The Insured's Expectations Should Be Honored Only if They are Reasonable

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ARTICLES

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I. INTRODUCTION

Most people in this country own one or more insurance policies. Most of these people pay for insurance coverage that is at best difficult, and often impossible, to understand. Most people, in fact, find their insurance policies so complex and confusing that they make no attempt at all to read them. The result is that insurers prepare and offer to insureds standard policies which insureds must accept or decline without any negotiations as to the terms of coverage. Simple economics dictates this practice. If each insurance contract were individually negotiated, the enormous cost would make insurance coverage unaffordable for most potential buyers.

It is likely that most, if not all, “insurance contracts were negotiated among persons of relatively equal bargaining power” in the early years at Lloyd’s Coffee House. The person seeking insurance coverage usually wrote the insurance proposal, and the insurers then “underwrote” the coverage. It was not long, however, before some or all of the coverage provisions included in the proposal were suggested or required by the underwriters. In the course of time, as various kinds of insurance were developed and marketed both within and outside the Coffee House, it became increasingly

1. See KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 1 (2d ed. 1995) (explaining that private insurance premiums in the United States approach one trillion dollars per year). “Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.” United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 540 (1944).


4. See Keeton, supra note 3, at 966. When an insurer “underwrites” coverage, it places its name at the bottom, following the description of the coverage, and indicates the amount or percentage it is accepting. See id.

5. See id.
common to find insurance coverage provisions standardized for all buyers, with the terms "almost invariably drafted by [the] insurers."

There are several reasons why standardized contracts are desirable and probably indispensable. They allow for the spreading of risks among insureds who are similarly situated and calculation of premiums on the basis of a large and broad pool of insureds. They also produce economies of scale, which reduce the cost of insurance. Finally, they greatly reduce the expense involved in applying legal and other expertise which is required for the drafting of contracts.

However, standardized contracts also create many problems. They frequently do not make clear to insureds either the extent of coverage affirmatively provided, or the limitations and exclusions that reduce the coverage. They often are complex and very difficult to read and understand. This often leads to a situation where an insured believes he has coverage only to be told, when he files a claim, that the policy does not provide the expected coverage. Standardized insurance policies are a prime example of a contract of adhesion, in which the insurance buyer has no real choice except the standardized provisions offered to him. There is no negotiation; it is strictly "take it or leave it."

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6. *Id.*
8. See id.
9. See id.
10. See id. at 687-89.
11. See id. at 687.
12. When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically, due to habit and my masculine personal orientation. By doing so I avoid the rather awkward "he or she" and the grammatically incorrect "they." I trust that female authors will balance the scales on the other side.
15. See Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 (Cal. 1981). The California Supreme Court stated, "The term ['contract of adhesion'] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Id.*
17. See David L. Goodhue, *The Doctrine of Reasonable Expectations in Massachu-
panies are therefore in a position to give "an illusion of broad coverage which is severely limited by highly technical exclusionary language oftentimes hidden in a mass of fine print in an obscure part of the policy."\footnote{18}

In construing adhesion contracts most, if not all, courts apply the rule of \textit{contra proferentem},\footnote{19} which mandates that ambiguous language in a contract, especially an insurance policy, will be strictly construed against the drafter of the contract (almost always the insurer) and in favor of the other party (usually the insured).\footnote{20} Courts often paint a picture of naked power on the one hand and helpless need on the other, indicating "a clear need to redress the balance [by enforcing] . . . the contract according to the expectation of the adhering party" (here, the insured).\footnote{21} Not infrequently, courts go even further and use the ambiguity rule "to avoid what they perceive to be unfair results, fabricating ambiguities which they then construe against the insurer."\footnote{22}

II. THE DOCTRINE OF REASONABLE EXPECTATIONS

Although the doctrine of reasonable expectations was not formally denominated as such until Professor (later Judge) Keeton’s seminal article in 1970, it had an influence on judicial decisions in much earlier years.\footnote{23} For example, in 1918, in \textit{Bird v. Saint Paul Fire & Marine Insurance Co.}, Justice Cardozo analyzed an in-

\begin{itemize}
\item 18. Goodhue, \textit{supra} note 17, at 896 n.32.
\item 19. "\textit{Contra proferentem}" is a term that is "[u]sed in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language." \textsc{Black's Law Dictionary} 327 (6th ed. 1990). The \textit{Restatement (Second) of Contracts} also states that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." \textit{Restatement (Second) of Contracts} § 206 (1981).
\item 20. See Collins, \textit{supra} note 7, at 690.
\item 23. See Keeton, \textit{supra} note 3, at 1322 (arguing that courts should "rely on the principle of honoring reasonable expectations and disallowing unconscionable advantage when there are compelling reasons for protecting the insured beyond the normal scope of waiver and estoppel").
\end{itemize}
surance coverage issue by considering the reasonable expectations of the "ordinary business man when making an ordinary business contract." Nearly thirty years later, in Gaunt v. John Hancock Mutual Life Insurance Co., Judge Learned Hand interpreted an insurance contract provision in conformity with the understanding of an ordinary insured.

There is a difference between the use of "reasonable expectations" by Cardozo in Bird and by Hand in Gaunt. Subsequent cases relying on Bird indicate that the later courts understood "reasonable expectations" to apply to the interpretation of particular terms in a policy — what the insured reasonably would expect a term to mean — rather than to the insured's general expectation of coverage under the policy. On the other hand, in Gaunt Judge Hand held that, despite unambiguous language to the contrary in a receipt given to an applicant for life insurance,

24. 120 N.E. 86, 87 (N.Y. 1918). In Bird, the plaintiff sought coverage for his boat which was damaged as a result of a nearby explosion. Id. at 86. The insurer sought to deny coverage based on the remoteness of the initial fire which set off the explosion causing damage to the plaintiff's boat. See id. Justice Cardozo explained that the reasonable expectations of the insured, whether express or inferred, are significant in determining the insurer's liability on the contract. The court held for the insurer, however, stating, "Fire must reach the thing insured, or come within such proximity to it that damage, direct or indirect, is within the compass of reasonable probability." Id. at 88.

25. 160 F.2d 599, 601 (2d Cir.), cert. denied, 331 U.S. 849 (1947). In Gaunt, the plaintiff sought recovery pursuant to a life insurance contract after her son's death. Id. at 599. The insurer denied coverage, arguing the application had not yet been approved by the insurer at the time of the son's death. Id. at 601. Judge Hand held that coverage did exist, explaining that insurers must bear the burden of any resulting confusion surrounding the nature of a policy when the policy's words are uncommon and the insured is "unacquainted with the niceties of life insurance." Id. In addition, Judge Hand intimated that injustice would result if an ordinary applicant for a life insurance policy, who paid the premium and successfully passed his physical examination, was left uncovered because the insurer eventually failed to approve the policy. Id. at 602.

26. See, e.g., Shell Oil Co. v. Winterthur Ins. Co., 15 Cal. Rptr. 2d 815, 828 (Ct. App. 1993) ("When particular policy language is ambiguous, it is interpreted in the sense the insurer believed the insured understood it at the time of formation."); State Farm Fire & Cas. Ins. Co. v. Deni Assoc., Inc., 678 So. 2d 297, 400 (Fla. Dist. Ct. App. 1996) (noting that courts may interpret an insurance contract only when particular terms in the policy are ambiguous); Sentry Sec. Sys., Inc. v. Detroit Auto. Inter-Ins. Exch., 223 N.W.2d 708, 711 (Mich. Ct. App. 1974) (noting that if the language of an insurance contract is ambiguous, the court may construe its meaning); Allen v. Prudential Property & Cas. Ins. Co., 839 F.2d 798, 801 (Utah 1992) (recognizing that some states allow insureds to recover when a particular term in an insurance policy is ambiguous); see also Ware, supra note 22, at 1467-69 (discussing cases which use the insured's reasonable expectations to "fill in the gaps" created by ambiguous terms in a contract of insurance).
the ordinary applicant who has paid his first premium and has successfully passed his physical examination, would not by the remotest chance understand the clause as leaving him uncovered until the insurer at its leisure approved the risk; he would assume that he was getting immediate coverage for his money. 27

It is the latter approach that was later expressly formulated in Keeton's article. 28

This view was further expounded in 1961 by the New Jersey Supreme Court in Kievit v. Loyal Protective Life Insurance Co. 29 The court stated that members of the public who purchase insurance are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls[,] and their policies should be construed liberally in their favor to the end that coverage is afforded “to the full extent that any fair interpretation will allow.” 30

In 1970, Professor Robert E. Keeton of the Harvard Law School 31 published a two-part article identifying a number of cases interpreting insurance contracts which, in his opinion, demonstrated new principles of insurance law. 32 After examining these cases, Keeton identified the principle involved as follows:

The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. 33

This principle, usually referred to as the “doctrine of reasonable expectations” or the “doctrine of the layman’s reasonable expecta-

27. Gaunt, 160 F.2d at 602. The agent gave Gaunt a receipt which provided that coverage would not be in force until the insurer had approved the coverage. Id. at 600. Upon approval, the coverage would relate back and be effective as of the date of the medical examination. Id. The medical staff examined and approved Gaunt and then sent on its approval for final acceptance by the company underwriter. Id. Gaunt died the day the medical staff sent its approval. Id.

28. See Keeton, supra note 3, at 966-74.


30. Id. at 26.


32. See Keeton, supra note 3, at 970-73.

33. Keeton, supra note 3, at 967.
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...has received a great deal of attention from courts and writers in the years since 1970. Some have accepted the doctrine with approval; some have been essentially indifferent about it; some have expressly rejected it.

There can be no doubt that to some extent the insurance industry has brought this problem on itself. The marketing of insurance is designed to create and build upon the trust and confidence of the public. Insurers tell us that they are "like a good neighbor," that we are "in good hands with" them, and that they provide an "umbrella" or a "shield." Not surprisingly, this leads insurance buyers to expect very broad protection when they buy "full coverage," an "all-risk policy," or the "comprehensive, broad-form policy." There is no question that this has been a strong influence on those who favor the reasonable expectations doctrine. Yet, as Keeton himself pointed out, application of the doctrine should be tempered by a recognition that even though one supports the broad principle of honoring reasonable expectations, those expectations should be honored only if they are indeed reasonable. The doctrine should not be distorted to include expectations of the insured which are patently unreasonable.

III. INTERPRETATIONS AND APPLICATIONS OF THE DOCTRINE

Keeton started with the generally recognized "proposition that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters." As he correctly indicated, this proposition is merely "a corollary of the principle of resolving ambiguities against the insurer," which is universally accepted. Keeton urged that the doctrine should be extended beyond merely resolving ambiguities, and should protect "the policyholder's expectations as long as they are objectively reasonable from the layman's point of view, in spite of the fact that had he made a painstaking study of the contract, he

34. See Roger C. Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 OHIO ST. L.J. 823, 824 (1990) (explaining that the "reasonable expectations" doctrine has been a part of a considerable amount of litigation and the subject of numerous legal articles over the last twenty years).
35. See id. at 823-24.
36. See Keeton, supra note 3, at 970 n.15.
37. See id.
38. Id. at 967.
39. Id.
would have understood the limitation that defeats the expectations at issue."

Courts in various jurisdictions have taken different approaches in applying the doctrine of reasonable expectations. First, some courts will apply the doctrine only if there is an ambiguity in the policy and then usually will resolve the ambiguity in the insured's favor. Second, some courts will apply the doctrine where the policy language is unclear or the terms limiting coverage are hidden, so that the insured cannot be expected to understand or discover them. Third, some courts apply the doctrine as Keeton intended, honoring the insured's expectation of coverage even though the policy clearly and explicitly excludes coverage. In one way or another, the doctrine of reasonable expectations has been applied to almost every kind of insurance, from the common consumer policies (automobile, homeowners, et cetera) to the more sophisticated coverages of business and industry.

A. Ambiguity

A majority of the courts tend to favor insureds in disputes with insurers. Many decisions are justified only by "the maxim that an instrument is to be construed against its drafter." Courts frequently search for and somehow find an ambiguity to construe in favor of the insured and against "the deep-pocketed insurer." This excessive zeal to find an ambiguity is especially prevalent with

40. Id. Keeton argued that an objective standard allows a greater degree of certainty and predictability, as well as a method of achieving equity between insured and insurer. Id. at 968.

41. See Kenneth J. Horner, Jr., Comment, Insurance – Contracts – The Ambiguity in the Doctrine of Reasonable Expectations, 62 N.D. L. Rev. 423, 425 n.15 (1986) (listing the jurisdictions where courts have refused to apply the doctrine of reasonable expectations unless an ambiguity exists in the insurance policy); Joseph E. Minnock, Comment, Protecting the Insured from an Insurance Adhesion Policy: The Doctrine of Reasonable Expectations in Utah, UTAH L. Rev. 837, 854 (1991) (noting that the California courts and the New Hampshire courts have held that the doctrine does not apply unless the policy language is ambiguous).

42. See Horner, supra note 41, at 425.

43. See id. at 426-27.

44. See Minnock, supra note 41, at 854.

45. See Mark C. Rahdert, Reasonable Expectations Reconsidered, 18 CONN. L. Rev. 323, 346-47 n.78 (1986) (providing examples of the wide range of policies that have been subject to the doctrine of reasonable expectations).


47. Id.
courts that are determined to achieve a "fair" result for the insured but are unwilling to openly espouse the direct approach favored by Keeton, perhaps deeming the latter too radical in terms of traditional contract law.

A vivid example of the extreme lengths to which some courts will go can be found in *Northwest Airlines, Inc. v. Globe Indemnity Co.* The court used an unusual test in determining whether there was an ambiguity: "[T]he very fact that [the parties'] respective positions as to what this policy says are so contrary compels one to conclude that the agreement is indeed ambiguous." Application of this test would mean that if the creative mind of the insured's attorney could find some interpretation of the policy language that differed from the interpretation of the insurer, there would be an ambiguity which the court would construe in favor of coverage.

Most courts do not expressly go this far in defining "ambiguity" in favor of the insured. A more common definition can be found in *Stordahl v. Government Employees Insurance Co.*:

An ambiguity does not exist, however, merely because the parties disagree as to the interpretation of a term. An "ambiguity" exists only where the contract as a whole and all the extrinsic evidence support two different interpretations, both of which are reasonable.

 Courts which consider the insured's reasonable expectations in resolving ambiguities usually accept the limitations that this should not be used to rewrite the policy and that a clear and unambiguous coverage provision should be enforced even though it may be surprising or one-sided. "[T]he insured can reasonably expect only the coverage afforded by the plain language of the contract."

48. 225 N.W.2d 831 (Minn. 1975).
49. Id. at 837.
51. See, e.g., Wallace v. Auto-Owners Ins. Co., 421 So. 2d 131, 133 (Ala. Civ. App. 1982) (holding that the additional living expenses clause in the homeowner's policy, which limited such payments to the time required to become settled in permanent quarters, was not ambiguous; refusing to rewrite the policy in favor of the insured); Fidelity & Deposit Co. v. Sun Life Ins. Co., 329 S.E.2d 517, 519-20 (Ga. Ct. App. 1985) (finding that the court did not have authority to make the insurance policy more beneficial by extending coverage for which the insured had not contracted).
There is no logical reason to require an ambiguity in order to invoke the doctrine of reasonable expectations. It is well settled that ambiguities will be construed against the insurer. This rule should be applied before even considering the reasonable expectations doctrine. Only when no ambiguity exists should the expectations of the insured be considered. "[A]mbiguity should be wholly irrelevant to the doctrine of reasonable expectations because it is neither necessary nor sufficient for application of the doctrine."53

B. Policy Is Not Clear, or Exclusion Is Hidden

As the New Hampshire Supreme Court stated in Storms v. United States Fidelity and Guarantee Co., "[a]lthough insurers have had over one hundred years to hone their policies into forms that would not ferry the unwary reader on a trip through Wonderland, they regrettably have not seen fit to do so."54 Courts consistently point out that insurers can defeat an insured's expectation of coverage by using provisions of limitation which are "conspicuous, plain[,] and clear"55 and which are brought to the attention of the insured "either by [his] being required to sign it or by having his attention particularly called to it."56 Despite that, insurers continue to use provisions that courts find are not clearly worded or are placed in remote areas of the policy.57 "[I]f the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print,"58 many courts will rule that there is coverage based on the insured's reasonable expectations.59 This

53. Fett, supra note 2, at 1134.
56. Id. at 296 (quoting Los Angeles Inv. Co. v. Home Sav. Bank, 182 P. 293, 298 (Cal. 1919)).
57. See, e.g., Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del. 1982) (explaining that the fine print hidden in the policy does not take away what was given in large print); Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985) (providing that where major exclusions are hidden in definitions section, insured is required only to have reasonable knowledge of terms).
58. Hallowell, 443 A.2d at 927.
frequently occurs when a broad measure of protection is afforded by the first page of the policy, while the actual coverage is severely limited "in inconspicuous exclusionary clauses buried in a mass of fine print." Therefore, where the insurer has failed "to dispel an expectation of coverage . . . which it was responsible for creating in the first place," the insurer will be liable.

C. Policy Is Clear, but a Layman Would Expect Coverage

Some courts apply the doctrine of reasonable expectations in its broadest form, mandating coverage even where the policy unambiguously and conspicuously denies coverage. An oft-cited example of this can be found in C&J Fertilizer, Inc. v. Allied Mutual Insurance Co. In this case, the burglary insurance policy unambiguously required that there be "visible marks" of "felonious entry . . . by actual force and violence." If anyone at C&J had read the policy, there would have been no reasonable expectation of coverage for a burglary where no marks were left on the exterior of the premises. Despite that, the Iowa Supreme Court recognized that most insureds do not read insurance policies, and the court therefore held that C&J was not bound by policy terms of which it was unaware. The court further held that C&J reasonably would expect coverage where there was extensive proof of a burglary by

60. Goodhue, supra note 17, at 904; see also, e.g., Atwood v. Hartford Accident & Indem. Co., 365 A.2d 744, 746 (N.H. 1976) ("This exclusion clause [was] buried amidst thirteen others [all] either irrelevant to [the insured] or unexpected.").
61. Goodhue, supra note 17, at 904. Because the insurer is to blame for creating "a misleading impression of coverage," the insurer will be liable for the subsequent failure to dispel the expectation of coverage. Id.
62. See supra notes 27-30 and accompanying text.
64. 227 N.W.2d 169 (Iowa 1975).
65. Id. at 171; see also Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985) (explaining that both the police and the trial court found that the burglary was an "outside job," even though there were no visible marks of forcible entry).
67. Id. at 174.
68. Id. at 177.
outsiders as opposed to an "inside job."

Another situation where some courts will find coverage despite a clear and conspicuous exclusion in the policy can be found where an insurer's advertising and brochures lead an insured to expect coverage. In such cases a court may require an insurer "to provide coverage according to its advertising, despite more restrictive provisions in the insurance contract itself."

Yet even those courts which apply a very broad version of the reasonable expectations doctrine usually will require that the insured's expectations be reasonable. For example, in Baker v. Grinnell Mutual Reinsurance Co., the insured, while driving another person's car, hit a median and warning sign and damaged the car. Her own automobile insurance policy specifically excluded from its liability coverage "damage to property . . . in the care, custody or control of any insured person." The court said that since the insured explicitly had rejected collision coverage, she could not reasonably expect coverage for damage to a car she was driving.

69. Id.

70. See, e.g., Futz v. Old Am. Ins. Co., 354 F. Supp. 514, 518-19 (S.D. Tex. 1973) (providing for coverage based on the insured's reasonable expectations that life insurance coverage would begin after a completed application was returned to the insurer, who solicited such policies through the mail, and despite language in the literature explaining coverage would not begin until the insurer approved it); Suarez v. Life Ins. Co. of N. Am., 254 Cal. Rptr. 377, 382 (Ct. App. 1988) (explaining that because an insurer is bound by the expectations it has created, the insurer could be forced to provide coverage based on its advertising); Klos v. Mobil Oil, Co., 259 A.2d 889, 893 (N.J. 1969) (holding that direct-mail solicitation to purchase accident insurance constituted a sufficient and complete offer with which the plaintiffs reasonably could expect to guarantee coverage with the return of an application); Riordan v. Automobile Club of N.Y., Inc., 422 N.Y.S.2d 811, 815 (N.Y. 1979) (holding that insureds reasonably relied on misleading advertisement for travel accident insurance and, thus, the advertised direct-mail solicitation was an offer that could be accepted with the return of a check and enrollment form).

71. Suarez, 254 Cal. Rptr. at 382.


73. Id.

74. Id. at 675 (noting that because the insured knew she was not covered for acts of her own negligence with regard to her own automobile, she could not expect greater coverage with regard to another person's automobile); cf. Foremost Ins. Co. v. Putzier, 606 P.2d 987, 991 (Idaho 1980) (stating that insured could not reasonably expect coverage for riot or mob action where that was expressly excluded in policy, insured's attorneys were aware of exclusion and did not object, and exclusion could have been removed by paying extra premium).
D. Courts that Have Rejected Keeton's Approach

As discussed in Part II supra, Keeton proposed that courts should honor the insured's reasonable expectations of coverage even though the express language of the policy itself made clear that there was no coverage. Some courts have expressly rejected this approach, holding that insurance policies "should be enforced according to [their] clear meaning and purpose regardless of the coverage the insured thought he had."75 These courts take the position that they should not "engraft such a novel doctrine upon the law."76 They also point out that Keeton's approach "requires a court to rewrite an insurance contract which does not meet popular expectations[,] [and that] [s]uch rewriting is done regardless of the bargain entered into by the parties to the contract."77

While rejecting "[s]uch judicial activism,"78 however, some courts imply that their refusal to apply the reasonable expectations doctrine may be limited to the facts of the instant case and that such refusal does not necessarily constitute a total and absolute rejection of the doctrine for all possible situations.79 For example, in Sterling Merchandise Co. v. Hartford Insurance Co., the court pointed out that "[t]he facts of [the] case . . . [did] not indicate any misrepresentation, overreaching, or other conduct on behalf of the insurer which would justify abrogating the parties' agreement. Nor was there any evidence that [the insured] was beguiled into believing it had more protection than it actually did."80 The court further noted that the coverage definition in question "was written in the same style and size type as the rest of the policy provisions[,]"81

78. Id.
79. See id.; see also, e.g., Zaragoza v. West Bend Mut. Ins. Co., 549 N.W.2d 510, 515-16 (Iowa 1996) (holding that the plaintiff presented no facts that would have created the reliance interest necessary to apply the reasonable expectations doctrine); Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 114 (Iowa 1983) (holding that the facts of the case precluded the defendant from claiming he reasonably expected to be covered for a highway accident because he had purchased only on-the-premises insurance).
80. Sterling Merchandise, 506 N.E.2d at 1197.
... was not hidden away in fine print in an obscure place[,] [and] was not so complex or esoteric that a competent businessman could not understand it."81 The court further found that the insured, "a large company presumably run by astute business people," "chose not to discuss the terms of the policy with its agent" and "tacitly refused to read" the policy.82

In addition to the implicit suggestion that this court might honor the insured's reasonable expectations if the facts were different, the Sterling court also suggested that it might apply the reasonable expectations doctrine if the policy definition at issue had been ambiguous.83 As discussed previously, using reasonable expectations to resolve ambiguities is not what Keeton had in mind, since it is basic contract law that ambiguities will be resolved in favor of the insured.84 However, a number of courts which have rejected Keeton's suggested use of the doctrine nevertheless purport to honor the insured's reasonable expectations in resolving ambiguities.85

IV. OBJECTIVE OR SUBJECTIVE STANDARD?

One of the difficulties in any application of the doctrine of reasonable expectations is determining the proper standard to use. There are several possibilities:

(1) the expectations of an objectively "reasonable person";86

81. Id.
82. Id.
83. Id. at 1198. "Because the definition is not ambiguous, it must be given its plain and ordinary meaning." Id.
84. See discussion supra Part III.A.
85. See, e.g., Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 721 (8th Cir. 1981) (applying Minnesota law and stating that Minnesota applies the reasonable expectations doctrine only where there are ambiguities in an insurance policy); Carley v. Lumbermens Mut. Cas. Co., 521 A.2d 1039, 1058 (Conn. Ct. App. 1987) (holding that "[s]ince we find no ambiguity in the policy provisions, we don't consider the question of the policy holder's expectations"); Soliva v. Shand, Morahan & Co., 345 S.E.2d 33, 36 (W. Va. 1986) (stating that where there is no ambiguity, the plain language of the policy controls).
(2) the expectations of "a reasonable person in the position of the insured"; or
(3) the expectations of this particular insured.

In many cases, unhappily, members of the same court, in majority and dissenting opinions, disagree as to what expectations are reasonable. Even more frustrating, it is quite common in such cases for neither side to explain why it reached its particular conclusion. There also is great variation as to the factors courts will consider beyond the policy language itself. Among the extrinsic factors that are sometimes considered are marketing practices, policy structure and design, and underwriting concerns.

A. Insured Expected to Read, or Deemed to Have Read, the Policy?

Traditional rules of contract law suggest that an insured has some duty to read and attempt to understand the policy. An in-
sured's claim of coverage should be weaker if he could have read and understood the policy and had sufficient time to do so, but did not avail himself of the opportunity.95 A fair standard might be "to interpret the policy in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured."96 However, this probably should not mean that the insured has a duty to read the policy in every case, nor that he would understand it even if he read it. Moreover, what constitutes a "reasonable effort" or a "more than casual reading" may vary according to the circumstances, such as the experience and sophistication of the insured.97 Many laymen lack "the necessary skills to read and understand insurance policies, which are typically long, set out in very small type[,] and written from a legalistic or insurance expert's perspective."98 In fact, there are probably few lawyers in general practice, or judges drawn therefrom, who can read an insurance policy with a clear understanding of what is covered and what is not. If these people, supposedly intelligent and well trained, have such difficulty, how much can we expect from laymen?

We also must recognize that the adhesive nature of insurance contracts encourages insureds not to read them. These contracts usually are complex and filled with legal terms of art, leading insureds to believe (often quite correctly) that they probably would not understand even if they did read the policy.99 Furthermore, since the insured will not be able to change the coverage provisions, he has less incentive to inform himself in order to request better coverage.100
The incentive to read the policy is further reduced by the fact that insureds usually do not receive policies until some time after the purchase. Of course, the less we require of insureds as to reading and understanding policies, the more we allow insurance buyers to be less careful in selecting proper coverage. If an insured is not expected to read the policy and is bound only by that which he did read, the effect is to bind him only to that which he will admit — after the loss — to having read and understood. This possibility leads directly to Keeton’s suggestion that fairness requires that an insured who does take the time to read and understand the policy should not be penalized for doing so. "If the enforcement of a policy provision would defeat the reasonable expectations of the great majority of policyholders to whose claims it is relevant, it will not be enforced even against those who know of its restrictive terms."103

B. Sophistication of Insured

A number of courts have held that the contra proferentem principle and the doctrine of reasonable expectations should not be applied where the insured is a large enterprise, as contrasted with an individual consumer or small business. A typical example can

101. See Marston, 439 F.2d at 1038 (citing 3 CORBIN ON CONTRACTS § 559, at 265-66 (1960); W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 540 (1971)).

102. See ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW § 6.3(b) (1971).

103. Id. at 358.

104. See, e.g., Eastern Associated Coal Corp. v. Aetna Cas. & Sur. Co., 632 F.2d 1068, 1075 (3d Cir. 1980) (discussing how a large corporation, advised by counsel, can have equal bargaining power with an insurance company); Industrial Risk Insurers v. New Orleans Pub. Serv., Inc., 666 F. Supp. 874, 881 (E.D. La. 1987) (explaining that a large municipality, represented by professionals, a city attorney, and an experienced insurance agent, stood on equal footing with the insurers and had significant input in negotiating the terms of the policy); McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525, 547 (D.N.J. 1986) (finding that the policy in question had been negotiated by Johnson & Johnson, a sophisticated insured, and that most of the amendments to the policy were made by the com-
be found in Northbrook Excess & Surplus Insurance Co. v. Proctor & Gamble Co. As the court noted, Proctor & Gamble (P&G) was a co-drafter of the policy, "not simply a party given a take-it-or-leave-it option. . . . [T]o a considerable extent [the policies] were tailor-made." P&G had an insurance department, its own lawyers, and the economic clout to influence the policy's terms. The final policy "was profoundly more than a standard insurance policy . . . [-] significant portions of [its] language were customized at P&G's insistence."

Thus, in contrast to the individual insurance consumer or small business insured, larger entities typically will have a "risk manager" who is a skilled and experienced professional responsible for determining the insurance needs of his employer and securing appropriate insurance coverage. In addition, these larger entities usually have the assistance of legal counsel and independent brokerage firms which specialize in negotiating and obtaining business insurance coverage. Clearly, there is seldom any basis for protecting such insureds from sophisticated, over-reaching insurance companies.

The issue of sophistication of the insured becomes more difficult, however, when the insured appears to be intelligent, well educated, and experienced in business matters. While some small and medium-sized manufacturers, retailers, tradesmen, and such may have the benefit of skilled advisers, most do not and are in essentially the same position as the individual consumer. There is, perhaps, at least one arguable difference. People in business, even on a small scale, should have considerable knowledge about those risks that have an immediate relation to their business. A tree trimmer, for example, should be well aware of the risk of falling from a high place or of making contact with live electric wires and, thus, should know that he should seek coverage for these risks. Some courts accept this rationale as supporting a rule that in de-
termining the reasonable expectations for coverage under an insurance policy of someone in a certain business – for example, a general contractor – the test is the reasonable expectations of the usual general contractor, not that of the usual layman.\textsuperscript{110}

The sophistication issue becomes even murkier when the insured is an individual who has purchased an ordinary consumer policy, such as automobile or homeowners coverage. On one side you find cases such as \textit{Minnesota Mutual Fire \& Casualty Insurance Co. v. Manderfeld}, where the court held that the insurer could deny coverage on the basis of a clear and unambiguous exclusion in the policy.\textsuperscript{111} The court pointed out that the insured was a certified public accountant who could read and understand the exclusion without the need for “painstaking study.”\textsuperscript{112}

In sharp contrast is \textit{Karol v. New Hampshire Insurance Co.}\textsuperscript{113} In response to the insurer’s argument that an exclusion should bar recovery because the insured was a bright and sophisticated attorney and had read the policy, the court stated: “We need not consider the intelligence of the insured in determining whether he comprehended the terms of an insurance policy.”\textsuperscript{114} “The well-established rule in this [s]tate is that insurance policies are interpreted from the standpoint of the average layman ‘in light of what a more than casual reading of the policy reveals to an ordinary intelligent insured.’”\textsuperscript{115} The court thus held that the standard is ob-

\begin{thebibliography}{11}
\bibitem{} 110. \textit{See, e.g., United States v. Conservation Chem. Co.,} 653 F. Supp. 152, 190 (W.D. Mo. 1986) (stating that courts must look at the specific business of the insured to determine whether a particular insured intended and expected coverage); \textit{Hartland Computer Leasing Corp. v. Insurance Man, Inc.,} 770 S.W.2d 525, 527 (Mo. Ct. App. 1989) (stating that courts seek to enforce the reasonable expectations of the parties from the totality of the circumstances); \textit{Estrin Constr. Co. v. Aetna Cas. \& Sur. Co.,} 612 S.W.2d 413, 425 (Mo. Ct. App. 1981) (observing that the question is not whether the policy exclusion is ambiguous, but whether the policy exclusion runs contrary to the specific insured’s reasonable expectations). \textit{But see Atkins v. Hartford Cas. Ins. Co.,} 801 F.2d 346, 348 (8th Cir. 1986) (quoting \textit{Lawrence v. New York Life Ins. Co.,} 649 S.W.2d 461, 467 (Mo. App. 1983)) (“Where the doctrine is applicable, it must appear that the expectation of coverage was not that of the claimant alone but was that of the average public member.”).

\bibitem{} 111. 482 N.W.2d 521, 527 (Minn. Ct. App. 1992).
\bibitem{} 112. \textit{Id.} at 525.
\bibitem{} 113. 414 A.2d 939 (N.H. 1980).
\bibitem{} 114. \textit{Id.} at 941 (citations omitted); \textit{see also Dobosz v. State Farm Fire \& Cas. Co.,} 458 N.E.2d 611, 615 (Ill. App. Ct. 1983) (finding irrelevant the fact that the insured was an attorney, especially as there was no showing he had any expertise in insurance matters).
\bibitem{} 115. \textit{Brown v. City of Laconia,} 386 A.2d 1276, 1277 (N.H. 1978) (quoting

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jective, without regard to the sophistication or actual knowledge of the insured. If an average or ordinary insured would expect coverage, there is coverage.\textsuperscript{116}

C. Would Insurer Think That Insured Would Expect Coverage?

It sometimes is suggested that the extent to which an insurer knows or should know that a reasonable person in the insured’s position would expect coverage should be a relevant consideration.\textsuperscript{118} This is based on a provision in the \textit{Restatement (Second) of Contracts}, which states: “Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”\textsuperscript{119} There is certainly an equitable argument for requiring an insurer to provide the coverage which its words or conduct, in advertising or agent’s activities, would lead the insured reasonably to expect, and which the insurer should know is expected.\textsuperscript{120}

V. “REASONABLE EXPECTATIONS” RUN AMOK

A. Examples

Even if one accepts the requirement that an insurer should provide coverage which the insured reasonably expects, this requirement should be limited to expectations which truly are reasonable. Some courts simply go beyond even a liberal test or standard for reasonableness. There are, unfortunately, many such cases, but three oft-cited cases provide typical examples. In \textit{Gray v. Zurich Insurance Co.}, the complaint in a suit against the insured alleged an intentional assault.\textsuperscript{121} The policy excluded coverage for injury caused intentionally by the insured.\textsuperscript{122} The insured said he

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{116} See \textit{Karol}, 414 A.2d at 941.
\item \textsuperscript{117} See \textit{id}.
\item \textsuperscript{118} See \textit{Henderson}, supra note 34, at 846-53.
\item \textsuperscript{119} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 211(3) (1981).
\item \textsuperscript{120} See \textit{Abraham}, supra note 46, at 1155; cf. \textit{Farm Bureau Mut. Ins. Co. v. Sandbulte}, 302 N.W.2d 104, 107-13 (Iowa 1981) (finding that where farm liability policy excluded coverage for motor vehicles “while away from insured’s premises or at the ways immediately adjoining” the premises, insurer had no reason to think insured wanted this policy to cover automobile liability away from premises, as that usually is covered by insured’s automobile liability policy).
\item \textsuperscript{121} 419 P.2d 168, 169 (Cal. 1966).
\item \textsuperscript{122} \textit{Id}.
\end{enumerate}
\end{footnotesize}
acted in self-defense, but the insurer refused to defend the suit on his behalf. The insured then unsuccessfully defended the suit on the self-defense theory. Thereafter, the insured sued the insurer for its failure to defend.

The California Supreme Court said that the insured’s liability insurance policy provided that the insurer would defend any suit against the insured alleging bodily injury even though the allegations of the suit were groundless, false, or fraudulent, and this would lead an insured reasonably to expect a defense of any suit regardless of merit or cause. But why would a reasonable insured expect the insurer to provide a defense for an intentional assault which was excluded expressly from indemnity coverage? Would the insured not have purchased this policy had he understood that the insurer would not defend a suit based on an intentional assault?

The court further attempted to justify its holding by noting that the pleadings could be amended to allege that the injury was caused unintentionally and negligently. That is true, of course, and at the time of such an amendment a duty to defend would arise. But in the absence of any allegations which would create a potential duty of the insurer to indemnify, there should be no duty to defend.

A similar example of excessive judicial zeal to require coverage can be found in C&J Fertilizer, Inc. v. Allied Mutual Insurance Co. The definition of burglary in the insured’s mercantile burglary and robbery policy included a requirement that there be a felonious entry into the premises by actual force and violence, of which there were visible marks. The evidence in the case strongly suggested that there had been a felonious entry, as opposed to an “inside job” by an employee, but there were no visible marks of force or violence on the exterior of the building.

The majority of the court allowed recovery by the insured. The court relied on the fact that the definition of burglary was

123. Id. at 169-70.
124. Id.
125. Id. at 170.
126. Id. at 171.
127. See Gray, 419 P.2d at 177.
128. 227 N.W.2d 169 (Iowa 1975).
129. Id. at 171.
130. Id.
131. Id. at 181.
never read to or by the insured's people, was not explained by the insurer's agent, and did not comport with a layman's concept of the crime of burglary. 132 The most an insured might reasonably anticipate was a requirement of visual evidence (abundant in this case) indicating an "outside" rather than an "inside" job. 133

The four dissenters stated quite correctly that the majority was giving the insured "ex post facto insurance coverage which it not only did not buy but which it knew it did not buy."134 "Burglary" was clearly and unambiguously defined, and there was "unequivocal testimony from an officer and director of the [insured] corporation that he knew the disputed provision was in the policies."135 The dissenters further stated that they should not "meddle with contracts which clearly and plainly state their meaning simply because we dislike that meaning."136

A third and final example of judicial excess in applying the doctrine of reasonable expectations is found in Foremost Insurance Co. v. Putzier.137 A theft claim was made against Foremost by a concessionaire at Evil Knievel's jump across the Snake River.138 The concessionaire had been told that he had to have insurance and that he could get it from Foremost, which was providing insurance for Knievel and the sponsor.139 He gave Foremost's agent $300 for insurance coverage and the agent told him he was "covered."140 He did not tell the agent what kind of insurance he wanted, was not told what he was buying, and was never given any insurance policy.141

The three-judge majority of the Idaho Supreme Court stated that the doctrine of reasonable expectations was not the law in Idaho.142 Presumably it meant the doctrine in its strongest form as espoused by Keeton, since the majority went on to say that "insurance policies [should] be construed most liberally in favor of recovery, with all ambiguities being resolved in favor of the in-

132. Id. at 177.
133. Id.
134. C&J Fertilizer, 227 N.W.2d at 182 (LeGrand, J., dissenting).
135. Id. at 184.
136. Id. at 183.
138. Id. at 318-19.
139. Id. at 319.
140. Id.
141. Id.
142. Id. at 321.
sured." They tested "what a reasonable person in the position of the insured would have understood the language of the contract to mean." The majority accepted and affirmed the trial court's finding that the concessionaire intended to insure against loss by theft and believed he had such coverage, and that this was a reasonable belief under the facts of the case.

The two dissenting justices reviewed the facts and determined that there was neither an ambiguity nor a reasonable expectation. Knievel and the sponsors of the jump were required to have liability insurance. No first-party coverage (fire, theft, etc.) was required. They bought liability insurance from Foremost. They told the concessionaire he would need insurance. There was no indication he would have bought any insurance if it were not required. He asked the sponsors to take care of his required insurance, and they did so by making him an additional insured on their liability insurance policy. Clearly, both the concessionaire and Foremost intended his coverage to be the required coverage – for liability only.

Finally, the dissent pointed out the obvious fallacy in the majority's position. Where is the outer limit for what the insured might have expected? Could it include insurance on his automobiles? Employee dishonesty? Accidental death? With tongue probably in cheek, Justice Bakes suggested the potential absurdity of the majority's approach:

What are, I wonder, the outer limits of [the concessionaire's] oral contract for insurance "coverage"? If [his wife] was blessed with a child during Knievel's jump, could [they] recover maternity benefits? How about life insurance for any children, or [his] horse? I think the limits of [his] coverage should be established, not by his

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143. Putzier, 627 P.2d at 321.
144. Id.
145. Id. at 323.
146. Id. at 324-25 (Bakes, C.J., dissenting).
147. Id.
148. Id. at 324.
149. Putzier, 627 P.2d at 324 (Bakes, C.J., dissenting).
150. Id.
151. Id.
152. Id.
153. Id. at 324-25.
154. Id.
secret and unexpressed desires, but by the context in which the insurance was obtained. Thus, the trial court should consider the probability that [he] intended to procure, and Foremost intended to sell, only that coverage which satisfied the county's requirements, which did not include first[-]party coverage.\footnote{156}

B. Result of Judicial Excess: Higher Premiums, or Coverage Not Offered

One result of judicial excess in applying the doctrine of reasonable expectations is unpredictability,\footnote{157} which may defeat the pro-insured intent since it will prompt insurers either to raise premiums or to stop writing certain coverages lest the courts disregard express exclusions and limitations in their policies.\footnote{158} Judicial decision-makers should balance the need for an efficient system of broadly available insurance coverage against their desire to aid one insured in an individual case.\footnote{159}

As the New Hampshire Supreme Court wisely noted:

[A] garage liability policy is one of the most complex, and perhaps least understood, liability forms in use today. Its complexity is largely attributable to the breadth of coverage. However[,] although it may be difficult for an untrained layman to understand the nature of coverages written, that, in itself, does not warrant distorting the risk undertaken by the insurer. If companies are to continue solvent and capable of serving an important public interest, they must carefully protect themselves against risks

\footnote{156}{Id.}
\footnote{157}{See Craig Litsey, \textit{Property Insurance Coverage and Policy Exclusions: Problems of Multiple Causation}, 35 \textit{Fed'n Ins. Couns. Q.} 415, 417 (1985). Recognizing the importance of predictability, Litsey notes: \textit{Predictability is important for several reasons, not the least of which is that it helps ensure that insurance premiums accurately reflect the risks involved. Predictability enables policyholders to better understand [sic] the ambit of their coverage and know whether their policy will include or exclude peripheral losses. The company can then determine premiums accordingly. With the parties more certain of their respective positions, settlements are more easily arrived at and litigation is reduced. Insurers are then able to pay claims more quickly and at a lower internal cost.}}
\footnote{159}{See \textit{American Home Prods.}, 565 F. Supp. at 1512 (emphasizing the need for uniformity in decisions).}
which they have not covered and for which no premiums have been paid to them.\textsuperscript{160}

VI. ARE THERE SOLUTIONS?

A. Objective Standard

To be fair to all insureds, if the doctrine of reasonable expectations is to be applied at all, an objective standard should be used. This substantially would reduce the potential for abuse and would produce a higher level of predictability.\textsuperscript{161} It would lead to increased equity between insurer and insured and also among all of the insureds, whose premium payments are the source of funds to pay judgments against insurers.\textsuperscript{162}

B. Ambiguity

A clear distinction should be made between the universally accepted rule that ambiguities ordinarily will be resolved in favor of the insured and the doctrine of reasonable expectations as propounded by Keeton. It is quite proper to consider the insured's reasonable expectations in resolving ambiguities, but that should be viewed as basic contract law and not as an exception to general principles of contract interpretation. It is an entirely different matter for a court to require coverage that the insurance policy clearly and unambiguously does not provide. One of the best arguments for applying Keeton's reasonable expectations doctrine is that it may discourage courts from finding ambiguity where none exists.\textsuperscript{163} Keeton's straightforward approach, if applied objectively and sen-

\textsuperscript{160} Aetna Ins. Co. v. State Motors, Inc., 244 A.2d 64, 67 (N.H. 1968) (citations omitted).

\textsuperscript{161} See Fett, supra note 2, at 1136. In contrast, under a subjective standard, policyholders would not know whether their premium dollars were paying for the claims of others (claims which they may have believed were not covered under their own policies). With a subjective standard, it would not be possible for an insurance company to know or limit its risks because interpretation of the policy would be decided on an individual basis. See id. at 1136-37.

\textsuperscript{162} See Keeton, supra note 3, at 968.

sibly, would be more likely to produce certainty and predictability.\textsuperscript{164}

C. Unconscionability

The doctrine of reasonable expectations should not be used to provide coverage in cases where a limitation or exclusion from coverage is deemed to be unconscionable. Such policy provisions should be unenforceable simply because they are unconscionable, regardless of the expectations of the particular insured. Insurers should not be allowed to limit or exclude coverage where it would be inconsistent with the reasonable expectations of the average consumer of the type of insurance in question. This should apply even though the policy provisions are very clear and unambiguous, and regardless of whether the particular insured has not read and understood the provision at issue.\textsuperscript{165} Enforcement of such provisions should be uniformly denied as a matter of public policy, because it would be unconscionable to enforce them. There is no reason why insureds who are unaware of unconscionable provisions should receive less protection for their premium dollars than those who are aware of such provisions.\textsuperscript{166}

While it is certainly within the power of the courts to strike down unconscionable policy provisions, such action leads to unpredictability, since judicial action can operate only retroactively. It would be much better for the legislatures, whose actions have a prospective effect, to declare which policy provisions thereafter will be unenforceable because they are deemed to be unconscionable. This will give insurers ample opportunity to react in an appropriate and timely way.\textsuperscript{167}

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\textsuperscript{164} See Keeton, supra note 3, at 968.

\textsuperscript{165} See id. (noting that insurers know most ordinary insureds will not read their policies).

\textsuperscript{166} See id. at 974. "If the enforcement of a policy provision would defeat the reasonable expectations of the great majority of policyholders to whose claims it is relevant, it will not be enforced even against those who know of its restrictive terms." Id.

\textsuperscript{167} See Spencer L. Kimble, Book Review, 19 Conn. L. Rev. 311, 315 & n.24 (1987) (discussing the retroactive effect of judicial decisions and the uncertainty it creates).
D. Redraft Policies and/or Raise Premiums

As some commentators have noted, "the courts have been the chief architects of a great bulk of the verbose and highly technical policy language."\(^{168}\) When insurers are forced to pay claims they thought were not covered, they often go back to the drawing board and try to confine the coverage to that which they intended. In most cases this results in increasingly long and complex policies.

Some insurers have attempted to solve the problem of providing unintended coverage by adopting standard policy forms that are relatively brief and are written in very simple language which the average insured is capable of understanding. In simplifying their policies insurers know that they are granting broader coverage to all insureds, but they have decided it is better to raise their premiums and charge for the extra coverage than try to exclude it.

Another possible approach is for insurers to change the basic design of their policies. Most current insurance policies are designed to provide broad coverage initially and then to eliminate some of this coverage through exclusions and limitations. The alternative to this modern "all risk with exclusions" approach would be to return to the "specified risk" approach of the past.\(^{169}\) Here, one starts with no coverage and then lists "inclusions" of coverage for specific situations.\(^{170}\) For the insured, the "broad coverage with exclusions" approach is much more desirable, because it will provide coverage for many unexpected situations which are not specifically mentioned in the policy, while the "specified risk" or "inclusion" approach would not.\(^{171}\) Thus, the action of the courts to broaden coverage by refusing to enforce exclusions ultimately could lead to an undesirable narrowing of coverage.\(^{172}\)

E. Help Insureds Understand Their Coverage

Over the years courts repeatedly have warned insurers that they are largely responsible for problems relating to the coverage

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169. See Ware, *supra* note 22, at 1472.
170. See id.
171. See id.
172. See id.
expectations of insureds. As the New Jersey Supreme Court pointed out,

[...]

... insurance industry itself for, despite repeated cau-
tions from the courts, it has persisted in using language
which is obscure to the layman and in tolerating agency
practices which are calculated to lead the layman to be-
lieve that he has coverage beyond that which may be
called for by a literal reading.

Insurers would be well advised to (1) write their policies in
language which can be easily understood by the average layman; (2)
be sure that exclusions and limitations are conspicuous, plain
and clear, and delineated in bold type; and (3) specifically bring
exclusions and limitations to the attention of the insured, either
by requiring him to acknowledge such provisions in writing or by hav-
ing his attention focused on them by the agent.

As I have indicated previously, this inevitably will result in
broader coverage and higher cost, but that probably would be out-
weighed by the increase in certainty and predictability and the ac-
companying reduction in disputes and litigation. It also would re-
quire more rigorous training of insurance agents, to be sure they
understand and can explain clearly the coverage of the policies
they sell and the limitations of coverage. It is certainly in the pub-
lic interest to have the needs of insurance consumers served by a
host of articulate, well-trained insurance agents.

173. See, e.g., Allen v. Metropolitan Life Ins. Co., 208 A.2d 638, 642 (N.J. 1965) (noting the insurance agent's role in the policyholder's common misun-
derstanding of interim coverage prior to the company's investigation of the appli-
cation).

174. Id.

contracts, and we would urge insurers to reword policies to more clearly align
[sic] the language with what we believe to be the reasonable expectations of a
purchaser. . . .").

176. See Minnesota Mut. Fire & Cas. Ins. Co. v. Manderfeld, 482 N.W.2d 521,
525 (Minn. Ct. App. 1992) (holding the insured could not argue he was misled
since the exclusion was "delineated clearly in bold letters").

177. See Steven v. Fidelity & Cas. Co., 377 P.2d 284, 295-96 (Cal. 1962) (dis-
scussing cases which state that it is unjust to void the insured's coverage where the
exclusionary clause was not brought to the insured's attention).
VII. CONCLUSION

There can be no question that standard forms for insurance coverage benefit both insurers and insureds by greatly reducing the costs involved. The mere fact that the insurer usually drafts the contract does not necessarily mean that it will include only provisions favorable to it and unfavorable to the insured. In a free market, insurers will try to include those coverages for which there is consumer demand, so long as consumers are willing to pay a fair price for those coverages. 178

We probably must accept the fact that most insureds will not voluntarily read their policies and, at most, merely will scan the first page. In light of this, it is probably fair to hold that any exclusions or limitations which would not be reasonably expected by an average consumer of the type of insurance at issue will be unenforceable unless they are brought to the attention of the insured in a clear and understandable way. This will give the insured the opportunity to accept the policy as is, reject it, or attempt to obtain separate coverage for the excluded risk.

As Professor Kenneth Abraham has stated so well:

It is deceptively easy to find an insured's expectations "reasonable" and require that they be honored in order to mitigate the consequences of the insured's unfortunate loss. It is more difficult, but very important, to realize that the award of compensation in such cases may have more profound effects than a simple reduction of the insurer's surplus. Saving one insured from catastrophe may not simply spread a neutral risk to all insureds; it may spread it in ways that a court sensitive to the consequences of its actions would find disturbing. 179

It is high time to back away from the excessive liberality of some courts in honoring reasonable expectations that are not reasonable at all. But the quid pro quo for this must be a recognition and acceptance by insurers of their duty to have their policies accurately reflect the reasonable expectations of their insureds, and to give their insureds an opportunity to know and understand what is covered and what is not.

178. See Ware, supra note 22, at 1477-78 (discussing the benefits of standard form contracts, including the reduction in transaction costs).
179. Abraham, supra note 46, at 1188-89.