The $5 Million Comma

by Norman G. Tabler Jr.

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For want of a comma, we have this case.—Judge David J. Barron[1]

Punctuation nerds love to argue about the "serial comma," also known—especially by those who favor it—as the "Oxford comma." It's the comma that you may or may not put before the "and" or the "or" at the end of a list of items. Do you write "apples, oranges, and pears" or "apples, oranges and pears"?

Opponents argue that using the final comma is pompous and needlessly takes up space. They note that *The New York Times* and most newspapers avoid the serial comma.

Proponents insist that proper punctuation requires the serial comma. They note that it is used by prestigious publications, publishing houses such as the Oxford University Press—hence the name favored by the comma's proponents—and *The New Yorker*, and it is endorsed by such eminent authorities as *The Chicago Manual of Style*.

Proponents also observe that the absence of the serial comma can lead to ambiguity and can confuse the reader. Consider this sentence in a hypothetical newspaper article: "The Las Vegas-themed fund-raiser featured two blackjack dealers, Sen. Chuck Grassley and Rep. Liz Cheney."

Were there two dealers *as well as* the senator and congresswoman? Or do Chuck and Liz have a talent we didn't know about? The Oxford comma would have told us the answer.

Sometimes the ambiguity created by omitting the serial comma can have real, legal consequences. That was the case in Maine, when an argument over the absence of a serial comma reached such intensity that the two sides made a federal case of it, with millions of dollars in the balance.

The Disputed Language

The State of Maine has an overtime statute aimed at ensuring workers are properly paid for overtime work—that is, paid with a premium. The statute has some exemptions, many dictated by common sense. One exemption is for workers who deal with perishable food. The underlying idea is that such workers should not have an incentive—like overtime pay—to take longer than necessary to complete their work.

At the time of the dispute, the perishable food exemption, Exemption F, covered:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of … perishable foods.[2]

The dispute was over five words at the end of the list of activities: "packing for shipment or distribution."

The Two Sides

In one corner was Oakhurst Dairy. Oakhurst was not a fan of the serial comma—at least not in this case. Oakhurst's position on Exemption F was that those five words denoted two separate activities: "packing for shipment" and "distribution." If so, no overtime was due for packing dairy products for shipping *or* for distributing such products.

In the other corner were the drivers who distributed Oakhurst products. Their view was that "packing for shipment or distribution" was a single activity—not two activities. In effect, they read the five words to mean "packing, whether for shipping or distribution."

What was at stake? Plenty. The drivers do no packing, but they do a great deal of distributing. If the exempt activity was limited to packing, whether for shipment or distribution, the exemption wouldn't apply to their considerable distribution work. They would be therefore entitled to overtime pay.

The Lawsuit

Because Oakhurst refused to accept the drivers' position and pay overtime for the distribution activity they engaged in—an activity that did not include packing—the drivers brought an action in the U.S. District Court for the District of Maine[3] to recover their unpaid overtime under the federal Fair Labor Standards Act[4] and the Maine overtime law.[5]

The Arguments

The Missing Comma

We don't know whether the drivers were generally proponents of the serial comma. But we know that in the case of Exemption F, they were the strongest of proponents. In fact, their case rested primarily on

the serial comma. The absence of the serial comma in front of "or distribution," they argued, meant that distribution was not a separate activity. It was not the last item in the list of activities.

The last item—which was properly preceded by a comma—was "packing for shipment or distribution." If "distribution" by itself was the last item, the legislature would have put a comma in front of "or distribution." That's what literate people do. Just check *The Chicago Manual of Style*.[6]

Just as the drivers' position rested heavily on the sanctity of the serial comma, Oakhurst's position relied heavily on rejection of the serial comma. In Oakhurst's view, the serial comma was an outmoded convention long ago abandoned by contemporary writers, including legislatures. A contemporary legislature would, and did, end its list of activities with a clean "or distribution" uncluttered by a serial comma.

In addition to relying on the widespread abandonment of the serial comma, Oakhurst had an additional argument that was formidable. No less an authority than the *Maine Legislative Drafting Manual* advised legislative drafters that:

> When drafting Maine law or rules, don't use a comma between the penultimate and last item of a series.

Citing the *Drafting Manual*, Oakhurst argued that the drafters who wrote Exemption F couldn't have used a serial comma, even if they had wanted to.

The drivers had a response. They noted that the *Drafting Manual* contained a caution to the general proscription against serial commas:

> Be careful if an item in the series is modified.

And the *Drafting Manual* set out examples of how lists with modified or complex terms should be written to avoid the ambiguity that a missing comma might create. So the *Drafting Manual* not only *allowed* drafters to use the serial comma, but it also encouraged its use when the statutory language would otherwise be ambiguous or confusing.

Oakhurst had another argument to explain the missing comma, one for which the drivers had no rebuttal: All the other lists in the same section of the statute eschewed the serial comma.

The Parallel Usage Convention

For their next argument the drivers pivoted from punctuation to grammar. Again citing *The Chicago Manual*, they invoked that authority's insistence on the "parallel usage convention":

> Every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb).[7]

The drivers noted that their own reading of Exemption F comported perfectly with the parallel usage convention: Each exempt activity was denoted with a gerund (e.g., "canning" and "processing"), while the two *non*-gerunds—"distribution" and "shipment"—were objects of the preposition "for," which describes the activity of "packing." So the two non-gerunds were not themselves exempt activities.

The Missing Conjunction

Oakhurst argued that there was a glaring flaw in the drivers' position: a missing conjunction. If "packing for shipment or distribution" was the last activity in the series, why was there no "or" in front of it? What kind of list ends without a conjunction before the final item? Omission of the serial comma may be common, but omission of a serial conjunction isn't.

The drivers made no concession. They invoked a literary device called "asyndeton," citing no less an authority than Scalia & Garner's *Reading Law: The Interpretation of Legal Texts*: "Sometimes drafters will omit conjunctions altogether between the enumerated items [in a list] in a techniques called asyndeton."[8]

Unfortunately for the drivers, they could not cite a single instance of asyndeton in Maine statutes.[9]

The Surplusage Issue

Oakhurst argued that the drivers' reading of the language would render the words "or distribution" as surplusage. Why? Because "packing" is the same, whether it is for "shipment" or for "distribution." So distribution must be different from packing for shipment.

The drivers responded that under Maine law "shipment" and "distribution" are *not* the same thing. The former means outsourced transport by a third party, while the latter suggests in-house transport. What's more, Maine statutes are full of sections that employ both terms side by side.

The Purpose of the Exemption

Strangely, the purpose of the exemption seems to have ranked low on the list of arguments by either side. Oakhurst argued that its reading of the language served the statutory purpose better than the drivers' reading. The purpose was to prevent the incentive of overtime pay from encouraging delay in the handling of perishable food. But what is the point of avoiding that incentive all along the production line, only to permit it in the final phase of distribution?

The drivers responded that travel time is travel time. A trip takes a given amount of time, irrespective of the pay rate.

The Decisions

The District Court

The magistrate judge issued a recommended decision,[10] which the district court judge affirmed without modification.[11] It was a solid win for Oakhurst. The court cited four considerations for its decision in favor of Oakhurst. First, the drivers' position would, in the court's view, render the term "or distribution" as surplusage because packing is the same, whether for shipment or distribution.

Second, the absence of a serial comma is not significant because the entire statutory section in question consistently omits the serial comma throughout.

Third, if the drivers were correct, there should be an "and" or an "or" before the word "packing," but there isn't.

Fourth, Oakhurst's position is consistent with the purpose of the exemption: to avoid overtime pay serving as an incentive for delay by workers involved in the production and distribution of perishable food.

The Circuit Court

In March 2017 the First Circuit rendered its decision on the drivers' appeal of the granting of partial summary judgment in favor of Oakhurst.[12] The court's 10-page opinion weighed each of the argu-

ments set out above. With the exception of the argument described under "The Purpose of the Exemption" section above, the court seemed to give equal weight to each side's arguments. As to that one exception, the court sided with the drivers, agreeing that travel time is the same whether exempt or not exempt:

> No matter what delivery drivers are paid for the journey, the trip cannot be made shorter than it is.

Taken as a whole, the opinion seemed almost to regard the textual interpretation contest as a tie. But that was good news for the drivers because, as the court saw it:

> The default rule of construction under Maine law for ambiguous provisions of the state's wage and hour laws is that "they should be liberally construed to further the beneficent purposes for which they were enacted."[13]

In effect, by fighting to a draw—by demonstrating not that the language clearly favored them but that it was ambiguous—the drivers had won.[14]

Meanwhile Back at the Legislature

Perhaps embarrassed by widespread press coverage of the litigation over a missing comma, the Maine legislature amended the statute. In the process it sided with Oakhurst, making it clear that distribution is a stand-alone activity exempt from the general overtime requirement.

Did the legislature insert a serial comma before the words "or distribution"? No. It used *semi-colons* to separate the exempt activities, the one before "or distributing" functioning as what might be termed a "serial semi-colon." And, heeding *The Chicago Manual*'s insistence on the parallel usage convention, the non-gerund term "distribution" was changed to the gerund "distributing." ⊙

Postscript

In February 2018 the press reported that Oakhurst settled the case with the drivers, paying them $5 million in back overtime pay.

Endnotes

[1]*O'Connor v. Oakhurst Dairy*, 851 F.3d 69, (1st Cir. 2017).
[2]26 M.R.S.A. § 664(3)(F).
[3]*O'Connor v. Oakhurst Dairy*, Case No. 2:14-cv-00192-NT, 2015 WL 245 2678 (D. Me. 2016).
[4]29 U.S.C. §§ 201 *et seq.*
[5]26 M.R.S.A. § 664(3).
[6]*See* Chicago Manual of Style § 6.123 (16th ed. 2010).
[7]*Id.* at § 5.212.
[8]Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 119 (2012).
[9]Note that the Chicago Manual quotation cited above employs asyndeton twice in a single sentence.
[10]*Recommended Decision on Cross-Mots. for Partial Summ. J.,* Dkt. 112, *filed* Jan. 26, 2016.
[11]*Order Affirming Recommended Decision of the Magistrate Judge*, Dkt. 123 *filed* Mar. 25, 2016.
[12]*O'Connor*, 851 F.3d 69.
[13]Citing *Dir. of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987).
[14]Interestingly, the court looked to the purpose of the wage and hour statute as a whole rather than to the purpose of the exemption section. The district court had taken the opposite approach to reach the opposite result.

At Sidebar *continued from page 5*

erative suspect murders a 2-year-old child and stabs officers with a knife.[5] In that case, physical restraint techniques and tasers were applied by the officers in order to avoid additional casualties; however, these solutions were ineffective and resulted in the officers having to shoot the suspect.[6]

Whether law enforcement officers should respond to danger with escalating force is a question recently posed to and addressed by the U.S. Supreme Court in *Kisela v. Hughes*.[7] This case involved the shooting of a suspect, who had a knife, and officers believed that a potential victim was in imminent danger. Officer Andrew Kisela was called to the scene of the shooting incident "after hearing a police radio report that a woman was engaging in erratic behavior with a knife."[8] Almost immediately upon arrival, Kisela identified Amy Hughes as matching the description of the reported suspect who was seen "hacking a tree with a kitchen knife."[9] The record demonstrated that "Hughes was [seen] holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so."[10] A chain-link fence separated the officers from the suspect and potential victim, which prevented the officers from being able to engage in other compliance techniques.[11] Officer Kisela determined that the danger to the potential victim was imminent and he shot Hughes four times; Hughes later recovered from the injuries.[12]

"Hughes sued Kisela under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment."[13] The case progressed over an eight-year period as the "district court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed."[14] Ultimately, the Supreme Court determined that in this particular case, Kisela was entitled to "qualified immunity" and "the question is whether at the time of the shooting Kisela's actions violated clearly established law."[15] Importantly, "qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[16]

Supporting this proposition that qualified immunity provides an assessment of reasonableness in the actions of government employees, the Supreme Court relied upon on *Tennessee v. Garner*[17] and *Graham v. Connor.*[18] In *Garner*, "the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that 'where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'"[19] In *Graham*, the Court determined that the facts and circumstances of each individual case must be assessed to determine whether the officer's actions are reasonable and "the calculus of reasonableness must embody allowance for