

REVISITING THE AMBIGUITY OF “AND” AND “OR” IN LEGAL DRAFTING

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INTRODUCTION

Most general works on legal drafting contain a discussion of ambiguity, and usually such discussions touch on the ambiguity associated with the words *and* and *or*.¹ Treatment of this topic has, however, been characterized by oversimplification and error. This is not without consequence, as an element of this flawed analysis has made its way into case law.²

The analysis offered in Barbara Child's *Drafting Legal Documents: Principles and Practices* is representative. To illustrate the ambiguity of *and* and *or*, it offers three examples, the first two involving *or* and the third involving *and*.³ But in the first example,⁴ the emphasized *or* is in fact not ambiguous; this example just demonstrates that drafters sometimes use *or* when the better choice would be *and*.⁵ The second example⁶ does

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¹ See, e.g., BARBARA CHILD, *DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES* 323–29 (2d ed. 1992); ROBERT C. DICK, *LEGAL DRAFTING IN PLAIN LANGUAGE* 104–05 (3d ed. 1995); F. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* § 6.2, at 104–14 (2d ed. 1986) [hereinafter *FLD2*]; BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 624 (2d ed. 1995); THOMAS R. HAGGARD, *LEGAL DRAFTING IN A NUTSHELL* 259–68 (2003).

² See *infra* text following note 79.

³ See CHILD, *supra* note 1, at 323–25.

⁴ See *id.* at 323 (“I certify that I have read the names of the above listed organizations, and that I am not now, nor have I ever been, a member of, in association with, or affiliated with, *or* that I have not contributed to any of such organizations, except as indicated and explained below.”)

⁵ See *infra* notes 93–94 and accompanying text.

⁶ See CHILD, *supra* note 1, at 324 (“Any male person . . . who solicits *or* receives

exhibit ambiguity, but it is caused not by the emphasized *or* but by uncertainty as to whether the closing modifier is *compensation for soliciting for her* or *for her*.⁷ And in the third example,⁸ the *and* is not ambiguous; this example just demonstrates that drafters sometimes use *and* when the better choice would be *or*.⁹

The authors thought it appropriate to reexamine the ambiguity engendered in legal drafting by *and* and *or*, and to do so in a way that reflects linguists' understanding of the subject and explores how ambiguity varies depending on the grammatical context.

After defining ambiguity and distinguishing it from vagueness, and after considering the significance of context, this article examines the ambiguity engendered by plural nouns, a topic that is closely related to the ambiguity of *and* and *or*. It then discusses in turn the ambiguity engendered by *and* and by *or* and closes with a discussion of *and/or* and the ambiguity of *and* used in conjunction with *or*. Any marked divergence from analyses offered elsewhere in the literature on legal drafting is noted.

To illustrate the analysis, this article contains numbered example sentences. Each such sentence that is ambiguous is followed by one or more italicized sentences that convey its alternative meanings, in the following manner:

- [0] Each numbered example in regular font is either ambiguous or unambiguous.
- [0a] *Each numbered-and-lettered example in italics represents one of the possible meanings of the immediately preceding ambiguous numbered example.*

compensation for soliciting for her, is guilty of pimping, a felony . . .").

⁷ See KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING ¶¶ 8.134–35 (2004) (discussing ambiguity caused by opening and closing modifiers).

⁸ See CHILD, *supra* note 1, at 324 ("No person shall . . . use obscene, profane, vulgar, lewd, lascivious or indecent language, suggestions or proposals of an obscene nature *and* threats of any kind whatsoever.") (emphasis in the original).

⁹ See *infra* notes 93–94 and accompanying text.

I. AMBIGUITY AND VAGUENESS

A contract provision is ambiguous if it is capable of having two or more meanings.¹⁰

Ambiguity is to be distinguished from vagueness, which is a function of imprecision rather than alternative meanings. Whereas vagueness is a standard drafting tool, an ambiguity will generally go unnoticed, at least until sometime after signing. And ambiguity is pernicious: it can render illusory what the parties had thought to be a meeting of the minds, or it can be used by one of the parties to accomplish that after the fact.¹¹

II. CONTEXT

The shortcomings in analyses of *and* and *or* in the literature on legal drafting are largely due to commentators having paid insufficient attention to grammatical context. The category of contract language involved, where in the sentence the *and* and *or* coordination occurs, what part of speech occurs on either side of the coordination, and other such factors are relevant to determining the meaning associated with *and* and *or*.

Determining how these various elements interact is challenging, so it is not surprising that commentators on legal drafting should have instead opted to offer simplistic analyses that suggest that any ambiguity is inherent in the words *and* and *or* themselves.¹² From there it is but a small step to assuming, incorrectly, that ambiguity lurks in each instance of *and* and *or*.¹³

III. PLURAL NOUNS

Sentences containing plural nouns can be unambiguous—for example, *The Acme Subsidiaries are Delaware corporations*. In many sentences, however, a plural noun can engender ambiguity, with the nature and extent of the ambiguity being a function of context. Plural nouns engender three kinds of ambiguity: First, uncertainty regarding whether the members of a group are acting, or being acted on, individually or collectively. Second, if

¹⁰ See GARNER, *supra* note 1, at 48.

¹¹ ADAMS, *supra* note 7, ¶ 8.1, at 115 (internal citations omitted).

¹² See *infra* notes 17–20, 33–35 and accompanying text.

¹³ See *infra* text accompanying notes 52–54 and following note 88.

the members of a group are acting or being acted on individually, uncertainty regarding whether they must all act, or be acted on, in unison. And third, and more narrowly, uncertainty regarding whether a plural direct object relates to each member of a plural subject considered separately or to all members considered as a whole.¹⁴

A. *Subject Ambiguity*

When a plural noun is the subject of a sentence that uses any category of contract language¹⁵ other than language of discretion, as in [1] (which uses language of obligation), it can be unclear whether the persons or things constituting the subject are to act individually, as in [1a], or collectively, as in [1b]. Often when a contract requires that parties act collectively, an agent is appointed to act on their behalf. That reduces the potential for ambiguity of the sort exhibited by [1].

[1] The Stockholders shall notify Acme.

[1a] *Each Stockholder shall notify Acme.*

[1b] *The Stockholders, acting collectively, shall notify Acme.*

In the case of language of discretion, there are additional possible meanings. Imposing an obligation on each member of a group, as in [1a], has the same effect as imposing that obligation on all members of that group. By contrast, saying that the members of a group have discretion to take a given action could mean either (1) that any given member may take that action irrespective of whether any other member takes that action (see [2a]) or (2) that no member may take that action unless all members do (see [2b]).

[2] The Stockholders may notify Acme.

[2a] *Any Stockholder may notify Acme.*

[2b] *No fewer than all Stockholders may notify Acme.*

[2c] *The Stockholders, acting collectively, may notify Acme.*

¹⁴ See *infra* example [7].

¹⁵ See ADAMS, *supra* note 7, ch. 3 (discussing the categories of contract language—language of obligation, discretion, prohibition, policy, and representation—as well as how to express conditions in conjunction with categories of contract language).

B. Direct-Object Ambiguity

When a plural noun is other than the subject of a sentence, the potential ambiguity is similar to the ambiguity that arises when a plural noun is the subject. See [3], in which the plural noun serves as the direct object. When, however, it does not make sense to distinguish between treating the persons or things constituting the direct object individually or collectively, the potential number of meanings is reduced accordingly. For example, whereas [3b] is one of the possible meanings of [3], because giving a single notice could serve to notify a group, no analogous meaning is possible in the case of [4].

- [3] Acme shall notify the Stockholders.
- [3a] *Acme shall notify each of the Stockholders.*
- [3b] *Acme shall notify the Stockholders, considered collectively.*

- [4] Acme shall sell the Shares.

As is the case when the plural noun is the subject of the sentence, the potential number of meanings in [3] increases when the sentence is expressed using language of discretion: when the members of the object group are considered individually rather than collectively, it is not clear whether the subject has discretion to act with regard to all the members, as in [5a], or some or all of them, as in [5b]. The same ambiguity is present when one restates [4] using language of discretion (see [6]).

- [5] Acme may notify the Stockholders.
- [5a] *Acme may notify no fewer than all Stockholders.*
- [5b] *Acme may notify one or more Stockholders.*
- [5c] *Acme may notify the Stockholders, considered collectively.*

- [6] Acme may sell the Shares.
- [6a] *Acme may sell no fewer than all the Shares.*
- [6b] *Acme may sell one or more Shares.*

C. Subject-and-Direct-Object Ambiguity

When both the subject and the direct object are plural nouns, it can be unclear whether the plural direct object relates to each member of the plural subject considered separately or to all

members considered as a whole. In the case of [7], the question is whether each Stockholder is required to submit one questionnaire or more than one. Often it will be clear from the context which is the intended meaning.

- [7] The Stockholders shall promptly submit the completed questionnaires.
- [7a] *Each Stockholder shall promptly submit a completed questionnaire.*
- [7b] *Each Stockholder shall promptly submit the completed questionnaires.*

IV. "AND"

Related to the ambiguity caused by plural nouns is that engendered by nouns or adjectives linked by *and*.

And conveys conjunction, with items linked by *and* being considered together.¹⁶ Sentences containing nouns linked by *and* can be unambiguous—an example is *Acme and Widgetco are Delaware corporations*. But *and* can also engender ambiguity.

And can convey that the members of a group are to be considered together, but it can also convey that they are to be considered together and separately. Furthermore, it can be unclear whether nouns linked by *and* are acting, or are being acted on, individually or collectively. (The latter kind of ambiguity also arises in connection with plural nouns).¹⁷

Authorities on drafting recognize the former kind of ambiguity,¹⁸ but they gloss over the fact that whether *and* is ambiguous, and in what way, depends entirely on the grammatical context. The subtleties involved bring into question how Dickerson can assert that "in most cases . . . 'and' is used in the several rather than the joint sense"¹⁹ and that therefore in the absence of special circumstances drafters can rely on *and* to

¹⁶ See RODNEY HUDDLESTON & GEOFFREY K. PULLUM, THE CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE § 2.2, at 1293 (2002) [hereinafter CGEL] (stating that "[w]ith *and* we are concerned with a set in its totality").

¹⁷ See *supra* text preceding note 14.

¹⁸ See FLD2, *supra* note 1, § 6.2, at 105 (distinguishing the "several" *and*—A and B, jointly or severally—and the "joint" *and*—A and B, jointly and not severally); GARNER, *supra* note 1, at 624 (same).

¹⁹ FLD2, *supra* note 1, § 6.2, at 106.

convey the sense of *together* or *separately*.²⁰

A. Subject Ambiguity

When nouns linked by *and* constitute the subject of a sentence using any category of contract language other than language of discretion, as in [8] (which uses language of obligation), it can be unclear whether the persons or things constituting the subject are to be considered individually, as in [8a], or collectively, as in [8b]. (Note that the ambiguity in [8] is analogous to that in [1]).

- [8] Able and Baker shall notify Acme.
- [8a] *Able and Baker shall each notify Acme.*
- [8b] *Able and Baker, acting collectively, shall notify Acme.*

Language of discretion gives rise to greater ambiguity than does language of obligation. (Note that the ambiguity in [9] is analogous to that in [2]).

- [9] Able and Baker may notify Acme.
- [9a] *Both Able and Baker, as opposed to one or the other of them, may notify Acme.*
- [9b] *Able or Baker, or both of them, may notify Acme.*
- [9c] *Able and Baker, acting collectively, may notify Acme.*

B. Direct-Object Ambiguity

A similar range of potential meanings arises when nouns linked by *and* are other than the subject of the sentence. See, for example, [10] where nouns linked by *and* serve as direct objects. When, however, the persons or things constituting direct objects cannot be considered collectively, as in [11], the potential ambiguity is reduced accordingly.

- [10] Acme shall notify Able and Baker.
- [10a] *Acme shall notify both Able and Baker.*
- [10b] *Acme shall notify Able and Baker, considered collectively.*
- [11] Acme shall dissolve Subsidiary A and Subsidiary B.

²⁰ See *id.*

As with [8], the number of potential meanings conveyed by [10] increases when it is expressed using language of discretion; when the members of the object group are considered individually rather than collectively, it is not clear whether the subject has discretion to act with regard to all the members, as in [12a], or some or all of them, as in [12b]. The same ambiguity is present when one restates [11] using language of discretion; see [13].

[12] Acme may notify Able and Baker.

[12a] *Acme may notify both Able and Baker, as opposed to one or the other of them.*

[12b] *Acme may notify either Able or Baker, or both of them.*

[12c] *Acme may notify Able and Baker, considered collectively.*

[13] Acme may dissolve Subsidiary A and Subsidiary B.

[13a] *Acme may dissolve both Subsidiary A and Subsidiary B, as opposed to one or the other of them.*

[13b] *Acme may dissolve one or both of Subsidiary A and Subsidiary B.*

A range of ambiguity comparable to that in [12] and [13] arises when instead one uses language of prohibition, as in [14] and [15]. The more natural meaning of [14] and [15] is conveyed by [14a] and [15a], respectively.²¹ If you wish to convey the meaning in [14b] or [15b], you should not rely on [14] or [15] to do so.

[14] Acme shall not notify Able and Baker.

[14a] *Acme shall not notify Able and shall not notify Baker.*

[14b] *Acme shall not notify both Able and Baker but may notify one or the other of them.*

[14c] *Acme shall not notify Able and Baker, considered collectively.*

²¹ See CGEL, *supra* note 16 § 2.2.2, at 1298–99 (stating that more often than not a subclausal *and*-coordination will have scope over a negative, with the natural interpretation of *I'm not free on Saturday and Sunday* being “I’m free on Saturday and I’m not free on Sunday,” although an alternative reading—particularly if the *and* is stressed—would be “I’m not free on both days”).

- [15] Acme shall not dissolve Subsidiary A and Subsidiary B.
- [15a] *Acme shall not dissolve Subsidiary A and shall not dissolve Subsidiary B.*
- [15b] *Acme shall not dissolve both Subsidiary A and Subsidiary B but may dissolve one or the other of them.*

C. Subject-and-Direct-Object Ambiguity

Example [16] demonstrates the ambiguity found in [8], but, in addition, it is unclear whether the *and*-coordination of the subjects is “distributive” (as in [16a]) or “joint” (as in [16b]).²² In other words, it is unclear whether each of the subjects is to notify one or both of the objects.

- [16] Able and Baker shall notify Acme and Widgetco.
- [16a] *Able and Baker shall each notify Acme and Widgetco.*
- [16b] *Able and Baker shall notify Acme and Widgetco, respectively.*
- [16c] *Able and Baker, acting collectively, shall notify Acme and Widgetco.*

D. Multiple Verb Phrases

A variant of the ambiguity present in [12] occurs when in language of discretion the subject and a single *may* are used with two verb phrases, as in [17]. Using *may* in each verb phrase, as in [17b], would make it clear that Acme’s discretion is not limited to either selling assets and making capital expenditures or doing neither. [17c] accomplishes the same goal. When there are three or more verb phrases, it may be most efficient to express this meaning by stating that the subject *may do any one or more of the following*.

- [17] Acme may sell assets and make capital expenditures.
- [17a] *Acme may sell assets and make capital expenditures, but not one or the other.*
- [17b] *Acme may sell assets and may make capital expenditures.*
- [17c] *Acme may sell assets or make capital expenditures, or it*

²² See *id.* § 1.3.2, at 1282 (stating that the example *Kim and Pat are studying law and economics* “has not only the distributive reading ‘Kim is studying law and economics, and Pat is studying law and economics,’ but also the joint one ‘Kim and Pat are studying law and economics respectively’”).

may do both.

When the first verb phrase logically leads to the second, it is likely that the sense *together and not separately* is intended, as in [18].²³

- [18] Widgetco may terminate Subsidiary A and liquidate its assets.

E. Object-Predicative Ambiguity

When nouns separated by *and* function as objects predicative of a sentence, as do *Echo* and *Foxtrot* in [19], [20], and [21], the ambiguity can be analogous to that exhibited in [10], [12], and [14].

- [19] Delta shall issue a promissory note to Echo and Foxtrot.
[19a] *Delta shall issue a promissory note to each of Echo and Foxtrot.*
[19b] *Delta shall issue a promissory note to Echo and Foxtrot jointly.*
- [20] Delta may issue a promissory note to Echo and Foxtrot.
[20a] *Delta may issue a promissory note to both Echo and Foxtrot, as opposed to one or the other.*
[20b] *Delta may issue a promissory note to Echo, to Foxtrot, or to each of them.*
[20c] *Delta may issue a promissory note to Echo and Foxtrot jointly.*
- [21] Delta shall not issue a promissory note to Echo and Foxtrot.
[21a] *Delta shall not issue a promissory note to each of Echo and Foxtrot, as opposed to one or the other.*
[21b] *Delta shall not issue a promissory note to Echo or Foxtrot.*
[21c] *Delta shall not issue a promissory note to Echo and Foxtrot jointly.*

When, however, the objects predicative are mutually exclusive and so cannot be considered collectively, there is

²³ Cf. *id.* § 2.2.3, at 1300 (concerning asymmetric constructions, with *X and Y* implicating *X and then Y*).

2006]

“AND” AND “OR” IN LEGAL DRAFTING

1177

reduced scope for ambiguity. Because it would not be possible to construct a factory that is located in both California and Florida, the language of obligation in [22] is unambiguous and the language of discretion in [23] and language of prohibition in [24] exhibit fewer possible meanings than the analogous [20] and [21].

- [22] Acme shall construct a factory in California and Florida.
- [23] Acme may construct a factory in California and Florida.
- [23a] *Acme may construct a factory in California, in Florida, or in both states.*
- [23b] *Acme may construct a factory in both California and Florida, as opposed to in one state or the other.*
- [24] Acme shall not construct a factory in California and Florida.
- [24a] *Acme shall not construct a factory in California or in Florida.*
- [24b] *Acme shall not construct a factory in both California and Florida, as opposed to in one or the other.*

F. The Effect of Adjectives

Another form of ambiguity associated with *and* is that which derives from (1) adjectives that modify a noun and are linked by *and* (as in *temporary and part-time employees*) and (2) nouns that are modified by adjectives and linked by *and* (as in *temporary employees and part-time employees*).²⁴

Here is an example of the basic potential meanings of a plural noun modified by two adjectives:

- [25] temporary and part-time employees
- [25a] *employees who are temporary and employees who are part-time*
- [25b] *employees, each of whom is both temporary and part-time*

The ambiguity that actually arises in a provision using a plural noun modified by adjectives joined by *and* is, however, a function of context and of which kind of contract language is used. In lieu of giving examples of each of the many permutations, below are two examples; [26] uses language of obligation and [27] uses language of discretion. [27] exhibits a greater number of possible meanings than does [26] due to the ambiguity associated with plural nouns, namely (1) whether the members of a group are acting, or being acted on, individually or collectively, and (2) if the members of a group are acting or being

²⁴ See FLD2, *supra* note 1, § 6.2, at 109–14.

acted upon individually, whether they must all act, or be acted upon, in unison.²⁵

- [26] Tango shall terminate the employment of Acme’s temporary and part-time employees.
- [26a] *Tango shall terminate the employment of those Acme employees who are temporary and those Acme employees who are part-time.*
- [26b] *Tango shall terminate the employment of those Acme employees who are both temporary and part-time.*

- [27] Tango may terminate the employment of Acme’s temporary and part-time employees.
- [27a] *Tango may terminate the employment of no fewer than all Acme employees who are temporary and no fewer than all Acme employees who are part-time. Tango may not terminate all the employees in one group without also terminating all the employees in the other group.*
- [27b] *Tango may terminate the employment of one or both of the following: (1) no fewer than all Acme employees who are temporary and (2) no fewer than all Acme employees who are part-time.*
- [27c] *Tango may terminate the employment of no fewer than all Acme employees who are both temporary and part-time.*
- [27d] *Tango may terminate the employment of any Acme employees who are both temporary and part-time.*
- [27e] *Tango may terminate the employment of (1) one or more Acme employees who are temporary and (2) one or more Acme employees who are part-time.*

There is no ambiguity when adjectives linked by *and* are mutually exclusive (*hospital and burial expenses*;²⁶ *damaged and intact widgets*; *federal, state, and local laws*), are inextricably linked (*due and payable notes*), or represent sequential steps in a process (*inspected and certified widgets*).

If one were to apply the analysis that Dickerson offers in an analogous context,²⁷ one would posit that [25a] is ambiguous, in that it raises the question whether one can cumulate attributes—in other words, whether an employee who is both temporary and

²⁵ See *supra* text preceding note 14.

²⁶ See FLD2, *supra* note 1, § 6.2, at 109–10.

²⁷ See *infra* note 64 and accompanying text.

part-time would fall within both the group of temporary employees and the group of part-time employees or would be excluded from each group for having both attributes. But in the example discussed below,²⁸ the issue of cumulation of attributes is extrinsic to the meaning conveyed by [25a], and one has no basis for concluding that an employee who is both temporary and part-time would be excluded from both groups.

An alternative to having a noun modified by two or more adjectives is to repeat the noun with each adjective, as in [28]. This has the effect of eliminating the ambiguity exhibited in [25], because one meaning that is not possible is *employees who are both temporary and part-time*. But due to the ambiguity associated with plural nouns,²⁹ ambiguity would result if [28] were used with language of discretion the way [25] is used in [27].³⁰

[28] temporary employees and part-time employees

G. *The Ambiguity of "Every X and Y"*

When *every* is used before two or more nouns that are linked by *and*, another kind of ambiguity results.³¹ In [29], the question arises whether every director and every officer is entitled to indemnification, or whether only persons who are both a director and an officer are entitled to indemnification. Context will often suggest the intended meaning; in the case of [29], the intended meaning is presumably that expressed in [29a] rather than that expressed in [29b].

[29] Acme shall indemnify every director and officer of Widgetco.

[29a] *Acme shall indemnify every director and every officer of Widgetco.*

[29b] *Acme shall indemnify every person who is both a director and an officer of Widgetco.*

²⁸ See *infra* text accompanying note 64.

²⁹ See *supra* example [5].

³⁰ See FLD2, *supra* note 1, § 6.2, at 112 (stating that the two possible meanings of "charitable institutions and educational institutions" are a function of whether the phrase is used with "mandatory" or "permissive" language).

³¹ See *id.* § 6.2, at 107; HAGGARD, *supra* note 1, at 260–61.

V. “OR”

Or introduces alternatives.³² But since at least the time of publication of Dickerson’s *Fundamentals of Legal Drafting*,³³ authorities on legal drafting have stated that *or* is ambiguous, in that it can be “inclusive,” meaning *A or B, or both*, or it can be “exclusive,” meaning *A or B, but not both*.³⁴ Dickerson goes so far as to state that “in most cases ‘or’ is used in the inclusive rather than the exclusive sense” and that, therefore, in the absence of special circumstances drafters can rely on *or* to convey the sense of “A or B or both.”³⁵ (The authors suggest below how this view of the inclusive and exclusive *or* arose).³⁶

*The Cambridge Grammar of the English Language*³⁷ (referred to here as “CGEL”) represents the most recent attempt at a comprehensive descriptive grammar of English. It offers a more detailed analysis of *or* than can be found in the literature on legal drafting.

CGEL notes that “[t]he collective and alternative relations expressed by *and* and *or* . . . correspond closely to the relations known to logicians as conjunction and disjunction.”³⁸ In considering *or*, CGEL notes that logicians distinguish two kinds of disjunction: inclusive and exclusive disjunction. The disjunction of *P* and *Q* is inclusive if and only if at least one of the propositions *P* and *Q* is true. The disjunction of *P* and *Q* is exclusive if and only if only one of *P* and *Q* is true.³⁹

CGEL goes on to state that “*or* expresses inclusive disjunction but that a statement with the form ‘*P or Q*’ is typically interpreted as carrying the implicature ‘*P* and *Q* are not both true.’”⁴⁰ That is because “we don’t generally say ‘*P or Q*’ if we know ‘*P and Q*’ to be true The most likely reason for

³² See CGEL, *supra* note 16, § 2.2, at 1293 (“[W]ith *or* the members of the set are regarded as alternatives.”).

³³ F. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 76 (1965) [hereinafter FLD1]; see also FLD2, *supra* note 1, at 104.

³⁴ See DICK, *supra* note 1, at 104–05; GARNER, *supra* note 1, at 624; HAGGARD, *supra* note 1, at 263–64; Maurice B. Kirk, *Legal Drafting: The Ambiguity of “And” and “Or,”* 2 TEX. TECH L. REV. 235, 237–38 (1971).

³⁵ FLD2, *supra* note 1, § 6.2, at 106.

³⁶ See *infra* text accompanying notes 67–69.

³⁷ CGEL, *supra* note 16.

³⁸ *Id.* § 2.2.1, at 1294 (emphasis omitted).

³⁹ See *id.*

⁴⁰ *Id.* § 2.2.1, at 1295.

saying '*P or Q*' rather than '*P and Q*', therefore, is that the latter would be false, which leads to the 'not and' implicature."⁴¹ Consequently, "if I intend to invite Kim and Pat to dinner, it is normally misleading to say *I'll invite Kim or Pat to dinner*."⁴² Of course, when the alternatives joined by *or* are mutually exclusive (*He was born on Christmas Day in 1950 or 1951*), there is no need to rely on this implicature.⁴³

But CGEL offers two other reasons for saying *P or Q* rather than *P and Q*. The first is that the speaker may know that one or the other of *P* and *Q* is true, but does not know whether both are.⁴⁴ As an example, CGEL offers *Either the mailman hasn't got here yet or there's no mail for us today*.⁴⁵ A second reason for saying *P or Q* rather than *P and Q* arises when the speaker is presenting a choice and it does not matter to the speaker which alternative is chosen.⁴⁶ CGEL offers as an example *They are obtainable at Coles or Woolworths*. Presupposing that both stores stock the item, you have a choice between obtaining them at Coles and obtaining them at Woolworths.⁴⁷ Alternatively, the meaning "but not both" is intended—*They are obtainable at one or other of Coles and Woolworths, but I don't know (can't remember) which*.⁴⁸

So while commentators on legal drafting suggest that every *or* has the potential to be either inclusive or exclusive, and generally conveys the exclusive meaning,⁴⁹ CGEL states that *or* is typically used when the drafter wants to convey that only one of the propositions is correct—in effect, wants the *or* to be exclusive.⁵⁰

The discrepancy between these analyses is enhanced when one considers that the two categories of speech that would allow *P or Q* to be interpreted as meaning something other than *P and Q are not both true*⁵¹ represent casual speech that is unlikely to

⁴¹ *Id.* § 2.2.1, at 1297.

⁴² *Id.*

⁴³ *See id.* § 2.2.1, at 1295–96.

⁴⁴ *See id.*

⁴⁵ *Id.* § 2.2.1, at 1295.

⁴⁶ *See id.* § 2.2.1, at 1297.

⁴⁷ *See id.*

⁴⁸ *Id.* § 2.2.1, at 1297 n.17.

⁴⁹ *See supra* notes 33–35 and accompanying text.

⁵⁰ *See* CGEL, *supra* note 16, § 2.2.1, at 1294.

⁵¹ *See supra* notes 44–48 and accompanying text.

apply in the rigid context of legal drafting.

The approach offered in the literature on legal drafting can lead one astray. For example, one authority offers as an example of the ambiguous *or* the phrase “a \$500 fine or ten days in jail” and asks: “Does this mean that the judge can impose the fine or the term in jail, but not both? Or can the judge impose both?”⁵² According to CGEL, the normal interpretation would be that the legislature intended to convey that only one of the propositions—the fine or the jail term—was correct, and there is no basis for suggesting that this language conveys the meaning *or both*. To be able to impose both the fine and the jail term, one would need to add *or both* to the end of the phrase.

Another commentator with an expansive view of the inclusive *or* is Bryan Garner,⁵³ who recently offered the following analysis of the ambiguous *or*: “If you are offered coffee or tea, you may pick either (or, in this case, neither), or you may for whatever reason order both. This is the ordinary sense of the word, understood by everyone and universally accommodated by the simple *or*.”⁵⁴

But if in response to the question *Would you like coffee or tea?* you say that you would like both, that does not mean that the question was equivalent to your interrogator’s asking whether you wanted coffee, tea, or both. Instead, if you feel free to respond that you would like both, that is because although you know that in this context *or* introduces an alternative, you have decided that you would in fact like both coffee and tea and that, given the casual setting, it would be unduly rigid of you to take your interrogator at his or her word and opt for only a cup of tea or a cup of coffee. The authors concur with CGEL when it states that *both* “is not a possible answer” to the question *Would you like tea or coffee?*⁵⁵

In fact, *Would you like coffee or tea?* represents an unfortunate choice of sentence for advancing the cause of the inclusive *or*, because the inherent exclusiveness of *or* noted by CGEL is buttressed in that phrase by the fact that ordering both coffee and tea for oneself would be decidedly eccentric. The

⁵² HAGGARD, *supra* note 1, at 263.

⁵³ See GARNER, *supra* note 1, at 624.

⁵⁴ BRYAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 45 (2d ed. 2003).

⁵⁵ See CGEL, *supra* note 16, § 2.2.1, at 1298.

converse is true for a potential follow-up question, *Would you like milk or sugar?* Because having one's coffee or tea with both milk and sugar is such a standard alternative to having just milk or just sugar, whoever is posing the question is entitled to assume that it will be understood that *or both* is implicit in the question. Similarly, anyone encountering a rule stating that patrons may take their coffee with milk or sugar would likely assume that it was not intended to frustrate any patron wishing to take both milk and sugar. In this respect, the phrase *a \$500 fine or ten days in jail*⁵⁶ is more neutral and so is better suited to assessing the meaning of *or*.

The foregoing analysis shows that for purposes of contract drafting, *or* serves to distinguish alternatives, and it is untenable to seek to attribute, across the board, an inclusive meaning to *or*. For a proper understanding of the ambiguity associated with *or*, one must explore the different grammatical contexts in which *or* is used. This demonstrates that the ambiguity is of two sorts (setting aside anomalies of the *milk or sugar* variety). First, it arises when a plural noun is associated with an *or*-coordination: it is unclear whether all the items in question are to be attributed to one coordinate or the other, or can be divided between them. Second, it occurs in the context of negation, including, most pertinently, language of prohibition, and only in this context can one correctly speak of ambiguity—albeit limited—as to whether *or* is exclusive or inclusive.

A. Subject Ambiguity

When nouns linked by *or* constitute the subject of a sentence, there is no ambiguity when the direct object is singular, as is the case in [30] (using language of obligation) and [31] (using language of discretion).

[30] Able or Baker shall submit a claim form to Charlie.

[31] Able or Baker may submit a claim form to Charlie.

Ambiguity arises when the direct object is plural, not only in language of obligation, as in [32], but also in other categories of

⁵⁶ See *supra* text accompanying note 52.

2006] *“AND” AND “OR” IN LEGAL DRAFTING* 1185

contract language.

- [32] Able or Baker shall submit invoices to Charlie.
[32a] *Able or Baker shall submit invoices to Charlie, with all invoices being submitted by the same person.*
[32b] *Able or Baker shall submit invoices to Charlie, with any invoice being submitted by either Able or Baker.*

If one or more of the nouns linked by *or* is a plural noun (as in *the Purchasers and the Sellers*), the ambiguity would be compounded by that associated with plural nouns.⁵⁷

B. Direct-Object Ambiguity

When the object consists of singular nouns separated by *or*, there is no ambiguity in language of obligation, as in [33], or language of discretion, as in [34]. Ambiguity does, however, arise in language of prohibition, as in [35], although the more likely interpretation is [35a].⁵⁸

- [33] Acme shall dissolve Subsidiary A or Subsidiary B.
[34] Acme may dissolve Subsidiary A or Subsidiary B.
[35] Acme shall not dissolve Subsidiary A or Subsidiary B.
[35a] *Acme shall not dissolve Subsidiary A and shall not dissolve Subsidiary B.*
[35b] *Acme shall not dissolve one or the other of Subsidiary A or Subsidiary B, but may dissolve both of them.*

And ambiguity arises when the nouns linked by *or* are plural. For example, in [36], which uses language of obligation, it is uncertain whether each group of fruit should be considered collectively. This ambiguity also arises in language of discretion.

⁵⁷ See *supra* notes 16–20 and accompanying text.

⁵⁸ See CGEL, *supra* note 16, § 2.2.2, at 1299 (stating that generally a subclausal *or*-coordination falls within the scope of a preceding negative but that “wide scope readings are often possible as less likely interpretations,” and noting with respect to *He wasn’t at work on Monday or Tuesday* that “[t]he salient interpretation is ‘He wasn’t at work on Monday and he wasn’t at work on Tuesday,’ but it can also be read as ‘On Monday or Tuesday (I can’t remember precisely which day it was) he wasn’t at work’”).

- [36] Roe shall sell apples or oranges.
[36a] *Roe shall sell either apples or oranges, and once Roe sells either an orange or an apple, Roe shall not thereafter sell any of the other kind of fruit.*
[36b] *At any given time Roe shall sell either apples or oranges, but not both.*

C. Object-Predicative Ambiguity

When nouns separated by *or* function as objects predicative of a sentence, there is no ambiguity if the direct object is singular and one uses language of obligation, as in [37], or language of discretion, as in [38]. By contrast, when one uses language of prohibition, as in [39], the *or* could be either exclusive or inclusive, although the inclusive meaning, as in [39b], is the more likely.⁵⁹ (In [37], [38], and [39], *Delta* is the subject, *promissory note* the object, and *Echo* and *Foxtrot* objects predicative.)

- [37] Delta shall issue a promissory note to Echo or Foxtrot.
[38] Delta may issue a promissory note to Echo or Foxtrot.
[39] Delta shall not issue a promissory note to Echo or Foxtrot.
[39a] *Delta shall not issue a promissory note to either or both of Echo or Foxtrot.*
[39b] *Delta shall not issue a promissory note to either Echo or Foxtrot, as opposed to both of them.*

But ambiguity does arise in language of obligation when the direct object is plural, as in [40], due to uncertainty as to whether the items constituting the direct object are to be considered individually or collectively. (The same ambiguity arises with language of discretion.) This ambiguity is analogous to that in [32].

- [40] Delta shall issue promissory notes to Echo or Foxtrot.
[40a] *Delta shall issue promissory notes to Echo or Foxtrot, with one or other of them being issued all the promissory notes.*
[40b] *Delta shall issue promissory notes to Echo or Foxtrot, with*

⁵⁹ See *supra* note 58 and accompanying text.

any promissory note being issued to either Echo or Foxtrot.

D. The Effect of Adjectives

As is the case with *and*,⁶⁰ another form of ambiguity associated with *or* is that which derives from (1) adjectives that modify a noun and are linked by *or* (*temporary or part-time employees*) and (2) nouns that are modified by adjectives and linked by *or* (*temporary employees or part-time employees*).

The following example demonstrates the potential meanings conveyed by a plural noun modified by two adjectives joined by *or*. The ambiguity derives from the plural noun.⁶¹

[41] temporary or part-time employees

[41a] *employees, each of whom is either temporary or part-time*

[41b] *employees who are temporary or employees who are part-time*

Example [41] is similar to an example offered by Dickerson ("*charitable or educational institutions*"), except that he states that his example conveys four alternative meanings, the additional two meanings deriving from uncertainty as to whether one can cumulate attributes.⁶² Applying Dickerson's analysis to [41a], the question would be whether an employee who is both temporary and part-time would fall within the scope of the example, or whether instead the employee would have to be temporary or part-time, but not both.⁶³

This second inquiry does not, however, relate to ambiguity. In the case of mutually exclusive adjectives (such as *hospital or burial expenses*), it would not be possible to cumulate attributes—an expense cannot be both a hospital expense and a burial expense.⁶⁴ But in [41] the adjectives are not mutually

⁶⁰ See *supra* notes 24–30 and accompanying text.

⁶¹ See *supra* text accompanying note 14.

⁶² See FLD1, *supra* note 33, at 83; FLD2, *supra* note 1, § 6.2, at 111; see also Kirk, *supra* note 34, at 242 (using Dickerson's example).

⁶³ See Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2021 (1985) (stating, in connection with the phrase *any defendant who is out of the jurisdiction, insane . . . [or] under the age of eighteen*, "[b]ut technically, an insane minor is not insane *or* under eighteen but *both* insane *and* under eighteen; does the provision apply to him?").

⁶⁴ See FLD2, *supra* note 33, § 6.2, at 111–12.

exclusive, and there would be no basis for concluding, based solely on the wording of the example, that an employee who is both temporary and part-time would not fall within the scope of [41a] and [41b]. In that respect, neither [41a] nor [41b] is ambiguous—the issue of cumulation of attributes is extrinsic to the meaning conveyed by [41].

One issue that [41] does not raise is ambiguity associated with *or*—the ambiguity giving rise to [41a] and [41b] is that engendered by plural nouns;⁶⁵ in both [41a] and [41b] the *or* is exclusive;⁶⁶ and the question of cumulation of attributes does not involve *or*.

The flawed understanding of *or* that is to be found in the literature on legal drafting may well have originated in Dickerson’s analysis of adjectives linked by *or*. His was the first detailed analysis of the ambiguity of *or* from a drafting perspective,⁶⁷ and his analysis focuses on use of *or* with adjectives. Even though the ambiguity that he identifies—whether actual (the ambiguity engendered by plural nouns) or questionable (the question of cumulation of attributes)—has nothing to do with *or*, he brings it under the umbrella of the ambiguous *or*. It would seem that others then accepted this flawed analysis as being applicable to *or* wherever it is used, even outside the context of adjectives. (When a text on legal drafting cites an authority on the ambiguous *or*, usually that authority is Dickerson or someone who relies on Dickerson.)⁶⁸ With this in mind, the misconceptions regarding *or* to be found in the literature on drafting⁶⁹ should not come as a surprise.

The question of cumulation of attributes is actually not a pressing one, because it is an unlikely notion that one could not cumulate attributes.⁷⁰ With respect to [41], it would be difficult

⁶⁵ See *supra* text accompanying note 61.

⁶⁶ See *supra* text accompanying note 59.

⁶⁷ See *supra* note 33 and accompanying text.

⁶⁸ See, e.g., DICK, *supra* note 1, at 105 n.23 (citing Dickerson); GARNER, *supra* note 1, at 624 (citing Kirk, *supra* note 34); Kirk, *supra* note 34, at 237 (“The most readily available statement of these uncertainties [those involving use of *and* and *or*], and of their subtleties and difficulties, is to be found in Professor Reed Dickerson’s landmark book, *The Fundamentals of Legal Drafting*.”).

⁶⁹ See *supra* notes 33–35 and 52–55 and accompanying text.

⁷⁰ See Leff, *supra* note 63, at 2021 (asking rhetorically whether the phrase *any defendant who is out of the jurisdiction, insane . . . [or] under the age of eighteen* applies to an insane minor, and responding “[o]f course it does, at least to any sane

to imagine a provision that is intended to encompass any given temporary employee or part-time employee, but only if that temporary employee is not also part time, and vice versa.

Examples [42] and [43] demonstrate the ambiguity that actually arises in a provision using a plural noun modified by adjectives that are joined by *or*. Just as [27] exhibits a greater number of possible meanings than does [26], the ambiguity associated with plural nouns⁷¹ results in [43] exhibiting a greater number of possible meanings than does [42].

[42] Tango shall terminate the employment of Acme's temporary or part-time employees.

[42a] *Tango shall terminate the employment of those Acme employees who are temporary or those Acme employees who are part-time.*

[42b] *Tango shall terminate the employment of those Acme employees who are temporary or part-time—in other words, shall terminate the employment of all those Acme employees who are temporary and all those Acme employees who are part-time.*

[43] Tango may terminate the employment of Acme's temporary or part-time employees.

[43a] *Tango may terminate the employment of no fewer than all Acme employees who are temporary or no fewer than all Acme employees who are part-time.*

[43b] *Tango may terminate the employment of one or more of those Acme employees who are temporary or one or more of those Acme employees who are part-time.*

[43c] *Tango may terminate the employment of no fewer than all those Acme employees who are temporary and no fewer than all those Acme employees who are part-time, but Tango may not terminate all the employees in one group without also terminating all the employees in the other group.*

[43d] *Tango may terminate the employment of one or more of those Acme employees who are temporary and may terminate the employment of one or more of those Acme employees who are part-time.*

interpreter").

⁷¹ See *supra* text following note 14.

An alternative to having a noun modified by two or more adjectives is to repeat the noun for each adjective, as in [44]. This has the effect of eliminating the ambiguity exhibited by [41], because one meaning that is not possible is that of [41a], namely *employees, each of whom is either temporary or part-time*. The only meaning conveyed is that of [41b]—*employees who are temporary or employees who are part-time*. But due to the ambiguity associated with plural nouns,⁷² ambiguity would result if [44] were used with language of discretion the way [41] is used in [43].

[44] temporary employees or part-time employees

Dickerson states that an example similar to [44] conveys two alternative meanings.⁷³ Applying his analysis to [44], the question would be whether an employee who is both temporary and part-time would fall within the scope of the example, or whether instead the employee would have to be temporary or part-time, but not both. But like [41a] and [41b], [44] does not convey the latter meaning: the issue of cumulation of attributes is extrinsic to the meaning conveyed by [44].⁷⁴

VI. “AND/OR”

Drafters sometimes use *and/or* to convey the meaning of the inclusive *or*. Judges and legal-writing commentators have fulminated against use of *and/or*,⁷⁵ but it has gained greater acceptance among general authorities.⁷⁶ It does, after all, have a

⁷² See *supra* example [5].

⁷³ See FLD2, *supra* note 1, § 6.2, at 112–13.

⁷⁴ See *supra* notes 62–64 and accompanying text.

⁷⁵ See, e.g., DICK, *supra* note 1, at 107 (referring to *and/or* as a “linguistic aberration”); HAGGARD, *supra* note 1, at 266 (noting that judicial outrage directed at *and/or* “is fully warranted”); DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE (1992) (“Where precision is called for, *and/or* is a disaster.”); see also GARNER, *supra* note 1, at 56 (quoting the views of some “ardent haters” of *and/or*); 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:12 (4th ed. 1990) [hereinafter WILLISTON] (noting that *and/or* “has provoked outbursts of invective which are somewhat disproportionate to the amount of harm it causes”).

⁷⁶ See, e.g., CGEL, *supra* note 16, § 3.3, at 1329 (offering the example *They’re inviting [Kim and/or Pat]* and stating that *and/or* serves to block the implicature that they’re only inviting one of them, thereby “explicitly allowing for the situation where they invite both Kim and Pat as well as that where they invite only one.”);

specific meaning—*X and/or Y* means *X or Y or both*. One could use *Acme may dissolve Subsidiary A and/or Subsidiary B* as an alternative to [13b]. (*X, Y, and/or Z* means *X or Y or Z or any two or more of them*).

On the other hand, *X or Y or both* is generally clearer than *and/or*. And drafters sometimes use *and/or* when the only possible meaning is that conveyed by *or*: *Acme shall incorporate Subsidiary in Delaware and/or New York*. On balance, it is best to avoid *and/or*.

That said, in some contexts *and/or* is the most efficient way to incorporate into a provision the concept of *or both*. An example: *Acme may sell widgets in the Roetown Store and/or one or more of any other discount stores that Acme opens in the Territory with the prior written approval of Widgetco, which approval Widgetco may not unreasonably withhold*. The best alternative to *and/or* would be as follows: *Acme may sell widgets in the Roetown Store or one or more of any other discount stores that Acme opens in the Territory with the prior written approval of Widgetco, which approval Widgetco may not unreasonably withhold, or in both the Roetown Store and one or more of any such other discount stores*. This alternative is wordier, and in this context *both* is a little awkward, since it is best applied to two homogeneous objects.⁷⁷

In any event, do not use *and/or* in language of obligation, since it can be misleading. In the provision *Acme shall hire Roe and/or Doe*, using *and/or* obscures the fact that Acme's obligation would be satisfied by hiring either Roe or Doe. It would be more precise to use *or* and append, if necessary, the phrase *and may hire both Roe and Doe*.

WILLISTON, *supra* note 75, at § 30:12.

[R]egardless of how purists may feel about the term, it is fairly clear and certain that where the term 'and/or' is used in a contract, the intention is that the one word or the other may be taken accordingly as the one or the other will best effect the purposes of the parties as gathered from the contract as a whole.

Id.

⁷⁷ FOWLER'S MODERN ENGLISH USAGE 114 (R.W. Burchfield ed., 3d ed. 1996) ("In practice, *both* is almost always used with two homogenous words or phrases . . .").

VII. “AND . . . OR”

When in any string of three nouns (as in [45]), verbs, adjectives, or adverbs the first and second are separated by *and* and the second and third are separated by *or*, or vice versa, the meaning varies depending on which conjunction “has scope over” the other.⁷⁸ In [45], either *or* has scope over *and* (with the choice being between Able and Baker on the one hand and Charlie on the other) or *and* has scope over *or* (with the choice being between Baker and Charlie). Enumeration, as in [45a] and [45b], is the simplest way to eliminate this ambiguity. In addition, when the second and third elements are separated by *or*, one can use *either* to indicate that *and* has scope over *or*, as in [45c]. But this sort of ambiguity appears only rarely in contracts.

[45] Acme shall hire Able and Baker or Charlie.

[45a] Acme shall hire (1) Able and Baker or (2) Charlie.

[45b] Acme shall hire (1) Able and (2) Baker or Charlie.

[45c] Acme shall hire Able and either Baker or Charlie.

VIII. PRACTICAL CONSIDERATIONS

A. Courts May Find Ambiguity Where None Exists

This article has shown that ambiguity associated with *and* and *or* is considerably more subtle than the generalizations in the literature on drafting suggest. Those generalizations have the potential to cause a court to find ambiguity where linguistic analysis would indicate none exists.

Consider the case of *SouthTrust Bank v. Copeland One, L.L.C.*⁷⁹ Defendant SouthTrust operated an automated teller machine, or “ATM,” at an Alabama mall. It did so under a lease with the landlord, Copeland One, that provided in pertinent part as follows: “Tenant [SouthTrust] shall have the exclusive right during the term of this lease and any renewals to operate an ATM *or* any other type of banking facility on the Property.”⁸⁰ SouthTrust also operated a branch bank at the mall.⁸¹ Shortly

⁷⁸ See CGEL, *supra* note 16, § 1.2, at 1279–80.

⁷⁹ 886 So. 2d 38 (Ala. 2003).

⁸⁰ *Id.* at 39.

⁸¹ See *id.*

before the end of the lease for the branch premises, Copeland One and another bank entered into a new lease, and Copeland One informed SouthTrust that it would have to vacate the branch premises at the end of the existing lease.⁸² SouthTrust did so and opened its branch at a new location.⁸³ It then notified Copeland One that under the exclusive-use provision of the ATM

⁸² *Id.* at 40.

⁸³ *Id.*

lease, SouthTrust had the exclusive right to operate a branch bank at the mall.⁸⁴

Copeland One filed a complaint seeking a judgment declaring the parties' rights under the ATM lease.⁸⁵ The lower court found in favor of Copeland One, holding that the ATM lease was ambiguous and should be construed against SouthTrust, the drafter.⁸⁶ SouthTrust appealed, and in its analysis, the Alabama Supreme Court cited Bryan A. Garner's *A Dictionary of Modern Legal Usage*,⁸⁷ which offers the problematic analysis of the inclusive and exclusive *or* that is enshrined in the literature on legal drafting.⁸⁸ The court seemed to assume that every instance of *or* carries within it an exclusive and an inclusive meaning—it concluded that the ATM lease provision was ambiguous, in that it could be interpreted to mean either (1) that SouthTrust had the exclusive right to operate an ATM at the mall or the exclusive right to operate any other type of banking facility at the mall, or the exclusive right to operate both or (2) that SouthTrust had the exclusive right to operate an ATM at the mall or to operate any other type of banking facility at the mall, but did not have the exclusive right to operate both an ATM and any other type of banking facility at the mall.⁸⁹ Because SouthTrust drafted the ATM lease, the court construed the ATM lease against SouthTrust and held that meaning (2) applied.⁹⁰

The ATM lease was not, however, ambiguous. The provision of the ATM lease at issue is analogous to [34], and the only reasonable interpretation is that conveyed by (2). The court opted for the correct meaning, but for the wrong reasons.

The lesson in this for drafters is that it might not be enough to draft provisions that, in linguistic terms, are unambiguous, since courts may be willing to apply uncritically the flawed analysis of ambiguity contained in the literature on drafting. In other words, even though a provision may be unambiguous, in sensitive contexts, it may be appropriate to rule out the possibility of any alternative meaning.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 40–41.

⁸⁷ GARNER, *supra* note 1.

⁸⁸ See *SouthTrust*, 886 So. 2d at 42; see *supra* note 1 and accompanying text.

⁸⁹ *SouthTrust*, 886 So. 2d at 42–43.

⁹⁰ *Id.* at 43.

One could seek to accomplish this by using *either . . . or*. For instance, even though [34] is unambiguous as is, one could revise it to read, *Acme may dissolve either Subsidiary A or Subsidiary B*—adding *either* strengthens the implication that Acme may only dissolve one of the subsidiaries.⁹¹ But to convey the same meaning expressly, use *but not both*.⁹²

This belt-and-suspenders approach could also reduce the chances of a court unwarrantedly replacing an *and* with an *or*, or vice versa. Courts are quick to make such a change if they think that doing so would better reflect the intent of the parties,⁹³ and such changes are not always justified.⁹⁴

B. Minding Your “Ands” and “Ors,” and Supplementing Them

It would seem that what actually underlay the dispute in the *SouthTrust* case was not ambiguity. Instead, whoever drafted the ATM lease was not aware what meaning *or* would convey in this context. Because the exclusivity provision was contained in an ATM lease, it is unlikely that the meaning conveyed by that provision was the meaning that had been intended, since that would have meant that the ATM would have had to have been removed and the ATM lease and its exclusivity provision terminated if SouthTrust wished to open another banking facility.

Given the choice of using the word *and* or using the word *or* in the ATM lease provision, SouthTrust would have been advised

⁹¹ See CGEL, *supra* note 16, § 2.3, at 1307.

Either emphasises that one of the coordinates must obtain, and tends to strengthen the exclusive implicature that only one of them does. *I'll be seeing her on either Friday or Saturday* conveys somewhat more strongly than the version without *either* that I'll be seeing her on just one of these days. Exclusiveness nevertheless is still only an implicature

Id.

⁹² See *id.* § 2.2.1, at 1297 (noting that “the implicature [of exclusiveness] can be made explicit in a *but*-coordinate: *He'll invite Kim or Pat, but not both*”).

⁹³ See GARNER, *supra* note 1, at 55 (stating how “[s]loppy drafting sometimes leads courts to recognize that *and* in a given context means *or*,” and referring to “the opposite mistake”); see, e.g., *People v. Skinner*, 704 P.2d 752, 758 (Cal. 1985) (“The inadvertent use of ‘and’ where the purpose or intent of a statute seems clearly to require ‘or’ is a familiar example of a drafting error which may properly be rectified by judicial construction.”).

⁹⁴ See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 46 (1993) (stating that in some cases courts construe *and* as meaning *or*, and vice versa, without there being any apparent linguistic basis for doing so).

to opt for *and*. Simply replacing *or* with *and*—“Tenant [SouthTrust] shall have the exclusive right . . . to operate an ATM or [read and] any other type of banking facility on the Property”—would have resulted in actual ambiguity of the sort exhibited by [13]. But of the two possible meanings, the more likely would have been that sought by SouthTrust, namely what the court offered as meaning (1) of the ATM lease provision. A better solution, however, would have been to eliminate this ambiguity by having the provision read “the exclusive right . . . to operate an ATM and, at its discretion, any other type of banking facility on the Property.”

In these respects, the *SouthTrust* case is illustrative of two principles. The first is that it is commonplace for drafters to mistakenly use *and* instead of *or*, and vice versa.⁹⁵ An example: “Each of the Selling Stockholders shall notify the Purchaser of any updates to the representations in section 3.1 or [read and] 3.2.” Courts have often shown themselves willing to read *and* instead of *or*, or vice versa, in a contract provision when that would better reflect the intent of the parties,⁹⁶ but a drafter cannot count on a court to do so. Instead, a drafter should take care in choosing between *and* and *or*, particularly in sensitive provisions.

The second principle is that instead of simply opting for *and* or *or* and tolerating any ambiguity associated with one’s choice, in sensitive contexts you should eliminate that ambiguity by using language of the sort reflected in the italicized, unambiguous examples in this article. To exercise such control over meaning, a drafter needs to understand how the ambiguity associated with *and* and *or* manifests itself.

C. On Seeking to Eliminate Every Ambiguity

It would be unreasonable to expect drafters to attempt to eliminate all instances of ambiguity associated with *and* or *or*. Consider [46] and [47]. Each example is ambiguous, but anyone inclined to recommend that a drafter restructure them to eliminate the ambiguity should consider two factors. First, of the

⁹⁵ See GARNER, *supra* note 1, at 55 (noting that “*and* is frequently misused for *or* where a singular noun, or one of two nouns, is called for,” and noting that the opposite mistake—*or* for *and*—also occurs).

⁹⁶ See *supra* note 93.

two possible meanings of each example, one is clearly the most natural, namely [46a] and [47a]. Second, given the extra verbiage required to avoid ambiguity, prose stylists would likely steer clear of [46a] and [47a], while drafters in a hurry would be oblivious to these alternatives. Whether to eliminate ambiguity involves a balancing—whether conscious or not—of expediency and risk, and one should not be surprised if often enough in a given contract expediency trumps risk, and defensibly so.

[46] The Seller has complied with all laws applicable to the Business and the Acquired Assets.

[46a] *The Seller has complied with all laws applicable to the Business and all laws applicable to the Acquired Assets.*

[46b] *The Seller has complied with all laws applicable to both the Business and the Acquired Assets.*

[47] The Seller has complied with all laws applicable to the Business or the Acquired Assets.

[47a] *The Seller has complied with all laws applicable to the Business and all laws applicable to the Acquired Assets.*

[47b] *The Seller has complied with all laws applicable to the Business or all laws applicable to the Acquired Assets, but not both sets of laws.*

Although *and* expresses conjunction and *or* expresses disjunction,⁹⁷ they can serve to convey the same meaning: [46a] and [47a] are identical. Likewise, in the case of *This power of attorney will survive Smith's death [and] [or] incompetence*, in both cases the most natural meaning is *This power of attorney will survive Smith's death and will survive Smith's incompetence*. This phenomenon arises when the relevance of two alternatives depends not on the parties but on external factors. It adds an ironic twist to analysis of ambiguity associated with *and* and *or*.

⁹⁷ See *supra* text accompanying note 38.