

4.12 Contracts in small print (CPLR 4544).

The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared.

As used in the immediately preceding sentence, the term “consumer transaction” means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes.

No provision of any contract or agreement waiving the provisions of this section shall be effective.

The provisions of this section shall not apply to agreements or contracts entered into prior to the effective date of this section.

Note

This rule restates verbatim CPLR 4544. The statute’s purpose is to require that a contract or agreement be legible when the contract or agreement involves (1) a consumer transaction (as defined in the second sentence) or (2) a lease for space to be occupied for “residential purposes.” The statute accomplishes that purpose by precluding the introduction in evidence at a trial, hearing, or proceeding on behalf of the party who “printed or prepared” a contract or agreement (or caused same to be printed or prepared) that fails to meet the statute’s legibility requirements.

The statute’s prohibition on its provisions being waived further protects the person who stands to be victimized by the illegible writing (*Matter of Filippazzo v Garden State Brickface Co.*, 120 AD2d 663, 665 [2d Dept 1986] [“Although this statute speaks in terms of the admissibility in evidence of such a contract, the underlying purpose of this ‘consumer’ legislation is to prevent

draftsmen of small, illegibly printed clauses from enforcing them The few cases construing this statute interpret it as rendering a contract's provisions 'unenforceable' if printed in 'small print' ”]; see *Street v Davis*, 143 Misc 2d 983, 985 [Civ Ct, NY County 1989] [“The public policy rationale behind CPLR 4544 was to protect residential tenants and consumers who are at risk when entering into contracts drawn up by others and presented to them on a take-or-leave basis. Since they cannot truly negotiate these contracts as an equal, they should at least be able to read them!”]).

The definition of “consumer transaction” does not on its face or by implication include a “contract for the construction and sale of a one-family dwelling.” (*Drelich v Kenlyn Homes*, 86 AD2d 648, 649-650 [2d Dept 1982] [“The statute reflects the legislative intent to regulate transactions for such property and services which are primarily personal in nature in order to protect the unwary consumer from the sharp practices of various dubious business enterprises which deal in such services and goods which are attractive to consumers . . . (and) the statute is also made applicable to leases for residential property, which, as chattels real, constitute personal property”].)

In a “conflict of laws” case, the statute, although phrased in terms of a rule of evidence, “should be regarded as a substantive, formal, contractual requirement rather than a procedural rule of the forum” and where a “choice-of-law provision” provides for the application of the law of another state, “the substantive laws of that state must be applied and the substantive laws of New York, including for these purposes CPLR 4544, have no application.” (*Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 287 [2d Dept 2010].) Nor may CPLR 4544 “be employed to nullify a contractual limitation enforceable under Federal maritime law.” (*Lerner v Karageorgis Lines*, 66 NY2d 479, 485 [1985].)

The statute's last sentence precludes retroactive effect before the effective date of July 1, 1976. That provision is undoubtedly based on the principle that the drafters of a requisite contract or agreement should not be held to its remedial requirements that they were unaware of at the time of the drafting. There is a difference of opinion, however, over whether an agreement entered into after the effective date of the statute, incorporating by reference provisions of an agreement entered into prior to the effective date of the statute that did not meet the statute's legibility requirements, is subject to the statute's remedial dictates. *Street v Davis* (143 Misc 2d at 986-987) found that an agreement made after the effective date of this statute was subject to its remedial terms, given that there was an opportunity to remedy the illegible portions of the incorporated agreement. (*Contra Jossel v Filicori*, 145 Misc 2d 779, 782 [Sup Ct, NY County 1989]; *King Enters. v O'Connell*, 172 Misc 2d 925, 927 [Civ Ct, NY County 1997]; see Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4544 at 797 [2007 ed] [*Street v Davis* “hits closer to home because upon renewal, a new contract has been ‘entered into’ ”].)