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An Inconsistently Sensitive Mind: Richard Posner's Celebration of Insurance Law and Continuing Blind Spots of Economicalism

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AN INCONSISTENTLY SENSITIVE MIND: RICHARD POSNER'S CEREBRATION OF INSURANCE LAW AND CONTINUING BLIND SPOTS OF ECONOMINALISM

*Jeffrey W. Stempel**

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* Professor of Law and Associate Dean for Academic Affairs, William S. Boyd School of Law, University of Nevada at Las Vegas. Special thanks to Professor Tom Baker and the Connecticut Insurance Law Journal for inviting my participation in this most interesting symposium issue. Thanks also to Dean Richard Morgan, Ann McGinley, Kory Staheli and Kent Syverud. This project was supported by the James A. Rogers Research Fund. I am particularly indebted to but unable ever to repay Prof. Arthur Leff, whose untimely death in 1981 deprived the legal academy of one of its outstanding scholars and citizens. See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 450, 473, n.60 (suggesting that in response to Posner's summary of Llewellyn's *The Common Law Tradition: Deciding Appeals*, "but for the transaction costs involved in returning from the dead, Llewellyn would cheerfully strangle Posner.").

III. POSNER AT THE INTERSECTION OF INSURANCE, EMPLOYMENT, AND CIVIL RIGHTS: <i>DOE V. MUTUAL OF OMAHA INSURANCE CO. AS MICROCOSM</i>	65
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INTRODUCTION

More than a quarter-century ago, in reviewing the first edition of Richard Posner's now-iconic *Economic Analysis of Law*,¹ the late Arthur Leff remarked upon the degree to which the book displayed the sensitive mind of the author at work.² As a first-year law student absorbing Leff's critique (it remains the best book review I have ever seen and it sure beat reading cases), I was at first struck by the compliment. Although Leff clearly admired Posner's work and was a fair critic throughout, there was no mistaking that he was indeed a critic.

Pointing out the debatable assumptions of the Posnerian thesis, Leff poked significant holes in the seeming seamlessness of Posner's treatise,³ presaging and inaugurating the academic and political debate over law and economics that would ensue over the next decade or so.⁴ In particular, Leff criticized Posner's blind spots⁵ and submerged value choices.⁶ In particular,

1. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

2. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 450 (1974). Leff describes Posner's mind as "supple, strong, and even (in a sense) sensitive," *id.* at 462, and Posner himself as "bright, talented, and sensitive." *Id.* at 482.

3. *Id.* at 452-72 (criticizing Posner for excessive use of one-sided assumptions, a crabbed view of society, and narrow concept of efficiency).

4. *See, e.g.*, Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *see also* Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980); Ronald Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980). The debate over Posner's work and Chicago School Economic Analysis continued into the 1980's, *see*, for example, Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 390, 400-01 (1985)(criticizing Posner's assumption that consumers uniformly consent to wealth-maximizing transactions) and the 1990's, *see*, for example, Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7 (1991)(criticizing Posner's writings in *Problems of Jurisprudence* (1990) as remaining imprisoned by many of his normative biases attacked by Leff).

5. Leff, *supra* note 2, at 452 (describing Posner as "single-minded," and the *Economic Analysis of Law* as "four hundred pages of tunnel vision"). *Id.* at 456 (stating that Posner makes "critical early moves" in assumptions that are problematic but affect his work throughout).

Leff noted Posner's reflexive preference for the "market" over the "government," seemingly without regard for the facts and circumstances of the problem under review as well as Posner's preference for the status quo of wealth distribution (i.e., inequality).⁷ Leff labeled this value-laden commitment to the Chicago School model of economics as applied to law by Posner, "American Legal Nominalism."⁸

Thus, coming during this critique, I found it a bit jarring to see the word "sensitive" applied to what Leff has characterized earlier as Posner's unrealistically narrow, tough-minded cost-benefit, wealth maximization analysis of law and the world at large. With the hindsight of 20 years, I can now appreciate Leff's insight and accuracy. Posner, despite his status as a lightning rod of criticism as well as adulation, has during the ensuing years demonstrated a good deal of sensitivity and intellectual subtlety and progression. Although still grating at times, *Economic Analysis of Law* has evolved into a less doctrinaire tome.⁹ Posner himself also made major contributions in less commercial areas of the law, particularly statutory interpretation.¹⁰ He has moved away from the more rigid microeconomic view of the world to a legal philosophy of pragmatism, a philosophy that eschews rigid absolutes.¹¹ Since ascending to the Seventh Circuit bench in 1981, Posner has consistently rendered interesting, well-written, and largely

6. *Id.* at 455-58 (suggesting that Posner's assumptions reflect value choices more than empirical facts).

7. Leff, *supra* note 2, at 456-59, 462-69, 477-85. Leff continued his discussion of the limits of overly pure and politically conservative economic analysis in subsequent work. *E.g.*, Arthur Allen Leff, *Law And ?*, 87 YALE L.J. 989 (1979).

8. Leff, *supra* note 2, at 459.

9. John J. Donohue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 791-94 (1987) (praising and criticizing Posner's Third Edition of *Economic Analysis of Law*). *See generally* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998) (continuing to push the Chicago School line of economic analysis but discussing other factors that mitigate against the pure application of an economic model to legal issues).

10. *See, e.g.*, RICHARD A. POSNER, *OVERCOMING LAW* (1995) [hereinafter *OVERCOMING LAW*]; RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1992); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter *PROBLEMS OF JURISPRUDENCE*]; Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEV. L. REV. 431 (1989) (presenting a summary of Posner's insights on interpretation and citing to his earlier work); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987).

11. Posner identifies himself as a pragmatist throughout two of his writings. *OVERCOMING LAW*, *supra* note 10; *PROBLEMS OF JURISPRUDENCE*, *supra* note 10.

moderate judicial opinions while at the same time retaining the occasional capacity to shock or anger.

In short, Posner is far less the micro-economic extremist reflected in the first edition of his justifiably celebrated work. But at the same time, he remains subject to the grip of “American Legal Nominalism” (or “econominalism” for short).¹² This article's thesis is that the degree to which these blind spots affect Posner's judicial performance can vary considerably with the subject under review. On insurance cases, discussed at length below,¹³ Posner is almost without judicial peer. But where the topic is employment discrimination or civil rights, Posner's econominalism plays an arguably counterproductive role and insensitivity often replaces sensitivity. The Posnerian preference for the private and the wealthy continues as well. Although it seldom affects Posner's insurance decisions, one sees it in cases involving statutory construction.¹⁴ Although Posner correctly brings the same comprehensive methodology to contracts and statutes, his statutory interpretation remains less sensitive and satisfying than his contract interpretation. In a recent case of note addressing the application of the Americans With Disabilities Act to insurance policies, Posner's econominalist resistance to government and remedial legislation unfortunately trumped his usual excellence on matter of insurance.¹⁵

By praising Posner's insurance opinions, I do not mean to denigrate his other work (and here comes the academic's inevitable “but”), but one cannot help but notice a continuing problem (at least I think it is a problem). Posner's insurance opinions tend to display far more sensitivity than do his opinions on issues of employment law, civil rights, and discrimination. One

12. Leff found the use of the shorter term “econominalism” in lieu of “American Legal Nominalism” to be “tempting” but “obviously barbaric.” Leff, *supra* note 2, at 459 n.26. Having little of Leff's moderation and decency, I adopt the more barbaric but shorter term “econominalism” to describe the imbedded value choices and political preferences found in Posner's work.

13. See *infra* notes 19-60 and accompanying text (discussing Posner's insurance decisions in general); see also *infra* notes 61-123 and accompanying text (discussing specific cases decided by Posner).

14. See *infra* notes 142-242 and accompanying text (discussing Posner on employment discrimination and statutory issues).

15. See *infra* notes 201-242 and accompanying text; see also Lori Bloch Izzo, Note, *Doe v. Mutual of Omaha Insurance Company: The ADA Does Not Regulate the Content of Insurance Policies, But What Have Cameras, Braille Books or Wheelchairs Got To Do With It?*, 7 CONN. INS. L.J. 263 (2000) (discussing *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999)).

can even argue that his employment law cases are occasionally marked by an insensitivity bordering on callousness.¹⁶ The seeming contradiction seems equally counterintuitive: sensitive about insurance but insensitive about individuals, discrimination and worker's rights? Since the Legal Realist movement, courts have been thought to be the other-way-around, showing empathy and even sympathy for individual rights claims but not in commercial matters.

This article both seeks to codify its compliment to Posner's cerebral approach to insurance questions, while at the same time noting and exploring the degree to which Posner's approach to other cases may lag behind his admirable analyses of insurance law. Along the way, particular note will be given to specific Posner insurance cases, most of which I regard as models for scholarly and judicial analysis, as well as to noninsurance cases that would have benefited from heightened sensitivity and less devotion to the econominialist ideal.

I. POSNER ON INSURANCE: A GENERAL THESIS AND REVIEW OF SIGNIFICANT CASES

Perhaps ironically, it is in the area of insurance law, a field historically viewed as dry and formalist, that Posner's pragmatism and sensitivity may be at its zenith. His intellectual and reflective approach to law and policy shines in this area. Unlike so many insurance cases, which read as if written by a robot using A.L.R. software, Posner's insurance opinions are notable in that they address the underlying structure of risk and insurance and its relation to the world, including the appropriate mix of incentives and equity. They are sensitive to the relations between insurers, policyholders, third parties, and the outside world. The explanatory power of text is respected but not idolized. The meaning of policy provisions is determined with healthy regard for the context and purpose of the insuring arrangement rather than myopic focus on a word or phrase in isolation.¹⁷ Even when one disagrees with a Posner insurance opinion, one cannot help but be impressed by it in relation to much of the discussion of insurance coverage that fills the case reports.

16. Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 230-35 (1994) (arguing that Posner's employment opinions occasionally reflect unfair and scolding criticism of workers).

17. See *infra* notes 19-60 and accompanying text (discussing Posner's insurance opinions); see *infra* notes 61-123 and accompanying text (discussing particular cases).

Posner is, in short, one of the best judicial examples of what I term the “cerebration” of insurance law -- increased focus and in-depth analysis of not only policy language but the intent, purpose, and context of insurance arrangements as well as the role of risk and insurance in the modern world. Posner opinions do not simply quote past dicta, decree results, or apply superficially similar precedents without analysis. His opinions tend to explore at length the structure of the question (coverage, regulation, bad faith) and site the decision in the broader field of insurance law. Where necessary, history, equity, and public policy are deployed in the service of the decision. One may not always agree with it, of course, but one gets an education when reading a Posner insurance opinion.

The sheer productivity of Posner makes it difficult to systematically characterize and classify his insurance law and coverage opinions. In the time and space constraints afforded this article in this issue of the Connecticut Insurance Law Journal, the task is impossible (at least for me). But after years of reading Posner on insurance in non-systematic fashion coupled with a more systematic review for this article, it appears to me that he deserves attention in this area as in so many others for a variety of reasons.¹⁸

First, although generally considered a political and economic conservative, Posner cannot be fairly classified as favoring insurance companies in litigation -- an allegation frequently leveled at other conservative jurists.¹⁹ However, although Posner opinions side with the

18. This article's focus on Posner is not intended to suggest the absence of the other Seventh Circuit judges' important role in these decisions. Although Posner is the author of the decisions discussed in this paper, each majority opinion had at least one (and usually two) judges joining. Nonetheless, the content of the opinion is normally thought to reflect especially upon the authoring judge. As such, I will treat Posner-written judicial opinions as Posner analyses rather than group analyses notwithstanding that such treatment may obscure both compromises among the bench and the contribution of other judges.

19. *Compare* Level 3 Communications, Inc. v. Fed. Ins. Co., 168 F.3d 956 (7th Cir. 1999) (construing the insured-vs.-insured exclusion favorably to the policyholder), *and* Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir. 1994) (finding a pollution exclusion not to bar CGL coverage), *and* Harbor Ins. v. Cont'l Bank Corp., 922 F.2d 357 (7th Cir. 1990) (finding coverage for a company in a suit against the directors and officers), *with* Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467 (7th Cir. 1999) (finding a complaint against an insurer not to have pleaded fraud with sufficient particularity), *and* Wis. Power & Light Co. v. Century Indem. Co., 130 F.3d 787 (7th Cir. 1997) (finding no coverage for environmental cleanup costs), *and* Essex Ins. Co. v. Kasten Railcar Servs., Inc., 129 F.3d 947 (7th Cir. 1997) (holding that an exclusion in originally issued policies continues as part of renewal policies despite the absence of an express statement to this effect; coverage is precluded).

policyholder with some frequency,²⁰ neither can he be considered a judge unduly favorable to policyholders or motivated by a pronounced desire to take from the cash-rich and give to the poor.²¹ In short, he appears to me to be refreshingly neutral and moderate in the face of the frequent “us-against-them” world of coverage litigation, where many judges appear to display an instinctive but not well-articulated preference for either insurers or policyholders.

Second, and consistent with the first observation, Posner is refreshingly amoral in his approach to insurance coverage disputes. Frequently, one finds courts succumbing to the siren song of party briefs that seek to paint either insurer or claimant as the good guy or bad guy of litigation. Consider the morality play insurers have staged (with considerable success) in environmental coverage litigation, where the policyholder seeking liability protection is regularly characterized as a socially undesirable “polluter” rather than a business sued for past operations leading to pollution claims.²² His

20. See, e.g., *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869 (7th Cir. 1999) (finding equitable estoppel potentially applicable to an insurer under ERISA and reversing and remanding summary judgment against the insured); *Rozenfeld v. Med. Protective Co.*, 73 F.3d 1543 (7th Cir. 1995) (finding a medical malpractice claim to be subject to a second policy with higher limits for the policyholder than the first, lower-limit policy); *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119 (7th Cir. 1994) (finding that the wording of a liability policy requires coverage for “unfair competition” alleged by a third party despite an insurer argument that the term has a more narrowly understood meaning in connection with CGL advertising injury coverage); *Patz v. St. Paul Fire & Marine Ins. Co.*, 15 F.3d 699 (7th Cir. 1994) (finding coverage under a pre-1986 CGL “sudden and accidental” exception to a pollution exclusion for discharges that were not intentional but were also neither abrupt nor swift); *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 809 (7th Cir. 1992) (finding CGL to be triggered over a longer period of incorporation of defective product rather than the time of actual leaking of pipes and damage to homes); *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 957 (7th Cir. 1990) (reversing finding for insurer due to error in trial court and articulating “larger settlement” rule for articulation of D & O claims).

21. See, e.g., *Essex Ins. Co.*, 129 F.3d at 947 (holding that in absence of specific language or other evidence to the contrary, an exclusion found in original policy continues to be part of renewals of the policy); *Hamlin, Inc. v. Hartford Accident & Indem. Co.*, 86 F.3d 93, 95-96 (7th Cir. 1996) (applying “impaired property” exclusion in CGL to precluded coverage); *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787 (7th Cir. 1992) (enforcing knowledge of fraud exclusion in professional services policy); *Cont'l Cas. Co. v. Am. Color, Inc.*, 817 F.2d 1287 (7th Cir. 1987) (finding cancellation effective upon mailing by insurer because of clear policy language).

22. See Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the “Absolute” Exclusion in Context and in Accord With Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 58-59 (1998) (identifying and criticizing this litigation tactic of liability insurers).

assessment appears not to be affected by such characterizations. He may implicitly point out good guys and bad guys when he criticizes bad faith or duplicitous performance but one seldom gets the feeling he has become emotional about the issue.²³

Third, and related to the nonmoralist observation: Posner does not appear to become emotionally involved in the cases or treat coverage issues as something more than that simply because the underlying facts are more lurid. This lack of emotion is an arguably positive feature of econominism identified long ago by Leff.²⁴ For example, in *Prudential Insurance Co. v. Athmer*,²⁵ Posner held that the secondary beneficiary son of a murdering primary beneficiary wife could recover the proceeds of the husband's life insurance policy and this was not inconsistent with the general rule that beneficiaries who murder may not profit from the estates and insurance policies of the deceased.²⁶ He was similarly constrained when confronted with the salacious facts of another spousal murder for insurance.²⁷ In some contexts, such as the employment and civil rights cases discussed in this article, Posner's lack of empathy makes his decisions subject to criticism. For insurance coverage decisions, however, detachment of this sort is almost always a virtue. Some of Posner's insurance decisions may, of course, be viewed by some as "too cold," but the best examples of this I have found date

23. See, e.g., *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157 (7th Cir. 1999) (discussing coverage dispute between liability insurer and boiler insurer in neutral, matter-of-fact terms); *Eljer Mfg., Inc.*, 972 F.2d at 809 (discussing the issue of property damage trigger in liability insurance with focus on policy language and nature of underlying claim rather than in terms of empathy for either policyholders or insurers).

24. Leff, *supra* note 2, at 460-61 (noting that, unlike many observers, Posner does not reflexively say "how awful" when confronted with sad facts such as eviction or personal injury, but rather avoids emotion and looks at net systemic effects).

25. 178 F.3d 473 (7th Cir. 1999).

26. While providing sufficient facts to inform the reader ("[h]is wife had him murdered . . . by her 18-year-old lover and three of his 16-year-old pals"), Posner does not dwell on the made-for-TV-movie sordidness of the crime and focuses factually on the murdering mother-wife's lifetime incarceration, the son's estrangement, and the remote-to-impossible chance that the murderer would ever actually enjoy the insurance policy benefits if given to the son. *Id.* at 474, 476-79.

27. See, e.g., *Harmann v. Prudential Ins. Co.*, 9 F.3d 1207, 1208 (7th Cir. 1993) ("In 1981 Debra Hartmann moved out of the marital abode and in with her lover, a tennis pro -- and gun-store clerk -- named Korabik. They decided to murder Werner [Hartman] before he could divorce her.").

from the 1980s and not the 1990s, which is consistent with the general view of scholars that Posner's jurisprudence has evolved favorably.²⁸

Fourth, and connected the second observation, Posner does view the good faith obligation of contract law with some seriousness.²⁹ In both insurance cases and other contract situations, he had inveighed against a party "hoking up" defenses to contract nonperformance³⁰ and emphasized the economic benefits of a legal regime that provides an incentive for contracting parties to behave honestly and to expend reasonable efforts to keep their promises.³¹

28. See, e.g., *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936 (7th Cir. 1986) (finding no duty by contracting entity to protect subcontractor workers from danger of silicon dust from sandblasting done by subcontractor); *Smith v. N. Am. Co. for Life & Health Ins.*, 775 F.2d 777 (7th Cir. 1985) (upholding insurer's argument for rescission of health policy due to inaccuracy in application regarding blood pressure treatment in the face of a widow's argument that conditional receipt language created coverage); *Sur v. Glidden-Durkee*, 681 F.2d 490, 499 (7th Cir. 1982) (Posner, J., dissenting) (arguing against majority holding that worker enjoys continued health care coverage for wife and child with birth defect based on representations by employer agent; in this dissent, Posner is almost stridently Chicago School in his use of law and economic analysis, essentially rerunning the arguments in his book that Leff parodied in part -- that the court's decision saves an individual but hurts society by increasing the future costs of employer-provided health insurance; majority opinion "opens up breathtaking vistas of liability"); see also *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991) (refusing to find that death during treatment for Crohn's Disease was an "accident" under ERISA-provided insurance policy).

29. See, e.g., *Mkt. St. Assoc. Ltd. P'ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991) ("The contractual duty of good faith is thus not some newfangled bit of welfare-state paternalism or . . . the sediment of an altruistic strain in contract law, and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases. . . .") (citations omitted); *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.*, 896 F.2d 1035, 1041 (7th Cir. 1990) ("The parties to a contract are embarked on a cooperative venture, and a minimum of cooperativeness in the event unforeseen problems arise at the performance state is required even if not an explicit duty of the contract.").

30. See, e.g., *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990) (applying Illinois law and discussed at length *infra* notes 61-87 and accompanying text); *AMPAT/Midwest, Inc.*, 896 F.2d at 1041 (applying Illinois law); *Mkt. St. Assoc. Ltd. P'ship*, 941 F.2d at 588 (applying Wisconsin law).

31. See, e.g., *In re New Era*, 135 F.3d 1206 (7th Cir. 1998) (finding an insurer to have acted in bad faith by "hiring its opponent's lawyer to sell out the opponent" by prosecuting action that if successful will effectively strip policyholder of rights); *Hamlin, Inc. v. Hartford Accident & Indem. Co.*, 86 F.3d 93, 94 (7th Cir. 1996); *Mkt. St. Assoc. Ltd. P'ship*, 941 F.2d at 594. In *Market Street*, Posner stated:

But it is one thing to say that you can exploit your superior knowledge of the market -- for if you cannot, you will not be able to recoup your investment you made in obtaining that knowledge -- or that you are not

Posner's opinions reflect a solid understanding of the concepts underlying not only contract law but also insurance and the insurer-policyholder relationship concerning such matters as the duty to defend, the duty to cooperate, and the "duty" to settle, moral hazard, and the distinction between liability risk and business risk.³² He also appreciates the language, doctrine, and positions specific to particular lines of insurance.³³

Fifth, Posner is not a slavish literalist of contract text interpretation³⁴ but accords it measured respect.³⁵ In construing insurance policy and other

required to spend money bailing out a contract partner who has gotten into trouble. It is another thing to say that you can take deliberate advantage of an oversight by your contract partner concerning his rights under the contract. Such taking advantage is not the exploitation of superior knowledge or the avoidance of unbargained-for expense; it is sharp dealing. Like theft, it has no social product, and also like theft it induces costly defensive expenditures, in the form of over-elaborate disclaimers or investigations in the trustworthiness of a prospective contract partner, just as the prospect of theft induces expenditures on locks.

Id.

32. *See, e.g.*, *Great Cent. Ins. Co. v. Ins. Servs. Office, Inc.*, 74 F.3d 778 (7th Cir. 1996) (describing role of ISO in workings of modern property/casualty insurance); *Charter Oak Fire Ins. Co. v. Travelers Ins. Co.*, 45 F.3d 1170, 1172-74 (7th Cir. 1995) ("[W]e do not find any basis . . . for interpolating into a contract of liability insurance a promise by the insurer to handle a claim in a manner that will minimize the business risk, as distinct from the liability risk, to the insured.").

33. *See, e.g.*, *Milam v. State Farm Mut. Auto. Co.*, 972 F.2d 166 (7th Cir. 1992) (dealing with bouncing tires as part of uninsured motorist coverage and the problem of phantom or hit-and-run drivers causing injury to insureds); *Cont'l Cas. Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297 (7th Cir. 1990) (discussing the nature of excess insurance and pricing).

34. *See, e.g.*, *Level 3 Communications, Inc. v. Fed. Ins. Co.*, 168 F.3d 956 (7th Cir. 1999) (holding that the "insured vs. insured" exception to a Directors & Officers liability insurance policy does not apply in full to preclude coverage merely because a director (who was clearly an "insured" under the policy) resigned during suit and became member of a plaintiff's class suing incumbent directors and company that would reimburse them (also "insureds" under the policy)). Posner's solution in *Level 3 Communications* was to allocate recovery and preclude insurance only for former director-insured's share. *Id.*

35. *See, e.g.*, *Cole Taylor Bank v. Truck Ins. Exch.*, 51 F.3d 736, 737 (7th Cir. 1995). In *Cole Taylor Bank*, Posner stated:

Waiver is one of a multitude of contract doctrines that allow oral testimony to modify the terms of an apparently clear written contract. There is no more vexing question in contract law than when a written contract can be rewritten by oral testimony. "Always" is an unsatisfactory answer because it defeats one of the main purposes of written contracts, which is to protect a contracting party against the vagaries of juries. "Never" is equally

contract language, his test for clarity is whether the mythical “reasonable layperson” without additional information would know with certainty what is meant by the contract language.³⁶ He does not pull out a dictionary and then read a term with literal breadth if doing so does not comport with the ordinary lay understanding or the purpose of the transaction.³⁷

Sixth, and in related fashion, Posner attempts to assess insurance contract meaning (and other contract meaning so far as I can tell) according to the purpose of the transaction and the context of the dispute.³⁸ He realizes that contracts are not sacred texts to be pondered over in search of only textual meaning but are instruments designed to accomplish commercial or other purposes. Policies need to be read carefully but contextually, with a consideration of both the context provided by the contract as a whole and the context of the transaction.³⁹ Policyholders purchase insurance to accomplish

unsatisfactory, because of the acute danger of misinterpretation by a reader ignorant of the contract's commercial setting.

Id.

36. See, e.g., *Conn. Gen. Life Ins. Co. v. Sun Life Co.*, 210 F.3d 771, 773 (7th Cir. 2000); *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157 (7th Cir. 1999); *Cont'l Cas. Co.*, 917 F.2d at 300 (stating “interpretation, like other legal methodologies, is at bottom a practical art.”).

37. See, e.g., *Level 3 Communications, Inc.*, 168 F.3d at 957 (citations omitted). In *Level 3*, Posner explained that

when the application of a rule leads to a truly whacky result, a more than suspicion arises that the parties can't have set so high a value on clarity that they would have thought such an application a proper interpretation of the rule. This is true whether the rule is statutory or contractual.

Id. (citations omitted).

38. See, e.g., *Conn. Gen. Life Ins. Co.*, 210 F.3d at 773 (assessing the issue of arbitration consolidation in light of purpose of contract); *Rhone-Poulenc, Inc. v. Int'l Ins. Co.*, 71 F.3d 1299 (7th Cir. 1999) (determining whether the policy at issue is primary, “pure” excess by intent, or “excess by coincidence”); *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 365-68 (7th Cir. 1990) (assessing obligations of an insurer in light of the risk management goals of a policyholder and the purpose of the insuring agreement).

39. See, e.g., *Rozenfeld v. Med. Protective Co.*, 73 F.3d 154, 157 (7th Cir. 1996) (“[T]he best ‘rule’ may be to attend carefully to the specific wording of the policy *and the character of the liability insured against.* . . .”) (emphasis added). In *Rhone-Poulenc, Inc. v. International Insurance Co.*, 71 F.3d 1299, 1304 (7th Cir. 1995), Posner stated:

Every competent person engaged in translation or interpretation understands that you cannot figure out the meaning of a sentence just by looking up every word in it in the dictionary. The meaning of a sentence inheres in the relationships among the words, relations given by the rules of grammar, and not just in the meaning of the words considered one by

particular goals of risk management and insurers sell particular products in order to profit through risk distribution (and investment of premium proceeds), designing the product to attempt to cover certain profitable risks while avoiding unprofitable or unpredictable risks. Sorting out the meaning of insurance policies in particular situations, many of which were unanticipated by the parties or unaddressed in the policy or other documents, frequently requires courts to utilize more than just a dictionary or an instinctive reaction. Posner appreciates this and adjudicates insurance controversies with an eye toward purpose and context.⁴⁰

Seventh, and of course related to the previous observations, Posner has a moderate, reasonable and nuanced view of the ambiguity doctrine. It has long been fashionable for courts to declare that they will not bend, twist, or distort a contract in order to deem it ambiguous.⁴¹ Posner not only avoids this pitfall, but also avoids the opposite and equally erroneous temptation to deem problematic language clear and unambiguous.⁴² He also properly treats the

one in isolation from each other . . . “I have a pair of loafers” seems clear enough. But its meaning depends on whether the sentence preceding it is “I’m disappointed with my research assistants this year” or “I have comfortable shoes.”

Id.; see also *Bidlack v. Wheelabrater Corp.*, 993 F.2d 603, 609 (7th Cir. 1993) (“We could argue back and forth till we were blue in the face over the proper interpretation of the language relating to the retirees’ health benefits without reaching a confident conclusion, if all we had to go on was the written contract itself.”).

40. See, e.g., *Great Cent. Ins. Co. v. Ins. Servs. Office*, 74 F.3d 778, 785 (7th Cir. 1996) (discussing the role and function of ISO as it bears on the question of alleged liability of ISO to insurer using ISO rate data: “ISO is an enterprise rather than an individual, and its ability to prevent its employees from making careless mistakes whether of unlimited liability for the consequence of those mistakes might be to jeopardize its existence or make it unduly timid about proposing less than astronomical rates”); *Rhone-Poulenc, Inc.*, 71 F.3d at 1305 (applying Illinois law) (“Suppose, to take the simplest case, that each policy states that it is inapplicable if the insured is covered by other insurance. Such a series of identical conditions cannot be enforced. That would leave the insured with no insurance, even though he had bought much insurance. So the courts invalidate the identical conditions and require each insurer to contribute pro rata to the satisfaction of the insured’s claim, in effect converting a series of excess policies into [pro-rata] primary policies.”).

41. See, e.g., *E. Assoc. Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1075 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981) (courts “should not torture the language of the policy in order to create ambiguities”); *J. Ray McDermott & Co. v. Fid. & Cas. Co.*, 466 F. Supp. 353, 361 (3d Cir. 1980). See JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* § 4.08 (2d ed. 1999 & Supp. 2000).

42. See *supra* note 36; *infra* notes 44-45 and accompanying text (discussing in detail where Posner is willing to consider extratextual factors because a contract is sufficiently

ambiguity rule (a.k.a. the *contra proferentem* principle that ambiguous language is construed against the drafter) as “merely a tiebreaker” to be employed after other indicia of meaning (such as purpose and context) fail to resolve the meaning of language unclear on its face.⁴³ At the same time, Posner's primary focus is text and determination according to linguistic meaning where text is clear. He has staked out an interpretative position that admits additional evidence of contract meaning only when there is “objective” evidence (e.g., usage in trade, specialized understanding of terms, etc.) that suggests a meaning other than that reflected on the page of the contract.⁴⁴

ambiguous to benefit from application of such information). Posner has not, to my knowledge, expressly stated that he seeks to avoid cleaving to a false contractual clarity. Rather, he simply does so in his decision-making and implicitly endorses the concept.

43. See, e.g., *Harbor Ins. Co.*, 922 F.2d at 366; *Cont'l Cas. Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297, 300 (7th Cir. 1990). In *AM International, Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 575, 576 (7th Cir. 1995), a breach of contract case with obvious implications for insurance policy construction, Posner explains in some detail his view of contract law:

Rules of law are rarely as clean and strict as statements of them make them seem. So varied and unpredictable are the circumstances in which they are applied that more often than not the summary statement of a rule . . . is better regarded as a generalization than as the premise of a syllogism. Take the rule that if a contract is clear on its face, the court will not permit the taking of evidence to contradict that “clear” meaning. The famous contract in *Raffles v. Wichelhaus* . . . was clear on its face. It called for the shipment of a specified amount of cotton from one port to another on the ship *Peerless*. Clear as a bell. Only there were two (if not more) ships *Peerless*, and it was impossible to tell which one the contract referred to. The contract was unclear because clarity in a contract is a property of the correspondence between the contract and the things or activities that it regulates, and not just of the semantic surface.

. . . .

The rule that the judge must be satisfied that extrinsic evidence creates a legitimate ambiguity before he can submit the dispute over the contract's meaning to the jury is a sensible rule

Id. at 575-76 (citations omitted).

44. E.g., *AM Int'l, Inc.*, 44 F.3d at 575 (citations omitted) (emphasis added). In *AM International*, Posner reasoned:

There has to be a means by which the law allows these surfaces [of the standard textual reading of a contract] to be penetrated, but without depriving contracting parties of the protection from the vagaries of judges

Eighth, Posner appreciates that insurance law remains largely a matter of state law but also accounts for the growing body of a federal common law of insurance in ERISA cases.⁴⁵ A surprisingly large number of insurance coverage opinions do not expressly tell the reader the applicable controlling law applied by the court.⁴⁶ This is to me a surprising shortcoming of many

and juries that they sought by reducing their contract to writing. A review of the doctrines that allow this penetration of semantic surfaces suggests that the key is the distinction between what might be called “objective” and “subjective” evidence of ambiguity. . . . By “objective” evidence we mean evidence of ambiguity that can be supplied by disinterested third parties The ability of one of the contracting parties to “fake” such evidence, and fool a judge or jury, is limited. By “subjective” evidence we mean the testimony of the parties themselves as to what they believe the contract means. Such testimony is invariably self-serving . . . [but] “[o]bjective” evidence is admissible to demonstrate that apparently clear contract language means something different from what it seems to mean; “subjective” evidence is inadmissible for this purpose. . . . [A party who attacks the clear textual meaning of a contract must show] that anyone who understood the *context* of the contract would realize it couldn’t mean what an untutored reader would suppose it meant

Id. (emphasis added). This is not to say that I agree with every word of Posner’s analysis or his operationalization of the concept in all subsequent cases. Posner’s objective/subjective distinction could be interpreted to provide too high a barrier to useful extrinsic evidence of meaning or could needlessly raise the transaction costs of litigating insurance coverage disputes.

In addition, Posner’s view that only “objective” extrinsic evidence cuts it for purposes of showing that seemingly clear language does not mean what it seems to say presumably does not foreclose the receipt of evidence on waiver, estoppel, fraud, or related doctrines.

45. *E.g.*, *Harbor Ins. Co.*, 922 F.2d at 362-64 (recognizing that insurance coverage is controlled by Illinois law and engaging in extensive analysis of Illinois precedents on the issue of “mend the hold” doctrine); *Herzberger v. Prudential Ins. Co. of Am.*, 205 F.3d 327, 329 (7th Cir. 2000) (using federal common law to determine degree to which ERISA administrator’s authority is discretionary in deciding benefits questions); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 541 (7th Cir. 2000) (noting that ERISA plans are to be construed under federal common law rather than state law, and that federal common law also governs construction of collective bargaining agreements pursuant to federal labor statutes).

46. *See, e.g.*, *Keene Corp. v. Ins. Co. of No. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). *Keene*, of course, is the famous case that adopted the continuous trigger or multiple trigger (based on exposure, injury or manifestation) for commercial general liability coverage in connection with long-tail asbestos claims and permitted the policyholder to designate which policy among multiply-triggered policies will be tapped for specific claims. Despite this momentous conclusion of obvious import, the court does not specifically state the controlling applicable law. Because of the multiple jurisdictions interested in the case, I have always read *Keene* as being decided on general principles of contract and insurance law that, at least as of

coverage opinions, particularly since state law is practically “constitutionalized” as the rule of decision for insurance disputes under the McCarran-Ferguson Act.⁴⁷

I do not mean to overstate this “problem.” One normally can quickly glean the applicable law from scanning the case and noting the precedent cited, but not always. In some areas of insurance law, moreover, the applicable law is crucial to the outcome, as in the case of pollution liability coverage (gradual discharges are covered in some states if unintentional but other states require the discharge to be abrupt), bad faith (some states permit punitive damages, some do not), apportionment of responsibility (some allocate by time on the risk, some by time and policy limits, some refuse to allocate against a policyholder), and other areas.⁴⁸ In many areas insurance law is rather consistent among states. All jurisdictions profess to follow the ambiguity rule, for example. But as discussed above and as apparent from reading case law, courts vary in their aggressiveness in the invocation of this doctrine.⁴⁹ In light of the importance of state law and its variegation (as well as the emerging federal common law of ERISA coverage), it is refreshing (and helpful to readers) that Posner consistently identifies the applicable law

1981, could be said to be consistent from state to state. But I could be wrong. Since the decision, it has become clear that the particular state law applied can make a rather dramatic difference in the trigger of liability coverage and any subsequent allocation of coverage responsibility among insurers and policyholders. See STEMPER, *supra* note 41, at §§ 2.02, 14.09, 14.10; Jeffrey W. Stempel, *Domtar Baby: Misplaced Notions of Equitable Apportionment Create a Potential Thicket of Unfairness for Policyholders*, 25 WM. MITCHELL L. REV. 769, 776-824 (1999) (describing dramatic differences in jurisdictions on these points). Even before the *Keene* decision, there was some indication that courts applying different law might decide the issue differently. See, e.g., *Ins. Co. of No. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981) (applying Illinois and New Jersey law and finding that exposure is the proper measure of liability trigger and requiring pro-rata allocation of coverage by years in question).

47. See 15 U.S.C. §§ 1011-12. The McCarran-Ferguson Act was first enacted in 1945 to overrule the Supreme Court decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and provides that insurance shall be governed by state law and that federal law does not alter this baseline norm absent clear and authoritative statement in federal statutory scheme. STEMPER, *supra* note 41, § 2.03[a].

48. See STEMPER, *supra* note 41, §§ 10.01, 14.09, 14.10, 14.11 (discussing state differences in these areas).

49. *Id.* § 4.08[g] (dividing jurisdictions into strong, weak, and moderate states regarding use of ambiguity as decisionmaker in coverage disputes).

governing his decisions.⁵⁰ He also appears to faithfully follow the state-based nuances of insurance law.⁵¹

Ninth, Posner decides cases with considerable self-consciousness about both his own jurisprudential approach and the implications of legal theory and judicial approach for real case outcomes. His opinions are liberally salted with discussions of legal approaches and explanation (usually persuasive) as to why the approach or characterization chosen leads to a better result in the instant case and in general application.⁵² In the long tradition of academics, Posner is a self-citer, one who frequently notes his previous decisions to support and emphasize the point.⁵³ He frequently repeats assessments,

50. *See, e.g.*, *Prudential Ins. Co. v. Athmer*, 178 F.3d 473 (7th Cir. 1999) (applying Illinois law and discussing varying state law approaches to recovery of insurance benefits when policyholder has been murdered, expressly selecting use of federal common law as wiser course in case of serviceman's life insurance due to preference for uniformity in cases involving federal employees).

51. *See, e.g.*, *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119, 1123 (7th Cir. 1994) (applying Wisconsin law) (“[T]he criterion for interpreting a term in an insurance policy is how the insured would reasonably have understood it.”). To some extent, the Wisconsin rule of law quoted by Posner in *Curtis-Universal* is more favorable to the policyholder than Posner's own statements of contract interpretation. Posner appears generally to interpret a contract in the same manner as a reasonable layperson with no connection to the transaction would understand the words of the contract. Focusing on the insured's understanding appears to be Posner yielding to the standard announced under Wisconsin law. As a practical matter, of course, it may make little difference. Under Posner's announced contract views, even contract language clear on its face against the policyholder may be subject to objective extrinsic evidence that shows the reasonable policyholder's understanding to be otherwise.

52. *See, e.g.*, *Level 3 Communications, Inc. v. Fed. Ins. Co.*, 168 F.3d 956, 958 (7th Cir. 1999):

A simple, flat rule is deliciously clear and easy to apply, but it may be both underinclusive and overinclusive in relation to the purpose that animates it. A standard, like “no coverage for collusive suits or lovers' quarrels,” is contoured exactly to its purpose, but it cannot be applied without a potentially costly, time-consuming, and uncertain inquiry into the nature of the underlying dispute sought to be covered. It is apparent from the wording [of the D & O policy] that the parties opted for the rule, not the standard, in agreeing to the “Insured versus Insured” exclusion.

Id. (citations omitted).

53. *E.g., id.* at 957 (citing prior Posner opinions on rules, standards and clarity in support of current musings on subject).

undoubtedly for the benefit of litigants and readers unfamiliar with or forgetful of his prior pronouncements on the topic.⁵⁴

Although this may be seen as repetition and ego by some, the serial self-invocation of law's most successful modern agenda entrepreneur,⁵⁵ I find it useful. Posner more than any other modern judge relentlessly gives even his short decisions an intellectual flavor and focuses on the importance of legal principles and approaches so that discerning readers appreciate the stakes of even seemingly mundane decisions. His work, although obviously advocating his view of law and the world, generally raises the discourse about law and legal precedent.

Tenth, Posner writes well, with clarity, wit, and distinctively memorable prose.⁵⁶ His opinions are a joy to read,⁵⁷ which is no small attribute given that his audience is lawyers, judges, and professors whose eyes understandably may begin to glaze over a bit after working lifetimes spent

54. For example, Posner's general (and very good) discussion of contract meaning in *AM International, Inc. v. Graphic Management Associates*, 44 F.3d 572, 577 (7th Cir. 1995) is often repeated, at least in part, in later cases. See, e.g., *Level 3 Communications*, 168 F.3d at 958 (discussing rules, standards and clarity in terms similar to those used in prior Posner opinions).

Posner first discussed the "mend the hold" doctrine of contract law in *Harbor Insurance Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990). He has since alluded to that opinion and addressed the doctrine in several subsequent cases. See, e.g., *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1123 (7th Cir. 1998) (finding doctrine applicable in pay dispute); *Level 3 Communications*, 168 F.3d at 959 (finding argument inapplicable in instant case).

55. William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 333 (1992) (book review) ("Posner is law's most successful agenda entrepreneur since Oliver Wendell Holmes, Jr.").

56. See, e.g., *In re New Era, Inc.*, 135 F.3d 1206, 1208 (7th Cir. 1998) ("[T]hese bankruptcy appeals have a tangled history, an unbelievable present, and no future."); *Old Republic Ins. Co. v. Chuhak & Tecson, P.C.*, 84 F.3d 998, 999 (7th Cir. 1996) ("We have consolidated for argument and decision the appeals in two cases, virtually identical, mysteriously assigned to two different judges of the same district court -- who reached opposite results, the second judge disagreeing so violently with the first that he imposed sanctions on the plaintiff in the second case for relying on the first judge's opinion"); *Great Cent. Ins. Co. v. Ins. Servs. Office*, 74 F.3d 778, 785 (7th Cir. 1996) ("ISO is an enterprise rather than an individual, and its ability to prevent its employees from making careless mistakes [leading to liability] might be to jeopardize its existence or make it unduly timid about proposing less than astronomical rates.").

57. See, e.g., *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 32 F.3d 1175, 1176 (7th Cir. 1994) ("Marx once said that every great event or character in history appears twice, the first time as tragedy and the second as farce (he had in mind Napoleon and his nephew). This case bids fair to illustrate the adage.").

reading opinion after opinion. Despite the wealth of material contained in them, Posner's opinions are seldom long and often read with the pace of a bestseller. He peppers his sober scholarly verbiage with punchy commonspeak and contractions.⁵⁸ From the pen of a weaker jurist, what might seem like a failed attempt to write for the masses instead normally provides clearer explanation with fewer words.

Posner's writing flair is of course a general asset of his judging. For insurance, however, an area customarily damned as boring and technical, his writing skill has even greater value in that it makes insurance opinions considerably more interesting and worth reading. This tends to serve insurance law as a subdiscipline by expanding the number of readers, and perhaps even practitioners or scholars of insurance. At some point, insurance opinions also become interesting not only because they are well-written but because Posner has written them. This issue of the *Journal*, for example, will probably be read by many who do not specialize in insurance matters simply because Posner is the topic of the issue.⁵⁹

In this section, I attempt to provide some support for my sweeping general praise of Posner through examining his approach to specific cases of interest or note. In a sense, I am taking a "greatest hits" approach to Posner's insurance law opinions (as determined by me, perhaps even a more dubious source than Dick Clark). I do this both for expediency (I simply have not had the time or energy or depth of mind to rigorously evaluate all of his work according to the criteria set forth above in the time available) and because it will increase accessibility to the reader, who can make his or her own assessment as well.

58. See, e.g., *Hamlin, Inc. v. Hartford Accident & Indem. Co.*, 86 F.3d 93, 94 (7th Cir. 1996) ("If the lack of a defender causes the insured to throw in the towel in the suit against it, the insurer may find itself obligated to pay the entire resulting judgment or settlement even if it can prove lack of coverage."); *Cole Taylor Bank v. Truck Ins. Exch.*, 51 F.3d 736, 740 (7th Cir. 1995) ("[T]he victim of a breach of contract is not required upon learning of the breach to wail and tear his hair."); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993) ("We could argue back and forth till we were blue in the face over the proper interpretation of the language relating to the retirees' health benefits.").

59. Posner's succinct clarity does, however, present a problem for one commenting on his work. In summarizing Posner opinions, it is very hard to state the case better than Posner has done in writing the opinion. As a result, a discussion of Posner opinions lends itself to relatively long quotations from the opinions. Consequently, this article has more block quotations than I would prefer. However, I frequently find myself unable to express the concept under review better than Posner, and have elected to quote Posner at some length throughout this article despite its tendency to expand the article.

A. *Harbor Insurance Co. v. Continental Bank Corp.*

Perhaps my favorite Posner opinion is *Harbor Insurance Co. v. Continental Bank Corp.*,⁶⁰ which centered on a Directors' and Officers' liability policy. Continental was one of the largest, wealthiest banks in America but floundered in the 1980s, in substantial part because it had bought \$1 billion in loans from the now-infamous Penn Square bank. Penn Square, located in an Oklahoma strip shopping center and led by an aggressive but reckless entrepreneur,⁶¹ had written a lot of bad loans -- and sold most of them to Continental and other banks that should have known better, generating its own smaller version of the savings and loan solvency crisis that took place later in the 1980s. When Penn Square collapsed and the \$1 billion on loans proved uncollectible, Continental

itself collapsed, and although it was saved at the last minute by the Federal Deposit Insurance Corporation its stock became virtually worthless, precipitating a flurry of lawsuits by investors who had bought the stock just before the collapse. The suits charged securities fraud -- specifically, that Continental had concealed the bad news about the Penn Square loans in order to keep up the price of its stock.⁶²

Continental, like most large companies, had D & O Insurance. Its D & O policy, like most such policies, provided coverage for judgments or settlements against directors or officers or for the company if it was legally indemnifying the defendant officers or directors. A "wrongful act" in these policies is generally defined as an error or omission -- and the individual defendants in the Continental shareholders litigation were accused of plenty of such acts. The D & O policy, however, while covering errors and omissions, typically excludes coverage for intentionally caused injury, fraud, criminal wrongdoing, certain regulatory violations, or conduct outside that permitted by the company's authority.⁶³ Harbor and Allstate, Continental's two D & O insurers, rejected coverage and filed a declaratory judgment taking the position that "the behavior of the directors had been so egregious

60. 922 F.2d 357 (7th Cir. 1990).

61. See JONATHAN R. MACEY & GEOFFREY P. MILLER, *BANKING LAW & REGULATION* 276 (2d ed. 1997); PHILLIP L. ZWEIG, *BELLY UP: THE COLLAPSE OF PENN SQUARE BANK* (1985); MARK SINGER, *FUNNY MONEY* 153-59 (1985); *Penn Square Bank Failure: Hearing Before the House Committee on Banking, Finance and Urban Affairs*, 97th Cong., 2d Sess. 392 (1982).

62. *Harbor Ins. Co.*, 922 F.2d at 359 (citations omitted).

63. STEMPEL, *supra* note 41, § 19.01.

that, even in the unlikely event that such conduct could be fitted within the good faith proviso in Continental's charter, federal and state law would forbid Continental to indemnify the directors for any liability they incurred as a result of that conduct."⁶⁴

Continental settled the two suits, one certified as a class action, for \$17.5 million and then counterclaimed against the insurers for coverage. "Harbor and Allstate now changed their tune. No longer did they argue that the directors' conduct had been so egregious as to make indemnification by Continental offensive to public policy. They argued that Continental had settled the cases prematurely; the directors had been guilty of no misconduct at all!"⁶⁵ Despite this dramatic change of tune, the insurers won a judgment of noncoverage after trial in the district court.⁶⁶

Writing for the Appeals Court panel, Posner found the trial court's refusal to admit a copy of the declaratory judgment complaint as "evidence" to or consider the insurers' shifting position incorrect. The complaint "was the cornerstone of Continental's effort to establish the insurers' liability with the help of the doctrine of 'mend the hold.'"⁶⁷ From there, Posner launched into a mini-treatise of this formerly obscure contract law doctrine and also launched something of a cottage industry in commenting on the significance of the rediscovery of what might have been previously seen as a 19th century doctrine in desuetude.

The court's invocation of the doctrine is an admonition to lawyers that they should be more careful about talking out of both sides of their mouths in representing clients.⁶⁸ Although too much can be made of this and other professionalism concerns, the "mend the hold" doctrine does stand for the proposition that, in disputes, one must eventually take a reasonably concrete position. However, if one's reasonably concrete position at trial differs from the position taken in pretrial, the adversary should at least have the chance to cross-examine on this point and use the earlier position as evidence of the suspicious convenience of the current position.

64. *Harbor Ins. Co.*, 922 F.2d at 359.

65. *Id.* at 360.

66. *Id.* at 362.

67. *Id.*

68. See Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation With a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589 (1998).

In *Harbor Insurance Co.*, Posner makes this point with clarity and depth in surprisingly few pages (almost fewer than I can here summarize his assessment). He takes the reader on a condensed tour de force, implicitly revealing that the adversary system does not as promised always result in counsel overturning every stone in search of information.

Demonstrating a curious incuriosity about language, none of the lawyers was able to explain to us the meaning of this phrase, which at times indeed they made complete nonsense of -- alas, with judicial authority. . . . [b]ut they agree as they must that it is the name of a common law doctrine that limits the right of a party to a contract suit to change his litigating position. In fact the phrase is a nineteenth-century wrestling term, meaning to get a better grip (hold) on your opponent.⁶⁹

Posner then describes the first case to use the term, an 1877 U.S. Supreme Court decision, “although the essential features of the doctrine can be found in much earlier cases” and the doctrine's first appearance in Illinois was 1905.⁷⁰ He reviews Illinois law, focusing on the most prominent “modern” state case (a 1953 Illinois Supreme Court opinion) and notes mention of the doctrine in decisions in eight other states.⁷¹ According to Posner’s analysis, the “mend the hold” doctrine, in essence, states that a party with a fixed litigation position in a contract dispute is stuck with that position and may not take an opposite view absent the presence of significant intervening factual information.

Posner reaches this view with considerable sensitivity to the need to reconcile the “mend the hold” doctrine with concepts of pleading in the alternative and a due process-like right of litigants to present their case based on the most favorable evidence available at the time of trial.⁷² Consequently, a party in contract litigation can and should be confronted with “prior inconsistent statements” about the matter, but can nonetheless prevail if it persuades the factfinder that its prior position was wrong and its current position right because this is what facts previously unavailable show and not

69. *Harbor Ins. Co.*, 922 F.2d at 362 (citation omitted).

70. *Id.*

71. *Id.* at 363.

72. *See id.* at 364-65 (reconciling “mend the hold” doctrine with Rules of Civil Procedure, particularly Rules 8, 11, and 15).

because the party has simply decided that Position B resonates more with the jurors than Position A.⁷³

Posner correctly treats the “mend the hold” doctrine as part of Illinois’s substantive contract law rather than a rule of litigation procedure, thus making it applicable in cases involving state law under the *Erie* doctrine.⁷⁴ As part of contract law, the name of the doctrine is

quirky, but the doctrine itself, appropriately configured . . . can be seen as a corollary of the duty of good faith that the law of Illinois as of other states imposes on the parties to contracts. A party who hokes up a phoney defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith. [Illinois case law] explicitly connects the “mend the hold” doctrine to considerations of good faith and ethical obligations in contract relations.⁷⁵

This concern for treating seriously the good faith obligation in contract law generally, as well as insurance law, is a recurrent Posner theme, and also serves to distinguish his opinions from most.⁷⁶

In essence, Posner read the record in *Harbor Insurance Co.* as reflecting two insurers taking inconsistent positions on coverage to the detriment of a policyholder. At the very least, a factfinder was entitled to know about this inconsistency and to then determine whether it was the result of expanding knowledge or simply litigation expediency. *Harbor Insurance Co.* also found the original underlying complaint admissible because it (a) showed that the insured directors named as defendants were in fact exposed to liability; and (b) the complaint could be properly used for impeachment of the insurers when they claimed the insureds were not at risk.⁷⁷

Posner also used the dispute as a forum to make useful statements regarding the ambiguity principle of insurance contract interpretation and the manner in which lump sum settlements may be allocated between insured and

73. *See id.* at 363-65.

74. *See id.* at 364.

75. *Id.* at 363 (citations omitted).

76. *See, e.g.,* *Mkt. St. Assoc. Ltd. P’ship v. Frey*, 941 F.2d 588, 593-95 (7th Cir. 1991); *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.*, 896 F.2d 1035, 1041 (7th Cir. 1990).

77. *Harbor Ins. Co.*, 922 F.2d at 365.

uninsured amounts. After setting forth the standard rule that ambiguous contract language is construed against the drafter,⁷⁸ he continues:

Given this rule -- if there is an ambiguity, the insured wins -- why would there ever be an occasion for attempting to resolve an ambiguity in an insurance contract by evidence? . . . Reconciliation is possible along the following lines. If an insurance contract is ambiguous either party should be allowed to introduce evidence to disambiguate it. But if, all such evidence having been considered, the meaning of the contract is still uncertain, then the insured wins. In other words, the interpretative principle (favor the insured) is merely a tie-breaker.⁷⁹

In a nutshell, Posner sets forth what I regard as the intelligent version of the ambiguity doctrine (use it as a last resort tiebreaker when other indicia of meaning fail).⁸⁰ In this same vein, he had valuable insight to offer on the appropriate role of an expert witness for insurance coverage litigation. At trial, the insurers had offered a lawyer's expert testimony to the effect that Continental's charter did not permit indemnification of the directors under the circumstances of the underlying claim. Posner rejected the view that expert testimony was completely off limits: "The charter is ambiguous, and therefore testimony, including expert testimony . . . by a lawyer -- was a permissible aid to interpretation."⁸¹ Therefore, a "lawyer experienced in indemnification matters was a proper witness to opine on the probable

78. See also BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 101 (10th ed. 2000); STEMPER, *supra* note 41, § 4.08 (summarizing ambiguity or *contra proferentem* rule).

79. *Harbor Ins. Co.*, 922 F.2d at 366 (citing *Cont'l Cas. Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297, 300 (7th Cir. 1990)).

80. I include the concept of a party's reasonable expectations, particularly those of the policyholder, as part of the material that can be used to indicate contract meaning before one resorts to the *contra proferentem* tiebreaker. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181 (1998). Insurance law precedents and doctrine tend, however, to argue for a more restricted role of party expectations. See generally Symposium, 5 CONN. INS. L.J. 1 (1998). Posner's views on this issue are unclear but not necessarily inconsistent with my own. See, e.g., *AM Int'l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 574-76 (7th Cir. 1995) (permitting consideration of "objective" extrinsic evidence of meaning even where face of contract text appears to have clear meaning).

81. *Harbor Ins. Co.*, 922 F.2d at 365.

meaning of the charter.”⁸² However, Posner found the instant case to have gone too far both in using dissimilar judicial precedent as a basis for his opinions and to have “permit[ted] a lawyer to testify to the legal meaning of indemnification.”⁸³ Even so, the error “would be harmless if Continental’s suggested interpretation of the charter were highly implausible. But it is not.”⁸⁴

Because *Harbor Insurance Co.* was to be remanded to the trial court, which had found for the insurers, there had not been a decision on allocation of the settlement between the insurers and Continental. Should Continental prevail on remand, the trial court would need to address the issue, prompting the Seventh Circuit to set forth its views on the matter.

How much of that amount [the \$17.5 million paid by Continental to settle the claims] represents indemnification of the directors and other insured persons against whom claims had been made for their liability to the plaintiffs? Harbor and Allstate say none of it -- or at most \$20,000, for that was the demand of the named plaintiff in the suit that

82. *Id.* at 366.

83. *Id.* at 366-67.

84. *Id.* at 366. Posner’s assessment of the expert witness issue is helpful but in my view a bit too restrictive. He is apparently fine with experts talking about general understandings and activity, “industry practice” if you will. He is uncomfortable with expert witnesses who are lawyers discussing case law as this may undermine the role of the judge, to whom the jury is supposed to look for guidance as to the law.

Perhaps. But this part of *Harbor Insurance Co.* may need to be read with a grain of salt. Posner was particularly upset with the substance of the expert’s testimony rather than its form. The lawyer expert testified

on an examination of the word “indemnity” as it is used in judicial opinions. There, however, the word frequently is used not to describe an explicit term in a contract but instead to denote one of several noncontractual legal doctrines, such as the doctrine governing indemnification of one joint tortfeasor by another. There was no basis for an assumption that the draftsmen of Continental’s charter, in authorizing the company to indemnify its directors and officers for expenses caused by their (allegedly) wrongful acts, meant to incorporate some doctrine of tort law.

Id. (citations omitted). On remand, *Harbor Insurance Co.* was assigned to a new trial judge, who issued an extensive ruling on several in limine motions brought by the parties concerning expert witness issues. *Harbor Ins. Co. v. Cont’l Bank Corp.*, No. 85-C7081, 1991 U.S. Dist. LEXIS 15272 (E.D. Ill. Oct. 25, 1991). There were no further reported opinions for *Harbor Insurance Co.*, suggesting the case settled.

named the directors, and that suit unlike the other was not certified as a class action. But this is incorrect. That suit *was* certified as a class action, when the judge approved the settlement; moreover, the other suit was against directors and officers as well as against Continental, albeit the directors and officers were not identified by name.

Continental on the other hand claims, with equal unreason as it seems to us, that the insurers must be obligated to it for the full \$17.5 million. This argument assumes, quite without evidence, that Continental's liability derived solely from the wrongful acts by the five directors named in the suit. . . . *To the extent that the amount for which Continental settled was larger than it would have been but for the misfeasance of [persons other than the named defendants] Continental's entitlement to reimbursement in this suit would be cut down. . . .*

. . . .

[o]n remand it will be necessary for the district court to determine how much larger the settlement was by virtue of the activities of persons against whom no claim within the meaning of the policy was made, and to cut down Continental's \$17.5 million claim against the insurance companies accordingly.

. . . .

The point of the insurance policies plus the provision in Continental's charter for indemnifying the directors was to insure them against liability and then shift the liability for this insurance to Harbor and Allstate -- was, in other words, to eliminate the solvency risk [this may make plaintiffs target the deep pocket uninsured company rather than the shallower pocketed directors and officers]. To allow the insurance companies an allocation between the directors' liability and the corporation's derivative liability for the directors' acts would rob Continental of the insurance protection that it sought and bought. *We conclude that the entire \$17.5 million of joint liability should be allocated to the directors and therefore that Continental is entitled to*

*recover up to the insurance limits, except for the portion, if any, of Continental's derivative liability that was due to the conduct of other directors, officers, or employees [not named as defendants], besides those directors and officers against whom claims were made within the meaning of the policy. All of this is on the assumption that Continental establishes liability in the new trial that we are ordering.*⁸⁵

With the rather swift brush of a pen (or word processor), Posner both “decided” the instant dispute (assuming the facts at trial unfold as expected), set forth a rule of allocation for D & O policies, and said a good deal about his more comprehensive, cerebral, approach to insurance law and coverage litigation.

A frequent issue with D & O insurance is the apt allocation of responsibility for settlement payments between insurer and company. As noted, typically, a corporation cannot obtain insurance coverage for certain claims (although it may be able to obtain Errors & Omissions coverage that does many of the same things). However, companies can purchase D & O coverage that will not only protect these individuals (and make it more likely that qualified persons will be willing to accept such positions) but, as noted in the *Harbor Insurance Co.* opinion, provided what might be termed collateral protection to the company when it is sued in tandem with insured officers and directors. The existence of the D & O insurance both protects the individuals and indirectly protects the company. In addition, the conventional D & O policy typically excludes coverage for claims of fraud (but not misrepresentation) and punitive damages or criminal fines (which may be deemed uninsurable as a matter of law under controlling state law).

This coverage mixture frequently creates allocation questions. Most litigation results in settlement so it is hardly surprising that after a suit against the company and directors, settlement results. In its aftermath, there will be questions regarding the amount of funds paid on behalf of the corporation-vs.-directors and paid for uncovered-claims-vs.-covered-claims. Most D & O policies do not impose a duty to defend on the insurer but provide that reasonable defense costs are part of the “loss” insured under the policy. Consequently, sorting out the settlement often raises issues of defense cost allocation. Most of the time, the company (which has indemnified the individuals in most cases) and the insurer(s) settle the matter based on an

85. *Harbor Ins. Co.*, 922 F.2d at 367-68 (citations omitted) (emphasis added).

equitable assessment of sorts fueled to some degree by business considerations (e.g., How badly does the insurer want to continue to write coverage for the policyholder or affiliated entities? Will a hard line stance create bad buzz about the carrier among brokers or other prospective policyholders?).

As of 1990, surprisingly few reported cases had addressed the issue of settlement allocation, with relatively little law at all predating the 1980s. *Harbor Insurance Co.* was thus an important case because it affected an area as yet relatively unfixed in doctrine (and remaining so to this day in spite of the upsurge in D & O coverage litigation spurred by the Savings & Loan solvency crisis). In *Harbor Insurance Co.*, Posner lays down a relatively straight-forward rule that seeks to vindicate the purpose of the D & O policy. In doing so, he is consistent with his general approach to contract meaning and relations. He focuses of course on contract language but will not strain to find clarity in the face of uncertain policy language. He would rather consider additional evidence of contract meaning, both specific extrinsic evidence if it is available (e.g., a letter or conversation illuminating the agreement) and the overall purpose of the policy and context of the transaction. The “larger settlement rule” enunciated by *Harbor Insurance Co.* was sensitive to both context and purpose -- and has proven to be influential as well.⁸⁶

Harbor Insurance Co. is thus consistent with Posner's general view that contract and insurance law should not be excessively formalistic (e.g., ambiguity is resolved against the insurer-drafter in knee-jerk fashion) or textually literalist (e.g., a word is given its literal dictionary meaning). Rather, judicial effort is made to decide the case in a manner consistent with the aims of the contract transaction so that the decision gives the parties what they contracted for, including good faith performance. Despite having championed the concept of efficient breach in his law-and-economics writings, Posner recognizes that efficiency is not the same as opportunistic

86. See, e.g., *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424 (9th Cir. 1995); *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1282 (9th Cir. 1995); *Nodaway Valley Bank v. Cont'l Cas. Co.*, 916 F.2d 1362, 1366-67 (8th Cir. 1990), *aff'g* 715 F. Supp. 1458 (W.D. Mo. 1989) (endorsing larger settlement approach to D & O allocation). *But see* *Piper Jaffrey Companies v. Nat'l Union Fire Ins. Co.*, 38 F. Supp. 2d 771, 774-75 (D. Minn. 1999) (noting that *Nodaway Valley* has been characterized as both a “larger settlement” rule case and a “relative exposure” rule case, the latter being an approach to allocation that attempts to determine the degree to which settlement funds were paid in connection with risk posed by insured claims relative to uncovered claims).

behavior. Contracting parties still need to play by the rules and observe good faith and fair dealing. A party that talks out of both sides of its mouth receives little sympathy. Implicitly, Posner is suggesting that contracting parties in disputes must be candid and consistent with one another. It is okay for a widgetmaker to refuse to deliver because it got a better price from another buyer but it is not okay to falsely tell the buyer left in the lurch that delivery was impossible because of force majeure events. Although not express in *Harbor Insurance Co.* or other opinions, Posner also seems to appreciate that insurance contracts are different than other contracts in terms of prepayment, reliance, and the foregoing of other commercial options. As a result, insurers will be held to somewhat more exacting standards regarding breach and performance.

B. *Eljer Manufacturing, Inc. v. Liberty Mutual Insurance Co.*

Another Posner case of significant importance and interest is *Eljer Manufacturing, Inc. v. Liberty Mutual Insurance Co.*,⁸⁷ which addressed the issue of when property damage claims are “triggered” under a commercial general liability (CGL) policy. Policyholder Eljer manufactured a plumbing system, installed in perhaps as many as a million homes between 1979 and 1986, that was “invariably behind walls or below floors or above ceilings, so that the repair or replacement the unit requires breaking into the walls, floors, or ceilings.”⁸⁸ When the Eljer systems began leaking in many homes within a year of installation, claims ensued,⁸⁹ leading Eljer to seek a declaration of the applicability of its Liberty Mutual primary insurance policies (in effect from 1979 to 1988) and its Travelers excess policies (in effect from 1982 to 1986). It was estimated that ultimately five percent of the systems would fail and be subject to claims.⁹⁰

The issue before the court was the manner in which liability policies are “triggered” in such situations. The CGL provides, both in its better known “bodily injury” section and in its “property damage” section, that the policy is invoked by an allegation of actual injury. Specifically, the standard CGL policy requires an allegation of “physical injury to tangible property” to

87. 972 F.2d 805 (7th Cir. 1992) (applying Illinois law to the coverage trigger issue with reference to New York law apparently applicable to some of the underlying claims).

88. *Id.* at 807.

89. Individual claims and class actions affected “almost 17,000 of the systems.” *Id.* at 808.

90. *Id.* at 807.

trigger property damage coverage. The Eljer plumbing systems were like a ticking “time bomb” and posed the question of whether “the person or property in which the defective product is implanted or installed physically injured at the moment of implantation or installation -- in a word, incorporation -- or not until the latent harm becomes actual?”⁹¹

Posner, over the modest dissent of Judge Cudahy,⁹² concluded that the incorporation of the defective plumbing systems constituted a sufficiently concrete injury to trigger policies in effect at the time of installation.⁹³ Posner recognized that this decision was in at least some tension with the general rule of liability insurance that finds negligence alone insufficient to trigger coverage. There must be some injury allegedly stemming from the policyholder's negligence or other wrongdoing.⁹⁴ Posner found sufficient injury in the corrupting of the home's infrastructure because of the plumbing system. The homes were, as a practical matter, damaged by the incorporation of the plumbing systems, which could not easily be removed, and diminished the value of the homes. In addition, denying coverage until the metaphorical (or perhaps actual) roof fell in was regarded as too strident a reading of the CGL.⁹⁵

Posner applied a comprehensive inquiry to the task of interpreting the CGL trigger question in *Eljer Manufacturing*. Acknowledging that the word “injury” generally connotes “harmful change in appearance, shape, composition or some other physical dimension,”⁹⁶ Posner balanced this factor (which argued for requiring an actual leak to trigger the CGL) with the “objective of the parties to insurance contracts.”⁹⁷

The purpose of insurance is to spread risks and by spreading cancel them. Most people (including most corporate executives) are risk averse, and will therefore pay a premium to avoid a small probability of a large loss. Once a risk

91. *Id.*

92. *Id.* at 814 (Cudahy, J., dissenting). Cudahy took issue with Posner primarily over his reading of Illinois precedent but conceded that Posner's resolution was a reasonable one. There is no hint of outrage, passion, or strong analytic disagreement in the dissent. *Id.*

93. *Id.* at 809-12.

94. STEMPER, *supra* note 41, § 14.09.

95. *Eljer Mfg., Inc.*, 972 F.2d at 809-12.

96. *Id.* at 809.

97. *Id.* at 808-09.

becomes a certainty -- once the large loss occurs -- insurance has no function.⁹⁸

Posner's analysis also includes considering that the policyholder in question is a relatively sophisticated commercial entity,⁹⁹ the analogy of fixtures in the law of real property,¹⁰⁰ and the background and drafting history of the 1973 version of the occurrence-basis CGL.¹⁰¹ In particular, Posner noted that the CGL covered "loss of use" of property that was not itself physically injured. He reviewed New York and Illinois case law and found no clear answer, but thought his *Eljer* holding consistent with Illinois and other law that had not required dramatic tangible damage to qualify as injury under either the property damage or bodily injury provisions of the CGL.¹⁰² "[T]he drafting history of the property-damage clause and the probable understanding of the parties to liability insurance contracts, persuade us that the incorporation of a defective product into another product inflicts physical injury in the relevant sense on the latter at the moment of incorporation."¹⁰³

On the whole, Posner decides *Eljer Manufacturing* through a sort of practical reasoning that seeks to provide the promised risk-spreading protection to the policyholder without forcing the insurer to cover losses that are merely speculative.¹⁰⁴ By determining that incorporation of the defective plumbing constitutes a proper CGL property damage trigger, Posner provides expected and fair protection to the policyholder through a yardstick that can be applied with some clarity and certainty in determining the responsibilities of the insurers involved in such matters.

Posner recognizes that *Eljer Manufacturing* is a bit of a trailblazer and might be criticized in some quarters for arguably focusing on dates of negligence rather than dates of injury. He justifies this approach in *Eljer Manufacturing* and subsequent decisions as necessitated by the comparatively long interval between conduct and injury as well as the difficulty in

98. *Id.* at 807. Posner's view of human nature as risk averse is consistent with his scholarly economic analysis of law. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12-13 (4th ed. 1992).

99. *Eljer Mfg., Inc.*, 972 F.2d at 809.

100. *Id.* at 810.

101. *Id.* at 809-11.

102. *Id.* at 811-13.

103. *Id.* at 814.

104. *Id.* at 810.

ascertaining the timing and extent of injury.¹⁰⁵ In addition, although *Eljer Manufacturing* allows policyholders to invoke the protection of now-expired policies in effect at the time of installation, *Eljer Manufacturing* does not, as is the case for bodily injury claims such as asbestos exposure, trigger all insurance continuously from the date of installation to the date of the third-party's claim.¹⁰⁶ Thus, *Eljer Manufacturing* cannot be seen as dramatically expanding insurer liability but does prevent insurers from engaging in opportunistic cancellation when made aware of manifested plumbing leak problems that present the ticking time bomb to the policyholder-manufacturer.

C. *Stone Container Corp. v. Hartford Steam Boiler Inspection & Insurance Co.*

Stone Container Corp. v. Hartford Steam Boiler Inspection & Insurance Co.,¹⁰⁷ is not a case involving great public controversy, but illustrates well the context-based, purposive, sensitive reasoning Posner applies to the text of insurance policies in coverage disputes. Policyholder Stone Container Corporation ("Stone Container"), a manufacturer of wood products, operated a "pulp digester" at its plant. This machine made pulp by having wood chips placed in a tank with chemicals and then heating the contents under pressure from steam piped into the tank, all of which caused the wood chips to decompose into woodpulp fiber. A thin area of the steel shell of the tank ruptured and blew a twenty-eight ton fragment of the pulp digester tank into the air. The fragment "landed more than 200 feet away with disastrous results. Besides much property damage, several workers were killed. The plant was forced to shut down for months. Stone Container incurred total losses in excess of \$80 million."¹⁰⁸

In the wake of this disaster arose a contest between two insurers over their respective coverage responsibilities. Stone Container had a boiler and machinery insurance policy from Hartford Steam Boiler as well as an all-risk policy from Lloyd's of London. The boiler insurer argued that it was not responsible because of an exclusion in its policy for losses caused by an

105. See, e.g., *Rozenfeld v. Med. Protective Co.*, 73 F.3d 154, 158 (7th Cir. 1996) (explaining and defending the *Eljer* rationale).

106. STEMPER, *supra* note 41, § 14.09 (discussing the prominence of continuous trigger CGL coverage for bodily injury claims involving asbestos and other injurious products).

107. 165 F.3d 1157 (7th Cir. 1999).

108. *Id.* at 1159.

“explosion” while the policyholder and the all-risk carrier argued that (a) the incident was not an “explosion” and alternatively (b) if an explosion, the pulp digester was an object falling under the terms of a list of exceptions to the exclusion for explosion-related losses in the boiler policy. In a procedural oddity of the case, Lloyd's advanced funds to Stone Container and Stone commenced a declaratory judgment action against only Hartford Steam Boiler, seeking a determination that the boiler policy provided primary coverage.¹⁰⁹ The trial court held that the boiler insurer must provide coverage, reasoning that the term “explosion” was sufficiently ambiguous that it must be construed against the insurer that drafted the policy and that the status of objects excepted from the exclusion was ambiguous. The Seventh Circuit reversed, with Posner writing for the Court.

The policyholder argued that “for exclusion purposes” the term “explosion” should be read narrowly to mean any “sudden and violent release of energy (which of course we have here) caused by combustion or other chemical reaction (which we don't have here).”¹¹⁰ “Stone believes that the same word should be read narrowly when it appears in an exclusion from coverage, and broadly when it appears in an exception to an exclusion, even if the context is the same.” However, “Stone offer[ed] no support for this suggestion . . . beyond the principle that ambiguities in insurance contracts should be resolved in favor of the insured.”¹¹¹ Furthermore, “the proposed definition of ‘explosion’ is not only narrow, but weirdly narrow. It seems to exclude the explosion of an atomic bomb, since a nuclear reaction is not a form of combustion or chemical reaction, at least in the usual senses of these words.” The proposed definition imposing coverage on the boiler insurer would also have excluded volcanic explosions, a tire blowout, bursting matter caused by a bullet, and “to take an example very close to home, the explosion of a boiler as a result of the failure of a valve to open.”¹¹²

Stone (on behalf of Lloyd's) had argued for this definition because the pulp digester's demise stemmed from metal failure under steam pressure rather than through incendiary combustion. Hence, Stone and Lloyd's were hoping to have the term explosion confined to combustion-based blowups that

109. As the Court commented, “[i]t is unclear to us what incentive Stone has to press such a suit vigorously, the dispute really being between the insurance companies; but it has done so.” *Id.*

110. *Id.*

111. *Id.* at 1159-60.

112. *Id.* at 1160.

did not include steam-pressure-based blowups. Posner rejected this suggestion as too narrow as both a matter of text and common sense understanding.

[A] blast that blows 28 tons of steel and concrete more than 200 feet away is the ordinary person's idea of an explosion, whatever the precise cause of the explosion. . . . [E]ven the engineering firm that Stone hired to investigate the accident called it an explosion -- a "Boiling Liquid Expanding Vapor Explosion (BLEVE) of a large, steam-pressurized vessel."¹¹³

Posner found it a more difficult question regarding whether the pulp digester explosion nonetheless fell back within coverage under an exception to the explosion exclusion. As is often the case for insurance policies, the policy set forth a generalized exclusion (for explosions) but also created a more limited number of "exceptions" to the exclusion that provided coverage for certain types of explosions fitting within the exception. In particular, the exception provided that notwithstanding the explosion exclusion, there was coverage for loss caused by or resulting from the explosion of an "object." Boiler insurance generally applies to insured "objects" of the policyholder at a particular location. The exception in the Hartford policy applied to objects of a kind described below:

Explosion of any: (1) Steam boiler; (2) Electric steam generator; (3) Steam piping; (4) Steam turbine; (5) Steam engine; (6) Gas turbine; or (7) Moving or rotating machinery [if the explosion is] caused by centrifugal force or mechanical breakdown.¹¹⁴

Posner concluded that the pulp digester was neither one of the enumerated objects. The digester was closest to the steam boiler but was not considered its equivalent. A boiler creates steam while the pulp digester used steam piped in from outside.¹¹⁵

Posner focused not only on the textual context of the disputed language but upon the nature and purpose of boiler and machinery insurance. Because boiler insurance is specified risk insurance, terms like "of a kind" are not to be interpreted with undue breadth. Furthermore, noted Posner, language is not to be automatically construed against an insurer simply because the language is open-ended to some degree. "[T]he rule that ambiguities in

113. *Id.*

114. *Id.* at 1159 (quoting boiler policy).

115. *Id.* at 1160-61 (emphasis added).

insurance contracts are to be resolved in favor of the insured comes into play only after the insurance company has had an opportunity to present evidence designed to dispel the ambiguity.”¹¹⁶ Posner regarded this as the correct approach to extrinsic evidence and the ambiguity principle in both noninsurance and insurance contracts. (He also noted the distinction between “patent” and “latent” ambiguity and the minority rule (not applicable in Illinois) that permits use of extrinsic evidence only in cases of latent ambiguity.)

Posner concluded that the pulp digester, although in retrospect a machine presenting great danger from explosion, was not the type of object covered under the boiler and machinery policy; therefore, the boiler insurer (Hartford Steam Boiler) was not required to provide coverage. The coverage burden for this “nonboiler” risk fell on the all-risk insurer (Lloyd's). *Stone Container* is eminently sensible and measured in both approach and tone. It appreciates the nature of the business and the types of insurance purchased by the manufacturer. It examines policy language closely but not myopically with the benefit of contextual perspective. Appreciating that difficult construction problems do not inevitably reflect ambiguous contracts, it discerns the reasonable meaning of the policies and renders a sensible, seemingly correct coverage decision.

D. *Connecticut General Life Insurance v. Sun Life Insurance of Canada*

In a major insurance-ADR imbroglio, Posner has also reached a sound result sensitive to the facts of the case and modern business dealings. In *Connecticut General Life Insurance Co. v. Sun Life Assurance of Canada*,¹¹⁷ reinsurers and retrocessionaires were in conflict both over duties of payment and the tribunal or tribunals that would decide the issue. Three retrocessionaires (Sun Life, Phoenix, and Cologne) “agreed to reinsure workers' compensation reinsurance policies issued” by seven retrocedents. The contract had been negotiated for the reinsurers (some of which were reinsuring and some of which were providing reinsurance) by Unicover, a “middleman” in the workers' compensation reinsurance market.¹¹⁸

The companies then sought disparate orders compelling arbitration, subsequent to an arbitration provision in the insurance policy. The

116. *Id.* at 1161.

117. 210 F.3d 771 (7th Cir. 2000).

118. *Id.* at 772.

retrocessionaires sought a single arbitration, which was denied by the trial court and appealed to the Seventh Circuit. The appellate court per Judge Posner remanded the case for consolidation of the arbitrations. Posner took the view that although a court could not meddle in the arbitral process, the question of arbitrability generally was for the court rather than the arbitrators, unless a matter was by contract committed to the arbitrators.¹¹⁹

Posner then addressed the limited utility of the *expressio unius est exclusio alterius* (the listing of things included implies the exclusion of those things not listed) canon of contract construction as illustrated by the case.¹²⁰ The contract language did provide for treating the retrocessionaires as a single party but not for treating retrocedents as a single party. According to Posner, this was not a textual bar to consolidating the arbitration because the

sensible answer . . . is that the contract itself makes the [retrocedents] one party but not the [retrocessionaires] so that making the [retrocessionaires] a single party for purposes of arbitration suggests if anything an intent to have a single arbitration proceeding when there is a single dispute, even if it's a dispute with more than one of the [retrocedents]. . . . The parties could foresee that any dispute [would involve Unicover and] Unicover didn't want to be in the position have having to arbitrate separately. . . . Another straw in the wind is the provision for arbitration in Chicago, which just happens to be Unicover's headquarters but not that of any of the other parties.¹²¹

Posner continued: "We cannot say that these textual inferences are conclusive in favor of consolidation, but they support it, as do practical considerations, which are relevant to disambiguating a contract, because parties to a contract generally aim at obtaining sensible results in a sensible way."¹²²

In this opinion, as in others like *Harbor Insurance Co.* and *Eljer Manufacturing*, Posner takes a considered view of contract language but is not fixed on text to the exclusion of practical considerations and the sensible resolution of business disputes consistent with judicial economy and other public policy considerations. Through clear contract language, the parties

119. *Id.* at 770-71.

120. *Id.* at 771 (citing William N. Eskridge, Jr., *Norms, Empiricism, and the Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676-77 (1999)).

121. *Id.* at 775.

122. *Id.*

may behave idiosyncratically or even stupidly, but Posner's implicit default rule for contract construction and dispute resolution is that the resolution of the dispute should make commercial and social sense. Despite the current infatuation with arbitration and ADR among most judges (and other members of the legal profession), consolidation of arbitration has tended to be a backwater reminiscent of the pre-1970s judicial hostility toward arbitration in that many decisions (cited unsuccessfully by the losing retrocedents in *Connecticut General*) have resisted consolidation in holding or dicta or both. Posner breaks out of this judicial rut and renders a useful decision on both arbitration and insurance.

II. CONTINUING CONCERNS ABOUT POSNER, EMPLOYMENT LAW, CIVIL RIGHTS, DISCRIMINATION, AND THE SCOPE OF REMEDIAL LEGISLATION

In the related areas of contract law and ERISA, Posner has frequently demonstrated breadth, depth, and sensitivity regarding the meaning of agreements disputed by parties. Where the interests of employees and commercial entities clash, however, he can be accused of being more sensitive to the latter. Similarly, his normally rewarding examination of contract and insurance principles can be diluted into what can be characterized as simple conservatism when this issue becomes the scope and reach of the ERISA statute and its benefits conferred to workers. When construing antidiscrimination statutes, Posner's sensitivity to context, reality, and purpose on occasion fades into what appears to some as simply resistance to a liberal statute he probably thinks wrongheaded. Where such legislation abuts insurance, Posner's jurisprudence is interesting, arguably correct, but disturbingly resistant to the rights of workers at the expense of opposing commercial entities.

A. *Posner's ERISA Decisions: Less Satisfying than his Insurance Opinions?*

Many ERISA cases are essentially insurance coverage cases. But many are also federal preemption cases, pension benefit cases, fiduciary duty cases, workplace rights cases and, of course, statutory interpretation cases. Consequently, a comprehensive examination of ERISA law and Posner's contribution to it probably merits a volume (or at least the note found in this

issue)¹²³ rather than a section of this article. To limit the task, I am addressing (too briefly, perhaps) Posner's ERISA decisions bearing on insurance coverage and also his ERISA writings that reflect on worker status and construction of the statute. In the realm of ERISA, which is neither pure contract nor pure insurance, Posner continues to provide well-reasoned opinions that are, for the most part, sensitive to facts, context, litigants, and the law but with some slippage away from his exemplary work on insurance matters.

In *Herzberger v. Standard Insurance Co.*,¹²⁴ Posner addressed the issue of when ERISA plans have discretionary authority over health benefits claims. A continuing ERISA controversy is the degree of freedom a benefit plan administrator (usually a health insurance company claims adjuster) has in denying such claims. Employers and insurers prefer to have total discretion so that any benefit denials are final and not subject to successful court challenge. Beneficiaries prefer to categorize a plan as providing coverage subject to certain contractual standards and norms of acceptable health insurance. Courts have had some difficulty in determining from the plan documents whether the plan's decision authority is discretionary or circumscribed.

In *Herzberger*, Posner sought to bring some clarity to Seventh Circuit precedents (some of them authored by Posner). He framed the issue as whether language in plan documents to the effect that benefits shall be paid when the plan administrator upon proof (or satisfactory proof) determines that the applicant is entitled to them confers upon the administrator a power of discretionary judgment, so that a court can set it aside only if it was "arbitrary and capricious," that is, unreasonable, and not merely incorrect, which is the question for the court when review is plenary ("de novo").¹²⁵

Finding some of the case law unclear or arguably in tension, the court issued the *Herzberger* opinion to "clarify our position and reduce the tension."¹²⁶ In particular, Posner deemed it "highly desirable to have a

123. Aldo R. Edwards van Muijen, Note, *Posner and ERISA: A Survey*, 7 CONN. INS. L.J. 195 (2000).

124. 205 F.3d 327 (7th Cir. 2000).

125. *Id.* at 329 (citations omitted).

126. *Id.* at 330.

uniform national rule” because of the movement of workers and the multi-state operations of employers.¹²⁷

The very existence of “rights” under such plans depends on the degree of discretion lodged in the administrator. The broader that discretion, the less solid an entitlement the employee has and the more important it may be to him, therefore, to supplement his ERISA plan with other forms of insurance. In these circumstances, the employer should have to make it clear whether a plan confers solid rights or merely the “right” to appeal to the discretion of the plan’s administrators.¹²⁸

To clarify matters, Posner and the *Herzberger* panel, after circulating its draft opinion to the entire Seventh Circuit, issued and “commend[ed] to employers” what it deemed “safe harbor” language for employers to use if they wish to have their plan benefits decisions reviewed under the more deferential arbitrary and capricious standard used with discretionary plans.¹²⁹

Although future beneficiaries will undoubtedly want to claim that the absence of such “safe harbor” language provides plenary review, Posner suggested that this was not necessarily a persuasive argument, stating that

[i]n some cases the nature of the benefits or the conditions upon it will make reasonably clear that the plan administrator is to exercise discretion. In others the plan will contain language that, while not so clear as our “safe harbor” proposal, indicates with the requisite if minimum clarity that a discretionary determination is envisaged.¹³⁰

Under Posner’s construct, employers appear to have an advantage of either using the “safe harbor” language, which is presumably conclusive, or litigating the issue of the standard established by plan documents containing other language. Beneficiaries have something of an advantage as well under *Herzberger* in that

the mere fact that a plan requires a determination of eligibility or entitlement by the administrator, or requires proof or satisfactory proof [or similar provisions] does not give the employee adequate notice that the plan

127. *Id.* at 330-31.

128. *Id.* at 331.

129. *Id.*

130. *Id.*

administrator is to make a judgment largely insulated from judicial review by reason of being discretionary.¹³¹

On the whole, however, Posner's system seems slanted toward employer prerogatives at the expense of fair treatment of workers and beneficiaries. To be sure, Posner will require employers to "prove" that they have discretionary authority (and interprets arbitrary and capricious review as being review for reasonableness). But he has (a) given employers a roadmap for giving themselves discretionary authority as a matter of law rather than making firmer contractual commitments to workers and (b) still permits employers who fail to follow his roadmap to nonetheless litigate the issue, engaging in a war of attrition if necessary to stave off employee claims.

In *Herzberger*, Posner is concerned enough to encourage straight talk from the employer but seems too quick to assume that the boilerplate benefit plans issued by most employers are part of some meaningful conversation between management and workers. Although perhaps forced into this position by the statute, Posner seems to have embraced employer prerogatives and a "bargain" model of employment contracting that many would find inconsistent with the reality of the workplace. For example, Posner defends the current regime of deference to plan administrators so long as the plan documents adequately establish the discretion of the administrator on implicit freedom of contract grounds.

An ERISA plan can stipulate for deferential review; it might be entirely rational for an employee to accede to and even prefer such a plan -- it might be cheaper. But the stipulation must be clear, and cannot merely be assumed from language that in the closely related setting of insurance contracts has never been thought to entitle the insurer to exercise a discretionary judgment in determining whether to pay an insured's claim. An employer should not be allowed to get credit with its employees for having an ERISA plan that confers solid rights on them and later, when an employee seeks to enforce the right, pull a discretionary judicial review rabbit out of his hat. The employees are entitled to know what they're getting into, and so if the employer is going to reserve a broad, unchanneled discretion to deny claims, the employees should be told about this, and told clearly.¹³²

131. *Id.* at 332.

132. *Id.* at 332-33.

Posner's concern for full disclosure is admirable. His notion that the average worker needing a job is in a position to pick and choose among employers (even in a booming economy) according to the standard of review language in the company health care plan is surreal. Concern for protecting worker expectations might take better judicial form if courts were to limit the employer's ability to adopt "discretionary" benefit plans or to put more teeth into the notion of what constitutes "reasonable" coverage decisions by plan administrators. This more worker-protective path is in my view not foreclosed by the ERISA statute, despite precedent.¹³³ For example, we have seen since 1995 movement by the Supreme Court away from an incorrect approach to ERISA preemption of state law toward one more consistent with the federal courts' traditional approach to preemption.¹³⁴ Rather than treating cases like *Herzberger* as classic illustrations of neoclassical contract negotiation, Posner could benefit from recognizing that the model is not particularly apt in many employment contracts. His "rational actor, economic analysis, business context" orientation serves him well in most insurance matters, particularly inter-insurer or commercial policyholder disputes. It is perhaps not as useful an orientation for reaching statutory and contractual justice in other contexts.

Rossetto v. Pabst Brewing Co.,¹³⁵ involved "the much-litigated issue of when a right to health benefits that is granted to retired workers by a collective bargaining agreement (or an ERISA plan, but that is not this case) survives the termination of the agreement."¹³⁶ After the expiration of Pabst's agreement with the machinists' union in 1995, the brewer closed its plant in 1996. The Machinists claimed that their health benefits survived the agreement. Pabst argued that the benefits could be effective only so long as the collective bargaining agreement was in effect. Addressing the issue of whether this determination could be made as a matter of law, Posner once again provided an explanation of the role of text and other factors in judicial construction of contracts.

If [Pabst's position] is right -- if someone who read these provisions without knowing anything about their background or real-world context would say, "Yes, it sure looks as if the

133. BARRY R. FURROW ET AL., HEALTH LAW § 8-6 (2d ed. 2000).

134. *Id.* § 8-3. See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

135. 217 F.3d 539 (7th Cir. 2000).

136. *Id.* at 541.

provisions are in effect only for the term of the agreement in which they appear” -- then Pabst is off the hook as a matter of law (that is, the case would not reach the jury) unless the plaintiffs can adduce (1) objective evidence of (2) a latent, or, as it is sometimes called, an extrinsic ambiguity. A “latent ambiguity” is an “ambiguity” . . . that is recognized as such only when a contract -- clear on its face -- clear, that is, to the uninformed reader -- is applied to a particular dispute.

....

The doctrine of latent ambiguity comes into play . . . only if someone who read the contract without knowledge of its real-world context of application would think it clear. If even this innocent reader would find the contract unclear -- if, that is, an ambiguity is apparent just from reading the contract without having to know anything about how it interacts with the world -- then the contract has what is called a patent, or intrinsic, ambiguity, and the evidence is admissible to cure it.¹³⁷

The Court then applied the Seventh Circuit's default rule that there is a presumption of an end to benefits when the agreement ends rather than a vesting of benefits in the worker but that the worker may be able to overcome this presumption by pointing to text or other factors suggesting a different meaning of the agreement.¹³⁸

In *Rossetto*, and in earlier ERISA-collective bargaining agreement disputes over longevity, Posner's analysis is sound and relatively charitable toward the affected workers. One could take the view that when an employment agreement or benefit plan is over, it's over and no further right to benefits remains. Indeed, this was the position of Judge Easterbrook and others in dissent when Posner first wrote for the en banc Seventh Circuit on this issue in the key case of *Bidlack v. Wheelabrator Corp.*,¹³⁹ In this area, then, Posner has not been the conservative ideologue painted by this critics.

137. *Id.* at 539-43.

138. *Id.* at 544.

139. 993 F.2d 603 (7th Cir. 1993) (Posner writing for a majority including Judges Cudahy, Flaum, Ripple, Kanne and Rovner); *Id.* at 614 (Easterbrook, J., dissenting) (joined by Judges Bauer, Coffey and Manion).

To be sure, he has not given away the store to former employees seeking benefits -- they must demonstrate objectively that the agreement is susceptible to being construed as providing ongoing benefits after termination. But Posner is far less protective of the employer closing operations than other judges on his court.

B. *Posner on Employment Discrimination: Consciousness
Imperfectly Raised; Vestiges of Economicalism*

Employment discrimination cases depart further from the insurance and contract model. Instead of party-generated rights and obligations based on agreement, usually for commercial gain or risk transfer and spreading (contract and insurance), we have antidiscrimination statutes created “in derogation” of the common law that largely permits employers to do whatever they want, short of intentional physical injury, to workers. Where nondiscrimination statutes are not applicable, the employment-at-will doctrine retains considerable vitality and permits employers to discharge workers for frivolous reasons (“What an ugly tie, clean out your desk.”) or manage them in frivolous ways (“I suppose I could hire a secretary for the office, but I think it's good for Ph.D's to spend a couple hours a day at the photocopy machine.”). Under the common law legal regime, the employer is king of the workplace castle, period. Tort law may intrude in the case of egregious conduct and worker's compensation law imposes strict liability for job-related injuries, but in return limits recovery to scheduled amounts. But where there is claimed racial, sexual, ethnic, religious, age, or disability discrimination, the relatively newfangled (dating only from the 1960s) tangle of antidiscrimination law and regulation may intrude on the employer in a significant way.¹⁴⁰

I have previously argued (with considerable assistance) that in throwing a pregnancy discrimination claim out of court in 1994,¹⁴¹ Posner both gave Title VII short shrift in a manner at odds with his professed pragmatism. He also exhibited condescending scorn for the plaintiff, a discharged retail store

140. See *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 979 (7th Cir. 2000) (“Title VII is not a “good cause” statute; it creates a remedy against caprice invidious discrimination (or, as here, retaliation), not against caprice.” *Id.* See generally Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996).

141. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

clerk.¹⁴² I won't belabor that case or other pre-1995 Posner discrimination cases today other than to reassert that Professor McGinley and I stand by our criticism of Posner's approach to the statute and decision in that case. Of greater interest and relevance to this article is Posner's more recent discrimination decisions. Since 1994, Posner's writings in this area have on occasion been excellent, but have also showed continuing underappreciation of workplace realities and continuing overnarrow reading of the antidiscrimination laws.

Pryor v. Seyfarth, Shaw, Fairweather & Gersalson,¹⁴³ provides an example of Posner's better side on employment discrimination issues. A secretary at the large, Chicago-based Seyfarth firm claimed that a partner sexually harassed her on the basis of five incidents, which involved comments on her looking through a "Frederick's of Hollywood" catalogue and asking "can I see some pictures of you in some of the outfits that you have bought from Frederick's of Hollywood?"¹⁴⁴ He also asked Pryor to look at a book of women in bondage and commented flirtatiously (in the Court's view) or lecherously (in her view) on her attire. Posner described the incidents as either "innocuous" or "mildly flirtatious" save for the possibly offensive invitation to peruse women in bondage, but this was "not so offensive as to constitute actionable harassment" because it was as a matter of law insufficiently severe to have "actually changed the conditions of the plaintiff's workplace."¹⁴⁵ To do so, offensive, sexually-oriented behavior must be of a quantum and type to offend a reasonable person, not a "hypersensitive" one.

Posner's assessment seems correct even to a liberal. Although Title VII clearly suggests that it is not "okay" for law firm partners to attempt to engage women co-workers in S & M voyeurism, a single incident without more (e.g., forcing Pryor to look, grabbing her, continued insistence, etc.) is not a sufficiently big deal to change the work environment. Even Judge Illana Diamond Rovner, frequently in opposition to Posner on discrimination cases, agreed and joined Posner's opinion without dissent.¹⁴⁶

142. Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 230-35 (1994).

143. 212 F.3d 976 (7th Cir. 2000).

144. *Id.* at 977. Frederick's is known for stylishly outlandish and provocative women's wear.

145. *Id.* at 976.

146. *Id.* The *Pryor* panel included Judge Rovner and Seventh Circuit Judge Terence Evans, another generally liberal judge who dissented from Posner's decision in *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 263 (7th Cir. 1999), stated that ADA does not apply to the

Posner then proceeded to reverse the trial court's summary judgment for the law firm by noting that Pryor was subsequently discharged for "glueing an artificial fingernail on the finger of a friend in the ladies' room" at the firm.¹⁴⁷ The firm defended the discharge as permitted under the law so long as it was not motivated by Pryor's filing of a discrimination claim. According to Posner, "the circumstances leading up to the discharge, however, cast enough suspicion on the motive for firing Pryor to entitle her to a trial."¹⁴⁸ Posner then marshaled a considerable array of evidence that could support a reasonable factfinder's conclusion that the discharge of Pryor was pretextual and in retaliation for her having complained (albeit perhaps hypersensitively) about sexual harassment.¹⁴⁹

In short, a case like *Pryor* suggests that Posner remains no leftist (it takes more than one suggestion to look at a dirty magazine to constitute harassment) but neither is he unrealistically resistant to the possible retaliatory conduct of employers when employees allege harassment. In *Pryor*, Posner also displays some appreciation for the grittiness of the real world (the employer might have been looking for a seemingly nondiscriminatory way to get back at Pryor for complaining) that is often absent in his other employment decisions.

In other discrimination cases, Posner's voice is mainstream and helpfully informative. For example, in *Bourbon v. KMart Corporation*,¹⁵⁰ he concurs in a panel opinion written by Judge Rovner affirming a trial court summary judgment for the employer in a retaliatory discharge claim brought under state law.¹⁵¹ Posner's concurrence addresses the lurking (but unaddressed by the

content of insurance policies. See *infra* notes 201-42 and accompanying text (discussing *Mutual of Omaha*).

147. *Pryor*, 212 F.3d at 979.

148. *Id.*

149. *Id.* at 980. Posner stated:

A reasonable jury could find that after and because Pryor filed a claim, the firm was 'laying' for her, biding its time to create a space between the date of the claim and the date of the discharge, and in the interval gathering pretextual evidence of misconduct to provide a figleaf for its retaliatory action. Of course we do not hold that this is the correct interpretation of the events, only that the matter is sufficiently in doubt to require a trial.

Id.

150. 223 F.3d 469 (7th Cir. 2000).

151. *Id.* at 471 (finding Illinois retaliatory discharge protections limited and the record as a matter of law would not permit reasonable fact-finder to conclude that proffered reasons for discharge were pretextual).

parties) issue of whether such cases are controlled by the *McDonnell-Douglas* order of proof applicable to discrimination cases brought in federal court¹⁵² (on the theory that this is procedure applicable in federal litigation regardless of the underlying state claim) or instead is controlled by the state's methodology of proof (on the theory that this is part of controlling state substantive law under the *Erie* doctrine).¹⁵³ Although cynics might see this as Posner beginning to make a case for applying state protocols, which will tend to be less favorable to discrimination plaintiffs than the *McDonnell-Douglas* standard, I see it as Posner the intellectual seeking to clarify the law (albeit with something of an advocacy brief for a broad construction of the sphere of state law control under *Erie*).¹⁵⁴

In *Thorn v. Sundstrand Aerospace Corp.*,¹⁵⁵ Posner reviewed trial court summary judgments for the employer in two age discrimination suits, affirming one dismissal and reversing the other. Although the district court decisions were "replete with findings that are not proper in summary judgment proceedings, for example, findings that credit fiercely contested testimony,"¹⁵⁶ Posner took an aggressive view of appellate court summary judgment decisionmaking power. "[S]ince the review of summary judgment is plenary, errors of analysis by the district court are immaterial; we ask

152. Under *McDonnell-Douglas v. Green*, 411 U.S. 792, 802 (1973), a discrimination plaintiff survives summary judgment by establishing that he or she was qualified for a position and suffered an adverse employment action. The defendant must then articulate a legitimate, nondiscriminatory reason for the adverse action. When that occurs, the plaintiff still needs to prove discrimination, which it may do by showing that the employer's reason is pretextual. On the whole, the *McDonnell-Douglas* approach is regarded as pro-plaintiff because it reduces the claimant's initial need to "prove" discrimination to keep the case in court. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000). For a further description and analysis of *McDonnell-Douglas*, see Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Misuse of Summary Judgment in Title VII and ADEA Actions*, 34 B.C. L. REV. 203, 230-35 (1993) (arguing that many courts erroneously treat employer's articulation of nondiscriminatory reason for discharge as proof of nondiscrimination as a matter of law), Catherine Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 141 (1991) (arguing that lower courts have strayed from *McDonnell-Douglas* in treating employer's articulation of nondiscriminatory reason for discharge as conclusive proof of nondiscrimination).

153. *Bourbon*, 223 F.3d at 473-77.

154. Of course, after *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 429 (1996) (holding New York rule on seeking new trial and setting aside verdict to be substantive rather than procedural), Posner may well be correct.

155. 207 F.3d 383 (7th Cir. 2000).

156. *Id.* at 386.

whether we would have granted summary judgment on this record.”¹⁵⁷ Although Posner is correct as to the scope of judicial power, he is arguably insensitive to the potential for error when cases are decided by appellate courts removed from close scrutiny of trial or pretrial evidence. Posner seems to see no greater potential for error or possible bias when a trial judge is so enthusiastic to grant summary judgment for a defendant that he rushes toward the impropriety of impermissible fact-finding.¹⁵⁸

On the substance of the ADEA claims,¹⁵⁹ which involved workers who were “riffed” (discharged as part of a reduction in force or RIF), Posner holds that the *McDonnell-Douglas* approach to proof of discrimination applies to RIF cases.¹⁶⁰ This is something of a break for plaintiffs, although one Posner dilutes by stating that the prima facie case of age discrimination is not satisfied unless the plaintiff is replaced by a “much” younger worker, a requirement found nowhere in the statute.¹⁶¹

On the merits of the cases, Posner found that one plaintiff (Thorn, a 61-year-old), who had received glowing reviews in his work, was denied the opportunity to keep his skills up to date because the employer told him they thought he was “only going to be here for another year or so.”¹⁶² There was also evidence of pretextual evaluations by the employer designed to set up the

157. *Id.*

158. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (arguing against more aggressive view of permissible summary judgment use reflected in Supreme Court's 1986 trilogy of cases).

159. Or possibly the “procedure” of ADEA cases. See *supra* note 152-56 and accompanying text (discussing Posner's concurrence in *Bourbon v. KMart Corp.*, in which he discusses the status of the *McDonnell-Douglas* approach to discrimination proofs under the *Erie* doctrine).

160. *Thorn*, 207 F.3d at 386 (requiring that a plaintiff prove that he is in the ADEA protected class and that “he is performing his job satisfactorily [and] was replaced by a much younger worker and that the defendant then produce evidence that it had a noninvidious reason for the discharge -- in an age discrimination case, that the reason was not the plaintiff's age.”).

161. *Id.* In fairness to Posner, the pro-plaintiff *McDonnell-Douglas* standard, or the disparate impact theory of discrimination, is not found in the text of antidiscrimination laws. Posner has company in requiring a “much” younger replacement to trigger an inference of discrimination, but this seems an unnecessary softening of the *McDonnell-Douglas* formula. If a 41-year-old is replaced by a 39-year-old, the employer should be able to use this as rather powerful evidence of nondiscrimination but not to gut the *McDonnell-Douglas* approach. Congress drew the line at 40 and it seems unnecessary judicial activism not to observe this as the dividing line between “older” and “younger” workers.

162. *Thorn*, 207 F.3d at 387.

older Thorn for riffing. The company did, however, retain an employee in his thirties doing similar work even though the younger man was a “problem employee” who was “deficient in communication and interpersonal skills.”¹⁶³ Based on the record, Posner concluded that a trial might well result in a finding of age discrimination against Thorn.¹⁶⁴ The other plaintiff, Curran, had a “much weaker” case that was also marred by his attempt to change his deposition testimony.¹⁶⁵

As a whole, the *Thorn* opinion shows Posner working hard to examine the record and render considered decisions without exhibiting great hostility toward the ADEA statute. But neither is Posner enthusiastic about his partial finding for one plaintiff. In fact, Posner shows his greatest sensitivity to context in discussing the employer's motivations when making personnel decisions.

It would be a foolish RIF that retained an employee who was likely to quit anyway in a few months while riffing one likely to perform well for the company over a period of years. High turnover of skilled workers can be very harmful to a company. The worker who leaves may take with him trade secrets valuable to a competitor or the benefits of specialized training that the employer had given him, at some expense, in the hope of recouping the expense in the worker's superior productivity now to be enjoyed by another employer. Since younger employees tend to be more mobile than older ones, there is no basis for an inference that employers interested in the long-term potential of an employee prefer young to old.¹⁶⁶

163. *Id.* at 387.

164. *Id.* at 388 (“In so ruling, we do not predict the outcome of the trial, and we remind the reader that our description of the facts was tilted as favorably to Thorn as the record permits, as of course we're required to do in considering a motion for summary judgment.”). Even when finding for a discrimination plaintiff, Posner appears to go out of his way to suggest some resistance toward the antidiscrimination statutes. Any lawyer or judge reading the opinion would of course know that a reversal of summary judgment, standing alone, is only an opportunity for the plaintiff to prove his case at trial, not a finding against the employer. Although I have not searched with any seriousness, I have not seen Posner use similar cautionary language when reversing a plaintiff's ruling or decision and remanding to the trial court.

165. *Id.* “The contretemps over the altered deposition would not be enough to justify a verdict for Curran, and there is nothing else.” *Id.* at 390.

166. *Id.* at 389.

*Hunt v. City of Markam*¹⁶⁷ shows Posner taking on a civil rights case and providing considerable guidance for other judges and lawyers. In *Hunt*, four white police officers sued the City, alleging violations of 42 U.S.C. §1981 (which bars race nondiscrimination in contractual relations) and the ADEA. *Hunt* was a reverse discrimination case with a twist. Plaintiffs alleged that when the City came under black political control, it was payback time for the whites who had formerly held political power and government jobs.¹⁶⁸ Specifically, plaintiffs alleged a series of racist statements suggesting that the white officers were marked for dismissal or other mistreatment.¹⁶⁹ They also alleged and produced evidence of denial of raises and promotion as well as constructive discharge.¹⁷⁰

The trial court granted summary judgment for the City, characterizing plaintiffs' proffered evidence of discrimination as simply offhand commentary insufficient to make a case. In reversing, Posner observed:

[t]he district court overread language in a number of our cases to the effect that "stray remarks" of a derogatory character are not evidence of actionable discrimination. All that these cases hold -- all that they could hold and still make any sense -- is that the fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the *decision* had a discriminatory motivation. That is simply common sense. It is different when the decision makers themselves, or those who provide input into the decision, express such feelings (1) around the time of, and (2) in reference to, the adverse employment action complaint of. For then it may be possible to infer that the decision makers were influenced by those feelings in making their decision. This is such a case.¹⁷¹

Posner's discussion is helpful in that too many courts have been too quick to dismiss discriminatory statements (which, if believed, constitute not just some evidence of racial animus but direct evidence of prejudice) as mere

167. 219 F.3d 649 (7th Cir. 2000).

168. *Id.* at 652.

169. *Id.* The alleged statements were pretty blatantly racist, including talk of a need to "get rid of all the old white police officers" so that "we can bring these young black men up"; "you are the minority now; you lost, you might as well move out" and similar comments. *Id.*

170. *Id.* at 650.

171. *Id.* at 652-53 (emphasis in original) (citations omitted).

“stray remarks.” But by emphasizing the divide between statements by decision-makers versus others, Posner fails to note that statements by others should nonetheless be considered evidence of discrimination to the extent they indicate a hostile environment that was encouraged or condoned by management. He does not expressly make this point, suggesting that he is not willing to consider these “atmospheric” factors as sufficient evidence of discrimination. Although this position is consistent with the Seventh Circuit precedent cited by Posner in *Hunt*,¹⁷² I doubt Posner would take this constricted a view if presented with the appropriate case of co-worker statements reflecting a hostile environment. But I’m not sure. Posner seems insensitive to the totality of circumstances in the workplace, which might be a very racist, sexist place because of the daily assault of language even if decision-makers themselves are never caught uttering a politically incorrect word. Posner recognizes this where the claim is one of sexual harassment (provided the atmosphere is sufficiently oppressive) but appears not to see it for other sorts of discrimination claims.

In *EEOC v. Humiston-Keeling, Inc.*,¹⁷³ Posner exhibits a similarly moderate approach to employee rights although the opinion perhaps suggests some unawareness of the modern marketplace of employment. In *Humiston-Keeling*, a complaining worker (Houser) “worked as a picker in a warehouse, where her duty was to carry pharmaceutical products from a shelf to a conveyor belt. The jobs required frequent lifting of as much as five pounds.”¹⁷⁴ An accident at work led to an injured elbow that left her unable to lift more than five pounds, a condition the Court treated as a disability within the meaning of the ADA.¹⁷⁵

172. See, e.g., *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir. 2000); *Cullen v. Olin Corp.*, 195 F.3d 317, 323 (7th Cir. 1999); *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714-15 (7th Cir. 1999); *Cianci v. Pettibone Corp.*, 152 F.3d 723, 727 (7th Cir. 1998); *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1293 (7th Cir. 1997); *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 203 (7th Cir. 1996); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1116 (7th Cir. 1992); see also *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 (5th Cir. 2000); *Stone v. Autolive ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000).

173. 227 F.3d 1024 (7th Cir. 2000).

174. *Id.* at 1028.

175. *Id.* at 1025. The court explained:

We may assume without having to decide that this impairment was a sufficiently significant restriction on a major life activity to count as a disability within the meaning of the statute (although we have our doubts) thus placing on her employer, the defendant, the duty to find if possible,

As an attempt to accommodate Houser, the employer fire rigged an apron that was to help her carry items using only her good arm. The EEOC characterized the apron as not being a “meaningful” attempt to accommodate, but Posner rejected the EEOC view as “too strong,” finding the apron to be a “failed experiment, undertaken in good faith so far as it appears and not obviously doomed to fail from the start.”¹⁷⁶ Posner criticized the EEOC, stating the such experimentation should not be discouraged by deeming failed accommodation attempts as unreasonable “with the wisdom of hindsight,” something Posner thought “seems to be the Commission's view.”¹⁷⁷

The Seventh Circuit then addressed the question of other accommodations. Houser was given a “light job as a greeter” at a company construction site but the job disappeared when the construction finished. The issue in the case then became Houser's ADA right to “several vacant clerical positions for which Houser was qualified in the sense of having at least the minimum qualifications for the position. She applied for these positions but in each case was turned down in favor of another applicant, and as a result was eventually let go by the company.”¹⁷⁸ Posner found that giving the clerical positions to the other applicants did not violate the ADA because “[t]he EEOC does not deny that in every case the applicant chosen for the job was better than Houser in the sense of likely to be more productive.”¹⁷⁹

According to Posner, there was no dispute that the company had a policy of “giving a vacant job to the best applicant rather than the first qualified one” and that none of the clerical jobs “involved a degree of lifting that [Houser's] disability would have interfered with her performing.” Further, Posner found that the EEOC had not “suggested that the defendant harbors any animus toward disabled workers.”¹⁸⁰ Under these premises, Posner rejected the EEOC argument that the ADA requires that disabled workers be accommodated by assigning them another open job in the company if they are

a 'reasonable accommodation' of Houser's disability that would enable her to remain in the company's employ.

Id. (citations omitted). See 42 U.S.C. §§ 12101-12114 (defining disability and prohibiting discrimination against disabled, requiring reasonable accommodations of disabled workers).

176. *Humiston-Keeling, Inc.*, 227 F.3d at 1025.

177. *Id.*

178. *Id.* at 1026-27.

179. *Id.* at 1027.

180. *Id.*

minimally qualified for the position unless the employer can demonstrate “undue hardship.”¹⁸¹

In addition to raising burdens on employers, Posner suggested that the EEOC position would create difficult conflicts in antidiscrimination law. What if, for example, one of Houser's competitors for a clerical position is black and another Hispanic. Would the EEOC then not be advocating that the disabled have more protection against discrimination than ethnic or racial minorities, or women (which could have been an issue if Houser were male)?¹⁸² Posner emphasized that the ADA “does not command affirmative action in hiring or firing.”¹⁸³

[T]here is a difference, one of principle and not merely cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group. That is affirmative action with a vengeance. This is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing.¹⁸⁴

The court added that the ADA does not require an employer to promote an employee as a reasonable accommodation. Although the EEOC had not advocated promotion as accommodation, Posner could not resist driving a stake through the heart of any such argument and in trying to use the EEOC's moderation on this point against it concerning the clerical positions, which were initially assumed to be a “lateral move” rather than a promotion. “Promotions are a subset of reassignments. A promotion is merely a reassignment to a better job -- and so the Commission's concession shows that

181. *Id.*

182. *Id.*

183. *Id.* at 1028 (citing *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997)).

184. *Id.* at 1028-29.

even the Commission does not interpret the duty of reassignment literally.”¹⁸⁵

Posner then opined on the relative desirability of clerical jobs-vs.-warehouse jobs, neither of which he appears to have ever done.

Economists since Adam Smith have taught that part of a wage is compensation for whatever disamenities the job involves. . . . No doubt some people prefer the more strenuous job, perhaps to control their weight, perhaps because they find desk jobs insufferably boring; but it seems a fair generalization that most desk jobs are “better” in the sense we’re using than factory or other physically demanding jobs that pay no more, other things being equal.¹⁸⁶

Tempted to make the “ADA does not require promotion” conclusion a holding, Posner refrained because it might be argued that the warehouse job was nonetheless “better” because of the possibility of overtime work and pay. This uncertainty operated to

make us prefer to rest decision on the alternative ground that the ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question rather than the first qualified applicant.¹⁸⁷

In *Humiston-Keeling*, Posner's decision is certainly defensible (the ADA was designed to level the playing field but not give disabled workers preferred status) but appears to stack the decisional deck, perhaps simply because the EEOC permitted it. Posner suggests both that Houser is less qualified than the other candidates and that such qualifications can be known with considerable certainty and accuracy. His vision of personnel management is one in which the applicants for a vacant clerical position can be rank-ordered with precision, the human equivalent of interval data in social science.

Although this type of “scientific” applicant ranking may be possible according to some dimensions (e.g., Candidate A may type 75 words per minute while Candidate B types 45 words per minute), Posner's view sets forth something of a false precision about evaluating workers -- false

185. *Id.* at 1029.

186. *Id.* (citation omitted).

187. *Id.*

precision used to defeat the EEOC and Houser. When the question is framed as whether the ADA requires a company to shift a disabled worker to an open job at the expense of refusing to hire a clearly “more qualified” person, the EEOC and the statute are made to look foolish, with the Commission trying to make the ADA affirmative action on steroids.

If one views the actual, empirical world of hiring more like I do and less like Posner, the EEOC position in *Humiston-Keeling* becomes considerably less radical. Rather than interpreting the ADA to force employers to hire the weakest workers just because of disability, the statute then looks more like something of a “super tie-breaker” that requires reassignment of an open job to the formerly productive disabled worker even if other applicants arguably have “better” qualifications. Perhaps Posner is right and Houser in the clerical position will not approach the productivity of the “best” candidate in practice. But perhaps I am right and Houser in practice will be roughly as good as the other leading applicants because of her experience, knowledge of the company, relations with other workers, and loyalty to the organization, even if her typing is a little slower.

Under this scenario, it is arguably not at all radical at all to interpret the ADA as requiring that Houser get a shot at an open clerical position (she would not be bumping another worker from the position; if there were no open positions, the ADA would not require the employer to fire someone else to make room for Houser) when she is unable to work at her warehouse job because of disability. In addition, the EEOC position takes into account something Posner appears not to appreciate. Even though Houser might be roughly as good as the “best” competing job applicant, employers may find disabled employees irritating and discomfoting, making the employer too quick to find ways of removing the disabled worker. The ADA was passed in large part to engage law in forcing employers (and governments) to overcome this (often unconscious) bias and to go the extra yard for such workers, even if not the extra mile.

On the facts of Houser, this argument of mine is not particularly compelling. Houser is not badly disabled and the employer appears to have acted in good faith. Five pounds is not a lot to lift (although it could be over the course of a day) and Posner might suspect she is malingering. But his suspicions are the stuff of jury consideration, not judicial pretrial decisionmaking. In addition, what if Houser were in a wheelchair or were hideously disfigured as part of her disability? In such a case, prejudice against the disabled might well be a factor in the employer preferring to hire

a “better” applicant for the secretarial post. In that sort of case, the EEOC position looks more reasonable and Posner's view of the ADA too limiting.

These are fact-based disagreements of course. My point simply is that Posner's approach in *Humiston-Keeling* suggests some of the historical Posner insensitivity toward the realities of the workplace. It also suggests resistance to a remedial statutory scheme. Posner is exerting himself a bit to keep the ADA from receiving an expansive interpretation even though the agency charged with implementing and enforcing the statute is urging such an interpretation. One would ordinarily expect more judicial deference to the EEOC -- unless the judge just doesn't like the statute or government intrusion on employer prerogatives.

Thus far in employment discrimination cases, we see a centrist Posner offering useful analysis but reflecting restraint to the point of lack of enthusiasm in enforcing antidiscrimination laws. When he talks at all about workplace context, it tends to be from the perspective of the employer, as if he were seeking to persuade the reader that employers are not generally unreasonable and that one should not be too quick to find discrimination in adverse employment actions. Prior to the 1990s, Posner had expressed the view that many job discrimination actions were brought by workers who were merely disgruntled rather than victimized.¹⁸⁸ But these decisions and their rhetoric are defensible, despite falling short of the neutrality and insight Posner tends to display in his insurance opinions. *DeClue v. Central Illinois Light Co.*,¹⁸⁹ however, suggests that the thoroughly modern Posner still fails to “get it” regarding job discrimination.

In *DeClue*, plaintiff was an apprentice lineman for the utility. She alleged numerous acts of discrimination taking place prior to filing her suit, but Posner (joined by Judge Bauer) found for the defendant. First, Posner ruled many of the most egregious incidents out of consideration as occurring prior to the 300-day time limit for bringing a discrimination claim.¹⁹⁰ Second, Posner found that the continuing alleged discrimination (failure to provide restroom facilities for her) did not raise a triable claim of a hostile work environment or disparate treatment.¹⁹¹

188. See Richard A. Posner, *Coping With the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989). Posner also took the view that the increase in discrimination was a substantial part of a perceived court congestion problem. *Id.*

189. 223 F.3d 434 (7th Cir. 2000).

190. *Id.* at 436.

191. *Id.*

This history of harassment was deemed nonactionable by Posner on statute of limitations grounds. In addition, he seems to have accorded the incidents no evidentiary value. Because of the interests in leaving the past behind embodied in a statute of limitation, a court may be required not to hold someone liable for past acts too far in the past -- but certainly those incidents should have some bearing upon how a reasonable fact-finder might construe a current failure to provide toilet facilities to the one woman worker on the crew.

As to the continuing toilet denial, Posner found as a matter of law that this could not be gender discrimination. Once again, Posner's sensitivity antennae tilt toward employer rather than employee as he views the context as one of logistical difficulty or economic efficiency rather than the worker's actual work context.

Linemen work where the lines are, and that is often far from any public restroom; nor do the linemen's trucks have bathroom facilities. Male linemen have never felt any inhibitions about urinating in the open, as it were. They do not interrupt their work to go in search of a public restroom. Women are more reticent about urinating in public than men. So while the defendant's male linemen were untroubled by the absence of bathroom facilities at the job sight, the plaintiff was very troubled.¹⁹²

But, according to Posner this was not sexual harassment or a hostile work environment. It might be qualify as disparate impact gender discrimination because a facially neutral policy (no port-a-potties traveling with the line crew) impacts more negatively on women. "But this case has not been litigated as a disparate impact case."¹⁹³ In other words, DeClue must lose as a matter of law because of the demands of the adversary system and Posner's formalistic characterization of the claim.

By failing to present her case as one of disparate impact, the plaintiff prevented the defendant from trying to show that it would be infeasible or unduly burdensome to equip its linemen's trucks with toilet facilities sufficiently private to meet the plaintiff's needs. She waived what may have been a perfectly good claim of sex discrimination.¹⁹⁴

192. *Id.*

193. *Id.* at 437.

194. *Id.*

In contrast to the insurance cases, where Posner displays even-handed contextualism, in employment cases Posner's sensitivity runs toward the employer. It might have been annoying to remand the case and reopen discovery or to allow a jury to address the hostile work environment case that perhaps should have been framed as a disparate impact case, but this surely could have been done to resolve the issue, particularly when there is such an aroma of harassment surrounding DeClue's tenure on the line crew. However, Posner's highest priority appears to be avoiding "unfairness" to the employer and undermining the "you live with your tactical decisions" ethos of the adversary system.

Posner also elevates a formalist devotion to doctrine above service to the norms embodied in the statutes and the reality of the workplace.

[I]t might be possible to argue that an employer who fails to correct a work condition that he knows or should know has a disparate impact on some class of his employees is perpetuating a working environment that is hostile to that class. But if this argument were accepted, it would make disparate impact synonymous with hostile work environment.¹⁹⁵

Contrast Posner's approach in *DeClue* with his insurance law opinions discussed above. In the insurance cases, Posner is not looking to decide policy coverage and the like according to counsel's possibly erroneous framing of the question; he is looking to make the right determination by allowing appropriate reference to the overall purpose of the policy and context of the risk-bearing taken on by the parties. He is even willing to do some heavy lifting legal research (or at least keep his law clerks under the lash) to flesh out contract doctrines such as "mend the hold"¹⁹⁶ or to explain in some detail the nature of the Insurance Services Office.¹⁹⁷ But in a gender discrimination case, Posner is happy to boot the claim out of court because it was in his view improperly framed.

Judge Illana Diamond Rovner's dissent properly rejected both Posner's formalism and his curious detachment from workplace reality in her dissent in *DeClue*. Her dissent deserves quotation at length.

195. *Id.*

196. See *supra* notes 61-87 and accompanying text (discussing Posner's opinion in *Harbor Insurance Co. v. Continental Bank Corp.*, 922 F.2d 357 (7th Cir. 1990)).

197. See *supra* notes 33, 41 (discussing *Great Central Insurance Co. v. Insurance Services Office, Inc.*, 74 F.3d 778 (1996)).

Women know that this disparity [of restroom facilities], which strikes many men to be of secondary, if not trivial, importance, can affect their ability to do their job in concrete and material ways. As recently as the 1990s, for example, women elected to the nation's Congress -- which had banned gender discrimination in the workplace some 30 years earlier -- found that without careful planning, they risked missing the vote on a bill by heeding the call of nature, because there was no restroom for women convenient to the Senate or the House chamber.

....

The fact is, biology has given men less to do in the restroom and made it much easier for them to do it. If men are less reluctant to urinate outdoors, it is in significant part because they need only unzip and take aim. And although public urination is potentially a crime whether committed by a man or a woman, the risk of being caught in the act is arguably greater for women, for whom it is a more cumbersome, awkward, and time-consuming proposition. [Therefore, the lack of facilities for women workers] can support a disparate-impact claim for female employees.

But there are respects in which the refusals to provide female employees with restrooms can be understood as creating a hostile work environment as well. . . . [W]hen, in the face of complaints, an employer fails to correct a work condition that it knows or should know has a disparate impact on its female employee -- that reasonable women would find intolerable -- it is arguably fostering a work environment that is hostile to women, just as surely as it does when it fails to put a stop to the more familiar types of sexual harassment. Indeed, the cases teach us that some employers not only maintain, but deliberately play up, the lack of restroom facilities and similarly inhospitable work conditions as a way to keep women out of the workplace.

The evidence in this case supports a hostile environment claim. . . . I dare say that if the tables were turned, and all but one of the employees in this environment were women, a reasonable man would be equally reticent to drop his trousers

in order to relieve himself. . . . The defendant's failure to remedy the problem in turn could be viewed as a negligent response that subjects it to liability for a hostile work environment.

Discrimination in the real world many times does not fit neatly into the legal models we have constructed. . . . Because prejudice and ignorance have way of defying formulaic constructs, the lines with which we attempt to divide the various categories of discrimination cannot be rigid. DeClue's complaint, insofar as it concerns the lack of restroom facilities, may fit more naturally into the disparate-impact framework that my colleagues discuss, but it also overlaps with the hostile environment framework into which she has placed it. It should be allowed to proceed within that framework.¹⁹⁸

Rovner's treatment of the issue -- contextual, comprehensive, pragmatic, empirical (not statistics and graphs but an appreciation of the real world), and sensitive -- reminds me of Posner's insurance opinions. If only Posner's discrimination opinions reminded me of his insurance opinions.

198. *DeClue*, 223 F.3d at 436-38 (citations omitted) (emphasis added). Judge Rovner aptly noted that the disparate impact theory itself was not drawn from the language of the statute or the express intent of the enacting Congress but was a wise judicial response to recognition that facially neutral rules could in application be discriminatory. *Id.* at 439-40. She also noted one famous instance where the Supreme Court embarrassed itself with excessive formalism when the Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), held that pregnancy discrimination was not covered by Title VII because the employer-provided health insurance plan under attack differentiated only according to pregnancy rather than gender, ignoring that only women become pregnant. Congress swiftly acted to amend the statute to overrule the *Gilbert* decision. *Id.* at 440 n.4. See also Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (cited in 223 F.3d at 439) (Rovner, J., dissenting) (arguing that much male behavior in workplace is designed to exclude women or make them sufficiently uncomfortable so that they will leave or at least accept subservient status).

III. POSNER AT THE INTERSECTION OF INSURANCE, EMPLOYMENT,
AND CIVIL RIGHTS: *DOE V. MUTUAL OF OMAHA INSURANCE CO.*
AS MICROCOSM

In *Doe v. Mutual of Omaha*,¹⁹⁹ the Seventh Circuit per Judge Posner ruled that a health insurance policy's exclusion of or cap on AIDS-related medical expenses does not violate the Americans with Disabilities Act (ADA) and that the McCarran-Ferguson Act also precludes an employee insured's challenge to the exclusion. The reconciliation of the ADA with the contract-based framework of insurance law presents difficult questions similar to those faced by courts in ruling on conflicts between discrimination statutes and insurance or pension plans.

Mutual of Omaha provides a reasoned and defensible analytic path in finding no ADA bar to the coverage exclusions at issue but, as reflected in the dissent in the case and commentary such as the note in this issue of the *Connecticut Insurance Law Journal*,²⁰⁰ many disagree with Posner's view. The decision has a bit of the offhand, dispassionate tone that makes Posner's "pure" insurance opinions so good but can seem like lack of empathy toward or even scorn for the plight of the less fortunate worker or policyholder. But there is much less of this in *Mutual of Omaha* than one can find in earlier Posner discrimination opinions, just as there is much less of this in Posner's more recent discrimination and employment law opinions that do not touch upon insurance.²⁰¹

Mutual of Omaha is a confluence of important insurance, discrimination, and jurisprudential forces, including the interpretation of two major statutes (the ADA and the McCarran-Ferguson Act). Initially reading the case, I was

199. 179 F.3d 557 (7th Cir. 1999), *rehearing en banc denied*, 1999 U.S. App. LEXIS 18360 (Aug. 3, 1999), *cert. denied*, 528 U.S. 1106 (2000).

200. See Lori Bloch Izzo, Note, *Doe v. Mutual of Omaha Insurance Company: The ADA Does Not Regulate the Content of Insurance Policies, But What Have Cameras, Braille Books, or Wheelchairs Got to Do With It?*, 7 CONN. INS. L.J. 263 (2000).

201. See McGinley & Stempel, *supra* note 16, at 245-59 (contending that Posner is frequently dismissive of discrimination claimants and often resistant to discrimination law claims). Despite the critical posture of much of this article, it should not be overlooked that Posner deserves credit for some positive evolution in this realm. In *Mutual of Omaha Insurance Co.*, Posner can perhaps be faulted for insufficient appreciation of the practical realities facing the average worker in need of health insurance protection but *Mutual of Omaha Insurance Co.* does not reflect the "let them eat cake" tone of some of his employment opinions like *DeClue* and *Troupe*.

unhappy with the bottom line result of reduced insurance security for the AIDS-afflicted but persuaded by Posner's analysis of the ADA-Insurance conflict. So viewed, *Mutual of Omaha* can be seen as an example of Posner's cool logic saving a court from the excessive pull of empathy for the disabled. But upon further examination of the decision, I have come to see *Mutual of Omaha* as incorrectly decided and once again revealing the "soft spots" in Posner's legal philosophy in application, at least where remedial statutes and antidiscrimination are concerned. *Mutual of Omaha* was more discrimination case than insurance case and Posner's resulting opinion is consequently more unsatisfactory than satisfactory.

The ADA states that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" by the owner of the operation. The sale of an insurance policy can be said to be the sale of a good or service. However, Posner found that the ADA language at issue had a "core meaning" of prohibiting a business from refusing to deal with the disabled. According to the panel majority, the ADA does not prevent a business from differentiating its products in a way that may impact upon the disabled.

[A] dentist cannot refuse to fill a cavity of a person with AIDS unless he demonstrates a direct threat to safety or health, and an insurance company cannot (at least without pleading a special defense [of actuarial need discussed later in the opinion and this article]) refuse to sell an insurance policy to a person with AIDS. *Mutual of Omaha* does not refuse to sell insurance policies to such persons -- it was happy to sell health insurance policies to the two plaintiffs. But because of the AIDS caps, the policies have less value to persons with AIDS than they would have to persons with other, equally expensive diseases or disabilities. This does not make the offer to sell illusory, for people with AIDS have medical needs unrelated to AIDS, and the policies give such people as much coverage for those needs as the policies give people who don't have AIDS.²⁰²

202. *Mut. of Omaha Ins. Co.*, 179 F.3d at 559 (citations omitted).

The court continued:

The common sense of the [ADA] statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress proposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intention clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide . . . how many Braille books the Borders or Barnes and Noble bookstore chains should stock in each of their stores.²⁰³

Posner concluded that prohibiting AIDS caps for insurers willing to write health policies would make little sense when insurers retained the right to refuse to cover any pre-existing conditions related to AIDS or HIV-positive status, where “the insurer can in effect cap his AIDS-related coverage at \$0.”²⁰⁴ Consequently, Posner did not regard it as counter to the ADA for the insurer to attach some limits on AIDS-related coverage since the insurer has substantial power to refuse to insure HIV-positive applicants altogether.

In making this argument, however, Posner failed to expressly note what I regard as a rather significant distinction: a refusal to cover pre-existing conditions does not preclude coverage for that condition per se -- even expensive coverage -- should the condition develop after the policy is in effect. Thus, Posner permits insurers to not only refuse to write coverage for persons that already have AIDS but also allows insurers to limit or exclude coverage should the originally HIV-free policyholder develop AIDS complications at some later date. As a practical matter, the distinction may mean a large difference in the number of ultimately covered persons and benefit dollars ultimately provided.

In addition, a health insurer's ability to preclude coverage of AIDS on pre-existing condition grounds is limited by practical considerations. Most health insurance is sold in group policies where the group is underwritten as a whole with minimal or no investigation of individual insureds. Of a pool of insureds, a certain percent may already have HIV-positive blood but it will

203. *Id.* at 560.

204. *Id.* at 559.

not be possible to know this with certainty years later when these insureds begin developing symptoms requiring physician treatment. This suggests that what Mutual of Omaha did (capping AIDS benefits) is indeed more dramatically adverse to the insured than the standard insurer practice of excluding the pre-existing condition. Although one can defend insurers on this point because they can be victimized by adverse selection, countervailing factors help the insurer. First, because group health insurance usually comes through a job, there are practical limits on adverse selection (people are not as likely to change jobs just to get insurance as they are to simply apply for insurance knowing they are in a high risk group). Second, employer-provided health insurance is subject to ERISA, which can make for deferential review of adverse coverage decisions.²⁰⁵

Posner buttressed his view by noting that other appellate cases had given similar construction to the ADA, even though several district court cases, including the trial court in *Mutual of Omaha*, had found disparate AIDS caps to violate the ADA.²⁰⁶ These appellate cases essentially state that disparate benefit structures do not violate the ADA merely because they fall more adversely upon disabled persons so long as the disparate benefit schedule is not directed at disabilities per se.

In addition to assessing the ADA, Posner concluded that even if his interpretation of the ADA “is wrong, the [*Doe*] suit must fail anyway, because it is barred by the McCarran-Ferguson Act.”²⁰⁷

That Act [McCarran-Ferguson], so far as bears on this case, forbids construing a federal statute to “impair any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.” . . . Direct conflict with state law is not required to trigger this prohibition; it is enough if the interpretation would “interfere with a State’s administrative regime.” The interpretation of section 302(a) of the Americans with Disabilities Act for which the Plaintiffs contend would do this. State regulation of

205. See *supra* notes 125-35 and accompanying text (discussing the *Herschenberger* case).

206. See, e.g., *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-14 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-14 (6th Cir. 1997) (en banc); *Vaughn v. Sullivan*, 83 F.3d 907, 912-13 (7th Cir. 1996).

207. *Mut. of Omaha Ins. Co.*, 179 F.3d at 563.

insurance is comprehensive and includes rate and coverage issues, so if federal courts are now to determine whether caps on disabling conditions (by no means limited to AIDS) are actuarially sound and consistent with principles of state law they will be stepping on the toes of state insurance commissioners.²⁰⁸

Both the majority and dissenting opinion set forth thoughtful and strong arguments. Not surprisingly, the unsuccessful plaintiff policyholders petitioned for rehearing before the entire Seventh Circuit. It is perhaps similarly unsurprising that the full circuit court of 12 judges split 7 to 5 on the issue of whether to grant a rehearing of the *Mutual of Omaha* case before the full Court.²⁰⁹

Although the majority of other cases on the issue, particularly appellate opinions, accord with the *Mutual of Omaha* majority rather than with the dissent, there is sharp division on the issue among federal judges.²¹⁰ For example, the Seventh Circuit was closely divided on the issue. The more “conservative” members of the Court supported the Posner opinion while the more “liberal” members of the Court voted to grant rehearing, but the judicial split on this issue is not uniformly ideological, either in the Seventh Circuit or other courts. To date, however, the Supreme Court has avoided the matter, denying certiorari in *Mutual of Omaha* and similar cases.²¹¹

Mutual of Omaha is the type of difficult case that makes me happy not to be a judge. Historical, practical, and textual information points in both directions on the issues in the case.²¹² Posner's McCarran-Ferguson analysis seems more persuasive than his ADA analysis: If the ADA is to have this much impact on insurance, traditionally a subject of state regulation, would one not have expected more indication from Congress? The ADA provides that it

shall not be construed to prohibit or restrict --

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from

208. *Id.* at 563-64 (citations omitted).

209. *Doe v. Mut. of Omaha*, No. 98-4112, 1999 U.S. App. LEXIS 18360 (7th Cir. 1999).

210. *See Izzo, supra* note 200, at 267-71 (summarizing case law).

211. *Doe v. Mut. of Omaha Ins. Co.*, 528 U.S. 1106 (2000) (denying certiorari).

212. For a description of the ADA and its operation, *see generally Izzo, supra* note 200.

underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that is subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.²¹³

In drafting the ADA, Congress went out of its way to state that insurers were not in violation of the Act if their insurance policies were supported by valid and nonpretextual actuarial reasons for a coverage restriction that adversely affected the disabled.²¹⁴ Why would a rational legislature take the time to do this if the content of insurance policies was not subject to the Act? Posner has no good answer to this query. His failure to adequately explain away the “safe harbor” provisions of the law is ultimately the strongest reason suggesting that his *Mutual of Omaha* opinion is wrong on this point.

It is also the strongest reason for thinking that his McCarran-Ferguson analysis is also mistaken. The “safe harbor” language expressly states that the actuarial administration of the insurance policies offered must be “based on or not inconsistent with State law” in order to dock at the “safe harbor”. In other words, the Act suggests that insurer behavior under the ADA must comport with the state regulatory scheme governing the policy in questions. This suggests that Congress has spoken with the requisite clarity to overcome the McCarran-Ferguson Act's general presumption against federal law inadvertently displacing or overriding state insurance regulation.

Although not presented for decision in the *Mutual of Omaha* case, the ADA “safe harbor” language also suggests that if the ADA's antidiscrimination edict is in conflict with state law, the insurer is protected from this aspect of the ADA so long as the alleged discriminatory risk

213. 42 U.S.C. § 12201(c)(1)-(3) (2001); see also Izzo, *supra* note 200, at 288-300 (discussing “safe harbor” provision).

214. 42 U.S.C. § 12201(c)(1) (2001).

classification is shown to be “based on” state law. Thus, if insurers can persuade state regulators to mandate or expressly permit differential coverage to the disabled, the insurance policies would not be rewritten by federal courts applying the ADA nor would insurers be subject to liability. Frankly, as a liberal, I’m not sure I like what this part of the statutory scheme is saying. Insurers have historically proven quite adept at getting what they want from state regulators (something that Posner, as a pragmatist and economist familiar with public choice literature must surely appreciate). To the extent insurers are successful lobbyists with regulators on matters of differential coverage for the disabled, the ADA does not appear to prohibit this, although in blatant cases, courts may deem such state regulation urged by industry to be a subterfuge violating the statute. Nonetheless, state regulators, who are responsive to the insurance industry but also responsible to state politics, may be the best source of final decision on these issues.

Of course, the abstract existence of the ADA “safe harbor” without concrete state regulatory pronouncements on matters of AIDS coverage does not suggest the broad-based immunity found by Posner in *Mutual of Omaha*. It does not follow that the ADA may not be applied to insurers simply because under the ADA and McCarran-Ferguson, state regulation might permit insurers to discriminate because they “have to” to maintain the financial integrity of their risk pools. As Judge Evans stated in dissent in *Mutual of Omaha*, the defendant insurer’s stipulation that the “safe harbor” was not at issue removed this defense from the case. Without this defense, the ADA appears applicable by its terms and the state regulation is not at issue, meaning McCarran-Ferguson is not at issue.

Judge Posner’s best point is suggesting that the ADA “dog” did not “bark” loudly enough to indicate that Congress really wanted to intrude on traditional state regulation through the ADA.²¹⁵ Certainly, greater clarity on

215. In statutory interpretation matters, a number of scholars and Justices Stevens and Rehnquist have stated that they find it significant when Congress is silent when one would have expected express Congressional commentary on issues of significant change in the law. For example, if Congress in a new statute stated only that “no law should treat Americans differently because of their wealth”, few would interpret this as a legislative abolition of the income tax or the estate tax, substantial changes in the law for which one would expect Congress to make noise, “bark” if you will. The analogy comes from the A. Conan Doyle Sherlock Holmes story *Silver Blaze*, in which the racehorse named in the title is quietly stolen from the stables without the family watchdog barking. Holmes correctly concludes the dog’s failure to bark meant that the thief was someone familiar to the dog who did not arouse suspicion. A. CONAN DOYLE, *THE COMPLETE SHERLOCK HOLMES* 35, 349 (1927) (reprinting

this point would be appreciated. But we are talking about legislation, which emerges in a muddle of compromise and expediency. Despite this, the ADA pretty clearly states that nondiscrimination is the rule in insurance²¹⁶ unless insurers can, consistent with their state law regulatory regimes, demonstrate that they need to discriminate in order to maintain solvency. The dog is not howling, but it is probably barking loudly enough for anyone willing to listen.

Instead of listening with a judicially open mind, Posner strains to characterize this portion of the actuarial “safe harbor” as the insurance industry's extraction of exculpatory language from Congress in case the ADA is “given just the expansive interpretation that the district court gave it in this case.”²¹⁷ To Posner, the “safe harbor” provision, because it is “obviously intended for the benefit of insurance companies,”²¹⁸ must not auger for the *Mutual of Omaha* plaintiffs. But here Posner is just plain illogical. Of course the “safe harbor” was intended to protect insurers where their business requires disability discrimination to maintain solvency. But that's got to be because the Act otherwise governs their policies. If it did not, there would be no reason for the “safe harbor.”

If, as Posner suggests, the “safe harbor” were added to the statute just to buttress the non-applicability of the statute to insurance policies, it would not read as it does (requiring a showing of actuarial need consistent with state regulation) but would simply say “this Act does not require insurers or employers to offer insurance coverage that does not adversely impact disabled policyholders” or similarly broad language. The insurance industry failed to obtain such super-exculpatory language and got only the “safe harbor” language, which requires insurers to demonstrate the actuarial need for disability discrimination. *Mutual of Omaha* stipulated away the right to

story); *see, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (using analogy); *Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) (Rehnquist, J.); *see also* WILLIAM N. ESKRIDGE, JR. & PHILIP A. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 757, 834 (2d ed. 1995).

216. 42 U.S.C. § 12182(a) (2001). The “general rule” is that “[n]o individual shall be discriminated against on the basis of disability in the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation.” *Id.* (emphasis added). 42 U.S.C. § 12181(7)(F) (2001) defines insurance offices as public accommodations.

217. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 562 (7th Cir. 1999).

218. *Id.*

make this argument, which means they stipulated away the right to use this defense. Judge Evans appreciates this; Judge Posner fails to appreciate it.

The ADA clearly defines an “insurance office” as a “public accommodation” subject to the Act²¹⁹ which means that insurance sales and service are clearly subject to the Act. This subjection leaves open the issue of whether the products sold by the insurer in the public accommodation insurance office must be nondiscriminatory. However, coupled with the “safe harbor” provision, which allows insurers product differentiation based on actuarial need, the inevitable conclusion is that the ADA does indeed require that the products offered at a public accommodation not be discriminatory.²²⁰ In addition, the statute's language strongly suggests that the statute was designed to do more than simply allow disabled persons to enter businesses through the front door, stating that

[i]t shall be discriminatory to afford an individual or class of individuals, on the basis of a disability . . . directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a [good or service] that is not equal to that afforded to other [nondisabled] individuals.²²¹

Posner's opinion, while purporting to be grounded on a reading of statutory language, gives insufficient attention to this part of the statute²²² as well as failing to appreciate the significance of the “safe harbor” provision.

In addition, legislative history surrounding the ADA appears to favor the *Doe v. Mutual of Omaha* plaintiffs. A Senate Report on the bill stated that under the law, “a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.”²²³ The only exception to this discussed in the House or Senate Reports on the Act is the “safe harbor” for insurers who can demonstrate that “the refusal, limitation, or rate differential [adversely affecting disabled persons] is based on sound actuarial principles

219. 42 U.S.C. § 12181(7)(F) (2001).

220. See Izzo, *supra* note 200, at 288-300.

221. 42 U.S.C. § 12182(b)(1)(A)(ii) (2001).

222. See Izzo, *supra* note 200, at 287 (discussing this language and Posner's incorrect focus on some statutory text to the exclusion of statutory text as a whole).

223. S. Rep. No. 106-16 at 84 (1989). The *Mutual of Omaha Insurance Co.* district court found this history significant. *Doe v. Mut. of Omaha Ins. Co.*, 999 F. Supp. 1188, 1193-94 (N.D. Ill. 1998).

or is related to actual or reasonably anticipated experience.”²²⁴ Against this evidence of statutory meaning, there appears to be no legislative history stating that the content of insurance policies is outside the ADA.

In addition, as noted by the trial court, Department of Justice interpretative guidelines favored the *Mutual of Omaha* plaintiffs.²²⁵ The Department had in fact filed an amicus brief supporting the plaintiffs with the Seventh Circuit.²²⁶ Posner accorded the Department *Chevron* deference, but not much of it.²²⁷ One wonders whether he would have been so grudging if the Environmental Protection Agency were construing a law or regulation as exempting a business from the need to install expensive anti-pollution equipment. But, by the same token, Posner has a very good point in limiting his deference to the Department where the proffered interpretation comes internally and through amicus brief rather than from the “more deliberative, public and systematic procedure” of rulemaking²²⁸ (or, for that matter, government-commenced litigation).²²⁹

Posner's *Mutual of Omaha* opinion also falters in other ways because of its lack of sensitivity to context. The policy in question capped benefits for health care expenses stemming from conditions related to AIDS --but the policy did not define this with any clarity. After *Mutual of Omaha*, a health insurer is not only permitted to cap benefits to disabled policyholders based on their disability but also is in a position to construe any doubtful expenses in its favor and give the disability discrimination excessive bite. For example, if an HIV-positive policyholder gets pneumonia or receives other treatment for flu, fatigue, arthritis, or other maladies, an insurer will be tempted to deny coverage on all of these, contending that the diseases are AIDS-related. But people without AIDS get the flu, pneumonia, arthritis, fatigue, and other maladies. Although the question of insurance policy construction was not directly before the Court, its broad holding of ADA immunity for insurers drafting policies surely will lead insurers to continue

224. H.R. Rep. No. 101-485, pt. 2, at 136-37 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 419-20, cited with approval in *Doe v. Mut. of Omaha Ins. Co.*, 999 F. Supp. at 1193.

225. *Mut. of Omaha Ins. Co.*, 999 F. Supp. at 1194. See Izzo, *supra* note 200, at 275.

226. Izzo, *supra* note 200, at 281.

227. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984), courts are to grant considerable deference to the reasonable interpretation of a statute proffered by the agency responsible for the statute's administration.

228. *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 562-63 (7th Cir. 1999).

229. Izzo, however, has a strong response to this aspect of Posner's *Mutual of Omaha Insurance Co.* opinion. See Izzo, *supra* note 200, at 293-95.

using similarly vague policy language and to resolve cases in their favor at the expense of disabled policyholders. Judge Evans's dissent expressly recognized that the practical effect of allowing a cap on coverage for "AIDS-related conditions" is to give the insurer carte blanche discretion to deny claims made by insureds with AIDS. In *Mutual of Omaha*, Posner opens the door to the type of opportunistic insurer misbehavior he generally does not permit when deciding insurance coverage cases.

Posner also is guilty of suggesting greater government interference in the market than would ultimately result if the *Mutual of Omaha* plaintiffs prevail. He suggests that a victory for plaintiffs would threaten to require providers of goods and services to offer a product line catering to every manner of disability.²³⁰ But this seems to be a bit too much *reductio ad absurdum*, even for judicial rhetoric. As one commentator suggests, "the real issue, however, concerns the *intentional* placement of a clause in an insurance contract that singles out individuals with a recognized disability for differential treatment where the insurer cannot defend its disparate treatment based on actuarially- or historically-based justifications."²³¹ Insurance is a product of sorts, but one with special aspects that require special judicial consideration.²³²

Where disability discrimination in an insurance policy (or other product or service contract for that matter) is express, a better reading of the ADA suggests that such discrimination violates the statute. Where a generically offered good or service is truly only incidentally less valuable to the disabled, courts can easily find this not to violate the ADA. In such cases, Posner's discussion of bookstores, shoes stores, and the like makes sense. For example, a person without legs cannot with a straight face allege that a shoestore discriminates because it sells pairs of shoes without leg-replacing prosthetic devices or that it charges extra for artificial legs that go along with shoes. Similarly, a one-leg amputee cannot complain that he must buy a pair of shoes at regular price rather than insisting on one shoe at half-price. But if a vendor expressly designs products to give them less value or greater cost for the disabled, both the text and the purpose of the ADA would seem

230. *Mut. of Omaha Ins. Co.*, 179 F.3d at 562. Izzo suggests that Posner was unduly influenced by the doomsday predictions of the defendant in the litigation, which asserted in its briefs that the plaintiffs' position would "effect a sea change in the provision of every good and service throughout the American economy" and require that goods and services be tailored for every disability. See Izzo, *supra* note 200, at 291.

231. Izzo, *supra* note 200, at 291.

232. *Id.* at 301.

applicable. A victory for the insureds in *Mutual of Omaha* would probably increase disputing costs at the margin because there will be greater need for adjudication of the vendor's motive and the application of the ADA's "safe harbor" provision. But this is an acceptable price to pay for enforcing the statute, not the drastic one suggested by Posner.

Further, Posner fails to appreciate practical realities of health insurance that would prevent a plaintiffs' victory in *Mutual of Omaha* from unraveling risk pools and the insurance system. *Mutual of Omaha* stipulated away the "safe harbor" defense of actuarial need, but this does not mean that it "cannot defend its disparate treatment based on actuarially- or historically-based justifications" as suggested by the otherwise excellent and persuasive Note in this issue of the Journal.²³³ A stipulation is just that, a concession for purposes of the instant litigation. Stipulating may mean that the facts are inarguable or it may mean that the litigant seeks only a pure legal ruling. *Mutual of Omaha* may simply have sought a circuit court decision of no ADA applicability without the need to develop facts supporting its policy provisions. If it had lost before the Seventh Circuit, it would not have been precluded from developing an actuarial "safe harbor" defense in subsequent policyholder litigation. I suspect that insurers, if forced to litigate on "safe harbor" grounds, will generally do pretty well.²³⁴ AIDS is a tragic disease that raises medical costs and may well require disparate treatment by health insurers by way of policy exclusions, benefit caps, or higher premiums. Posner and others may regard "safe harbor" adjudication as a recipe for wasteful litigation expense, but it is no justification for an unduly crabbed reading of the ADA or an unduly expansive reading of the McCarran-Ferguson Act.

Despite the difficulty presented in *Mutual of Omaha*, it appears that the decision is one where Posner's resistance to corrective legislation and government protection of the less powerful trumped his normally keen appreciation of the totality of the circumstances for insurance matters. Notwithstanding all his progressive evolution as a pragmatist judge, Posner is ultimately continuing to decide the close cases based on a personal philosophical preference for private sector prerogatives and an aversion to

233. *Id.* at 287.

234. See Alan I. Widiss, *To Insure or Not to Insure Persons Infected with the Virus that Causes AIDS*, 77 IOWA L. REV. 1617 (1992) (explaining that persons with AIDS are often uninsurable or insurable only with exceptions or high premiums); Izzo, *supra* note 200, at 296-97.

government legislation. As one commentator noted, Posner did not consider the sweeping nature of the statute.²³⁵ In this regard, Arthur Leff's earlier criticism of Posner, that he respects human endeavor that amasses commercial wealth but not human endeavor that operates governments, continues to ring true.²³⁶

CONCLUSION

In the insurance context, Posner opinions consistently reflect such neutrality and nonpartisanship. As a political-psychological matter, he seems indifferent to policyholder-vs.-insurer, primary-vs.-excess, liability carrier-vs.-boiler-insurer, reinsurer-vs.-retrocessionaire. His employment opinions are less satisfying because of their occasional tone of preference for employers with corresponding insensitivity to workers alleging discrimination, injury, or intolerable conditions.

Although one perhaps cannot undo the subtle effects of Realism in judging, at least one can study it. Posner arguably falls short of the ideal in judging in some instances where he is faced with gritty types of workplace related claims or claims of workers he subconsciously appears to regard as lackluster, malingering, or unduly sensitive. In discrimination cases, he continues to have bouts of elitism, unreality, and insensitivity to the plight of worker complainants. In statutory interpretation matters, Posner is often excellent but also on many occasions tends toward a restricted scope of the statute in question, particularly statutes like the antidiscrimination laws in which the government overrides operation of the labor market or other business operations in pursuit of other social goals. His occasional "insensitivity" to workers and remedial legislation contrasts markedly with his consistent sensitivity to the operation of insurance, contracting, and commercial relations.

Why the contradiction? Or is it a contradiction? In assessing the prejudicial Posner, Arthur Leff observed this inconsistency in the first edition of *Economic Analysis of Law*. Posner venerated the market but either did not realize or did not concede that this was a value choice. And, of course, by embracing the private sector and market as superior to a world shaped by legislation and enforcement, Posner implicitly embraced the status quo.

235. Izzo, *supra* note 200, at 287.

236. Leff, *supra* note 2, at 480-81.

What this all means is that Posner has not played fair with the question of power, or inequalities thereof. He has made a very common move: *after* something of value has been distributed he has defined *taking* as illicit and *keeping* (except when paid) as in tune with the expressed wishes of the universe. . . . [B]y and large, the government is to have no role in even annoying those who choose to exclude others from what they already have. Keepers, keepers, so to speak.

But why is that? Let us say I am naturally superior to a rich man in taking things, either by my own strength or by organizing aggregations of others (call them governments) to do my will. I am not much of a trader, but I'm one hell of a grabber. That's just the way things are.

. . . .

In brief, there seems to be some normative content in Posner's neo-Panglossianism after all. Only some kinds of inequality are to be accepted as unquestionable *grundnorm* upon which to base efficiency analysis. The transfers that come about against a background of wealth inequality are fine; any that come about against a background of inequality in strength, or the power to organize and apply strength, are unjustifiable. Some inequalities are more equal than others -- and all without reference to any apparent normative criterion at all.²³⁷

Even if one concedes for argument the inefficiency of antidiscrimination laws,²³⁸ in particular the ADA, these laws appear to be clear instances where Congress and the vast majority of the public wanted nondiscrimination more

237. Leff, *supra* note 2, at 480-81 (footnotes omitted) (emphasis in original).

238. There is, of course, debate within the legal academic community on this point. Compare RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW (1992); POSNER, *supra* note 98, at 336-340; Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) (arguing that Title VII is inefficient) with John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337 (1989); John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987); John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986) (arguing that Title VII is efficient).

than it wanted market efficiency, in effect saying “you lose” to business objections. In addition, both Posner and Leff give short shrift to an important point: markets do not arise in a state of nature; they need government provided law and its enforcement to protect the wealth-creating exchange Posner so values. Without government, wealth is possible only if one is pretty good at maintaining a private army to conquer and occupy (and can pay one's mercenaries in the absence of effective legal tender). Under these circumstances, hostility or even resistance toward government-enacted statutes is unwarranted so long as the statutes are passed through good faith operation of the political process (e.g., not the result of bribery or other corruption).

Without doubt, Posner has emerged as a judge of note regarding insurance matters. Unfortunately, resistance to remedial legislation and overzealous economism continue to make Posner's work less admirable in other contexts.

