



ONCE UPON A CAR

A TALE OF THREE AMBIGUITIES

Mark Cooney

THIS IS THE STORY of an expensive syllable – of a legal drafter’s apparent dissatisfaction with a simple word that would have nailed meaning shut. It’s about how inconsistency and loose syntax can feed uncertainty, sometimes for decades.

Is it possible for a ten-word sentence to suffer from three different types of ambiguity? Yes, it is. Welcome to the standard auto-insurance definition of *occupying*.

THE SENTENCE

Auto-insurance coverage may, under standard industry forms, depend on whether an accident victim was “occupying” a vehicle when injured. The forms’ definition of *occupying* reads, with occasional (minor) variations, like this:

“Occupying” means in, upon, getting in, on, out or off.¹

Mark Cooney is a Professor at Western Michigan University Thomas M. Cooley Law School. Copyright 2017 Mark Cooney.

¹ PL-6000 3-87 and PP 00 01 06 94 Ins. Services Office, Inc. (1994), www1.maine.gov/pfr/insurance/PC_Compare/PAP/Concord/PP000164.pdf; *see also* Nadeau v. OBE Specialty Ins. Co., No. CV146053383S, 2015 WL 7421805, at *1 (Conn. Super. Ct. Nov. 2, 2015); Westfield Ins. Co. v. Ken’s Serv., 815 N.W.2d 786, 788 (Mich. Ct. App. 2012); Hartford Underwriters Ins. Co. v. Cincinnati Ins. Co., No. 1:09CV-00267-JGM, 2011 WL 90319, at *3 (D. Vt. Jan. 11, 2011); U.S. Fid. & Cas. Co. v. Goudeau, 272 S.W.3d 603, 606 (Tex. 2008); Liberty Mut. Ins. Co. v. Drouin, 554 F. Supp. 2d 1339, 1341 (S.D. Fla. 2008); Lambert v. Coregis Ins. Co., 950 So. 2d 1156, 1159 (Ala. 2006); Ins. Co. of Pa. v. Pearson, No. 07-03-0340-CV, 2004 WL 2053285, at *2 (Tex. Ct. App. Sept. 7, 2004).

This definition is simple unless you think about it. As one appellate panel put it, “[a]lthough the term ‘occupying’ as defined in the insurance contract may not seem ambiguous on its face, it often becomes ambiguous” when applied to certain facts.²

Let’s dissect the definition and see how, in just ten words, it gives rise to semantic ambiguity, contextual ambiguity, and, to a lesser degree, syntactic ambiguity.

SEMANTIC AMBIGUITY

I first encountered our *occupying* definition after a man was sideswiped while preparing to change a flat tire. He’d gotten out of his friend’s car minutes earlier, and he was near the tire – and less than a foot from the car – when hit. He sought benefits under his friend’s auto policy, and coverage hinged on whether he was *occupying* his friend’s car when injured.

Looking back at the definition with those facts in mind, you’ll see that our *occupying* definition posed a troubling question from the outset: *occupying* includes being “upon” a vehicle. But what does *upon* mean? Was a man standing next to a car – but not quite touching it – *upon* the car?

Upon . . . Upon . . .

It’s a four-letter word, after all. Every struggle that the parties, their attorneys, and the courts had with this definition was ultimately a struggle to unearth the exact – or appropriate – meaning of *upon*. Again, the injured man wasn’t touching the insured car when hit, but he was less than a foot away. Just six inches away, he said. . . . *Upon?*

Ambiguity exists when language forces readers to choose between two or more possible meanings – to do, in essence, an interpretive coin flip.³ Semantic ambiguity arises when a word has more than one possible meaning.⁴ A classic example is the word *sanctioned*:

- The board *sanctioned* his conduct.

Did the board authorize his conduct? Affirm it? (A good thing.) Or did the board punish him, as when a court sanctions an attorney for filing a frivolous lawsuit? (A bad thing – for the attorney, at least.)

² *Etter v. Travelers Ins. Cos.*, 657 N.E.2d 298, 300 (Ohio Ct. App. 1995).

³ Stephen L. Sepinuck & John Francis Hilson, *Transactional Skills: How to Structure and Document a Deal* 146 (2015).

⁴ *Id.* at 148.

Once upon a Car

Context usually resolves semantic ambiguity. (The board sanctioned the doctor's clinical trials, finding that they fell within the proper scope of his hospital privileges.) And my *sanctioned* example – a contronym with meanings on opposite poles – is unusual. Semantic ambiguity is more often about different shades of meaning, which brings us back to our *occupying* definition – and back to *upon*.

Upon is ripe for semantic ambiguity, given its various shades or degrees of possible meaning – even when limited to notions of physical proximity:

- I sat *upon* the bench, counting butterflies. (The bench is fully and directly supporting the speaker's body.)
- “Fly! The enemy is *upon* us!”⁵ (The Elf-lord Glorfindel cries out in alarm as mounted wraiths close in on Frodo Baggins's party.)

A more docile example:

- At the path's end, we came *upon* a lovely brook that shimmered in sunlight. (The speaker could be five feet from the brook.)

Dictionaries attest to these semantic shades. *Merriam-Webster.com* defines *upon* to mean, quite simply, “on.” Likewise, *WordReference.com* defines *upon* as “up and on.” *YourDictionary.com* notes that *upon* is a “somewhat elevated” version of *on* and is “generally interchangeable” with *on*.

So *upon* is a synonym for *on*, right? Yes. Easy enough.

But *upon*'s meaning doesn't end there. These same dictionaries embrace the broader meaning, too. For instance, *Merriam-Webster.com* also defines *upon* to mean that “someone or something is very close.” *WordReference.com* adds “in or into proximity with in time or space.” *Dictionary.com* includes “approximate contact” as a possible meaning.

So again, what does it mean to be *upon* a car? Is someone six inches away from a car, preparing to change a flat tire, *upon* the car? The dictionaries give no definitive answer. In fact, they only underscore the ambiguity. You can pick your definition.

The insurer naturally argued that *upon* means *on*. And a person who isn't touching a car can hardly be *on* the car. Even getting knocked or

⁵ J.R.R. Tolkien, *The Fellowship of the Ring* 207 (Houghton Mifflin Co. 1966) (italics added).

pinned against it for a second doesn't put a person *on* the car. And, said the insurer, isn't that really the core meaning of *upon*? Isn't it the same as *on*?

The plaintiff's attorney seized on the word's broader meaning, arguing that the plaintiff was *upon* the car while standing just inches from it. In other words, he played up the "very close" sense of the word – the "approximate contact" or "into proximity with" sense.

Some courts have done the same. After reviewing *upon*'s competing dictionary definitions, a California court complained that the *occupying* definition "does not clarify whether . . . 'upon' is intended to convey the narrower sense of contact with a surface or a broader meaning of close physical proximity."⁶ Siding with a line of cases interpreting *upon* to mean "more than direct physical contact with the insured vehicle," the court held that a man who'd earlier helped a passenger out of a van was *upon* the van while standing a foot outside the passenger door, speaking to the driver.⁷

Likewise, an Ohio court stated that "[i]nclusion of such words as 'upon' in the definition of 'occupying' is meant to expand the terms in the definition beyond 'in,' 'on,' 'getting in,' and 'getting out' of the vehicle."⁸ Thus, in Ohio a person is *upon* an insured vehicle if he or she is "within a reasonable geographic perimeter and ha[s] a relationship with" the vehicle.⁹

An Illinois court (applying a slightly different version of the definition) held that a motorist was *upon* his car when he got out for two or three minutes, stood two to three feet in front of the car to write down his license number, and was injured when the car got rear-ended and pushed into him. After noting *upon*'s ambiguity, the court declared that the word must have been included to enlarge the concept of *occupancy*:

[I]t is the use of the word "upon" which creates an ambiguity. It cannot mean that the insured, to be within the meaning of the clause, had to be couched on the roof of the car or on the running board or sitting on the hood. It must connote some physical relationship between himself and the car that enlarged the area defined by the words "entering or alighting" and the word "in."¹⁰

⁶ Atlantic Mut. Ins. Co. v. Ruiz, 20 Cal. Rptr. 3d 628, 633-34 (Ct. App. 2004).

⁷ *Id.* at 636, 639.

⁸ Morris v. Continental Ins. Cos., 594 N.E.2d 1106, 1109 (Ohio Ct. App. 1991).

⁹ *Id.* at 1109-10.

¹⁰ Wolf v. American Cas. Co. of Reading, 118 N.E.2d 777, 780 (Ill. App. Ct. 1954).

Once upon a Car

As you might expect, other courts have gravitated to the narrower view of *upon*, refusing to bite on the word's broader meaning.¹¹ This despite the adage about construing ambiguous contract terms against the drafter.

Semantic ambiguity. Flip the coin.

But the ambiguity thickens . . .

CONTEXTUAL AMBIGUITY

I said above that the flat-tire case was about semantic ambiguity – about the meaning of *upon*. And I suppose it was. Yet after some time and thought, I finally and truly grasped the other devil in this diabolical *occupying* definition: contextual ambiguity.

Contextual ambiguity is typically caused by inconsistent language choices within the same document or related documents.¹² It's the banana peel dropped by drafters who fail to consistently – ruthlessly – use the same term to refer to the same thing.

For instance, if a lease repeatedly refers to *outbuildings* but later throws in a reference to *ancillary structures*, shouldn't a reader presume that the meaning is different? After all, if the drafter had intended the same meaning, he or she would have used the same term, right?

So the argument goes that if the drafter of our *occupying* definition (“in, upon, getting in, on, out or off”) had intended for *upon* to mean *on*, then the drafter surely would have used the same word – *on* – just as in the nearby phrase *getting on*. This consistent word choice would have signaled a consistent meaning.

Instead, the drafter's presumably conscious decision to use *upon* in one breath but *on* in the next opened the door to ambiguity: it invited the argument that in this definition, *upon* is not synonymous with *on* but instead carries the broader “very close” or “approximate contact” meaning. This interpretation expands the concept of occupancy and thus expands the policy's potential coverage.

In short, the drafter's addition of the single syllable *up-* to the simple word *on* created an inconsistency with real consequences. A single syllable,

¹¹ See, e.g., *Short v. Midwest Family Mut. Ins. Co.*, 602 N.W.2d 914, 916 (Minn. 1999) (opining that broader definitions of *upon* and *on* are merely figurative).

¹² *Sepinuck & Hilson*, *supra* note 3, at 150-51.

yes – but far from an academic triviality. In the flat-tire case, years of brainache, not to mention mounting costs and attorney fees, arose from this lapse in consistency, leaving the fuzzy *upon* in a place where the drafter really meant, I’m convinced, to say *on*. Contextual ambiguity – and here, contextual ambiguity conspiring with semantic ambiguity.

Consistent use of the word *on* would have left little room for debate:

“Occupying” means in; on; or getting in, on, out, or off.

And you aren’t *on* a car when you aren’t touching it. Oh, sure, some lawyers might give that a go. In at least one case, the plaintiff (unsuccessfully) argued that *on* includes nearness or close proximity, as in “a house on the lake.”¹³ But the opportunity for artful advocacy (or a bad-faith reading) is dramatically curtailed when a drafter remains consistent and says what he or she means.

SYNTACTIC AMBIGUITY

My first look at cases interpreting our *occupying* definition quickly revealed disputes arising from yet another type of ambiguity: syntactic ambiguity. This is, by far, the easiest type of ambiguity to resolve here, but that’s not usually the case.

Syntactic ambiguity, as the label suggests, arises from syntax, meaning the way in which words are arranged and relate in a sentence.¹⁴

Modifiers are often the culprit. For instance, if a statute applies only to *licensed healthcare facilities and caregivers*, do the caregivers need to be licensed? Probably. But maybe not. The question, of course, is whether the leading (prepositive) modifier *licensed* modifies only *healthcare facilities* or modifies both *healthcare facilities* and *caregivers*. Does it reach – modify – both series items or just the single item that immediately follows it?

Returning to our *occupying* definition, we see an example of mild syntactic ambiguity caused by a leading modifier. See whether it jumps out at you:

“Occupying” means in, upon, getting in, on, out or off.

Does the modifier *getting* modify all four series items that follow it or just the first? In other words, does this series mean *getting in, getting on,*

¹³ *Short*, 602 N.W.2d at 916.

¹⁴ *Id.* at 152.

Once upon a Car

getting out, or *getting off*? Or do the words *on*, *out*, and *off* act independently, without any connection to *getting*?

If *getting* modifies only the first word that trails it – *in* – then the entire definition would, when tabulated, mean this:

- You are occupying a vehicle if
- you are *in* the vehicle
 - you are *upon* the vehicle
 - you are *getting in* the vehicle
 - you are *on* the vehicle
 - you are *out* of the vehicle, or
 - you are *off* the vehicle

While the flow of this tabulation might lull us momentarily, a closer inspection shakes us to our senses; tabulation, as it so often does, unravels the modifier mystery. If *getting* modified only *in*, that would leave an arguable repeat of concepts (*upon* the vehicle and *on* the vehicle – as discussed above). It would also leave two nonsensical items suggesting occupancy when a person is *out* of the vehicle or *off* the vehicle.¹⁵

Not surprisingly, courts have construed the definition to mean that *getting* modifies each of the words that follow it: *in*, *on*, *out*, and *off*.¹⁶

There was another culprit in our little syntax dilemma. Our original *occupying* definition, despite being just ten words, contains a series within a series. The entire definition is a three-item series, but the third series item is itself a four-item series: the *getting* series.

Readers can survive this degree of complexity only if the drafter throws a life preserver. When resorting to a complicated series – such as a series in which one item (or more) has an internal comma – the drafter should at least use semicolons to separate the series items.¹⁷ Though drafters shouldn't view punctuation as an ambiguity elixir, our original *occupying* definition would be easier to understand with semicolons dividing the main series items:

¹⁵ Lambert v. Coregis Ins. Co., 950 So. 2d 1156, 1160 (Ala. 2006).

¹⁶ See, e.g., *id.*; see also Ins. Co. of Pa. v. Pearson, No. 07-03-0340-CV, 2004 WL 2053285, at *3 (Tex. Ct. App. Sept. 7, 2004) (implicitly adopting this interpretation: “In essence, getting in, getting on, getting off and getting out connote not only action *immediately* directed towards entering or exiting the auto but also an ongoing yet incomplete process.”).

¹⁷ Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 1.18 (3d ed. 2013).

“Occupying” means in; [on]; or getting in, on, out, or off.

Perfect? No. A bit easier? Yes. This would have gone a long way to resolving whether the word *getting* modifies all the prepositions that follow it. A vertical list would have been even better:

- (1) “Occupying” means:
 - (a) in;
 - (b) [on]; or
 - (c) getting in, on, out, or off.

Although a vertical list can be a potent antidote to syntactic ambiguity, it isn’t a cure-all when, as here, there’s an embedded series or the drafter’s word choices cloud meaning. For our *occupying* definition, clarity will come from revisiting both language and organization – and thinking more carefully about the definition’s meaning.

REDESIGNING THE CHASSIS

Sometimes legal drafters should step back from the words and consider structural changes to promote clarity. The clearest documents reflect more than sensible, consistent word choices. Besides thoughtful document design and large-scale organization, careful organization within a single provision – structural syntax, one might call it – can dramatically enhance clarity. We started that process above by experimenting with a vertical list.

Our *occupying* definition begs for a stronger tie between visual structure and substantive meaning. If you scrutinize the definition and ponder its meaning, you eventually see that it captures two scenarios – two distinct continuums. Here’s the original definition again:

“Occupying” means in, upon, getting in, on, out or off.

A bit of analytical prospecting reveals the first and more obvious continuum: getting in, being in, and getting out of a vehicle. This scenario emerges from the italicized words below:

“Occupying” means *in*, upon, *getting in*, on, [*getting*] out or off.

Makes sense. We get in our cars to use them, stay in them while driving, and then get out after we’ve parked at our destination. So far, so good.

Once upon a Car

But that doesn't capture a second common scenario. Often, motorists get *on* insured vehicles rather than getting *in* them. Consider pickup trucks with uncovered flatbeds, or flat utility trailers. People get *on* those flatbeds and utility trailers to load firewood and secure boats and so on. They don't get *in* them, at least not in the traditional sense.

And this explains the second continuum. Using the original policy language and sticking with the pickup-truck example, you'd be *occupying* a pickup truck while *getting on* the flatbed, while *upon* the flatbed, and while *getting off* the flatbed. This continuum emerges from the definition's alternative series items:

“Occupying” means in, *upon*, getting in, [*getting*] on, out or [*getting*] off.

Yet the drafter added another layer of haze between reader and meaning by opting for a complex horizontal series that blurred these distinct continuums. The original definition offers readers no signals at all, no distinguishing features. In fact, the drafter separated related terms rather than grouping them together. Words were sprinkled about with little regard for how easily readers could appreciate their relationship. With a quick, rough tabulation, we start to see through the haze:

You are occupying a vehicle if you are

- (a) getting in, in, or getting out of the vehicle; or
- (b) getting on, [on], or getting off the vehicle (e.g., a flatbed/trailer).

Looking at the definition in this way ends the confusion. Given this and all the other issues we've considered, here's how the standard auto-insurance policy might define *occupying*:

“Occupying” means:

- (a) getting in, in, or getting out; or
- (b) getting on, on, or getting off.

This version separates and makes obvious the two possible *occupancy* continuums. It also uses the word *on* to discourage a broader close-is-good-enough reading of the definition. That *on* word choice also promotes consistency and thus reinforces the drafter's intended meaning.

I should acknowledge that some industry definitions of *occupying* look a bit more like our redraft than the version we've referred to throughout this article. For instance, one industry form uses a vertical list as we did above, which helps with syntax. Yet it retains that nagging *upon* and thus leaves semantic and contextual ambiguity. Note how the word *on* appears just a few breaths after *upon*, once again tempting *upon*'s broader construction:

“Occupying” means:

1. In;
2. Upon; or
3. Getting in, on, out or off.¹⁸

That version also fails to plainly lay out the two parallel continuums.

Another version seems more straightforward at first glance – but only because it omits any reference to getting on or off:

Occupying – means in, upon, entering into, or getting out of.¹⁹

And while this change removes the contextual ambiguity that's so troubling in the longer version we've been working with, we're still left with the pure semantic ambiguity that comes from using the more elevated *upon* instead of the direct *on*.

In short, these alternatives still have unnecessary gray smudges.

WHAT DROVE THE DRAFTER?

Given that *upon* opens the door to so much interpretive mischief, it's natural to wonder why the drafter of the original *occupying* definition wrote *upon* instead of *on* even though he or she presumably meant *on* (and had used *on* elsewhere). As is so often the case, that long-past drafting choice lives on in succeeding generations, apparently unquestioned.

Maybe it was just loose drafting – a simple oversight. But indulge me this flight of speculation: the original drafter wrote *upon* instead of *on* because he or she couldn't resist – just couldn't shake, even if subconsciously – the temptation to dress up the language a bit. Apparently unconvinced of

¹⁸ PP 00 01 01 05, ISO Properties, Inc. (2003), www.independentagent.com/Education/VU/SiteAssets/Documents/ISO/PP/PP00010105.pdf.

¹⁹ Mass. Auto. Ins. Policy, Auto. Insurers Bureau (2015), www.aib.org/contentpages/DocumentView.aspx?DocId=2930.

Once upon a Car

the intrinsic beauty of insurance forms, the drafter sneaked in an extra syllable to add a modest air of poetry to the definition of *occupying* an auto. As *YourDictionary.com* observed, *upon* is a “somewhat elevated” version of *on*.

And once again we see the weakness of needlessly elevated language.

No amount of clarity will stop lawyers from being lawyers – from making the best arguments they can. Yet a quick glance at the cited cases (and there are more that I haven’t cited) leaves no doubt that thousands of client dollars have been spilled, across the nation, because the drafter chose the more flowery *upon* instead of the more direct, simple, and consistent *on*.

That ill-fated word choice – and its deviation from the nearby *on* – gave us two parts of the ambiguity triad. (The *getting* series gave us the third.) This was hardly a gift to judges, lawyers, insurers, or injured motorists. But it was, to be sure, a gift to drafting professors looking for cautionary examples.

WHAT’S UNDER THE HOOD? (A FINAL WORD)

Some readers may bristle at the restrictiveness of my restyled *occupancy* definition. Note that I’ve offered no opinion on the merits – on how the standard policy *should*, in a substantive sense, define *occupancy*. That’s a completely different article, and one having nothing to do with my midlife drafting obsession.

Some readers might think that a person doing roadside repairs – changing a flat tire, for instance – ought to fall within the *occupying* definition while busy at the task, even when not touching the vehicle. Maybe so. Perhaps the standard definition should be redrafted to reflect that. But that’s a decision for insurers, legislators, consumer-advocacy groups, and others to work out.

Whatever the intended coverage, let the writing express it as clearly as possible, bringing to bear every tool for clear, unambiguous drafting – and recognizing that there will always be the odd case that tests language’s boundaries.

