



“For Want of a Comma”

## The Oxford Comma: Use It or Lose...

by Jonathan M. Stern

**R**emember the NBC television show *Ed*? Ed Stevens bought a bowling alley in his small Midwestern hometown after losing his job as an associate with a large Wall Street law firm. Ed lost his law firm job because he misplaced a comma in a contract.

Omitted and misplaced commas have played a role in many cases. In *Am. Nat'l Fire Ins. Co. v. Rose Acre Farms*, 107 F.3d 451 (7th Cir. 1997), the insurer took a no coverage position for a wrongful death case involving an airplane crash. The insurance policy at issue stated that it did not apply to “[i]njury arising out of the ownership, maintenance, operation, use, loading or unloading of an aircraft, *if such aircraft is owned or hired without pilot or crew by or on behalf of the Insured.*” The insurer argued that this language unambiguously excluded coverage for aircraft owned by the insured *or* for aircraft hired without crew or pilot on behalf of the insured. The policyholder agreed that the exclusion was unambiguous but argued that it meant “owned without pilot or crew or hired without pilot or crew,” in each case by or on behalf of the insured.

The court held that the exclusion was ambiguous. “At this point,” the court wrote, “we recognize that it pays not to daydream in grade school English class.... What would help [the insurer],” concluded the court, “is the insertion of a comma after ‘owned.’... [T]he comma would prevent the adverbial phrase ‘without pilot or crew’ from modifying both terms in the compound predicate. However, when construing an insurance contract, we may not rewrite unambiguous policy language.... So the comma stays out.”

I was reminded of *Ed* last March when the First Circuit decided the *Oakhurst Dairy* case. At issue in *Oakhurst Dairy* was whether a class of dairy truck drivers in Maine was entitled to approximately 10 million dollars in overtime pay. The case turned on whether a Maine statute that required employers to pay time and

a half for work in excess of 40 hours per week covered the drivers.

The statute exempted “[t]he 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.” The debate was whether “distribution,” on the one hand, or “packing for shipment or distribution,” on the other, was the last in a series of exempted activities. While the case did not turn on the absence of an Oxford comma (the comma placed immediately before the coordinating conjunction in a series of three or more terms), both sides agreed that inclusion of an Oxford Comma after “shipment” would have clinched the case for the employer. *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017) (“For want of a comma, we have this case.”). The First Circuit, instead, handed the victory to the driver employees.

In more than 30 years of editing legal writing, it appears to me that about half of the lawyers use the Oxford Comma (a.k.a. the “serial comma” or “Harvard comma”). That is consistent with my grammar school training that the use of an Oxford comma is optional, a matter of style. Lynne Truss, in her book *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation*, observes, “There are people who embrace the Oxford comma, and people who don’t, and I’ll just say this: never get between these people when drink has been taken.” Similarly, the New York Times described the Oxford Comma as “perhaps the most polarizing of punctuation marks.” Daniel Victor, *Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute* (Mar. 16, 2017).

As explained by Justice Thurgood Marshall, “many leading grammarians, while sometimes noting that commas at the end of a series can avoid ambiguity, concede that use of such commas is discretionary.” *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971). I use the Oxford comma, and most legal and business writing authorities—including my writing “bible,” William Strunk, Jr. and E.B. White, *The Elements of Style*—recommend the Oxford comma. The goal of all legal writing should be clarity. Whether writing a contract, a will, or a legal brief, we should strive to avoid ambiguity; “omitting the final comma may cause ambiguity,

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whereas including it never will.” Bryan Garner, *Garner's Modern American Usage* 676 (Oxford Press 3d ed. 2009). *Accord Christian v. Christian*, 300 Ga. 263, 265 n.2 (2016). Examples abound.

[A] bequest to three children phrased as ‘to Alice, Bill and Claire in equal shares’ could potentially result in a distribution of 50 percent to Alice and the remaining 50 percent to Bill and Claire to share. However, a bequest ‘to Alice, Bill, and Claire in equal shares’ would clearly result in each beneficiary receiving 1/3 of the estate.

*Han v. Synergy Homecare Franchising, LLC*, No. 16-cv-03759-KAW, 2017 U.S. Dist. Lexis 15021, at \*13 (N.D. Cal. Feb. 2, 2017).

Legal writers who opt not to use the Oxford comma must consistently refrain from doing so. When an Oxford comma appears in one place in a legal document, the absence of an Oxford comma elsewhere in the same document likely will lead to a different construction. *E.g.*, *Surratt v. Unum Life Ins. Co. of Am.*, No. 11-2943, 2013 U.S. Dist. Lexis 123866, at \*18–19 (E.D. La. Aug. 29, 2013) (“Unum suggests that the lack of a comma before ‘or’ and before ‘income’ is a stylistic choice of no consequence. However, Unum expressly used the serial comma in a preceding sentence, even though doing so was not necessary to avoid confusion”). *Cf. PEMS Co. Int’l, Inc. v. Temp-Air, Inc.*, No. A10-834, 2011 Minn. App. Unpub. Lexis 32 (Jan. 11, 2011) (“We recognize that our interpretation would be more grammatically corroborated if a comma separated the two phrases.... But the serial comma is similarly omitted seven words later in the same sentence.... We do not think the drafters intended anything more by omitting the comma in the first instance than it did by omitting the comma in the second instance.”).

Whether referred to as an Oxford comma, a serial comma, or a Harvard comma, use it or lose. 