

WILKIE V. AUTO-OWNERS INSURANCE COMPANY AND THE DOCTRINE OF
REASONABLE EXPECTATIONS IN MICHIGAN
NO SPECIAL RULES FOR INSURANCE CONTRACTS
by
David E. Lacasse

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Professor Clark C. Johnson, J.D., Ph.D., L.L.D.

I. Introduction

In the spring of 2003, as a first year student at Michigan State University College of Law, I had an assignment from my Research, Writing and Advocacy class to watch an appellate proceeding. I perused the Case Call for the Michigan Supreme Court and found that an insurance related case was to be before the Court on March 11. I have worked in the insurance industry both as a claims adjuster and an agent since 1989, so I felt I would more likely understand the issues in that case than in the other cases. The case was *Wilkie v. Auto-Owners Insurance Company*; Docket 119295¹.

Having worked in the insurance industry, I was familiar with the terms “adhesion contract” and “construing ambiguous terms against the drafter.” However, much of the oral argument and questions from the bench focused on the “doctrine of reasonable expectations.” It was a concept I had never heard of before as I had yet to take a Contracts class.²

Wilkie not only clarified Michigan’s position on the doctrine of reasonable expectations, but also has formed a basis, through *Rory v. Continental Ins. Co*³, to repudiate any special interpretive rules regarding insurance contracts. This paper will review the majority and dissenting opinions in *Wilkie*, review the positions for and against the doctrine, compare Michigan’s stance to other jurisdictions, and propose that *Rory* is not the logical extension of *Wilkie*, but can be distinguished. A contrary holding in *Rory* can stand with the holding in *Wilkie*.

II. Michigan Rejects the Doctrine of Reasonable Expectations

Wilkie involved the limits of underinsured motorist coverage. Paul K. Wilkie and Janna L. Frank were involved in an automobile accident with Stephen Ward. Ward crossed the center

line of the road and collided with the vehicle driven by Frank in which Wilkie was a passenger. Wilkie, who was the owner of the vehicle, died from his injuries, and Frank was seriously injured.⁴

Ward's vehicle was insured with an auto policy from Citizen's Insurance with a single liability limit of \$50,000 for Liability Coverage. This single limit was shared between Wilkie's estate and Frank with each receiving \$25,000.⁵ Wilkie's vehicle was insured by Auto-Owners and had Underinsured Motorist Coverage with limits of \$100,000 per person and \$300,000 per occurrence.⁶

There was no debate that Ward caused the accident and that Wilkie's and Frank's claims satisfied the threshold requirement to receive compensatory damages under Michigan's No-Fault statute,⁷ and that each of their claims exceeded \$100,000. Auto-Owners contended that it owed Wilkie and Frank \$50,000 each. As it understood the terms of the contract, the \$100,000 per person limit was reduced by the amount of coverage that would be available to Ward on a per person basis, \$50,000.⁸ Wilkie and Frank claimed that Auto-Owners owed each of them \$75,000. They argued that the \$100,000 should be reduced by the amount they actually received from Citizen's, \$25,000.⁹

Wilkie and Frank sought declaratory relief and moved for summary disposition based on their understanding of the policy. The trial court granted their motion and ruled that Auto-Owners owed them \$75,000 each.¹⁰

Auto-Owners appealed and the Michigan Court of Appeals upheld the trial court's granting of Wilkie and Frank's motion.¹¹ The court held that the term "available" was ambiguous and, consistent with ambiguities being construed against the drafter of the contract, held for the plaintiffs.¹²

The Court of Appeals, unnecessarily¹³, stated that Auto-Owners' interpretation of the contract also violated the rule of reasonable expectations,¹⁴ which was "[c]oncomitant with the rules of construction When determining the existence or extent of coverage under the rule of reasonable expectations, a court examines whether a policyholder, upon reading the contract, was led to reasonably expect coverage."¹⁵ The court concluded that, "[t]he reasonable expectation would be that the insured has contracted to have the amount of the policy limits available to him, whether paid by the underinsured motorist, or by the insured's policy."¹⁶ The balance of the opinion is an ambiguity analysis and reference to the rule of reasonable expectations is limited to two paragraphs.¹⁷

In overturning the Court of Appeals, the Michigan Supreme Court held that the policy language was not ambiguous. The Court stated that since the Underinsured Motorist Coverage limit was \$100,000, and the total of all bodily injury policies available to Ward was \$50,000, the policy clearly limited each plaintiff's recovery to \$50,000.¹⁸ Any ambiguity that there may be in the term "available" in paragraph 4(a)(1) of the policy is settled when read with paragraphs 4(b)(2) and (3), which state that the amounts paid will not be increased because of the number of persons injured or claims brought.¹⁹

Having found the policy language to be unambiguous, the Court dispensed with the doctrine of reasonable expectations in a lengthy analysis that started with its statement of fidelity to the freedom of contract. According to the Court, the doctrine is the antithesis of the notion of freedom of contract. "This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of

law or public policy.”²⁰ As opposed to the foundational limitation on the government’s ability to restrict the freedom of contract,²¹ the Court characterized the rule of reasonable expectations as being of recent origin, beginning with a 1970 article by then Professor Robert E. Keeton,²² which spawned a “frontal assault on the ability of our citizens to manage, by contract, their own affairs”²³

The Court recited what it termed Michigan’s “puzzling history” with the doctrine of reasonable expectations, starting with *Zurich Ins. Co. v. Rombough*.²⁴ The doctrine is addressed positively in what the *Wilkie* Court termed as dicta.²⁵ Twelve years later the Court discussed the doctrine in *Raska v. Farm Bureau Ins. Co.*²⁶ The *Raska* Court strongly rejected the position that an unambiguous contract can be overcome by the reasonable expectations of the insured.

[T]he expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that there was no contract at all for there was no meeting of the minds.

But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligation is neither reasonable nor just.²⁷

Interestingly, in his dissent in *Raska*, the only Michigan authority Justice Williams uses in support of the doctrine of reasonable expectations is *Rombough*.²⁸

Four years after *Raska*, a plurality of the Court decided *Powers v. DAIIE*.²⁹ As the *Wilkie* Court observed, the *Powers* plurality cited *Raska* for the proposition that if an insured read a contract, their reasonable expectations would be enforced, which is interesting considering *Raska*’s repudiation of the doctrine of reasonable expectations.³⁰ For the first time, the *Powers* plurality recognized that an ambiguity in the policy language was not required for the doctrine of reasonable expectations to apply.³¹ *Powers* has been cited for the proposition that Michigan had

been using reasonable expectations language for the interpretation of insurance contracts.³² However, it has been criticized as applying the doctrine, but not holding to the basis of the doctrine.³³

Five years later in *Vanguard Ins. Co. v. Clark*,³⁴ the Court agreed with the *Powers* plurality that the doctrine of reasonable expectations was an adjunct to the rules of contract interpretation, but did not follow the *Powers* Court's view that the doctrine did not need an ambiguity to be applicable.³⁵ That view was also rejected in *Farm Bureau Mut. Ins. Co. v. Nikkel*.³⁶

Thus, the *Wilkie* Court described Michigan's history with the doctrine of reasonable expectations as a "confused jumble of ignored precedent, silently acquiesced to plurality opinions, and dicta, all of which, with little scrutiny, have been piled on each other to establish authority."³⁷ The Court took to clear up the status of the doctrine of reasonable expectations in Michigan.³⁸

The Court summarily rejected the notion that the doctrine would be applicable to unambiguous policy language, and applying it to ambiguous policy language would add nothing to the maxim *contra preferentem*.³⁹

In sum, the rule of reasonable expectations clearly has no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract. Further, it is already well established that ambiguous language should be construed against the drafter, i.e., the insurer. Therefore, stating that ambiguous language should be interpreted in favor of the policyholder's reasonable expectations adds nothing to the way in which Michigan courts construe contracts, and thus the rule of reasonable expectations should be abolished.⁴⁰

Justice Weaver concurred with the majority that the doctrine of reasonable expectations was not applicable when interpreting unambiguous policy language, but dissented on the basis

that she thought the policy language was ambiguous.⁴¹ However, she did not say that the doctrine was not applicable in the case of ambiguous policy language. Even though she only used *contra preferentem* as the basis for her dissent, I believe she would still use the doctrine to interpret ambiguous policy language.⁴²

Justice Cavanagh in dissent argued that the doctrine of reasonable expectations is not limited to circumstances where the policy language is ambiguous on its face and can be used to make the ambiguity determination.⁴³ In the realm of contracts of adhesion, the court should look not only at the text of the contract, but also at the circumstances surrounding the transaction to determine the objectively reasonable expectations of the insured.⁴⁴ “I would prefer not to disregard the manner in which the insurance industry operates. Though an adhesion contract may be a necessary ingredient in the trade, I cannot condone a doctrine of interpretation that all but ignores the potentially precarious effect on the bound party.”⁴⁵

In looking at the policy language from the insured’s perspective, Justice Cavanagh determined that it can be construed to mean that the term “available” applies to the amount of coverage available to the tortfeasor to pay each claim. Therefore, the calculation should be to subtract the \$25,000 each plaintiff received from the \$100,000 limit of underinsured motorist coverage to determine Auto-Owners’ obligation. Since this interpretation is objectively reasonable, the policy language is ambiguous and should be construed against the drafter.⁴⁶

Justice Kelly in dissent agreed with Justice Cavanagh’s approval of the rule of reasonable expectations. She found that the simple dictionary definition of “available” could render the term ambiguous in a multiple claimant situation.⁴⁷ Since both plaintiffs’ and Auto-Owners’ interpretations are reasonable, the policy language is ambiguous and the language should be construed against the drafter.⁴⁸

III. Michigan Cases After *Wilkie*

While *Wilkie* has been used as authority regarding Michigan's stance on the doctrine of reasonable expectations,⁴⁹ many of the citations are for reasons other than the doctrine.⁵⁰ One of the issues soon after *Wilkie* was decided was encountered in *Michigan Mun. Risk Mgmt. Auth. v. Seaboard Surety Co.*⁵¹ The case involved an unambiguous absolute pollution exclusion in the policy covering a contractor who was hired by the City of Westland to separate the city's storm drain and sewage drain systems.⁵² The company negligently installed a bulkhead, which caused basements of nearby homes to be flooded with sewage.⁵³ In a seemingly sympathetic statement, the court stated that "although the flooding problem is perhaps a foreseeable situation when undertaking a sewer and paving project, the contract language, and specifically the exclusion language, are clear and unambiguous."⁵⁴ The court held, citing *Wilkie*, that despite the unambiguous language, the trial court used the rule of reasonable expectations, which is not applicable.⁵⁵

In *Dahlke v. Home Owners Ins. Co.*⁵⁶, the Court of Appeals seemed to reluctantly enforce unambiguous policy language. *Dahlke* involved a clear policy exclusion for damage caused by mold.⁵⁷ In reversing the trial court's decision, the court stated, that "[w]e are not unmindful of the concerns expressed to us regarding the number and breadth of listed causes of loss that are excluded by Home Owners' policy. Our interpretation of the exclusion would result in denial of coverage for damage to covered property that many insureds would ordinarily expect to be covered."⁵⁸ The court held, quoting *Wilkie*, that they had to apply unambiguous terms of the policy contract, and the insured's reasonable expectations of coverage were not applicable.⁵⁹

*Unionville-Sebewaing Area Schools v. MASB-SEG Prop. Cas. Pool*⁶⁰ found a defendant attempting to characterize the trial court's decision as a use of the doctrine of reasonable expectations.⁶¹ The court rejected that argument stating that the trial court used principles of contract interpretation and found the policy sufficiently ambiguous to find against the defendant. The Court of Appeals agreed and upheld the trial court.⁶²

In *Great American Ins. Co. v. Baird*,⁶³ another defendant attempted to use *Wilkie*'s repudiation of the doctrine of reasonable expectations to exclude coverage. Great American cited *Wilkie* for the proposition that their policy exclusion was unambiguous and that the insured's reasonable expectations could not be a foundation for a finding of coverage.⁶⁴ However, the court held that the language of the policy was unambiguous in its granting of coverage. Since *Wilkie* dictates that the plain language of the policy controls, the court found that the exclusion unambiguously did not preclude coverage in the facts of this case.⁶⁵

In another pollution exclusion case, the court in *Watson v. Travelers Indem. Co.*⁶⁶ rejected the plaintiff's attempt to apply the doctrine of reasonable expectations and stated that the exclusionary clause could easily have been discovered on examination of the policy.⁶⁷ This case seems to stand for the position that policyholders have an obligation to read their policies. If they do not, they will be held to unambiguous policy language as if they had.

*Farm Bureau General Ins. Co. v. Palmateer*⁶⁸ dealt with whether the trial court correctly applied a *contra preferentem* analysis to a resident relative exclusion to the liability coverage in a Builders Risk policy.⁶⁹ The court found that the exclusion was unambiguous, reversed the trial court, and remanded the case to determine whether the exclusion applied to the facts of the case.⁷⁰ In a discussion regarding the appropriate circumstance to apply *contra preferentem*, the court parenthetically cited *Wilkie* for the proposition that "the rule of reasonable

expectations is the same as the rule of construing against the drafter and its application is limited to ambiguous contracts.”⁷¹ This is an interesting and inaccurate description of the holding in *Wilkie*. *Wilkie* held that the rule of reasonable expectations was not applicable to unambiguous contracts, because the policyholder could not reasonably have expected something different from the clear language of the policy; and the rule added nothing to the interpretation of ambiguous language, since the policy would be construed against the drafter in favor of the policyholder.⁷² Therefore, the rule had no application and should be abolished.⁷³

Other Michigan cases cite *Wilkie* correctly to say that the rule of reasonable expectations has no applicability;⁷⁴ a policyholder’s reasonable expectations are immaterial;⁷⁵ courts may not rewrite contracts on the basis of “discerned reasonable expectations” of the parties;⁷⁶ and that a party’s reasonable expectations cannot overcome the plain language of the contract.⁷⁷

An example of a gross misstatement of the holding in *Wilkie* is found in an argument made by the defendant in *In re Tower Automotive, Inc.*⁷⁸ Defendant had moved for reargument on the basis that the court, in its original order, had referenced the rule of reasonable expectations. The defendant unsuccessfully argued that the rule was a “principle foundation for the Court’s decision.”⁷⁹ The court granted the motion, but only to the extent of deleting all reference to the rule of reasonable expectations, but otherwise confirmed the original opinion.⁸⁰ Quoting defendant’s Reply in Support of Motion to Dismiss, the court stated, “Federal itself quotes *Wilkie* for the proposition that ‘the rule of reasonable expectations only applies when ‘there is more than one way to *reasonably* interpret a contract.’”⁸¹

IV. Keeton and the Academic Debate Over the Doctrine of Reasonable Expectations

It is well recognized that then Professor Keeton's famous article⁸² was the beginning of the recognition of what Professor Keeton termed a "principle" of reasonable expectations.⁸³ Keeton started with the premise that, as opposed to contracts that are negotiated at arms length, insurance contracts are contracts of adhesion, and therefore the unequal bargaining power between the insurance company and the insured make judicial regulation appropriate.⁸⁴ He stated his now well known definition of the doctrine 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.⁸⁵

The starting point is that policy language should be objectively viewed from the perspective of the layperson.⁸⁶ Even if the particular insured made a "painstaking study of the contract," as long as his expectations were objectively reasonable from the layperson's point of view, those reasonable expectations would not be frustrated by contrary policy language.⁸⁷

Keeton identified an important corollary to this expectations principle:

[I]nsurers ought not to be allowed to use qualifications and exceptions from coverage that are inconsistent with the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved. This ought not to be allowed even though the insurer's form is very explicit and unambiguous, because insurers know that ordinarily policyholders will not in fact read their policies.⁸⁸

Timing of information seems to be important to Professor Keeton, because while he recognized that in most insurance transactions, the policyholder does not receive the detailed policy language until days or weeks after purchasing the insurance, insurers can make explicit coverage qualifications by notifying the policyholder of it at the time of contracting, "thereby negating surprise to him."⁸⁹ Professor Keeton does not explain what painstaking, as opposed to cursory, examination of the policy would be. He also does not identify standards that courts can

use to identify what a reasonable policyholder would find as an unusual limitation of coverage requiring disclosure.

Despite the title of his article, Professor Keeton admitted that the decisions that could be most easily explained by the principle were the decisions that involved ambiguities.⁹⁰

Theoretically, the doctrine may work to the detriment of the insured. If the expectation of coverage is not reasonable, even though the policy language is ambiguous, the policyholder's unreasonable expectations would not be honored.

It seems likely, however, that, even though not often expressed, there has always been an implicit understanding that ambiguities, which in most cases might be resolved in more than just one or the other of two ways,⁹¹ would be resolved favorably to the insured's claim only if a reasonable person in his position would have expected coverage.⁹²

Professor Keeton goes on to list examples of cases where the limits of ambiguity analysis are stretched, but do not explicitly go beyond it,⁹³ those that have seemed to press beyond the rationale of ambiguity,⁹⁴ and one in which the court invented an ambiguity and then construed the ambiguity against the insurer.⁹⁵ He also lists cases that were decided under other theories, but would be better explained as having honored the insured's reasonable expectations.⁹⁶ Professor Keeton saw these expectation principles overlapping somewhat with detrimental reliance; however reliance may be caused by representations of agents. Expectations in the cases cited *supra* were created by policy language and structure, marketing patterns by the insurer, and general practices.⁹⁷ While reliance principles would focus on the individual policyholder, expectations principles reflect those that are common.⁹⁸ In evaluating these cases, Professor Keeton does not decide whether they were rightly decided or whether an expectations analysis would produce the correct result. He only analyzes them under the equitable theories employed by the courts, determines that those equitable theories do not adequately describe how

the courts reached their decisions, and found a better basis for the decisions under the reasonable expectations of the policyholders.

Professor Keeton next entertained the question of whether “rights at variance that would otherwise be recognized under the expectations principle [were] defeated by a policyholder’s specific knowledge of the policy provisions that limit protection in a surprising way.”⁹⁹ Professor Keeton had stated earlier that insurer protection has limits if the provision is “fundamentally unconscionable because it misleads the great majority of policyholders.”¹⁰⁰ This combines honoring reasonable expectations with disallowing unconscionable advantage to the insurer.¹⁰¹ Provisions that are subject to this analysis, because they are complex or otherwise unexpected, may not be effectively communicated to the general public by mass marketing; therefore, “no amount of care in drafting and in marketing will avoid the creation of reasonable expectations contrary to the literal terms of policy provisions.”¹⁰² According to Professor Keeton it would be unduly harsh for these knowledgeable policyholders to receive less coverage for the same premium as less knowledgeable policyholders.¹⁰³

There has been much legal scholarship regarding the doctrine of reasonable expectations in the years following Professor Keeton’s article. The doctrine has been described as exemplifying legal functionalism in insurance law in the ongoing debate with legal formalism.¹⁰⁴ Its proponents have termed it a “stance insurance law should take in an ongoing – and still continuing – battle for the soul of contract law.”¹⁰⁵ In the years after Professor Keeton’s article, functionalist courts adopted the doctrine.¹⁰⁶ However, a number of states expressly rejected the doctrine,¹⁰⁷ and even by the early 1990’s legal functionalism was in a resurgence, while the reasonable expectations doctrine was “experiencing a more limited judicial application than various commentators had initially predicted.”¹⁰⁸

For advocates of the doctrine, the focus is on the relationship of the parties. The “tremendous imbalance in information, financial resources and litigation experience” allow insurance companies to hold tremendous power and control over the development of case law, the outcome of insurance litigation, and the resources and recourses available to insurance policyholders.¹⁰⁹ The doctrine helps take the power away from the insurance companies to control policy drafting and insurance law.¹¹⁰ Traditional approaches for protecting policyholders are not enough in the face of insurance adhesion contracts. Unconscionability requires egregious and unfair conduct by the insurer. Estoppel requires a representation that the policyholder relied on. Courts are not willing to apply implied warranty of fitness for intended use.¹¹¹ Traditional protections are too limited. They do not look at the relationship of the parties. They do not look at the transaction as a whole.

Stephen J. Ware in his comment, *A Critique Of The Reasonable Expectations Doctrine*¹¹² presents many of the arguments that the critics of the doctrine express. Ware begins his analysis with a review of judicial remedies to adhesion contracts, of which *contra preferentem* is the most commonly used.¹¹³ He notes that it has been transformed from a rule of last resort to a substantive tool used to systematically construe the insurance contract in the policyholder’s favor.¹¹⁴ Other doctrines in use include unconscionability, estoppel, waiver, implied warrantee of fitness, reformation and public policy.¹¹⁵

Ware identifies three versions of the reasonable expectations doctrine as applied by various courts:¹¹⁶

1. Construing ambiguities in contract language to meet the reasonable expectations of the policyholder;

2. Refusing to enforce policy provisions in fine print that limit coverage granted in a part of the contract that is more prominent; and
3. Honoring the reasonable expectations of the policyholder, because those expectations arise from outside the contract and come from the insurer.¹¹⁷

The ambiguity version of the doctrine is no different than *contra preferentem*. It just uses the insured's reasonable expectations as a reason for its particular construction. As Ware notes,

The states using the ambiguity version of the reasonable expectations doctrine are not analyzing cases any differently from states that reject the doctrine; both sets of courts claim that contractual language is crucial to their decisions, and both fabricate ambiguities or "read" the policy as a layperson would in order to provide coverage unwarranted by a precise parsing of the policy.¹¹⁸

Under the fine print version, unambiguous policy provisions will be overcome by the policyholder's reasonable expectations by reason of the structure of the contract itself. "Terms that an insured would see in glancing at the policy are generally enforced, but those that are 'buried' in many pages of 'fine print' are likely to be disregarded."¹¹⁹ This is more in line with Professor Keeton's description of the doctrine, because the court recognizes a policyholder's rights that are at variance with unambiguous, explicit policy language. It assumes that policyholders do not read their policies or if they do only at a cursory level.¹²⁰ Most often the offending provisions are exclusions of coverage. Ware argues that, as a result of courts' hostility to policy exclusions, insurers may change the way they draft policies, to the detriment of insureds.¹²¹ Instead of granting broad coverage and limiting portions of that coverage with specific exclusions, insurers could start with a baseline of no coverage and only grant coverage for specific situations. Arguably this would take away coverage for instances that are not

anticipated by either the insured or insurer, because they are not expressly mentioned in the policy.¹²²

The whole transaction version does not look at the contract language at all, but at the circumstances surrounding transaction, such as marketing and general practices of the insurer.¹²³ This is distinguished from equitable estoppel, because there is no detrimental reliance requirement with this reasonable expectations version.¹²⁴ This version is also within Professor Keeton's description, because unambiguous policy language can be disregarded.

Ward, then, addresses what he identifies are the three main reasons proponents give for the doctrine of reasonable expectations: not receiving the policy until after entering into the contract, the inequality of bargaining power, and the complexity of the insurance contracts.

Ware contends that a policyholder not receiving the policy until after agreeing to buy the insurance and paying the first premium does not justify the doctrine. The process of the transaction makes the proposed insured the offeror. When the offeree, the insurance company, accepts the offer, it delivers the policy contract. If the insurance company rejects the offer, the entire amount of any premium paid is refunded and the insured is in the same position he was in prior to the transaction. Likewise, the insured, after receiving the policy contract, can cancel and receive a full refund of premium or at least a pro rata amount based on the amount of time coverage was effective.¹²⁵

It is a common argument among expectations proponents that an influential reason for the doctrine is the unequal bargaining power between the insurance company and the potential insured.¹²⁶ However, both the insurer and the insured benefit economically from the use of standardized contracts. Because the insurer is freed from drafting individual contracts with each potential policyholder, its transaction costs are drastically minimized. Because those transaction

costs are minimized, the public is able to afford insurance coverage so that its risks are effectively transferred to the insurance company. The primary reason, therefore, of standardized insurance contracts are to reducing transaction costs and not to take advantage of unequal bargaining power.¹²⁷

The last justification is that the insurance contracts are long, complex and written by the insurer. This justification is based on the premise that insurers will only include terms in the insurance policies that are favorable to them.¹²⁸ Wade argues that this does not make sense from an economical and marketing standpoint. He quotes Judge Richard Posner for the position that if a seller offers unattractive terms, another seller will offer more attractive terms in order to gain market share. After acknowledging that this is an oversimplification in the insurance context, Ware discusses the various mechanisms of price/policy provision mix; “easy to read” policy summaries, overt comparisons by insurers with their competitors, fostering goodwill by ignoring certain policy provisions, and developing a good claims-adjusting reputation in order to distinguish themselves.¹²⁹

Ware finishes this section by proposing that governmental, both administrative and judicial, interference is part of the problem of why and how insurance contracts became long and complex. As courts construe policy language, insurance contract drafters attempt to isolate the legal words and phrases used in order to clarify the policy language according to the court ruling. The drafters’ attempts result in longer and more complex policies.¹³⁰ Ware contends that courts could help clarify policy language by intervening less, not more. The use of the reasonable expectations doctrine causes drafters to make policies more complicated in order to attempt to clarify the policy language under the court ruling.¹³¹

Ware ends with an analysis of freedom of contract, which is a favorite point among critics of the doctrine of reasonable expectations.¹³² Ware contends that “even if bargaining power or contract terms did favor the insurer, one would still have to reject ‘freedom of contract’ and weaken the rule of law in order to justify the reasonable expectations doctrine.”¹³³ The basis of freedom of contract is the notion that contractual duties are not imposed on a party by force or coercion. Both the insurer, by obtaining licensure from the state and soliciting customers, and the proposed insured, by seeking to purchase insurance, enter into a contractual relationship with its obligations and duties. The logical conclusion is their rights and duties are determined by the language of the written contract.¹³⁴ However, the doctrine of reasonable expectations imposes on the insurer additional duties not found in the contract. Advocates of the doctrine contend that this is appropriate, because the policyholder has not truly consented to the duties in the contract.¹³⁵

On the other hand, ascribing to the traditional rule that one who signs a contract assents to its terms promotes equality, freedom, and wealth.¹³⁶ By viewing the policyholder’s signature as an assent to the contract terms, the interpretation of the contract is made clear and objective, and the law is applied equally and not on the whim of a judge or jury.¹³⁷ Freedom is served by objective and clear rules so that “[m]an is free if he needs to obey no person but solely the laws.”¹³⁸ Finally, wealth is promoted because economic actors have confidence that they can predict how a state will act with its coercive powers.¹³⁹ Nothing in freedom of contract states that each term must be bargained and negotiated. Freedom of contract allows parties to enter into form contracts as long as they are not defrauded or forced.

VI. Jurisdictional Differences

This paper will not attempt to inventory every jurisdiction and attempt to classify it. Many of the articles cited herein provide such lists as they stood at various times. However, a review California in some detail with more cursory reviews of New Jersey, Florida, Pennsylvania, Utah, and Wisconsin is appropriate to show how the doctrine is treated differently around the country.

A. California

One of the foundational cases that Professor Keeton relied on to show the reasonable expectations principle was *Steven v. Fidelity & Cas. Co.*¹⁴⁰ In this famous case of the vending machine airline insurance, the California Supreme Court stated

In this type of standardized contract, sold by a vending machine, the insured may reasonably expect coverage for the whole trip which he inserted in the policy, including reasonable substituted transportation necessitated by emergency.¹⁴¹

It was charged by the Court that ambiguity in the language is determined in view of the policyholders “knowledge and understanding as a reasonable layman, his normal expectation of the extent of coverage of the policy”¹⁴²

One of the most influential cases in the development of the reasonable expectations doctrine is *Gray v. Zurich Ins. Co.*¹⁴³ *Gray* involved the insurance company denying a defense to Mr. Gray for a third-party suit. Writing for the Court, Justice Tobriner stated that the meaning of the contract comes from the reasonable expectations of the insured as opposed to the words used in the insurance contract.

Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the insured would reasonably expect.¹⁴⁴

It appears at the time of Professor Keeton's article, California already had a fairly well developed doctrine in which the insured's reasonable expectation could prevail over policy language that was unambiguous on its face.

In 1992, the California Supreme Court decided *Bank of the West v. Superior Court*.¹⁴⁵ The case involved construing the terms "unfair competition" and "advertising injury."¹⁴⁶ While admitting that insurance contracts have "special features," ordinary contract interpretation rules apply.¹⁴⁷ If the contract language is clear, it governs; however, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."¹⁴⁸

There are two significant developments in this statement of insurance contract interpretation. First, the Court seems to say that any reasonable expectations analysis is inapplicable without first there being an ambiguity in the contract language. This would back away from the *Gray* Court's strong statement in favor of reasonable expectations. This is also not in keeping with Professor Keeton's presentment of not needing an ambiguity to apply the doctrine. Secondly, when the doctrine is applied, it is viewed from the insurer's perspective. The question is not what the insured reasonably expected coverage to be, but what the insurer believed the insured expected. This is a significant shift, and is similar to the standard in the Restatement (Second) of Contracts § 211 relating to "Standardized Agreements."¹⁴⁹

California's analytical frame-work for interpreting insurance contracts now had a three-step sequential process that used reasonable expectations as only a part, not the overriding

theme.¹⁵⁰ “(1) [L]ook to the plain meaning of the policy language as an initial inquiry; 2) a consideration of the insured’s reasonable expectation (from the insurer’s perspective) of coverage; 3) and the doctrine that ambiguous policies are strictly construed against the drafter of the policy.”¹⁵¹

As one Associate Justice of the California Court of Appeals put it,

In California, policy ambiguities can no longer be resolved in the insured’s favor unless, in the context of the circumstances, coverage is consistent with the insured’s objectively reasonable expectations in light of (1) the language of the entire policy, (2) the total circumstances of the particular case and (3) common sense. This is a much tougher standard and provides the courts with a powerful tool to broadly examine and evaluate those expectations. Indeed it can fairly be said that in California the doctrine of reasonable expectations has moved from a rationale justifying a broad, pro-insured rule of construction to an analytical tool which will be utilized in many cases to deny coverage where it previously would have been recognized.¹⁵²

In *MacKinnon v. Truck Ins. Exch.*,¹⁵³ the Court arguably placed more emphasis on the reasonable expectations of the insured, but still applied the three-step analysis, and some argued that the test did not survive *MacKinnon*.¹⁵⁴ One year later in *Hansen v. OneBeacon Ins. Grp.*,¹⁵⁵ the California Court of Appeals reviewed the declarations page of a Business Auto policy to determine the limits of uninsured and underinsured motorist coverage. The limits for underinsured motorist coverage were not clear on the face of the declarations page.¹⁵⁶ The insurance company proffered an interpretation which stated that the limits for underinsured motorist coverage were the same as uninsured motorist coverage, \$100,000, and the court found that interpretation reasonable.¹⁵⁷ The Hansen’s asserted interpretation was that the limit was the same as the liability coverage limit, \$1,000,000.¹⁵⁸ The court found the Hansen’s interpretation unreasonable; therefore the insurance company’s reasonable interpretation prevailed.¹⁵⁹ Interestingly, the court used *Wilkie* to show that the doctrine of reasonable expectations to

overcome unambiguous policy language is not universally accepted, and underscored that California did not follow that version of the doctrine.¹⁶⁰

It appears, therefore, that California, while using reasonable expectations in its formula, is with a growing number of states that have changed from the “pure” Keetonian version of the doctrine to one that requires an ambiguity before the insured’s reasonable expectations are considered.

B. Other Jurisdictions

In Minnesota, the high water mark for the doctrine was in *Atwater Creamery Co. v. Western Nat’l. Mut. Ins. Co.*¹⁶¹ in which Minnesota’s Supreme Court refused to honor clear, unambiguous policy language in the definition of “burglary” to find coverage based on the insured’s reasonable expectations. However, in *Univ. of Minnesota v. Royal Ins. Co.*,¹⁶² the Court limited *Atwater Creamery* to state that the doctrine has no place where the policy language is clear and unambiguous. Subsequent Minnesota cases have restricted the doctrine even further to applying it only to instances of hidden exclusions.¹⁶³

New Jersey had the most cases in Professor Keeton’s article showing that reasonable expectations could overcome seemingly clear policy language. However, in *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*,¹⁶⁴ the New Jersey Supreme Court did not use the doctrine to overcome clear and unambiguous policy language and applied a \$10,000 deductible for each consecutive policy for a claim of long-term lead-based paint exposure. This was over a vigorous dissent which would have applied the doctrine¹⁶⁵ and strenuous urging by some in the New Jersey Bar.¹⁶⁶

Florida is a jurisdiction that has completely rejected the doctrine in all its forms. This was made clear in *Deni v. State Farm Fire & Cas. Ins. Co.*¹⁶⁷ In construing a pollution exclusion provision, the Court stated

We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged The reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties of the contract.

* * *

Construing policies upon a determination as to whether the insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.¹⁶⁸

In *Allen v. Prudential Prop. & Cas. Ins. Co.*,¹⁶⁹ which is cited approvingly in *Deni, supra*, even in the absence of full development of other equitable doctrines, the Utah Supreme Court refused to adopt such a "new and potentially sweeping equitable doctrine."¹⁷⁰

Pennsylvania, a quick adherent to the reasonable expectations doctrine, started by allowing reasonable expectations to overcome unambiguous contract language.¹⁷¹ However, it has retreated, like many former strong adherents, to relegating it to ambiguous policy provisions. Pennsylvania's current position on the doctrine has been summarized thusly:

1. If the language is clear and unambiguous, the court will enforce it even though it works against the insured's reasonable expectation.
2. If policy language is ambiguous, it will be construed in favor of the insured.
3. If an insurer accepts payment for a policy and cannot show that the insured did not have a reasonable basis for having an expectation of coverage, those reasonable expectations will be honored.
4. Reasonable expectations of coverage will overcome a clear policy exclusion if:

- a. Specific insurance was applied for, but the issued policy is materially different;
- b. Misrepresentation by the insurer or its agent and justifiable reliance by the insured on those misrepresentations; and
- c. The insurance company failed to fulfill a duty to the policyholder, and that failure caused a denial of coverage.¹⁷²

Wisconsin has not expressly adopted or rejected the doctrine. As described in a comment in the *Marquette Law Review*,¹⁷³ the majority of Wisconsin Supreme Court cases have used the doctrine as a way to construe policy ambiguities in favor of the reasonable expectations of the insured.¹⁷⁴ However, in a confusing jumble of opinions, the Court has applied four different approaches to the doctrine causing one of the justices to comment that “[t]he majority’s application of the principle of reasonable expectations is not entirely clear. The principle has more than one meaning.”¹⁷⁵

As the foregoing analysis shows, Michigan is not alone in its repudiation of the doctrine of reasonable expectations. In fact, the vast majority of those jurisdictions that do use an expectation analysis, do so primarily, if not exclusively, to resolve ambiguous policy language. Many states, like Michigan prior to *Wilkie*, had not addressed the doctrine specifically to either reject or adopt it. The trend is that those states that have used the pure, strong Keetonian version of the doctrine have tended to back away from it, and some who have adopted it as a tool for resolving ambiguities have abandoned it, because it was indistinguishable from *contra preferentem*.

VI. The Michigan Supreme Court Misapplies Its *Wilkie* Analysis

Two years after deciding *Wilkie*, the Michigan Supreme Court decided *Rory v. Continental Ins. Co.*¹⁷⁶ The majority opinion, authored by Justice Robert P. Young, constituted the same justices as *Wilkie*.¹⁷⁷

The case involved an Uninsured Motorist coverage provision which limited the time the insured could make a claim or file an action for Uninsured Motorist benefits to one year from the date of the accident. Plaintiffs were injured in a motor vehicle accident with a vehicle driven by Charlene Haynes on May 15, 1998.¹⁷⁸ Plaintiffs filed a third-party suit against Haynes in September 1999, well within the statute of limitations.¹⁷⁹ Sometime after the suit was filed, plaintiffs discovered that Haynes was not insured. On March 14, 2000, plaintiffs submitted a claim for Uninsured Motorist benefits under their auto insurance policy with the defendant.¹⁸⁰ Continental (hereinafter CNA) denied the claim based on the one-year limitation in the policy. In August 2000, plaintiffs filed suit against CNA.¹⁸¹

CNA filed a motion for summary disposition relying on the policy provision. The trial court denied the motion, stating that the provision was an “unenforceable adhesion clause,” and constituted a “significant reduction” in the time plaintiffs would otherwise be required to file an action against the tortfeasor.¹⁸²

CNA filed an appeal, and the Court of Appeals upheld the denial of the motion.¹⁸³ The court stated that this was not a case of ambiguity or public policy,¹⁸⁴ but of reasonableness.¹⁸⁵ The court held that the one-year limitation was unreasonable, because it is not enough time to determine if the plaintiff has suffered a serious injury and whether the tortfeasor is insured and imposed a three-year limitation.¹⁸⁶ There is no mention in the opinion regarding the doctrine of reasonable expectations or that plaintiffs expected coverage in some way based on the doctrine.

Justice Young¹⁸⁷ framed the issues of this case as:

- (1) [A]re insurance contracts subject to a standard of enforcement different from that applicable to other contracts, and
- (2) under what conditions may a court disregard and refuse to enforce unambiguous contract terms[.]¹⁸⁸

The Court held that standards of enforcement for insurance contracts are no different than any other contract, and that absent a violation of law or the applicability of one of the traditional contract defenses, unambiguous contract language will be enforced.¹⁸⁹ It should be noticed that the holding regarding unambiguous terms is different than in *Wilkie*, in that there is no mention of public policy as a defense initially.¹⁹⁰ Secondly, the Court held that the legislature has given the task to evaluate policy contracts for reasonableness to the Commissioner of the Office of Financial and Insurance Services, exclusively.

Initially, there is discussion that if there was a statute of limitations that would apply, it would be the six-year contractual statute,¹⁹¹ not the three-year injury statute.¹⁹² This line of reasoning is not logical. The contractual statute of limitations limits the ability to bring suit for specific performance or breach of contract. There is no language that expresses or implies that it applies to filing a claim against coverage under an insurance policy. However, it would limit the insured to six years in order to file a suit to enforce the terms of an insurance contract or a breach of contract suit regarding an insurance contract. Uninsured Motorist coverage is a derivative coverage. It is only applicable when there is a valid actionable claim against the driver and/or owner of the motor vehicle which caused the accident. The injured party can file a valid claim or file suit against the tortfeasor up to three years after the accident. Therefore, contrary to the Court's contention, the Court of Appeal's application of the three-year limitation is logical and conforms with the purpose of Uninsured Motorist coverage and the applicable statute of limitations enacted by the legislature.

Despite Justice Young's adherence to the stance that public policy is the product of the legislative and executive branches of government,¹⁹³ the apparent public policy statement of the legislature is that those who are injured by a negligent driver of an automobile in Michigan, and whose injuries satisfy the threshold for compensability,¹⁹⁴ have three years in which to determine if they have the basis to file a good faith action for compensation of their injuries.¹⁹⁵ Even though, admittedly, Uninsured Motorist coverage is not mandated by the Michigan No-Fault Act, the ability of an insured to take advantage of the coverage is directly affected by the injury threshold requirement in the Act. Michigan is not a state that gives those injured in an automobile accident an unfettered right to sue the tortfeasor no matter how minor the injury may be. In such a state, a shorter statute of limitation may be appropriate, as the extent of the injury can be determined during the course of the litigation. A one-year limitation on the ability of an injured party to file a claim or suit under uninsured motorist coverage in Michigan is unreasonable, and it can be argued unconscionable.

In the reasonableness discussion of insurance terms, the Court states that an adhesion contract is just that: a contract; and "adhesion" is just a label for the type of contract.¹⁹⁶ They are not subject to any special rules.¹⁹⁷ The Court, then, cites *Wilkie* and uses a similar analytical process, to state that only traditional contract construction doctrines apply, mistakenly equating the analysis in this case with the doctrine of reasonable expectations.¹⁹⁸ The error in the Court's analysis is that there is not a claim that the policy term was ambiguous, or that the plaintiff's reasonably expected coverage. The provision is inapposite to the express statutory granting of a three-year statute of limitation to file suit for injuries upon which Uninsured Motorist coverage is predicated. The Court's analysis is in direct contradiction to the public policy statement by the

legislature that injured parties have three years in which to file an action to be compensated for their injuries.

The Court relies on MCL 500.2236 for the contention that the public policy statement of the legislature is to reserve all inquiries as to reasonableness of insurance policy provisions to the Commissioner of the Office of Insurance and Financial Services.¹⁹⁹ As Justice Kelly argued, in dissent, the statute requires the Commissioner to approve insurance contracts as long as they do not violate the law. Reasonableness applies to the discretion the Commissioner has as a basis for disapproving or withdrawing approval for insurance contract provisions.²⁰⁰ The statute does not say, or even imply, that the sole arbiter of reasonableness of all the insurance contract language used in this state is the Commissioner to the exclusion of the Judiciary.

VII. Conclusion

The doctrine of reasonable expectations, as a principled, well-developed and clear body of law is lacking. Despite Professor Keeton's clear declaration of the doctrine in 1970, the 37 years since have not supplied a cohesive national consensus on the factors, steps in the analysis, or even the general applicability of the doctrine. Michigan is not alone in its repudiation of the doctrine. It is following the national trend away from the strong, Keetonian version of the doctrine of reasonable expectations.

However, the Court erred in applying the same analytical framework in *Rory*. The challenge to the policy provision was not based on the reasonable expectations of the insured, but on the unreasonableness of the provision itself. Unlike the Court of Appeals, I argue that this case was about public policy. The contract provision violated the legislative public policy of providing injured parties three years to determine whether they have an actionable injury under the Michigan

No-Fault Act and file an action in order to be compensated for that injury. The Court misapplied *Wilkie* in its analysis in upholding the one-year limitation.

¹ *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 661 N.W.2d 776 (2003).

² I have taken many insurance courses, and in none of the materials has there ever been any mention of the doctrine of reasonable expectations. See, BARRY D. SMITH, JAMES S. TRIESCHMANN, ERIC A. WIENING, PROPERTY AND LIABILITY INSURANCE PRINCIPLES (Insurance Institute of America, Inc. 1987), J. J. LAUNIE, GEORGE E. REJDA, DONALD R. OAKES, PERSONAL INSURANCE (2d ed. Insurance Institute of America, Inc. 1991), WILLIAM H. CUMMINGS, J. MAC SPEARS, LIFE & HEALTH PATHFINDER (3d ed. Pathfinder Publishers 1992)

³ 473 Mich. 457, 703 N.W.2d 23 (2005)

⁴ *Wilkie*, *supra* at 43-44, N.W.2d at 778

⁵ *Id.*

⁶ The contract language provided:

2. COVERAGE

- a. We will pay compensatory damages any person is legally entitled to recover:
- (1) from the owner or operator of an underinsured automobile;
 - (2) for bodily injury sustained while occupying or getting into or out of an automobile that is covered by Section II – LIABILITY COVERAGE of the policy

* * *

4. LIMIT OF LIABILITY

- a. Our Limit of Liability for Underinsured Motorists Coverage shall not exceed the lowest of:
- (1) the amount by which the Underinsured Motorist Coverage limits stated in the Declarations exceed the total limits of all bodily injury liability bonds and policies available to the owner or operator of the underinsured automobile; or
 - (2) the amount by which compensatory damages for bodily injury exceed the total limits of those bodily injury liability bonds and policies
- b. The Limit of Liability is not increased because of the number of:
- (1) automobiles shown or premiums charged in the Declarations;
 - (2) claims made or suits brought;
 - (3) persons injured; or
 - (4) automobiles involved in the occurrence.

⁷ MCL §500.3101 *et seq.*

⁸ Ward's liability limit acted both as a per person and per occurrence limit. If there had been only one person injured, Citizen's could have paid the entire \$50,000 under the per person basis. If more than one person is injured, under the per occurrence basis, the most Citizen's is obligated to pay is \$50,000 to all claimants.

⁹ 473 Mich. at 45, 664 N.W.2d at 779.

¹⁰ *Id.* at 45-46, N.W.2d at 779.

¹¹ *Wilkie v. Auto-Owners Ins. Co.*, 245 Mich. App. 521, 629 N.W.2d 86 (2001).

¹² *Id.* at 526-527, N.W.2d at 89.

¹³ The court had already decided the case with their ambiguity analysis. The additional discussion of the reasonable expectations of the insured was unnecessary.

¹⁴ *Id.* at 527, N.W.2d at 89.

¹⁵ *Id.* at 525, N.W.2d at 88-89, citing *Gelman Sciences, Inc. v. Fidelity & Casualty Co.*, 456 Mich. 305, 318, 527 N.W.2d 617 (1993), quoting *Vanguard Ins. Co. v. Clarke*, 438 Mich. 463, 472, 475 N.W.2d 48 (1991), quoting *Powers v. DAIIE*, 427 Mich. 602, 623, 398 N.W.2d 411 (1986).

¹⁶ *Id.* at 527, N.W.2d at 90.

¹⁷ The court's reference to the reasonable expectations of the insured is used only to bolster its position that the policy should be interpreted to the benefit of the plaintiffs. Arguably it is pure dicta as the court does not mention the rule in its summary paragraph. *Id.* at 534, N.W.2d at 93.

¹⁸ 469 Mich. at 50, N.W.2d at 781.

¹⁹ *Id.* at 50-51, N.W.2d at 781. See n 6 for the text of these provisions.

²⁰ *Id.* at 51, N.W.2d at 782.

²¹ See, U.S. CONST. art. I, § 10, cl. 1. See also, MICH. CONST. OF 1963, art. 1, § 10.

²² Robert E. Keeton, *Insurance Law Rights At Variance With Policy Provisions*, 83 HARV. L.R. 961 (1970)

²³ 469 Mich. at 52-53, 664 N.W.2d at 782-783.

²⁴ 384 Mich. 228, 180 N.W.2d 775 (1970)

²⁵ *Id.* at 232-233, N.W.2d at 777.

²⁶ 412 Mich. 355, 314 N.W.2d 440 (1982).

²⁷ 469 Mich. at 56-57, N.W.2d at 784-785, quoting *Raska, supra* at 362-363, N.W.2d at 441.

²⁸ *Raska, supra*, at 377-380, N.W.2d at 447-449 (Williams, J. in dissent).

²⁹ 427 Mich. 602, 398 N.W.2d 411 (1986). Chief Justice Williams, the dissenter in *Raska*, authored the plurality opinion with Justice Archer concurring and Justices Cavanagh and Brickley concurring only in the result. Justices Riley and Levin concurred in part and dissented in part.

³⁰ 469 Mich. at 57, 664 N.W.2d at 785, citing *Powers, supra*, at 632, N.W.2d at 424 n 8.

³¹ *Id.* at 57-58, N.W.2d at 785, citing *Powers, supra*, at 631, N.W.2d at 424 n 7.

³² Roger C. Henderson, *The Doctrine of Reasonable Expectations In Insurance Law After Two Decades*, 51 OHIO ST. L.J. 832, 835-836 (1990)

³³ Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHIC. L.R. 1461, 1471 (1989) (The basis of the doctrine is that policyholders do not read their policies, but the court "imagined a policyholder who reads about coverage of 'nonowned vehicles' but who does not read the definition of 'nonowned.'")

³⁴ 438 Mich. 463, 475 N.W.2d 48 (1991).

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- ³⁵ 469 Mich. at 58-59, N.W.2d at 785-786, citing *Vanguard*, *supra*, at 472-478, N.W.2d at 52.
- ³⁶ 460 Mich. 558, 567-568, 596 N.W.2d 915, 920 (1999).
- ³⁷ 469 Mich. at 60, N.W.2d 786 (citations omitted).
- ³⁸ *Id.*
- ³⁹ *Id.* at 60-62, N.W.2d 786-787, citing Ware, n 33 at 1468, Susan M. Popik and Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 429 (1998), Henderson, *supra*, note 31 at 827.
- ⁴⁰ *Id.* at 62, N.W.2d at 787.
- ⁴¹ *Id.* at 63-64, N.W.2d at 788 (Weaver, J. concurring in part and dissenting in part).
- ⁴² See, *Rory v. Continental Ins. Co.*, 473 Mich. 457, 517, 703 N.W.2d 23, 56 (2005) (Weaver, J. dissenting) (“Courts must interpret insurance policies from the perspective of an average consumer.”)
- ⁴³ 469 Mich. at 65-66, N.W.2d at 789 (Cavanagh, J. dissenting).
- ⁴⁴ *Id.* at 66-67, N.W.2d at 789-790.
- ⁴⁵ *Id.* at 70, N.W.2d at 791.
- ⁴⁶ *Id.* at 70-75, N.W.2d at 791-794.
- ⁴⁷ *Id.* at 76-77, N.W.2d at 794-795 (Kelly, J. dissenting, quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1995)).
- ⁴⁸ *Id.* at 78-79, N.W.2d at 795.
- ⁴⁹ See discussion *infra*.
- ⁵⁰ See, *Kloian v. Domino’s Pizza, L.L.C.*, No. 263882, 2006 WL 3824890, at *4 (Mich. App. Dec. 28, 2006) (Courts are required to enforce unambiguous contracts according to their terms.), *Toolanen v. Lear Corp.*, No. 272056, 2007 WL 189659, at *2 (Mich. App. Jan. 25, 2007) (One who signs a contract is presumed to have read it, and when enforcement is sought, may not allege that he did not read it or that it was different in its terms.)
- ⁵¹ No. 235310, 2003 WL 21854655 (Mich. App. Aug. 7, 2003).
- ⁵² *Id.* at *1.
- ⁵³ *Id.*
- ⁵⁴ *Id.* at *3.
- ⁵⁵ *Id.* at *4. The trial court’s use of the doctrine was arguably appropriate at the time since its decision was reached before *Wilkie* had been decided.
- ⁵⁶ No. 239128, 2003 WL 23018291 (Mich. App. Dec. 23, 2003).
- ⁵⁷ *Id.* at *1.

⁵⁸ *Id.* at *4.

⁵⁹ *Id.*

⁶⁰ No. 242084, 2004 WL 177143 (Mich. App. Jan. 29, 2004).

⁶¹ *Id.* at *1.

⁶² *Id.*

⁶³ No. 249646, 2004 WL 2290471 (Mich. App. Oct. 12, 2004).

⁶⁴ *Id.* at *1.

⁶⁵ *Id.*

⁶⁶ No. 253127, 2005 WL 839504 (Mich. App. April 12, 2005).

⁶⁷ *Id.* at *5.

⁶⁸ No. 253290, 2005 WL 1280177 (Mich. App. May 31, 2005).

⁶⁹ A Builders Risk policy covers a dwelling that is in the process of being constructed. Somewhat similar to a Homeowners policy, there is a coverage section for the structure itself and a coverage section that provides premises liability.

⁷⁰ *Id.* at *4-*5.

⁷¹ *Id.* at *3.

⁷² *Wilkie, supra*, 469 Mich. at 62, 664 N.W.2d at 787.

⁷³ *Id.*

⁷⁴ *Harvey v. Allstate Ins. Co.*, No. 258695, 2006 WL 707789, at *2 (Mich. App. March 21, 2006).

⁷⁵ *Dupuis v. Utica Mutual Ins. Co.*, No. 250766, 2006 WL 1084336, at *14 (Mich. App. April 25, 2006) (White, J. concurring in part and dissenting in part).

⁷⁶ *EUG, LLC v. RPL of Michigan, Inc.*, No. 268337, 2006 WL 2355090, at *3 (Mich. App. Aug. 15, 2006) (Non insurance case) (internal quotes omitted).

⁷⁷ *Casey v. Auto-Owners Ins. Co.*, 273 Mich. App. 388, --- N.W.2d ---, WL 2708675, at *4 (Mich. App. Sept. 21, 2006).

⁷⁸ No. 05-10578(ALG), 2005 WL 3789428 (Bankr. S.D.N.Y. Nov. 9, 2005) (Applying Michigan law).

⁷⁹ *Id.* at *1.

⁸⁰ *Id.* at *2.

⁸¹ *Id.* at *1 n. 2, quoting *Wilkie* 469 Mich. at 60, 664 N.W.2d at 786 (emphasis in the original).

⁸² Keeton, *Insurance Law Rights*, 83 HARV. L. REV. 961 note 22.

⁸³ Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, *supra* note 31.

⁸⁴ Keeton, *supra* at 966-967.

⁸⁵ *Id.* at 967.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 968.

⁸⁹ *Id.*

⁹⁰ *Id.* at 969.

⁹¹ In an action filed by an insured, he has the initial burden to show that the contended policy language is ambiguous by presenting an alternative interpretation affording coverage to the one proffered by the insurance company. If the action is filed by the insurance company, it has the initial burden to prove that there is but one interpretation excluding or limiting coverage.

⁹² *Id.*

⁹³ *Gaunt v. John Hancock Mut. Life Ins. Co.*, 150 F.2d 599 (2d Cir.), *cert. denied*, 331 U.S. 849 (1947) (Hand, J); *Lachs v. Fidelity & Cas. Co.*, 118 N.E.2d 555 (N.Y. 1954); *Steven v. Fidelity & Cas. Co.*, 377 P.2d 384 (Cal. 1962); *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966); *Lowell v. Maryland Cas. Co.*, 491 P.2d 180 (Cal. 1966).

⁹⁴ *Kievit v. Loyal Protective Life Ins. Co.*, 140 A.2d 22 (N.J. 1961); *Prudential Ins. Co. v. Lamme*, 425 P.2d 346 (Nev. 1967); *Allen v. Metropolitan Life Ins. Co.*, 208 A.2d 638 (Nev. 1965); *Morgan v. State Farm Life Ins. Co.*, 400 P.2d 223, 225-227 (Ore. 1965) (dissenting opinion); *Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291 (N.J. 1966); *Harr v. Allstate Ins. Co.*, 255 A.2d 208 (N.J. 1969).

⁹⁵ *Mosby v. Mutual Life Ins. Co.*, 92 N.E.2d 103 (Ill. 1950).

⁹⁶ *Long v. New York Life Ins. Co.*, 180 P. 479 (Wash. 1919); *Providential Life Ins. Co. v. Clem*, 403 S.W.2d 68 (Ark. 1966); *Lawrence v. Providential Life Ins. Co.*, 385 S.W.2d 936 (Ark. 1965); *Bauman v. Royal Indem. Co.*, 174 A.2d 585 (N.J. 1961).

⁹⁷ Keeton, *supra* at 973.

⁹⁸ *Id.* at 974.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 968-969.

¹⁰¹ *Id.* at 974. Similar to combining reasonable expectations with an ambiguity, combining it with unconscionability does not necessarily add to the analysis. If a policy provision is unconscionable, a court will refuse to enforce the provision, just as the ambiguity will be construed against the drafter. A policyholder's reasonable expectations do not have to determine the outcome with either doctrine. A court will use its equitable powers to fashion a remedy that is fair to both parties looking at the totality of the circumstances.

¹⁰² *Id.*

¹⁰³ *Id.* at 974-975. This denies policyholders of the prerogative of deciding what coverages they desire and those they do not, and how much they are willing to pay for those coverages. If the standard is the objective reasonable expectations of a layperson in that individual policyholder's circumstances, it is defeated by this concept. As a threshold matter, a court must determine, by some measure, what coverages the great majority of policyholders would expect. Secondly, the court must decide which provisions fall outside of this expectation. Finally, the court must decide that the coverage at issue in the case before it, as worded by the individual insurer, fits into the offending category. There are no identifiable standards to guide the court in this analysis.

¹⁰⁴ Peter Nash Swisher, *Judicial Rationales In Insurance Law: Dusting Off The Formal For The Function*, 52 OHIO ST. L.J. 1037, 1073-1074 (1991).

¹⁰⁵ Robert H. Jerry, II, *Insurance Contract, And The Doctrine Of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 23 (1998).

¹⁰⁶ Swisher, *supra* at 1054. Professor Swisher cites Henderson, *supra* note 31 for the list of states that have expressly adopted the doctrine of reasonable expectations as propounded by Professor Keeton: Alabama, Alaska, Arizona, California, Iowa, Montana, Nebraska, Nevada, New Hampshire, and New Jersey. Six other states may have adopted the doctrine, but there is some ambiguity in their decisions: Colorado, Delaware, Hawaii, North Carolina, Pennsylvania and Rhode Island.

¹⁰⁷ *Id.* at 1055. Professor Swisher cites Henderson *supra* note 31 for the list of states that have rejected the doctrine: Idaho, Illinois, Massachusetts, North Dakota, Ohio, Oklahoma, South Carolina, Washington, and Wyoming. At least 25 other states had not expressly rejected or adopted the doctrine at that time.

¹⁰⁸ *Id.* at 1074.

¹⁰⁹ Eugene R. Anderson and James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations Of Insurance Coverage*, 5 CONN. INS. L.J. 335, 336 (1998).

¹¹⁰ *Id.* at 338.

¹¹¹ Joseph E. Minnock, *Protecting The Insured From An Adhesion Insurance Policy: The Doctrine Of Reasonable Expectation In Utah*, 1991 UTAH L. REV. 837, 850 (1991).

¹¹² 56 U. CHI. L. REV., *supra* note 33.

¹¹³ *Id.* at 1464-1465.

¹¹⁴ *Id.* at 1465, quoting Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 328 (1986).

¹¹⁵ *Id.* Proponents of the doctrine argue that these traditional contract remedies are insufficient to protect the interests of the policyholder, especially in the face of unambiguous policy language.

¹¹⁶ Other commentators have broken the versions down differently into as many as versions. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction Of The Reasonable Expectations Approach And The Misleading Mythology Of Judicial Role*, 5 CONN. INS. L.J. 181, 192-193 (1998).

¹¹⁷ *Id.* at 1467.

¹¹⁸ *Id.* at 1469.

¹¹⁹ *Id.* at 1469-1470.

¹²⁰ In this context, Ware makes his point about *Powers, supra*. See note 33 and accompanying text.

¹²¹ *Id.* at 1472.

¹²² *Id.* For example, this is the basic premise behind “special” and “broad” form Homeowners insurance policies. Under special form, or “all risk” coverage, there is a general statement of coverage to the dwelling structure, with limiting exclusions (flood, war, intentional acts, etc.). If the “peril,” or cause of loss, is not specifically excluded, damage to the home is covered. However, under broad form, or “named peril” coverage, in order for the home to be covered, the peril must be one of the covered perils listed in the policy (wind, rain, weight of ice and snow, etc.). Special form coverage is much more desirable and comprehensive than broad form coverage. That is why insurers reserve special form coverage for newer and/or well-maintained homes.

¹²³ *Id.*

¹²⁴ *Id.* at 1473.

¹²⁵ *Id.* at 1475.

¹²⁶ Anderson & Fournier, *supra*, at 336-337 note 109 (discussing the control insurance companies have in insurance law), Minnock, *supra*, at 829 note 111 (“[T]he characteristics of an adhesion contract are that the contract is standardized and that its issuer has superior bargaining power.”), Jeffrey R. Pawelski, *Insurers Don’t Need The Court to “Babysit” Them: An Argument For Reasonable Expectations In American Mutual Insurance Co. v. Elliot*, 41 S.D. L. REV. 375 (1996) (“The need for this severance [of insurance contracts from normal contract law] is based primarily on the disparate bargaining positions of the parties in an insurance transactions.”) (Citing Minnock, *supra*).

¹²⁷ Ware, *supra* at 1477 – 1478.

¹²⁸ *Id.* at 1478.

¹²⁹ *Id.* at 1478-1483.

¹³⁰ *Id.* at 1483.

¹³¹ *Id.* at 1485.

¹³² See *Wilkie, supra*, 469 Mich. at 52-53, 664 N.W.2d at 782-787.

¹³³ Ware, *supra* at 1487.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1487-1488.

¹³⁶ *Id.* at 1488-1489. As Ware notes, the insured does not actually sign the policy, but the application for insurance based on the terms of the policy. When the insurance company accepts the risk, the application is part of the contract. In fact many times, in life insurance and annuity contracts, a copy of the signed application is bound in the policy booklet.

¹³⁷ *Id.* at 1489.

¹³⁸ *Id.* citing FRIEDRICH A. HEYEK, *THE ROAD TO SERFDOM* 72, 82 (U. Chicago, 1944) (quoting Immanuel Kant).

¹³⁹ *Id.*

¹⁴⁰ 377 P.2d 284 (Cal. 1962) cited in Keeton, *supra* n 14. The other similar foundational case used by Professor Keeton was *Lachs v. Fidelity & Cas. Co.*, 118 N.E.2d 555 (N.Y. 1954).

¹⁴¹ *Id.* at 288.

¹⁴² *Id.*

¹⁴³ 419 P.2d 168 (Cal. 1966).

¹⁴⁴ *Id.* at 171-172.

¹⁴⁵ 833 P.2d 545 (Cal. 1992). See John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank Of The West v. Superior Court Places The Fox In Charge Of The Henhouse*, 29 CAL. W. L. REV. 83.

¹⁴⁶ *Bank of the West* at 549.

¹⁴⁷ *Id.* at 551-552.

¹⁴⁸ *Id.* at 552 (quoting CAL. CIV. CODE, § 1649).

¹⁴⁹ Restatement (Second) § 211 states:

- (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms and agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
- (2) Such a writing is interpreted wherever reasonable as treating alike those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- (3) Where the other party has reason to believe that the other 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.

See Romaker & Prieto, *supra*, note 145 at 85.

¹⁵⁰ See, *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990).

¹⁵¹ Daniel Sanchez-Behar, *California's Approach To The Interpretation of Insurance Policies – Mackinnon v. Truck Insurance Exchange*, 38 U.S.F. L. REV. 577, 578 (2004) (citing *AIU Ins. Co.*, *supra*).

¹⁵² H. Walter Croskey, *The Doctrine of Reasonable Expectations In California: A Judge's View*, 5 CONN. INS. L.J. 451, 471-472 (1998).

¹⁵³ 73 P.3d 1205 (Cal. 2003).

¹⁵⁴ Sanchez-Behar, note 151 at 588 (citing Rex Heesemant, 'MacKinnon' Case May Change How Courts Interpret Insurance Contracts, L.A. DAILY J., Sept. 8, 2003 at 7).

¹⁵⁵ No. C044082, 2004 WL 1739417, (Cal. App. Aug. 4, 2004).

¹⁵⁶ *Id.* at *3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *4.

¹⁶⁰ *Id.*

¹⁶¹ 366 N.W.2d 241 (Minn. 1985).

¹⁶² 517 N.W.2d 888, 891 (Minn. 1994).

¹⁶³ *Kabanuk Diversified Investments, Inc. v. Credit General Ins. Co.*, 553 N.W.2d 65, 72 (Minn. Ct. App. 1996). For a further list of cases for the same position along with a discussion on the decline of Keeton's strong version of the doctrine generally, see John M. Bjorkman, *The Reasonable Expectations Doctrine: An Overview*, 29 SUM BRIEF 38 (2000).

¹⁶⁴ 843 A.2d 1094 (N.J. 2004).

¹⁶⁵ *Id.* at 1109 (Albin, J. dissenting).

¹⁶⁶ See, Robert D. Chesler & Lynda A. Bennett, *When Coverage Does Not Meet Expectations Appellate Division Turns The Doctrine Of Reasonable Expectations On Its Head*, 172 N.J.L.J. 112 (2003).

¹⁶⁷ 711 So.2d 1135 (Fla. 1998).

¹⁶⁸ *Id.* at 1140 (footnote and internal citation, parentheses and quotation marks omitted). For a critical view of the Court's decision as misstating and misunderstanding the doctrine, see Anderson & Fournier, *supra*, note 109 at 357-359.

¹⁶⁹ 839 P.2d 798 (Utah 1992).

¹⁷⁰ *Id.* at 806. For criticism, see Mark T. Flickinger, *Protecting The Insured In Utah: Rethinking The "Interstitial" Approach Of Allen v. Prudential Property & Casualty Insurance Co.*, 12 BYU J. PUB. L. 389 (1998).

¹⁷¹ *Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346, 1353 (Pa. 1978), cert. denied, 439, 439 U.S. 1089 (1979).

¹⁷² The foregoing analysis is taken from Thomas J. Rueter & Joshua H. Roberts, *Pennsylvania's Reasonable Expectations Doctrine: The Third Circuit's Perspective*, 45 VILL. L. REV. 581, 604-606.

¹⁷³ David J. Seno, *The Doctrine Of Reasonable Expectations In Insurance Law: What To Expect In Wisconsin*, 85 MARQ. L. REV. 859 (2002).

¹⁷⁴ *Id.* at 873.

¹⁷⁵ *Id.* at 882-883 (quoting *Gross v. Lloyds of London Ins. Co.*, 358 N.W.2d 266, 272 n 1 (Wis. 1984) (Abrahamson, J. concurring)).

¹⁷⁶ 473 Mich. 457, 703 N.W.2d 23 (2005).

¹⁷⁷ Justices Taylor, Corrigan, Markman and Young formed the majority on both cases. Justice Weaver concurred in part and dissented in part in *Wilkie*, but dissented in *Rory*.

¹⁷⁸ *Rory*, *supra* at 461-462, N.W.2d at 27.

¹⁷⁹ MCL 600.5805(10).

¹⁸⁰ *Rory*, *supra* at 462, N.W.2d at 27.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Rory v. Continental Ins. Co.*, 262 Mich. App. 679, 687 N.W.2d 304 (2004).

¹⁸⁴ The position of this paper is that this is a public policy issue. See discussion *infra*.

¹⁸⁵ 262 Mich. App. at 682, N.W.2d at 306.

¹⁸⁶ 262 Mich. App. at 686, N.W.2d at 308-309.

¹⁸⁷ For a self-description as a “disciplined judicial traditionalist” written one year after *Wilkie* and one year before *Rory*, see Robert P. Young, Jr., *A Judicial Traditionalist Confronts The Common Law*, 8 TEX. REV. L. & POL. 299 (2004).

¹⁸⁸ *Rory*, *supra*, 473 Mich. at 460, N.W.2d at 26.

¹⁸⁹ *Id.* at 461, N.W.2d at 26.

¹⁹⁰ *Wilkie*, *supra*, 469 Mich. 41, 51, 664 N.W.2d 776, 782 (“[T]he courts are to enforce the agreement as written absent some highly unusual circumstance, such as . . . public policy”).

¹⁹¹ MCL 600.5807(8).

¹⁹² MCL 600.5805(10).

¹⁹³ *Young*, *supra*, note 187 at 300.

¹⁹⁴ See, *Kreiner v. Fischer*, 471 Mich. 109, 683 N.W.2d 611 (2004).

¹⁹⁵ See note 192.

¹⁹⁶ *Rory*, *supra* at 477, N.W.2d 35.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 488, N.W.2d at 41.

¹⁹⁹ *Id.* at 474, N.W.2d at 33. In relevant part the statute provides:

(1) A basic insurance policy form or annuity contract form shall not be issued or delivered to any person in this state, and an insurance or annuity application form if a written application is required and is to be made a part of the policy or contract, a printed rider or indorsement form or form of renewal certificate, and a group certificate in connection with the policy or contract, shall not be issued or delivered to a person in this state, until a copy of the form is filed with the insurance bureau and approved by the commissioner as conforming with the requirements of this act and not inconsistent with the law.

* * *

(5) Upon written notice to the insurer, the commissioner *may* disapprove, withdraw approval or prohibit the issuance, advertising, or delivery of any form to any person in this state if it violates any provisions of this act, or contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that *unreasonably* or deceptively affect the risk purported to be assumed in the general coverage of the policy. (emphasis added)

²⁰⁰ *Rory, supra*, at 49-50, N.W.2d 504-505 (Kelly, J. dissenting).