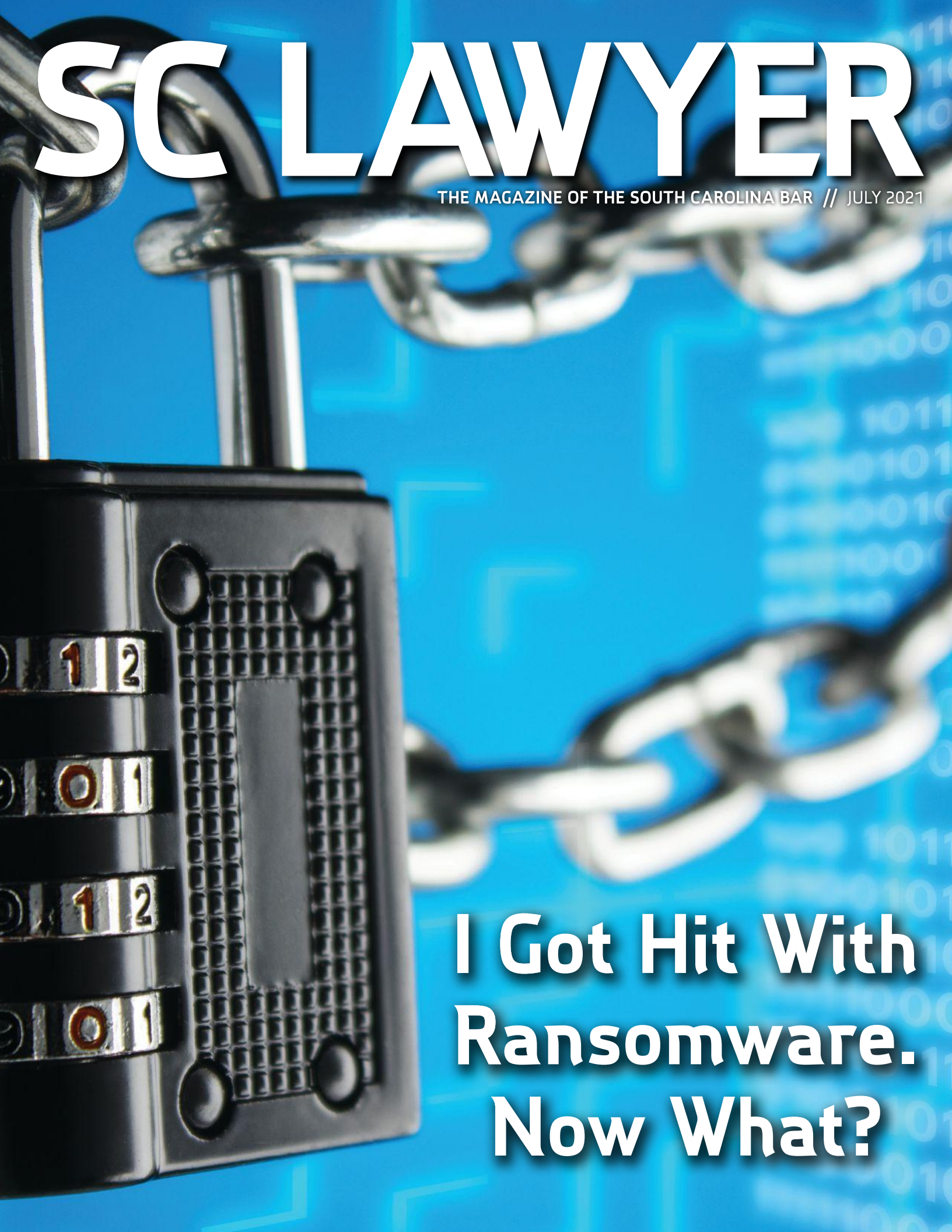

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I Got Hit With Ransomware. Now What?

THE SCRIVENER

An "A-Day" for Articles

By Scott Moïse

At one level, today's dispute may seem semantic, focused on a single word, a small word at that. But words are how the law constrains power.
-United States Supreme Court Justice Neil M. Gorsuch

An article caused a ruckus in the Supreme Court recently. No, this was not an article in the U.S. Constitution, or a written piece in a publication, or even an article of incorporation. It was a part of speech, the kind you learned about in English class. Specifically, the article "a" caused a commotion between the majority and dissenting justices and a thorough scholarly study of a one-letter word. As Justice Gorsuch noted, "a lot here turns on a small word."

Niz-Chavez v. Garland

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the Court addressed a rule in the federal Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which allowed nonpermanent resident immigrants to apply to stay in the United States if they meet certain criteria, one of which is that they had stayed in the country continuously for at least 10 years. The IIRIRA contains a "time-stop rule," which provides that the period of continuous presence "shall be deemed to end . . . when the alien is served **a notice to appear**" in a removal proceeding. The term "notice to appear" is defined as a "written notice . . . specifying" certain information, such as the charges against the immigrant, the time and place at which the removal proceedings will be held, the consequences of failing to appear, and other information. *Id.* at 1479 (citing U.S.C. § 1229(a)(1)). If the notice omits any of this statutorily required information, the stop-time rule is not triggered.

Mr. Niz-Chavez argued that he was not served with "a notice" because the government sent him two documents, and neither document contained <u>all</u> the required information: one informed him of the charges, and two months later another document provided the rest of the information. Therefore, the decision turned on whether "a" notice under the IIRIRA could be valid if it could be sent in two installments, so to speak.

Writing for the majority in this 6-3 decision, Justice Gorsuch wrote that "[t]o an ordinary reader—both in 1996 and today—'a' notice would seem to suggest just that: 'a' single document containing the required information, not a mishmash of pieces with some assembly required." *Id.* at 1480. Justice Gorsuch continued: "[S]omeone who agrees to buy 'a car' would hardly expect to receive the chassis today, wheels next week, and an engine to follow," *Id.* at 1481 (citations omitted).

The Court then jumped straight into the grammar books:

> Start with customary usage. Normally, indefinite articles (like "a" or "an") precede *countable* nouns. The examples above illustrate the point: While you might say "she wrote a manuscript" or "he sent three job applications," no one would say "she wrote manuscript" or "he sent job application." By contrast, *noncountable* nouns—including abstractions like "cowardice" or "fun"—"almost never take indefinite articles." After all, few would speak of "a cowardice" or "three funs."

Id. at 141 S. Ct. at 1481 (emphasis in original) (internal citations omitted) (quoting *The Chicago Manual of Style* and *The Cambridge Grammar of the English Language*) The Court then held that the government must comply strictly with the IIRIRA statute and send all the information in "a" single document.

Justice Brett Kavanaugh, joined by Chief Justice Roberts and Justice Alito, strenuously disagreed with the majority's analysis of the word "a":

> The word "a" is not a one-size-fits-all word. As relevant here, the word "a" is sometimes used to modify a single thing that must be delivered in one package, but it is sometimes used to modify a single thing that can be delivered in multiple installments, rather than in one installment. Context is critical to determine the proper meaning of "a" in a particular phrase. Consider some examples. A car dealership that promises to ship "a car" to a customer has not fulfilled its obligation if it sends the customer one car part at a time. By contrast, it is common to submit "a job application" by sending a resume first and then references as they are available. When the final reference arrives, the applicant has submitted "a job application." Similarly, an author might submit chapters of a novel to an editor one at a time, as they are ready. Upon submission of the final chapter, the author undoubtedly has submitted "a manuscript." "A contract" likewise can be "established by multiple documents." The list goes on.

Id. at 1491–92 (citation omitted) (Kavanaugh, J., dissenting).

Other courts

The Supreme Court does not have monopoly on grammar. South Carolina courts know their articles, too, although not all of them place the same importance on articles as the Supreme Court does in *Niz-Chavez*. *See, e.g.*, *United States v. Bethea*, 841 F. App'x 544, 549 (4th Cir. 2021) ("But it does not follow from Congress's use of an indefinite article that 'a sentence' means *any* sentence, even if later vacated. As the Seventh Circuit has persuasively reasoned, the government's construction places far too much emphasis on the use of an indefinite article."); *Brown v. Mackenburd*, No. CV 9:19-02367-MGL, 2021 WL 1669797, at *1 (D.S.C. Apr. 28, 2021) ("The consistent use of the definite article in reference to the custodian indicates . . . there is generally only one proper respondent to a given prisoner's habeas petition. This custodian, moreover, is 'the person' with the ability to produce the prisoner's body before the habeas court.") (citation omitted); *Brown v. Sikes*, 188 S.C. 288, 198 S.E. 854, 856 (1938) (construing the indefinite article "a" in a statute that allowed "a Barracks Building" to be built at Clemson College and holding that the article "a" was not a term of limitation and had no significance in itself in determine the number of barracks that the Board of Trustees was allowed to build); *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346, 428 S.E.2d 889, 892 (Ct. App. 1993) ("The use of the definite article 'the' and the singular noun 'state' shows that the Legislature intended the word 'located' to refer to one state, not many.").

What are articles?

The justices in *Niz-Chavez* got surprisingly testy with each other over the meaning of the word "a." But do we really understand articles, words that can change lives? Do we understand what Justice Gorsuch meant by an "indefinite" article and "countable" nouns? To find out, we can look to legal writing expert Bryan A. Garner's book *The Chicago Guide to Grammar, Usage, and Punctuation* (2016) ("*Chicago Guide*") since he wrote the grammar section of *The Chicago Manual of Style* cited in *Niz-Chavez*.

Beginning with the basics, there are only three articles: "a," "an," and "the." An article is considered to be a limiting adjective that precedes a noun or noun phrase to indicate something definite (*the*) or indefinite (*a* or *an*).

A **definite article** (*the*) points to a definite object that is either so well understood that it does not need description ("the brief has been filed," meaning the one and only brief we have been working on for the past week); it is something that is about to be described ("the Gardners: Basil and Perdita"); or it is important ("the VIP Award"). *See Chicago Guide*, at 173–74. Definite articles can go with both singular ("the gavel") or plural ("the gavels") nouns. *Id.* at 174.

An **indefinite article** (*a* or *an*) goes with a nonspecific object, thing, or person that is not distinguished from other members of a class ("a lawyer in the South Carolina Bar") or things that are

uncountable ("a multitude of ancestors") or generalized ("an idea of epic proportions"). *Id.* at 175. An indefinite article should not be used with countable nouns, such as Justice Gorsuch noted in *Niz-Chavez*. A countable noun is exactly how it sounds: If you can count units (for example "courts"), it is a "countable noun." If not, the noun is "uncountable" (for example "information" or "salt"). *Id.* at 174.

An indefinite article can sometimes provide a specific reference ("we saw a great oral argument in court today"), and a definite article may provide a generic reference ("the French are planning an all-outdoor Bastille Day celebration" (generalizing by nationality)). *Id.* at 175.

Confused? In another book, Mr. Garner simplifies article usage as follows: "Use the definite article *the* to signal a specific person, place, or thing; use the indefinite article *a* or *an* to signal a generic reference." *See* Bryan A. Garner, *The Redbook, A Manual on Legal Style*, § 10:38, at 173 (2d ed. 2006). A subject with an indefinite article (*a* or *an*) is usually plural. A subject with the definite article (*the*) is usually singular. *Id.* § 10.25(a), at 163.

Conclusion

When I began reading the *Niz-Chavez* case, I thought that the Supreme Court was surely going to rule that the Government had fully complied with the IIRIRA by sending all the required information in two documents. I underestimated the power of grammar and a tiny word, "a," which gave a second chance to a Guatemalan immigrant who was seeking American citizenship. The justices painstakingly analyzed the article "a" in the statute and gave it the attention it deserved, with the majority finally stating that "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez*, 141 S. Ct. at 1486. Words make a difference.