

ARTICLE

IT'S NOT THE OXFORD COMMA, IT'S THE AMBIGUITY

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Celebration of the Oxford comma's vindication as the definitive tool providing clarity of language is premature. In *O'Connor v. Oakhurst Dairy*,¹ lack of an Oxford comma supported the finding of ambiguity that opened the door to reversal of summary judgment and remand for additional proceedings. Opening with the observation that "For want of a comma, we have this case,"² Judge Barron caught the attention of the lay press, and articles declaring the importance and victory of the Oxford comma quickly followed.³ However, a quick review of additional case law reveals that the Oxford comma alone is not a substitute for careful drafting to avoid ambiguity, nor does the use or omission of the serial comma alone create ambiguity.

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1. *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017).
2. *Id.* at 70.
3. See, e.g., Daniel Victor, *Lack of Oxford comma costs Maine company millions in overtime dispute*, THE BOSTON GLOBE (Mar. 16, 2017), <https://www.bostonglobe.com/business/2017/03/16/lack-oxford-comma-costs-maine-company-millions-overtime-dispute/BIxK837fA2C06qavQMDs5J/story.html>; A.J. Willingham, *An Oxford comma changed this court case completely*, CNN (Mar. 16, 2017, 6:07 AM), <http://www.cnn.com/2017/03/15/health/oxford-comma-maine-court-case-trnd/index.html>; Elena Cresci, *Oxford comma helps drivers win dispute about overtime pay*, THE GUARDIAN (Mar. 16, 2017), <https://www.theguardian.com/books/2017/mar/16/oxford-comma-helps-drivers-win-dispute-about-overtime-pay>; Kyle Scott Clauss, *Oxford Comma Decides Court Case in Maine Labor Dispute*, BOSTON MAGAZINE (Mar. 15, 2017, 11:12 AM), <http://www.bostonmagazine.com/news/blog/2017/03/15/oxford-comma-maine-labor-dispute/>.

In *Oakhurst*, the Oakhurst Dairy distribution drivers' claims for overtime pay turned on interpretation of the Maine exemption from overtime pay for work which included a list of activities: "[t]he canning, processing, preserving, freezing, drying, marketing, storing, packing or shipment or distribution of: (1) Agricultural produce; (2) Meat and fish products; (3) Perishable foods."⁴ The Court found that the clause was ambiguous without the serial comma before the word "distribution". Finding the employer's and drivers' arguments each were not definitive, the court was not persuaded by the employer's argument that the comma was banned by the Maine Legislative Drafting Manual.⁵ Declining to follow an unpublished Maine Superior court decision finding distribution was exempted,⁶ and looking to the remedial nature of the wage and hour statute as well as the canons of construction regarding remedial legislation, the Court found in favor of the drivers.

While this Court observed that the use of the comma would have resolved the matter, other courts have not found use of the Oxford comma sufficient to foreclose further analysis. The impact of inclusion or omission of a comma has been considered in a number of cases where the Court looked beyond punctuation to resolve ambiguity.

In the 1880's, where the statute in question had later been amended to correct the ambiguity, the Texas Supreme Court read in a comma to cure same. In *Bradstreet Co. v. Gill*, 9 SW 753 (1888), the Court interpreted the Act of March 31, 1885, which provides:

that foreign private or public corporations, doing business in this state, may be sued 'in any county where the cause of action, or a part thereof, accrued, or in any county where such company may have an agency or representation in the county in which the principal office may be situated, or, etc.⁷

The Court read the statute as if the comma had been in place to give the apparent intended effect of allowing jurisdiction if an agent or representative of the defendant was in the county.

Over the years, Courts have not been unanimous in finding addition of a comma sufficient to clarify intent, but the issue recurs. In *Hughes v. Samedan Oil Corporation et al.*,⁸ the Court

4. 26 M.R.S.A § 664(3)(F).

5. *Id.* The Court also notes that other state drafting manuals encourage use of the comma to avoid ambiguity. *Id.* at 10.

6. *Thompson v. Shaw's Supermarkets, Inc.* 847 A.2d 409 (Me. 2004).

7. 446 F. Supp. 2d at 814.

8. 166 F.2d 871 (10th Cir. 1947).

reviewed rule of grammatical construction before finding that citations to those rules did not support plaintiff's argument, noting that the primary interest is to "give effect to the intention of the parties' and rejecting the claim for overriding royalty payments.⁹ The court stated that "neither the rules of grammatical construction, nor any other rule, should be indulged to confuse that [which] is otherwise manifestly plain. . ."¹⁰

Similarly, the Court in *Anderson & Kerr Drilling Co. v. Bruhlmeier*¹¹ rejected elevation of punctuation above meaning, and stated:

The following rules with reference to punctuation have been announced: The words, not the punctuation, are the controlling guide in construing a contract. If the meaning of the words is clear the court will interpret a contract according to their meaning and without regard to the punctuation marks or the want of them. . . .¹²

Anderson was adopted in Texas and applied to interpretation of a will in *Gonzales Warm Springs Foundation for Crippled Children, Inc., et al., v. Maddux*.¹³ The Court rejected a tortured reading of a holographic will and upheld a charitable bequest. The Court upheld the application of the four corners rule and decided that it must construe the will "without regard to commas or their absence. Only if and after that method fails would [the court] be warranted in resorting to the position of a comma to determine Mrs. Hofstetter's testamentary intent."¹⁴

This rejection of comma positioning as an interpretive guide spread beyond Texas. The Supreme Court of Iowa cited *Anderson* in *Randolf v. Fireman's Fund Insurance Co.*, declining to find ambiguity created by the punctuation of otherwise clear policy language.¹⁵ Similarly, in *Avis Rent a Car Systems Inc. v. American Fruit Purveyors Inc.*,¹⁶ the Georgia Court of Appeals declined to find ambiguity created by punctuation, citing *Anderson*, and gave effect to the entire contract in holding that either payment in full or notice of termination would be required

9. *Id.* at 873 (citations omitted).

10. *Id.* The court explicitly rejected the use of punctuation as an interpretive tool: "Courts will not resort to grammatical niceties or the technicalities of punctuation in the interpretation and construction of an instrument, unless they may be utilized to make plain that which is otherwise obscure." *Id.*

11. 136 S.W.2d 800 (1940).

12. *Id.* at 803.

13. 304 S.W.2d 373, 376 (Tex. Civ. App. – Austin 1957, writ ref'd n.r.e.).

14. *Id.* at 376.

15. 124 N.W.2d 528, 531 (1963).

16. 165 S.E.2d 879 (1968).

upon termination of a fleet of vehicles.¹⁷ The Court rejected the argument that punctuation would cause an ambiguity such that a single vehicle could not be returned without notice or payment but an entire fleet could.¹⁸

Anderson has also been cited for rejection of punctuation beyond the Oxford comma. The Court in *Ferguson v. DRG Colony North Ltd.*,¹⁹ cited *Anderson* in declining to find ambiguity due to the use of quotation marks around the words “watertight” in a contract document relating to roof repairs: “Having concluded that the meaning of the word is clear, we may not use punctuation marks to create an ambiguity.” *Id.* at 882. The Fifth Circuit was similarly eager to adopt *Anderson* when parentheses and other punctuation created ambiguity. In *WBCMT v. NNN Realty*,²⁰ the court noted that the *Anderson* rule was “well-established” and quoted extensively from the *Anderson* opinion.²¹

Texas is not alone in declining to rely on the comma (or lack thereof) as being dispositive. In *Shipman v. Case Handyman Services, L.L.C.*,²² amendment to add a comma was not viewed as improving clarity. Here, a franchisee alleged negligent misrepresentation and violation of the Illinois Franchise Disclosure Act (IFDA) Illinois Consumer Fraud and Deceptive Business Practices Act which contained an enumeration of persons who could be liable for misrepresentations. The District Court was unsure why the IFDA was amended to add a comma and noted that prior to amendment, another Court had interpreted the statute as requiring fault regardless of the punctuation based on general law principles.²³ The court went on to state that the statute drew a distinction between an officer and an employee of the franchisor, and found that control person such as officers could be liable unless they had no knowledge of the facts, acts or transactions alleged to underpin the claim. The Court found sufficient grounds to dismiss the motion as it was clear that the defendant was a corporate officer and plaintiffs claimed the officer was liable for a violation of the statute.

In *USNB of Oregon v. Independent Ins. Agents*,²⁴ the US

17. *Id.* at 880.

18. *Id.*

19. 764 S.W.2d 874 (Tex. App. –Austin 1989, writ denied).

20. WBCMT 2007 C33 OFFICE 9720, L.L.C. v. NNN Realty Advisors, Incorporated, 844 F.3d 473 (5th Cir. 2016).

21. *Id.* at 479.

22. *Shipman v. Case Handyman Servs., L.L.C.*, 446 F. Supp. 2d 812, 814 (N.D. Ill. 2006).

23. *Id.*

24. 508 U.S. 439 (1993).

Supreme Court interpreted a poorly punctuated act and determined that the provision underlying the dispute had not been repealed and remained in effect, noting that:

A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain meaning analysis based only on punctuation is necessarily incomplete, and runs the risk of distorting a statute's true meaning. Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used." Over and over we have stressed that, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.²⁵

*AIG v Bank of America*²⁶ presented the question of whether federal jurisdiction conferred by the Edge Act, 12 U.S.C. § 632, applied or whether the case should be remanded to the lower court. The court concluded the Edge Act did not apply, after a review of the applicable principles relating to the application of punctuation to interpretation:

We address first the grammar. . . [t]he treatise [cited by the Supreme Court] says, "Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." . . .

One of the methods by which a writer indicates whether a modifier that follows a list of nouns or phrases is intended to modify the entire list, or only the immediate antecedent, is by punctuation—specifically by whether the list is separated from the subsequent modifier by a comma. When there is no comma, as in the statute considered in *Barnhart*, the subsequent modifier is ordinarily understood to apply only to its last antecedent. When a comma is included, as in the Edge Act provision, the modifier is generally understood to apply to the entire series. . .

The list of offshore transactions in § 632 is separated from the subsequent modifier by a comma, indicating, according to the conventions of grammar and statutory interpretation,

25. *Id.* at 454-55 (citations omitted).

26. *AIG v Bank of America et al.*, 712 F.3d 775 (2d. Cir. 2013).

an intention that the modifier apply to the entire list and not merely to the last item in the list. . . . At the end of that list is a comma, and then a modifier, which establishes that the statute's provisions apply regardless of whether a qualifying transaction was done "directly or through the agency, ownership, or control of branches." If there were no comma separating the last phrase in the list from the subsequent modifier, Defendants' argument would at least be consistent with the Barnhart principle. The comma, however, distinguishes the Barnhart principle and indicates a contrary intention.

Nor is this a case in which the statute's grammar is in conflict with the apparent intentions of Congress. . . .²⁷

The key to all of these decisions is ambiguity. Where the placement or absence of a comma creates no true ambiguity in otherwise clear language or leads to one sensible and one nonsensical interpretation, the courts will not allow the rules surrounding the Oxford comma to guide interpretation. The Oxford comma only matters when its presence or absence creates actual ambiguity regarding the intent of the parties, as is the case with other punctuation. Thus, the Texas courts seek to apply the intent of the parties—and look to punctuation as just one means of achieving that goal where the meaning is not clear from the words alone.

27. *Id.*