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A Conjunction is Worth Thousands of Dollars: Recent Case Highlights Significance of “And” vs. “Or”

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You do not need a Lexis or Westlaw subscription to know that major cases and significant judgments have sometimes hinged on the meaning of a single word, or the placement of a single Oxford comma. We have a recent case to add to the list: *Weinberg v. Waystar, Inc., et al.*, which was an executive contract dispute case in Delaware that hinged on a single word: “*and*.”

The plaintiff, an executive at Waystar, received three option grants. The “call right” provision in the option award documentation allowed the defendants to repurchase the plaintiff’s equity acquired upon exercise of the options upon specified events, including termination without cause and/or a restrictive covenant breach. The plaintiff’s employment was terminated without cause, and she exercised her vested options. The defendants then exercised their call right, repurchasing the plaintiff’s newly acquired equity, pursuant to their interpretation of the call right provision.

As a matter of background, many private companies’ equity incentive arrangements include call rights to allow the company to repurchase equity under a variety of circumstances. The call right serves both strategic and logistical ends. Strategically, many companies do not want ex-employees to participate in the upside of the company’s growth post-termination because these ex-employees are no longer contributing to the company’s success. Logistically, having too many minority holders on the capitalization table can create administrative challenges in the future (e.g. with respect to information rights or payments in connection with an exit event) and could also raise securities law issues. To these ends, call rights are typically triggered upon the termination of an executive’s employment.

Back to the case at hand. The call right provision read:

"The Converted Units shall be subject to the right of repurchase (the 'Call Right') . . . during the six (6) month period following (x) the … Termination of such Participant's employment . . . ***and*** *(y) a Restrictive Covenant Breach."*

(Emphasis added.) The dispute hinged entirely on the meaning of the word "*and*" before clause (y).

The plaintiff asserted that the word "*and*" between "*(x)*" and "*(y)*" meant that both conditions had to be satisfied before the defendants could exercise their call right (i.e. the conjunctive interpretation). Under this interpretation, the call right would not be triggered unless the plaintiff's employment were terminated and the plaintiff were to breach a restrictive covenant. The parties agreed that the plaintiff did not breach a restrictive covenant; so under the plaintiff's interpretation, the defendant would not have had a right to buy back the equity.

In contrast, the defendants interpreted the word "*and*" to mean that they could exercise the call right if the plaintiff's employment were terminated or if she were to breach a restrictive covenant (i.e. the disjunctive interpretation). Under this interpretation, the defendants were within their rights to repurchase the plaintiff's equity grant on the basis of the plaintiff's termination alone.

The judge sided with the defendants, concluding based on the language and the surrounding context, that the parties must have intended the disjunctive interpretation: "*I find that the plain language of the Call Right provision supports the Defendant's interpretation because it is consistent with the 'several' use of 'and' that is used in permissive sentences*." The judge concluded that the provision was analogous to saying "*at our resort, you can swim, golf and play tennis*"—which would not require participating in all three activities.

The judge also noted that the purchase price for the call right varied depending on whether the plaintiff's termination was with cause or without cause (another common feature of call right provisions). The judge said that distinction would be rendered "meaningless" if the conjunctive interpretation of the provision were correct. It would not make sense to have a "no cause" purchase price if the call right required both termination and breach of a restrictive covenant.

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At the end of the day, the word choice did not change the outcome, but that would ignore the cost of defense. This case is a good reminder that, in drafting, every word matters.

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