

PolicyPennings by Dr. Daryll E. Ray

## It's all in the grammar

Even though we spend much of our time writing, we readily admit that when we were in junior high and high school, one of the subjects that gave us fits was English grammar. We went to school when diagramming sentences was the primary tool used to teach the connections among the various parts of speech. Faced with diagramming ten or twenty sentences for homework, we were inclined to argue with the teacher saying, "What difference does it make? You know what I mean."

A recent 8th US Court of Appeals decision came down to a matter of grammar and the way in which the jurists interpreted the construction of one portion of a sentence in the law. In the end, the grammar made a difference of \$9.25 million.

The court case concerned a 2002 lawsuit brought by three cattle producers (later certified as a class action suit on behalf of all cattle producers) against four major meat packers—Tyson Fresh Meats Inc., formerly IBP Inc.; Cargill Meat Solutions, d/b/a Excel Corporation; Swift & Co., formerly known as ConAgra Beef Co.; and National Beef Packing Co., formerly known as Farmland National Beef Packing Co.

In their suit the plaintiffs alleged that "the packers violated § 202(a) and (e) of the [Packers and Stockyard Act] by taking advantage of the United States Department of Agriculture's (USDA) error in calculating cutout values, which error lowered the prices the packers paid the plaintiffs for their cattle" (from the Appeals Court decision, the full text of which can be found at <http://r-calfusa.com/Competition/2008012908CourtReversesAberdeenJuryDecision.pdf>).

It turns out that "the USDA erroneously reported the cutout values [for choice and select grades of beef] to the public over a six-week period—April 2, 2001, to May 11, 2001." The reported prices were lower than they should have been because the USDA included lower grades of meat in their calculation.

Cattle producers use cutout values as a price guide when they take their animals to market. The plaintiffs contend that the packers, from their own sales records, knew that the reported price was too low, thus benefiting from the misreported prices.

In the district court trial, as a part of the instructions to the jury "the district court instructed that to find a violation of § 202(e), it must find that the defendant '[e]ngaged in any course of business or did any act for the purpose or with the effect of manipulating or controlling prices paid to class members.' The district court further stated that '[p]laintiffs need not prove that defendants acted intentionally or with the intent to violate [§ 202(e)]."

The jury ruled for the cattle producers recommending a \$4 million against Tyson, a \$3 million fine against Cargill, and a \$2.25 million fine against Swift. National Beef was not found liable.

The packers appealed, arguing that the jury instruction on that point was in error when it stated that the plaintiffs need not prove that the defendants acted intentionally.

For the 8th Circuit Court of Appeals, the issue revolved around the meaning of the words: "for the purpose or with the effect of manipulating or controlling prices."

The cattle producers contended that the words under question form a two tine fork, where the word "purpose" requires intent while the word "effect" does not. In effect, their argument asserts that the packers may have had a different "purpose" for their action but the "effect" was to pay producers a lower price for their cattle.

The appeals court ruled that the words "purpose" and "effect" are both modified by the words "manipulating" and "controlling." In the absence of evidence of legislative intent the court used the dictionary definition of "manipulating" and "controlling" arguing that both words require intent.

Thus the ruling came down to the meaning of the conjunction "or" that appears between "for the purpose" and "with the effect."

The cattle producers were arguing for what is called a "disjunctive interpretation" of the word "or," meaning that the two conditions purpose and intent are separate so one can hold independently of the other—that is there could be purpose with no effect and effect with no purpose.

The court acknowledges that "the use of 'or' generally connotes a disjunctive interpretation." However, in this case the court asserts that the "'or' is interpretative or expository of the preceding word" and thus ties them together.

With "purpose" and "intent" tied together and "manipulating" requiring intent, the 8th US Court of Appeals ruled that the jury instructions were incorrect and intent is required. Thus the court set aside the \$9.25 million judgment against the packers.

But this ruling also will likely be appealed so there may be at least one more opportunity for the courts to referee the law's interpretation based not on the rules of law but the rules of English grammar. We guess we were wrong back in junior high school. Grammar does make a difference.

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Originally published in *MidAmerica Farmer Grower*, Vol. 25, No. 6, February 8, 2008  
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