Unreason in Action: A Case Study in the Wrong Approach to Construing the Liability Insurance Pollution Exclusion

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UNREASON IN ACTION: A CASE STUDY OF THE WRONG APPROACH TO CONSTRUING THE LIABILITY INSURANCE POLLUTION EXCLUSION

Jeffrey W. Stempel*

INTRODUCTION ......................................................... 464

I. THE REASONABLE EXPECTATIONS CONCEPT ................. 468

II. HISTORICAL PERSPECTIVE ....................................... 469

III. REASONABLE EXPECTATIONS FLOUNDERING
    IN FLORIDA: THE DENI ASSOCIATES CASE ................. 476
    A. Avoiding a Definitive Stand: Florida’s
       Quarter-Century of Resistance to Addressing
       Reasonable Expectations Analysis ................. 476
    B. The Deni Associates and Fogg Cases ............... 480
       1. Lower Court Proceedings ......................... 480
          a. The Factual Background ....................... 480
          b. Competing Theories of Policy
             Construction and Expectation ............... 481
       2. The Supreme Court Decision .................... 489
          a. Oral Argument: Insurer Stridency
             and Judicial Skepticism ..................... 489
          b. The Supreme Court of Florida’s
             Surprisingly Superficial Opinion .......... 491

IV. EVALUATING DENI ASSOCIATES AND THE
    ANTI-REASONABLE EXPECTATIONS RATIONALE .......... 496
    A. Pure and Contaminated Reasoning: The
       Errors of the Deni Associates Opinion .......... 496
       1. Slanting the Inquiry to Benefit the Insurer .... 496
       2. Jumping on a Rickety Bandwagon: The Court
          Credulously Accepts the Insurance Industry’s
          Scorecard Regarding the Pollution Exclusion
          and Misunderstands the Nature of

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Pollution Exclusion Precedent .................. 497
3. Misunderstanding Contract Law .................. 502
4. Misunderstanding Judicial Role and Potential ...... 503
5. Ahistorical Contracts Scholarship .................. 504
6. The Court Leaves an “Absurd Result” Escape Hatch—But Fails to Explain How This is More Legitimate than Application of Expectations Analysis ................................................. 506
B. Deni Associates as a Microcosm of Larger Judicial Error ................................................. 512

V. THE REMNANTS OF REASON: A METHOD FOR APPLYING THE ABSURD RESULT TEST TO FUTURE INSURANCE COVERAGE CASES ................................................. 522

CONCLUSION .................................................. 526

INTRODUCTION

For more than twenty-five years, a significant component of the scholarly commentary on insurance law has focused on the so-called “reasonable expectations doctrine”\(^1\) enunciated by then-Professor (now Judge) Robert Keeton in his justly celebrated 1970 article.\(^2\) The reasonable expectations principle made a seemingly sudden emergence with the appearance of Keeton’s article and has held particular attraction to academics\(^3\) while simultaneously prompting resistance from elements of

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1. I say “so-called” because the reasonable expectations perspective is often referred to as a “doctrine,” even by its “creator” Judge Keeton. However, my own view is that reasonable expectations analysis is most appropriately viewed as an approach to the interpretation of insurance contracts rather than a firm “doctrine.” See Jeffrey W. Stempel, Interpretation of Insurance Contracts ch. 11 (1994).


Throughout the 1970s and 1980s, the reasonable expectations doctrine generated considerable commentary. 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., (in
the bench and bar, and particularly from the insurance industry.\textsuperscript{4} The


Then-Professor and Vice Dean Keeton added his voice to the commentary, sounding a note of caution and restraint regarding characterization of his writings and application of the expectations approach. \textit{See} Robert E. Keeton, \textit{Reasonable Expectations in the Second Decade}, 12 FORUM 275 (1976). Keeton described the emergence of the reasonable expectations concept, and noted that during the 1960s and 1970s, the "principle" was more influential than the "doctrine." \textit{See id.} at 276-77. He also noted the degree to which reasonable expectations analysis may often be interwoven with ambiguity analysis and detrimental reliance. \textit{See id.} at 278-79. He was careful to emphasize, however, that a reasonable expectations approach must do more than merely consider policyholders' expectations while construing ambiguous language. \textit{See id.} at 279. Regarding the degree to which the reasonable expectations approach should impact coverage decisions, Keeton suggested restraint in both objective and outcome:

\begin{quote}
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.
\end{quote}

\textit{Id.} at 279-80 (footnotes omitted).


Now, if reasonable people in general want the law to protect reasonable
doctrine's life to date can be described as one of early growth followed by subsequent retreat and dilution, with continuing controversy.\textsuperscript{5}

However, despite the prominence of the reasonable expectations debate in insurance law and the large volume of insurance litigation, Florida courts avoided taking a definitive position on the role of reasonable expectations in construing insurance policies until 1998. Unfortunately, Florida's resolution of the matter was not worth the wait. In \textit{Deni Associates, Inc. v. State Farm Fire & Casualty Insurance Co.},\textsuperscript{6} the court faced two cases that presented a powerful argument for embracing reasonable expectations analysis.\textsuperscript{7} The Supreme Court of Florida not only spurned the opportunity, but rejected the concept curtly in the course of rendering two problematic holdings.\textsuperscript{8} Worse than the actual holdings of noncoverage for non-extraordinary tort claims against commercial policyholders was the contract doctrine adopted by the court almost without dissent. In an opinion notable for its formal, superficial analysis and tone, the supreme court exhibited a fundamental misunderstanding of the reasonable expectations concept and appeared mired in an orthodox form of textual literalism well outside the mainstream of American contract law.\textsuperscript{9}

Specifically, the court gave a broadly literal reading to the so-called "absolute" pollution exclusion incorporated into standard commercial general liability (CGL) insurance policies since the mid-1980s.\textsuperscript{10} The 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.


5. See Jeffrey W. Stempel, \textit{Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role}, 4 CONN. INS. L.J. (forthcoming 1998); see also Henderson, supra note 3; Rahdert, supra note 3.

6. 711 So. 2d 1135 (Fla. 1998).

7. The court reviewed two unrelated cases that had been consolidated by the Fourth District Court of Appeal, both of which involved the same issue. See \textit{id.} at 1136.

8. \textit{See id.} at 1140.


10. A commercial general liability policy (CGL) is the standard liability insurance policy sold to businesses to protect them from accidents, and liability due to the negligence of the business or its agents. The CGL obligates an insurer to defend claims against the policyholder or other insureds under the policy. \textit{See generally} DONALD S. MALECKI & ARTHUR L. FLITNER, \textbf{COMMERCIAL GENERAL LIABILITY} (5th ed. 1994); STEMPEL, supra note 1, § T1.2.

The scope of the CGL is broad but also provides a number of exclusions, including the pollution exclusion. As its name implies, the exclusion is designed to bar coverage for pollution claims against the policyholder. The exclusion is broadly worded, stating that it excludes from
insurance industry introduced the absolute pollution exclusion into the CGL as a reaction to what insurers viewed as excessive coverage obligations incurred under the former “qualified” pollution exclusion. The former pollution exclusion generally barred coverage or a defense for pollution-related liability claims against the policyholder unless the discharge of pollutant was “sudden and accidental.” Roughly half the courts that construed the former exclusion found coverage where the pollution was unintended but not abrupt. Insurers contended that this result was not the intent of the former exclusion. Since introduction of the absolute exclusion, courts have generally found that the exclusion bars coverage for even unintended, abrupt pollution. However, courts have differed to some degree as to what constitutes “pollution” as opposed to a non-pollution tort incidentally involving an irritant. Thus, notwithstanding the breadth of the absolute exclusion, substantial insurance coverage litigation during the late 1980s and 1990s has addressed its scope and application. Against this backdrop, the construction of the exclusion by a large state such as Florida assumes considerable importance, as does Florida’s attitude toward reasonable expectations analysis.

Consequently, the Deni Associates opinion is not only a wrongly decided, poorly reasoned setback for Florida citizens and policyholders—it is a substantial setback for general insurance coverage doctrine. The decision also exemplifies the degree to which an unrealistic vision of contracts generally, and insurance policies in particular, not only continues to hold sway but also appears reascendent. Nonetheless, reasonable

coverage any claim “arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants.” “Pollutant” is defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalines, chemicals and waste.” Deni Assoc., 711 So. 2d at 1137 (quoting portions of the standard pollution exclusion contained in the policies at issue; Insurance Services Office, Commercial General Liability Form No. CG 00 01 11 88 (1988)). See generally Stempel, supra, § T1.2.


13. See id. § 10.02[e]-[f]; Stempel, supra note 1, § T1.2.

14. The decision is surprising and disappointing in view of the normally well-reasoned opinions from the Supreme Court of Florida, which is composed of intelligent jurists who are normally sensitive to both legal doctrine and the larger social context of their decisions. All seven justices on the current supreme court were distinguished practitioners and were also all prominent lower court judges prior to their appointments to the high court, and several have served as adjunct faculty at Florida State University College of Law and elsewhere. On a personal level, this Article is difficult to write because my assessment of the Deni Associates opinion is so necessarily critical of the work of a court that I very much respect. At the same time, my criticism of Deni Associates is especially hard to contain because the opinion emanates from a court that clearly was capable of
expectations analysis is available to improve contract interpretation—if only courts will use it.

This Article thus seeks not just to underscore the errors of the Deni Associates opinion but also to illustrate the degree to which courts such as the Supreme Court of Florida have mistakenly spurned the opportunity for wiser contract construction through use of reasonable expectations analysis. This judicial error stems from a mistaken view of the reasonable expectations concept and its doctrinal legitimacy as well as an unrealistic view of the infallibility of textual analysis. Part I of this Article briefly reviews the nature and history of the reasonable expectations concept. Part II describes the two cases considered in Deni Associates and the pollution exclusion coverage litigation. Part III critically analyzes the supreme court’s Deni Associates opinion, concluding that the court erred both in its holdings and its failure to realize or acknowledge the difficulty presented by the two cases. More important, the court erred by embracing a narrow, hyperliteral, outmoded, and inappropriate form of contract analysis for insurance policies. Part IV explores the ability of the remaining “absurd result” yardstick to prevent erroneous contract construction and to focus on contract purpose and the parties’ intent.

I. THE REASONABLE EXPECTATIONS CONCEPT

Judge Keeton enunciated the reasonable expectations principle in his now-famous article.15 The principle states that courts should construe insurance policies consistently with the objectively reasonable expectations of the policyholder—even where those expectations are contradicted by apparently clear policy language.16 This formulation of the reasonable expectations principle has been viewed by much of the legal and political mainstream as inconsistent with the prevailing American paradigm of judicial restraint, strict construction of disputed texts, and minimal government involvement in market activity.17 Some of this resistance is likely the product of an unrealistic reification of the prevailing American politico-legal philosophy of judicial restraint. Some of the resistance probably results from legitimate concerns about judicial lawmaking that is less tethered to the text of legal documents. Although excessively reified and deified, the judicial restraint paradigm remains a bedrock of American jurisprudence and is unlikely to shift significantly unless American society incurs radical change. To the extent the reasonable expectations approach

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a far better analysis of this important issue.

15. See Keeton, supra note 2, at 967.
16. See id.
17. See sources cited, supra note 3, critical of reasonable expectations doctrine, especially Rahdert, supra note 3, at 368-73 (summarizing criticisms of reasonable expectations doctrine).
is viewed as conflicting with the judicial restraint paradigm, it is unlikely to succeed. However, properly understood, the expectations concept is, in fact, perfectly consistent with judicial restraint, strict enforcement of contracts, and predictability in law.\(^\text{18}\)

The reasonable expectations doctrine, even in its strong “rights at variance” form, is actually consistent with the prevailing jurisprudential ethos because of the insurance coverage context. Determining the “correct” meaning of an insurance policy inevitably requires consideration not only of policy text, but also the reasonable expectations of both insurer and insured, even where those expectations to some extent run counter to the text and certainly where the text is unclear, insufficiently certain, or applied to unanticipated situations. Contrary to the perspective adopted by the Supreme Court of Florida, judicial invocation of the reasonable expectations concept poses no genuine obstacle to vindicating contract law and ensuring agreement.

Of course, the reasonable expectations concept can be used to construe ambiguous policy text or to overcome clear text violative of the insured’s reasonable expectations; it can also be used to serve as a check on absurd, hyperliteral interpretations of policy text. 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 courts.

II. HISTORICAL PERSPECTIVE\(^\text{19}\)

The reasonable expectations “doctrine” was not, of course, identified as a separate mode of insurance policy construction until Professor (now Judge) Robert Keeton’s famous article, \textit{Insurance Law Rights at Variance with Policy Provisions}.\(^\text{20}\) He subsequently came to describe the consideration of expectations as moving from an identifiable “principle”

\(^{18}\) \textit{See} Stempel, \textit{supra} note 5, at ___ (text and notes 258-282 of manuscript).

\(^{19}\) Substantial portions of the following discussion of the history and evolution of the reasonable expectations doctrine are derived from Stempel, \textit{supra} note 5, at ____.

\(^{20}\) Keeton, \textit{supra} note 2, at 961. In this first article, 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. \textit{See id.} at 965-70. 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. \textit{See} Robert E. Keeton, \textit{Insurance Law Rights at Variance with Policy Provisions: Part Two}, 83 HARV. L. REV. 1281 (1970). The second article also discussed insurer reservation of rights and regulatory controls on policy language and insurer practices. \textit{See id.} at 1314-17.
during the 1960s to a "doctrine" in the 1970s. Keeton's article was empirical as well as normative in that it 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: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." 

21. Writing six years later, Judge Keeton noted the influence of the reasonable expectations principle during the 1960s but that "[b]efore a decade had passed, a new doctrine of reasonable expectations was solidly established" in one state and nearly rooted in two other states. Keeton, supra note 3, at 275. 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. . . .

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 interests with which the legal system must grapple.

Id. at 276-77.

22. See Keeton, supra note 2, at 965-70.

23. Id. at 967. In addition, the Keeton article posited additional principles creating policyholder rights beyond the terms of insurance policy text. According to Keeton, "[I]f 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." 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." 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." Id. at 977-78.

Thus, although the Keeton article is best known for its identification and formulation of the
Keeton observed that courts occasionally utilized expectations analysis to go beyond the normal benefit accorded the policyholder when policy language was unclear. In such a case, any ambiguities in the policy were construed against the insurer and in favor of the insured. When a court applies "pure" reasonable expectations theory, it mandates coverage consistent with the policyholder's expectations even if relatively clear policy language is to the contrary.

In the wake of the Keeton article, courts and commentators identified expectations analysis as more than ordinary equitable interpretation in which the parties' expectations are considered in construing ambiguous contract language and preventing absurd results from the literal interpretation of a contract term. Commentary after the Keeton article focused on the rights-at-variance "brand" of reasonable expectations set forth by Keeton, and debated the extent to which policyholder expectations should be permitted to trump "clear" contract provisions. Although the presence of a role for a "milder" version of expectations analysis is frequently acknowledged by commentators, it is not the primary subject of scholarly explorations of the role of reasonable expectations.

Keeton's article specifically identified two other significant circumstances where the policyholder should have additional rights even where the text of the policy augered against coverage. The first such situation was where the strictly applied policy language would create an unconscionable advantage for the insurer. The second situation was where the insured had relied to its detriment on the representations or conduct of the insurer.

After Judge Keeton's article, several courts accepted Keeton's analysis and overtly declared themselves followers of the reasonable expectations approach. But, "the expectations principle [was and] is being employed

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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 recovery under an adversely worded policy.

24. See id. at 965-75.
25. See id. at 965-66.
26. The rationale for the approach is based on several factors: the 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. See STEMPFL, supra note 1, § 11.3; Abraham, supra note 3, at 1153-55; Keeton, supra note 2, at 963-85; Rahdert, supra note 3, at 326-29; Ware, Comment, supra note 4, at 1463-64.
27. See sources cited in supra note 3.
29. See supra note 23.
30. See STEMPFL, supra note 1, § 11.1, at 312; Abraham, supra note 3, at 1153 n.7 (finding more than 100 "opinions voicing the expectations principle" that were "decided both before and after Professor Keeton's article"); Rahdert, supra note 3, at 324, 354-67; Karen K. Shinevar; Note,
in varying situations and with varying justifications." Many courts had difficulty embracing a concept they regarded as turning too quickly away from the traditional contract law principle 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, unfairly surprising, or where the insured was a consumer or small business.

The Keeton thesis rapidly caught the attention of the academic community and a good deal of the judiciary and practicing bar as well. 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


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. Keeton, supra note 3, at 275 (citing six New Jersey cases). However, even if one reads these cases as solidly supporting the reasonable expectations orientation, as does Keeton, the caselaw here and elsewhere did not use reasonable expectations terminology until after appearance of the Keeton article.

31. Abraham, supra note 3, at 1153; see Henderson, supra note 3, at 824 (noting the uncertainty and unpredictability in the application of the reasonable expectations principle); Stempel, supra note 1, § 11.1, at 313 (stating that "[d]etermining 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.").

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

But, as noted above, my view is that courts permitting policyholder expectations to assist in interpretation only where contract language is ambiguous 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 the parties' expectations and their basis.

33. See, e.g., Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 277-78 & n.2 (Minn. 1985). However, the Supreme Court of Minnesota later refused to apply the reasonable expectations analysis of Atwater Creamery to a pollution exclusion provision that it found was clearly designated in the policy. See Regents of Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888, 891 (Minn. 1994).

34. See STEMP EL, supra note 1, ch. 1; Henderson, supra note 3, at 823-24 nn.5-8 (summarizing commentary and developments in the wake of the Keeton article).

35. See, e.g., Henderson, supra note 3, at 823 n.5 ("As 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.").
with favor. 36 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.” 37

After its rapid initial success, however, the Keeton doctrine was subject to limitation, retrenchment, and even reversal in many states. 38 Today, by the most liberal count of two leading commentators, thirty-eight states “have recognized some variation of the reasonable expectations doctrine.” 39 States may be divided into three categories. First, some states have adopted reasonable expectations analysis supporting rights at variance with policy text as set forth by Keeton. 40 Second, some states utilize the reasonable expectations of the policyholder only in interpreting ambiguous policy language. 41 And, third, some states have completely rejected the doctrine. 42 As noted above, some commentators make a more blunt cut, classifying states as either accepting or rejecting the approach. 43 A review

36. See Ostrager & Newman, supra note 12, § 1.03(b).
37. See id. § 1.03(b), at 21 (citing cases).
38. See STEMPFL, supra note 1; Rahdert, supra note 3, at 323 (describing state court decisions reversing or limiting earlier application of reasonable expectations doctrine).
39. See OSTRAGER & NEWMAN, supra note 12, § 1.03(b), at 22.
40. See, e.g., C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176-77 (Iowa 1975) (insurance policy covers theft with no visible marks despite policy language requiring visible marks; reasonable expectations of policyholder overcome exclusionary language); Kievit v. Loyal Protective Life Ins. Co., 170 A.2d 22, 30 (N.J. 1961) (requiring coverage to effectuate the policyholder’s reasonable expectations notwithstanding exclusionary language). See also Rahdert, supra note 3, at 353 n.111 (listing states that apply the Keeton analysis). The Minnesota case of Atwater Creamery Co. v. Western National Mutual Insurance Co., 366 N.W.2d 271 (Minn. 1985) is frequently viewed as a leading case adopting the pure Keeton-esque version of the doctrine. See, e.g., KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 53 (2d ed. 1995) (reproducing Atwater Creamery as part of casebook’s discussion of reasonable expectations concept). 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 supra note 33.
43. See, e.g., OSTRAGER & NEWMAN, supra note 12, § 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, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota,
of the cases, however, suggests somewhat more variety in the manner in which courts employ the reasonable expectations concept.\footnote{See Stempel, \textit{supra} note 5, at notes 23-30 and accompanying text.}

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.\footnote{In part, this was undoubtedly because courts in some states merely began to name what they had been doing for some time. As noted above, the Keeton thesis was based on his empirical observations of what courts did and was not a purely normative or aspirational view. See Keeton, \textit{supra} note 3, at 275-76 (explaining that he identified the reasonable expectations doctrine based on actual court decisions of the 1960s and suggesting that the reasonable expectations approach was not a substantial departure from ordinary contract construction).} The 1980s continued to see growth in support of reasonable expectations analysis, but also began to reveal some backpedaling by courts that had adopted the doctrine, as well as a weakening tendency in other states to embrace the reasonable expectations method.\footnote{Academic reaction to reasonable expectations reveals a similar pattern of embrace followed by some retreat, 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. See sources cited \textit{supra} note 3. Legal scholars tended to support the reasonable expectations approach, although some expressed misgivings or even attacked the doctrine. See Ware, Comment, \textit{supra} note 4, at 1461. \textit{See also}, e.g., STEMPEL, \textit{supra} note 1, \S 11.3 (outlining "justifications and criticisms" of the doctrine); Rahdert, \textit{supra} note 3, at 336-45 (listing pro and con arguments regarding expectations approach); Baker, \textit{supra} note 4, at 23-24; Ware, Comment, \textit{supra} note 4, at 1461-62:}

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.

Baker, \textit{supra} note 4, at 23-24. Insurers and their counsel have largely been unrelenting in their opposition. \textit{See}, e.g., Perlet, \textit{supra} note 3; Squires, \textit{supra} note 3, at 255-57.
"plebiscite" among the states is remaining relatively stable, with few states changing their respective positions on the doctrine. 47 Professor Rahdert, writing in 1986, 48 and Professor Henderson, writing in 1990, 49 found a similar pattern of initial growth, uncertainty, retreatment, and stability with a diluted version of the reasonable expectations principle holding sway in most states. Professor Henderson expressly found, 50 and Professor Rahdert implicitly found, that despite dilution of the Keeton rights-at-variance version of expectations analysis, the concept had a significant effect on modern insurance construction jurisprudence. Courts themselves appear to see the reasonable expectations approach as an established part of the legal landscape despite reluctance to embrace the concept in rights-at-variance form. 51 At the very least, the reasonable expectations approach appears to be stalled, if not continuing to lose ground. A 1992 Utah decision rejected the doctrine in perhaps the most comprehensive anti-reasonable expectations case of the 1990s, 52 and the 1998 Deni Associates

47. A LEXIS search of caselaw from 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 was 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 Professor Alan Widiss, are included. Although cases from the 1980s and 1990s show more actual use of the expectations principle, it remains accurate to view the 1970s as the period of doctrinal growth during which the reasonable expectations principle grew from an undefined concept to a recognized “doctrine” that was embraced by a significant number of courts.

48. See Rahdert, supra note 3, at 353-67 (analyzing the development of the reasonable expectations doctrine in Idaho, Iowa, New Jersey, and Pennsylvania).

49. See Henderson, supra note 3, at 827-34 (containing a survey of the states that have accepted the reasonable expectations doctrine).

50. See id.

51. See, e.g., Max True Plastering Co. v. United States Fidelity & Guar., 912 P.2d 861, 868-70 (Okla. 1996). The Max True court concluded that the reasonable expectations doctrine had been accepted in some form in 36 states, see id. at 863-64 n.5, but cited cases from four states expressly rejecting the doctrine, see id. at 864 n.6. Ultimately, the Max True court, like most courts, was willing to consider expectations analysis only after having concluded that the policy language at issue was ambiguous. See id. at 868.

52. See Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798 (Utah 1992). In Allen, the policyholder held a homeowner’s policy. See id. at 799. 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. See id. at 799-800. 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. See id. at 800. Because the household exclusion is so common, serves a readily understandable purpose, and is rather clearly worded, the Utah court could simply have decreed that the exclusion’s enforcement did not violate
decision was equally resistant to expectations analysis.\textsuperscript{53}

In the 1990s, industry attack on expectations analysis and policyholder defense of the expectations approach continues, but the rush of attention given to the doctrine during the 1970s and 1980s seems to have abated. Legal scholars have not focused on the doctrine as frequently or explicitly during the 1990s; however, the issue continues to receive major scholarly treatment, although often as a subset of an examination of insurance coverage doctrine in general rather than the reasonable expectations principle alone.\textsuperscript{54} Against this backdrop, Florida finally came face-to-face with reasonable expectations analysis.

III. REASONABLE EXPECTATIONS FLOUNDERING IN FLORIDA:
THE \textbf{DENI ASSOCIATES} CASE\textsuperscript{55}

A. \textit{Avoiding a Definitive Stand: Florida's Quarter-Century of Resistance to Addressing Reasonable Expectations Analysis}

Perhaps surprisingly, nearly three decades after the Keeton article, several of the largest states still lack an extended evaluation principle by the highest court of the state. For example, New York is cited as a state both embracing and rejecting the reasonable expectations doctrine.\textsuperscript{56} In the

\textsuperscript{53} See Deni Assocs., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1140 (Fla. 1998).


\textsuperscript{55} Substantial portions of the following discussion of the intermediated appellate court opinion in \textit{Deni Associates} are drawn from Stempel, \textit{supra} note 5, at .

\textsuperscript{56} In my view, New York is receptive to reasonable expectations thinking in the interpretation of insurance policies (and other contracts for that matter) but will not utilize reasonable expectations analysis to find coverage in the face of sufficiently clear contractual language. But despite the passing of three decades since Keeton wrote, the New York Court of Appeals has not expressly discussed the reasonable expectations doctrine to officially accept or reject the Keeton approach.

In determining the proper meaning of a disputed insurance contract term, the court favors a construction that comports with the reasonable expectations of the policyholder. See Album Realty

The case of Little v. Blue Cross, 424 N.Y.S.2d 553 (N.Y. App. Div. 1980), summarizes New York law well on this point:

[T]he terms of a contract as a whole shall 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 policy holder and against the company which issued the policy, . . . the reasonable expectation of an insured from his reading of the policy must control.

Id. at 555-56 (citations omitted); see also NEW YORK JURISPRUDENCE 2D Insurance § 706, at 100-01 (1988) ("The 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 a person of ordinary business intelligence.").

However, in ordinary contract cases, the New York Court of Appeals will generally not look past the intent of the parties as expressed in their written agreement. See W.W. W. Assocs. Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990) (stating that intent of the parties is the touchstone for determining the meaning of a contract term); Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413, 416 (N.Y. 1983) (indicating a clear exculpatory clause will not apply to protect a party from willful or grossly negligent acts); Breed v. Insurance Co. of N. Am., 385 N.E.2d 1280, 1282-83 (N.Y. 1978) (stating that the best determinant of the parties' intent is ordinarily the contract language, which will be given its plain and ordinary meaning as 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 even clear contract language will not be enforced if contract term is unconscionable or violates public policy of state).


A number of New York cases, despite refraining from any express analysis of the "reasonable expectations doctrine," suggest that the concept affects judicial thinking on insurance coverage and may benefit either policyholders or insurers. In Michaels v. City of Buffalo, 651 N.E.2d 1272, 1273 (N.Y. 1995), the third-party claimant was the estate of a decedent who had arguably died because of a delay in transporting him to a hospital when the first ambulance dispatched failed to start. The ambulance company sought coverage under its "business auto policy" that provided coverage for liability resulting from an "accident." Id. at 1273. The court held that the 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. See id. at 1274. The court found, in effect,
years since the Keeton article, Florida has, until recently, said little about reasonable expectations, artfully dodging an extended discussion of the concept for a quarter-century. But as one might expect, a large and important jurisdiction such as Florida faced an almost hydraulic pressure to at last address the issue at length. In State Farm Fire & Casualty Insurance Co. v. Deni Associates, Inc., an intermediate appellate court certified the following question to the Supreme Court of Florida: "Where an ambiguity is shown to exist in a CGL policy, is the court limited in resolving the ambiguity in favor of coverage, or may the court apply the doctrine of reasonable expectations of the insured to resolve ambiguities in CGL policies?"

Although Florida law on reasonable expectations prior to Deni Associates was remarkably nondefinitive, it is clear that Florida had never accepted the pure Keeton form of the doctrine. Some decisions implicitly criticized the expectations concept. Similarly, Florida never 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 oppressive language to be ambiguous, or vitiated by other representations. In general, Florida

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57. 678 So. 2d 397 (Fla. 4th DCA 1996) (en banc).
58. Id. at 404.
59. See, e.g., Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979) (courts may not "rewrite contracts" to "add meaning"); State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986) (rejecting coverage where auto lost through conversion; "mere fact that a provision in an insurance policy could be more clearly drafted" does not create ambiguity); AAA Life Ins. Co. v. Nicolas, 603 So. 2d 622, 627 (Fla. 3d DCA 1992) ("a court shall not rewrite a contract of insurance extending coverage afforded beyond that plainly set forth in the insurance contract"); Dorrell v. State Farm Cas. Co., 221 So. 2d 5 (Fla. 3d DCA 1969) (courts must follow definition of terms set forth in policy).
60. See, e.g., Florida Farm Bureau Ins. Co. v. Birge, 659 So. 2d 310 (Fla. 2d DCA 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).

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.
insurance coverage cases generally followed the traditional approach to policy interpretation and accepted the following common precepts. The meaning of a contract is a question of law. Terms and phrases in an insurance policy are generally given their natural, practical, and reasonable meaning. Where a policy term or provision is textually clear, it will be enforced as written. When Florida courts find that policy language is clear, parol evidence and extrinsic evidence are generally not admissible to vary or modify the textual terms. Such evidence is available, however, in order to explain an unclear provision.

Florida law remains 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

Id. at 311; see also Weldon v. All Am. Life Ins. Co., 605 So. 2d 911, 915 (Fla. 2d DCA 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 Med. Clinic, P.A. v. Barrera, 419 So. 2d 681, 683 (Fla. 5th DCA 1982) (finding seemingly facially clear language to have "latent" ambiguity requiring use of extrinsic information to construe policy in favor of coverage).


65. See Dimmitt Chevrolet 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 the court). This decision effectively reversed the earlier decision of Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 17 Fla. L. Weekly S579, S581-82 (Fla. Sept. 3, 1992), which found the drafting history and regulatory estoppel relevant to determine the meaning of the phrase "sudden and accidental."

66. See Dimmitt, 636 So. 2d at 705.

67. For example, in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., the Supreme Court of Florida utilized the drafting history of the policy language to conclude that the former "sudden and accidental" pollution exclusion contained in CGL policies prior to 1983 was ambiguous and provided coverage for gradual but unintentional pollution. See 17 Fla. L. Weekly S579, S581-82 (Fla. Sept. 3, 1992). However, the court then granted the insurer's motion for rehearing, and the second decision on the point found no ambiguity, refused to be influenced by the drafting history, and concluded that the term "sudden" required that claims result from abrupt, unintentional pollution to be covered under the old CGL policy language. See Dimmitt, 636 So. 2d at 702-03.
drafted the ambiguous language, which is usually the insurer. 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 and the insurer.

B. The Deni Associates and Fogg Cases

1. Lower Court Proceedings

a. The Factual Background

Deni Associates, an architectural and engineering firm, was moving office equipment into new quarters when workers jostled or knocked over a blueprint machine, spilling ammonia contained inside. (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. (Obviously, it was not one of Deni’s more productive days.) In addition, other building tenants were evacuated, leading to claims against Deni. In the companion case to Deni Associates, E.C. Fogg, III v. Florida Farm Bureau Mutual Insurance Co., the citrus farm partnership retained a contractor to spray Ethion insecticide on a citrus grove. Using a helicopter, the sprayer went slightly wide of the mark, spraying two men

69. See, e.g., Spengler v. State Farm Fire & Cas. Co., 568 So. 2d 1293, 1294-95 (Fla. 1st DCA 1990) (finding the intentional act exclusion in homeowner’s policy inapplicable to claim by policyholder’s girlfriend, who policyholder accidentally shot when he mistook her for a burglar); United States Fire Ins. Co. v. Pruess, 394 So. 2d 468, 470 (Fla. 4th DCA 1981) (finding that rental pilot exclusion inapplicable to coverage claim arising from aircraft liability policy; court based opinion on “more reasonable interpretation of [the] policy”).
70. See, e.g., Florida Farm Bureau Cas. Co. v. Hurtado, 587 So. 2d 1314, 1318-19 (Fla. 1991) (refusing to “stack” uninsured motorist coverage for each car in a fleet of vehicles in order to reach large amount of coverage not set forth in policy limits); Pomona Park, 369 So. 2d at 942 (construing general liability policy sold to liquor store as not providing dram shop liability coverage because of liquor liability exclusion, and 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).
72. See id.
73. See id.
74. See id. The Fogg case was consolidated with the Deni Associates case by the Fourth District Court of Appeal. See id. at 399.
on adjacent property, resulting in serious injuries to the bystanders and substantial personal injury claims against the partnership.\textsuperscript{75}

Both Deni Associates and the Fogg partnership 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 insure for loss either consisting of, or directly and immediately caused by one or more of the following.

\ldots

E. The presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot, fumes, acids, alkalis, chemicals and waste, except as provided in the Pollutant Clean Up and Removal Extension of Coverage.\textsuperscript{76}

The trial courts in both \textit{Deni Associates} and \textit{Fogg} ruled that this "absolute" pollution exclusion was ambiguous as applied to the instant facts and granted summary judgment for the policyholders.\textsuperscript{77} The Fourth District Court of Appeal reversed.\textsuperscript{78} Because of the relative youth of the absolute pollution exclusion (inserted into CGL policies only since the mid-1980s), \textit{Deni Associates} and \textit{Fogg} would have been noteworthy cases in any event, particularly in a large and important jurisdiction such as Florida. But \textit{Deni Associates} and \textit{Fogg} take on considerably more significance because the appellate court addressed the reasonable expectations doctrine in some detail, engaged in extensive discussion about the theory and practice of insurance coverage, and then placed the issue before the Supreme Court of Florida.

b. Competing Theories of Policy Construction and Expectation

The trial court in \textit{Deni Associates} not only employed traditional ambiguity analysis but expressly hinged its decision upon "what a reasonable person placed in the position of the insured would have understood the word [pollution] to mean."\textsuperscript{79} In reversing, the majority of a sharply divided en banc Fourth District Court of Appeal disagreed, and after an extensive discussion found the pollution exclusion unambiguous.

\textsuperscript{75} See \textit{id.} at 399.
\textsuperscript{76} Id. at 406 (Klein, J., concurring in part and dissenting in part) (quoting State Farm policy issued to Deni Associates).
\textsuperscript{77} See \textit{id.} at 399.
\textsuperscript{78} See \textit{id.} at 403-04.
\textsuperscript{79} Id. at 399.
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, the ammonia in the blueprint machine and the Ethion insecticide sprayed from the air were clearly "pollutants" and the discharge or release of these pollutants had caused the underlying liability claims.

In particular, the appellate court majority found reasonable expectations analysis to have no place in insurance coverage matters because it ran afoul of the objective theory of contract. To some extent, the Deni Associates court 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," 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 of external signs—not on the parties having meant the same thing but on their having said the same thing."

From this, the Deni Associates majority erroneously concluded that application of the reasonable expectations doctrine would make coverage turn on the subjective beliefs of the litigant policyholder. Actually, Keeton's reasonable expectations formula is quite clear that the reasonableness of a coverage expectation is determined by an objective standard. That is, the reasonableness of an expectation would turn on what the mythical reasonable person in the policyholder's position would expect, not upon the idiosyncratic notions of the policyholder involved in the dispute. Presumably, the Deni Associates 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 Associates majority to erroneously conclude that anything supporting a result at odds

80. See id. at 402-03.
81. See id.
82. See id.
83. See id. at 402.
84. Id. at 400 (quoting Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957)) (citation omitted).
85. See id. at 402.
86. See Keeton, supra note 2, at 967.
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.\footnote{See Gordon D. Schaber & Claude D. Rohwer, Contracts in a Nutshell (3d ed. 1990) (describing modern approach under the American Law Institutes Restatement (Second) of Contracts (1981) as having replaced the "objective" theory of contract with emphasis on subjective intent of the parties).} Holmes himself seemed considerably less confident about such an objectively undeniable meaning of language. Twenty years after his law review article quoted with such assurance by the Deni Associates 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."\footnote{See Towne v. Eisner, 245 U.S. 418, 425 (1918); see also Neil Duxbury, Patterns of American Jurisprudence 34-46, 60 (1995) (stating that Holmes exhibited elements of both formalism and anti-formalism, or realism in his thinking, and even while writing The Common Law he espoused a mixture of views despite generally favoring objective standards and positive law); Symposium, The Path of the Law 100 years Later: Holmes' Influence on Modern Jurisprudence, 63 Brook. L. Rev. 1-278 (containing works by several Holmes scholars who note the eclectic nature of Holmes' views and the evolution of his thinking over time, with observers often disagreeing about his 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 Professor 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 163-88 and accompanying text (noting that the judiciary may act with excessive formalism, textualism, and accompanying rhetoric to minimize the judicial burden in resolving cases and rendering opinions).} 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."\footnote{Arthur L. Corbin, Corbin on Contracts § 535, at 495 (1952).} Furthermore, contract construction inherently involves more than simply extracting a linguistic 

\footnote{See E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L.J. 939, 952 (1967).}
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 decision-makers 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 content 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). Supplied terms reflect social views of the proper goals of contractual relations.91

Many, if not most, contemporary courts—in contrast to the Florida appellate court in Deni Associates—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 interpretive 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 interpretive tools, and not simply relying on the false idol of “plain meaning.”92

A noted contracts scholar has made a similar observation:

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. . . . Often the meaning attached to a word by the parties must be gleaned from its context, including all the circumstances of the transaction.93


93. FARNSWORTH, supra note 92, § 7.10, at 512 (footnotes omitted); see also Farnsworth,
Although the reasonable expectations principle has been inaccurately portrayed by its critics as a radical departure from settled contract doctrine,\textsuperscript{94} Keeton in essence only refined and clarified modern contract law. Under this vision of contract law, one that arguably has been dominant over formalism and literalism for several decades,\textsuperscript{95} 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.\textsuperscript{96}

A term like “pollution” and the pollution exclusion litigation of Deni Associates provide powerful support for Keeton’s point.

The Deni Associates majority in the appellate court applied a strict version of the traditional rule on extrinsic evidence—permitting consideration of extra-textual matter only if a term is ambiguous.\textsuperscript{97} Because it saw the words “pollutant,” and “release” as unambiguous,\textsuperscript{98} the Deni Associates 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 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

\textit{supra} note 90, at 940-42 (noting that “meaning” is determined by the intent of the parties).

\textsuperscript{94} See supra notes 3-18 and accompanying text; see also Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 807 (Utah 1992) (Stewart, J., concurring in result).

\textsuperscript{95} See infra notes 143-63 and accompanying text (discussing 20th century contract jurisprudence and consistency of reasonable expectations principle with modern contract law).

\textsuperscript{96} See ROBERT E. KEETON, JUDGING 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.

\textsuperscript{97} See State Farm Fire & Cas. Ins. Co. v. Deni Assocs., Inc., 678 So. 2d 397, 403 (4th DCA 1996), aff’d, 711 So. 2d 1135 (Fla. 1998).

\textsuperscript{98} See id.
before the Texas Insurance Department in which an industry representative stated that the language of the exclusion was drafted with unrealistic breadth to ensure its effectiveness and that it would not be literally enforced against insureds in cases where doing so would be inconsistent with basic understandings about the policy.99 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 Fourth District majority in *Deni Associates* precluded consideration of this material since it found the pollution exclusion clear on its face.

The *Deni Associates* 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 Associates* majority believed so. However, the modern trend is to permit courts to consider extrinsic evidence as an aid to assessing whether disputed language is ambiguous.100 In addition, contracts scholars such as E. Allan 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? Prominent modern contracts scholars would say no,101 as would most courts.102 Courts are divided, 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 dealing between the parties even though this is viewed by many courts as a type of "extrinsic" evidence.103

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99. See *Stempel*, *supra* note 1, § T1.6, at 116-17 (1998 Supp).

100. See *infra* notes 102-05 and accompanying text.

101. See *Farnsworth*, *supra* note 92, §§ 7.8, 7.9.

102. See *id.* §§ 7.12, 7.13; *Schaber & Rohwer*, *supra* note 87, § 94, at 173 ("Evidence is admissible to show the background and circumstances in which a contract was negotiated. . ."); Abraham, *supra* note 55, at 540 (citing Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968) (considering 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, 1521-22 (7th Cir. 1989) (applying New York law) (discussing the prevalence of the modern, expanded use of extrinsic evidence, but noting New York’s more traditional approach); Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988) (following *Pacific Gas & Electric* as required in a federal case applying California law but criticizing the same on the ground that a more traditional doctrine should be followed, allowing a court to consider extrinsic matter only where the contract language is facially ambiguous). *But see Schaber & Rohwer*, *supra* note 87, § 94, at 174 (stating that *Pacific Gas & Electric* stands for the proposition that extrinsic matter may be used only to argue for a meaning for which the contract language is "reasonably susceptible").

103. See *Farnsworth*, *supra* note 92, §§ 7.12, 7.13; *Stempel*, *supra* note 1, § 3.2; see *also*
The Deni Associates majority in the court of appeal was clearly motivated by fears of judicial activism—stating that courts could not "rewrite" unambiguous contract language to reach a preferred result.\textsuperscript{104} Courts must be mindful not to "torture" policy language in favor of the insured.\textsuperscript{105} As the court stated:

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.\textsuperscript{106}

Despite its view of linguistic clarity, and its aversion to the reasonable expectations approach, the Deni Associates majority set the stage for the Supreme Court of Florida to consider in detail the reasonable expectations doctrine and the scope of the absolute pollution exclusion:

Nevertheless, we also recognize that CGL policies are widely and generally used in Florida. We perceive, 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 ambiguous. Therefore,

\begin{quote}
Schaber & Rohwer, supra note 87, § 91, at 167-68.
\end{quote}

The [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. They are not the subject of any extrinsic agreement between the parties.

\textit{Id.} (emphasis added).

\textsuperscript{104} See Deni Assocs., 678 So. 2d at 401 (quoting United States Fire Ins. Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976)).

\textsuperscript{105} See id. at 401, 403.

\textsuperscript{106} Id. at 403.
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 doctrine of reasonable expectations of the insured to resolve ambiguities in CGL policies?  

The Fourth District’s Deni Associates majority acknowledged a role for a “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.”  

Judge Stone concurred in part and dissented in part, voting in favor of Deni Associates (the architectural firm with the moving mishap) and concurring in the result denying coverage to the Fogg partnership 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.  

Judge Stone’s 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.”  

In addition, Judge Stone argued for construing policy language according to reasonable expectations of the insured, rather than deciding policy meaning on the basis of dictionary or policy definitions alone.  

But Judge Stone’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 concurred specially and in a short, somewhat cryptic opinion, appeared to argue for adoption of the Keeton version of reasonable expectations.  

107. Id. at 403-04.  
108. Id. at 401.  
109. See id. at 404 (Stone, J., concurring in part and dissenting in part).  
110. See id. (Stone, J., concurring in part and dissenting in part).  
111. Id. at 404-05 (Stone, J., concurring in part and dissenting in part).  
112. See id. at 405. (Stone, J., concurring in part and dissenting in part).  
113. See id. at 405-06 (Stone, J., concurring in part and dissenting in part).  
114. See id. at 406 (Warner, J., concurring).
expectations doctrine as a two-way street: "It would seem to me that an insurer could argue successfully the reasonable expectation test to exclude coverage in circumstances where it has heretofore been construed in favor of the insured."115

Judge Klein concurred in part and dissented in part, finding that the pollution exclusion clearly did not preclude coverage in the Deni Associates case.116

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 of the types of claims which the majority would exclude, there would be no reasonable certainty as to coverage, and insureds would only discover their lack of coverage as everyday mishaps occurred.117

Notwithstanding that CGL policies are now "Commercial" General Liability policies, Judge Klein's position is supported by approximately half of 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 policy should reasonably cover.118 In the alternative, Judge Klein saw the exclusion as ambiguous, in part because of the division of the courts on the issue.119

2. The Supreme Court Decision

a. Oral Argument: Insurer Stridency and Judicial Skepticism

Deni Associates was argued before the Supreme Court of Florida on September 11, 1997. Argument before what then appeared to be a closely divided Court illustrated the difficulty of the absolute pollution exclusion and the potential utility of expectations analysis. The oral argument placed in stark relief the Achilles Heel of the insurance industry in seeking a broad

115. Id. (Warner, J., concurring).
116. See id. (Klein, J., concurring in part and dissenting in part).
117. Id. (Klein, J., concurring in part and dissenting in part).
118. See id. at 407 (Klein, J., concurring in part and dissenting in part) (citing cases); see also STEMPEL, supra note 1, § 1.6 (reviewing caselaw of "absolute" pollution exclusion and finding that courts are split between the literal enforcement of broad exclusionary language and the common sense view that every claim involving caustic material is not necessarily a "pollution" claim).
119. See Deni Assocs., 678 So. 2d. at 407-08 (Klein, J., concurring in part and dissenting in part).
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." 120 These terms are obviously capable of a 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 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—a result at odds with most observers' common sense view.

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. 121 At the Deni Associates oral argument, the Supreme Court of Florida pressed this hypothetical with interesting results. 122 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. 123 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." 124 Justice Overton pressed the point, asking with some incredulity whether slipping on soap was covered while slipping on ammonia was not. 125 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 policy was an "illusory contract" since it appeared to cover such ordinary negligence but then failed to provide coverage when the negligence involved the spill and failure to mop up

120. See supra text accompanying note 76.

121. This is the hypothetical asked by the Texas Insurance Commission at hearings on the absolute pollution exclusion. See STEMPLE, supra note 1, § T1.6, at 116-18 (1998 Supp.). 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 the insurance industry overdrafted it. See id. The insurer representative quickly suggested that responsible insurers would not attempt such literal enforcement of the exclusion. See id.


123. Id. (Question of Hon. Ben Overton).

124. Id. (Question of Hon. Ben Overton and Response of Elizabeth Russo, Esq.). State Farm counsel quickly added that she 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. See id.

125. See id. (Question of Hon. Ben Overton).
irritating chemicals.\textsuperscript{126}

When Farm Bureau's counsel rose to argue \textit{Fogg}, Justice Overton reiterated the slip-and-fall hypothetical.\textsuperscript{127} Farm Bureau counsel argued that the slip claim was covered because the injury was not caused by pollution but by wetness,\textsuperscript{128} a less rigid and more reasonable response than that given by State Farm. Justice Harry Lee Anstead pounced on the 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."\textsuperscript{129}

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.\textsuperscript{130} Nonetheless, State Farm's absolutist position on the exclusion appeared at the time to have dealt the insurance industry a mortal blow. Unless Florida's high court is to tacitly permit insurers to deny coverage to slip-and-fall and other "ordinary" negligence claims incidently involving irritants, it must seemingly use ambiguity analysis, a version of the reasonable expectations doctrine, or contextual construction. There must be a limit to the literal reach of the language of the absolute pollution exclusion so that the claim arising from a wet floor is not excluded merely because the wet substance is a chemical irritant as well.

b. The Supreme Court of Florida's Surprisingly Superficial Opinion

If nothing else, the supreme court's \textit{Deni Associates} opinion (released January 29, 1998, some four and one-half months after oral argument), proves the adage that one can never predict the outcome of a decision according to the content and tone of the oral argument. During oral argument, the court seemed annoyed with the insurance industry position of a pollution exclusion so broad it barred coverage for items clearly considered staple CGL policy claims only a few years earlier. In particular, State Farm's absolutist, hyperliteral position, the divergent interpretations

\textsuperscript{126} See \textit{id}. (Question of Hon. Leander Shaw and Response of Elizabeth Russo, Esq.).
\textsuperscript{127} See \textit{id}. (Question of Hon. Ben Overton).
\textsuperscript{128} See \textit{id}. (Question of Hon. Ben Overton and Response of Bonita Kneeland, Esq.).
\textsuperscript{129} \textit{Id}. (Question of Hon. Harry Lee Anstead and Response of Bonita Kneeland, Esq.).
of the insurers, and the seemingly unfair and surprising absence of coverage for claims that clearly were something quite distinct from Times Beach, Missouri\textsuperscript{131} or Love Canal\textsuperscript{132} all suggested a decision that would in some way limit the pollution exclusion, even if the intermediate appellate results were to stand.

Instead, the supreme court issued an opinion addressing none of the concerns it voiced during oral argument. Rather, the court focused narrowly on the pollution exclusion language, read it extremely literally, and concluded that this unrealistically literal reading was so clear as to preclude alternative meanings.\textsuperscript{133} The reasonable expectations principle was considered inappropriate for assisting the analysis.\textsuperscript{134} The court rejected reasonable expectations analysis curtly, but in language that suggested the supreme court harbored the same misunderstanding about the doctrine held by the Fourth District Court of Appeal.\textsuperscript{135}

Despite the closeness of prior decisions regarding the former “sudden and accidental” pollution exclusion, and the seemingly inconsistent positions outlined by the insurers, the supreme court’s holding, analysis, and rhetoric in Deni Associates was nearly unanimously in the insurers’ favor. Despite the prospect that under State Farm’s view of the absolute pollution exclusion, the grocery store slip-and-fall and other “ordinary” negligence claims incidently involving irritants would be excluded from CGL policy coverage,\textsuperscript{136} the court accepted the insurers’ construction of the exclusion, denied coverage to Deni Associates and the Fogg partnership, and rejected the reasonable expectations doctrine.\textsuperscript{137} The court also refused to use ambiguity analysis, or contextual construction, to limit the literal reach of the language of the absolute pollution exclusion.\textsuperscript{138}

It was equally surprising that the supreme court’s decision was overwhelmingly one-sided, with five justices ruling in favor of State Farm. The only dissenters were Justice Wells and Justice Overton, the author of the court’s original pro-coverage decision in Dimmitt Chevrolet, Inc. v.

\begin{enumerate}
\item \textsuperscript{131} Times Beach, Missouri, a town along the Mississippi River, was so badly polluted by dioxin that evacuation of much of the town and expensive soil remediation was required as a result of the spraying of polluted chemicals onto dirt roads in the area as a dust suppressant. For additional background on the Times Beach disaster, see Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977, 979-81 (8th Cir. 1988) (applying Missouri law).
\item \textsuperscript{132} Love Canal was a waterway polluted by manufacturing discharges, again forcing some evacuation of the adjacent neighborhood near Erie, Pennsylvania.
\item \textsuperscript{133} See Deni Assocs., 711 So. 2d at 1138-39.
\item \textsuperscript{134} See id. at 1140.
\item \textsuperscript{135} See id.
\item \textsuperscript{136} See supra text accompanying notes 121-26.
\item \textsuperscript{137} See Deni Assocs., 711 So. 2d at 1139-41.
\item \textsuperscript{138} See id. at 1138-39.
\end{enumerate}
Southeastern Fidelity Insurance Corp.\textsuperscript{139} and the principal dissenter when the court reversed itself on rehearing and found no coverage for gradual pollution due to the qualified pollution exclusion formerly found in CGL policies.\textsuperscript{140} Meanwhile, Justice Harding, who had allied himself with Justice Overton in the original Dimmitt Chevrolet opinion,\textsuperscript{141} did not join the limited dissent in favor of coverage for Deni Associates. The supreme court, like the Fourth District Court of Appeal, unanimously found no coverage for the botched crop spraying in Fogg.

The Fourth District Court of Appeal's decision in Deni Associates featured split views, substantial discussion of contract law and the expectations approach, and a powerful dissent. By contrast, the Deni Associates dissent in the Supreme Court of Florida was a comparative shrug of the shoulders, with Justice Wells merely adopting a court of appeal dissent by reference and suggesting support for a reasonable expectations approach, but not endorsing the doctrine explicitly.\textsuperscript{142} The supreme court opinion presented a more streamlined analysis than what was presented by the intermediate court, thereby making its misunderstanding of the reasonable expectations doctrine less obvious than that of the court of appeal.\textsuperscript{143} The court also failed to discuss (much less refute) the reasonable expectations doctrine at any length, and in dismissing the certified question stated:

\begin{quote}
[T]he certified question . . . asks whether the doctrine of reasonable expectations should be applied to interpret CGL
\end{quote}

\textsuperscript{139} See 17 Fla. L. Weekly S579, S582 (Fla. Sept. 3, 1992) (finding "sudden and accidental" qualified pollution exclusion to bar coverage only for intentional pollution where damage was expected).

\textsuperscript{140} See Dimmitt Chevrolet, Inc. v Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 706 (Fla. 1993) (Overton, J., dissenting); see also id. at 711 (Overton, J., dissenting from order denying rehearing).

\textsuperscript{141} Fellow Dimmitt Chevrolet dissenting Chief Justice Rosemary Barkett was subsequently appointed to the United States Court of Appeals for the Eleventh Circuit and was no longer on the Supreme Court of Florida at the time of the Deni Associates decision.

\textsuperscript{142} The entirety of Justice Wells' concurring and dissenting opinion is as follows:

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.

\textit{Deni Assocs.}, 711 So. 2d at 1141 (Wells, J., concurring in part and dissenting in part).

\textsuperscript{143} See id. at 1140 (referring to reasonable expectations doctrine as one that makes coverage turn on "insured's subjective expectations" (emphasis added). The court reached this conclusion notwithstanding Keeton's clear enunciation that the issue is one of the policyholder's objectively reasonable expectations). See supra notes 4-13 and accompanying text.
policies. Under this doctrine, the insured's expectations as to the scope of coverage is upheld provided that such expectations are objectively reasonable.

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. 144

As the italicized language shows, the supreme court, like the Fourth District Court of Appeal, appears to confuse the standard for assessing reasonable expectations. At the outset of the language quoted above, the court appears to appreciate that the Keeton doctrine requires that the insured have an objectively reasonable basis for expecting coverage in the situation at issue. 145 But only a few sentences later, the court appears to see the doctrine as resting on the subjective expectations of the individual insured of the instant case. 146

The objective-subjective references can be reconciled in that the court probably meant that it did not want to engage in the difficult and burdensome process of determining whether the insured's actual expectations of coverage (which exist by definition if there is a coverage dispute) were objectively reasonable. However, the court's assessment misses the mark even when read charitably. According to the reasonable expectations doctrine, a reviewing court need not be concerned with the actual subjective expectations of the insured. 147 What is important is whether the admittedly mythical reasonable person in the position of the insured would have expected coverage under the circumstances of the case. 148 This requires no greater judicial effort than that already put forth when a court seeks to determine if a linguistic term is "clear" or "ambiguous." Additionally, it is hard to see how expectations analysis will be any less predictable than the textual regime endorsed by the court. Different courts have divided dramatically over whether "sudden and

144. Deni Assocs., 711 So. 2d at 1140 (emphasis added) (footnote omitted) (quoting Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 803 (Utah 1992)). The court also stated that "[t]here is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application." Id. (quoting Allen, 839 P.2d at 803).

145. See id.

146. See id.

147. See Keeton, supra note 2, at 961-64.

148. See id.
accidental" pollution must be abrupt, whether the absolute pollution exclusion at issue in Deni Associates is ambiguous, and whether "damages" covered by liability insurance includes environmental cleanup costs.\footnote{See STEMPEL, supra note 1, § 1.4 (noting that states are evenly split on the question of whether "sudden and accidental" language of qualified pollution exclusion precludes coverage for gradual discharge not expected to cause harm); id. § T1.6 (stating that courts are divided over whether absolute pollution exclusion precludes coverage for claim arising out of smoke, carbon monoxide); id. § T2.5 (stating that courts are divided nearly equally concerning whether a CGL must cover as "damage" environmental cleanup costs required by government order).
}

The Deni Associates court left open the possibility of coverage in future cases resembling the grocery store slip-and-fall alluded to at oral argument.\footnote{See Deni Assocs., 711 So. 2d at 1140.} The court did this by stating that courts would not enforce an absurd result.\footnote{The court stated:}

\begin{quote}
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.
\end{quote}

\footnote{Id. at 1141.}

\footnote{See id. at 800. Prudential refused payment, however, 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. See id. at 800. Despite its extensive discussion of the expectations principle, Allen is ultimately unpersuasive. The decision both misconstrues the realities of the consumer market for insurance and sets forth a most problematic argument based on a misperception of separation of powers. The Allen court took the view that it would violate the American notion of government structure if a court did not enforce literally the terms of an insurance contract approved by state regulators. See Stempel, supra note 5, at ___ (criticizing Allen at length).
}

\footnote{See Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861, 868 (Okla. 1996) (adopting reasonable expectations approach to construing insurance policies only where the language in question is ambiguous).}
conducive to the doctrine’s application. Compared to the welcoming embrace of expectations analysis in the 1970s, the 1990s reaction of courts seems tantamount to deportation of the Keeton doctrine.

IV. EVALUATING DENI ASSOCIATES AND THE ANTI-REASONABLE EXPECTATIONS RATIONALE

A. Pure and Contaminated Reasoning: The Errors of the Deni Associates Opinion

1. Slanting the Inquiry to Benefit the Insurer

The Supreme Court of Florida opinion began with a brief recitation of the facts of the two cases, emphasizing the degree to which the toxic or irritating nature of the spilled chemicals (ammonia from the blueprint machine in Deni Associates and insecticide in the crop spraying of Fogg) contributed to the losses underlying the claims against the insureds.\(^{155}\) The court noted that the certified question asking whether Florida would adopt the reasonable expectations approach in cases of ambiguous policy language was something of a non sequitur in that it “presupposes an ambiguity, whereas the court held that no such ambiguity existed.”\(^{156}\) But the court accepted the certification, largely because it wished to address the issue of the pollution exclusion: “[w]e believe that the legal efficacy of the pollution exclusion is an important issue which should be decided by this Court.”\(^{157}\)

Framing the question in this manner accrued to the benefit of the insurer. It suggested that finding for the policyholder not only merely limited the application of the pollution exclusion for these two comparatively minor incidents,\(^{158}\) but also imperilled the “efficacy” of an important policy provision added in response to the massive pollution liability litigation of the 1970s and 1980s.\(^{159}\) So phrased, the question would seem to beg for a pro-insurer answer. If the absolute pollution exclusion had no “efficacy,” then perhaps the insurance industry remained

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155. See Deni Assocs., 711 So. 2d at 1136-37.
156. Id. at 1137.
157. Id.
158. I do not mean to denigrate the seriousness of the plaintiffs’ claims in Deni Associates and Fogg. The persons mistakenly sprayed with insecticide in Fogg were seriously injured. However, neither the Deni Associates nor the Fogg claims involved widespread or long lasting damage outside the immediacy of the incident. By contrast, claims more easily classified as pollution incidents may involve contamination of acreage or water systems that extends for acres and decades.
159. See Stemppel, supra note 1, § T.1.1, at 825 (Main Volume 1994); id. § T1.6, at 113-14 (Supp. 1998) (describing background history of qualified and absolute pollution exclusions).
in the throes of the large, long-tailed, unanticipated coverage obligations that had created the hard insurance market of the mid-1980s. These coverage issues threatened to bring down Lloyd’s and the London Market, and linked today’s insurers to gradual pollution dating back as much as a century.\textsuperscript{160}

Whether consciously or not, the \textit{Deni Associates} court accepted the tacit “parade of horribles” or Armageddon implied by insurers should coverage be found. Wittingly or unwittingly, the Supreme Court of Florida erroneously assumed that a vote for coverage was a vote for an ineffective pollution exclusion. One might just as easily and more appropriately view \textit{Deni Associates} as a case testing the degree to which an industry-imposed exclusion could be applied to ordinary business activity not commonly thought of as pollution and not contemplated for exclusion at the time the policy was issued. Had the case been framed in this latter, more apt manner, the consequence of finding coverage would be simple resolution of the dispute without any lurking threat to insurer solvency.

2. Jumping on a Rickety Bandwagon: The Court Credulously Accepts the Insurance Industry’s Scorecard Regarding the Pollution Exclusion and Misunderstands the Nature of Pollution Exclusion Precedent

Again demonstrating that it saw the case as one about the general enforceability of the pollution exclusion rather than a case about the reach of the pollution exclusion to nonpollution activity, the \textit{Deni Associates} court began its legal analysis by noting that “[a] substantial majority of . . . courts have concluded that the pollution exclusion is clear and unambiguous so as to preclude coverage for all pollution-related liability.”\textsuperscript{161} In the footnote accompanying this quotation, the supreme court noted that the insurers and “their amici have cited more than 100 cases from 36 other states which have applied the plain language of the pollution exclusion clause to deny coverage.”\textsuperscript{162}

The court’s invocation of the “box score” of pollution exclusion litigation reflects the success of the insurance industry’s professional amicus, the Insurance Environmental Litigation Association (IELA), a trade group which submitted the key amicus brief to which the court refers.\textsuperscript{163} The approach of the IELA amicus brief is one of overwhelming the reader by numbers. As a coordinator of the insurers’ national efforts to

\begin{footnotesize}
\textsuperscript{161} \textit{Deni Assocs.}, 711 So. 2d at 1137.
\textsuperscript{162} \textit{Id.} at 1137 n.2.
\textsuperscript{163} See Brief Amicus Curie of the Insurance Environmental Litigation Association, \textit{Deni Assocs.} (No. 89-115).
\end{footnotesize}
further expand the scope of the pollution exclusion, IELA has cataloged even the most obscure pollution exclusion cases, and can muster in one brief all of the industry’s victories, even unreported cases, such as those from local courts with limited jurisdiction. The resulting list of “more than 100 cases,” composing a twenty-seven page appendix to the IELA brief is impressive, but should not have influenced the *Deni Associates* court to the degree it did.

Although a good deal of the impact of the IELA amicus brief results from courts’ siding with the insurers on the reach of the exclusion, the thrust of the brief is misleading and partially fallacious. An example is the issue of how to count and classify the cases. Many of the pro-insurer cases cited in the IELA brief involved the qualified “sudden and accidental” pollution exclusion language.\(^{164}\) If one is a pure textualist, the determination that one clause was held unambiguous by some courts is of no utility in determining whether a similar but different clause is clear or ambiguous.

Looking at an “apples vs. apples” comparison, it is true that many courts construing the absolute pollution exclusion have deemed it textually clear. But a similar number of courts have either characterized the extremely broad exclusionary language as ambiguous, or have failed to apply the exclusion to a variety of liability claims involving irritants, chemicals, smoke, gas, and waste. The IELA brief asserts that courts enforcing the absolute pollution exclusion not only constitute a majority, but have rejected any possibility that the language is ambiguous. However, what these cases really decided was that the pollution exclusion was enforceable and precluded coverage in a particular case. As observed by the District Court for the Eastern District of New York:

> In [the case cited by the insurer] claims were filed against the insured municipality for improper disposal of toxic material. [The insured] argued that the pollution exclusion in its liability policy was ambiguous as to coverage of these claims, because there was a question as to whether the [insured] was responsible for dumping the toxic material. The [New York] Court of Appeals held that the language of the applicable policy’s exclusion was not ambiguous on this point.

> Thus, . . . the New York Court of Appeals did not hold that pollution exclusions are unambiguous *for all purposes*. It merely refused to find that the pollution exclusion at issue there was ambiguous with respect to claims arising out of the

\(^{164}\) The policy at issue in *Deni Associates* contained the “absolute pollution exclusion,” which does not use the “sudden and accidental” language. *See Deni Assocs.*, 711 So. 2d at 1137.
dumping of environmental waste when the identity of the party responsible for dumping the waste was in doubt. 165

As more succinctly put by the New York Court of Appeals itself, pollution exclusion "[c]lauses can, of course, be ambiguous in one context and not another." 166

Thus, for example, in the cases cited in the IELA brief and seized upon by the Supreme Court of Florida, one finds the exclusion effective to bar coverage for release of petroleum from underground storage tanks, 167 spraying of oil by a contractor, 168 hauling and storage of hazardous waste, 169 storage of nuclear waste, 170 cleanup of groundwater contamination, 171 generalized spraying of pesticide throughout a municipality, 172 county-wide mosquito control spraying, 173 fumes given off by the process of "rubber de-nuding," 174 sick building syndrome, 175 and the

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165. See Garfield Slope, 973 F. Supp. at 337.
170. See, e.g., Constitution State Ins. Co. v. Iso-Tex, Inc., 61 F.3d 405 (5th Cir. 1995) (applying Texas law), cited with approval in Deni Assocs., 711 So. 2d at 1140.
173. See, e.g., Federal Ins. Co. v. McNichols, 77 So. 2d 454 (Fla. 1955) (finding no coverage because mosquito pesticide spraying company's liability policy excluded coverage for "...injury or damage... caused directly or indirectly by chemicals or dusting powder"), cited with approval in Deni Assocs., 711 So. 2d at 1141.
174. See, e.g., Park-Ohio Indus., Inc. v. Home Indem. Co., 975 F.2d 1215 (6th Cir. 1992) (applying Ohio law), cited with approval in Deni Assocs., 711 So. 2d at 1140. In Park-Ohio, the Sixth Circuit was divided on the applicability of the exclusion despite the widely dispersed fumes from the rubber de-nuding operation. See Park-Ohio, 975 F.2d at 1224 (Guy, J., dissenting).
175. See, e.g., West Am. Ins. Co. v. Band & Desenberg, 925 F. Supp. 758 (M.D. Fla. 1996), cited with approval in Deni Assocs., 711 So. 2d at 1138. In Band & Desenberg, as in most sick building syndrome cases, workers on the site claimed that "contaminants in the building's air caused them to suffer from a series of symptoms" because of "air-borne contaminants" in the ventilation system. Band & Desenberg, 925 F. Supp. at 760. The Band & Desenberg court described this condition as "indoor air pollution." Id. at 761 n.1.

The Deni Associates court also cited with approval a case that denied coverage on pollution exclusion grounds when tenants sued their landlord for injuries due to carbon monoxide poisoning resulting from a negligently installed and maintained furnace. See Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1047 (Md. Ct. Spec. App. 1994). Although the two situations have similarities, the
movement and spilling of mercury. Not surprisingly, when one looks closely at the insurer victories chronicled by IELA and cited by the Deni Associates court, one finds the pollution exclusion applied to prevent coverage for “pollution” as the term is traditionally defined and understood by the reasonable layperson.

There are, of course, a few cases in other states that, like Deni Associates, apply the exclusion to mishaps that, but for some involvement of an irritant, traditionally were considered mere garden-variety accidents. But the bulk of the cases invoked by the insurers look like pollution in that the liability claims against the insured stemmed from widespread, serious, or long-lasting dispersal of foul substances, often over an extended time period. For example, in American States Insurance Co. v. F.H.S., Inc., quoted at length in Deni Associates, the insured operated a cold storage warehouse. “Ammonia leaked from a pressure relief valve on F.H.S.’s refrigeration system at the warehouse . . . [and] [a]s a result of this ammonia leak, a number of people in the surrounding area were treated at local hospitals and fifteen people made claims.” Thus, although both F.H.S. and Deni Associates involve ammonia, the F.H.S. situation better

loss and claims in Bernhardt can be said to result from improper management, supervision, or repair. By contrast, sick building syndrome is more widely dispersed, more intractably a part of the property, less isolated, and less remediable or reversible. In other words, the sick building claim is more analogous to the traditional understanding of a pollution claim.

176. See, e.g., Economy Preferred Ins. Co. v. Grandadam, 656 N.E.2d 787 (Ill. App. Ct. 1995), cited with approval in Deni Assoc., 711 So. 2d at 1137. Note, however, that in Grandadam, the mercury at issue was not the result of commercial discharge but was released as part of a minor child’s prank or carelessness. See Grandadam, 656 N.E.2d at 788. However, the mercury had been removed from the insured’s home and transferred to the home of the claimant prior to the apparently dispersed release of the chemical in the claimant’s home, suggesting a broad but perhaps erroneous construction of the exclusion by the Grandadam court. See id.


178. For example, the claim in Grandadam, in which the minor released mercury into the claimant’s home, despite its closeness, looks more like a pollution claim than Deni Associates or Fogg. Without the release of mercury in Grandadam, there is no tort. Grandadam is not a case involving negligent conduct where a contaminant was incidently involved. Release of the contaminant is the negligence. Spilling Pepsi is unlikely to prompt a claim worthy of coverage litigation. But the Deni Associates and Fogg torts may have given rise to significant claims under slightly different circumstances (e.g., Deni Associates’ blueprint machine tips off the office balcony; the Fogg partnership’s helicopter crashes into a farmhouse).


180. See id. at 188.

181. Id. This factual aspect of F.H.S. was not quoted by the Deni Associates court, which instead opted to quote the sanctity of contract rhetoric of the F.H.S. Court. See Deni Assoc., 711 So. 2d at 1138.
fits the average person's understanding of a "release" or "discharge" of pollutants than does the smaller, more confined, more episodic and contained spill of Deni Associates.

To say that an exclusion is not so facially unclear as to be deemed ambiguous as a matter of law is hardly the same thing as saying that the exclusion will bar coverage for broken containers during an office move just as it bars coverage for years of sewage discharge despoiling a river. A court might well find the pollution exclusion clear when applying the exclusion to industrial waste and discharge—but this hardly demonstrates that the same court would apply the exclusion to blueprint machine spills and isolated mishaps when applying chemicals in the ordinary course of business. One can seriously question whether a reasonable expectations jurisprudence that employs the expectations concept only after first determining that disputed policy analysis is ambiguous standing alone 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.

For example, the Deni Associates court cited three of the IELA amicus brief cases for the proposition that the exclusion was unambiguous and included a pithy parenthetical quote referring to the judicial trend rejecting ambiguity of the pollution exclusion clause as a matter of law. Unfortunately, each of these cases on closer examination shows that the courts applied the exclusion to a fact situation more like conventional pollution than the Deni Associates and Fogg coverage matters. The cases cited, although employing dicta stating that the exclusion is not ambiguous, clearly do not extend the exclusion as far as the Supreme Court of Florida did. Read with sensitivity, the cited cases (and many others in the IELA


183. See Deni Assoc., 711 So. 2d at 1137.

184. See supra notes 128, 130 & 137 and accompanying text. In addition, a more recent and authoritative Illinois case than Grandadam rejected a literalist interpretation of the pollution exclusion cause. In American States Insurance Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997), the policyholder apartment owner was sued by tenants for loss arising out of carbon monoxide poisoning from a defective furnace. See id. at 74. Although carbon monoxide is clearly a "pollutant" as defined in the exclusion (because it is an irritant, contaminant, fume, vapor, chemical, and waste), the Koloms court correctly viewed the suits concerning the carbon monoxide poisoning as covered because they sounded more in the nature of a garden variety claim against the landlord for failure to maintain premises in a safe condition. See id. at 79.

The Supreme Judicial Court of Massachusetts took a similar view of carbon monoxide claims in late 1997, but this decision was not noted by the Supreme Court of Florida. See Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 999-1000 (Mass. 1997).
amicus brief) merely say that the pollution exclusion is neither ambiguous nor against public policy when applied to claims that fit the common sense notion of “pollution.”

3. Misunderstanding Contract Law

The Deni Associates court briefly discussed precedent that, for reasons discussed later, actually weighed in favor of the policyholders. The court mischaracterized cases finding coverage by stating that the court “cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution.”

It then cited three cases that found coverage not on the basis of textual ambiguity, but on the basis of the greater contextual meaning of the exclusion in light of the intent of the parties and the purpose of the CGL policy.

The Deni Associates majority then cited a case suggesting that failure to apply the pollution exclusion literally was an improper “rewriting” of the CGL policy. In addition, this case—and this line of thought—begs the question of what constitutes unauthorized judicial “rewriting” of a contract. The Deni Associates court starts from the proposition that contract text is to be given strictly literal meaning without regard to the historical background of the language and other contextual factors such as the intent of the parties, overall purpose of the contract, representations by party representatives, or other matter shedding light on the meaning of the contract term. Having seized on the literalist, textualist position, the court then views any interpretation beyond a dictionary search as “rewriting.”

This analysis begs the question of what is the chicken and what constitutes the egg by assuming that dictionary definitions of text are the “true” meaning of the contract term. If the true meaning of the term is that resulting from the more comprehensive contextual analysis, then it is the literalist who is “rewriting” the contract by seeking or mandating a narrow

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185. See Deni Assocs., 711 So. 2d at 1138.
186. The Deni Associates court cited the following: Westchester Fire Insurance Co. v. City of Pittsburg, 768 F. Supp. 1463 (D. Kan. 1991) (involving accidental spraying of insecticide on bystanders in a manner similar to the facts of the Fogg claim); South Central Bell Telephone Co. v. Ka-Jon Food Stores, 644 So. 2d 357 (La. 1994) (involving a claim by the phone company that its underground lines had been damaged by gasoline leaking from the insured’s storage tanks); West American Insurance Co. v. Tufo Flooring East, Inc., 409 S.E.2d 692 (N.C. Ct. App. 1991) (involving claims by a food manufacturer that the fumes from Tufco’s polishing of the claimant’s floor had adversely affected the smell and taste of the chicken, resulting in ruined meals and altered plans). Reading these cases, one is hard pressed to describe their results in favor of coverage as based upon any finding of textual ambiguity.
and literal application of the disputed term even though none was intended by contracting parties. By leapfrogging this more nuanced and difficult analysis in order to embrace textual literalism at the outset, the Deni Associates court itself can be said to have rewritten the pollution exclusion to expand it and work a rewritten contraction of coverage inconsistent with the intent of the parties, purpose of the CGL, public policy goals, and policyholder expectations.

4. Misunderstanding Judicial Role and Potential

Additionally, one might well be suspicious of textual literalism as an interpretive philosophy because it creates a blatant misuse of resources. Judges at all levels, but particularly the state supreme court and federal court levels, are drawn from the highest echelons of the bar. By definition, these jurists (and most trial and intermediate appellate judges as well) are persons of demonstrable intellect, skill, and experience. When lawyers of such talent and experience face an interpretative question, one would expect them to do more than merely look up a word in the dictionary.

This preference for text (and a particularly stilted reading of text at that) over context is, of course, the product of the Supreme Court of Florida's earlier error (widely shared by other courts) of refusing to consider background information when it finds the text at issue sufficiently clear. The Supreme Court of Florida applied this rule in its important decision construing the old "sudden and accidental" pollution exclusion.\textsuperscript{188} The Deni Associates court cited cases taking a similar textually literalist approach without giving due consideration to the policyholder's contextual arguments.\textsuperscript{189} When it wanted to discern the meaning of a term, the Deni Associates court did not wade into the complex but potentially more rewarding waters of intent, purpose, context, representations, history, estoppel, and public policy. Instead, the court reached for a dictionary.\textsuperscript{190}

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\textsuperscript{188} See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 705 (Fla. 1993), cited in Deni Assocs., 711 So. 2d at 1139.
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\textsuperscript{190} See id. at 1139 (using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (1981) as a source for meaning of words not defined in the policy). Although, in fairness, I should add that in this segment of the opinion, the Deni Associates court was largely making the point that a disputed term is not to be deemed ambiguous merely because it was not defined in the policy itself, a proposition with which I agree.
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But in essence, the court's observation is part of a brief for expectations analysis. The reason that a contract drafter need not define each term of a contract or insurance policy is not the ready presence of the dictionary for decoding contract language. Rather, because relatively common terms read against the intent of the parties and the purpose of the contract in the context of the instrument and transaction create objectively reasonable expectations, the parties know what the contract
The court then rejected the policyholders’ argument that even if seemingly clear on its face, the pollution exclusion was latently ambiguous because its scope became unclear in operation in specific factual situations. In doing so, the Deni Associates court advanced an unusually narrow view of the role of latent ambiguity in contract law. Indeed, the court’s entire sense of the notion of contractual ambiguity seems wooden and outdated.

5. Ahistorical Contracts Scholarship

The classic high version of “objective” theory of contract\(^{191}\) fell from favor during the course of the twentieth century. Its excessive faith in the precision of words and the shared nature and agreement of those reading words was not helpful for resolving disputed contracts unless there was 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 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 or not a given CGL policy claim is covered. 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,

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\(^{191}\) A less lofty version of the objective theory of contract might well be helpful by attempting 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.
policy purpose, and common sense, it is difficult to accept that words like the CGL policy "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. Professor 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. 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 the one extreme and into blue at the other, so that its applicability in marginal situations is uncertain." An ambiguous provision in a contract is one that may have two distinct connotations. "Thus the word light is ambiguous when considered in the context of dark feathers." 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"? 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.

Ambiguity of syntax involves uncertainty created by the way otherwise clear words are put together. Something like the "sudden and accidental" pollution exclusion can be seen 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. 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 policyholders' reasonable expectations might countermand

192. See FARNSWORTH, supra note 92, § 7.8, at 498-501; Farnsworth, supra note 91, at 940-42.
193. FARNSWORTH, supra note 92, § 7.8, at 498.
194. See id.
195. See id. § 7.8, at 498-99. The famous Peerless case is Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1864), 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.
clear policy language.

6. The Court Leaves an “Absurd Result” Escape Hatch—But Fails to Explain How This Is More Legitimate than Application of Expectations Analysis

The Deni Associates court attempted to follow the well-known common law norm of only deciding the case before it when it refused to address “certain hypothetical situations” that might fit in the pollution exclusion provision simply because the situation was accompanied by the tangential presence of chemicals.196 Unfortunately, the court’s active oral argument on this dimension had already illustrated the degree to which the pollution exclusion is rife for abuse if read in the literal manner championed by the insurers.197 And then, ironically, the Deni Associates court. Instead of continuing on this potentially productive path, testing the contours of the pollution exclusion, and providing guidance for future courts, the court turned its back on the illuminating exchanges at oral argument that demonstrated beyond cavil the problematic nature of a dictionary-determined adjudication of the pollution exclusion.

To prevent such obvious lurking abuses as the denial of the slip-and-fall claim where the fall took place because of a bleach or lye spill (discussed expressly at oral argument), the court stated that despite the literalist interpretation at work in Deni Associates, “insurance policies will not be construed to reach an absurd result.”198 The court’s assurance is cold comfort for a variety of reasons. First, the court suggests no principled methodology for determining what constitutes an absurd result. Exactly what is an absurd result? What makes it absurd? Unless these questions can be answered in a principled manner, presumably the bench would be acting ultra vires and “rewriting” the contract by refusing to enforce it as written. The court had stated only a sentence earlier that it would not rewrite contracts merely because literal language might produce results at odds with policyholder expectations. If the “absurd result” test is to be used by the bench, the court must have a workable yardstick for measuring the absurd.

One possible means of operationalizing the absurd result standard is to emulate the Deni Associates majority, and reach for a dictionary. According to the dictionary nearest me when writing this Article (one advantage of being a nontextualist is that one need not worry about which

196. Deni Assocs., 711 So. 2d at 1140.
197. For discussion on the oral argument in Deni Associates, see text accompanying supra note 121-26.
198. See Deni Assocs., 711 So. 2d at 1140.
particular dictionary to use) the adjective "absurd" means: "1: ridiculously unreasonable, unsound, or incongruous 2: having no rational or orderly relationship to human life: Meaningless." 

The almighty dictionary itself regards highly unreasonable acts or things as absurd. By dictionary definition, then, a contract construction that violates the reasonable expectations of the policyholder would seem to be absurd and therefore unenforceable. The Deni Associates court itself said this when it embraced the absurd result backstop to literal contract textualism. But paradoxically, in what can in retrospect be seen as Catch-22 logic, the Deni Associates court refused to give any consideration to policyholder expectations, even though these are clearly relevant to determining whether a given contract construction produces an absurd result.

A glance at a thesaurus is even more damning to the word-fixated Deni Associates court. According to one major thesaurus (again, the one on my bookshelf at home) synonyms for "absurd" are: "preposterous, ridiculous, ludicrous, foolish, silly, laughable, crazy, irrational, senseless, pointless, meaningless, nonsensical, illogical, unreasonable, self-contradictory, impossible, implausible, outlandish, untenable, unsound, incongruous, risible, mad, loony; see also stupid." Further exposition by the thesaurus is equally damning: "absurd means laughably inconsistent with what is judged as true or reasonable [an absurd conclusion]."

In both the dictionary and the thesaurus, absurdity is judged according to whether a position is reasonable. Things insufficiently reasonable are absurd. Presumably, something at odds with the objectively reasonable expectations of one party to a contract at least verges on the absurd,

199. Apparently this is not much of a worry for textualists, either. See Note, Looking It Up: Dictionaries and Statutory Interpretation, 107 HARV. L. REV. 1437, 1438-47 (1994) (observing that the United States Supreme Court, including noted and self-described textualist Justice Antonin Scalia, makes apparently random use of different dictionaries defining key terms of statutes, and then gives legal effect to such terms in accordance with dictionary meaning; the Court made reference to 27 different dictionaries during 1988-94 period).

200. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 5 (10th ed. 1996). The definition of the adjective absurd continues “also: lacking order or value 3: dealing with the absurd or with absurdism.” As a noun, “absurd” means: “the state or condition in which human beings exist in an irrational and meaningless universe and in which human life has no ultimate meaning.” Id. These definitions are obviously less helpful to understanding what type of contract construction or enforcement of literal contract language would be absurd. However, one might consider it more than a little irrational if a business purchases liability insurance only to find no coverage from that liability insurance when the business becomes the target of a more or less conventional lawsuit against the policyholder growing out of ordinary business operations known to the insurer at the time the policy was issued.

201. WEBSTER’S NEW WORLD THESAURUS 5 (Charlton Laird ed., 3d ed. 1997) (emphasis added). Antonyms for “absurd” are “sensible, logical, rational.” Id.

202. See id. at 5.
perhaps crossing the line. Thus, like the proverbial vicious circle, the Deni Associates court has turned back on itself. It wants to prevent the broad textual boilerplate contained in insurance policies from absurdly stripping policyholders of coverage, but refuses to engage in the analysis required to determine in a principled way whether the exclusion sought by the insurer produces an absurd result: whether the insurer’s construction of the policy is greatly or ridiculously unreasonable.

Like a textualist should, I emphasize the first meaning given in the dictionary,\(^{203}\) which defines absurdity according to its unreasonableness. However, the secondary definition of absurd—lacking rational or orderly value—also suggests that the Deni Associates court may have erred in denying coverage, or at least should have engaged in a more searching, functional analysis of the insurance policy at issue. Insurance is sold as a product imparting “peace of mind” to the policyholder: assurance that the insurer will defend and pay ordinary types of liability claims that threaten the operation and fiscal health of the business. The insurer’s obligation is subject to the policy limits and other essentially obvious or fair considerations such as the insured’s paying premiums, cooperating, and providing the insurer truthful information. The rational and orderly operation of liability insurance would seemingly require that the CGL policy cover common sources of liability claims and their near cousins. This is not the case where such claims are clearly and appropriately excluded by the policy or the context of the insurance transaction—or perhaps where coverage is dramatically inconsistent with the nature of the risks assumed by the insurer and the attendant underwriting realities. When a CGL policy provides no coverage simply because the otherwise unexceptional tort happens to involve a chemical, the order and rationality of the “all-risk” insurance policy, an order and rationality fostered by insurers and customers alike since World War II, is clearly upset, if not quite eliminated. Denying coverage merely because of the incidental presence of a pollutant in a claim thus tends toward the absurd.

A second problem of the Deni Associates court’s articulation of an absurd result test for policing contract construction rather than use of reasonable expectations analysis is that the court suggests that it will not countenance absurd results—but what about bad results? If it is

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\(^{203}\) At least I would think that one who places great legal import in dictionary definitions would place most emphasis on the first, preferred meaning in the dictionary. But the Supreme Court of Florida in the second and final Dimmitt Chevrolet decision requiring pollution discharges to be abrupt in order to be covered under the former “sudden and accidental” pollution exclusion spurned the preferred dictionary meaning of “sudden” (“happening or coming unexpectedly”). See Dimmit Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 705 (Fla. 1993); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1176 (10th ed. 1996). For discussion of Dimmit Chevrolet, see supra notes 138-43 and accompanying text.
permissible to escape the straightjacket of a contextual, isolated word literalism in order to avoid "absurd" outcomes, why does the court lack power to escape literalism in order to avoid results that are "bad," "unfair," or "unjust?" Why can't the court ensure that contractual arrangements fulfill their purpose and square with the intent and objectively reasonable expectations of the parties?

If a court eschews cramped word literalism to avoid absurd results, it nonetheless is "rewriting" the contract away from its dictionary definition. According to the textual literalism embraced by the Deni Associates court, any departure from a word's literal meaning is bad, lawless rewriting. But if this is true when the nonliteral interpretation is used to achieve a "better" construction of the contract or to avoid a "bad" or "unfair" interpretation, it is equally true when done to avoid the "absurd" result.

All lawyers and judges presumably agree that courts should not enforce contracts so literally as to bring about absurd results. That is the law of every jurisdiction.204 If this is so, why must a court not only accept, but embrace, (as did the Deni Associates court) results that may not be "absurd" but seem clearly bad, unwise, unfair, or inconsistent with the overall transaction?

In my view, there is no persuasive answer to this question. If it is permissible to depart from textual literalism where the threatened result is absurd, it also must be permissible to take a less hidebound approach in order to prevent "poor" or "unwise" constructions that border on the absurd and are at odds with the expectations or intent of the parties or their purpose in contracting. An effective judiciary can unleash itself from textual literalism to foster wiser contract doctrine without waiting for a result so bad it qualifies as absurd as a prerequisite for untying its hands.

One response to this criticism that the Deni Associates majority could make is to note that I am arguing for a departure from textual literalism when literalism produces unreasonable, unwise, or unfair results in light of the intent and purpose of the contract at issue. But the court is willing to depart from textual literalism only when the result would be "ridiculously unreasonable." A result merely unreasonable or even highly unreasonable is insufficient in the eyes of the Deni Associates court to permit anything less than literal and broad construction of the insurance policy. That view may distinguish the absurd from the merely unreasonable, but it is a distinction that accomplishes little, save excessive fidelity to a simplistic school of contract analysis. For decades, the rule of law has been that exclusions (and other provisions tending to defeat coverage) in an insurance policy are to be strictly construed against the

204. See generally FARNSWORTH, supra note 92, ch. 7. This is also, of course, the law of Florida. See State Farm Mutual Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986); Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979).
Deni Associates turns this rule on its head by construing exclusionary language broadly in order to defeat coverage, an approach and result verging on the absurd.

A third problem with the court’s rejection of reasonable expectations analysis, but assurance that the absurd result escape hatch still exists, is the Deni Associates result itself. Judged by even the high standard and dictionary definition of “absurd” as “ridiculously unreasonable,” it is not altogether clear that the actual holding of Deni Associates is not absurd. Justices Wells and Overton saw the broad interpretation of the pollution exclusion “swallowing” coverage, at least in the Deni Associates ammonia blueprint machine spill. An exception that swallows coverage sounds uncomfortably close to an absurdity. Judge Klein in the Fourth District Court of Appeal, joined by Judges Polen and Pariente had a similar view. The trial judge implicitly agreed, and appeared even less hospitable to the insurers’ assessments than did the appellate judges.

As discussed in Part V, below, which develops a working definition of absurdity in the context of insurance coverage, the Deni Associates result was more than merely unwise and qualifies as absurd. Although the Fogg spraying case received a vote for coverage only by the trial judge, the definition of absurdity drawn from the dictionary, and that developed in Part IV, suggests that the coverage denial in Fogg was perhaps even less justified, more “absurd” if you will, than that of Deni Associates.

Reconsider the facts of Deni Associates and Fogg. In Deni Associates, the insured’s agents knocked over a blueprint machine, spilling ammonia, which required the clearing of much of an office building. Like Justices Wells and Overton, I regard this not so much as a pollution incident but as a workplace accident that simply involved chemicals. The presence of a toxic chemical in a small (but obviously potent) dose as an adjunct to the company’s operations was not enough to convert the matter from a garden variety tort claim against a business into a pollution claim, even though the ammonia fumes had a good deal to do with both the claim and the extent of the damages.

Despite the presence of chemical fumes giving rise to the claims, the

206. See Deni Assocs., 711 So. 2d at 1141 (Wells, J., concurring in part and dissenting in part).
207. See State Farm Fire & Cas. Ins. Co. v. Deni Assocs., Inc., 678 So. 2d 397, 406-07 (4th DCA 1996) (Klein, J., concurring in part and dissenting in part), aff’d, 711 So. 2d 1135 (Fla. 1998). Fourth District Court of Appeal Judge Barbara Pariente was elevated to the Supreme Court of Florida in February 1998 and did not participate in the Deni Associates decision in the supreme court.
208. See id. at 399-400.
209. See id. at 399.
common sense observer would easily distinguish between the ammonia spill in *Deni Associates* and genuine pollution such as wastewater discharge on land or water, or smokestack emissions. The fact that the office building in *Deni Associates* was evacuated because of fumes is of relatively little import if the claims are viewed with some perspective. Agents of Deni Associates might just as easily have caused the building's evacuation by carelessly starting a fire because of overloading an electric outlet, or leaving rags in a closet, or discarding a smoldering cigarette into a wastebasket, or backing a delivery truck into a water main or a key pillar supporting the building. Thus, the *Deni Associates* claim does not become anything really extraordinary merely because of the presence of ammonia. By contrast, true pollution claims tend to allege long-term, widespread contamination of a wide area involving persons other than just those in immediate proximity of the insured tortfeasor (as were the other office building tenants). Thus, to exclude Deni Associates from the standard liability coverage sold by State Farm seems not only unreasonable, but ridiculously unreasonable.

Still, there is the matter of the chemical and its fumes making the situation worse than if the machine that tipped over had contained something harmless like water. Despite the cold reception experienced in the supreme court, the policyholder in *Fogg* had no greater degree of "pollution" associated with the liability claims against it. Recall that the Fogg partnership became liable because its agents erred in conducting crop spraying and doused two bystanders with Ethion.\(^\text{210}\) As in *Deni Associates*, the presence of the chemical made things worse than would have been the case had the plane been spraying water. But the fact remains that crop-dusting is what an agricultural insured frequently does as part of its business—and things can go wrong causing injuries when small aircraft regularly conduct this process. The helicopter could, for example, have crash-landed on the bystanders and killed them. The helicopter could have crashed into a building or school bus. The helicopter could have struck a powerline, shutting down area businesses and leading to the business interruption claims reflected in the *Deni Associates* case. The helicopter could even have been irrigating from the air and injured the bystanders with a direct hit of water (a nonpollutant) under high pressure.

Although the actual injuries in *Fogg* were chemically related, which undoubtedly accounts for the unanimity against the policyholder partnership in the high court, there is nothing about the circumstances of the *Fogg* injury claims that suggests it be characterized as a "pollution" claim rather than a mere errant operations claim. For example, if the partnership's security guard was overzealous in subduing a trespasser with
MACE, would a reasonable layperson or jurist think of the resulting claim as one caused by "pollution?" This encroaches upon or enters into the realm of the reasonably ridiculous absurd result. Stripping the Fogg partnership of its CGL policy coverage merely because the errant helicopter injured with Ethion rather than with its rotors or fuselage is uncomfortably similar.

As a matter of fairness and construction of the insurance policy as a whole, one would be remiss unless it was noted that Deni Associates' insurer must have been at least constructively aware that architects use drafting machines, which contain ammonia, which can spill and give off fumes. Yet State Farm insured Deni Associates and never appeared to disclaim coverage for torts resulting from ordinary business operations, either through policy language or other communications. Similarly, Farm Bureau constructively knew that farmers spray crops and it never expressly disclaimed coverage for crop dusting mishaps. Indeed, Farm Bureau's refusal to cover a farmer for a crop dusting tort is particularly hard to justify in light of that insurer's longtime marketing strategy of portraying itself as the farmer's friend and an insurer that understands the farmer's business.

B. Deni Associates as a Microcosm of Larger Judicial Error

Although Deni Associates is a disastrous opinion, it hardly stands alone. In their zeal to fend off reasonable expectations analysis, other courts, like the Deni Associates court, have rendered decisions inconsistent with other contract principles, or overlooked available avenues of resolution that would not require an assault against the reasonable expectations doctrine. Many judges are so adverse to or fearful of reasonable expectations analysis that they are driven to bad results, through poor analysis. As noted above, much of the criticism of reasonable expectations analysis, particularly of the Keeton "rights-at-variance" form,

211. See, e.g., Casey v. Highlands Ins. Co., 600 P.2d 1387, 1390-91 (Idaho 1979) (reversing earlier case adopting reasonable expectations approach, and strictly enforcing "visible marks" requirement for burglary insurance claim despite overall nature of policy and no seeming doubt as to bona fides of claim); see also Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861, 868-69 (Okl. 1996) (citing cases that use expectations analysis only when a contract is ambiguous). Arguably, this is an unnecessary exercise if ambiguities are to be construed in favor of the nondrafter.

212. See supra note 155 (discussing Allen v. Prudential Property & Casualty Insurance Co., 839 P.2d 798 (Utah 1992), in which the court attempted to refute the legitimacy of expectations analysis based on highly suspect view that insurance policy forms were approved by insurance commissioner, which made interpretation of those forms in any manner other than textual literalism a separation of powers problem).

213. See supra notes 16-17 and accompanying text.
asserts that the expectations approach violates a basic principle of American law: freedom of contract.\textsuperscript{214} 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.

As Keeton and others have detailed, insurance contracts are contracts of adhesion that are standardized and complex. Due to necessity, they are broadly worded and even “overdrafted” to cover a wide range of potential events,\textsuperscript{215} 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.\textsuperscript{216} 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. Consequently, a rigid view of the power of the dictionary definition of policy text seems misplaced in the insurance context.

Furthermore, reasonable expectations analysis hardly guts the generally textualist formality of contract and insurance law. Even in its strongest rights-at-variance form, the Keeton concept of reasonable expectations analysis places heavy emphasis on policy text and surrounding circumstances. The policyholder does not prevail, particularly when text is clear, unless contextual factors strongly favor 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.

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 coerced into involuntary arrangements. The point is not to venerate contract text or dictionary

\textsuperscript{214} Two sources making this argument at length and with considerable force are: Baker, \textit{supra} note 4, at 17-23; Ware, Comment, \textit{supra} note 4, at 1487-93.

\textsuperscript{215} Insurers have admitted to “overdrafting” policy language in order to cast an exclusionary net so wide that it cannot be linguistically avoided—but also have 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. \textit{See}, e.g., Texas State Bd. of Ins., 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 (Oct. 30, 1985), Vol. I, at 6-10, \textit{excerpted in part in} STEMPEL, \textit{supra} note 1, at 116-18 (Supp. 1998) (detailing insurance representatives description of the “absolute” pollution exclusion as “overdrafted” but that insurers would not seek to deny coverage on all claims that incidently involved an irritant or toxic substance).

\textsuperscript{216} Much of this—but not all—holds true even where the policyholder is large, wealthy, and commercially “sophisticated”. \textit{See} Jeffrey W. Stempel, \textit{Reassessing the “Sophisticated” Policyholder Defense in Insurance Coverage Litigation}, 42 DRAKE L. REV. 801, 931-57 (1993).
definitions in and of themselves. Insurance contracting, even more than most modern contracting, is not totally free, and perhaps not very free at all. Even outside of the insurance context, the government (including legislatures, executive agencies, and 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{217} Additionally, human activity is generally widely regulated in modern society, with the operation of the insurance industry perhaps more regulated than most commercial activity this side of the securities or food and 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 interpretive tool for construing contracts so that courts are not required to completely strike contract terms that are unfair if read literally. Similarly, the reasonable expectations approach provides an alternative to simplistic application of a strong form of \textit{contra proferentem}, and also provides the courts with a route other than simplistic enforcement of policy text whose meaning is suspect or tending toward the absurd when applied literally to the context of the dispute.\textsuperscript{218} 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 reasonable 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-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{219} Corbin observed:

\begin{quote}
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
\end{quote}

\textsuperscript{217} See \textsc{Stempel}, \textit{supra} note 1, § 7.1.
\textsuperscript{218} See \textsc{Feit}, Note, \textit{supra} note 54, at 1113-14.
\textsuperscript{219} \textsc{Arthur C. Corbin, The Law of Contracts} § 1, at 1 (1950) (One Volume Edition).
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{220}

Of course, thorny questions 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 these 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 look 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 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), reasonable expectations analysis seems more of a departure and hence less legitimate. Reasonable expectations then becomes something of a "radical" doctrine that cannot be fully embraced. Courts taking this view further exacerbate the practical problem of interpreting insurance policies by tending not to use reasonable 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, with a functional view of the policy in question and its intended purpose. Logically, the parties' expectations shed light on policy meaning just as this information sheds light on the meaning of non-insurance contracts. But this potential use of reasonable 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 interpretative tools available to the courts. Although much contract law scholarship and
precedent has stressed the textual and formal, 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. As previously discussed, the broader, functionalist view, frequently associated with Professors Corbin and Farnsworth, appears to have gained ascendency in the years after World War II and culminating in the Second Restatement, although the 1980s and 1990s have witnessed something

221. See, e.g., SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACT (original ed. 1936; 4th ed. 1990 and supplements).

222. See, e.g., CORBIN, supra note 219, § 1; FARNSWORTH, supra note 92, § 7.11. 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 and Farnsworth side of the debate and against Williston. See JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 47 (1970). In discussing "Standards of Interpretation," the authors state "there is no 'lawyers' Paradise' where 'all words have a fixed, precisely ascertained meaning,,'" id. at 89, setting off the authors' perspective from those of evidence expert James Bradley Thayer, a Harvard Law faculty contemporary of contract law formalist Samuel Williston. See id. at 89 n.2 (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 88, at 119-21.

223. See supra notes 195-200 and accompanying text.

224. See RESTATEMENT (SECOND) CONTRACTS (1981); SCHA BER & ROHWER, supra note 87, § 88, at 147 (authors of basic contract law text designed as primer and study aid for first-year law students state that "the purpose of contract law is to protect the reasonable expectations of persons who become parties to a bargain"). The Schaber and 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 ch. 5 (5th ed. 1990); FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS (3d ed. 1986).

In particular, Schaber and 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." SCHA BER & ROHWER, supra note 87, at 148. They also note that even under the purportedly formalist or textualist views of Williston and the First Restatement, for which Williston served as reporter, a number of nontextual factors were proffered as interpretative tools where the contract text at issue was not indisputably clear. See id. at 150-53.

The approach of Corbin, Farnsworth, and the Second Restatement 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 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 § 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. This is hardly a farfetched scenario in the context of
of a formalist revival, particularly in the United States Supreme Court.\footnote{225} However, this formalist recidivism,\footnote{226} one largely decried by commentators,\footnote{227} hardly suggests the absence of a place for reasonable expectations analysis at contract law's figurative table.\footnote{228}

The notion of freedom of contract has been rhetorically oversold.\footnote{229} Similarly, the notion that contracting parties, even the drafter, choose all words in a contract carefully and with a specific intent is hopelessly wrong much of the time. Consequently, judicial scrutiny of contracts to ensure a 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 willing to give under their interpretation of the

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\footnote{225} See Jean Braucher, The Afterlife of Contract, 90 NW. U. L. REV. 49, 61-75 (1995) (viewing recent Supreme Court decisions as formalist and rendered as if Court was "blinded by a thick fog of free market rhetoric"); G. Richard Shell, Contracts in the Modern Supreme Court, 81 CAL. L. REV. 431 (1990) (finding Supreme Court contract cases of the 1980s governed by unrealistically rigid textualism, formalism, and insensitivity to pragmatic policy concerns); Jeffrey W. Stempel, Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent, 62 BROOK. L. REV. 1381, 1412-17 (1996) (criticizing Court's interpretation of arbitration clauses in contracts as adopting erroneous view of objective meaning and reasonable reach of contract language).

\footnote{226} Although the standard "story" of the march of 20th century American jurisprudence is of a retreat 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—something considerably more complex than a "pendulum swing" alternating between periods of formalist and functionalist dominance. See DUXBURY, supra note 89, at 2-5; see also id. at 10 (finding the realist revolt against formalism was "by no means as straightforward as some commentators have cared to suggest"); id. at 21 (even disciples of highly formalist 19th century Harvard Law Dean Christopher Columbus Langdell (such as Samuel Williston) found Landell's approach too narrow); id. at 47 (progressive judges such as Benjamin Cardozo exhibited both formalist and functionalist traits); id. at 55 (noting Harvard Law Dean Roscoe Pound's professed sociological jurisprudence attacking as "mechanical" jurisprudence the high formalism of Langdell); id. at 60 (stating that Pound and Oliver Wendell Holmes were both formalist and anti-formalist); id. at 301-419 (noting that the modern "law and economics" movement has elements of both formalism and functionalism); see also STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 156-68 (1994) (discussing "Contract's Two Stories," regarding the nature and adequacy of consideration as an example of ongoing tensions in the law).

\footnote{227} See sources supra note 232. See generally Symposium, 90 NW. U. L. REV. 1 (1995) (containing articles by a variety of authors discussing aspects of Grant Gilmore's 1975 book, The Death of Contract, with most authors criticizing the United States Supreme Court's recent approach of rigid style textualism and formalism).

\footnote{228} See SCHABER & ROHWER, supra note 87, § 6, at 11 ("Contract law is concerned with protection of the reasonable expectations of the parties").

\footnote{229} See supra notes 225-27 and accompanying text.
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.

Rather than continue to debate the merits of the reasonable expectations concept itself, or to argue over whether express consideration of the parties' reasonable expectations adds anything to traditional ambiguity analysis in which the contract drafter always loses if the wording is not sufficiently clear, courts should take a more comprehensive look at the role of policyholder and insurer expectations. Specifically, courts should examine 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 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, use of reasonable expectations analysis can assist the court in determining whether policy language can or should be read literally—or whether a dictionary definition is accurate for use in gauging the meaning of a word as used by the contracting parties. 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 by a passing truck? In this 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 pollution exclusion should be read literally or whether it is ambiguous.

When courts reject the potential utility of reasonable expectations analysis they are left with an artificially bipolar choice of either reading the language literally, or broadly, in the wooden manner of a dictionary. In the case of the pollution exclusion, this expands the exclusion and limits coverage. But in other instances (e.g., the meaning of "damages"), a dictionary-oriented approach has the effect of expanding coverage, even if the parties may have intended or expected a more narrow meaning that restricted the concept of damages to judgments for monetary relief in court rather than anything that entails an expenditure of funds.

The absolute pollution exclusion is an example of the type of insurance
policy provision for which courts should apply even-handed 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. This use of reasonable expectations as background context 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, and the identity of the parties. 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 policyholder become an important factor in deciding whether to give the benefit of the doubt to the policyholder or to the insurer.

230. Two recent cases provide good examples of the 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*, 686 N.E.2d 997 (Mass. 1997), and *American States Insurance Co. v. Koloms*, 687 N.E.2d 72 (III. 1997), the highest 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. The exclusion states that it excludes liability claims related to any "actual, alleged or threatened discharge, dispersal, release or escape of pollutants," with pollutants defined as "any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Gill*, 686 N.E.2d at 999 n.4.

In *Koloms*, the Illinois Supreme Court faced a situation where the claim was against an insured landlord for failure to properly maintain a building furnace which emitted the carbon monoxide fumes that caused the injuries resulting in the claim. *See Koloms*, 687 N.E.2d at 74. 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. *See id.* at 78-79. Claims for the type of injuries traditionally arising from nonpolluting forms of insured negligence were not to be excluded. *See id.* at 79. Hence, despite the linguistic breadth of the exclusion, the Illinois Supreme Court limited the reach of the exclusion in order to render a coverage determination it viewed as more consistent with the purpose of the CGL policy and the exclusion, as well as the intent of the drafters. *See id.*

The Massachusetts court stated that the absolute pollution exclusion "should not reflexively be 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.'" *Gill*, 686 N.E.2d at 999. 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 was not thwarted by the exclusion or the contaminant's role in bringing about the injury. *See id.* at 1000-01. 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 cost millions of dollars in litigation expenses.

231. Other indicia of contract meaning could be weighed along with the expectations of the
As the foregoing discussion suggests, the reasonable expectations concept has substantial utility even if it is not asserted in its strong form of overcoming explicit policy provisions. Courts can use reasonable expectations thinking 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.  

parties, 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); and
- 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 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.

232. Unfortunately, the Florida Department of Insurance, although supporting coverage for Deni Associates and the Fogg partnership, rejected this assessment and argued in its amicus brief in Deni Associates that Florida should reject reasonable expectations analysis and rely only upon
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 have generally moved away from the traditional rule and permit nontextual matter to assist the court in determining whether text is ambiguous. 233

Viewed from this perspective, use of the reasonable expectations inquiry to assess text is not anti-textual; it seeks to give the text its correct meaning rather than crucify it on the cross of hyper-literalism. Similarly, reasonable expectations analysis does not denigrate the intent of the parties or the purpose of the contract. Rather, the reasonable expectations inquiry seeks to vindicate party intent and contract purpose. Consequently—and contrary to much of the traditional wisdom—the reasonable expectations approach serves the concepts of freedom of contract and market transaction. In the cases already identified by Judge Keeton—unfair surprise or unconscionable advantage—an objective reasonable 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.

If the courts are too reverent toward text and too hesitant to utilize the traditional contra proferentem rule and absurd result rules in resolving insurance coverage disputes. See Deni Assocs., 711 So. 2d at 1140 n.4. According to the department brief "[a]dopting the reasonable expectations doctrine will negate the traditional construction guidelines and create greater uncertainty. This Court should not resort to the reasonable expectations doctrine because it will only spawn more litigation to determine the parties' expectations." Id. Like the Deni Associates court, the insurance department apparently misunderstood the reasonable expectations doctrine and erroneously believed that expectations analysis requires an adjudication as to the actual subjective expectations of the litigant insured.

In retrospect, of course, the department's position was tactically unwise. It provided the court with the opportunity to assert that even the department charged with protecting insureds opposed reasonable expectations analysis. But the Deni Associates result illustrates just how poorly "traditional construction guidelines" protect insureds in the hands of the current Supreme Court of Florida.

Apart from its miscues in the Deni Associates case, the department's position is wrong in a greater sense. On more than a few occasions, insurance policy language is ambiguous, but the insured could have no expectation of coverage. In such cases, the insurer should not lose merely because it had the misfortune to draft an unclear provision, and the insured should not win when it has no expectation or clear contractual right to coverage.

233. See Abraham, supra note 40, at 539-40; see also Pacific Gas & Elec. Co. v. G.W. Thomas Drayage, 442 P.2d 641, 645 (Cal. 1968) (frequently cited as an example of modern trend of courts considering extrinsic matter as an aid to determining whether written contract language is ambiguous).
rights-at-variance reasonable expectations, the courts become 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 be read literally or broadly to alter such a bargain and its accompanying expectations, 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 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 also should be respected rather than routinely undermined because the insurer did a suboptimal job of drafting policy language.

V. THE REMNANTS OF REASON: A METHOD FOR APPLYING THE ABSURD RESULT TEST TO FUTURE INSURANCE COVERAGE CASES

After Deni Associates, the reasonable expectations concept is not available—either at the threshold or as a tiebreaker—to assist the court in resolving difficult coverage questions caused by technically clear but complex, contextual, or competing terms in an insurance policy. The resulting insurance and contract law of Florida is accordingly impoverished, although perhaps not destitute. As noted above, the court stated that in the future it would not apply textual literalism to reach an absurd result. In other words, the pollution exclusion and other exclusions presumably will not be given a dictionary-like and broad application if the effect is to deny coverage in cases were coverage seems indisputably apt.

Despite the problems of the absurd result standard of contract construction and its relative inferiority to reasonable expectations analysis, the absurd result backstop still can provide a means of avoiding the worst pitfalls of the textual-literal approach. But the question remains: What is an absurd result? How may it be defined and applied? As discussed above, the dictionary defines an unreasonable result as one that is "ridiculously

234. See generally Edward A. Dauer, Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction, 5 Akron L. Rev. 1 (1972) (noting that standard form contracting does not meet the 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).

235. See Deni Assocs., 711 So. 2d at 1140.
unreasonable.  Despite a strong argument that the coverage denials in \textit{Deni Associates} were ridiculous, the court was implicitly unpersuaded. If it had engaged in an inquiry as to reasonableness, it may well have found the insurer’s interpretation unreasonable, but not ridiculously so. A subsequent case somewhat more jarring than \textit{Deni Associates} might qualify as a ridiculously unreasonable denial of coverage. Although the \textit{Deni Associates} case itself appeared to close the door to a reasonableness analysis, one can make a compelling case that the reasonableness of a coverage denial must be assessed in order to determine whether the result sought by either litigant is “absurd.”

Another means of assessing whether a result is unreasonable is suggested by the \textit{Deni Associates} dissent: It is absurd when an exclusion vitiates too greatly the mainstream coverage that would otherwise be available.\textsuperscript{237} But this standard is problematic because it requires the reviewing court to agree upon exactly what is to be provided by mainstream CGL or other insurance coverage. Also, this eminently reasonable-sounding yardstick offered by Justices Wells and Overton failed to prompt the other justices to see the compelling nature of Deni Associate’s claim for insurance coverage. It even failed to help Justices Wells and Overton realize the degree to which the Fogg partnership had a compelling argument for liability coverage for the claims arising from the spraying mishap.

My own suggestion for a working yardstick for applying the absurd result standard in policing insurance controversies is this:

An absurd result ensues when an insurance policy exclusion, if read literally, or construed broadly, would preclude coverage in situations where the claims arise for relatively common mishaps in the course of the insured’s normal operations and where the nature of the underlying claim does not fundamentally fit the purpose for which the exclusion was incorporated into the policy.

Literal or broad construction of a policy provision either to create or to deny coverage creates an absurd result where the resulting decision is negated by the objectively reasonable expectations of either insurer or insured, or where finding coverage is inconsistent with the purpose of the insurance arrangement, the function of insurance, or public policy.\textsuperscript{238}

\textsuperscript{236} See supra note 205 and accompanying text.

\textsuperscript{237} See \textit{Deni Assocs.}, 711 So. 2d at 1141 (Wells, J., concurring in part and dissenting in part).

\textsuperscript{238} Even in situations where requested coverage runs counter to the reasonable expectations of the insurer and is not supported by the policyholder’s objectively reasonable expectations, the policyholder still may obtain coverage if the factual circumstances of the dispute present a case of waiver, equitable estoppel, or promissory estoppel. In the rare case where the insurer and the
Overlooking Deni Associates as an isolated, erroneous decision, one could apply this functional definition of the absurd result test to assess the types of cases that have already arisen in connection with the CGL policy pollution exclusion or which might be anticipated. Consider a suit against a landlord or a furnace installer or service person for carbon monoxide poisoning. Although carbon monoxide is a deadly gas, one that "pollutes" or "irritates" its victims to death, the better reasoned cases have ruled that the absolute pollution exclusion does not bar liability coverage for such claims. The insurer must defend and indemnify its policyholder when it faces such claims. 239 These decisions have not rested upon the reasonable expectations doctrine as such, but have interpreted the pollution exclusion in light of party intent and contract purpose.

These decisions also could be supported under an absurd result standard. It would be ridiculously unreasonable to deny coverage to the landlord whose tenants dies from carbon monoxide poisoning due to a defective furnace when the landlord is clearly covered for deaths related to a fire, failure to provide adequate security, or food poisoning (if the landlord is a dormitory or extended care facility). All of these causes have just as much potential to kill or injure tenants en masse. The claim against the insured is not one of "pollution" liability, even though the agent of injury meets the definition of "pollutant." Denying coverage for carbon monoxide claims also produces an absurd result because such claims clearly were covered prior to the revision of the pollution exclusion; however, there was no announcement of a change in the scope of the CGL policy and the understanding of the parties regarding coverage.

Similarly, where the insured is a contractor installing a product or constructing a building, coverage should be available for claims against the insured even if the claim in part relates to chemical irritants. For example, a floor may be installed in a new home and the owner may have an allergic reaction to fumes given off by grout used in the tile. The same could occur due to odor given off by paint, insulation, or wallpaper glue. In all these cases, it would be unreasonably ridiculous for the insurer to deny coverage. 240 All of these hypothetical insureds are being sued for matters


arising out of their isolated provision of specific services normally encompassed by the CGL insurance policy.

For example, the tile installer would be covered if the patron slipped on improperly installed tile and sued. It is absurd to suggest that the tile installer who is not negligent but merely has the bad luck to use grout that irritates the patron has no coverage, while the negligent installer is fully covered. The pollution exclusion was never designed to preclude episodic claims against commercial entities arising out of ordinary job activities. Further, the nature of these claims does not involve the long-tail, long-latency, insidious operation, and wide dispersal that made pollution claims so threatening to the actuarial calculations of the insurance industry, and spawned the redrafting of the pollution exclusion into its current "absolute" form.

Similarly, the manufacturers of grout, paint, insulation, glue, and the like should be covered under this standard. The normal and proper application of the insured's product is not "pollution" except in the most unusual and extreme of circumstances. Denying coverage to the paint manufacturer for allergic reaction is ridiculously unreasonable. Cases involving lead poisoning claims arising out of children's ingestion of paint chips support this point. Although exclusions expressly disclaiming coverage for lead poisoning claims present more difficult problems and have been upheld by courts, the pollution exclusion alone should not be considered sufficient to preclude lead poisoning claims directed at the paint manufacturer. Paint—at least to the normal observer—is not a pollutant and is not considered "released" or "discharged" when flakes of it are chewed on by curious youngsters, or when the vapors naturally given off from installation give rise to claims.\footnote{See, e.g., Technical Coating Applicators, Inc. v. United States Fidelity & Guar. Co., No. 5:96CV221-RH (N.D. Fla. 1996), appeal pending, No. 97-2448 (11th Cir.).}

In attempting to flesh out a working definition of the "absurd result" principle of contract construction in the wake of Deni Associates, one struggles with the inherent circularity of the exercise. To determine what is absurd, one must consider what is reasonable—but Deni Associates suggests, to paraphrase Mae West, that reason has nothing to do with the matter. Perhaps given time to reflect, and review of a more sympathetic case (although both Deni Associates and Fogg were sympathetic cases for...
the policyholder), the court will appreciate the importance of reasonable expectations analysis to effective policing of contract language to avoid absurd results, even if the court continues to reject the reasonable expectations doctrine in its rights-at-variance form advocated by Judge Keeton.

Unless the court is willing to look beyond the dictionary to decide future cases, the absurd result yardstick set forth in *Deni Associates* becomes either dead letter or a matter of a future majority’s “gut” feeling. Neither result appropriately serves the causes of contract and insurance law.

**CONCLUSION**

Perhaps the most apt assessment of the *Deni Associates* opinion is borrowed from a most unlikely source, Marlon Brando’s character in “On the Waterfront,” who delivered the memorable “I coulda been a contender” line in a soliloquy in which he recalled days of being on the verge of boxing excellence only to have been seduced by the path of least resistance toward a life of petty thuggery rather than championship pugilism.242 The *Deni Associates* opinion, through the certified question regarding the reasonable expectations of insurers and policyholders, presented the Supreme Court of Florida with a direct and timely opportunity to make a reflective assessment of the reasonable expectations concept, and to move in the doctrinal direction of making contracts (including insurance policies) fulfill their purpose. But instead of becoming a serious contender in the ongoing national debate over the role of reasonable expectations in insurance matters, the Supreme Court of Florida in *Deni Associates* rendered a hidebound hymn to an unrealistic and (one hopes) outdated contract textualism, perhaps to a word literalism that never existed, even for formalists like Samuel Williston and Joseph Beale.243 In the ring of

242. See ON THE WATERFRONT (Columbia Pictures 1954).

243. Williston, of course, was the century’s leading contracts scholar prior to Corbin’s ascendancy and is generally seen as more of a textualist and formalist than currently prominent contract law experts such as E. Alan Farnsworth. Beale, a professor at Harvard Law School during the early 20th century “was a special target” of the legal realists. See BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 153-54 (1994):

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 ultraformalism thus became a lightning rod for the Realist’s criticisms, and even their
jurisprudential conflict, few contenders have hit the canvas with such a thump. The Deni Associates opinion ushers in a disquieting era of contract and insurance law. This is true not only for the ten million residents of Florida, but others who in the future find their contract rights subdued as a result of the influence of Deni Associates and similar precedent, making contract meaning subject to the unrealistic and unreasonable formalism, insurer favoritism, and corresponding misunderstanding of insurance agreements.

ridicule. Some members of the Yale Law faculty even penned a mocking poem about Beale and posted it in the faculty lounge. 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.

Id.