(0.832)	(0.355)	(0.268)
Clear non-cov. × Sophisticated	0.925	0.990	1.159	
	(0.368)	(0.397)	(0.468)	
Clear non-cov.× Sophisticated	1.551	0.661	0.709	
× Rec'd policy lang.	(0.828)	(0.368)	(0.376)	
Baseline odds	1.305	0.869	1.092	0.728
	(0.324)	(0.212)	(0.268)	(0.177)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.0826	0.0526	0.0416	0.100
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were

indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were employment and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

C. Definition of higher-income respondents

Comparing the results in Tables A7 and A11 indicates our results were not impacted by using an alternative definition of high-income respondents as those with gross household annual incomes of $200,000 or greater. Our primary definition of high income was those with gross household incomes of $150,000 or more.

Table A11. Logit Regression Analyses of Respondents' Accuracy of Coverage Assessments with Alternative High-Income Definition

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.333**	3.637**	1.974**	0.218**
	(0.052)	(0.577)	(0.307)	(0.030)
Clear non-coverage scenario	0.344**	2.228**	0.908	
	(0.059)	(0.379)	(0.153)	
High-income respondent	0.598	1.474	2.657	1.134
	(0.253)	(0.761)	(1.352)	(0.294)
Clear non-cov. × Rec'd policy lang.	13.141**	0.273**	0.967	
	(2.935)	(0.060)	(0.211)	
High income × Rec'd policy lang.	1.999	1.303	0.358	1.099
	(1.110)	(1.139)	(0.236)	(0.563)
Clear non-cov. × High income	4.443*	0.563	0.528	
	(2.753)	(0.365)	(0.367)	
Clear non-cov.× High income	0.296	2.243	3.660	
× Rec'd policy lang.	(0.262)	(2.335)	(3.374)	
Baseline odds	1.158	0.791	0.713	0.506*
	(0.325)	(0.222)	(0.202)	(0.143)
No. of observations	1,644	1,611	1,640	1,453
Pseudo R-squared	0.0858	0.0549	0.0485	0.106
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses

controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they had read and understand their homeowners insurance policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education and employment. The symbols * and ** represent significance at the 5% and 1% level, respectively.

D. Analyzing differences by race using only Black and white respondents

Comparing the results in Tables A8 and A12 indicates our results were not impacted by restricting the analysis sample to only Black and white respondents when evaluating the differences by race. This analysis excludes those who identified their race as neither Black nor white, who were included in our primary analysis.

Table A12. Logit Regression Analyses of Respondents' Accuracy of Coverage Assessments Using Only Black and White Respondents

	Earthquake Damage	Deck Collapse	Slip & Fall Liability	Electrical Fire
	(1)	(2)	(3)	(4)
Received policy language	0.295**	3.124**	1.941**	0.226**
	(0.056)	(0.590)	(0.371)	(0.037)
Clear non-coverage scenario	0.414**	2.464**	0.732	
	(0.083)	(0.497)	(0.146)	
Nonwhite respondent	0.770	1.304	0.527	1.007
	(0.268)	(0.482)	(0.200)	(0.220)
Clear non-cov. × Rec'd policy lang.	13.567**	0.328**	1.067	
	(3.635)	(0.087)	(0.283)	
Nonwhite × Rec'd policy lang.	1.864	1.830	1.134	0.668
	(0.825)	(0.887)	(0.528)	(0.284)
Clear non-cov. × Nonwhite	0.596	0.350*	1.686	
	(0.341)	(0.180)	(0.851)	
Clear non-cov.× Nonwhite	0.841	0.793	0.570	
× Rec'd policy lang.	(0.588)	(0.523)	(0.368)	
Baseline odds	1.063	0.713	0.684	0.653
	(0.339)	(0.232)	(0.221)	(0.212)
No. of observations	1,285	1,287	1,292	1,132
Pseudo R-squared	0.0928	0.0628	0.0562	0.115
Experiential controls	Yes	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated

coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they had read and understand their homeowners insurance policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, marital status, and region. Economic controls were education, employment, and income . The symbols * and ** represent significance at the 5% and 1% level, respectively.

E. Testing for the Impact of Differing Cognitive Load

As discussed in Section II.A.2, one of the limitations of our experiment involved subjecting treatment group respondents to an overall higher cognitive load than their control group counterparts. Our survey instrument was programmed to randomize the order in which the main vignettes (i.e., earthquake, deck collapse, and slip-and-fall) were distributed to respondents. We leverage this mechanism of our survey design to test whether the potential impact of differing cognitive load significantly impacted our results. We do this by limiting the analyses to only the first-encountered vignette for all respondents, reported in Table A13. Notably, we cannot run the same test for the electrical fire vignette because it was excluded from the randomization algorithm, but we believe the analyses reported in Table A13 indicate that the differing cognitive load between surveys likely does not drive any of our main results.

Table A13. Logit Regression Analyses of Respondents' Accuracy of Coverage Assessments Using Only First-Encountered Vignettes

	Earthquake Damage	Deck Collapse	Slip & Fall Liability
	(1)	(2)	(3)
Received policy language	0.294**	5.047**	2.331**
	(0.080)	(1.421)	(0.616)
Clear non-coverage scenario	0.588	3.644**	0.691
	(0.171)	(1.088)	(0.203)
Clear non-cov. × Rec'd policy language	11.686**	0.238**	1.069
	(4.595)	(0.091)	(0.402)
Baseline odds	1.232	0.423	0.587
	(0.622)	(0.230)	(0.283)
No. of observations	533	518	542
Pseudo R-squared	0.116	0.0782	0.0704
Experiential controls	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable is equal to one if the respondent's understanding of insurance coverage is accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting that they have read and understand their own policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

Appendix C. Impact When the Application Policy Language Is Ambiguous or Unenforceable

In addition to testing the impact of viewing policy language when the event described in a vignette was clearly covered or clearly not covered, we also tested the impact of providing policy language when it was unclear whether the situation in the vignette would be covered.[160] As described in more detail in Part IV, consumers' ability to detect potential uncertainties or ambiguities about whether a loss is covered is quite important as a policy matter, because policyholders are generally entitled to coverage when the operative policy language is ambiguous.

A. Policy Language and Vignettes

To better understand the extent to which consumers could recognize when policy language was potentially ambiguous or unenforceable in a specific situation, we again used the first three policy excerpts reported in the primary analyses, pertaining to earthquake damage, deck collapse, and slip-and-fall liability. In each case, however, we provided respondents with vignettes modified intentionally to describe situations in which it was unclear whether the policy language would cover the loss or was unenforceable.

1. Earthquake Policy Language: Unclear Coverage Vignette

In the revised earthquake vignette, the insured's loss was caused more directly by the negligence of a local city in erecting a utility pole than by an earthquake.[161] Although the plain meaning of the ISO policy language appears to deny coverage, the enforceability of this language is unclear and depends on whether the jurisdiction allows insurers to contract out of the "efficient proximate cause rule."[162] One common formulation of the efficient

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[160] These experiments more closely mirror those conducted by Ben-Shahar and Strahilevitz, *supra* note 18.

[161] This vignette was loosely modeled on State Farm Fire and Cas. Co. v. Bongen, 925 P.2d 1042 (Alaska 1996).

[162] *See* Vonda Mallicoat Laughlin, *The Proximate Cause Doctrine—What Is It, and Why Should I Care?*, 73 BAYLOR L. REV. 311, 313 (2021) ("The efficient proximate cause doctrine sets forth a method to determine policy coverage in situations in which two or more identifiable causes contribute to a loss and both covered and excluded causative factors are involved."). *See also* Murray v. State Farm Fire & Cas. Co., 509 S.E.2d. 1, 12 (1998) ("The efficient proximate cause . . . is not necessarily the last in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of links in the chain of causation. The efficient proximate cause is the predominating cause of the loss."). For research on the use of unenforceable terms, *see* sources cited *supra* note 127.

proximate cause rule is that, in the event that a covered peril and an uncovered peril both cause a loss, coverage depends on which is the dominant cause of the loss. In some jurisdictions, this rule supersedes policy language attempting to contract out of that rule. Figure A1 provides the text of the earthquake policy language (which matches the excerpted policy language used in the experiments reported in the primary analyses).

Earthquake Vignette (Unclear Coverage)

Earthquake Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Unclear Coverage Scenario: A magnitude 6.0 earthquake strikes near your home. The shaking from the earthquake knocks down an electrical pole in front of your home, which lands on your home and caves in the roof. The local utility company hadn't maintained the pole. If it had, the pole wouldn't have fallen. Major repairs are required.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	We insure against direct physical loss to covered property. We do not insure for loss excluded under the Exclusions Section. **Section I -- Exclusions** A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area. 1. Earth Movement Earth Movement means: a. Earthquake, including land shock waves or tremors before, during or after volcanic eruption; b. Landslide, mudslide or mudflow; c. Subsidence or sinkhole; or d. Any other earth movement including earth sinking, rising or shifting. This Exclusion A.1 applies regardless of whether any of the above, in A.1.a. through A.1.d., is caused by an act of nature or is otherwise caused. However, direct loss by fire, explosion or theft resulting from any of the above, in A.1.a through A.1.d., is covered.

Figure A1. Instruction and policy language distributed in the earthquake unclear coverage vignette

2. Deck Collapse Policy Language: Unclear Coverage Vignette

To test the impact of the deck collapse policy language, we modified the vignette used in the primary analysis to describe a situation in which the homeowner discovered the existence of termites before the collapse of their deck, but had not had a chance to check the deck for structural damage before the collapse occurred. The exact language and scenario provided to respondents is outlined in Figure A2. Here, the appropriate interpretation of the policy language is, in our judgment, unclear because it turns on whether the discovery of termites in the deck is sufficient to constitute "insect damage." In our view, the homeowner in this scenario has a reasonable and potentially meritorious argument that they are entitled to coverage because they did not yet appreciate the extent of the termite damage to their deck. On the other hand, the insurer has a strong argument that the homeowner was

indeed aware of the termites having burrowed into the deck before the loss, and that all that is required is for them to have known there was "insect damage." Ultimately, the strength of these competing arguments likely turns on additional facts not specified in the vignette, such as how long the homeowner waited to call the structural engineer and the extent of the visible damage to the deck at the time they discovered the termites.

Deck Collapse Vignette (Unclear Coverage)

Deck Collapse Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Unclear Coverage Scenario: Two large wooden beams support your home's deck. Termites have burrowed into the beams causing serious structural damage. You discover the termites, but before you can have the deck checked for structural damage, it collapses suddenly and is destroyed as a result of the termite infestation.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	We do not insure for loss involving collapse, except as provided in the Collapse Coverage. **Collapse** a. We insure for direct physical loss to covered property involving abrupt collapse of a building or any part of a building if such collapse was caused by one or more of the following: (1) Decay, of a building or any part of a building, that is hidden from view, unless the presence of such decay is known to an "insured" prior to collapse; (2) Insect or vermin damage, to a building or any part of a building, that is hidden from view, unless the presence of such damage is known to an "insured" prior to collapse; (3) Weight of contents, equipment, animals or people; (4) Weight of rain which collects on a roof; or (5) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation. b. Loss to an awning, fence, patio, deck, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under a.(1) through (5) above, unless the loss is a direct result of the collapse of a building or any part of a building. c. This coverage does not increase the limit of liability that applies to the damaged covered property.

Figure A2. Instruction and policy language distributed in the deck collapse unclear coverage vignette

3. Slip-and-Fall Policy Language: Unclear Coverage Vignette

Turning to the slip-and-fall liability scenario, we introduced ambiguity into the revised vignette by specifying that the homeowner was hosting a small gathering of work colleagues at their home for the dual purpose of discussing a work-related project and fostering friendships. The precise details of the vignette and the operative policy language are contained in Figure A3. As above, we view the question of whether the slip-and-fall lawsuit would be covered to be ambiguous. On one hand, the insurer has a good argument that the bodily injury was "in connection" with a "business…engaged in by an insured" given that it involved colleagues gathering for work-related discussions, and the phrase "in connection" is deliberately broad. But on the other hand, there is a good argument that even a gathering of colleagues at one's home is not really "in connection" with

one's work, especially given some of the surrounding language of the clause that seems to focus on the prospect of an insured conducting business operations in their home.

Slip and Fall Vignette (Unclear Coverage)

Slip and Fall Coverage Scenario	Control Group (No policy language)	Treatment Group (ISO HO3 Policy Language)
Unclear Coverage Scenario: It snows the night before you are scheduled to host a small gathering at your home of people you work with. The point of the gathering is to build better work relationships, to discuss a controversial project at work that hasn't been resolved, and to foster friendships that will continue beyond the workplace. Although you shoveled your front walkway, you didn't shovel the steps leading up from the sidewalk to your front walkway. One of your guests slips on these steps, suffers a broken leg and concussion, and sues you for negligence.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies, we will pay up to our limit of liability for the damages for which an insured is legally liable. **Exclusions** Liability Coverage does not apply to the following: (1) "Business" a. Bodily injury or property damage arising out of or in connection with a "business" conducted from an insured location or engaged in by an insured, whether or not the "business" is owned or operated by an insured or employs an insured. This Exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business". **DEFINITIONS** "Business" means: a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or b. Any other activity engaged in for money or other compensation, except the following: (1) One or more activities, not described in (2) through (4) below, for which no insured receives more than $2,000 in total compensation for the 12 months before the beginning of the policy period; (2) Volunteer activities for which no money is received other than payment for expenses incurred to perform the activity; (3) Providing home day case services for which no compensation is received, other than the mutual exchange of such services; or (4) The rendering of home day care services to a relative of an insured.

Figure A3. Instruction and policy language distributed in the slip-and-fall liability unclear coverage vignette

B. Results of Unclear Coverage Vignettes

Table A14 reports the results of providing the relevant policy language to the treatment group for each of the unclear coverage vignettes described above. Unlike in the results reported in the main body of the paper, these results define an accurate response to be one in which the respondent recognized uncertainty by selecting any response other than "definitely covered" or "definitely not covered."

Table A14. Accurate Perceptions of Insurance Coverage for Unclear Coverage Vignettes

Coverage Context	No Policy Language (Control Group)			Policy Language (Treatment Group)			Difference
	N	*Accurate*	*%*	*N*	*Accurate*	*%*	*PP*
Earthquake	323	219	67.8	472	232	49.2	-18.6
Deck Collapse	323	265	82.0	505	295	58.4	-23.6
Slip and Fall	313	234	74.8	487	370	76.0	1.2

Note. Percentages denote the proportion of the respective survey sub-sample that accurately predicted policy coverage. We defined accurate responses in unclear coverage scenarios as those that recognized uncertainty in the likely coverage outcome for a typical homeowners insurance policy.

As reflected in Table A14, in two of the three vignettes we tested, relative to the control group a *smaller* proportion of the treatment group who received relevant policy language accurately evaluated scenarios in which the homeowners insurance coverage was ambiguous (in the deck collapse scenario) or potentially unenforceable (in the earthquake scenario). In the third vignette, involving the slip-and-fall event, the proportions accurately assessing coverage were virtually the same. In Table A15, we report the results of our tests for the significance of these differences after accounting for observable differences using a series of logistic regression analyses.

Table A15. Logit Regression Analyses of Respondents' Accuracy of Coverage Assessments for Unclear Vignettes

	Earthquake Damage	Deck Collapse	Slip & Fall Liability
	(1)	(2)	(3)
Received policy language	0.457**	0.293**	1.122
	(0.070)	(0.051)	(0.202)
Baseline odds	5.034**	8.689**	2.223
	(1.933)	(3.666)	(0.925)
No. of observations	795	828	799
Pseudo R-squared	0.0484	0.0907	0.0700
Experiential controls	Yes	Yes	Yes
Demographic controls	Yes	Yes	Yes
Economic controls	Yes	Yes	Yes

Note: The table reports results from logit regressions in which the dichotomous outcome variable was equal to one if the respondent's understanding of insurance coverage was accurate and equal to zero otherwise. Estimates are shown as odds ratios (i.e., exponentiated coefficients of the logistic regression). Heteroskedasticity-robust standard errors are reported in parentheses. Reported pseudo R-squared is McFadden's R-squared. The analyses controlled for experiential, demographic, and economic factors. Experiential controls were indicators for selling insurance, being the final decisionmaker on a homeowners insurance contract, reporting they have read and understand their own policy, having switched carriers, and having prior negative views of insurers. Demographic controls were gender, age, race/ethnicity, marital status, and region. Economic controls were education, employment, and income. The symbols * and ** represent significance at the 5% and 1% level, respectively.

As reflected in Table A15, the relationship between receiving policy language and the accuracy of assessing coverage in the earthquake and deck collapse unclear coverage vignettes persisted even after controlling for potentially confounding factors; as indicated by the odds ratio values less than 1, the relationship was negative and statistically significant (at the 1% level). For the slip-and-fall unclear coverage vignette, the evidence of a positive relationship between receiving policy language and ability to identify ambiguity was not statistically significant.

There are various ways to interpret these results depending on how one conceptualizes the tested coverage vignettes. For the earthquake vignette, to the extent that courts apply the test policy language as written, then the correct answer to the vignette would be definitely not covered, which is strongly consistent with how respondents themselves interpreted this language (61% of the treatment group predicted that the loss would not be covered). This impact of the policy language is perhaps not surprising given

that the provided policy language points uniformly in the direction of non-coverage. On the other hand, a number of courts/jurisdictions refuse to enforce this policy language in part because they view it as inconsistent with consumers' reasonable expectations of coverage. Although respondents provided with this policy language generally did not have an expectation of coverage, a majority of the respondents who assessed the coverage in this vignette in the absence of policy language did in fact expect coverage (52% of the control group predicted that the loss would be covered).

Likewise, in the deck collapse unclear coverage vignette, respondents who saw the relevant policy language were actually more likely to believe there was a definitive answer to whether the loss was covered than those in the control group; the influence of seeing policy language was large and statistically significant. One interpretation of these results is that the survey data may support the conclusion that the described loss should be covered. However, another interpretation is that the respondents failed to appreciate the ambiguity in the coverage vignette and applicable policy language. We favor this interpretation because, in our view, the coverage vignette is clearly ambiguous, meaning that no respondent who correctly understood the policy language and coverage vignette could conclude that the loss would be "definitely" covered or not covered.

In the slip-and-fall unclear coverage vignette, contrary to our hypothesis, respondents provided with the relevant policy language were no more likely to recognize the ambiguity of the coverage question than respondents who did not receive the policy language. Instead, the percentage of respondents who believed there was a definitive answer to the coverage question was relatively the same in both groups. One possible explanation for this result is that the vignette itself was sufficiently suggestive of an ambiguity such that respondents intuited this conclusion independently of the policy language. But it is nonetheless striking, in our view, that respondents who received policy language that in our view clearly confirmed this intuition were no more likely to report this conclusion than the control group.

Appendix D. Impact of Receiving Different Insurers' Policy Language for the Same Vignette

In addition to testing whether respondents' understanding of a typical homeowners insurance policy would be impacted if they saw excerpts from the ISO HO3 policy – the "standard form" on which most private insurers base their actual homeowners policies[163] – we also tested specific homeowners policy language that departed from the ISO HO3 policy. To do so, we focused on the electrical fire coverage vignette, which is described in Part II. Recall that the terms of the ISO HO3 policy unambiguously covered the damage described in the vignettes we used in Part A. Even so, providing respondents with the relevant policy language significantly decreased the accuracy of respondents' coverage assessments, increasing the percentage of respondents who wrongly believe that the loss would not be covered.

To test how variation in policy language might impact these results, we split our treatment sample for this coverage vignette into three groups: Treatment Group A received ISO HO3 policy language, Treatment Group B received Farmers Insurance Company policy language, and Treatment Group C received State Farm Insurance Company policy language.

As described more fully in Figure A4, the Farmers Insurance Company policy language purports to exclude coverage whenever a loss is caused "directly or indirectly" by a "failure to undertake any maintenance." A plain meaning application of this language to the electrical fire vignette would result in a denial of coverage. However, we are deeply uncertain whether most courts would enforce the Farmers policy language, which is, in our view, extremely overly broad and highly atypical of homeowners policy language. In fact, caselaw from decades ago generally refused to enforce similar, though less obviously overly broad, language in insurance policies that purported to deny coverage "due to an increase of risk" for the policyholder.[164] Although doctrines like the "reasonable expectations doctrine," which purport to provide courts with the authority to disregard the plain meaning of policy language that is inconsistent with policyholder expectations, have fallen out of favor in recent years, we suspect many courts would find an attempt by Farmers to enforce its outrageously overly broad policy language in a case like the electrical fire vignette to warrant a limited invocation of this doctrine.

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[163] Although the ISO HO3 policy is the presumptive standard contract for homeowners insurance policies in the U.S., individual insurers in recent years have increasingly opted to depart from the ISO terms in their homeowners policies. *See* Schwarcz, *supra* note 27, at 1342.

[164] *See id*.

For the second atypical policy language, we extracted the section from a State Farm policy that purports to exclude coverage when an insured neglects to use all reasonable means to prevent a loss "when property is endangered." Although the State Farm policy language is less favorable to the insured than the ISO language, it is also not nearly as overly broad as the Farmers policy language. We therefore think that many courts would enforce this exclusion in cases where it plainly applies. The difficulty presented by this language in the context of the electrical fire vignette, however, is that it produces clearly ambiguous results in our view. In particular, it is not at all clear whether the homeowner's property was "endangered" when the electrical switch described in the vignette started sparking and the homeowner decided not to use the associated room. Once again, we view this as a genuine ambiguity whose resolution would turn on additional relevant facts not specified in the vignette as well as the applicability of doctrines like *contra proferentem*.

Electrical Fire Vignette (Unclear Coverage)

Coverage Scenario	Control Group (No policy language)	Treatment Group (Non-ISO Policy Language)
Unclear Coverage Scenario: An electrical switch in your home's guest room starts to spark when you turn on the light. Instead of repairing the switch, you simply decide not to use the room. Two months later, however, you forget about the malfunctioning light switch, go into the room, and flip the switch on. The resulting sparks trigger a fire that burns down your home.	Respondents instructed to answer coverage scenario based on their existing understanding of what a typical homeowners policy would cover, without looking at any specific insurance policy language or conducting any research.	**Farmers Insurance Policy:** We insure against direct physical loss to covered property. We do not insure for loss excluded under the Exclusions Section. **Excluded Causes of Loss or Damage** Except as expressly provided elsewhere in this policy, we do not a. insure property covered by this policy; b. provide Loss of Use coverage; or c. provide coverage in any Extensions of Coverage; for loss or damage which directly or indirectly is caused by, arises out of, or results from any of the excluded causes of loss or damage listed below, whether the loss or damage occurs on or away from the **residence premises**. Acts or omissions of persons or other causes or other events can cause, contribute to, combine with or aggravate any of the excluded causes of loss or damage to cause loss or damage. Loss or damage caused by an excluded cause of loss or damage is not covered regardless of any acts, omissions or decisions of any persons, group, organization, association or governmental body or of any other causes or other events which aggravate or contribute concurrently or in any combination or sequence with the excluded cause of loss or damage. If covered and excluded causes of loss or damage each cause loss or damage to property such that the resulting damage is indistinguishable except as to the timing or sequence of the causes of the damage, then none of the loss or damage is insured by this policy. Excluded Causes of Loss or Damage are excluded whether they are, or are the result of, natural or man-made activities, conditions or events. Excluded Causes of Loss or Damage apply to exclude the loss or damage arising from or as a result of the excluded activity, condition or event, whether the loss or damage is direct or indirect or immediate or consequential. **1. Neglect or Lack of Maintenance or Failure to Make Repairs** is an Excluded Cause of Loss or Damage. Lack of maintenance includes a failure to undertake any maintenance.
		State Farm Insurance Policy: We insure against direct physical loss to covered property. We do not insure for loss excluded under the Exclusions Section. **SECTION I -- LOSSES NOT INSURED** We do not insure for any loss to the property which consists of, or is directly and immediately caused by, one or more of the perils listed below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: **1. Neglect**, meaning neglect of the insured to use all reasonable means to save and preserve property at and after the time of a loss, or when property is endangered.

Figure A4. Instruction and policy language distributed to Treatment Groups B and C in the electrical fire unclear coverage vignette

Table A16 depicts the response patterns to the question asking whether respondents believed the relevant policy—i.e., the "typical" policy

for the control group, the ISO HO3 policy for Treatment Group A, the Farmers policy for Treatment Group B, and the State Farm policy for Treatment Group C—would cover the electrical fire vignette described in Figure A4.

Table A16. Perceptions of Insurance Coverage for Electrical Fire Unclear Coverage Vignettes

Answers	No Policy Language (Control Group)		ISO HO3 Policy Language (Treatment Group A)		Farmers Policy Language (Treatment Group B)		State Farm Policy Language (Treatment Group C)	
	N	*%*	*N*	*%*	*N*	*%*	*N*	*%*
Definitely not covered	65	6.7	113	23.6	172	34.6	146	29.8
Probably not covered	165	16.9	145	30.3	151	30.4	142	29
Could go either way	228	23.4	122	25.5	86	17.3	109	22.2
Probably covered	334	34.3	62	12.9	56	11.3	68	13.9
Definitely covered	182	18.7	37	7.7	32	6.4	25	5.1
Total	974	100	479	100	497	100	490	100
Total Predicting Non-Coverage	230	23.6	258	53.9	323	65	288	58.8
Total Predicting Coverage	516	53	99	20.7	88	17.7	93	19

Note. Answers predicting likely non-coverage include "Definitely not covered" and "Probably not covered;" answers predicting likely coverage include "Probably covered" and "Definitely covered."

Despite the clear differences in coverage across the language in the three policies, respondents in all three treatment groups largely reacted to receiving policy language in the same way. Respondents who received any policy language were more likely than their counterparts in the control group to predict that the policy does not cover the damages described in the vignette. Consistent with our test of the potentially unenforceable anti-concurrent causation language, the potentially unenforceable Farmers policy language prompted the largest proportion of respondents who determined that the described loss was definitely not covered, as well as a general shift away from pro-coverage assessments and assessments acknowledging ambiguity and toward anti-coverage assessments. Respondents appeared not to recognize the prospect that the supplied language might be unenforceable.

Readability Standards in State Insurance Laws

Brenda J. Cude, Ph.D.

NAIC Consumer Representative

NAIC Market Regulation and Consumer Affairs Committee

March 2024

Readability Standards

- In 2023, 47 states, the District of Columbia, and the federal government collectively have 240 readability or plain language laws that apply to the insurance sector

Source: M. A. Blasie.

Four Types of Readability Standards (in order from most to least objective)

- Objective: “Score” based on number of syllables, words, and sentences
- Features: Requires use of or avoiding specific writing features
  - Use frequent section headings, Avoid double negatives
- Descriptive: Uses abstract terms (“plain language” or “clear and coherent”) or reader descriptions (“understandable by average person”) without definitions
- Hybrid: Combines Objective Standard with Features or allows choice
- Authorizing Law: Directs other parties to create plain language standard

Standards Used in State Insurance Laws (2022)

Source: Blasie, M. A. (2022). The rise of plain language laws. *University of Miami Law Review, 76*(2), Article 4. https://repository.law.miami.edu/umlr/vol76/iss2/4

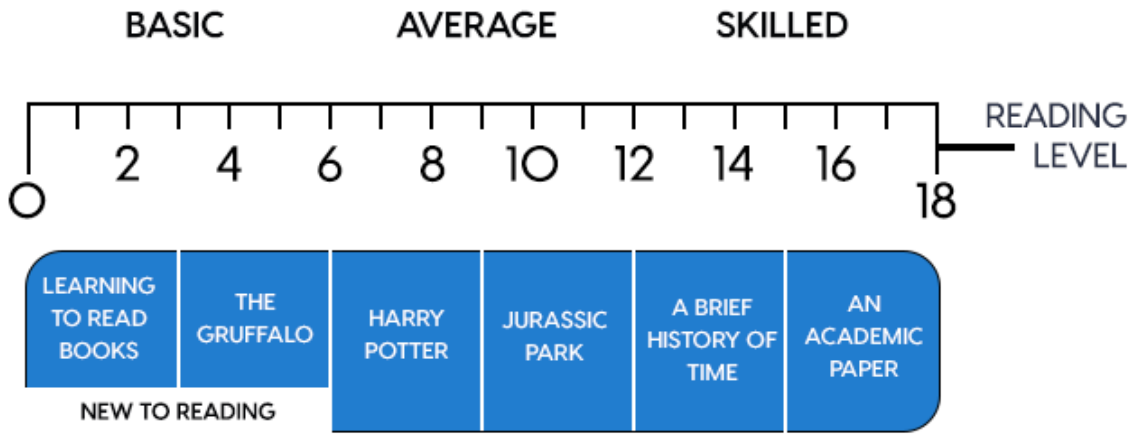
Standard	*Number of Laws*	*Percent*
Objective	57	26.9
Features	8	3.8
Descriptive	91	42.9
Hybrid	42	19.8
Authorizing law	14	6.6

Objective Readability Scores

- Calculated based on formulas that consider number of words, syllables, and sentences
- Usually stated as grade level **except** Flesch Reading Ease Score, which is on a scale of 0 to 100

Objective Readability Scores

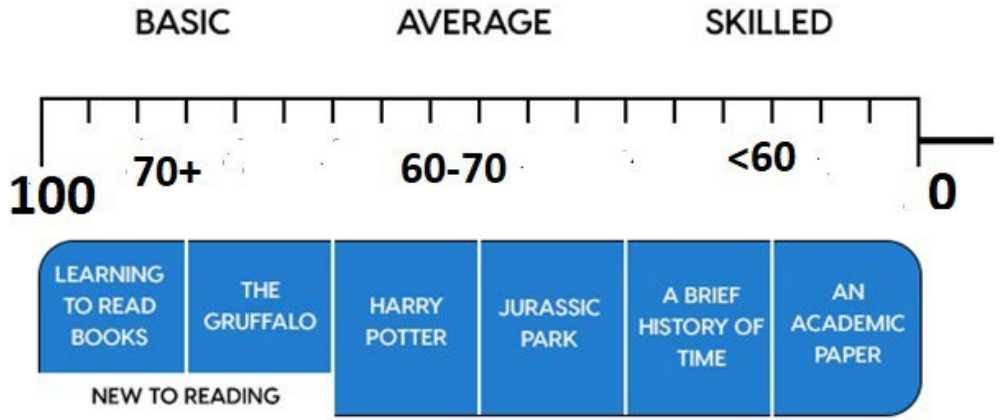
Flesch-Kincaid Grade Level



Aim for grade 8 to ensure your content can be read by 80% of Americans.

readable

Flesch Reading Ease Score



We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

45 FRE, 11.2 FKGL

We don't cover losses caused either directly or indirectly by any of the following. This applies even if other factors contribute to the loss at the same time or after. These rules still stand even if the loss affects a large area or causes widespread damage.

NAIC Models

- Life and Health Insurance Policy Language Simplification Model Act (1978) requires:
  - A minimum score of **40 on the Flesch reading ease** test or an equivalent score on any other comparable test
  - Printed in not less than ten point type, one point leaded
  - No undue prominence to any portion of the text
  - A table of contents

NAIC Models That Use Descriptive or Features Standards

- Long-Term Care Insurance Model Regulation: “Shall be appropriately captioned, shall appear on the first page of the policy...."
- Model Regulation to Implement the Accident and Sickness Insurance Minimum Standards Model Act: ”A prominent statement by type, stamp or other appropriate means in either contrasting color or in boldface type at least equal to the size type used for the headings or captions of sections of the application and in close conjunction with the applicant’s signature block on the application.“
- NAIC Insurance Information and Privacy Protection Model Act: Disclosure authorization forms must be “written in plain language.”

Challenges

- For NAIC:
  - Evaluate readability standards in existing models as they are reopened and use a minimum of an 8th grade Flesch Kincaid Grade Level score as the standard
  - Query states with plain language laws re enforcement and share best practices
- For states:
  - What are you doing to encourage plain language?
    - The Texas Department includes plain language resources on its website
  - What are your laws about readability? How are they enforced?

Questions or Comments?

- Brenda J. Cude, Ph.D., NAIC Consumer Representative
- bcude@uga.edu

REGULATING PLAIN LANGUAGE

BY MICHAEL A. BLASIE*

What one scholar coined a "quiet revolution" in consumer contracts has been a half century in the making. And the revolution extends well beyond consumer contracts. Legislatures and regulators passed over seven hundred plain language laws infusing plain language into consumer contracts, notices, disclosures, government reports, court forms, election ballots, and more. They did so with one goal in mind: make legal documents more understandable. This shared goal crosses doctrines and pierces the traditional private law-public law divide. Yet, despite sharing a goal, lawmakers differ dramatically on how to achieve it. The result is a bizarre patchwork of constitutions, statutes, and regulations with massive variations.

By examining these variations, this Article takes on the previously overlooked normative implications of plain language law design. Lawmakers must decide which documents to cover, what standard to apply, and what enforcement and penalties to allow, which necessarily involves classic policy-infused decisions like choosing between the free market or regulation, allocating burdens and costs, and line drawing. As a result, this Article contends that the traditional view that document design is a lawyer skillset reducible to convenient lists of "best practices" is wrong. Lawmakers have replaced lawyer discretion. Their involvement, and the scale and complexity of their design choices, have converted plain language into a legal doctrine driven by quintessential public policies.

More, the complexity of plain language laws extends beyond how to design the laws to the more fundamental question of who designs them. The complex patchwork of codified laws from legislatures and regulators sits alongside expansive common law plain language requirements unilaterally injected by courts. Predictably, with so many decisions made by different decisionmakers, discrepancies pervade the national landscape. Such discrepancies create separations of powers tension and inefficiencies as drafters struggle to find and comply with the many different requirements from different lawmakers. This Article argues for an expansion of plain language common law, because courts are best equipped to create such a standard. It turns out plain language laws are anything but plain.

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* Michael Blasie is an Assistant Professor of Law at Seattle University School of Law. For insightful comments and support, thank you to Yonathan Arbel, Mary Bowman, Rosa Kim, Margaret Hannon, Daniel Schwarcz, Wayne Scheiss, Rachel Stabler, Mark Wojcik, and the 2022 AALS conference attendees.

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INTRODUCTION

"What if we'd already revolutionized contract law but no one knew it?" asked Professor David Hoffman after learning of a "quiet revolution" and "shocking story" in consumer contracts.[1] The revolution and story he referred to is the passage of nearly eight hundred plain language laws.[2] The laws are ubiquitous: every state, the District of Columbia, and the federal government have them.[3] They exist in every form of codified law: constitutions, statutes, and regulations.[4] While over half govern consumer contracts, coverage ranges from insurance policies and leases,[5] to food labels and healthcare disclosures,[6] to election ballots and guardianship waivers.[7] In terms of content, these laws use a variety of approaches to theoretically increase a document's understandability.[8]

Legions of legal doctrines pivot on whether readers understand a document—just imagine all of the notice and waiver requirements. Did the defendant understand that written *Miranda* warning? Was that notice enough to help the patient give informed consent? Did the defendant know the consequences of not appearing at the immigration hearing? Then there are arenas like contract law, which assumes a signer understood the contract.[9] Yet, study after study shows no one actually understands them.[10] If plain language is the solution to incomprehensible legal documents, plain language laws could yield a host of theoretical benefits from protecting constitutional rights to improving access to justice to informing consumers. More, plain language laws may show that the traditional divides between public and private law, and between

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1. David Hoffman, *What If We'd Already Revolutionized Contract Law but No One Knew It?,* JOTWELL (Mar. 8, 2022), https://contracts.jotwell.com/what-if-wed-already-revolutionized-contract-law-but-no-one-knew-it/ [https://perma.cc/DE7Z-A9A6].

2. *See infra* Part III.

3. *See, e.g.*, MINN. STAT. § 72C.10(2)(a) (2022); D.C. CODE § 1-1162.02(a)(7) (2022); Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010).

4. *See, e.g.*, IND. CONST. art. IV, § 20; MINN. STAT. § 72C.10(2)(a) (2022); 17 C.F.R. § 230.421(d)(1) (2022).

5. *See, e.g.*, ARK. CODE ANN. § 23-61-115(b)(5); N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.5(c)(1) (2021).

6. *See, e.g.*, MICH. ADMIN. CODE r. 285.569.10(3) (2023); N.M. CODE R. § 8.300.2.11(b)(2)(b) (LexisNexis 2023).

7. *See, e.g.*, ALASKA STAT. ANN. § 15.80.005 (2021); VT. STAT. ANN. tit. 15A, § 2-406(a) (2022).

8. *See infra* Section II.B.

9. *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2257, 2260 (2019).

10. *See, e.g.*, Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 387 (2020).

different doctrines, are more permeable than previously thought. After all, if plain language laws make an environmental report more understandable then they probably improve a privacy agreement too. So, do they work?

The journey towards an answer requires examining these laws' design. Because most of these codified plain language laws cover different kinds of documents and apply different standards, the effects of one law may differ from another. Plus, no scholarship has yet to detail what is perhaps the most critical design choice: how to enforce the law. Can tenants bring a class action against a landlord for using an incomprehensible lease? If so, what are the damages? Must a state void election results because the ballot was not at an eighth-grade reading level? This Article investigates the key design decisions lawmakers face when creating codified plain language laws. Along the way, it makes four contributions to scholarship.

First, this Article provides a classification scheme for codified plain language law design choices. Legislatures and regulators must select the coverage, standard, and enforcement schemes for a plain language law. Each decision has enormous complexity. Nationwide there are fifteen coverage categories and four standards. The enforcement schemes for each of the nearly eight hundred plain language laws consist of several pivotal decisions like whether the law is enforceable, if so by who and how, and what penalties are available. The gamut of enforcement schemes is nearly all the ones conceivable from being explicitly or functionally unenforceable, to allowing, capping, or prohibiting monetary damages; to voiding or preserving enforcement, to authorizing or barring class actions.[11] Plus, there are good faith exceptions and other defenses.[12]

Second, this Article classifies the scope of common law plain language requirements. Courts have unliterally created common law plain language requirements that supplement, expand, and perhaps conflict with the codified laws passed by legislatures and regulators. Overlooked by scholars and perhaps by legislatures and regulators, courts have been hyperactive in applying their own plain language requirements.[13] Courts have imported such requirements into constitutional doctrines like procedural Due Process[14] and voluntary and knowing constitutional waivers.[15] More, courts now examine plain

11. *See infra* Section II.C.

12. *See infra* Section II.C.3.

13. *See infra* Part III.

14. *See, e.g.*, *Walters v. Reno*, No. C94-1204C, 1996 WL 897662, at *15 (W.D. Wash. Mar. 13, 1996).

15. *See, e.g.*, *Dennis v. G4S Secure Sols. (USA), Inc.*, No. 1:20-CV-46, 2021 WL 6275630, at *3, *5 (E.D. Tenn. Jan. 28, 2021).

language to answer contract law questions: like whether a contract is ambiguous,[16] whether the product has unambiguous intent[17] or mutual assent,[18] or is unconscionable.[19] Courts even consider the use or absence of plain language as evidence of discrimination.[20]

Third, this Article argues the design of legal documents is a policy-infused decision for lawmakers. While traditional scholarship and practitioner views classified document drafting as a skill or strategy—that view is no longer accurate. Plain language drafting is now doctrinal. More, decisions about whether to incorporate plain language into law, what documents to cover, what standard to apply, and what enforcement scheme to deploy are intensely policy-infused decisions.[21] Each decision affects burdens and costs and can achieve very different public policy goals.[22]

Fourth, this Article contends courts should expand their role in crafting common law plain language standards. The involvement of all three branches of government in creating plain language laws creates a separation of powers tension and inefficiencies over who controls these policy-infused decisions.[23] Part of that tension stems from branches effectively regulating government documents produced by the other branches.[24] Another part of the tension comes from branches creating plain language legal requirements that potentially conflict with the policy-infused decisions made by another branch's laws.[25] Lawmakers should resolve some of these tensions by tasking legislatures and regulators with creating minimum plain language standards, while allowing courts to expand upon and refine those standards in common law fashion.

This Article proceeds as follows. Part I details the Plain Language Movement, explaining what plain language is, how it gained steam in the United States, and its purported advantages and potential disadvantages. Part II reveals the varying designs of codified plain language laws passed by legislatures and regulators, including variations in coverage, standards, and enforcement schemes. Part III identifies the common law

16. *See, e.g.*, *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 223, 236–38 (Wis. 2002).

17. *See, e.g.*, *Gross v. Sweet*, 400 N.E.2d 306, 309 (N.Y. 1979).

18. *See, e.g.*, *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1180 (N.J. 2016).

19. *See, e.g.*, *Stormont-Vail Hosp. v. Spurling*, No. 110,979, 2014 WL 4082469, (Kan. Ct. App. 2014).

20. *See, e.g.*, *United States v. City of New York*, 637 F. Supp. 2d 77, 122–23, 131–32 (E.D.N.Y. 2009).

21. *See infra* Section IV.A.

22. *See infra* Part IV.

23. *See infra* Section IV.B.

24. *See infra* Section IV.B.

25. *See infra* Section IV.B.

plain language requirements courts have created. Part IV argues the creation of codified and uncodified plain language laws are intensely policy-infused decisions and explains why and how courts should take on a bigger role in designing plain language standards.

I. THE PLAIN LANGUAGE MOVEMENT

The lengthy, centuries-old complaints about difficulties understanding legal documents[26] led to consensus on one modern solution: plain language. This Part details how over the last century, plain language emerged as a form of advice on drafting legal documents.

A. What Is Plain Language?

Plain language—sometimes called "plain English"[27]—refers to drafting a document in ways that maximize the understandability of a document's contents.[28] Plain language is a reader-focused concept. According to the Plain Language Association International, a "communication is in plain language if its wording, structure, and design

26. Kenneth B. Firtel, *Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933*, 72 S. CAL. L. REV. 851, 852 (1999) (acknowledging history of complaints).

27. *What Is Plain Language?*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/about/definitions/ [https://perma.cc/GA58-VLNV] (last visited Mar. 20, 2023) ("Plain language (also called plain writing or plain English) . . . ."); Wayne Schiess, *Using Intensifiers Is Literally a Crime*, 96 MICH. B.J. 48, 48 (2017) ("'Plain Language' is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee."); Michael D. Murray, *Diagrammatics and the Proactive Visualization of Legal Information*, 43 U. ARK. LITTLE ROCK L. REV. 1, 2 n.5 (2021) ("The Proactive Law movement shares common and parallel goals with the Plain Language (or Plain English) movement[s] . . . .").

28. Firtel, *supra* note 26, at 878–82; Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 ALA. L. REV. 237, 241–45 (2018) (discussing how the plain language movement tries to make legal texts readable and easily understood by normal consumers); Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 J. LEGAL WRITING INST. 183, 185 (2010) ("The basic idea behind it is to make the document as reader-friendly as possible to get the message across."); Andrew T. Serafin, *Kicking the Legalese Habit: The SEC's "Plain English Disclosure" Proposal*, 29 LOY. U. CHI. L.J. 681, 683 (1998) (stating that plain language is the "idea that writing must be clear and readable in order for people to fully understand what is written"); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 11–14 (1992) (plain language involves crafting a document "to convey your ideas with the greatest possible clarity"); Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 1065, 1068 (2013) ("The goal of using plain language is to make documents intelligible to the greatest possible number of intended readers.").

are so clear that the intended audience can easily find what they need, understand what they find, and use that information."[29]

How a drafter designs a document to use plain language varies depending on both the document and the reader.[30] Plain language drafting principles include knowing the document's intended reader (which can affect decisions like vocabulary choice), deciding what content to include or exclude, determining how to organize information to aid understanding, and using clear writing techniques, which can range from creating bullet points and charts to avoiding double negatives.[31] There is no definitive list of plain language writing techniques. Plain language may receive a uniformity boost if the pending international multi-language plain language standard passes.[32]

B. The History of Plain Language as a Form of Advice

Legal documents are hard to understand. Nearly everyone from the Founding Fathers to scholars to clients to the general public agree.[33] The

29. PLAIN LANGUAGE ASS'N INT'L, https://plainlanguagenetwork.org/ (last visited Apr. 9, 2023). This Article chooses an objective standard that stops short of whether the intended results of plain language occur. That decision separates the efficacy of plain language from its standard and catches a broader range of lawmaking approaches to codifying plain language into law. *See* Annetta Cheek, *Defining Plain Language*, 64 CLARITY 5, 5–9 (2010) (discussing three ways of defining plain language through standards and advocating for a subjective standard).

30. *What Is Plain Language?*, *supra* note 27 (noting a variety of definitions); Flammer, *supra* note 28, at 185 ("Like many legal terms, 'Plan English' is vague and difficult to define.").

31. Kimble, *supra* note 28, at 11–14 (listing various plain language features); Cheek, *supra* note 29, at 5–9; Flammer, *supra* note 28, at 186; *Organize the Information*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/organize/ [https://perma.cc/D8H7-5CM7] (last visited Mar. 15, 2023); *Be Concise*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/concise/ [https://perma.cc/F596-P47N] (last visited Mar. 15, 2023); *Keep It Conversational*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/conversational/ [https://perma.cc/4GS2-ZG9T] (last visited Mar. 15, 2023); *Choose Your Words Carefully*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/words/ [https://perma.cc/HKH8-UVXL] (last visited Mar. 15, 2023).

32. *See One Giant Step Towards a Plain Language Standard*, INT'L PLAIN LANGUAGE FED'N (June 2019), http://www.iplfederation.org/one-giant-step-towards-a-plain-language-standard/ [https://perma.cc/D33Y-KB3Z].

33. George D. Gopen, *The State of Legal Writing:* Res Ipsa Loquitur, 86 MICH. L. REV. 333, 346–47 (1987) (identifying complaints throughout the centuries); Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 494 & n.19 (1999) (providing examples of complaints); Carol M. Bast, *Lawyers Should Use Plain Language*, 69 FLA. B.J. 30, 30, 32 (1995) (describing the Legal Writing Institute resolution that acknowledged over four centuries of complaints); Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 104 (1995) (describing Founding Fathers' complaints); Matthew Salzwedel, *Face It—Bad Legal Writing Wastes Money*, 92 MICH. B.J. 52, 52 (2013)

conclusion applies equally to every kind of legal document lawyers or lawmakers could draft—*e.g.*, transactional documents like contracts,[34] litigation documents like briefs,[35] legislative documents like statutes and regulations,[36] and even court notices and forms.[37]

Incomprehensible legal documents cause problems for individuals, society, and the justice system. Unclear briefs risk losing a motion and skewing the law's development.[38] Unintelligible contracts can harm

(explaining that clients realize better writing saves them "time and money by increasing the ability of readers to understand and retain what they have read"); Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 420 (2012) (judges have called legal writing "appalling" and "awful"); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984) ("'[L]egal writing' has become synonymous with poor writing"); Matthew J. Arnold, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 228 (1995) (explaining that there is "a pervasive lack of elementary writing skills among law students and lawyers").

34. *See, e.g.*, Chad Baruch, *Everything You Wanted to Know About Legal Writing But Were Afraid to Ask*, 17 J. CONSUMER & COM. L. 9, 11 (2013) ("[M]any contracts leave one with the unmistakable impression that the drafter's goal was to make certain that no one would ever comprehend the contract's terms."); Ian Gallacher, *"When Numbers Get Serious": A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals*, 46 SUFFOLK U. L. REV. 451, 462 (2013) ("Corporate lawyers rely heavily on boilerplate, and most practitioners seem to have absorbed the language of their law school casebooks. They may have heard that legalese is dead, but they don't write like they believe it.") (quoting ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 127 (3d ed. 2009)); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 253 (2013).

35. *See, e.g.*, Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L. J. 59, 80–81 (2013) (describing harms from poor brief writing); Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMMC'N & RHETORIC: JALWD 109, 109 (2014) (describing judicial admonishments to lawyers for poorly written briefs); Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL PRO. 259, 262 (2017) (same).

36. Eric Martinez, Francis Mollica & Edward Gibson, *So Much for Plain Language: An Analysis of the Accessibility of United States Federal Laws Over Time* 5–6 (Oct. 23, 2022) (unpublished manuscript) (available at https://ssrn.com/abstract=4036863).

37. *See, e.g.*, 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 7–8 (5th ed. 2019) (describing judicial branch plain language revisions to federal procedural rules); UTAH CODE JUD. ADMIN. 3-117(3)(b) (West 2023) (requiring plain language in court forms); UTAH CODE ANN. § 75-5-309(2) (West 2022) (requiring plain language in guardianship proceeding notices); Dyer et al., *supra* note 28, at 1068, 1072–73 (describing plain language revisions to court documents).

38. *See, e.g.*, Moss, *supra* note 35, at 93 (using empirical data to explain effects of bad brief writing).

consumers, businesses, and the economy.[39] Lawyers suffer too. Baffling writing leads to poor communication which in turn limits access to the law and hinders the lawyer-client relationship.[40] Public opinion, respect, and trust in lawyers decreases when clients and the public struggle to understand legal documents.[41] Pragmatically, when readers struggle to understand legal documents, lawyers waste resources, risk malpractice, and may face professional discipline.[42]

The leading solution encouraged by scholars, judges, and practitioners is using plain language so the reader can understand the document.[43] The idea is not new. The Framers wanted the Constitution to use plain language so the layperson could understand and vote on it.[44]

But it took a while before plain language became a widely known phenomenon. The concept of "plain language" as a form of advice gained momentum over the last eighty years. A 1940s federal government project to improve how the government communicates price control

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39. *See* Bernard Black, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 255–57 (1981) (discussing harms to consumers from incomprehensible contracts); Christopher Cox, Chairman, SEC, Keynote Address to the Center for Plain Language Symposium: Plain Language and Good Business (Oct. 12, 2007) (discussing market benefits of plain language) [hereinafter Plain Language and Good Business]; Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 80–81 (1995) (noting litigation caused by poorly written contracts); Budnitz, *supra* note 10, at 448–49 (encouraging reporters of Restatement of the Law of Consumer Contracts to draft plain language best practices because some consumers and consumer watchdog organizations read contract terms and may inform other consumers of those terms through media); Andrea M. Matwyshyn, *Resilience: Building Better Users and Fair Trade Practices in Information*, 63 FED. COMMC'NS L.J. 391, 405–07 (2011) (suggesting requiring plain English to "greatly assist consumers' sense of control over information exchanges and, consequently, foster resiliency"); Steven O. Weise, *"Plain English" Will Set the UCC Free*, 28 LOY. L.A. L. REV. 371, 385–89 (1994) (encouraging use of plain language in warranties and providing examples of plain language provisions).

40. *See, e.g.*, *Plain English Committee*, PA. BAR ASS'N, https://www.pabar.org/site/For-Lawyers/Committees-Commissions/Plain-English [https://perma.cc/UH22-YDL6] (last visited Mar. 15, 2023); ILLINOIS SUPREME COURT POLICY ON PLAIN LANGUAGE, IL. SUP. CT. (2018), https://www.illinoiscourts.gov/Resources/e44f267e-8de5-4833-9ac7-9272e70301d2/Plain_Language_Policy.pdf [https://perma.cc/7CNH-79PE] [hereinafter ILLINOIS SUPREME COURT POLICY].

41. George Hathaway, *An Overview of the Plain English Movement for Lawyers . . . Ten Years Later*, 73 MICH. BAR. J. 26, 26 (1994).

42. Cohen, *supra* note 33, at 492–93.

43. *See, e.g.*, Bast, *supra* note 33, at 31–32; Gallacher, *supra* note 34, at 460–61 ("That [p]lain English is something to be desired in legal writing . . . is something taken almost as an article of faith in legal writing circles."); Baruch, *supra* note 34, at 11 (encouraging transactional lawyers to "set aside entrenched writing habits and embrace the use of plain language").

44. Kali Jensen, *The Plain English Movement's Shifting Goals*, 13 J. GENDER, RACE & JUST. 807, 809 (2010); Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 223–24 (1987).

regulations to businesses led to Professor Rudolph Flesch's book on how to use "plain talk."[45] The book included a readability formula that scored documents based on the number of words in a sentence and the number of syllables in a word.[46] Plain language gained steam in the social sciences as a way to communicate information more effectively; that momentum continues today where fields like accounting and finance,[47] healthcare,[48] and social justice analyze plain language.[49] In 1963, David Mellinkoff identified specific writing traits common to legal writing, detailed the historical criticisms of those traits and the corresponding problems caused by them, and declared legal documents should not diverge from everyday language without a reason.[50] In an influential 1978 article, Professor Richard Wydick explored why lawyers should use "plain English."[51]

Since 2000, plain language advice has become even more ubiquitous. Now, professors teach plain language in law school.[52] Books urge practitioners to use plain language.[53] Clients share stories of plain language successes.[54] Empiricists document plain language benefits.[55]

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45. *See* Cohen, *supra* note 33, at 499 n.46.

46. Serafin, *supra* note 28, at 683–84; Cheek, *supra* note 29, at 6.

47. *See, e.g.*, Samuel B. Bonsall IV, Andrew J. Leone, Brian P. Miller & Kristina Rennekamp, *A Plain English Measure of Financial Reporting Readability*, 63 J. ACCT. & ECON. 329, 329 (2017) (proposing new measure of readability for financial disclosures).

48. *See, e.g.*, Sue Stableford & Wendy Mettger, *Plain Language: A Strategic Response to the Health Literacy Challenge*, 28 J. PUB. HEALTH POL'Y 71, 75–86 (2007) (identifying and refuting myths about plain language and proposing plain language as a tool to promote health literacy).

49. Michela Sims, *Overcoming Tools of Oppression: Plain Language and Human-Centered Design for Social Justice* 11–19 (2020) (M.A. thesis, Minnesota State University, Mankato) (discussing research into how plain language in technical communications effects social justice).

50. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 11, 230–85 (1963).

51. Richard Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 727 (1978).

52. Gallacher, *supra* note 34, at 462 (noting ABA Sourcebook on legal writing courses promotes using plain language).

53. *See, e.g.*, RICHARD C. WYDICK & AMY E. SLOAN, PLAIN ENGLISH FOR LAWYERS (6th ed. 2019); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001); WAYNE SCHIESS, PLAIN LEGAL WRITING: DO IT (2019).

54. Shawn Burton, *The Case for Plain-Language Contracts*, HARV. BUS. REV., Jan.–Feb. 2018, at 134, 136–37; Kate Vitasek, *Plain Language Contracts on the Rise*, FORBES (Mar. 19, 2018, 7:00 AM), https://www.forbes.com/sites/katevitasek/2018/03/19/plain-language-contracts-on-the-rise/?sh=595b9e1efc66 [https://perma.cc/SE35-YG9K].

55. Gallacher, *supra* note 34, at 461; Flammer, *supra* note 28, at 211 (showing that "judges prefer Plain English to Legalese").

Anecdotes now measure pragmatic benefits to using plain language.[56] Bar association committees give out awards for plain language and create plain language templates.[57]

C. The Pros and Cons of Plain Language

Plain language supporters point to many benefits, often with the benefit changing depending on the reader and the kind of legal document. For example, supporters contend plain language makes contracts easier to read and therefore increases the chances a consumer will understand its contents.[58] Increasing consumer understanding helps consumers and businesses by helping consumers make informed decisions, increasing the chance all consumers have equal information and understanding regardless of their education or prior knowledge of the product, and promoting more purchases.[59] Others assert that plain language in business documents reduces litigation, avoids controversy, decreases ambiguity, and reduces transaction and litigation costs.[60] Some even find benefits in plain language public filings. Warren Buffet and Securities and Exchange Commission (SEC) chairpersons contend plain language helps investors make informed decisions and increases their appetite to invest while improving market transparency.[61] Supporters also argue plain language may increase respect for lawyers and the law and improve lawyer-client relations.[62]

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56. JOSEPH KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 104–33 (2012) (describing benefits to businesses and customers: customers buy more while complaining and suing less, saving companies hundreds of thousands of dollars or more); Joseph Kimble, *Notes Toward Better Legal Writing*, 75 MICH. BAR J. 1072, 1074 (1996).

57. Kimble, *supra* note 28, at 3, 19 (identifying plain language legal organizations and Michigan Bar Association plain language template forms).

58. Benoliel & Becher, *supra* note 9, at 2289 (although it is impossible to measure the effect of improving contract readability without first making them more readable, experimental evidence suggests it improves understanding).

59. Susumu Miyazaki, *Should Japan Adopt a Plain Language Rule?*, 13 MINN. J. GLOB. TRADE 1, 8–11 (2004).

60. Weise, *supra* note 39, at 385–89 (encouraging plain language use in warranties and providing examples of plain language provisions).

61. OFF. INV. EDUC. & ASSISTANCE, SEC, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS 1–4 (1998), https://www.sec.gov/pdf/handbook.pdf [https://perma.cc/9G9Q-2DTT]; Christopher Cox, Chairman, SEC, Before the Subcommittee on Contracting and Technology: Plain Language—The Benefits to Small Business (Feb. 26, 2008), https://www.sec.gov/news/testimony/2008/ts022608cc.htm [https://perma.cc/6ZZN-QLJ3]; KIMBLE, *supra* note 56, at 165.

62. *See* Kimble, *supra* note 28, at 27; Christopher R. Trudeau, *The Public Speaks: An Empirical Study of Legal Communication*, 14 SCRIBES J. LEGAL WRITING 121, 124–25, 137–44 (2012) (summarizing empirical research and results of testing).

Then there is plain language in government documents. Pointing to a national literacy assessment, one scholar contended plain language may be the only way to allow average citizens to understand government documents.[63] Data suggests using plain language in government documents saves costs and improves efficiency.[64] Using plain language in statutes and regulations may improve predictability, reduce disputes, and make interpreting laws easier.[65] Courts deploy plain language to improve access to justice and public faith in the judiciary.[66]

Despite increasing support and data, voluntary implementation of plain language into legal documents has been sporadic and inconsistent.[67] Outside the context of government documents, there are no examples of private sector mass-market contracts adopting plain language or of empirical evidence tracking the effects (beneficial or detrimental) of widespread adoption of plain language.[68]

Why plain language has not become more widespread is unclear, but plain language has always had opponents and skeptics. Some drafters may find comfort in the traditional language used in legal documents or perceive the traditional language as safe or predictable.[69] Others may worry the shift to plain language will cause litigation, a drafter may

63. Ellen E. Hoffman, *Getting to "Plain Language,"* 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 47, 48–49 (2009).

64. Joseph Kimble, *Testifying to Plain Language*, 85 MICH. BAR J. 45, 45 (2006).

65. *See* Hoffman, *supra* note 63, at 49–57.

66. *See, e.g.*, NAT'L ASS'N CT. MGMT., PLAIN LANGUAGE GUIDE: HOW TO INCORPORATE PLAIN LANGUAGE INTO COURT FORMS, WEBSITES, AND OTHER MATERIALS, 1, 13–14 (2019), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e777731b-4188-48dc-8213-3aec4f232b22/ReferenceGuide.pdf [https://perma.cc/F5AE-69A5].

67. George H. Hathaway, *Plain English in Car Loans*, 77 MICH. BAR J. 954, 954–56 (1998) (some companies voluntarily experimented with plain language in the 1970s); Cohen, *supra* note 33, at 501 (explaining how plain language gained momentum but, "on the whole, companies were not rushing to revise their documents"); George Hathaway, *Plain English in Real Estate Papers*, 72 MICH. BAR J. 1308, 1308–10 (1993) (even after a bar committee provided free plain language versions of real estate documents, some clients refused to use them); Friman, *supra* note 33, at 105 ("[W]hile the private sector's efforts were encouraging, there was simply not enough incentive (or disincentive) to trigger widespread use of plain English contracts.").

68. For a compilation of anecdotal evidence, see KIMBLE, *supra* note 56, at 64–73, 104.

69. Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 BYU L. REV. 471, 480–85, 492–93 (2021) (discussing reasons why standard form contracts resist change but questioning traditional wisdom on degree of resistance); Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1112–28 (2006) (explaining why boilerplate language persists); George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L., BUS. & FIN. 177, 194–95 (2013).

misapply plain language, or that plain language does not or cannot apply to certain kinds of legal documents, like those that are particularly complex or have language thoroughly vetted in precedent.[70] Or perhaps some worry the costs of plain language training and of revising documents will not outweigh plain language's purported benefits. Pessimistically, although perhaps pragmatically, some might contend that even if a drafter committed to all the tenets of plain language, the purported benefits would never arrive because so few people read legal documents[71] or because the literacy rate and education levels in the United States are so low that plain language would have minimal effect.[72] Whether voluntary adoption of plain language delivers benefits or costs and, if so, when, what kind, and to what degree, is beyond the scope of this Article but certainly worthy of future research.

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70. *See, e.g.*, Nick Ciaramitaro, *The Plain English Bills . . . Ten Years Later*, 73 MICH. BAR J. 34, 34–35 (1994) (describing thirteen years of business opposition to Michigan consumer protection plain language law driven by fear of litigation); Jensen, *supra* note 44, at 810 (when Citibank considered voluntarily using plain language in bank documents, its lawyers objected because they worried plain language would create legal risks); Serafin, *supra* note 28, at 707–10 (investor lawyers opposed the SEC plain language regulations in part because they claimed the contents of public filings were too complicated to communicate in plain language); David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 727–29 (2002) (disputing plain language's effectiveness); Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 193–94 (2017) (contending plain language versions of tax laws result in "simplexity" that does not fully explain tax law). *But see* Kimble, *supra* note 39, at 51–62 (describing criticisms and then responding to them); KIMBLE, *supra* note 56, at 42–43 (noting errors in a plain language document are often caused by difficulties understanding the original version, not by application of plain language); Wayne Schiess, *What Plain English Really Is*, 9 SCRIBES J. LEGAL WRITING 43 (2004) (responding to Crump); Matt Keating, *On the Cult of Precision Underpinning Legalese: A Reflection on the Goals of Legal Drafting*, 18 SCRIBES J. LEGAL WRITING 91, 91–92 (2019) (finding no link between plain language adoptions and increased confusion or litigation); Miyazaki, *supra* note 59, at 5–6 (explaining that while some worry plain language can be less accurate and less complete than a more traditional disclosure, advocates of plain language contend it is more precise and accurate).

71. *See* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 30–31 (2012) (showing anecdotal and empirical evidence that people do not read standard contracts).

72. John Aloysius Cogan Jr., *Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93, 97–98 (2010) ("Almost one quarter of the U.S. adult population is functionally illiterate and an additional quarter has poor reading and comprehension skills. Nearly half of the adult population has deficiencies in reading and/or computational skills, and it is widely acknowledged that, on average, the U.S. adult reading level is eighth to ninth grade.").

II. CODIFIED PLAIN LANGUAGE LAWS

Practitioners, clients, and lawyers are not the only ones who gravitated to plain language. Lawmakers have too. More than recommending plain language, lawmakers codified plain language into laws: constitutions, statutes, regulations, and rules. This Part details when and how lawmakers passed codified plain language laws. After explaining the history of these laws, this Part explains the pivotal decisions legislatures and regulators make about coverage, standards, and enforcement when designing these laws.

A. A Brief History of Codified Plain Language Laws

Some scholars trace codified plain language laws back to a 1362 English statute.[73] United States codified plain language laws date back to the 1800s as a way to regulate government legal writing.[74] For example, since 1851, Indiana's Constitution required every legislative act to use plain language.[75] In 1857, Oregon did the same for every legislative act or joint resolution.[76] Idaho followed in 1890 with a nearly identical provision.[77]

After 1890, codified plain language laws went into hibernation. In fact, apart from a 1942 Kentucky law governing public officer bills,[78] the idea of passing plain language laws went out of fashion.

In the 1970s, codified plain language laws covering both private and public sector documents suddenly spiked. Driven by the consumer protection movement, several states and the federal government passed plain language laws covering contracts or disclosures.[79] A similar surge

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73. Jensen, *supra* note 44, at 809; Friman, *supra* note 33, at 104.

74. *See, e.g.*, IND. CONST. art. IV, § 20.

75. *Id.*

76. OR. CONST. art. IV, § 21.

77. IDAHO CONST. art. III, § 17; 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, app. A, at 2054 (I.W. Hart ed., 1912).

78. KY. REV. STAT. ANN. § 64.410(1) (2023) (effective 1942).

79. *See, e.g.*, Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 260–61 (2002); Friman, *supra* note 33, at 105; Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 223-24 (1987); Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 281–84 (2013); *see, e.g.*, CONN. GEN. STAT. §§ 42-151 to -158 (2023) (effective 1979) (consumer contracts for residential leases, for buying or leasing up to $25,000 in property or services, or for up $25,000 in credit must satisfy either features test or readability test); W. VA. CODE § 61-3-39c (2022) (effective 1977) (explanation of bank refusals to cash checks); ARIZ. REV. STAT. ANN. § 20-1110.01 (2022) (effective 1977) (insurance policies); DEL. CODE ANN. tit. 18, §§ 2740–2741 (2023) (effective 1976) (auto insurance policies); NEB. REV. STAT. § 44-3405 (2021) (effective 1979) (life, sickness and accident, credit life, credit accident, and health insurance policies); MINN. STAT. §§ 72C.06–.10 (2022) (effective May 28, 1997) (all

occurred in laws covering public sector documents. For example, in 1978 Hawaii amended its constitution to require plain language in government writing meant for the public.[80] Around the same time, Oregon required plain language in income tax return instructions and legislative digests and summaries,[81] Minnesota required plain language in labor commissioner brochures about injured worker's rights,[82] and Kentucky required the legislature to use plain language in its laws.[83] On the federal side, the executive branch started to adopt plain language, although not through laws. President Nixon asked Congress to approve a Special Assistant to the President for Consumer Affairs to translate new administrative law information "from its technical form into language which is readily understandable by the layman."[84] Later, President Carter issued an executive order requiring federal regulations to be as simple and as clear as possible.[85]

Since the 1970s, lawmakers across the country have continued to regularly pass plain language laws covering private sector documents.[86]

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insurance policies); CONN. GEN. STAT. §§ 38a-295 to -300 (2023) (effective 1979) (life, health, auto, and homeowner insurance policies); 28 TEX. ADMIN. CODE §§ 3.3092–.3102 (2023) (effective Jan. 26, 1977) (life, accident, and health insurance outlines of coverage and policies); 15 U.S.C. § 2303(a) (consumer product warranties for tangible property sold for personal, family, or household purposes); 15 U.S.C. § 2306(b) (service contracts).

80. HAW. CONST. art. XVI, § 13 (amended 1978).

81. OR. REV. STAT. § 316.364(1) (effective 1977) (income tax return instructions); § 171.134 (effective 1979) (digests and summaries of laws).

82. MINN. STAT. § 176.235 (effective 1979).

83. KY. REV. STAT. § 446.015 (West 2023) (effective 1978).

84. Richard Nixon, 37th President of the United States, The White House, Special Message to the Congress on Consumer Protection (Oct. 30, 1969) (transcript available at https://www.presidency.ucsb.edu/documents/special-message-the-congress-consumer-protection-0 [https://perma.cc/G6WG-VH7Y]).

85. Exec. Order No. 12,044, 3 C.F.R. 152 (1979). President Reagan later revoked this Executive Order. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

86. *See, e.g.*, 15 U.S.C. § 1666(f) (discount for not using credit plan or credit card); MONT. CODE ANN. §§ 30-14-1101 to -1113 (2021) (effective July 1, 1987) (consumer contracts for a sale, lease, or loan valued less than $50,000, with certain exceptions); VA. CODE ANN. § 38.2-2608(B)(1) (2022) (effective 1986) (home protection insurance contract); 15 U.S.C. § 1693c(a) (electronic fund transfer disclosures); 12 U.S.C. § 4301 (banking disclosures); D.C. CODE § 28-3702(c)(3), (d)(3) (2023) (effective Apr. 9, 1997) (credit service charge notice); 19 R.I. GEN. LAWS § 19-14.2-13 (2022) (effective 1995) (small loan lender statement); ARIZ. REV. STAT. ANN. § 44-6954(D)(2) (2022) (effective July 9, 2000) (disclosures for senior living center contract); S.C. CODE ANN. § 38-71-1940(C) (2022) (effective Sept. 6, 2000) (health carrier external review notices, statements, and forms); MINN. STAT. §§ 17.942–.944 (2023) (effective Jan. 1, 2001) (agricultural contracts); N.M. STAT. ANN. § 59A-61-5(B) (West 2023) (effective May 21, 2014) (pharmacy benefits manager contract); VT. STAT. ANN. tit. 9, § 2482i(1) (2021–22) (effective July 1, 2018) (finance lease for credit card terminal); 17 C.F.R. § 229.105 (2020) (risk factors disclosure); CAL. HEALTH & SAFETY CODE § 127350 (2022) (effective July 27, 2021) (hospital community benefit report explanation

One major burst was in the 1990s when the SEC issued several plain language regulations governing public filings to strengthen market transparency and aid investors.[87] Codified plain language laws covering the public sector also expanded.[88] In addition to President Clinton's executive order[89] and memorandum,[90] and President Obama's executive order,[91] the 2010 Plain Writing Act required many federal government agencies to use plain language in certain documents.[92]

Here is the current landscape of codified plain language laws in the United States. My earlier research revealed over 750 codified plain language laws spread across each state, the District of Columbia, and the federal government.[93] The overwhelming majority are state laws, with only about five percent coming from the federal system.[94] Some states have high numbers of codified plain language laws: Texas has over sixty and Connecticut has forty-eight.[95] Others have very few: Mississippi, Nebraska, and Kansas have four or less.[96] Nearly all of these laws are statutes or regulations passed by legislatures or regulators.[97]

B. Codified Plain Language Law Coverage and Standards

When drafting plain language laws, legislatures and regulators face two paramount decisions. The first is coverage: what kinds of documents should this law apply to? The second is standard: what standard must the covered documents satisfy? This Section details the different coverages and standards in codified plain language laws.

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of costs); *see also* Benoliel & Zheng, *supra* note 28 at 241–45 (providing examples of state and federal plain language consumer protection laws and regulations).

87. Firtel, *supra* note 26, at 877–81; Jeremy R. McClane, *Regulating Substance Through Form: Lessons from the SEC's Plain English Initiative*, 55 HARV. J. ON LEGIS. 265, 274–76 (2018) (detailing history of SEC disclosure rules and plain language initiative). For a more recent discussion on SEC initiatives to promote plain language, see Plain Language and Good Business, *supra* note 39.

88. For a detailed history of plain language requirements in federal rulemaking, see Cynthia R. Farina, Mary J. Newhart & Cherly Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1367–79 (2015).

89. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

90. Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 1, 1998).

91. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

92. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010).

93. Michael A. Blasie, *The Rise of Plain Language Laws*, 76 U. MIA. L. REV. 447, 485 (2022).

94. *Id.*

95. *Id.* at 487.

96. *Id.*

97. *Id.* But a small number are procedural rules that may have been passed by courts through a judicial rulemaking process. *Id.*

Coverage varies dramatically. Three quarters of codified plain language laws cover documents drafted in the private sector.[98] The largest concentration of private sector coverage is consumer contracts, which accounts for about fifty-nine percent of all codified plain language laws.[99] Codified consumer contract plain language laws are vast, covering documents like mortgages and loans,[100] medical consent forms,[101] explanations of patient rights,[102] continuing care facility disclosures,[103] leases,[104] insurance policies,[105] sale of collateral notices,[106] gas, water, and electricity termination notices,[107] car rental waivers and disclosures,[108] food labels,[109] funeral and cemetery contracts and notices,[110] consumer data and privacy notices,[111] service contracts,[112] and consumer contracts.[113] Other kinds of private sector codified plain language laws cover documents like commercial contracts,[114] securities disclosures,[115] employee discrimination policies,[116] environmental cleanup information,[117] healthcare disclosures,[118] property transfers,[119] premarital agreements,[120] guardianship waivers,[121] and wildlife

98. *Id.* at 485–86.

99. *Id.* at 486.

100. *See, e.g.*, N.J. STAT. ANN. § 17:16F-38(a) (West 2023); 7 TEX. ADMIN. CODE §§ 90.101–.105 (2015).

101. *See, e.g.*, DEL. CODE ANN. tit. 16, § 2509A(6) (West 2023–24).

102. *See, e.g.*, VT. STAT. ANN. tit. 18, § 1852(12) (2022).

103. *See, e.g.*, N.M. STAT. ANN. § 24-17-4(B)(1) (West 2022).

104. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.5(c)(1) (2023).

105. *See, e.g.*, WIS. STAT. § 631.22(2) (2023).

106. *See, e.g.*, ALA. CODE § 7-9A-101, U.C.C. cmt. 4(j)(vii) (2022); ALA. CODE § 7-9A-614(3) (2022).

107. *See, e.g.*, NEV. ADMIN. CODE § 704.393(5) (2023); NEV. ADMIN. CODE § 704.360(7) (2023).

108. *See, e.g.*, HAW. REV. STAT. §§ 437D-3 to 17.5 (2022).

109. *See, e.g.*, MICH. ADMIN. CODE r. 285.569.10(3) (2023).

110. *See, e.g.*, TEX. FIN. CODE ANN. § 154.151(d) (West 2021); TEX. HEALTH & SAFETY CODE ANN. § 711.064(c) (West 2021); TEX. HEALTH & SAFETY CODE ANN. § 712.066(c) (West 2021); 7 TEX. ADMIN. CODE § 25.4(a) (2023).

111. *See, e.g.*, CAL. CODE REGS. tit. 11, § 7012(a)(2) (2023).

112. *See, e.g.*, N.J. STAT. ANN. §§ 56:12-1, -2, -10 (West 2023).

113. *See, e.g.*, MINN. STAT. §§ 325G.29–.37 (2022).

114. *See, e.g.*, 505 ILL. COMP. STAT. 17/20 (2022).

115. *See, e.g.*, 17 C.F.R. § 240.13a-20 (2023).

116. *See, e.g.*, WASH. REV. CODE § 49.95.020(c) (2022).

117. *See, e.g.*, 35 PA. STAT. & CONS. STAT. ANN. § 6026.901 (West 2022).

118. *See, e.g.*, N.M. CODE R. § 8.300.2.11(B)(2)(b) (LexisNexis 2023).

119. *See, e.g.*, OHIO REV. CODE ANN. § 5311.26 (West 2022).

120. *See, e.g.*, N.D. CENT. CODE § 14-03.2-08(1)(c) (2023).

121. *See, e.g.*, VT. STAT. ANN. tit. 15A, § 2-406(a) (2022).

records.[122] Some laws even govern litigation filings like complaints,[123] answers,[124] notices of proceedings,[125] explanations of rights,[126] and settlement agreements.[127]

The other quarter of codified plain language laws cover documents drafted by the government.[128] Some of these laws are so broad that they cover all branches of government, like an Illinois law that applies to all laws and government public-facing documents.[129] The range of executive branch plain language law coverage is gigantic: student progress reports[130] and school safety plans,[131] election ballots and pamphlets,[132] river commission documents,[133] security breach notices,[134] tax forms and instructions,[135] ethics guides,[136] agency websites,[137] and hospital reports to name a few.[138] The judiciary is not immune. Some laws apply to administrative hearing notices,[139] child support notices,[140] pro se forms,[141] court instruction forms,[142] explanations of rights,[143] court orders,[144] and class action notices.[145] Still other laws target legislatures and regulators by requiring plain language in regulations,[146] statutes,[147] and even state constitutional amendments.[148] Yet, others govern documents created by

122. *See, e.g.*, W. VA. CODE R. § 58-47-3.11 (2022).
123. *See, e.g.*, HAW. CODE R. § 3-170-7 (LexisNexis 2023).
124. *See, e.g.*, 104 KY. ADMIN. REGS. 1:020(4)(2)(b) (2021).
125. *See, e.g.*, W. VA. CODE § 48-22-602(b) (2022).
126. *See, e.g.*, CONN. GEN. STAT. § 10a-55m(b)(3), (e) (2023).
127. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1706(e) (McKinney 2022).
128. Blasie, *supra* note 93, at 486.
129. *See, e.g.*, 20 ILL. COMP. STAT. 4090/30 (2022).
130. *See, e.g.*, N.Y. EDUC. LAW § 305(36) (McKinney 2022).
131. *See, e.g.*, 16 R.I. GEN. LAWS § 16-21-24(a) (2022).
132. *See, e.g.*, ALASKA STAT. § 15.80.005(a) (2022).
133. *See, e.g.*, OR. ADMIN R. 350-016-0001 (2022).
134. *See, e.g.*, WASH. REV. CODE § 42.56.590(6)(a) (2022).
135. *See, e.g.*, LA. STAT. ANN. § 47:15(2) (2023).
136. *See, e.g.*, D.C. CODE § 1-1162.02(a)(7) (2023).
137. *See, e.g.*, TEX. GOV'T CODE ANN. § 531.119 (West 2021).
138. *See, e.g.*, DEL. CODE ANN. tit. 16, § 1005A(c) (West 2023–24).
139. *See, e.g.*, HAW. REV. STAT. § 353-13.8(b)(3), (b)(5) (2022).
140. *See, e.g.*, ALASKA STAT. § 25.27.120(c) (2022).
141. *See, e.g.*, MICH. COMP. LAWS § 600.2950b(1) (2023).
142. *See, e.g.*, MICH. COMP. LAWS § 600.8401a(1) (2023).
143. *See, e.g.*, GA. CODE ANN. § 17-17-6(a) (2022).
144. *See, e.g.*, VA. CODE ANN. § 24.2-684 (West 2016).
145. *See, e.g.*, WYO. R. CIV. P. 23(c)(2)(B).
146. *See, e.g.*, OKLA. STAT. tit. 75, § 251(B)(2) (2019).
147. *See, e.g.*, COLO. REV. STAT. § 2-2-801 (2022).
148. *See, e.g.*, COLO. REV. STAT. § 1-40-105(1) (2016).

municipalities like board of education information[149] and zoning change notices.[150]

The coverage of individual laws varies significantly too. Some codified plain language laws are extremely targeted, like a Colorado law on car rental collision damage waivers,[151] a Texas law about prepaid funeral service contracts,[152] and an Ohio law on agency information to child day care providers.[153] But others are staggeringly broad, like a California law covering agency forms, contracts, and communications,[154] and a Montana law covering consumer contracts worth up to $50,000.[155]

Generally, codified plain language laws apply one of four kinds of standards. The *first* kind of standards are "Descriptive Standards." Descriptive Standards describe results without describing the process to achieve the result. Sometimes the "result" is the kind of language in the document. For example, some Descriptive Standards require a document to use "plain language"[156] or "plain English"[157] without defining either term. Other times the result describes the document's effect on the reader. For example, some Descriptive Standards require the document to be "understandable by a person of average intelligence and education."[158] Descriptive Standards are the most common by far. About 700 codified plain language laws use them, which accounts for about eighty percent of all codified plain language laws.[159]

The *second* kind of standards are "Readability Standards." These standards subject a document to one or more readability tests that measure objective features. Often these standards require a document to meet a certain score on a test. For example, the Flesch Reading Ease Test scores a document on a zero-to-one-hundred scale based on the number of syllables in words and the number of words in a sentence.[160]

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149. *See, e.g.*, CONN. GEN. STAT. § 10-222r (2019).

150. *See, e.g.*, ME. STAT. tit. 30-A, § 4352(9)(B) (2010).

151. COLO. REV. STAT. § 6-1-203(1)(a) (1990).

152. 7 TEX. ADMIN. CODE § 25.4 (2016).

153. OHIO REV. CODE ANN. § 5104.14 (West 2014).

154. CAL. GOV'T CODE § 6219 (West 2005).

155. MONT. CODE ANN. §§ 30-14-1101 to -1113 (West 1985).

156. 3001 DEL. ADMIN. CODE § 5.0(5.2) (detailing Delaware's language requirements regarding utility bills).

157. N.Y. COMP. CODES R. & REGS. tit. 19, § 201.11(a)(8)(B) (detailing New York's language requirements regarding mausoleum construction notices).

158. *See, e.g.*, MINN. STAT. § 80D.04 (detailing Minnesota's language requirements regarding continuing care facility disclosure statements).

159. Blasie, *supra* note 93, at 488.

160. *Id.* at 482. Other tests use a close variation. For example, the Dale-Chall Readability Test measures sentence length and the difficulty of words used based on a 1993 list of 3000 words fourth graders recognized. Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26

Another common test is the Flesch-Kincaid Grade Level formula, which calculates a grade level reading score (*e.g.*, eighth-grade level).[161] Some Readability Standards import external formulas from the social sciences like the Flesch Reading Ease Test, while others detail their own hyper-precise formula, often going as far as explaining how to count contractions or digits.[162] Only about eight percent of codified plain language laws use Readability Standards.[163] Scores range from as low as forty to as high as seventy on a one to one-hundred scale.[164]

The *third* kind of standards are "Features Standards." They require documents to use, or prohibit documents from using, specific writing features that affect structure, design, or language. Consider New Jersey's consumer contracts law, which prohibits using confusing cross-references, "[s]entences that are of greater length than necessary," "double negatives and exceptions to exceptions," confusing or illogically ordered sentences and sections, and "Old English," "middle English," Latin, French or "words with obsolete meanings or words that differ in their legal meaning from their common ordinary meaning."[165] Oregon's equivalent law requires using "words that convey meanings clearly and directly," "present tense and active voice," "simple sentences," and "frequent section headings, in a narrative format."[166] Features Standards are the most rare. Only about five percent of codified plain language laws use them.[167]

The *fourth* kind of standards are "Hybrid Standards." Hybrid Standards combine a Readability Standard with a Features Standard or offer a choice between the two. For example, an Arizona insurance law requires documents to have a minimum readability test score of 40[168] (a Readability Standard) and to organize sections logically, place exclusions near the general rule, cut non-essential provisions, place defined terms up front, use "everyday, conversational language," and use "short, simple sentences and words in common usage" (a Features Standard).[169]

QUINNIPIAC L. REV. 147, 162–64 (2007) (detailing the evolution of the Dale-Chall formula).

161. Veronica J. Finkelstein & Nicole E. Crossey, *Making Every Word Count: Using Strategic Editing to Increase the Readability of Your Appellate Brief*, 67 DEP'T JUST. J. FED. L. & PRAC. 85, 90 (2019).

162. *See, e.g.*, ARIZ. ADMIN. CODE § R20-6-213(C)(2) (2007).

163. Blasie, *supra* note 93, at 488.

164. *Id.* at 488–90.

165. N.J. STAT. ANN. § 56:12-10(a) (West 1981).

166. OR. REV. STAT. § 180.545(1) (2021).

167. Blasie, *supra* note 93, at 488.

168. ARIZ. ADMIN. CODE § R20-6-210(C)(2) (2007).

169. ARIZ. ADMIN. CODE § R20-6-210(D)(1)–(3) (2007).

About six percent of codified plain language laws use Hybrid Standards.[170]

Like any codified standard, courts exert considerable discretion in applying the standard. Some courts apply them strictly. In one New York court case, landlords claimed they have the "overwhelmingly difficult and possibly impossible task of converting each and every clause of the lengthy expired lease to plain English," while tenants claimed they have "the equally difficult task of determining whether the terms and conditions in the plain English lease are the same as the expired lease."[171] The court called both arguments specious because the benefits to all involved "far outweigh these inconveniences."[172] Another New York court awarded fifty dollars in damages when a lease violated a law's "division of subject matter and captions" requirements.[173] A Connecticut court deemed a contract noncompliant for using the incorrect kind of pronouns.[174] The Ninth Circuit held the National Environmental Policy Act's plain language provision required agency environmental impact statements to be "organized and written in language understandable to the general public and at the same time contain sufficient technical and scientific data to alert specialists to particular problems within their expertise."[175]

Other courts apply plain language laws more loosely. Consider Wisconsin, where a law requires the state government to create a plain language pamphlet describing eminent domain.[176] When a landowner tried to prevent the state from exercising eminent domain authority because the pamphlet inadequately explained the law, a Wisconsin court rejected the argument, reasoning "[n]o reasonable person would initiate a lawsuit against a state agency and rely on a pamphlet's summary of a complex area of the law as its sole source of information."[177]

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170. Blasie, *supra* note 93, at 488.

171. *Francis Apts. v. McKittrick*, 429 N.Y.S.2d 516, 518–19 (N.Y. Civ. Ct. 1979).

172. *Id.* at 519.

173. *Rock v. Klepper*, No. SC-270-2008, slip op. at *7 (N.Y. City Ct. Mar. 25, 2009).

174. *Keill v. Howland*, No. CV NH 6172, 1995 WL 591467, at *13 (Conn. Super. Ct. Sept. 1, 1995).

175. *Or. Env't Council v. Kunzman*, 817 F.2d 484, 494 (9th Cir. 1987) ("The discussion of certain risks is at times dry and dense, but accessible to the interested layperson.").

176. WIS. STAT. § 32.26(6) (2019–20).

177. *Scott Dev. Co. v. State Dep't of Transp.*, No. 99-2329, 617 N.W.2d 677, at *4 (Wis. Ct. App. June 20, 2000); *see also Benson v. Dep't of Emp. & Econ. Dev.*, No. A08-1144, 2009 WL 1374886, at *3 (Minn. Ct. App. May 19, 2009) (rejecting challenge that unemployment handbook violated plain language law by not adequately explaining how to seek benefit because handbook was not intended to be exhaustive explanation and ability to understand handbook does not affect right to benefit).

C. Enforcement of Codified Plain Language Laws

Just as the standards and coverage of codified plain language laws vary, so too do the enforcement mechanisms. In designing enforcement mechanisms, lawmakers make three fundamental decisions: (1) how to enforce the law; (2) what penalties are available; and (3) what defenses or exceptions to permit.

1. HOW TO ENFORCE CODIFIED PLAIN LANGUAGE LAWS

Nationwide, lawmakers employ five approaches to enforcing codified plain language laws.

The *first* approach is silence. Many codified plain language laws say nothing about enforcement. Some of these laws have language suggesting compliance is mandatory, like a Kentucky law that says car rental insurance agreements "shall not be transacted" unless certain disclosures meet readability requirements.[178] But without explicit penalties or caselaw interpreting such laws, whether anyone could enforce them is unclear. To be sure, sometimes courts have interpreted silence as creating a viable cause of action. For example, the Indiana Constitution requires every legislative act and joint resolution to "be plainly worded, avoiding, as far as practicable, the use of technical terms."[179] For over a century, Indiana courts have fielded claims that statutes were unconstitutional for not being plainly worded.[180] Likewise, a Pennsylvania law requires the state Attorney General to prepare a plain language explanation of proposed state constitutional amendments before election day.[181] Although the Pennsylvania Supreme Court has on at least two occasions

178. KY. REV. STAT. ANN. § 304.9-509 (West 2010) (applying readability standard to disclosures in car rental agreements); *see also* KY. REV. STAT. ANN. § 304.9-497 (West 2014) (same for self-service storage insurance).

179. IND. CONST. art. IV, § 20.

180. *See, e.g.*, *Welsh v. Sells*, 192 N.E.2d 753, 762–63 (Ind. 1963) (although the statute is "clumsily worded and is certainly confusing . . . [and] is not crystal-clear," the statute did not violate the constitution because it was susceptible to both an intelligible and reasonable construction), *opinion adhered to on denial of reh'g*, 193 N.E.2d 359 (Ind. 1963); *State ex rel. Spencer v. Baker*, 7 N.E.2d 984, 988 (Ind. 1937) ("A statute should not be held void for uncertainty, if any reasonable and practical construction can be given it. Mere difficulty in ascertaining its meaning does not render it void. It is the duty of the courts to endeavor by every rule of construction, if possible, to give full force and effect to every enactment of the General Assembly not obnoxious to constitutional prohibitions.").

181. 25 PA. CONS. STAT. § 2621.1 (1986).

rejected challenges to a statement's adequacy,[182] in doing so the Court showed that the requirement is enforceable.

The *second* approach is no enforcement. Many broad public sector codified plain language laws are explicitly unenforceable, including the federal Plain Writing Act of 2010.[183] However, more targeted laws governing government writing often are enforceable.[184] Some plain language laws simply state that they do not create new causes of action or penalties, nor do they create, expand, or limit other causes of action.[185] Whether this latter variation is enforceable seems to depend on whether other sources of law could enforce the plain language provision.

The *third* approach is regulatory enforcement. This approach empowers agencies to ensure regulated industries comply. In doing so, lawmakers sometimes shift the enforcement burden. The insurance industry provides a good illustration. Insurance forms are almost entirely regulated by states.[186] State regulators usually supply template insurance forms or review insurance forms for compliance with state law, although some commentators have questioned how effective regulators are at doing so.[187] Some insurance plain language laws require insurers to certify that each policy complies with the plain language law.[188] Others

182. *See Grimaud v. Commonwealth*, 865 A.2d 835, 843–44 (Pa. 2005); *Bergdoll v. Commonwealth*, 858 A.2d 185, 196 (Pa. Commw. Ct. 2004), *aff'd*, 874 A.2d 1148–49 (Pa. 2005).

183. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010) (no judicial review or enforceable rights); *see also* COLO. REV. STAT. § 2-2-801 (1993) (enactment of bill by the Colorado General Assembly "create[s] a presumption that such bill conforms" to law requiring plain language in statutes); KY. REV. STAT. ANN. § 446.015 (West 1978) (enactment of bill by the Kentucky General Assembly creates "a conclusive presumption that such bill conforms" to law requiring plain language in statutes); ALASKA STAT. § 44.62.300(b)(3)(A) (failure of agency to use plain language in notices is not grounds to void regulation); *id.* § 15.80.005(d) (election results remain valid even if election ballot fails the plain language requirement).

184. *See, e.g.*, *Grimaud*, 865 A.2d at 843–44 (considering plain language challenge to election ballot design); *Welsh*, 192 N.E.2d at 762–63 (considering constitutional challenge to statute's compliance with plain language standard); *TracFone Wireless, Inc. v. State*, 351 P.3d 599, 605 (Idaho 2015) (considering and rejecting claim that statute violated plain language provision of Idaho Constitution); *In re Idleman's Commitment*, 27 P.2d 305, 311 (Or. 1933) (considering and rejecting claim that statute violated plain language provision of Oregon Constitution); *Marcoccia v. Suffolk Cnty. Bd. of Elections*, 766 N.Y.S.2d 567, 568 (N.Y. App. Div. 2003) (election ballot question phrasing violated plain language election law).

185. *See, e.g.*, ARK. CODE ANN. § 23-61-115(c) (2019) (guaranteeing a "readable [insurance] policy" but not creating a new cause of action); LA. STAT. ANN. § 22:41 (2018) (creating "the right to a readable [insurance] policy," but not creating a cause of action or new damages).

186. 15 U.S.C. § 1012.

187. Robert L. Tucker, *Disappearing Ink: The Emerging Duty to Remove Invalid Policy Provisions*, 42 AKRON L. REV. 519, 576–80 (2009).

188. *See, e.g.*, ARIZ. ADMIN. CODE § R20-6-213(C)(4) (2023); COLO. REV. STAT. ANN. § 10-4-633.5(1)(b) (West 2023); COLO. REV. STAT. ANN. § 10-16-

place the entire burden of review on agencies, like those requiring insurance commissioners to check for compliance before approving a policy.[189] Yet, other states combine both approaches. Consider Minnesota, which requires the insurer to submit certifications and the insurance commissioner to conduct an independent assessment.[190] Notably, regulatory enforcement sometimes is a tradeoff that offers protection to the regulated parties. For example, SEC regulations require certain public filings to use plain language.[191] But even when violations harm individuals, the individuals have no private right of action.[192] "That the SEC has the power to enforce its rules and regulations creates a strong presumption that Congress did not intend for private individuals to have that power."[193] Thus, without an explicit private right of action, regulatory enforcement may preclude individuals from suing.

A *fourth* approach is enforcement under a pre-existing cause of action.[194] For instance, failure to use plain language in Alaskan and

107.3(1)(b) (West 2023); HAW. REV. STAT. ANN. § 431:10-107(a) (West 2022); ME. REV. STAT. ANN. tit. 24-A, § 2441(4); *see also* HAW. REV. STAT. ANN. § 431:10-105 (West 2022).

189. *See, e.g.*, CONN. GEN. STAT. ANN. § 38a-299(a)(1) (West 2022) (describing how the insurance commissioner must approve policies as meeting readability requirements); IOWA ADMIN. CODE r. 191-28.14(509) (2023); N.J. STAT. ANN. § 17B:25-18(h) (West 2023) (explaining that the insurance commissioner may disapprove policy that is unjust, unfair, misleading, contrary to law, or contrary to public policy); N.C. GEN. STAT. ANN. § 58-38-30(b) (West 2022) (stating the commissioner must deny noncompliant policies); N.J. STAT. ANN. § 17:46C-6(3)(b)(ii)–(iii) (West 2023) (explaining that the insurance commissioner must reject legal services insurance policies that fail "to attain a reasonable degree of readability, simplicity and conciseness" or are "misleading, deceptive or obscure because of its physical aspects such as format, typography, style, color, material or organization."); 230-20-60 R.I. Code R. § 1.14 (LexisNexis 2023) (explaining the insurance commissioner cannot approve certain consumer credit insurance forms "unless the policy or certificate is written in non-technical, readily understandable language, using words of common everyday usage" and those forms meet a minimum readability score on the Flesch scale).

190. MINN. STAT. ANN. § 72C.10(2)(a) (West 2023).

191. SEC Div. of Corp. Finance: Updated Staff Legal Bulletin No. 7, WL 34984247 (June 7, 1999) [hereinafter SEC Staff Legal Bulletin No. 7]; 17 C.F.R. § 230.421(d)(1) (2023); 17 C.F.R. § 230.481(b) (2023); 17 C.F.R. § 229.105 (2023); 17 C.F.R. § 270.30e-3(d) (202317 C.F.R. § 240.13a-20 (2023); 17 C.F.R. § 240.15d-20 (2023); 17 C.F.R. § 229.503 (2023); 17 C.F.R. § 229.501 (2023); 17 C.F.R. § 229.502 (2023).

192. *Campbell ex rel. Equity Units Holders v. Am. Int'l Grp., Inc.*, 86 F.Supp.3d 464, 471–72 (E.D. Va. 2015), *aff'd sub nom. Campbell v. Am. Int'l Grp., Inc.*, 616 Fed. Appx. 74 (4th Cir. 2015).

193. *Id.* at 472.

194. A close variation creates functional barriers to enforcing a noncompliant contract. One of the few codified New York rules of evidence prevents fine print consumer contracts or leases that use fine print or illegible print from being admitted into evidence at any trial, hearing, or proceeding by the party who prepared the contract. N.Y. C.P.L.R. § 4544 (McKinney 2022).

Coloradan installment plan contracts is grounds for unfair competition and deceptive trade practices claims.[195] Car rental companies who dare issue a Colorado collision damage waiver not written "in simple and readable plain language" have committed a deceptive trade practice.[196] The Colorado Attorney General, district attorneys, and injured consumers can sue.[197]

The *fifth* approach is explicitly creating a cause of action. This approach allows allegedly harmed parties to bring a claim under the plain language law. Several laws explicitly authorize injured parties to seek relief like an injunction[198] or monetary damages.[199]

2. PENALTIES FOR VIOLATIONS

When permitted, the penalties for violating plain language laws vary dramatically. In fact, the kinds of penalties encompass nearly the full range of civil law penalties.

A sampling of plain language laws enforceable by regulators showcases such variety. The FEMA administrator can fine flood insurers up to $50,000 for noncompliant policies.[200] State insurance departments can deny or withdraw approval of noncompliant policies.[201] Meanwhile, the SEC can issue comments and deny requests to accelerate noncompliant filings.[202] The New Jersey Office of Administrative Law will reject any noncompliant notice of rule changes.[203] The Colorado Attorney General can seek up to $20,000 for each violation of a consumer protection plain language law.[204] And the Vermont Commissioner of

195. ALASKA STAT. ANN. § 45.50.471(b)(13) (West 2022) (creating unfair competition or deceptive practices claim when seller permits payment on an installment plan without including a description of the goods or services "in readable, clear, and unambiguous language"); COLO. REV. STAT. ANN. § 6-1-105(1)(m) (West 2023) (creating unfair competition or deceptive practices claim when seller permits payment on an installment plan without including a description of the goods or services "in readable, clear, and unambiguous language").

196. COLO. REV. STAT. ANN. § 6-1-203(1)(b) (West 2022); *see also* 16 C.F.R. § 436.6(b) (2023) (stating that it is an unfair or deceptive act or practice for a franchisor to not use plain language disclosures and is enforced by the federal trade commission).

197. COLO. REV. STAT. ANN. § 6-1-103, -112 to -113 (West 2022).

198. *See, e.g.*, MINN. STAT. ANN. § 604.175(a) (West 2023).

199. *See, e.g.*, MONT. CODE ANN. § 30-14-1111 (West 2021).

200. 42 U.S.C. § 4013(b)(A)(iii).

201. *See, e.g.*, S.C. CODE ANN. § 38-61-40 (empowering insurance director to withdraw approval or certification of policy).

202. SEC Staff Legal Bulletin No. 7, *supra* note 191; 17 C.F.R. § 230.461(b)(1) (2023).

203. N.J. STAT. ANN. § 52:14B-4.1a(b) (West 2023) (stating that the Office of Administrative Law cannot accept notice of a rule change "which lacks a standard of clarity").

204. COLO. REV. STAT. ANN. § 6-1-112(a) (West 2022).

Disabilities, Aging, and Independent Living can fine a nursing home up to $1,000 for not issuing a certain kind of notice in plain language.[205] Thus, regulatory penalties range from monetary fines to denying market access to halting or slowing government processing.

Laws enforceable by private parties have similar variety. Some authorize equitable remedies. For example, a Minnesota law allows patients to enjoin a nonprofit hospital from collecting bills when the hospital failed to provide a plain language summary of the financial assistance policy.[206] And New York courts have required landlords to rewrite noncompliant renewal leases.[207] Some laws even authorize courts to reform noncompliant contracts.[208]

Other laws void noncompliant documents.[209] For instance, a North Dakota premarital agreement is unenforceable without "an explanation in plain language of the marital rights or obligations being modified or waived by the agreement."[210] Oregon voids noncompliant lawyer contingency fee agreements.[211] Substantial compliance is insufficient.[212] Citizens are not bashful about suing the government to void quintessential government actions like elections or even the passage of a law.[213] By

205. VT. STAT. ANN. tit. 33, § 7303 (2023) (describing notice); VT. STAT. ANN. tit. 33, § 7304 (2022) (authorizing penalty).

206. MINN. STAT. ANN. § 604.175(a) (West 2023).

207. *Newport Apartments Co. v. Collins*, 431 N.Y.S.2d 231, 232 (App. Term 1980) (finding landlord must rewrite renewal lease to satisfy plain language law); *Francis Apts. v. McKittrick*, 429 N.Y.S.2d 516, 519 (Civ. Ct. 1979) (finding landlord must rewrite renewal lease to satisfy plain language law).

208. MINN. STAT. ANN. § 325G.33 (West 2023). A New Jersey plain language law permits courts to reform a consumer contract if a notice provision of the contract violates the consumer protection plain language law and the violation has caused or is likely to cause financial detriment to the consumer. N.J. STAT. ANN. § 56:12-4.1 (West 2023) (authorizing court to reformat consumer contract when violation substantially confused and caused financial detriment to the consumer); *Alloway v. Gen. Marine Indus., L.P.*, 695 A.2d 264, 274 (N.J. 1997).

209. *See, e.g.*, W. VA. CODE R. 77-6-3 (2022) (stating that a waiver is not knowing and voluntary if not in plain language); 18-1 VT. CODE R. § 14: 4.702(B)(1) (2023) (explaining that a letter changing long distance telecommunication provider is invalid if not in plain language); DEL. CODE ANN. tit. 6, § 2807(a), (g) (West 2023) (giving purchaser option to void camping ground contract that does not use plain language); GA. CODE ANN. § 10-4-107.1(b)(2) (2023) (stating that a contract to purchase tobacco is invalid and not binding unless written in plain language).

210. N.D. CENT. CODE ANN. § 14-03.2-08(1) (West 2021).

211. OR. REV. STAT. ANN. § 20.340 (West 2022).

212. *Bechler v. Macaluso*, No. CV 08-3059-CL, 2010 WL 2034635, at *9 (D. Or. May 14, 2010).

213. *See, e.g.*, *Mavromatis v. Town of W. Seneca*, 869 N.Y.S.2d 709, 710 (App. Div. 2008) (finding election proposition language misleading); *Marcoccia v. Suffolk Cnty. Bd. of Elections*, 766 N.Y.S.2d 567, 568 (App. Div. 2003) (affirming annulment of election proposition language because it was misleading); *Ass'n for a Better Long Island v. Cnty. of Suffolk*, 663 N.Y.S.2d 226, 227 (App. Div. 1997) (finding proposed election ballot language misleading); *Bint v. Creative Forest Prods.*, 697 P.2d

contrast, some laws are careful to preserve enforcement of noncompliant documents. One of Wisconsin's plain language laws states a violation does not void or render voidable any part of an insurance policy and the law is not a defense to an action under the policy.[214]

Consumer contract plain language laws exemplify how lawmakers mix and match a smorgasbord of penalties, including monetary damages, class actions, and attorneys costs and fees.[215] Any violation of New York's plain language consumer contract law permits affected consumers to recover "any actual damages" plus fifty dollars.[216] The law caps class action penalties at ten thousand dollars.[217] Violations do not void the contracts or prevent enforcement.[218] For repeat offenders, the New York Attorney General can move to prevent the company from doing business.[219] Pennsylvania's plain language consumer contract law takes a similar approach, allowing parties to recover actual loss, statutory damages of the larger of $100 or the total value of the contract, court costs, reasonable attorney fees, and any other relief ordered by the court.[220] Like New York, Pennsylvania does not allow breaches to void

818, 830 (Idaho 1985) (Bistline, J., dissenting) (finding statute unconstitutional because it "is not plainly worded"); *Gruskoff v. Cnty. of Suffolk*, 18 N.Y.S.3d 344, 345 (App. Div. 2015) (rejecting plain language challenge to proposed election proposition); *Leib v. Walsh*, 992 N.Y.S.2d 637, 640 (Sup. Ct. 2014) (considering election language challenge); *In re Initiative Petition No. 363, State Question No. 672*, 927 P.2d 558, 567–68 (Okla. 1996) (considering challenge to election ballot language); *In re Initiative Petition No. 360, State Question No. 662*, 879 P.2d 810, 819 (Okla. 1994) (rejecting challenge to election ballot language because language was not misleading); *TracFone Wireless, Inc. v. State*, 351 P.3d 599, 605 (Idaho 2015) (presence of technical term did not render law unconstitutional); *State v. Newman*, 696 P.2d 856, 865 n.17 (Idaho 1985) (describing constitutional provisions as a "void-for-vagueness" doctrine); *Simmons v. Ewing*, 529 P.2d 776, 778 (Idaho 1974) (upholding statute against constitutional challenge); *Nelson v. Marshall*, 497 P.2d 47, 51–52 (Idaho 1972) (same); *Ada Cnty. v. Wright*, 92 P.2d 134, 137–38 (Idaho 1939) (same); *Burns v. Lukens*, 269 P. 596, 596–97 (Idaho 1928) (upholding statute against constitutional challenge); *Settlers' Irrigation Dist. v. Settlers' Canal Co.*, 94 P. 829, 831 (Idaho 1908) (finding act constitutional under plain language challenge even though phrasing included a word that was "meaningless and surplusage").

214. WIS. STAT. ANN. § 631.22(6) (West 2022).

215. *See, e.g.*, MONT. CODE ANN. § 30-14-1111 (2021) (setting remedy at $50 plus actual damages and costs); MONT. CODE ANN. § 30-14-1112 (2021) (capping class action damages at $10,000 plus actual damages and a violation does not void a contract); MINN. STAT. § 325G.33 (2022); MINN. STAT. ANN. § 8.31(3) (2022) (permitting reformation, injunctions, monetary penalty up to $25,000, attorneys fees and costs); MINN. STAT. § 325G.34 (2022) (permitting class actions).

216. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney 2020).

217. *Id.*

218. *Id.* § 5-702(b).

219. *Id.* § 5-702(c); N.Y. EXEC. LAW § 63(12) (McKinney 2022).

220. 73 PA. STAT. & CONS. STAT. § 2207 (West 1993).

the contract, but Pennsylvania prohibits class actions.[221] Connecticut sets damages of its plain language consumer contract law at $100 and potential attorney fees.[222] Its courts have certified class actions based on plain language law violations, like one case involving claims that a standard-form lease breached the statute by using the words "lessor" and "lessee" in two sentences.[223] New Jersey's plain language consumer contract law permits punitive damages on top of attorney's fees and costs.[224]

3. DEFENSES AND EXCEPTIONS

At least three unique exceptions or defenses are sometimes built into plain language laws. Usually, they arise in very broad laws.

First, some plain language laws contain a "practicable" exception. These laws require drafters to abide by the plain language law only to the extent doing so is practicable. For example, Hawaii's constitution says "[i]nsofar as practicable" government writing for the public must use plain language.[225] Indiana's Constitution takes a similar approach: legislative acts must use plain language and avoid "as far as practicable . . . technical terms."[226] Colorado's General Assembly must "to the extent possible" use plain language when drafting laws.[227] Such caveats seem to provide substantial discretion to drafters. Research revealed no sources commenting on when using plain language would be impracticable.

Second, some plain language laws allow parties to obtain government preapproval: a certification from a government agency that a document complies with the plain language law. This exception arises in plain language insurance and consumer contract laws. Most commonly, government approval comes from the head of the state insurance agency or department of justice.[228] For example, under the New Jersey plain language consumer contract law, the attorney general

221. *Id.* § 2208(c)–(d). A consumer contract preapproved by the Attorney General complies with the act and constitutes good faith effort to comply with the act. 37 PA. CODE § 307.10(a) (1999).

222. CONN. GEN. STAT. ANN. § 42-154 (West 1979).

223. *Lessard v. Rent-A-Ctr. E., Inc.*, 250 F.R.D. 103, 105–06 (D. Conn. 2008).

224. N.J. STAT. ANN. § 56:12-3 to -4 (West 1981).

225. HAW. CONST. art. XVI, § 13.

226. IND. CONST. art. IV, § 20.

227. COLO. REV. STAT. ANN. § 2-2-801 (West 1993).

228. *See, e.g.*, N.J. ADMIN. CODE § 11:2-18.5(a) (2018) (insurer can request insurance commissioner opinions on whether policy and documents satisfy plain language standard); OR. REV. STAT. ANN. § 180.540 (West 2009) (permitting department of justice review of certain consumer contracts); *id.* § 180.520(1)(h) (same); 73 PA. STAT. ANN. § 2209 (West 1993) (attorney general can preapprove consumer contracts).

and commissioner of insurance can certify a contract complies with the law.[229] Preapproval eases the mind of drafters but shifts power from courts and legislators to agencies. Under the New Jersey law, the attorney general's and commissioner's determinations are not appealable.[230] And if a drafter obtains preapproval, that preapproval can serve as a defense: when certified the contract "is deemed to comply with this act."[231] While the act provides guidelines the attorney general and commissioner could use to review contracts for compliance, the guidelines appear to be suggestions and non-exclusive, which means both agencies have significant influence over the law.[232]

Third, some plain language laws contain a good faith defense. Usually, this defense is in plain language consumer contract laws. For example, alleged violators of Minnesota's or Pennsylvania's plain language consumer contract laws have a defense if they "made a good faith and reasonable effort" to comply with the law.[233] What actions do or do not amount to good faith and reasonable effort is unclear. Although under the Pennsylvania law, preapproval by the attorney general satisfies the good faith exception.[234]

D. The Unmeasured Effects of Plain Language Laws

Generally, the effects of plain language laws fall into two categories. The first is compliance: have the laws affected the documents they cover? The second is societal effects: when covered documents do comply with the laws, what is the effect on readers, drafters, and society as a whole? This Section details the data currently available on these effects and the significant challenges to measuring these effects.

1. MEASURING COMPLIANCE WITH PLAIN LANGUAGE LAWS

This Article offers a summary of some of the empirical scholarly work on compliance but does not offer definitive estimates. Data tracking whether documents comply with plain language laws is scarce. Several complications likely contribute to the scarcity. For one, until recently no

229. N.J. STAT. ANN. § 56:12-8 (West 1982).

230. *Id.*

231. *Id.*; *see also* 37 PA. CODE § 307.10(a) (1999) (attorney general preapproval is compliance with act).

232. *See* N.J. STAT. ANN. § 56:12-10 (West 1982).

233. MINN. STAT. § 325G.34(1) (2022); 73 PA. STAT. & CONS. STAT. § 2208(a)(3) (West 1993).

234. 37 PA. CODE § 307.10(a) (1999). One of Pennsylvania's laws also prevents liability when all contracting parties complete their responsibilities or the consumer wrote the part of the contract that violates the law. *See* 73 PA. STAT. & CONS. STAT. § 2208 (West 1993).

one knew how many plain language laws existed.[235] Moreover, any researcher would face difficulties obtaining a representative sample set of covered documents. For instance, how could one analyze all the contracts covered by a consumer protection law or obtain all law firm contingency agreements in a state? Even tracking plain language law lawsuits is difficult as such cases are most likely in state courts and state court trial decisions and pleadings are not readily searchable on Westlaw or LexisNexis. How to measure compliance also presents novel methodological challenges, like how to decide if a contract is understandable to a person of average intelligence and education.[236] Still, a few scholars have ventured into this unmapped territory.

In one of the earliest assessments of plain language laws, in 1979, Michael Wisdom analyzed compliance with the 1975 Magnuson-Moss Warranty Act's requirements that certain warranties use "simple and readily understood language."[237] Looking at a sample set of about thirty seven warranties he concluded most corresponded to a college-level reading score or higher; one-third of warranties were more readable than their pre-act predecessors while two-thirds were less readable.[238] Wisdom concluded manufacturers may have complied with parts of the Magnuson-Moss Warranty Act but not the plain language portion.[239]

Fast forward to 2013, when Rachel Stabler analyzed federal government compliance with the Plain Writing Act of 2010 and concluded the Act has not stimulated government use of plain language due to its lack of oversight and enforcement.[240] Of thirty-five agencies, few issued the required annual reports and compliance decreased over time, eventually to less than fifty percent compliance; of those who did file, most reports "are generally paltry and provide little useful

235. *See* Blasie, *supra* note 93, at 473–75.

236. *See* McClane, *supra* note 87, at 268 ("Moreover, it has been difficult in the past to measure style in a way that permits investigation into whether the regulations are followed."); *accord* Firtel, *supra* note 26, at 887–93 ("What constitutes plain English is a subjective standard that will be hard to determine and virtually impossible to enforce.").

237. Michael J. Wisdom, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117, 1119–20 (1979).

238. *Id.* at 1127–29.

239. *Id.* at 1144. In 1995, Michael Friman pointed to treatise commentary no longer available that suggested in response to New York's consumer protection plain language law a "[l]arge numbers of firms have revised their printed forms to comply with the statute and have experienced no adverse impact. There has been no flood of litigation as initially feared." Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 108 (1995). Some government agencies provide resources to private entities to assist their compliance with plain language laws. *See, e.g.*, *Plain Language Initiative*, TEX. OFF. CONSUMER CREDIT COMM'R, https://occc.texas.gov/industry/plain-language-initiative (last visited Mar. 2, 2023).

240. Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 280 (2013).

information."[241] One agency duplicated the prior year's report and just changed the date.[242] Conversely, most agencies complied with the requirement to appoint an official to oversee the Act and provide a point of contact.[243] Looking at documents the agencies drafted, Stabler reported mixed improvement: agencies that do not comply with "the more technical requirements of the Act, are also faring poorly when it comes to communicating in plain language.[244] Still, Stabler noted many agencies have moved away from certain bad writing habits, like using legal jargon.[245]

The Center for Plain Language has graded each federal agency's compliance with the Plain Writing Act of 2010 since 2012.[246] The report card reflects massive variance. The Department of the Interior went from a B one year, to an F the next, to an A the following year, and in the last four years has received a C-, two Fs, and one A+.[247] The Departments of Commerce, Housing and Urban Development, Transportation, and the Treasury all received an F annually from 2018 to 2021.[248] By contrast, the Departments of Defense, Energy, Health and Human Services,

241. *Id.* at 296–303.

242. *Id.* at 302–03.

243. *Id.* at 304.

244. *Id.* at 306–15. But some agencies embraced the Act's plain language goal. The Department of Health and Human Services reduced a resource library from over one-hundred pages to only thirty-three, concluded the top three documents on substance abuse and mental health that had the largest public impact used plain language, provided information on how to submit grant applications using plain language, pages describing intensive writing training programs and evaluations of work product. U.S. DEP'T OF HEALTH & HUM. SERVS., PLAIN WRITING ACT COMPLIANCE REPORT, 2–4 (2020), https://www.hhs.gov/sites/default/files/hhs-2020-plain-writing-act-compliance-rpt.pdf [https://perma.cc/W9SK-QWRY]. To comply with the 2010 Plain Writing Act, the FDA made employees aware of the new requirement, provided training by using recorded modules developed by another government agency, and recognized employees who excel at using plain language. *Plain Writing: It's the Law!*, FOOD & DRUG ADMIN., https://www.fda.gov/about-fda/plain-writing-its-law [https://perma.cc/TE7U-NDB5] (last visited Mar. 2, 2023). The Department of Labor has a Senior Official for Plain Language, gives itself a grade each year on organizational compliance and writing quality, and requires new employees to take a plain language training. *Plain Language*, DEP'T OF LABOR, https://www.dol.gov/general/plainwriting [https://perma.cc/KMF5-VVB3] (last visited Mar. 2, 2023).

245. Stabler, *supra* note 240, at 315–16.

246. *Report Card Grades Across 10 Years: Compliance Grades, 2012–2021*, CTR. FOR PLAIN LANGUAGE (2023), https://centerforplainlanguage.org/2021-federal-plain-language-report-card/report-card-grades-across-10-years [https://perma.cc/3NPX-U9DU].

247. *Id.*

248. *Id.*

National Archives, and Social Security Administration received an A+ annually during the same time period.[249]

Turning to securities filings, take a look at Jeremy McClane's 2018 analysis of 2,255 initial public offering prospectuses filed with the SEC.[250] McClane analyzed each one for compliance with the SEC regulations' Features Standard.[251] More than that, his conclusions are telling: compliance varied within each prospectus with the most technical portions having the lowest score.[252] Compliance also varied over time. Compliance was "relatively stable" with a "gentle upward" trend in some sections before the 1998 plain language regulations took effect.[253] After the regulations took effect, plain language compliance had a "steep upward trend, peaking in mid-2000."[254] But after mid-2000, compliance had a "downward drift" and some sections fell below their pre-regulation averages.[255] For example:

> It is not clear why the plain English scores taper off over time, although it is possible that for both plain English and boilerplate, compliance with the regulation slipped once the SEC or the bar stopped focusing on it. Given the subjective nature of the regulation, it could also be the case that the SEC was unwilling or unable to enforce the policy and allowed compliance to slacken over time.[256]

Although there is insufficient data about compliance with plain language laws, the data available suggests compliance is mixed and may vary over time, by law, and by drafter. More research is needed.

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249. *Id.* Keep in mind the grades are based on a small snapshot of what agencies write. For example, the 2021 grades were based on each agency's FOIA page and COVID-19 page. *What We Graded in 2021*, CTR. FOR PLAIN LANGUAGE (2023), https://centerforplainlanguage.org/2021-federal-plain-language-report-card/what-we-graded/. These amount to a very small subset of what an agency writes that is considered by the Plain Writing Act. At the same time, voluntarily examining and grading this material is a true labor of love for the volunteers at the Center for Plain Language.

250. McClane, *supra* note 87, at 283.

251. *Id.* at 280–81.

252. *Id.* at 287.

253. *Id.* at 291.

254. *Id.*

255. *Id.* at 293.

256. *Id.* at 294.

2. MEASURING THE SOCIETAL EFFECTS OF PLAIN LANGUAGE LAWS

The societal effects of plain language laws are not fully understood.[257] Here again, several challenges impede understanding but there is some data.

At least four challenges limit assessments. *First*, there is no consensus on what effects to look for. Noted above, plain language supporters point to a range of benefits like helping consumers make informed decisions, improving market transparency, helping business efficiency, improving access to justice, and decreasing litigation.[258] Likewise, plain language skeptics and opponents have a list of concerns like causing confusion or increasing litigation.[259] *Second*, scholars have yet to agree on reliable methods to measure effects like trust in lawyers, consumer behavior, access to justice, or market transparency. *Third*, accessing and gathering data to measure these laws' effects is difficult. Researchers might need generous cooperation from businesses and citizens, and investments from governments willing to collect the right data. Researchers might also need data before and after plain language laws took effect or to compare jurisdictions with different plain language laws or one with a law to one without a law. *Fourth*, variations in coverage, standards, enforcement, and penalties add complex variables to any comparison.

Nonetheless, there are some data points on potential effects. One kind of data point is reflections from judges and scholars. In 1998, James Fischer was not optimistic as he opined that despite revised plain language insurance policies "it is difficult to discern any notable improvement in policy readability over the past 25 years."[260] He concluded insurance policies for even basic consumer products like car and home insurance remain complex contracts.[261] But in a 2004 opinion, Judge Richard S. Brown of the Wisconsin Court of Appeals was more optimistic. He said:

> Compared to years past, the policies are now written in simple words, short sentences and the active voice rather than in long

257. *See* Betsy A. Bowen, Thomas M. Duffy & Erwin R. Steinberg, *Analyzing the Various Approaches of Plain Language Laws*, 20 VISIBLE LANGUAGE 155, 155 (1986) (noting there has been no comprehensive evaluation of the effectiveness of plain language laws and more research is needed to determine what characteristics of style and design effect use and comprehension, what are characteristics of strategies of companies that produce the most understandable contracts, and the best model of plain language laws).

258. *See supra* Section I.C.

259. *See supra* Section I.C.

260. James M. Fischer, *The Doctrine of Reasonable Expectations Is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L.J. 151, 170 (1998).

261. *Id.*

> pages of text without headings, complex sentences, passive construction, unnecessary legalese and multisyllabic words. . . . But more needs to be done.[262]

As improvement, Judge Brown pointed to examples of undefined jargon, confusing organization, and poorly explained complexities.[263] Then he suggested plain language will help decrease lawsuits over contract ambiguity even if they do not disappear and insureds will make informed decisions about insurance.[264] Judge Brown recommended the Wisconsin Bar Association, plaintiffs' bar, and defense bar create a committee to award writers of well-written policies and "spur a Plain English movement in the writing of policies."[265]

Empirical research is needed. Here again, Jeremy McClane's work comes in handy. McClane concluded using plain language in federal securities filings did not affect deal speed or significantly save issuers legal fees but did impact "the outcome of the deal, and thus matters to investors, either because it affects the intelligibility of disclosure, or because better drafting forces more information to be disclosed in the first place."[266] McClane concluded "it is unclear whether stylistic regulation is effective as an empirical matter."[267]

Regardless of the empirical challenges of measuring effects, there is little evidence that plain language laws have had widespread effects. Consider consumer protection, the largest concentration of plain language laws where nearly five hundred plain language laws provide coverage.[268] Despite such a large number of laws, studies universally agree consumer contracts have abysmal readability.[269] Nonetheless, a compelling and growing body of literature and anecdotes shows that voluntary adoption of plain language delivers many benefits including increased readability.[270] The seemingly conflicting results raise questions about the need for plain language laws, and whether a combination of coverage, standard, and enforcement decisions have weakened their efficacy. Big questions remain about the effects of plain language laws and how to measure them; whether the effects vary depending on the

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262. *Com. Union Midwest Ins. Co. v. Vorbeck*, 674 N.W.2d 665, 677 (Wis. Ct. App. 2003) (Brown, J., concurring).

263. *Id.* at 677–79 (Brown, J., concurring).

264. *Id.* at 679 (Brown, J., concurring).

265. *Id.*

266. McClane, *supra* note 87, at 269–70.

267. *Id.* at 268.

268. Blasie, *supra* note 93, at 486.

269. Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 60–82 (2023) (summarizing studies of "contractual non-transparency practices" to demonstrate that these practices severely hinder consumer readability).

270. *See* KIMBLE, *supra* note 56, at 103–05.

reader, document, or context; and whether different designs of laws could have different effects. All are worthy of scholarly inquiry.

III. COMMON LAW PLAIN LANGUAGE

With nearly eight hundred codified plain language laws, one might assume that courts are powerless to impose plain language requirements. After all, with legislatures and regulators so involved, there is likely little elbow room for courts.

At times, courts suggested this assumption is correct. In a memorable 1984 opinion, the Supreme Court of Mississippi chastised a district attorney's form indictment for breaking and entering, which included incomplete sentences and legalese.[271] The trial court had

> repeatedly begged for six years or five years for the district attorney not to use this form. It is very poor English. It is impossible English. . . . I again ask the district attorney not to use this form. It's archaic. Even Shakespeare could not understand the grammatical construction of this indictment.[272]

Nonetheless, the Court upheld the form because the relevant criminal procedure rule only required the indictment to be "plain, concise and definite" and the Court knew "of no constitutional or natural law that might supplement" the rule with a requirement of basic grammatical compliance; "[e]stablishment of a literate bar is a worthy aspiration."[273]

But it turns out this case is an anomaly. When examining citing references to all 700-plus plain language laws, I discovered courts are intensely involved in crafting plain language standards. At times, they are interpreting codified plain language laws with considerable discretion. Other times, they are unilaterally creating and imposing their own plain language requirements in areas not covered by codified plain language laws. Sometimes they import standards from plain language laws; other times they create their own standard. This Part describes this body of court-made law and labels it "common law plain language," because courts develop it on a case-by-case basis.

A. Notice and Waiver Requirements

In a variety of settings, codified laws require individuals or entities to receive a written notice. These notices might explain the recipient's rights, trigger a recipient's legal obligation, or satisfy a legal

271. *Henderson v. State*, 445 So. 2d 1364, 1366–69 (Miss. 1984).
272. *Id.* at 1366.
273. *Id.* at 1368.

requirement. Two common ways of challenging such a notice are: (1) contending the notice was inadequate; and (2) when the notice constitutes a waiver of rights, contending the waiver was not made knowingly and voluntarily by the recipient. In both instances, courts have imported or expanded on plain language requirements.

1. ADEQUACY REQUIREMENT

To determine the adequacy of a legally required notice, courts often examine both the notice's substance and form. More and more, that examination includes determining whether the notice uses plain language.

The presence or absence of plain language can affect how courts weigh an act or omission following receipt of a written notice. For example, an Illinois case pivoted on whether a death certificate made the next of kin sufficiently aware of the cause of death which would start the clock on the claim's statute of limitations.[274] The court considered the certificate's lack of plain language in finding it did not trigger the clock.[275] A federal trial court concluded a plaintiff "intentionally and in bad faith misrepresented his financial status" on an *in forma pauperis* application.[276] The court also said that "[w]hile he claims he misunderstood the IFP form, the Court questions this explanation in light of the plain language of the form itself."[277]

Some courts even consider plain language when assessing the adequacy of a verbal notice. Iowa criminal law waivers provide a good illustration. Under Iowa law, many criminal defendants have argued they did not waive the right to challenge their guilty pleas because the trial court did not adequately advise them of the need to file a motion to preserve such an argument.[278] But Iowa courts repeatedly reject this argument when the trial judge used plain language during a hearing.[279]

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274. *Fure v. Sherman Hosp.*, 380 N.E.2d 1376, 1386 (Ill. App. Ct. 1978).

275. *Id.* ("Because the widow did not within 2 years translate 'Mallory Weiss Syndrome' into a discrepancy between the treatment and the actual illness is hardly a reason to deny her a right to try her case.").

276. *Johnson v. Working Am.*, No. 1:12CV1505, 2013 WL 3822232, at *5 (N.D. Ohio July 23, 2013).

277. *Id.*

278. *See, e.g.*, *State v. Thornburg*, No. 16-2019, at *2 (Iowa Ct. App. Sept. 13, 2017).

279. *See, e.g.*, *id.* at *3 ("While the court did not use the specific words 'appeal' or 'waive,' the court's plain-language explanation informed Thornburg that he had only a limited time to point out any mistakes."); *State v. Abrahamson*, No. 06-0383, at *2 (Iowa Ct. App. May 23, 2007) ("Given the court's statements to Abrahamson, outlining in 'plain English' the consequences of the rule coupled with the clear indication of Abrahamson's understanding of the functioning of the rule, we find there was substantial compliance with rule 2.8(2)(d)."); *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006), *superseded in part on other grounds by* Iowa Code §§ 814.6(1)(a), 814.7 ("Instead of

Shifting to the Due Process context, lack of plain language supports a finding of inadequate notice. In *Walters v. Reno*,[280] a federal court found a class action Due Process violation from immigration notices and orders of alleged immigration law violations that described the administrative hearing process and recipient's rights.[281] Due Process required the notices to be "reasonably calculated, under all the circumstances," to make recipients aware of the pending case and an opportunity to object.[282] In addition to the class members' language barriers and lack of education, the court noted the notices used "highly technical, legalistic language."[283] The court found the "confusing nature of this language, whether in English or Spanish, is manifestly evident from the record," pointing to testimony that "[m]ost, if not all, of the aliens who testified stated that they did not understand the forms, and did not realize that they faced permanent exclusion."[284]

Evidence also showed many federal agents did not understand the forms.[285] Ironically, an order written in plain language that accompanied the notices "profoundly exacerbated" the confusion because of how it interacted with the incomprehensible notices.[286] Another class action reached a similar conclusion, finding Medicare claim notices violated Due Process.[287] "First, they are incomprehensible to most of the people who receive them."[288] The evidence "clearly established that the review notices could not be understood by the great majority of the beneficiaries who received them" and were "written at a level well beyond most in this segment of the population, with no discernable added benefit from complexity in information provided."[289] Not pulling its punches, the court declared the "language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English."[290] Lastly, the court reasoned the government burden to write in a clear manner was not substantial.[291]

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quoting rule 2.8(2)(d) verbatim, the court performed its duty commendably by using plain English to explain the motion in arrest of judgment.").

280. *Walters v. Reno*, No. C94-1204C, 1996 WL 897662 (W.D. Wash. Mar. 13, 1996).

281. *Id.* at *15.

282. *Id.* at *10 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)).

283. *Id.* at *10–11.

284. *Id.* at *11.

285. *Id.* at *4.

286. *Id.* at *11.

287. *David v. Heckler*, 591 F. Supp. 1033, 1035 (E.D.N.Y. 1984).

288. *Id.* at 1042.

289. *Id.* at 1042–43.

290. *Id.* at 1043.

291. *Id.* In 1983, the First Circuit found a food stamp reduction notice violated of Due Process in parts because of its deficient form. *Foggs v. Block*, 722 F.2d 933, 938

Thus, regardless of the statutory, common law, or constitutional notice adequacy requirement courts are applying, many courts have added plain language as a factor when considering such requirements.

2. VOLUNTARY AND KNOWING REQUIREMENT

Sometimes how recipients respond to a notice can waive rights. When that occurs, some legal doctrines will only enforce that waiver if the facts show the recipients voluntarily and knowingly waived their rights. As part of that analysis, courts often examine the presence or absence of plain language.

As an example of a statutory waiver of rights, consider the Age Discrimination in Employment Act. The Act is a codified plain language law in the form of a federal regulation that applies a Descriptive Standard: a waiver under the Act is only valid if made voluntarily and knowingly, which requires using language "geared to the level of understanding of the" signatory.[292] *Romero v. Allstate Insurance Co.*[293] shows how courts have considerable discretion when interpreting a Descriptive Standard. *Romero* held a waiver with a critical, solitary, 203-word-long sentence filled with legal jargon satisfied the Descriptive Standard.[294] Even though the sentence "is hardly the model of clarity and certainly is less preferable to the use of several shorter sentences," the court found it met the standard because the sentence was "not buried at the bottom of a contract, but rather [was] highlighted for the employee,"

(1st Cir. 1983) (cleaned up) ("[T]he form of the notice was constitutionally inadequate owing to its unfamiliar language, poor composition, small print, exclusive use of capital letters, and excessive line length. . . . [T]he December notice was difficult to read, relatively difficult to comprehend, ambiguous (in that it indicated only that benefits would be reduced or terminated), and that it lacked the specific information necessary to allow recipients to determine if a calculation had been made."). The Supreme Court reversed without diving into the format of the notice. *Atkins v. Parker*, 472 U.S. 115, 131 (1985) ("Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."). *See generally Stevenson v. Reed*, 391 F. Supp. 1375, 1377–79, 1383 (N.D. Miss. 1975) (acknowledging inmate access to law library was ineffective because of low educational attainment of inmates and high reading level of library material but denying Due Process claim because inmates had adequate access to writ writers), *aff'd*, 530 F.2d 1207 (5th Cir. 1976).

292. 29 C.F.R. § 1625.22(b)(3)–(4) (2023). West Virginia has a similar law: no waiver of a right or claim under the West Virginia Human Rights Act is knowing and voluntary unless the waiver uses plain language "in a manner calculated to be understood by the average person with a similar educational and work background as the individual in question." W. VA. CODE R. 77-6-3 (2002).

293. *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319 (E.D. Pa.), *mem. clarifying denial of reconsideration* (2014).

294. *Id.* at 388–89.

the "provision says what it means," and another document helped clarify its meaning.[295] "Thus, the mere fact that the Release was long and contained legalese does not, in and of itself, render it incomprehensible."[296] Plus, the court considered the signatory's business background, education, and experience with the insurer and insurance contracts.[297] Thus, to apply this Descriptive Standard the *Romero* Court decided to examine language features like sentence length, location, and highlighting, plus factors about the signatory like education and familiarity with the content.

Even when not required by statute, courts sometimes look at plain language to determine if a waiver was made voluntarily and knowingly. For example, when assessing whether a contractual waiver of ERISA claims was made knowingly and voluntarily, a federal court noted the contract's use of plain language.[298]

Turning to the intersection of contractual waivers and constitutions, courts will only enforce a contractual waiver of the Seventh Amendment right to a jury trial when the waiver was made knowingly and voluntarily.[299] To determine if a waiver meets this standard, courts consider many factors including the "clarity of the waiver."[300] A Tennessee federal court found such a contractual waiver to be clear because it used plain language and a high school graduate could understand it.[301]

To be sure, not all courts require plain language for constitutional rights waivers. For example, in assessing whether a defendant "understandingly waived his right to conflict-free representation," Colorado courts examine whether the defendant voluntarily, knowingly, and intelligently relinquished the right.[302] In a 1990 case, a criminal defendant argued his waiver was invalid because he did not receive

295. *Id.*

296. *Id.* at 398; *see also Ridinger v. Dow Jones & Co., Inc.*, 717 F. Supp. 2d 369, 374 (S.D.N.Y. 2010) ("While the Agreement is nevertheless scarcely a model of 'plain English' draftsmanship, it adequately conveys the limitations that Ridinger accepted in exchange for enhanced severance pay. There also is no indication that any of the undertakings set forth in the Agreement were couched in terms too complicated for Ridinger to understand."), *aff'd*, 651 F.3d 309 (2d Cir. 2011).

297. *Romero*, 1 F. Supp. 3d at 390.

298. *Yablon v. Stroock & Stroock & Lavan Ret. Plan & Tr.*, No. 01 CIV.452, 2002 WL 1300256, at *6 (S.D.N.Y. June 11, 2002), *aff'd*, 93 F. App'x 329 (2d Cir. 2004), *opinion amended and superseded*, 98 F. App'x 55 (2d Cir. 2004).

299. *Dennis v. G4S Secure Sols. (USA), Inc.*, No. 1:20-CV-46, 2021 WL 6275630, at *3 (E.D. Tenn. Jan. 28, 2021).

300. *Id.*

301. *Id.* at *4–5.

302. *People v. Czemerynski*, 786 P.2d 1100, 1105–06 (Colo. 1990).

information in plain language.[303] The Colorado Supreme Court disagreed, concluding:

> [T]he court and counsel used appropriate language to advise him . . . . Our preference for plain English does not mean that a trial court is required to avoid all use of legal terms when advising a defendant. . . . While the record might have been more fully developed on the waiver issue, it is adequate for us to conclude that the defendant understandingly waived his right to conflict-free representation.[304]

Therefore, voluntary and knowing waiver requirements are an area courts have expanded on statutory plain language requirements or imported their own plain language requirements.

B. Contract Law

Courts have imported plain language requirements into contract law doctrines. In particular, the use or absence of plain language in a contract affects how courts interpret a contract and whether courts enforce a contract.

1. AMBIGUITY AND MEANING

Courts usually resolve contractual ambiguities against the drafter.[305] This principle often applies in the insurance context under the doctrines of *contra proforentum* or the reasonable expectations doctrine.[306] More and more, plain language affects whether courts find a contract ambiguous.

Courts consider the use or nonuse of plain language to determine if an insurance policy is ambiguous. For example, invoking the doctrine of

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303. *Id.* at 1106.

304. *Id.*; *see also Kinney v. Nogan*, No. CV 17-5608 (MCA), 2020 WL 1466361, at *7 (D.N.J. Mar. 26, 2020) ("Petitioner has not . . . provided any precedent that requires trial courts give a 'plain English' explanation of a [jury] charge.").

305. 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2022).

306. *See, e.g.*, Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1078 (2010) (describing doctrines); *Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.*, 570 N.Y.S.2d 51, 52 (N.Y. App. Div. 1991) (ambiguities are resolved against the insurer), *aff'd as modified*, 607 N.E.2d 795 (N.Y. 1992); *accord Aetna Ins. Co. v. Stevens*, 229 So. 2d 601, 602 (Fla. Dist. Ct. App. 1969) ("Florida courts have held in many cases, some of which are cited in the cases cited in our memorandum opinion, that ambiguity is resolved against the insurer. If this insurance company had no intention of defending an electrical contractor accused of negligent *installation* (not *manufacture*) after completion of his work it should have said so in plain English.").

reasonable expectations and referencing a plain language regulation, a Delaware court found ambiguity in an insurance policy because "the terms as used differ from the term as ordinarily understood and is so convoluted as to cause confusion to the reader."[307] Conversely, the New York Court of Appeals refused to find ambiguity when a clause used plain language because to "divine ambiguity here would violate that principle and would defeat the use of plain English language in this insurance policy and clause."[308] When an Ohio litigant tried to argue an insurer's compliance with a plain language law rendered a contract ambiguous, the court described the argument as "highly ironic" and "more than a little specious" as the statute decreases ambiguity.[309] While plain language is a strong factor in determining ambiguity,[310] its presence or absence is not always dispositive.[311]

Even if a clause is unambiguous, sometimes the document's overall lack of plain language can cause ambiguity. In *Badger Mutual Insurance Co. v. Schmitz*,[312] the Wisconsin Supreme Court found the poor drafting of an insurance policy rendered an otherwise "unambiguous clause unenforceable."[313] The policy was "a maze that is organizationally complex and plainly contradictory," that "sends several false signals to the insured" and "is not user-friendly," which created enough "confusion, ambiguity, and illusory coverage in the context of the entire

307. *Cintron v. Universal Underwriters Grp.*, 601 A.2d 1051, 1056 (Del. Super. Ct. 1990), *aff'd*, 586 A.2d 1203 (Del. 1990).

308. *Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.*, 607 N.E.2d 795, 797 (N.Y. 1992); *see also Steinhauer v. Liberty Mut. Ins. Co.*, No. 3:18-CV-1416-JR, 2019 WL 3559474, at *7 (D. Or. May 21, 2019) (finding insurance policy was not ambiguous because "the contract clearly spells out that requirement in plain English"); *Hill v. Wackenhut Servs. Int'l*, 865 F. Supp.2d 84, 97 (D.D.C. 2012) (finding meeting of minds on arbitration clause in part because clause used plain English); Mark Cooney, *Style Is Substance: Collected Cases Showing Why It Matters*, 14 SCRIBES J. LEGAL WRITING 1, 3, 15 (2011–12) ("For example, legalese can doom exculpatory releases designed to avoid personal-injury suits. On the flip side, courts have cited the absence of legalese as a reason to enforce a release. . . . [A] court may be reluctant to enforce a potentially harsh contractual provision, such as an indemnity clause in a consumer document, if that provision is "buried at the end of a run-on sentence.").

309. *See Tscherne v. Nationwide Mut. Ins. Co.*, No. 81620, 2003 WL 22724630, at *1 (Ohio Ct. App. Nov. 20, 2003).

310. *See, e.g.*, *Harris v. St. Vincent Healthcare*, 305 P.3d 852, 857 (Mont. 2013) (rejecting claim of ambiguity when contract clauses used plain language). But just because a contract describes itself as using plain language does not mean a court will not find the contract ambiguous. *See H.E.D. Inc. v. Konica Minolta Bus. Sols. U.S.A. Inc.*, No. 2:14 CV 311, 2017 WL 4340205, at *3 (N.D. Ind. Sept. 29, 2017) (finding contract ambiguous even though contract asserted it used plain language).

311. *See Plastic Surgery Ctr., P.A. v. Cigna Health & Life Ins. Co.*, No. 3:17-cv-2055-FLW-DEA, 2021 WL 1686772, at *6 (D.N.J. Apr. 29, 2021) (insurance plan was not ambiguous even though provision was "far" from plain language).

312. *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 223 (Wis. 2002).

313. *Id.* at 236–38.

policy" to "render an otherwise unambiguous, although poorly labeled" clause unenforceable.[314]

Plain language's role has become so important that courts actively encourage insurers to use it. For example, when interpreting an insurance contract in a way adverse to the insurance company, an Indiana court explained, "if the insurance company intended a different interpretation, it should have stated so in plain English so that their policyholders understand what is necessary to protect their interests and collect their benefits under the policy."[315] The court reached this conclusion even though the insurance company may have had a different intent: "[w]hile we recognize that this may have been Auto–Owner's intent, it should have stated so in plain English in its policy documents so that its policyholders know how to protect their interests and collect their benefits."[316] Likewise, a New York federal court awarded attorney fees for an ERISA violation in part to incentivize insurance companies to "draft plain policy language in plain English and expressly delineate policy exclusions."[317]

2. Clarity and Unambiguous Intent Requirements

When certain areas of contract law require heightened clarity, some courts have begun examining the use or absence of plain language.

A good example is the 1979 case of *Gross v. Sweet*,[318] where the New York Court of Appeals imported a statutory plain language standard into the common law. The court held a plaintiff could sue a parachute jumping company for negligence despite a contractual release clause exempting the company from all liability.[319] New York common law permitted releases of negligent conduct only if the provision uses

314. *Id.* at 238. The next year, the Wisconsin Supreme Court backpedaled. *Folkman v. Quamme*, 665 N.W.2d 857, 869 (Wis. 2003) ("Aspirational goals and admonitions on how to avoid ambiguity are admittedly different from minimum legal standards. *Schmitz* and its predecessors do not demand perfection in policy draftsmanship. . . . To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings.").

315. *Auto-Owners Ins. Co. v. Benko*, 964 N.E.2d 886, 887 (Ind. Ct. App. 2012).

316. *Id.* at 891.

317. *McLean v. Cont'l Cas. Co.*, No. 95 CIV. 10415 HB, 1997 WL 566117, at *3 (S.D.N.Y. Sept. 11, 1997); *see also Auto-Owners Ins. Co.*, 964 N.E.2d at 887 ("[I]f the insurance company intended a different interpretation, it should have stated so in plain English so that their policyholders understand what is necessary to protect their interests and collect their benefits under the policy.").

318. *Gross v. Sweet*, 400 N.E.2d 306 (N.Y. 1979).

319. *Id.* at 307.

"unmistakable language."[320] To be "unmistakable language," the terms must be both "unambiguous" and "understandable."[321] The provisions "should not compel resort to a magnifying glass and lexicon. Of course, this does not imply that only simple or monosyllabic language can be used in such clauses. Rather, what the law demands is that such provisions be clear and coherent (*cf.* General Obligations Law, § 5-702)."[322] Note the citation to Section 5-702 (New York's plain language consumer contract law), which did not apply to the parachute contract. The law only covered contracts for residential and personal property leases.[323] And the plain language law could not void covered contracts or defend against enforcement.[324] Nonetheless, the court used the codified law's standard to explain the "unmistakable language" common law standard.

Elsewhere, courts reference plain language as evidence of whether provisions meet a clarity standard. Consider California, where an insurance policy risk carveout must be "plain and clear."[325] One court held such a clause satisfies the "plain and clear" requirement because it used plain language and did not contain insurance jargon.[326] Likewise, Hawaii law looks for whether there was unambiguous intent to agree to arbitration.[327] In finding unambiguous intent, one court reasoned, "[i]t is written in plain English with no fine print or cross-references to other documents. . . . the plain language of the arbitration agreement demonstrates the parties' mutual assent to arbitrate."[328]

Courts even consider plain language to determine whether there was mutual assent to a contract's terms. A great illustration comes from New Jersey. New Jersey requires all contracts to have mutual assent and requires contracts that waive rights to use clear and unmistakable language.[329] A 2014 New Jersey Supreme Court decision held arbitration clauses will be enforced when they use plain language that is understandable to the reasonable consumer or else they are unenforceable for lack of mutual assent.[330] In defining what makes such a waiver understandable, the court imported the standard from the New Jersey

320. *Id.* at 309.

321. *Id.*

322. *Id.*

323. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 2022).

324. *Id.* § 5-702(b).

325. *Fussell v. AMCO Ins. Co.*, No. 2:11-cv-02766-GEB-EFB, 2013 WL 127675, at *10 (E.D. Cal. Jan. 9, 2013).

326. *Id.*

327. *Gabriel v. Island Pac. Acad., Inc.*, 400 P.3d 526, 535 (Haw. 2017).

328. *Id.* at 536.

329. *Atalese v. U.S. Legal Servs. Grp.*, 99 A.3d 306, 313 (N.J. 2014).

330. *Id.* at 314.

plain language consumer contract law.[331] Under that law, courts have discretion to void noncompliant contracts but voiding is not automatic.[332] Yet, by incorporating the plain language standard into the mutual assent requirement, the court seemed to change the stakes of noncompliance. Indeed, in a 2016 case the court refused to enforce an arbitration clause that violated the plain language law's standard, noting the clause was in nine-point font and had a "more than 750-word arbitration clause set forth in thirty-five unbroken lines."[333] In 2019, the court again struck down an arbitration clause for failure to follow the plain language law based on "small typeface, confusing sentence order, and misleading caption."[334]

Thus, courts have used their common law control of contract law to extend the reach of plain language statutes or to import plain language into contract law.

3. ENFORCING UNENFORCEABLE PLAIN LANGUAGE LAWS

Even unenforceable plain language laws influence courts. When consumers are unable to sue for a violation of a plain language consumer contract law, some courts have found ways to enforce such laws.

In *Gross v. Lloyds of London Insurance Co.*,[335] the Wisconsin Court of Appeals interpreted an insurance policy governed by Minnesota law.[336] The insured contended the policy violated the Minnesota plain language statute because it used legal terminology, lacked a cover sheet, and lacked bold warnings.[337] While correct, the court held the statute contained no penalty for violation apart from disapproval by the Minnesota Commissioner of Insurance.[338] Because the Commissioner had approved the noncompliant policy and there was no other basis for relief, the court could not void the contract.[339] On appeal, the Wisconsin Supreme Court reversed. Without addressing the plain language statute, the court invalidated the provision for being added during a policy renewal process through a deficient notice.[340] Because the new language was an exception

331. *Id.*
332. N.J. STAT. ANN. §§ 56:12-11, -17 (West 2023).
333. *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181 (N.J. 2016).
334. *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 199 A.3d 766, 781 (N.J. 2019).
335. *Gross v. Lloyds of London Ins. Co.*, 347 N.W.2d 899, 904 (Wis. Ct. App. 1984).
336. *Id.* at 903.
337. *Id.*
338. *Id.* at 904.
339. *Id.*
340. *Gross v. Lloyds of London Ins. Co.*, 358 N.W.2d 266, 271–72 (Wis. 1984).

to longstanding coverage, it needed to "be highlighted in the policy and binder by means of conspicuous print, such as bold, italicized, or colored type, which gives clear notice to the insured . . . ."[341] Essentially, the Wisconsin Supreme Court created a common law plain language standard for policy change notices that applies even to insurance policies that pass the Commissioner's review.

In 2008, the Montana Supreme Court faced a similar issue when a party tried to invalidate an insurance policy provision for noncompliance with a plain language law based on the failure to include the provision in the table of contents and notice section.[342] Both parties agreed the policy violated the plain language law.[343] Just like in *Gross*, the insurance commissioner had "sole authority to enforce" or "to seek remedies."[344] Nonetheless, although the statute barred a private right of action, it "does not prevent this Court from determining that the notice provision in the policy before us violates the laws of this State, and from refusing to enforce it."[345] The court held the provision was void and unenforceable as a matter of public policy because it violated the plain language law.[346]

These examples showcase how courts can use their power to supplement and arguably override limitations in plain language statutes and regulations.

4. UNCONSCIONABILITY

Courts have also added plain language as a factor in unconscionability analyses. When considering procedural unconscionability, many courts consider plain language features, like "hidden or unduly complex contract terms,"[347] "the use of complex

341. *Id.* at 271 (plurality opinion). Two concurrences flagged the need for deference to the Minnesota Commissioner. *Id.* at 272 (Abrahamson, J., concurring); *id.* at 273 (Ceci, J., concurring).

342. *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 959 (Mont. 2008).

343. *Id.*

344. *Id.* at 960 (quoting MONT. CODE ANN. § 33-15-338(2) (2007)).

345. *Id.*

346. *Id.*; *see also Hayes v. AMCO Ins. Co.*, No. CV 11–137–M, 2012 WL 5354553, at *7 (D. Mont. Oct. 29, 2012) (dismissing attempt to raise independent claim under plain language law); *High Country Paving, Inc. v. United Fire & Cas. Co.*, No. CV 18-163-M, 2020 WL 42722, at *3 (D. Mont. Jan. 3, 2020) (declaring insurance policy exclusion unenforceable for violating the plain language statute); *Van Vallis v. Transcon. Ins. Co.*, No. CV 07–26–M, 2008 WL 11348493, at *8–9 (D. Mont.) (denying insurer's motion for summary judgment on the issue of the enforceability of certain provisions because the insurer had failed to provide evidence of compliance with the statute), *report and recommendation adopted*, 2008 WL 11349695 (D. Mont. Aug. 28, 2008).

347. *Laibow v. Menashe*, Civ. No. 19-4549, 2019 WL 6243368, at *8–9 (D.N.J. Nov. 21, 2019); *see also Hampden Coal, LLC v. Varney*, 810 S.E.2d 286, 297–

legalistic language,"[348] or "the hiding of clauses in fine print or inconspicuous places . . . [and] phrasing clauses in language incomprehensible to an average person without legal training, or phrasing clauses in such a way so as to divert from the problems they raise or the rights relinquished under them."[349] Other courts explicitly consider whether a contract uses plain language in conducting a procedural unconscionability analysis.[350] Some courts even consider plain language as part of a substantive unconscionability analysis.[351]

So even if no plain language statute or regulation applies, or perhaps applies but does not void a contract for noncompliance, courts have added their own backstop by at least considering plain language in an unconscionability analysis.

C. Other Doctrines

Plain language has also affected how parties support their claims and what kinds of evidence courts consider.

More and more parties use the absence of plain language to support claims, with mixed success. In 2009, a New York federal court held the New York City Fire Department's written examinations constituted employment discrimination and "unfairly excluded hundreds of qualified people of color," in part because the exams were not written at an appropriate reading level.[352] Based on the results of a readability formula, the court found the exams had an inappropriately high reading level that exceeded a twelfth-grade level.[353] Meanwhile, in a 2001 case, a criminal

98 (W. Va. 2018) (considering "inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties" that include "whether each party had a reasonable opportunity to understand the terms of the contract"); *Sierra v. Isdell*, No. 09-cv-124-Orl-19KRS, 2009 WL 2179127, at *4–5 (M.D. Fla. July 21, 2009) ("Procedural unconscionability . . . turns on the bargaining power of the parties and their ability to understand the relevant terms, . . . [including] whether each party had a reasonable opportunity to understand the terms.").

348. *Bell v. Koch Foods of Miss., LLC*, 358 F. App'x 498, 503 (5th Cir. 2009).

349. *Stormont-Vail Hosp. v. Spurling*, No. 110,979, 2014 WL 4082469, at *5 (Kan. Ct. App. Aug. 15, 2014).

350. *See, e.g.*, *id.*; *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 888 (Wis. Ct. App. 2004); *In re Park W. Galleries, Inc., Mktg. & Sales Pracs. Litig.*, MDL No. 09–2076, 2010 WL 2640262, at *3 (W.D. Wash. June 25, 2010); *Sierra*, WL 2179127, at *4–5; *Sanchez v. Brown Auto., Inc.*, B306713, 2021 WL 1608575, at *7 (Cal. Ct. App. Apr. 26, 2021).

351. *See, e.g.*, *Copello v. Boehringer Ingelheim Pharms. Inc.*, 812 F. Supp. 2d 886, 896–97 (N.D. Ill. 2011); *H.H. Franchising Sys., Inc. v. Pawson*, No. 17-CV-368, 2018 WL 1456131, at *6 (S.D. Ohio Mar. 23, 2018); *Hampden Coal*, 810 S.E.2d at 295.

352. *United States v. City of New York*, 637 F. Supp. 2d 77, 79, 122–23 (E.D.N.Y. 2009).

353. *Id.* at 122–23.

defendant argued his defense attorney was ineffective by not enforcing the plea agreement.[354] Although ultimately rejecting the claim, the Eighth Circuit had to "decipher the poorly written plea agreement," and pointed to the SEC handbook on plain language before concluding the agreement was "a monument to legalese. The paragraph's three sentences drown in clauses. The key middle sentence runs over fifty words. The middle sentence also makes unfortunate use of the 'and/or' phrase."[355]

Plain language also affects evidentiary decisions. For example, courts will not consider external representations when a contract uses plain language.[356] According to one court, "[g]iven the plain language on the face of the signature page," a signatory was negligent for relying on an alleged oral representation.[357] Similarly, the presence or absence of plain language affects whether courts permit expert testimony on contract language.[358]

The use or absence of plain language in documents also affects litigation strategies and costs. Parties now use plain language experts to opine on the understandability of legal documents, like class action notices, election ballots, operator manuals, consumer disclosures, advertisements, and contracts.[359]

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354. *United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001).

355. *Id.* at 818–20, 819 n.3.

356. *Demarco v. LaPay*, No. 09–CV–190, 2009 WL 3855704, at *9 (D. Utah Nov. 17, 2009) (concluding complaint did not allege an investment contract amounting to a federal security).

357. *Generale Bank v. Wassel*, 779 F. Supp. 310, 315 (S.D.N.Y. 1991).

358. *See Or. Env't Council v. Kunzman*, 636 F. Supp. 632, 634–36 (D. Or. 1986) (considering conflicting expert testimony about how to measure readability and concluding environmental impact statement was written in language public could understand), *aff'd*, 817 F.2d 484 (9th Cir. 1987). *Compare Suzlon Wind Energy Corp. v. Shippers Stevedoring Co.*, 662 F. Supp. 2d 623, 668–69 (S.D. Tex. 2009) (excluding expert testimony on contract because contract uses plain language so expert's testimony would not assist the jury), *with N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, C.A. No. 88C-JA-155, 1995 WL 628447, at *1–2 (Del. Super. Ct. Apr. 22, 1995) (observing that the court and jury would benefit from insurance contract expert because "the contracts are complex commercial insurance policies which are not written in a layperson's 'plain English' and which have evolved from a highly specialized commercial environment"), *and Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1076–77 (Del. Super. Ct. 1992) ("Because of the specialized nature of the language used in the insurance contracts at issue and the fact that these are not 'plain English' policies, the court considered expert testimony [to determine the contract's meaning].").

359. *See, e.g.*, Affidavit of William Lutz at 2–18, *Am. Council of Life Insurers v. Vt. Dep't of Banking*, No. 50-1-02 Wncv (Super. Ct. Vt. Feb. 12, 2004), 2004 WL 578737 at *7 (evaluating financial and insurance company privacy notices for compliance under federal law); Affidavit of Todd B. Hilsee on Settlement Notices & Notice Plan at 27–30, *Larson v. AT&T Mobility LLC*, Civ. Act. No. 07-5325 (D.N.J. Mar. 21, 2011), 2011 WL 1085255 (class action notices); Readability Issues & State of Alaska & City of Bethel Ballot Propositions Since January 2000, *Nick v. Bethel*, Case No. 07-cv-0098 (D. Alaska filed May 13, 2008); A Pallet Jack Injury Case: Human Factors Analysis at 4, *Beard v. Mighty Lift, Inc.*, 224 F. Supp. 3d 1131 (W.D. Wash. 2016) (Case No. C15–

As party reliance on and use of plain language grow, so too will court's reliance on and use of plain language. Common law plain language is likely on the rise.

IV. THE ROLE OF CODIFIED AND COMMON LAW PLAIN LANGUAGE LAWS

The preceding section shows writing legal documents is more than an issue of skill or strategy. Yes, skill and strategy are involved, but what the hundreds of laws and cases on plain language show is that the design of legal documents is now doctrinal and regulated. This Part details two conclusions from the above findings. *First*, plain language law design implicates public policies, and those policies are different from the policies driving the covered documents' substance. *Second*, the inconsistencies in plain language laws and uncertainty about their effectiveness creates an untenable national patchwork and courts are well-suited to find the most effective plain language law standard.

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146) (pallet jack operator's manual); Human Factors Incident Report at 7, *Sherwood v. Jeld-Wen, Inc.*, No. 04-CV-03020 (E.D. Wash. filed Feb. 24, 2005) (safety instructions); Expert Report of Gail Stygall at 4–9, *Hampton v. Allstate Corp.*, No. 13-cv-00541 (W.D. Wash. filed Nov. 15, 2013) (insurance policy); Report Prepared for William D. Chapman at 5–6, *Merck Eprova AG v. Gnosis S.P.A*, 901 F. Supp. 2d 436 (S.D.N.Y. 2012) (No. 07 Civ. 5898) (consumer label); GC Services: Analysis of Debt Collection Documents, *Sims v. GC Servs. L.P.*, No. 03-4077 (C.D. Ill. Mar. 16, 2005), 2005 WL 3988380; Declaration of Jens Grossklags at 9–11, *Baxter v. Intelius, Inc.*, Case No. 09-cv-01031 (C.D. Cal. Sept. 16, 2010), 2010 WL 3791487 (consumer offer); Analysis of Loan Solicitation Document at 4–5, *Murray v. Indymac Bank, F.S.B.*, No. 04 C 7669 (N.D. Ill. June 13, 2005), 2005 WL 1866043; Declaration of Wendy Levin Newby, *In re Cmty. Bank of N. Va.*, 467 Fed. Supp. 2d 466 (W.D. Pa. 2006) (No. CV-03-0425) (class action notice); Declaration of Sheryl Ann Greenwood Gowen at 4–6, *Common Cause/Georgia v. Billups*, 504 Fed. Supp. 2d 1133 (N.D. Ga. 2007) (Civil Action File No. 05–CV–201–HLM) (absentee ballot); Report of David G. Curry at 3–5, *Hernandez v. Schering Corp.*, No. 04L 9028 (Ill. Cir. Ct. Nov. 2, 2009) (drug warning and instructions); Declaration of Alan Vasquez re Dissemination of Notice to Class Members at 23–24, *Larson v. AT&T Mobility LLC*, Civil Action No. 07–5325 (D.N.J. Mar. 21, 2011) (class action notice); Report of William Lutz, *In re Paxil Litigation*, 218 F.R.D. 242 (C.D. Cal. 2003) (No. CV 01–07937 MRP) (television drug advertisement); Declaration of Jeanne C. Finegan at 10, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 931 Fed. Supp. 2d 458 (E.D.N.Y. 2013) (No. 06–MD–1775) (class action notice); Affidavit of Linda J. Gummow at ¶¶ 11–17, *Williams v. Progressive Halcyon Ins. Co.*, No. 05-CV-00324 (D. Wyo. 2006), 2006 WL 2232274 (prenuptial agreement); *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, Civil Action No. MDL 1632, 2006 WL 8451358, at *8 (E.D. La. Sept. 7, 2006) (class action notice drafted by expert who federal judicial center endorsed as using plain language class notices).

A. The Policy Decisions of Converting Plain Language into Law

Once a lawmaker—legislature, regulator, or court—decides to convert plain language from advice into law, the lawmaker makes at least four major policy-infused decisions.

1. ADVICE OR LAW

First, lawmakers decide to require plain language through the law, rather than other means like advice, bar reform, or market pressures.[360] Thus, the decision to convert plain language into law suggests lawmakers are concluding these other avenues of change are falling short or that a law will have more positive effects than these alternatives.

Here are a few potential reasons lawmakers might prefer implementing plain language through the law. Lawmakers may think there is symbolic value to elevating plain language into law, even if that law is unenforceable. For example, even though the Plain Writing Act of 2010 is unenforceable, it influenced certain federal agencies.[361] Alternatively, lawmakers may believe requiring plain language through an enforceable law will incentivize widespread change in industries that have resisted change.[362] Yet another reason may be that lawmakers

360. Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 235–40 (1987) (describing need for top-down pressure to convince military lawyers to use plain language); Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CAN. BUS. L.J. 408, 414–15 (1982) (supporting expansion of plain language laws because businesses have not deployed plain language quickly enough).

361. *See Report Card Grades Across 10 Years*, CTR. FOR PLAIN LANGUAGE (2023), https://centerforplainlanguage.org/2021-federal-plain-language-report-card/report-card-grades-across-10-years (last visited Mar. 19, 2023). *But see* Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 287 (2013) ("Federal agencies that deal with the public should obviously be communicating the benefits and services they provide in clear, understandable language. It should not require legislation to accomplish that goal, and it is not clear how the legislation would actually achieve that.") (quoting 156 CONG. REC. H111,7315 (daily ed. Sept. 29, 2010) (statement of Rep. Jason Chaffetz)).

362. Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination, and Tagging of Personally Identifying Information*, 10 VAND. J. ENT. & TECH. L. 553, 588–91, 598, 632 (2008) (proposing plain language law to require e-commerce privacy policies to use plain language); Benoliel & Zheng, *supra* note 28 at 257 (proposing enhancing plain language laws with a clear mechanism to determine readability, like setting an average sentence length of under twenty-five words, and adding sanctions for violations); Felsenfeld, *supra* note 360, at 414–15 (supporting expansion of plain language laws because businesses have not deployed plain language quickly enough); *see also* David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1416–21 (2018) (discussing incentives and disincentives for contract innovation while acknowledging limited innovation in certain kinds of contracts); Jensen, *supra* note 44, at 812–13 (President Clinton's memorandum emphasized time and cost savings and required government agencies to use plain language in government documents, but resulted in little change).

believe a plain language law will ensure a long-term commitment to and investment in plain language. Such a commitment helps plain language outlast changes in government administrations or private sector executive turnover.[363] In the regulatory space, plain language may be a way to improve disclosures without expanding them, a compromise to appease disclosure supporters and opponents.[364]

Keep in mind that converting plain language into law changes who controls plain language. Once converted, the parameters of plain language no longer lie with lawyers and bar leaders who understand the legal profession and attorney-client relationship. Nor do they lie with businesses and individuals who know their industry and might have expertise in document design. Nor do they lie with academics who research behavioral psychology, linguistics, and other disciplines involving how people comprehend documents. Each of these groups may have influence or a voice, but once plain language becomes part of a law, the future of plain language in that area now lies exclusively with legislatures, regulators, and courts.[365]

2. COVERAGE

Second, lawmakers decide which documents the law covers. Lawmakers choose which documents must use plain language and which retain the option of using plain language. Policies often drive that choice.

One policy driving this choice is the lawmaker's goals. Noted above, plain language has many different purported benefits ranging from access to justice to protecting consumers.[366] Coverage decisions reveal which benefits the law targets. Sometimes legislatures include the law's goal in the statute's text. Consider the legislative findings in Pennsylvania's consumer protection plain language law: "[M]any consumer contracts are written, arranged and designed in a way that makes them hard for consumers to understand. Competition would be aided if these contracts were easier to understand;" plain language "will protect consumers from making contracts that they do not understand. It will help consumers to

363. *See, e.g.*, Exec. Order No. 12,291, 3 C.F.R. 13193 (1981) (revoking prior presidential plain language executive order).

364. McClane, *supra* note 87, at 268.

365. Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 108–09 (1995) ("[W]hile plain English statutes are a definite step in the right direction, achieving plain English will require more than just legislation. It will require a good faith effort on the part of contract drafters to provide coherent language and to comply with the ordinary rules of English grammar that have always produced clear writing.").

366. *See supra* Section I.C.

know better their rights and duties under those contracts."[367] Other times court opinions detail a statute's goals. For example, a Pennsylvania court described an insurance plain language law as protecting "consumers by completely informing them of their choices and the costs associated with each" without imposing a "costly burden on insurers."[368] The New Jersey Supreme Court made a similar point: "[u]nderlying that requirement is the legislative judgment that the average insured can better understand his or her policy" when it uses plain language.[369] When examining an election plain language law, the Pennsylvania Supreme Court explained the law "ensures that voters will receive all the information that they need to make an informed choice."[370]

Coverage decisions involve more than just choosing the kind of document to cover. Lawmakers are also choosing which specific documents and sometimes which parts of documents to cover. For instance, a Kentucky law covers all administrative hearing notices,[371] while a Maine law covers only environmental administrative hearing notices,[372] and an Idaho law only covers a certain part of a racing commission administrative hearing notice.[373]

Equally telling are coverage limitations. For instance, many consumer-contract plain language laws exclude commercial contracts or contracts worth large amounts.[374] Such exclusions suggest lawmakers intended the benefits to target only everyday individual consumers or perhaps standard form contracts. Alternatively, such limitations might suggest lawmakers believe a plain language law is unnecessary when contracts are negotiated by parties represented by lawyers or perhaps that the purported benefits of plain language do not flow to the same degree in these excluded contracts. To be sure, this reasoning may be flawed. Businesses sign standard form contracts like leases and loans just like individuals do, and there is little evidence contracts negotiated and customized by lawyers are any more understandable than template

367. 73 PA. CONS. STAT. § 2202 (2023); *see also Grimm v. First Nat'l Bank*, 578 F. Supp. 2d 785, 793 n.15 (W.D. Pa. 2008) (acknowledging the Pennsylvania consumer protection law's purpose); *In re Derienzo*, 254 B.R. 334, 345 (Bankr. M.D. Pa. 2000) (same).

368. *Donnelly v. Bauer*, 683 A.2d 1242, 1251 (Pa. Super. Ct. 1996) (Del Sole, J., dissenting), *aff'd*, 720 A.2d 447 (Pa. 1998).

369. *Longobardi v. Chubb Ins. Co.*, 582 A.2d 1257, 1261 (N.J. 1990).

370. *Sprague v. Cortes*, 145 A.3d 1136, 1144 (Pa. 2016).

371. KY. REV. STAT. ANN. § 13B.050(3) (West 2023).

372. 06-096-003 ME. CODE R. § 12(A)(3)(a) (LexisNexis 2023).

373. IDAHO ADMIN. CODE r. 11.04.04.071(4) (2022) (description of conduct at issue in notice of disciplinary hearing of racing commission).

374. *See, e.g.*, ME. REV. STAT. ANN. tit. 10, §§ 1121–1124 (West 2023) (defining consumer and limiting coverage to consumer leases of goods and loans for less than $100,000).

contracts. Indeed, some plain language laws apply to commercial contracts.[375]

Just because a law does not apply to a document does not mean the law does not affect that document. When a law forces drafters to learn plain language, there is some evidence of a bleed-over effect into other kinds of documents the drafter creates. For example, even when SEC plain language regulations covered only parts of public filings, compliant documents tended to use plain language throughout.[376] In other words, once a drafter acquires the skill of writing in plain language, that skill is always "on."

Coverage decisions also reveal a lawmaker's judgment on who bears compliance costs. Depending on a law's scope, costs could include writing training or revising legions of templates. Depending on who the law covers, those costs might be borne by the individuals and entities affected, or the lawyers or drafters they hire. Some laws even contemplate these costs. A federal environmental plain language law encourages agencies to "employ writers of clear prose or editors to write, review, or edit statements,"[377] while an Ohio housing plain language law authorizes an agency to hire a readability expert.[378]

3. STANDARD

Third, lawmakers must define plain language by selecting which standard to apply. Recall there are four general kinds of plain language standards: Descriptive Standards, Readability Standards, Features Standards, and Hybrid Standards. In addition to deciding which standard produces the intended result on the reader, choosing a standard also involves carefully weighing costs and benefits.

In many ways the choice of plain language standards resembles the choice lawmakers make in the regulatory context. Imagine an environmental regulation designed to improve air quality. One version of the regulation might require factories to reduce pollutant emissions or implement air quality controls. Like Descriptive Standards, this approach grants affected parties considerable discretion in how to achieve the end result. Parties can customize their methods based on their particular context. This approach may create market competition to find the most cost-effective means of compliance. The approach also allows parties to change their method over time as new methods become available or research reveals which methods are the most effective. However, this standard is also the least predictable. Parties would likely struggle to

375. *See, e.g.*, MINN. STAT. ANN. §§ 17.942–.944 (West 2023).
376. McClane, *supra* note 87, at 292.
377. 40 C.F.R. § 1502.8 (2018).
378. OHIO REV. CODE ANN. § 5104.14 (West 2022).

know if they comply or to predict how a court or regulator will interpret the law.[379] If penalized, parties would cry foul because they were not on notice of how to comply and would argue the law is too subjective.[380] Plus, regulators charged with enforcement might water down the standard to render it ineffective. More, the approach may yield inconsistent application between different courts and regulators. Finally, the ambiguity of Descriptive Standards may cause affected parties to do the bare minimum to comply, functionally stripping the law of any meaningful effect.[381]

A different approach might limit the amount of methane a factory releases each year. Like a Readability Standard, this approach has the benefit of objective application. These objective tests mean affected parties can accurately predict whether they comply, and courts and regulators can more consistently apply the law. Affected parties can also predict whether document edits comply. However, this approach has limitations. To the extent the problem of comprehension is more than the length of words and number of words in sentences (or the problem with air quality is more than just methane), the law only addresses part of the problem. Indeed, many have criticized Readability Standards for not addressing the many causes of reader confusion.[382] In short, Readability Standards make compliance predictable and application consistent but may not have a significant effect on the problem the law hopes to solve.

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379. Rachelle R. Greer, *Introducing Plain Language Principles to Business Communication Students*, 75 BUS. COMMC'N Q. 136, 138 (2012) (criticizing plain language mandates "for lacking a clear definition [and] being too difficult . . . to adopt"); Black, *supra* note 39, at 278 (criticizing a New York plain language law as a vague standard that left too much uncertainty).

380. *See* McClane, *supra* note 87, at 268 (describing how stylistic regulations, such as SEC plain language regulations, are "tricky to enforce, in part because style is relatively subjective").

381. Black, *supra* note 39, at 278–79 ("The New York law leaves businesses uncertain about how much must be done to achieve compliance. As a result, businesses are likely to take the easier route of doing too little . . . . The vaguer the underlying standard, the greater the chance that a good faith defense will succeed. This weakens the incentive for private enforcement, leading to spotty compliance."); *see also* Serafin, *supra* note 28, at 698 (suggesting many plain language laws fail because of a lack of clear standards); Jensen, *supra* note 44, at 812 (explaining that President Carter's Executive Order had little effect because functionally, it contained no plain language standard and limited coverage, and pragmatically, bureaucrats did not know what the average citizen could understand).

382. *See, e.g.*, Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 420–22 (2014) [hereinafter Schwarcz, *Transparently Opaque*] (criticizing readability formulas and noting importance organization can play in understanding); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1326–27 (2011) [hereinafter Schwarcz, *Reevaluating Policies*] (noting same and that combining information from different provisions and "verbose and confusing grammatical structures and word choices" harm comprehension).

Yet another approach is to require factories to place a particular air filter in their smokestack. Like a Features Standard, this approach dictates a specific solution to a problem. Benefits include the predictability of compliance and consistency in application, but often at great cost because it is the most elaborate and detailed solution. The great downside of this approach is that the affected parties lack flexibility and any incentive for innovation. The solution chosen by lawmakers might not work, might not be the most effective, or might not be the most efficient or the cheapest. Even as better solutions become available, affected parties remain unable to implement them until lawmakers amend the law. Such laws only incentivize compliance, not creativity or an investment in effective communication.[383] In the worst-case scenario, the solution chosen by lawmakers worsens the problem and affected parties have no choice but to comply.[384] Plus, this approach usually consists of bright lines: avoid passive voice, limit sentence length to twenty words, etc. But such Features Standards strip parties of judgment and risk being both underinclusive and overinclusive.[385]

The final approach combines two of the others such as by requiring an air filter and requiring a decrease in a certain amount of methane. Like the Hybrid Standard, this approach inherits the advantages and disadvantages of the others.

Whether one standard is more effective than the others, or whether effectiveness varies depending on the law's goals, the documents at issue, or the readership, are areas for future inquiry. Regardless, the choice of standard by lawmakers remains a policy-infused decision with significant ramifications on those affected. And the choice can vary not just between laws but sometimes between documents or parts of documents. For example, although a Texas statute covers many different kinds of loans,

383. *See generally* Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862 (measuring the impact of "all-caps" contract language on consumer comprehension and suggesting that reliance on such requirements stifles more potentially effective innovation).

384. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-92, PRIVATE PENSIONS: CLARIFY OF REQUIRED REPORTS AND DISCLOSURES COULD BE IMPROVED 2, 36 (2013) ("Thus, it seems likely that the information in these disclosures would not be readily understandable to many average plan participants and that readability might present a challenge for participants, even when plan sponsors adopt the model notice developed by the agency.").

385. *See, e.g.*, Mary Beth Beazley, *Hiding in Plain Sight: "Conspicuous Type" Standards in Mandated Communication Statutes*, 40 J. LEGIS. 1, 16–17 (2014) ("Readers need more than just better sentence structure . . . myriad features of the written word can encourage or discourage reader engagement with the text."); Friman, *supra* note 365 at 104 ("[N]ot all short sentences are coherent, and the passive voice is perfectly acceptable when used properly.").

it requires an eighth-grade reading level for one kind of loan, ninth-grade for another, and tenth-grade for a third.[386]

4. ENFORCEMENT, PENALTIES, AND DEFENSES

Fourth, lawmakers decide if the new plain language law is enforceable and, if so, by who and with what penalties and defenses. Each decision shapes a law's effect.

Laws that charge regulators with enforcement strike a delicate balance. On one hand, such a design charges particular people with being aware of the law and enforcing it year-round. Plus, the agency has funding and the internal skillset to enforce the law. On the other hand, this design runs the risk the agency will not devote enough staff to enforcement or that the staff will not have adequate training on plain language.[387] Sometimes noncompliant documents pass regulators.[388] Plus, as administrations or employees change, regulators may vary in their interpretation or rigor when enforcing the law.[389]

Even when private parties can enforce a plain language law, penalties affect whether they exercise that right. Laws that do not offer a defense to contract enforcement, or which have limited monetary recovery, may not provide a strong enough incentive to bring a claim given litigation costs. It may be that such a plain language law violation gets tacked on to other claims, but such limitations make it less likely a prospective plaintiff would sue exclusively for violating a plain language law. Rarely raised claims might contribute to their own downfall. Since few lawyers are periodically combing caselaw and statutory codes, they may be unaware of plain language laws because they do not come across them, which in turn means fewer covered parties and fewer harmed parties being aware of these laws. If the costs of compliance exceed the costs of penalties, then affected parties likely will not comply.[390]

Likewise, the burdens of proving a plain language law violation may also discourage claims or decrease the likelihood of success. A claimant might need to hire experts because some standards are unclear. Violations of Features and Readability Standards may be more straightforward than violations of the ambiguous Descriptive Standards. Also, claimants may have significant evidentiary burdens like proving causation and actual

386. 7 TEX. ADMIN. CODE § 90.104(c)(4) (2023).

387. Black, *supra* note 39, at 286–87.

388. *See, e.g.*, *Gross v. Lloyds of London Ins. Co.*, 347 N.W.2d 899, 904 (Wis. Ct. App. 1984); *Mont. Petrol. Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 959 (Mont. 2008).

389. McClane, *supra* note 87, at 294 (describing how compliance with the SEC plain language regulations decreased over time and hypothesized potential causes included inability to enforce or slackened enforcement).

390. *Id.*

damages.[391] One court balked at a defendant's claim that the failure to define certain terms led him to incorrectly borrow money when the terms identified had no relation to the contract's core provisions.[392] A New York appellate court enforced a noncompliant insurance policy that violated the typeface requirements because the insured was not prejudiced and the noncompliant provision did not materially influence the insured's rights and liabilities.[393] How many contractual breaches are the result of confusing language is an unanswered question. But odds are slim a tenant did not pay rent because the lease was not in plain language.

Lastly, defenses also affect enforcement. Agency preapproval may stifle innovation because if businesses can get pre-approval then they have no incentive to go beyond the minimum for pre-approval.[394] A good faith defense could be an exception that swallows the rule.[395]

B. The Case for Expanding Common Law Plain Language

Assuming there should be some degree of plain language laws,[396] if the creation of plain language laws necessarily involves multiple significant policy decisions, the next question is who should make these policy decisions. With plain language appearing in constitutions, statutes, regulations, and common law, all three branches of government have been making those decisions. This Section details the potential tensions and inefficiencies when all three branches start creating laws on the same topic without coordination. Then, this Section proposes an expansion of uncodified common law plain language standards.

1. THE SEPARATION OF POWERS TENSION AND INEFFICIENCIES WHEN ALL THREE BRANCHES CREATE PLAIN LANGUAGE LAWS

Two kinds of tensions arise when different branches of government create plain language laws with overlapping coverage. The first tension is a conflict over who controls how to write government documents. The

391. Black, *supra* note 39, at 288–94.

392. *Providian Nat'l Bank v. McGowan*, 687 N.Y.S.2d 858, 862 (N.Y. Civ. Ct. 1999), *aff'd as modified*, 720 N.Y.S.2d 709 (N.Y. App. Div. 2000).

393. *McDaniels v. Am. Bankers Ins. Co.*, 643 N.Y.S.2d 846, 846–47 (N.Y. App. Div. 1996).

394. Black, *supra* note 39, at 286–87.

395. *Id.* at 278–79.

396. The landscape of whether plain language laws are needed may be changing. New technology that translates dense contract language may change lawmaker opinions on the need for plain language laws. *See* Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83, 95–114 (2022) (discussing how consumers can use "smart readers" to understand contracts). Or perhaps this technology informs the design of such laws.

other separation of powers tension is which branch of government controls plain language in the private sector. This Subsection explains how these tensions arise.

a. Who Controls Plain Language in Government Documents

When one branch of government creates a plain language law covering documents produced by a different branch, the creating branch is making policy-infused decisions about how another branch should do its job. Such an act may be a separation of powers overreach or perhaps checks and balances at work.

Through statutes, legislatures have exercised control over all three branches. Sometimes legislatures regulate themselves. While one might see little need in legislatures passing a law governing themselves, such a statute continues to bind legislatures even when membership changes. Thus, the law could produce a longer lasting effect than voluntary changes.[397] Statutes governing the executive branch cover documents like administrative agency forms and letters,[398] election ballot designs,[399] governor reports,[400] and even the school textbook approval process.[401] Other statutes govern the judicial branch. For instance, an Illinois statute recommends the judiciary use plain language in public-facing documents.[402] Others cover documents ranging from pleadings and settlement agreements,[403] to court notices and forms,[404] to court orders.[405] Plain language statutes have even influenced how courts exercise their judicial authority. When the New Jersey Supreme Court used its constitutional powers to oversee the practice of law to require certain real estate contract disclosures, it drafted the required language to comply

397. But the effect will be limited or nonexistent if the law is unenforceable. *See, e.g.*, KY. REV. STAT. ANN. § 446.015 (West 2023) (passage of law is conclusive presumption of compliance with plain language standard).

398. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861.

399. CONN. GEN. STAT. ANN. § 9-139a(c) (West 2023).

400. NEV. REV. STAT. ANN. § 353.333(2)(b) (West 2022).

401. KY. REV. STAT. ANN. § 156.407(5)(d) (West 2023).

402. 20 ILL. COMP. STAT. ANN. 4090/30(2) (West 2022).

403. *See, e.g.*, ALASKA ADMIN. CODE tit. 3, § 48.130(a)(2) (2023) (statement of facts and circumstances in formal complaint or protest to regulatory commission); WASH. JUV. CT. R 3.3(e); N.Y. GEN. OBLIG. LAW § 5-1706(e) (McKinney 2022) (transfer of structured settlement payment rights); N.Y. GEN. OBLIG. LAW § 5-336(1)(b) (McKinney 2022) (confidentiality terms and conditions of employment discrimination claim settlement).

404. UTAH CODE ANN. § 75-5-309(2) (West 2022) (guardianship proceeding notices); MICH. COMP. LAWS ANN. § 600.2950b(1) (West 2023) (pro se forms for personal protection orders); *id.* § 600.8401a(1) (West 2023) (instruction forms for small claims court); *id.* § 600.8409(2) (West 2023) (instructions enforcing small claims court judgment).

405. VA. CODE ANN. § 24.2-684 (West 2022).

with the New Jersey consumer protection plain language law.[406] Voluntary court plain language initiatives like revising procedural rules,[407] court forms,[408] class action notices,[409] jury instructions,[410] and other court documents[411] may be an effort to fend off more legislative regulation. Enforceability aside, these statutes reflect legislatures regulating areas traditionally controlled by the other branches.

Like legislatures, courts have used plain language to influence how other branches operate. So far, court intervention has been minimal and concentrated on the executive branch by importing plain language into constitutional requirements like procedural Due Process[412] or the voluntary and knowing waiver requirement.[413] Courts have also worked plain language into the judicial branch by considering plain language when evaluating a statutory or common law claim or by interpreting codified plain language laws.[414] So far courts have not added plain language requirements into their review of the legislative or lawmaking process.[415] Thus far, the executive branch (through regulations) has not added plain language to legislative or judicial documents.

Doctrinally, there is a need to clarify the source and scope of authority for one branch to regulate another branch's written documents. Pragmatically, because government documents are mass produced and have wide-ranging effects, branches need to accurately predict a document's legal compliance. When, why, and how one branch can decide to intervene in another branch's document drafting is an arena ripe for future research. After all, imposing an enforceable plain

406. *Calvert v. K. Hovnanian at Galloway, VI, Inc.*, 607 A.2d 156, 162–63 (N.J. 1992).

407. *See, e.g.*, WRIGHT, MILLER, COOPER & STRUVE, *supra* note 37, at 7–10; ARIZ. R. CIV. P. cmt. (noting that the 2017 amendments sought to use "plain English" where possible).

408. *See, e.g.*, Dyer et al., *supra* note 28, at 1068; Hathaway, *supra* note 41, at 28; FED. JUD. CTR., JUDGES' CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE 5–6 (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf [https://perma.cc/6AQ6-KSG8].

409. *See, e.g.*, FED. JUD. CTR., *supra* note 408.

410. *See, e.g.*, Arthur J. Hanes, Jr., Bert S. Nettles & Leila H. Watson, *The "Plain English" Project of the Alabama Pattern Jury Instructions Committee—Civil*, 68 ALA. LAW. 368, 371–72 (2007).

411. *See, e.g.*, ILLINOIS SUPREME COURT POLICY, *supra* note 40.

412. *Walters v. Reno*, No. C94-1204C, 1996 WL 897662, at *10–14 (W.D. Wash. Mar. 13, 1996).

413. *Dennis v. G4S Secure Sols. (USA), Inc.*, No. 20-CV-46, 2021 WL 6275630, at *5 (E.D. Tenn. Jan. 28, 2021).

414. *See, e.g.*, *United States v. City of New York*, 637 F. Supp. 2d 77, 122–23 (E.D.N.Y. 2009).

415. The closest courts have come may be the Due Process Clause's void for vagueness doctrine. *See Reynolds v. Quiros*, 25 F.4th 72, 96 (2d Cir. 2022).

language standard on a branch could impose enormous costs and might impose a standard the branch disagrees with. For now, this Article contributes the conclusion that branches are intervening and that the intervention creates potential tension.

b. Who Controls Plain Language in Private Sector Documents

Apart from a few regulations, hundreds of plain language statutes govern the private sector, courtesy of legislatures.[416] Yet, courts too have flexed their authority to create plain language legal requirements. Sometimes they interpret codified laws, like by determining what factors are relevant to a Descriptive Standard.[417] Elsewhere courts infuse plain language in traditional common law doctrines, like determining if a contract is ambiguous,[418] enforcing common law requirements for clarity,[419] or deciding if a contract is unconscionable.[420] Other times courts are more aggressive, like when they find ways to enforce unenforceable codified laws.[421]

When courts have exercised their authority, in many ways they are making significant plain language policy decisions. And those decisions potentially conflict with the decisions made by legislatures and regulators. For instance, when adding a plain language requirement to an area of law that had none, courts are potentially deciding to regulate a kind of document legislatures chose to exclude from plain language statutes. When finding ways to enforce unenforceable codified laws, courts are effectively changing the enforcement scheme chosen by the legislature or regulator. Thus, courts are often making policy decisions about whether to require plain language in the law, and the appropriate coverage, standard, and enforcement schemes. In doing so, they may be extending, modifying, or conflicting with policy decisions made by legislatures or regulators.

Currently, plain language laws may suffer from the "too many cooks in the kitchen" syndrome. Imagine a drafter creating a standard form lease for use in multiple jurisdictions. Such a drafter must find the relevant codified laws, caselaw interpreting those codified laws, and the contract common law for *each* jurisdiction. The drafter may need to

416. Blasie, *supra* note 93, at apps. A–J (on file with author).

417. *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319, 375, 387–90 (E.D. Pa. 2014).

418. *Cintron v. Universal Underwriters Grp.*, 601 A.2d 1051, 1052–56 (Del. Sup. Ct.), *aff'd*, 586 A.2d 1203 (Del. 1990).

419. *Gross v. Sweet*, 400 N.E.2d 306, 308–09 (N.Y. 1979).

420. *See, e.g.*, *Stormont-Vail Hosp. v. Spurling*, No. 110,979, 2014 WL 4082469, at *3–6 (Kan. Ct. App. Aug. 15, 2014).

421. *Mont. Petrol. Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 959–60 (Mont. 2008).

consult multiple lawyers to find these sources, determine whether they apply, and determine what they mean. Sources may differ or even conflict between and within jurisdictions. And each year regulators, legislatures, and courts in each jurisdiction might create new laws. The costs and inefficiencies of such an evolving patchwork create high demand for uniformity.

2. EXPANDING COMMON LAW PLAIN LANGUAGE

With so many policy decisions embedded in plain language, which branch of government is best positioned to make them? Given the breadth of these laws, the answer may differ depending on the kind of document or kind of reader, or even on the kind of policy decision. Thus, on the policy issues of whether to require plain language by law, what documents to cover, and how to enforce legal requirements, this Article leaves that question open. But on the issue of setting plain language standards, this Article contends there is a role for both codified plain language laws made by legislatures and regulators, and for uncodified plain language laws made by courts. More, this Article argues for expanding the role of plain language common law created by courts to determine the most effective plain language standards.

Designing an effective plain language law standard is extraordinarily difficult. Many plain language laws have incredibly broad goals, like ensuring consumers are well-informed or making the court system as accessible as possible to all citizens. Achieving such goals impacts documents written for a massive cross-section of the country. The challenge cannot be understated: some legal documents are incredibly complex yet must be understandable to readers whose education and literacy rates vary dramatically. At the same time, science's understanding of how readers process legal documents is evolving, while the number of drafting options available continues to expand, especially with electronic documents that can make use of colors, shapes, sounds, brightness, and even movement. Deciding the "best" method or incentivizing others to find the best method is a monumental task still in progress. Nonetheless, because each branch of government creates laws differently, each can play a unique role in crafting the most effective plain language standard.

Legislatures and regulators should focus on setting plain language minimum requirements through codified laws. Because "many different writing styles can communicate effectively, an exact formula for success in plain English is difficult to define."[422] But "identifying poorly written documents may be an easier task."[423] Therefore, codified laws can be

422. Serafin, *supra* note 28, at 681.

423. *Id.*

powerful ways of identifying common drafting techniques that do not work or whose benefits have universal acceptance. Such codified laws incentivize long-term change in parts of the public and private sector that have resisted adopting plain language.[424] These laws can also encourage change across a much broader spectrum of parties because the laws can apply to parties and documents rarely subject to litigation or to parties who traditionally have strategic advantages in litigation. Essentially, codified plain language laws can serve as effective floors for industries and governments: at a minimum, here is what you must stop doing and must start doing.

However, legislatures and regulators are not well-positioned to do more than set minimum standards because codified laws tend to be static and generalized. Indeed, codified laws do not have an impressive record of improving reader understanding of legal documents. As one example, consider efforts to make information "conspicuous" using empirically discredited methods like all-caps.[425] While all-caps may have at one time seemed liked a good idea, evidence shows it does not work yet the laws remain, effectively requiring documents to use a method that may make a document less understandable.[426] More, legislatures and regulators may face pressure to pass laws with "bright line" standards to make those laws' application predictable. But those bright lines cannot keep up with a changing society, a changing understanding of linguistics, and variations in readers and content. One of the chief critiques of codified plain language laws is that they are too mechanical and inflexible.[427] On the other hand, many of the currently problematic documents might satisfy a codified standard that is too general. More, codified laws run the risk of setting too low of a bar and not incentivizing or even permitting experimentation with more effective methods. We have seen this occur. Despite the massive concentration of plain language laws on the insurance industry—more than any other industry—insurance policies are hardly models of clarity. One main contributor is that these laws often use Readability Standards.[428] As Daniel Schwarcz rightfully points out, "[n]ot only are the required scores well above the reading level of most Americans, but these scores do not reflect the length of the underlying document, its organization or formatting, or the extent to which words

424. *See* Cohen, *supra* note 33, at 504–05 (discussing why lawyers in all sectors have resisted changing how they write).

425. *See* Arbel & Toler, *supra* note 383, 866–72; Beazley, *supra* note 385, at 16–17.

426. *See* Arbel & Toler, *supra* note 383, at 869–71, 875–83; Beazley, *supra* note 385, at 15–17, 32–34.

427. Felsenfeld, *supra* note 360, at 415 (noting opposition to plain language laws includes being too mechanical and unyielding, prevents experimentation, and we do not yet know the best form of language).

428. *See* Blasie, *supra* note 93, at 503–07.

are put together in logical and clear sentences."[429] Thus when incomprehensible documents comply with a codified plain language law's standards, courts are often left with little choice but to reject claims that a compliant document is unclear.[430] Indeed, when a statute applies, a court's primary inquiry is what the legislature intended, not what is the most effective way to achieve a result.[431]

To be clear, state and federal governments can still play a significant role in influencing plain language practices without passing plain language laws. For example, employees from multiple federal agencies regularly share best practices on working plain language into government documents and make this information publicly available for others.[432] And the Consumer Financial Protection Board uses qualitative and quantitative testing to design more understandable mortgage disclosures.[433] Another example is the National Center for State Courts, which offers a plain language glossary and forms training to court personnel to design court forms and notices.[434] To the extent governments draft, provide templates for, or influence the documents or forms in particular private industries or in the public sector, this kind of collaboration and experimentation should continue. However, providing tips, examples, and research is still a long way from articulating an effective plain language legal standard.

Here is where courts step in. For several reasons, courts should continue to, and even expand their role in, developing uncodified plain language law standards. First, courts can more effectively consider

429. Schwarcz, *Transparently Opaque*, *supra* note 382, at 420–22; *see also* Schwarcz, *Reevaluating Policies*, *supra* note 382, at 1326–27 ("Thus, to understand whether a policy provides coverage for property damage, the policyholder must understand the relationship among six different portions of the contract. Insurance policies are also indecipherable because they rely on verbose and confusing grammatical structures and word choices. . . . The typical requirement is that insurance contracts score 40 on the Flesch-Kincaid scale, which equates to the reading level of an early college student. Yet most Americans read below their grade level—high school graduates typically read at the eighth-grade level and college graduates typically read at the tenth-grade level. In any event, anyone who has attempted to comprehend even a small part of an insurance policy will recognize that crudeness of quantitative readability scores.").

430. *See, e.g.*, *Tscherne v. Nationwide Mut. Ins. Co.*, No. 81620, 2003 WL 22724630, at *1 (Ohio Ct. App. Nov. 20, 2003).

431. *See Smith v. Parker*, No. 10-1158-JDB-egb, 2013 WL 5409783, at *27 (W.D. Tenn. Sept. 25, 2013) ("Our duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature.").

432. *See About*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/about/ [https://perma.cc/T5M5-CL4T] (last visited Mar. 5, 2023).

433. Talia B. Gillis, *Putting Disclosure to the Test: Toward Better Evidence-Based Policy*, 28 LOY. CONSUMER L. REV. 31, 66–67 (2015).

434. *Plain Language*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/plain-language [https://perma.cc/74BZ-JRT6] (last visited Mar. 19, 2023).

emerging social science evidence as a battle of experts plays out between the litigating parties.[435] For example, a court could hear expert testimony on the different kinds of readability tests to learn which, if any, to apply.[436] And courts could hear from the drafters about why they designed language a particular way, or how other readers have reacted in the past. Likewise, plaintiffs could submit evidence about what confused them or how other people in similar situations would not understand the language. Although any branch of government can consider expert evidence, the adversarial process incentivizes parties to bring forth new social science evidence specific to the case's context. While a legislature might consider research on what makes contracts more or less understandable, courts could hear evidence about what makes the kind of contract at issue in that case more or less understandable to that contract's signatories. In other words, while the Pennsylvania General Assembly might consider data on how the average person interprets contracts, a Pennsylvania court could consider evidence about what makes a lease more or less understandable to low-income residents with an average eleventh-grade education who happen to live in a particular apartment complex.

Second, a common law standard can evolve as science's understanding of how humans comprehend documents changes. There is no consensus on an exhaustive list of reader or document traits that affect understanding. Perhaps the most effective form of plain language for the same document may vary as the reader changes.[437] Or perhaps what is effective when a particular reader reads one kind of document is less effective when the same reader accesses a different kind of document. And of course, what may be true today may not be true ten years from now as education changes, as cognitive abilities change, or as technology evolves. Indeed, the kinds of traits we can measure or the kinds of features a document can contain are changing. Perhaps people do not comprehend court notices viewed on cell phone screens the same way as court notices viewed on paper. A common law doctrine can evolve to match new information and societal changes.[438] In short, because

435. For example, James Gibson proposed courts evaluate evidence of unconscionability "in light of the emerging empirical findings on consumers' cognitive limitations when dealing with boilerplate." James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 218–24 (2013).

436. *See* Jonathan M. Barnes, *Tailored Jury Instructions: Writing Instructions That Match a Specific Jury's Reading Level*, 87 MISS. L.J. 193, 198–202 (2018) (describing how there are over hundred readability tests and how their results can vary dramatically from one another).

437. *See id.* at 211–21.

438. *See* Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 49 ("Moreover, the benefit of a common law doctrine is that it can both support a statute enacted to define and control particular

currently no one knows what the most effective form of plain language is for a particular context or all the factors about a reader or context that affect understanding, a common law doctrine helps combine the most recent knowledge from multiple disciplines to determine the best form of plain language legal documents.

Third, the common law's flexibility allows drafters to test and apply new plain language techniques. A common law doctrine encourages parties to gather data, subject their documents to qualitative and quantitative analysis, and to consult experts in the drafting phase. Such a process encourages drafters to experiment with new and potentially radically different (and radically more effective) forms of legal documents. For instance, drafters could consider working in visual aids like charts, maps, or images.[439] Drafters could even become teams of drafters consisting of more than just lawyers; nonlawyers who have a better sense of how to communicate with the average person, like marketers or user experience experts, could add their insights.[440] More, if future market forces or bar reform efforts become strong enough to incentivize plain language, common law standards will not impede innovation.[441] Thus, a common law standard brings lawyers, businesses, and scientists back into the evolution of plain language. Court endorsement of new effective techniques encourages others to follow. When Schwarcz found caselaw had a significant impact on prompting material changes to homeowners' insurance policies, he concluded "courts play a pivotal role in forcing insurers to spell out their contractual relationship with policyholders more precisely."[442] The same could be true more broadly for all legal documents and the use of plain language.

CONCLUSION

Plain language law design has massive variance between and within jurisdictions, and between and within different branches of government. Each law contains several policy-infused design choices which convert

terms (such as those that touch on informational privacy) and can also be applied to new situations and terms that develop over time.").

439. *See* Thomas D. Barton, Gerlinde Berger-Walliser & Helena Haapio, *Visualization: Seeing Contracts for What They Are, and What They Could Become*, 19 J.L. BUS. & ETHICS 47, 48 (2013); Olga V. Mack, *Tech Toolbox: Visual Intelligence Is Imperative for Lawyers*, ACC DOCKET (May 3, 2022) https://docket.acc.com/tech-toolbox-visual-intelligence-imperative-lawyers.

440. *See* David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1433 (2018) (describing Etsy's revisions to a legal document using lawyers and "product, engineering and design teams").

441. *See* Friman, *supra* note 365, at 108 (suggesting "market forces can bring about most necessary changes in contract language without the aid of these [plain language] statutes").

442. Schwarcz, *supra* note 69, at 478.

legal document design from being within a lawyer's discretion to being subject to lawmakers' requirements. More data and research will help measure the effects of plain language, necessity of plain language laws, and design of plain language laws. To achieve more informed plain language policy decisions, courts should play a more aggressive role in designing plain language standards and weaving them into legal doctrines. A future article will explain how. For now, all lawmakers should be aware of the many design options available, the policy implications of choosing amongst those options, and the role other lawmakers play in implementing plain language.

“I BOUGHT AUTO INSURANCE, BUT HAVE NO IDEA WHAT IT MEANS OR WHAT IS ACTUALLY COVERED.”

NAIC FALL MEETING
TAMPA, FL DECEMBER, 2022

Erica. L. Eversman, J.D.
Automotive Education & Policy Institute

Eric Ellsworth
Consumers’ Checkbook

Auto Policy Access

- Do you know where to find your auto policy quickly?
  - *Is it online?*
  - *Is it available via a phone app?*
  - *How many pages/links to navigate to it?*

Once You Find Your Policy. . .

- Does it include all of your endorsements?
  - *Are these separate documents?*
  - *Are there links to them?*
  - *Do you have to access each one separately?*
- Can you read your policy and endorsements?

Policies Have Standard Provisions

- Many insurers utilize ISO form policies
  - *May customize certain language*
- Endorsements have standard provisions, also

Insurers Do Not Discuss All Features with Consumers

- May be required to discuss uninsured/underinsured medical coverage (per state law)
  - *May not discuss UM/UIM property loss coverage*
- OEM v. non-OEM parts
- Replacement cost for new vehicle
- Gap coverage for purchased vehicle
- Customization of vehicle (e.g. wheels, paint, audio, sensors)
- Rental car coverage and/or extended rental coverage

Consumers Have Expectations

- Expected benefit
- Expected features

- Without knowing the exact terms of the policy ***before*** purchase, consumers cannot know if expectations are reasonable
  - *Because insurance policies are not published online, consumers need easy access to what they purchased*

Easy Solution

- Make policies and endorsements readily available online
- Provide standard policy number to all consumers
  - *Print on insurance/financial responsibility card*
- Create QR code to allow consumer to go directly to:
  - *Policyholder's own policy, endorsements, & declaration page*
  - *Print QR code on insurance/financial responsibility card*

How Does This Benefit Consumers?

- Gives consumers easy access to individual policy & endorsements
- Allows consumers to get expert advice about benefits included in policy
- Allows consumers to determine gaps in coverage

Using Data for Consumer Protection

- Providing consumers easy access to their individual policy allows others to use the data in new ways:
  - Link specifics of "full" policy (including endorsements) to other datasets (reviews/complaints, performance measures, etc.)
  - Make computers do the tedious work of assembling and analyzing data about insurance– consumers should not have to do this
  - Build apps to provide information tailored to consumer's specific situation, without them having to learn complex insurance language or concepts

Enable-Value Oriented Shopping

- You already use technology to simplify shopping in the rest of your life, why not for insurance?
  - *Travel (Expedia, Kayak, Orbitz, countless others)*
  - *Real estate (Zillow, Redfin, Trulia, Realtor.com, so many more)*
  - *Cars (Carvana, Carmax, etc.)*

  All of these apps are built on access to consumer-specific data
- Feasible: One auto insurer starting providing consumers with comparison rate data decades ago
- Simplifying the process for consumers enables to them shop for insurance based on value not just premium

Recommendations

- Require insurers to provide:
  - *Put standard policy form number on all insurance cards (in addition to individual policy number)*
  - *QR code to access the policyholder's declaration page, policy, & endorsements all in one place*

QUESTIONS?

Erica L. Eversman, J.D.
erica@autoepi.org

Eric Ellsworth, M.S. M.B.A
eellsworth@checkbook.org