


HAVING YOUR CAKE AND/OR EATING IT TOO

THE INHERENT AMBIGUITY IN
THE TERM “AND/OR”



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From informal emails to the most technical written instruments, drafters often use the term “and/or,” usually without thinking too much about it. Generally, it is intended to mean “either, as applicable,” or “both if possible.” But considering the meaning of the words as written, how can you choose one of two options (thereby rejecting one) but at the same time choose both? Or as one court so aptly put

it, what exactly does the “/” mean?

Let’s consider the proverbial piece of cake. You can have your cake, or eat your cake. You can’t both have it *and* eat it, too. Rather than clarify the available options, many people quickly shortcut the issue by reverting to “and/or.” However, later on, when the meaning of “and/or” must be determined it is often unclear, leading to unintended results.

The use of this phrase dates back to at least the mid-1800s, and is fairly well-ac-

cepted in our vocabulary. Yet, it often does not make sense and is inherently ambiguous, particularly in the courts, where litigants essentially ask judges to decide what “/” means.

Courts have lambasted parties because of poorly drafted instruments and pleadings. Judges nationwide have written that “and/or” is “neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean.” It is a “lin-

guistic abomination” described as “the interlocking disjunctive-conjunctive-conjunctive-disjunctive conjunction.” It is a “mongrel expression” and an “abominable invention” that “certainly jurors could not be expected to interpret.”

Lest it appear that this is a lawyer drafting issue only, be assured it is not. People from all occupations and roles use “and/or,” and no one is immune. Even judges.

INSURANCE COVERAGE CASE EXAMPLES

In the world of insurance coverage, when every word and term in an insurance policy has, or will be, scrutinized by the courts, a claimed ambiguity will always create controversy. I once reviewed a coverage file where one adjuster wrote to another: “We hereby tender the defense and/or indemnity of our named insured to you.” Did the adjuster want defense and indemnity, or was either of the two acceptable? Incredibly (or perhaps sarcastically, I thought) the adjuster from the other carrier wrote back: “We hereby accept your tender of defense and/or indemnity.” It never became an issue in that case, and I presumed an isolated incident of poor word choice. But it turns out it was not an isolated incident.

When an Alabama widow sued the County for negligent medical treatment given to her husband while incarcerated, the County sought a declaration that the insurer must defend and/or indemnify the County. The trial court decided in the insured’s favor on an insurance coverage matter and declared the insurer had an obligation to defend “and/or” indemnify its insured. The insurer appealed. The Supreme Court affirmed the same holding.

Similarly, in an infant lead paint ingestion case against an insured landlord, a New York trial court ruled that the insurer had a duty to defend “and/or” indemnify the landlord. The Appellate Division affirmed, declaring that the insurer had a duty to defend and/or indemnify the landlord. So does the insurer then get to choose an option, to defend or to indemnify?

Another example deals with the use of “and/or” in a policy with regard to who the insured was. In that case, a homeowners’ insurance policy listed the named insured as the husband “and/or” his wife. In many policies or claims situations, this may have gone unnoticed. But when the husband intentionally burned down the home owned by both he and his wife, and took his own life while it was in flames, the insurer raised the fraud exclusion, and denied the wife’s

claims for lost personal property. The issue was whether the innocent spouse was bound by her husband’s intentional act, or whether she could recover. Contrary to most states, the New Jersey court ruled that the innocent spouse could recover because the husband or wife was the insured, in large part due to the use of the “and/or” phrase by the policy drafter.

In another instance, a policy insured an individual in Wisconsin, “and/or” his company. The insurer raised the “employee exclusion,” arguing that the exclusion applies to both insureds together for an employee of either, while the individual insured argued that the two insureds should be treated separately, and an employee of one was not necessarily an employee of the other. The court referred to “and/or” as a “verbal monstrosity” that is “Janus-faced,” for it imputes to it more than two faces.” The court ultimately held that the two insureds were to be treated separately, so that the insured was either the principal or the company.

One Michigan court considered whether a policy endorsement that added coverage for an injury “arising out of sexual abuse and/or misconduct” included coverage for a non-sexual attack. The policy defined “sexual abuse and/or misconduct” to include “sexual and/or physical abuse or misconduct.” These words raised the question: Did this add coverage only for *sexual* misconduct or did “misconduct” stand alone so that either was covered? The insured argued that “sexual abuse and/or misconduct” referred to two different coverages. The court disagreed with the insured, finding that the clauses were meant to be read together, in conjunction with each other. Thus, the court interpreted the endorsement as “sexual abuse *and* misconduct.”

In another example, a policy exclusion (that seems counterintuitive) for any injury, “while downhill skiing except for recreational skiing and/or cross country skiing away from marked territories and/or against the advice of the local ski school or authoritative body” a court found this was not ambiguous at all. Finding in favor of the insurer, the court ruled that under Indiana law, “and/or” does not render the exclusion ambiguous, and must be read as “and.”

OTHER CONTEXTS

“I hereby bequeath my estate to my niece, and/or my grandniece” was actually drafted into a will, and would become the subject of litigation some years later. Both niece and grandniece were alive when the will was probated. The New Jersey court

struggled with the “illiterate” drafting, saying: “there is no known understanding as to what ‘/’ means.”

Fortunately, the attorney who drafted that will was also alive, and testified that the intent was both devisees would share equally if still alive, and to the survivor if not. The court decided the issue “not by giving force to the accepted definition of each word, but to extract from the document or from other relevant evidence, the probable intention” of the benefactor. After much discussion, the court divided the assets equally between the niece *and* grandniece, based on the attorney’s testimony, which was the only evidence of the decedent’s intent.

In another example, the directions in a will were that it was to be interpreted “under the laws or the State of New Jersey and/or the State of New York.” The court determined that the intent must be gleaned from the document itself or from extrinsic evidence, and “as such the word ‘and’ should be disregarded” to allow the trustee to choose the law of either state. Thus, this court read “and/or” to mean “or.”

Finally, on an action on two promissory notes executed in favor of “A and/or B” and subsequently assigned to a third party, a Colorado court wrote that such “misuse” of the English language has been “severely and properly criticized in times past” but “that does not relieve us of the necessity of working with the term as used by the parties.” The court looked to the Uniform Commercial Code, which allows either of the payees to assign the notes. Thus, at least to that court, where “and/or” was used in the context of promissory notes, it meant “or.”

CONCLUSION

Whether “and/or” actually means “and” or “or” is fairly evenly split in these decisions on the issue. Given that uncertainty, one may be best served by avoiding “and/or” and clarify for the reader the alternatives presented.



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