

Ambiguous Drafting and the 12-Pound Cat

By Jeffrey S. Ammon

A recent Michigan Court of Appeals decision can teach us how to avoid ambiguous drafting. To appreciate the ambiguity that the decision addressed, imagine this sign at your local kennel: *We accept only cats and dogs weighing less than 10 pounds.* Now ask yourself: will the kennel accept your 12-pound cat? That is, does the 10-pound limit apply only to dogs, or also to cats?

Experienced contract drafters will recognize this as a “trailing modifier” problem. When a modifying phrase follows a string of two or more items, does the phrase modify just the last item, or every item in the string?

The Court of Appeals faced this ambiguity in *Lafarge Midwest, Inc v City of Detroit*.¹ In that case, a taxpayer claimed that its property, located in a Michigan renaissance zone, was exempt from school-bond millage under MCL 211.7ff:

- (1) For taxes levied after 1996, except as otherwise provided in subsection [] (2)... real property in a renaissance zone and personal property located in a renaissance zone is exempt from taxes collected under this act....
- (2) Real and personal property in a renaissance zone is not exempt from collection of the following:
 - (a) A special assessment levied by the local tax collecting unit in which the property is located.

(b) Ad valorem property taxes specifically levied for the payment of principal and interest of *obligations approved by the electors or obligations pledging the unlimited taxing power of the local governmental unit.* [Emphasis added.]

The taxpayer and the City of Detroit agreed that subsection 2(b) describes two kinds of obligations: those approved by electors and those pledging a local-governmental unit’s unlimited taxing power.² Since the school bonds did not pledge unlimited taxing power, the remaining question was whether the bonds had been *approved by the electors*.³

But which group of electors needed to approve the bonds so that taxes could be imposed? The bonds had been approved by a vote of only school-district electors, not electors of the entire city.

Does the trailing-modifier phrase *of the local governmental unit* modify the word *electors*? The taxpayer argued it did, and the court agreed: the phrase modified both kinds of obligations. Therefore, subsection 2(b) did not apply. The school-bond millage could not be imposed on the taxpayer.

The court’s analysis attached tremendous significance to the word *the*:

Next, we consider whether the phrase “of the local governmental unit” applies to “obligations approved by the electors,” as held by the Tax Tribunal. Guidance is gleaned from

the statutory language. The Legislature used the word “the” with respect to “electors.” “The” is a definite article which, when used especially before a noun—like “electors”—has a specifying or particularizing effect.... If the provision had simply said “electors,” it may have referred to electors generally, as the dissent opines. However, because the phrase “of the local governmental unit” is within the same statutory provision, we conclude that “the electors” must be the electors of the local governmental unit. This interpretation recognizes that the legislature is presumed to be familiar with the rules of statutory construction, as well as the rules of grammar. This construction is also in compliance with the mandate to “give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.”⁴

The court says it must give effect to every word. But its analysis does the opposite. Look at the way subsection 2(b) repeats the word *obligations*. Doesn’t that signal that what follows the second *obligations* refers only as far back as that word? The drafter seemed to carefully start over again with that word. But the court’s analysis makes that second reference to *obligations* meaningless, contradicting the court’s desire to give every word significance.

In addition, *the* electors might well refer to *the* electors who had to vote on that

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particular bond issue. That would give effect to the word *the*. The court does not even address this alternate and equally plausible reference for *the*.

More sensibly, the court demonstrated little patience for the rather arbitrary rule of the last antecedent. That rule provides that a modifier following a list of two or more items generally modifies only the last item in the string. (Thus, the *10-pound* phrase in my example would apply only to dogs, not to cats.) But now the court is picking and choosing among the rules of statutory construction.

Context can sometimes help resolve ambiguity. What if the kennel in my example were named *Cats and Their Small Friends*? That context would support a customer's conclusion that the weight limit applies only to dogs.

And looking beyond the text itself could have helped the court effectuate the legislative intent in this case. School districts and cities had been routinely collecting school-bond millage from renaissance-zone taxpayers since 1996 when these zones were created. This decision surprised school districts so much that legislation was promptly enacted to reverse the court's interpretation.⁵ If the court's opinion could have acknowledged that longstanding statewide practice and the reading it took for granted, the court might have reached a different result.

This case also teaches us that the court has a high tolerance for ambiguous drafting. As amazing as it seems, the court in this case concluded that subsection (b) was *not* ambiguous. But it took two sets of lawyers, a trial and trial-court opinion, and four pages of Court of Appeals analysis to determine what this subsection means. If that doesn't signal ambiguity, what does?

At any rate, it's best not to tolerate that much potential ambiguity in your drafting. After all, plain drafting could have avoided this entire dispute. The drafters could have used a vertical list, for example. Depending on which interpretation the drafter intended, subsection (b) would be rewritten in one of the following two ways:

- (a) *obligations of a local governmental unit that*
- (i) *are approved by its electors; or*
- (ii) *pledge its unlimited taxing power.*

The Contest Returns!

And it's better than ever.

I'll send a free copy of *Lifting the Fog of Legalese* to the first three people—that's right, three winners—who send me an "A" revision of the sentence below. Send an e-mail to kimblej@cooley.edu. The deadline is July 20, and I have to be the sole judge of the winners.

The sentence is from the website of the Social Security Administration. You'll see that it presents the very ambiguity discussed in this month's column.

"The SSI program pays benefits to people age 65 and older or blind or disabled adults under 65 who have limited income and resources."

Fix the ambiguity. If you want to, also explain your assumption about what modifies what.

Or this:

- (b) *obligations that*
- (i) *are approved by electors; or*
- (ii) *pledge a local governmental unit's unlimited taxing power.*

Vertical lists are not the only way to avoid ambiguity with trailing modifiers. If the phrase modifies both items, you could rewrite subsection (b) to read:

obligations of a local governmental unit that are approved by its electors or that pledge its unlimited taxing power.

Or use a dash:

obligations approved by electors—or obligations pledging the unlimited taxing power—of the local governmental unit.

Mid-sentence dashes are used for just this purpose in the restyled Federal Rules of Civil Procedure and Federal Rules of Evidence. For example, FR Civ P 4(b) states: "A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served."⁶ Another way to avoid ambiguity if the phrase modifies only the second of the two items: list that item and the phrase first. Thus, the City in this case would have accepted the following:

obligations that pledge the local governmental unit's unlimited taxing power or obligations that are approved by electors.

And do not think that you can always solve this trailing-modifier ambiguity simply by placing the modifying phrase before a string instead of after it. For example, what if I had titled this article *Avoiding Ambiguity*

and the 12-Pound Cat? Would you have expected to learn not just how to improve your writing but also how to elude large felines?

So handle trailing modifiers with care. And even if the kennel accepts your 12-pound cat, put it on a diet. ■

Jeffrey S. Ammon, a member of Miller Johnson law firm, is an avid student of plain-language drafting. He recommends the resources below for more information on avoiding ambiguity with trailing modifiers.

RESOURCES

- Adams, *A Manual of Style for Contract Drafting* (2008), 215–223.
- Garfinkel, *Real World Document Drafting—A Dispute—Avoidance Approach* (2008), 43, 71–74, 126–127.
- Kimble, *Lifting the Fog of Legalese—Essays on Plain Language* (2006), 119–122.

FOOTNOTES

1. *Lafarge Midwest, Inc v City of Detroit*, ___ Mich App ___, ___ NW2d ___ (2010), <http://coa.courts.mi.gov/documents/opinions/final/coa/20101012_c289292_44_289292.opn.pdf> (accessed June 20, 2011).
2. See *Lafarge* at *1–2 (citations omitted).
3. *Id.*
4. *Id.* at *5.
5. See 2010 PA 277 (amending section 3(h) of Michigan's Renaissance Zone Act—MCL 125.2683(h)—to include "any other jurisdiction that levies an ad valorem property tax" within the definition of "local government unit") <<http://www.legislature.mi.gov/documents/2009-2010/publicact/pdf/2010-PA-0277.pdf>>; see also E-Mail from Kelli Sobel, Exec. Dir. Mich. State Tax Comm'n, to its listserv, *Renaissance Zones and School Debt* (Dec. 6, 2010) (noting that the revised definition was intended to clarify whether "the exemption applies to school debt mills") (copy on file with author).
6. FR Civ P 4(b).