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The Problem With 'Plain Meaning'

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Peter J. Gallagher

I was at the beach recently and passed a sign that read “Swimmers Only Between Flags.” Being a lawyer, I couldn't simply nod knowingly at the sign and keep walking. Instead, I thought, “Well, that is ambiguous.” Did it mean that swimmers were only allowed between the flags and not outside them or that only swimmers were allowed between the flags (and not, for example, surfers or boogie boarders)? I mentioned it to my wife, who told me to make sure I put sunscreen on the kids. But, the sign stuck with me that day, and it came up again when I read the U.S. Supreme Court’s recent decision in Abramski v. United States, a decision that involved competing interpretations of the “plain meaning” of a statute regulating the purchase of guns.

In that case, Abramski was convicted for knowingly making materially false statements on a form that he was required to complete in order to purchase a handgun. Although Abramski indicated on the form that he was the “transferee/buyer” of the gun, he was actually purchasing it for his uncle (who was legally eligible to purchase and own a gun). After being convicted by the trial court, Abramski appealed, arguing, among other things, that this statement was immaterial because federal gun laws do not apply to straw purchasers. According to Abramski, these laws regulate gun dealers’ transactions with “persons” or “transferees” (e.g., by requiring dealers to record certain identifying information about the “person” who buys a gun and by prohibiting dealers from selling guns to a “person” without verifying that person’s identity and performing a background check) not straw purchasers or “actual buyers.” Abramski argued that, because it is not illegal to buy a gun for someone else, his statement that he was the “buyer” of the gun, even assuming it was false, was not material, and thus his conviction should be overturned.

In its opinion — a 5-4 decision, authored by Justice Elena Kagan, who was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor — the Supreme Court rejected this argument. The nation's high court noted that, because federal gun laws regulate the sale of guns to “persons,” defining the term “person” was the central question in Abramski: “In a straw purchase, who is the ‘person’ ... whom federal gun law addresses? ... Is it the conduit at the counter, or the gun’s intended owner?” If it is the latter, then Abramski’s statements were material, and his purchase illegal, because, by concealing the identity of the gun’s true owner, Abramski prevented the dealer from verifying the owner’s true identity, performing a background check and doing the myriad other things

required under the federal gun laws.

To define "person," the Supreme Court turned to the context, structure, history and purpose of federal gun laws. It noted that the "twin goals" of these laws were to keep guns out of the hands of individuals who should not have them and to assist law enforcement in investigating crimes involving guns. Neither of these goals would be met if the "person" regulated by the federal gun laws was only the individual at the counter and not the individual who was the intended recipient of the gun:

Read Abramski's way (the "man at the counter"), those terms deny effect to the regulatory scheme, as criminals could always use straw purchasers to evade the law. Read the other way ("the man getting, and always meant to get, the firearm"), those terms give effect to the statutory provisions, allowing them to accomplish their manifest objects. That alone provides more than sufficient reason to understand "person" ... as referring not to the fictitious but to the real buyer.

Therefore, the Supreme Court held that Abramski was not the "person" to whom the dealer sold the gun, his statement to the contrary was false and material, and his conviction must stand.

In dissent, Justice Antonin Scalia, joined by Chief Justice John Roberts as well as Justices Clarence Thomas and Samuel Alito, disagreed. Among other things, the dissent criticized the court for interpreting the word "person" in a manner that was inconsistent with "ordinary English usage." Justice Scalia offered the following example to demonstrate that the "person" who buys a gun, at least for the purposes of the federal gun laws, can only be the man at the counter:

In ordinary usage, a vendor sells (or delivers, or transfers) an item of merchandise to the person who physically appears in his store, selects the item, pays for it and takes possession of it. So if I give my son $10 and tell him to pick up milk and eggs at the store, no English speaker would say that the store "sells" the milk and eggs to me.

This led to an interesting exchange between Justice Kagan and Justice Scalia in the footnotes to their respective opinions about "ordinary usage" and how an "English speaker" would define "person." Justice Kagan responded to Justice Scalia's hypothetical with one of her own:

If I send my brother to the Apple Store with money and instructions to purchase an iPhone and then take immediate and sole possession of the device, am I the "person" (or "transferee") who has bought the phone or is he? Nothing in ordinary English usage compels an answer either way.

Then Justice Scalia replied:

The majority makes the puzzling suggestion that the answer would be different if the sale involved consumer electronics instead of groceries. But whether the item sold is a carton of milk, an iPhone or anything else under the Sun, an ordinary English speaker would say that an over-the-counter merchant "sells" the item to the person who pays for it and takes possession of it, not the individual to whom that person later transfers the item.

Regardless of which of these examples one finds more compelling, Justice Kagan is correct that neither compels an answer either way. This, ultimately, is the problem with Justice Scalia's point, and the problem advocates face when they base arguments about the "plain meaning" of a statute or a contract on an everyone-knows-this-is-what-it-means rationale. Successful advocates can compel a judge — through the strength of their arguments and the quality of the authority they marshal to support them — to find in their favor, even when the judge might not be inclined to do so. But to do this, they need to provide the reluctant judge with evidence of the "plain meaning" of a disputed term or phrase to overcome the judge's inclinations. Without this, a judge faced with two equally reasonable alternatives can make an entirely subjective decision between the two, rather than being compelled to choose the one the advocate wants.

To be sure, as the Supreme Court's most vocal proponent of plain meaning, Justice Scalia often supports his position about "ordinary English usage" with objective evidence about that usage. For example, in his dissenting opinion in Chisom v. Roemer, Justice Scalia disagreed with the court's interpretation of the word "representatives" to include anyone chosen by popular election, including judges. In arguing that "there is little doubt that the ordinary meaning of 'representatives' does not include judges," Justice Scalia not only provided a hypothetical meant to demonstrate the error of the court's interpretation — "[o]n [the majority's] hypothesis, the fan-elected members of the baseball all-star teams are 'representatives,' hardly a common, if even a permissible, usage" — but also cited to the dictionary definition of "representatives" and to case law supporting his interpretation of the term. Although it did not win the day in that case, this type of objective support, which was missing from his dissent in Abramski, makes the argument about the "plain meaning" of a disputed word more compelling than simply declaring how an "ordinary English speaker" would interpret the word.

To get back to the "Swimmers Only Between Flags" example, the sign has two possible meanings. Both are reasonable and neither compels an answer to the question of what exactly is permitted between the flags. Most careful writers put the modifier "only" immediately before the word or phrase it modifies, so most readers might conclude that the "ordinary" or "plain" meaning of the sign is that swimmers are only allowed between the flags, and not outside of them. But, objective evidence (i.e., the way the rules are enforced by the lifeguards) reveals this to be wrong. In fact, any ambiguity about the sign's meaning was clarified by the lifeguards who whistled and waved at any errant surfer or boogie boarder who drifted between the flags.

Ultimately, the New Jersey Supreme Court probably had it right, many years ago, when it observed: "Litigation proceeding from the poverty of language is constant." (See Atlantic Northern Airlines Inc. v. Schwimmer, 12 N.J. 293, 303 (1954).) This is good news for litigators, but also reminds us that, when it comes to ambiguous terms, plain meaning may be in the eye of the beholder, and the only way to ensure that the beholder sees things the way you want is to support your version with compelling, objective support.

—By Peter J. Gallagher, Porzio Bromberg & Newman PC

Peter Gallagher is counsel in Porzio Bromberg & Newman's Morristown, New Jersey, office.