

**WHAT TO REASONABLY EXPECT IN THE COMING YEARS  
FROM THE REASONABLE EXPECTATIONS OF THE  
INSURED DOCTRINE**

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TABLE OF CONTENTS

INTRODUCTION.....	165
I. ORIGIN OF THE REI DOCTRINE .....	166
II. HOW THE STATES HAVE INTERPRETED AND APPLIED THE REI DOCTRINE.....	168
III. JUSTIFICATIONS AND RATIONALE IN SUPPORT OF THE REI DOCTRINE.....	170
IV. CONTINUED CRITICISM OF THE REI DOCTRINE OVER FORTY YEARS .....	175
V. WHERE WE'RE HEADED—RECENT TRENDS IN STATES APPLYING THE REI DOCTRINE.....	179
VI. WHERE WE SHOULD BE HEADED—REI DOCTRINE AS A LIMIT ON <i>CONTRA PROFERENTEM</i> .....	182
CONCLUSION.....	188

INTRODUCTION

The reasonable expectations of the insured (REI) doctrine is one of the most controversial legal theories of the twentieth and twenty-first centuries and has been a frequent topic among commentators, receiving both high praise,<sup>1</sup> and scathing criticism.<sup>2</sup> Despite the

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1. See, e.g., Martin Kamarck, *Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153 (1977); Robert E. Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275 (1976); Kelli Hanley Crabb, Note,

continued analysis, the REI doctrine continues to evade a universal understanding or clear definition—as the Utah Supreme Court said, “after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application.”<sup>3</sup> A few recent cases have completely rejected the REI doctrine, casting doubt on the doctrine’s continued existence.<sup>4</sup> Despite this criticism, the REI doctrine should continue to assist the courts in insurance coverage disputes, although perhaps in a somewhat altered nature.<sup>5</sup>

## I. ORIGIN OF THE REI DOCTRINE

The modern REI doctrine can be traced back to the seminal law journal article *Insurance Law Rights at Variance with Policy Provisions* written by Professor Robert Keeton in 1970.<sup>6</sup> Professor Keeton began with the notion that “[i]nsurance contracts continue to be contracts of adhesion, under which the insured is left little choice beyond electing among standardized provisions offered to him.”<sup>7</sup> The REI doctrine was originally formulated as follows: “[t]he 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

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*Interpreting the “Business Pursuits” Exclusion in Homeowner’s Policies—Toward Honoring “Reasonable Expectations,”* 25 S.D. L. REV. 132 (1980); John Fielding Shreves, Comment, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S.D. L. REV. 239 (1982).

2. See, e.g., Arnold P. Anderson, *Life Insurance Conditional Receipts and Judicial Intervention*, 63 MARQ. L. REV. 593 (1980); Gary L. Birnbaum, Louis A. Stahl & Michael P. West, *Standardized Agreements and the Parol Evidence Rule: Defining and Applying the Expectations Principle*, 26 ARIZ. L. REV. 793 (1984); Frank E. Gardner, *Reasonable Expectations: Evolution Completed or Revolution Begun?*, 669 INS. L.J. 573 (1978); Conrad L. Squires, *A Skeptical Look at the Doctrine of Reasonable Expectation*, 6 FORUM 252 (1971).

3. *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 803 (Utah 1992).

4. See *infra* Part V.

5. See *infra* Part VI.

6. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part One*, 83 HARV. L. REV. 961 (1970). Of course, Professor Keeton did not come up with the REI doctrine out of the blue; several cases had applied aspects of the REI doctrine before the Keeton article. See Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 50 (1998) (citing *Klos v. Mobil Oil Co.*, 259 A.2d 889 (N.J. 1969) (insurance solicited by mail); *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966) (duty to defend under liability insurance); *Kievit v. Loyal Protection Life Ins. Co.*, 170 A.2d 22 (N.J. 1961)).

7. Keeton, *supra* note 6, at 966.

those expectations.”<sup>8</sup> The Keeton formulation was clearly meant to extend beyond the *contra proferentem* doctrine that ambiguities must be construed against the drafter—i.e. against the insurer and in favor of the insured.<sup>9</sup>

The principle of honoring reasonable expectations should be extended further, protecting 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 would have understood the limitation that defeats the expectations at issue.<sup>10</sup>

However, the REI doctrine was also meant to be based on an objective, rather than subjective, standard. “An objective standard produces an essential degree of certainty and predictability about legal rights, as well as a method of achieving equity not only between insurer and insured but also among different insureds whose contributions through premiums create the funds that are tapped to pay judgments against insurers.”<sup>11</sup>

According to Keeton, one reason that the REI doctrine should include unambiguous contract language—in limited situations—is that the vast majority of insureds do not actually read their policy, much less have the opportunity to negotiate the policy terms. In other words:

[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 be allowed even though the insurer’s form is very explicit and

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8. *Id.* at 967.

9. The *contra proferentem* doctrine states that ambiguities are to be construed against the drafter; in the insurance context, this means that ambiguous policy provisions will be construed against the insurer and in favor of the insured. *See, e.g.*, *In re Ancillary Receivership of Reliance Ins. Co.*, 863 N.Y.S.2d 415, 416 (N.Y. App. Div. 1st Dep’t 2008) *aff’d* 904 N.E.2d 495 (N.Y. 2009).

10. Keeton, *supra* note 6, at 967. Under Keeton’s view of REI, “the essential point was that the insured’s reasonable expectations could be enforced even in the face of unambiguous policy language.” Jerry, *supra* note 6, at 37.

11. Keeton, *supra* note 6, at 968. It is clear that Keeton required the expectation to be objectively reasonable. *See* Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 839 (1990).

unambiguous, because insurers know that ordinarily policyholders will not in fact read their policies.<sup>12</sup>

While the REI doctrine could apply to unambiguous language, it “does not deny the insurer the opportunity to make an explicit qualification effective by calling it to the attention of a policyholder at the time of contracting, thereby negating surprise to him.”<sup>13</sup>

## II. HOW THE STATES HAVE INTERPRETED AND APPLIED THE REI DOCTRINE

When it comes to interpreting and applying the REI doctrine, the states are far from agreement: “[f]rom the beginning, there has been a striking lack of agreement among the courts and commentators as to what the reasonable expectations doctrine is, how it should be applied, or when it should be invoked.”<sup>14</sup>

The state courts have essentially developed four variations on the REI doctrine: (1) the unqualified version, (2) the prominence-based version, (3) the ambiguity-based version, and (4) the hybrid version.<sup>15</sup>

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12. Keeton, *supra* note 6, at 968.

13. *Id.*

14. Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 427 (1998). “Despite thirty years of effort, neither courts nor commentators have been able to provide a real analytic framework for the doctrine.” *Id.* at 449. For example, “the courts cannot even agree on whether the threshold determination is a question of law or a question of fact.” *Id.* at 441 (citing *Christie v. Ill. Farmers Ins. Co.*, 580 N.W.2d 507 (Minn. Ct. App. 1998) (question of law); *Wessman v. Mass. Mut. Life Ins. Co.*, 929 F.2d 402 (8th Cir. 1991) (question of fact)).

15. *Id.* at 428–30. While other commentators have had a field day attempting to categorize and re-categorize the different REI approaches states have taken, this author found the Popik/Quackenbos discussion to be the most persuasive. *See, e.g.*, Marc Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107, 111 (1998) (listing the four REI approaches: (1) ambiguity and traditional insurance policy rules of construction, (2) avoiding unfair results, (3) promoting the purpose of insurance, and (4) protection of third-party interests); 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, 192–93 (1998) (describing seven forms of the REI doctrine:

- 1) Acceptance of the “pure” Keeton approach where policyholder expectations can win out over even clear policy text;
- 2) Construction in favor of policyholder expectations where the arguably clear language is hidden, surprising, or would seem to contravene the essence of the insurance product in question;
- 3) Use of reasonable expectations in what Professor Kenneth Abraham has referred to as “mandated coverage” cases—situations where the court tacitly seems to declare that a certain sort of policy must cover certain perils;
- 4) Enforcement of the insurance contract in favor of the insured’s expectations due

First, the unqualified version allows the court to apply the REI doctrine to unambiguous policy language.<sup>16</sup> At its worst, the unqualified version “puts the court in the paternalistic role of rewriting the contract for the insured and overriding the insured’s apparent judgment that the contract was worthwhile as written.”<sup>17</sup> Under the prominence-based version, the court “will not invalidate an otherwise clear and unambiguous policy provision unless it is ‘hidden’ in some manner, such as by fine print or inconspicuous placement in the policy.”<sup>18</sup> In other words, “a casual inspection of the policy would not have alerted the insured to the provision at issue.”<sup>19</sup> Third, the ambiguity-based version “apparently abandon[s] the

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to estoppel-like conduct by the insurer;

5) Consideration of policyholder expectations in determining the proper construction to give to ambiguous language in dispute;

6) Rejection of any role for policyholder expectations;

7) In addition, as observed by the Keeton article, courts often use the reasonable expectations concept to avoid coverage where the insured, despite ambiguous or seemingly favorable language, is asserting a right to coverage that is unreasonable or at odds with basic insurance concepts such as fortuity, moral hazard, or adverse selection.).

*See also, e.g.,* Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1467 n.32, 1469 n.40, 1472 n.54 (1989) (listing three forms of the REI doctrine and the states that follow each approach: (1) the ambiguity version (Connecticut, Indiana, Maine, Missouri, Nebraska, Nevada, New Hampshire, New York, and Rhode Island), (2) the fine print version (Alabama, Arizona, California, Delaware, Kentucky, Michigan, Minnesota, Pennsylvania, and West Virginia), and (3) the whole transaction version (Alaska, Arizona, California, Colorado, Iowa, Montana, New Jersey, New Mexico, and North Carolina)).

However, any attempt to categorize the states remains difficult as even the same state may not apply REI principles consistently over time. *See, e.g.,* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975) (finding coverage based on the doctrine of reasonable expectations despite unambiguous policy language); Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 112 (Iowa 1981) (requiring ambiguous, bizarre, or oppressive policy language to apply the doctrine of reasonable expectations).

16. Popik, *supra* note 14, at 428.

17. *Id.*

18. *Id.* at 429 (citing *Chu v. Allianz Life Ins. Co.*, 980 F. Supp. 1086, 1092 (N.D. Cal. 1997)) (To be enforceable, exclusion must be “positioned in a place and printed in a form which will attract the reader’s attention.”); *Lehroff v. Aetna Cas. & Sur. Co.*, 638 A.2d 889, 892 (N.J. 1994) (“Reasonable expectations of coverage raised by the declaration page cannot be contradicted by the policy’s boilerplate unless the declaration page itself clearly so warns the insured.”).

19. *Id.* (citing *Chu*, 980 F. Supp. at 1092 (“Courts have invalidated exclusions as not conspicuous where not in a section labeled exclusions and placed on an overcrowded page . . . or in a section labeled ‘General Limitations’ but in a dense pack format . . . or hidden in a subsequent section of the policy bearing no clear relationship to the insuring clause and concealed in fine print.”)).

doctrine as a rule of substantive law altogether, treating it instead as a rule of construction analogous to—indeed, virtually indistinguishable from—the *contra proferentem* doctrine.”<sup>20</sup> The ambiguity-based version has been described as “fundamentally at odds with Professor Keeton’s basic conception, which plainly contemplated that in appropriate circumstances, the insured’s reasonable expectations should prevail despite unambiguous policy language.”<sup>21</sup> Fourth, the hybrid version is applied when a contract provision is hidden or ambiguous.<sup>22</sup> Furthermore, these REI approaches are “interrelated [and] often overlap,” so the courts often apply more than one of these approaches to justify their decisions.<sup>23</sup>

It should also be noted that the states’ different approaches to the REI doctrine can be case-determinative, thus making the choice of law analysis of the utmost importance and leading to possible forum shopping by the insured.<sup>24</sup>

### III. JUSTIFICATIONS AND RATIONALE IN SUPPORT OF THE REI DOCTRINE

The REI doctrine attempts to create some balance in the one-sided insurance process since insurers draft all of the terms, insureds rarely read the policies, and the average insured could not understand the policy even if he tried to read it. As noted by Professor Keeton, “[i]nsurance contracts continue to be contracts of adhesion, under which the insured is left little choice beyond electing among standardized provisions offered to him.”<sup>25</sup> In addition, “insurers know that ordinarily policyholders will not in fact read their policies.”<sup>26</sup> In short,

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20. *Id.* (citing *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 807 (Utah 1992) (“It is doubtful whether application of [the ambiguity-based] version of the reasonable expectations doctrine can be distinguished from, or adds anything to, the application of the canon of construction resolving ambiguities against the drafter and reforming the contract accordingly.”)).

21. *Id.* at 430.

22. *Id.* (citing *Max True Plastering Co. v. United States Fid. & Guar. Co.*, 912 P.2d 861 (Okla. 1996) (requiring either a finding of ambiguity or a determination that the exclusions were “masked by technical or obscure language or . . . hidden in a policy’s provisions”)).

23. Rahdert, *supra* note 15, at 144–46.

24. *See, e.g.*, *Mulvey Const., Inc. v. Bituminous Cas. Corp.*, No. 1:07–0634, 2010 WL 1380246 at \*3–5 (S.D. W. Va. Mar. 30, 2010) (applying conservative Virginia law in certificate of insurance context).

25. Keeton, *supra* note 6, at 966.

26. *Id.* at 968.

[I]nsurance contracts are standardized, are contracts of adhesion, are complex, are of necessity broadly worded and even ‘overdrafted’ to cover a wide range of potential events, are almost never read prior to the transaction, are seldom read afterward (unless a coverage dispute arises) and involve contracting parties frequently having wide disparities of expertise and bargaining power.<sup>27</sup>

First of all, the insured does not read the insurance policy and probably could not understand the complex language even if he had read the policy.<sup>28</sup> It is universally accepted “[t]hat most policyholders do not read their policies after they receive them.”<sup>29</sup> Similarly, “[v]irtually no one expects the policyholder to have read or understood the language of a standard form insurance policy.”<sup>30</sup> Furthermore, “[m]ost policyholders do not see their policies until long after they have purchased insurance coverage.”<sup>31</sup> In sum, the REI doctrine is essential to achieving fairness in the contracting process because it relieves an insured from certain clauses of an insurance agreement which he did not negotiate, probably did not read, and probably would not have understood had he read them.<sup>32</sup>

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27. Stempel, *supra* noted 15, at 256.

28. Mark Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 329 (1986); William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267, 270–71 (1986).

29. Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 363 (1998). *But see* Mayhew, *supra* note 28, at 272 (“By industry practice an insurance policy can usually be cancelled prior to its expiration date without the insured incurring untoward expenses or legal consequences.”). If the policyholder receives the policy after the inception of the contract and is unhappy with the terms, he may cancel the policy.

30. Anderson, *supra* note 29, at 363 (citing W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law By Standard Forms*, 46 U. PITT L. REV. 21, 26 (1984)).

31. *Id.*

32. *See* State Farm Fire & Cas. Ins. Co. v. Grabowski, 150 P.3d 275 (Ariz. Ct. App. 2007). However, the insured is more likely to read a summary of the insurance policy, sometimes referred to as an “easy to read” policy guide, and courts may view these policy guides as binding on the insurance company. *See, e.g.,* Suarez v. Life Ins. Co. of N. Am., 254 Cal. Rptr. 377, 382 (Cal. Ct. App. 1988) (The court will “consider advertising copy and brochures issued by the insurance company describing the coverage in determining a purchaser’s ‘reasonable expectations,’” so an insurer “may be required to provide coverage according to its advertising, despite more restrictive provisions in the insurance contract itself.”); Dobosz v. State Farm Fire & Cas. Co., 458 N.E.2d 611, 613–14 (Ill. Ct. App. 1983) (“Various cases have held that a descriptive brochure furnished to an individual insured

The second justification is “the ‘inequality of bargaining power’ between the parties to an insurance contract.”<sup>33</sup> Since nearly all insurance companies use identical standard form language drafted by the Insurance Services Office, “except for perhaps negotiating the premium to be paid, ‘shopping around’ for different insurance coverage is futile.”<sup>34</sup> It has been argued that “a lot of people who regarded themselves as rather powerful got together and [rode] roughshod over [the policyholder] because they viewed him as someone who was powerless and unable to fight back.”<sup>35</sup> Proponents of the REI doctrine also point out that (a) insurers make more money with every claim they deny, (b) insurers continue to earn a profit from investment income during a coverage dispute, and (c) insurers tend to pay the lowest attorney’s fees due to their status as bulk purchasers of legal services.<sup>36</sup>

Another argument in favor of the REI doctrine is “the fact that insurers usually use long, complex policies with provisions over which the policyholder cannot negotiate.”<sup>37</sup> In other words, “the terms of the standard form policies cannot be left to voluntary agreements in the marketplace because they are long, complex, and written by the insurer.”<sup>38</sup>

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becomes a part of the insurance contract.” When the brochure and policy are read together, an ambiguity can exist “despite the brochure’s statement that it is subject to the conditions expressed in the policy.”); *Romano v. New England Mut. Life Ins. Co.*, 362 S.E.2d 334, 340 (W. Va. 1987) (holding that with respect to such policy summaries, “[w]here a conflict exists between a master policy and other informational resources prepared and distributed at the insurer’s behest, . . . insureds are not bound by more restrictive provisions in the policy.”); see also *Ware*, *supra* note 15, at 1481.

33. *Ware*, *supra* note 15, at 1475.

34. *Anderson*, *supra* note 29, at 364–65. However, the benefit of standardization is efficiency due to the absence of bargaining. See *Ware*, *supra* note 15, at 1477–78 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 102 (3d ed. 1986)) (Those who invoke the “bargaining power” argument often assume that standardized forms are evidence of a powerful seller using its position in the market to the detriment of a helpless consumer. A more plausible explanation is that both parties benefit from standard forms because they greatly reduce the transaction costs of contracting. “Not only is the insurance company able to avoid negotiating and writing individual contracts with each of its customers, but it is relieved of the supervision of its agents who actually negotiate contracts on the company’s behalf.” Perhaps there is a false assumption that “since the seller writes the contract, it will include only terms favorable to it and onerous to the buyer.”).

35. *W. Am. Ins. Co. v. Freeman*, 44 Cal. Rptr. 2d 555, 564 (Cal. Ct. App. 1995).

36. *Anderson*, *supra* note 29, at 398.

37. *Ware*, *supra* note 15, at 1475.

38. *Id.* at 1478.

[T]he insurance policy has become overloaded with warranties, representations, conditions and exceptions, and other restrictive provisions, besides which tend to take on highly technical and treacherous characteristics. . . . It has been often said that if all the provisions of the modern insurance policy were literally enforced no policyholder could recover a penny. This is an overstatement, but suggestive.<sup>39</sup>

The insurance companies' inability to craft understandable policy language has also been criticized by the courts. "Although insurers have had over a 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."<sup>40</sup> It has also been said that insurance policies

are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication. But, until such time as courts generally weary of the task we have just experienced and strike down the entire practice, we feel that we must run with the pack and attempt to construe that which may well be impossible of construction.<sup>41</sup>

Finally, "[i]nsurance companies' advertisements often *create* their policyholders' reasonable expectations of insurance coverage."<sup>42</sup> In addition, the whole transaction version of REI takes the insurers' advertisements into consideration as well as "marketing patterns and

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39. Anderson, *supra* note 29, at 367 (quoting WILLIAM REYNOLDS VANCE, CASES AND OTHER MATERIAL ON THE LAW OF INSURANCE 211–12 (3d ed. 1940)).

40. *Id.* (quoting *Storms v. United States Fid. & Guar. Co.*, 338 A.2d 578, 580 (N.H. 1978)).

41. *Id.* at 367–68 (quoting *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 451 S.W.2d 616, 622–23 (Ky. Ct. App. 1970)); *see also* *Harr v. Allstate Ins. Co.*, 255 A.2d 208, 217 (N.J. 1969) ("We have realistically faced up to the fact that insurance policies are complex contracts of adhesion, prepared by the insurer, not subject to negotiation, in the case of the average person, as to terms and provisions and quite unintelligible to the insured even were he or she to attempt to read and understand their unfamiliar and technical language and awkward and unclear arrangement.").

42. Anderson, *supra* note 29, at 394.

general practices.”<sup>43</sup> For example:

Allstate’s slogan “You’re in Good Hands,” Travelers’ motto of protection “Under the Umbrella,” and Fireman’s Fund symbolic protection beneath the “Fireman’s Hat,” exemplify the industry’s own efforts to portray itself as a repository of the public trust . . . . It is noteworthy that the insurance company involved in this appeal promotes itself in national advertisements with the slogan, “Like a good neighbor, State Farm is there.”<sup>44</sup>

Some other examples of insurance company advertisements include “[t]he insurer’s promise to the insured to ‘simplify his life,’ to put him ‘in good hands,’ to back him with ‘a piece of the rock’ or to be ‘on his side’ hardly suggest that the insurer will abandon the insured in his time of need.”<sup>45</sup> In a passionate dissent, Justice Lent of Oregon argued:

[I]nsurers sell their product as being not only an agreement to indemnify the insured for certain kinds of loss but also to relieve the purchaser from anxiety concerning all aspects of claims is readily apparent in our society. One cannot watch televised entertainment for very long without being exposed to commercials for the sale of insurance which, for example, indicate that the purchaser will be in “good hands,” that he will have the assistance of a troop of mounted cavalry, that he [will have] “a piece of the rock,” or that “like a good neighbor” the insurer will be there. As such advertisements reflect, the relationship between insurer and insured does not merely concern indemnity for monetary loss.<sup>46</sup>

This advertising argument is strengthened by State Farm’s recent “Magic Jingle” commercials in which the insureds (a) get an intern to do their work and casual Wednesdays from their boss after their car is stolen, (b) transform their significant others into models after a fender bender, (c) receive a hot tub in their apartment after a baseball breaks

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43. *Id.* at 393; Keeton, *supra* note 6, at 973.

44. Anderson, *supra* note 29, at 394 (quoting *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1156 n.6 (Alaska 1989)).

45. *Id.* (quoting *D’Ambrosio v. Pa. Nat’l Mut. Cas. Ins. Co.*, 431 A.2d 966, 972 (Pa. 1981) (Larsen, J., dissenting)).

46. *Farris v. United States Fid. & Guar. Co.*, 587 P.2d 1015, 1028 n.4 (Or. 1978) (Lent, J., dissenting).

a window, and (d) replace their smashed car with a new car complete with Bob Barker and a Price Is Right model, all through the “magic” of buying insurance from State Farm.<sup>47</sup> Furthermore, State Farm had previously run a series of “Something’s Missing” ads in which individuals received subpar, misleading goods from vendors (i.e. other insurance companies) who did not care about their customers/insureds, such as (a) a hot dog without a bun, (b) only one shoe shined, (c) only one foot massaged, (d) a bike rental without a seat, and (e) a popsicle without a stick.<sup>48</sup> Tellingly, these ads ended with the phrase “Is your insurance company giving you less than you expected?”<sup>49</sup> Nevertheless, State Farm will undoubtedly continue to argue for a technical, literal application of the policy’s definitions and exclusions in future cases.<sup>50</sup>

#### IV. CONTINUED CRITICISM OF THE REI DOCTRINE OVER FORTY YEARS

One of the primary arguments against the REI doctrine is the effect on all consumers in the marketplace through increased premiums and further attempts by insurers to limit coverage. In other words, “the absence of any real doctrinal standards has resulted in such inconsistent and unpredictable results that the ultimate effect of the doctrine can only be to increase premiums or restrict coverage, all to the detriment of the very people the doctrine was intended to

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47. See State Farm Videos, <http://www.statefarm.com/aboutus/newsroom/resources/videos.asp?playid=C8F4F045037F9F3F&clipid=07Kb2LbPLo0> (last visited June 2, 2012). Of course, the insured does not automatically obtain coverage simply because of an insurance company advertisement. See *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997) (rejecting the insureds’ argument that Humana Insurance represented to them, through mailings, television and radio commercials, and phone calls, that cost savings would be passed along to them in the form of reduced premiums; the insurer’s statements were not fraudulent and constituted mere puffery).

48. See Jeffrey W. Stempel, *March Madness Makes It “Official”: State Farm Embraces the Reasonable Expectations Doctrine and Rejects Linguistic Literalism*, LEXIS INSURANCE LAW BLOG, (March 22, 2009, 9:50 AM), [http://0-www.lexisnexis.com.precise.petronas.com.my/community/insurancelaw/blogs/insurancelawblog/archive/2009/03/22/march-madness-makes-it-\\_1c20\\_official\\_1d203a00\\_—state-farm-embraces-the-reasonable-expectations-doctrine-and-rejects-linguistic-literalism.aspx](http://0-www.lexisnexis.com.precise.petronas.com.my/community/insurancelaw/blogs/insurancelawblog/archive/2009/03/22/march-madness-makes-it-_1c20_official_1d203a00_—state-farm-embraces-the-reasonable-expectations-doctrine-and-rejects-linguistic-literalism.aspx).

49. *Id.*

50. See also *id.* (“But on another level, these latest ads reflect the company fully embracing the reasonable expectations concept and rejecting the idea that any literal interpretation of the ‘fine print’ of an insurance policy (e.g., exclusions, conditions, tricky definitions) can defeat the policyholder’s objectively reasonable concept of what the policy should provide in coverage.”).

protect.”<sup>51</sup> This idea is important because “insurers must be able to predict *in advance and with reasonable certainty* how the policy terms will be interpreted.”<sup>52</sup> It is “imperative that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered judicial interpretation” under the REI doctrine.<sup>53</sup> When it comes to the REI doctrine, “the insurer confronts a variable in its pricing strategy that is difficult to measure, at least as unpredictable as jury verdicts or judicial findings, and hard to control.”<sup>54</sup> Keeton’s REI formulation thus “created an alarming challenge to insurers’ efforts to draft and achieve predictability.”<sup>55</sup> Whenever the court finds coverage under the REI doctrine, other “[o]rdinary insureds would have to bear the expense of the increased premiums necessitated by the expansion of their insurers’ potential liabilities.”<sup>56</sup> Finally, insurers must return to the drawing board every time a court construes a policy to find unintended coverage; the drafters’ new attempt to strictly confine coverage can result in even longer and more complex policies.<sup>57</sup>

The REI doctrine also leads to increased premiums due to

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51. Popik, *supra* note 14, at 427.

52. *Id.* at 431 (citing *Allen*, 839 P.2d at 808 (“The insurance company certainly considers the household exclusion when calculating its risk under a homeowner’s policy. The result is a relatively low premium when compared with premiums for higher risk coverage, such as medical and health insurance.”)).

53. *Id.* at 431 n.21 (quoting *Max True Plastering Co. v. United States Fid. & Guar. Co.*, 912 P.2d 861, 870 (Okla. 1996)).

54. Jerry, *supra* note 6, at 37–38. “From the insurance industry’s perspective, any insurer that succeeds in drafting clear, unambiguous text ought to enjoy the benefit of that text, notwithstanding a different understanding or expectation held by the insured” unless the insurer or its agent promoted the different understanding or the text is unconscionable. *Id.*

55. *Id.* at 37.

56. *Hartford Fire Ins. Co. v. Superior Court*, 191 Cal. Rptr. 37, 44 (Cal. Ct. App. 1983).

57. *Ware*, *supra* note 15, at 1483 (citing ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 97–98 (1st ed. 1987)). *See also id.* at 1472 (“Courts’ hostility to exclusions may, however, cause insurers to modify policy designs in a way that will ultimately harm the insured. When an insurer designs a policy, it initially provides broad coverage and then selectively deletes coverage through exclusions. The alternative to the exclusion method is to start with a baseline of no coverage and then list ‘inclusions’ that selectively provide coverage in specific situations. The ‘exclusion’ method of policy design seems better for the insured because, in contrast to the inclusion method, it provides coverage for unanticipated situations not specifically mentioned in the policy. Courts’ hostility to exclusions may encourage insurers to write policies covering only losses specifically included by policy terms; thus, judicial attempts to enforce broader coverage might in the long run produce narrower coverage.”).

litigation expenses. Determining the insured's reasonable expectations can be a fact-specific inquiry, especially when the REI doctrine can be applied to unambiguous provisions, i.e., to every single provision in every single insurance policy.<sup>58</sup> For example, “[b]y focusing on what was and was not said at the time of contract formation rather than on the parties’ writing, [the reasonable expectations doctrine] makes the question of the scope of insurance coverage in any given case depend upon how a fact-finder resolves questions of credibility,” thus creating both uncertain results, unnecessary delays in litigation, and unwanted costs.<sup>59</sup>

Perhaps the most furious criticism of the REI doctrine is the possibility for judicial lawmaking. The REI doctrine “turns every court into a mini-legislature, with the power to fashion public policy by invalidating contract terms it believes to be unfair or inappropriate.”<sup>60</sup> In this way, “courts unable to find any other means of providing insurance coverage will turn to the reasonable expectations doctrine to ensure a source of funding for victims of tragic circumstances who might otherwise find themselves without financial resources.”<sup>61</sup> In one commentator’s example of judicial lawmaking, the Kentucky Supreme Court ruled that the household exclusion in automobile insurance policy was void as against public policy simply because the injured party was a nine-year-old child with a brain injury.<sup>62</sup> In other words, hard facts often make bad law,<sup>63</sup> and

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58. Popik, *supra* note 14, at 432.

59. *Id.* at 432 n.25 (quoting *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 567 (Pa. 1983)).

60. *Id.* at 433. *But see*, Stempel, *supra* note 15, at 256 (arguing in response: “Armed with the notion that a textual focus limits unwarranted judicial activism and keeps the judiciary properly balanced against other government branches and market forces, courts strive to render textualist contract constructions. Faced with the counter-theory of reasonable expectations creating rights at variance with text, some elements of the profession have recoiled and resisted this antithesis or opposing paradigm. This explains a good deal of the opposition to the Keeton article.”); *id.* at 268 (The judicial activism argument often “fail[s] to go beyond the surface of this shibboleth, the utterance of which alone is expected to convince the reader that expectations analysis must be bad if it entails judges doing anything more complex than reading an insurance policy and a dictionary in tandem.”).

61. Popik, *supra* note 14, at 433. This same argument has been applied to the *contra proferentum* doctrine as well in that ambiguity can differ from person to person. Stempel, *supra* note 15, at 265 (citing *Agfa-Gevaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518 (7th Cir. 1989)) (“The trial court found the contract language in dispute to unambiguously create a requirements contract. The Seventh Circuit unanimously found the contract unambiguously not to be a requirements contract. So much for the predictability, reliability, and certainty wrought by the four-corners plain meaning approach.”).

62. Popik, *supra* note 14, at 433–34 (discussing *Lewis v. W. Am. Ins. Co.*, 927 S.W.2d

the REI doctrine can be used as a tool to reach a desired result.

Finally, it has been postulated that “the existing rules of contract interpretation, such as waiver, estoppel, unconscionability, and *contra proferentem*, are all that is necessary to interpret the contract—and even to protect insureds from overreaching insurers.”<sup>64</sup> In other words:

[W]aiver and estoppel rely for their application on the actual dealings between the insured and the insurer. Thus, courts cannot invoke these doctrines to create coverage unless the insurer has actively misled the insured or otherwise done something affirmatively to create an expectation of coverage. Accordingly, waiver and estoppel avoid the nebulous inquiry into the “reasonable expectations” of “objective” policyholders, and do not give courts the excessive latitude afforded under the reasonable expectations doctrine.<sup>65</sup>

Others have noted that “[b]oth reformation and equitable estoppel operate in a fashion that is analogous to the expectations principle.”<sup>66</sup>

However, there are still limits on such an argument. For example, “[c]ourts adopting a more restrictive view of waiver and estoppel will not apply these doctrines unless the party seeking to assert the estoppel did not know and could not have discovered the truth,” so estoppel would not be available when the insured could read the policy.<sup>67</sup> Although Professor Keeton acknowledged that the REI

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829 (Ky. 1996)). Similarly, “courts around the country have had no difficulty conjuring an ambiguity when necessary to enable them to disregard the plain meaning of an insurance policy and thus to achieve a predetermined outcome.” *Id.* at 437–39 (citing *Fed. Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563 (7th Cir. 1997) in which the court found ambiguity in coverage for “personal injury” that included “false arrest, malicious prosecution, libel, slander, invasion of privacy, humiliation or discrimination” where beer manufacturer was sued for antitrust price discrimination).

63. *See generally* *Tahfs v. Proctor*, 316 F.3d 584, 592 (6th Cir. 2003); *Schein v. Chasen*, 519 F.2d 453, 458 (2d Cir. 1975).

64. Popik, *supra* note 14, at 447–48. *See also* *Mayhew*, *supra* note 28, at 268 (listing existing remedies as unconscionability, estoppel, waiver, implied warranty of fitness, reformation, and public policy).

65. Popik, *supra* note 14, at 448.

66. Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1177 (1981).

67. Popik, *supra* note 14, at 448 n.104 (citing *Aetna Cas. & Sur. Co. v. Richmond*, 143 Cal. Rptr. 75, 79 (Cal. Ct. App. 1977) (estoppel does not absolve insured of duty to read policy)).

doctrine overlaps with unconscionability,<sup>68</sup> the unconscionability standard is “more specific, more exacting, and more demanding than an ‘unreasonableness’ standard.”<sup>69</sup> In addition, insurer’s rarely meet the legal requirements of fraud or negligent misrepresentation.<sup>70</sup> In short, “Keeton described the [REI] principle as one that synthesized many ‘doctrinal theories,’ including waiver, estoppel, *contra proferentem*, reformation, rescission, modification rules in contract, and agency.”<sup>71</sup>

#### V. WHERE WE’RE HEADED—RECENT TRENDS IN STATES APPLYING THE REI DOCTRINE

Recent cases have expressly rejected the REI doctrine, finding the critiques and criticisms of the doctrine outweigh the arguments in support. In *Deni Associates of Florida, Incorporated v. State Farm Fire & Casualty Insurance Company*,<sup>72</sup> the Florida Supreme Court rejected the REI doctrine. The court noted the “great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application” that continues to linger despite years of analysis.<sup>73</sup> The court further provided that “[a]mong those courts which have adopted the doctrine, most only apply it when it can be said that the policy language is ambiguous.”<sup>74</sup> The *Deni* Court held:

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.<sup>75</sup>

In addition, “[c]onstruing insurance policies upon a determination as to whether the insured’s subjective expectations are reasonable can

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68. Keeton, *supra* note 6, at 961–62.

69. Cal. Grocers Ass’n v. Bank of Am., 27 Cal. Rptr. 2d 396, 402 (Cal. Ct. App. 1994) (quotation marks in original).

70. Abraham, *supra* note 63, at 1177.

71. Jerry, *supra* note 6, at 38; Keeton, *supra* note 6, at 962.

72. 711 So. 2d 1135 (Fla. 1998).

73. *Id.* at 1140 (quoting Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 803 (Utah 1992)).

74. *Id.*

75. *Id.*

only lead to uncertainty and unnecessary litigation.”<sup>76</sup>

Five years after the *Deni* decision, the Michigan Supreme Court also rejected the REI doctrine in *Wilkie v. Auto-Owners Insurance Company*.<sup>77</sup> The REI doctrine, “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.”<sup>78</sup> After discussing some prior, conflicting cases in Michigan, the Court in *Wilkie* concluded:

The rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one’s alleged “reasonable expectations” cannot supersede the clear language of a contract. Therefore, if this rule has any meaning, it can only be that, if there is more than one way to reasonably interpret a contract, i.e., the contract is ambiguous, and one of these interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail. However, this is saying no more than that, if a contract is ambiguous and the parties’ intent cannot be discerned from extrinsic evidence, the contract should be interpreted against the insurer. In other words, when its application is limited to ambiguous contracts, the rule of reasonable expectations is just a surrogate for the rule of construing against the drafter.<sup>79</sup>

The Michigan Supreme Court further commented:

[T]he 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

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76. *Id.*

77. 664 N.W.2d 776 (Mich. 2003).

78. *Id.* at 782.

79. *Id.* at 786–87.

expectations should be abolished.<sup>80</sup>

Florida's *Deni* decision was criticized for referring to both objective and subjective expectations and for stating that the REI doctrine requires ambiguous policy language.<sup>81</sup> This criticism would apply with equal force to Michigan's *Wilkie* decision. It is clear that the REI doctrine should apply to objective expectations, not subjective.<sup>82</sup> In his seminal article, Professor Keeton asserted that "[a]n objective standard produces an essential degree of certainty and predictability about legal rights, as well as a method of achieving equity not only between insurer and insured but also among different insureds whose contributions through premiums create the funds that are tapped to pay judgments against insurers."<sup>83</sup> However, the courts appear to remain confused on this point. Some courts, applying the unqualified or pure version of the REI doctrine, "simply divine what coverage 'the average person' or theoretical group of 'consumers' would expect the policy to provide without the benefit of any extrinsic evidence on the subject."<sup>84</sup> Other courts, applying the prominence-based version of the REI doctrine, "tend to determine the insured's reasonable expectations as to coverage primarily from an examination of the overall format of the policy."<sup>85</sup>

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80. *Id.* at 787.

81. Anderson, *supra* note 29, at 357–58.

82. See Stempel, *supra* note 15, at 257 ("Mere policyholder hope and whim is not enough to gain coverage. There must be an objectively reasonable expectation of coverage before the policyholder may prevail."); Henderson, *supra* note 11, at 839 (REI "seems to require that there be some evidentiary basis beyond naked belief on the part of the person seeking coverage, i.e., that it be objectively determinable."); Popik, *supra* note 14, at 441 ("[M]ost insureds develop a 'reasonable expectation' that every loss will be covered by their policy. Therefore, the reasonable expectation concept must be limited by something more than the fervent hope usually engendered by loss.").

83. Keeton, *supra* note 6, at 968.

84. Popik, *supra* note 14, at 441–42 (citing *Lewis v. W. Am. Ins. Co.*, 927 S.W.2d 829, 833 (Ky. 1996) (refusing to enforce unambiguous household exclusion because buyers of automobile insurance "expect their family members to receive comparable protection to that afforded to unknown third persons . . .") (quotation marks in original); *Sparks v. St. Paul Ins. Co.*, 495 A.2d 406, 414 (N.J. 1985) (unambiguous provision will be enforced only if it conforms to "public expectations" about insurance coverage)).

85. *Id.* at 442 (citing *State Farm v. Falness*, 39 F.3d 966, 968 (9th Cir. 1994) (inquiry into insured's reasonable expectations "involves an analysis of the format and clarity of the policy, as well as the circumstances of its acquisition and issuance"); *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 174 (Cal. 1966) (en banc) (refusing to enforce limitation on duty to defend that "is not 'conspicuous' since it appears only after a long and complicated page of fine print, and is itself in fine print"); *Lehroff v. Aetna Cas. & Sur. Co.*, 638 A.2d 889, 892 (N.J. 1994)

It should also be noted that Iowa and Pennsylvania have “disapproved the pure reasonable expectations doctrine and instead appear to use expectations analysis only when contested policy language is ambiguous or otherwise problematic.”<sup>86</sup> Professor Stempel went on to predict that “the Keeton formula alone will probably never enjoy majority status nor can it ever comprise the entire role of reasonable expectations analysis in construing insurance policies and resolving insurance coverage disputes.”<sup>87</sup> It appears that this prediction was accurate.

#### VI. WHERE WE SHOULD BE HEADED—REI DOCTRINE AS A LIMIT ON *CONTRA PROFERENTEM*

The key to moving the REI doctrine forward is in the ambiguity-based version and in understanding how it should be applied. As it is currently applied, the ambiguity-based version of the REI doctrine has received a good deal of criticism. The *contra proferentem* doctrine states that ambiguities are to be construed against the drafter; in the insurance context, this means that ambiguous policy provisions will be construed against the insurer and in favor of the insured.<sup>88</sup> The decisions that use the REI doctrine “solely to construe [ambiguous] policy language do not support a new principle at all, but fall within the time-honored canon of construing ambiguities against the drafter of the contract—*contra proferentem*.”<sup>89</sup> Applying the REI doctrine

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(“Reasonable expectations of coverage raised by the declaration page cannot be contradicted by the policy’s boilerplate unless the declaration page itself clearly so warns the insured.”).

86. Stempel, *supra* note 15, at 194–95 (citing *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W. 2d 169 (Iowa 1975) (providing coverage for burglary loss with no visible marks despite policy language requiring visible marks of entry for coverage); *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W. 2d 104 (Iowa 1981) (moving away from pure reasonable expectations doctrine to requirement that policy language in question be ambiguous, bizarre, or oppressive to provide coverage based on policyholder expectations); *Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346 (Pa. 1978) (ordering temporary coverage in conditional receipt case despite language restricting coverage unless applicant is deemed insurable by company); *Hionis v. N. Mut. Ins. Co.*, 327 A.2d 363 (Pa. 1974) (requiring that even clearly written exclusions be called to attention of applicant or policyholder if they are to be enforced); *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563 (Pa. 1983) (suggesting that Pennsylvania is now a “middle level” reasonable expectations state that uses the approach in combination with ambiguity analysis to resolve disputed and allegedly ambiguous language); *Tonkovic v. State Farm Mut. Auto Ins. Co.*, 521 A.2d 920 (Pa. 1987) (same)).

87. *Id.* at 279.

88. *See, e.g.*, *In re Ancillary Receivership of Reliance Ins. Co.*, 863 N.Y.S.2d 415, 416 (N.Y. App. Div. 2008) *aff’d* 904 N.E.2d 495 (N.Y. 2009).

89. Henderson, *supra* note 11, at 827.

only after first determining that the disputed policy language is ambiguous “adds nothing to the policyholder’s quiver of arguments for coverage beyond that already existing through the *contra proferentem* principle, although it perhaps provides insurers with a chance to avoid liability even when guilty of drafting ambiguous language.”<sup>90</sup> Also, “the presence of an ambiguity is not essential to invocation of the principle articulated by Professor Keeton.”<sup>91</sup> Furthermore, “[t]he conclusion is inescapable that courts have sometimes invented ambiguity where none existed, then resolving the invented ambiguity contrary to the plainly expressed terms of the contract document.”<sup>92</sup>

However, some continue to argue in favor of the ambiguity approach. At least one commentator has opined that the ambiguity approach “represents the best approach because it confines the court to its traditional role of interpreting the bargain struck between the insured and insurer,” and therefore “the court should continue to limit its application of the doctrine of reasonable expectations to a rule of construction to resolve ambiguity.”<sup>93</sup>

Under the ambiguity-based version of the REI doctrine, the courts have taken three different views to determine the insured’s reasonable expectations when faced with an ambiguous policy.<sup>94</sup> The first ambiguity approach provides that “the only question is whether the challenged provision is ambiguous; once that determination is made, the inquiry ends and coverage follows more or less automatically.”<sup>95</sup> This approach can be especially troubling when applied to hypothetical situations.<sup>96</sup> The first ambiguity approach has even been referred to as the “penalty standard” because the insurance company, as the drafter of the policy, is penalized for employing unclear language, regardless of whether it is objectively reasonable to

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90. Stempel, *supra* note 15, at 206.

91. Henderson, *supra* note 11, at 827.

92. Keeton, *supra* note 6, at 972.

93. David J. Seno, Comment, *The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin*, 85 MARQ. L. REV. 859, 885–86 (2002).

94. Popik, *supra* note 14, at 444.

95. *Id.*

96. *Id.* (citing *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 77 (Ill. 1977) (commercial landlord insured under CGL policy sued by tenants injured by carbon monoxide fumes emitted by defective furnace; absolute pollution exclusion not enforced because definition of pollutant as “any solid, liquid, gaseous . . . irritant or contaminant” was overbroad and could apply to any normally harmless substance to which someone had an allergic reaction)).

expect coverage under the specific circumstances.<sup>97</sup>

The second ambiguity approach will “find coverage only if a reasonable insured would have expected the policy to provide coverage under those specific circumstances.”<sup>98</sup> In other words, “[i]f an ambiguity arises that cannot be resolved by examining the parties’ intentions, then the ambiguous language should be construed in accordance with the reasonable expectations of the insured when he entered into the contract.”<sup>99</sup>

Under the third ambiguity approach, also known as the “majoritarian standard,”<sup>100</sup> courts “interpret the policy to include coverage only if they determine that a majority of policyholders would choose to purchase such coverage if it were offered at an actuarially fair price.”<sup>101</sup> However, this method is generally considered the most expensive of the three as it requires expert testimony, market studies, and actuarial studies.<sup>102</sup>

One way of alleviating the concerns and criticisms discussed above is to treat the REI doctrine as a middle ground of sorts—“the reasonable expectations approach provides an alternative to simplistic application of a strong form of *contra proferentem* as well as allowing the courts a route other than simplistic enforcement policy text whose meaning is suspect or tending toward the absurd when applied literally to the context of the dispute.”<sup>103</sup> The problem with

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97. *Id.* at 444 n.82 (citing Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 566 (1996)).

98. *Id.* at 444.

99. *Haber v. St. Paul Guardian Life Ins. Co.*, 137 F.3d 691, 697 (2d Cir. 1998).

100. Popik, *supra* note 14, at 445 n.85.

101. *Id.* at 444–45 (citing *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994), in which the policyholder asked the court to require successive insurers to assume joint and several responsibility for the insured’s asbestos-related liabilities. The court held that the policies were ambiguous as to the method of allocating coverage and referred the case to a special master to determine what coverage the policyholders would have selected had they been given a choice.)).

102. *Id.* at 445.

103. Stempel, *supra* note 15, at 259. For an excellent discussion of another “middle ground” approach to insurance contract construction, see Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward A Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 567–68 (1996). Swisher argues in favor of four basic rules:

1. Insurance contracts will be construed and interpreted in their ordinary sense, rather than in a purely technical or legal sense, from the viewpoint of the untrained mind or the ‘common man or woman in the marketplace.’
2. If the insurance contract is susceptible to two or more reasonable interpretations, then it generally will be construed liberally in favor of the nondrafting party, the insured, and it will be strictly construed against the drafting party, the insurer. This

traditional, rote application of the *contra proferentem* doctrine has been described as follows:

[I]f a state is unwilling to utilize expectations analysis, it is often left with a Hobson's Choice when reviewing policy language such as the absolute pollution exclusion: either the court reads the language literally and broadly, excluding far more than was ever intended by even the insurance industry; or it characterizes the exclusion as ambiguous and routinely rules against the insurer, even in cases that should not be covered in a rational system of insurance adjudication.<sup>104</sup>

In short, "courts should apply evenhanded reasonable expectations analysis not so much as a counterweight to clear text *but as a prerequisite to determining the meaning of words and the possible ambiguity of words.*"<sup>105</sup> As described by Professor Stempel:

Reasonable expectations thinking can be used by courts to provide a more nuanced approach to contract interpretation than the traditionally crude two-step of consulting the dictionary and invoking *contra proferentem* where dictionary definitions are deemed ambiguous. Reasonable expectations analysis provides both a check against absurd hyperliteralism (e.g., the slip-and-fall claim excluded because the slippery liquid on the floor falls within the technical linguistic reach of the policy definition of "pollutant") and an alternative to routinely ruling against the insurer whenever the language is something less than inarguably clear. Similarly, the reasonable expectations concept can be significantly more sensible than traditional *contra proferentem* in calibrating the amount of coverage or other relief available to the

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rule, however, is subject to extrinsic evidence to determine the parties' intent, and subject to the 'sophisticated policyholder' defense.

3. Based upon the acts and representations made by the insurer and its agents, the legal doctrines of waiver, estoppel, election, and reformation of contract are available to the insured and should be liberally construed to validate the insured's reasonable expectation to coverage.

4. In order to further validate the reasonable expectations of the insured to coverage, any exclusion, exception, or limitation to coverage must be clearly, expressly, and unambiguously stated in the insurance contract.

*Id.*

104. Stempel, *supra* note 15, at 280.

105. *Id.* (emphasis in original).

policyholder.<sup>106</sup>

The case of *Rusthoven v. Commercial Standard Insurance Company*,<sup>107</sup> is instructive on this point.<sup>108</sup> In *Rusthoven*, the court found \$1.675 million in uninsured motorist coverage after the insured was forced off the road by an unknown or “phantom” driver.<sup>109</sup> The *Rusthoven* Court found an ambiguity with respect to two policy provisions: (1) uninsured motorist coverage of \$25,000 for “each person,” and (2) a provision stating that “[i]f there is more than one covered auto our limit of liability for any one accident is the sum of the limits applicable to each covered auto.”<sup>110</sup> The policy under which the injured truck driver was a named insured covered a total of sixty-seven rigs in the fleet of the driver’s employer.<sup>111</sup> Having found an ambiguity, the *contra proferentem* doctrine would mandate a decision of coverage for the insured, regardless of reasonable expectations of the insured or even basic common sense.<sup>112</sup>

Citing the famous Keeton article on REI and first edition of the Keeton hornbook, the Minnesota Supreme Court stated that the “result of such a [*contra proferentem*] construction, however, must not be beyond the reasonable expectations of the insured.”<sup>113</sup> Despite this recognition, “the Court did not even tarry before finding this rather enormous and unusual uninsured motorist limit to be reasonable.”<sup>114</sup>

While it is unlikely “that Rusthoven’s employer expected that it had purchased and paid for over a million dollars worth of uninsured motorist coverage for each of its employees . . . , did the court have any alternative to allowing the stacking of 67 limits of liability” after finding an ambiguity?<sup>115</sup> “Despite the conventional wisdom that courts construing contract provisions must pick one of the alternative meanings proffered by the disputants, the reasonable expectations

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106. *Id.* at 287.

107. 387 N.W.2d 642 (Minn. 1986).

108. *See generally* Stempel, *supra* note 15, at 287–88.

109. *Rusthoven*, 387 N.W.2d at 642, 645 (also known as a “miss-and-run” driver).

110. *Id.* at 643.

111. *Id.* at 644.

112. *See id.* at 644–45.

113. *Id.* at 645.

114. Stempel, *supra* note 15, at 288.

115. *Id.* (quoting KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 47 (2d ed. 1995)).

approach provides not only a useful method for selecting from alternatives but also the possibility of escaping extreme alternatives.”<sup>116</sup> As such, the *Rusthoven* Court should not have been limited to uninsured motorist limits of only \$25,000 on the one hand and \$1.675 million in stacked coverage on the other.<sup>117</sup> For example, the court could have considered “the ‘extra’ uninsured motorist protection ordinarily purchased by policyholders when offered the specific option” that tend to be \$100,000 per person and \$300,000 per accident.<sup>118</sup>

Unless one is prepared to ruthlessly impose strict liability on the contract drafter and hold against the insurer in every case of mistaken or insufficiently prescient contract drafting, reasonable expectations construction provides a sound alternative, even where the result is not completely consistent with policy text—or runs counter to policy text in some significant way. *Rusthoven* provides a good example of the missed opportunities of reasonable expectations doctrine. In view of the linguistic uncertainty provided by the policy, the Minnesota Supreme Court could seemingly have reached a more reasonable construction without depriving the policyholder of an expected benefit or giving a financial windfall to the insurer. But even though expressly recognizing this potential, the Court timidly granted near absolute deference to the ambiguity tiebreaker.<sup>119</sup>

In short, the courts should not rush to find coverage for the insured simply because there was a possible ambiguity in the policy language. The *contra proferentem* doctrine does not—and should not—mandate a victory for the insured. Instead, the courts should apply the REI doctrine when faced with ambiguous policy language to avoid nonsensical results that go beyond the insured’s reasonable

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116. *Id.*

117. *Id.* at 288–89 (“In *Rusthoven*, it seems that uninsured motorist limits of \$25,000 are too low. But certainly limits of \$1.675 million seems too high absent evidence of similarly high premium payments or other bases for creating such an expectation other than mere conflict of policy provisions.”).

118. *Id.* at 289 (“Because *Rusthoven*’s employer was a commercial entity that probably faced greater exposure to claims, 100/300 may be too low. But \$1.675 million?”). While such a view could be critiqued as judicially rewriting the contract, it appears to be more consistent with the classic “meeting of the minds” approach as neither of the parties in *Rusthoven* intended an insurance contract with \$1.675 million of coverage.

119. *Id.* at 289–90.

expectations.<sup>120</sup>

#### CONCLUSION

After Professor Keeton articulated it in 1970, the states have essentially developed four variations of the REI doctrine: (1) the unqualified version, (2) the prominence-based version, (3) the ambiguity-based version, and (4) the hybrid version. In addition, the REI doctrine has received both rave reviews and severe critiques. Although a few recent cases have completely rejected the REI doctrine, the REI doctrine should continue to assist the courts in insurance coverage disputes in the coming years. However, that assistance should come in the form of a middle ground or compromise. In other words, the REI doctrine should be applied as a limitation on the *contra proferentem* doctrine because ambiguous policy language should not automatically be construed against the insurer. When faced with ambiguous policy language, the courts should further analyze the reasonable expectations of the insured before ruling in favor of coverage.

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120. *Id.* at 292 (“Except when expectations analysis is inapposite, the insurer’s bargain should also be respected rather than routinely undermined because the insurer did a suboptimal job of drafting policy language.”); *see also* Swisher, *supra* note 103, at 570 n.77 (citing *Seeburg Corp. v. United Founders Life Ins. Co.*, 403 N.E.2d 503, 506 (Ill. Ct. App. 1980) (the court should give effect to the plain and obvious import of the policy language without considering extrinsic evidence unless the construction would lead to unreasonable and absurd consequences); *Frank Lucas Ins. Agency v. Fireman’s Fund Am. Ins.*, 425 A.2d 1378, 1381 (Md. Ct. Spec. App. 1981) (an interpretation that is fair and reasonable is preferred to one which leads to an unreasonable result); *Dixon v. Gunter*, 636 S.W.2d 437, 441 (Tenn. Ct. App. 1982) (an insurance contract should not be given a forced, unnatural, or unreasonable construction which would extend or restrict the policy beyond what is fairly within its terms, or which would lead to an absurd conclusion or render the policy nonsensical or ineffective)).