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2003 SENATE JUDICIARY

SB 2264

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Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2264

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 02/04/03

Tape Number	Side A	Side B	Meter #
2	X		19.4 - 48.1
4	X		21.0 - 40
Committee Clerk Signature	Mona L Solberg		

Minutes: **Senator John T. Traynor, Chairman,** called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with testimony on the bill:

Testimony Support of SB 2264

Senator Dwayne Much - District 19, Introduced the Bill (meter 19.6)

Paul Sanderson - Attorney with Zuger Kirmis & Smith, Bismarck, representing ND Domestic Insurance Companies. (meter 20.4) Read Testimony-Attachment 1a.

Senator Thomas L. Trenbeath asked how long this law has been in on the record (meter 27.5) Discussion of this and what other states have done. Senator John T. Traynor, Chairman asked if this bill was intended to look into the mind of a person? No clear standard.

Rob Hovland - Chairman ND Domestic Insurance Assoc. - Rep 10 Companies (meter 30.4)

1991 - 1995 151% Loss Ratio

1995 - 2000 175% Loss Ratio

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2000 - 2001 340% Loss Ratio

Several companies have left state or stop writing property insurance, creating a hard market for consumers. Discussed a house bill. This bill is an alternative to try to alleviate the raise of prices.

Sited UND vs. Western National Case (meter 33.5)

Mr. Hovland stated that perhaps the ND Supreme Court is looking for guidelines such as this for there rulings. Insurance should be as clear when purchasing as when a claim is made. Discussion of the adhesion principle.

Senator Thomas L. Trenbeath questioned how we could possible change a bill that we have still not yet defined "reasonable expectations. Discussion

Request was made by the committee if Steve Bitz (Judicial Intern) to try and find the definition for reasonable.

Testimony in opposition of SB 2264

none

Testimony Neutral to SB 2264

none

Senator John T. Traynor, Chairman closed the hearing

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Minutes: **Senator John T. Traynor, Chairman,** called the afternoon meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill:

Committee reviewed Steve Bitz - Judicial Intern, Corpus Juris Secundum on Reasonable Expectation - Attachment #2

Discussed why our supreme court has rejected this debate. Senator Thomas L. Trenbeath discussed how he would like the insurance company/bill to define what they are trying to exclude

Senator John T. Traynor, Chairman Closed the committee work session

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2264

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 02/05/03

Tape Number	Side A	Side B	Meter #
1	X		21.0 - 31.9
Committee Clerk Signature Moira L Solberg			

Minutes: **Senator John T. Traynor, Chairman,** called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill:

Senator John T. Traynor, Chairman reviewed previous discussion on bill. Discussion of looking for a better definition, if that is possible? (meter 26) Senators that that this definition was a "moving target"

Steve Bitz - Judicial Intern, submitted requested information - Attachment #1, Corpus Juris Secundum on Reasonable Expectation.

Motion Made to DO NOT PASS SB 2264 by Senator Dick Dever and seconded by Senator Thomas L. Trenbeath.

Roll Call Vote: 6 Yes. 0 No. 0 Absent

Motion Passed

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Floor Assignment: Senator Thomas L. Trenbeath

Senator John T. Traynor, Chairman closed the hearing

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10/21/03
Date

Date: February 5, 2003
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2264

Senate **JUDICIARY** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number ______

Action Taken DO NOT PASS

Motion Made By Senator Dick Dever Seconded By Senator Thomas L. Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	X	
Sen. Stanley. Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) SIX (6) No ZERO (0)

Absent ZERO (0)

Floor Assignment Senator Thomas L. Trenbeath

If the vote is on an amendment, briefly indicate intent:

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[signature] 10/21/03
Operator's Signature Date

REPORT OF STANDING COMMITTEE (410)
February 5, 2003 12:48 p.m.

Module No: SR-22-1709
Carrier: Trenbeath
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2264: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2264 was placed on the Eleventh order on the calendar.

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2003 TESTIMONY

SB 2264

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Steve Bitz #1

45 C.J.S. Insurance § 363

Corpus Juris Secundum
Database updated August 2002

Insurance
X. Construction and Operation
A. General Considerations
1. General Rules of Construction

Topic Contents List of Topics

§ 363. --REASONABLE EXPECTATION

In construing insurance contracts, some authorities rule that the objectively reasonable expectations of the parties must be fulfilled.

Research References

West's Key Number Digest, Insurance ⇨1817

A fundamental principle of insurance law is to fulfill the objectively reasonable expectations of the parties to an insurance contract. [FN47] However, the doctrine is a rule of construction that acknowledges the usual disparity between the buying power of the insurance company and the party covered and the fact that insurance contracts are generally contracts of adhesion. [FN48] Thus, under some authorities, the insurance contract should be interpreted in accordance with the objectively [FN49] reasonable expectations of the covered party, [FN50] intended beneficiaries, [FN51] and other third persons, [FN52] even if the contract language is not necessarily ambiguous. [FN53] Under some authority, it is the expectations of the purchaser of the policy rather than of the person on behalf of whom the claim is made that is considered. [FN54] These reasonable expectations will be enforced even though a painstaking study of the policy would have negated those expectations. [FN55]

The reasonableness of a covered party's expectations must be evaluated according to the sophistication of the average policyholder, [FN56] and the expectations to be realized must be those that have been induced by the making of a promise. [FN57] They may be established by proof of the underlying negotiations, [FN58] or inferred from the circumstances. [FN59]

Under some authorities, the doctrine of reasonable expectation is applicable where, and only where, the policy language is ambiguous, [FN60] or a hidden major exclusion exists in the policy, [FN61] or where the provision in question is bizarre or oppressive [FN62] or unusual or unexpected, [FN63] eviscerates terms explicitly agreed to, [FN64] or eliminates the dominant purpose of the transaction. [FN65] The doctrine is applicable in limited situations where a standardized contract has unambiguous boilerplate terms, [FN66] such as where some activity which can reasonably be attributed to the insurance company would create an objective impression of coverage in the mind of the reasonable covered party, [FN67] even if such coverage is expressly and unambiguously denied by the policy. [FN68]

The doctrine is inapplicable if an ordinary layperson would not misunderstand the policy's coverage, and there are no circumstances attributable to the insurance company which would foster average expectations, [FN69] and where there is no disparity in bargaining power between the insurance company and the covered party. [FN70] Furthermore, where a covered party has an opportunity to purchase broader coverage but instead chooses to rely on a more limited policy, he cannot claim

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broader coverage on the narrower policy on the grounds of reasonable expectation. [FN71]
Some authorities hold that, under the reasonable expectation doctrine, ambiguities are to be construed in favor of the covered party and against the insurance company. [FN72] Similarly, where hidden pitfalls in policy language conflict with the covered party's reasonable expectations, such language should not be applied to defeat coverage. [FN73]
The reasonable expectations doctrine has not been adopted by all authorities. [FN74]

CUMULATIVE SUPPLEMENT:

Cases:

Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 169 F.3d 43 (1st Cir. 1999).
Haber v. St. Paul Guardian Ins. Co., 137 F.3d 691 (2d Cir. 1998).
Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co. of Maryland, 741 F. Supp. 515 (D.N.J. 1990).
Cobra Products, Inc. v. Federal Ins. Co., 317 N.J. Super. 392, 722 A.2d 545 (App. Div. 1998).
Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352 (Iowa 1995).
Ruggerio Ambulance Service, Inc. v. National Grange Ins. Co., 430 Mass. 794, 724 N.E.2d 295 (2000).
Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756 (Minn. Ct. App. 1999).
Kellar v. American Family Mut. Ins. Co., 987 S.W.2d 452 (Mo. Ct. App. W.D. 1999).
Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co., 959 S.W.2d 864 (Mo. Ct. App. E.D. 1997).
Max True Plastering Co. v. U.S. Fidelity and Guar. Co., 1996 OK 28, 912 P.2d 861 (Okla. 1996).

[FN47]. N.J.--Werner Industries, Inc. v. First State Ins. Co., 548 A.2d 188, 112 N.J. 30.

Goal

U.S.--Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co. of Maryland, D.N.J., 741 F.Supp. 515, reconsideration denied 744 F.Supp. 1311.

[FN48]. Mo.--Spychalski v. MFA Life Ins. Co., App., 620 S.W.2d 388.
Wyo.--St. Paul Fire and Marine Ins. Co. v. Albany County School Dist. No. 1, 763 P.2d 1255.

[FN49]. Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437. Iowa--West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262.
Mo.--Spychalski v. MFA Life Ins. Co., App., 620 S.W.2d 388.

[FN50]. U.S.--Insurance Co. of North America v. Gibralco, Inc., C.A.9(Cal.), 847 F.2d 530--Enterprise Tools, Inc. v. Export-Import Bank of U.S., C.A.8(Ark.), 799 F.2d 437, certiorari denied 107 S.Ct. 1569, 480 U.S. 931, 94 L.Ed.2d 761.
Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437.
Cal.--Waranch v. Gulf Ins. Co., 2 Dist., 266 Cal.Rptr. 827, 218 C.A.3d 356, opinion modified.
Idaho--Mutual of Enumclaw Ins. Co. v. Wood By-Products, Inc., 695 P.2d 409, 107 Idaho 1024.
Iowa--West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262.
Mass.--Hazen Paper Co. v. U.S. Fidelity and Guar. Co., 555 N.E.2d 576, 407 Mass. 689.
Mo.--Krombach v. Mayflower Ins. Co., Ltd., App., 785 S.W.2d 728.
Neb.--Central Waste Systems, Inc. v. Granite State Ins. Co., 437 N.W.2d 496, 231 Neb. 640.
Nev.--National Union Fire Ins. Co. v. Caesars Palace Hotel and Casino, 792 P.2d 1129, 106 Nev. 330.
N.J.--Stiefel v. Bayly, Martin and Fay of Connecticut, Inc., 577 A.2d 1303, 242 N.J.Super. 643.

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Pa.--DiFabio v. Centaur Ins. Co., 531 A.2d 1141, 366 Pa.Super. 590.

Purpose of doctrine

Doctrine of reasonable expectations is a recognition that there is an inequality in bargaining power between the insurance company and insured, that a typical layperson is not able to read and understand insurance policies, that people purchase insurance in reliance on others to provide a policy that meets their needs.
Minn.--National Indem. Co. of Minnesota v. Ness, App., 457 N.W.2d 755, review denied.

Character of doctrine

Reasonable expectations doctrine is a principle of **insurance** contract construction and not an independent cause of action.
Minn.--Peterson v. Brown, App., 457 N.W.2d 745, review denied.

[FN51]. Ind.--Property Owners Ins. Co. v. Hack, App. 1 Dist., 559 N.E.2d 396.
Iowa--West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262.

[FN52]. Ind.--Property Owners Ins. Co. v. Hack, App. 1 Dist., 559 N.E.2d 396.

[FN53]. U.S.--Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co. of Maryland, D.N.J., 741 F.Supp. 515, reconsideration denied 744 F.Supp. 1311.

[FN54]. Conn.--Travelers Ins. Co. v. Kulla, 579 A.2d 525, 216 Conn. 390.

[FN55]. Iowa--Aid (Mut.) Ins. v. Steffen, 423 N.W.2d 189.
Minn.--Grinnell Mut. Reinsurance Co. v. Wasmuth, App., 432 N.W.2d 495, review denied.
W.Va.--National Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 177 W.Va. 734.

[FN56]. U.S.--Totedo by Union Nat. Bank of Pittsburgh v. Bankers Life and Cas. Co., W.D.Pa., 670 F.Supp. 148.

[FN57]. Ariz.--State Farm Fire & Cas. Co. v. Powers By and Through Fleming, App., 786 P.2d 1064, 163 Ariz. 213.

[FN58]. Iowa--Aid (Mut.) Ins. v. Steffen, 423 N.W.2d 189.

[FN59]. Iowa--Aid (Mut.) Ins. v. Steffen, 423 N.W.2d 189.

[FN60]. Cal.--Watamura v. State Farm Fire and Cas. Co., 2 Dist., 253 Cal.Rptr. 555, 206 C.A.3d 369.
Idaho--Mutual of Enumclaw Ins. Co. v. Wood By-Products, Inc., 695 P.2d 409, 107 Idaho 1024.
Minn.--Centennial Ins. Co. v. Zylberberg, App., 422 N.W.2d 18.
Tex.--Yancey v. Floyd West & Co., App.--Fort Worth, 755 S.W.2d 914, error denied.
Wash.--Keenan v. Industrial Indem. Ins. Co. of the Northwest, 738 P.2d 270, 108 Wash.2d 314.
W.Va.--National Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 177 W.Va. 734.
Wyo.--St. Paul Fire and Marine Ins. Co. v. Albany County School Dist. No. 1, 763 P.2d 1255.

[FN61]. Minn.--Centennial Ins. Co. v. Zylberberg, App., 422 N.W.2d 18.

[FN62]. Iowa--West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262.

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[FN63]. Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437.

[FN64]. Iowa--West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262.

[FN65]. Iowa--West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262.

Apparent coverage

Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437.

[FN66]. Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437.

[FN67]. Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437.

[FN68]. Ariz.--Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 154 Ariz. 266, appeal after remand 778 P.2d 1333, 161 Ariz. 437.

[FN69]. Iowa--Aid (Mut.) Ins. v. Steffen, 423 N.W.2d 189.

[FN70]. Minn.--Empire State Bank of Cottonwood v. St. Paul Fire and Marine Ins. Co., App., 441 N.W.2d 811.

[FN71]. Pa.--Peerless Dyeing Co., Inc. v. Industrial Risk Insurers, 573 A.2d 541, 392 Pa.Super. 434, appeal denied 592 A.2d 1303, 527 Pa. 636.

[FN72]. N.J.--Campbell Soup Co. v. Liberty Mut. Ins. Co., 571 A.2d 1013, 239 N.J.Super. 488, affirmed 571 A.2d 969, 239 N.J.Super. 403, certification denied 584 A.2d 230, 122 N.J. 163.

[FN73]. U.S.--Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co. of Maryland, D.N.J., 741 F.Supp. 515, reconsideration denied 744 F.Supp. 1311.

[FN74]. Ohio--Sterling Merchandise Co. v. Hartford Ins. Co., 506 N.E.2d 1192, 30 Ohio App.3d 131, 30 O.B.R. 249.
S.C.--Allstate Ins. Co. v. Mangum, App., 383 S.E.2d 464, 299 S.C. 226.

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CJS INSURANCE § 363

END OF DOCUMENT

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Att #1a

TESTIMONY

SENATE BILL NO. 2264

My name is Paul Sanderson. I am an attorney with the law firm of Zuger Kirmis & Smith of Bismarck. I represent the North Dakota Domestic Insurance Companies and other property and casualty insurers, including State Farm and American Family Insurance in support of this bill.

Senate Bill No. 2264 amends section 9-07-14 to exclude the reasonable expectations doctrine from insurance contract interpretation of unambiguous insurance policies.

PROBLEMS

The reasonable expectations doctrine is an interpretive tool used by courts to interpret insurance contracts. Basically, the reasonable expectations doctrine has been used by courts to disregard the unambiguous language of the policy and conduct a hearing on the expectations of the parties.

The Reasonable Expectations Doctrine has yet to be accepted by a majority of the North Dakota Supreme Court. In 1977, two members of the Court adopted the doctrine, but a majority has never embraced the doctrine. See Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663 (1977). The problem is that more and more parties in North Dakota are arguing that the courts should apply the reasonable expectations doctrine to interpret unambiguous insurance contracts. Since the Supreme Court's Mills decision in 1977, the Court has addressed arguments over the reasonable expectations doctrine nine times, each time refusing to directly address the issue. See Center Mutual v. Thompson, (2000); DeCoteau v. Nodak Mut. Ins. Co., (2000); Medd v. Fonder, (1996); RLI Ins. Co. v. Heling, (1994); Hart Const. Co. v. American Family Mutual Ins., (1994); Walle Mut. Ins. Co. v. Sweeny, (1988); Milbank Mut. Ins. Co. v. Dairyland Ins. Co., (1985); Hins v. Herr, (1977); Henson v. State Farm Ins., (1977).

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The biggest consequence that will occur if courts are allowed to adopt the reasonable expectations doctrine will be the increased costs to consumers for property insurance coverage. If North Dakota courts were allowed to invalidate unambiguous policy exclusions, the insurance industry's ability to calculate and manage risk would be severely impaired. The insurance companies' only options to manage this uncertainty would be to either increase premiums or restrict coverage. See Popik and Quackenbos, Reasonable Expectations After Thirty Years: A Failed Doctrine, 5 Connecticut Insurance Law Journal 425 (1998).

In addition, allowing the insured to invoke the reasonable expectations doctrine as a way to challenge unambiguous policy provisions will increase the cost of litigation in most actions. If every insurance policy provision is potentially subject to invalidation on reasonable expectations grounds, a person whose insurance claim has been denied has a tremendous incentive to challenge any claim denial, whether or not the person had an expectation of coverage. Therefore, instead of a quick resolution of a dispute based on the language of the policy the parties agreed upon, the parties are forced into a prolonged and expensive litigation in an effort to ascertain the insured's expectations with regard to coverage. By allowing courts to use the reasonable expectations doctrine, we will be encouraging lawsuits, and the ultimate loser will be the insurance-buying public because the increased litigation costs will be passed on to the consumers in the form of higher premiums. See Reasonable Expectations After Thirty Years: A Failed Doctrine, 5 Connecticut Insurance Law Journal at 432. The increased monetary cost to consumers will be too great to allow courts to adopt the reasonable expectations doctrine.

The Center Mutual v. Thompson case is a perfect example of how parties try to use the reasonable expectations doctrine to litigate a claim against the insurance company. 618 N.W.2d 505. In Center Mutual, the parties had an Farm Employer's liability coverage policy which expressly excluded "**bodily injury to *you*, and if residents of *your* household, *your* relatives, and persons under the age of 21 in *your* care.**" Id. at 507-08. Thompson's son was injured in a farm accident, and Center Mutual denied coverage based on the policy exclusion. Id. at 507. Thompson brought a claim aginst Center Mutual for $3,000,000 arguing the reasonable expectations doctrine should provide coverage because it is not unreasonable for him to believe his

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son was covered under the policy. Id. at 509. The Court rejected Thompson's claim regarding reasonable expectations finding his own testimony "showed he did not expect coverage of his children when he bought the insurance." Id. The Center Mutual case illustrates how a party will use the reasonable expectations doctrine takes a clear, unambiguous policy exclusion and turn it into a long, drawn-out, expensive litigation which ends up costing the insurance buying consumers money.

Another major problem that has arisen in other states where the reasonable expectations doctrine has been applied has been the unpredictable and uncertain decisions that have arisen as the result of a lack of a clear and concise standard. The reasonable expectations doctrine turns every court into a mini-legislature with the power to fashion public policy by invalidating unambiguous contract terms it believes to be unfair or inappropriate.

The publics' interests will still be protected with the passage of this bill. This bill only addresses those policies in which the damage was expressly and unambiguously excluded in the policy. North Dakota courts have been and will continue to have the power to use tools of interpretation when the intent of the coverage is uncertain from the policy. It is only when the insurance policy is clear on its face, that courts should be prevented from ignoring the express language of the policy and engage in a search for the parties' intent. It should not be considered unfair or unconscionable to require the insured to read the terms of the insurance contract, and likewise it should not be unfair or unconscionable to deny coverage when the insured has not paid for the coverage for the type of damage that occurred.

The domestic insurance companies therefore request a Do Pass recommendation from this committee on SB 2264.

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/b.

Connecticut Insurance Law Journal
Fall, 1998

*425 REASONABLE EXPECTATIONS AFTER THIRTY YEARS: A FAILED DOCTRINE

Susan M. Popik [FNa1]
Carol D. Quackenbos [FNaa1]

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*426 INTRODUCTION

Despite optimistic predictions from some quarters, [FN1] the reasonable expectations doctrine [FN2] has not developed into a coherent, principled body of law that can be used to interpret insurance policies with a reasonable degree of certainty in the outcome. Rather, the problems that have plagued the developing doctrine from the start, such as its indefinite contours and the lack of objectivity and predictability in its application, [FN3] have persisted. [FN4] With the *427 benefit of hindsight, it seems clear that the problems are inherent in the doctrine itself, and thus will not work themselves out over time.

This article examines the several variations of the doctrine that have evolved over the last three decades, pointing out along the way some of the more blatant inconsistencies among, and even within, these variations. It does not attempt to provide a comprehensive survey of the many cases across the country that, in the author's view, have improperly invoked the doctrine in an effort to reach a desired result. Rather, it highlights the problem by example in order to demonstrate the critical point: that the absence of any real doctrinal standards has resulted in such inconsistent and unpredictable results that the ultimate effect of the doctrine can only be to increase premiums or restrict coverage, all to the detriment of the very people the doctrine was intended to protect.

I. WILL THE REAL REASONABLE EXPECTATIONS DOCTRINE PLEASE STAND UP?

From the beginning, there has been a striking lack of agreement among the courts and commentators

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as to what the reasonable expectations doctrine is, how it should be applied, or when it should be invoked. [FN5] According to Professor Keeton's oft-quoted formulation: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." [FN6] This principle, Professor Keeton believed, would explain the results in a number of insurance cases that did not fit neatly into established doctrines generally invoked in cases involving "rights at variance" with contract provisions, i.e., cases in which there was no other way to justify relieving one contracting party from the literal terms of the contract. [FN7] What began as a description soon became a rule of law, and courts since 1970 have frequently invoked the "reasonable expectations doctrine" as a rationale for refusing to enforce a variety of contract terms. But despite the apparent simplicity of Professor Keeton's words, courts seeking to apply them have created a patchwork of rules that are *428 impossible to harmonize and, in many instances, virtually unrecognizable as the progeny of Professor Keeton's formulation.

Fundamental to Professor Keeton's analysis is the notion that the challenged provision, while apparent upon a "painstaking study" of the policy language, is "inconsistent with the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved." [FN8] Stated differently, "[A]s a prerequisite to the applicability of [the reasonable expectations] doctrine, the insured must ... show that 'the policy is such that an ordinary layperson would misunderstand its coverage.'" [FN9]

Yet many courts purporting to embrace the doctrine simply ignore the key adjective "painstaking" and allow the purportedly reasonable expectations of the insured to override the express terms of the policy even when the most cursory examination of the policy would have "negated" any alleged expectations of coverage. [FN10] Applying this "unqualified" version of the doctrine, a court may invalidate an exclusion that is both clearly stated and prominently placed based simply on the court's determination that the insured expected something different. [FN11] Whatever else is so, this approach puts the court in the paternalistic role of rewriting the contract for the insured and overriding the insured's apparent judgment that the contract was worthwhile as written.

Other courts hew more closely to Professor Keeton's original definition and give greater weight to the word "painstaking." [FN12] These courts take the *429 language and format of the policy into account in determining whether the insured's expectations of coverage are objectively reasonable. Theoretically at least, a court applying this variation of the doctrine will not invalidate an otherwise clear and unambiguous policy provision unless it is "hidden" in some manner, such as by fine print or inconspicuous placement in the policy. [FN13] Thus, in contrast to courts applying the unqualified version of the doctrine, courts applying this "prominence" - based variation must satisfy themselves that at least a casual inspection of the policy would not have alerted the insured to the provision at issue. [FN14]

A third iteration of the reasonable expectations doctrine is even further afield from its doctrinal underpinnings. Under this variation, the court will invoke the doctrine to nullify a policy provision only if the challenged provision is ambiguous. [FN15] Courts applying an "ambiguity" - based version of the doctrine have apparently abandoned the doctrine as a rule of substantive law altogether, treating it instead as a rule of construction analogous to--indeed, virtually indistinguishable from--the contra proferentem doctrine. [FN16] *430 This formulation is thus fundamentally at odds with Professor Keeton's basic conception, which plainly contemplated that in appropriate circumstances, the insured's reasonable expectations should prevail despite unambiguous policy language. [FN17]

Finally, some courts have combined the second and third variations to create a hybrid version of the reasonable expectations doctrine, which may be invoked to override a contract term if the provision is either "hidden" or ambiguous. [FN18]

*431 II. CONSUMERS CANNOT AFFORD THE PRICE OF PROFESSOR KEETON'S FORMULA

Although it might be tempting to assume that abandoning the reasonable expectations doctrine would be a boon to insurance carriers, such an assumption would be entirely too facile. The reality is that

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judicial invalidation of policy language based on a court's view of an insured's alleged reasonably expectations is as serious a threat to the insurance-buying public as it is to the insurance industry. Insurance is a conduit, not a cornucopia. In its most basic (albeit grossly oversimplified) form, it is a risk-spreading mechanism by which many people pay a relatively small amount of money so that a smaller number of people will receive a larger amount of money in the event of certain defined contingencies. This mechanism depends for its success on the insurer's ability (1) to calculate its anticipated losses relatively accurately, and (2) to set premiums at a level low enough to enable large numbers of people to buy insurance but high enough to ensure that sufficient funds will be available to cover those losses when they occur. In order to do either of these things, insurers must be able to predict in advance and with reasonable certainty how the policy terms will be interpreted. [FN19] As one commentator has described it:

No principles are more deeply ingrained in the minds of underwriters than the selection of risk and the determination of premium. Insurers must know with certainty that contract language will be judicially respected. Absent such certainty, only the most cavalier insurer would attempt to write business. [FN20]

When the courts invalidate unambiguous exclusions, the insurance industry's ability to calculate and manage risk is severely impaired. [FN21] The **432* insurers' only alternative to this uncertainty is to hedge their bets by increasing premiums [FN22] or restricting coverage. [FN23]

It is not just the direct costs that create the problem. When the courts allow the insured to invoke the reasonable expectations doctrine as a basis for defeating an unambiguous policy provision, transactions costs-- especially the cost of litigation--increase as well. The reason is simple: If every policy provision is potentially subject to invalidation on reasonable expectations grounds, an insured whose claim is denied has a tremendous incentive to challenge any claim denial, whether or not he or she in fact had an expectation of coverage. Due to the fact-intensive nature of the inquiry, the parties are forced to engage in prolonged and expensive litigation in an effort to ascertain the insured's reasonable expectations with regard to coverage, a dubious enterprise at best. [FN24] Thus, rather than a speedy resolution based on the plain meaning of the policy, the determination of coverage turns into a full-scale trial. [FN25] Here again, the ultimate loser is the insurance-buying public as these increased costs are passed along to insureds in the form of higher premiums.

**433* III. UNPREDICTABLE, UNPRINICIPLED, AND UNCERTAIN: A TRILOGY OF PROBLEMS

A. Problem No. 1: Ad Hoc Judicial Lawmaking

One of the chief vices of the reasonable expectations doctrine is that it turns every court into a mini-legislature, with the power to fashion public policy by invalidating contract terms it believes to be unfair or inappropriate. Not surprisingly, this tendency is seen most often in states that have adopted the unqualified variation of the doctrine, which may be invoked in the absence of any finding that the challenged policy provision is inconspicuous or ambiguous. The unqualified version of the doctrine is intended not only to level the playing field between insurers and their policyholders but also to fill a perceived gap in the protections otherwise afforded by doctrines such as unconscionability, ambiguity, and adhesion. [FN27] Thus, courts unable to find any other means of providing insurance coverage will turn to the reasonable expectations doctrine to ensure a source of funding for victims of tragic circumstances who might otherwise find themselves without financial resources.

In Lewis v. West American Insurance Co., [FN28] for example, the Kentucky Supreme Court was called upon to determine the validity of a "household exclusion" in an automobile liability insurance policy. [FN29] In that case, a nine-year old child was brain damaged in a car accident that killed her mother, who was the owner and operator of the insured vehicle. The mother's policy contained a household exclusion that clearly and unambiguously excluded coverage for the child's injuries. [FN30] Confronted with these tragic facts, the court refused to enforce the limiting language, even though Kentucky case law had **434* previously upheld such exclusions. [FN31] Instead, the court

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divined a reasonable expectation of coverage based on its own, unaided conclusion that, despite what their insurance policies may say, insureds expect that "their family members [will] receive comparable protection to that afforded to unknown third persons ...." [FN32]
As a further basis for nullifying the household exclusion in Lewis, the Kentucky Supreme Court pronounced its view that public policy required "that innocent victims of another's negligence" receive "fair compensation." [FN33] Accordingly, under the principle that a court may declare void a contract that is "against public policy," the court invalidated the household exclusion. [FN34] In so holding, the court rejected as inadequate the competing interest served by the exclusion: to allow insurers to offer reasonably priced policies based upon their ability to exclude from coverage "high risk collusive claims." [FN35] To justify this departure from settled case law, the court noted that public policy is "dynamic, flexible and fully capable of adapting to new situations ... to permit our institutions to better serve the needs of our citizens." [FN36]
As the concurring and dissenting justices pointed out, the Lewis majority's approach is rife with problems. For one, except in rare cases, courts should not declare a contractual provision void as against public policy in the absence of ****435*** a specific legislative mandate. [FN37] In this case, despite ample opportunity to do so, the Kentucky Legislature had never prohibited household exclusions. [FN38] Nonetheless, the Lewis majority took it upon itself "to adjust economic relations to achieve its view of economic fairness with what seems to be too little regard for the role of the legislative branch and for this Court's prior decisions." [FN39] And although the majority couched its opinion in sweeping generalities about serving the needs of its citizens, it thereby sacrificed the interests of a larger segment of the public: other policyholders who will eventually carry the load in the form of higher premiums or restricted coverage. [FN40]
Similarly, in Nation v. State Farm Insurance Co., [FN41] the Oklahoma Supreme Court held that household exclusions in automobile liability policies are unenforceable as against public policy. Remarkably, in reaching its decision, the court relied on a statute that expressly allowed insurers to exclude designated persons from coverage if agreed to by the insured in a separate endorsement. [FN42] To compound matters, in a prior opinion, the same court had upheld household and named insured exclusions, declaring that the purpose of the statute was to compel motor vehicle owners to maintain minimum amounts of liability insurance, not to dictate policy terms. [FN43]
****436*** One would assume that a doctrine allegedly based on some sort of objective expectation-- applicable by definition to all "reasonable" insureds-- would be construed more or less identically by all courts, thus providing a measure of certainty to the interpretive process. After all, if the highest courts of Kentucky and Oklahoma find the household exclusion so repugnant to public policy that it cannot be applied as a matter of law, surely one would expect that other courts addressing the exclusion should react similarly.
Of course, that is not the case. Many other states have held there is no public policy impediment whatever to the household exclusion. [FN44] Indeed, since 1970, the exclusion has been specifically authorized by the California legislature. [FN45] Ironically, the very concerns dismissed by the Kentucky's Supreme Court as unworthy of serious consideration--the possibility of fraud and collusion among insureds and the attendant increase in insurance premiums-- were the primary reasons that led the California Legislature to enact the statute. [FN46]
There is no denying the benefit of the reasonable expectations doctrine to the individual policyholder in those cases where it is invoked to override a contractual limitation on coverage. Despite that benefit, however, the ultimate cost to the insurance-buying public as a whole is simply too great. As one dissenting justice stated in challenging the majority's refusal to enforce a landslide exclusion in a flood insurance policy:
****437*** Although what befell plaintiffs was unq[illegible] disaster, disallowing recovery under an insurance policy that plainly does not cover their [illegible] entirely reasonable and just. It is not unconscionable to require an insured to read the terms of the contract, and it is not unconscionable to deny coverage when the insured has not bought coverage for the particular kind of disaster that occurred.... [T]he opposite result is what would be unconscionable. Others who have purchased flood

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insurance must pay for the claim in the form of increased premiums. Purchasers of flood insurance agree to share only the risk of flood, not any of the many other risks for which other forms of insurance are designed. [FN47]

There is a cost to the system as well. As one commentator aptly put it, "[s] ocial goals should be achieved in ways other than cross-subsidization within the insurance system, which works badly enough as a pure market system without being burdened with solving the ills of the world at the same time." [FN48]

In any event, wealth transfers such as this should be imposed by the legislature rather than the courts, because "the legislative alternative would do less harm to the values protected by freedom of contract and the rule of law." [FN49]

B. Problem No. 2: Policy Reconstruction in the Guise of Construction

Although it would seem that the ambiguity-based variation of the reasonable expectations doctrine ought to afford greater protection to the insurer, the reality is that it does not. As even Professor Keeton recognized, the unavoidably subjective nature of determining whether a policy provision is amenable to two or more reasonable interpretations is itself subject to considerable judicial manipulation. [FN50] Indeed, courts around the country have *438 had no difficulty conjuring an ambiguity when necessary to enable them to disregard the plain meaning of an insurance policy and thus to achieve a predetermined outcome. [FN51] As a dissenting justice recently stated, in condemning this practice:

What we have here is not a case of contract construction. It is, rather, a case of contract reconstruction. As such, it is thimblerigging, pure and simple. It also indicates the depths to which a court will go to achieve a desired result. If any principle can be derived from this ruling, it is that words have no meaning. [FN52]

Just a few examples should suffice to make the point. In Minnesota, a trial court ruled that a minor injured in a snowmobile accident was covered by a homeowner's policy, despite the policy's exclusion of coverage for injuries resulting from the operation or use of a motor vehicle. [FN53] "Motor vehicle" was defined in the policy as "a motorized land vehicle, including a trailer, semitrailer or motorized bicycle," or "any other motorized land vehicle designed for recreational use off public roads." [FN54] The lower court held that this definition was ambiguous and did not encompass snowmobiles for two reasons: (1) snowmobiles travel on snow or ice as opposed to "land," and (2) a snowmobile is not limited to recreational use, but may also be used for transportation or hauling. [FN55] The appellate court reversed, noting among other things that snowmobiles are included in the listing of "recreational motor vehicles" under state statutes. [FN56]

In Federal Ins. Co. v. Stroh Brewing Co., [FN57] a wholesale distributor sued a beer manufacturer for antitrust violations, alleging that the manufacturer's *439 volume discounts constituted price discrimination against smaller distributors. The manufacturer's standard form business liability umbrella policy provided coverage for liability arising from "personal injury," defined to include "false arrest, malicious prosecution, libel, slander, invasion of privacy, humiliation or discrimination." [FN58] Although conceding that most people would understand the word "discrimination" to mean unfavorable treatment based on race or gender, the majority nevertheless held that the term was ambiguous. The court thus found coverage by concluding, with essentially no analysis, that this particular insured would reasonably expect the term to cover price discrimination suits, since such suits are common in the beer industry. [FN59]

This reasoning and result are ludicrous. [FN60] As the dissent correctly noted, both the current usage of the word "discrimination" and its placement in the policy with the term "humiliation" made plain that the term was intended to cover claims involving prejudicial or unfavorable treatment of "persons on the basis of some personal characteristic, such as race, age, sex, handicap, or nationality--not the pricing of one's products in a manner injurious to competition." [FN61] Given this reality, combined with the fact that insurance coverage is not typically provided for antitrust damages and that such claims are brought relatively frequently, it was highly unlikely the insured actually "expected" its

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liability policy to afford coverage for this kind of claim. To the contrary,

the more plausible assumption ... is that the parties would have addressed the issue of antitrust coverage in a more direct manner if they had in fact intended to do so. One would expect recurring claims to be addressed with a certain degree of precision and clarity. Relying upon the placement of the phrase "humiliation or discrimination" in the "Personal Injury" section of the policy is a highly unusual, if not obtuse, means of indemnifying one's company against antitrust suits of this nature. [FN62]

In yet another example, a "Peeping Tom" husband surreptitiously videotaped the family's Danish au pair while she was taking a shower. [FN63] When *440 the au pair discovered the tape, she sued for invasion of privacy. The family's personal catastrophe liability insurance policy provided coverage for "personal injury," this time defined to include bodily injury, libel, slander, defamation, false arrest, malicious prosecution, invasion of privacy or "humiliation caused by any of these." [FN64] Based on a specific exclusion for personal injury "expected or intended" by the insured, the insurer declined to defend or indemnify the insured.

In an analysis that can most charitably be described as tortured, the Maryland Court of Appeals held that the au pair's suit was within the scope of coverage. First analyzing the phrase "invasion of privacy," the court concluded that a reasonable insured would interpret the phrase to refer to the tort of "unreasonable intrusion upon the seclusion of another." [FN65] The court next undertook a lengthy analysis of somewhat ambiguous Maryland case law regarding this tort, and concluded that the tort can only be committed intentionally. Having made this decision, the court then held that the "expected or intended" exclusion had to be invalidated, because it rendered coverage for "intrusion upon seclusion" illusory and thus rendered the policy ambiguous. [FN66]

The dissent disagreed with the majority's threshold conclusion that the tort required intent and therefore rejected its conclusion that the exclusion could not be reconciled with the basic personal injury coverage. [FN67] More to the point here, its analysis of the issue demonstrates the absurdity of the majority's assumptions as to the insured's reasonable expectations:

The majority's construction further presumes that a "reasonable" policy purchaser is sufficiently knowledgeable of the law of torts to understand that an intrusion upon seclusion can only be committed intentionally and that, as a result, the inclusion of coverage for invasion of privacy supersedes the policy's intentional injury exclusion clause .... The express language of the policy is a better aid to construction than assumptions about a reasonable person who is ignorant of the variations of invasion of privacy, some of which may be committed unintentionally, but who does know *441 what [the majority] reveals for the first time in the instant case, that the unreasonable invasion of seclusion form of invasion of privacy can only be committed intentionally. [FN68]

C. Problem No. 3: Expectations in the Eye of the Beholder

There is yet another crucial element of the reasonable expectations doctrine that is subject to exploitation by judges inclined to indulge a bias against insurers [FN69] or who for some other reason seek to provide coverage where none exists under the policy: the manner in which the court determines, after a coverage dispute has arisen, what the reasonable expectations of the insured were prior to that dispute. After all, "most insureds develop a 'reasonable expectation' that every loss will be covered by their policy. Therefore, the reasonable expectation concept must be limited by something more than the fervent hope usually engendered by loss." [FN70]

How the courts go about determining an insured's reasonable expectations often depends on which variation of the doctrine the court employs--and again reveals the intractable problems inherent in a doctrine that looks far beyond the language of the contract to determine how it will be interpreted. Indeed, the courts cannot even agree on whether the threshold determination is a question of law or a question of fact. [FN71]

Under the unqualified version of the doctrine, courts often simply divine what coverage "the average person" or theoretical group of "consumers" would expect the policy to provide without the benefit of any extrinsic evidence on *442 the subject. [FN72] However, unless an insured claims not to have

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read the policy at all before buying it (a fact which, even if true, generally may not be used as a basis for avoiding contractual terms [FN73]), most insureds would be hard-pressed to admit they had an expectation of coverage that was directly contrary to a clear and prominently placed policy provision. [FN74] It is difficult to avoid the suspicion in such cases that the court's refusal to enforce the policy as written has nothing to do with the insured's "reasonable expectations" of coverage, and everything to do with the court's judicial expectations of "reasonableness."

There is a somewhat greater degree of objectivity to the inquiry under the prominence-based variation of the doctrine. In these instances, the courts tend to determine the insured's reasonable expectations as to coverage primarily from an examination of the overall format of the policy. [FN75] So, for example, if the challenged provision does not appear sufficiently close to the beginning of the policy, [FN76] or if the headings in the policy give a misleadingly expansive impression of coverage, [FN77] the court may disregard it.

*443 As with the unqualified version of the doctrine, those courts that purport to determine the insured's reasonable expectations without considering extrinsic evidence [FN78] may rewrite the policy to provide coverage even though the insured was well aware of and understood the coverage limitations. [FN79] Other courts, applying a more rigorous standard, require evidence of some conduct by the carrier, such as a misrepresentation about the scope of coverage or a failure to point out an obscure exclusion, that created an actual, i.e., subjective-expectation of coverage on the part of the insured. [FN80] Of course, the downside of this latter approach is that it often hinges on a credibility contest, which itself causes protracted litigation and greater uncertainty in the outcome. [FN81]

*444 Courts applying the ambiguity-based version of the doctrine take three different approaches to determining the insured's reasonable expectations. In some states, the only question is whether the challenged provision is ambiguous; once that determination is made, the inquiry ends and coverage follows more or less automatically. [FN82] This approach is especially troublesome when a court declares a policy provision to be ambiguous not because the exclusion is unclear in the context of the specific circumstances of the case before it, but instead because the court can imagine other scenarios in which applying the literal language of the exclusion might lead to absurd results. [FN83]

A second group of states goes further and inquires into the specific circumstances of the case. Even when a policy provision is found to be ambiguous, courts applying this approach will find coverage only if a reasonable insured would have expected the policy to provide coverage under those specific circumstances. [FN84]

A third group of states applies an even more objective standard. Courts in these jurisdictions will interpret the policy to include coverage only if they determine that a majority of policyholders would choose to purchase such *445 coverage if it were offered at an actuarially fair price. [FN85] Although on its face fairer to the carrier, this last approach--requiring expert testimony, market surveys, and actuarial studies--necessarily increases the cost and length of litigation, to the benefit of no one but the lawyers and their experts. [FN86]

IV. AN EMERGING DOCTRINE OF IMPUTED EXPECTATIONS?

As troublesome as the prior examples may be, they pale in comparison to the Supreme Court of New Jersey's opinion in Morton v. General Accident Insurance Co. [FN87] In that case, the court was called upon to determine, among other things, whether the "sudden and accidental" pollution exclusions [FN88] in a variety of commercial general liability policies precluded coverage for government-mandated cleanup costs incurred by the insured in remediating pollution caused by forty years of discharging mercury into an estuary. The court held that the exclusions would not be given effect, in part because of alleged misstatements as to the scope and effect of the exclusionary language by the insurance carriers to the New Jersey state regulatory authorities when the exclusion was initially presented for approval in 1970. [FN89] In so holding, the *446 court invoked the reasonable expectations of the regulators to invalidate the exclusion:

We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL

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policies would limit coverage for pollution damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading.... [FN90]

Because, in the court's view, "the typical commercial insured may have had little, if any, awareness that the terms of CGL coverage had been changed, much less any 'objectively-reasonable expectation' of the scope of the new coverage," the court simply "imputed" the "reasonable expectations" of the New Jersey insurance regulatory authorities to the insureds and, on that basis, wrote the exclusion out of the policy. [FN91]

The New Jersey Supreme Court is hardly alone in refusing to give effect to the qualified pollution exclusion. [FN92] But that is not the point. The point is how the court got to that result: by recognizing an entirely new theory of policy invalidation based on the "reasonable expectations" of a third party-- and a third party with whom the insured has no connection whatever.

While it is would be easy to dismiss the Morton court's analysis as a solution in search of a theory, its implications are too disturbing to ignore. As this article is being written, insurers are presenting to insurance regulators around the country a variety of policy provisions designed to exclude liability for "Y2K" losses. [FN93] These potential losses and related litigation expense, which result from computers' inability to process the year date "2000," are *447 predicted to run as high as a trillion dollars or more [FN94]--some two and one-half times the combined reserves of all North American property and casualty insurers. [FN95] While the true magnitude of the Y2K problem may be uncertain, one thing is not: insureds and insurers are sure to do battle over the validity of the Y2K exclusions. Given the potential magnitude of the problem, it is easy to see that even a passing nod to a Morton-like analysis could bankrupt the property/casualty industry. And while the chances of that happening may be remote, the real problem is that there is no way to predict whether, or when, it might.

V. THE REASONABLE EXPECTATIONS DOCTRINE IS UNNECESSARY IN LIGHT OF EXISTING EQUITABLE REMEDIES

It is a fundamental principle of contract law that the best indication of the intent of the parties to a contract is the language of the contract itself and that, in most circumstances, that alone should guide the interpretive process. This is no less true for insurance policies than any other kind of contract. [FN96]

There will always, of course, be circumstances in which a determination of the parties' intent cannot be made from the language of the policy alone. In those instances, the existing rules of contract interpretation, such as waiver, [FN97] estoppel, [FN98] unconscionability, [FN99] and contra proferentem, [FN100] are all that is *448 necessary to interpret the contract--and even to protect insureds from overreaching insurers. [FN101] Applicable to all contracts, these equitable principles do not suffer from the same infirmities as the reasonable expectations doctrine and are thus preferable to that doctrine, with its unavoidable vagaries and uncertainties.

For example, waiver and estoppel rely for their application on the actual dealings between the insured and the insurer. [FN102] Thus, courts cannot invoke these doctrines to create coverage unless the insurer has actively misled the insured or otherwise done something affirmatively to create an expectation of coverage. [FN103] Accordingly, waiver and estoppel avoid the nebulous inquiry into the "reasonable expectations" of "objective" policyholders, and do not give courts the excessive latitude afforded under the reasonable expectations doctrine. [FN104]

*449 Similarly, unlike the vague expressions of "public policy" invoked under the reasonable expectations doctrine to invalidate clear policy language, the "unconscionability" doctrine--which requires a contractual provision to be shockingly unfair or unjust to be unenforceable--is more rigorous, and thus less subject to abuse by result-oriented courts. [FN105] Finally, although contra proferentem can be manipulated in the same way that the similar ambiguity-based version of the reasonable expectations doctrine can, [FN106] at least it does not fall prey to the worst excesses of the doctrine.

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CONCLUSION

It is not enough to say that the lack of certainty and uniformity reflected in the reasonable expectations doctrine are inherent in the nature of the judicial process. Different approaches among judges may be an unavoidable fact of litigation life, but the hazy contours of the doctrine make it particularly subject to abuse. A few years ago, the Court of Appeals for the Ninth Circuit had occasion to consider California's now defunct tort of bad-faith denial of a contract. In his concurring opinion, Judge Alex Kozinski had this to say:

In inventing the tort of bad faith denial of a contract, ... the California Supreme Court has created a cause of action so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law. [FN107]

Unfortunately, the same may be said of the reasonable expectations doctrine. Despite thirty years of effort, neither courts nor commentators have been able to provide a real analytic framework for the doctrine. The inescapable conclusion may be that it is just not possible to do so--and that perhaps it is time to stop trying.

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[FNaa1]. Chapman, Popik & White, San Francisco, California (B.A., Barnard College, 1979; J.D., Fordham University School of Law, 1984).

[FN1]. Looking back after 20 years, Professor Roger Henderson expressed the belief that the doctrine had evolved to the point that "its jurisprudential core ... consist[s] of rules that provide sufficient guidelines for its application" and predicted that "any confusion over the nature of the doctrine itself will rapidly dissipate." Roger C. Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 OHIO L.J. 823, 825, 838 (1990); accord Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 816 (Utah 1992) ("Although I acknowledge certain difficulties with the reasonable expectations doctrine, I view such problems as grounds for refinement of its content and care in its application, not for exclusion of its use.").

[FN2]. The reasonable expectations doctrine "was initially formulated by Professor, now Judge, Robert Keeton as an overarching set of principles to assist in explaining the results of disparate insurance law decisions that appeared to be based on a number of different rationales." Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d at 801.

[FN3]. Since Professor Keeton's seminal article identifying a doctrine of "reasonable expectations," Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions: Part One, 83 HARV. L. REV. 961, 967 (1970) (hereinafter KEETON, PART ONE); Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions: Part Two, 83 HARV. L. REV. 1281 (1970), the doctrine has generated extensive debate in the academic community. See Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1311 (3d Cir. 1994) ("Since Professor Keeton's article, a considerable number of trees have been sacrificed in the name of reasonable expectations as the academic community has debated what reasonable expectations means, which courts have adopted the doctrine, and whether it is desirable for them to have done so."); Peter Nash Swisher, Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach, 57 OHIO ST. L.J. 543, 553 nn.29-30 (1996) (listing articles supporting and criticizing the reasonable expectations doctrine).

Even commentators advocating the use of some form of the doctrine have noted a myriad of difficulties in its scope and application. See, e.g., HENDERSON, supra note 1, at 823 ("Even after two decades, there still seems to exist a great deal of uncertainty as to the doctrinal content and when

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the principle may be invoked, including most of the jurisdictions that have professed to have adopted it."); Mark Rahdert, Reasonable Expectations Reconsidered, 18 CONN. L. REV. 323, 392 (1986) ("The difficulties with the reasonable expectations concept, though real, do not outweigh its usefulness to the point that the principle should be abandoned.").

[FN4]. A survey of recent decisions shows judicial criticism in much the same vein as in the earlier decisions. See, e.g., Nielsen v. O'Reilly, 848 P.2d 664, 667 (Utah 1992) (noting that "substantial uncertainty surrounds 'the theoretical underpinnings of the doctrine, its scope, and the details of its application'") (quoting Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d at 803 ("[A] number of states have struggled with the doctrine's scope, leaving a trail of inconsistent decisions and creating an obviously uncertain future for the doctrine in those states.")).

[FN5]. See supra, notes 3-4. See also Stephen J. Ware, A Critique of the Reasonable Expectations Doctrine, 56 U. CHI. L. REV. 1461, 1466-67 (1989) ("Construing an insurance policy to protect the insured's 'reasonable expectations' means different things to different courts.... [The various versions of the doctrine] form a rough continuum from purported adherence to the policy's language to open disregard of the written contract.").

[FN6]. KEETON, PART ONE, supra note 3, at 967.

[FN7]. HENDERSON, supra note 1, at 823, 825.

[FN8]. KEETON, PART ONE, supra note 3, at 968.

[FN9]. Lemars Mut. Ins. Co. v. Joffer, 574 N.W.2d 303, 311 (Iowa 1998) (quoting Benavides v. J.C. Penney Life Ins. Co., 539 N.W.2d 352, 357 (Iowa 1995)).

[FN10]. For example, in Hamilton v. Allstate Insurance Co., 789 S.W.2d 751, 752-53 (Ky. 1990), the court was called upon to determine the validity of an "anti-stacking" clause in an automobile liability policy, which provided that the insured's payment of an additional premium for another car under the policy did not allow the insured to aggregate or "stack" the two policy limits in the event of an accident involving one of the cars. Despite acknowledging that the provision was both unambiguous and prominently placed, the court invoked the reasonable expectations doctrine to invalidate the provision. According to the court, "Under the doctrine of reasonable expectations, we have held that when one has bought and paid for an item of insurance coverage, he may reasonably expect it to be provided." See also Regional Bank of Colo. v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494, 497-98 (10th Cir. 1994) (voiding absolute pollution exclusion in CGL policy: "Regardless of the ambiguity, or lack thereof ... the public has a right to expect that they will receive something of comparable value in return for the premium paid.").

[FN11]. The various means by which the courts determine what a particular insured's objectively reasonable expectations are, and the problems accompanying such a determination, are discussed infra Part III.C.

[FN12]. See, e.g., Minnesota Mut. Fire & Cas. Co. v. Manderfield, 482 N.W.2d 521, 524 (Minn. Ct. App. 1992) (upholding household exclusion in homeowners policy: "We find no reason to believe that [the insured] could not read the policy and understand the exclusion provision without the need for 'painstaking' study."); see also RAHDERT, supra note 3, at 335 (Some courts' "heavy emphasis on 'painstaking' ... means that expectations derived from sources other than at least a cursory review of the policy are not reasonable and should not be honored in the face of unambiguous contrary policy language.").

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[FN13]. See, e.g., Chu v. Allianz Life Ins. Co., 980 F. Supp. 1086, 1092 (N.D. Cal. 1997) (to be enforceable, exclusion must be "positioned in a place and printed in a form which will attract the reader's attention"); Lehroff v. Aetna Cas. & Sur. Co., 638 A.2d 889, 892 (N.J. 1994) ("Reasonable expectations of coverage raised by the declaration page cannot be contradicted by the policy's boilerplate unless the declaration page itself clearly so warns the insured.").

[FN14]. See, e.g., Chu v. Allianz Life Ins. Co., 980 F. Supp. at 1092 ("Courts have invalidated exclusions as not conspicuous where not in a section labeled exclusions and placed on an overcrowded page ... or in a section labeled 'General Limitations' but in a dense pack format ... or hidden in a subsequent section of the policy bearing no clear relationship to the insuring clause and concealed in fine print."); Vierkant v. AMCO Ins. Co., 543 N.W.2d 117, 121 (Minn. Ct. App. 1996) (refusing to invalidate exclusion where it was neither hidden nor ambiguous and there was no evidence the insured was unable to read the policy).

[FN15]. See, e.g., Commerce & Indus. Ins. Co. v. Valero Terrestrial Corp., No. 95-1875, 1996 U.S. App. LEXIS 10320, at *9 (4th Cir. May 6, 1996) ("[U]nder West Virginia law ... the doctrine of reasonable expectations applies only where the policy terms are ambiguous"); Continental Cas. Co. v. City of Richmond, 763 F.2d 1076, 1080 (9th Cir. 1985) (reasonable expectations doctrine "is applicable only when the policy language is found to be unclear"); see also WARE, supra note 5, at 1468 n.32 (listing nine other states that have adopted this approach).

[FN16]. The maxim of contra proferentem--"against the drafter"--is a rule of contract construction that provides that a contract will be interpreted most strictly against the party that drafted it. Kenneth S. Abraham, A Theory of Insurance Policy Interpretation, 95 MICH. L. REV. 531, 531 (1996). As a general rule, therefore, any ambiguity in an insurance contract is construed against the insurer. See, e.g., Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728, 731 (Wis. 1997) ("Under the doctrine of contra proferentem, ambiguities in a policy's terms are to be resolved in favor of coverage, while coverage exclusion clauses are narrowly construed against the insurer."). Courts and commentators have noted that the ambiguity-based variation of the reasonable expectations doctrine is in reality contra proferentem by another name. See, e.g., Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 807 (Utah 1992) (citing HENDERSON, supra note 1, at 827) ("It is doubtful whether application of [the ambiguity-based] version of the reasonable expectations doctrine can be distinguished from, or adds anything to, the application of the canon of construction resolving ambiguities against the drafter and reforming the contract accordingly.").

[FN17]. See McHugh v. United Service Automobile Ass'n No. 97-35019, 1998 U.S. App. LEXIS 24272, at *15 (9th Cir. Sept. 29, 1998). After all, no amount of "painstaking study" will enable an insured to divine the proper meaning of policy language that is, by definition, "capable of two constructions, both of which are reasonable." Chu v. Allianz Life Ins. Co., 980 F. Supp. at 1089. The problems associated with a court's determination that a policy provision is ambiguous are discussed infra Part III.B.

[FN18]. See, e.g., Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861 (Okla. 1996) (requiring either a finding of ambiguity or a determination that the exclusions were "masked by technical or obscure language or ... hidden in a policy's provisions"); see also RAHDERT, supra note 3, at 335-36 (distinguishing between "weaker" and "stronger" versions of the reasonable expectations doctrine: "weaker" version encompasses expectation of coverage caused by ambiguous or "hidden" policy provisions; "stronger" version allows reasonable expectation of coverage to be honored despite lack of ambiguity if expectation was created by "some source other than the policy language itself"). Because of the conceptual differences and practical consequences of these variations of the doctrine,

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the author believes they should be analyzed separately--a view shared by other commentators as well. See WARE, supra note 5, at 1467.
Some courts, of course, have rejected the doctrine altogether on various grounds, including that existing equitable doctrines provide sufficient protection or that there is insufficient justification to depart from the usual rules that apply to all contracts. See, e.g., Constitution State Ins. Co. v. Iso-Tex, Inc., 62 F.3d 405, 410 n.4 (5th Cir. 1995) ("Texas law does not recognize coverage because of 'reasonable expectation' of the insured."); Nielsen v. O'Reilly, 848 P.2d 664, 667 (Utah 1992) ("This court, however, has never adopted any version of the [reasonable expectations] doctrine."); Findlay v. United Pacific Ins. Co., 917 P.2d 116, 121 (Wash. 1996) ("The 'reasonable expectations' doctrine has never been adopted in Washington, and there is no reasonable expectation that no exemptions to coverage exist.").

[FN19]. See, e.g., Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d at 808 ("The insurance company certainly considers the household exclusion when calculating its risk under a homeowner's policy. The result is a relatively low premium when compared with premiums for higher risk coverage, such as medical and health insurance.").

[FN20]. Michael E. Bragg, Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 FORUM 385 (Spring 1985).

[FN21]. As one court put it, it is "imperative that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered judicial interpretation [[under the reasonable expectations doctrine.]" Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861, 870 (Okla. 1996).

[FN22]. "If we were to extend the coverage of the Hartford policies in this case, by some strained interpretation, to find potential coverage for the situation presented by this [loss], we would be doing no favors to the consumers of homeowners and excess insurance policies. Ordinary insureds would have to bear the expense of the increased premiums necessitated by the expansion of their insurers' potential liabilities." Hartford Fire Ins. Co. v. Superior Court, 142 Cal. App. 3d 406, 414, 191 Cal. Rptr. 37, 42 (1983); accord Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 711 (Cal. 1989); see also Nation v. State Farm Ins. Co., 880 P.2d 877, 889 (Okla. 1994) (Opala, J., concurring) (observing that majority's invalidation of household exclusion in automobile liability policy is no "victory for consumers" because expanded coverage "would doubtless be passed on to all affected consumers in the form of higher premiums"); Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d at 808 (enforcing household exclusion in homeowner's policy: "If an insurer provided bodily injury coverage in a homeowner's policy for those living on the insured premises, the likelihood of covered injuries would increase and the insurer would assess a higher premium based on the increased risk.").

[FN23]. Safeco Ins. Co. v. Hirschmann, 773 P.2d 413, 427 (Wash. 1989) (Callow, J., dissenting) (criticizing majority for invalidating unambiguous language in an "all-risk" homeowner's policy: "The insurance industry's ability to segregate and manage risk will be severely impaired. Insurance purchasers may be required to choose between high premiums or foregoing 'all-risk coverage' entirely."); BRAGG, supra note 20, at 391 ("The traditional response of insurers upon discovering that their contract language is not being interpreted by the courts as the drafters intended is to rewrite the language.").

[FN24]. See infra Part III.C.

[FN25]. As the Pennsylvania Supreme Court has noted, "[b]y focusing on what was and was not said

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at the time of contract formation rather than on the parties' writing, [the reasonable expectations doctrine] makes the question of the scope of insurance coverage in any given case depend upon how a fact-finder resolves questions of credibility. Such a process, apart from the obvious uncertainty of its results, unnecessarily delays the resolution of controversy, adding unwanted costs to the cost of procuring insurance." Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983).

[FN27]. See, e.g., Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d at 864 (the reasonable expectations doctrine "developed in part because established equitable doctrines were inadequate ...."); Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 805 (Utah 1992) ("[T]he reasonable expectations doctrine has been urged because of the supposed inadequacy of the existing equitable doctrines available to courts confronted with overreaching insurers.").

[FN28]. 927 S.W.2d 829 (Ky. 1996).

[FN29]. The household exclusion, also known as the "family exclusion," is a standard provision in virtually all automobile liability policies and typically precludes coverage for bodily injury to the named insured and relatives of the named insured who are residents of the same household.

[FN30]. 927 S.W.2d at 830.

[FN31]. Although the majority avoided acknowledging that it was overruling prior Kentucky decisional law, it clearly did, as both the concurring and dissenting opinions pointed out. Id. at 837 (Lambert, J., concurring); id. (Stephens, J. dissenting).

[FN32]. Id. at 833. Not coincidentally, the court noted that the effect of such exclusions was to deny insurance protection to "innocent children". Id.
Similar sentiments prompted the dissent in Forbau v. Aetna Life Ins., 876 S.W.2d 132 (Tex. 1994) (Doggett, J., dissenting). In that case, a clear and unambiguous provision limited medical expense benefits to one year after the group employer terminated the policy. Pursuant to this provision, Aetna discontinued benefits to Amy Miller, a permanently disabled teenager, and she brought suit. Following a jury trial, the trial court rendered judgment in favor of Amy, which was reversed by the Texas Court of Appeals. The Texas Supreme Court affirmed the court of appeals. Although conceding that the termination of benefits provision was clear and unambiguous, the dissent argued that the coverage limitation should not be enforced in order to ensure compensation to someone in need:
Amy Miller, a young quadriplegic, now leaves this court with nothing-- without any of the means that a judge and jury in Lubbock, Texas thought essential to meeting her lifetime medical needs over the course of her now bleak future.
Id. at 136.

[FN33]. Lewis v. West American Ins. Co., 927 S.W.2d at 836.

[FN34]. Id.

[FN35]. Id. at 834.

[FN36]. Id. at 835.

[FN37]. Id. at 837; see also Aerojet Gen. Corp. v. Transport Indem. Co., 48 P.2d 909, 932 (Cal. 1997) (rejecting lower court's reliance on "fairness" as basis for disregarding plain meaning of CGL policy so as to prevent insurer from allocating defense costs to insured; "[a]s a general matter at least, we do

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not add to, take away from, or otherwise modify a contract for 'public policy considerations.'").

[FN38]. Lewis v. West American Ins. Co., 927 S.W.2d at 837 (Lambert, J., concurring).

[FN39]. Id.

[FN40]. This is generally the price of ad hoc judicial lawmaking. As the commentators have observed: "Judicial, as distinguished from legislative, intervention renders costs quite unpredictable and makes insurers fearful, tightening the market... Legislative intervention can destroy a market, too. Yet recurring judicial activism ... can have an even more disruptive effect. Whereas legislative intervention is prospective, judicial intervention has a retroactive effect. This creates greater uncertainty, giving insurers no opportunity to react in a timely fashion to the changes in the legal environment." WARE, supra note 5, at 1489 (quoting Spencer L. Kimball, Book Review, 19 CONN. L. REV. 311, 322 (1987) (reviewing KENNETH S. ABRAHAM, DISTINGUISHING RISK).

[FN41]. 880 P.2d 877, 890 (Okla. 1994) (per curiam).

[FN42]. Although the majority did not acknowledge this fact, a concurring justice pointed out that "the [Financial Responsibility] Act--presumably the source for [the majority's] perceived public policy mandate--expressly allows exclusions by agreement." Id. at 890 (Summers, J., concurring). The purpose of allowing exclusions of designated individuals from coverage is to "enabl[e] individual insureds to keep their insurance rates at an acceptable level" and reflects a legislative judgment to balance competing interests. Id.

[FN43]. Id. at 889.

[FN44]. For example, the household exclusion has withstood public policy challenges in Alabama (see Hutcheson v. Alabama Farm Bureau Mut. Cas. Ins. Co., 435 So. 2d 734, 737 (Ala. 1983)); California (see Farmers Ins. Exch. v. Cocking, 629 P.2d 1 (Cal. 1981)); Colorado (see Allstate Ins. Co. v. Feghali, 814 P.2d 863, 866-67 (Colo. 1991)); Florida (see Amica Mut. Ins. Co. v. Wells, 507 So. 2d 750, 752 (Fla. Dist. Ct. App. 1987)); Georgia (see Stepho v. Allstate Ins. Co., 383 S.E.2d 665, 667 (Ga. 1987)); Illinois (see Severs v. Country Mut. Ins. Co., 434 N.E.2d 290, 292 (Ill. 1982)); Indiana (see Transamerica Ins. Co. v. Henry, 563 N.E.2d 1265, 1268-69 (Ind. 1990)); Iowa (see Walker v. American Family Mut. Ins. Co., 340 N.W.2d 599, 603 (Iowa 1983)); Massachusetts (see Hahn v. Berkshire Mut. Ins. Co., 547 N.E.2d 1144, 1145 (Mass. App. Ct. 1989)); Minnesota (see American Family Ins. Co. v. Ryan, 330 N.W.2d 113, 115 (Minn. 1983)); Pennsylvania (see Paiano v. Home Ins. Co., 385 A.2d 460, 462 (Pa. Super. 1978)); and Rhode Island (see Faraj v. Allstate Ins. Co., 486 A.2d 582, 588 (R.I. 1984)).
For a listing of jurisdictions that have nullified household exclusions, see Nation v. State Farm Ins. Co., 880 P.2d at 886 (Opala, J., concurring).

[FN45]. See Cal. Ins. Code §11580.1(c)(5) (West 1998), as construed in Farmers Ins. Exch. v. Cocking, 629 P.2d 1, 2 (1981).

[FN46]. "The primary basis underlying the use of this exclusion ... 'is to prevent suspect inter-family legal actions which may not be truly adversary and over which the insurer has little or no control. Such an exclusion is a natural target for the insurer's protection from collusive assertions of liability.'" Farmers Ins. Exch. v. Cocking, 629 P.2d at 4.

[FN47]. McHugh v. United Service Automobile Assn., No. 97-35019, 1998 U.S. App. LEXIS 24272, at *31 (9th Cir. Sept. 29, 1998) (Graber, J., dissenting).

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[FN48]. KIMBALL, supra note 40, at 322. Another commentator agrees, criticizing the reasonable expectations doctrine as a "coerced wealth transfer" mechanism, i.e., a way of "forc[ing] some people to provide others with insurance that they could not have obtained through auslander transactions in the market" by means of a judicially imposed "tax" on insurers and, ultimately, other policyholders. WARE, supra note 5, at 1492.

[FN49]. WARE, supra note 5, at 1493.

[FN50]. See KEETON, PART ONE, supra note 3, at 972 ("The conclusion is inescapable that courts have sometimes invented ambiguity where none existed, then resolving [sic] the invented ambiguity contrary to the plainly expressed terms of the contract document."); ABRAHAM, supra note 16, at 538-39 ("The formulation [for determining ambiguity] presupposes something like an 'I know it when I see it' or 'I know what the ordinary reader would understand' test, aided perhaps by some other aged maxims of interpretation.").

[FN51]. See KEETON, PART ONE, supra note 3, at 972; see also Dodson v. St. Paul Ins. Co., 812 P.2d 372, 376 (Okla. 1991) ("We cannot agree with a construction which isolates and stretches one contractual provision, creating an ambiguity, and then entirely neutralizes two provisions ....").

[FN52]. American States Ins. Co. v. Koloms, 687 N.E.2d 72, 82 (Ill. 1997) (Heiple, J., dissenting).

[FN53]. See Christie v. Illinois Farmers Ins. Co., No. C4-98-134, 1998 Minn. App. LEXIS 711, at *3-5 (June 23, 1998).

[FN54]. Id. at *3.

[FN55]. Id. at *4-5.

[FN56]. Id.

[FN57]. 127 F.3d 563 (7th Cir. 1997).

[FN58]. Id. at 565.

[FN59]. Id. at 567.

[FN60]. See id. at 570 (Flaum, J., dissenting).

[FN61]. Id. at 572.

[FN62]. Id. at 573.

[FN63]. Bailer v. Erie Ins. Co., 687 A.2d 1375 (Md. 1997).

[FN64]. Id. at 1377.

[FN65]. Id. at 1380.

[FN66]. As the majority put it, "If the exclusion totally swallows the insuring provision, the provisions are completely contradictory. That is the grossest form of ambiguity ...." Id. at 1380-81.

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[FN67]. Id. at 1385-86 (Chasanow, J., dissenting).

[FN68]. Id. at 1387.

[FN69]. Although some courts and commentators maintain that the reasonable expectations doctrine is neutral, that is, neither pro-insured nor pro-insurer, see, e.g., Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861, 869 (Okla. 1996) ("the doctrine does not mandate either a pro- insurer or pro-insured result because only reasonable expectations of coverage are warranted"), others acknowledge that, in at least some of its forms, it "tilts insurance disputes in favor of the insured," see also KEETON, PART ONE, supra note 3, at 972 (when the courts strain to find ambiguity, it "not only causes confusion and uncertainty about the effective scope of judicial regulation of [insurance] contract terms but also creates an impression of unprincipled judicial prejudice against insurers"); WARE, supra note 5, at 1461.

[FN70]. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 390 (Ariz. 1984); accord State Farm Fire & Cas. Co. v. Bongen, 925 P.2d 1042, 1047 (Alaska 1996); Millar v. State Farm Fire & Cas. Co., 804 P.2d 822, 826 (Ariz. 1990).

[FN71]. Compare Christie v. Illinois Farmers Ins. Co., 580 N.W.2d 507 (Minn. Ct. App. 1998) (question of law), with Wessman v. Massachusetts Mut. Life Ins. Co., 929 F.2d 402 (8th Cir. 1991) (question of fact).

[FN72]. See, e.g., Lewis v. West American Ins. Co., 927 S.W.2d 829, 833 (Ky. 1996) (refusing to enforce unambiguous household exclusion because buyers of automobile insurance "expect their family members to receive comparable protection to that afforded to unknown third persons ..."); Sparks v. St. Paul Ins. Co., 495 A.2d 406, 414 (N.J. 1985) (unambiguous provision will be enforced only if it conforms to "public expectations" about insurance coverage); In re Unum Life Ins. Co., 647 A.2d 708, 713 (Vt. 1994) (voiding clear exclusion in life insurance policy precluding coverage for insureds with pre-existing AIDS or cancer, because, in the court's view, consumers expect to receive coverage unless they commit suicide). Ironically, at least one court has applied a "reasonable layman" standard to determine the reasonable expectations of an attorney--insured under a professional liability policy. See Bodell v. Walbrook, 119 F.3d 1411 (9th Cir. 1997).

[FN73]. As a general rule, acceptance of the policy without objection binds the insured, "and he cannot thereafter complain that he did not read it or know its terms." Aetna Cas. & Sur. Co. v. Richmond, 76 Cal. App. 3d 645, 652, 143 Cal. Rptr. 75, 79 (1977).

[FN74]. As other courts have noted in refusing to invoke the reasonable expectations doctrine to invalidate clear and conspicuous provisions, "expectations which are contrary to a clear exclusion from coverage are not 'objectively reasonable.'" Stutzman v. Safeco Ins. Co., 945 P.2d 32, 37 (Mont. 1997); accord Frain v. Keystone Ins., 640 A.2d 1352, 1354 (Pa. 1994) ("[A]n insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.").

[FN75]. See, e.g., State Farm v. Falness, 39 F.3d 966, 968 (9th Cir. 1994) (inquiry into insured's reasonable expectations "involves an analysis of the format and clarity of the policy, as well as the circumstances of its acquisition and issuance"); Gray v. Zurich Ins. Co., 419 P.2d 168, 174 (Cal. 1966) (en banc) (refusing to enforce limitation on duty to defend that "is not 'conspicuous' since it appears only after a long and complicated page of fine print, and is itself in fine print"); Lehroff v. Aetna Cas. & Sur. Co., 638 A.2d 889, 892 (N.J. 1994) ("Reasonable expectations of coverage raised

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by the declaration page cannot be contradicted by the policy's boilerplate unless the declaration page itself clearly so warns the insured.").

[FN76]. See, e.g., State Farm v. Falness, 39 F.3d at 967 (holding that named insured exclusion on page 6 of 18-page automobile liability policy was unenforceable because insufficiently conspicuous); see also Chu v. Allianz Life Ins. Co., 980 F. Supp. 1086, 1093 (N.D. Cal. 1997) ("Courts have invalidated exclusions where not in a section labeled exclusions and placed on an overcrowded page.").

[FN77]. See, e.g., Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132 (1994) (Doggett, J., dissenting) (although group accident and health insurance policy restricted coverage for medical expenses to one year after the policy was terminated by employer, where heading on policy referred to "comprehensive" medical benefits and application form described coverage for medical benefits as "unlimited," insured could reasonably expect coverage for all expenses resulting from injury that occurred while policy in force).

[FN78]. Relevant extrinsic evidence could include testimony from the parties as to the meaning they attached to the disputed provision, see Nygard v. Western Nat'l Ins. Co., No. C8-97-1163, 1998 Minn. App. LEXIS 36, at *4-5 (January 13, 1998), its drafting history, see Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878, 887 (Cal. 1995) (en banc), or representations the parties made about it, see, e.g., Morton Int'l Inc. v. General Accident Ins. Co. of America, 629 A.2d 831, 847-48 (N.J. 1993) (representations made to state regulatory authorities).

[FN79]. See, e.g., State Farm v. Falness, 39 F.3d at 967 ("[T]he reasonable expectations doctrine applies even in the absence of proof of promises or misrepresentations by an insurance agent").

[FN80]. See, e.g., Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903-04 (3d Cir. 1997) (if the insured requests specific insurance coverage, and the insurer unilaterally changes the coverage provided without telling the insured, the insured's "reasonable expectation" that it had obtained the requested coverage will prevail over the clear language of the policy); Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1308-09 (3d Cir. 1994) (even though exclusion for claims related to prior or pending litigation was clear, insured allowed to take discovery on whether insurer added exclusion after renewal and failed to call it to insured's attention or misled insured by telling it claims would be covered despite exclusion); Grinnel Mut. Reins. Co. v. Voeltz, 431 N.W.2d 783, 786 (Iowa 1988) (rejecting application of doctrine to clear policy language "unless there are other circumstances attributable to the insurer which caused such expectations"); Minnesota Mut. Fire & Cas. Ins. Co. v. Manderfield, 483 N.W.2d 521, 524 (Minn. Ct. App. 1992) (factors such as "whether the insured was told of important, but obscure, conditions or exclusions and whether the particular provision in the contract at issue is an item known by the public generally").

[FN81]. See, e.g., Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983) ("By focusing on what was and was not said at the time of contract formation rather than on the parties' writing, [the reasonable expectations doctrine] makes the question of the scope of insurance coverage in any given case depend on how a fact finder resolves questions of credibility. Such a process, apart from the obvious uncertainty of its results, unnecessarily delays the resolution of the controversy, adding unwanted costs to the cost of procuring insurance.").

[FN82]. See ABRAHAM, supra note 16, at 566. Abraham dubs this approach the "penalty standard," pursuant to which "a finding for the policyholder follows automatically from a finding of linguistic ambiguity, however defined." Id. Thus, the insurer is penalized for employing unclear language, irrespective of whether it is objectively reasonable to expect coverage under the specific

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circumstances. For a good illustration of this approach, see Federal Ins. Co. v. Stroh Brewing Co., 127 F.3d 563 (7th Cir. 1997), supra text accompanying notes 56-61.

[FN83]. See, e.g., American States Ins. Co. v. Koloms, 687 N.E.2d 72, 77 (Ill. 1977) (commercial landlord insured under CGL policy sued by tenants injured by carbon monoxide fumes emitted by defective furnace; absolute pollution exclusion not enforced because definition of pollutant as "any solid, liquid, gaseous ... irritant or contaminant ..." was overbroad and could apply to any normally harmless substance to which someone had an allergic reaction); accord Regional Bank of Colo. v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994) (same).

[FN84]. See, e.g., Haber v. St. Paul Guardian Life Ins. Co., 137 F.3d 691, 697 (2d Cir. 1998) ("If an ambiguity arises that cannot be resolved by examining the parties' intentions, then the ambiguous language should be construed in accordance with the reasonable expectations of the insured when he entered into the contract."); Robert E. Keeton & Alan I. Widiss, INSURANCE LAW § 6.3(a)(2) (1988) (ambiguities should "be resolved favorably to the insured's claim only if a reasonable person in the insured's position would have expected coverage"). Some courts have expressed skepticism about the worth of an insured's assertion where that is the only evidence supporting his claim that he believed an ambiguous clause provided coverage. See, e.g., Nygard v. Western Nat'l Ins. Co., 1998 Minn. App. LEXIS 36, at *4-5 (January 13, 1998).

[FN85]. Abraham calls this approach the "majoritarian standard." See ABRAHAM, supra note 16, at 547-49. He cites as an example of this approach, Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994), in which the policyholder asked the court to require successive insurers to assume joint and several responsibility for the insured's asbestos-related liabilities. The court held that the policies were ambiguous as to the method of allocating coverage and referred the case to a special master to determine what coverage the policyholders would have selected had they been given a choice.

[FN86]. See ABRAHAM, supra note 16, at 566 ("Notwithstanding the greater normative appeal of a majoritarian standard, however, it would be extremely undesirable to require or even permit an ordinary interpretive dispute to be encumbered by evidence from experts, market surveys, and the like, regarding policyholder coverage preferences.").

[FN87]. 629 A.2d 831 (N.J. 1993).

[FN88]. A typical form of this exclusion, also called the "qualified" pollution exclusion, provides as follows:

This insurance does not apply ... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 836.

[FN89]. Id. at 851.

[FN90]. Id. at 847.

[FN91]. Id. at 875.

[FN92]. To the contrary, the scope and application of such exclusions has been among the "most hotly litigated insurance coverage questions of the late 1980s and early 1990s." Jeffrey W. Stempel,

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INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 825 (1994), quoted in Center for Creative Studies v. Aetna Life & Cas. Co., 871 F. Supp. 941, 943 (E.D. Mich. 1994).

[FN93]. The "Y2K" or "Year 2000" problem, also known as "The Millennium Bug," results from the use of two-digit codes to identify the years in date fields in computer programs. Begun in the 1950s and 1960s as a means of saving space in (then) costly computer memory, the practice persisted in many cases well into the 1990s. The fear is that when the last two digits of the year change from "99" to "00," programs containing the two-digit date fields will malfunction, resulting in massive business interruption and other serious global consequences.

[FN94]. Insurers' Reserves Thin for Coming Y2K Woes, J. COM., Sept. 17, 1998, at 16, available in LEXIS, Insure Library, Curnws File.

[FN95]. Id.

[FN96]. As even courts applying the reasonable expectations doctrine concede, "in most cases, the language of the insurance policy will provide the best indication of the content of the parties' reasonable expectations." See, e.g., Reliance Ins. Co. v. Moessner, 121 F.3d 895, 905 (3d Cir. 1997).

[FN97]. Waiver generally is defined as the voluntary and intentional relinquishment of a known right. See, e.g., Services Holding Co., Inc. v. Transamerica Occidental Life Ins. Co., 883 P.2d 435, 443 (Ariz. Ct. App. 1994); 16B Appleman, INSURANCE LAW & PRACTICE 9081 (1981). Courts have found waiver of policy provisions that would otherwise defeat coverage where, for example, a liability insurer, with knowledge of a ground of noncoverage under the policy, nonetheless assumes the defense of its insured without reserving its rights to contest coverage later. See, e.g., Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 754, 161 Cal. Rptr. 322, 330 (1980).

[FN98]. Equitable estoppel generally has four elements: (1) the false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know or could not discover the truth; (3) the false representation or concealment was made with the intent that it be relied upon; and (4) the person to whom the representation was made or from whom the facts were concealed relied and acted upon the representation or concealment to his prejudice. See, e.g., Miller v. Elite Ins. Co., 100 Cal. App. 3d at 754, 161 Cal. Rptr. At 330; Wells v. United States Life Ins. Co., 804 P.2d 333, 336 (Idaho Ct. App. 1991).

[FN99]. As one court has held, to nullify a contractual provision as "unconscionable," it must "shock the conscience and confound the judgment of any man of common sense." California Grocers Ass'n v. Bank of America, 22 Cal. App. 4th 205, 215, 27 Cal. Rptr. 2d 396, 402 (1994).

[FN100]. Like the ambiguity-based variation of the reasonable expectations doctrine, this maxim of construction should not automatically result in a finding of coverage. Rather, an ambiguous provision should be interpreted in a way that is objectively reasonable in light of the remaining terms of the contract and other relevant circumstances.

[FN101]. In at least one state, the courts have expressly relied on the adequacy of these other equitable doctrines as a ground for rejecting the reasonable expectations doctrine. See, e.g., Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 805 (Utah 1992) ("[W]e note that the reasonable expectations doctrine has been urged because of the supposed inadequacy of the existing equitable doctrines available to courts confronted with overreaching insurers.... The difficulty with this logic is that no such inadequacy has been shown to exist in Utah.").

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[FN102]. See ABRAHAM, supra note 16, at 559 (recognizing that waiver and estoppel "focus on specific factual interactions between particular policyholders and their insurers").

[FN103]. Some courts do not allow waiver and estoppel to create coverage even when the insurer's conduct induced the insured's mistaken, but reasonable, belief that there was coverage. See, e.g., Manneck v. Lawyers Title Ins. Corp., 28 Cal. App. 4th 1294, 1303, 33 Cal. Rptr. 2d 771, 777 (1994) ("The rule is well-established that the doctrines of implied waiver and estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom ...."); Nationwide Mut. Ins. Co. v. Hockessin Constr., Inc., No. 93C-03-179-SCD, 1996 Del. Super. LEXIS 263, at *12 (May 15, 1996) ("It is fundamental, however, that neither waiver nor estoppel may be used by an insured to create an insurance contract that does not otherwise exist"). A court recently expressed the view, however, that the modern trend is to allow waiver and estoppel to expand the scope of coverage beyond the terms of the policy as written. See Peoples Bank & Trust Co. v. Aetna Cas. & Sur. Co., 113 F.3d 629, 637-38 (6th Cir. 1997).

[FN104]. Courts adopting a more restrictive view of waiver and estoppel will not apply these doctrines unless the party seeking to assert the estoppel did not know and could not have discovered the truth. Thus, for example, an insured cannot successfully claim estoppel by pointing to a false representation by an agent that a particular risk was covered under the policy, if reading the policy would have alerted the insured to the fact of noncoverage. See, e.g., Aetna Cas. & Sur. Co. v. Richmond, 76 Cal. App. 3d 645, 652, 143 Cal. Rptr. 75, 79 (1977) (estoppel does not absolve insured of duty to read policy).

[FN105]. As one court has stated, the unconscionability standard is "more specific, more exacting, and more demanding than an 'unreasonableness' standard ...." California Grocers Ass'n v. Bank of America, 22 Cal. App. 4th at 215, 27 Cal. Rptr. 2d at 402.

[FN106]. See discussion supra Part III.B.

[FN107]. Oki America, Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 315 (9th Cir. 1988) (Kozinski, J., concurring).

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THOMAS L. FRIEDMAN

Ah, Those Principled Europeans

BRUSSELS

Last week I went to lunch at the Hotel Schweizerhof in Davos, Switzerland, and discovered why America and Europe are at odds. At the bottom of the lunch menu was a list of the countries that the lamb, beef and chicken came from. But next to the meat imported from the U.S. was a tiny asterisk, which warned that it might contain genetically modified organisms — G.M.O.'s.

My initial patriotic instinct was to order the U.S. beef and ask for it "tartare," just for spite. But then I and my lunch guest just looked at

Acting morally superior is just blowing smoke.

each other and had a good laugh. How quaint! we said. Europeans, out of some romantic rebellion against America and high technology, were shunning U.S.-grown food containing G.M.O.'s — even though there is no scientific evidence that these are harmful. But practically everywhere we went in Davos, Europeans were smoking cigarettes — with their meals, coffee or conversation — even though there is indisputable scientific evidence that smoking can kill you. In fact, I got enough secondhand smoke just dining in Europe last week to make me want to have a chest X-ray.

So pardon me if I don't take seriously all the Euro-whining about the Bush policies toward Iraq — for one very simple reason: It strikes me as deeply unserious. It's not that there are no serious arguments to be made against war in Iraq. There are plenty. It's just that so much of what one hears coming from German Chancellor Gerhard Schröder and French President Jacques Chirac are not serious arguments. They are station identification.

They are not the arguments of people who have really gotten beyond the distorted Arab press and tapped into what young Arabs are saying about their aspirations for democracy a[illegible] how much they blame Saddam Hu[illegible]sein and his ilk for the poor state [illegible] their region. Rather, they are t[illegible] diplomatic equivalent of smoki[illegible] cancerous cigarettes while rejecti[illegible] harmless G.M.O.'s — an assertion [illegible] identity by trying to be whatever t[illegible] Americans are not, regardless of t[illegible] real interests or stakes.

And where this comes from, ala[illegible] is weakness. Being weak after bei[illegible] powerful is a terrible thing. It ca[illegible] make you stupid. It can make yo[illegible] reject U.S. policies simply to diffe[illegible]entiate yourself from the world[illegible] only superpower. Or, in the case [illegible] Mr. Chirac, it can even prompt you [illegible] invite Zimbabwean President Rob[illegible]ert Mugabe — a terrible tyrant — [illegible] visit Paris just to spite Tony Blai[illegible] Ah, those principled French.

"Power corrupts, but so doe[illegible] weakness," said Josef Joffe, editor o[illegible] Germany's Die Zeit newspaper[illegible] "And absolute weakness corrupt[illegible] absolutely. We are now livin[illegible] through the most critical watershe[illegible] of the postwar period, with enormou[illegible] moral and strategic issues at stake and the only answer many Europeans offer is to constrain and contain American power. So by default they end up on the side of Saddam, in an intellectually corrupt position."

The more one sees of this, the more one is convinced that the historian Robert Kagan, in his very smart new book "Of Paradise and Power," is right: "Americans are from Mars and Europeans are from Venus." There is now a structural gap between America and Europe, which derives from the yawning power gap, and this produces all sorts of resentments, insecurities and diverging attitudes as to what constitutes the legitimate exercise of force.

I can live with this difference. But Europe's cynicism and insecurity, masquerading as moral superiority, is insufferable. Each year at the Davos economic forum protesters are allowed to march through the north end of town, where last year they broke shop windows. So this year, on demonstration day, all the shopkeepers on that end of town closed. But when I walked by their shops in the morning, I noticed that three of them had put up signs in their windows that said, "U.S.A. No War in Iraq."

I wondered to myself: Why did the shopkeepers at the lingerie store suddenly decide to express their antiwar sentiments? Well, the demonstrators came and left without getting near these shops. And guess what? As soon as they were gone, the antiwar signs disappeared. They had been put up simply as window insurance — to placate the demonstrators so they wouldn't throw stones at them.

As I said, there are serious argu[illegible]ments against the war in Iraq, b[illegible] they have weight only if they [illegible] made out of conviction, not out [illegible] expedience or petulance — an[illegible] they are made by people with [illegible] beliefs, not identity crises.

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