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Essay

The Doctrine of the Last Antecedent

A Case Study in Flimsiness

Joseph Kimble*

In a much longer article, I strongly criticized the doctrine of the last antecedent.[1] You readers will probably know how it works: in the phrase *doctors, nurses, and paramedics in a hospital*, the doctrine would apply the modifier—*in a hospital*—to *paramedics* only.[2] But a comma before the modifier would supposedly indicate that it applies to all three groups.[3] That's the comma exception to the doctrine.

The longer article argued the following points:

- The doctrine is intrinsically weak as a matter of syntax and grammar.
- It has no validity in resolving ambiguity.
- The comma exception only compounds the infirmity.
- Courts sometimes misapply the doctrine altogether.
- It seemingly contradicts another canon, the series-qualifier canon (under which *in a hospital* would modify all three antecedents even without the comma).

* Distinguished Professor Emeritus, WMU–Cooley Law School.

1 Joseph Kimble, *The Doctrine of the Last Antecedent, the Example in* Barnhart*, Why Both Are Weak, and How Textualism Postures*, 16 SCRIBES J. LEGAL WRITING 5 (2014–2015).

2 Example adapted from LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 108 (2d ed. 2013).

3 2A NORMAN J. SINGER & SHAMBIE SINGER, (SUTHERLAND) STATUTES AND STATUTORY CONSTRUCTION § 47:33, at 499–500 (7th rev. ed. 2014) ("A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." (citations omitted)).

- It is formulated in slightly different ways that, on the surface at least, show different degrees of strength behind the presumption.
- Its use has accelerated since the Supreme Court case of *Barnhart v. Thomas*, in which Justice Scalia illustrated the doctrine with a homey example[4]—an example that I found to be unpersuasive.
- In about forty cases sampled for the article, the great majority relied on other reasons as well for their decisions. What's more, courts relied on it as their primary reason in only 14% of the cases. And only one case relied on it exclusively.

Recently, I came across another of the rare cases that rely on the doctrine exclusively. It's a fascinating case—and worth a look. I think it shows once again that courts often tie themselves in knots trying to apply the doctrine, that it's a poor way to resolve ambiguity, and (more generally) that a strictly textualist approach to interpretation and decision-making is all too often inadequate.

An Outline of the Case

The case, from the New Mexico Supreme Court, involved the forfeiture of a Ford Bronco.[5] The owner, Stevens, told two other men that he could get some marijuana. He took their money, drove to Texas to make the purchase, and was arrested on his way back to deliver the two men's shares. In the forfeiture action, Stevens argued that the sale took place in Texas, where title to the marijuana passed to him as agent for the three men, so he was not transporting it for sale—as required under the forfeiture statute.

The supreme court disagreed, holding that the act of transporting was enough, regardless of whether it was for purposes of a sale. The court overruled an earlier case, *State v. Barela*, in which the sale had been completed before the owner transported the marijuana: the owner and buyer drove to the owner's house to pick it up, the buyer paid for a pound, and they left with it in the owner's truck.[6]

The same statutory language was at issue in both cases. It made the following subject to forfeiture:

4 540 U.S. 20, 27–28 (2003).

5 In re Forfeiture of 1982 Ford Bronco, 673 P.2d 1310 (N.M. 1983).

6 604 P.2d 838 (N.M. Ct. App. 1979).

> all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A or B . . . .

In breaking this down, we can ignore the phrases *including aircraft, vehicles or vessels* and *or intended for use*. Both phrases are enclosed in a pair of commas, indicating a parenthetical element that cannot be independently affected by a modifier (as in *any man, or any woman, who plays sports*).[7] So that leaves this nugget:

> all conveyances . . . which are used . . . to transport, or in any manner to facilitate the transportation for the purpose of sale of [a controlled substance].

The Analysis

As in hundreds of earlier and later cases, the court in *Ford Bronco* was faced with an ambiguous trailing modifier, *for the purpose of sale*: does it modify only *to facilitate . . . transportation*, or does it reach back and also modify *to transport*? The court did not specifically name the doctrine of the last antecedent but in effect applied it: the modifier attached only to the *facilitate* piece because the modifier was not preceded by a comma. The court said that a pair of commas around *for the purpose of sale* would have thrown the modification back to *to transport* as well. The modifier would have become a parenthetical (again, the court didn't use that term).

Here's the trouble with the textual analysis. Go back to the full provision. A single comma before *for the purpose of sale* would indeed seemingly defeat the doctrine of the last antecedent—because you would then have paired commas around *or in any manner to facilitate the transportation*, not because of the single-comma exception normally associated with the last antecedent. The same goes for the suggested pair of commas around *for the purpose of sale*: that would have created still another parenthetical.

The underlying problem is that the original is missing a comma—the comma that should pair with the one after *to transport*. Which of these possibilities is intended? The first supports the owner; the second supports the state:

7 *See* Kimble, *supra* note 1, at 15–16.

> to transport, or in any manner to facilitate the transportation[,] for the purpose of sale of property . . . .
>
> to transport, or in any manner to facilitate the transportation for the purpose of sale of[,] property . . . . (To work with *transport*, the comma needs to follow *of*. Better to have written *selling* [,] *property*.)

If we're going to talk about grammar and punctuation, then the statute is faulty without an additional comma.

Now, courts can't insert a comma that isn't there. But the *Ford Bronco* decision relied entirely on punctuation, or lack of it. How could the court conclude that the legislature, in its infinite punctuational wisdom, had deliberately left out a comma before the ambiguous modifier but missed a needed comma whose placement would arguably have made all the difference? At this point, the court should have abandoned commas and the doctrine of the last antecedent and close textual analysis—instead of trying to make sense of the muddle. Even better would have been to ignore the doctrine in the first place.

Incidentally, the trial court concluded that the owner was transporting the marijuana "to complete the sale,"[8] thus apparently distinguishing the earlier *Barela* case. But the supreme court did not examine that possible ground for upholding the forfeiture.

My main criticism is this: the mechanical application of a flimsy doctrine diverted the court's attention from more substantive questions. The statute includes a piece about sale—*for the purpose of sale*. Why on earth would the legislature want the sale aspect to apply just to facilitating transportation and not to transporting itself? Does that distinction make any sense from a standpoint of purpose or policy or enforcement? The court should have used its judgment, its intuition, its common sense—call this quality what you will.

Besides that puzzler, the court didn't mention its long-standing rule that a forfeiture proceeding is quasi-criminal and that "statutes are to be construed strictly against forfeiture."[9] Nor did the court consider persuasive authority that the rule of lenity applies to forfeiture proceedings.[10] Presumably, the court thought there was no ambiguity or reasonable doubt about the modifier's reach. But in fact there was ambiguity—a textbook case of syntactic ambiguity—on which the court imposed a meaning through a narrow and problematic textual analysis.

8 In re Forfeiture of 1982 Ford Bronco, 673 P.2d at 1311.

9 State v. Ozarek, 573 P.2d 209, 209 (N.M. 1978) (citing a case from 1944).

10 *E.g.*, United States v. Long, 654 F.2d 911, 914 (3d Cir. 1981).

Then, in the years following, the plot thickened.

The Aftermath

The legislators apparently didn't like the result in *Ford Bronco*, because they amended the forfeiture statute. Guess how? You might think that they added a comma before *for the purpose of sale*. No, they *deleted* commas—three of them, to be exact. Now guess whether the change fixed the trouble, the ambiguity.

The same modification issue came up in a 1993 forfeiture case (actually, three consolidated cases).[11] The owner was transporting a controlled substance for personal use, not sale, so the question was once again whether the *for the purpose of sale* modifier reached *to transport*. The amended statute now read like this:

> all conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A or B . . . .

Three commas gone. And yet . . . how could the drafters or legislators not see that the ambiguity remains? Recall that in the earlier decision the court had in effect applied the doctrine of the last antecedent.[12] But there's still no comma before the ambiguous trailing modifier, so technically speaking, the doctrine would still apply.

This time, though, the court made quick work of the doctrine—calling it "merely a tool of statutory interpretation" and "not inflexible and uniformly binding" when the context requires otherwise.[13] In short, it did what courts should do: it dug deeper. And it held that the modifier did apply all the way back. The statute did not cover transporting for personal use only. No forfeiture.

The court examined the Uniform Controlled Substances Act, which the New Mexico statute was modeled after; the two are (or were) almost identical. And the comments to the Uniform Act suggested that its purpose was to disrupt drug trafficking by authorizing law enforcement to confiscate the "vehicles and instrumentalities used by drug traffickers in committing violations under this Act."[14] Finally, the court distinguished

11 State ex rel. Dep't of Pub. Safety v. One 1990 Chevrolet Pickup, 857 P.2d 44 (N.M. Ct. App.), *cert. denied*, 856 P.2d 250 (N.M. 1993).

12 *See id*. at 47 (noting that in *Ford Bronco* the court had "relied heavily on the 'last antecedent rule'").

13 *Id*. at 48.

cases in other states because their statutes more clearly and specifically allowed forfeiture when the drugs were for personal use only.

The point is not whether this second decision was right or wrong. The point is that by focusing exclusively on the doctrine of the last antecedent in the first case, the court blinkered itself to other considerations:

- The apparent lack of any sensible rationale for treating transporting and facilitating transportation differently.
- New Mexico's settled rule of strictly interpreting forfeiture statutes.
- The rule of lenity.
- The policy behind the Uniform Act that the New Mexico statute was modeled on.
- The difference between the New Mexico statute and forfeiture statutes in other states.

Now for an amazing irony: the Uniform Act had a comma before *for the purpose of sale*.[15] In fact, the punctuation was identical to the punctuation in the first example on page 132 above. Going strictly by the commas in the Act, the second case, *Chevrolet Pickup*, got it right. But the court had apparently had enough of decision-by-comma—or lack-of-comma—when dealing with the forfeiture statute.

The lessons from all this? A drafter who puts much stock in the doctrine of the last antecedent is gambling. (I can't imagine that any drafters do.) And a court that relies on it exclusively or even primarily to resolve an ambiguity is a court that's at a loss.

14 *Id.* (quoting the comment following the pertinent section of the Uniform Act).

15 *Id.* (quoting the Uniform Act).