

2008

Beyond Black's and Webster's: The Persuasive Value of Thesauri in Legal Research and Writing

Brian Craig

Beyond *Black's* and *Webster's*: The Persuasive Value of Thesauri in Legal Research and Writing

By Brian Craig

Brian Craig is an attorney at Thomson-West in Eagan, Minn., and an adjunct legal writing instructor at the University of Minnesota Law School.¹

I. Introduction

The U.S. Supreme Court has increasingly relied on dictionaries² and numerous articles have discussed the persuasive value of dictionaries to construe statutes, contracts, and patent claims.³ Despite this extensive theoretical literature, a dearth of scholarly literature remains on the efficacy of thesauri in the legal framework. This article discusses the value of thesauri, in conjunction with dictionaries, as persuasive secondary sources to ascertain the plain and ordinary meaning of words and phrases. Based on empirical research, this article examines the frequency of opinions that cite to thesauri from 1990 to 2006. The article also provides a review of opinions where courts found thesauri persuasive and unpersuasive in construing statutes, regulations, and contracts. Finally, the article discusses the benefits of using thesauri in legal research.

Peter Mark Roget created and published the first modern day thesaurus in 1852 with the *Thesaurus*

of English Words and Phrases.⁴ The word *thesaurus* comes from the word *treasure* in Latin. The Merriam-Webster Dictionary defines a thesaurus as “a book of words or of information about a particular field or set of concepts; especially: a book of words and their synonyms.”⁵ Many modern day thesauri bear Peter Roget’s name, including *Roget’s International Thesaurus*, *Roget’s II: The New Thesaurus*, *Roget’s New Millennium Thesaurus*, and *Roget’s 21st Century Thesaurus*. Other popular general thesauri include *Webster’s Collegiate Thesaurus*, *Webster’s New World Thesaurus*, *Webster’s New Dictionary of Synonyms*, the *Random House Thesaurus*, and Rodale’s *The Synonym Finder*. *Burton’s Legal Thesaurus* and *West’s® Legal Thesaurus/Dictionary* are the two leading legal thesauri.⁶

Since the English language has a wealth of synonyms, a thesaurus can help to identify synonyms for certain terms. One source identified 223 different terms for the word *marijuana* and noted that Eskimos reputedly have 22 different words for *snow*.⁷

Judges in the American legal system have cited to thesauri in judicial opinions for many years. The earliest known reference to *Roget’s Thesaurus* in a

“This article discusses the value of thesauri, in conjunction with dictionaries, as persuasive secondary sources to ascertain the plain and ordinary meaning of words and phrases.”

¹ The views expressed in this article do not necessarily represent the views of Thomson-West or any of its employees.

² Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1440 (1994). For example, the 1992 Term had a fourteenfold increase in citations to dictionary definitions over the 1981 Term. *Id.* at 1438.

³ See Jason Weinstein, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. Mich. J.L. Reform 649 (2005); Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 Fordham L. Rev. 2177 (2003); Scott A. Turk, *The Proper Method for Using Dictionaries to Construe Patent Claims*, 6 Chi.-Kent J. Intell. Prop. 43 (2006); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 Buff. L. Rev. 227 (1999); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 334 (1998).

⁴ Bryon Cahill, *The Perfect Word—It’s Out There*, 29 Writing! 22, Feb. 1, 2006.

⁵ Merriam-Webster Online Dictionary, <mw1.merriam-webster.com/dictionary/thesaurus> (last visited Aug. 31, 2007).

⁶ *Ballentine’s Legal Dictionary and Thesaurus* and *Ballentine’s Thesaurus for Legal Research and Writing* are the only other known legal thesauri. Only one unreported case has cited *Ballentine’s Legal Dictionary and Thesaurus*. See *Smith v. City of Hartford*, 2000 WL 1058877, at *15 (Conn. Super. Ct. July 14, 2000). No reported opinions have cited *Ballentine’s Thesaurus for Legal Research and Writing*.

⁷ *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997) (citing Esther Lewin & Albert E. Lewin, *The Thesaurus of Slang* 243 (1994)).

“Since words are the tools of the lawyer’s craft, legal writers should employ all resources, including thesauri, to find the meaning of terms in the English language.”

reported case occurred in 1857 in Maryland.⁸ Early American courts consulted thesauri along with dictionaries to find the plain meaning of words. This form of analysis whereby courts consult thesauri in conjunction with dictionaries continues in modern jurisprudence.

Courts and judges have addressed the benefits of using thesauri in legal analysis. In the foreword to *Burton’s Legal Thesaurus*, U.S. Supreme Court Justice William O. Douglas observed:

In the English language, each word may have several meanings. Often, it is the use of a specific word or term upon which a case or controversy may hinge. Only by using precise language can the waters remain clear and unmuddied allowing justice to take its course unfettered by those who would mislead or misrepresent. It is through the use of such a tool as the Legal Thesaurus that one may find the precise term to fit the nuances of a particular situation.⁹

Since words are the tools of the lawyer’s craft, legal writers should employ all resources, including thesauri, to find the meaning of terms in the English language.

II. Methodology and Results

A. Methodology

The empirical study included in this article consists of comprehensive data derived from U.S. federal and state court reported opinions from 1990 through 2006 that explicitly cite to thesauri.

To determine the frequency of judicial opinions that cite thesauri, searches were conducted in the Westlaw® All Federal and State Cases database (ALLCASES). Prior empirical research has previously been conducted using Westlaw. Similar searches were also conducted on LexisNexis® to confirm the results. Specific references to thesauri

were identified to determine the number of cases that cite to each thesaurus in the study corresponding to calendar years from 1990 to 2006.

Thesauri with fewer than three references were excluded from the study. All unpublished cases were also excluded from the analysis. Furthermore, the study excludes those opinions that merely mention the word *thesaurus* or an unspecified version of *Roget’s Thesaurus* without reference to one of the specific thesauri in the study. The results in Table 1 do not distinguish between the different editions of a thesaurus with the same name. For example, the column for *Roget’s International Thesaurus* in Table 1 includes references to the third, fourth, and fifth editions. Likewise, references to *Burton’s Legal Thesaurus* also include citations to any edition, including the 1980, 1992, and 1998 editions. Any references to the *Merriam-Webster Collegiate Thesaurus* are included with citations to *Webster’s Collegiate Thesaurus*. In Table 2, results show the frequency of citations to legal thesauri, including specific citations for all three editions of *Burton’s Legal Thesaurus*. Where a single opinion cites to the same thesaurus more than once, only one reference is included. The citations include references to thesauri in any portion of the opinion, including concurring and dissenting opinions. The references include instances where courts found thesauri both persuasive and unpersuasive. Further analysis of specific cases where courts found thesauri persuasive and unpersuasive is provided below. The Westlaw queries, conducted on August 31, 2007, are on file with the author.

B. Results of Empirical Study

The results of the empirical study demonstrate that courts have increasingly relied on thesauri since 1990. Other studies have noted the increased reliance on dictionaries by the U.S. Supreme Court.¹⁰ It seems a logical extension that courts have also increasingly relied on thesauri since dictionaries and thesauri are both common reference books for the English

⁸ *New England Car Spring Co. v. Baltimore & Ohio R.R. Co.*, 11 Md. 81 (1857).

⁹ William O. Douglas, Foreword to *Burton’s Legal Thesaurus* xi (1980).

¹⁰ See Thumma & Kirchmeier, *supra* note 3.

language. From 1991 to 1996, the mean annual number of reported cases that cited to any of the thesauri in the study was 16. From 2001 to 2006, the mean annual number of reported cases that cited to any of the thesauri in the study was 22. Although this upward trend is not large, the results show that judges increasingly rely on thesauri.

The empirical study also analyzes which specific thesauri courts cite most frequently. One measure of a source's impact and influence is the frequency with which courts cite that source.¹¹ Table 1 shows that courts cited to *Roget's International Thesaurus* more than any other thesaurus between 1990 to 2006 with 52 total references. *Roget's II: The New Thesaurus* was the second most popular nonlegal thesaurus with 38 total citations. *Webster's Collegiate Thesaurus* (including references to the *Merriam-Webster Collegiate Thesaurus*) and *The Synonym Finder* tied for third among the most popular general thesauri over the past 16 years.

As shown in Table 2, which shows explicit citations to legal thesauri from 1990 to 2006, courts cited to *Burton's Legal Thesaurus* more frequently than *West's Legal Thesaurus/Dictionary*. Fifty reported opinions cited to *Burton's Legal Thesaurus* while courts cited to *West's Legal Thesaurus/Dictionary* in 30 separate opinions. Since 2001, courts have particularly favored *Burton's Legal Thesaurus*. From 2001 to 2006, courts cited to *Burton's Legal Thesaurus* in 23 opinions compared to eight references to *West's Legal Thesaurus/Dictionary*. Based on the frequency of citations, this nearly threefold disparity in the frequency of reported cases between *Burton's Legal Thesaurus* and *West's Legal Thesaurus/Dictionary* over the past five years affirms *Burton's Legal Thesaurus* as the leading legal thesaurus.

The empirical data demonstrates that courts have increasingly relied on legal and nonlegal thesauri as persuasive secondary sources. Although courts have cited *Burton's Legal Thesaurus* and *Roget's International Thesaurus* most frequently over the past 15 years, legal writers should also consider the benefits of consulting other thesauri including *Roget's II: The New Thesaurus*, *Roget's New Millennium Thesaurus*, *Roget's 21st Century Thesaurus*, *Webster's Collegiate Thesaurus*, *Webster's New World Thesaurus*, *Webster's New Dictionary of Synonyms*, *Merriam-Webster's Online Thesaurus*, *Random House Thesaurus*, *The Synonym Finder*, and *West's Legal Thesaurus/Dictionary*.

III. Treatment by the U.S. Supreme Court

As the highest court in the land, the U.S. Supreme Court serves as standard-bearer of American jurisprudence and lower courts respond to guidance and trends from the U.S. Supreme Court.¹² The U.S. Supreme Court has explicitly cited to thesauri to determine the meaning of specific words in three separate opinions. In *McLaughlin v. Richland Shoe Co.*, Justice Stevens cited to *Roget's International Thesaurus* to ascertain the meaning of the word *willful*.¹³ Stevens wrote that “the word ‘willful’ is considered synonymous with such words as ‘voluntary,’ ‘deliberate,’ and ‘intentional.’”¹⁴ In *McLaughlin*, Justices Rehnquist, White, O'Connor, Scalia, and Kennedy joined Justice Stevens in delivering the opinion of the court.

Besides Justice Stevens, Justice Scalia is the only other justice to explicitly cite to a thesaurus in a U.S. Supreme Court opinion.¹⁵ Other commentators have previously observed that

“The U.S. Supreme Court has explicitly cited to thesauri to determine the meaning of specific words in three separate opinions.”

¹¹ See Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 Fla. St. U. L. Rev. 1331, 1332 n.7 (2005) (noting that “[v]arious types of citation analysis have been used for decades in the legal community to gauge the impact of books, law review articles, court decisions, or judges, among other things”).

¹² See Sarah A. Maguire, *Precedent and Procedural Due Process: Policymaking in the Federal Courts*, 84 U. Det. Mercy L. Rev. 99, 100 (2007).

¹³ 486 U.S. 128, 133, 108 S. Ct. 1677, 1681 (1988).

¹⁴ *Id.*

¹⁵ Based on a Westlaw search for the term *thesaurus* in the All U.S. Supreme Court Cases database (SCT) on Aug. 31, 2007.

“When a state legislature fails to define a statutory term, courts often apply the ordinary meaning of the term as found in the dictionary.”

Justice Scalia frequently cites to dictionaries and *Roget's Thesaurus* in textual legal analysis.¹⁶ A search for the term *thesaurus* in opinions written by Justice Scalia yields two cases.¹⁷ In one opinion in which he concurred in part and dissented in part, Justice Scalia cited to *Roget's International Thesaurus* to find the plain and ordinary meaning of the adverb *regularly*, writing that it “can mean ‘constantly, continually, steadily, sustainedly.’”¹⁸ In another dissenting opinion, Scalia cited to *Roget's Thesaurus of Synonyms and Antonyms* to construe the term *compile*.¹⁹

While the U.S. Supreme Court has not extensively relied on thesauri, a review of opinions indicates that some justices, particularly Justices Stevens and Scalia, will look to thesauri as persuasive secondary sources in certain situations.

IV. Selected Cases Where Courts Found Thesauri Persuasive

When a state legislature fails to define a statutory term, courts often apply the ordinary meaning of the term as found in the dictionary. Although courts routinely look to dictionaries such as *The Merriam-Webster Dictionary* or *Black's Law Dictionary**, the question remains open on whether thesauri can serve as helpful secondary sources when trying to determine the plain and ordinary meaning of words in constitutions, statutes, regulations, and contracts.

A. Construction of Statutes and Constitutional Provisions

In construing statutory provisions, courts may consult dictionaries in use at the time the statute was enacted. A thesaurus can also serve as an

appropriate source to ascertain the ordinary, plain, and usual meaning of undefined terms.

A number of state courts have relied on *Roget's International Thesaurus* as an aid in finding the plain and ordinary meaning of terms in statutory construction. The Iowa Supreme Court looked to *Roget's International Thesaurus* along with dictionaries to find the plain and ordinary meaning of the terms *policy-making duties*, which the Iowa Legislature failed to define in the Iowa open meetings law.²⁰ The Louisiana Supreme Court also relied on *Roget's International Thesaurus* to conclude that the words *imminent* and *impending* in a statute are synonymous.²¹ Meanwhile, the Washington Supreme Court also cited to *Roget's International Thesaurus* to conclude that the words *arising from* are synonymous with the words *resulting from*.²² *Roget's International Thesaurus* provides helpful guidance to determine the plain meaning of state statutes by the court of last resort in many states.²³

Federal courts have also consulted *Roget's International Thesaurus*, especially to determine the meaning of the word *willful* or *willfulness*. Following the U.S. Supreme Court's reference to *Roget's International Thesaurus* to arrive at the meaning of the word *willfulness* in *McLaughlin v. Richland Shoe Co.*, the U.S. Courts of Appeals for the Second, Fourth, and Fifth Circuits have also cited *Roget's International Thesaurus* to find the common usage of the word *willful* or *willfulness*.²⁴ After the U.S. Supreme Court consults a specific thesaurus to find the meaning of a particular term, other courts

¹⁶ See 3 *Sutherland Statutory Construction* § 65A:10 (6th ed.); Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 *Harv. J.L. & Pub. Pol'y* 401, 407 (1994).

¹⁷ Based on a Westlaw search for *ju(scalia) & thesaurus* in the All U.S. Supreme Court Cases database (SCT) on Aug. 31, 2007.

¹⁸ *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 259, 110 S. Ct. 596, 623 (1990).

¹⁹ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 162, 110 S. Ct. 471, 480 (1989).

²⁰ *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 354 (Iowa 2005).

²¹ *Garza v. Delta Tau Delta Fraternity Nat.*, 948 So. 2d 84, 93 (La. 2006).

²² *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 435 (Wash. 1977).

²³ See also *Lockhart v. Cedar Rapids Cmty. Sch. Dist.*, 577 N.W.2d 845, 847 (Iowa 1998); *State ex rel. Kroger Co. v. Indus. Comm'n of Ohio*, 687 N.E.2d 768, 771 (Ohio 1998).

²⁴ See *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 43 (2d Cir. 1989); *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 110 (4th Cir. 1988); *Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217, 218 (5th Cir. 1992).

will likely follow the Court's lead and look to that same thesaurus to find the meaning of that same term.

Courts also rely on *Burton's Legal Thesaurus* to find the meaning of terms not expressly defined in statutes. The Tenth Circuit cited *Burton's Legal Thesaurus* to construe a provision not defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).²⁵ In construing the meaning of the term *monitoring*, the Tenth Circuit held that a term not defined in a statute must be construed in accordance with its ordinary and natural meaning.²⁶ The court stated: "[t]he verb 'monitor' is generally synonymous with audit, check, control, inspect, investigate, observe, oversee, regulate, review, scrutinize, study, survey, test and watch."²⁷

In a concurring opinion, one Alabama Supreme Court justice consulted a thesaurus in construing a provision found in the Alabama Constitution.²⁸ To find the meaning of the term *interested* as used in Ala. Const. art. IV, § 93, which prevents the state from being placed in business enterprises in competition with private individuals or corporations, Justice Houston opined:

[N]owhere can I find any authority to support the majority's contention that the phrase "[to] be interested in" is synonymous with the phrase "to be in competition with." *The Oxford Thesaurus*, American Edition 242 (1992), does not list "compete" as a synonym of "interested," nor does it list "interested" as a synonym of "compete," pp. 70–71.²⁹

The lack of a synonymous term in a thesaurus can also assist the court in determining the plain meaning of a specific word.

Federal courts have also relied on the Merriam-Webster Online Thesaurus to find the plain meaning of words found in statutes where Congress has failed to provide express definitions. Two bankruptcy court judges cited to the Merriam-Webster Online Thesaurus to find the meaning of the terms *subject to* under 11 U.S.C. § 521.³⁰ The Fifth Circuit also cited to the Merriam-Webster Online Thesaurus to construe the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).³¹ Relying on the online thesaurus, the Fifth Circuit recognized that the terms *plausible* and *credible* do not have identical definitions.³²

Courts have utilized other thesauri, including the *Random House Thesaurus* and *Roget's New Millennium Thesaurus*, as aids in statutory construction. The Tenth Circuit relied on synonyms found in the *Random House Thesaurus* for the term *modify* to conclude that the term *modify* as used in 18 U.S.C. § 1818(i)(2)(F), is ambiguous.³³ The Mississippi Supreme Court consulted *Roget's New Millennium Thesaurus* in a 2007 opinion in which the court found that synonyms for the word *duly* include "appropriately," "fitly," "properly," and "suitably."³⁴

While thesauri do not serve as the definitive source to interpret statutes, several courts have relied on thesauri, especially *Roget's International Thesaurus* and *Burton's Legal Thesaurus*, as aids in statutory construction.

B. Construction of Regulations and Other Agency Actions

Like dictionaries, thesauri can also provide guidance in construing regulations and other

“Courts have utilized other thesauri, including the *Random House Thesaurus* and *Roget's New Millennium Thesaurus*, as aids in statutory construction.”

²⁵ See *Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 569 (10th Cir. 1996).

²⁶ See *id.*

²⁷ *Id.* at 569.

²⁸ *Ex parte Alabama Alcoholic Beverage Control Bd.*, 683 So. 2d 952, 959 (Ala. 1996).

²⁹ *Id.* at 959.

³⁰ *In re Jackson*, 348 B.R. 487, 497 (Bankr. S.D. Iowa 2006). See also *In re Brickey*, 363 B.R. 59, 64 (Bankr. N.D.N.Y. 2007).

³¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See *Pondexter v. Dretke*, 346 F.3d 142, 149 (5th Cir. 2003).

³² *Id.* at 149.

³³ *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1147 (10th Cir. 1997).

³⁴ *Cousin v. Enter. Leasing Co.-S. Cent., Inc.*, 948 So. 2d 1287, 1293 (Miss. 2007).

“Since thesauri are akin to dictionaries, courts also employ thesauri to find synonyms to find the plain and ordinary meaning of terms in contracts.”

actions by administrative agencies. It is well settled that it is appropriate to consult dictionaries to discern the ordinary meaning of a term not explicitly defined by regulation. Authority also exists for the use of thesauri to determine the plain and ordinary meaning of words in regulations where the administrative agency fails to provide an express definition.

The Tax Court of Indiana referenced the utility in consulting thesauri to find the plain and ordinary meaning of terms appearing in regulations and agency bulletins.³⁵ The opinion states that where “specific words or phrases used in the statutes, regulations or documents like the bulletin in question are not defined, [the court] will strive to give those words or phrases their plain, ordinary and usual meanings ... [and a] myriad of dictionaries and *thesauri*—both general and specialized—are available to assist the taxpayer in ferreting out a word’s or phrase’s meaning.”³⁶ Furthermore, the opinion states, “[t]he Court also reminds Counsel ... that today’s word processing programs often have a thesaurus feature for ease of reference in assisting the writer in fleshing out the meaning of a word or phrase.”³⁷

The Eleventh Circuit also cited to a thesaurus to find the meaning of the term *frivolous* to determine whether an alien filed a frivolous application for asylum. The court noted that “[s]ynonyms for frivolous are ‘carefree, fanciful, fickle, giddy, flippant, nonchalant.’ Roget, International Thesaurus (3d ed.1965). ... Here we think that the record very clearly reflects that [petitioner] was sincere, albeit fraudulent, in his application. He was not nonchalant or flip.”³⁸

³⁵ *CDI, Inc. v. State Bd. of Tax Comm’rs*, 725 N.E.2d 1015, 1022 (Ind. Tax. 2000).

³⁶ *Id.* (emphasis added).

³⁷ *Id.* See also *Korotko-Hatch v. John G. Shedd Aquarium*, 65 F. Supp. 2d 789, 801 (N.D. Ill. 1999) where a U.S. magistrate judge consulted the thesaurus in the court’s computerized word-processing program, Corel® WordPerfect®, Version 8.0, to find synonyms for the terms *youthful* and *academic*.

³⁸ *Barreto-Claro v. U.S. Atty. Gen.* 275 F.3d 1334, 1339 (11th Cir. 2001). For further discussion by the Eleventh Circuit of the efficacy of thesauri, see Part V. Selected Cases Where Courts Found Thesauri Unpersuasive, *infra*.

In the construction of administrative regulations and other administrative agency actions, thesauri can serve as persuasive resources to find the plain and ordinary meaning of certain words and phrases.

C. Construction of Contracts

Thesauri can also assist in the interpretation of words and phrases found in contracts and agreements. In searching for the meaning of contractual terms, courts often resort to the dictionary to ascertain a term’s common meaning. Since thesauri are akin to dictionaries, courts also employ thesauri to find synonyms to find the plain and ordinary meaning of terms in contracts.

In a 2002 opinion, the Eleventh Circuit cited thesauri to construe terms not expressly defined in contracts.³⁹ The court researched synonyms found in two thesauri to find the meaning of the word *expense*, which the court considered the crucial word in the disputed terms “health care expenses” in a contract. The court consulted *Roget’s International Thesaurus* and the Merriam Webster Online Thesaurus and found that synonyms for expense include expenditure, cost, outlay, and disbursement.

The Third and Ninth Circuits have also cited thesauri to construe contracts. The Third Circuit cited *Burton’s Legal Thesaurus* and dictionaries to find the meaning of the terms *eligible* and *entitled*.⁴⁰ The Ninth Circuit also cited *Burton’s Legal Thesaurus* and dictionaries to find the meaning of the phrase “no longer” used in a contract.⁴¹

Courts of last resort in several states have found synonyms helpful and persuasive in construing contracts. The Oklahoma Supreme Court cited *Webster’s New World Dictionary and Thesaurus* in construing the word *jurisdiction* where the court noted that synonyms for jurisdiction include

³⁹ *Vencor Hosps. v. Blue Cross Blue Shield of Rhode Island*, 284 F.3d 1174, 1181 (11th Cir. 2002).

⁴⁰ *Local Union No. 1992, Int’l Bd. of Elec. Workers v. Okonite Co.*, 189 F.3d 339, 350 (3d Cir. 1999).

⁴¹ *United Food & Commercial Workers Union Local 1119 v. United Markets, Inc.*, 784 F.2d 1413, 1416 (9th Cir. 1986).

authority, range, supervision, and control.⁴² The Wyoming Supreme Court consulted *Burton's Legal Thesaurus* and found that one of the synonyms for *satisfy* is *settle* in construing the phrase “fully satisfied” in a contract construction action.⁴³

Federal and state courts alike have consulted a variety of thesauri to find the plain meaning of words when construing contracts.

V. Selected Cases Where Courts Found Thesauri Unpersuasive

Although thesauri can serve as helpful secondary sources to determine the plain and ordinary meaning of words, courts do not always find thesauri persuasive. Legal writers should use some caution when relying on thesauri as persuasive resources in briefs.

In *Price v. Time, Inc.*,⁴⁴ the Eleventh Circuit outright rejected the efficacy of thesauri in determining a word's plain meaning and instead relied especially on *Black's Law Dictionary* and other standard reference works. To argue that the term *newspaper* included magazines such as *Sports Illustrated* in the Alabama shield law, the defendants in *Price* cited to *Roget's 21st Century Thesaurus in Dictionary Form* and *Merriam-Webster's Collegiate Thesaurus* because those books list *magazine* as one synonym of *newspaper*. The court found fault with counsel's “selective synonymizing” since other thesauri not cited by defendants fail to list the term *magazine* as a synonym for *newspaper*.⁴⁵ The *Price* court continued with its rejection of thesauri:

More fundamentally, a thesaurus is not a dictionary. It does not purport to define words but instead suggests synonyms and antonyms. A synonym is not a definition because words that are similar can, and often do, have distinct

meanings. To illustrate the problems with the definition-by-thesauri approach, we note that the listing of “newspaper” that the defendants cite from *Roget's 21st Century Thesaurus in Dictionary Form*, *supra*, also indicates that “scandal sheet” is a synonym of “newspaper.” *Id.* at 573. We doubt that most publishers of newspapers or magazines would define their product as a scandal sheet. Another example of the perils of using a thesaurus to define can be found when one looks up “lawyer.” Among the listed synonyms in one thesaurus are “fixer,” “mouthpiece,” “ambulance chaser,” and “shyster.” *Roget's International Thesaurus*, *supra*, at 422–23. We doubt that counsel would concede that those synonyms define lawyers.⁴⁶

Based on this strong language in *Price*, counsel should consider the possible ramifications of citing to thesauri in briefs, especially where different thesauri provide inconsistent results. Although the *Price* decision does not outright reject the use of thesauri in all circumstances, counsel writing a brief before the U.S. Court of Appeals for the Eleventh Circuit should check entries in multiple thesauri before citing to a thesaurus to avoid “selective synonymizing.”

While some courts have rejected the utility of thesauri and found them unpersuasive in certain cases, no authority exists that outright prohibits the use of thesauri as a helpful resource to find the plain and ordinary meaning of terms.

VI. Using Thesauri in Legal Research

Along with the persuasive value of thesauri as authoritative secondary sources, a thesaurus can also help those who conduct legal research. One author wrote that “often a thesaurus is more helpful for a writer than a dictionary, because the thesaurus uses information the writer already knows as a reference point.”⁴⁷ Another article suggests that

“Although thesauri can serve as helpful secondary sources to determine the plain and ordinary meaning of words, courts do not always find thesauri persuasive.”

⁴² M.J. Lee Constr. Co. v. Oklahoma Transp. Auth., 125 P.3d 1205, 1214 (Okla. 2005).

⁴³ Hayes v. Am. Nat'l Bank of Powell, 784 P.2d 599, 609 (Wyo. 1989).

⁴⁴ 416 F.3d 1327, 1336–1338 (11th Cir. 2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Paul F. Kirgis, *Lawyer's Bookshelf*, 72 N.Y. St. B.J. 50, 52–53 (2000) (reviewing Jo Ann Harris et al., *New York Evidence with Objections* (1999)).

“Print and online thesauri can also assist those who conduct legal research to find and use the appropriate terms for effective searching.”

“[e]ven knowledgeable professionals occasionally need an encyclopedia, thesaurus, dictionary, or other general reference to serve as a springboard to further investigation or guide a creative problem-solving initiative.”⁴⁸ Another commentator recognized the value of thesauri, especially legal thesauri: “Just like a regular thesaurus, a legal thesaurus provides alternate terms for a specific word or phrase. This can greatly aid researchers who may not be aware of the legal terminology in the area in which they are researching.”⁴⁹ In further support of legal thesauri as helpful resources, the Library of Congress assigns legal thesauri the KF classification for U.S. legal authorities.

Thesauri and dictionaries can assist legal researchers in finding synonymous and related search terms to expand the search parameters. For example, *Burton’s Legal Thesaurus* lists “deliberate,” “inflexible,” “intractable,” “obstinate,” and “unyielding” as synonyms for the term *willful*.⁵⁰ *Black’s Law Dictionary* lists “act of nature,” “act of providence,” “superior force,” “vis major,” “irresistible superhuman force,” and “vis divina” as related terms for *act of God*.⁵¹ These synonyms can assist the legal researcher. An article in the *Law Library Journal* also identifies thesauri as useful legal reference tools along with dictionaries.⁵²

Researchers can also use online thesauri to find synonyms and alternative terms not previously considered. Both Westlaw and LexisNexis have an online thesaurus feature to search for synonyms and related terms. The online thesaurus and related terms feature on LexisNexis contains data from the *Burton’s Legal Thesaurus* and *Webster’s Collegiate Thesaurus*. In addition to a standard thesaurus feature, Westlaw also has a Smart Tools® feature to

improve search results by suggesting synonyms and related legal terms. Legal researchers can also search leading thesauri for free on the Internet.

Print and online thesauri can also assist those who conduct legal research to find and use the appropriate terms for effective searching.

VII. Conclusion

Although the synonyms found in thesauri are not determinative, legal professionals should consider the value of thesauri as helpful and persuasive secondary sources, in conjunction with dictionaries, to ascertain the plain and ordinary meaning of particular words found in statutes, regulations, and contracts.

Table 1
Frequency of Citations to Thesauri
U.S. Federal and State Cases (1990–2006)

Legend

- A: *Roget’s International Thesaurus*
- B: *Roget’s II: The New Thesaurus*
- C: *Roget’s New Millennium Thesaurus*
- D: *Roget’s 21st Century Thesaurus*
- E: *Burton’s Legal Thesaurus*
- F: *Webster’s Collegiate Thesaurus*
- G: *Webster’s New World Thesaurus*
- H: *Webster’s New Dictionary of Synonyms*
- I: *Random House Thesaurus*
- J: *The Synonym Finder*
- K: *West’s Legal Thesaurus/Dictionary*
- L: *Oxford Dictionary and Thesaurus*
- M: *Oxford Thesaurus: American Edition*
- N: *Merriam-Webster Online Thesaurus*

⁴⁸ William H. Ginsburg, *Problems in Health Care Law (7th Edition)*, 18 J. Legal Med. 395, 396 (1997).

⁴⁹ William A. Hilyerd, *Using the Law Library: A Guide for Educators Part IV: Secondary Sources to the Rescue*, 34 J.L. & Educ. 273, 279 (2005).

⁵⁰ *Burton’s Legal Thesaurus* 600 (2006).

⁵¹ *Black’s Law Dictionary* 37 (8th ed. 2004).

⁵² *Standards for Appellate Court Libraries and State Law Libraries*, 98 Law Libr. J. 189, 198 (2006).

Table 1

Year	A	B	C	D	E	F	G	H	I	J	K	L	M	N	Total
2006	3	2	5	0	4	3	0	0	0	2	2	1	0	1	23
2005	5	3	2	1	6	4	0	0	0	0	1	0	0	0	22
2004	2	4	2	1	2	1	0	0	1	1	0	3	0	0	17
2003	3	2	0	0	5	0	1	0	0	0	2	0	0	1	14
2002	3	3	0	0	3	3	1	0	1	0	3	1	0	0	18
2001	3	2	0	1	3	2	3	1	0	0	0	1	0	0	16
2000	3	2	0	1	1	0	1	0	0	1	3	2	0	1	15
1999	3	4	0	1	4	0	0	0	1	1	2	0	0	0	16
1998	2	2	0	1	3	1	0	0	0	0	3	1	0	0	13
1997	1	1	0	0	4	1	1	0	2	2	1	1	1	0	15
1996	1	0	0	3	2	0	0	1	0	0	0	0	1	0	8
1995	1	3	0	0	1	0	2	0	0	1	0	0	0	0	8
1994	4	0	0	1	2	1	0	2	0	2	2	0	0	0	14
1993	2	4	0	0	2	0	1	0	0	1	1	0	1	0	12
1992	11	2	0	0	2	1	0	1	1	3	4	0	0	0	25
1991	3	2	0	0	3	2	0	1	1	0	1	0	0	0	13
1990	2	2	0	0	3	0	0	1	0	5	5	0	0	0	18
Total	52	38	9	10	50	19	10	7	7	19	30	10	3	3	267

Table 2

Year	A	B	C	D	E
2006	4	1	2	1	2
2005	6	5	0	1	1
2004	2	1	1	0	0
2003	5	1	1	3	2
2002	3	1	2	0	3
2001	3	1	0	2	0
2000	1	0	0	1	3
1999	4	0	0	4	2
1998	3	0	1	2	3
1997	4	0	1	3	1
1996	2	0	0	2	0
1995	1	0	1	0	0
1994	2	0	1	1	2
1993	2	0	0	2	1
1992	2	0	0	2	4
1991	3	0	0	3	1
1990	3	0	0	3	5
Total	50	10	10	30	30

Table 2
Frequency of Citations to Legal Thesauri
U.S. Federal and State Cases (1990–2006)

Legend

- A: *Burton’s Legal Thesaurus* (all editions)
- B: *Burton’s Legal Thesaurus* (3d ed. 1998)
- C: *Burton’s Legal Thesaurus* (2d ed. 1992)
- D: *Burton’s Legal Thesaurus* (1980)
- E: *West’s Legal Thesaurus/Dictionary*

© 2008 Brian Craig