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LEGAL ISSUES



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Cases of Note — Punctilious for Punctuation

by **Bill Hannay** (Partner, Schiff Hardin LLP, Chicago, IL) <whannay@schiffhardin.com>

If you Google the phrase “Oxford comma,” you get literally a million hits, most I would think since March 13, 2017. That’s when the U.S. Court of Appeals for the First Circuit in Boston — normally one of the most prestigious courts in America — handed down a preposterous decision in *O’Connor v. Oakhurst Dairy*, 2017 U.S. App. LEXIS 4392 (1st Cir.). The decision hinged on the absence of an “Oxford comma” in a piece of employment legislation in Maine.

If this silly decision stands, it will cost Maine employers millions of dollars in unexpected overtime charges.

The statute at issue requires employers to pay overtime, unless the employment activity involves food, specifically:

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

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

A bunch of milk delivery drivers sued a bunch of dairies, contending that the words “packing for shipment or distribution” refer to the single activity of “packing” foods and not to delivering foods. And since drivers do not engage in “packing” perishable foods (like milk), the exemption does not apply to them, and they are owed overtime.

A U.S. magistrate rejected the drivers’ interpretation of the statute, holding that the exemption clearly included distribution of food, not just “packing,” and the chief judge of the U.S. District Court concurred in March of

2016. On appeal, however, a panel of the First Circuit reversed, issuing a labored 29-page opinion authored by **Judge David Barron**.

Judge Barron is a controversial figure. After graduating from **Harvard College** and then **Harvard Law School**, he briefly worked in the U.S. Department of Justice and then became a professor at **Harvard**. In 2009, he took a leave of absence from teaching and served as the Acting Assistant Attorney General in charge of the DOJ’s Office of Legal Counsel.

In that position, he authored a 2010 legal opinion justifying **President Obama’s** decision to order a drone strike on an American citizen who was a radical Islamic militant living in Yemen. When **Mr. Barron’s** memo was made public in 2014, *The New York Times* described it as “a slapdash pastiche of legal theories — some based on obscure interpretations of British and Israeli law — that was clearly tailored to the desired result.” By that time, **President Obama** had nominated him to the First Circuit. He was criticized in the Senate debate for being — in the words of Sen. Ted Cruz — an “unabashed judicial activist ... disregarding the terms of the Constitution.” (He was confirmed by a vote of 53-45.)

In the milk drivers case, **Judge Barron** looked at the text of the statutory exemption and concluded that the absence of a comma after the word “shipment” made the wording ambiguous. Given this ambiguity and the supposed lack of clear legislative intent as to “distribution,” the court decided to err on

the side of the general purpose of overtime laws which is to protect employees’ health and welfare.

The use of a comma at the end of a list of items — referred to as a “serial” or “Oxford” comma — is itself somewhat controversial. **Strunk** and **White** call for its use, but — ironically — the Maine Legislative Drafting Manual expressly instructs that: “when drafting Maine

law or rules, don’t use a comma between the penultimate and the last item of a series.” **Judge Barron** gave no weight to the latter.

The oddest thing about the opinion is that it ignores the plain reading of the conjunction “or” in the statute. To reach his result,

Judge Barron creates an unusual sentence structure which has no “terminal conjunction.” Normally a list ends with an “and” or an “or.” But the First Circuit’s reading has no such terminal conjunction, thus making hash of the text.

One would hope that reason and common sense would prevail in this linguistic never-neverland, but I am doubtful that enough other members of the First Circuit would want to take on the issue. I am even more doubtful that the Supreme Court would want to wade in. 🐻

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Questions & Answers — Copyright Column

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QUESTION: *A government agency librarian asks about a recent report proposing an amendment to section 105 of the Copyright Act to create some exceptions that would permit government employees to own copyright in the works they create even in the course of their employment.*

ANSWER: In response to an inquiry from the House Judiciary Committee about reforming copyright, the Chair of the Joint Chiefs of Staff responded asking for an exception to section 105, the section of the *Act* that generally provides that no copyright shall exist in works created by the U.S. Government. The concern

is for faculty members at the service academies, war or staff colleges and other schools of professional military education. According to the proposal, this ban on copyright ownership is making it difficult to recruit faculty members for these institutions. Section 105 prevents

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