

Clearing Up Ambiguity from a Series Modifier

By Thomas Myers

Introduction

We all use series modifiers in our writing. That's when a word could modify one item in a series or all the items:

- *cats and dogs weighing less than 10 pounds*¹
- *men and women over 50*
- *for-profit hospitals and colleges*

In the July column, Jeffrey S. Ammon wrote a fine article about the ambiguous trailing modifier, illustrated by the first and second bullet points. But the trailing modifier is just one cause of ambiguity. Another possible cause is the leading modifier, as shown in the third bullet point. Taken together, the trailing modifier and the leading modifier make up perhaps the most common cause of syntactic ambiguity: the series modifier.

And no writer wants ambiguity. It's "always unintended, always avoidable, and always a sin—the worst sin in drafting."²

Context does not always clear up ambiguity from a series modifier the way it might with semantic ambiguity. To take a simple example, in the sentence "Leaves fall during fall," the context resolves any semantic ambiguity from *fall*. But with the series modifier, the context of the sentence, coupled with the order of words, causes the ambi-

guity in the first place. The reader is left playing a guessing game: does the modifier affect only the item next to it, or does it extend to cover all items in the series? The answer: you're almost reduced to flipping a coin.³

How Common Is an Ambiguous Series Modifier?

I heard my first bit of ambiguity when I was a kid. You may remember Groucho Marx's famous joke. "Last night, I shot an elephant in my pajamas. How he got in my pajamas, I'll never know."

But ambiguity was around long before I played tee-ball and considered Marx's wit as anything more than a joke. In fact, an ambiguous trailing modifier—which is probably more common than the ambiguous leading modifier—first appeared in the Michigan Supreme Court in 1913.⁴ To find out how common it has been since then, I conducted a search on Westlaw. I figured that many courts that wrote about the trailing modifier would also mention the doctrine of the last antecedent. So I searched "last antecedent" under "Michigan State Cases." The results surprised me.

For the first 75 years, a modest 18 cases involving an ambiguous trailing modifier made their way through the Michigan Supreme Court or Michigan Court of Appeals. But more recently, the numbers have accelerated. During the last 20 years, the Michi-

gan Supreme Court and Michigan Court of Appeals have discussed over 50 cases involving a trailing modifier. And 40 of those cases have been in the last 10 years.

Keep in mind that this search retrieved results only where the Michigan Supreme Court or Michigan Court of Appeals discussed the last-antecedent doctrine and the trailing modifier. But there must be countless cases in the Michigan trial courts and in other state and federal courts. In fact, a search on Westlaw for "last antecedent" under "All State and Federal Cases" produced almost 1,400 results. And there are probably even more cases where a court tried to clear up an ambiguous trailing modifier without discussing the last-antecedent doctrine. Then add cases where the court tried to clear up an ambiguous leading modifier, and we're left with a serious problem that needs to be fixed.

So let's take a look at two ambiguous series modifiers. The first is a leading modifier from the United States Code⁵ and the old Federal Rules of Civil Procedure. The second is a trailing modifier from a Michigan statute.

Example 1

A judge... may reconsider any pretrial matter... where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

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Taken together, the trailing modifier and the leading modifier make up perhaps the most common cause of syntactic ambiguity: the series modifier.

Is it enough that the order is simply *contrary to law*? Or must the order be clearly contrary to law?

The drafter can easily clear up the ambiguity. If a leading modifier affects only the item next to it, flip the items in the series so the modifier and the modified item end the series. (I'll drop the ellipses from my revisions.)

*A judge may reconsider any pretrial matter where it has been shown that the magistrate judge's order is **contrary to law or clearly erroneous**.*

And there's another way to get the same result. FR Civ P 72(a) used to contain this same series modifier. But in 2007, the civil rules were restyled, and the new rule is unambiguous:

*The district judge...must...modify or set aside any part of the order that **is clearly erroneous or is contrary to law**.*

Here, the series modifier vanished by simply placing *is* before the second item in the series—*is contrary to law*. Now the series begins after *that*. So the first item in the series becomes *is clearly erroneous*, and the second item becomes *is contrary to law*.

Here's how the sentence breaks down:

The district judge must modify or set aside any part of the order that:

- is clearly erroneous
- or
- is contrary to law.

And now there's no question about what *clearly* modifies.

Example 2

The second example comes from Michigan's Professional Investigator Licensure Act.⁶ This trailing modifier made its way to the Michigan Court of Appeals:⁷

The department may suspend or revoke a license...if the department determines that the licensee...has...[b]een convicted of a felony or misdemeanor involving dishonesty....

Does *involving dishonesty* modify *felony*? Can the secretary revoke a license if the felony has nothing to do with dishonesty?

Again, if a trailing modifier affects only the item next to it, try flipping the items in the series so the modified item and the modifier begin the series:

*The department may suspend or revoke a license if the department determines that the licensee has been convicted of **a misdemeanor involving dishonesty or a felony**.*

Or repeating the *of* would point strongly toward that meaning:

*The department may suspend or revoke a license if the department determines that the licensee has been convicted **of a felony or of a misdemeanor involving dishonesty**.*

None of this would have happened with careful drafting. The fix is so easy.

But what if, in these two examples, the modifiers affect both items? Then you might have to repeat the modifiers—*clearly* and *involving dishonesty*. More complicated items might call for different fixes.

The Latest Series Modifier to Make Its Way to the Michigan Supreme Court

For over three years, the Michigan courts have been trying to clear up ambiguity caused by a trailing modifier. Michigan law imposes a duty on a city to keep its highways in reasonable repair. If the city breaches its duty, a plaintiff may recover for injuries suffered "on the highway." The courts have been considering the reach of "on the highway":

*"Highway"... includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway.*⁸

Does *on the highway* modify *culverts* only, or the entire series? The courts have gone back and forth on the answer.

The trial court held that *on the highway* modified all items in the series.⁹ So the city had a duty to maintain only those bridges, sidewalks, trailways, crosswalks, and culverts that were *on the highway*. And a plaintiff who broke an ankle while walking on a trailway 300 feet from the "highway" could not recover against the city.

In contrast, the Court of Appeals applied the doctrine of the last antecedent and held that *on the highway* modified *culverts* only.¹⁰ So the city had a duty to maintain: (1) only culverts that were on the highway, and (2) all bridges, sidewalks, trailways, and crosswalks—whether or not they were on the highway. Thus, the plaintiff who broke an ankle on a trailway 300 feet from the "highway" could recover.

So what did the Michigan Supreme Court say that *on the highway* modifies? At first, it denied leave. Justice Marilyn Kelly stated in her concurrence that "the justices split evenly in their good faith reading of the statute."¹¹ The Court has since granted a motion for reconsideration,¹² and the ambiguous trailing modifier should be resolved soon.

Clearing Up Ambiguity in MCL 691.1401(e)

What a mess. Those three misplaced words—*on the highway*—have had everyone guessing about their reach. They have cost plaintiffs and defendants a lot of stress and money. They've cost lawyers and judges a lot of time and energy.

And worst of all, none of this would have happened with careful drafting. The fix is so easy. The statute can easily be rewritten without ambiguity. If we assume that the legislature intended the meaning given by the trial court:

"Highway" includes any of the following on the highway: bridges, sidewalks, trailways, crosswalks, and culverts.

In last month's column, the contest winner provided a similar revision. Of course, if the items were longer or more complex, you would probably use a numbered vertical list.

And here's an easy fix if the legislature intended the Court of Appeals' interpretation:

"Highway" includes culverts on the highway, bridges, sidewalks, trailways, and crosswalks.

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The second winner in last month's contest provided another way to create the same result, using a bulleted list:

The term "highway" includes all the following:

- *bridges;*
- *sidewalks;*
- *trailways;*
- *crosswalks; and*
- *culverts on the highway.*

Conclusion

The next time you read an opinion, a statute, or even your own writing, look to see if you can spot an ambiguous series modifier. If you do, clear up the ambiguity before it causes bigger problems for your client, the judge, and yourself. ■



Thomas Myers graduated magna cum laude from Thomas M. Cooley Law School in 2010. He was managing associate editor of the Thomas M. Cooley Law Review, an editor and writer for the

school newspaper, and a research assistant for several Cooley professors. He also worked for two years as a law clerk at Potestivo & Associates, P.C.

FOOTNOTES

1. Example taken from Ammon, *Ambiguous drafting and the 12-pound cat*, 90 Mich B J 56 (July 2011).
2. Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese: Essays on Plain Language* 105, 120–121 (Carolina Academic Press 2006).
3. *Id.* at 120.
4. *Drake v Industrial Works*, 174 Mich 622; 140 NW 933 (1913).
5. 28 USC 636(b)(1)(A).
6. MCL 338.830(1)(c).
7. See *Rios v Dept of State Police*, 188 Mich App 166; 469 NW2d 71 (1991).
8. MCL 691.1401(e).
9. See *Williams v City of Detroit*, 488 Mich 889, 889; 788 NW2d 675, 675–676 (2010).
10. See *id.*
11. *Id.* at 665.
12. See *Williams v City of Detroit*, 489 Mich 865; 795 NW2d 154 (2011).