

The Last Word

An Expensive Dispute About Serial Commas

The lack of a serial comma cost an employer in Maine millions of dollars in unexpected overtime pay last year. A Maine statute denied overtime pay to employees who work in the “canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution” of certain food or agricultural products. 26 Me. Rev. Stat. § 664(3)(F). In *O’Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017), the federal appellate court could have interpreted the Maine statute in two possible ways. The court stretched to choose the interpretation that would give employees more money—the court’s view of the statutory purpose. One might describe that result as goal-oriented.

In *O’Connor*, employees who drove delivery trucks carrying the specified products claimed overtime pay. Their work admittedly consisted of just “distribution”; it was not broad enough to include “packing” the products. Could those employees claim overtime pay? Yes, if the last item in the list of activities ineligible for overtime was “packing for shipment or distribution.” No, if the last item in the list was just “distribution.”

The court concluded that when the Maine legislature omitted a serial comma before the last two words (“or distribution”) in the quoted list of activities, it meant that the last item in the list consisted of “packing for shipment or distribution”—a single item referring to “packing” for two possible purposes, shipment or distribution. According to the court, the list had only eight items in it, and “distribution” without more didn’t make it onto the list.

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Thus, employees who participated only in “distribution”—but not “packing for shipment or distribution”—could recover overtime pay.

The grammatical structure that the court apparently recognized in the Maine overtime law is one sometimes heard in stentorian oratory, such as Mark Antony’s speech beginning “Friends, Romans, countrymen, lend me your ears” in Shakespeare’s *Julius Caesar*, act 3, sc. 2. Another example was attributed to Julius Caesar himself: “I came, I saw, I conquered.” Similar dramatic declamations appear in poetry, fiction, and argumentation.

This grammatical structure is not, however, used in the drafting of statutes or legal documents, at least not in my experience. In every statute or legal document I can remember, I have always seen the conjunctions “and” or “or” used to separate the last and second-to-last items in a list, with or without a serial comma. That’s how people, including lawyers, generally write.

The court quoted from a respected book on legal interpretation that said legal writers sometimes “omit conjunctions altogether between the enumerated items” in a list—a practice called “asyndeton.” *O’Connor*, 851 F.3d at 76 (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 119 (2012)). So maybe the Maine statute was intended as an example of asyndeton. Maybe the legislature was thinking about Julius Caesar. This interpretation would not have been possible had the statute included a serial comma after the word “shipment.” See Marie A. Moore, *Practical Punctuation (Part 3): The Comma Law*, Prob. & Prop., May/June 2015, at 64. Prevention of such (mis)interpretations may itself justify consistent use of serial commas.

Before the court reached its final decision on how to interpret the statute, it devoted many pages to other arguments on the statute’s meaning. It

analyzed other grammatical elements of the statute. It reviewed the statute’s history. It looked for clues about what the legislature meant.

Ultimately the court threw up its hands, declaring the statute ambiguous. No one could infer which meaning the legislature really meant. So the court reverted to a general principle, previously expressed by Maine courts: the state’s wage and hour laws should be “liberally construed to further the beneficent purposes for which they are intended.” *O’Connor*, 851 F.3d at 79. In other words, if a wage and hour statute is ambiguous, the courts should interpret it to give employees more money, presumably its “beneficent purpose.” Hence the “distribution” employees prevailed.

To declare the statute ambiguous, though, the court first had to believe the legislature really intended to use the grammatical structure of asyndeton—a structure from ancient rhetoric rather than modern American law or legal documents. Without that step, the court’s decision would have been easy: the legislature made a list of nine items; it used the word “or” between the eighth and ninth items in the list; and it saw no need for a serial comma. This is ordinarily how English works, particularly in legal documents and statutes.

By accepting the grand oratorical concept of asyndeton, the court opened a broader discussion that ultimately led to a determination of ambiguity. Yes, a serial comma could have prevented that broader discussion. So, could have a judicial recognition that serious legal writing—as opposed to speeches involving Julius Caesar—universally uses the conjunctions “and” or “or” to set off the last item in a list. That’s how I would have decided the case. And the Maine legislature has now amended the statute to resolve the ambiguity the same way I would have. ■