

Missing Comma May Prove Costly

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15 March 2017

Good legal writing is an important skill.

The failure to properly draft a contract or a legislative provision can have significant consequences for parties who believe that a document or provision says one thing, when it actually means something else.

As recently determined in *O'Connor v. Oakhurst Dairy* (United States Court of Appeal, 1st Circ., 13 March 2017), the omission of a comma from an exemption under Maine's overtime law may cost an employer millions.

Whereas delivery truck drivers claimed entitlement to years of unremitted overtime pay, their employer contended that they were disentitled to overtime pay because a particular statutory exemption applied to them.

The specific statutory exemption provided that the protection of Maine's overtime law did not apply to:

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fishing products; and
- (3) Perishable foods.

Since the drivers were engaged in the distribution of perishable foods (a fact which was not disputed), the employer believed that it did not have to pay the drivers overtime pay whenever their work day exceeded the statutory maximum for regular pay work hours.

In contrast, the drivers interpreted the exemption differently. They contended that, although they did handle perishable foods, they did not engage in "packing" them and that the words "distribution of" did not refer to a separate exempt activity in the list of activities set out in the exemption.

A District Court judge agreed with the employer's interpretation and granted it summary judgment to dismiss the drivers' case. But the appellate court agreed with the drivers' interpretation.

A careful examination of the exemption by the appellate court showed that it lacked parallelism.

The drivers argued that each of the terms of the exemption indisputably named an exempt activity – "canning, processing, preserving," and so forth on through "packing" – that was a gerund (a form of a verb functioning as a noun, or, more simply a word ending in "ing"). By contrast, neither "distribution" nor "shipment" was a gerund. So the drivers contended that in accordance with the parallel usage convention, "distribution" and "shipment" had to play the same grammatical role, one which was distinct from the role that the gerunds played.

Even though no conjunction preceded the word "packing", the appellate court held that the exemption was ambiguous and had to be read in favour of the drivers. The use of the word "distribution" rather than the word "distributing" and the failure to insert a comma after the word "or" made the activity of "distribution" parallel in usage to "shipment" which modified the exemption of "packing" and did not name an exempt activity on its own.

The appellate court held given that the delivery drivers contended that they engaged in neither "packing for shipment" nor "packing for distribution", the District Court had erred in granting the employer summary judgment. The court also noted that if the drivers engaged only in distribution and not in any of the stand-alone activities that the exemption covered, the drivers would fall outside of the exemption's scope and within the protection of the Maine overtime law.

The lesson to be learned from *Oakhurst Dairy* is that lawyers must pay careful attention to the rules about parallelism and that a failure to include a comma in a series of activities or events can be a costly error.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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