
SATISFACTION AND POSNER'S MORIN OPINION:
ALIQUANDO BONUS DORMITAT POSNERUS?

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I. INTRODUCTION

I have read and pondered Judge Richard Posner's judicial opinions and scholarship for many years. Over that time I have been nourished, informed, challenged, provoked, annoyed, angered, impressed, and delighted. I have been delighted, for example, to point out to students that Judge Posner (hereinafter Posner — for brevity and with all due respect), virtually alone at the time among Seventh Circuit judges, spotted a significant logical mistake in the way some of his colleagues had been interpreting the rule for “material alteration” offered in official comment 4 to section 2-207 of the Uniform Commercial Code (U.C.C.). Essentially, they misread a rule in comment 4 that has the form “if P then Q” as having the form “if Q then P.”¹ Not only was this error an offense to, say, Quine, Frege, Peirce, and Aristotle, but it also made bad law, as Posner explained.² It is hard to get students to pay attention to this kind of detail — especially in a legal culture that has for more than a century been benighted by the dictum that sets in opposition “the life of the law” and “logic.”³ But my pedagogical efforts to teach the value of logical acuity have been made at least somewhat easier because I can point to an opinion by one of our most prominent judges that illustrates how logic may be used to clarify legal doctrine.⁴

I have also been a delighted teacher, in my Contracts class, of the opinion Posner wrote for a unanimous panel in *Morin Building Products Co. v. Baystone Construction, Inc.*⁵ I say “delighted” because the opinion has absorbed and puzzled me, and, being a devoted student of philosophy, I enjoy being puzzled by worthy thinkers. *Morin* con-

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¹ For a detailed discussion of the logical and doctrinal problems with some courts' interpretation of section 2-207 of the U.C.C., see Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey*, 34 J. MARSHALL L. REV. 9, 17–23 (2000).

² See *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1336 (7th Cir. 1991).

³ For a discussion of this “anti-logical” jurisprudence, see Scott Brewer, *Traversing Holmes' Path Toward a Jurisprudence of Logical Form*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 94 (Steven J. Burton ed., 2000). See also Brewer, *supra* note 1.

⁴ See *Union Carbide Corp.*, 947 F.2d at 1336; see also Brewer, *supra* note 1.

⁵ 717 F.2d 413 (7th Cir. 1983).

cerned the question whether, under Indiana law, a judge (or jury) should use an “objective” or a “subjective” standard when interpreting a “satisfaction clause.” Although the case involved a “black letter” issue of contract law, Posner’s opinion connected this narrow doctrinal issue to broader themes of jurisprudence and legal and political philosophy. (Holmes had a similar talent.) Thus, by the time the *Morin* opinion closes, readers have witnessed a concise explanation and deployment of a law and economics methodology, an examination of the relation between language and intention, and reflections on paternalism and freedom of contract.

I have developed a standard method for teaching and analyzing judicial opinions. I try (and try to get students to try) to answer seven questions regarding the arguments a judge proffers in an opinion:

- (i) How many distinct arguments are there?;
- (ii) What exactly are the premises and conclusions of each argument?;
- (iii) How do those arguments relate to one another? For example, does the conclusion of one provide the premise for another? Is there a “lemma” for a principal “theorem” in the opinion?;
- (iv) What arguments are offered to resolve any unclarity in the applicable legal texts (like semantic or syntactic ambiguity, or vagueness) that the judge encounters?;
- (v) According to a fair interpretive judgment, what logical form does each argument have (that is, deductive, inductive, analogical, or abductive⁶)?;
- (vi) Given one’s interpretation of the logical form of a given argument, does it display the specific virtues that pertain to that logical form (such as either soundness or validity for a deductive inference)?;
- (vii) Does the overall set of arguments succeed in justifying the result?

I label the analytical method reflected in the effort to answer these seven questions the “logocratic” method — a term coined to reflect the central concern with assessing the “strength” (Greek “κράτος”) of a purportedly justifying argument (“λογος”). To answer the logocratic questions, one must also make careful interpretive judgments about the rules that apply (or seem to apply) in a judge’s argument and about the rationales the judge (or the reader) may supply to explain and justify those rules. The overall jurisprudential motivation for the logocratic exercise is most clearly reflected in question (vii), namely: does the overall set of arguments succeed in justifying the result the judge reaches? Although judicial decisions serve several distinct and overlapping social and political functions, one central function — perhaps a *sine qua non* in the American legal system — is to provide a justification for the use of state power of the sort that judges wield (in cooperation, to be sure, with other branches of government). That is, broadly speaking, the power to redistribute wealth in the civil setting

⁶ See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 942–49 (1996).

and the power to redistribute wealth or liberty (or life) in the criminal setting. The overarching focus of this analytical method is to pursue the following inquiry: does this judge's proffered justification for this particular use of state power actually succeed in doing its intended work?

Posner's opinions lend themselves well to this kind of analysis. In this Commentary, I seek mainly to offer a celebratory critique of Posner's opinion in *Morin*, focusing on a few of the intellectual virtues, devices, and vices I see in the opinion. In so doing, I hope also to offer an abbreviated illustration of the logocratic method. I shall provide one brief example, elaborating on the rules discussed in *Morin*, that reveals the way in which meticulous attention to logical detail can pay off in the critique of substantive law. The argumentative practices of American jurists have been misled by the misguided maxim, "[t]he life of the law has not been logic: it has been experience."⁷ *Morin*, like so many of Posner's writings (judicial and otherwise), is an agreeably provocative occasion for reflecting on and teaching a more accurate claim: the life of the law is logic suffused with experience and experience tempered by logic.

II. RELEVANT FACTS OF *MORIN*

Morin concerned a contract between a subcontractor, plaintiff Morin Building Products Co., and a general contractor, defendant Baystone Construction, Inc. General Motors (GM) had hired Baystone to build an addition to a Chevrolet plant in Indiana, and Baystone in turn hired Morin to supply and erect the addition's aluminum walls. Posner noted the following provisions specified in the contract:

(i) "that the exterior siding of the walls be of 'aluminum type 3003, not less than 18 B & S gauge, with a mill finish and stucco embossed surface texture to match finish and texture of existing metal siding';"⁸ (ii) "that all work shall be done subject to the final approval of the Architect or Owner's [GM's] authorized agent, and his decision in matters relating to artistic effect shall be final, if within the terms of the Contract Documents";⁹ (iii) "should any dispute arise as to the quality or fitness of materials or workmanship, the decision as to acceptability shall rest strictly with the Owner, based on the requirement that all work done or materials furnished shall be first class in every respect. What is usual or customary in erecting other buildings shall in no wise enter into any consideration or decision."¹⁰

⁷ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1938) (1881).

⁸ *Morin*, 717 F.2d at 414.

⁹ *Id.* (alteration in original).

¹⁰ *Id.*

Morin erected the aluminum walls for the addition, but GM's authorized agent rejected the work on the ground that, when "viewed in bright sunlight from an acute angle the exterior siding did not give the impression of having a uniform finish."¹¹ Baystone then removed Morin's siding and hired another subcontractor to replace it, which the GM agent subsequently approved.¹² Baystone refused to pay Morin the balance of the contract price, \$23,000, causing Morin to bring suit and prevail at the district court. Then Baystone appealed to Posner's court.

III. PRINCIPAL ISSUE IN *MORIN*: INTERPRETATION OF A "SATISFACTION CLAUSE" UNDER INDIANA CONTRACT LAW

Morin focused on an issue at the intersection of the contract doctrines of interpretation and conditions. The provisions in the *Morin* contract quoted in the previous Part raise the issue of a so-called "satisfaction clause," which is a type of condition. I shall refer to the contract party whose obligations under the contract are conditioned on that party's or a third party's "satisfaction" as the "satisfaction-obligor." I shall refer to the other party as the "satisfaction-obligee." Recall that GM was the owner who hired the general contractor defendant Baystone, who in turn hired the subcontractor plaintiff Morin. In *Morin*, the contract made the GM agent the satisfaction-obligor and plaintiff Morin the satisfaction-obligee.

Initially, satisfaction clauses seemed to jurists to raise the danger of being "illusory promises" — speech acts that have the form of promises but actually commit the promisor to nothing. In other words, an illusory promise fails to provide consideration for the transaction. Today, settled law has worked out two main interpretive approaches to the potentially illusory (and therefore potentially unenforceable) promise in a satisfaction clause contract: One is to interpret a satisfaction clause under an "objective" or "reasonable person" standard. The other is a "subjective," "good faith," or "honest satisfaction" standard. Under the latter approach, the satisfaction-obligee has consideration even when the satisfaction-obligor's duties are conditioned on his or her personal aesthetics or fancy because the satisfaction-obligee has "bargained for the chance" that the aesthetic or fanciful judgment of the satisfaction-obligor will be satisfied with the obligee's performance.

The district judge in *Morin* gave a jury instruction that relied on an objective interpretation rule for the satisfaction clause in the disputed contract. As Posner framed it, the "only issue on appeal" was

¹¹ *Id.*

¹² *Id.*

the correctness of that jury instruction.¹³ He concluded that the instruction was indeed correct.¹⁴

IV. POSNER ON THE LAW APPLICABLE IN *MORIN*: A LOGICAL ANALYSIS

At the start of the opinion, Posner noted that the case was an appeal from a district court that sat in diversity jurisdiction and that the appeal “require[d] [the court] to interpret Indiana’s common law of contracts.”¹⁵ After reciting the facts and the principal issue in the case, Posner turned to the interpretive question: what rules are authoritatively endorsed in the contract law of Indiana?¹⁶

Posner, and the Indiana state contract law case on which he principally relied, identified two main approaches to interpreting satisfaction clauses. The first, which Posner and the Indiana case characterized as the majority position, provides two rules: a rule that offers a sufficient condition for using the objective interpretive standard and a rule that offers a sufficient condition for using the subjective interpretive standard. The second, which Posner and the Indiana case described as the minority position, provides a rule that offers only a sufficient condition for using the subjective standard.¹⁷

Jurisdictions (and the *Restatement*) whose rules can fairly be said to adopt the majority position nevertheless differ significantly in their precise logical elements. Posner characterized Indiana as having adopted (in *Indiana Tri-City Plaza Bowl, Inc. v. Estate of Glueck*¹⁸) the majority position, which, according to Posner, “conform[ed] to the position stated in [section 228 of the *Restatement*].”¹⁹ However, the rules in the Indiana case and the *Restatement* differ in their exact logical requirements, and the difference is potentially significant.

A. Comparing the Rules: A Critique from “Experience and Logic”

The text of section 228 of the *Restatement* provides only one (logically internally complex) sufficient condition for interpreting a satisfaction clause using an objective standard. Interpreted into its perspicuous logical form (that is, the form that makes clear exactly what the rule’s necessary and sufficient conditions are):

¹³ *Id.* at 416.

¹⁴ *Id.* at 414.

¹⁵ *Id.*

¹⁶ *Id.* at 415.

¹⁷ *See id.* at 414–15; *see also* *Ind. Tri-City Plaza Bowl, Inc. v. Estate of Glueck*, 422 N.E.2d 670, 675 (Ind. Ct. App. 1981).

¹⁸ 422 N.E.2d 670.

¹⁹ *Morin*, 717 F.2d at 414–15.

(1a) If [P] “it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied,” then [Q] “an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.”²⁰ [Structure of this rule: *If P then Q*]

Q reflects the *Restatement’s* commitment to the objective standard of interpretation when the antecedent of the rule, P, is true. Although the text of section 228 of the *Restatement* provides only a rule for applying the objective standard, comment a to section 228 provides a rule for applying the subjective interpretive standard. That rule, presented in its logically perspicuous form, is:

(1b) If [L] “the agreement leaves no doubt that it is only honest satisfaction that is meant and no more,” then [M] “it will be so interpreted, and the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied.”²¹ [*If L then M*]

Indiana Tri-City provides a pair of rules that are designed to address the same types of contracts contemplated in *Restatement* rules (1a) and (1b). The rules from *Indiana Tri-City*, presented in their logically perspicuous form, are:

(2a) If [R] “the contract involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge,”²² then [S] “the reasonable person standard is employed.”²³ [*If R then S*]

(2b) If [T] “the contract involves personal aesthetics or fancy,”²⁴ then [U] “[t]he standard of good faith is employed.”²⁵ [*If T then U*]

Restatement rules (1a) and (1b) differ significantly from *Indiana Tri-City* rules (2a) and (2b) even though both pairs reflect the majority position, which provides rules for both the objective and subjective interpretive approaches. The difference is that the *Indiana Tri-City* rules rely on a characterization of a type of contracted-for item (one that “involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge,” as distinguished from one that “involves personal aesthetics or fancy”). In contrast, the *Restatement* rules’ criteria are epistemic — they pertain not to some particular kind of item but to the confident judgment that a factfinder can make (contracts in which “it is practicable to determine whether a

²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 228 (1981). I am assuming that the scope of this rule covers cases in which there are satisfaction clauses, so I have not represented in the text the first prong of the rule in section 228 of the *Restatement*, namely, “[w]hen it is a condition of an obligor’s duty that he be satisfied with respect to the obligee’s performance or with respect to something else.” *Id.*

²¹ *Id.* § 228 cmt. a.

²² *Morin*, 717 F.2d at 415 (quoting *Ind. Tri-City*, 422 N.E.2d at 675).

²³ *Id.* (quoting *Ind. Tri-City*, 422 N.E.2d at 675) (internal quotation mark omitted).

²⁴ *Id.* (quoting *Ind. Tri-City*, 422 N.E.2d at 675) (internal quotation mark omitted).

²⁵ *Id.* (quoting *Ind. Tri-City*, 422 N.E.2d at 675).

reasonable person in the position of the obligor would be satisfied,” as distinguished from those contracts in which “the agreement leaves no doubt that it is only honest satisfaction that is meant and no more”). One might say that the Indiana rules are “item focused” while the *Restatement* rules are “judgment focused.” Although I cannot develop the point in sufficient detail here, one can use the logocratic method, drawing on considerations of both logic and experience, to defend the following claim: the item-focused Indiana rules are ill-suited to handle contracts that involve *both* “commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge” and “personal aesthetics or fancy.”²⁶

*B. Presumption, Analogy, Language, and Intent:
Primary and Secondary Arguments in Morin*

The heart of Posner’s argument, located in the final four (of eleven) paragraphs of the opinion, concerns a scheme in which a rebuttable

²⁶ At least since the early twentieth century, there have been many contracts that call for the production of “dual aspect” items in which aesthetics and utility are combined. The Bauhaus movement, which generated contracts for a wide variety of manufactured items, including buildings, furniture, and eating implements, is a leading example. Logically speaking, the problem with the item-focused Indiana rules (2a) and (2b) is that they presuppose another rule:

(3) If [R] the contract “involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge,” then it is *not* the case that [T] the contract “involves personal aesthetics or fancy.” [*If R then not-T*; this rule in turn is logically equivalent to “*If T then not-R*”].

Under this rule, R and T are, logically speaking, contrary propositions — if one is true then the other is false.

It seems reasonable to surmise that Indiana law is committed to rule (3) for two reasons. First, Indiana law also seems committed to the proposition that one may use a subjective standard to interpret a satisfaction clause if and only if one does not use an objective standard — that is, using the propositional variables offered above:

(4) [S] the reasonable person standard is employed if and only if not-[U] the standard of good faith is employed.

The *Indiana Tri-City* rules presuppose that S and U are *contradictory* propositions. Second, taken together, rules (2a), (2b), and (4) — each of which is asserted or presupposed by the *Indiana Tri-City* rules — logically imply rule (3).

Combined, *Indiana Tri-City* rules (2a), (2b), and (3) “rule out” the possibility that a single item can be such that T and R are both true (as in many Bauhaus designs). It is not clear how often this logical conclusion leads to untoward interpretations of satisfaction clause contracts because one would have to know — as I do not — how many dual aspect contracts have satisfaction clauses. But legal rules are designed to handle not only present but also future cases, and we can at least say that the *Indiana Tri-City* rules would lead to logically contradictory results in any dual aspect contract that does have a satisfaction clause. The *Restatement* rules are superior to the Indiana rules in that respect, even though they both instantiate the majority position (as defined in the text).

Finally, it’s worth briefly asking whether the *Morin* contract itself was of a dual aspect nature. Posner did not consider the possibility, and perhaps he would have rejected it as a logical impossibility. Even if the *Morin* contract did not itself have a dual aspect, I believe that the judgment-focused *Restatement* rules are superior to the item-focused Indiana rules. My critique of the analysis and outcome in *Morin* reflects my view.

presumption is fashioned to resolve the case by assessing the intent of the parties. Along the way, he offered a quick thought experiment, in the form of an argument by analogy, to show that not every satisfaction clause contract that calls for an assessment of “appearance” — as does the *Morin* contract — requires the factfinder to assess satisfaction under the subjective standard. This thought experiment seems effective but quite limited in its utility for resolving *Morin* because, as Posner himself noted, his analogy suggests “only that a requirement of reasonableness would be read into this [*Morin*] contract if it contained a standard owner’s satisfaction clause, which it did not”²⁷

Then comes the presumption rule. Posner described the presumption and the criterion that could rebut it according to the following scheme: The judge presumes that the satisfaction-obligee “would not have wanted to put himself at the mercy of the [satisfaction-obligor’s] whim.”²⁸ If that presumption is not rebutted, then “[t]he requirement of reasonableness is read into [the] contract,”²⁹ and if it is rebutted, then the subjective standard is used. When is the presumption rebutted? One rebuttal criterion Posner offered is that “the nature of the performance contracted for is such that there are no objective standards to guide the court.”³⁰ But to make such determinations, a court must assess the actual intentions of the parties (the reasonableness standard “is not read into every contract, because it is not always a reliable guide to the parties’ intentions”³¹). “[S]ince the ultimate touchstone of decision must be the intent of the parties to the contract, [the court] must consider the actual language they used.”³² Thus, more generally and more concisely, the presumption can be overcome when “it appear[s] from the language or circumstances of the contract that the parties really intended” to give the satisfaction-obligor the right to reject the satisfaction-obligee’s work for failure to satisfy the obligor’s personal fancy or aesthetic taste.³³

The discussion of the “language and circumstances of the contract,” and the inference of the parties’ intent Posner made therefrom, seem to me the most puzzling parts of the *Morin* opinion. Posner acknowledged that two clauses in the contract suggested that the parties indeed intended to have the contract judged according to the subjective satisfaction of the satisfaction-obligor, GM. Regarding the first of these clauses, Posner noted that “[t]he contract refer[red] explicitly to

²⁷ *Morin*, 717 F.2d at 416.

²⁸ *Id.* at 415.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 416.

³³ *Id.* at 417.

'artistic effect,' a choice of words that may seem deliberately designed to put the contract in the 'personal aesthetics' category whatever an outside observer might think."³⁴ (I shall refer to this contract clause as the "artistic effect" language.³⁵) Regarding the second clause, he observed that "[t]he other clause on which Baystone relie[d], relating to the quality or fitness of workmanship and materials, may seem all-encompassing."³⁶ (I shall refer to this contract clause as the "quality" language.³⁷) But for each clause taken as evidence of intent Posner offered arguments about the "circumstances" of the language that defeated the conclusion that the parties intended to use the subjective standard. Thus, he concluded that the presumption that parties intended the *objective* standard was *not* rebutted by the "language and circumstances" of this case and affirmed the objective standard jury instruction given by the trial judge.

I discern four distinct but related arguments used by Posner to reach this conclusion in the final four paragraphs of the opinion. I shall refer to these as the "ordinal" argument, the "form contract" argument, the "whim-premium" argument, and the "freedom of contract" argument. (One might also discern a "*contra proferentem*" argument, but only an implicit one.)

1. *The Ordinal and Form Contract Arguments.* — With respect to the artistic effect language, Posner noted that "the reference appears as number 17 in a list of conditions in a general purpose form contract."³⁸ Regarding the quality language, Posner observed that it "also was not drafted for this contract; it was incorporated by reference to another form contract, of which it is paragraph 35."³⁹

Consider first his observations about the seventeenth and thirty-fifth positions of these clauses. This is the "ordinal argument," which, when fairly unpacked from its enthymematic form,⁴⁰ seems to rely on the following major premise: the higher the ordinal number of a condition in a contract, the less important that condition is to a contracting party. If the artistic effect language had been third or fourth or tenth in a list of conditions, and if the quality language had been in the fifth or twelfth or twentieth — or indeed seventeenth! — paragraph, would Posner have adjusted the weight, accordingly, as evidence of the party's intent? Is there a good reason for the assumption that ani-

³⁴ *Id.* at 416.

³⁵ *See supra* p. 1125.

³⁶ *Morin*, 717 F.2d at 416.

³⁷ *See supra* p. 1125.

³⁸ *Morin*, 717 F.2d at 416.

³⁹ *Id.*

⁴⁰ On the reconstruction of enthymemes in legal arguments, see Brewer, *supra* note 6, at 984–87.

mates the major premise of this argument? That is, should the ordinal rank of a condition lead a judge (or jury) to discount its evidentiary value? Here is a reason to think not: many complex contracts have a great many conditions that are important to a party. Put another way, there seems no good reason to suppose that a contract cannot have more than five or ten or twenty conditions, all of which are *equally* important to a party. And obviously not all of them can be listed in the top five or ten or seventeen or twenty.

In addition to the ordinal argument, Posner noted that these clauses appeared in “form contracts.” Similar to the ordinal argument, the form contract argument, when unpacked, seems to rely on the following major premise: if a provision appears on a party’s general form contract, then that provision is less likely to be important to that contracting party than is a deal-specific provision. Is this premise warranted? Isn’t a central purpose of form contracts to allow a party (like GM, in this case) to produce a core contract that fits its needs in anticipated repeat transactions, thereby reducing legal and other costs and, most importantly for satisfaction clauses, allocating risk as it sees fit?⁴¹ Posner himself declared that in offering such an argument, “[w]e do not disparage form contracts, without which the commercial life of the nation would grind to a halt.”⁴² However, the form contract argument uses *the fact that language is repeated in a form* as a reason to devalue the probative value of that language for inferring intent, and therefore as a reason not to heed the condition apparently specified by that language. How else is one to understand this argument *except* as a “disparagement” of form contracts?

2. *The Whim-Premium Argument.* — This argument is central to what I take to be Posner’s “economic” approach to the rules in this case. The main point of this argument is to show that Morin (and maybe also Baystone) “would not have wanted to put [itself] at the mercy of the paying party’s whim”⁴³ — as it would do if the only constraint on GM’s satisfaction was reporting it in good faith. As noted previously, Posner fashioned the presumption rule from the majority position on interpreting satisfaction clauses endorsed by *Indiana Tri-City*. He explained the rationale for that rule as follows:

We do not understand the majority position to be paternalistic; and paternalism would be out of place in a case such as this, where the subcontractor is a substantial multistate enterprise. The requirement of reasonableness is read into a contract not to protect the weaker party but to

⁴¹ This point has long been recognized. See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 588 (1933).

⁴² *Morin*, 717 F.2d at 416.

⁴³ *Id.* at 415.

approximate what the parties would have expressly provided with respect to a contingency that they did not foresee, if they had foreseen it.⁴⁴

Near the end of the opinion, Posner put this rationale to work in the presumption argument:

[The jury instruction to use a reasonable person standard was correct] if, as we believe, the parties would have adopted it had they foreseen this dispute. It is unlikely that Morin intended to bind itself to a higher and perhaps unattainable standard of achieving whatever perfection of matching that General Motors' agent insisted on, or that General Motors would have required Baystone to submit to such a standard. Because it is difficult — maybe impossible — to achieve a uniform finish with mill-finish aluminum, Morin would have been running a considerable risk of rejection if it had agreed to such a condition, and it therefore could have been expected to demand a compensating increase in the contract price.⁴⁵

Insofar as paternalism is concerned, Posner seems to have read this contract in a way that he acknowledged was at odds with key parts of the contract's language. He did so to serve the supposed intent of a party (the satisfaction-obligee, Morin) who did not have the wherewithal to protect himself. Was he protecting Morin here, or Morin and Baystone? Or was he actually not protecting anyone, as he claimed, but simply supplying what all three of these actors would have intended had they foreseen that GM might not have been satisfied with Morin's work? In the text quoted above, Posner referred to what the "parties" would have intended. But is there any good reason to suppose that the interests of Baystone and Morin, or of Baystone and Morin and GM, would have been congruent and would have produced the same language even if they had foreseen something that they were supposed not to have foreseen? To be sure, "Morin would have been running a considerable risk of rejection if it had agreed to" a subjectively interpretable standard of satisfaction.⁴⁶ But what supports the claim that "General Motors would [not] have required Baystone to submit to such a standard"?⁴⁷ As noted, a primary value of a form contract for a company like GM is to allocate risk, and what better way to allocate risk than by means of a satisfaction clause that is interpreted using a subjective standard, limited only by "good faith"? Indeed, that is such an attractive way to allocate risk that it might lead a sufficiently savvy and powerful company to write provisions into form contracts that are designed to prevent a court from "second-

⁴⁴ *Id.*

⁴⁵ *Id.* at 416.

⁴⁶ *Id.*

⁴⁷ *Id.* Such a requirement would have had the predictable result that Baystone would have sought to impose any loss on Morin. Indeed, it seems that Baystone, with whom GM made the general contract, was able to pass some of the costs of its loss on to Morin, while completing the job with another subcontractor.

guess[ing] the buyer's rejection."⁴⁸ Isn't one left with the strong impression that the district judge and Posner's panel acted in a way that protects Morin against the "whim" of GM, presumably a larger and more powerful company, when Morin did not have the foresight or resources to protect itself? Is that not paternalism?

Posner's answer comes in the "premium" component of what I have called his "whim-premium" argument: that "Morin would have been running a considerable risk of rejection if it had agreed to [a subjectively interpreted satisfaction] condition, and it *therefore could have been expected to demand a compensating increase in the contract price.*"⁴⁹ This is one of the most puzzling arguments in *Morin*. The argument assumes away the possibility that GM was simply so powerful that it could take advantage of its superior bargaining power by imposing subjective satisfaction on Morin (and Baystone) without paying a premium. Several general doctrines of contract law, such as economic duress⁵⁰ and unconscionability, explicitly recognize that substantial disparities in bargaining power affect the contract terms to which unevenly matched parties agree. Posner offered no evidence from the record that this was not so here. A simpler explanation of why GM paid no premium for a subjective satisfaction clause would be that Morin was too weak to negotiate a better deal.

But did GM pay a premium? Posner adduced no evidence from the record (or from judicial notice) indicating contract prices for comparable contracts. That evidence is crucial to assessing whether or not GM paid a premium. Doesn't Posner's conclusion that the Morin contract "involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge"⁵¹ imply — or at least strongly suggest — that Posner believed that that kind of expert information would be available? And since so much turned on that question, why not remand for findings on that issue if there were no data in the record? Would this not have been a more cogent treatment of expert evidence than relying, as Posner did, on the supposed expertise of the district judge, "an experienced Indiana lawyer who thought this the type of contract where the buyer cannot unreasonably withhold approval of the seller's performance"?⁵²

⁴⁸ *Id.* at 415.

⁴⁹ *Id.* at 416 (emphasis added).

⁵⁰ See, e.g., *Selmer Co. v. Blackslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983) (Posner, J.).

⁵¹ *Morin*, 717 F.2d at 415 (quoting *Ind. Tri-City Plaza Bowl, Inc. v. Estate of Glueck*, 422 N.E.2d 670, 675 (Ind. Ct. App. 1981)).

⁵² *Id.* at 417. It is perhaps worth noting that, less than a decade after *Morin* was decided, the Supreme Court repudiated this kind of deference to a trial judge. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 234 (1991). But see Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975 (2004) (defending this type of deference).

3. *The Freedom of Contract (and Contra Proferentem?) Arguments.* — In a tone that seems almost defensive or apologetic, Posner's final paragraph in *Morin* offers the assurance that his conclusion does not "strike at the foundations of freedom of contract."⁵³

As I come to the end of my analysis of this absorbing opinion, let me sum up Posner's core arguments. Interpreting and applying state law, Posner fashioned a presumption rule. Under this rule, Posner presumed that the *Morin* contract's satisfaction clauses should be read using an objective standard, subject to rebuttal by evidence from the "language or circumstances." He observed that some notable language suggested use of a subjective standard, but that circumstances — the ordinal, form contract, and whim-premium arguments discussed in the two preceding sections — ought to lead one, as they led him, to discount the value of that language as evidence of intent.

An additional claim surfaced several times in the course of these other arguments — namely, that "circumstances suggest that the parties *probably* did not intend to subject *Morin's* rights to aesthetic whim";⁵⁴ that "[a]ll this is conjecture; we do not know how important the aesthetics were to General Motors when the contract was signed or how difficult it really would have been to obtain the uniformity of finish it desired";⁵⁵ and that "*we are left with more than a suspicion* that the artistic-effect and quality-fitness clauses in the form contract used here were not intended to cover the aesthetics of a mill-finish aluminum factory wall."⁵⁶ To my ear, these claims "sound" in *contra proferentem*, the doctrine of contract interpretation that directs a judge, when certain conditions are met, to interpret an ambiguous or vague contract provision against the interest of the drafter.

Posner did not say that he knew that subjective satisfaction was not intended. Instead, he repeatedly emphasized that he did not know but invoked a kind of interpretive tie breaker. In this way, the opinion reads as if *contra proferentem* was one important inferential device used to resolve the case. But if Posner was relying on *contra proferentem*, it would have been better to state clearly what he thought to be the applicable *contra proferentem* rule under Indiana law. This would have been especially useful since jurisdictions vary in their logical criteria for the rule. Sounder versions impose, as a logically necessary condition on reading against the interest of the drafter, that the contract be an "adhesion contract" or that the case be one in which "one party is in a stronger bargaining position."⁵⁷ If Indiana did not recog-

⁵³ *Morin*, 717 F.2d at 417.

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.* at 416.

⁵⁶ *Id.* (emphasis added).

⁵⁷ See, e.g., *Joyner v. Adams*, 361 S.E.2d 902, 906 (N.C. Ct. App. 1987).

nize such a restriction on the *contra proferentem* rule, then Posner would have been faced with applying, to resolve the case, an overtly “paternalistic” rule — although, said he (and one is hard pressed to disagree), “paternalism would be out of place in a case such as this, where the subcontractor is a substantial multistate enterprise.”⁵⁸

Does, then, the *Morin* analysis “strike at the foundations of freedom of contract”?⁵⁹ Posner claimed that it did not, because the parties were “free” to use language that, under the circumstances, provided evidence “that the parties really intended GM to have the right to reject Morin’s work for failure to satisfy the private aesthetic taste of General Motors’ representative.”⁶⁰ One might think that the *repeated* references in the *Morin* satisfaction clauses to what sounded like matters of taste in the artistic effect language and the quality language would have been enough.

But the strongest threat to “freedom of contract” in Posner’s analysis comes not from language that he tried to explain away, but in language that he quoted once and never returned to — to wit, “What is usual or customary in erecting other buildings shall in no wise enter into any consideration or decision.”⁶¹ Does not this language (added to the other “subjective-sounding” language) seem *designed* to block every single one of the arguments that Posner explicitly used to defend the conclusion that the objective approach was appropriate for this contract? (*Aliquando bonus dormitat Posnerus!*⁶²) The ordinal, form contract, and whim-premium arguments (which, as I have argued, I do not find convincing even apart from this “usual or customary” clause) *all* rely on generalizations about what other rational contracting actors would do or believe in similar circumstances with similar buildings. They all, that is, rely on generalizations about what is “usual or customary.” Alas, poor freedom of contract! *Morin* could have known it better!

⁵⁸ *Morin*, 717 F.2d at 415.

⁵⁹ *Id.* at 417.

⁶⁰ *Id.*

⁶¹ *Id.* at 414 (internal quotation mark omitted).

⁶² Having observed that Homer killed off a character only to have that character reappear, alive, later in one of his epics, the Latin poet Horace reports, “[I]ndignor quandoque bonus dormitat Homerus” (“I am indignant whenever worthy Homer drownses.”). HORACE, *ARS POETICA*, line 359, reprinted in HORACE, *THE ART OF POETRY* 32, 39 (Burton Raffel trans., 1974). Horace does go on in the next line to offer a modest defense of Homer on the ground that “[v]erum operi longo fas est obrepere somnum” (“Truly it is permitted for some drowsiness to creep into a long work.”). *Id.* line 360. Although *Morin* is not a long “work,” perhaps Cervantes offers a better explanation that one might deploy, given the valuable and vast body of Posner’s work: “[F]or if *aliquando* [“even”] *bonus dormitat Homerus*, [critics] ought to stop and think how wide-awake he had to be, most of the time, to make his book cast so much light and so little shade” MIGUEL DE CERVANTES, *DON QUIJOTE* 379 (Diana de Armas Wilson ed., Burton Raffel trans., 1999) (citation omitted).