

1998

Symposium Introduction

Peter N. Swisher

University of Richmond, pswisher@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Insurance Law Commons](#)

Recommended Citation

Peter Nash Swisher, *Symposium Introduction*, 5 Conn. Ins. L.J. 1 (1998-99).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

SYMPOSIUM INTRODUCTION

*Peter Nash Swisher**

On January 7, 1998, during the Annual Meeting of the Association of American Law Schools in San Francisco, the AALS Insurance Law Section presented a program entitled "The Insurance Law Doctrine of Reasonable Expectations after Three Decades." The following articles appearing in this law review symposium are the culmination of those program presentations. I would like to thank all the participants once again for their valuable contributions, both to our AALS Program, and to this Symposium issue. I also wish to thank Mr. Michael Ungaro and Ms. Susan Chmielecki and their editorial staff at the *Connecticut Insurance Law Journal* for their invaluable assistance in making this symposium on the insurance law doctrine of reasonable expectations a reality.

One of our program speakers in San Francisco, Professor Robert Jerry, discussed the current jurisprudential clash between a classical Formalist approach to insurance contract interpretation in conflict with the modern Functionalist insurance law doctrine of reasonable expectations of the insured to coverage. Professor Jerry declared that today there is "a battle for the heart and soul—not only of contract law, or insurance law—but of American jurisprudence generally."

Although Professor Ken Abraham, in his symposium article, disagrees with this assessment, I do not believe that Professor Jerry has overstated this crucial observation. Today, as in the past,¹ there still exists a fundamental clash

* Professor of Law, University of Richmond Law School. Chair, AALS Insurance Law Section (1997-1998) and Symposium Coordinator.

1. See, e.g., William Vance, *The History of the Development of the Warranty in Insurance Law*, 20 YALE L. J. 523, 534 (1911):

Policies became overgrown with a wilderness of warranties, many of the most trivial character, in which the rights of the policyholder, however honest and careful, were in grave danger of being lost.... The unseemly struggle that ensued between the unwise insurers who sought to frame their policies as to compel the courts to allow them the dishonest benefit of forfeitures unsuspected by the insured, and the courts who sought by liberal construction, and sometimes distortion of the language of the policies, to do justice in spite of the warranties, resulted in a mass of litigation and confused precedent, the like of which cannot be found in any other field of our law.

between two competing theories of American jurisprudence—Legal Formalism and Legal Functionalism in an insurance law context. Other commentators, in addition to Professor Jerry, also have observed the surprising resurgence of Legal Formalism² in American jurisprudence generally³ and in American insurance law in particular.⁴ In an insurance law context, Legal Formalism is

Id. at 534.

2. Legal Formalism, also known as Legal Positivism, is the traditional view that correct legal decisions are determined by pre-existing judicial and legislative precedent, and the law is viewed as a complete, autonomous system of logical, socially neutral, principles and rules. Judging under this formalistic theory is thus a matter of logical necessity rather than a matter of choice.

See generally MARIO JORI, *LEGAL POSITIVISM* (1992). *See also* Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988) (discussing how Legal Formalism still serves a legitimate function in limiting judicial discretion or judicial activism); and Ernest Weinrib, *Legal Formalism: On the Imminent Rationality of Law*, 97 *YALE L.J.* 949 (1988) (questioning whether the law is essentially rational as the Formalists believe, or is essentially political, as the Functionalists believe).

Legal Functionalism, also known as Legal Realism or Legal Pragmatism, on the other hand, is based on the belief that the Formalist theory of a logical and socially neutral legal framework is rarely attainable and may be undesirable in a changing society, and the paramount concern of the law should not be logical consistency, but socially desirable consequences. Thus, where Legal Formalism is more logically-based and precedent-oriented, Legal Functionalism is more sociologically-based and result-oriented. *See generally* ROSCOE POUND, *JURISPRUDENCE* (1959); WILFRED E. RUMBLE, JR., *AMERICAN LEGAL REALISM* (1968); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

3. *See, e.g.*, GARY AICHELE, *LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE* (1990):

Not since the late 1920s and 1930s has there been such widespread interest in American jurisprudence. But it is no longer the [Functionalists] who are challenging established norms. The victories at the polls of political conservatives like Richard Nixon and Ronald Reagan [and George Bush] [and the Republican Congress] and the corresponding ideological commitments of many recent appointments to the bench, now threaten the continued prominence of a theory of judicial interpretation first articulated and advanced by the [Formalists]. Impossible only a decade ago, "mechanical jurisprudence" has made a remarkable comeback, and a new Legal Formalism may yet triumph as the principal mode of [judicial] interpretation of the federal courts.

Id. at x.

4. *See, e.g.*, Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 *OHIO ST. L.J.* 1037 (1991):

Legal Formalism today is far from a dead issue, at least in an insurance law context, and may in fact be in a resurgence, while Legal Functionalism, as exemplified by the insurance law doctrine of "reasonable expectations",

exemplified through the seminal writings and the major influence of Professor Samuel Williston.⁵ A bedrock principle underlying Professor Williston's classical Formalistic view of insurance contract interpretation is that an insurance policy must be construed and enforced according to general principles of contract law,⁶ and the courts therefore are not at liberty to reinterpret or modify the terms of a clearly written and unambiguous insurance policy.⁷ A number of courts today continue to follow Professor Williston's often-cited legal axioms regarding a contractually based interpretation of insurance contracts.⁸

may be experiencing a more limited judicial application than various commentators had initially predicted.

Id. at 1074. See also Bill Blum, *The California Supreme Court: Toward a Radical Middle*, 77 A.B.A. J. 48 (Jan. 1991):

[T]he court has also expressed a preference for deferring policy judgments affecting important social issues and commercial relationships to legislative decision making. Some court watchers see this as a healthy return to the proper role of the court as an interpreter, rather than a maker of law. Others. . . think the court is too deferential. . . . "In the area of the common law," says former Justice Grodin, "I think [the Lucas court's] conservatism is reflected in the notion that it is unwise to expand liability, that liability on the whole should be contracted, that contract principles should be applied strictly and without regard, or with very little regard, for differences in bargaining power between the parties, and in a tendency toward the insistence upon clear, bright lines and rules."

Id. at 50.

Justice H. Walter Croskey's Symposium article *infra* examines this significant change in California insurance law which, since 1990, now places significant limitations on the prior pro-insured California doctrine of reasonable expectations to coverage.

5. See, e.g. WILLISTON ON CONTRACTS (Walter H.E. Jaeger ed., 3d ed. 1998 Cum. Supp.). This treatise on contract law comprises 18 substantive volumes and three volumes of forms. Professor Williston also was the Reporter for the RESTATEMENT OF THE LAW OF CONTRACTS (1928).

6. See 7 WILLISTON ON CONTRACTS § 900 at 28 (Walter H.E. Jaeger ed., 3d ed. 1998 Cum. Supp.) ("[u]nless contrary to statute or public policy, a contract of insurance will be enforced according to its terms"). *Id.*

7. See 4 WILLISTON ON CONTRACTS § 610 at 512 (Walter H.E. Jaeger ed., 3d ed. 1998 Cum. Supp.). See also BARRY OSTRAGER & THOMAS NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES 3-5 (7th ed. 1994).

8. See, e.g., *Schultz v. Hartford Fire Ins. Co.*, 569 A.2d 1131, 1134 (Conn. 1990) ("[A]n insurance policy is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the real intent of the parties as expressed in the language employed in the policy.") See also *American Family Mut. Ins. Co. v. National Ins. Ass'n*, 577 N.E.2d 969, 971 (holding that coverage cannot be extended "beyond that

Although this classical Formalistic contractual approach to the judicial interpretation of insurance policies arguably brings greater uniformity and predictability to insurance contract disputes, a serious problem with this Formalistic interpretive approach is that insurance policies very often are *not* ordinary contracts negotiated by parties with roughly equal bargaining power. Rather, insurance policies very often constitute adhesion contracts, where the insurer has a superior bargaining position, and the insured often must accept the policy on a “take it or leave it” basis if the insured desires any kind of insurance coverage at all.⁹ Moreover, in the real world, few insureds take the time or the effort to read and understand their insurance policies, although under a Formalistic contractual interpretive approach they are generally bound by the terms of their insurance contracts, despite any reasonable policyholder expectation of coverage to the contrary.¹⁰ Indeed, if an insurance policy is sold as a “product” by appealing to an insured’s “peace of mind,” it is still generally construed and interpreted as a “contract,” at least by the insurer, when loss occurs.¹¹

In reaction to this rather strict Formalistic contractual analysis of insurance policies, a number of courts and commentators, beginning in the early 1970s, and largely influenced by the writings of Professor (now Judge) Robert

provided in the contract and we may not rewrite the plain and unambiguous language of an insurance contract”) (Ind. Ct. App. 1991); *Hybrid Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096, 1102 (Ohio 1992) (“Thus, in reviewing an insurance policy, words and phrases used therein ‘must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined.’”)

9. See, e.g., Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964). See also Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

10. See, e.g., *Powers v. Detroit Auto. Inter-Ins. Exch.*, 398 N.W.2d 411, 413 (Mich. 1986) (“[t]he common wisdom is that very few insurance policy purchasers read all or even substantially all of the purchased contract, and it is not guaranteeable that they would understand it if they did”). *Id.* at 413. See also JOHN A. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 8843 at 231 (rev. ed. 1981) (stating that most insureds never read their policies, and 90% of those who do read their insurance policies would not understand them).

11. See, e.g., Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1417 (1994) (observing that the insurance-as-contract approach is typically the baseline for judging an insurance relationship, and “[m]any, if not most courts—whether deciding in favor of insurance companies or insureds—rely heavily on a straightforward interpretation of the insurance company’s printed form”).

Keeton¹² and others,¹³ have applied a result-oriented Functionalistic approach to the interpretation of insurance policy disputes in order to protect the reasonable expectations of the insured policyholder to coverage, and from a possible forfeiture of coverage that might occur under a more traditional Formalistic insurance contract analysis. As propounded by Professor Keeton, this Functionalistic insurance law doctrine of reasonable expectations is based upon a two-prong rationale: (1) that an insurer should be denied any unconscionable advantage in an insurance contract; and (2) that the reasonable expectations of insurance applicants and intended beneficiaries regarding the terms of insurance coverage should be honored, even though a painstaking study of the policy provisions contractually would have negated those expectations.¹⁴ A minority of state courts today have adopted this insurance law doctrine of reasonable expectations at variance with the insurance policy language.¹⁵

A major problem with this Functionalistic reasonable expectations approach regarding the interpretation of insurance coverage disputes generally, however, is that under the Keeton reasonable expectations formula, the insurance policy need *not* be interpreted according to its clear and unambiguous contractual language—which is anathema to a Formalistic theory of insurance contract interpretation.¹⁶ Moreover, those courts purportedly

12. See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970).

13. See, e.g., Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267 (1986); Mark Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986); Roger Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990).

14. See Keeton, *supra* note 12, at 963-964.

15. See, e.g., *Lambert v. Liberty Mut. Ins. Co.*, 331 So. 2d 260 (Ala. 1976); *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441 (Ariz. 1982); and *C & J Fertilizer Inc. v. Allied Mut. Ins. Co.* 227 N.W.2d 169 (Iowa 1975). According to Professor Henderson, the following states arguably have adopted the Keeton “reasonable expectations” doctrine: Alabama, Alaska, Arizona, California, Iowa, Montana, Nebraska, Nevada, New Hampshire, and New Jersey. See Henderson, *supra* note 13, at 828. Another six states may, or may not, have adopted the Keeton “reasonable expectations” doctrine, but “the decisions from these six jurisdictions are not entirely free from ambiguity themselves and require [further] analysis”: Colorado, Delaware, Hawaii, North Carolina, Pennsylvania, and Rhode Island. *Id.* at 829-834.

16. See, e.g., Rahdert, *supra* note 13, at 335:

The Keeton formula suggests that an insured can have reasonable expectations of coverage that arise from some source *other* than the policy language itself, and that such an extrinsic expectation can be powerful

applying the doctrine of reasonable expectations in interpreting insurance coverage disputes have been unable to agree on what specific factors would constitute such a reasonable expectation of coverage, and what factors would not.¹⁷ Accordingly, a number of other commentators have been critical of the insurance law doctrine of reasonable expectations,¹⁸ and a number of other

enough to override any policy provisions no matter how clear. So interpreted, the Keeton formula pushes insurance law in a dramatic new direction, one that discards the traditional contract premise that a written agreement is the controlling code for determining the parties' rights and duties.

Id.

See also 1 ALLAN D. WINDT, *INSURANCE CLAIMS & DISPUTES* § 6.03, at 376 (3d ed. 1995):

The reasonable expectations rule, therefore, abandons the general contract principle that the insured's legitimate expectations are necessarily governed and limited by the terms of the policy. That principle will, instead, be applied only when it is fair to do so. As a result, in a proper case, an insured may be held to be entitled to coverage despite unambiguous language in the policy to the contrary.

Id.

17. *See, e.g.,* Abraham, *supra* note 13, at 1153 [footnotes omitted]:

The [Functionalist] courts have employed the [reasonable] expectations principle in cases where the insured's expectation of coverage was probably real and reasonable. They have also employed it where an expectation of coverage was less probable, but the policy's denial of coverage seemed unfair. Finally, they have relied on the principle even where an expectation of coverage was improbable and the denial of coverage would not appear unfair. In short, the judicial concept of an "expectation" of coverage is not a monolithic one.

Id.

See also Rahdert, *supra* note 13, at 335:

[T]he Keeton formula gives no hint at what factors other than the policy provisions courts might use to define the "terms" of the insurance arrangement, or how the courts are to measure the force of these external factors against the force of restrictive policy provisions to determine which should prevail in any given instance.

Id.

18. *See, e.g.,* Conrad Squires, *A Skeptical Look at the Doctrine of Reasonable Expectations*, 6 FORUM 252 (1971); Frank Gardner, *Reasonable Expectations: Evolution Completed or Revolution Begun?* 669 INS. L.J. 573 (1978); William Lashner, *A Common Law*

courts have expressly rejected the insurance law doctrine of reasonable expectations.¹⁹ For example, the Florida Supreme Court on January 29, 1998, in the case of *Deni Associates of Florida Inc. v. State Farm Fire & Casualty Ins. Co.* declared:

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. *See Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App. 3d 131, 506 N.E.2d 1192, 1197 (Ohio Ct. App. 1986) ("The reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties to the contract.")

Construing insurance policies upon a determination as to whether the insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation. As noted in *Allen v. Prudential Property & Casualty Insurance Co.*, 839 P.2d 798, 803 (Utah 1992):

Today, after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application.²⁰

Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts, 57 N.Y.U. L. REV. 1175 (1982); and Stephen Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989).

19. *See, e.g.*, *Meckert v. Transamerica Ins. Co.*, 701 P.2d 217 (Idaho 1985); *Menke v. Country Mut. Ins. Co.*, 401 N.E.2d 539 (Ill. 1980); and *Bond Brothers v. Robinson*, 471 N.E.2d 1332 (Mass. 1984). According to Professor Henderson, nine state courts have expressly declared that the Keeton reasonable expectations doctrine has *not* been adopted in their respective jurisdictions: Idaho, Illinois, Massachusetts, North Dakota, Ohio, Oklahoma, South Carolina, Washington and Wyoming. Henderson, *supra* note 13, at 834 n.68.

20. 711 So. 2d 1135, 1140 (Fla. 1998).

A majority of American courts today, however, have neither expressly adopted nor expressly rejected the doctrine of reasonable expectations,²¹ and a number of these courts arguably apply a “middle ground” interpretive approach to insurance coverage disputes—somewhere between a classical Formalistic contractual approach on one hand, and the doctrine of reasonable expectations on the other hand.²² Thus, as Professor Roger Henderson aptly observes, “[serious] questions remain as to whether the [reasonable expectations] principle has developed into a full-fledged doctrine which can be applied in a predictable and evenhanded manner by the courts.”²³

This Symposium addresses a number of these serious questions and issues involving the insurance law doctrine of reasonable expectations after three decades. We are fortunate to have ten excellent symposium articles analyzing the doctrine of reasonable expectations from various perspectives, written by seven academic lawyers, two prominent insurance law practitioners, and an eminent jurist.

Professor Robert Jerry II is the Missouri Endowed Floyd R. Gibson Professor of Law at the University of Missouri-Columbia Law School. He is

21. See, e.g., *Collins v. Farmers' Ins. Co.*, 822 P.2d 1146, 1162 ([t]his court has not explicitly adopted the doctrine of 'reasonable expectations,' at least by name, in any of its forms. Neither has this court explicitly rejected it. . . . At some point, this court will have to address this series of conflicting precedents in our cases which today's majority opinion simply ignores.") *Id.* at 1162 (Unis, J., dissenting).

22. See, e.g., Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 *DRAKE L. REV.* 807, 827-29 (1993):

[A] third of the states appear receptive to the underlying notion of vindicating the reasonable expectations of the policyholder but stop short of treating the notion as a distinct doctrine or principle for decision. Instead, these courts introduce reasonable expectations thinking into their opinions, often combining it with the ambiguity doctrine and relatively broad notions of promissory and equitable estoppel, waiver, unconscionability, and public policy review, but stop short of using the policyholders' expectations, however reasonable, to override policy language viewed as clear.

See also Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 *OHIO ST. L.J.* 543 (1996) (arguing that this “middle ground” interpretive approach constitutes a realistic and viable reconciliation of Legal Formalism and Legal Functionalism in an insurance law context).

23. Roger Henderson, *supra* note 13, at 824. See also Stempel, *supra* note 22, at 827-28 (where Professor Stempel argues that trying to characterize the various states' use of the reasonable expectations doctrine is to a great extent an exercise in futility).

also the author of a prominent insurance law treatise.²⁴ Professor Jerry's Symposium article presents an excellent overview and introduction to the insurance law doctrine of reasonable expectations. The doctrine's roots, Professor Jerry contends, are in the law of contract, but the influential analysis of Judge Keeton in his 1970 article in the *Harvard Law Review* gave this doctrine very different dimensions. Even so, this "new" doctrine of reasonable policyholder expectations had anchors in other legal principles with which courts and lawyers were (and are) well familiar, even if this "new" doctrine, as applied by the courts, gave these familiar legal principles a wider sweep. Professor Jerry's overview thus sets the stage for a closer look at the insurance law doctrine of reasonable expectations' contours by the other contributors to this Symposium.

Professor Kenneth Abraham is the Class of 1962 Professor of Law at the University of Virginia Law School, and author of a definitive article on the doctrine of reasonable expectations.²⁵ In his present Symposium article, Professor Abraham observes that the present-day doctrine of reasonable expectations has had very little impact on the rise of managed health care insurance, on Commercial General Liability insurance coverage disputes, in determining automobile insurance rates, and in bad faith claims litigation over the past twenty years. Today, Professor Abraham states that the doctrine of reasonable expectations is infrequently invoked, and that it is rarely utilized in most commercial disputes. Nevertheless, this "fairly minor" legal doctrine still has fundamental importance in bringing a sense of equity and fairness to both the insured and the insurer alike.

In contrast to a number of Symposium contributors who believe that the interpretive split among the jurisdictions is part of a struggle for "the heart and soul of insurance law," Professor Abraham asserts that this difference reflects the normal and longstanding tension within insurance law between the insurer's need for predictability of obligation, and the policyholders' comparative lack of information about the scope of coverage that they have actually purchased. This healthy tension, according to Professor Abraham, has been incompletely resolved—and in all probability will always be incompletely resolved—in the law of both the minority of jurisdictions that honor the reasonable expectations of the insured, and in the majority of jurisdictions that do not.

24. See ROBERT JERRY II, *UNDERSTANDING INSURANCE LAW* (2d ed. 1996).

25. See Kenneth Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

Professor Roger Henderson is the Joseph Livermore Professor of Law at the University of Arizona College of Law. Professor Henderson wrote an earlier article assessing the doctrine of reasonable expectations after two decades,²⁶ and in his Symposium article, he analyzes the formation of the doctrine of reasonable expectations in relation to the influence of forces outside insurance law. Professor Henderson notes that almost three decades have elapsed since the doctrine of reasonable expectations was first recognized, but the doctrine has not swept the country. In fact, less than one-fourth of the states have clearly adopted the doctrine as a substantive rule of insurance law that permits courts to ignore unambiguous terms in insurance policy forms that would otherwise defeat the expectations of the insured. Part of the reason for this failure to thrive, Professor Henderson believes, may stem from the confusion that still exists regarding the nature of the doctrine. This confusion is perpetrated by courts that purport to adopt the doctrine, but who continue to speak of it in a manner that fails to distinguish it from the canon of construction *contra proferentem*, or doctrine of ambiguities. Whereas the latter operates to resolve competing constructions of insurance policy terms, it should be clear by now that the doctrine of reasonable expectations may operate without regard to the existence of any ambiguities. On the other hand, the doctrine of reasonable expectations may also suffer from the fact that many courts have never come to grips with these competing formulations that were articulated at the outset.

Professor Henderson notes that Professor (now Judge) Robert Keeton offered a formulation in his landmark Harvard Law Review articles that differs materially from that rendered by the American Law Institute in revising the RESTATEMENT OF CONTRACTS. Despite these differences, the courts have spoken of the two formulations as if they were the same. This has created questions about the substantive nature of the doctrine and its limits, questions that would not work in favor of its recognition by more jurisdictions. This situation, however, may be on the verge of change—a change that may be dictated by forces outside the law of insurance.

The American Law Institute and the National Conference of Commissioners on Uniform State Laws are currently revising Articles 2 and 2A of the Uniform Commercial Code, and are drafting a new article—Article 2B—dealing with licenses. In the process, they are considering the competing formulations advanced by Judge Keeton and the ALI regarding the enforceability of standard form contracts. They have found that there are strong business and consumer forces that have entrenched views regarding the

26. See Roger Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990).

doctrine of reasonable expectations. Although no acceptable compromise between these competing views has yet been crafted, there undoubtedly will be some subsequent accommodation. Whatever the result, the doctrine of reasonable expectations as it emerges from this process will very likely be restated as the law in general when it comes time to draft a third Restatement of Contracts, and since courts have uniformly cited the Restatement of Contracts in support of a decision to adopt the doctrine of reasonable expectations in insurance cases, Professor Henderson believes that the work of the American Law Institute and the National Conference of Commissioners on Uniform State Laws on the Uniform Commercial Code may well have a significant impact on the doctrinal developments in insurance law in the future.

Professor Mark Rahdert is the I. Herman Stern Professor of Law at Temple University Law School. Professor Rahdert believes that the reasonable expectations doctrine, which enables courts to consider the reasonable expectations of the insured as an aid to policy interpretation and as a guide for guaranteeing the insured rights that the policy language may not itself provide, has steadily gathered force, and has become the key principle of policy interpretation in a number of major jurisdictions. At the same time, the doctrine of reasonable expectations has sparked a great deal of controversy over the extent to which this doctrine should be carried. This controversy has prevented many courts from the wholesale embrace of the doctrine. In 1986 Professor Rahdert wrote an article entitled *Reasonable Expectations Reconsidered*.²⁷ In that article, he detected opposition to the “strong” form of the reasonable expectations doctrine, though he argued for its continued application where restrictions on coverage amounted to “naked preferences” favoring the insurer. He also offered suggestions for making the reasonable expectations doctrine clearer, more consistent, and perhaps more defensible. A dozen years later, however, the same uncertainties that plagued the doctrine of reasonable expectations then, still linger today.

Professor Rahdert’s Symposium article discusses “two relatively small but significant points.” Initially, he argues that part of the difficulty with the doctrine of reasonable expectations is that it means too many different things to different people. The doctrine can be invoked in at least four different ways, and courts that utilize the doctrine in these different ways rarely distinguish clearly among them. Usually, courts rely on the reasonable expectations of the insured (1) simply as an interpretive device for ascertaining the meaning of the policy language. This interpretive technique fits within traditional precepts of

27. Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986).

insurance law and should not be controversial. With reasonable frequency, courts also employ reasonable expectations (2) to adjust contract terms that, when applied to the insured's situation, would otherwise seem unconscionable.

While this idea might have been more controversial thirty years ago, it is now a relatively widely accepted power of the courts. Moreover, what makes the insured's expectation "reasonable" in this context is that it rests on a *plausible* interpretation of the policy language, making this use of the reasonable expectations doctrine a small leap from traditional practice. Insurers can also modify policy language to adjust to these judicial determinations: On rare occasions, courts also employ the reasonable expectations doctrine (3) to avoid enforcing policy language that, even when clear, defeats the essential objectives of the insurance policy. These instances involve a greater leap from traditional insurance contract interpretation, but it is one that the courts seldom take. Finally, in but a handful of instances, courts have invoked reasonable expectations (4) to avoid policy limitations that would defeat public policies regarding assured compensation. Only the more aggressive uses of (3) and (4) ought to stir much controversy. Moreover, given the infrequency with which these aggressive uses of the reasonable expectations doctrine occur, Professor Rahdert believes, they amount to a tempest in a teapot.

Yet, from another perspective, the controversy surrounding the reasonable expectations doctrine is well-deserved, because an aggressive use of the doctrine challenges time-honored contract law assumptions that undergird the basic structure on which insurance law depends—particularly the notion of the policy as a fixed bargain. Since courts are basically unwilling to overhaul insurance law in its entirety, or rethink its basic assumptions, it is difficult to reconcile these aggressive applications of the reasonable expectations idea with the other insurance law principles that routinely guide their decisions. The result is instability about the role of reasonable expectations in insurance law analysis.

Professor James Fischer is a Professor of Law at Southwestern University School of Law, and he is the author of a seminal article on the construction and interpretation of insurance contracts.²⁸ The focus of Professor Fischer's Symposium article is on what he perceives to be the failure of the proponents of the doctrine of reasonable expectations to align the doctrine with the larger goals that we believe insurance law should advance. In this context, Professor Fischer looks at the doctrine of reasonable expectations in terms of how it relates to policyholder and carrier conduct. For example, does the

28. See James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation: Text Versus Context*, 24 ARIZ. ST. L.J. 995 (1992).

doctrine of reasonable expectations encourage policyholders to read or seek assistance to understand the policy they purchase? Is this conduct that insurance law should encourage? With respect to insurance carriers, does the doctrine of reasonable expectations encourage carriers to write clearer, more reasonable policies? Professor Fischer argues that in each case the answer is "no." As presently formulated and applied, the doctrine of reasonable expectations "accomplishes little more than to apply a label to a result already reached, and sugarcoat that result with the patina of doctrinal respectability." The doctrine of reasonable expectations' emphasis on "policyholder" expectations also misdirects analysis away from what Professor Fischer contends should be a public policy orientation toward the construction of insurance contracts generally.

Professor Jeffrey Stempel is the Fonvielle & Hickie Professor of Law and Associate Dean for Academic Affairs at the Florida State University College of Law. He is also the author of a leading treatise on the interpretation of insurance contracts.²⁹ The thesis of Professor Stempel's Symposium article is that the doctrine of reasonable expectations, although long a tacit pull on insurance coverage jurisprudence, has never really been fully utilized as an analytical tool and has not been fully deployed in a self-consciously thoughtful and comprehensive manner. In part, this unfortunate underuse of the reasonable expectations thinking resulted from the manner in which the doctrine burst on the scene, with emphasis on the reasonable expectations concept as something creating rights "at variance" with the language of the insurance policy. Although the reasonable expectations approach does this in a relatively small segment of the case law, it has far more potential impact as a tool for addressing uncertain policy language and application, a potential that has largely been overlooked due to an overfixation on the role of reasonable expectations in overcoming clearly worded insurance policy language.

Viewed comprehensively, Professor Stempel argues that the reasonable expectations of the parties to an insurance contract can be used not only to construe ambiguous policy text or to overcome clear text violative of the insured's reasonable expectations, but also to serve as a check on absurd hyperliteral interpretations of policy text. In addition, the reasonable expectations approach can assist courts in determining whether policy provisions are ambiguous or whether "painstaking" study of the policy suggests a clear meaning for problematic text. All of these varieties of the reasonable

29. See JEFFREY W. STEMPEL, *INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS* (1994).

expectations approach, Professor Stempel believes, merit fuller use by the courts.

The doctrine of reasonable expectations is viewed by the legal political mainstream as too inconsistent with the prevailing American paradigm of judicial restraint, strict construction of disputed texts, and minimal governmental involvement in market activity. Properly seen, however, the reasonable expectation doctrine, even in its strong “rights at variance with the policy language” form, is actually consistent with the prevailing jurisprudential ethos because of the context of insurance coverage. Determining the “correct” meaning of an insurance policy inevitably requires not only a sharp focus on policy text, but also full consideration of the reasonable expectations of *both* insurer and insured, even where those expectations to some extent run counter to the policy text, and certainly where the policy text is unclear, insufficiently certain, or applied to unanticipated situations. Contrary to the assertions of some courts and commentators, Professor Stempel argues that a strong judicial invocation of the reasonable expectations doctrine poses no threat to separation of powers and little serious obstacle toward vindicating the intent of the parties to the insurance contract as well as the purpose of the insuring agreement.

Professor Jeffrey Thomas is an Assistant Professor of Law at the University of Missouri-Kansas City. In his Symposium article, Professor Thomas takes an interdisciplinary approach to the doctrine of reasonable expectations. The traditional rules of insurance policy interpretation, he argues, have developed within a “rational bargaining” paradigm. The reasonable expectations doctrine, which permits courts to ignore express policy language, is perhaps the most notable exception to the traditional rules of insurance contract interpretation. Although the doctrine of reasonable expectations, which is intended to provide greater protection for unsophisticated insurance consumers, is nontraditional, it is nevertheless an extension of the “rational bargaining” paradigm. Professor Thomas uses information available from other academic disciplines to show that the “rational bargaining” paradigm and the reasonable expectations doctrine do not accurately reflect insurance consumer behavior.

Eugene Anderson, Esquire is a partner in the New York City law firm of Anderson, Kill & Olick P.C. with offices in Washington D.C., Philadelphia, Newark, San Francisco, Phoenix, and Tucson. The author of numerous articles on insurance law, as well as a recent two-volume treatise on insurance

coverage litigation,³⁰ Mr. Anderson has been called “the dean of insurance policyholder attorneys” by *Business Week* magazine.

Mr. Anderson’s thesis in his Symposium article asserts that an insurance policy is a consumer product, not merely a contract. After years of premium payments, and after a claim is made, policyholders all too often are shocked to discover that the insurance coverage they *thought* they had purchased was illusory. Unfortunately, an insurance product is much different from other products. An insurance policy cannot be replaced after a policyholder suffers a loss; it cannot be replaced after an insurance company breaches its obligation to cover such a loss. A policyholder cannot decide to take its business elsewhere once it has suffered a loss—by then, it is too late.

Traditional contract law principles, Mr. Anderson argues, do not adequately compensate a policyholder who has been wrongfully denied insurance coverage, since Anglo-American legal doctrines too often reward a party who breaches a contract. Opportunistic breaches of insurance contracts are common, and they are overwhelmingly cost-effective for insurance companies. Insurance companies win by saying “No.” The reasonable expectations doctrine thus gives policyholders the insurance coverage they thought they had, and the courts should apply the doctrine of reasonable expectations more fully to protect a policyholder’s rights as the purchaser of a product, not a contract.

Susan Popik, Esquire is a partner in the San Francisco law firm of Chapman, Popik & White. Ms. Popik is a prominent insurance defense attorney, and she also serves on the editorial board of the *CGL Reporter* and as a contributing editor for the *California Civil Litigation Reporter* in the area of insurance litigation.³¹

The thesis of Ms. Popik’s Symposium article is that in theory, and when properly limited, the insurance law doctrine of reasonable expectations serves a useful consumer protection function. In practice, however, the doctrine—intended as a shield against contractual overreaching—has too often been used as a sword to eviscerate clear and unambiguous policy language. In the hands of a result-oriented court, invocation of the “reasonable expectations” mantra becomes a license to rewrite the policy to ensure a result that benefits the insured. In these instances, the question becomes not what the insured, at the time of purchase, reasonably expected the policy to cover, but what he or she, following a loss, fervently wished it covered.

30. See EUGENE ANDERSON, ET AL., *INSURANCE COVERAGE LITIGATION* (Giovanni Rodriguez ed., John Wiley & Sons, Inc. 1997)

31. See CAL. CIV. LITIG. REP. (1985-Present).

Although it would seem that one answer to this problem would be to limit the doctrine of reasonable expectations to a rule of construction, thus requiring a judicial finding of ambiguity before the doctrine could be invoked, the case law does not support this conclusion. Ambiguity is in the eye of the beholder, argues Ms. Popik, and result-oriented courts have had no greater difficulty divining multiple meanings than they have conjuring disappointed expectations.

Whether employed to defeat the terms of unambiguous policy language or as a variation of the *contra proferentum* doctrine, Ms. Popik argues that the reasonable expectations doctrine must be confined to those relatively few situations in which there is objective evidence beyond the insured's personal assurances to support the application of the doctrine. To accept any other rule would be to countenance a form of post-loss underwriting that leads to inconsistent and unpredictable results, which ultimately inures to the detriment of insurers and insureds alike.

The Honorable H. Walter Croskey is Associate Justice of the California Court of Appeal, Second Appellate District. In addition to his busy judicial workload, Justice Croskey also is a noted authority on California insurance law.³² In his Symposium article, Justice Croskey discusses the development, evolution, and the current status of the doctrine of reasonable expectations in California insurance law from a judicial perspective.

Justice Croskey notes that in the context of the construction and interpretation of insurance policy provisions, California insurance law has long recognized the importance of an insured's reasonable expectations to coverage. For example, in 1936, a California Court of Appeal decision noted that an insurance policy's provisions "must be construed so as to give the insured the protection which he *reasonably had a right to expect*, and to that end [any] doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor." Prior to 1990, this summarized California's very wide open *pro-insured* approach to the resolution of policy ambiguity issues. The doctrine of reasonable expectations therefore was the effective rationale justifying a bias in favor of coverage when any ambiguity in the policy language *semantically* could be demonstrated.

However, in 1990 this all changed. In what can only be described as a major departure from prior law, the California Supreme Court adopted a more restrictive rule of construction with the emphasis now placed on the *objectively* reasonable expectations of the insured. Now, in California, no ambiguity can

32. See, e.g., H. Walter Croskey, *Bad Faith in California: Its History, Development and Current Status*, 26 TORT & INS. L.J. 561 (1991).

be resolved in favor of the insured unless it comports with the insured's objectively reasonable expectations in light of: (1) the language used in the entire policy; (2) the total circumstances of the case; and (3) common sense. Thus, the doctrine of reasonable expectations, which had served as the rationale for a pro-insured interpretive approach in California, now serves as an analytical tool in California for limiting coverage. Justice Croskey's Symposium article examines this significant change, the full scope of which was not initially appreciated by the bench and bar, and the court's rationale for its adoption, and how it is being currently applied in particular cases. We are honored to include Justice Croskey's article in our Symposium issue on the insurance law doctrine of reasonable expectations after three decades.

The Doctrine of Reasonable Expectations and Related Insurance Coverage Issues:

A Selected Bibliography

In addition to these ten Symposium articles, the reader is also directed to the following related articles and treatises analyzing the insurance law doctrine of reasonable expectations:

Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions* (Parts I & II), 83 HARV. L. REV. 961 (1970) and 83 HARV. L. REV. 1281 (1970) (developing the modern insurance law doctrine of reasonable expectations). *See also* Robert E. Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275 (1976); and ROBERT E. KEETON & ALAN WIDISS, *INSURANCE LAW* §§ 6.01-6.10 (1988).

Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

Kenneth S. Abraham, *A Theory of Insurance Contract Interpretation*, 95 MICH. L. REV. 541 (1996).

EUGENE ANDERSON ET AL., *INSURANCE COVERAGE LITIGATION* §§ 2.1-2.15 (1997).

Gary Birnbaum, et al., *Standardized Agreements and the Parol Evidence Rule: Defining and Applying the Expectations Principle*, 26 ARIZ. L. REV. 793 (1984).

Edward Collins, *Insurance Contract Interpretation: The Doctrine of Reasonable Expectations Has No Place in Illinois*, 1985 S. ILL. U. L.J. 687 (1985).

Comment, *A Reasonable Approach to the Doctrine of Reasonable Expectation as Applied to Insurance Contracts*, 13 U. MICH. J.L. REFORM 603 (1980).

Comment, *The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, 18 J. MARSHALL L. REV. 155 (1984).

Comment, *Reasonable Expectations: The Insurer's Dilemma*, 24 DRAKE L. REV. 853 (1975).

Amy Cabbage, *The Interaction of the Doctrine of Reasonable Expectations and Ambiguity in Drafting: The Development of the Kentucky Formulation*, 85 KY. L.J. 435 (1997).

Douglas Fadel, *Utah Rejects the Reasonable Expectations Doctrine in Insurance Contract Interpretation*, 1993 UTAH L. REV. 275 (1993).

Laurie Kindel Fett, *The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditional Tools of Contract Interpretation*, 18 WM. MITCHELL L. REV. 1113 (1992).

James Fischer, *Why are Insurance Contracts Subject to Special Rules of Interpretation? Text versus Context*, 24 ARIZ. ST. L.J. 995 (1992).

Frank Gardner, *Reasonable Expectations: Evolution Completed or Revolution Begun?*, 669 INS. L.J. 573 (1978).

David Goodhue, *The Doctrine of Reasonable Expectations in Massachusetts and New Hampshire: A Comparative Analysis*, 17 NEW ENG. L. REV. 891 (1991).

Roger Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990).

Kenneth J. Horner, Jr., *Insurance—Contracts—The Ambiguity in the Doctrine of Reasonable Expectations*, 62 NOTRE DAME L. REV. 423 (1986).

ROBERT JERRY II, UNDERSTANDING INSURANCE LAW § 25D (2d ed. 1996).

Kelso, *Idaho and the Doctrine of Reasonable Expectations: A Springboard for an Analysis of a New Approach to a Valuable But Often Misunderstood Doctrine*, 47 INS. COUNS. J. 325 (1980).

Fredrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1971).

William Mark Lashner, *A Common Law Alternative to the Doctrine of Reasonable Expectations*, 57 N.Y.U. L. REV. 1175 (1982).

David Leitner, *Enforcing the Customers “Reasonable Expectations” in Interpreting Insurance Contracts*, 38 FED. INS. & CORP. COUNS. Q. 379.

William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267 (1986).

Note, *Reasonable Expectations Approach to Insurance Contract Interpretation Modified in Missouri*, 47 MO. L. REV. 577 (1982).

BARRY OSTRAGER & THOMAS NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 1.03 (9th ed. 1998).

Jeffrey Pawelski, *Insurers Don’t Need the Courts to “Babysit” Them: An Argument for Reasonable Expectations in American Family Mutual Ins. Co. v. Elliot*, 41 SAN DIEGO L. REV. 375 (1996).

Pitcher, *Insured’s “Reasonable Expectations” as to Coverage of an Insurance Policy*, 20 AM. JUR. 2D Proof of Facts § 59 (1970).

Perlet, *The Insurance Contract and the Doctrine of Reasonable Expectations*, 6 FORUM 116 (1970).

Mark Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 3223 (1986).

Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

Arnold Rotkin, *Standardized Forms: Legal Documents in Search of An Appropriate Body of Law*, 1977 ARIZ. ST. L.J. 599 (1977).

W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

W. Wylie Spicer, *Ch-Ch-Changes: Stumbling Toward the Reasonable Expectations of the Assured in Marine Insurance*, 66 TUL. L. REV. 457 (1991).

Conrad Squires, *A Skeptical Look at the Doctrine of Reasonable Expectations*, 6 FORUM 252 (1971).

Scot C. Stirling, *Reasonable Expectations of Insurance Coverage and the Problem of Environmental Liabilities*, 22 ARIZ. ST. L.J. 395 (1990).

JEFFREY STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS (1994).

Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1991).

Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543 (1996).

Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989).

ALLAN WINDT, INSURANCE CLAIMS & DISPUTES § 6.03 (3d ed. 1995).