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Bamboozled by a Comma: The Second Circuit's Misdiagnosis of Ambiguity in American International Group, Inc. v. Bank of America Corp.

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In its opinion in *American International Group, Inc. v. Bank of America Corp.*,[1] the United States Court of Appeals for the Second Circuit invoked the principle of construction that if in a sentence a series of nouns, noun phrases, or clauses is followed by a modifier and the modifier is preceded by a comma, the modifier applies to the entire series, not just the final element in the series.

But as the opinion inadvertently demonstrates, that principle of construction is inconsistent with English usage and should be rejected. The opinion also serves as a reminder that judges cannot be counted on to understand how ambiguity operates; courts should permit expert-witness testimony on ambiguity.

Background

The plaintiffs in this case were American International Group, Inc. and various subsidiaries. They had invested in residential mortgage-backed securities underwritten, sponsored, or sold by the defendants, Bank of America Corporation and various subsidiaries.

The plaintiffs alleged that the defendants had engaged in fraud, causing the plaintiffs to suffer substantial losses. The plaintiffs sued in a New York state court. Because some of the mortgages underlying the securities were secured by properties in territories of the United States, the defendants contended that under the terms of the Edge Act[2] the defendants could remove the state court action to federal court.

The District Court for the Southern District of New York denied the plaintiffs' motion for remand to state court, ruling that the case fell within the jurisdiction of section 632 of the Edge Act. But the district court certified the question for interlocutory appeal. The plaintiffs appealed the district court's order. On appeal, the Second Circuit held that the dispute did not fall within section 632's grant of jurisdiction, so removal from state to federal court was not authorized by the statute. It vacated the district court's order denying remand.

The Language at Issue

In its opinion, the Second Circuit noted that the Edge Act was enacted by Congress in 1919 to support U.S. foreign trade. The Edge Act authorized creation of banking corporations chartered by the Federal Reserve Bank—so-called "Edge Act banks" or "Edge Act corporations." They could engage in offshore banking operations without being subject to state and local regulations that hampered competition with foreign banks.

Section 632, providing for federal court jurisdiction of certain suits to which Edge Act banks were party, was added in 1933. It reads in relevant part as follows (divided into three portions; italics added):

> Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party,
>
> arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, *either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries,*
>
> shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district . . . .

The issue addressed on appeal in *American International Group* was whether the offshore banking transaction on which the suit was based would fall within section 632 only if it was a transaction of the Edge Act corporation that was party to the suit, or whether any offshore banking transaction would do, regardless of whether that corporation was involved in it. The uncertainty was due to syntactic ambiguity—uncertainty over the order in which words and phrases appear and how they relate to each other.[3]

The Holding

The plaintiffs argued that the offshore banking transaction must be a transaction of the Edge Act corporation—otherwise, that portion of the quoted extract of section 632 that's in italics (that portion is referred to in this article as the "'either directly' modifier") would be rendered meaningless. The Second Circuit agreed, holding that the "either directly" modifier refers to an actor taking some action, and that the only actor named in the statute to which the "either directly" modifier could apply is the Edge Act corporation and the only action named is the necessary offshore banking transaction. The Second Circuit noted that this interpretation "makes perfect sense when viewed in terms of the Edge Act's objectives."[4]

The Second Circuit then tackled the defendants' argument that the "either directly" modifier "should be read to modify only the immediately preceding clause, 'arising . . . out of other international or foreign financial operations,' and not as modifying the other preceding clauses specifying suits that arise out of 'transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States.'"[5]

The Second Circuit held that there was no merit, "grammatical or otherwise," to the argument.[6] It's that part of the Second Circuit's decision that's of interest for purposes of this article.

Principles of Construction

A court could resolve syntactic ambiguity in one of two ways: it could consider what meaning had actually been intended, or it could invoke a principle of construction. A court that invokes a principle of construction isn't attempting to determine what those responsible for the text had intended. Instead, it's opting to resolve textual confusion based on what appears to be the most reasonable reading.[7]

Because principles of construction are divorced from actual intent, they are, to a greater or lesser extent, driven by expediency. But leaving aside any debate over the broader role of principles of construction, a principle of construction will be plausible only if it's consistent with actual English usage. The principle of construction that the Second Circuit relied on in *American International Group* fails that test.

The Second Circuit's opinion refers to two principles of construction.

The defendants' argument relied on the principle of construction that "favors reading a 'limiting clause or phrase . . . as modifying only the noun or phrase that it immediately follows.'"[8] That principle is commonly referred to as "the rule of the last antecedent."[9] The Second Circuit noted that the principle of construction is more nuanced than that, quoting the sixth edition of *Sutherland on Statutory Construction*[10] ("*Sutherland*") as saying that the principle applies only "where no contrary intention appears."

But the Second Circuit didn't limit itself to demonstrating that shortcoming in the defendants' argument. Instead, it proposed a principle of construction that pointed to the meaning opposite to that sought by the defendants: "When there is no comma . . . , 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."[11] (This article refers to that principle as "the comma test under the rule of the last antecedent.") The court went on to state that presence of a comma before the "either directly" modifier indicated, "according to the conventions of grammar and statutory interpretation, an intention that the modifier apply to the entire list and not merely to the last item in the list."

Flawed Analysis

But consider the shortcomings in the Second Circuit's assessment of how the comma is relevant.

First, although the court emphasized the nuance in how the rule of the last antecedent is stated in *Sutherland*, it underplayed the same nuance in assessing significance of the comma. According to the most recent edition of *Sutherland*, "A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."[12] So the suggestion is that presence of a comma isn't dispositive—instead, it's merely evidence.

Second, and more perniciously, the court confused grammar and principles of interpretation. Grammar describes the principles or rules governing the form and meaning of words, phrases, clauses, and sentences. Grammar is a function of how people speak and write. By contrast, principles of construction offer courts an expedient way to resolve syntactic ambiguity without having to look closely into the intended meaning.

In that regard, no one should confuse the comma test under the rule of the last antecedent with how writers use commas and how manuals on English usage recommend that writers use commas. Usage manuals recognize that a comma is used to indicate a slight break in a sentence. But according to the Second Circuit, adding a comma after a series of antecedents not only does not sever the modifier from the last noun, noun phrase, or clause in the series, it in fact operates remotely on all the antecedents, binding them to the modifier. Nothing of substance in the linguistics literature on punctuation or in usage manuals suggests such a mechanism. In fact, it suggests the opposite.

The Court's Example

To demonstrate the significance of the comma before the "either directly" modifier, the court offered the following comparison:[13]

> For example, the statement, "This basketball team has a seven-foot center, a huge power forward, and two large guards, who do spectacular dunks," differs from the statement, "This basketball team has a seven-foot center, a huge power forward, and two large guards who do spectacular dunks." The first statement conveys that all four players do spectacular dunks. The latter statement conveys that only the guards do so.

Because these contrasted versions are simpler than the language of section 632 of the Edge Act, they offer a clearer way to demonstrate that in English usage, commas do not serve the function attributed to them by the court.

In each of the two versions of the court's example, *who do spectacular dunks* is a relative clause. Relative clauses can be either restrictive or nonrestrictive. Typically, restrictive relative clauses give essential information about the preceding noun, noun phrase, or clause to distinguish it from similar items; nonrestrictive relative clauses give supplemental, nonessential information.

Use of commas is relevant for distinguishing between restrictive and nonrestrictive relative clauses. Although actual usage is less tidy, usage manuals recommend that nonuse and use of commas be paired with use of *that* and *which*, respectively,[14] as in the following examples:

> *The cakes that George baked were delicious.* [restrictive]
>
> *The cakes, which George baked, were delicious.* [nonrestrictive]

But the conjunction used in the court's example, *who*, can occur in both restrictive and nonrestrictive clauses. In the version of the court's example that uses a comma, the clause following *who* would typically be read as a nonrestrictive clause, indicating that the fact that the players in question dunk constitutes nonessential information. By contrast, in the version without the comma, the clause following *who* could be read as a restrictive clause, so that the meaning conveyed is that the team has additional players who don't do spectacular dunks.

Furthermore, the examples below demonstrate that commas are routinely used in a manner that's inconsistent with the comma test under the rule of the last antecedent. (After each example it's stated whether the example contains a restrictive or nonrestrictive clause and whether that clause is "narrow scope," with the clause modifying just the immediately preceding noun, or "wide scope," with the clause modifying both preceding nouns.)

[1] *She was accompanied by a lawyer and the accountant who was advising her on her tax matters.*
[restrictive (no comma); narrow scope (antecedent is *the accountant*)]

[2] *She was accompanied by the lawyer and the accountant who were advising her on the revision of her will.*
[restrictive (no comma); wide scope (antecedents are *the lawyer* and *the accountant*)]

[3] *She was accompanied by her father and her sister, who was now seven months pregnant.*
[nonrestrictive (comma); narrow scope (antecedent is *her sister*)]

[4] *She was accompanied by her father and her sister, who were both giving her their full support.*
[nonrestrictive (comma); wide scope (antecedents are *her father* and *her sister*)]

More specifically, in [2] the absence of a comma doesn't preclude wide-scope modification, with the restrictive clause modifying more than the preceding noun. And in [3] the presence of a comma doesn't preclude narrow-scope modification, with the nonrestrictive clause modifying just the preceding noun. Those results are inconsistent with the comma test under the rule of the last antecedent.

Regarding the court's example, a simple way to demonstrate the irrelevance of presence or absence of a comma is to add *both* after "who" in the first example and *all* after "who" in the second example. In the first example, that would result in the modifier's having narrow scope, despite the comma; in the second example, that would result in the modifier's having broad scope, despite absence of the comma.

So there's no basis for thinking that a reasonable reader would assume that if in a sentence a series is followed by a modifier and the modifier is preceded by a comma, the modifier applies to the entire series, not just the final element in the series. The only basis for invoking the comma test under the rule of the last antecedent is expediency—it offers an easy way to resolve syntactic ambiguity caused by closing modifiers. But to invoke a principle of interpretation that has no basis in English usage is in effect to abandon rational inquiry as to meaning. That's a travesty.

The Court's Use of Fowler's 2d Edition

To support its interpretation, the court quoted the second edition of H.W. Fowler's *A Dictionary of Modern English Usage*, revised by Ernest Gowers[15] ("*Fowler's 2d Edition*"), as "explaining that in the sentence 'French, German, Italian, and Spanish, in particular are taught,' the comma at the end of the list 'show[s] that in particular relates to all four languages and not to Spanish only.'"[16] (The court omitted italics used in the original.)

One problem with this example is that the selective and altered quotation offered by the Second Circuit is misleading. In the context of a discussion of the rule against "separating inseparables," for example separating a verb from its subject or object, *Fowler's 2d Edition* considers whether it's appropriate to break the rule to indicate the end of a long or complicated subject. It goes on as follows:

> In enumerations, for instance, should there be a comma after *Spanish* in *French, German, Italian, and Spanish, are taught*? … The answer here suggested is no; not even when the intrusion of an adverbial phrase between subject and verb tempts a writer to use a comma to prevent ambiguity, as he might write *French, German, Italian, and Spanish, in particular are taught*, to show that *in particular* relates to all four languages and not to Spanish only."

So far from endorsing the punctuation in the example offered, *Fowler's 2d Edition* says that it's wrongly punctuated. Furthermore, *Fowler's 2d Edition* doesn't say that the comma after *Spanish* shows that *in particular* relates to all four languages—instead, it states that a writer might use the comma to show as much. That cannot be read as an endorsement of that usage, or even as an assertion that the purpose intended by a writer in so using the comma would be achieved.

Besides, in the *Fowler's 2d Edition* example it would be more typical to set *in particular* apart with paired commas, thereby indicating that the phrase is parenthetical, or to do without any commas. That suggests that the *Fowler's 2d Edition* example is simply a poor one. With paired commas, there would be no need to attribute some other function to the comma preceding *in particular*.

So the *Fowler's 2d Edition* example cannot reasonably be seen as supporting the comma test under the rule of the last antecedent.

Conclusion

After considering the scope of the "either directly" modifier, the Second Circuit addressed more generally the meaning of the language at issue, noting that "for purposes of the present dispute, it makes no difference whether the subsequent modifier applies to the entire preceding list or only to the immediate antecedent."[17]

In so saying, the Second Circuit would seem to have rendered moot its analysis of the scope of the "either directly" modifier. But that's no reason to ignore it: courts are inclined to invoke the comma test under the rule of the last antecedent, and *American International Group* offers a perfect opportunity to lay bare its shortcomings.

As a matter of English usage, one cannot reasonably attribute to the comma before the "either directly" modifier the significance that the Second Circuit attributed to it. All that one can say is that the "either directly" modifier is nonrestrictive supplementary material offset by commas—it's not clear from the text whether the "either directly" modifier has broad or narrow scope.

More broadly, *American International Group* shows particularly clearly how the comma test under the rule of the last antecedent has no foundation in English usage. The comma test goes beyond the expediency that can characterize principles of construction and strays into nonsense. Presence or absence of a comma before a modifier wouldn't even be of use as evidence as to the scope of the modifier. Although plenty of courts have invoked the comma test,[18] courts cannot justify doing so and henceforth should reject it.

American International Group also serves as a reminder that when judges attempt to diagnose ambiguity, they might well trip up. For a comparable example, see the Third Circuit's flawed analysis, in *Meyer v. CUNA Mutual Insurance Society*,[19] of the meaning of an *or* in an insurance policy.[20]

It's unlikely that seeking to improve the semantic acuity of judges would, by itself, remedy this problem. But a meaningful fix is at hand.

Courts generally decline to admit expert testimony regarding whether contract language is ambiguous.[21] That makes no sense—cases such as *American International Group* and *Meyer* demonstrate that one cannot assume that judges are equipped to analyze ambiguity, any more than being a careful driver equips one to service a car engine. Litigants could nevertheless enlist experts to help them behind the scenes, but allowing expert testimony on ambiguity would give litigants a better chance of guiding judges to a sensible analysis. It would also remind judges to be aware of the limits to their expertise.

For courts, continuing to invoke the comma test under the rule of the last antecedent would be an exercise in obliviousness; continuing to bar expert testimony on ambiguity would be an exercise in hubris.

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[1] 712 F.3d 775 (2d Cir. 2013).

[2] 12 U.S.C. §§ 611-632.

[3] *See* KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ¶ 12.1 (3d ed. 2013).

[4] Am. Int'l Group, Inc. v. Bank of Am. Corp., 712 F.3d 775, 782 (2d Cir. 2013).

[5] *Id.* at 781.

[6] *Id.*

[7] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012) (endorsing an interpretive approach based on "determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued").

[8] *Am. Int'l Group, Inc.*, 712 F.3d at 781 (quoting Barnhart v. Thomas, 540 U.S. 20, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003)).

[9] *See* ADAMS, *supra* note 3, at ¶ 12.6.

[10] 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:33 (7th ed. 2014) (more recent edition than that cited by the court).

[11] *Am. Int'l Group, Inc.*, 712 F.3d at 782.

[12] *See* SUTHERLAND, *supra* note 10.

[13] *Id.*

[14] *See* ADAMS, *supra* note 3, at ¶¶ 12.41–54.

[15] H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 587–88 (Ernest Gowers ed., 2d ed. 1965).

[16] *Am. Int'l Group, Inc.*, 712 F.3d at 782.

[17] *Id.* at 784.

[18] *See* SUTHERLAND, *supra* note 10.

[19] 648 F.3d 154 (3d Cir. 2011).

[20] *See* ADAMS, *supra* note 3, at ¶¶ 11.87–116.

[21] *See* Kenneth A. Adams, *Expert Testimony and Ambiguity*, Adams on Contract Drafting (June 16, 2009), http://www.adamsdrafting.com/expert-testimony-and-ambiguity/.