

BUSINESS LAW TODAY

The ABA Business Law Section's Online Resource

Making a Mess of Ambiguity: Lessons from the Third Circuit's Opinion in *Meyer v. CUNA Mutual Insurance Society*

By [Kenneth A. Adams](#)

A complex source of uncertainty in contract language is ambiguity associated with use of plural nouns and the words *and, or, every, each, and any*—what this author refers to as “ambiguity of the part versus the whole.” In each case, the question is whether a single member of a group of two or more is being referred to, or the entire group.

Most courts that encounter this kind of ambiguity are ill-equipped to analyze it. A noteworthy example of this is the opinion by the Court of Appeals for the Third Circuit in *Meyer v. CUNA Mutual Insurance Society*, 648 F.3d 154 (3d Cir. 2011). Because its flawed analysis caused the court to find ambiguity in an insurance policy where in fact there was none, the court decided the case incorrectly. This case serves as a cautionary tale for judges, litigators, contract drafters, and companies that routinely create contracts.

Background

Plaintiff Meyer, a railroad employee, purchased a credit disability insurance policy from defendant CUNA Mutual Group in connection Meyer's purchase of a car with financing provided by a credit union. Under the policy, CUNA would make car-loan payments on Meyer's behalf if he was deemed disabled. After Meyer injured himself on the job, CUNA made his car payments for approximately three years, then notified Meyer that it would be stopping the payments: Meyer no longer

met the definition of “Total Disability,” as stated in CUNA's policy, in that Meyer's doctors had determined that he could return to work in some capacity.

Here's how “Total Disability” was defined in the policy:

during the first 12 consecutive months of disability means that a member is not able to perform substantially all of the duties of his occupation on the date his disability commenced because of a medically determined sickness or accidental bodily injury. After the first 12 consecutive months of disability, the definition changes and requires the member to be unable to perform any of the duties of his occupation or any occupation for which he is reasonably qualified by education, training or experience.

Meyer responded to CUNA's stopping payments on the car by filing a class action with the District Court for the Western District of Pennsylvania. He argued that the policy language was unambiguous and meant that after the first 12 consecutive months, he qualified as totally disabled if he could show either that (1) he was unable to perform the duties of his occupation or (2) he was unable to perform the duties of any occupation for which he was reasonably qualified by education, training, or experience.

By contrast, CUNA argued that for the post-12-month period, the “any occupation” standard applied.

The district court granted Meyer's motion for partial summary judgment, holding that the definition of the term “Total Disability” was ambiguous and so should be construed in favor of Meyer. CUNA appealed; the Third Circuit affirmed.

The Third Circuit's Analysis

In its opinion, the Third Circuit noted that contract language is ambiguous when it's reasonably susceptible of being understood in different ways; that ambiguous language in an insurance policy should be construed against the insurance company; and that words in an insurance policy “should be construed in their natural, plain and ordinary sense.” (An insurance policy is a kind of contract.)

After considering the dictionary definition of *or* and citing two cases, the court concluded that “The commonly used and understood definition of ‘or’ suggests an alternative between two or more choices.” In other words, the *or* was, to use the court's terminology, disjunctive rather than conjunctive. The court found unpersuasive the case law cited by CUNA to support its interpretation. The court noted that its conclusion that Meyer's interpretation was reasonable was bolstered by the fact that CUNA could have avoided any ambiguity by using the word *and* instead of *or* to convey that it indeed intended a conjunctive meaning. The court summarized its position as follows: “Based on our analysis of a plain reading of the

language and common, disjunctive meaning of the word ‘or,’ we find that Meyer’s interpretation is not unreasonable.”

The court went on to decline to accept arguments to the effect that CUNA’s interpretation was consistent with the relevant Pennsylvania statute and industry practice. It also rejected, on the grounds that the “substantially all” standard of the first half of the definition differed from the “any” standard of the second half, the argument that the meaning sought by Meyer would result in the same standard applying to both the first 12 months and the following period.

But the court noted a “potential contextual defect” that arises from attributing a disjunctive meaning to the *or* in question—it renders meaningless the second part of the provision relating to the period after the first 12 months. That caused the court to conclude that that definition is ambiguous and that CUNA’s interpretation too was reasonable. But the court held that due to Pennsylvania’s policy of construing against the insurer any ambiguities in an insurance policy, the meaning claimed by Meyer was the one the applied.

What Are the Possible Meanings?

So the Third Circuit accepted Meyer’s argument that the definition applied to him because he was unable to perform any of the duties of his occupation—all that was required for him to fall within the scope of the definition was that his inability apply to only one of the alternatives presented.

But the court’s reasoning is deficient in terms of how it determined the possible alternative meanings and which should apply. The approach taken by the Third Circuit is broadly comparable to that taken by other courts, but that doesn’t make it any less mistaken. In relying on the dictionary definition of *or* and case law that was essentially irrelevant, the Third Circuit failed to consider unavoidable nuances of the English language. A broader analysis is required, one that recognizes that the ambiguity associated with *or* is a complex issue of English usage rather than a narrow legal question.

As a first step in such an analysis, let’s consider the possible alternative meanings. Here’s the relevant portion of the

definition (emphasis added):

[a member is] unable to perform any of the duties of his occupation *or* any occupation for which he is reasonably qualified by education, training or experience.

According to the leading reference work *The Cambridge Grammar of the English Language* at page 1298, “When a subclausal *or*-coordination falls within the scope of a negative, it is equivalent to an *and*-coordination of negative clauses.” In other words, the natural interpretation of *I didn’t like his mother or his father* is *I didn’t like his mother and I didn’t like his father*.

It follows that a natural interpretation of the language at issue in Meyer is the following:

[a member is] unable to perform any of the duties of his occupation *and* [a member is] unable to perform any of the duties of any occupation for which he is reasonably qualified by education, training or experience.

That is the meaning advocated by CUNA.

As regards alternative meanings, *I didn’t like his mother or his father* could conceivably mean *I didn’t like his mother or his father, but I don’t recall which* or *I didn’t like his mother or his father, I liked them both*. But because the language at issue in *Meyer* isn’t a statement of fact but a statement of the circumstances that give rise to a legal arrangement, only one possible alternative meaning presents itself—that advanced by Meyer.

Is CUNA’s Meaning Reasonable?

That the language at issue gives rise to two alternative meanings isn’t enough to make it ambiguous. For that to be the case, each alternative meaning would have to be reasonable.

Given that *The Cambridge Grammar of the English Language* acknowledges the reading giving rise to the meaning advanced by CUNA, any court should be willing to hold that that meaning is a reasonable one.

But the Third Circuit pointed to use of “any occupation” in the language at issue rather than “any other occupation” as an

argument against CUNA’s interpretation:

Reading the phrase conjunctively, one could argue that inclusion of continued coverage if one cannot perform “any of the duties of one’s former occupation” is redundant or unnecessary if “duties of any occupation for which one is reasonably qualified” includes one’s own occupation.

The court is correct—omitting *other* does render superfluous the reference to “his occupation,” and contract language should avoid redundancy. But omission of *other* doesn’t leap out at the reader—in everyday English it’s commonplace to link with *or* a reference to a member of a class and a reference to the entire class, without carving out that member—for example, *I can’t eat ice cream or any dairy products*. (In speech, you’d stress the “any.”)

And more importantly, that overlap is benign—the meaning conveyed by the whole is unaffected. So the court has no basis for hinting that omission of *other* brings into question whether the language at issue conveys CUNA’s meaning.

Is Meyer’s Meaning Reasonable?

By contrast, Meyer’s meaning is problematic—if you assume that the *or* is disjunctive, the remainder of the definition is rendered superfluous.

Understanding how this plays out requires first considering a second potential ambiguity in the definition of “Total Disability”—the alternative meanings conveyed by the word *any*, which can mean one of a number of items, or all of them.

The word *any* occurs twice in the language at issue. The phrase “any of the duties of his occupation” could be taken to mean *one of* the member’s duties, but the context makes it clear that the intended meaning is *all* duties—the standard for the first 12 months refers to substantially all duties, and it’s clear that the intention was to make the standard for the following period more onerous.

The second instance of *any* occurs in the phrase “any occupation for which he is reasonably qualified.” This could be taken to mean “one of the occupations for which he is reasonably qualified.” But that

would suggest that inability to perform the duties of a single occupation—say, truck driver—would be enough to satisfy the second part of the standard relating to the post-12-months period. The member's ability to perform any number of other occupations would be irrelevant. But it would be nonsensical to allow the member to meet the requirements for total disability simply by finding a single occupation that the member is unable to perform the duties of. Instead, the phrase makes sense only if it's understood as referring to all occupations for which the member is qualified.

With that in mind, if you accept that the language at issue conveys Meyer's meaning, a member who is unable to perform any of the duties of his former occupation wouldn't have to worry about establishing that no suitable occupation remained available to him. The court says as much:

If he cannot perform any of the duties of his occupation, construing 'or' disjunctively, he is qualified for coverage, and there is no need to move to the second part of the clause—whether he can perform the duties of any occupation for which he is qualified—to determine coverage.

And the court noted that second part of the language at issue is similarly superfluous if the member is able to perform any of the duties of his former occupation:

If, on the other hand, an insured can perform one or more tasks of his former occupation, he is not qualified for coverage and there is no need to look to the second part of the clause because he has already failed to qualify for coverage—his own occupation is a subset of any occupation for which he is qualified.

So accepting Meyer's meaning requires that you disregard the second part of the language at issue. As a matter of contract interpretation, that's deeply problematic, particularly when compared to the benign overlap in CUNA's meaning caused by the absence of *other*. If the meaning that you seek to apply to a provision renders redun-

dant half that provision, the only possible conclusion is that the meaning doesn't make sense—that it's unreasonable.

The court notes that "Courts should not distort the meaning of the language or strain to find an ambiguity," but that's exactly what the Third Circuit does in nevertheless endorsing Meyer's meaning. It blithely dismisses the problem as a "potential contextual defect," offering in support of its disregard of the redundancy only one case, one that has only the most remote bearing on the issue.

Mixing Analyses of Different Meanings

The court capped its flawed analysis by concluding that the redundancy inherent in accepting Meyer's meaning "does lead us to find that the phrase is capable of being understood in more than one sense and that a conjunctive interpretation is also reasonable." That doesn't make sense. When weighing the reasonableness of alternative possible meanings, you consider them independently. The defects in one possible meaning go only to its reasonableness—they don't serve to bolster the reasonableness of the other possible meaning. The conclusion that follows from the redundancy required by Meyer's meaning is that Meyer's meaning is unreasonable, not that CUNA's meaning is somehow made more palatable.

Similarly, it didn't make sense for the court to conclude that reasonableness of Meyer's meaning was bolstered by the court's mistaken view that CUNA could have avoided any ambiguity by using the word *and* instead of *or*. Again, the ostensible weakness of one alternative meaning doesn't serve to bolster the reasonableness of another alternative meaning.

Lessons for Judges

The Third Circuit's analysis of the contract language at issue in *Meyer* has lessons to offer different constituencies—judges, litigators, contract drafters, and companies that routinely create contracts.

Judges who wish to avoid being responsible for a mess such as the *Meyer* decision should familiarize themselves with recurring sources of confusion in contracts, in

particular the different forms of ambiguity. They should also recognize that relying on dictionary definitions—something that's increasingly in evidence in opinions—often represents a poor substitute for the semantic acuity required to rigorously parse confusing contract language. Nevertheless, it's increasingly in evidence in opinions, as noted in [this article](#) by Adam Liptak in the *New York Times*.

And courts should recognize that just because judges speak and write in English, that doesn't mean they have the expertise necessary to diagnose ambiguity. The prevailing rule is that no expert testimony is admissible for purposes of determining whether contract language is ambiguous. *Meyer* is the latest of many cases showing that that rule doesn't make sense.

Lessons for Litigators

Litigators should be aware that disputes over contract language may well be more complex than first appears, and that judges may not be equipped to make sense of them. Litigators should be prepared to make available to a judge presiding over any such dispute a clear and complete linguistic analysis of the issues. The outcome in *Meyer* may well have been different if CUNA's counsel had included in its filings an analysis comparable to that contained in this article.

Lessons for Drafters

Meyer serves as a reminder that if you draft contracts, it would be reckless of you not to be alert to ambiguity of the part versus the whole. Unless you're attuned to it, the odds are that you'll be oblivious to any instance of such ambiguity until such time as it blossoms into a dispute.

And *Meyer* suggests that drafters might want to reconsider how far they need to go in seeking to avoid ambiguity. Alternative meanings caused by *or* and *and* are virtually inescapable in contract language. Consider two components of the definition of "Total Disability" that weren't at issue in *Meyer*. The definition refers to "a medically determined sickness or accidental bodily injury." Does that mean that disability that is due to both sickness and injury doesn't fall within the definition? And consider

the reference to “any occupation for which he is reasonably qualified by education, training or experience.” Does that mean that if the member is qualified because of some combination of education, training, and experience, it would be irrelevant for purposes of the definition?

You could revise contract language to eliminate the possibility of alternative meanings, but that would make it more wordy. If one of any given set of alternative meanings isn’t a reasonable one, you could elect to leave the language as is, on the grounds that the limited risk of ambiguity doesn’t warrant the extra verbiage. For example, it would be outlandish to revise the definition of “Total Disability” to rule out the possible meanings suggested in the immediately preceding paragraph.

But *Meyer* serves as a reminder that you cannot expect courts to be equipped to determine whether the alternative meanings of a given provision are reasonable and so give rise to ambiguity. If an alternative meaning appears unreasonable but could result in mischief if misconstrued by a court, the cautious drafter should consider redrafting that provision to eliminate the alternative meaning. The meaning attributed by *Meyer* to the language at issue in his dispute perhaps represents just such an alternative meaning.

Lessons for Companies

Meyer also offers a lesson to companies looking to put their contract process on a more efficient footing. It’s ironic that the language at issue was compiled as part of an effort by CUNA to make its policies easier to read. In addition to the three sets of alternative meanings included in, and omission of the word *other* from, the second sentence of the definition, the definition as a whole isn’t a model of clarity.

Here’s an alternative version that, among other things, goes out of its way to eliminate the alternative meanings and restores the missing *other*.

due to sickness or accidental bodily injury, (1) the member is unable to perform substantially all of the duties of his occupation (applies only during the first 12 consecutive months of that

disability) and (2) the member is able to perform none of the duties of his occupation and is able to perform duties of none of the other occupations for which he is reasonably qualified by education, training, or experience (applies thereafter), with disability being determined by a doctor in each case.

The shortcomings on display in CUNA’s policy are hardly exceptional, in that the language of mainstream contract drafting is dysfunctional. Fixing a company’s template contracts requires a concerted effort and some resources, the main obstacles being institutional inertia and obliviousness to the shortcomings of traditional contract language. But the fact that CUNA’s revised policy gave rise to litigation shows that willingness to effect change isn’t enough—you also need clear and modern contract language that complies with a rigorous set of guidelines.

Kenneth A. Adams is a speaker and consultant on contract drafting. He’s a lecturer at the University of Pennsylvania Law School, author of [A Manual of Style for Contract Drafting](#) (ABA 2d ed. 2008) and [The Structure of M&A Contracts](#) (West LegalEdcenter 2011), and founder and president of [Koncision Contract Automation](#).