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# Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function

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## Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function

PETER NASH SWISHER\*

Judicial opinions [in insurance law] are less than ordinarily enlightening about principled bases for decision. Often . . . the favorite generalization advanced by outside observers to explain a judgment against an insurance company at variance with policy provisions is the ambivalent, suggestive, and wholly unsatisfactory aphorism: "It's an insurance case."

—Professor [now Judge] Robert E. Keeton  
BASIC TEXT ON INSURANCE LAW 341 (1971)

Disinterested legal doctrinal analysis of the traditional kind remains the indispensable core of legal thought, and there is no surfeit of such analysis today. I daresay that many legal scholars who today are breathing the heady fumes of deconstruction, structuralism, moral philosophy, and the theory of second best would be better employed . . . synthesizing the law of insurance.

—Professor [now Judge] Richard A. Posner  
*The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV.  
L. REV. 761, 777 (1987)

You knew the law, Portia. But you didn't know the judge.

—RUMPOLE OF THE BAILEY  
PBS Television

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## I. INTRODUCTION

Many decisional patterns in insurance law cases are very difficult to understand, and the judicial rationales underlying these conflicting decisions are seldom expressly stated.

Indeed, one writer has suggested that insurance contract cases “frequently read like a chapter out of *Alice in Wonderland*,”<sup>1</sup> and two other authors write: “Welcome to the wonderful world of Insurance. In it the rules of law of Contracts are reflected as in a fun house mirror.”<sup>2</sup> Even Professor Keeton admits that the underlying justifications for many insurance law cases “are less than ordinarily enlightening.”<sup>3</sup>

The purpose of this Article is to demonstrate that there is indeed a great deal of method within this apparent judicial “madness” if one properly understands and appreciates the two competing theories of Judicial Formalism versus Judicial Functionalism in an insurance law context. And with a proper understanding of these two competing judicial theories, numerous apparent inconsistencies in insurance law decisions may be reconciled within each particular theoretical framework.

Accordingly, this Article will present a general overview of these two competing theories of American jurisprudence, and then discuss their conflicting applications in various insurance law decisions by utilizing a number of specific insurance law examples for illustrative purposes.

The central theme of this Article is that, in an insurance law context at least, Legal Formalism today is far from a dead issue and may in fact be in a resurgence, while Legal Functionalism, as exemplified by the “doctrine of reasonable expectations,” may be experiencing a more limited application in many courts today than various commentators had originally predicted. The resulting conclusion of this Article, therefore, is that it is not enough to know the law of insurance. One must also know the judge.

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<sup>1</sup> J. DOBBYN, *INSURANCE LAW IN A NUTSHELL* xix (1981).

<sup>2</sup> K. YORK & J. WHELAN, *INSURANCE LAW: CASES, MATERIALS AND PROBLEMS* xv (1982).

<sup>3</sup> R. KEETON, *BASIC TEXT ON INSURANCE LAW* 341 (1971). *See also* R. KEETON & A. WIDISS, *INSURANCE LAW* 614–16 (1988); *infra* note 52.

## II. THE TWO COMPETING THEORIES OF AMERICAN JURISPRUDENCE

### A. *Legal Formalism versus Legal Functionalism: An Overview*

Legal Formalism,<sup>4</sup> also known as Legal Positivism,<sup>5</sup> is a school of jurisprudence first identified with the English philosopher John Austin<sup>6</sup> and later embraced by American judicial scholars such as Christopher Columbus Langdell<sup>7</sup> and Joseph Henry Beale.<sup>8</sup>

Of major importance to American contract law in general, and to American insurance law in particular, was the fact that Legal Formalism was also embraced by the eminent American authority on the law of contracts, Samuel Williston.<sup>9</sup>

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Legal Formalism is difficult to define because, so far as I can tell, no one ever developed and defended a systematic body of doctrines that would answer to that name. . . . [But] [p]art of what is meant by formalism is this: The law provides a sufficient basis for deciding any case that arises. There are no 'gaps' within the law, and there is but one sound legal decision for each case. The law is complete and univocal . . . .

Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981).

<sup>5</sup> See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958).

<sup>6</sup> Austin's major thesis was that a legal system is a collection of laws emanating from a sovereign power and such laws, regardless of their social or moral consequence, are still valid if enacted in due form.

"The existence of law is one thing; its merit or demerit is another." Austin continues, "A law, which actually exists, is a law, though we happen to dislike it." J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 46-47 (1832); see also J. AUSTIN, *LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW* (1863).

<sup>7</sup> See, e.g., Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123 (1887), 3 LAW Q. REV. 123 (1887).

Langdell, Dean and Professor of Law at Harvard Law School from 1870 to 1895, was the primary originator of the "casebook" method and the "socratic" method for teaching law, which is still found in most American law schools today.

<sup>8</sup> See, e.g., J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

<sup>9</sup> See, e.g., S. WILLISTON, *THE LAW OF CONTRACTS* (1920); see also S. WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* (1940).

Under the contractual interpretive approach of Professor Williston, extrinsic evidence relating to a contract in general, and to an insurance contract in particular, may be examined for the purpose of determining a document's meaning *only* if the language of that document is unclear; otherwise the court is limited in determining the parties' intention to an objective analysis of the "four corners" of the contract. See, e.g., R. JERRY,

Generally speaking, Legal Formalism is the traditional view that correct legal decisions are determined by pre-existing legal precedent, and the courts must reach their decisions solely based upon logical deduction, applying the facts of a particular case to a set of pre-existing legal rules. Under this Formalistic legal theory, the law is viewed as a complete and autonomous system of logical principles and rules. The judge's techniques must therefore be socially neutral, and his or her private views or philosophy is irrelevant. Judging under this formalistic theory is thus a matter of logical necessity rather than a matter of choice.<sup>10</sup>

For example, Professor Langdell, as a representative Legal Formalist,<sup>11</sup> believed that the law was a science consisting of logical principles and rules, and he further believed that fundamental legal doctrine only grew by a slow evolutionary process that was traceable to a relatively small number of legal decisions.<sup>12</sup> Langdell thus maintained that all sources of the law are "contained in printed books,"<sup>13</sup> and therefore "the library is the proper workshop of [law] professors and students alike . . . it is to us all that the laboratories . . . are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists."<sup>14</sup>

This autonomous theory of the law as logically applied by the Legal Formalists, however, was not without its critics. Oliver Wendell Holmes, for example, in 1881 stated that "the life of the law has not been logic: it has been

UNDERSTANDING INSURANCE LAW 98-99 (1987); *see also infra* notes 31-32, 36-38 and accompanying text.

<sup>10</sup> *See, e.g.*, G.W. PATON, A TEXTBOOK OF JURISPRUDENCE 3-14 (Derham 4th ed. 1972).

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Despite important differences between Austin and Langdell, they were, in a sense, spiritually closer to each other than either was to the [Legal Functionalists]. Both men presumed that principles exist which provide a complete map of the law. They assumed that law has an underlying unity of doctrine that can be mastered by the right kind of [logical] approach.

Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 1004 n.87 (1981).

<sup>12</sup> Langdell claimed, for example, that "[t]he vast majority of [judicial cases] are useless, and worse than useless, for any purpose of systematic study." C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

<sup>13</sup> Langdell, *supra* note 7, at 123.

<sup>14</sup> C. Langdell, Commemorative Speech at Harvard College, *reprinted in* A. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN 1817-1967 at 175 (1967).

For a more comprehensive overview and analysis of Langdell's Formalist legal philosophy, *see generally* Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Speziale, *Langdell's Concept of Law as Science*, 5 VT. L. REV. 1 (1980).

experience."<sup>15</sup> Moreover, Roscoe Pound argued in 1910 that Langdell's view of the law "in the books" often was not the same as the law "in action."<sup>16</sup>

Thus, there emerged a countervailing school of thought in American jurisprudence, which has alternately been labelled Legal Realism,<sup>17</sup> Pragmatic Instrumentalism,<sup>18</sup> or Legal Functionalism.<sup>19</sup>

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<sup>15</sup> O.W. HOLMES, *THE COMMON LAW* 1 (1881). *But see* TWINING & MIERS, *HOW TO DO THINGS WITH RULES* 141 (1976) ("even a cursory reading of Holmes reveals that he was concerned to show that logic is only one of a number of factors in 'determining the rules by which men should be governed'. . . .")

By "logic" Holmes indicated that he meant the logical syllogisms and corollaries of Legal Formalism, and by "experience" he meant considerations of what was socially expedient in the real world. To Holmes, even the Constitution was "an experiment, as all life is an experiment." *Abrams v. United States*, 250 U.S. 616, 630 (1919).

For a more comprehensive overview and analysis of Holmes' legal philosophy, *see generally* Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787 (1989); H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984).

<sup>16</sup> Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

Both Holmes and Pound were "particularly vigorous in their condemnation of those judges of the federal and state supreme courts who invalidated social legislation partly on the ground that the 'logic' of such very general constitutional conceptions as liberty of contract and substantive due process dictated that outcome." Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought*, 66 *CORNELL L. REV.* 861, 868-69 (1981).

For a more comprehensive analysis of Pound's legal philosophy, *see generally* R. POUND, *JURISPRUDENCE* (1959).

<sup>17</sup> Although the term "Legal Realism" is still widely used to encompass the entire body of ideas of this uniquely American school of jurisprudence, it is more technically applied to the legal theorists of the 1920s and 1930s. *See generally* W. RUMBLE, *AMERICAN LEGAL REALISM* (1968). Also, the term "Legal Realism" has not been regularly used to refer to the most current theory of sociological jurisprudence alternately referred to as "Legal Pragmatism" or "Pragmatic Instrumentalism." *See, e.g.*, Summers, *supra* note 16, at 685 n.2; *see also infra* note 18 and accompanying text.

Nevertheless, Paton and Derham have generically referred to this "sociological" school of American jurisprudence as "The Functional School," and, for the sake of definitional simplification, so shall I. *See generally* Paton, *supra* note 10, at 22-36.

<sup>18</sup> *See generally* R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331 (1988); Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 *CORNELL L. REV.* 988 (1984); Stainsky, *The Possibility of Legal Change: Pragmatism and Legal Theory*, 46 *U. TORONTO L. REV.* 456 (1988); Summers, *supra* note 16.

<sup>19</sup> Again, for the purpose of simplification within this Article, I shall include both Legal Realism and Legal Pragmatism under the term Legal Functionalism as a very broad generic concept of sociological jurisprudence.

For influential works in this Functionalist field of American sociological jurisprudence *see generally* F. COHEN, *THE LEGAL CONSCIENCE* (1960); K. LLEWELLYN, *JURISPRUDENCE: REALISM AND THEORY IN PRACTICE* (1962); R. POUND, *JURISPRUDENCE* (1959); W. RUMBLE, *AMERICAN LEGAL REALISM* (1968); R. SUMMERS,

How do Legal Formalism and Legal Functionalism differ? First, Legal Formalism is logically-based and precedent-oriented, whereas Legal Functionalism is sociologically-based and result-oriented.

For example, one Legal Formalist defined a formalist judicial approach in this manner:

It is not the duty of our courts to be leaders in reform . . . The judge is always confined within the narrow limits of reasonable interpretation. It is not his function or within his power to enlarge or improve the law [since that is the function of the legislature]. His duty is to maintain it, to enforce it, whether it is good or bad, wise or foolish . . . [Thus] our courts are excluded from playing the part of reformer. Their duty is to interpret the law as it is, in sincerity and truth, under the sanction of their oaths and in the spirit of justice.<sup>20</sup>

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INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

The most consistent and comprehensive response to the many claims of Legal Realism has been made by Professor Ronald Dworkin in his classic works *R. DWORKIN, TAKING RIGHTS SERIOUSLY* (1977); *R. DWORKIN, A MATTER OF PRINCIPLE* (1985); *R. DWORKIN, LAW'S EMPIRE* (1986). Dworkin's works have also influenced other post-Realist legal theorists. *See, e.g., M. SANDEL, LIBERALISM AND ITS CRITICS* (M. Sandel ed. 1984); *B. ACKERMAN, RECONSTRUCTING AMERICAN LAW* (1984); *see also* Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *PHIL. & PUB. AFF.* 205 (1986).

There is still another school of American legal theory, the Critical Legal Studies Movement, which generally calls for the dismantling of existing political and legal institutions in favor of newly empowered forms of social democracy. *See, e.g., M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES* (1987); *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys, ed. 1982); *R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); *see also* White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 *SW. U.L. REV.* 819 (1986).

For critical comment regarding Critical Legal Studies, *see, e.g., Dowd, Critical Legal Studies: Beyond Skeptical Jurisprudence*, 11 *J. CONTEMP. L.* 345 (1984); Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 *YALE L.J.* 665 (1988). *See also* A. ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); Comment, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *HARV. L. REV.* 1669 (1982).

<sup>20</sup> Root, *The Importance of an Independent Judiciary*, 72 *THE INDEPENDENT* 704 (1912). At this time "the overwhelming majority of lawyers and judges provided unquestioning endorsement" to this legal philosophy. *See, e.g. G. AICHELE, LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE* 10, (1990); *see also* *United States v. Butler*, 297 U.S. 1, 63 (1936) ("This Court neither approves or condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.")

The Legal Functionalists, on the other hand, believe that the Formalistic theory of logical, socially-neutral, legal “certainty” is rarely attainable,<sup>21</sup> and perhaps undesirable in a changing society, and that the paramount concern of the law should not be logical consistency, as the Formalists believed, but socially desirable consequences:

Insofar as formalists and conservative theorists at the turn of the century did recognize proposals for genuinely new law, they often assumed that these proposals should be judged primarily by how well they meshed with existing law. Consistency, analogy, coherence, harmony, and symmetry were their main tests of soundness. The [functionalists] rejected this view. They did not look to the past and ask: Is this proposal consistent with X? Analogous to Y? Harmonious with Z? Rather, they looked forward and asked: What can now be done to alter the future? What substantive goals, derived from popular wants and interests, are relevant? What rules or other precepts are required to further them? Thus, the [functionalist] theorists subscribed to a *substantive* means-goal rationality.<sup>22</sup>

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<sup>21</sup> Indeed, one author argues that Legal Formalism, as a system of judicial rules, was never really “socially neutral” at all, but was rather a judicial support system for a political ideology that favored certain social and political ideas over other ideas. *See, e.g.*, Goetsch, *The Future of Legal Formalism*, 24 AM. J. LEGAL HIST. 221 (1980).

<sup>22</sup> Summers, *supra* note 16, at 890. Professor Summers also presents twelve additional factors that separate Legal Formalists from Legal Functionalists:

#### CONTRASTS OF FORMALISTIC AND [FUNCTIONALISTIC] VIEWS

CONTEXT	FORMALISTIC VIEW	[FUNCTIONALISTIC] VIEW
1. ambit of legal creativity and legal change	scope narrow; law is like a static and closed logical system	scope wide; law is like a dynamic and open framework
2. judicial power to make law	due to separation of powers, judges may only discover, declare, and apply the law as it already exists	judges have power to make law, and regularly do so, covertly as well as overtly
3. responsibility of Supreme Court to test Constitutionality of legislation	responsibility broad ; legislation at least presumptively invalid if it conflicts with literal text of constitutional phrase	responsibility narrow; legislation presumptively valid



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4. whether there is a single perfect form of law as a solution to each problem	always one "true rule" ascertainable by reason . . .	plurality of plausible forms of law for the usual problem
5. considerations relevant in law-making	coherence, harmony, and consistency with existing law	social facts and existing wants and interests
6. tests for identifying valid forms of law	whether law is traceable to an authoritative source	whether law has a defensible substantive content
7. nature of reality of valid law	general rules "in books"	predictable law. "in action"
8. structure of valid law within a field	reducible to a unitary general theory, as in science	pluralistic and irreducible
9. correct statement of valid law	susceptible to statement only in a limited number of abstract and wide generalizations	susceptible to statement only in many concrete and narrow generalizations
10. interpretation and application of case law	words of opinion and "logic" control	judge's action in light of facts controls
11. interpretation and application of written law	authoritative language and "logic" of the concepts expressed controls	goals of lawmaker infuse the language and these together control
12. elaboration and extension of existing law	"logic" of existing concepts controls	"policy" controls

*Id.* at 867-68 n.4.

Based upon these result-oriented and sociologically-based tenets, Legal Functionalism is now recognized as the dominant legal theory of American jurisprudence today.<sup>23</sup>

But if Legal Functionalism is now so well-entrenched within American jurisprudence<sup>24</sup>—at least in the academic community<sup>25</sup>—do we need any longer to recognize the impact of traditional Legal Formalism in American judicial decisionmaking today?

The answer is that Legal Formalism, as a theory of American jurisprudence and as a framework for judicial decisionmaking, is far from a dead issue, and in fact seems to be enjoying a remarkable resurgence.<sup>26</sup> Equally important is the current impact of Legal Formalism on members of the state and federal judiciary:

Not since the late 1920s and 1930s has there been such widespread interest in American jurisprudence. But it is no longer the [Legal 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 corresponding ideological commitments of many recent appointments to the federal bench, now threaten the continued prominence of a theory of judicial interpretation first articulated and advanced by the [Legal Functionalists]. 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 . . . .<sup>27</sup>

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<sup>23</sup> See generally G. AICHELE, *supra* note 20; see also *supra* notes 17-19 and accompanying text.

<sup>24</sup> See, e.g., *supra* notes 17-19, 22-23 and accompanying text.

<sup>25</sup> For an interesting discussion of the historical conflicts and tensions between practicing lawyers on one hand, and legal educators on the other hand, see generally W. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* (1978).

<sup>26</sup> For example, recent articles have been written examining how Legal Formalism might still serve to limit judicial discretion or judicial activism. See, e.g., Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988). Recent articles also question whether law is essentially rational, as the Formalists believe, or essentially political, as the Functionalists believe. Weinrib, *Legal Formalism: On the Imminent Rationality of Law*, 97 *YALE L.J.* 949 (1988).

Also, in conjunction with the political philosophy of the Ronald Reagan administration, the theory of “original intent” as a theory of limited judicial interpretation has also been propounded. See, e.g., Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *S. TEX. L. REV.* 455 (1986); Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849 (1989); see also J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984); R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

<sup>27</sup> G. AICHELE, *supra* note 20, at x.

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And if there ever was any serious question that a judge's personal judicial philosophy is not a crucial factor in his or her appointment to the bench, such a question has been dispelled in the nomination hearings of Robert H. Bork to the United States Supreme Court:

Not since the equally intense confirmation fight over Justice Brandeis's nomination to the high court [and arguably the Abe Fortas controversy during the Johnson Administration] has legal theory been such an explicit factor in a jurist's selection . . . . Judge Bork ultimately lost the fight, not because he was deemed professionally incompetent or personally unfit, but because a very well organized opposition thought him too capable an exponent of a politically unacceptable theory of judicial interpretation. The recent nomination of Judge David Souter by President Bush to fill the vacancy created by Justice Brennan's retirement suggests that presidents may begin to choose judges without any known theoretical commitments rather than run the risk of political controversy and ultimate confirmation defeat.

*Id.* at ix-x. The recent confirmation hearings of Supreme Court Associate Justice Clarence Thomas, at least regarding his judicial philosophy, also demonstrate this important point. *See also* R. BORK, *supra* note 26, at 363:

Reagan's [Supreme Court] appointments . . . created a significant minority opposed to political judging, and Bush appears determined to make that minority a majority. He may succeed in his first term with the appointment of Justice David Souter, and will certainly succeed if he is elected to a second. In that case, over half a century of liberal policy-making by the judiciary will come to an end. The Supreme Court will once more come to be, and be seen to be, a legal rather than a political institution.

Accordingly, it will be interesting and instructive over the next few years to compare the Rehnquist Court's judicial analysis and decisionmaking rationale against prior Supreme Court decisions made by the Warren Court and the Burger Court. This author would predict that the Rehnquist Court, utilizing a more Formalistic approach than its predecessors, will give more deference to state and federal legislative action over judicial discretion, as long as such legislation is not clearly unconstitutional.

*See also* Reuben, *The Amazing Kozinski*, 11 CALIF. LAW. 32, 33-36 (March, 1991):

Ever-colorful Alex Kozinski of the Ninth Circuit U.S. Court of Appeals, who five years ago at age 35 became the youngest person appointed this century to the federal appellate bench. Since then he has emerged as an original judicial thinker who unabashedly admits he wants to "change the face of American jurisprudence." One of the many young conservatives appointed by President Ronald Reagan to reshape the federal judiciary, Kozinski may be working on his best move yet: appearing in the next vacant seat on the U.S. Supreme Court . . . .

His rigorous opinions and playful style have won him an odd combination of supporters. They range from liberals such as Santa Clara University Law School Dean Gerald Uelman, who praises Kozinski's "wonderful sensitivity for constitutional rights" to such conservatives as failed Supreme Court nominee Robert Bork, who says, "He and I tend to view things in the same general way."

Even Laurence Tribe of Harvard Law School, a patron saint of legal liberalism, considers Kozinski "extremely intelligent and interesting, someone very much worth watching . . . ."

A resurgence in Legal Formalism can be found in the state courts as well.<sup>28</sup>

Thus, as will be demonstrated below, despite the preeminence of Legal Functionalism in other fields of American law, Legal Formalism continues to exist as a viable rationale for judicial decisionmaking in insurance law, which is largely based upon a traditional contractual interpretation of insurance policies generally.

Whether or not one agrees with the philosophical tenets underlying Legal Formalism or Legal Functionalism, one must still recognize and appreciate the fact that these two conflicting legal theories continue to co-exist as uneasy alternatives in American insurance law.

### B. *Legal Formalism versus Legal Functionalism in an Insurance Law Context*

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As much as I have a distrust for government, [states Kozinski] . . . I have even more distrust for the excessive discretion of judges.

<sup>28</sup> A good example of this Formalist resurgence is found in the California Supreme Court. Where once, under the Functionalist leadership of Chief Justice Roger Traynor, and later under the Functionalist leadership of Chief Justice Rose Bird, the court "was unafraid to lead the law into new and untracked areas," now, under the Formalist leadership of Chief Justice Malcolm Lucas, the court "seems content to leave the leading to others." *See, e.g.,* Blum, *The California Supreme Court: Toward a Radical Middle*, 77 A.B.A. J. 48 (January, 1991).

Notice how the Lucas court has been described in classical Formalist terms:

[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.

Other state courts have also either rejected, retracted, or limited their earlier Functionalist approach regarding the interpretation of insurance contracts, and have adopted more of a Formalist approach. *See, e.g.,* *Hallowell v. State Farm Mut. Ins. Co.*, 443 A.2d 925 (Del. 1982); *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 600 P.2d 1387 (1979); *Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 512 Pa. 420, 517 A.2d 910 (1986).

It was more than fortuitous that two major proponents of Legal Formalism, Christopher Columbus Langdell<sup>29</sup> and Samuel Williston,<sup>30</sup> were also noted authorities on the law of contracts<sup>31</sup> since American insurance law, to a very large extent, is based upon principles of contract law.<sup>32</sup>

Accordingly, Formalistic judicial interpretations of insurance policies are still interpreted under the theory of strict contractual construction. For example, in *Brown v. Equitable Life Insurance Co.*,<sup>33</sup> the Wisconsin Supreme Court stated:

We think the theory of strict contractual construction of insurance contracts followed by a majority of jurisdictions is consistent with the philosophy of this court . . . . Contracts of insurance rest upon and are controlled by the same principles of law that are applicable to other contracts, and parties to an insurance contract may provide such provisions as they deem proper as long as the contract does not contravene law or public policy.<sup>34</sup>

And although the *Brown* court was not happy that the insured was not contractually entitled to coverage in this particular case, under a Legal Formalist theory the court was powerless to rectify the situation:

It is not within the province of this court to determine what coverage, in its good conscience, the life insurance industry should be required to offer . . . . Nor is this court empowered by [state statute] to regulate and approve policies of life insurance. That function is vested by the legislature in the office of the Commissioner of Insurance. We do not have the power to create a new contract for the parties. Thus, while we may not approve of such a sales device as a conditional receipt and would like to see interim insurance afforded, we are powerless to so legislate . . . .<sup>35</sup>

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<sup>29</sup> See *supra* notes 7, 11-14 and accompanying text.

<sup>30</sup> See *supra* note 9 and accompanying text.

<sup>31</sup> See, e.g., C. LANGDELL, *supra* note 12; S. WILLISTON, THE LAW OF CONTRACTS (1920). Williston was also the Reporter for the Restatement of the Law of Contracts (1928).

The Williston Treatise on the Law of Contracts continues to have an impact on the present-day practice of contract law generally, and insurance law in particular. See, e.g., S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (W. Jaeger 3rd ed. 1957-1978, & Supp. 1990). The Williston treatise currently is comprised of 18 substantive volumes and 3 volumes of forms.

<sup>32</sup> "There are certain principles applying to the law of insurance which pertain to all contracts alike, except for special forms regulated by statute." 1 J. APPLEMAN, INSURANCE LAW & PRACTICE § 1 (1981); see also 1 C. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 2:1, 2:12-2:13 (2d ed. 1984).

<sup>33</sup> 60 Wis. 2d 620, 211 N.W.2d 431 (1973).

<sup>34</sup> *Id.* at 628, 211 N.W.2d at 435.

<sup>35</sup> *Id.* at 630, 211 N.W.2d at 436; see also *Grandpre v. Northwestern Nat'l Life Ins. Co.*, 261 N.W.2d 804, 807 (S.D. 1977) (The insurance contract's language must be construed according to its plain and ordinary meaning. It does not permit the court to make

The rationale behind this Formalist theory of strict contractual construction regarding insurance policies generally is found both in Williston's *Treatise on the Law of Contracts*<sup>36</sup> and in the *Restatement of the Law of Contracts*.<sup>37</sup> For example, in his treatise, Williston reiterates that:

Under the guise of interpretation, courts are repeatedly importuned to give a meaning to the writing under consideration, which is not to be found in the instrument itself, but which is based entirely on direct evidence of intention. And just as steadfastly, the courts reiterate the well-established principle that it is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make.<sup>38</sup>

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a forced construction or a new contract for the parties.); *supra* note 20 and accompanying text.

<sup>36</sup> See, e.g., 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 900 (W. Jaeger 3d ed. 1963): "Unless contrary to statute or public policy, a contract of insurance will be enforced according to its terms"; see also 2 C. COUCH, *supra* note 32, at § 15:70; 13 J. APPLEMAN, *supra* note 32, at § 7402 (1976 rev. ed.).

<sup>37</sup> See, e.g., RESTATEMENT OF THE LAW OF CONTRACTS § 70 (1928), which states: "One who makes a written offer which is accepted, or who manifests acceptance of the terms of a writing which he should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or its proper interpretation."

Regarding the interpretation of contracts, see *id.* at §§ 227-30. Comment (a) to Section 230, for example, states that the words in a writing will be given the meaning that a reasonably intelligent third person would give to them, even though such a meaning is not one that would be anticipated by one party or the other. Comment (b) to Section 230 states that if a contract has been integrated in writing by the parties, the contracting parties will be deemed to have assented to the written words as a definite expression of their agreement.

<sup>38</sup> 4 S. WILLISTON, *supra* note 36, at § 610 (W. Jaeger 3d ed. 1961).

Numerous courts have continued to follow Williston's often-cited axiom. See, e.g., *Drilling v. New York Life Ins. Co.*, 234 N.Y. 234, 137 N.E. 314 (1922) (a contract for insurance is no different from any other contract, and the insurance company is therefore entitled to have its contract enforced by the courts as written); *LaPoint v. Richards*, 66 Wash. 2d 585, 403 P.2d 889 (1965) (the existence of an insurance policy is a matter of contract law, since insurance involves a contractual relationship between the insured and the insurer); *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 210 S.E.2d 187 (1974) (if the language of an insurance policy is plain, unambiguous, and susceptible to only one reasonable construction, the courts must enforce that contract according to its terms); *Showers v. Allstate Ins. Co.*, 136 Ga. App. 792, 222 S.E.2d 198 (Ga. Ct. App. 1975) (an insurance policy, which by clear and unambiguous terms is limited in its coverage, will not be so construed as to expand coverage beyond its stated terms); *Transit Casualty Co. v. Hartman's Inc.*, 218 Va. 703, 239 S.E.2d 894 (1978) (a contract of insurance, as any other contract, must be construed to give effect to the intention of the parties, if that intention can be fairly determined from the instrument when read as a whole).

Nevertheless, this Formalistic contractual approach to the interpretation of insurance policies, while bringing uniformity and predictability into insurance law disputes, still presents some serious problems.

Admittedly, an insurance company, in order to avoid unacceptable risks of loss, may contractually limit such risks of loss.<sup>39</sup> But in order to achieve all these protective ends

the insurance policy has become overloaded with warranties, representations, conditions and exceptions, and other restrictive provisions, which tend to take on highly technical and treacherous characteristics. . . . It has been often said that if all the provisions of the modern insurance policy were literally enforced, no policy holder could recover a penny. This is an overstatement, but suggestive.<sup>40</sup>

Thus, according to Professor Vance:

Policies become 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. It was necessary for the courts to go to the rescue of the public. . . . The unseemly struggle that ensued between the unwise insurers who sought so to frame their policies as to compel the courts to allow them the dishonest benefit of forfeitures unsuspected by the insured, and the [Functionalist] courts who sought by liberal construction, and sometimes distortion of the language of the policies, to do justice in spite of the [policy language], resulted in a mass of litigation and confused precedent, the likes of which cannot be found in any other field of our law.<sup>41</sup>

In addition, there has been the argument advanced by various Functionalist courts that standardized insurance contracts are *not* ordinary contracts negotiated by parties with roughly equal bargaining power. Rather, they are contracts of adhesion, in which the insurance company, in drafting a standardized policy, has the superior bargaining position, and the insured has to accept such a policy on a "take it or leave it" basis if he or she desires any form of insurance protection.<sup>42</sup> For example, in the case of *Prudential Insurance Co. v. Lamme*<sup>43</sup> the Nevada Supreme Court noted that:

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<sup>39</sup> See generally R. KEETON & A. WIDISS, *supra* note 3, at 460-608; W. VANCE, *HANDBOOK ON THE LAW OF INSURANCE* 364-427 (3d ed. 1951).

<sup>40</sup> W. VANCE, *CASES ON INSURANCE* 211-12 (3d ed. 1940).

<sup>41</sup> Vance, *The History of the Development of the Warranty in Insurance Law*, 20 *YALE L.J.* 523, 534 (1911).

<sup>42</sup> Even Professor Williston, or his successor Professor Jaeger, recognized this serious problem. See, e.g., 7 S. WILLISTON *supra* note 36, at § 900, page 19-20.

See also 7 S. Williston, *supra* note 36, at § 900:

[A]n insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured. . . . The parties are not similarly situated. The company and its representatives are experts in the field; the applicant is not. A court should not be unaware of this reality and subordinate its significance to strict legal doctrine.<sup>44</sup>

Accordingly, since the 1960s, a growing number of Functionalist courts have utilized a result-oriented sociological approach<sup>45</sup> in insurance law disputes, in order to protect the “reasonable expectations” of the insured policyholder<sup>46</sup> from any possible forfeiture of coverage that might well occur under a traditional Formalistic contractual analysis of insurance policies.<sup>47</sup>

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There are several characteristics of an insurance contract which set it apart from the general run of contracts. Perhaps it is not too much to say that the courts are in the process of creating a body of special rules to handle insurance cases and yet retain insurance cases within the general framework of contract law.

See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

<sup>43</sup> 83 Nev. 146, 425 P.2d 346 (1967).

<sup>44</sup> *Id.* at 148-49, 425 P.2d at 347.

See also *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965) (similar holding); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168 (1966) (A contract entered into between two parties of unequal bargaining strength, expressed in language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a “take it or leave it” basis carries some consequences that extend beyond orthodox [Formalist contract analysis] implications); *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 650 P.2d 441 (1982) (An insurance agreement is not a contract arrived at by negotiation between the parties. The insured is given no choice regarding the terms and conditions of coverage, which the insured seldom sees before purchase of the policy, which often are difficult to understand, and which usually are neither read nor expected to be read by either party. This is not the traditional method by which contracts, including insurance contracts, have been made.)

A Formalist reply to this argument, however, would be that standardized insurance contracts are indispensable in conducting an insurance business in a mass society. See, e.g., *Gowing v. Great Plains Mutual Ins. Co.*, 207 Kan. 78, 80, 483 P.2d 1072, 1075 (1971); *Estin Construction Co. v. Aetna Casualty & Sur. Co.*, 612 S.W.2d 413, 418 (Mo. App. 1981); see also Squires, *A Skeptical Look at the Doctrine of Reasonable Expectations*, 6 FORUM 252, 252-53 (1971); Birnbaum, Stahl, & West, *Standardized Agreements and the Parol Evidence Rule: Defining and Applying the Expectations Principle*, 26 ARIZ. L. REV. 793 (1984).

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

<sup>45</sup> See *supra* notes 15-19, 21-22 and accompanying text.

<sup>46</sup> See generally Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST.



The major problem with this Functionalistic approach, however, is how the policyholder's "reasonable expectations" to coverage under the insurance policy should be defined and formulated. There is no problem, for example, under both the Formalist and Functionalist approaches to insurance contract interpretation whenever there are ambiguities within the policy. Under both views, whenever the insurance contract is susceptible to two or more reasonable interpretations, under the theory of *contra proferentum*, the policy will be strictly construed against the insurer who drafted the contract, and the policy will be liberally construed in favor of the non-drafting party, the insured.<sup>48</sup>

The Functionalist dilemma develops, however, in defining the insured's "reasonable expectations" to coverage under the insurance policy *when such "reasonable expectations" are at variance with the language in the insurance policy itself*. And it is eminently clear that the Functionalist courts are not at all uniform in how they approach this problem.

For example, as Professor Abraham succinctly writes:

The [Functionalist] courts have employed the [reasonable] expectations principle in cases where the insured's expectation [of coverage] was probably

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L.J. 823 (1990); Keeton, *Insurance Law Rights at Variance with Policy Provisions* (pts 1 & 2), 83 HARV. L. REV. 961, 1281 (1970); Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275 (1976); Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986).

See also Comment, *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts*, 13 U. MICH. J.L. REF. 603 (1980); Comment, *Insurer Liability in the Asbestos Disease—Context Application of the Reasonable Expectations Doctrine*, 27 SAN DIEGO L. REV. 239 (1982); Note, *Interpreting the Business Pursuits Exclusion in Homeowners' Policies—Toward Honoring "Reasonable Expectations,"* 25 SAN DIEGO L. REV. 132 (1980); Comment, *The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, 18 J. MARSHALL L. REV. 155 (1984).

<sup>47</sup> See *supra* notes 32-36 and accompanying text.

<sup>48</sup> See, e.g., *Gaunt v. John Hancock Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947) (applying Conn. law); *Goucher v. John Hancock Mut. Life Ins. Co.*, 113 R.I. 672, 324 A.2d 657 (1974); see also 13 J. APPLEMAN, *supra* note 32, at § 7401; 2 C. COUCH, *supra* note 32, at § 15:74; R. JERRY, *supra* note 9, at 94-98; R. KEETON & A. WIDISS, *supra* note 3, at 628-30.

RESTATEMENT OF CONTRACTS § 236(d) (1932) provides: "Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law."

RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979) also carries forward the substance of former Sec. 236(d) in this manner: "In choosing among the reasonable meanings of a promise or agreement or term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."

real and reasonable.<sup>49</sup> They have also employed it where an expectation of coverage was less probable, but the policy's denial of coverage seemed unfair.<sup>50</sup> Finally, they have relied on the principle even where an expectation of coverage was improbable and the denial of coverage would not appear unfair.<sup>51</sup> In short, the [Functionalist] judicial concept of an "expectation" of coverage is not a monolithic one.<sup>52</sup>

The *Restatement (Second) of Contracts* arguably also incorporates this Functionalist "reasonable expectations" view into its Section 211.<sup>53</sup> The most

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<sup>49</sup> Abraham, *supra* note 46, at 1153 (citing as an example, *Kievet v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 170 A.2d 22 (1961)).

<sup>50</sup> *Id.* (citing as an example, *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975)).

<sup>51</sup> *Id.* (citing as an example, *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966)).

<sup>52</sup> *Id.*

"The courts," writes Professor Abraham, "are [now] beginning to articulate the reasons underlying their ['reasonable expectations'] decisions," since prior to the 1960s, the casual observer often could find "little doctrinal support for such decisions other than the maxim that an instrument is to be construed against its drafter. Often courts even seem to search for an ambiguity to construe against the insurer. It is easy to conclude that this simply reflects an unprincipled preference for the policyholder at the expense of the deep-pocketed insurer, contrary policy provisions notwithstanding." *Id.* at 1151.

See also a two-page advertisement, appearing simultaneously in *TIME* magazine, March 11, 1991, and *NEWSWEEK* magazine, March 11, 1991, by American International Group (AIG), describing itself as "the largest underwriter of commercial and industrial insurance in America, and the leading U.S. based international insurance organization," stating that "[w]e must reform our 'deep pockets' approach to liability," and urging readers to contact their legislators to support a legislative 'reform' of this "liability crisis."

<sup>53</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

Comment (b) to Section 211 states:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms . . . . Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or understood, subject to such limitations as the law may impose.

Comment (e) to Section 211 states in part: "Apart from government regulation, courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it . . . ." There is no comparable section in the *First Restatement of Contracts*.

According to Professor Jerry, "[o]nly one court has relied upon section 211 of the *Restatement (Second) of Contracts* in the insurance setting [citing *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388 (1984)], but section 211

extreme application of a Functionalist “reasonable expectations” test, however, is found in a formula propounded by Professor (now Judge) Robert Keeton in an influential 1970 *Harvard Law Review* article. He states: “The objectively reasonable expectations of [insurance] 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.”<sup>54</sup>

The crucial factor here is that, under Professor Keeton’s Functionalist “reasonable expectations” formula, the insurance policy need not be read at all, which is anathema to a Formalist theory of insurance contract interpretation.<sup>55</sup>

Since 1970, the Keeton “reasonable expectations” formula has enjoyed substantial acceptance and support from various commentators<sup>56</sup> and has been adopted by a number of Functionalist courts.<sup>57</sup> In recent years, however, this

can be expected to attain greater prominence in future years.” R. JERRY, *supra* note 9, at 100.

Professor Henderson writes, however, that the Arizona Supreme Court may have gone beyond the Restatement’s requirements in the case of *Gordinier v. Aetna Casualty & Sur. Co.*, 154 Ariz. 266, 742 P.2d 277 (1987); *see also* *C & J Fertilizer Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975). A good discussion of Section 211 is found in Henderson, *supra* note 46, at 844-53.

<sup>54</sup> Keeton, *Insurance Law Rights at Variance with Policy Provisions* 83 HARV. L. REV. 961, 963-64 (1970). The second part of the Keeton formula was that “an insurer should be denied any unconscionable advantage in an insurance contract.” *Id.*

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[T]he 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 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 [Formalist] contract premise that a written agreement is the controlling code for determining the parties’ rights and duties.

Rahdert, *supra* note 46, at 335.

*Compare* the majority Functionalist opinion in *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 594, 388 A.2d 1346, 1353 (1978) (“The reasonable expectation of the insured is the focal point of an insurance transaction. . . . Courts should be concerned with assuring that the insurance purchasing public’s reasonable expectations are fulfilled.”) *with* the minority Formalist dissent (“[T]he problem in deciding an insurance claim seems no longer to be one of ascertaining what the contract as written means, but somehow divining the ‘reasonable expectation’ of the insured as to what the contract should mean.”). *Id.* at 600, 388 A.2d at 1357; *see also supra* notes 30-36 and accompanying text.

<sup>56</sup> *See, e.g.*, authorities cited in note 46 *supra*.

<sup>57</sup> *See, e.g.*, *Lambert v. Liberty Mut. Ins. Co.*, 331 So. 2d 260 (Ala. 1976); *Puritan Life Ins. Co. v. Guess*, 598 P.2d 900 (Alaska, 1979); *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 650 P.2d 441 (1982); *C. & J. Fertilizer Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa, 1975); *Brown v. Blue Cross & Blue Shield*, 427 So. 2d 139 (Miss. 1983); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983).

Functionalist doctrine of “reasonable expectations” has come under increasing criticism from other commentators,<sup>58</sup> and the doctrine has been rejected by a number of Formalist courts:<sup>59</sup>

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According to Professor Henderson, the following states have adopted the Keeton “reasonable expectations” doctrine: Alabama, Alaska, Arizona, California, Iowa, Montana, Nebraska, Nevada, New Hampshire, and New Jersey. Henderson, *supra* note 46, at 828. Another six jurisdictions 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 analysis:” Colorado, Delaware, Hawaii, North Carolina, Pennsylvania, and Rhode Island. *Id.* at 829-34.

<sup>58</sup> See, e.g., Note, *Reasonable Expectations: The Insurer’s Dilemma*, 24 DRAKE L. REV. 853, 863 (1975) (“It is questionable whether such a marked departure from the traditional contract rule is warranted.”); Comment, *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts*, 13 U. MICH. J.L. REF. 603, 617 (1980) (“the bargain courts protect under the Keeton analysis may be neither in the contract nor indicated by surrounding circumstances.”).

See also Anderson, *Reasonable Expectations and Insurance Contracts: What Should We Reasonably Expect from Judges?*, 28 FOR THE DEFENSE 9 (April, 1986); Birnbaum, Stahl, & West, *supra* note 44; Gardner, *Reasonable Expectations: Evolution Completed or Revolution Begun?*, 669 INS. L.J. 573 (1978); Squires, *supra* note 44, at 252; Comment, *Insurance Law Insurance Contract Interpretation: Doctrine of Reasonable Expectations Has No Place in Illinois*, 1985 S. ILL. L.J. 687 (1985); Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175 (1982); Note, *The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, 18 J. MARSHALL L. REV. 155 (1984); Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989).

And see Rahdert, *supra* note 46, 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.

<sup>59</sup> See, e.g., *Hallowell v. State Farm Ins. Co.*, 443 A.2d 925 (Del. 1982); *Meckert v. Transamerica Ins. Co.*, 108 Idaho 597, 701 P.2d 217 (1985); *Menke v. Country Mut. Ins. Co.*, 78 Ill. 2d 420, 36 Ill. Dec. 698, 401 N.E.2d 539 (1980); *Bond Bros. v. Robinson*, 393 Mass. 546, 471 N.E.2d 1332 (1984); *Robbins Auto Parts Inc. v. Granite State Ins. Co.*, 121 N.H. 760, 435 A.2d 507 (1981); *Walle Mut. Ins. Co. v. Sweeney*, 419 N.W.2d 176 (N.D. 1988); *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App. 3d 131, 506 N.E.2d 1192 (1986); *Ryan v. Harrison*, 40 Wash. App. 395, 699 P.2d 230 (1985); *St. Paul Fire & Marine Ins. Co. v. Albany County School Dist.*, 763 P.2d 1255 (Wyo. 1988); see also *Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass’n Ins. Co.*, 512 Pa. 420, 517 A.2d 910 (1986).

According to Professor Henderson, a number of jurisdictions have rejected the Keeton “reasonable expectations” doctrine, including: Idaho, Illinois, Massachusetts, North Dakota, Ohio, Oklahoma, South Carolina, Washington, and Wyoming. Henderson, *supra* note 46, at 834-35. At least 25 other states have not expressly adopted, nor expressly rejected, the Keeton doctrine of “reasonable expectations” either because the courts have not really

Remarkably, for a doctrine initially so popular, there are signs that its appeal is beginning to fade. Courts in a growing number of jurisdictions have announced limits on the doctrine's sway, while others that initially led the advance have begun to march in retreat. What has happened in the courts has been paralleled in the literature, where some commentators of late have challenged the doctrine's validity or called for narrowing reformulations. In short, the doctrine of reasonable expectations seems to have come half-circle in a matter of approximately twenty-five years. By no means has it passed from the scene, but the ardor of the early apostles seems to have given way rather quickly to the doubting of skeptics.<sup>60</sup>

Four commentators, however, stress that the Functionalist doctrine of "reasonable expectations," although plagued in the past with serious problems of uncertainty and unpredictability in its judicial application, should nevertheless continue to be utilized as a useful and viable doctrine in the interpretation of insurance contracts, as long as this "reasonable expectations" doctrine is augmented and buttressed with additional clearly defined rules and procedures in order to ensure a more uniform and a more predictable judicial application.<sup>61</sup>

But although the "reasonable expectations" doctrine continues to enjoy support from many academic scholars, and although it continues to enjoy support from various Functionalist courts, a Formalist judge would counter this

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addressed the issue, or because it is not clear whether the doctrine would be utilized in the absence of any policy ambiguity. *Id.* at 835-38. A majority of state courts, therefore, have *not* to date expressly adopted the Keeton doctrine of "reasonable expectations"; and although Professor Henderson states that "one may predict with considerable confidence that courts in [these] jurisdictions will recognize these developments and that any confusion over the nature of the ['reasonable expectations'] doctrine itself will rapidly dissipate," *id.* at 838, this author cannot as easily accept Professor Henderson's optimistic prediction, at least in the foreseeable future, based upon the apparent resurgence of present-day Legal Formalism.

<sup>60</sup> Rahdert, *supra* note 46, at 324; *see also* Henderson, *supra* note 46, at 824, 837-38:

[E]ven after two decades, there still seems to exist a great deal of uncertainty as to the doctrinal content and when the [reasonable expectations] principle may be invoked, including most of the jurisdictions that have professed to have adopted it. In short, questions remain as to whether the principle has developed into a full-fledged doctrine which can be applied in a predictable and evenhanded manner by the courts . . .

Although the number of adoptions [of the doctrine of reasonable expectations] is impressive, one may also conclude from [other cases] . . . that there remains some ambivalence towards adopting the doctrine . . .

<sup>61</sup> *See, e.g.*, Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); Henderson, *supra* note 46; Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPPERDINE L. REV. 267 (1986); Rahdert, *supra* note 46.

argument by stating that any alleged unfairness in the insurance contract should be rectified, not through discretionary judicial action, but rather through the administrative action of the state insurance commissioner, who possesses properly delegated authority from the state legislature to approve or disapprove of all insurance policies contracted within that state. Under this Formalist philosophy, then, any alleged unfairness in the insurance policy should be rectified, not by the court, but by the state insurance commissioner whenever the insurance policy does not comply with the state insurance code or whenever the policy contains misleading provisions, clauses, or titles.<sup>62</sup>

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<sup>62</sup> See, e.g., *Brown v. Equitable Life Ins. Co.*, 60 Wis. 2d 620, 630, 211 N.W.2d 431, 436 (1973) (“[T]his court is [not] empowered by [state statute] to regulate and approve policies of life insurance. That function is vested by the legislature in the office of the Commissioner of Insurance. We do not have the power to create a new contract for the parties.”); *Kirk v. Financial Sec. Life Ins. Co.*, 75 Ill. 2d 367, 374, 376, 389 N.E.2d 144, 146, 148 (1978) (“The legislature has not been silent on the matter of public policy as it relates to the contents of insurance policies. The Director of the Department of Insurance is required by statute to review policies of insurance in certain categories and approve or disapprove them, based on criteria including the established public policy of the State . . . . The approval of . . . policies of insurance by the Department, although not conclusive upon the courts, is, however, entitled to great weight . . . .”); *Formisano v. Blue Cross*, 478 A.2d 167, 170, 171 (R.I. 1984) (“The Legislature has the constitutional authority to prescribe conditions under which an insurance company shall transact business within our state, and concomitantly it has the power to delegate to the [state insurance commissioner] the authority to issue rules and regulations governing the content of insurance contracts . . . .”).

See also PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* (1927). Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 523 (1961), states, in pertinent part:

While protection of the weaker of two contracting parties explains the intervention of the state in the insurance transaction, it does not explain the myriad forms taken by that intervention . . . . Once [state] intervention has begun, new purposes begin to emerge, and the goals of reasonableness, equity, and fairness become explicit. Finally, as the insurance enterprise becomes more and more crucial to the social fabric and as regulation acquires more sophistication, the manifold purposes of society at large come to have more and more implications for the processes of insurance regulation.

See also Kimball & Pfennigstorf, *Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice*, 39 IND. L.J. 675 (1964); Kimball & Pfennigstorf, *Administrative Control of the Terms of Insurance Contracts*, 40 IND. L.J. 143 (1965); Kimball, *Book Review*, 19 CONN. L. REV. 311 (1987) (critical of the “reasonable expectations” doctrine).

The Formalists, therefore, also believe in reasonableness, equity, and fairness in insurance contracts. But they differ from the Functionalists as to which branch of government should have primary responsibility in regulating and reforming the insurance industry in general, and in regulating and reforming insurance policies in particular. The Formalists would favor legislative and administrative action in this area, and judicial restraint rather than judicial discretionary action.

Thus, irrespective of the particular merits and weaknesses of a Formalist approach or a Functionalist approach to American insurance law, one must nevertheless understand and appreciate the fact that *both* theories of American jurisprudence co-exist today in an uneasy, conflicting, and often confusing relationship within the overall framework of insurance law.

### III. SPECIFIC EXAMPLES OF THE FORMALIST—FUNCTIONALIST DICHOTOMY IN AMERICAN INSURANCE LAW

Although the selected insurance law topics discussed below do not purport to be an exhaustive treatment covering every aspect of the Formalist—Functionalist insurance law dichotomy, these four examples nevertheless do serve as important illustrations of how this Formalist—Functionalist jurisprudential dichotomy continues to exist in an uneasy and conflicting framework in American insurance law today.

#### A. *Insurance Contract Ambiguity versus “Constructive” Ambiguity versus No Ambiguity at All*

Under general rules of contract interpretation, whenever the insurance policy is susceptible to two or more reasonable interpretations so that an ambiguity exists, under the doctrine of *contra proferentum* the insurance policy will be strictly construed against the insurer who drafted the contract, and the policy will be liberally construed in favor of the insured who was the non-drafting party.<sup>63</sup> On this general rule of insurance contract interpretation, both the Formalist courts and the Functionalist courts can readily agree.<sup>64</sup> A

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Arguably too, current state regulation of the insurance industry is more comprehensive and more effective than state regulation that existed in Professor Vance's day. *See, e.g., supra* notes 40-41 and accompanying text.

<sup>63</sup> *See, e.g.,* RESTATEMENT OF CONTRACTS § 236(d) (1932); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). *See also* sources cited *supra* note 48 and accompanying text.

<sup>64</sup> *See, e.g.,* Hartnett v. Southern Ins. Co., 181 So. 2d 524, 528 (Fla. 1965) (“[S]o long as [insurance] policies are drawn in such a manner that it requires the proverbial Philadelphia lawyer to comprehend the terms embodied in it, the courts should and will construe them liberally in favor of the insured and strictly against the insurer to protect the buying public who rely upon [insurers] and agencies in such transactions.”). *See also* the extensive compilation of insurance law cases cited in support of this well-accepted rule of contractual construction of ambiguities appearing in 2 C. COUCH, *supra* note 32 §§ 15:74-15:78 (2d ed. 1984 & 1990 Com. Supp.); 13 J. APPLEMAN, *supra* note 32 § 7401 (rev. ed. 1976 and 1990 Supp.).

Moreover, the important corollary to this general rule is that:

When the [insurance] contract is clear, precise, and unambiguous in its terms, and the sense is manifest and leads to nothing absurd, there is *no* proper scope for a resort

problem, however, arises for most Formalist judges when various Functionalist judges, purportedly in order to justify the insured's expectation of coverage, attempt to find a so-called "constructive" ambiguity in an insurance policy, when no such ambiguity exists in fact.<sup>65</sup>

So under this Formalist—Functionalist clash, the question remains: is such a judicial practice of finding "constructive" ambiguities in insurance policies socially defensible, or is it logically and philosophically dishonest? For example, the Formalist courts and Functionalist courts are deeply divided regarding the interpretation of "conditional receipt" coverages regarding life and accident insurance policies, specifically when the prospective insured dies after submitting his or her insurance application and first premium payment, but before the final insurance policy is delivered to the applicant.<sup>66</sup> Although the vast majority of jurisdictions continue to interpret such "conditional receipts" according to the clear and unambiguous language appearing within the insurance application itself, and thus provide coverage to such applicants only

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to rules of construction, even to give effect to the policy. If the express terms and language that the parties have used is *not* ambiguous or uncertain, it should be given effect as written.

2 C. COUCH, *supra* note 32, § 15:70 (2d ed. 1984 & Com. Supp. 1990) (emphasis added); *see also* 13 J. APPLEMAN, *supra* note 32, § 7402 ("[T]his rule does not justify abandoning principles of normal interpretation where the [insurance] contract is clear, or taking such a construction as would vary the true meaning of the contract and the intention of the parties.").

<sup>65</sup> Even Professor Keeton states that "[t]o extend the principle of resolving ambiguities against the draftsman in this fictional way not only causes confusion and uncertainty about the effective scope of judicial regulation of contract terms but also creates an impression of unprincipled judicial prejudice against insurers." Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 972 (1970).

*See also* Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1154 (1981) ("by sometimes finding ambiguities where none apparently existed, courts have avoided explaining why an insured's expectations, even though reasonable, should override the language of the policy."); Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 327-33 (1986).

<sup>66</sup> For a good discussion of the various legal theories involving "conditional receipt" insurance disputes, *see* *Hildebrand v. Franklin Life Ins. Co.*, 118 Ill. App. 3d 861, 455 N.E.2d 553 (1983). *See also* Anderson, *Life Insurance Conditional Receipts and Judicial Intervention*, 63 MARQ. L. REV. 593 (1980); Note, "Binding Receipts" in California, 7 STAN. L. REV. 292 (1955); Note, *Life Insurance Policies and "Binding Receipts": Is the Insurer Bound?*, 1968 UTAH L. REV. 448 (1968); Note, *Life Insurance Receipts: The Mystery of the Non-Binding Binder*, 63 YALE L.J. 523 (1954).

*See also* Annotation, *Temporary Life, Accident, and Health Insurance Pending Approval of Application or Issuance of Policy*, 2 A.L.R.2d 943 (1948).



if they are found to be acceptable risks as of the underwriting date,<sup>67</sup> a minority of Functionalist courts have held that such “conditional receipts” constitute temporary insurance, by utilizing a “constructive” ambiguity argument in the absence of any actual ambiguity.<sup>68</sup>

Not surprisingly, this “constructive” ambiguity rationale in insurance contract interpretation has received severe criticism from various Formalist courts. For example, in *Brown v. Equitable Life Insurance Co.*,<sup>69</sup> the Wisconsin Supreme Court noted that:

The appellant would have us apply that which one court has called the doctrine of “constructive ambiguity” . . .<sup>70</sup> [which has been applied in] subsequent cases.<sup>71</sup> Under such a doctrine, the court would avail itself of a fictional ambiguity so as to provide a basis upon which the court could legislate coverage under a conditional receipt. We refuse to do so.<sup>72</sup>

Quoting an earlier decision from the Oregon Supreme Court,<sup>73</sup> the *Brown* court continued:

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<sup>67</sup> See *Hildebrand v. Franklin Life Ins. Co.*, 118 Ill. App. 3d 861, 455 N.E.2d 553 (1983).

The most commonly used form of conditional receipt is the “satisfaction” or “insurability” type of conditional receipt, which means the insurer must be satisfied that the prospective insured was otherwise insurable as a standard risk at the time of the application.

A more traditional minority approach is the “approval” type of conditional receipt, which means no insurance coverage comes into effect until the insurance is approved by an authorized official of the insurer. If it does come into effect, however, the effective date of the policy is that of the application or the medical examination.

See, e.g., *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947), cert. denied, 331 U.S. 849 (1947); *Hildebrand v. Franklin Life Ins. Co.*, 118 Ill. App. 3d 861, 455 N.E.2d 553 (1983).

<sup>68</sup> This theory of “temporary” insurance, based upon a “constructive” ambiguity insurance contract interpretation, generally requires that the insurer cannot terminate its coverage unless the insured is notified during his or her lifetime that his or her insurance application was rejected. See, e.g., *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975); *Slobojan v. Western Travelers Life Ins. Co.*, 70 Cal. 2d 432, 450 P.2d 271, 74 Cal. Rptr. 895 (1969); *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954); *Law v. Hawaiian Life Ins. Co.*, 51 Haw. 288, 459 P.2d 195 (1969); *Service v. Pyramid Life Ins. Co.*, 201 Kan. 196, 440 P.2d 944 (1968); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965); *Prudential Ins. Co. of Am. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967).

<sup>69</sup> 60 Wis. 2d 620, 211 N.W.2d 431 (1973).

<sup>70</sup> Citing *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954).

<sup>71</sup> See cases cited *supra* note 68 and accompanying text.

<sup>72</sup> *Brown*, 60 Wis. 2d at 629, 211 N.W.2d at 436.

<sup>73</sup> *Morgan v. State Farm Life Ins. Co.*, 240 Or. 113, 116-17, 400 P.2d 223, 224 (1965) (citations omitted).

Admittedly there have been cases in which a theory of constructive ambiguity has been employed in the absence of any ambiguity . . . .<sup>74</sup> Nevertheless, we are unable to decide the case at bar on a basis of a fiction which we deem inapplicable. The literal meaning of the [conditional] receipt in this case is that the insurer engaged to insure the insured if he turned out to be insurable, and, in that event, the insurance would be in effect from the date of the application. Such contracts have not yet been declared to be illegal in this state. Accordingly, this is the contract the parties made, and we are not at liberty to create a new contract for the parties.<sup>75</sup>

Indeed, various commentators who are strong proponents of the Functionalist “reasonable expectations” theory in insurance law<sup>76</sup> also have been disturbed by this “constructive” ambiguity analysis<sup>77</sup> and, in practice, the vast majority of American courts have refused to recognize such a “constructive” ambiguity argument.<sup>78</sup>

A better approach, at least for modern Functionalist courts, would be to openly and expressly embrace the “reasonable expectations” doctrine as a legitimate legal theory,<sup>79</sup> rather than attempting to judicially justify some hidden agenda by espousing an intellectually and philosophically unsound argument based upon the questionable doctrine of a “constructive” ambiguity.<sup>80</sup>

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<sup>74</sup> Citing *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954).

<sup>75</sup> *Brown*, 60 Wis. 2d at 629, 211 N.W.2d at 436.

<sup>76</sup> See *supra* note 46 and accompanying text.

<sup>77</sup> See *supra* notes 52 & 65 and accompanying text.

<sup>78</sup> See, e.g., 2 C. COUCH, *supra* note 32 § 15:86:

Merely because contracts of insurance are to be construed against the insurer or merely because the contract itself is one of insurance does not warrant the creation of doubt through construction of plain and unambiguous provisions of a contract. A doubt which would not be tolerated in any other kind of contract will not be created in insurance cases where the language in the policy is too clear and unambiguous to leave room for doubt. Resort is not to be had to a strained construction for the purpose of recognizing an ambiguity not otherwise apparent so that the court may have the liberty of applying the rule of construction against the insurer [citing many cases in support of this Formalist proposition].

<sup>79</sup> See *supra* note 46 and accompanying text.

<sup>80</sup> See, e.g., Henderson, *supra* note 46, at 846-53; Rahdert, *supra* note 46, at 325-33; Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988).

For example, in *Gordinier v. Aetna Casualty & Sur. Co.*, 154 Ariz. 266, 742 P.2d 277 (1987), a wife who was not living in the same household with her husband at the time of the accident attempted to collect uninsured motorists' benefits under an insurance policy that required that the wife reside in her husband's household. Even in the absence of any ambiguity or “constructive” ambiguity in the policy language, the Arizona Supreme Court held that such a restriction to coverage might nevertheless be unenforceable under the “reasonable expectations” doctrine “[w]here the contract terms, although not ambiguous to

A Formalist court, however, would still continue to apply traditional rules of insurance contract interpretation, and would still continue to reject the “constructive” ambiguity argument, as well as the “reasonable expectations” doctrine.<sup>81</sup>

### B. *Insurance Contract Provisions in Violation of State Public Policy: Who Decides?*

The general rule of traditional insurance law contract interpretation is that in the absence of ambiguity, the courts have no authority to alter or change the plain meaning of an insurance contract under the guise of contract interpretation, and the courts must therefore give effect to the provisions of a valid insurance contract that is otherwise not prohibited by law.<sup>82</sup> But whenever an insurance contract is contrary to state public policy, it is illegal and void.<sup>83</sup> The test of whether or not an insurance contract is void as against state public policy is whether it is injurious to the public or contravenes some important established societal interest, or when its purpose is to promote, effect, or encourage a violation of law.<sup>84</sup>

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the court, cannot be understood by the reasonably intelligent consumer . . . [then] the court will interpret them in light of the objective, reasonable expectations of the average insured . . .” or “[w]here some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he [or she] has coverage, although such coverage is expressly and unambiguously denied by the policy . . . .” *Id.* at 272-73, 742 P.2d at 283-84.

*See also* *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388 (1984), in which the Arizona Supreme Court followed the lead of the Iowa Supreme Court in *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975), in not only adopting the “reasonable expectation” doctrine, but also in adopting what was to later become Section 211 of the Restatement (Second) of Contracts (1981). *See generally supra* note 53 and accompanying text. *But see* Comment, *Decapitation to Cure Dandruff? The Scope of the Reasonable Expectations Doctrine of Darner Motor Sales Inc. v. Universal Underwriters Ins. Co.*, 20 ARIZ. ST. L.J. 841 (1988).

<sup>81</sup> *See, e.g., supra* notes 38, 62, & 78 and accompanying text; *see also* Anderson, *Life Insurance Conditional Receipts and Judicial Intervention*, 63 MARQ. L. REV. 593 (1980); Comment, *Reasonable Expectations: Contract Ambiguity vs. Arbitrary Application*, 34 DRAKE L. REV. 1065 (1985-86).

<sup>82</sup> *See, e.g., Sibley v. Bankers Life & Casualty Co.*, 213 So. 2d 59 (La. App. 1968); *see also supra* notes 36-38 and accompanying text. *See generally* 2 C. COUCH, *supra* note 32 § 15:38 and the extensive number of cases cited therein.

<sup>83</sup> *See, e.g., L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (applying Ohio law); *Boston Ins. Co. v. Read*, 166 F.2d 551 (10th Cir. 1948) (applying Okla. law); *Concord Gen. Mut. Ins. Co. v. McLain*, 270 A.2d 362 (Me. 1970). *See generally* 12 J. APPLEMAN, *supra* note 32 § 7027 (1981); 9 C. COUCH, *supra* note 32 § 39:14 (2d ed. 1985).

<sup>84</sup> *See, e.g., L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (applying Ohio law).

The question then arises as to who should decide whether or not an insurance contract violates state public policy—the state legislatures or the courts?

Traditionally, state public policy is normally expressed through the state legislature, and through the legislature's duly authorized administrative agency, the state insurance commission, since a state has a valid legal right to regulate and control the business of insurance for the public good.<sup>85</sup> Various courts, however, have also held that an insurance policy may be void because it violates not only statutorily declared public policy, but also because it violates a public policy that the courts would enforce in the absence of any statutory authority. For example, some Functionalist courts have relied on state public policy grounds to override nonambiguous, explicit terms in an insurance contract whenever the contract terms would arguably operate to defeat the “reasonable expectations” of the insured.<sup>86</sup> But other Formalist courts would reiterate that any seemingly harsh contractual result against an insured should not justify public policy “meddling” by the Functionalist courts in the absence of clearly stated legislative or administrative guidelines.<sup>87</sup>

There are many examples of insurance law cases illustrating how this Formalist—Functionalist dichotomy operates within the public policy context affecting insurance law generally. But among these many examples, the controversy involving time limitations for accidental death benefits in life insurance contracts serves as a prime example of this Formalist—Functionalist public policy disparity.

For example, in the case of *Burne v. The Franklin Life Insurance Co.*,<sup>88</sup> the insured, Bartholomew Burne, had a life insurance policy that contained a double indemnity payment provision if the insured's death was accidental, and if “such death occurred . . . within ninety days from the date of the accident.”<sup>89</sup> This policy provision was clear, express, and unambiguous. On January 30, 1959, Mr. Burne was struck by an automobile while crossing a street in North Miami, Florida. With vast sums of money and sophisticated medical techniques, Mr. Burne was kept medically alive, albeit in a persistent

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<sup>85</sup> See, e.g., *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105 (1951); *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1 (7th Cir. 1972) (applying Ill. law); *Swanco Ins. Co. v. Hager*, 879 F.2d 353 (8th Cir. 1989) (applying Iowa law), *cert. denied*, 110 S. Ct. 866 (1990); *Mutual Life Ins. Co. v. Daddy\$ Money, Inc.*, 646 S.W.2d 255 (Tex. App. 1982); see also *supra* note 62 and accompanying text. See generally 2A C. COUCH, *supra* note 32, §§ 21:1-21:14 & 21:24-21:104 (2d ed. 1985).

<sup>86</sup> See, e.g., *Sands v. Granite Mut. Ins. Co.*, 232 Pa. Super. 70, 331 A.2d 711 (1974).

<sup>87</sup> See, e.g., *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 269 N.E.2d 97 (1970).

<sup>88</sup> 451 Pa. 218, 301 A.2d 799 (1973).

<sup>89</sup> *Id.* at 221, 301 A.2d at 801 (quoting decedent's life insurance policy).

vegetative state, for four and a half more years.<sup>90</sup> So although his death in fact was accidental, Mr. Burne clearly did not die within the specified ninety day period that was required in his insurance policy in order for his beneficiary to receive a double indemnity payment.

Nevertheless, the Pennsylvania Supreme Court held that Mr. Burne's beneficiary was entitled to an accidental death double indemnity payment, since the ninety day accidental death policy provision was held to be against Pennsylvania's strong public policy. The court stated:

There are strong public policy reasons which militate against the enforceability of the ninety day limitation. The provision has its origins at a much earlier state of medicine . . . . Physicians and surgeons now stand at the very citadel of death, possessing the awesome responsibility of sometimes deciding whether and what measure should be used to prolong, even though momentarily, an individual's life. The legal and ethical issues attending such deliberations are gravely complex.

The result reached by the trial court [granting summary judgment in favor of the insurer, based upon the unambiguous insurance policy language] presents a gruesome paradox indeed—it would permit double indemnity recovery for the death of an accident victim who dies instantly or within ninety days of an accident, but would deny such recovery for the death of an accident victim who endures the agony of prolonged illness, suffers longer, and necessitates greater expense by his family in hopes of sustaining life even momentarily beyond the ninety day period. To predicate liability under a life insurance policy upon death occurring only on or prior to a specific date, while denying policy recovery if death occurs after that fixed date, offends the basic concepts and fundamental objectives of life insurance and is contrary to public policy. Hence, the ninety-day limitation is unenforceable.<sup>91</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 221-22, 301 A.2d at 801-02.

The *Burne* court went on to state:

[T]he decisions as to what medical treatment should be accorded an accident victim should be unhampered by considerations which might have a tendency to encourage something less than the maximum medical care on penalty of financial loss if such care succeeds in extending life beyond the 90th day. All such factors should, whenever possible, be removed from the antiseptic halls of the hospital. Rejection of the arbitrary 90-day provision does exactly that.

*Id.* at 223, 301 A.2d at 802.

This rationale might also be germane to various "right to die" cases involving surrogate medical decision making. Compare, for example, the judicial rationale in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), cert. denied sub nom., *Garger v. New Jersey*, 429 U.S. 922 (1976), with *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), aff'd, 110 S. Ct. 2841 (1990).

Other Functionalist courts have likewise held, as did the *Burne* court, that a ninety-day provision for accidental death benefits in a life insurance policy is unenforceable as contrary to state public policy.<sup>92</sup>

However, a Formalist court in the subsequent case of *Kirk v. Financial Security Life Insurance Co.*,<sup>93</sup> severely criticized the *Burne* rationale, and expressly declined to follow it.<sup>94</sup> In *Kirk*, the insured died 92 days after the accident, and the double indemnity provision of his life insurance policy took effect only if the insured died within 90 days of the accident. The Illinois Supreme Court in this case ruled in favor of the insurance company, holding that such an unambiguous ninety-day provision in the life insurance contract did *not* violate state public policy.<sup>95</sup> The Illinois Supreme Court reasoned in *Kirk*:

The long line of authority supporting these time-limitations requirements in insurance policies, the recent departure from these holdings by the Pennsylvania Supreme Court in *Burne* and the New Jersey appellate court in *Karl*, and the subsequent rejection of *Burne* by the Ohio Supreme Court and the Louisiana appellate court indicate that the issue is not one where there are clearly defined and objective rules and standards of public policy. This is not a matter where public policy is so clear that objective criteria compel us to hold the 90-day limitation invalid. Furthermore, public policy of a State or the nation is found imbedded in its constitution and its statutes, and, when these are silent on a subject, in the decisions of the courts [citations omitted]. The legislature has not been silent on the matter of public policy as it relates to the contents of insurance policies. The Director of the Department of Insurance is required by statute to review policies of insurance in certain categories and approve or disapprove them, based on criteria including the established public policy of this State . . . .

. . . .

The approval of the use of 90-day limitation periods in policies of insurance by the Department, although not conclusive on the courts, is,

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<sup>92</sup> See, e.g., *Karl v. New York Life Ins. Co.*, 139 N.J. Super. 318, 353 A.2d 564 (1976), *aff'd*, 154 N.J. Super. 182, 381 A.2d 62 (App. Div. 1977); see also Note, *Death Be Not Proud—The Demise of Double Indemnity Time Limitations*, 23 DEPAUL L. REV. 854 (1974).

<sup>93</sup> 75 Ill. 2d 367, 389 N.E.2d 144 (1978).

<sup>94</sup> The *Kirk* court noted that two other courts had also rejected the *Burne* rationale, and had upheld the traditional 90-day accidental death limitations. See, e.g., *Rhoades v. Equitable Life Assurance Soc'y of U.S.*, 54 Ohio St.2d 45, 374 N.E.2d 643 (1978); *Fontenot v. New York Life Ins. Co.*, 357 So. 2d 1185 (La. App. 1978).

<sup>95</sup> The *Kirk* court stated that it was following the traditional Formalist rule recognized in the vast majority of jurisdictions, citing more than 25 cases in support of its holding, and Annotation, *Validity and Construction of Provision in Accident Insurance Policy Limiting Coverage for Deaths or Loss of Member to Death or Loss Occurring Within Specified Period After Accident*, 39 A.L.R.3d 1311 (1971). 1A J. APPLEMAN, *supra* note 32 § 612 (1965). *Kirk*, 75 Ill. 2d at 371-72, 389 N.E.2d at 145-46.

however, entitled to great weight as against the contention that such a provision is against public policy . . . .

That this 90-day provision is a matter best left to the legislature and Department of Insurance is clear from an analysis of the issues involved . . . .<sup>96</sup>

So, again, we observe how some Functionalist courts, in order to validate the "reasonable expectations" of the insured, actively utilize judicial discretion under the rubric of a public policy argument to achieve their ultimate goal.<sup>97</sup> Formalist courts, on the other hand, when faced with a similar public policy issue, continue to utilize judicial restraint in deference to state constitutional, statutory, and administrative guidelines and continue to espouse a traditional contractual interpretation applied to insurance contracts generally.<sup>98</sup>

### C. Loss "Arising Out of the Ownership, Maintenance or Use" of an Automobile: What Causal Nexus Is Required?

In a standard personal automobile insurance policy, liability insurance coverage generally is afforded to the insured or to any other "covered person" for any loss arising out of "the ownership, maintenance or use" of such automobile.<sup>99</sup> But how should such a loss "arising out of the ownership, maintenance or use" of the automobile be interpreted by the courts?<sup>100</sup> Again, a

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<sup>96</sup> *Kirk*, 75 Ill. 2d at 374-77, 389 N.E.2d at 147-48.

<sup>97</sup> See generally Note, *Death Be Not Proud—The Demise of Double Indemnity Time Limitations*, 23 DEPAUL L. REV. 854 (1974) (supporting this Functionalist approach).

<sup>98</sup> See generally Note, *The Role of Public Policy and Reasonable Expectations in Construing Insurance Contracts*, 47 TEMPLE L.Q. 748 (1974) (supporting this Formalist approach).

<sup>99</sup> See, e.g., Insurance Services Office, *Sample Personal Automobile Insurance Policy*, Insuring Agreement Part A, Section 1 (1983).

<sup>100</sup> For an overview of this important subject, see generally 12 C. COUCH, *supra* note 32, at § 45:53-45:80 (2d ed. 1981); 7A J. APPLEMAN, *supra* note 32, at § 4500 (1979); Annotation, *Automobile Liability Insurance: What Are Accidents or Injuries "Arising Out of Ownership, Maintenance, or Use" of Insured Vehicle*, 15 A.L.R.4th 10 (1982).

It should also be noted that loss arising out of the "ownership, maintenance or use" of a vehicle, while expressly *included* in most automobile insurance policies, is expressly *excluded* in most homeowner insurance policies. Thus, very often this legal question of interpretation hinges on whether the automobile insurer or the homeowners insurer is ultimately liable to the insured. See, e.g., *State Farm Fire & Casualty Co. v. Kohl*, 131 Cal. App. 3d 1031, 182 Cal. Rptr. 720 (1982); *National Am. Ins. Co. v. Insurance Co. of N. Am.*, 74 Cal. App. 3d 565, 140 Cal. Rptr. 828 (1977); *Farm Bureau Mut. Ins. Co. v. Evans*, 7 Kan. App. 2d 60, 637 P.2d 491 (1981); *Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917 (Minn. 1983); *Farmers Fire Ins. Co. v. Kingsbury*, 118 Misc. 2d 735, 461 N.Y.S.2d 226 (1983).

divergence of Formalist and Functionalist courts becomes apparent in this area of insurance law as well.

Although some courts have applied a severely restricted interpretation of the word "use" of an automobile to mean the actual "operation" of such a vehicle, or the manipulation of the automobile's controls in order to propel it,<sup>101</sup> most other courts have not applied such a strict interpretative standard. A majority of these courts have held that the "use" of an automobile is not necessarily synonymous with "driving" or "operating" the vehicle, and therefore it is sufficient to show only that the accident "was connected with," "grew out of," or "flowed from" the use of the automobile.<sup>102</sup> All courts, however, uniformly agree that a causal connection or causal nexus must exist between the injury or loss on one hand, and the ownership, maintenance, or use of the automobile on the other hand, in order to comply with the insurance policy coverage provision for loss "arising out of the ownership, maintenance or use" of the automobile.<sup>103</sup>

But the important distinction between many Formalist and Functionalist courts is the *degree* of this causal connection that is required between the loss and the "use" of the automobile. Put another way, the courts have differed regarding whether a *substantial* causal nexus is required under the insurance policy, or merely a *minimal* or *sufficient* causal nexus.

Although the courts are far from uniform in how they interpret this causal nexus requirement, it is submitted that those courts applying a more Formalistic approach to automobile insurance policy disputes tend to require a *substantial* causal connection between the injury and the "use" of the automobile, largely based upon traditional principles of insurance contract interpretation. Those courts that apply a more Functionalistic approach to automobile insurance disputes, based upon the insured's "reasonable

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<sup>101</sup> See, e.g., *Richland Knox Mut. Ins. Co. v. Kallen*, 376 F.2d 360 (6th Cir. 1967).

<sup>102</sup> See, e.g., *Brenner v. Aetna Ins. Co.*, 8 Ariz. App. 272, 445 P.2d 474 (1968); *Hogle v. Hogle*, 167 Conn. 572, 356 A.2d 172 (1975); *Cagle v. Playland Amusement, Inc.*, 202 So. 2d 396 (La. App. 1967); *Progressive Casualty Ins. Co. v. Hoekman*, 359 N.W.2d 685 (Minn. App. 1984); *State Farm Mut. Ins. Co. v. Allstate Ins. Co.*, 154 W. Va. 448, 175 S.E.2d 478 (1970).

<sup>103</sup> See, e.g., *Unigard Mut. Ins. Co. v. Abbott*, 732 F.2d 1414 (9th Cir. 1984) (applying Mont. law); *State Farm Mut. Auto. Ins. Co. v. Smith*, 107 Idaho 674, 691 P.2d 1289 (Idaho App. 1984); *Chicago Ins. Co. v. Security Ins. Co.*, 111 N.J. Super. 291, 268 A.2d 296 (1970); *Plaxco v. United States Fidelity & Guar. Co.*, 252 S.C. 437, 166 S.E.2d 799 (1969).

However, a break in the chain of causation, where the injury results from an independent, superceding cause, generally would *not* arise out of the ownership, maintenance, or use of the automobile. See, e.g., *State Farm Fire & Casualty Co. v. Kohl*, 131 Cal. App. 3d 1031, 182 Cal. Rptr. 720 (1982); *Carter v. City Parish Government*, 409 So. 2d 345 (La. App.) *cert. denied in part*, 412 So. 2d 1114 (La. 1981), *rev'd in part*, 423 So. 2d 1080 (La. 1982).



expectation" of coverage, are not as concerned with traditional contractual implications as the Formalist courts are, and therefore require only a *minimal* or *sufficient* causal nexus to find coverage under the policy.

For example, in the case of *Lumberman's Mutual Casualty Co. v. Logan*,<sup>104</sup> a New York appellate court refused to find that the insurance company was liable for an accident "arising out of the ownership, maintenance or use" of an automobile where the injury resulted from the insured's fall in an icy automobile parking lot. The New York court reasoned that since the accident did not arise from the intrinsic nature of the automobile, and the vehicle itself did not produce the injury, there was no substantial causal nexus between the injury and the "use" of the automobile to allow coverage under the policy.<sup>105</sup> A number of other Formalist courts also have utilized this substantial causal nexus standard.<sup>106</sup>

In *Novak v. Government Employees Insurance Co.*,<sup>107</sup> however, a Florida appellate court held that where the insured, while leaving her house, was shot by an assailant in her driveway after she refused his request to give him a ride, the insured's injury and subsequent death did arise "out of the ownership, maintenance or use" of the automobile. The court reasoned that the insured's automobile need not be the instrumentality of the injury, nor must the type of conduct that caused the injury be foreseeably identifiable with the normal use of the automobile. Thus, since a direct causal connection was not required in the

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<sup>104</sup> 88 App. Div. 2d 971, 451 N.Y.S.2d 804 (1982).

<sup>105</sup> *Id.* at 971, 451 N.Y.S.2d at 805.

<sup>106</sup> In addition to requiring a substantial causal nexus between the injury and the "use" of the automobile, courts applying this Formalist-based rationale also try to determine whether or not the automobile was "used" in a "normal" manner. *See, e.g., Carter v. Grain Dealers Mut. Ins. Co.*, 10 Ark. App. 16, 660 S.W.2d 952 (1983) (there must be a causal connection between the injury and the operation of the automobile, so being shot while sitting inside an automobile is not enough, since the victim could as easily have been shot outside the vehicle as well); *State Farm Mut. Auto. Ins. Co. v. Smith*, 107 Idaho 674, 691 P.2d 1289 (Idaho App. 1984) (an automobile insurance policy provision requiring an injury to "arise out of the use" of the automobile connotes a substantial causal nexus between the injury and use, and this causal nexus must be more than an incidental or fortuitous nexus); *United States Fidelity & Guar. Co. v. Western Fire Ins. Co.*, 450 S.W.2d 491 (Ky. 1970) (an accident has to arise out of the inherent nature of the automobile in order to bring it within the terms of the policy "use" provision); *Coleman v. Sanford*, 521 So. 2d 876 (Miss. 1988) (similar holding to the *Carter* case, *supra*); *Nassau Ins. Co. v. Jiminez*, 116 Misc. 2d 908, 456 N.Y.S.2d 654 (1982) (there was no substantial causal nexus between the injury and the "use" of the vehicle, because the vehicle was not the actual instrumentality that produced the injuries); *State Farm Mut. Auto. Ins. Co. v. Powell*, 227 Va. 492, 318 S.E.2d 393 (1984) (even though the "ownership, maintenance or use" of an automobile need not be the direct and proximate cause of the injury in a legal sense, there still must be a causal connection between the accident and the employment of the insured motor vehicle as a motor vehicle in order for coverage to exist).

<sup>107</sup> 424 So. 2d 178 (Fla. App. 1983).

legal sense, only a minimal causal nexus was necessary.<sup>108</sup> A number of other Functionalist courts also have utilized this minimal causal nexus standard.<sup>109</sup>

The courts are also split on the question of whether injuries sustained when a firearms weapon accidentally discharges while being loaded in, or unloaded from, a vehicle arises out of the "use" of such a vehicle. Again, those courts requiring a substantial causal nexus with the "use" of the automobile generally deny coverage,<sup>110</sup> while those courts requiring only a minimal causal nexus with the "use" of the automobile generally find that coverage exists.<sup>111</sup>

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<sup>108</sup> *Id.* at 180-81.

<sup>109</sup> *See, e.g.,* Wyoming Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 467 F.2d 990 (10th Cir. 1972) (applying Wyo. law) (for an accident to be regarded as one resulting from the "use" of a vehicle, the causal relationship needs only to be "sufficiently connected" to the act); Allstate Ins. Co. v. Gillespie, 455 So. 2d 617 (Fla. App. 1984) (the causal nexus between the injury and the automobile "use" need not be substantial); North Am. Ins. Co. v. Insurance Co. of N. Am., 74 Cal. App. 3d 565, 140 Cal. Rptr. 828 (1977) (only a minimal causal connection is required between the injury and "use" of the automobile, and since coverage for accidents arising out of the "use" of an automobile has a broad and comprehensive meaning, almost any causal connection between the automobile and the injury will provide coverage); Government Employees Ins. Co. v. Batcheler, 421 So. 2d 59 (Fla. App. 1982) ("some connection" or "nexus" is all that is legally required between the injury and "use" of the automobile); Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917 (Minn. 1983) (the phrase "arising out of the use" of an automobile requires only "some" causal connection between the injury and the use of the vehicle).

<sup>110</sup> *See, e.g.,* Bruno v. Hartford Accident & Indem. Co., 337 So. 2d 241 (La. App. 1976); Shinabarger v. Citizens Mut. Ins. Co., 90 Mich. App. 307, 282 N.W.2d 301 (1979).

<sup>111</sup> *See, e.g.,* Traveler's Ins. Co. v. Aetna Casualty & Sur. Co., 491 S.W.2d 363 (Tenn. 1973); Allstate Ins. Co. v. Truck Ins. Exch., 63 Wis. 2d 148, 216 N.W.2d 205 (1974); *see also* State Farm Mut. Auto. Ins. Co. v. Smith, 107 Idaho 674, 675-76, 691 P.2d 1289, 1290-91, which states:

The Missouri Court of Appeals recently reviewed and categorized the decisions determining coverage under a use provision when an accidental shooting occurs in the proximity of a vehicle. *Cameron Mutual Insurance Company v. Ward*, 599 S.W.2d 13 (Mo. App. 1980). The first category involves "the accidental discharge of guns inside moving or motionless vehicles while an occupant of the vehicle is handling or toying with the gun . . . ." The Missouri Court found, without exception, the cases in this category disallow coverage under the insuring agreements because no causal connection exists between the discharge of the guns and the use of the vehicles. The vehicles were merely the situs of the injuries since discharge of the guns was unconnected with the inherent use of the vehicle.

The Missouri Court's second category of cases involves "the accidental discharge of guns during the process of loading them into or unloading them from vehicles." These cases hold that coverage exists under the insurance policies. The third category involves the use of a physical portion of a vehicle as a "gun rest" for the purpose of firing a weapon. The three decisions reviewed by the Missouri Court in this category split in their determination regarding coverage. The fourth category involves the "accidental discharge of guns resting in or being removed from gun racks permanently attached to vehicles." The cases in this category usually find that coverage exists. The

Accordingly, a wide divergence still exists between Judicial Formalists and Judicial Functionalists in this important area of automobile insurance law.

*D. Comprehensive or Commercial General Liability Insurance Coverage: Interpreting the Pollution Exclusion Clause for Environmental Losses*

One of the greatest challenges facing the American liability insurance industry today deals with the major threat of pollution-related environmental liability.<sup>112</sup> Such liability may be based upon the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),<sup>113</sup> or liability also may be based upon other state and federal pollution statutes, or upon state common law principles such as nuisance.<sup>114</sup> In the wake of this pollution-related litigation explosion, many manufacturers and other commercial enterprises have sought to shift the financial burden of these pollution liability claims onto their insurance companies under their comprehensive general liability insurance policies (now called commercial general liability insurance policies), or CGL policies for short.<sup>115</sup> The liability insurance companies, however, in order to avoid these pollution liability claims, have drafted and incorporated pollution exclusion clauses into their CGL insurance policies.<sup>116</sup>

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fifth category involves "the accidental discharge of guns inside a vehicle caused by the actual movement or operation of the vehicle." The cases reviewed by the court in this category find a sufficient causal connection between the use of the vehicle and the injury to invoke coverage under the use provision of the liability policy.

<sup>112</sup> See, e.g., The American Law Institute, *Complex Litigation Project* Tentative Draft No. 1 at page 17 (1989) (identifies pollution insurance coverage disputes as the paradigms of modern complex litigation which may well require new management and adjudicative techniques). See generally Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (1988).

<sup>113</sup> 42 U.S.C. §§ 9601-9675 (1988).

<sup>114</sup> See, e.g., *New Jersey Dept. of Env'tl. Protection v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 19 E.R.C. 1505 (1983).

<sup>115</sup> See, e.g., *Westinghouse Corp. v. Liberty Mut. Ins. Co.*, 233 N.J. Super. 463, 559 A.2d 435 (1989), in which Westinghouse Corporation sought, in a single action, a declaration of coverage rights with respect to all their pollution liability claims under hundreds of CGL policies issued over a 40 to 50 year period.

<sup>116</sup> A pollution exclusion clause generally provides that coverage that may otherwise exist under a CGL policy does *not* apply to claims based on:

[B]odily injury or property damage resulting from the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

According to one commentator, the liability insurance companies devised these pollution exclusion clauses:

to exclude *all* pollution coverage for pollution-related liability claims *except* those claims arising from causative events that fit within the traditional, pre-1966 concept of "accident." That is, the general exclusion for pollution liability claims was expressly made subject to a narrow exception for claims resulting from polluting discharges that are *both* fortuitous, unexpected and unintended—"accidental"—*and* non-recurrent, abrupt and isolated in time, or truly "sudden."<sup>117</sup>

Various Functionalist courts, however, have *not* interpreted the pollution exclusion clause in this manner. These Functionalist courts, in order to validate the "reasonable expectations" of the insured policyholders, have held that the "sudden and accidental" exception to the pollution exclusion clause is ambiguous,<sup>118</sup> and therefore the pollution exclusion clause should be construed to have no independent meaning at all, since it is simply a "restatement" of the policy "occurrence" clause, with its limitation of coverage based only upon injuries or damages that are either expected or intended from the standpoint of the insured.<sup>119</sup>

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Standard CGL Exclusion Clause, Insurance Services Office, 1973. *See generally* Ballard & Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610 (1990); Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEORGETOWN L.J. 1237 (1986); Russell, *Developments in Insurance Coverage for Environmental Losses—The Pollution Exclusion*, Paper delivered to the Insurance Law Section of the Association of American Law Schools in Washington D.C. on January 6, 1991; Marrs, *Pollution Exclusions Validity and Applicability*, 26 TORT & INS. L.J. 662 (1991).

<sup>117</sup> Russell, *supra* note 116, at 8.

For the policyholders' perspective regarding the pollution exclusion's "drafting history," however, see *contra* Saylor & Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, MEALEY'S LITIGATION REPORTS (INSURANCE), Vol. 2 at 4425 (1986).

But for a case that supports the insurers' interpretation of the pollution exclusion's "drafting history," see *American Motorists Ins. Co. v. General Host Corp.*, 120 F.R.D. 129 (D. Kan. 1988).

<sup>118</sup> *See, e.g.*, *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990 (1982) (because the term "sudden" is ambiguous, the pollution exclusion clause does not preclude coverage when an intentional discharge results in unintended harm).

<sup>119</sup> *See, e.g.*, *Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 164, 451 A.2d 990, 992 (1982), in which the court held that the CGL pollution exclusion clause :

But recently, a number of Formalist courts have taken serious issue with this Functionalist interpretation of the pollution exclusion clause in CGL policies and have held that since the pollution exclusion provision and its "sudden and accidental" exception are *not* ambiguous,<sup>120</sup> the courts must interpret and apply the "everyday meaning" of the pollution exclusion clause,<sup>121</sup> rather than attempting to utilize some Functionalist rationale in order to find policyholder coverage that is at variance with the clear and unambiguous terms of the CGL insurance policy exclusion.<sup>122</sup>

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can be interpreted as simply a restatement of the definition of "occurrence"—that is, that the [CGL] policy will cover claims where the injury was "neither expected nor intended" [by the insured]. It is a re-affirmation of the principle that coverage will not be provided for intended results of intentional acts but will be provided for the unintended results of an intentional act.

*See also* *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 135 (D. Del. 1987); *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *Jonesville Prod. Co. v. Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986); *DuWel Products, Inc. v. United States Fire Ins. Co.*, 236 N.J. Super. 349, 565 A.2d 1113 (App. Div. 1989), *cert. denied*, 121 N.J. 617, 583 A.2d 316 (1990); *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

<sup>120</sup> *See, e.g.*, *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988) (applying Ky. law) ("We fully agree with the conclusion that this language is clear and plain, something only a lawyer's ingenuity could make ambiguous."); *Technicon Elecs. Corp. v. American Home Assurance Co.*, 141 App. Div. 124, 533 N.Y.S.2d 91 (1988), *aff'd*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989).

<sup>121</sup> *See, e.g.*, *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 34 (6th Cir. 1988) (applying Ky. law):

We have no difficulty reconciling the [pollution exclusion clause with the CGL policy "occurrence" provision]. We believe the "occurrence" definition results in a policy that provides coverage for continuous or repeated exposure to conditions causing damages in all cases except those involving pollution, where coverage is limited to those situations where the *discharge* was "sudden and accidental." . . .

We believe that the everyday meaning of the term "sudden" is exactly what this clause means . . . . It must also be emphasized that the focus of this "sudden and accidental" exception to the general pollution exclusion is on the nature of the discharge of the pollution itself, not on the nature of the damages caused.

We believe that the phrase "sudden and accidental" is not a synonym for "unexpected and unintended," and that it should not be defined by reference to whether the accident or damages were expected.

<sup>122</sup> The resurgence of this Formalist rationale, involving a traditional contractual interpretation of pollution exclusion clauses in CGL policies, is illustrated in the following cases: *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 119 Ill. Dec. 96, 522 N.E.2d 758 (1988); *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 407 Mass. 675, 555 N.E.2d 568 (1990); *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 728 F. Supp. 1310 (E.D. Mich. 1989); *Technicon Elecs. Co. v. American*

Thus, again, with this final illustration of pollution exclusion clauses in CGL insurance policies, not only is there strong evidence of a Formalist—Functionalist dichotomy in the way these pollution exclusion clauses are interpreted by the courts, but there is also strong evidence of a surprising resurgence in the Formalist judicial philosophy of applying a traditional contractual interpretation to insurance contracts generally, and to comprehensive or commercial general liability insurance contracts in particular.

#### IV. CONCLUSION

Seemingly arbitrary and contradictory decisional patterns in American insurance law cases can be understood and appreciated only if one recognizes the fundamental impact—and clash—of two competing theories of American jurisprudence, Legal Formalism and Legal Functionalism, in an insurance law context.

Legal Formalism is based upon a traditional view that correct legal decisions are determined by pre-existing legal rules, and that the courts must reach their decisions in a logical and socially neutral manner. Formalist judges therefore generally apply the philosophy of judicial restraint, in favor of established legislative and administrative authority.

In an insurance law context, Legal Formalism is exemplified by the writings of Professor Samuel Williston and others who believe that insurance contracts ought to be judicially interpreted under the same legal principles as contracts in general, with the exception of various insurance forms and procedures that are regulated by statute.

Legal Functionalism, on the other hand, is based upon a modern view that the paramount concern of the courts should not be logical consistency, as the Formalists believe, but socially desirable consequences. Functionalist judges therefore generally apply the philosophy of judicial activism, co-equal to legislative or administrative authority.

In an insurance law context, Legal Functionalism is exemplified by the writings of Professor Robert Keeton and others who believe that the “reasonable expectations” of the insured ought to be honored, even though a

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Home Assurance Co., 141 App. Div. 124, 533 N.Y.S.2d 91 (1988) *aff'd* 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989); Waste Management, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987).

In order to avoid future litigation in this complex area of insurance law, the liability insurance industry in 1986 drafted and incorporated a new “absolute” pollution exclusion clause into their new Commercial General Liability Insurance Policy. *See generally* Hendrick & Wiesel, *The New Commercial General Liability Forms: An Introduction and Critique*, 36 FED. INS. & CORP. COUNS. Q. 319 (1986).

painstaking study of the insurance policy provisions contractually would negate those expectations.

Although Legal Functionalism is widely recognized as the dominant legal theory of jurisprudence in most areas of American law today, Legal Formalism has nevertheless maintained continuing theoretical credibility with many courts in the field of insurance law, primarily based upon a traditional contractual interpretation of insurance policies in general.

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

So whether one agrees with the philosophical tenets underlying Legal Formalism or Legal Functionalism in an insurance law context, one must still recognize and appreciate the fact that both of these conflicting theories continue to co-exist as uneasy alternatives in American insurance law today.

It is not enough, therefore, to understand insurance law "in the books" and insurance law "in action." One must also know the judge—and understand the jurisprudential philosophy of each particular court.