Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role

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UNMET EXPECTATIONS: UNDUE RESTRICTION OF THE REASONABLE EXPECTATIONS APPROACH AND THE MISLEADING MYTHOLOGY OF JUDICIAL ROLE

Jeffrey W. Stempel*

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Thanks to Gene Comey, Alan Farnsworth, Larry Garvin, Gary Haugen, David Herr, Bob Jerry,
Jim Reece, Peter Swisher, and especially Alan Widiss for thoughts and guidance concerning
the ever-elusive reasonable expectations concept. Special thanks to Dean Paul LeBel and Ann
McGinley for support. Preparation of this article was assisted by an FSU College of Law
research leave.
INTRODUCTION

In my contribution to this Symposium I want to try to sit the reasonable expectations doctrine on the jurisprudential landscape generally, to revisit the emergence of the concept, and to assess the legal profession’s reaction to reasonable expectations. By doing so, I hope to explain to some degree the doctrine's seemingly sudden emergence, attraction to academics but resistance from elements of bench and bar, early growth, subsequent retreat, current status, and continuing controversy.

In brief and oversimplified peroration, my thesis is that the reasonable expectations concept, although long a tacit, tidal pull on insurance coverage jurisprudence, has never really been fully utilized as an analytical tool and has not yet been fully deployed in a self-consciously thoughtful and comprehensive manner.
In part, this unfortunate underuse of reasonable expectations thinking resulted from the manner in which the doctrine burst on the scene, with emphasis on the reasonable expectations concept as something creating rights "at variance" with the language of the insurance policy. Although the reasonable expectations approach of course does this in a relatively small segment of the case law, it has far more potential impact as a tool for addressing uncertain policy language and application, potential that has been underutilized due to overfixation on the role of reasonable expectations in overcoming clearly worded policy language and the attendant jurisprudential debate this has engendered.

A complete and open embrace of the pure version of the doctrine as enunciated in Judge Keeton’s famous article—which expressly provides for finding coverage consistent with the objectively reasonable expectations of the policyholder even where those expectations are contradicted by apparently clear policy language—is viewed by much of the legal and political mainstream as too inconsistent with the prevailing American paradigm of judicial restraint, strict construction of disputed texts, and minimal government involvement in market activity. Some of this resistance to reasonable expectations is the product of an unrealistic reification of the prevailing American politico-legal philosophy of judicial restraint. Some of the resistance results from legitimate concerns about judicial lawmaking less tethered to text (of insurance policies, contracts, statutes, treaties, or documents in general). But although excessively reified and deified, the judicial restraint paradigm is unlikely to shift significantly unless American society incurs radical change. The resilience of the judicial restraint construct is understandable in that, for the most part, it has proven sound and apt for the American system.

Properly seen, however, the reasonable expectations doctrine, even in its strong "rights at variance" form, is actually consistent with the prevailing jurisprudential ethos because of the context of insurance coverage. Determining the "correct" meaning of an insurance policy inevitably requires not only a sharp focus on policy text but also full consideration of the reasonable expectations of both insurer and insured, even where those expectations to some extent run counter to the text and certainly where text is unclear, insufficiently certain, or applied to unanticipated situations. Contrary to the assertions of some courts and commentators, strong judicial invocation of the reasonable expectations

concept poses no threat to separation of powers and little serious obstacle
toward vindicating the intent of the parties to the insurance contract and
the purpose of the insurance agreement.

Viewed comprehensively, the reasonable expectations of the parties to
an insurance contract can be used not only to construe ambiguous policy
text or to overcome clear text violative of the insured's reasonable
expectations but also to serve as a check on absurd hyperliteral
interpretations of policy text. In addition, the reasonable expectations
approach can assist courts in determining whether policy provisions are
ambiguous or whether "painstaking" study of the policy suggests a clear
meaning for problematic text. All of these varieties of the reasonable
expectations approach merit more frequent, more expansive, and more self-
consciously reflective use by the courts.

I. HISTORICAL PERSPECTIVE

A. The "Birth" of the Reasonable Expectations Doctrine

The Reasonable Expectations "Doctrine" was not identified as a
separate mode of insurance policy construction until Professor (now
Judge) Robert Keeton's famous article, Insurance Law Rights at Variance
with Policy Provisions. But Keeton had humility. Although he came to
describe the consideration of expectations as moving from an identifiable
"principle" during the 1960s to a "doctrine" in the 1970s, he did not label

2. Id. In this first of two articles, Keeton addressed the degree to which three factors—
objectively reasonable policyholder expectations, detrimental reliance, and unconscionability—
combined to give policyholders rights beyond the text of the insurance policy. In Part II of his
project, Keeton discussed the legal evolution away from rigorous judicial enforcement of
warranty provisions in insurance policies, which also tended to give the policyholder rights "at
variance" with the policy language in that warranty provisions had historically been strictly
construed in favor of the insurer rather than the policyholder. The second article also discussed
insurer reservation of rights and regulatory controls on policy language and insurer practices.

3. Writing six years later, Judge Keeton expressly labeled the expectations consideration
a principle during the 1960s but that "[b]efore a decade has passed, a new doctrine of
reasonable expectations was solidly established" in one state and nearly rooted in other states.
Keeton further elaborated on the distinction between doctrine and principle:

In the early years of the 1970s judicial support for a doctrine of reasonable
expectations gradually increased.
or describe this development as a rule of black letter law. Rather, Keeton examined judicial decisions and attempted to find a uniform explanation for cases that seemed to stretch or torture the notion of linguistic ambiguity. Keeton summarized his assessment in the now-famous words:

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.\(^4\)

* * *

As an aid to understanding this development in insurance law, it may be useful to observe a distinction between what we might call a “principle” and a “doctrine” of honoring reasonable expectations. What has happened in the 1960s and 1970s is explicit judicial endorsement of a new ground of decision—a development connoted by the term “doctrine.” The influence of the principle was apparent even earlier, and its influence during the 1960s and 1970s was considerably more pervasive than the applications of the doctrine.

Because we depend on language to express substantive distinctions, we are always in danger of mistaking semantics for deeper substance. Nevertheless, the distinction between a “principle” and a “doctrine” of reasonable expectations is one of deeper substance, however imprecisely it may be expressed by our linguistic usages.

Principles collide in a sense beyond doctrinal conflict. Doctrines are sets of explicit rules of decision—the outcomes of accommodation among competing principles. Conflicts among doctrines are imperfections yet to be worked out as the operational rules of the legal system evolve. The collision of principles, on the other hand, is a phenomenon that does not signal imperfection of the legal system but rather signals the underlying conflict of interest with which the legal system must grapple.

_Id._ at 276-77.

4. Keeton, _supra_ note 1, at 967. In addition, the Keeton article posited additional principles creating policyholder rights beyond the terms of insurance policy text. According to Keeton:

If the enforcement of a policy provision would defeat the reasonable expectations of the great majority of policyholders to whose claims it is relevant, it will not be enforced even against those who know of its restrictive terms.
According to Keeton, expectations analysis was utilized by courts on occasion to go beyond the normal benefit accorded the policyholder when policy language was unclear (in which case any ambiguities in the policy are construed against the policyholder and in favor of the insured). When courts apply "pure" reasonable expectations theory, the court mandates coverage consistent with the policyholder's expectations even if relatively clear policy language is to the contrary.\textsuperscript{5} With all due respect to the "creator" of the doctrine, I disagree with Keeton to an extent. Even today, courts use expectations analysis so gingerly that calling it a doctrine rather than a principle seems too much. In my view, consideration of the reasonable expectations of the parties, primarily the insured, is an approach or method of interpretation more akin to a principle than a doctrine. Keeton defines doctrine as a set of explicit "rules" for decision. As I read reasonable expectations cases, even those most often cited as

\textit{Id.} at 974.

An insurer will not be permitted an unconscionable advantage in an insurance transaction even though the policyholder or other person whose interests are affected has manifested fully informed consent.

\textit{Id.} at 963.

A policyholder or other person intended to receive benefits under an insurance policy is entitled to redress against the insurer to the extent of detriment he suffers because he or another person justifiably relied upon an agent's representation incidental to his employment for the insurer.

\textit{Id.} at 977-78.

Thus, although the Keeton article is best know for its identification of and formulation of the reasonable expectations principle, Keeton also identified the reasonable expectations approach as preventing even defenses of actual knowledge and noted the importance of unconscionability and detrimental reliance as grounds for recover under an adversely worded policy.

\textsuperscript{5} The rationale for the approach is based on several factors: complexity of policy language; standardization of policies; the adhesion nature of most insurance policies; the contracting process, in which insureds almost never see the full policy until after it is in force and seldom read it; and the need to protect unsophisticated or vulnerable insureds. \textit{See} Keeton, supra note 1, at 963-85; \textsc{Jeffrey W. Stempel, Interpretation of Insurance Contracts} § 11.3 (1994); Mark C. Raddon, \textit{Reasonable Expectations Reconsidered}, 18 \textsc{Conn. L. Rev.} 323, 324-30 (1986); Kenneth S. Abraham, \textit{Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured}, 67 \textsc{Va. L. Rev.} 1151, 1153-55 (1981); Stephen J. Ware, Comment, \textit{A Critique of the Reasonable Expectations Doctrine}, 56 \textsc{U. Chi. L. Rev.} 1461, 1463-64 (1989).
trumpeting the doctrine, the courts hardly seem to be decreeing a consistently all-powerful "rule". More often, one has the sense that the courts are invoking the equity considerations implicit in reasonable expectations analysis to decide an at least moderately difficult case. Often, one senses an almost apologetic tone by the courts rather than the handing down of a decision by "rule".

But Keeton is surely correct that in the wake of his article, courts and commentators expressly identified expectations analysis as something more than ordinary equitable interpretation, focusing on the rights-at-variance "brand" of the reasonable expectations doctrine and debating the extent to which policyholder expectations should be permitted to trump "clear" contract provisions. Before swiftly reviewing the history of reaction to the "reasonable expectations doctrine", it is worth emphasizing what many observers apparently failed to note or have forgotten: Keeton was not purporting to comment comprehensively on the role of party expectations in determining the meaning of insurance policies across-the-board. Rather, Keeton wrote about a number of instances in which the policyholder might enjoy rights "at variance" with the specific language of the insurance policy. Court-ordered coverage consistent with the policyholder's objectively reasonable expectations was simply one instance giving rise to what might be termed "extra-textual" policyholder rights. Keeton's article specifically identified two other significant instances creating such rights for the policyholder: (1) when the strictly applied policy language would create an unconscionable advantage for the insurer; and (2) where the insured had relied to its detriment on representations or conduct of the insurer.

In short, Keeton's work, masterful and far-reaching as it was, had a relatively narrow focus: examination of situations giving rise to policyholder rights in addition to or in contravention of policy text. The use of "rights at variance" reasonable expectations was but one part of the project. Keeton did not purport to provide the definitive statement on the role of reasonable expectations analysis in general, although he noted that the expectations principle was used in ways other than contravention of adverse policy language. Instead, Keeton focused on the relatively small

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6. See infra cases cited in nn.21 and 22,
7. See Keeton, supra note 1.
8. For example, Keeton suggested that reasonable expectations thinking has been used to limit the application of the contra proferentem principle (requiring ambiguous policy language to be resolved against the drafting insurance company) so as to prevent absurd results.
It might be objected that resolving ambiguities against the insurer would sometimes be more favorable to the insured than would honoring reasonable expectations. For example, even though the contractual language was ambiguous, there might be no expectations at all, or the expectation might be unreasonable, thus defeating a claimed expansion of coverage beyond the letter of the contract. It seems likely, however, that, even though not often expressed, there has always been an implicit understanding that ambiguities, which in most cases might be resolved in more than just one or the other of two ways, would be resolved favorably to the insured's claim only if a reasonable person in his position would have expected coverage.

Id. at 969 (citations omitted).

However, cases such as Rusthoven v. Commercial Standard Ins. Co., 387 N.W.2d 642 (Minn. 1986) (finding policy insuring 67 vehicles ambiguous as to uninsured motorist policy limits, Court requires insurer to provide 67 times the $25,000 per vehicle UM limit, requiring coverage of $1.675 million) (discussed infra notes 251-57 and accompanying text), in which the Court cited this very passage, suggest that reasonable expectations may provide only modest restraint upon the more longstanding and expressly accepted contra proferentem doctrine. See also Foremost Ins. Co. v. Putzier, 627 P.2d 317 (Idaho 1981) (finding third-party liability policy sufficiently ambiguous to permit policyholder to obtain first-party benefits based on agent's statement that policyholder was "covered"); Michael B. Rappaport, The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter, 30 GA. L. REV. 171 (1995) (criticizing ambiguity rule as unfairly mandating coverage from mere drafting imprecision where insured could not have reasonably expected coverage and suggesting unconscionability analysis as preferable approach).
B. Surge, Decline and Uncertainty About Support for the Doctrine

1. A New Doctrine for Debate

After Judge Keeton’s article, the judicial activity undertaken to aid insured now had a name. Several courts accepted Keeton’s analysis and overtly declared themselves to be followers of the reasonable expectations approach. But, “the expectations principle [was and] is being employed in varying situations and with varying justifications.” Many courts had difficulty embracing a concept that they regarded as turning too quickly away from the traditional contract law principles positing that contract language should be enforced as written if it is sufficiently clear. These courts were willing to consider policyholder expectations only if policy language was ambiguous. Other courts were willing to utilize the Keeton form of reasonable expectations analysis to overcome clear text, but only where language favorable to insurers was complex, hidden, arguably

9. See Stempel, supra note 5, §11.1 at 312; Rahdert, supra note 5, at 324, 345-55; Abraham, supra note 5, 1153 n.7 (finding more than 100 “opinions voicing the expectations principle” decided “both before and after Professor Keeton’s article”); Note, A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts, 13 U. Mich. J. L. Ref. 603 (1980) (collecting cases discussing reasonable expectations).

Again, for historical fairness, I should note that Keeton suggested that the doctrine was “solidly established” in New Jersey prior to publication of his article. See Keeton, supra note 3, at 275 (citing five New Jersey cases). However, even if one reads these cases as solidly reasonable expectations in orientation, as does Keeton, the caselaw here and elsewhere did not use reasonable expectations terminology until after appearance of the Keeton article.

10. Abraham, supra note 5, at 1153. See also Roger C. Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 Ohio St. L. J. 823 (1990); Stempel, supra note 5, §11.1 at 313:

Determining the exact status of the reasonable expectations school is difficult. In many states, court discussion is intermeshed with other insurance contract terminology. In other states, only lower courts have invoked the term, sometimes with different assessments or at least different actual use of the concept.

11. See, e.g., Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 908 (Iowa 1973)(expectations of policyholder considered only when layperson would not understand exclusion at issue or where insurer conduct created expectation of coverage).

But, as noted above, my view is that courts permitting policyholder expectations to assist in interpreting ambiguous language have failed to provide thorough analysis of the reach and application of the expectations principle. Most such decisions merely note that ambiguous terms must be construed consistently with the reasonable expectations of the parties and then render a decision without further discussion of party expectations and their basis.
unfairly surprising, or where the insured was a consumer or small business.\textsuperscript{12}

Courts have for decades and perhaps centuries been using the policyholder’s understanding of the policy as a tool for resolving coverage disputes. However, the conventional wisdom held that these considerations only applied if the policy language at issue was unclear or unconscionable. Keeton both debunked this conventional wisdom and attempted to synthesize case law finding coverage despite policy language favorable to insurers denying coverage.\textsuperscript{13} According to Keeton, these cases could not be solely explained by reference to traditional doctrines such as unconscionability, waiver, estoppel, or construction of ambiguities in favor of the policyholder. Rather, the common thread in these cases was the court’s willingness to provide coverage consistent with the objectively reasonable expectations of the policyholder even if policy text read literally would foreclose coverage.

The Keeton thesis rapidly caught the attention of the academic community and a good deal of the judiciary and practicing bar as well.\textsuperscript{14} Although assessments vary, observers consider at least a dozen states to have adopted the doctrine in the form articulated by Judge Keeton while more than half the states have invoked the reasonable expectations concept with favor.\textsuperscript{15} Usually, however, the form of reasonable expectations applied is one in which “application of the reasonable expectations doctrine is typically limited to cases in which the policy is ambiguous and the mutual intent of the parties cannot be determined.”\textsuperscript{16}

\begin{flushleft}
12. See, e.g., Atwater Creamery Co. v. Western National Mutual Ins. Co., 366 N.W. 2d 271 (Minn. 1985), particularly as reinterpreted in Board of Regents of Univ. of Minn. v. Royal Ins. Co., 517 N.W. 2d 888 (Minn. 1994).


14. See STEMPLE, supra note 5, Ch. 11; Henderson, supra note 10, at 823-24 nn.5-8 (listing significant commentary on Keeton analysis and noting adoption of approach by many state courts) (summarizing commentary and developments in the wake of Keeton article).

15. See, e.g., Henderson, supra note 10, at 823 n.5 (“[a]s many as sixteen states may be viewed as having adopted the doctrine, but it is not clear whether every court intended to embrace the broadest formulation.”).

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2. The Scorecard in the States: Acceptance and Rejection of a Variety of Expectations Doctrines

After its rapid initial success, however, the Keeton doctrine was subject to limitation, retrenchment, and even reversal in many states.17 Today, by the most liberal count of two leading commentators, 38 states "have recognized some variation of the reasonable expectations doctrine".18

Usually, commentators divide states into (1) those that have adopted reasonable expectations analysis supporting rights at variance with policy text as set forth by Keeton;19 (2) those that utilize the reasonable expectations of the policyholder in interpreting ambiguous policy language,20 and (3) those that have completely rejected the doctrine.21 As noted above, some commentators make a blunter cut, classifying states as jurisdictions accepting or rejecting the approach.22 A review of the cases

17. See generally STEMPPEL, supra note 5; Rahdert, supra note 5 (describing state court decisions reversing or limiting earlier application of reasonable expectations doctrine).
18. See OSTRAGER & NEWMAN, supra note 16, § 1.03[b] at 22.
19. See Rahdert, supra note 5 (dividing states according to strong and moderate versions of reasonable expectations doctrine as well as those that have rejected doctrine). See, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975) (case very similar to Atwater Creamery; insurance policy covers theft with no visible marks despite express policy language requiring visible marks; reasonable expectations of policyholder overcome clear exclusionary language); Kievet v. Loyal Protective Life Ins. Co., 170 A.2d 22 (N.J. 1961) (requiring coverage notwithstanding exclusionary language due to policyholder expectations). The Minnesota case Atwater Creamery Co. v. Western National Mut. Ins. Co., 366 N.W. 2d 271 (1985) is frequently viewed as a leading case adopting the pure Keeton-esque version of the doctrine. See discussion infra notes 40-62 and accompanying text. However, Atwater Creamery is arguably more limited in that subsequent Minnesota decisions have emphasized that the reasonable expectations can trump clear policy language only where the language is hidden or unfairly surprising. See infra notes 55-62 and accompanying text.
22. See, e.g., OSTRAGER & NEWMAN, supra note 16, § 1.03[b] (dividing states into those that "recognize the reasonable expectations doctrine" (citing decisions in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia,
suggests somewhat more variety in the manner in which courts employ the reasonable expectations concept. Commentators listing up to 38 states as approving the reasonable expectations doctrine characterize the reasonable expectations approach too broadly. Reasonable expectations analysis takes several forms ranging on a continuum from use only as a near last-resort means of resolving ambiguous contract language (the version of the approach normally least helpful to policyholders) to use as a principle of insurance law that overrides clear and obvious policy language (the version of the approach that is normally most helpful to policyholders). There are logically several versions of the reasonable expectations approach:

1) Acceptance of the "pure" Keeton approach where policyholder expectations can win out over even clear policy text;

2) Construction in favor of policyholder expectations where the arguably clear language is hidden, surprising, or would seem to contravene the essence of the insurance product in question;

3) Use of reasonable expectations in what Professor Kenneth Abraham has referred to as "mandated coverage" cases—situations where the court tacitly seems to declare that a certain sort of policy must cover certain perils;\(^{23}\)

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\(^{23}\) See Abraham, supra note 5, at 1162-63.
4) Enforcement of the insurance contract in favor of the insured’s expectations due to estoppel-like conduct by the insurer;

5) Consideration of policyholder expectations in determining the proper construction to give to ambiguous language in dispute;

6) Rejection of any role for policyholder expectations;

7) In addition, as observed by the Keeton article, courts often use the reasonable expectations concept to avoid coverage where the insured, despite ambiguous or seemingly favorable language, is asserting a right to coverage that is unreasonable or at odds with basic insurance concepts such as fortuity, moral hazard, or adverse selection.\(^\text{24}\)

As noted above, the number of jurisdictions that has adopted this "pure" version of the Keeton doctrine is relatively small, numbering approximately a half-dozen. It includes states generally regarded as more progressive and favorable to consumers and claimants: California;\(^\text{25}\) New Jersey,\(^\text{26}\) Pennsylvania,\(^\text{27}\) and the District of Columbia.\(^\text{28}\) Also appearing at

\(^{24}\) See Keeton, supra note 1, at 969. Notions of reasonable expectations also are used to prevent unfair or fraudulent attempts to obtain coverage for intentionally caused injury, previously indemnified amounts, or recovery where the policyholder lacks an insurable interest in the subject matter of the policy. In these sorts of cases, the reasonable expectations doctrine can be seen as evenhanded as between insurers and policyholders, although courts usually describe the doctrine as one focusing on the reasonable expectations of the insured.

\(^{25}\) See, e.g., Gray v. Zurich Ins. Co., 419 P. 2d 180 (Cal. 1966) (finding coverage for assault and battery claim under homeowner’s policy despite clear intentional conduct exclusion). But see Bank of the West v. Superior Court, 833 P. 2d 545 (Cal. 1992) (apparently modifying doctrine narrowing range of policyholder expectations considered reasonable and suggesting inapplicability of the doctrine where exclusionary language is both clear and consistent with the purpose of the insurance policy).

\(^{26}\) See, e.g., Kievet v. Loyal Protective Life Ins. Co., 170 A.2d 22 (N.J. 1961) (finding coverage for commercial activities under homeowner’s policy despite clear business activities exclusion). Subsequent New Jersey decisions appear to have backed away from a broad form of the reasonable expectations doctrine to one requiring ambiguity, see, e.g., DiOrio v. New Jersey Mfrs. Co., 398 A. 2d 1274, 1280-81 (N.J. 1979), but then returned to a stronger form of the doctrine consistent with the Keeton formulation. See, e.g., Sparks v. St. Paul Ins. Co., 495 A.2d 406, 414-15 (N.J. 1985) (scope of coverage provided by text of lawyers’ professional liability policy invalidated for failing to meet “objectively reasonable expectations” of
least at one time to endorse the full dress form of the reasonable expectations doctrine are Hawaii, Idaho, Iowa, Minnesota, and Nevada. Today, however, Idaho, Iowa, and Pennsylvania have since disapproved the pure reasonable expectations doctrine and instead appear

policyholder; court declines to set forth criteria for assessing reasonableness of policyholder views). But, on the central issue of the case—the general validity of a claims-made form of commercial general liability (CGL) policy—the court rejected the argument that the claims-made form of trigger would violate the reasonable expectations of the insured. However, the particularly narrow form of claims-made coverage provided by the policy in question, which provided no retroactive coverage (understandably a concern for attorneys whose prior matters are all potential time bombs) was unenforceable because of its contravention of policyholder expectations. See also Morton Int'l v. General Accident Ins. Co., 629 A. 2d 831 (N.J. 1993) (construing “sudden and accidental” pollution exclusion not to preclude coverage for gradual pollution claims against insured due in part to manner in which the exclusion was characterized when amended in 1970s and degree to which policyholders would have reasonable expectation of coverage for unintended pollution).

27. See, e.g., Collister v. Nationwide Life Ins. Co., 388 A. 2d 1346 (Pa. 1978) (ordering temporary coverage in conditional receipt case despite language restricting coverage unless applicant is deemed insurable by company); Hionis v. Northern Mut. Ins. Co., 327 A. 2d 363 (1974) (requiring that even clearly written exclusions be called to attention of applicant or policyholder if they are to be enforced). Subsequent Pennsylvania cases have backed away from the Hionis approach, see e.g., Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A. 2d 563 (Pa. 1983), and suggest that Pennsylvania is now a “middle level” reasonable expectations state that uses the approach in combination with ambiguity analysis to resolve disputed and allegedly ambiguous language. See Tonkovic v. State Farm Mut. Auto Ins. Co., 521 A. 2d 920 (Pa. 1987).


30. See, e.g., Corbatelli v. Globe Life & Accident Ins. Co., 533 P.2d 737 (Idaho 1975) (providing coverage for partially separated shoulder under accident policy even though policy language required complete break or dislocation). However, in Casey v. Highlands Ins. Co., 600 P. 2d 1387 (Idaho 1979) (denying coverage for burglary because of absence of visible marks of entry), the Idaho Supreme Court expressly rejected the reasonable expectations doctrine in any form and overruled Corbatelli.

31. See, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W. 2d 169 (Iowa 1975) (providing coverage for burglary loss with no visible marks despite policy language requiring visible marks of entry for coverage). But see Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W. 2d 104 (Iowa 1981) (moving away from pure reasonable expectations doctrine to requirement that policy language in question be ambiguous, bizarre, or oppressive to provide coverage based on policyholder expectations).


to use expectations analysis only when contested policy language is ambiguous or otherwise problematic. Minnesota does not require ambiguous language as a trigger for expectations analysis but does require that the exclusionary language at issue be in some way hidden or surprising to the policyholder. New Jersey is seen by some commentators as similarly having moved from pure reasonable expectations analysis to expectations as a tool for resolving ambiguous language and then back again.

3. Progress, Retrenchment, Stability

Within the first decade after Keeton's seminal article, the major four variants (acceptance, rejection, use only in response to hidden exclusions; use only for construing ambiguous language) of the "reasonable expectations doctrine" had already become known. On the whole, the 1970s can be seen as something of a "growth period" for the reasonable expectations doctrine. The doctrine, unnamed until Keeton's article, was widely discussed and utilized, with adoption in seemingly pure form in several states. In part this was undoubtedly because courts in some states merely began to name what they had been doing for some time. The 1980s continued to see growth in support for reasonable expectations analysis but also began to reveal some backpedaling by courts that had adopted the doctrine as well as less tendency in other states to embrace the reasonable expectations method. The cases of the 1990s suggest that the reasonable expectations "plebiscite" among the states is remaining relatively stable, with few states changing their respective positions on the doctrine.

34. See supra notes 27, 30, and 31.
35. See infra notes 40-62 and accompanying text.
36. See Stempe1, supra note 5, § 11.4.4 at 348-49.
37. A Lexis search of caselaw in the 1970s reveals 36 cases citing to either the Keeton Rights at Variance article or discussion of the reasonable expectations principle in Keeton's insurance law treatise, ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW (1971). Prior to 1970, there is no express discussion of a reasonable expectations principle and no express suggestion that clear policy text could be overcome not only by unconscionability or actual estoppel but by policyholder expectations.

In the 1980s, 73 cases discuss the expectations principle and cite to one of the Keeton sources, with 61 cases doing so during the period from 1990 to the present. Those numbers increase to 89 and 75, respectively when citations to the Second Edition of the Keeton treatise, co-authored with Prof. Alan Widiss, is included. Although the 1980s and 1990s show more actual case use of the expectations principle, it remains accurate to view the 1970s as the period of doctrinal growth during which the reasonable expectations principle went from being undefined to being recognized as a "doctrine" and embraced by a significant number of courts.
A classic example of relatively early embrace of the reasonable expectations doctrine is found in two cases involving burglary insurance. In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,38 The insured collected under a burglary policy even though the policy stated that "visible marks of entry" were required for coverage and no such visible marks were present. The court cited the Keeton article favorably and appeared to have embraced the "rights at variance" version of the reasonable expectations doctrine, although subsequently, Iowa courts stated that insured could not benefit from the reasonable expectations approach in the face of clear language unless the limitation on coverage was "bizarre or oppressive" or eliminated the dominant purpose of the insuring agreement.39

a. The Minnesota story: an illustration of the limited acceptance of the reasonable expectations concept through the stunted growth of the children of *Atwater Creamery*

Minnesota's response to reasonable expectations was slightly different but similarly enthusiastic in that Minnesota seemingly embraced reasonable expectations analysis, also in a burglary claim without visible marks as did the Iowa courts. In *Atwater Creamery Co. v. Western National Mutual Insurance Co.*,40 the Minnesota Supreme Court examined a burglary insurance coverage dispute where the burglary lacked visible marks of entry, a type of coverage dispute that appears to test the receptiveness of state courts to the Keeton approach. This type of case prompted Iowa to adopt the doctrine41 while Nebraska implicitly rejected it.42 Idaho was so troubled that it decided the case in favor of the insurer

38. 227 N.W. 2d 169 (Iowa 1975).
40. 366 N.W.2d 271 (Minn. 1985).

In *Cochran*, the Nebraska court viewed the "visible marks" standard as a not unconscionable definition of coverage rather than a surprising limitation on otherwise broad burglary coverage. It is worth noting, however, that in *Cochran*, the insured was a professional
and expressly reversed earlier precedent adopting the pure form of the reasonable expectations doctrine. In *Atwater Creamery*, Minnesota appeared to opt for the full-fledged version of the Keeton doctrine and found coverage notwithstanding that the "visible marks of entry" burglary definition was not literally satisfied.

The policyholder was a creamery and feed store in rural Minnesota. The policy definition of burglary read:

[A covered theft is] the felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon or physical damage to, the exterior of the premises at the place of such entry, or . . . (3) from within the premises by a person making felonious exit therefrom by actual force and violence as evidence by visible marks made by tools, explosives, electricity or chemicals upon or physical damage to, the interior of the premises at the place of such exit.

Chemicals worth more than $15,000 were stolen from the insured's warehouse, with the locks removed and the doors open (sufficiently to drive a truck into the warehouse). The policyholder admitted to not reading the policy. The insurance agent testified that he had "mentioned" the evidence of forced entry provision sometime during the sales or coverage period but was uncertain regarding the time. The *Atwater* court defined the issue as "whether the reasonable expectations of the insured as to coverage govern to defeat the literal language of the policy". The Court noted that policy definition of burglary is different and more limited than the criminal statute's definition, a difference the Court regarded as

44. 366 N.W.2d at 275.
45. Id.
germane to the insured’s reasonable expectations in purchasing burglary insurance.\footnote{Id.}

The Court also assessed the insurer’s purpose in writing a visible marks requirement into the policy.

These purposes are two: to protect insurance companies from fraud by way of ‘inside jobs’ and to encourage insured to reasonably secure the premises. As long as the theft involved clearly neither an inside job nor the result of a lack of secured premises, some courts have simply held that the definition does not apply.

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We are uncomfortable, however, with this analysis given the right of an insurer to limit the risk against which it will indemnify insured.

\* \* \* \n
The policy attempts to comprehensively define burglaries that are covered by it. In essence, this \[purpose dominated interpretative\] approach ignores the policy definition altogether and substitutes the court’s or the statute’s definition of burglary. This we decline to do, either via the conformity clause or by calling the policy definition merely one form of evidence of a burglary.\footnote{Id. at 276 (citations omitted).}

The Court reviewed cases accepting or rejecting similar purpose-based approaches to interpreting insurance policies and found them too divorced from the actual policy language to be useful. However, the Court found no such infirmities with the Keeton doctrine. It noted that the burglary definition “constitutes a rather hidden exclusion from coverage”\footnote{Id.} and that exclusions are ordinarily strictly construed against the insurer. The Court then cited Keeton’s article in the course of observing that the visible marks requirement is “surprisingly restrictive” and that “no one purchasing something called burglary insurance would expect coverage to exclude skilled burglaries that leave no visible marks of forcible entry or exit.”\footnote{Id.}

\begin{footnotes}
46. \textit{Id.}
47. \textit{Id.} at 276 (citations omitted).
48. \textit{Id.}
49. \textit{Id.}
\end{footnotes}
The Minnesota Court in *Atwater Creamery* cited favorably Iowa’s *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*50 But, more than the Iowa court, Minnesota emphasized the “hidden” or “surprising” nature of the visible marks exclusion. Despite this, *Atwater Creamery* also embraced the Keeton reasonable expectations concept in broad conceptual terms:

The reasonable-expectations doctrine gives the court a standard by which to construe insurance contracts without having to rely on arbitrary rules which do not reflect real-life situations and without having to bend and stretch those rules to do justice in individual cases. As Professor Keeton points out, ambiguity in the language of the contract is not irrelevant under this standard but becomes a factor in determining the reasonable expectations of the insured, along with such factors 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. The doctrine does not automatically remove from the insured a responsibility to read the policy. It does, however, recognize that in certain instances, such as where major exclusions are hidden in the definitions section, the insured should be held only to reasonable knowledge of the literal terms and conditions. The insured may show what actual expectations he or she had, but the factfinder should determine whether those expectations were reasonable under the circumstances.

* * *

In our view, the reasonable expectations doctrine does not automatically mandate either pro-insurer or pro-insured results. It does place a burden on insurance companies to communicate coverage and exclusions of policies accurately and clearly. It does require that expectations of coverage by the insured be reasonable under the circumstances. Neither of those requirements seems overly burdensome. Properly used, the doctrine will result in coverage in some cases and in no coverage and others.51

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50. 227 N.W.2d 169 (Iowa 1975).
51. *Atwater Creamery*, 366 N.W.2d at 278.
The Iowa decision in *C & J Fertilizer* and the Minnesota decision in *Atwater* represent perhaps as pure a self-conscious reference to and incorporation of scholarly theory or method as one finds in the messy real world of actual litigation. Not surprisingly, both *C & J Fertilizer* and *Atwater Creamery* have become well-known for this reason and has been reprinted at length in many of the leading insurance law case books as the paradigmatic example of the Keeton reasonable expectations doctrine in action.  

However, over the course of the ensuing decade, subsequent cases in Minnesota limited *Atwater Creamery* to only a moderate or limited version of reasonable expectations analysis, limiting the use of “rights at variance” expectations analysis to cases of hidden or deceptive policy language. In *Board of Regents of the University of Minnesota v. Royal Insurance Co.*, Minnesota Justices who had dissented from earlier reasonable expectations rulings effected a substantial change in the law, removing the remnants of the Keeton version of the reasonable expectations doctrine from *Atwater Creamery*. *Regents v. Royal*, authored by *Atwater* dissenter Justice John Simonett, involved the University of Minnesota which, having settled with

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53. See, e.g., Hubred v. Control Data Corp., 442 N.W.2d 308 (Minn. 1989) (reaffirming *Atwater* but finding against insured medical benefits claimant, quickly deeming an exclusion to be clear and also using reasonable expectations reasoning against the claimant); Minnesota Mining and Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175 (Minn. 1990) (using a mixture of ambiguity and reasonable expectations analysis to find that environmental remission costs qualified as “damages” under a CGL, a determination that met with a strong dissent, as did *Atwater Creamery*). But see Eiynk v. Sabrowsky, 524 N.W.2d 297 (Minn. App. 1994) (expectations analysis precludes insurer from reducing coverage through added exclusion done as pro forma dispatch of boilerplate update of policy); Amatuzio v. United States Fire Ins. Co., 409 N.W.2d 278 (Minn. App. 1987) (policy endorsement providing coverage for FAA authorized “aerobic flight, air shows or aerobatic competition” includes “air racing” and does not bar coverage where insurer knew of policyholder’s participation in such events and failed to call the exclusionary language to the attention of the policyholder or utilize clearer language).

54. 517 N.W.2d 888 (Minn. 1994).
asbestos suppliers for costs associated with asbestos abatement, sought to enforce the settlement against the insurers. Both primary and excess insurers raised the pollution exclusions of their respective policies. The primary policies contained the “standard 1973 Form pollution exclusion” barring coverage for pollutants discharged into the “atmosphere” unless the release was “sudden and accidental” while the excess carriers employed an “absolute” pollution applying to “real or personal property”.

The Regents v. Royal Court sensibly concluded that a building’s interior was not “atmosphere” within the meaning of the primary policy pollution exclusion but more problematically found the claim uncovered by the excess insurance policies because the excess exclusion applied not only to discharges into the atmosphere but also to any pollution of real property, forgoing any serious consideration of whether asbestos contamination of a building was really what insureds and ordinary contracting parties would envision when reading a “pollution” exclusion.55 Although the language of the primary and excess policies clearly differs, the Court placed undue emphasis on the differing language despite purportedly adopting a contextual approach to insurance contract interpretation.56

By focusing so narrowly on whether the exclusion was spatially limited as an “indoor” or “outdoor” exclusion, the court overlooked the very real possibility that “pollution” itself is arguably an ambiguous term when applied to building injury claims. To restate: has an asbestos contaminated building been “polluted” or is its value reduced because the supplier used a defective material whose defect is its inadequacy, toxicity or other capacity for injury, as if the building were riddled with weak rivets about to release causing the building to sag? The Regents v. Royal Court does not really examine this issue of policy meaning but rather rushes to embrace the view that because asbestos is an irritant it must fit within a pollution exclusion that mentions irritants. But when we speak of a “sick” or problem building, we normally do not think of this as “pollution” so much as poor construction or materials.

Furthermore, Regents v. Royal also went out of its way to limit Atwater Creamery and to overrule the use of Atwater/Keeton style reasonable expectations analysis found in an intermediate state Court of Appeals case, Grinnell Mutual Reinsurance Co. v. Wasmuth.57 Grinnell found coverage

55. See id. at 893.
56. See id. at 892-93.
57. 432 N.W.2d 495 (Minn. App. 1988).
notwithstanding a pollution exclusion for a policyholder whose claim arose from formaldehyde fumes emitted by insulation material in the home, a seemingly sensible determination the Regents v. Royal Court viewed as troubling, stating:

[The court of appeals in Wasmuth] found insurance coverage, holding that an insured would not reasonably have expected its comprehensive general liability policy to exclude coverage for “unexpected damage due to installation of building materials in a home.” The reasonable expectations test [of Atwater Creamery], however, has no place here, and the contrary ruling of Grinnell is overruled. In Atwater, we held that where major exclusions are hidden in the definitions section, the insured should be held only to reasonable knowledge of the literal terms and conditions.” In the comprehensive general liability policy involved in this case, the pollution exclusion is plainly designated as such; consequently, the wording of the exclusion should be construed, if a claim of ambiguity is raised, in accordance with the usual rules of interpretation governing insurance contracts. The reasonable expectations test is not a license to ignore the pollution exclusion in this case nor to rewrite the exclusion solely to conform to a result that the insured might prefer.58

In a footnote, the Regents v. Royal Court moved to further restrict Atwater's reach by emphasizing the “hidden or deceptive language” aspect of Atwater rather than the other portions of the opinion praising the Keeton version of the doctrine. Regents v. Royal’s cavalier treatment of expectations concerns is troubling. Surely insulation suppliers would expect that when sued for products liability claims, their CGL insurance policies will be available to protect against such lawsuits (absent, perhaps, a specific products liability exclusion). For example, a surveyor of fiberglass insulation that scratched the occupant (e.g., if the insulation were exposed in the attic), causing serious bleeding would be covered under the typical CGL. If instead, the occupant is injured by the fumes of formaldehyde insulation, it seems odd that this should be excluded from coverage even though this may literally be a release of an irritating

58. Regents, 517 N.W.2d at 891 (citations omitted).
substance. Construing the pollution exclusion so broadly seriously shrinks available coverage, effectively transforming it into a specific risk policy rather than the all-risk CGL marketed to policyholders.

Atwater Creamery presented a unique situation. Under the policy definition, there was no “burglary” on the insured’s premises, even though admittedly a burglary had occurred and even though the policy was a “Mercantile Open Stock Burglary Policy.” For there to be a burglary, the policy definition required that there be a burglar who left visible marks of a forcible entry or exit. If, as was the case in Atwater, the burglar is skillful enough to leave no marks, there is no “burglary.” This “visible marks” qualification, we said in Atwater, was really a “hidden” or masked exclusion, impermissibly disguised within the definition section of the policy. The Iowa Supreme Court, it is interesting to note, has limited the application of its reasonable expectations doctrine to egregious situations similar to that in Atwater.  

*Regents v. Royal* narrows *Atwater* from an arguably pure Keeton reasonable expectations analysis to a moderate expectations jurisdiction that employs the concept as a means of interpreting ambiguous language or overcoming clear but furtive language restricting coverage. Effectively, Minnesota, like Iowa, moved from being a “cutting edge” Keeton-style reasonable expectations jurisdiction in 1985 to a mainstream jurisdiction

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59. *Id.* at 891 n.4 (citing Atwater and AID (Mut.) Ins. v. Steffen, 423 N.W. 2d 189, 192 (Iowa 1988)). *Steffen* involved an insured’s claim to have coverage for patent litigation expenses when customers refused to pay royalties, alleging the patents were worthless. Although the *Steffen* court does in dicta state that expectations analysis should be used only where coverage exclusions are hidden or bizarre, expectations analysis applied to the facts of *Steffen* case would have precluded coverage. The insureds were seeking to characterize as a “property damage” claim a business dispute that did not involve allegations that the Steffen brothers in fact caused bodily injury or property damage to others because of negligence. Consequently, they had no objectively reasonable expectation of coverage, a fact that alone would have supported the denial of coverage. Consequently, the facts of *Steffen* do not support the need for a hidden or bizarre provision to justify expectations analysis. In addition, it is difficult to determine what the *Regents v. Royal* Court used as its yardstick for measuring “egregious” circumstances.

60. *See supra* notes 21-29 and accompanying text.
by 1994.\(^6\) Ironically, the reasonable expectations concept in Minnesota today may possess greatest decisional strength when used against a policyholder to deem unreasonable an asserted expectation of coverage even though policy language is unclear or susceptible to being read against the insurer.\(^7\)

\(^6\) Cases since Regents v. Royal continue in this vein, as did a number of Court of Appeals decisions issued during the time period between Atwater Creamery and Regents v. Royal. See, e.g., Johnson v. Schrunk, Nos. C5-95-970, C6-95-959, 1995 Minn. App. LEXIS 1093, 1995 WL 747907 (Minn. Ct. App. Aug. 22, 1995) (reasonable expectations analysis only apt where policy language is not clear); Farmers Union Oil Co. v. Mutual Serv. Ins. Co., 422 N.W.2d 150, 153 (Minn. Ct. App. 1988) (use of reasonable expectations doctrine requires either ambiguity or unconscionability); Home Mut. Ins. Co. v. Thalman, 387 N.W.2d 219 (Minn. Ct. App. 1986) (restrictions in text of farm liability policy ambiguous as to status of accident on dirt road adjoining farm; policy construed to provide coverage to meet policyholder’s reasonable expectation of coverage for ordinary farming activity in vicinity of farm). In addition, federal cases applying Minnesota law also observed a retrenchment in the Atwater Creamery version of the doctrine. See, e.g., St. Paul Fire & Marine Ins. Co. v. Federal Deposit Ins. Co., 765 F. Supp. 538, 548 (D. Minn. 1991) (reasonable expectations doctrine ordinarily not applicable where exclusionary language clear).

\(^7\) See, e.g., Allstate Ins. Co. v. Steele, 74 F.3d 878 (8th Cir. 1996) (applying Minnesota law) (no coverage for sex abuse claim as this would rewrite clear exclusion for intentional acts; no reasonable expectation of coverage absent ambiguity or other factors negating clear language); Wicher Constr. Co. v. St. Paul Fire & Marine Ins. Co., 530 N.W.2d 1 (Minn. Ct. App. 1995) (construction contractor’s all-risk property insurance policy does not provide business interruption coverage as this is a distinct type of risk normally insured through purchase of a separate endorsement or policy); Fluoroware, Inc. v. Chubb Group of Ins. Cos., 545 N.W.2d 678 (Minn. Ct. App. 1996) (“advertising injury” portion of liability policy does not provide coverage for patent infringement claim); Minnesota Mut. Fire & Cas. Ins. Co. v. Manderfeld, 482 N.W.2d 520, 525 (Minn. Ct. App. 1992) (court notes that policyholder was certified public accountant and suggests this level of training makes him more capable of understanding policy text and less able to utilize contra proferentem or reasonable expectations analysis); State Farm Ins. Cos. v. Seefeld, 472 N.W.2d 170 (Minn. Ct. App. 1991) (motor vehicle exclusion in mobile homeowner’s policy applies to injuries arising out of use of trailer hauled behind jeep; policyholder had no reasonable expectation of coverage); Levin v. Aetna Cas. & Sur. Co., 465 N.W.2d 99 (Minn. Ct. App. 1991) (in case of fleet of vehicles, court distinguishes prominent prior precedent and finds per vehicle limit on coverage cannot be aggregated due to clarity of policy and policyholder’s understanding of limits of coverage); Grossman v. American Family Mut. Ins. Co., 461 N.W.2d 489, 495 (Minn. Ct. App. 1990) (policyholder could not reasonably expect homeowner’s policy to cover claims arising from business activity, both because of purpose and nature of policy at issue and because of text of business pursuits exclusion); Merseth v. State Farm Fire & Cas. Co., 390 N.W.2d 16, 18 (Minn. Ct. App. 1986) (policy exclusion of coverage for actions between insured sufficiently clear to set scope of policy and preclude reasonable expectation of coverage); Sicoli v. State Farm Mut. Auto. Ins. Co., 464 N.W.2d 300 (Minn. Ct. App. 1990) (loss of consortium claim not one constituting bodily injury as claim does not directly relate to physical damages and
b. Diluted Doctrine in the 1990s

Minnesota and Iowa provide particularly good illustrations of states appearing to adopt the pure Keeton form of the reasonable expectations doctrine and then retreating to a more limited use of the concept. As Professor Rahdert chronicled in 1986, Idaho is another clear example of the doctrine's surge and decline, while Pennsylvania and New Jersey display embrace, wavery allegiance, and then seemingly renewed affection for the doctrine.\textsuperscript{63} Professor Henderson writing in 1990 found a similar pattern in these and other states.\textsuperscript{64}

Thus, the third decade of reasonable expectations began with a legal landscape that revealed a diluted doctrine in many states that had seemingly been more receptive to the full implications of the concept but then retreated to a weaker form of the expectations doctrine. Where the reasonable expectations doctrine was evaluated by states writing on a clean slate, the doctrine was accepted only in moderate form. For example, the Oklahoma Supreme Court in \textit{Max True Plastering Co. v. United States} policyholder therefore had no reasonable expectation of coverage). \textit{But see} State Farm Fire & Cas. v. Wicka, 474 N.W.2d 324 (Minn. 1991) (intentional act exclusion inapplicable where policyholder's mental illness prevents him from appreciating or controlling conduct and its effects on others); Minnesota Mut. Fire & Cas. Ins. Co. v. Manderfeld, 482 N.W.2d 520, 525 (Minn. Ct. App. 1992) (policy exclusion of coverage for actions between insured sufficiently clear to set scope of policy and preclude reasonable expectation of coverage). \textit{See also} Vierkant v. Johnson, 543 N.W.2d 117 (Minn. Ct. App. 1996) (holding that a household exclusion in homeowner's policy is not hidden and that reasonable expectations analysis is therefore inapplicable). \textit{Vierkant} also puts an unusual emphasis on the reasonable expectations doctrine. The Court focused on the portion of the Keeton formula that posited coverage consistent with reasonable expectations even though "painstaking" study of the policy would have negated those expectations. According to the \textit{Vierkant} court, an hidden policy provision does not require painstaking study and thus is not eligible for reasonable expectations treatment.

In addition, cases involving the respective rights of excess and primary carriers frequently focus on the operational assumptions of the insurance marketplace at least as much as on policy text. \textit{See, e.g., American Hoist & Derrick Co. v. Employers of Wausau}, 454 N.W.2d 462, 466 (Minn. Ct. App. 1990) (policyholder could not expect that excess insurers would "drop down" to take place of insolvent primary carriers as this violates common understanding of role and risk assigned to primary and excess carriers); Seaway Port Auth. of Duluth v. Midland Ins. Co., 430 N.W.2d 242, 248 (Minn. Ct. App. 1988) (same) ("[t]he excess insurer's risk of loss is based on the assumption that a predetermined amount of primary coverage will be exhausted before the excess insurer must pay. Imposing primary coverage on the excess insurer would 'transmogrify the excess policy into one guaranteeing the solvency of whatever primary insurer the insured might choose.'").

\textsuperscript{63} \textit{See} Rahdert, \textit{supra} note 5, at 353-67.

\textsuperscript{64} \textit{See} Henderson, \textit{supra} note 10.
Fidelity & Guaranty Co. "adopted" the reasonable expectations doctrine relatively recently.\textsuperscript{65} The Max True court counted cases and concluded that the reasonable expectations doctrine had been accepted in some form in 36 states.\textsuperscript{66} Max True cited four states expressly rejecting the doctrine.\textsuperscript{67} This is consistent with the assessment of other commentators as well.\textsuperscript{68}

However, as previously noted, the form of a reasonable expectations doctrine accepted by the courts can vary substantially. Although the Max True decision and legal newspapers reporting it might at first glance be read to suggest a court embracing the Keeton version of the doctrine, a close reading of the case shows that Oklahoma has in fact accepted only a modified version of reasonable expectations analysis, one that employs policyholder expectations as an interpretative tool only after the court deems the disputed policy language to be ambiguous. Similarly, as noted above a close parsing of the other reasonable expectations cases shows that at most only a handful of states currently follow the Keeton form of the doctrine.

One can seriously question whether a reasonable expectations jurisprudence that employs the expectations concept only after first determining that disputed policy analysis is ambiguous is anything new at all. It adds nothing to the policyholder’s quiver of arguments for coverage beyond that already existing through the contra proferentem principle, although it perhaps provides insurers with a chance to avoid liability even when guilty of drafting ambiguous language.

4. Scholarly Reaction to Reasonable Expectations

Academic reaction to reasonable expectations reveals a similar pattern of embrace and then some backing away, although the doctrine continues to enjoy more support among scholars than among the courts. Throughout both the 1970s and 1980s, the reasonable expectations doctrine was the subject of considerable commentary.\textsuperscript{69} Then-Professor and Dean Keeton

\textsuperscript{65} See Max True Plastering Co. v. United States Fidelity & Guar., 912 P.2d 861 (Okla. 1996).

\textsuperscript{66} See id. at 863-64, n.5.

\textsuperscript{67} See id. at 864, n.6.

\textsuperscript{68} See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 1.03 (9th ed. 1997).

\textsuperscript{69} In addition to the sources already cited in this article, there were a number of shorter articles and student notes in the wake of Keeton’s Rights at Variance article. See, e.g., (listed in chronological order without regard to author or journal to illustrate the flow of commentary) Harry F. Perlet, The Insurance Contract and the Doctrine of Reasonable Expectation, 6 FORUM 116 (1971); Conrad L. Squires, A Skeptical Look at the Doctrine of Reasonable
added his voice to the commentary, sounding a note of caution and restraint regarding characterization of his writings and application of the expectations approach. Legal scholars tend to support the reasonable expectations approach, although some have expressed misgivings or


70. See Robert E. Keeton, Reasonable Expectations in the Second Decade, 12 FORUM 275 (1972). Keeton described the expectations concept as more of a “principle” than a “doctrine,” id. at 276-77, and noted the degree to which reasonable expectations analysis may often be interwoven with ambiguity analysis, waiver, equitable estoppel, and detrimental reliance. Id. at 278-79. He was careful to emphasize, however, that to be a distinct principle, a reasonable expectations approach must do something more than merely consider policyholder expectations while construing ambiguous language. Id. at 279-80. But regarding the degree to which the expectations approach should impact coverage decisions, Keeton suggested restraint in both objective and outcome:

Both the fears and the claims generated by this new doctrine may easily be exaggerated. I do not mean to suggest that the changes are inconsequential. On the contrary, they may well be the early manifestations of very substantial changes indeed. The point is that they are not unprincipled changes, and they need not be, as some have feared, unbridled changes. Several precedents among the small body of cases already decided make the point that this new doctrine is no guarantee of victory for a plaintiff against the insurer, and may even be used affirmatively by an insurer in defense against claims that are beyond reasonable expectations. Surely, however, there will be instances of misapplication, as there are for any other doctrine that is entrusted to human beings for application.

Id. at 279-80 (footnotes omitted).

71. See supra notes 9, 52, and 69 (citing sources).
even attacked the doctrine. Insurers and their counsel have largely been unrelenting in their opposition.

In the 1990s, which I define as the “third decade” of the expectations principle, industry attack and policyholder counsel’s defense continues but the rush of attention given to the doctrine during the 1970s and 1980s seems to have abated. Although legal scholars have not focused on the doctrine as frequently or explicitly during the 1990s, major scholarly treatment continues to be given to the issue. One obvious example is Roger Henderson’s *Reasonable Expectations After Two Decades*, which has of course in part set the agenda for this Symposium. In addition, three very insightful articles that do not bill themselves as reasonable expectations scholarship strike very close to the heart of the continuing debate on the concept: Peter Swisher’s *Dusting Off the Formal for the Function* and *Looking for the Middle Ground* as well as James Fischer's

72. *See, e.g.*, Stempel, *supra* note 5, § 11.3 (outlining “justifications and criticisms” of the doctrine); Rahdert, *supra* note 5, at 336-45 (listing pro and con arguments regarding expectations approach).


Now, if reasonable people in general want the law to protect reasonable expectations rather than the precise meaning of the formal words they have adopted, why should the law deny it to them?

The most obvious answer to that question is that the law does not seek to cushion men against the ordinary buffets of life. Men are always having their expectations disappointed . . . Reasonableness may be a measure of conduct, but it is not a source of obligation.

74. *See, e.g.*, Perlet, *supra* note 69; Squires, *supra* note 69.

75. I see the 1990s as the third decade because of the 1970 publication of Keeton’s *Rights at Variance* article, meaning that there have been three decades of self-conscious practitioner, judicial, and scholarly focus on the concept (i.e., the 1970s, the 1980s, and the 1990s). Prof. Henderson appeared to have a similar timeline in mind when in 1990, he wrote about reasonable expectations “after two decades”. *See* Henderson, *supra* note 10, at 823-35. However, Judge Keeton apparently viewed the 1960s as the inaugural decade of discernable reasonable expectations activity by courts, thus making the 1970s the “second decade” about which he wrote in 1976. *See* Keeton, *Second Decade, supra* note 3, at 275-76 (citing 1960s cases as examples of reasonable expectations in “first decade”).


Text Versus Context are extremely good examinations of the theory and practice of insurance policy interpretations that touch on the role of reasonable expectations analysis but do not directly defend or attack the Keeton approach.

By the 1990s, there was relatively little expansion or change regarding judicial reaction to the reasonable expectations doctrine. Courts had by the 1990s either accepted the doctrine in its "pure" Keeton form, accepted a modified version of the doctrine, or rejected the approach. Although one can argue that the status of reasonable expectations remains as limited and uncertain in the third decade as it has been from the outset, Roger Henderson has persuasively argued that the penumbra of the Keeton definition of the doctrine has exerted a discernible influence on insurance coverage adjudication, which has mushroomed during the time since the Keeton article. In addition, comments about and arguments for and against reasonable expectations have become more sophisticated and precise. However, new developments continue to occur, developments suggesting


80. A particularly good student note written while the Minnesota courts were in the process of retreating from the Keeton form of the doctrine also examines the reasonable expectations doctrine and evaluates it favorably. See Laurie Kindel Fett, Note, The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditional Tools of Contract Interpretation, 18 WM. MITCHELL L. REV. 1113 (1992).

81. Despite the quarter century of reasonable expectations decisions, there remains some debate regarding a number of seemingly baseline technical or procedural aspects of the doctrine. For example, some courts and commentators dispute whether the reasonable expectations doctrine is objective or subjective. The appropriate standard for applying reasonable expectations analysis is an objective one that asks what the mythical, average, reasonable policyholder expected regarding coverage. The objective test was used by Judge Keeton in articulating the doctrine, has been endorsed by commentators, and is the choice of a clear majority of courts discussing the issue. See, e.g., Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1983). However, courts continue to exhibit confusion on this point. See, e.g., State Farm Fire & Casualty Ins. Co. v. Deni Assoc's., 678 So. 2d 397, 400-401 (Fla. Dist. Ct. App. 1996) (erroneously viewing reasonable expectations approach as premised on instant policyholder's subjective anticipation of coverage).

There also remains confusion as to whether the judicial inquiry should seek to determine a reasonable insured's expectations or the actual expectations of the policyholder. Consistent with the use of an objective standard in assessing the reasonableness of expectations is the axiom that the applicability of the doctrine will be assessed according to the objectively reasonable expectations of a policyholder in the position of the claimant insured. The individual policyholder's actual expectations are not the yardstick for applying reasonable
that the expectations principle retains vitality while simultaneously being misunderstood and, in my view, insufficiently deployed. The most far-reaching implications of reasonable expectations analysis have been thwarted in favor of a not fully assessed judicial adoption of a middling form of the doctrine. In at least one recent case from a major jurisdiction (Florida), the state Supreme Court displayed surprising and unwarranted hostility to the reasonable expectations concept.

C. Continuing Controversy Over Reasonable Expectations: Developments in the Third Decade

The demise of the 1970s and 1980s “honeymoon” for reasonable expectations analysis is succinctly presented in the 1990s experiences of two states: Utah and Florida. Early in the third decade, Utah narrowly rejected reasonable expectations, in a battle of thorough opinions that expressly addressed the prudence of the reasonable expectations approach. In the latter portion of the third decade, Florida refused to even reflect expectations analysis. However, the actual expectations may be introduced by the policyholder as evidence of a reasonable understanding and presumably by the insurer as well for the same purpose if the actual expectations of the policyholder were in fact quite modest. Actual expectations may also of course to questions of estoppel.

Because reasonable expectations analysis uses an objective standard and because the cases are frequently litigated on the basis of uncontested documentary evidence or what might be termed legislative or social facts related to the purpose and function of the policy at issue and appropriate resolution of public policy factors, insurance policy meaning can often be resolved by the court as a matter of law. Nonetheless, the determination of what constitutes policyholder reasonable expectations is a question of fact. See e.g., Wessman v. Massachusetts Mut. Life Ins. Co., 929 F.2d 402, 405 (8th Cir. 1991) (applying Minnesota Law); Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 277-278 (Minn. 1985).

The role of expert testimony in reasonable expectations cases also remains unresolved. To the extent that a court’s assessment of the meaning of a contract turns on the existence of certain facts or the inference to be drawn from certain facts, the court may take evidence and may be required to submit the issue to the jury. Where these evidentiary disputes involve the purpose and function of a policy, the role of the policy in risk management, custom and practice among insurers, or similar issues, expert testimony is clearly appropriate from underwriters, brokers, risk managers, and lawyers regarding the marketing and placement of contested policies. More problematic is the issue of whether legal experts may testify as to the parameters of reasonable expectation, treatment of the issue in other courts, benefits and detriments of applying a reasonable expectations doctrine, and so on. The test, like any other matter under the rules of evidence, would appear to simply be whether the court believes expert testimony will be helpful to the court and not misleading. Courts have wide discretion over this aspect of the case and may refuse legal experts altogether (on the theory that the court is already legally expert) or may employ them extensively to digest and assess case law as well as to speak to the practicalities of underwriting and risk management.
upon the reasonable expectations of the parties in an opinion marked by linguistic literalism beyond the wildest strictures of William Safire\textsuperscript{82} or Edwin Newman\textsuperscript{83} and contractual formalism that would have made Joseph Beale\textsuperscript{84} blush. A closer examination of developments in these states illustrates the competing views of reasonable expectations analysis and draws into sharp relief the frequent misunderstandings that have hindered the doctrine’s development.

1. Mirroring the National Debate Over Reasonable Expectations, Utah Rejects The Keeton Doctrine and Hybrids

Perhaps the most comprehensive anti-reasonable expectations case to date is \textit{Allen v. Prudential Property and Casualty Insurance Co.}\textsuperscript{85} In \textit{Allen}, the policyholder held a homeowner’s policy. When the Allens’ two-year-old son was injured by a pot of boiling water spilled by Mrs. Allen, the Allens sought coverage for the son’s liability claim against the parents. Prudential refused payment, citing the “household exclusion”, a common provision in homeowner’s policies that bars coverage for claims made against the policyholder by other members of the household. The exclusion is rather straightforward in language (excluding liability

\begin{flushleft}
82. Safire, a speechwriter in the Nixon Administration and longtime \textit{New York Times} columnist, contributes a weekly “On Language” column to the \textit{New York Times Magazine} that regularly draws precise distinctions of word meaning and usage.

83. Newman, a longtime reporter and news anchor for NBC, wrote \textit{Strictly Speaking} (1977) and \textit{A Civil Tongue} (1979), both bestsellers that criticized the slack and slouching word usage of modern society.


Beale was a conflict of laws scholar who advocated the “lex loci delicti” theory under which the state in which an injury occurred provided the applicable substantive law for adjudicating the dispute—with no ifs, ands, or buts. Although the basic lex loci rule seems sensible as a presumption or consideration, Beale venerated it as an ironclad rule. For example, if a California plaintiff and a New York defendant crashed on a New Hampshire road, New Hampshire law would apply to all aspects of the case, even to questions of damages. Beale and his ultra-formalism thus became a lightning rod for the Realist’s criticisms, and even their ridicule. Some members of the Yale Law faculty even penned a mocking poem about Beale and posted it in the faculty lounge.

coverage for bodily injury claims to the policyholder "or an 'insured'", which is defined in the policy as "you or residents of your household who are your relatives") and serves an obvious purpose—the prevention of coverage for intra-family suits that may be collusive or in which the policyholder may lack the usual insured's incentive to cooperate in attempting to defeat the suit or minimize the damage award.

The Allens attempted to overcome the household exclusion by asserting that its presence in the policy disappointed their reasonable expectations. Because the household exclusion is so common and serves a readily understandable purpose as well as being rather clearly worded, the Utah Court could simply have decreed that the exclusion's enforcement did not violate the reasonable expectations of the policyholder. However, the Court launched into an extensive discussion of the reasonable expectations doctrine, reviewing its genesis and development, criticizing its intellectual foundations, and refusing to incorporate it into Utah law.

The Allen court dwelled on criticisms of the doctrine and even utilized selected portions of case law endorsing the doctrine to build its case against reasonable expectations. This initial portion of the Allen


87. This was the basis for one of the dissenting opinions. See infra notes 110-116 and accompanying text.

88. 839 P.2d at 801-03.

89. Id. at 802 (noting criticisms of the doctrine not only in works critical of the doctrine such as Stephen J. Ware, Comment, A Critique of the Reasonable Expectations Doctrine, 56 U. CHI. L. REV. 1461, 1467 (1989) but also as summarized in Roger C. Henderson, The Doctrine of Reasonable Expectations After Two Decades, 51 OHIO ST. L.J. 823 (1990); Mark C. Rahdert, Reasonable Expectations Reconsidered, 18 CONN. L. REV. 323 (1986); and William A. Mayhew, Reasonable Expectations: Seeking a Principled Application, 13 PEPP. L. REV. 267 (1986). The Henderson and Rahdert articles, however, are on the whole quite supportive of the reasonable expectations approach although they also collect contrary arguments).

90. See, e.g., id. at 803, n.6 ("as recognized by the Arizona Supreme Court, which has adopted one of the broadest versions of the reasonable expectations doctrine in the country, 'most insureds develop a 'reasonable expectation' that every loss will be covered by their policy" (citing Darner Motor Sales v. Universal Underwriters, 682 P. 2d 388, 395 (Ariz. 1984)).

Although this is sly rhetoric by the Allen majority, it is an intrinsically suspect statement. For example, even without reading the intentional act exclusion in a liability policy, the average insured is unlikely to expect coverage for a lawsuit arising out of the insured's intentional robbery at gunpoint of a third party. If instead, the Darner dicta cited by Allen means that in the nonobvious cases, policyholders holding comprehensive policies expect coverage, this
majority opinion in the main attacks expectations analysis for existing in different forms for slightly different reasons in different courts.\textsuperscript{91} In a nutshell, the \textit{Allen} majority is criticizing expectations analysis as insufficiently rigorous because it is sometimes used to interpret ambiguous language, sometimes used to prevent adverse enforcement of standard form language, and sometimes used to introduce non-contextual indicia of meaning into the contract construction analysis.\textsuperscript{92} However, the Court does not explain exactly why this makes the expectations concept unfit for Utah jurisprudence. Certainly, the \textit{Allen} court makes no case to suggest that expectations analysis is more inconsistent or less intellectually rigorous than other aspects of contract law (e.g., ambiguity analysis, which is used by courts in a variety of forms).\textsuperscript{93}

The Court also noted in critical fashion that several states had accepted the expectations approach and later rejected or diluted the doctrine.\textsuperscript{94} Of course, this observation is merely empirical: it fails to determine whether these other state courts were initially right to accept reasonable expectations or instead were later correct in rejecting or diluting the expectations approach. Although the \textit{Allen} majority obviously supports the antireasonable expectations decisions, there is no persuasive argumentation against the doctrine at this juncture of the opinion. Rather, the implied criticisms of others are simply arrayed for the reader.

Later in the opinion, the \textit{Allen} majority begins to give its actual reasons for opposing expectations analysis. One basis for opposition is the proposition that the reasonable expectations doctrine unnecessarily complicates the law without providing new benefit in light of the availability of other means of interpreting contracts and protecting policyholders.

It is not clear why estoppel, waiver, unconscionability, breach of the implied duty of good faith and fair dealing, and the rule that ambiguous language is to be resolved against the drafter, for example, are insufficient to protect

\textsuperscript{91} See id. at 801-3.
\textsuperscript{92} See id. at 801.
\textsuperscript{93} See STEMPPEL, supra note 5 § 5.8 (1994) (identifying states as falling within strong, medium, and weak camps re aggressiveness invoking contra proferentum principle for the benefit of insured).
\textsuperscript{94} See Allen, 839 P.2d at 803 (citing Idaho, Iowa, New Jersey, and Pennsylvania as examples).
against overreaching insurers when applied on a case-by-case basis.\textsuperscript{95}

However, in the case before it, the Allen majority gives only cursory treatment to the estoppel argument advanced by the Allens, who maintained that the agent who sold them the policy knew of their desire not to have claims by members of the household excluded from coverage. According to the court:

To bring herself within the ambit of this version of the doctrine [estoppel-like coverage obligations through insurer conduct creating expectations], Allen makes the following argument: A year after she received the Prudential policy and two years before her son’s accident, her husband met with the Prudential agent to increase the homeowner’s policy’s coverage because the family had just bought a trampoline. She alleges that her husband told the agent he wanted to make sure that “anyone” who was hurt on the trampoline would be covered. Thus, she argues, the agent knew or should have know that Mr. Allen expected the policy to cover the Allens’ son. Allen further argues that the agent’s failure to mention the existence of the exclusion when her husband made the statement “left the impression with Mr. Allen that his family was covered.” She concludes, “[b]ecause of the agent’s failure to meet his obligation at that stage, the insured’s expectations were reasonable.”\textsuperscript{96}

Despite its statement elsewhere in the opinion that the reasonable expectations approach is unnecessary because estoppel and other doctrines exist, the Allen court never examines this at least plausible (if one accepts the policyholder’s alleged version of events) argument on estoppel terms, instead preferring to argue that it is a newfangled reasonable expectations argument. By contrast, one of the dissenting opinions meets the Allens’ reliance argument and rejects it strongly, finding it therefore unnecessary

\textsuperscript{95} Id. at 805-06 (footnotes omitted).
\textsuperscript{96} Id. at 803 (footnote omitted).
for the Court to digress to an advisory opinion opposing the reasonable expectations doctrine.97

After characterizing the Allens’ contention as seeking something more than coverage via estoppel or reliance, the Court then launches its most direct attack on the doctrine:

In making this argument, Allen asks us to adopt a doctrine that considerably modifies the legislatively expressed public policy underlying the regulation of the insurance industry. The theory she advances essentially would allow a court to invalidate a clear provision of an insurance contract, even if the insured had not read it, if the finder of fact is convinced that the insurer’s agent knew or should have known that the insured had expectations that contradicted the policy’s language and that the agent created or helped to create those expectations. For the

97. See id. at 809 and n.2 (Stewart, J., concurring):

Nothing in [Mr. Allen’s] statement even remotely suggests that the Allens sought to procure coverage for themselves and their children. Indeed, the statement indicates only that the Allens sought a typical homeowner’s policy which would provide coverage for property damage, theft, and liability in the event they were sued.

*     *     *

The agent’s recommendation [to Mr. Allen] to build the fence [around the yard] and the Allen’s compliance also indicate a concern only for liability for non-family members injured on the trampoline. In addition, the record indicates that plaintiff had health and medical insurance at the time of the accident and that she filed a claim against that insurance.

There is no fact asserted in this case, even taking those facts in the light most favorable to plaintiff, that supports an inference that her expectations were objectively reasonable, and [the majority] cites none. Thus, [majority author] Justice Zimmerman erroneously proceeds on an inappropriate assumption in an effort to reject the reasonable expectations doctrine, without even attempting to define it. His failure to acknowledge that both Section 211 of the Restatement and Professor Keeton . . . require more than a subjective expectation to establish the reasonable expectations doctrine explains why this simple case has evolved into an unnecessarily protracted one.
reasons set forth below, we decline to make such a change in Utah law. 98

Somehow, the seeminglyarden variety estoppel, reliance, and contextual interpretation argument advanced by Allen (although perhaps unnecessarily labeled reasonable expectations by Allen) cannot be heard and decided by the Court without making new law—even though the prior existence of estoppel law and other construction doctrines makes the reasonable expectations doctrine unnecessary.

Without answering this contradiction, the Allen Court then reveals its concern over making new law by “recognizing” an additional reasonable expectations “problem”: possible violation of separation of powers. The Court notes the existence of the state Insurance Code, which permits the state Insurance Department to promulgate rules regulating insurance. As part of this rulemaking and enforcement scheme:

Preprinted policies for household insurance, such as the Prudential policy at issue in this case, must be filed with the commissioner. The commissioner may disapprove a preprinted policy at any time if it is found to be “inequitable, unfairly discriminatory, misleading, deceptive, obscure, or encourages misrepresentation.” Thus, the validity of preprinted insurance contracts is premised on executive approval, a regulatory mechanism that the Wagner [Wagner v. Farmers insurance Exchange, 786 P. 2d 763 (Utah Ct. App. 1990)] version of the of the reasonable expectations doctrine would largely undermine. 99

Lest one think the quoted passage is a non sequitur having no relation to the Allen dispute, the Court suggests that this Insurance Department power to approve or remove policy forms is in jeopardy if the Court either finds for the Allens on the estoppel claim or recognizes the reasonable expectations doctrine. According to the Court, “[o]ur prior case law demonstrates our tradition of deferring to the legislature on questions of general policy when considering the validity of insurance policies.” 100 “Taken as a whole, [prior] cases show our unwillingness to alter

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98. Id. at 804.
99. Id. at 804 (citations and footnotes omitted).
100. Id.
fundamentally the terms of insurance policies in the absence of legislative direction. . . . Today, we again affirm the principle of deferring to legislative policy in considering the facial validity of insurance provision.”

Even when attempting in good faith to empathize with the Allen majority’s view, one strains mightily to see any connection between policy form approval by the insurance commissioner and the meaning of that policy form in the context of a particular coverage dispute. The Allens were not asking to have the household exclusion invalidated as against public policy. Rather, they were seeking only to have the exclusion rendered unenforceable against them as a result of either (a) estoppel-like conduct attributable to the insurer; or (b) other factors showing that they had an objectively reasonable expectation that their policy covered liability claims by a member of the household. Regardless of whether the Allens’ argument is persuasive, it is clear that ruling in their favor would in no way have invalidated the standard form policy at issue nor tread upon the Insurance Department’s regulatory province.

Of course, even if ruling for the Allens would have required invalidating an exclusion, the Allen Court’s view that this violates legislative supremacy and separation of powers is poppycock. First, the ordinarily proper characterization of a regulatory agency such as an insurance department is as an arm of the executive branch. The mere establishment of the department by a legislature and the passage by the legislature of laws implemented by the department hardly makes the department the equivalent of the legislature. Insurance departments are administrative arms of the executive branch of government—and courts are to a large extent in the business of ruling upon the legality of executive branch action (e.g., wiretaps, police arrest conduct, treatment of personnel, administration of schools, provision of services). Striking down even an entire year’s worth of Insurance Department-approved policy forms would not exceed the scope of judicial power so long at the court had a basis for its action. Second, courts frequently use public policy and unconscionability as a basis for invalidating contract terms. Ordinarily, this is not considered judicial activism violative of separation of powers.

Transplanting the Allen Court’s reasoning to a hypothetical situation underscores the weakness of the rationale. If, for example, the Insurance Department had approved a life insurance policy form that expressly

101. Id. at 804, 805.
designated the named beneficiary in mandatory language and indicated the policyholder's strong desire that this designation be undisturbed under any circumstances, a judicial decision invalidating recovery for the beneficiary who murdered the CQV would arguably run afoul of the "freedom of contract" and "separation of powers" ideology espoused by the Allen majority.

Yet most observers would indeed expect courts to refuse to apply contract language literally for the benefit of murderers (or arsonists, or defrauders). The more enlightened view of contract law has for more than a century found that contract text is not so sacrosanct that it must be applied literally even if the literal application of the words thwarts the intent of the contracting parties, the purpose of the instrument, or public policy. This is in essence the teaching of the famous New York case Riggs v. Palmer,103 which refused to let a murdering heir inherit under a will.

At the time, Riggs v. Palmer was something of a departure from the formal "objective" theory of contract that is said to have dominated the era. But even in an era of supposedly strict formalism, the law recognized that inflexible literalism was not required by respect for contract text.104 In THE NATURE OF THE JUDICIAL PROCESS,105 then-Judge Benjamin Cardozo used Riggs v. Palmer as an illustration of the judiciary's need to sometimes choose among competing principles of decision. In Riggs, the court rejected decision based upon the force of contract text and even the force of statutory text (a state statute required disposition of property in accordance with a valid will and made no exception for any wrongdoing by the heir). According to Cardozo, the greater principle at work was decidedly nontextual and seeming nonformal: justice.106

But Allen v. Prudential seemingly bars Utah courts from engaging in the sort of common sense construction of any contract, including an insurance policy—or perhaps especially an insurance policy form that has been approved by the state insurance department. Under the rational of

103. 22 N.E. 188 (N.Y. 1889).
104. See BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JUDICIAL PRIMER 149-50 (1994) (describing position of many leading lawyers, including Roscoe Pound, that murdering heir was entitled to recover under will but that Riggs v. Palmer represented strong strand of contrary thought that has come to dominate modern jurisprudence and that "legal formalism of the 19th century was less hidebound than often supposed").
106. Id. at 41-53. See also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 217-220 (1995) (discussing this segment of Cardozo on Riggs v. Palmer as evidence of nonformal, nontextual, nonpositivist currents in American law).
Allen, the life insurance policy’s beneficiary designation is clear contract language regardless of the beneficiary’s wrongful conduct. If the policyholder or the insurance company had intended to bar recovery due to such wrongful conduct, presumably this contingency would have been addressed in the policy text. With such language lacking, according to the Allen court, the judicial role is only to enforce the provision and not to take into account the reasonable expectations of the contracting parties.

Assessing the Allen court’s notions of contract in this hypothetical context underscores the weakness of the reasoning of the decision. Surely fidelity to contract language and separation of powers does not require the type of hyperliteral contract interpretation that would permit murdering heirs and beneficiaries to recover. If this is what separation of powers requires, sign me up for government by judiciary. If this is freedom of contract, perhaps some shackling is in order. Because the household exclusion at issue in Allen v. Prudential is both clearly worded and sensible in light of the purpose of the homeowner’s policy, the Allen opinion reads more reasonably than it deserves. Because the holding of the case is correct, the indefensibility of the dicta is not initially obvious.

Although the result in Allen is unexceptional, its rejection of reasonable expectations analysis is not only gratuitous but also betrays a rigidly unrealistic notion of contract law in theory and in operation. The truth is that contracting parties, even in complex form agreements, cannot possibly spell out all contingencies. Thus, enforcing even clear contract language may lead to results at odds with party intent, party expectations, or contract purpose, even if the results are not extreme enough to be labeled “absurd”. In these instances, reasonable expectations analysis has an infrequent but vital role to play if contract law is to be rational and just.

To a limited extent, the Allen majority attempts to avoid completely painting itself into this textualist corner when it acknowledges that the court retains “authority to invalidate insurance provisions that are found contrary to public policy as expressed in the common law of contracts that has not been preempted by legislative enactment.”[107] But does the Court mean this literally? Are any contract actions based on something other than the common law (e.g., legislation) immune from judicial review on grounds of public policy, unconscionability, waiver, estoppel, and the like? This seemingly cannot be true since the Allen decision in part rejects the reasonable expectations doctrine because of the existence of these other doctrines.

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In short, Allen reads like a civics lecture delivered by an unsophisticated schizophrenic. It says contradictory and inconsistent things but has a central, mistaken theme of confusing the work of other branches of government with the work of the courts, foolishly suggesting that courts lose interpretative authority merely because contracts in dispute before them have been approved for use in the state by the executive or legislative branch.\footnote{In an almost tangential observation, the Allen court criticizes the reasonable expectations doctrine because there is no clearly principled basis for applying it to insurance contracts but not other contracts. \textit{See id.} at 806, n.17. But this observation is at least as much a brief for adopting reasonable expectations analysis for all contracts as it is a reason to refuse to recognize the concept for insurance policies or any other singular type of contract.} Allen takes a similarly unrealistic and excessively reverent view of judicial power vis-a-vis market forces, essentially concluding that the "freedom of contract" ethos requires courts to rebuke reasonable expectations analysis because it may undermine seemingly clear policy text which, the court simplistically assumes, surely reflects the volitional intent of the parties and the purpose of the agreement.\footnote{The Allen majority's rejection of the reasonable expectations principle on the basis that it is noncontextual and forces courts into the business of contract revision logically implies that the Allen court rejects any noncontextual basis for construing insurance policies or other contracts. However, as noted above, Allen also suggests that in some cases courts might have power to invoke concepts such as unconscionability and public policy to modify or refuse to enforce contract text.} It is not entirely clear why Allen would permit these noncontextual bases for construction when it rejects the expectations principle. Presumably, unconscionability and public policy are acceptable while reasonable expectations analysis is not because the former notions have a longer history in contract law. But if the court's concern is the degree to which a noncontextual basis for decision promotes judicial activism—which is what Allen states as its concern—the reasonable expectations principle is far less of a judicial power grab than the other doctrines. Objectively reasonable expectations are more linked to party intent and transaction purpose than are doctrines of unconscionability and public policy which (although not divorced from contract, context, and parties) are based more upon the judiciary's own collective opinions of fairness.

\textit{Allen} dissenter Justice Stewart correctly chides the majority for its wide-ranging advisory opinion inveighing against reasonable expectations:

The facts of this case present nothing more than plaintiff's assertion that she had a subjective, uncommunicated, and otherwise unsupported expectation of coverage under the homeowner's insurance policy. Whether the reasonable expectations doctrine should be applied in some future case on different facts cannot be legitimately determined in this...
case, and the majority’s attempt to foreclose reliance on that
d Doctrine is simply inappropriate.110

Justice Stewart also criticized the majority’s efforts to characterize the
reasonable expectations doctrine as an unruly horse likely to ride
roughshod over the whole of contract law:

[The majority] describes the doctrine in only the most
general terms, leaving the reader with the impression that
the reasonable expectations doctrine would allow courts to
engage in wholesale rewriting of insurance policies simply
because an insured expected coverage.111

The Stewart dissent correctly characterizes the expectations analysis as
"something of an extension" of "traditional principles of contract law" but
"not an aberration."112

Regarding separation of powers and judicial legitimacy, Justice
Stewart in dissent displayed a firmer grasp of practical reality and
jurisprudential perspective than did the majority.

[It is extremely farfetched for the majority to argue that pro
forma administrative approval of thousands upon thousands
of pages of forms somehow deprives the courts of the power
to use the common law process of developing principles of
fairness, justice, and equity.

The insurance commissioner neither writes nor, more
importantly, approves the forms. The fact that the
commissioner has the power to disapprove a form in certain
circumstances does not indicate “regulatory approval” of
forms not disapproved. The majority’s implication that the
commissioner’s review will guarantee fairness in the terms
of a contract is misguided and wrong.

110. 839 P.2d at 808. Later, the dissent added that: “the reasonable expectations
doctrine may be essential to reaching a fair result in certain cases. It is not appropriate for
this Court on this record to foreclose the application of some version of the doctrine in a
later case on other facts.” Id. at 811.
111. Id. at 810.
112. Id. See supra notes 17-39 and accompanying text (describing scope of reasonable
expectations “doctrine”).
Although the majority insists that we should always defer to legislative policy in construing insurance provisions, it never defines the legislative policy to which we should defer. The majority appears to be most concerned with freedom of contract. However, Utah Code Ann. § 31A-1-102 (1991) lists eleven other policies underlying the Insurance Code, including “to ensure that policyholders, claimants, and insurers are treated fairly and equitably.”113

In a second dissent, Justice Durham went beyond criticism of the majority and forcefully advocated express adoption of the reasonable expectations doctrine as a necessary tool for the modern construction of contracts.114 He cited the strong academic commentary supporting the doctrine and stressed the practical advantages of insurers vis-a-vis insured in contacting in for insurance coverage in the modern marketplace.

In sum, Allen reflects the obstacles that yet lay before the reasonable expectations approach in its continuing campaign for incorporation into mainstream insurance law—and for contract law as a whole. Although Allen is unusual in its express debate about reasonable expectations, the resistance of the Allen majority is reflected in the more cursory opinions rejecting or diluting the doctrine in many states.115 More than a quarter-century after Keeton wrote, many judges and lawyers see expectations analysis as something subversive of the bedrock legal values of separation of powers and freedom of contract. Under these circumstances, the legal profession would be remiss in concluding, despite the case counting of treatises and articles,116 that “we are all reasonable expectationists now”.117

114. See id. at 812 (Durham, J., dissenting).
115. See supra notes 9-20 and accompanying text (describing rejection of expectations doctrine or requiring ambiguity as prerequisite to use of expectations analysis).
116. See, e.g., OSTRAGER & NEWMAN, supra note 16, § 1.03[b] (listing 38 states as having “recognized” the reasonable expectations doctrine); Henderson, supra note 10, at 828-29 (identifying as many as 16 full-fledged reasonable expectations states and a roughly equal group of modified reasonable expectations states).
117. See WILLIAM TWNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973) (observing in comment upon the rise of the legal realism movement and its assimilation into the body of legal thought that “Realism is dead; we are all realists, now.”). The sentiment has been echoed or invoked as a springboard for discussion by subsequent commentators, although division remains regarding the degree to which legal realism was either tacitly triumphant or
2. Reasonable Expectations Comes to a Crossroad in Florida—and is driven into a ditch

a. A Long Run of Uncertainty

If a lawyer from another planet were to land on earth, the alien attorney would probably be surprised to learn that as we enter the third decade of self-conscious reasonable expectations doctrine several of the largest states lack extended evaluation of the expectations principle by the highest courts of the state in the 28 years since Keeton’s famous article. For example, New York is often cited as states embracing the reasonable expectations doctrine, this is incorrect—at least to the extent that one means the pure Keeton doctrine. If anything, most observers would merely housebroken by the legal establishment. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 100 (1982); Joseph Singer, Legal Realism Now, 76 CAL. L. REV. 467 (1988). No similar semi-consensus about the acceptance of “rights at variance” reasonable expectations analysis has emerged in legal literature.

118. For example, New York is an obviously important jurisdiction that has neither expressly accepted nor rejected the reasonable expectations doctrine—nor have New York courts engaged in any discussion of note regarding the jurisprudence of reasonable expectations. New York presents itself as a state following traditional contract principles, looking primarily to the language of the contract but eschewing hyperliteral application of text in favor of an interpretation that fulfills the purpose of the policy and the intent of the parties. See, e.g., Newmont Mines, Ltd. v. Hanover Ins. Co., 784 F.2d 127, 136-37 (2d. Cir. 1986); Ace Wire & Cable Co., Inc. v. Aetna Cas. & Sur. Co., 457 N.E.2d 761 (N.Y. 1983). A contract is to be read as a whole, with courts attempting to give effect to all contract provisions if this can be done without violating other contract construction precepts. See, e.g., Cruden v. Bank of New York, 957 F.2d 961 (2d Cir. 1992); W.W.W. Assocs. Inc. v. Giancontieri, 566 N.E.2d 639 (N.Y. 1990); Employers Commercial Union Ins. Co. v. Firemen’s Fund Ins. Co., 384 N.E.2d 668 (N.Y. 1978) (entire contract to be construed may include binder, application, or other documents in addition to four corners of the policy per se). See also E. ALLAN FARNSWORTH, CONTRACTS §§ 7.8-7.14 (2d ed. 1991).

But despite this deference to text, New York courts have also repeatedly said that the intent of the parties is the touchstone for determining the meaning of a contract term. See, e.g., Record Club of Am., Inc. v. United Artists Records, Inc., 890 F.2d 1264 (2d Cir. 1989) (applying New York law); W.W.W. Assocs. Inc. v. Giancontieri, 566 N.E.2d 639 (N.Y. 1990). Ordinarily, the best determinant of the parties’ intent is the contract language, which will be given its plain and ordinary meaning so long as this does not lead to an absurd result or to a result clearly at odds with party intent or the purpose of the instrument. See, e.g., Breed v. Ins. Co. of N. Am., 385 N.E.2d 1280 (N.Y. 1978). In addition, even crystal clear contract language will not be enforced if the contract term is unconscionable or violates a public policy of the state. See, e.g., Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413 (N.Y. 1983) (clear exculpatory clause will not apply to protect a party from willful or grossly negligent acts).

Where a disputed contract term is unclear, courts will attempt to resolve the ambiguity by examining the context of the transaction and probative extrinsic evidence, including the con-
text, background, purpose, and function of the both the contract and the disputed term unless the text of the contract itself admits of only one reasonable interpretation that does not make for an absurd resolution of the dispute. In determining the proper meaning of a disputed contract term, the court favors construction that comports with the reasonable expectations of the policyholder. See, e.g., J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co., 818 F. Supp. 553, 556 (W.D.N.Y. 1993); Album Realty Corp. v. American Home Assurance Co., 607 N.E.2d 804 (N.Y. 1992); Ace Wire & Cable Co., v. Aetna Cas. & Sur. Co., 457 N.E.2d 761 (N.Y. 1983); Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co., 314 N.E.2d 37 (N.Y. 1974). Where these construction techniques fail to indicate contract meaning, the issue will be resolved against the party that drafted the unclear contract term and in favor of the non-drafter, an approach common to all states. See Kenneth S. Abraham, A Theory of Insurance Policy Interpretation, 95 Mich. L. Rev. 531, 531 (1996) (“The first principle of insurance law is captured by the maxim contra proferentum, which directs that ambiguities in a contract be interpreted “against the drafter,” who is almost always the insurer.”) (citations omitted).


The terms of a contract as a whole must be examined in determining the intent of the parties, and where the meaning of a policy of insurance is in doubt or is subject to more than one reasonable interpretation, all ambiguity must be resolved in favor of the policyholder and against the company which issued the policy; the reasonable expectation of the insured, from his reading of the policy, must control.

See also N.Y. JUR 2D Insurance § 706 at 100 (1988) (“[t]he meaning of coverage and exclusion provisions of a liability insurance policy is to be resolved in the light of the reasonable expectation and purpose of an ordinary businessman in making the contract of insurance. If an insurance company desires to limit its liability in a drastic manner it must express the limitation in language that will reasonably convey its meaning to an intelligent layman or person of ordinary business intelligence”).

Thus, in essence, New York appears to be a middle level reasonable expectations state that utilizes the concept for construing ambiguous policy language but has not adopted the Keeton principle. Because reasonable constructions of the insured are always at least a part of the contra proferentum analysis, New York is one of those many states whose version of reasonable expectations is arguably no different than it was prior to Keeton’s writing.

probably regard the "expectations overcoming text" aspect of the doctrine as having been rejected in New York and California. More subtly, the influence of reasonable expectations analysis occurs frequently in these states and the reasonable expectations of the parties, particularly the policyholder, are given substantial consideration in resolving insurance coverage disputes.

For most of the three decades since the Keeton article, Florida has said even less about reasonable expectations than New York, artfully dodging an extended discussion of the concept for a quarter-century. Florida's avoidance of taking a stand on the reasonable expectations doctrine ended in early 1998 as the Court rejected expectations analysis in two cases involving the scope of the standard pollution exclusion contained in commercial general liability (CGL) policies. In *State Farm Fire & Casualty Insurance Co. v. Deni Associates of Florida, Inc. & Florida Farm Bureau Mutual Insurance Co. v. E.C. Fogg*, an intermediate appellate court certified to the Florida Supreme Court the question:

Where an ambiguity is shown to exist in a CGL policy, is the court limited to resolving the ambiguity in favor of coverage or may the court apply the doctrine of reasonable

2d 284, 288 (1st Dept. 1988), *aff'd*, 529 N.E. 2d 420 (N.Y. 1988) (plain contract language controls and evidence of party expectation not effective to provide for different result).

A number of New York cases, despite refraining from any express analysis of the "reasonable expectations doctrine" per se, suggest that the concept affects judicial thinking on insurance coverage and may benefit either policyholders or insurers. *See, e.g.*, Michaels v. City of Buffalo, 651 N.E. 2d 1272 (N.Y. 1995) (third-party claimant was the estate of a decedent who had died, arguably because of a delay in transporting to hospital when first ambulance dispatched failed to start; coverage sought under its "business auto policy" that provided coverage for liability resulting from an "accident"; court held failure of the first ambulance to start was not an "accident" within the meaning of the policy even if it resulted from the ambulance company's failure to maintain the vehicle; finding in effect no reasonable policyholder expectation of coverage notwithstanding debatability of meaning of term "accident"); Moshiko, Inc. v. Seiger & Smith, Inc., 529 N.Y.S. 284 (1st Dept. 1988) (court refused to find an insurer obligated to provide first party water damage benefits for flooding that damaged its own goods; policy was a third-party liability policy, although it did not spell this out in the text of the policy; court found insured could not have reasonably expected first-party property coverage). *See also* In re Liquidation of Union Indem. Ins. Co. of New York, 674 N.E.2d 313 (N.Y. 1996) (court found reinsurance unavailable due to failure to disclose the insolvency of a reinsured, vindicating reasonable expectations of the reinsurer).

But despite all this, New York's highest court, the Court of Appeals, has yet to expressly assess and accept or reject the Keeton principle.

119. 678 So. 2d 397 (Fla. Dist. 1996).
expectations of the insured to resolve ambiguities in CGL policies.\footnote{120.}

Prior to the Court's "answer" to this certified question, Florida law on reasonable expectations had been remarkably nondefinitive, but it was accurate to say that Florida never accepted the pure Keeton form of the doctrine. In fact, several intermediate appellate decisions expressly rejected the doctrine and leveled extensive criticism of the concept.\footnote{121.} Similarly, Florida never really adopted a reasonable expectations doctrine for hidden, surprising, or unfair policy language. However, in cases involving hidden or nonobvious restrictions on coverage, Florida courts frequently found the oppressive language to be ambiguous or vitiated by other representations.\footnote{122.} In general, Florida insurance coverage cases generally have followed the traditional approach to policy interpretation and accept the common precepts that: the meaning of a contract is a question of law;\footnote{123.} the policy is to be read as a whole rather than focusing

\begin{itemize}
\item \textit{Id.} at 404 (emphasis in original).
\item \textit{See, e.g.,} State Farm Mut. Auto Ins. Co. v. Pridgen, 498 So.2d 1245 (Fla. 1986) (finding conversion exclusion to comprehensive coverage provisions of automobile insurance policy not to be ambiguous and failing to consider whether notwithstanding clarity of meaning of "conversion" (which was excluded) as contrasted to "theft" (which was covered), insured might have reasonably expected coverage for loss of automobile under circumstances of the case).
\item \textit{See, e.g.,} Florida Farm Bureau Ins. Co. v. Birge, 659 So.2d 310 (Fla. Dist. Ct. App. 1994) (holding, over strong dissent, that absolute pollution exclusion does not bar coverage for damages caused by sewer backup notwithstanding obvious contaminant quality of loss).
\end{itemize}

We agree with the trial judge that the policy was ambiguous. The average homeowner's examination of the insurance contract would not reveal the applicability of these exclusions to this type of disaster. Our conclusion is supported by the availability of clear and unambiguous language that the insurance company could have used to exclude damage resulting from a backup of raw sewage.

\textit{Id.} at 311. \textit{See also} Weldon v. All American Life Ins. Co., 605 So.2d 911, 915 (Fla. 2d Dist. Ct. App. 1992) ("Since an insurer, as draftsman of the form policy, will not be allowed to use obscure terms to defeat the purpose for which a policy is purchased, the terms must be liberally construed in favor of coverage so that where two interpretations are available the one allowing greater indemnity will prevail."); Bunnell Medical Clinic, P.A. v. Barrera, 419 So.2d 681, 683 (Fla. Dist. Ct. App. 1982) (finding seemingly facially clear language to have "latent" ambiguity requiring use of extrinsic information to construe policy in favor of coverage).

\footnote{123.} \textit{See} Jones v. Utica Mut. Ins. Co., 463 So.2d 1153 (Fla. 1985).
on words in isolation, with effect given to all provisions if possible,\textsuperscript{124} terms and phrases in an insurance policy are generally given their natural meaning as understood by a reasonable person in the position of the policyholder;\textsuperscript{125} and where a policy term or provision is textually clear, it will be enforced as written accept where it will produce an absurd result or impose an unconscionable situation upon the policyholder.\textsuperscript{126} When Florida courts find that policy language is clear, parol evidence (evidence of prior contract negotiations) and extrinsic evidence (other extratextual matter) are generally not admissible to vary or modify the textual terms.\textsuperscript{127} Such evidence is available, however, in order to explain an unclear provision.\textsuperscript{128} Florida law is unclear regarding whether the background and context of the insurance transaction is considered parol or extrinsic evidence that cannot be consulted absent facial ambiguity of the policy text. Where policy language is unclear and resort to extrinsic matter does not resolve the ambiguity, the dispute is resolved against the party that drafted the ambiguous language, usually the insurer.\textsuperscript{129} Despite the failure of Florida courts to embrace the reasonable expectations doctrine, Florida courts have used the reasonable expectations concept in order to resolve thorny coverage issues and to protect the interests of both the policyholder,\textsuperscript{130} and the insurer.\textsuperscript{131}

\textsuperscript{124} See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979).


\textsuperscript{127} See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 702-03 (Fla. 1993) (refusing to consider drafting history and statements to regulators as relevant to meaning of "sudden and accidental" pollution exclusion deemed textually unambiguous by Court) (reversing decision in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1992 Fla. LEXIS 1599, *15-*21 (Fla. 1992) (finding drafting history and regulatory estoppel relevant to determine the meaning of "sudden and accidental" language)).

\textsuperscript{128} See id. at 705.


\textsuperscript{130} See, e.g., Spengler v. State Farm Fire & Cas. Co., 568 So.2d 1293, 1294-95 (Fla. Dist. Ct. App. 1990) (intentional act exclusion in homeowner's policy not applicable to claim by policyholder's girlfriend who policyholder accidently shot when mistaking her forburglar); United States Fire Ins. Co. v. Pruess, 394 So. 2d 468 (Fla. Dist. Ct. App. 1981) (rental piloting exclusion not applicable to coverage claim arising from aircraft liability policy; court bases opinion on "more reasonable interpretation of the policy").

\textsuperscript{131} See, e.g., Florida Farm Bureau Co. v. Hurtado, 587 So.2d 1314, 1318-20 (Fla. 1991) (refusing to "stack" uninsured motorist coverage for each car in a fleet of vehicles in
b. The Deni and Fogg Cases

Deni & Associates, an architectural firm, was in the process of moving office equipment into new quarters when a blueprint machine was jostled or knocked over, spilling ammonia contained in the machine (ammonia is used as part of the process of making blueprints). The ammonia spill was serious enough to force evacuation of the building for six hours, breaking of a window for ventilation, and removal of affected carpeting. Other building tenants were evacuated, leading to claims against Deni. Citrus farmers Fogg, Lane & Clark retained a contractor to spray Ethion insecticide on the citrus grove. Using a helicopter, the sprayer went slightly wide of the mark, spraying two men on adjacent property, resulting in serious injuries to the bystanders and substantial personal injury claims against Fogg.

Both Deni and Fogg sought defense and indemnity under their respective Commercial General Liability policies, which generally cover personal injury claims but also contained an exclusion providing

We do not insured for loss either consisting of, or directly and immediately caused by one or more of the following.

*   *   *

e. The presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot, fumes, acids, alcalis, chemicals and waste, except as provided in the Pollution Clean Up and Removal Extension of Coverage.132

order to reach large amount of coverage not set forth in policy limits); Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 938, 942 (Fla. 1979) (court construes general liability policy sold to liquor store not to provide dram shop liability coverage because of liquor liability exclusion, refusing to find exclusion ambiguous despite notion that policy sold to liquor store might be expected to cover liquor liability due in part to drastically higher exposure in dram shop actions, increase in exposure not reflected in premium charged).

Note that the Hurtado case reaches a result opposite that rendered in Minnesota, a state following almost the Keeton version of the doctrine. See Rusthoven v. Commercial Standard Ins. Co., 387 N.W.2d 642 (Minn. 1986), discussed supra notes 276-82 and accompanying text.

132. Deni, 678 So. 2d at 406 (Klein, J., dissenting) (quoting State Farm Policy issued to Deni Associates).
The trial courts in both cases ruled that this "absolute" pollution exclusion was ambiguous as applied to the instant facts and granted summary judgment for the policyholders. The Fourth District Court of Appeal reversed.133 Because of the relative youth of the absolute pollution exclusion (inserted into CGL policies since the mid-1980s), Deni and Fogg would have been noteworthy cases in any event. But Deni and Fogg take on considerably more significance in that the court expressly addressed the reasonable expectations doctrine in some detail, engaged in extensive discussion about the theory and practice of insurance coverage and placed the issue before the Florida Supreme Court.

i. Competing Theories of Policy Construction and Expectation

The trial court in Deni not only employed traditional ambiguity analysis but expressly hinged its decision upon "what a reasonable person in the position of the insured would have understood the word to mean".134 In reversing, the majority of a sharply divided en banc Fourth District disagreed and after an extensive discussion found the pollution exclusion unambiguous and clearly applicable to the two coverage disputes. The majority concluded that the insured's reasonable expectations had no force where insurance policy language was clear. According to the court, ammonia and Ethion insecticide were clearly pollutants and the discharge or release of these pollutants had caused the underlying liability claims.

In particular, the Deni majority found reasonable expectations analysis to have no place in insurance coverage matters because it runs afoul of the objective theory of contract. To some extent, the Deni majority revived focus on a part of contract doctrine frequently overlooked—the notion that contract language must be given an objective and universally applicable meaning in order to prevent opportunistic post-dispute behavior by the parties. Quoting an older Florida case and Oliver Wendell Holmes, the majority observed:

The [objective theory of contract] is probably best expressed by the late Justice Holmes in 'The Path of the Law', 10 Harvard Law Review 457, where it was stated in part that "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets

133. See id. at 400.
134. Id. at 399.
of external signs—not on the parties having meant the same thing but on their having said the same thing.” 135

From this, the Deni majority concluded—erroneously—that application of the reasonable expectations doctrine would make coverage turn on the subjective beliefs of litigant policyholder. In actuality, Keeton’s reasonable expectations formula is quite clear that determination of the reasonableness of a coverage expectation is to be determined by an objective standard. 136 That is, the reasonableness of an expectation would turn on what the mythical reasonable person in the policyholder’s position would expect, not upon an idiosyncratic notions of the policyholder involved in the dispute. Presumably, the Deni majority slid into this off-kilter view by contrasting the result it thought was dictated by the “objective” theory of contract and the result that would obtain under a reasonable expectations approach, thereby leading the Deni majority to erroneously conclude that anything supporting a result at odds with the court’s view of the objectively literal meaning of the exclusion must rest on subjective grounds.

The Holmes view of an “objective theory of contract” has tended to fade into the background in American law even though it was never really rejected. 137 Holmes himself seemed considerably less confident about such objectively undebatable meaning of language when—twenty years after his law review article quoted with such assurance by the Deni majority—Justice Holmes penned the at least equally famous words:

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. 138

135. Id. at 400 (quoting Gendzler v. Bielecki, 97 So.2d 604, 608 (Fla. 1957) (emphasis in Deni)).

136. See Keeton, supra note 1, at 967.


138. See Towne v. Eisner, 245 U.S. 418, 425 (1918). See also Neil Duxbury, Patterns of American Jurisprudence 34-46, 60 (1995) (Holmes exhibited elements of both formalism and anti-formalism, or realism in this thinking, even at time of writing The Common Law (1871) Holmes espoused mixture of views despite generally favoring objective standards and positive law); Symposium, The Path of the Law 100 Years Later: Holmes’ Influence on
The rarified version of the objective theory of contract has faded in large part because it presumes an unrealistic level of certainty as to the meaning of words. According to this mythology, agreement is widespread and easily reached regarding whether disputing parties “said the same thing.” In contrast to the view of the early Holmes, Yale Law Professor Arthur Corbin wrote that “no word has one true and unalterable meaning”.

As more recently put by a prominent contracts scholar writing in the Corbin tradition, “[t]he very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication”.

Furthermore, contract construction inherently involves more than simply extracting a linguistic definition from the contract language (even assuming reasonable readers were not in some disagreement over the semantic meaning of the words):

[A]s part of the process of interpreting whether a contract was formed and, if so the scope of contractual obligation, legal decisionmakers mold obligations along socially desired lines. Interpretation cannot be neutral, but must be done from some point of view. [T]he law must supply a great deal of the context of contractual obligations. No matter how detailed, parties are in their planning, they will never plan for every contingency (nor is it necessarily desirable that the law encourage them to try to do so).

Modern Jurisprudence, 63 Brook. L. Rev. 1-278 (several Holmes scholars note eclectic nature of Holmes’ views and evolution of Holmes’ thinking over time, with observers often disagreeing about Holmes’ thoughts and role); Richard A. Posner, Foreword: Holmes, 63 Brook. L. Rev. 7, 9-11 (1996) (Holmes was “buzzing hive” of ideas and his writings are not always consistent even though Holmes’ basic philosophy did not change greatly during his career; “the Holmes of the opinions is more formalistic and positivistic, especially in contract cases and in matters of interpretation and stare decisis, than the Holmes of the book and the articles”). In a sense, the Holmes posited by Posner (based on the work of Prof. Thomas Grey) may reflect a general trait of American contract law, where legal scholarship is less textual and formalist than judicial decisions in contract disputes. See infra notes 200-225 and accompanying text (judiciary may act with excessive formalism and textualism, with accompanying rhetoric in order to minimize judicial burden in resolving cases and rendering opinions).

139. See 3 Arthur L. Corbin, Corbin on Contracts § 535 (1960).

Supplied terms reflect social views of the proper goals of contractual relations.\textsuperscript{141}

Many, if not most, contemporary courts—in contrast to the Florida appellate court in \textit{Deni}—appear more inclined to the Corbin perspective. As one court observed:

In truth, language is inherently ambiguous. Nevertheless, over the centuries courts have developed a variety of interpretative tools to use in resolving the ambiguities that necessarily attach when written laws must be translated into legal decisions. The reliance of courts and litigants on claimed "plain meaning" usually represents a conscious disregard of evidence that would lead to an undesired result, and not the existence of true unambiguity. To translate the words [at issue in the case] into terms of meaning requires looking to all available interpretative tools and not simply relying on the false idol of "plain meaning."\textsuperscript{142}

Professor E. Alan Farnsworth, the Reporter of the American Law Institute's \textit{RESTATEMENT (SECOND) OF CONTRACTS}, takes a similar view:

Indeed, it is questionable whether a word has a meaning at all when divorced from the circumstances in which it is used. Dictionary definitions may be of help in showing the general use of words, but they are not necessarily dispositive.\ldots Often, the meaning attached to a word by the parties must be gleaned from its context, including all the circumstances of the transaction.\textsuperscript{143}

Although the reasonable expectations principle has been inaccurately portrayed by its critics as a radical departure from settled contract doctrine, Keeton in essence has (as Utah Supreme Court Justice Stewart suggested

\begin{flushleft}
\textsuperscript{143}  E. ALAN FARNSWORTH, \textit{CONTRACTS} § 7.10 at 512 (2d ed. 1990) (footnotes omitted). \textit{See also} Farnsworth, \textit{supra} note 140 at 940-42.
\end{flushleft}
UNMET EXPECTATIONS

in his \textit{Allen v. Prudential} dissent\cite{144} only refined and clarified modern contract law in the Corbin/Farnsworth mode. Under this vision of contract law, one that arguably has been dominant over formalism and literalism for several decades,\cite{145} courts recognize the practical elusiveness of seeking an objectively agreed meaning of terms based only on words themselves. Writing outside the field of insurance law, Keeton observed:

Differences in terminology sometimes interfere with communication. The risk of misunderstanding is especially high if writer and reader, or speaker and listener, are not alert to each other’s usages. You can use a word or phrase with any meaning you choose to give it, but you cannot force others to understand it that way. Moreover, if you propose a meaning different from ordinary usage, the risk that others will misunderstand what you mean rises dramatically.\cite{146}

A term like “pollution” and the pollution exclusion litigation of \textit{Deni} and \textit{Fogg} provides powerful support to Keeton’s point.

The classic high version of “objective” approach\cite{147} is therefore not helpful unless there is no room for doubt as to the meaning of a contract term, not only on paper but also as applied. If the term is really clear (e.g., “on or before July 1, 1997”) there is no serious dispute as to the meaning of the term and we would all agree that the contract should be enforced as written rather than as conveniently misremembered by a party in breach (e.g., “you mean I don’t have until July 15th to make payment?”). But in these cases of linguistic clarity, the objective theory of contract is almost a

\begin{flushleft}
\textit{\footnotesize 144. See supra} notes 110-117 and accompanying text.
\textit{\footnotesize 145. See infra} notes 200-240 and accompanying text (discussing 20th century contract jurisprudence and consistency of reasonable expectations principle with modern contract law).
\textit{\footnotesize 146. See ROBERT E. KEETON, JUDGING 66-67 (1990).} Judge Keeton then defines terms he uses in the book in some detail as an aid to the reader. Even in long and detailed form contracts, such extensive effort at defining terms is seldom found or practically effective, particularly when much of the contracting memorialized by forms occurs quickly in conversation, phone call, and wire, without “painstaking” study of the definitions (or most other parts of the contract) prior to entry into an agreement.
\textit{\footnotesize 147. However, a less lofty version of the objective theory of contract might well be helpful by attempting not only to interpret disputed language not only to vindicate the purpose of the agreement and the intent of the parties but also by seeking where possible to assign to contracts a meaning that is more universal, more objectively reasonable, and less idiosyncratic and subject to post hoc rationalization.}
\end{flushleft}
trite truism. In a large array of cases, of course, even relatively clear language becomes unclear in application and is subject to reasonable dispute even if the term standing alone is not obviously ambiguous.

For example, a survey researcher asking laypersons on the street the meaning of "pollution" would probably find the respondents ready with a quick, succinct, firm, and relatively consistent response: pollution is degradation of the environment because of the introduction of polluting material into the environment. This widely held concept of pollution is in general quite clear but it provides relatively little guidance for determining whether a given CGL claim is covered or uncovered. Unless the court is willing to engage in sustained analysis of the meaning of a disputed term through consideration of connotative and contextual factors, party intent, policy purpose, and common sense, it is difficult to accept that words like the CGL "absolute" pollution exclusion can have an objectively certain meaning.

The objective view of contract must be reconciled first with the reality that some words have uncertain meanings due to a variety of factors. Prof. Farnsworth has broadly classified the categories of linguistic uncertainty as: (1) vagueness, (2) ambiguity of term; (3) ambiguity of syntax; and (4) ambiguity resulting from inconsistent or contradictory language.\textsuperscript{148} Vague words are those not neatly bound but indicating only a general concept. For example, "the word green is vague as it shades into yellow at one extreme and into blue at the other, so that its applicability in marginal situations is uncertain."\textsuperscript{149} An ambiguous provision in a contract is one that may have two distinct connotations. "Thus the word \textit{light} is ambiguous when considered in the context of dark feathers."\textsuperscript{150} The ambiguity may exist because the word itself is capable of different meanings: e.g., short tons or long tons? Canadian dollars or American dollars or Hong Kong dollars? which ship named "Peerless"?\textsuperscript{151} Usually ambiguity of term can be resolved by reference to contract context. For example, a contract between two Americans in America involving the sale of an American-made product to be used in America probably contemplated payment in American dollars.

\begin{footnotes}
\item[148] See Farnsworth, Contracts, supra note 143, § 7.8; Farnsworth, supra note 140.
\item[149] Id., § 7.8 at 498.
\item[150] See id. §7.8 at 498 (footnote omitted).
\item[151] See id., § 8 at 498-99. The famous Peerless case is Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1964), which held that neither party was held to the other's concept of a particular ship Peerless. The case involved a classic example of mutual mistake.
\end{footnotes}
Ambiguity of syntax involves uncertainty created by the way otherwise clear words are put together. Something like the "sudden and accidental" pollution exclusion has been seen by some courts as evidencing both ambiguity of term ("sudden" has a dictionary definition meaning "unexpected" and one meaning "abrupt") and ambiguity of syntax (does the pairing of the two words indicate merely repetition or a requirement that coverage can exist only for discharges that are both unintentional and abrupt?). Ambiguity from inconsistent language takes place when one provision of a contract is arguably in conflict with another provision of the contract.\^\textsuperscript{152} To this list, one might add ambiguity caused by shifting context and unexpected application of the policy to unforeseen circumstances, or what is often termed "latent" rather than "patent" ambiguity.

Even if one adheres to the objective theory of contract and finds no ambiguity in a term, or the syntax of the policy or conflicting provisions of a policy, there remains the issue of whether policyholder reasonable expectations might countermand clear policy language. Courts taking this view have insisted, as did the Keeton article, that those expectations be measured by an objective yardstick—adoption of the reasonable expectations doctrine does not make coverage turn on the policyholder’s subjective state of mind. The Deni rejection of the reasonable expectations approach by the appellate court thus proceeds in large part based on what appears to be a misunderstanding of the doctrine.

The Deni Court of Appeals majority also applied a strict version of the traditional rule on extrinsic evidence—permitting consideration of extratextual matter only if a term is ambiguous. Because it saw the words "pollutant", and "release" as unambiguous, the Deni majority refused to consider the drafting history of the pollution exclusion, nontextual evidence of the intent and understanding of the parties, or the purpose of the pollution exclusion and the CGL policy.

The drafting history, if considered relevant, would of course have implications for the common understanding of the meaning of the absolute pollution exclusion. For example, there is an oft-quoted passage of an exchange before the Texas Insurance Department in which an industry representative states that the language of the exclusion was drafted with

\^\textsuperscript{152} See infra notes 276-82 and accompanying text (discussing Rusthoven v. Commercial Standard Ins. Co., 387 N.W. 2d 642 (Min. 1986), which involved a portion of the policy setting uninsured motorist coverage at the maximum available per a single vehicle while another portion of the policy set the coverage limit as the sum of the individual vehicle UM coverage amounts).
unrealistic breadth to ensure its effectiveness and that it would not be literally enforced against insured in cases where doing so would be inconsistent with basic understanding about the policy.153 Similarly, the overall purpose and the customary use of liability insurance would seemingly be relevant to interpreting policy language in a given context. However, the Deni majority precluded consideration of this material since it found the pollution exclusion clear on its face.

The Deni majority, like Florida law generally, was unclear about whether background or contextual material is the type of parol or extrinsic evidence that is barred absent ambiguity. Presumably, the Deni majority believed so. However, the modern trend is to permit courts to consider extrinsic evidence as an aid to assessing whether the disputed language is ambiguous. In addition, contracts scholars such as Farnsworth differentiate background context from extrinsic evidence. For example, is it impermissible extrinsic evidence if the court appreciates that a contract was formed during wartime? Farnsworth would say no,154 as would most courts.155 Courts divide however, when the degree of contextual information expands. When contextual information becomes more peculiar to the disputing parties (e.g., how things were done in the past, what someone said, failure to object to an undertaking), this is generally regarded as extrinsic matter admissible only if contract language is facially ambiguous. However, most courts will consider usage in trade or course of

153. See Stempel, supra note 9, § T1.6, at 16-17 (Supp. 1998) (pp. 116-17 of the Supplement).
154. See Farnsworth, Contracts, supra note 143, §§7.8-7.9.
155. Id. at §§ 7.12-7.13; Gordon D. Schaber & Claude D. Rohwer, Contracts (3d ed. 1990) § 94 at 173 (Evidence is admissible to show the background and circumstances in which a contract was negotiated”); Kenneth S. Abraham, A Theory of Insurance Policy Interpretation, 95 Mich. L. Rev. 531, 542 (1996) (citing Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P. 2d 561 (Cal. 1968) (which considered extrinsic matter to determine whether contract text was ambiguous, as representative of modern majority trend)). See also AGFA-Gevaert, A.G. v. A.B. Dick Co., 879 F. 2d 1518, 1522 (7th Cir. 1989) (applying New York law) (noting prevalence of modern expanded use of extrinsic matter but noting New York’s more traditional approach); Trident Center v. Connecticut Gen. Life Ins. Co., 847 F. 2d 564 (9th Cir. 1988) (following Pacific Gas & Electric as required precedent in federal case applying California law but Judge Alex Kozinski’s majority opinion is highly critical of decision and largely urges return to purported more traditional doctrine permitting consideration of extrinsic matter only where contract language is facially ambiguous). But see Schaber & Rohwer, supra note 155, §94 at 174 (Pacific Gas & Electric stands for proposition that extrinsic matter may be used only to argue for a meaning for which the contract language is “reasonable susceptible”).
dealing between the parties even though this is viewed by many courts as a type of "extrinsic" evidence.¹⁵⁶

The Court of Appeals in Deni was clearly motivated by fears of judicial activism—stating that courts could not "rewrite" unambiguous contract language to reach a preferred result. Courts must be mindful not to "torture" policy language in favor of the insured.¹⁵⁷ Said the Court:

When a policy clearly defines a term, however, it is error for the court to engage in further construction of the defined term under the rule of plain and ordinary meaning. The purpose of defining a contractual term is to make clear that the parties intend something in addition to the plain, ordinary meaning of the defined term. Hence, by finding an ambiguity in the general toxicity versus special toxicity rationale applied, the trial court has failed to give effect to the clear meaning of the actual exclusion defined in the policy. The court’s construction has effectually created a limitation on the breadth of the exclusion and added a coverage that the insurer had clearly excluded.¹⁵⁸

Despite its view of linguistic clarity and aversion to the reasonable expectations approach, the Deni majority opened the issue of reasonable expectations for the Florida Supreme Court:

Nevertheless, we also recognize that CGL policies are widely and generally used in Florida. We perceived, as demonstrated by the two summary judgments reviewed in this decision, that there is an opinion in the bench and bar that these categorical exclusions of pollution coverage are

¹⁵⁶. See Stempel, supra note 5, § 3.2; Farnsworth, Contracts, supra note 143, §§7.12-7.13. See also Schaber & Rohwer, supra note 155, § 91 at 167 ("[t]he [parol evidence] rule does not preclude use of extrinsic evidence offered for the purpose of lending meaning to contract terms . . . . The use of extrinsic evidence to establish usage of trade, course of dealing or course of performance is not barred by the parol evidence rule. The reason the rule does not apply in the situations described is simply that they do not involve evidence of an extrinsic agreement offered for the purpose of adding to or modifying the terms of the writing. Course of performance, course of dealing and usage of trade are part of the parties agreement by implication. The are not the subject of any extrinsic agreement between the parties.") (emphasis added).

¹⁵⁷. See Deni, 678 So. 2d at 401-3.
¹⁵⁸. Id. at 403.
ambiguous. Therefore, to enable the supreme court itself to
decide the issue of ambiguity and consider the doctrine of
reasonable expectations, we certify the following question to
the court:

Where an ambiguity is shown to exist in a
CGL policy, is the court limited to
resolving the ambiguity in favor of
coverage, or may the court apply the
document of reasonable expectations of the
insured to resolve ambiguities in CGL
policies?¹⁵⁹

The Dení majority acknowledged a role for “reasonable person”
analysis in that Florida law follows the traditional rule of insurance
contract interpretation “which requires that policy language be read as it
would be understood by reasonable people, i.e., given its plain and
ordinary meaning.”¹⁶⁰

In the Fourth District Court of Appeals decision, Judge Stone
concurred in part and dissented in part in Dení and Fogg. Specifically, he
voted in favor of Dení Associates (the architectural firm with the moving
mishap) and concurred in the result only in denying coverage to Fogg for
the errant insecticide spraying. In particular, Judge Stone was willing to
examine the historical background and drafting history of the pollution
exclusion and the purpose of the exclusion. The Stone view of language
placed emphasis not only on the dictionary definition of a term but upon its
connotative value:

First, I would note that the term “pollution” is generally
understood as referring to a more widespread exposure of
the environment to a polluting substance than occurred here.
In this case, the policy in question does not sufficiently alert
the insured that this is not the case.¹⁶¹

In addition, Judge Stone argued for construing policy language
according to reasonable expectations of the insured rather than deciding

¹⁵⁹. Id. at 403-404 (emphasis in original).
¹⁶⁰. Id. at 401.
¹⁶¹. Id. at 404-05.
policy meaning on the basis of dictionary or policy definitions alone. But the Stone dissent's interest in adopting a reasonable expectations approach was premised on the view that a more nuanced view of the absolute pollution exclusion would find it ambiguous as applied. Judge Stone did not argue for adoption of the pure Keeton doctrine of policyholder expectations trumping unambiguous policy language.

Judge Warner in the Court of Appeals concurred specially and in a short, somewhat cryptic opinion, appeared to argue for adoption of the Keeton version of reasonable expectations. Judge Warner also saw the reasonable expectations doctrine as a two-way street:

It would seem to me that an insurer could argue successfully the reasonable expectations test to exclude coverage in circumstances where it has heretofore been construed in favor of the insured.\textsuperscript{162}

Judge Klein concurred and dissented in part, finding the pollution exclusion clearly not to apply to preclude coverage in the \textit{Deni} case.

I, quite frankly, do not think that even State Farm intended this exclusion to leave its insured without coverage for the type of accident which occurred here. These insurance policies are not called comprehensive general liability policies for nothing. If they were intended to exclude liability for all the types of claims which the majority would exclude, there would be no reasonable certainty as to coverage, and insured would only discover their lack of coverage as everyday mishaps occurred.\textsuperscript{163}

Notwithstanding that CGL policies are now "Commercial" General Liability policies, Judge Warner's position is supported by approximately half the key decisions in other states, which have mitigated the textual breadth of the absolute pollution exclusion according to the court's common sense view of what a CGL should reasonably cover.\textsuperscript{164} In the

\textsuperscript{162} \textit{Id.} at 406.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{See id.} at 407 (citing cases). \textit{See also StempeL, supra} note 5, \textsection T1.6 (reviewing caselaw of "absolute" pollution exclusion and finding courts split between literal enforcement of broad exclusionary language and common sense view that every claim involving caustic material is not necessarily a "pollution" claim).
alternative, Judge Warner saw the exclusion as ambiguous, in part because of the division of the courts on the issue. 165

ii. Deni and Fogg before the Florida Supreme Court Decision

Deni and Fogg were argued before the Florida Supreme Court on Sept. 11, 1997. 166 Argument before what appears to be a closely divided Court further illustrates the difficulty of the absolute pollution exclusion and the potential utility of expectations analysis. Previous Florida decisions on pollution coverage set the stage for the Deni case and underscored the difficulty in predicting Florida’s ultimate direction on reasonable expectations. In Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 167 the Florida Supreme Court at first utilized the drafting history of policy language to conclude that the former “sudden and accidental” pollution exclusion contained in CGLs prior to 1985 was ambiguous and provided coverage for gradual but unintentional pollution. In the second Dimmitt decision reconsidering the question, the Court found no ambiguity, refused to be influenced by the drafting history, and concluded that the term “sudden” required claims to have resulted from abrupt pollution as well as unintentional pollution in order to be covered under the old CGL language. 168

The oral argument before the Florida Supreme Court placed in stark relief range of interpretations available for construing the CGL pollution exclusion. The insurance industry sought a broad and literal application of the absolute pollution exclusion. Recall that the exclusion applies to any “irritant” or “chemical” as well as to “smoke” and “soot” and “waste”, terms obviously capable of a most broad reading, one that could place outside coverage any claim involving one of these substances, even if the claim was otherwise one of ordinary negligence. For example, an

165. See id. at 407-08.
166. The insurers and their amici argued that the certified question should not be decided since the status of policyholder reasonable expectation in a dispute over ambiguous policy language was not germane to the actual case holding. Recall that the Deni majority held that the absolute pollution exclusion was not ambiguous, but that the certified question asks whether “the doctrine of reasonable expectations” may be applied to “resolve ambiguities” in CGL policies. As a matter of procedure and jurisprudence, the insurers appear to have a good point but not surprisingly, the Supreme Court forged ahead to a rule on the cases.
automobile accident often results in the "release" or "discharge" of oil, gasoline, or radiator fluid. To the extent that the accident can be said to "consist of" the presence of these substances or in some way be "caused by" the release (such as when the gasoline becomes ignited after an accident), these claims would be excluded "pollution" claims under this approach to insurance policy construction.

Similarly, a by-now well-known hypothetical designed to test the application of the pollution exclusion asks whether a "slip-and-fall" claim against a grocer is excluded if the patron slips on spilled bleach rather than spilled ketchup.169 At the Deni/Fogg oral argument, the Florida Supreme Court unveiled and pressed this hypothetical. Justice Ben Overton asked State Farm’s counsel whether the pollution exclusion would bar a claim if a patron slipped on ammonia leaking from the Deni Associates blueprint machine. State Farm answered without hesitation that it regarded such a simple and traditional slip-and-fall claim as excluded because the absolute pollution exclusion was "intended to be broad."170 Justice Overton pressed the point, asking with some incredulity whether slipping on soap was covered while slipping on ammonia was not. State Farm counsel continued to take the position that the ammonia slip-and-fall was excluded, prompting Justice Leander Shaw to ask whether in that case the CGL might be an "illusive contract" since it appeared to cover such ordinary negligence but then failed to when the negligence involved the spill and failure to mop up irritating chemicals.171

When Farm Bureau’s counsel rose to argue Fogg, Justice Overton reiterated the slip-and-fall hypothetical. Farm Bureau argued that the slip claim was covered and not excluded because the injury was not caused by pollution but by wetness,172 a less rigid and more reasonable response than that given by State Farm. Justice Harry Lee Anstead pounced on the

169. This is the hypothetical asked by the Texas Insurance Commission at hearings on the absolute pollution exclusion. In response, an industry representative agreed it would be ludicrous to apply the proposed absolute pollution exclusion to bar the bleach slip claim when the ketchup slip claim was covered but he also admitted that a literal application of the exclusion would bring this result because "we [the insurance industry] overdrafted it". The insurer representative quickly suggested that responsible insurers would not attempt such literal enforcement of the exclusion. See Stempel, supra note 5, § T1.6 at 116-18 (Supp. 1997).

170. Id. (question of Hon. Ben Overton and Response of Elizabeth Russo, Esq.). State Farm counsel quickly added that it was unaware of any actual slip-and-fall case in which the pollution exclusion had been asserted as a defense and suggested that Court discussion of such a hypothetical would be in the nature of dicta or an advisory opinion.

171. Id. (question of Hon. Leander Shaw and Response of Elizabeth Russo, Esq.).

172. Id. (question of Hon. Ben Overton and Response of Bonita Kneeland, Esq.).
inconsistency between the State Farm and Farm Bureau positions and asked Farm Bureau counsel why the conflict between the insurers on this point was not evidence of the ambiguity of the absolute pollution exclusion and "highly indicative of a serious problem". Farm Bureau counsel dealt with the question as well as could be expected and suggested that the "toxic nature" of the injury should be the controlling factor in determining whether the pollution exclusion applied. Nonetheless, State Farm's absolutist position on the exclusion illustrates the problems inherent in reading the pollution exclusion broadly and literally in view of the many things defined as pollutants in the exclusion.

iii. The Surprisingly Superficial Supreme Court Decision

Despite the closeness of the prior Dimmitt Chevrolet decision regarding the former "sudden and accidental" pollution exclusion and the seemingly extreme inconsistent positions outlined by the insurers, the Supreme Court's January 1998 opinion in Deni and Fogg was a veritable valentine for the insurance industry and a surprise to any detached observer attending the oral argument. Despite the prospect that under at least State Farm's view of the absolute pollution exclusion, the grocery store slip-and-fall and other "ordinary" negligence claims incidentally involving irritants would be excluded from CGL coverage, the Court accepted the insurers' construction of the exclusion, denied coverage to Deni Associates and to Fogg, and rejected the reasonable expectations doctrine. The Court also refused to use ambiguity analysis, contextual construction, estoppel or unconscionability to limit the literal reach of the language of the absolute pollution exclusion.

Equally surprisingly, the Supreme Court decision was overwhelmingly one-sided, with five Justices ruling in favor of State Farm over only the short dissents of Justice Theodore Wells and Justice Ben Overton, the author of the original pro-coverage Dimmitt Chevrolet opinion and the principle dissenter when the Court reversed itself in Dimmitt to find no coverage for gradual pollution due to the qualified pollution exclusion.

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173. *Id.* (question of Hon. Harry Lee Anstead and Response of Bonita Kneeland, Esq.).


formerly found in CGL policies. Justice Harding, who had allied with Overton in *Dimmitt Chevrolet* did not join the limited dissent in favor of the small architectural firm with the spilled ammonia problem. In *Fogg*, the Court unanimously found no coverage for the botched crop spraying.

By contrast, as detailed above, the Court of Appeals decision featured split views, substantial discussion of contract law and the expectations approach, and a powerful dissent. By contrast, the *Deni* dissent was a comparative shrug of the shoulders, with Justice Wells merely adopting an intermediate court dissent by reference and suggesting support for a reasonable expectations approach but not endorsing the doctrine explicitly.

The Court majority also presented a more streamlined opinion than had the intermediate court, thereby making its misunderstanding of the reasonable expectations doctrine less obvious than had the Court of Appeals but also failing to discuss (much less refute) the reasonable expectations doctrine at any length. Said the Court:

> We [like the Court of Appeals majority] agree that the pollution exclusion clause is clear and unambiguous.\(^{180}\)

\(^{176}\) *See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700, 706 (Fla. 1993) (Overton, J., joined by Barkett and Harding, dissenting from decision holding that qualified pollution exclusion bars coverage unless pollution damage is unintentional and discharge is abrupt). *See also id.* at 711 (Overton, J., joined by Barkett and Harding, dissenting from denial of Dimmitt’s motion for rehearing).

\(^{177}\) Fellow *Dimmitt Chevrolet* dissenter and Florida Supreme Court Justice Rosemary Barkett was subsequently appointed to the United States Court of Appeals for the Eleventh Circuit and was no longer on the Florida Court at the time of the *Deni* decision.

\(^{178}\) The entire concurrence and dissent of Justice Wells reads:

> I concur as to the spraying case involving Florida Farm Bureau. I dissent as to the case involving the printing machine. I adopt the well-reasoned dissent of Judge Klein in the district court’s opinion. I believe to do otherwise allows the exclusion to swallow the coverage, rendering the policy to no longer be a comprehensive general liability policy as it was sold to be by State Farm.

*Deni*, 636 So.2d at 1141.

\(^{179}\) *Id.* at 1140 (referring to reasonable expectations doctrine as one that makes coverage turn on “insured’s subjective expectations” (emphasis added) despite clear enunciation by Keeton that the issue is one of the policyholder’s objectively reasonable expectations. *See supra* notes 4-10 and accompanying text.

\(^{180}\) *Id.* at 1137.
We cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution.\footnote{\textit{Id}.}

* * *

As a court, we cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way. Moreover, unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history of the pollution exclusion clause.

We also reject the argument that because the words “irritant” and “contaminant” are not defined, the policy exclusion is ambiguous [citing \textit{WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED} (1981)].\footnote{\textit{Id}. at 1139 (citation omitted).}

* * *

We also cannot agree [that consideration of material other than the face of the policy] can be justified as clarifying a latent ambiguity.\footnote{\textit{Id}.}

As to the certified question, the Court was brief and dismissive:

We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged.

* * *

Construing insurance policies upon a determination as to whether the insured’s subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.\footnote{\textit{Id}. at 1140 (citing Allen v. Prudential Property & Cas. Ins. Co., 839 P. 2d 798, 803 (Utah 1992) (discussed supra notes 90-118 and accompanying text) for the proposition that there “is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application”).}
The Court left open some room for coverage in any future case resembling the grocery store slip-and-fall alluded to at oral argument and defended the logic of invoking the pollution exclusion in the instant case because ammonia and Ethion are both classified as pollutants by regulatory authorities.

Deni and Fogg emphasize the retreat of reasonable expectations analysis perhaps even more than Utah’s rejection of the doctrine in Allen v. Prudential and Oklahoma’s acceptance of only the watered down version of the Keeton doctrine. In Deni and Fogg, the highest court of America’s fourth largest state dismissed expectations analysis curtly and firmly despite a fact setting conducive to the doctrine’s application. Compared to the welcoming embrace of expectations analysis in the 1970s, the 1990s reaction of the courts seems tantamount to deportation of the Keeton doctrine.

II. EXPLAINING RESTRICTIVE REACTION TO REASONABLE EXPECTATIONS

As the foregoing analysis demonstrates, courts in the “Third Decade” of what might be termed the “Reasonable Expectations Era” continue to expend substantial judicial energy disapproving expectations analysis and in the process embracing what many modern contracts scholars would view as a wooden and unrealistic view of contract meaning. In Allen, Deni, and Fogg, for example, it is as if the majority opinion authors so hate the reasonable expectations approach that they cannot see straight. In zeal to fend off expectations analysis, these courts may render decisions that do not accord with “traditional” contract principles or overlook available avenues of case resolution that would not even require the court’s sortie against the expectations doctrine.

185. Said the Court:

We see no reason to address what might be the holding under certain hypothetical situations if we interpret the pollution exclusion clause as it is written because none of those facts are before us. Suffice it to say that insurance policies will not be construed to reach an absurd result.

Deni, 711 So. 2d at 1140.

186. Id.

187. See supra notes 150-187 and accompanying text (discussing Deni and Fogg).

188. See supra notes and accompanying text 120-150 (discussing Allen).
But despite its failure to displace traditional contract analysis or to reconfigure insurance law generally, the Keeton doctrine can hardly be viewed as unsuccessful or marginal. Since Keeton’s 1970 article, the terms “reasonable expectations” and “reasonable expectations doctrine” have become an important part of the language of discussing insurance coverage. Casebooks regularly reproduce and discuss significant reasonable expectations decisions and raise questions about the doctrine.

Treatises note the doctrine and its variations and differing degrees of support in the states. Legal periodicals, of course, contain substantial articles about the reasonable expectations concept, as this Symposium demonstrates. The Keeton form of reasonable expectations analysis has arrived as a major consideration affecting insurance law or a competing school of thought—but it has not become the prevailing standard. The fundamental organizational principles about insurance law involve classic doctrine. Reasonable expectations thinking is applied to this framework rather than used to form the framework itself.

Prior to publication of the Keeton article in 1970, insurance coverage lawyers did not speak of a reasonable expectations methodology or approach, much less a “doctrine”, although the reasonableness of the expectations and proffered interpretations of contracting parties was often a factor, frequently a decisive factor, in the resolution of contract and insurance disputes. As is the case today, the reasonable expectations

189. Again, to avoid misunderstanding, let me stress that Keeton did not intend the expectations concept to dramatically rework either insurance law or contract law. See Keeton, Second Decade, supra note 3, at 279-80.

190. See, e.g., KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 47-65 (2d ed. 1995); YORK, ET AL., supra note 52; FISCHER & SWISHER, supra note 52, 570 (but barely mentioning reasonable expectations in discussing insurance contract interpretation that is more “functional” than formal); KIMBALL, supra note 52, at 8-10; ALAN I. WIDDIS, INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES & REGULATORY ACTS 595-715 (1989) (entire Chapter 6 devoted to “Rights at Variance with Insurance Policy Provisions”); YOUNG & HOLMES, supra note 52, at 72-91.

191. See, e.g., OSTRAGER & NEWMAN, supra note 16, § 1.03; PETER J. KALIS, THOMAS R. REITER, POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE §§ 10.01, 20.04 (1997); EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION § 2.7 (Giovanni Rodriguez, ed.)(1997); ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 25D (2d ed. 1996); ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES § 6.03 (3d ed. 1995); STEMPPEL, supra note 5, at Ch. 11. But see ROBERT E. KEETON & ALAN I. WIDDIS, INSURANCE LAW Ch. 6 (2d ed. 1988) (130 pages devoted to “Rights at Variance”).

192. See supra notes 5, 8-10, 69, 73, 77-80 (sources cited therein).

193. See FARNsworth, CONTRACTS, supra note 143, §§ 1.6, 7.16; Keeton, Rights at Variance, supra note 1, at 966-70. See generally Keeton, Second Decade, supra note 3.
concept was used in a variety of ways in deciding coverage disputes even where there was no recognized effort to vindicate policyholder expectations as such. But prior to 1970, there were only a handful of cases that specifically focused on the reasonable expectations of the policyholder as a touchstone for determining coverage. After 1970, hundreds of cases began addressing the reasonable expectations of the policyholder and dozens of cases self-consciously considered the Keeton thesis that objectively reasonable expectations could determine coverage despite the existence of clear policy language to the contrary.

Thus, to a large extent, the legal profession’s receipt of reasonable expectations thinking is a success story, evidenced by this Symposium as well. Since Keeton’s famous article, lawyers, judges, and scholars dealing with insurance law must deal with reasonable expectations as both a principle and a doctrine, one recognized as a separate school of interpretative thought. But, the history of expectations analysis in actual cases also reflects distrust of the doctrine, dilution in its application, and even outright rejection as well as attack. To some extent, of course, any new proposal will encounter resistance. Furthermore, courts commonly apply different legal standards, particularly in insurance law, which is highly state-centered in its sources of authority. But in my view, reaction to the reasonable expectations approach has been something more than ordinary resistance to change and variance in judicial opinion. Because the reasonable expectations approach simultaneously appears to be a significant challenge to conventional contract thinking and is mistakenly seen as a significant increase in judicial power, many elements

194. See Keeton, supra note 3, at 275-77.
195. See supra notes 21 and 22 (noting cases using term “reasonable expectation(s)” and citing to Keeton’s Rights At Variance article or treatise since 1970). A Lexis search for use of the term “reasonable expectations” alone in a case involving an insurance company reveals only 181 such entries prior to 1970. From 1970 to 1980, there were 878 such cases contained in the Lexis “Mega” database. During the 1980s, more than 1,000 such cases are contained in this database. Although the 1990s are not yet behind us, the so-called “third decade” of reasonable expectations has already produced more than 1,000 such cases. The Lexis search used was delimited by date and then used the search terms “Name (insurance or assurance or Lloyd’s or property or casualty or life) and reasonable expectations”.

Thus, although the expectations principle is not often discussed in the full light of the Keeton theory, the term is omnipresent in insurance litigation.

196. See, e.g., Stempel, supra note 5, §§ T1.2, T1.6 (describing degree to which states split almost in half regarding meaning and application of “sudden and accidental” and “absolute” pollution exclusions, respectively).
of the legal profession and the body politic have wrongly resisted use of expectations analysis in resolving insurance disputes.

Comparing the surge and partial decline of the expectations doctrine with intellectual reaction to philosophical and scientific concepts generally helps to explain the sometimes tortured path of expectations analysis. Deeper reflection on the meaning of contract and the scope of the judicial role further demonstrates that to a large extent the reasonable expectations doctrine has received the proverbial “bum rap” from its critics. Appreciating these factors augers for a wider role for expectations analysis for insurance adjudication. In particular, it is important to appreciate the nature of “regular” contract law, which suggests that a reasonable expectations approach is hardly as radical as commonly thought. In addition, a more realistic and sophisticated view of judicial power and proper judicial role augers in favor of expectations analysis rather than against it.

It is also worth noting that judicial and scholarly focus on Keeton’s strong “rights at variance” form of the doctrine may have engendered sufficient “backlash” through the dilution or outright rejection of Keeton’s concept as to hold expectations analysis at undue arm’s length, limiting its use as an interpretative aid rather than a trump card over arguably clear but unexpected language.

A. Reasonable Expectations and the Hegelian Progression

The noted philosopher George Wilhelm Friedrich Hegel characterized the development of ideas as a process of thesis, antithesis, and synthesis.197 Put simply, the process begins with existence of a dominant “thesis”, an organizing principle, idea or theory. An alternative viewpoint or “antithesis” may be advanced that both gathers disciples and provokes response, even hostility, from adherents to the pre-existing thesis.198 The


198. According to one leading philosopher:
reaction leads to the promulgation of a counter-theory or a renewed shoring up of the school of thought attacked by the new theory. But if the new theory has sufficient intellectual force, it cannot be completely refuted or driven into submission by the antithesis. Yet the new theory cannot completely "conquer" the old theory or the antithesis triggered by the new theory. The relevant community—scientific, philosophical, political, social, or legal—eventually coalesces around a refined theory or construct that is a combination of the originally prevailing viewpoint, the new theory and its antithesis or the defense of the original viewpoint threatened by the new theory. The resulting "synthesis" is a new order or revised theory that holds sway for the moment but is subject to continuing dialectical revision.

The reasonable expectations doctrine resembles but does not quite duplicate the thesis-antithesis-synthesis pattern. As Judge Keeton demonstrated, case law prior to 1970 had been tacitly based in some cases on the reasonable expectations concept. But this basis of deciding cases was not self-consciously recognized as a distinct approach to coverage disputes until Keeton recognized and articulated the doctrine. Once this brooding omnipresence of insurance law had a formal name and physical embodiment, it immediately attracted attention. It also attracted the devotees and critics one finds cleaving to new ideas. In a sense, reasonable expectations thinking came on the scene as something of a perceived antithesis to the status quo insurance contract regime and a status quo counterattack quickly formed.

In dialectical logic, we start from a given position—as an example, we might take the customary ethics of ancient Greece. Then we find that this position contains within itself the seeds of its own destruction, in the form of an internal contradiction. The questioning of a Socrates leads eventually to the downfall of customary ethics, for example, and its replacement during the Reformation by a morality based on individual conscience alone. Yet this too is one-sided and unstable, and so we must move to a third position, the rational community. This third position combines the positive aspects of its two predecessors.

Singer, ENCYCLOPEDIA, supra note 197, at 342.
200. See supra notes 69-80 (citing sources defending and attacking reasonable expectations approach).
201. See G.W.F. Hegel entry in MS ENCARTA online encyclopedia (1997):

The thesis, then, might be an idea or a historical movement. Such an idea or movement contains within itself incompleteness that gives rise to opposition, or an antithesis, a conflicting idea or movement. As a result of
The pre-Keeton view of insurance law as merely contract law was sagging under the weight of its own contradictions of both application (courts were not enforcing policy language as written in all cases) and theoretical soundness (the insurance policy differed from "regular contracts" because of standardization, adhesion, marketing practices, complexity, and bargaining power of the parties). Thus, the Keeton reasonable expectations doctrine can be seen as the antithesis to pre-Rights at Variance insurance law.

I take some literary license to depart from a strict reading of Hegel and treat reasonable expectations as a thesis (rather than an antithesis) for illustration because it serves to underscore the hostility evoked by the doctrine in some quarters. The synthesis under either model is the same: the reasonable expectations concept is utilized, but not as fully as it should be, with many courts requiring ambiguity, hiddenness, or oppressiveness as a prerequisite for basing decision on the reasonable expectations of the policyholder. Also, the courts continue to undersell the frequency of their use of expectations analysis and either reject or reserve for rare instances decisions finding coverage expressly because of application of the Keeton form of rights at variance reasonable expectations doctrine. However, identifying some loose consensus in the ideological middle of the insurance law debate does not suggest that the status of the reasonable expectations approach is static.202


When Hegel was advocating the dialectical method, he had in mind a method in which oppositions, conflicts, tensions, and refutations were courted rather than avoided or evaded. Hegel was a student of the classical, laissez-faire economists who held that wealth would be maximized by the free play of competition. In this view, if traders and producers ceased to compete with one another, the whole level of
B. Reasonable Expectations and Kuhn's Model of Paradigms

Also illuminating the saga of the reaction to Keeton's article is Thomas Kuhn's by-now well known theory of the development of new paradigms of science and the displacement of an old scientific paradigm with a new paradigm. 203 According to Kuhn, the shift takes place when the existing paradigm develops perceived deficiencies largely because it can not explain discordant phenomena. 204 The new paradigm arises as a result of attempts to explain the discrepancies, gathers "an enduring group of adherents away from competing modes" of thought in the area, 205 and eventually is recognized as providing a better organization and explanation of the discipline than did the former paradigm. At that point, a paradigm shift occurs and the new paradigm displaces the old, becoming recognized as the dominant school of thought in the field. 206 When the paradigm shift is complete, textbooks have been rewritten and curricula revised so that the new paradigm is presented as the established orthodoxy of the discipline, with the dethroned old paradigm ignored or described as a historical step on the road to truth, an errant view of the field, or (where the new

economic life would be lowered. General prosperity could be reached only at the expense of labor and anxiety. So it is, Hegel believed, with the categories of our thought, the systems of philosophers, and the forms of life and society. There is no tranquillity to be had by withdrawal and isolation. Our categories compete with one another, and out of their competition emerges something better than either of them could have accomplished alone. But it is not possible for the superior category to go into retirement, for without the spur of competition it would fall into decay.

204. See id. at 27-35, n.203. Although Keeton emphasized that his expectations approach was not a suggestion of displacing the prevailing paradigm of contract theory, one can appreciate the Kuhnian parallels. Kuhn posited that during a time of "normal science" or less controversial practicing of the status quo, the energy of professionals is directed toward achieving a better understanding of the existing paradigm (e.g., the major contract treatises of Williston and Corbin, the insurance works of Edwin Patterson and Robert Vance), gathering new data to enrich the prevailing paradigm (e.g., refined treatise writing and the contract and insurance articles of both scholarly law reviews and practitioner-oriented legal periodicals), and further articulation of theory as the prevailing school of thought is interpolated or extrapolated to new situations (e.g., the Restatement, additional articles and major court decisions).
205. See Kuhn, supra note 203, at 17.
206. See id. at 17, 23.
paradigm's dominance is not complete) a competing world view held by a minority of those practicing the discipline.\footnote{207}

Although there are of course differences of note, Kuhn's analysis of paradigm shifts can be applied to legal and political movements as well as to shifts in scientific thought.\footnote{208} The Keeton version of reasonable expectations doctrine has elements of both the Hegelian dialectical progression and the Kuhnian paradigm shift but fits neither model perfectly. As noted above, the Keeton "thesis" has not been completely incorporated into the law but neither has the "synthesis" of reasonable expectations compromise been coherently articulated or consistently applied throughout the law.

Using the Kuhn measurement, the Keeton doctrine clearly has not displaced the pre-existing paradigm of "ordinary" contract construction and the interpretation of insurance policies as a matter of "ordinary" contract law.\footnote{209} The major treatises and textbooks of insurance law have not come to present the Keeton doctrine as the primary organizing principle of insurance law. Rather, the principal texts of insurance law present the Keeton doctrine as an important development in insurance law thinking and a major aspect of insurance policy construction. In the main, however, the authoritative sources of insurance law describe the dominant paradigm as one based on standard operating principles of contract: construction of the insurance policy is based primarily on text, party intent, and overall purpose of the insuring agreement.\footnote{210} For most courts most of

\footnote{207. See id. at 52-91.}


\footnote{209. See supra notes 203-08 and accompanying text.}

\footnote{210. As to casebooks, see, e.g., KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 47-65 (2d ed. 1995) (reasonable expectations doctrine given significant attention, with cases reproduced, but as one variety of an array of interpretative approaches, \textsc{York et al.}, supra note 52, at 42-43 (focus in interpretive section of casebook is on ambiguity analysis, with slight mention of reasonable expectations); \textsc{Fischer & Swisher}, supra note 52 at 570 (reasonable expectations approach described as subset of functionalist interpretative method that stresses purpose of insurance more than formal text; major reasonable expectations case (C \& J Fertilizer) reprinted in part, but authors tend to emphasize formal textual approach and ambiguity analysis); \textsc{Kimball}, supra note 52, at 8-10 (reasonable expectations discussed in passing but emphasis on text and ambiguity); \textsc{William F. Young \& Eric M. Holmes}, INSURANCE: CASES \& MATERIALS 72-91 (2d ed. 1985) (significant attention to reasonable...}
the time, party intent and the purpose of the instrument will be deduced from the written policy. The reasonable expectations of the parties of course affect the resolution of these issues. However, it is not "typical" for coverage disputes to be resolved according to policyholder expectations analysis incorporated into these traditional indicia of contract meaning. Even rarer are reasonable expectations controlling when contradicted by policy text of significant clarity.\footnote{211}

\textit{C. Reasonable Expectations and Freedom of Contract}

As noted above,\footnote{212} much of the criticism of expectations analysis, particularly the Keeton \textit{Rights at Variance} form, asserts that the expectations approach violates a first principle of American law: freedom of contract.\footnote{213} However, as the courts and commentators embracing the doctrine have noted (and as Keeton observed in identifying the doctrine) insurance contracting is something less than the classical libertarian ideal of bargaining and custom-made voluntary agreement. To paraphrase expectations, with cases reproduced and noted but doctrine presented as minority strain amidst prevailing text and ambiguity approach).

Not surprisingly, the casebook that most centers organization and discussion around the reasonable expectations concept by Prof. Widiss, co-author of the Keeton treatise on insurance law. \textit{See} \textit{Widiss}, \textit{supra} note 52, 595-616 (containing a substantial chapter devoted to rights at variance with policy provisions a/k/a reasonable expectations).

\textit{As to treatises, see}, \textit{e.g.}, \textit{Ostrager & Newman}, \textit{supra} note 16; \textit{Peter J. Kalis, Thomas R. Reiter, Policyholder's Guide to the Law of Insurance Coverage} (1997); \textit{Eugene R. Anderson, et al.}, \textit{supra} note 191; \textit{Jerry}, \textit{supra} note 191; \textit{Windt, supra} note 191; \textit{Stempel, supra} note 5. All of these text devote significant mention to reasonable expectations, but only Ostrager & Newman, which gives the doctrine a subsection in its "interpretation" chapter and Stempel, which devotes a rather large Chapter 11 to the approach, can be regarded as emphasizing the reasonable expectations principle as such. \textit{But see} \textit{Keeton & Widiss, supra} note 191, at Ch. 6 (providing prominent treatment of expectations approach as organizing principle of insurance law).

\footnote{211} \textit{See} \textit{supra} notes 21-60 and accompanying text. In actual litigation, the same pattern repeats itself. The ordinary brief of counsel begins with and stresses the standard contract law means of interpreting a disputed policy. The Keeton form of the reasonable expectations doctrine is invoked, if at all, when the traditional contract modes of analysis are unilluminating or adverse to the client's position.

\footnote{212} \textit{See} \textit{supra} notes 9-16, 69-80, 100-118, 160-180 and accompanying text (discussing cases rejecting reasonable expectations doctrine as an improper interference with freedom of contract).

\footnote{213} Two sources making this argument at length and with considerable force are: \textit{Stephen J. Ware, supra} note 5; \textit{J.H. Baker, From Sanctity of Contract to Reasonable Expectation}, in \textit{Current Legal Problems} 1979 at 17, 23-24 (Lord Lloyd, et al., eds.) (1979).
Stanley Fish, one might observe that there's no such thing as freedom of contract, and its a good thing, too. 214

Fish in fact, addresses aspects of this legal debate over the sanctity of words and "freedom of contract" tangentially but revealingly:

The law wishes to have a formal existence. This means, first of all, that the law does not wish to be absorbed by, or declared subordinate to, some other—nonlegal—structure of

214. See STANLEY FISH, THERE'S NO SUCH THING AS FREEDOM OF SPEECH—AND IT'S A GOOD THING, TOO (1994). Speaking in a different but related context, Fish defended his defense of the prospect of the regulation of speech through campus “hate speech” regulations. “[My opponents have suggested that I am saying] let's abandon principles, or let's dispense with an open mind. But, in fact, I am not making a recommendation but declaring what I take to be an unavoidable truth. That truth is not that freedom of speech should be abridged but that freedom of speech is a conceptual impossibility because the condition of speech’s being free in the first place is unrealizable.” Id. at 115. Substitute “of contract” for “speech” and Fish’s passage comes close to encapsulating my own views on contract law and insurance policy interpretation, suggesting that something other than a completely textualist/minimalist judicial role interpreting contracts is required.

Announcing the overall them of his book, which collects essays usually first published elsewhere, Fish states:

I would expect that from many readers the most distressing thing about these essays will be the skepticism with which they view the invocation of high-sounding words and phrases like "reason," "merit," "fairness," "neutrality," "free speech," "color blind," "level playing field," and "tolerance." My argument is that when such words and phrases are invoked, it is almost always as part of an effort to deprive moral and legal problems of their histories so that merely formal calculations can then be performed on phenomena that have been flattened out and no longer have their real-world shape. An exemplary (it is a bad example) instance of this practice has just been provided for us by the Supreme Court in its recent (June 28, 1993) decision that the creation by the North Carolina legislature of two black majority districts may be unconstitutional because it smells too much of “race consciousness.” [The Court majority opinion’s equating of this districting plan with partisan gerrymandering of the past] only emerges if one has forgotten or bracketed out everything about the past that makes the present an intelligible (and moral) response to it.

*         *         *

It is the willful disregard of history that is the object of critique in the pages that follow.

Id. at viii-ix.
concern; the law wishes, in a word, to be distinct, not something else.

*   *   *   *   *

In its long history, the law has perceived many threats to its autonomy, but two seem perennial: morality and interpretation.

*   *   *   *   *

[S]ome point of resistance to interpretation must be found, and that is why the doctrine of formalism has proved so attractive. Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences in such a precision and simplicity that their meanings leap off the page in a way no one—no matter what his or her situation or point of view—can ignore; it is the thesis that one can devise procedures that are self-executing in the sense that their unfolding is independent of the differences between the agents who might set them in motion. In the presence (in the strong Derridean sense) of such a mark or sentence or procedure, the interpretive will is stopped short and is obliged to press its claims within the constraints provided by that which it cannot override. It must take the marks into account; it must respect the self-declaring reasons; it must follow the route laid down by the implacable procedures, and if it then wins it will have done so fairly, with justice, with reason.

Obviously then, formalism's appeal is a function of the number of problems it solves, or at least appears to solve: it provides the law with a palpable manifestation of its basic claim to be perdurable and general; that is, not shifting and changing, but standing as a point of reference in relation to which change can be assessed and controlled; it enables the law to hold contending substantive agendas at bay by establishing threshold requirements of procedure that force those agendas to assume a shape the system will recognize.215

215. See id. at 141-43, n.214.
Seen as part of this drive toward formalism and resistance to reasonable expectations analysis is better understood as something not exclusively part of contract or insurance law. Indeed, much of the debate regarding statutory and constitutional interpretation also mirrors this "text vs. context" debate. The general operating principle or thesis of American law largely remains reverence for the word, be it constitution, statute, or contract, a view supported not only by the law's continued affinity for formalism even after the Realist revolution but also by the prevailing fears of an unchecked judiciary. Armed with the notion that a textual focus limits unwarranted judicial activism and keeps the judiciary properly balanced against other government branches and market forces, courts strive to render textualist contract constructions. Faced with the counter-theory of reasonable expectations creating rights at variance with text, some elements of the profession have recoiled and resisted this antithesis or opposing paradigm. This explains a good deal of the opposition to the Keeton article and also reflects the mistaken thrust of Keeton's critics.

As Keeton and others have detailed, insurance contracts are standardized, are contracts of adhesion, are complex, are of necessity broadly worded and even "overdrafted" to cover a wide range of potential events, are almost never read prior to the transaction, are seldom read afterward (unless a coverage dispute arises) and involve contracting parties frequently having wide disparities of expertise and bargaining power. Consequently, a rigid view of the power of the dictionary definition of policy text seems misplaced in the insurance context, although one can argue, as Fish has, that such thinking is generally misplaced but dominant in law because it serves other needs of the system.

216. Insurers have admitted to "overdrafting" policy language in order to cast an exclusionary net so wide that it can not be linguistically avoided—but have also stated that literal enforcement of such "overdrafted" exclusions was not intended by insurers where the claim did not fall within the purpose of the exclusions. See, e.g., Texas State Board of Insurance, Transcript of Proceedings: Hearing to Consider, Discuss, and Act on Commercial General Liability Policy Forms Filed by the Insurance Services Office, Inc., Bd. Dkt. No. 1472, vol. 1 at 6-10 (Oct. 30, 1985) (excerpted in part in Jeffrey W. Stempel, Interpretation of Insurance Contracts, at 116-18 (Supp. 1998) (insurer representatives describe "absolute" pollution exclusion as "overdrafted" but state that insurers would not seek to deny coverage on all claims that only incidentally involved an irritant or toxic substance)).

217. Much of this—but not all—holds true even where the policyholder is a large, wealthy, commercial and "sophisticated" insured. See Jeffrey W. Stempel, Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation, 42 Drake L. Rev. 807 (1993).
However, the reasonable expectations principle hardly guts the generally textualist formality of contract and insurance law. Even in its strongest "rights at variance" form, the Keeton concept of expectations analysis places heavy emphasis on policy text and surrounding circumstances. The policyholder does not prevail, particularly when text is clear, unless contextual factors auger strongly in favor of the policyholder's understanding of the insurance coverage. Mere policyholder hope and whim is not enough to gain coverage. There must be an objectively reasonable expectation of coverage before the policyholder may prevail.

In addition, it is generally agreed that the use of standardized forms and the marketing mechanism of insurance facilitates the operation of the primary, excess, and reinsurance systems as well as providing economies of scale that should (at least in theory) lower the cost of insurance. Thus, absence of total freedom of contract is not necessarily a bad thing. Usually, neither the insurer nor the policyholder can create a completely customized contract. Even so-called "manuscript" policies are much more the cutting and pasting of standard ISO terminology than they are any novel contract language independently generated by the parties.

Furthermore, to perhaps state the obvious, something less than total freedom of contract hardly means that the contracting process lacks all indicia of freedom. At a minimum, insurers and policyholders have the freedom not to contract with one another at all. Usually, there is also considerable flexibility in seeking particular combinations of endorsements or coverage provisions at varying premiums. Despite standardization, there is usually opportunity for some comparison shopping, if the policyholder is willing to invest the resources in the search. For commercial policyholders or individuals with significant insurance needs, brokers and independent agents can be used to lower the search costs. Consequently, the insurance

218. See STEMPBEL, supra note 5, at §§ 10.1, 10.2 (delineating advantages of policy form standardization for insurers and policyholders).

219. Although this "freedom" is muted as a practical matter in many situations. For example, a prospective homeowner normally needs a bank loan to purchase the home. Only the very wealthy can avoid this. Most banks require homeowners insurance and title insurance as a condition of issuing the mortgage. Although the homebuyer is free to do some comparison shopping, seldom is the buyer free to dispense with insurance on the home altogether. For further evidence of "non-freedom" of contract, see W. David Slawson, Standardization of Mass Contract: Lawful Fraud in California, 47 S. Cal. L. Rev. 1255 (1974) (law professor Slawson retells experience of buying home only to be presented at closing with standardized form documents that he had not had prior opportunity to read and was required to sign as a condition of completing sale).
contracting environment can be accurately characterized as partially free or semi-free, with observers debating the degree of freedom. But, without doubt, the insurance contract market is far less than 100 percent free.  

Under these circumstances, it is hardly persuasive to attack the reasonable expectations doctrine as some sort of stiletto thrust into the breast of freedom. To a large extent, even the rhetoric of "freedom" of contract is misplaced. Although the terminology may be a useful device for appealing to judicial sympathies by evoking images of the Boston Tea Party, The Declaration of Independence, Valley Forge, and the Constitutional Convention, the rhetorical flourish attending "freedom of contract" debates obscures more than it illuminates. The point of a contract regime in a liberal democracy is to permit parties to arrange their affairs as they wish subject to other needs of the society and to ensure that parties are not privately coerced into involuntary arrangements and that parties may receive the aid of the law to enforce their contractual arrangements. The point is not to venerate contract text or dictionary definitions in and of themselves.

To use a perhaps-inflammatory example, we forbid slavery and the sale of slaves, although this clearly restricts the "freedom" of slave marketers and plantation owners to make such contracts. Today, we recognize that attacking this sort of limitation of trade on freedom of contract grounds is revolting. It is only slightly less obnoxious to suggest that courts lack

220. Of course, assigning percentages of certainty as to a trait can be dangerously ludicrous by giving a false illusion of precision. See, e.g., DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST (1972) (describing former Defense Secretary Robert McNamara's seduction by such false certainty through essentially arbitrary assignment of numbers to issues; for example, McNamara would ask soldiers in the field to evaluate the safety (i.e., its friendliness to American troops) of a Vietnamese village on a scale of 1 to 10).

Notwithstanding this danger, my own impressionistic assessment is that the insurance contracting regime is perhaps 20 percent "free" for consumers and 50-60 percent "free" for commercial entities.

221. And, obnoxious as it may sound to modern ears, slavery was at least as much a commercial enterprise as it was a reflection of social norms. See generally HUGH THOMAS, THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE 1440-1870 (1997). One can also point to the slave trade not only as an example of the extreme results permitted under a "freedom of contract" regime but also to note that contract holds a central place in society largely because government enables this by establishing a policy favoring contracts and an infrastructure for enforcing them. For example, the governments of slave traders taxed slave trading as a substantial source of government revenue and used the coercive power of the state to protect slave brokers and owners and to hunt down or subdue rebellious slaves.

222. Although this was, of course, not always the social norm. From ancient times until the late 19th Century, slavery was considered something of a natural order and slavery as
power to set aside unconscionable contract terms or to ensure that contract terms are accorded reasonable meaning where there is a mistake of drafting, an unanticipated development, or even where the drafting party may have intended an unreasonable meaning not shared by the party adhering to the drafter's form. Clothing such arguments in rhetorical garb better reserved for political conventions fails to improve the arguments against reasonable expectations interpretation.

Insurance contracting, even more than most modern contracting, is not totally free and perhaps not very free at all. Even in the non-insurance atmosphere, the government (legislatures and executive agencies in addition to courts) is widely regarded as having the power to void or refuse to enforce contract provisions that are illegal, unconscionable, or otherwise at odds with public policy.\textsuperscript{223} In addition, human activity is generally widely regulated in modern society, with the operation of the insurance industry perhaps more regulated than most commercial activity on this side of the securities and food & drug laws. Thus, the real world of contract and insurance is not one of unfettered discretion of the contracting parties.

The question then becomes: what should the law provide under these circumstances? One persuasive defense of the reasonable expectations doctrine is that it simply adds another interpretative tool for construing contracts so that courts are not required to completely strike from contracts terms that are unfair if read literally. Similarly, the reasonable expectations approach provides an alternative to simplistic application of a strong form of contra proferentem as well as allowing the courts a route other than simplistic enforcement policy text whose meaning is suspect or tending toward the absurd when applied literally to the context of the dispute.\textsuperscript{224} Viewed from this realistic perspective, reasonable expectations analysis—even in its strongest "rights at variance" form—is not precluded by the legal system's treatment of contracting autonomy. Milder versions of expectations analysis as a tool for determining insurance policy meaning are perfectly consistent with the freedom of contract ethos. Accurate determination of contract meaning enhances party autonomy and the value of contract rather than diminishing it.

Furthermore, the expectations approach is well grounded in standard contract doctrine, although this seems frequently forgotten by courts and commentators resisting the reasonable expectations principle. A half-

\textsuperscript{223} See STEMPFL, supra note 5, at § 7.1.
\textsuperscript{224} See Fett, supra note 80.
century ago, Arthur Corbin listed as his first black letter pronouncement of the law of contracts that the "Main Purpose of Contract Law is the Realization of Reasonable Expectations Induced by Promises".\textsuperscript{225} Corbin observed:

The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have; and the promise must be one that most people would perform. This necessarily leads to a complexity in the law, to the construction of the various rules determining the circumstances under which a promise is said to be enforceable and those under which its performance will be excused.

* * *

reasonableness is no more absolute in character than is justice or morality.\textsuperscript{226}

Thorny questions of course remain regarding whose expectations should control and in determining the actual content of expectations as well as the degree to which expectations are belied by or trumped by policy language and other factors surrounding a disputed term. But resolving those sorts of questions is the essence of adjudicative activity. By disputing this, the critics of expectations analysis are in reality arguing that comprehensive judicial construction of written instruments somehow violates freedom of contract. On the contrary, the existence of volitional contracting depends upon having a court system that can resolve the inevitably arising disputes over meaning by rendering decisions that do more than looking up the disputed term in a dictionary.

Unfortunately, however, even the best discussions of the reasonable expectations doctrine appear to have tacitly assumed that contract law outside of insurance is both highly textual and that textual meaning is rather clear and certain. Once this assumption is made (or unconsciously brought to the analysis at the outset), expectations analysis seems more of

\textsuperscript{226} Id. at 2.
a departure and hence less legitimate. Reasonable expectations then
becomes something of a "radical" doctrine that cannot be fully embraced
by responsible judges. Courts taking this view then further exacerbate the
practical problem of interpreting insurance policies by tending not to use
expectations analysis in matters where there is no sufficiently clear text
that can be "painstakingly studied" to determine the meaning of the policy.
Meaning can only be derived from context and with a functional view of
the policy in question and its intended purpose. Logically, the expectations
of the parties would shed light on policy meaning just as this information
would shed light on the meaning on non-insurance contracts. But this
potential use of expectations analysis is truncated by adverse reaction to
the "rights at variance" form of expectations analysis.

However, if contract law is properly understood historically and
correctly as permitting substantial use of nontextual factors in resolving
interpretative issues, the reasonable expectations principle crystallizes as
an important but hardly radical addition to the collection of interpretative
tools available to the courts. Although much contract law scholarship and
precedent has stressed the textual and formal,227 an at least equally weighty
and persuasive body of case law and analysis has promoted the broader
view more hospitable to the reasonable expectations doctrine.228 As
previously discussed,229 the broader, functionalist view, frequently
associated with Professors Corbin and Farnsworth, appears to have gained
ascendancy in the years after World War II and culminating in the Second

227. See, e.g., SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACT (original ed.

228. See, e.g., FARNSWORTH, CONTRACTS, supra note 118; ARTHUR L. CORBIN, CORBIN
ON CONTRACTS (1952) (One Volume Edition). Although frequently regarded as more formalist
than Farnsworth, modern contracts scholars and treatise authors Calamari and Perillo appear to
weigh in more on the Corbin/Farnsworth side of the debate and against Williston. See JOHN D.
CALAMARI & JOSEPH M. PERILLO, CONTRACTS, §47 (1970)(discussing "Standards of
Interpretation", authors state there is no "‘lawyers’ Paradise’" where "‘all words have a fixed,
precisely ascertained meaning,’" id. at 89, setting off authors’ perspective from those of
evidence of evidence expert James Bradley Thayer, a Harvard Law faculty contemporary of
contract law formalist Samuel Williston (citing JAMES BRADLEY THAYER, A PRELIMINARY
TREATISE ON THE LAW OF EVIDENCE AT COMMON LAW 428-29 (1898)).

Although the theme of his study is largely that realism did not completely supplant
formalism as the dominant paradigm in American legal thought, English scholar Neil Duxbury
describes the American legal community as evolving during the 20th Century toward a less
text-centered jurisprudence where "word-worship" was to a large extent attacked or even
belittled. See DUXBURY, supra note 106, at 119-21.

229. See supra notes 215-225 and accompanying text.
Restatement, although the 1980s and 1990s have witnessed something of a formalist revival, particularly at the Supreme Court. However, this formalist recidivism, one largely decried by commentators, hardly

230. See generally Restatement (Second) Contracts (1981); Schaber & Rohwer, supra note 156, § 88 at 147 (authors of basic contract law text designed as primer and study aid for first-year law students state that “[o]ne purpose of contract law is to protect the reasonable expectations of persons who become parties to a bargain”). The Schaber & Rohwer view is in part premised on the work of earlier scholars who identified an “expectation interest” in contract performance. See, e.g., Lon Fuller & Melvin Aron Eisenberg, Basic Contract Law (5th ed. 1990); Friedrich Kessler, Grant Gilmore & Anthony T. Kronman, Contracts: Cases and Materials (3d ed. 1996). See also supra notes 215-225 and accompanying text.

In particular, Schaber & Rohwer observe that “[t]here is nothing wrong with ‘plain meaning’ and it may be a satisfactory answer to interpretations questions in some cases, but the problem may be more difficult than this expression indicates”. Schaber & Rohwer, supra note 155, at 148. They also note that even under the purportedly formalist/textualist views of Williston and the Restatement (First), for which Williston served as Reporter, a number of noncontextual factors were preferred as interpretative tools where the contract text at issue was not indisputably clear. Id. at 150-53. The approach of Corbin, Farnsworth, and the Restatement (Second) was more oriented to the parties actual and subjective meaning and did not seek an “objective” meaning for contract terms, as had Williston.

If this view is regarded as correctly summarizing the evolution of contract law in the 20th century, then the only real departure provided for insurance under the strong version of the Keeton “rights at variance” approach is that in cases of arguable unilateral mistake, where the policyholder has not read about or thought about portions of the policy language, the insurer’s intended meaning will not control if this violates the insured’s reasonable expectation. In fact, using the Keeton approach in these situations may be completely consistent with Restatement (Second) § 201(2)(b), which prevents one party’s intended meaning from controlling if that party had “reason to know” that the other party may have had a different understanding, hardly a farfetched scenario in the context of insurance law.


232. Although the standard “story” of the march of 20th century American jurisprudence is of a trek away from formalism and toward functionalism, recent scholarship has persuasively argued that modern American legal thought has engaged in a protracted and probably perpetual tug-of-war between these schools of thought, but something considerably more complex than a “pendulum swing” alternating between periods of formalist and functionalist dominance. See Duxbury, supra note 160, at 2-5 (1995). See also id. at 10 (realist revolt against formalism was “by no means as straightforward as some commentators have cared to suggest”); 21 (even
suggests the absence of a place for expectations analysis at the contract law's figurative table.  

D. Reasonable Expectations and Reverence for Text

As previously discussed, courts and commentators rejecting the reasonable expectations approach frequently do so on the basis that consideration of party expectations undermines the predictability of a contract law regime premised on enforcing the contract as written rather than as understood.  

But this perspective runs counter to the better reasoned views of contracts scholars such as Professors Corbin and Farnsworth and the assessment of the Restatement: the correct meaning of a contract term frequently cannot be determined by face of the term alone or even the term in the smaller context of the entire written instrument.  

Often, courts must examine the larger context of extrinsic matter, background information, overall purpose, party intent, and even party expectations and public policy. Only then can the complex terms or terms at issue in unanticipated situations be aptly assessed.

Anti-expectations cases such as Deni and Fogg ignore this truth in an almost simplistic manner, merely declaring that the meaning of the pollution exclusion is clear because the words “pollutant” or “irritant” can be looked up in a dictionary. The rallying cry of this jurisprudential perspective is that contract language must be given its “plain meaning” (and what could be more plain than a word that may be looked up in Webster’s?) and that contract meaning can be decided based on the “four

disciples of highly formalist 19th century Harvard Law Dean Christopher Columbus Langdell (such as Samuel Williston) found Landell’s approach too narrow; 47 (progressive judges such as Benjamin Cardozo exhibited both formalist and functionalist traits); 55 (noting Harvard Law Dean Roscoe Pound’s professed sociological jurisprudence attacking as “mechanical” jurisprudence the high formalism of Langdell); 60 (but both Pound and Oliver Wendell Holmes were both formalist and anti-formalist); 301-419 (modern “law and economics” movement has elements of both formalism and functionalism). See also FISH, supra note 214, at 156-68 (discussing “Contract’s Two Stories” regarding nature and adequacy of consideration as example of ongoing tensions in the law).


234. See SCHABER & ROHWER, supra note 155, § 6 at 11 (“[C]ontract law is concerned with protection of the reasonable expectations of the parties”).

235. See supra notes 4-16, 21-22, 69-80 and accompanying text.

236. See supra notes 140-54 and accompanying text.

237. See supra notes 174-212 and accompanying text (discussing Deni and Fogg cases).
corners” of the contract documents if the language used is sufficiently plain and clear.

A more sophisticated view of the four corners plain meaning rule is nicely stated by a jurist whose commitment to efficiency, predictability, party autonomy, and enforceable contract law is well-established. Judge Richard Posner, in *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 238 a commercial contract dispute, summarized:

The black-letter substantive rule, sometimes called the “four corners” rule, is that if a written contract is clear “on its face”—that is, clear to someone who can read English but does not know the background of the contract—evidence may not be introduced to vary that apparent meaning. The practical effect is to confine the power to decide in such cases to the judge, for the issue of interpretation can be answered only one way. . . . [T]he four-corners rule has now pretty much yielded to a rule that “extrinsic” evidence may be introduced not only if the written contract is ambiguous on its face, but also to show that it is ambiguous. 239

Applying this working definition of a four-corners plain meaning approach to insurance coverage immediately suggests the limited utility of the plain meaning textualist talisman. Many insurance policy provisions, even those routinely enforced by courts, simply are not clear unless one understands the nature of the insurance product and the background of the specific contract. Consider the pollution exclusion faced by the Florida Supreme Court in *Deni* and *Fogg*. The average reader of English perusing the exclusionary language can know what an irritant is, or what comprises smoke or soot—but when reading this language does the reader realize that policyholders will not receive liability coverage when a patron slips on the hypothetical blot of bleach? In a vacuum, the connotative value of the term “pollution” suggests something more despite the broad verbiage used by the insurance industry.

For the reader with background knowledge, i.e., the actual commercial policyholder, the meaning of the pollution exclusion becomes even more familiar. The insurer purchased coverage to obtain protection in the event of litigation over alleged business negligence. Under these circumstances,

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238. 879 F. 2d 1518 (7th Cir. 1989) (applying New York law).
239. *Id.* at 1521 (citation omitted).
would the reasonable reader poring over the four corners of the CGL and the pollution exclusion expect to be denied coverage when a blueprint machine tips over rather than catches fire or when a crop dusting plane sprays a bystander rather than crashing down upon him? My own preliminary reaction is that coverage should exist in this situation because of the nature of the CGL product. But even if my view is incorrect, refuting it would appear to require courts to do more than stare at the insurance policy and the dictionary in tandem.

The *Agfa-Gevaert* case from which the Posner quote is taken illustrates the practical limits of four-corners, plain meaning thought. In *Agfa*, the question was whether the contract between a manufacturer of paper copiers and a distributor was a “requirements” contract mandating that the distributor purchase all of its required copiers of that type from the manufacturer or whether the distributor was free to market the models of other manufacturers. The trial court found the contract language in dispute to unambiguously create a requirements contract. The Seventh Circuit unanimously found the contract unambiguously not to be a requirements contract. So much for the predictability, reliability, and certainty wrought by the four-corners plain meaning approach.

Furthermore, New York, identified in *Agfa* as the leading jurisdiction strongly supporting the traditional four corners approach resisting the intrusion of extrinsic evidence, frequently bases its insurance coverage decisions, at least implicitly and frequently explicitly, upon the objectively reasonable expectations of the parties reading the four corners of the policy in light of the context of the insurance contract. Although not openly embracing rights at variance expectations analysis, the New York courts can be regarded as considering party expectations when interpreting insurance policies notwithstanding their professed allegiance to the four-corners plain meaning approach.

**E. Reasonable Expectations and the Judicial Role**

The pure *Rights at Variance* form of the reasonable expectations doctrine appears to be losing ground, or at least failing to gain ground since 1985, although the doctrine appeared to be growing in popularity during the first 15 years after the Keeton article. Scholars observing this

240. See *supra* note 118 and accompanying text (discussing New York law).

241. The beginning of this trend was captured well in Prof. Mark Rahdert’s excellent 1986 article. See Mark Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986) and discussion in the article of reasonable expectations developments in Iowa, Idaho, New Jersey, and Pennsylvania.
trend have refrained from an extensive assessment of why these courts backtracked on the reasonable expectations doctrine and in particular eschewed a legally realist explanation for the change. For example, one might suggest that the retreat from the pure form of the reasonable expectations doctrine resulted from the increase in judicial conservatism during the 1980s and 1990s or the greater dominance of Republican Presidents and Governors in selecting judges. In my view, such an explanation, although perhaps sounding simplistically political, is partially correct.

The reasonable expectations doctrine is regarded (wrongly in my view) as overly liberal, result-oriented, and anti-free market anti-freedom of contract, and even at odds with the norm of judicial deference to the legislature. Republican-appointed judges and conservative judges are generally reluctant to embrace a doctrine with this sort of image. But, as discussed in Part IV, the retreat from reasonable expectations or the reluctance to further embrace it stems from a more metapolitical aspect of our culture than the relative strengths of the political parties or their primary ideologies. Rather, the growth of reasonable expectations analysis has been pared to a large degree by the prevailing view that judges must generally be restrained strict constructionists who do as little as possible to interfere with textual instruments and markets.


“Judicial activism” has traditionally been frowned upon in the folklore of American jurisprudence. Although this view has had greater strength since the 1968 election of Richard Nixon than it did during the 1930-1968 period, the veneration of “judicial restraint” or “strict construction” is hardwired into our law, politics, and society. Although there are of course exceptions to this “rule” and substantial but “hidden” chronic breaches of the rule, the American ethos of judging is one of constraint and frequent deference to other institutions (executive, legislative, private ordering, and to text: the text of the Constitution created by the framers; the text of a statute enacted by Congress; or the text of a contract “bargained” for and executed by private parties.

courts should enforce contract language as written and generally avoid judicial interference with market activity).

244. See generally Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (William N. Eskridge, Jr. & Philip P. Frickey, eds.) (1994) (discussing notions of separation of powers, procedure, neutrality, prudence, suggesting that these favor judicial restraint; book focuses strongly on the other branches of government and on the relatively slow and steady change of common law doctrine. Courts are portrayed as having substantial authority over common law matters. Other lawmaker activity is to be approached by courts only with care so as not to intrude upon other policymakers).

245. Nixon made purported “judicial activism” of Warren Court a major target in his presidential campaign and promised to appoint only “strict constructionists” to the Supreme Court should a vacancy occur. See Bob Woodward & Scott Armstrong, The Brethren Introduction & Ch. 1 (1979). Although like any clever candidate, Nixon was not particularly specific in defining a “strict constructionist”, he clearly was suggesting an appointee who focused on language (of the Constitution, a statute, a contract) rather than on other interpretative factors. Nixon won the election in 1968 and handily won re-election in 1972, suggesting that this perspective on judging and courts enjoyed substantial approval among the general public.

246. See Hart & Sacks, supra note 244 (outlining relationship and co-equal power of executive, legislative, and judiciary).

247. See Richard A. Posner, The Problems of Jurisprudence 9-12 (this “short history” of jurisprudence notes emergence of “legal positivism” in which law is defined as command of sovereign but with elements of natural law limiting range of sovereign’s power). But Posner also notes the malleability of rules, pragmatic approaches (which he favors) and alternative centers of power in American law. Id. at 17. Although Posner endorses the progressive judging of, for example, Cardozo, Posner clearly favors a judicial approach in which change is incremental and initially rule-driven, with functional policy analysis used where black letter rules yield ready, sensible answers. Id. at 23-30, 32 (Posner labels his views on judging “boringly centrist”).

Although this popular concept of judicial restraint obviously explains a good deal of the resistance to the reasonable expectations doctrine, there has been remarkably little serious reflection on exactly what it means to be a judge acting within the scope of properly limited judicial role. Many of the opinions rejecting the expectations doctrine on the ground that it is "judicial activism" fail to go beyond the surface of this shibboleth, the utterance of which alone is expected to convince the reader that expectations analysis must be bad if it entails judges doing anything more complex than reading an insurance policy and a dictionary in tandem.

As noted above, the notion of contract freedom has been rhetorically oversold. Similarly, the notion that contracting parties, even the drafter, chose all words in a contract carefully and with a specific intent is hopelessly wrong much of the time. Consequently, for the reasons stated above, judicial scrutiny of contracts to ensure reasonable construction hardly seems like the conduct of a rogue judiciary intent on rampaging outside its boundaries to impose on litigants agreements they never made. Undoubtedly, parties losing a contract dispute will make such charges whenever an adjudication requires more performance than they were

[T]he appropriate role of the judge—his incentives and constraints, the balance he should seek to maintain between discretion and obeisance, between creativity and conformity, the conditions of judicial greatness, the sources of judicial wisdom, the twin shoals of usurpation and passivity—has occupied center stage in the drama of Anglo-American jurisprudence.

* * *

Because there are so many ordinary judges, and because anti-intellectualism, democratic egalitarianism, and suspicion of officials run deep in the American soul, there is even a cult of ordinariness in judging. Exceptionally able judges arouse suspicion of having an "agenda" . . .

* * *

It is because judges play by the rules of the judicial game that legislatures can control judicial behavior, though not perfectly . . .

* * *

Traditional legal education and practice do tend to filter out of the profession, or at least the part of the profession from which most judges are appointed, persons radically uncomfortable with traditional legal roles, including that of the judge.

But "in our system the line between law and policy, the judging game and the legislating game, is blurred." Id. at 131. See also, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE, Ch. 4 (1990) ("Legitimacy in Adjudication") (although not adhering to strongly rigid or formal notion of judicial restraint himself, Posner acknowledges general social and legal view favoring restraintist model).

249. See supra notes 214-233 and accompanying text.
willing to give under their interpretation of the agreement. At most, however, a bad decision in this regard is just that: a bad decision. Construing a contract to require more than the losing party wanted to give is not judicial activism any more than it is judicial activism to construe an exclusion in an insurance policy more broadly than a policyholder wanted, thus eliminating coverage. An adjudicatory approach does not become uneven or quasi-legislative simply because the court uses additional factors to determine contract meaning.

In his other writings near the time of the Rights At Variance article, Judge Keeton shows an appreciation of this process and implicitly refutes cases like Allen, which suggest that courts may give only a certain interpretation to words contained in policies approved by the legislature. Rather than seeing courts as rebels seeking to overthrow the legislature, Keeton saw courts as flexible adjudicative institutions that would apply legislative commands to emerging or unforeseen situations and relieve the legislature of the burdensome and probably impractical duty of constantly updating and revisiting statutes and administrative rules.250

Thus, as discussed above, judicial use of expectations analysis does not violate the autonomy of contracting parties or their freedom to contract as they see fit subject to the already existing limits of illegality and unconscionability. To the extent that use of expectations analysis is attacked as judicial activism threatening separation of powers values, the criticisms of expectations analysis are even more misplaced. As discussed earlier in the article, even the Allen decision,251 which attempts a tour de force against the reasonable expectations doctrine, fails to convince. In essence, Allen and similar cases argue that courts cannot apply reasonable expectations analysis to construe insurance policies because the policy forms were previously approved by insurance regulators, who must have intended the policy language to mean whatever the court construes the language to mean based on dictionary definitions or (at most) non-dictionary interpretative tools other than reasonable expectations.252

As discussed at length in my criticism of Allen,253 the argument borders on the ridiculous. When regulators approve policy forms, they of course do so based on a generalized view of the coverage provided. But it is an

250. ROBERT E. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 83-86 (1969)
252. See supra notes 69-115 and accompanying text.
253. See supra notes 85-115 and accompanying text.
inferential leap of infinite magnitude to take this fact and from it suggest that regulators have in mind for every word of every policy form approved an intended meaning and that the regulators would take umbrage if the courts were to subject language in approved policy forms to expectations analysis. Furthermore, refusing to apply expectations analysis to contract terms in forms approved by government regulators is judicial activism in reverse—judicial atrophy or even abdication—in that it attempts have agency employees (usually neither elected by the people or appointed by elected officials) determine the meaning of contract terms. Even the most conservative politicians presumably agree that courts (and not executive branch employees or legislative aides) should be deciding contract disputes. Even where a statute enacted by the legislature defines terminology, courts must construe the definition as applied to an actual disputed insurance policy. If a judicial decision misconstrues the legislature’s intended meaning, the legislature has ample opportunity to revise the provisions at issue and can even overrule the court’s construction. Consequently, the reasonable expectations doctrine is perfectly consistent with the traditional judicial role and poses no threat to separation of powers or prevailing notions of judicial restraint.

Similarly, the expectations approach does not arrogate power to the judiciary when used in this manner. Recall that the “separation of powers/judicial activism” argument against the reasonable doctrine posits that policy text must be enforced as written because the policy text is embodied in forms approved by another branch of government, usually the state Insurance Department. The Department is normally an administrative agency of the Executive Branch of the state, although some Insurance Commissioners are elected in their own right. Sometimes legislation effectively mandates or authorizes particular policy language or provisions. Thus, runs the argument, any judicial use of any factor other than policy text is utilization of factors that have not been approved by the legislature. Or, if the text at issue is deemed “clear” according to dictionary criteria, the court may see itself (as did the Allen majority of the Utah Supreme Court) as rendering a decision not only outside the range of the other

254. Most review of proposed policy forms of necessity is done by employees of an insurance department and not by the insurance commissioner or even top aides. To the extent the commissioner gets involved, it will be to review the assessment of an employee, probably with considerable deference. Viewed this way, the Allen majority opinion is most indefensible in that it would require courts to limit their analysis of a contract term merely because the contract term was not prohibited by a civil service worker. This is judicial abdication every bit as lawless as any ultra vires judicial activism.
branch’s approval but in contravention of the views of another branch of government.\footnote{255}

As noted in the previous discussion of Allen, the “separation of powers” argument against reasonable expectations is unrealistic view of the practical operation of government regulation.\footnote{256} In the real world, government regulation is inconsistently and episodically imperfect. The regulators may be incompetent, ineffective, or even corrupt. By approving a policy form, the Insurance Commissioner does not simultaneously mandate that only a certain construction of the term applies or that dictionary construction of the term is required in future litigation.

At best, the regulatory agency approving insurance policy forms is scanning the policy and determining that the policy language, examined without reference to any actual dispute, seems noncontroversial. No serious observer of the regulatory process would suggest that in the ordinary case, the regulatory body by approving a form has also given serious reflection to possible constructions of the policy in a variety of litigation contexts. On the contrary, it seems more likely that the regulatory agency is expecting that the courts will ensure that the form language of approved policies is applied in a manner that serves the intent and purpose of the parties and the insuring arrangement. When a court


\footnote{256} In a different context, Judge Ralph Winter in dissent criticized application of the mail fraud statute against a well-connected politician accused of dispensing patronage, finding that the majority’s rationale that politically connected contracting deprived the citizens of honest government and the loyalty of elected officials to be “a legal standard which amounts to little more than the rhetoric of sixth grade civics classes.” See United States v. Margiotta, 688 F. 2d 108, 139 (2nd Cir. 1982) (Winter, J., dissenting).

Regarding the mail fraud statute, I disagree. But the Supreme Court soon found Judge Winter’s perspective persuasive. See McNally v. United States, 483 U.S. 350 (1987) (finding mail fraud statute did not reach a public officials “defrauding” of public of right to honest government). However, Congress had a different view, amending the statute with new section 18 U.S.C. § 1346 to overrule McNally by providing that a “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services”. The Court sustained application of the new provision. See Carpenter v. United States, 484 U.S. 19 (1987) (permitting mail fraud prosecution of government official involved in corrupt funneling of favors to political allies).

But whatever one’s view of the merits of mail fraud, the point remains well-taken: simplistic notions of government can make for problematic construction of statutes or contracts. See Lawrence M. Solan, Learning Our Limits: The Decline of Textualism in Statutory Cases, 1997 Wis. L. Rev. 235 (providing illustrations of inability of text-based approach to statutory interpretation fueled by formalistic notions of separation of powers to provide consistently sound construction of statutes at issue).
provides the “correct” construction by using reasonable expectations as an aide, the court is not undermining the legislature or the executive: the court is helping the other branches to be more effective.

In a few instances, obviously significant or highly publicized policy form language (e.g., the use of a claims-made policy rather than an occurrence policy) may receive unusual attention from the regulatory body. But even in such instances, this greater scrutiny seldom results in a pronouncement by another branch of government as to the “meaning” of the policy term in litigation that was not even pending at the time the form language was approved for marketing in the state. Even if the insurance regulator had made such a finding, it is unclear that such a directive should be binding on the courts. As the old chestnut from Marbury v. Madison provides, it is emphatically the province of the judiciary to say what the law is.\textsuperscript{257}

Similarly, within the core judicial mission of adjudicating private law disputes, it would seemingly violate separation of powers in a manner akin to a Bill of Attainder if a regulatory agency were to decree that the judiciary must render a given construction of a disputed contract term. To be sure, the agency’s interpretation (if in fact the agency has actually made an interpretation) is entitled to substantial weight and perhaps even deference (if the agency has expertise or the legislature has committed such matters to the agency). But the notion that government regulators can bind courts to given constructions of contract language raises separation of powers problems far more severe than even the most aggressive judicial use of the reasonable expectations doctrine.

\textit{F. Assessing the Misguided Jurisprudential Resistance to Reasonable Expectations Analysis}

In sum, more than two decades after the Keeton article, we continue to find uncertainty and division over the issue. Well-entrenched prior to the Keeton article was what might be termed the standard contract construction paradigm, which established the primacy of contract language, both as the legal content of the contract and the primary determinant of party intent. Against this bulwark, the suggestion that even clear contract text could be overcome by policyholder expectations has been unable to effect a paradigm shift. But, of course, Keeton did not purport to remake the contract law paradigm—only to refine its enunciation and application in a set subcategory of cases. Seen this way,

\textsuperscript{257} See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
the reasonable expectations doctrine was a new theory but not a competing paradigm.

However, despite the substantial contract law pedigree enjoyed by the expectations principle, courts and commentators have viewed it as somehow inconsistent with “normal” contract law. Several factors probably account for this:

- The long-standing and continuing tension in contract law between what might be termed the “Williston” and “Corbin” camps. Although the Corbin view may have enjoyed a period of relative dominance when Keeton wrote, Corbin’s less text-reverent approach to interpretation never completely displaced the Williston camp’s greater formalism in the manner of a Kuhnian paradigm shift.

- The comparative ascendancy of the Williston faction in the years since Keeton introduced the reasonable expectations doctrine. Although I continue to regard the Corbin view as having prevailed on the whole in the legal profession and in society, the textualism and formalism of the Williston school has made something of a comeback since the 1970s.

- The rise of textualism in the law generally, particularly renewed interest in textualism in statutory interpretation as popularized by Justice Antonin Scalia. Although this movement, like the Williston camp of contract law has or will ultimately lose out, it continues to enjoy substantial support and thus tends to color other fields of law.

- The rise of the law and economics movement, which has in tandem with textualism reinvigorated support for less limited judicial activity, greater deference to private ordering, the parol evidence rule, greater certainty, greater predictability, and greater efficiency in the law. The conventional wisdom—with which I disagree—posits that expectations analysis is inconsistent with these goals because it leads to results at odds with the
insurers' understanding of the words chosen for the policy and makes outcomes turn too much on the self-interested averments of the policyholder.

- The influence of Chicago-school thinking, textualism, and contract formalism is perhaps most pronounced in the U.S. Supreme Court. Consequently, these countervailing influences pushing back rights at variance expectations analysis have enjoyed a bully and influential pulpit likely to have osmotic affect on other courts, even the state courts that are not bound to follow the Supreme Court on most matter of insurance law.

- The upswing of political conservatism since Keeton wrote. Although it would be too legal realist to suggest that a Republicanization of the judiciary has led to diluting or compromise of the reasonable expectations doctrine, it is largely correct to attribute greater support for textualism, Chicago-school economic analysis, and formalism to Republican judges.

Thus, factors that might be deemed external to insurance law and certainly to the reasonable expectations doctrine itself added to the normal reaction attending a significant new concept in a field of law. But apart from the politics of judicial appointment and public sentiment, expectations analysis would have generated antithesis and resistance from the dominant contract formalism paradigm under siege from the doctrine. But these factors intensified opposition to the expectations concept and forced greater dilution such as the requirement that a policy provision be (apparently textually) ambiguous before expectations analysis can be brought to bear on the issue. Similarly, these factors thwarted any hope that expectations analysis might be the paradigm shift that rewrites leading texts in the field (other than Judge Keeton's).

In the end, "freedom of contract" rhetoric, always strong in American law and society, became stronger after Keeton's seminal article. Because too many lawyers, judges, and scholars erroneously portray expectations analysis as undermining freedom of contract, there was sure to be some retreat from it during the 1980s and 1990s. In the hubbub, the opportunity to use expectations analysis to enhance party autonomy and choice through prudent use of expectations analysis has been lost.
Left unanswered in the initial discussion of the Keeton doctrine was the question of exactly what contract construction process was to govern insurance coverage disputes and what role existed for reasonable expectations throughout this overarching model of contract interpretation. In addition, because of not only the traditional contract paradigm but also the historical paradigm of judicial restraint, courts have been reluctant to give a full hearing to the Keeton doctrine or a more comprehensive version of reasonable expectations thinking for fear of departing too greatly from the norm of judicial restraint.

It surely is not coincidence that the Keeton reasonable expectations formula was announced at a time of relatively ambitious if controversial expansion of the judicial role. It also cannot be mere coincidence that the largely successful counterattack on the Keeton application of expectations analysis paralleled a general upsurge in political conservatism in America and a retrenchment of the judicial role, complete with the onset of a different cast of more restrained judges deciding cases, often expressly aiming to reverse the perceived excesses of an earlier generation. At the same time, these events of the outside world were accompanied by and perhaps driven by a conservative counter-revolution in the academy, particularly the rise of the law and economics movement. The law and economics analysis provided renewed philosophical support for the argument that social policy was best served by a legal regime weighted toward laissez faire freedom of contract, a position that seemed to have been relegated to permanent minority status only a few years before in the wake of the Corbin Contracts treatise.


260. See ARTHUR L. CORBIN, CORBIN ON CONTRACTS (1950) (One Volume Edition). The first half of the 20th Century featured a good deal of conflict between Yale Professor Corbin and Harvard Professor Samuel Williston, the author of the other leading treatise on contract law (SAMPLU WILLISTON, TREATISE ON THE LAW OF CONTRACTS (1st ed. 1920); To oversimplify a complex dispute, Williston was generally more of a formalist and textualist in matters of contract (though not so much as commonly thought) while Corbin was more of a legal realist favoring contract interpretation that focused on the purpose of the contract and the intent and expectations of the parties. See Jean Braucher, The Afterlife of Contract, 90 NW. U. L. REV.
and an expanding notion of contract duty that one leading commentator termed the “death” of contract.261

As the law and economics school ascended in tandem with the Reagan Revolution, philosophical precepts that seemed outmoded only years before regained their status as irrefutable truths, ideals, and values of American polity—and legality. At the time Keeton’s famous “rights at variance” articles were published, the libertarian construct was under attack and seemingly on the run. It is hard, for example, to imagine the anti-Vietnam War generation of the time accepting the view that real freedom of contract existed and that contract language needed to be strictly or literally embraced in order to protect the expectations of primary insurers, excess insurers, and reinsurers. But by the second decade after Keeton’s articles, courts were regularly rejecting the Keeton doctrine with phrases suggesting that courts had no authority to disturb the “bargain” implicated in an insurance policy, in effect tacitly focusing on the expectations of the insurer. In the late 1960s and early 1970s, issues of justice, fairness, public safety, and equality were prominent: manufacturers were increasingly held strictly liable for product failures; liability was to be shouldered by the party in the most effective position to have avoided or spread the risk; discrimination was prohibited even if doing so created

49, 58-60 (1995) (Williston regarded as being more conservative and having less support than Corbin but Williston more concerned with quality of bargain and consent than commonly supposed).

The conventional wisdom holds that Corbin won this battle for the hearts and minds of the legal profession. See E. Alan Farnsworth, Contracts Chs. 1-3 (2d ed. 1990) (describing modern contract law as emphasizing importance not only of text but also party intent, purpose of agreement, contract setting, party expectations, as well as knowing and voluntary consent of parties). In particular, see id. §1.9, at 31 n.3 (describing Williston’s disagreement with provisions of Uniform Commercial Code supported by Corbin and legal realist Columbia Law Prof. Karl Llewellyn. However, since the 1970s, there has been a pronounced jurisprudential swing in favor of textualism and formalism, with a consequent diminution in the importance of other factors such as party expectations. See Braucher, supra at 60 (recent Supreme Court cases seem decided in “blinding fog of free market rhetoric); Edward L. Rubin, The Nonjudicial Life of Contract: Beyond the Shadow of the Law, 90 NW. U. L. REV. 107, 113 (1995) (contract law, because of law and economics influence, “took a massive wrong turn” during 1970s and 1980s in focusing too heavily on purported economic efficiency in interpretation); Shell, supra note 231.

collateral costs for business. Viewed retrospectively, the Keeton project of identifying rights at variance seemed a part of this drive for justice and effective function.

The late 1970s and 1980s saw renewed support for reduced government regulation, business and contracting autonomy, and reduced aggregate costs despite the possible imposition of serious losses on individuals. In this climate, counter-reaction to the Keeton thesis and a generalized attack on reasonable expectations doctrine can hardly be viewed as a surprise. In light of the conservative swing on the federal and state bench, judicial retreat from the Keeton doctrine and acceptance of anti-reasonable expectations arguments can hardly be thought of as a surprise, either. In the third decade, there has not been any new shift in direction so much as there has been a continuation and stabilization of the modern version of traditional neo-classical contract doctrine perhaps made “kinder and gentler” as a result of some dissatisfaction with the excesses of conservatism and a partial comeback by progressive political forces. But like American politics and law generally this “synthesis” of the Keeton “thesis” and the insurer’s “antithesis” has more in common with the traditional view of contract and insurance than it does the Keeton form of the reasonable expectations doctrine. Instead of Franklin Roosevelt, we have Bill Clinton. So much for counter-counter revolution.

Viewed with retrospective detachment, the Warren Court, the Civil Rights Movement, the Anti-Vietnam War Movement, the late 1960s and early 1970s (Hippies, Haight-Asbury, “Easy Rider” and all that) now most likely must be characterized as the clear exception rather than the rule. This period was one of unusual progressive ferment. Thereafter, these social forces receded before the more established social tide of ongoing commercial and political interests, who successfully re-established the hegemony of the neoclassical contract paradigm. But to some degree, the reassertion of the prior status quo was muted by the new wave of major coverage litigation involving long-tail latent injuries, mass product torts, and increasingly sophisticated legal talent deployed by both insurers and captives. Complex insurance problems were being litigated during the 1980s and 1990s, with increasingly sophisticated counsel for both policyholders and insurers marshalling an array of arguments, including of course the reasonable expectations doctrine.
III. TAKING REASONABLE EXPECTATIONS SERIOUSLY—AND COMPREHENSIVELY: TOWARD A RECOGNIZED COMPREHENSIVE ROLE FOR REASONABLE EXPECTATIONS ANALYSIS IN RESOLVING INSURANCE COVERAGE DISPUTES

Courts addressing the reasonable expectations issue during the first, second, and third decades of the Keeton era have all tended to commit the same mistake—focusing on the Keeton reasonable expectations formula and the particular application of reasonable expectations analysis employed by Keeton in the article as though it were the only realm of insurance law where reasonable expectations were at issue.

Keeton wrote about insurance coverage that was “at variance with” the policy provisions. By definition, he was looking at coverage decisions that seemed to run counter to a fair reading of the policy text. In doing so, Keeton necessarily was not giving full consideration to the utility of expectations analysis that was not “at variance” with policy provisions. Because Keeton’s article was deservedly celebrated and prominent, reasonable expectations analysis became indelibly associated with Keeton’s deployment of reasonable expectations. Some expectations commentators and courts have addressed the reasonable expectations concept more comprehensively, observing the use of reasonable expectations thinking in a variety of cases.\(^{262}\) However, most attention paid to reasonable expectations by courts and commentators has framed the issue as policyholder expectations vs. clear contract language, thus emphasizing the expectations approach as a trump card rather than an analytic tool.

For example, Professor Abraham’s well-regarded and frequently cited article on reasonable expectations,\(^{263}\) authored at the beginning of the second decade of the reasonable expectations era, focused almost exclusively on the Keeton formula and the cases posing stark conflict between expectations and clear policy language. Abraham further categorized and analyzed the Keeton formula cases as those reacting to insurer misbehavior and those involving “mandated coverage”, a phenomenon he termed “Judge-Made Insurance”. Even though Abraham largely endorsed the Keeton formula, his catchy term came to epitomize criticism of the Keeton doctrine—most likely because it resonated, perhaps unwittingly, with the prevailing American construct that courts do not “make” constitutional law, statutes, common law—or contracts. Rather,

\(^{262}\) See, e.g., Henderson, supra note 10; Rahdert, supra note 5.

\(^{263}\) See Abraham, supra note 5.
courts venerate the constitution, apply statutes, “find” common law, and construe contracts. A court that not only ventures widely in construing a contract but also finds the contract to create rights beyond the seemingly clear linguistic boundaries of the contract’s text seems to observers to run afoul of the American ethos, making the court’s activity seem somehow unprincipled.

As the history of more than a quarter-century of self-conscious reasonable expectations analysis suggests, the Keeton formula alone will probably never enjoy majority status nor can it ever comprise the entire role of reasonable expectations analysis in construing insurance policies and resolving insurance coverage disputes. As the third decade of reasonable expectations draws to a close, a more comprehensive and refined synthesis is necessary in order to establish a new (or at least modified) paradigm that can shoulder the burden imposed by the increasing frequency, complexity, and importance of insurance coverage litigation in the next century.

Rather than continue to debate the merits of the Keeton form of reasonable expectations or to argue over whether express consideration of the parties’ reasonable expectations adds anything to traditional ambiguity analysis, courts should take a more comprehensive look at the role of policyholder and insurer expectations and the degree to which those expectations enhance the contextual base for interpreting insurance policies. The objectively reasonable expectations of both the policyholder and the insurer (and beneficiaries and other interested parties such as a lender or guarantor) should routinely be consulted in order to provide the background context (what English lawyers sometimes refer to as the “factual matrix”) for determining the meaning of a disputed policy term. There is no compelling reason for courts to myopically focus only on policy text and to affirmatively avoid appreciating the connotation and context of the policy. Major indicators of such policy meaning are the objectively reasonable expectations of the parties and even the subjective expectations of the parties.

In many cases, consideration of expectations is of no moment. A term may be clear (e.g., “this policy covers your 1992 green Ford”) both on its face and in terms of the expectations of all parties. In other cases, the use of expectations analysis may be valuable in determining whether policy language can or should be read literally. For example, does a policy term disclaiming coverage for anything “related to” the “release” of a “pollutant” bar coverage for a claim by a third party whose car skids on a puddle of oil negligently left on the road? In this latter case, courts
unwilling to give literal application to such a broad exclusion should prefer to incorporate expectations into the analysis rather than arguing at length about the degree to which the text of the pollution exclusion should be read literally or is ambiguous. Further, if a state is unwilling to utilize expectations analysis, it is often left with a Hobson's Choice when reviewing policy language such as the absolute pollution exclusion: either the court reads the language literally and broadly, excluding far more than was ever intended by even the insurance industry; or it characterizes the exclusion as ambiguous and routinely rules against the insurer, even in cases that should not be covered in a rational system of insurance adjudication.

Because of the historical context of the Keeton reasonable expectations formula, the legal profession has essentially missed a sea of opportunity while quibbling over one wave of reasonable expectations controversy (the defensibility of invoking policyholder expectations to overcome the clear policy language). Even if the legal legitimacy of the Keeton approach is problematic under a regime of an objective theory of contract, there remains a wide array of cases that would greatly benefit from application of reasonable expectations thinking. But that application requires a general reassessment of the ground rules of contract meaning and interpretation.

The absolute pollution exclusion is an example of exactly the type of insurance policy provision for which courts should apply evenhanded reasonable expectations analysis not so much as a counterweight to clear text but as a prerequisite to determining the meaning of words and the possible ambiguity of words. Two recent cases provide good examples of proper use of this form of reasonable expectations analysis to resolve pollution exclusion controversies even though neither court emphasized the reasonable expectations aspects of its decisions.

In Western Alliance Insurance Co. v. Gill\textsuperscript{264} and American States Insurance Co. v. Koloms\textsuperscript{265} the Supreme Courts of Massachusetts and Illinois both determined that the absolute pollution exclusion does not bar coverage for claims related to negligence resulting in carbon monoxide poisoning simply because carbon monoxide is a dangerous gas and as such falls within the literal reach of the pollution exclusion, which on its face states that it excludes liability claims related to any “actual, alleged or threatened discharge, dispersal, release or escape of pollutants,” with

\textsuperscript{264} 686 N.E. 2d 997 (Mass. 1997).
\textsuperscript{265} 687 N.E. 2d 72 (Ill. 1997).
pollutants defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The Illinois Court in *Koloms* faced a situation where the claim was against an insured landlord for failure to properly maintain a building furnace which emitted the CO fumes that caused the injuries resulting in the claim. Examining the background, history, and purpose of the exclusion, the *Koloms* Court determined that the exclusion—despite its broad literal language—was intended only to bar coverage for the traditional sort of waste discharge and diffuse contamination ordinarily thought of as pollution. Claims for the type of injuries traditionally arising from nonpolluting forms of insured negligence were not to be excluded. Hence, despite the linguistic breadth of the exclusion, the Illinois Court limited the reach of the exclusion in order to render a coverage determination the Court viewed as more consistent with the purpose of the CGL and the exclusion and the intent of the drafters.266

Citing *Koloms* and adopting similar reasoning, the Massachusetts Court stated that the absolute pollution exclusion "should not be reflexively applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of an 'irritant or contaminant.'"267 Following this analysis and confronted with a claim by a restaurant patron who suffered carbon monoxide poisoning as a result of poor ventilation at the restaurant, the *Gill* Court found coverage not to be thwarted by the exclusion or the contaminant's role in bringing about the injury. In short, *Gill* and *Koloms* demonstrate the usefulness of reasonable expectations thinking in fairly resolving a thorny interpretative problem that has to date divided the state courts and required millions in litigation expenditures.

This use of background context expectations would be applied as part of the process of determining whether language is clear or ambiguous—and whether language should be read literally (even hyperliterally) or with greater breadth. Courts would generally, however, consider not only the dictionary definition of words, but also their connotative value, particularly the connotative value in light of the purpose of the contract, the setting of the contract, and the identity of the parties to the contract. If assessment of both text and context does not provide a clear meaning for the disputed term, the expectations of and consequences to both insurer and

266. See id.
policyholder become an important factor in deciding whether to give the benefit of the doubt to the policyholder or to the insurer.

Weighed along with those expectations would also be other indicia of contract meaning such as:

- The overall purpose of the contract and whether a particular interpretation of the disputed term better serves that purpose;

- The identity of the drafter;

- The degree of ambiguity and whether the ambiguity was inevitable or was the result of poor drafting that could have been improved;

- Whether the term is unconscionable, unfair, or surprising if construed in a particular manner;

- Any classic "parol" or "extrinsic" evidence (and, despite frequent confusion, the two terms are not strictly synonymous) that illuminates the parties' intent or specific subjective expectations (not to be confused with the objectively reasonable expectations that will be used as part of the background context to help assess the meaning of the four corners of the policy).

- Any factors supporting promissory or equitable estoppel against one or more of the parties.

To the extent that this sort of comprehensive inquiry does not resolve the issue, a court should be permitted to make an express consideration of public policy issues (qua public policy issues) and whether those considerations compel a particular construction in close cases. Factors to consider would include not only the perceived need for defense and indemnity by the policyholder but also the impact on insurance markets. Issues of solvency, notice, and stability should be permitted consideration by the court—but only in the closest cases where standard contract principles fail to bring resolution. Given the power held by insurers over contract language and structure, public policy issues affecting the insurer or the insurance industry should not be given significant consideration
unless the more traditional interpretative factors listed above fail to resolve the dispute. In short, the reasonable expectations of the parties should be expressly recognized as one of the by-now-conventional contract principles utilized by courts in deciding contract disputes, particularly insurance policy coverage actions.

A particularly instructive case example where consideration of reasonable expectations properly played an important overarching (but unfortunately under-appreciated) role comes ironically from a jurisdiction that has never self-consciously accepted the Keeton doctrine. In *Lachs v. Fidelity & Casualty Co. of New York*, the Court of Appeals was required to determine whether benefits would be paid on a “flight insurance” policy purchased by machine at the airport by a passenger moments before she boarded a plane destined for a fatal crash. The policy provided that it covered only flights on “scheduled” airlines. The policyholder died flying what the insurer considered a “non-scheduled” airline. The *Lachs* decision can be explained both on ambiguity grounds and on reasonable expectations grounds even though the term “scheduled” airline has a technical meaning to those in the trade. On the whole, the more comprehensive, expectations-oriented approach provides a more convincing rationale and satisfying justification for the court’s holding.

Because of the surrounding circumstances in *Lachs*—the background or extrinsic evidence so to speak—New York’s highest court was unwilling to permit the insurer to invoke the technical meaning of a disputed term, irrespective of its clarity, where this would run counter to the reasonable expectations of the policyholder who thought that he had purchased flight insurance for the flight he was about to board. Although the focus of the court’s analysis is the manner in which the decedent Lachs would have interpreted this context (buying “flight insurance” right in front of an airline counter and presuming that the flight he took on that airline or at that gate was covered by such flight insurance), it is clear that the court thought that any objectively reasonable airport patron would have reacted as did Lachs—there was no slouching toward subjectivity that might imperil the actuarial soundness of the flight insurance risk pool because of the deeply felt but bizarre views of a particular policyholder or class of policyholders. The flight insurance bought by Lachs was enforced to meet the expectations of the insurer’s intended customers: reasonable fliers like Lachs.

268. 120 N.E.2d 216 (N.Y. 1954).
In this regard, *Lachs* is consistent with other cases tacitly applying expectations analysis as a general principle of insurance contract construction rather than as a rationale for overcoming clear policy language. Rather than endorsing policyholder expectations as a trump card over policy language, many courts can be viewed as applying a broader and more subtle reasonable expectations doctrine that resists policy construction inconsistent with the reasonable expectations of the policyholder in light of the nature of the coverage purchased. As one court observed a half-century before the Keeton article:

We are construing a policy of insurance and we are not bound by the niceties of definition that might otherwise be proper. When a builder takes out builders' risk insurance, delivers his materials on the ground, and does some manifest act evidencing his intention to incorporate them into a building, and when there is and can be no dispute about his intention, it would be a harsh rule to require that he should protect himself by a general open policy on stock in order to cover a loss sustained before he had actually joined one timber to another. It was reasonable for the insured to believe that it had covered the risk of loss by fire of its materials when it took out the policy in suit. The ordinary builder would agree with the plaintiff's [policyholder's] witness that 'the building of the boat starts just as soon as you start getting that material ready,' and that such a construction of the policy expresses the fair and reasonable understanding of the risk.269

A similar approach was taken by a federal court applying Minnesota law in *Tower Insurance Co. v. Judge*,270 where inebriated teenagers played a fatal practical joke on their drunk, sleeping friend, accidentally electrocuting him while trying to shock him awake with a wire from a nearby light switch. There was no dispute that the boys did not subjectively intend harm to the decedent but the recklessness of their conduct led to criminal charges, to which they pleaded no contest. The insurer attempted to deny coverage under both the intentional act and the criminal act provisions of the policy. The court rejected both arguments.

finding that although the criminal act exclusion was literally applicable if one assumed the state could have proved reckless homicide (there had been a no contest plea, which lacks the preclusive effect of the guilty plea) since it required only recklessness and not intent to injure. One might consider the criminal act exclusion "overdrafted" in that insurers need only to exclude intentional efforts to cause damage but generally agree to cover policyholders for negligence. That the negligence leads to criminal charges has little to do with underwriting imperatives. Despite the literal textual applicability of the criminal act exclusion, the Tower Court found coverage, stating

application of the criminal act exclusion to the facts of this case would violate the reasonable expectations of the Balsters, the insureds. It is objectively reasonable to expect that the criminal act exclusion would not apply unless bodily injury was the reasonably expected result of the act.\textsuperscript{271}

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In short, although the criminal act exclusion interpreted as [the insurer] intended, would proscribe coverage, this Court finds that the exclusion is unenforceable in this case. Ambiguity is not a condition precedent to application of the reasonable expectations doctrine. The facts of this case present a situation for which people classically seek insurance coverage, and the Court concludes that a denial of coverage would conflict with the reasonable expectations of the insureds.\textsuperscript{272}

Other cases applying Minnesota law (the applicable law in Tower) have implicitly taken a similar view of the utility of expectations analysis and have in many cases found in favor of the insurer and against coverage even though policy language in dispute could be characterized as something less than clear.\textsuperscript{273}

\begin{footnotes}
\item[271] \textit{Id.} at 692. The Tower court cited with approval a similar New York decision, \textit{Allstate Ins. Co. v. Zuk}, 574 N.E. 2d 1035 (N.Y. 1991), which found coverage despite the insured's guilty plea to second degree manslaughter arising from an accidental shotgun discharge that killed a friend.

\item[272] Tower, 840 F. Supp. at 692-93 (citations and footnotes omitted).

\item[273] See, e.g.:
\end{footnotes}
Anderson v. AMCO Ins. Co., 541 N.W.2d 8, 11 (Minn. Ct. App. 1995) (denying no-fault auto policy medical benefits for policyholder’s "panic attacks" in the absence of physical injury. Policyholder "offers no support for her final argument that members of the public assume all necessary medical care is covered by their policies. Given that policies invariably contain exclusions and limitations on coverage, the assumption would seem unwarranted. While appellant may indeed have expected that her no-fault policy, despite its language, would cover losses resulting form her panic attacks, there is no evidence that her expectation was reasonable.... given the language of appellant's policy, any expectation that it would provide coverage was unreasonable.").

National Union Fire Ins. Co. v. Gates, 530 N.W.2d 223 (Minn. Ct. App. 1995) (despite third-party claim of negligence included with sex abuse claim, policyholder objectively would know that sexual abuse claims are intentional and uncovered and policyholder could thus have no expectation of coverage).

Illinois Farmers Ins. Co. v. Coppa, 494 N.W. 2d 503 (Minn. Ct. App. 1993) (no reasonable expectation of liability coverage under homeowner's policy insuring policyholder premises where claim arose from use of all-terrain vehicle on adjacent property that was not owned by the policyholder).

Centennial Ins. Co. v. Zylberberg, 422 N.W. 2d 18 (Minn. Ct. App. 1988) (claimant could not obtain coverage when not named in policy; claimant thus had no reasonable expectation of coverage; adding unnamed driver to policy as additional insured would constitute reformation of the policy rather than interpretation).

Independent Sch. Dist. No. 197 v. Accident & Cas. Co. of Winterthur, 525 N.W.2d 600 (Minn. Ct. App. 1995) (pollution exclusion stating that it applies to "all operations" of policyholder other than oil and gas operations precluded reasonable expectation of coverage for asbestos-related contamination).


See also Minnesota Mut. Fire & Cas. Ins. Co. v. Manderfeld, 482 N.W.2d 521, 525 (Minn. Ct. App. 1992) (also suggesting that policy language that is clear without painstaking study can not be overcome by reasonable expectations analysis). This view is not consistent with the original reasonable expectations doctrine, which in context used the words "painstaking study" to refer to clear text rather than the degree of effort required to locate, examine, and comprehend the text.
As the forgoing discussion suggests, the reasonable expectations concept has substantial utility even if not asserted in its full form of overcoming explicit policy provisions. Reasonable expectations thinking can be used by courts to provide a more nuanced approach to contract interpretation than the traditionally crude two-step of consulting the dictionary and invoking contra proferentem where dictionary definitions are deemed ambiguous. Reasonable expectations analysis provides both a check against absurd hyperliteralism (e.g., the slip-and-fall claim excluded because the slippery liquid on the floor falls within the technical linguistic reach of the policy definition of “pollutant”) and an alternative to routinely ruling against the insurer whenever the language is something less than inarguably clear. Similarly, the reasonable expectations concept can be significantly more sensible than traditional contra proferentem in calibrating the amount of coverage or other relief available to the policyholder.

For example, in Rusthoven v. Commercial Standard Insurance Co.,\(^{274}\) decided by the Minnesota Supreme Court only a year after it had embraced the reasonable expectations doctrine in Atwater Creamery,\(^{275}\) the Court required an insurer to provide up to $1,675,000 in uninsured motorist coverage where a truck driver was forced off the road by a “phantom” or “miss-and-run” driver. However, the insurance policy in question provides for uninsured motorist coverage of $25,000 “each person.” But the policy also contained a provision stating that “[i]f there is more than one covered auto our limit of liability for any one accident is the sum of the limits applicable to each covered auto.”\(^{276}\) The policy under which the injured truck driver was a named insured covered 67 rigs in the fleet of the driver’s employer, with premiums based on the employer’s gross receipts.\(^{277}\)

Seizing upon the inconsistency, the Rusthoven court noted the obvious contextual ambiguity (provision X of the policy contradicted by provision Y of the policy) and proceeded to apply the contra proferentem principle against the insurer that drafted the policy.\(^{278}\) However, the Minnesota Court was well aware of its recent adoption of the reasonable expectations doctrine and, citing Atwater Creamery as well as the famous Keeton article and first edition of the Keeton hornbook, stated the “result of such a

\(^{274}\) 387 N.W.2d 642 (Minn. 1986).
\(^{276}\) Rusthoven, 387 N.W.2d at 643.
\(^{277}\) Id.
\(^{278}\) Id. at 644-45.
[contra proferentem] construction, however, must not be beyond the reasonable expectations of the insured. Remarkably, the Court did not even tarry before finding this rather enormous and unusual uninsured motorist limit to be reasonable.

Nonetheless, one reasonable person, Professor Kenneth Abraham, obviously has qualms with the Court's assessment. After reproducing *Rusthoven* in his casebook, Abraham follows with notes that ask:

1. *A Tall Stack.* Did it make sense for the court to rule that the policy provided $1,675,000 of coverage (there were 67 covered autos, yielding coverage of $25,000 per auto multiplied by 67) when the premiums paid were based on the gross receipts of the plaintiff's employer rather than the number of vehicles insured?

2. . . . It seems unlikely that a lay person reading the policy in *Rusthoven* could have determined that the endorsements contradicted each other, and even less likely that Rusthoven's employer expected that it had purchased and paid for over a million dollars worth of uninsured motorist coverage for each of its employees. Should these facts have affected the result in the case? Having determined that the endorsements in the policy were contradictory, did the court have any alternative to allowing the stacking of 67 limits of liability?

Despite the conventional wisdom that courts construing contract provisions must pick one of the alternative meanings proffered by the disputants, the reasonable expectations approach provides not only a useful method for selecting from alternatives but also the possibility of escaping extreme alternatives. In *Rusthoven*, it seems that uninsured motorist limits of $25,000 are too low. But certainly limits of $1.675 million seems to high absent evidence of similarly high premium payments or other bases for creating such an expectation other than mere conflict of policy.


provisions. The court could have decreed a UM limit consistent with the "extra" uninsured motorist protection ordinarily purchased by policyholders when offered the specific option. By common practice in most states, this appears to be $100,000/person and $300,000 per accident. Because Rusthoven's employer was a commercial entity that probably faced greater exposure to claims, 100/300 may be too low. But $1.675 million?

Of course, in suggesting this alternative rather than the simple erring in favor of the policyholder performed by the Minnesota Supreme Court, I may in essence be advocating a form of reformation that fits the expectations of the parties. However, reformation is a long-accepted doctrine of contract law. So are the doctrines of impossibility and commercial impracticability. Making disputed contracts make sense is not inconsistent with the judicial role in contract adjudication. Reasonable expectations analysis can be a powerful tool for helping courts make sense of the provisions and, if necessary to render a construction of the contract that erects a different meaning of the term at issue than any of those advocated by the parties.

Although reasonable expectations analysis obviously need not become a regular route to contract reformation, it has this potential. This is a useful attribute if not overused. Although some undoubtedly would label this erroneous judicial rewriting of the contract, I disagree. The conventional wisdom—that policy meaning must be linguistically anchored in text—is bound to be erroneous in many instances. Sometimes the contract language is chosen without any anticipation of its application to unforeseen future events (e.g., CERCLA remediation costs, substantial gradual but unintentional pollution, long-tail insidious disease and product liability claims). Sometimes contract drafters make mistakes (e.g., adding an endorsement to a policy without realizing it contradicts language in the body of the policy). Unless one is prepared to ruthlessly impose strict liability on the contract drafter and hold against the insurer in every case of mistaken or insufficiently prescient contract drafting, reasonable expectations construction provides a sound alternative, even where the result is not completely consistent with policy text—or runs counter to policy text in some significant way. Rusthoven provides a good example of the missed opportunities of reasonable expectations doctrine. In view of the linguistic uncertainty provided by the policy, the Minnesota Supreme Court could seemingly have reached a more reasonable construction without depriving the policyholder of an expected benefit or giving a financial windfall to the insurer. But even though expressly recognizing

this potential, the Court timidly granted near absolute deference to the ambiguity tiebreaker. Cases like Rusthoven suggest that even express embrace of the expectations doctrine raises no serious threat of rampaging judicial activism. More likely is the problem of excessive judicial apathy.

Furthermore, consideration of the bilateral (or even multilateral) reasonable expectations of the parties can reveal whether the text is clear under the circumstances or in fact is ambiguous and in need of nontextual resolution. Similarly, the reasonable expectations polestar can serve to advise those applying the Keeton methodology as to whether the "painstaking" study of the policy provisions provides clear guidance. To some extent, there has always been a hidden circularity in the Keeton formula, which states that policyholder expectations control even though a "painstaking" look at the policy would have negated the expectations. But which is chicken and which is egg? Does a painstaking review of the policy language not require the reader to check the text against:

- the background of the contracting arrangement;
- the purpose of the transaction;
- the implicit and expressed intent of the parties;
- including behavior and oral statements (assuming the absence of a clear integration and "entire agreement" clause seeking to exclude parol evidence);
- as well the parties' prior course of dealing;
- customary trade or technical connotation of the terms;
- common sense; and (of course)
- the party's expectations.

In short, does the notion of a "painstaking" study of the policy provisions not imply more than simply staring back and forth at the four corners of the policy and the four corners of a dictionary? Undoubtedly, many insurance policy provisions are susceptible to such "four corners" certainty, either because of the clarity attending the word itself or the clause at issue or because these words become clear when the policy is read as a whole. Often, however, this sort of clarity of meaning can only be achieved by considering the extratextual factors described above, all of which tend to combine in forming the objectively reasonable expectations of the parties. To escape the trap of the policy meaning only what the literal definitions of the policy words provide, a reasonable expectations analysis would seemingly need to be part of the painstaking analysis that leads to a correct understanding of the policy.
In a sense, then, the conventional approach that refuses to consider reasonable expectations (or any extrinsic matter) unless the disputed term is ambiguous on its face has it backwards. Ambiguity can only be accurately determined to exist or not exist after the relevant nontextual factors are considered as well. "Pollution" may mean something in setting 1 and something quite different in setting 2. Consequently, it is not surprising that courts generally have moved away from the traditional rule and permit nontextual matter to assist the court in determining whether text is ambiguous. 281

Viewed from this perspective, use of the expectations inquiry to assess text is not anti-textual but rather seeks to give the text its correct meaning rather than to crucify it on the cross of hyper-literalism. Similarly, expectations analysis does not denigrate the intent of the parties or the purpose of the contract. Rather, the expectations inquiry seeks to vindicate party intent and contract purpose. Consequently—and contrary to much of the traditional wisdom—the expectations approach serves the concepts of freedom of contract and market transaction.

But what about the smaller universe of cases where the disputed policy text, when read literally, is clear and the impact is not absurd? In those cases, where painstaking review of the policy does reveal a text precluding coverage, at least as a matter of text, does the reasonable expectations doctrine have a role to play in the third decade? The answer, of course, is resounding affirmation. In the cases already identified by Judge Keeton—unfair surprise or unconscionable advantage—an objective expectations assessment serves to inform the court as to what is fair and conscionable and thus fills the "gap" created by unenforceable text in a principled way.

The harder question is whether expectations analysis should be permitted where the painstakingly studied clear text does not produce an absurd or unconscionable result surprising the policyholder. Although the question is close, the strong form of the Keeton reasonable expectations doctrine can be applied without doing violence to the traditional American notion of judicial restraint. First, the insurance policy with text that disappoints the policyholders' expectations is not fulfilling its intended purpose, unless the court is willing to conclude that the only recognizable purpose is revenue to the insurer. The insurance policy is in essence a product or good sold to the policyholder. When the product falls

substantially short of policyholder expectations, it has failed in its purpose unless expectations analysis is used to bring the written product in line with the marketed product and the use for which the policy was sold. To the extent premiums paid reflect more extensive rather than less extensive coverage, use of reasonable expectations analysis is legitimate because it permits the judiciary to bring the application of the product more in line with its seeming coverage and prevents the insurer from enjoying an unfair financial windfall that can result when the insurer charges Cadillac premiums but only delivers a Volkswagen Beetle. However, to be consistent, insureds must suffer the consequences when this expectations analysis brings different results. In other words, proper application of the expectations principle should prevent policyholders from paying VW Bug premiums and getting Cadillac coverage in return.

If the courts are too reverent toward text and too hesitant to utilize “rights at variance” reasonable expectations, the courts becoming accomplices in enforcing illusory “bargains.” Although the standardized insurance form contract does not easily fit within the historical bargain theory, it can be said that in purchasing the form policy (and perhaps a relatively customized pack of endorsements), the policyholder has “bargained” for a certain level of coverage, protection, and financial security. Even where the policy text might have altered such a bargain, the policyholder should not suffer. At some point, the Anglo-American reverence for text is required to yield to the greater systemic desire that contracts be enforced so as to meet the intent of the parties. Similarly, the insurer has committed to a given level of protection against fortuitous events in return for a calculated premium. Except when expectations analysis is inapposite, the insurer’s bargain should also be respected rather than routinely undermined because the insurer did a suboptimal job of drafting policy language.

CONCLUSION

Properly viewed, then, the reasonable expectations doctrine, even the strong form of the doctrine that “overpowers” the ostensible meaning of contract language, is not the sort of radical judicial arrogation of power that should make judges tremor at the thought of its invocation. Nor

282. See Edward A. Dauer, Contracts of Adhesion in Light of the Bargain Hypothesis, 5 Akron L. Rev. 1 (1972) (noting that standard form contracting does not meet bargain model of contract formation and that methods of interpretation developed for traditional contracts with bargained-for terms may be inapt for interpreting disputed standardized contracts).
should courts require that problematic policy language be hidden or deceptive before being willing to construe the disputed text in a manner vindicating the policyholder’s objectively reasonable expectations (or the actual subjective expectations created by the insurer, but that is another issue). Even where the arguably more persuasive linguistic meaning of disputed policy text augers in favor of the insurer, a constellation of other factors—perhaps most importantly reasonable expectations—may counsel construction favoring the policyholder. When this occurs, courts should not shrink from the task of vindicating reasonable expectations simply because of the longstanding rhetoric and misplaced iconography of judicial restraint.