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Article

PENNSYLVANIA'S REASONABLE EXPECTATIONS DOCTRINE: THE THIRD CIRCUIT'S PERSPECTIVE

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AND
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WHEN a federal court exercises diversity of citizenship jurisdiction, it must apply the substantive law as decided by the highest court of the state whose law governs the action.[1] When the state's highest court has not addressed the precise question presented or where state law is unclear, uncertain or ambiguous, a federal court must predict how the state's highest court would resolve the issue.[2] The United States Court of Appeals for the Third Circuit has held that when forecasting state law, a federal court "must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand."[3] The judges of the Third Circuit have commented on the difficulty of the

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1. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that governing state law must be applied when jurisdiction is based on diversity of citizenship); Commercial Union Ins. Co. v. Bituminous Cas. Corp., 851 F.2d 98, 100 (3d Cir. 1988) (stating that federal court exercising diversity jurisdiction must follow law as interpreted by that state's highest court).

2. *See* Borman v. Raymark Indus., Inc., 960 F.2d 327, 331 (3d Cir. 1992) (noting that, where issue is left unaddressed by state's highest court, federal court must predict likely outcome).

3. McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 663 (3d Cir. 1980).

court's task. For example, former Judge Arlin M. Adams[4] observed that "[t]he task of a federal court sitting in diversity is often difficult, for it must forsake its own expertise and assume that of the foreign state."[5] Judge Dolores K. Sloviter has also written about the difficulty that arises when a federal court must predict how the highest court of a state would decide an issue, noting that "[e]ven when there is a state supreme court decision on point, the direction [of state law] is not always crystal clear."[6]

Perhaps no other area of the law illustrates the difficulty of applying state law more than Pennsylvania's reasonable expectations doctrine ("reasonable expectations doctrine" or "doctrine"), which is applied to determine issues of insurance coverage. The doctrine has its origin in the thesis espoused by Professor (now United States District Judge) Robert E. Keeton.[7] In his seminal two-part article, *Insurance Law Rights at Variance with Policy Provisions*, Judge Keeton reviewed numerous court decisions that interpreted insurance policies in favor of insureds.[8] After his analysis of the cases, Judge Keeton opined that the rationale of these decisions could be reduced to one over-arching principle: "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."[9]

Since Judge Keeton's article was published some thirty years ago, courts and members of the academic community have struggled to understand and apply the doctrine of reasonable expectations. As Judge Jane R. Roth of the United States Court of Appeals for the Third Circuit has quipped, "Since Professor Keeton's article, a considerable number of trees have been sacrificed in the name of reasonable expectations as the academic community has debated what reasonable expectations means, which courts have adopted the doctrine, and whether it is desirable for them to have done so."[10] Judge Marvin Katz of the United States District Court for the Eastern District of Pennsylvania recently observed that the "exact status of the doctrine [in Pennsylvania] is not entirely clear."[11]

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4. Judge Adams was a member of the Court of Appeals for the Third Circuit from 1969 to 1987.

5. *McKenna*, 622 F.2d at 667.

6. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675-76 (1992).

7. For a discussion of Judge Keeton's thesis on the reasonable expectations doctrine, see *infra* notes 8-9 and accompanying text. Judge Keeton was appointed Judge for the United States District Court for the District of Massachusetts in 1979.

8. *See generally* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions* (pts. 1 & 2), 83 HARV. L. REV. 961, 1281 (1970) (discussing principles of regulation regarding insurance contracts).

9. Keeton, *supra* note 8, at 967.

10. Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1310 n.3 (3d Cir. 1994).

11. Nationwide Mut. Ins. Co. v. Reidler, No. CIV.A.99-4463, 2000 WL 424286, at *5 n.6 (E.D. Pa. Apr. 19, 2000).

On more than a dozen occasions, the Third Circuit has grappled with the reasonable expectations doctrine as it has been adopted by the Pennsylvania courts.[12] Because of the elusiveness of the doctrine and the inconsistency of its application by Pennsylvania appellate courts, the Third Circuit's analysis of the doctrine has likewise been inconsistent.[13] In fact, certain Third Circuit decisions are incompatible with decisions of the Pennsylvania courts and with other decisions of the Third Circuit Court of Appeals.[14] In an effort to clarify this difficult area of the law, this Article will review the applications of the doctrine throughout the country, provide a detailed history of its utilization by the Pennsylvania courts, discuss the Third Circuit's implementation of Pennsylvania law and finally, conclude with some recommendations.

I. OVERVIEW OF THE DOCTRINE

When Judge Keeton initially discussed the reasonable expectations doctrine, he observed that there were three principles primarily responsible for creating, as he called them, "rights . . . at variance with [insurance] policy provisions."[15] These three principles were: (1) the unconscionable advantage of the insurer; (2) the reasonable expectations of the applicants and intended beneficiaries; and (3) detrimental reliance by the insured upon representations by an insurance company's agent.[16] Keeton observed that these principles have been implemented by the courts through application of various doctrines, including waiver, estoppel, election, rescission and modification.[17]

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12. *See, e.g.*, Nationwide Mut. Fire Ins. Co. v. Pipher, 140 F.3d 222, 227 (3d Cir. 1998) (noting that ambiguous language should be construed against insurer); Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903 (3d Cir. 1997) (describing Pennsylvania courts' use of reasonable expectations doctrine); *Bensalem Township*, 38 F.3d at 1309 (noting that language of policy indicates parties' intentions); West Am. Ins. Co. v. Park, 933 F.2d 1236, 1239 (3d Cir. 1991) (noting that insured's reasonable expectations control even when contrary to terms in policy).

13. *See Reidler*, 2000 WL 424286, at *5 (noting discrepancies in opinions from Pennsylvania Supreme and Superior Courts and Third Circuit regarding reasonable expectations doctrine); *Moessner*, 121 F.3d at 903-04 (examining Pennsylvania law regarding reasonable expectations doctrine).

14. *See* Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 298 (1998) ("Courts in different jurisdictions have taken a variety of approaches to the [reasonable expectations] doctrine."); Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1469 n.40 (1989) (discussing holdings of Pennsylvania Superior Court as repudiated by Pennsylvania Supreme Court regarding reasonable expectations doctrine). *See generally* Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21 (1998) (discussing how courts have interpreted reasonable expectations doctrine over time).

15. Keeton, *supra* note 8, at 961.

16. *See id.* at 961-62 (listing principles used to negate an insurer's unconscionable advantage).

17. *See id.* at 962 (describing defenses used to negate unconscionable advantage of insurers).

Because of the unique nature of insurance contracts, Judge Keeton believed it was important to honor the reasonable expectations of the insured in certain circumstances.[18] Insurance contracts are contracts of adhesion in which there is virtually no room for negotiation between the parties involved.[19] Most insurance contracts are drafted by the insurer, who maintains an unconscionable advantage over the insured.[20] Keeton recognized that courts utilize several regulatory doctrines to balance the insurer's unequal bargaining power—such as resolving ambiguities in the insured's favor. In general though, they can all be grouped under the following broader rubric: "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."[21]

In introducing the reasonable expectations doctrine as a self-standing principle, Keeton observed some characteristics that he considered necessary to its consistent and correct application.[22] The baseline assumption is that the policy must be construed from the perspective of a layman and not according to the interpretation of the educated or sophisticated underwriter.[23] As a result, argued Keeton, the objectively reasonable expectations of the policyholder should control even if the expectations are contrary to the policy language.[24] Furthermore, an insurer should not be permitted to use exclusions from coverage that would be inconsistent with the objectively reasonable expectations of a consumer who possesses an ordinary degree of knowledge and familiarity with the type of coverage involved.[25] Few insurance consumers read their entire policy, and some do not even see the actual policy until after a contract has been signed and a premium has been paid.[26] As a result, Keeton proffered that "not only should a policyholder's reasonable expectations be honored in the face of difficult and technical language, but those expectations should prevail as well when the language of an unusual provision is clearly understandable, unless the insurer can show that the policyholder's failure to read such

18. *See id.* at 967 ("[T]he terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.").

19. *See id.* at 966-67 (noting that insurance contracts contain standardized provisions leaving little room for negotiation).

20. *See id.* (noting that insurance policy provisions are drafted by insurers).

21. *Id.* at 967.

22. *See id.* at 967-69 (discussing necessary implications of principle of reasonable expectations).

23. *See id.* at 966 (noting that reasonable expectation doctrine allows court to construe policy in insured's favor).

24. *See id.* (stating that policyholder's expectations should be honored as long as they are objectively reasonable).

25. *See id.* at 968 (noting important corollary to reasonable expectations doctrine is regulation of insurer's use of qualifications).

26. *See id.* (observing that policies are long and complicated and that policyholders rarely see their policy before contract is made).

language was unreasonable."[27] This, according to Keeton, introduced an element of certainty and predictability into insurance transactions and enabled consumers to understand their legal rights.[28]

Judge Keeton found support for his theories in long-standing judicial practices and beliefs concerning insurance transactions.[29] As Judge Keeton noted, the practice of construing contracts from the perspective of a lay consumer is not new.[30] It was Keeton's opinion that although the judiciary's practice of construing ambiguous terms against the insurer was an adequate theory to explain the results of some cases, it did not provide the most desirable explanation. Instead, Keeton argued, there were numerous times when the ambiguity principle was applied in an inconsistent and confusing manner, even though honoring the reasonable expectations of the insured would have provided an "alternative and arguably better justification."[31] Keeton ultimately concluded that although the reasonable ex-

27. *Id.*

28. *See id.* (crediting objectivity of reasonable expectation test with increased credibility and predictability of insurance transactions).

29. *See, e.g.*, Allen v. Metropolitan Life Ins. Co., 208 A.2d 638, 644 (N.J. 1965) (noting that court will examine reasonable expectations of insured when construing insurance policy). In *Allen*, the New Jersey Supreme Court noted that:

> The [insurance] company is expert in its field and its varied and complex instruments are prepared by it unilaterally whereas the assured or prospective assured is a layman unversed in insurance provisions and practices. He justifiably places heavy reliance on the knowledge and good faith of the company and its representatives and they, in turn, are under correspondingly heavy responsibility to him. His reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind. Thus we have consistently construed policy terms strictly against the insurer and where several interpretations were permissible, we have chosen the one most favorable to the assured.

Id.

Likewise, in *Steven v. Fidelity & Casualty Co.*, 377 P.2d 284 (Cal. 1962), the Supreme Court of California echoed the sentiments of the New Jersey Supreme Court in stating:

> We examine the question in the light of the purpose and intent of the parties in entering into the contract, Mr. Steven's knowledge and understanding as a reasonable layman, his normal expectation of the extent of coverage of the policy and the effect, if any, of the substitution of the transportation upon the risk undertaken by the insurer . . . . A reasonable person, having bought his ticket for a fixed itinerary, and thus having at the moment of purchase of the policy gained insurance protection for the whole trip, would normally expect that if a flight were interrupted by breakdown or other causes, his coverage would apply to substitute transportation for the same flight.

Id. at 288-89 (citations omitted).

30. *See* Keeton, *supra* note 8, at 969 (citing *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 601 (2d Cir. 1947), opinion by Judge L. Hand, which states: "[A]n underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. It is the understanding of such persons that counts . . . .").

31. *Id.* at 972.

pectations doctrine was only rarely recognized as a viable justification, it "is a better explanation of results in many cases than a strained rationale such as that . . . of resolving ambiguities against the insurer."[32]

Although hailed as a breakthrough principle in interpreting insurance policies, the doctrine of honoring the reasonable expectations of the insured was not universally accepted by all jurisdictions in the United States, and was discussed and modified at great length by academic scholars throughout the country. As one scholar suggested, many courts view the doctrine as an improper tool for judicial activism in rewriting an otherwise unfavorable policy.[33] Whether one agrees or disagrees with the doctrine, one must conclude that it has had an extremely influential impact on the law.

When it is used by courts, the doctrine has been applied in roughly four ways, all of which tend to overlap in many instances. The first application of the reasonable expectations doctrine is closely related to the traditional ambiguity principles that served as part of the foundation for Keeton's original theory.[34] When an insurance contract is susceptible to two or more reasonable interpretations, an ambiguity is said to exist.[35]

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32. *Id.* at 973.

33. *See* Mark C. Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107, 109 (1998) (stating doctrine is especially controversial when applied contrary to clear intent of policy).

34. *See id.* at 112 (noting that courts "routinely and universally" use reasonable expectations of consumers to interpret "ambiguous" language in insurance policies); *see also* John Dwight Ingram, *The Insured's Expectations Should Be Honored Only if They Are Reasonable*, 23 WM. MITCHELL L. REV. 813, 820 (1997) (discussing courts' tendency to find ambiguity in insurance contracts). Professor Ingram views the ambiguity principle from a more cynical point of view, noting that:

> Courts frequently search for and somehow find an ambiguity to construe in favor of the insured and against "the deep-pocketed insurer." This excessive zeal to find an ambiguity is especially prevalent with courts that are determined to achieve a "fair" result for the insured but are unwilling to openly espouse the direct approach favored by Keeton, perhaps deeming the latter too radical in terms of traditional contract law.

Id. at 820-21. In fact, Ingram is of the belief that the doctrine of reasonable expectations and the ambiguity principle are completely separate entities, and thus should not be tied together by courts that consider the reasonable expectations of the insured when resolving ambiguities. *See id.* at 822 (urging courts to resolve all ambiguities against insured). Instead, he argues that ambiguities should be construed against the drafter, and only when there are no ambiguities should a court even consider looking to the reasonable expectations of the insured. *See id.* (stating that reasonable expectations doctrine should never be used to resolve ambiguous language).

35. *See* Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1052 (1991) (defining ambiguity). In discussing the formalist-functionalist dichotomy, which Professor Swisher believes is prevalent in American jurisprudence, he remarked that functionalist judges will often apply the ambiguity principle in order to justify an expectation of coverage. *See id.* at 1059 (comparing formalist application of reasonable expectations doctrine to functionalist application of same doctrine). In other words, the judge will find a so-called "constructive" ambiguity where no such ambiguity really exists. *See id.* (noting that functionalist judges create ambiguities to get results they want—

Under the doctrine of *contra preferentem*,[36] the policy is strictly construed against the drafting party and liberally construed in favor of the non-drafting party.[37] A number of jurisdictions follow this model.[38] Courts following this version of the doctrine will defer to the reasonable expectations of the insurance consumer only in cases where the policy is ambiguous.[39] These courts are generally reluctant to rewrite otherwise unambiguous policy provisions, regardless of how unequal the provision may seem.[40]

The second application of the doctrine occurs when the unconscionable advantage the insurer has over the insured leads to a situation where either the insured has been misled or the policy does not reflect the coverage the insured requested. This application has been referred to as the "unconscionability" version of the doctrine.[41] Although the policy itself may not be ambiguous in the technical legal sense in which a truly "ambiguous" policy would be, it may be ambiguous nevertheless because it is confusing from the standpoint of the typical insurance consumer.[42] The theory behind applying the reasonable expectations of the insured in this context is quite simple. The insurance company maintains unequal bar-

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recovery for insureds). Another scholar has offered the view that "by sometimes finding ambiguities where none apparently existed, courts have avoided explaining why an insured's expectations, even though reasonable, should override the language of the policy." Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1154 (1981); *see also* Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1359 n.5 (Pa. 1978) (Pomeroy, J., dissenting) ("[I]t is improper for a court to purport to find an ambiguity where none exists and then to apply the rule of construction which resolves ambiguities against the drafter of the document.").

36. *See* McMillan v. State Mut. Life Assurance Co., 922 F.2d 1073, 1075 (3d Cir. 1990) (describing contract rule adopted by court). This phrase is derived from the Latin maxim *ambigua responsio contra proferentem est accipienda*, which translates "[a]n ambiguous answer is to be taken against him who offers it." *Id.* at n.2.

37. *See* Dardovitch v. Haltzman, 190 F.3d 125, 139 (3d Cir. 1999) (defining *contra preferentem*); Michael P. Van Alstine, *Of Textualism, Party Autonomy and Good Faith*, 40 WM. & MARY L. REV. 1223, 1302 (1999) (same).

38. *See, e.g.*, Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 926 (Del. 1982) (stating general rule that insurance contract is construed strongly against insurer and in favor of insured because language that is interpreted was drafted by insurer); Casey v. Highlands Ins. Co., 600 P.2d 1387, 1390-91 (Idaho 1979) (same); Lambert by Cobb v. State Farm Mut. Auto. Ins. Co., 820 S.W.2d 602, 603-04 (Mo. Ct. App. 1991) (same); Cacavas v. Maine Bonding & Cas. Co., 512 A.2d 423, 425 (N.H. 1986) (same).

39. *See, e.g., Hallowell*, 443 A.2d at 926 (stating that reasonable expectations rule is not applicable unless policy language is ambiguous).

40. *See* Ingram, *supra* note 34, at 821 ("Courts which consider the insured's reasonable expectations in resolving ambiguities usually accept the limitations that this should not be used to rewrite the policy and that a clear and unambiguous coverage provision should be enforced even though it may be surprising or one-sided.").

41. *See* Rahdert, *supra* note 33, at 112 (describing unconscionability application of reasonable expectations principle).

42. *See id.* (stating that although insurance policy is not ambiguous in technical legal sense, it is confusing from typical policyholder's standpoint).

gaining power over consumers because of its "superior information about the nature and incidence of particular risks and the legal significance of language defining or excluding them, industry-wide standardization of contract terms, poor consumer understanding of the transaction, and deliberately cultivated high levels of consumer reliance."[43]

Courts use the third application of the reasonable expectations doctrine to avoid enforcing the policy language, no matter how clear it may be or how well it was explained. Such language would, in the courts' view, defeat the essential objectives of the insurance coverage.[44] This particular application of the doctrine, although virtually nonexistent in practice, has

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43. *Id.* at 127. A number of jurisdictions follow the "unconscionability" application of the reasonable expectations doctrine. *See, e.g.*, C.P. *ex rel.* M.I. v. Allstate Ins. Co., 996 P.2d 1216, 1222 (Alaska 2000) (noting that insurance contracts that are ambiguous in sense that they can be interpreted in more than one way will be construed in favor of insured); West Trucking Line, Inc. v. Northland Ins. Co., 459 N.W.2d 262, 264-65 (Iowa 1990) (explaining doctrine of reasonable expectations and when it will apply); Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 277 (Minn. 1985) (noting that ambiguity is not condition precedent to use of reasonable expectations); American Family Mut. Ins. Co. v. Livengood, 970 P.2d 1054, 1059 (Mont. 1998) (describing provisions of reasonable expectations doctrine); Bromfeld v. Harleysville Ins. Cos., 688 A.2d 1114, 1122 (N.J. Super. Ct. App. Div. 1997) (same); Mitchell v. Broadnax, No. 25539, 2000 WL 204049, *1 (W. Va. Feb. 18, 2000) (discussing courts' application of Keeton's reasonable expectations doctrine). Professor Rahdert explained how the reasonable expectations doctrine applies in the unconscionability context:

> The essential function of this facet of the reasonable expectations idea is to secure the basic *fairness* of policy terms and procedures. It is a broader doctrine than its contract-law unconscionability cousin, because it is not limited to cases of extreme one-sidedness. Besides cases of outright sharp practice (which in insurance are fortunately rare), this variation on the reasonable expectations theme involves courts in guarding against at least three kinds of unfair situations: 1) "procedural" unfairness, in which insurer marketing practices (including sometimes the practices of agents subject to insurer control) lead the insured to expect coverage that the policy language (which the insured is fairly unlikely to read and even more unlikely to understand) actually purports to exclude; 2) "structural" unfairness, in which the complex structure and organization of the policy terms prevent even the most vigilant of ordinary insureds from understanding the restrictive scope of protection; and 3) "situational" unfairness, in which one-size-fits-most policy language that might well be fair and enforceable in many other contexts produces unacceptable restrictions on coverage or other rights when applied to the unique circumstances of a particular policyholder.

Rahdert, *supra* note 33, at 127-28.

44. *See generally* Lauretz v. Alaska Sales & Serv., 828 P.2d 162, 165 (Alaska 1991) (noting that even clear terms and conditions need to be construed in reasonable manner); Radhert, *supra* note 33, at 113 ("On still fewer occasions, courts employ the reasonable expectations principle . . . to avoid enforcing policy language that, no matter how clearly expressed or fully explained, would defeat what the court believes are the essential objectives of the insurance policy."); Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policy Holder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 827-29 (1993) (describing manner in which different states construe insurance provisions). *But see* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1160 (1995) (discussing cases where

triggered the most significant debate over its theoretical validity.[45] More than any other modern application of the doctrine, it bears the closest relationship to Keeton's original idea of what honoring the reasonable expectations of the insured should entail.[46] According to one leading scholar, under Keeton's original formulation of the theory, "the insurance policy need not be read at all, which is anathema to a Formalist theory of insurance contract interpretation."[47] Another author has described this version of the doctrine as follows:

> [T]he Keeton formula suggests that an insured can have reasonable expectations of coverage that arise from some source *other* than the policy language itself, and that such an extrinsic expectation can be powerful enough to override any policy provisions no matter how clear. So interpreted, the Keeton formula pushes insurance law in a dramatic new direction, one that discards the traditional [Formalist] contract premise that the written agreement is the controlling code for determining the parties' rights and duties.[48]

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courts have used "four-corner" and "plain-meaning" approach to interpret insurance contract).

45. *See* Rahdert, *supra* note 33, at 113 (stating that question whether courts should have power to apply reasonable expectations doctrine in these instances has been debatable for last decade).

46. *See* Stordahl v. Government Employees Ins. Co., 564 P.2d 63, 66 (Alaska 1977) (noting that "it is not required that ambiguities be found in the policy language as a condition precedent for [a] construction" of reasonable expectations); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 827 (1990) (describing Keeton's doctrine of reasonable expectations as one that "may affect the substantive provisions of the policy, regardless of how the policy is drafted").

47. Swisher, *supra* note 35, at 1054. Professor Swisher describes legal formalism as "the traditional view that correct legal decisions are determined by pre-existing legal precedent, and the courts must reach their decisions solely based upon logical deduction, applying the facts of a particular case to a set of pre-existing legal rules." *Id.* at 1040. Legal functionalists, on the other hand, prefer more socially desirable results over legal certainties and logically consistent results. *See id.* at 1043 (stating that Legal Functionalists believe Formalist theory of legal "certainty" is rarely attainable and that concern of law should not be logical consistency, as Formalists believe, but instead, should be socially desirable consequences).

48. Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 335 (1986). For an example of the inherent tension faced by courts in applying the reasonable expectations doctrine in instances where its application may defeat the clear terms of the policy, one need look no further than *Collister v. Nationwide Life Insurance Co.*, 388 A.2d 1346 (Pa. 1978). In *Collister*, the Pennsylvania Supreme Court presumably adopted the doctrine. The majority stated that "[t]he reasonable expectation of the insured is the focal point of the insurance transaction . . . . Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled." *Collister*, 388 A.2d at 1353. However, a critical dissenting opinion stated that "the problem in deciding an insurance claim seems no longer to be one of ascertaining what the contract as written means, but of somehow divining the 'reasonable expectations' of

The final theoretical application of the doctrine is not as widely recognized in scholarly circles, primarily because it is rarely employed. This application utilizes the reasonable expectations doctrine to avoid policy limitations that would contradict important public policies regarding compensation.[49] There is no consensus among jurisdictions in the United States as to which application of the doctrine, if any, is the proper one to apply. As one commentator has suggested:

> Many courts had difficulty embracing a concept that they regarded as turning too quickly away from the traditional contract law principles positing that contract language should be enforced as written if it is sufficiently clear. These courts were willing to consider policyholder expectations only if policy language was ambiguous. Other courts were willing to utilize the Keeton form of reasonable expectations analysis to overcome clear text, but only where language favorable to insurers was complex, hidden, arguably unfairly surprising, or where the insured was a consumer or small business.[50]

According to various scholars, anywhere between ten and thirty-eight jurisdictions have adopted the doctrine in some form.[51] The rationale for the large disparity is the criteria used by individual commentators to determine whether a jurisdiction has adopted the doctrine.[52] Initially, there were approximately a half-dozen states, including Pennsylvania, which apparently adopted the pure version of the doctrine as first introduced by

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the insured as to what the contract should mean." *Id.* at 1357 (Pomeroy, J., dissenting). The competing language from *Collister* has been used as a model example of the difficulty courts have faced in embracing a particular view on the reasonable expectations doctrine. *See* Swisher, *supra* note 35, at 1054 n.55 (noting differences between majority Functionalist opinion in *Collister* and minority Formalist dissent).

49. *See* Rahdert, *supra* note 33, at 113-14 (stating that in rare cases courts will invoke reasonable expectations concept to avoid policy limitations that would contravene important public policies regarding assured compensation).

50. 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, 189-90 (1998).

51. *See id.* at 191 (noting number of states using doctrine); *see also* Henderson, *supra* note 46, at 827-29 (noting states that have adopted doctrine). It is important to note that at the time Professor Henderson conducted his study of the jurisdictions, he concluded that as many as 16 jurisdictions had adopted the doctrine in varying forms. *See id.* at 828. Henderson concluded that there was a strong likelihood that more jurisdictions would adopt the doctrine in upcoming years. *See id.* at 834. It appears that approximately 32 jurisdictions have adopted some form of the doctrine. *See* Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861, 866 (Okla. 1996) (stating that 36 jurisdictions have addressed doctrine while only 4 have outright rejected it).

52. *See* Stempel, *supra* note 50, at 191-92 (noting different criteria).

Keeton.[53] That number has since declined.[54] Tracing the chronology of the development of the doctrine, one author has found the following:

> The 1980s continued to see growth in support for reasonable expectations analysis but also began to reveal some backpedaling by courts that had adopted the doctrine as well as less tendency in other states to embrace the reasonable expectations method. The cases of the 1990s suggest that the reasonable expectations "plebiscite" among the states is remaining relatively stable, with few states changing their respective positions on the doctrine.[55]

Several justifications have been offered for adopting the doctrine in one of its various forms. One of the more common justifications is that the doctrine greatly benefits consumers because it allows them to make a more fully-informed choice about the precise type of coverage they are receiving.[56] In other words, the expectations principle should encourage insurance companies to be more exhaustive and more accurate in the information they distribute to potential customers.[57] Access to more information would theoretically enable the consumer to "shop around" for coverage that would most benefit the insured and meet his or her individual needs and expectations.[58]

A second policy consideration that courts have cited as a justification for enforcing the reasonable expectations of the insured is equity.[59] When there have been misrepresentations on the part of the insurance salesperson or the language of the policy is confusing, the reasonable expectations of the insured must be upheld to prevent injustice.[60] The justification for applying the doctrine in the equity context is strengthened or weakened depending on the role of the insurer in misrepresenting information to the customer, and the degree of knowledge the customer possessed.[61] Regardless of the justification for applying the doctrine, the insured's expectations must still be reasonable. As the Pennsylvania Supe-

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53. *See id.* at 193 (noting that about six jurisdictions adopted "pure" version of doctrine).

54. *See id.* at 193-95 (stating that Idaho, Iowa, Pennsylvania, Minnesota and New Jersey no longer use pure reasonable expectations doctrine). According to Stempel, Pennsylvania has since disapproved the pure reasonable expectations doctrine. *See id.* at 194-95.

55. *Id.* at 195.

56. *See* Abraham, *supra* note 35, at 1169 (remarking that information about coverage is central concern of doctrine).

57. *See id.* at 1169-70 (stating insurer's liability for inaccurate information).

58. *See id.* at 1170-71 (noting insured's assessment of available coverage).

59. *See id.* at 1175 (outlining equitable goals of judicially created insurance).

60. *See id.* at 1179-85 (discussing ramifications of insured's reasonable expectations with regard to coverage).

61. *See id.* at 1180 (noting ramifications of role of insurer pursuant to doctrine of equity); *see also* Reliance Ins. Co. v. Moessner, 121 F.3d 895, 906 (3d Cir. 1997) ("[C]ourts should carefully consider whether an insured of the specified level of sophistication had reason to know of the existence of the exclusion prior to

rior Court has aptly stated, "[T]he term 'reasonable expectation' itself, implies exactly that quality, reasonableness. It is not carte blanche approval of the insured's wildest and most comprehensive expectation."[62]

Although some courts have offered a variety of rationales for enforcing the reasonable expectations of the insured, other courts have repeatedly criticized the doctrine.[63] For example, the Utah Supreme Court emphatically rejected the doctrine in the early 1990s because of its highly inconsistent application, and because application of the doctrine would promote judicial activism.[64] Additionally, numerous scholarly articles are devoted to critiquing the reasonable expectations doctrine.[65] Inconsistent application and results have been the major criticisms of the doctrine.[66] A by-product of such application, as leading commentators have suggested, is that "courts [that are] 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."[67]

Critics of the doctrine have argued that honoring an insured's reasonable expectations increases transaction costs, particularly by fostering liti-

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purchasing or renewing the policy, and hence had effective control over the insurance transaction.").

62. J.H. France Refractories Co. v. Allstate Ins. Co., 578 A.2d 468, 473 (Pa. Super. Ct. 1990), *rev'd in part and aff'd in part*, 626 A.2d 502 (Pa. 1993).

63. *See, e.g.*, Meckert v. Transamerica Ins. Co., 701 P.2d 217, 221 (Idaho 1985) (stating that Idaho has refused to adopt doctrine of reasonable expectations); American Country Ins. Co. v. Cash, 524 N.E.2d 1016, 1018 (Ill. App. Ct. 1988) (noting that provisions of insurance contracts are to be interpreted according to their plain language); Sterling Merchandise Co. v. Hartford Ins. Co., 506 N.E.2d 1192, 1197 (Ohio Ct. App. 1986) (declining to rewrite terms to reflect reasonable expectations); Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 804 (Utah 1992) (refusing to invalidate clear provision of insurance contract, even if it is contrary to insured's reasonable expectations). The Ohio Supreme Court summarized the consensus of the jurisdictions rejecting the doctrine by suggesting the following:

> [T]he reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties to the contract. Such judicial activism has not been adopted in Ohio by its courts and the courts' use of liberal rules of construction. Further, this court declines to do so.

Sterling Merchandise, 506 N.E.2d at 1197.

64. *See Allen*, 839 P.2d at 804-07 (discussing unwillingness to make sweeping changes to public policy underlying insurance industry regulation in absence of legislative direction).

65. *See, e.g.*, Ingram, *supra* note 34, at 832-37 (noting that courts often go beyond liberal test for reasonableness); Susan M. Popik & Carol D. Quakenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 433-45 (1998) (noting difficulties courts encounter when applying doctrine); Ware, *supra* note 46, at 1475-93 (exploring justifications for doctrine).

66. *See, e.g.*, Popik & Quakenbos, *supra* note 65, at 426-27 (stating that reasonable expectations doctrine lacks predictability in its application and its results).

67. *Id.* at 433.

gation.[68] Likewise, "[i]f every policy provision is potentially subject to invalidation on reasonable expectations grounds, an insured whose claim is denied has a tremendous incentive to challenge any claim denial, whether or not he or she in fact had an expectation of coverage."[69] The persistent threat of litigation subsequently raises premium costs as insurance companies provide a way to fund their increased costs.[70] If a jurisdiction takes a pro-consumer stance, the argument goes that insurance companies will raise premiums or be less exhaustive in their coverage.[71] A final rationale advanced against application of the reasonable expectations doctrine is that the government should take a hands-off approach and allow parties to contract freely among themselves.[72] As discussed below, both sides of the academic debate on the reasonable expectations doctrine are reflected in the opinions of the Pennsylvania Supreme Court, which initially embraced the doctrine with enthusiasm, but later retracted its complete endorsement of the doctrine.

II. PENNSYLVANIA'S APPLICATION OF THE REASONABLE EXPECTATIONS DOCTRINE

The first case in Pennsylvania to address the issue following Judge Keeton's introduction of the reasonable expectations doctrine to the legal landscape was the 1974 decision in *Hionis v. Northern Mutual Insurance Co.*[73] The plaintiff in *Hionis* was the owner of a restaurant, including all improvements and fixtures; however, the plaintiff only leased the land on which the restaurant was located.[74] A fire destroyed the restaurant and its contents—including improvements and fixtures.[75] The plaintiff promptly notified his insurance carriers of the fire and requested the maximum payment allowed under his policy.[76] The defendants, insurance companies, denied the plaintiff's request and instead offered an estimate of damages for the destroyed personal property far less than what was requested by the

68. *See id.* at 432 ("When the courts allow the insured to invoke the reasonable expectations doctrine as a basis for defeating an unambiguous policy provision, transaction costs—especially the cost of litigation—increase as well.").

69. *Id.*

70. *See id.* (stating that insurance companies are forced to increase premium prices to cover litigation costs).

71. *See* Ingram, *supra* note 34, at 836-37 (discussing results of judicial excess with regard to insurance coverage).

72. *See* Ware, *supra* note 14, at 1482 (arguing that natural economic interplay between consumers and insurers yields better contractual deals than standard forms).

73. 327 A.2d 363 (Pa. Super. Ct. 1974).

74. *See Hionis*, 327 A.2d at 363.

75. *See id.*

76. *See id.*

plaintiff.[77] At trial, the coverage limits of the policy were not contested.[78] The insurers argued, however, that the policy itself specifically limited the amount of coverage in the event that the insured failed to repair or replace the improvements or fixtures destroyed in the fire.[79] As a result, the insurance companies contended that the plaintiff was only entitled to the fair and reasonable value of the improvements prorated for the unexpired term of the lease.[80]

The trial court examined the circumstances surrounding the issuance of the insurance policies to the plaintiff.[81] The plaintiff, characterized by the trial court as a layman unschooled in insurance matters, testified that he followed the recommendations of the insurance agents and requested that his coverage included loss to the improvements that he made to the premises.[82] The insurer chose not to present any evidence, instead relying on the language of the policies.[83]

The Pennsylvania Superior Court started its analysis in *Hionis* with the well-established principle that, because a contract for insurance is viewed as an adhesion contract between parties of unequal bargaining power, the policy language is to be construed strictly against the drafter—the insurer—when a dispute arises.[84] The court further held that if an insurance company raises a defense based on an exception or exclusion in a policy, the burden is on the insurer to establish the defense by showing

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77. *See id.* at 363-64.

78. *See id.* at 364 (maintaining that plaintiff was limited to recovery for proportionate amount of cost of improvements because improvements were never repaired or replaced).

79. *See id.* (relying on portion (E)(3)(b) of policy to determine coverage). The policy states:

> If not repaired or replaced within a reasonable time after such loss, that portion of the original cost at the time of installation of the damaged or destroyed improvements and betterments, which the unexpired term of the lease at the time of the loss bears to the period(s) from the date(s) such improvements and betterments were made to the expiration date of the lease.

Id.

80. *See id.* (referring to "use interest clause" of section (E)(3)(b) to determine fair and reasonable value of improvements and betterments).

81. *See id.* at 365 (stating that plaintiff allowed restaurant patron, agent for Nationwide, to negotiate coverage with Northern Mutual and plaintiff accepted new policies for combined coverage of $49,500 with Nationwide and Northern Mutual).

82. *See id.* (testifying that plantiff requested that new policy cover him for any loss to improvements on basis of his considerable expense for such improvements).

83. *See id.* (basing defense solely upon terms of insurance policies).

84. *See id.* (affirming established policy that when dispute arises over policy prepared by insurer for purchaser with no bargaining power, contract should be construed against insurer).

that the insured was not only aware of the exclusion or exception, but also that the insured understood the exclusion or exception.[85]

Applying these principles to the facts of this case, the *Hionis* court found that the insurance company failed to meet its burden of establishing that the insured understood the exclusions contained in the insurance policies.[86] The court's placement of the burden on the insurer was a radical departure from existing Pennsylvania law and is quite broad in comparison to many other versions of the doctrine of reasonable expectations. The general principles discussed in *Hionis* were reaffirmed and expanded upon by the Pennsylvania Superior Court later in the same term in *Sands v. Granite Mutual Insurance Co.*[87] At issue in *Sands* was the applicability of an uninsured motorist clause in an automobile insurance policy. The insurance company contended that the insured should not be able to recover because the policy specifically contained a clear waiver for uninsured motorist coverage.[88] The court rejected this argument, however, relying instead on public policy considerations that indicated a desire to provide coverage for insured motorists who are involved in accidents with uninsured motorists.[89] Although the *Sands* court did not specifically cite to *Hionis*, its conclusions seem to reflect a logic similar to that employed in *Hionis*.[90] The *Sands* court acknowledged that a person is not normally relieved from a contractual obligation due to a failure to read the plain terms of a contract, but it also noted that contractual terms cannot thwart the reasonable expectations of the insured:

> Courts frequently rely upon public policy in overriding explicit terms in the insurance contract, at least when the contract terms would operate to defeat the reasonable expectations of the in-

85. *See id.* (requiring insurer to establish, even where policy is written in unambiguous terms, that insured was "aware of the exclusion or limitation and that the effect thereof was explained to him"). In *Miller v. Prudential Insurance Co. of America*, 362 A.2d 1017 (Pa. Super. Ct. 1976), the Pennsylvania Superior Court discussed some of the factors to be considered in determining whether an insurance consumer understood a policy and its exclusions. *See Miller*, 362 A.2d at 1020-21. The court considered the consumer's intent in obtaining the policy in the first place, the clarity of the written language of the policy and its exclusions, and the circumstance underlying the actual sale of the policy. *See id.* (listing factors court considered in interpreting insurance contract).

86. *See Hionis*, 327 A.2d at 366 (finding defendants failed to satisfy burden of proving plaintiff's understanding of, and intention to be bound by, policy terms because defendant offered no such evidence and because language of exclusion was in technical and unclear terms).

87. 331 A.2d 711 (Pa. Super. Ct. 1974).

88. *See Sands*, 331 A.2d at 716 (noting defendant insurance company's waiver argument).

89. *See id.* at 716-17 (citing *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389 (1968) and analyzing public policy considerations regarding automobile insurance coverage).

90. *Compare Sands*, 331 A.2d at 717 (stating that plaintiff expected to be fully insured so waiver was not valid), *with Hionis*, 327 A.2d at 366 (stating that plaintiff was not aware of exclusions and expected to be insured).

> sured, because insurance carriers are affected with a public interest and are in a better position to more equitably divide the risk of personal tragedy, insofar as such tragedy can be expressed in dollars and cents.[91]

The first time the Pennsylvania Supreme Court addressed an insured's "reasonable expectations" was in 1977.[92] In *Rempel v. Nationwide Life Insurance Co.*,[93] the Pennsylvania Supreme Court addressed a case where the plaintiff alleged that his reasonable expectation of insurance coverage was created by the negligent misrepresentations of an insurance company's agent.[94] Unlike the majority of cases that discussed the reasonable expectations doctrine as applied to breach of contract cases, *Rempel* was purely a tort case.[95] Although it did not cite the superior court's *Hionis* and *Sands* decisions, the *Rempel* court nonetheless focused on the reasonable expectations of the insured.[96]

In *Rempel*, the widow of the insured under a mortgage protection life insurance policy brought an action against the insurer and its agent, contending that the agent had either negligently or fraudulently misrepresented to her husband the extent of coverage under the policy.[97] The court noted that the "widow was, in effect, seeking to reform the contract of insurance to coincide with her husband's reasonable expectations and beliefs."[98] A plurality of the court affirmed judgment in favor of the in-

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91. *Sands*, 331 A.2d at 717 (citing W. PAGE KEETON, INSURANCE LAW 22, at § 341-42 (1971)). In *Sands*, the court determined that the plaintiff expressed a desire to be fully insured. *See id.* (detailing plaintiff's intentions regarding insurance coverage). Yet, it was never explained to the plaintiff that he would need an additional policy to cover uninsured motorists. *See id.* (expanding on factual circumstances of case).

92. *See* Rempel v. Nationwide Life Ins. Co., 370 A.2d 366, 366 (Pa. 1977).

93. 370 A.2d 366 (Pa. 1977).

94. *See id.* at 367 (stating that plaintiff contended that insurance company fraudulently or negligently misrepresented insurance coverage).

95. *See id.* (considering claims of negligent or fraudulent misrepresentation in tort context). The *Rempel* court defined the tort of negligent misrepresentation as follows:

> One who in the course of his business or profession supplied information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and (b) the harm is suffered (i) by the person or one of the class of persons for whose guidance the information was supplied, and (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

Id. at 367-68 (quoting RESTATEMENT OF TORTS § 552 (1938)).

96. *See id.* at 371 (noting that insurance policy did not coincide with what plaintiffs believed it contained).

97. *See id.* at 367 (stating that widow contended agent either fraudulently or negligently misrepresented insurance coverage).

98. *Id.* at 371.

sured and against the insurance company.[99] In finding that the insured reasonably relied on the representations of the insurance agent, rather than reading the policy, the court held that a policy holder had no duty to read the policy unless there was something on the face of the policy that would have alerted the insured that the policy did not contain the coverage expected as a result of the agent's explanation.[100] The court explained that it was "not unreasonable for consumers to rely on the representations of the expert [insurance agent] rather than on the contents of the insurance policy itself."[101] Thus, to the extent that the reasonable expectations of the insured, as to coverage, are caused by the negligent representations of the agent, those expectations will be satisfied—even if they are at variance with the clear and unambiguous language of the policy.[102]

It was not until four years after the Pennsylvania Superior Court decided *Hionis* that the Pennsylvania Supreme Court chose to address the reasonable expectations doctrine in a breach of contract case. In *Collister v. Nationwide Life Insurance Co.*,[103] the Pennsylvania Supreme Court addressed the question of whether a conditional receipt created an insurance contract when the insured had made a premium payment prior to the actual starting date of the insurance policy.[104] The plaintiff and her husband in *Collister* applied for a life insurance policy, and the insurance company, through its agent, accepted a payment from the plaintiff, which represented a two-month premium payment on the policy.[105] In exchange for the payment, the plaintiff was given a "conditional receipt."[106] Subsequently, the plaintiff's husband was killed in an automobile accident. He died before the insurance company's consideration of their application, and prior to him taking the medical examinations required under the terms of the policy.[107] As a result, the insurance company denied liability, contending that conditions mandatory for coverage had not been met.[108]

The *Collister* court first noted that the reasonable expectations of the insured were the most important consideration in insurance policy dis-

99. *See id.* at 372 (stating holding of case).

100. *See id.* at 368-69 (concluding that policyholder has no duty to read policy unless failure to do so would be unreasonable).

101. *Id.* at 368.

102. For a further discussion of negligent misrepresentation and an insured's reasonable expectations, see *supra* notes 93-101 and accompanying text.

103. 388 A.2d 1346 (Pa. 1978), *cert. denied*, 439 U.S. 1089 (1979).

104. *See Collister*, 388 A.2d at 1348 (discussing whether premium payment and application created temporary insurance contract).

105. *See id.* at 1347.

106. *See id.*

107. *See id.*

108. *See id.*

putes.[109] The court cited prior cases in both Pennsylvania and on the national level that acknowledged the adhesionary nature of insurance policies.[110] Curiously, neither of the prior superior court opinions in *Hionis* and *Sands* were mentioned by the supreme court. Nevertheless, the court relied heavily on authority in other jurisdictions, which concluded that if the language of an insurance contract gives rise to an intention on the part of the insurer to provide interim coverage in exchange for a conditional receipt, such coverage must be provided.[111] The court further established that in situations where the surrounding circumstances did not give rise to an inference that the insurer intended to provide interim coverage in exchange for payment, the burden was still on the insurer to establish, by clear and convincing evidence, that the insurance consumer had no reasonable basis for believing that he or she was receiving immediate coverage.[112]

The Pennsylvania's Supreme Court's discussion in *Collister*, however, did not end with simply establishing this burden. Instead, the court took its analysis a step further by indicating that when a person pays an insurance premium, he or she has a right to expect something of value in return, regardless of the clear language of the policy.[113] The court noted that the insurance industry often uses complex and difficult language in insurance contracts, forcing consumers to rely on the verbal assurances of the insurance agent.[114] Such situations, the court concluded, almost automatically give rise to misunderstanding on the part of the insurance consumer.[115] Therefore, the reasonable expectations of the insured must be the controlling principle, "regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents."[116] The broad policy statements made by the supreme court in *Collister* started Pennsylvania on a series of opinions that applied the reasonable expectations doctrine inconsistently and caused a great deal of confusion in the jurisdiction.[117]

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109. *See id.* at 1351 (stating that reasonable expectations of insured should be examined when normal contract principles no longer apply).

110. *See id.* at 1348-53.

111. *See id.* at 1353 (stating that when "the language of the application and conditional receipt . . . indicate[ ] an intent . . . of the insurer to provide interim insurance, then such benefits will be awarded").

112. *See id.* (noting that burden remains with insurer).

113. *See id.* (stating that public has "right to expect something of comparable value in return for the premium paid").

114. *See id.* (detailing misleading parts of insurance contracts).

115. *See id.* (stating that misunderstanding results when representations do not accurately reflect terms of contract).

116. *Id.*

117. *See id.* (explaining that court generated confusion when it appeared to apply reasonable expectations doctrine to conditional receipt context, but then reiterated its position that insured had no duty to read policy). Indeed, one scholar has written that the decision in *Collister* is largely responsible for the considerable confusion over the state of the reasonable expectations doctrine in Pennsylvania. *See* Henderson, *supra* note 46, at 829.

Illustrative of the confusion was the Pennsylvania Superior Court's decision in *Pruser v. State Farm Fire & Casualty Co.*,[118] decided nearly three years after *Collister*. In that case, the superior court was asked to interpret the scope of coverage provided by the provisions of a "tenants" policy, which covered personal property.[119] The insured, citing *Collister*, argued that the policy must be construed "by reference to the reasonable expectations of the insured."[120] The superior court rejected this argument, finding that reliance upon *Collister* was misplaced because the reasonable expectations doctrine was limited to the issue of whether an insurance contract existed, not to the scope of its coverage.[121] Approximately one year prior to *Pruser*, however, Judge Keeton characterized *Collister* as being in line with decisions from at least ten other states that adopted the reasonable expectations doctrine as applying to the scope of coverage, as well as to the issue of whether there was an insurance contract in the first instance.[122]

In 1983, only five years after the decision in *Collister*, the Pennsylvania Supreme Court took a completely opposite position, or at the very least, significantly retreated from the prior position taken in *Collister*. In *Standard Venetian Blind Co. v. American Empire Insurance Co.*,[123] the Pennsylvania Supreme Court applied traditional contract principles in concluding that when the language of an insurance policy is clear and unambiguous, a court must give effect to that language.[124] At issue in *Standard Venetian Blind* were certain exclusions contained in an insurance policy issued by American Empire Insurance ("American") to the plaintiff, Standard Venetian Blind ("Venetian Blind").[125] Plaintiff was a contractor, but had subcontracted the job that gave rise to the lawsuit, which Venetian Blind expected American to defend on its behalf.[126] American agreed to defend Venetian Blind on various claims against it, but refused to defend on

118. 428 A.2d 604 (Pa. Super. Ct. 1981).

119. *See Pruser*, 428 A.2d at 604-05 (stating issue presented).

120. *Id.* at 606.

121. *See id.* (distinguishing issue in *Collister* from issue in *Pruser*); *see also* Bierer v. Nationwide Ins. Co., 461 A.2d 216, 220-21 (Pa. Super. Ct. 1983) (applying reasonable expectations doctrine to determine starting date of an insurance policy); Gdovic v. Catholic Knights of St. George, 453 A.2d 1040, 1041 (Pa. Super. Ct. 1982) (same).

122. *See* Davenport Peters Co. v. Royal Globe Ins. Co., 490 F. Supp. 286, 291 & n.5 (D. Mass. 1980) (Keeton, J.) (listing cases that adhere to reasonable expectations doctrine).

123. 469 A.2d 563 (Pa. 1983).

124. *See Standard Venetian Blind*, 469 A.2d at 567 (noting that failure to read or understand clear and conspicuous policy limitation is not valid defense). The court suggested that "to allow Venetian to avoid application of the clear and unambiguous policy limitations in these circumstances would require us to rewrite the parties' written contract." *Id.* at 566.

125. *See id.* at 565.

126. *See id.* (quoting exclusions in contract).

the claims of damage caused by Venetian Blind's products themselves.[127] Both American and Venetian Blind agreed that the exclusions were clear and unambiguous. However, Venetian Blind, relying on the superior court's decision in *Hionis*, argued that the exclusions should be unenforceable because the insured had never been made aware of, nor had American explained to it, the meaning of the exclusions.[128]

The Pennsylvania Supreme Court strictly construed the insurance contract.[129] The court rejected the superior court's decision in *Hionis*, stating that "the burden imposed by *Hionis* fails to accord proper significance to the written contract, which has historically been the true test of parties' intentions."[130] It explained that reliance on the *Hionis* standard left too much discretion to the factfinder to evaluate the credibility of the parties involved.[131] The court was adamant in its position that the insured should not be able to avoid the application of clear and unambiguous terms in an insurance policy.[132] The court acknowledged, however, the "manifest inequality of bargaining power" between insurance companies and purchasers of insurance[133] and noted that on occasion it may be appropriate for a court to "deviat[e] from the plain language" of an unconscionable contract.[134] The supreme court then restated its holding that the insured may not avoid the exclusions contained in a policy for failure to read or understand when the exclusion is "clearly worded and conspicuously displayed."[135] What is puzzling about this decision is that the supreme court made no mention of its prior decision in *Collister*, leaving lower courts uncertain as to how to proceed in similar cases.[136] Indeed, in

127. *See id.*

128. *See id.* at 566 (noting that Venetian Blind was not aware of exclusions).

129. *See id.* at 565-67 (holding that when "policy limitation relied upon by the insurer to deny coverage is clearly worded and conspicuously displayed, the insured may not avoid the consequences of the limitation").

130. *Id.* at 567.

131. *See id.*

132. *See id.* (stating that insured cannot avoid consequences of failing to read or to understand limitations).

133. *Id.*

134. *Id.* (citing 13 PA. CONS. STAT. § 2302 (1999) concerning unconscionable contracts).

135. *Id.* Despite the emphatic rejection of *Hionis* by the Pennsylvania Supreme Court, one panel of judges of the superior court has stated in an opinion decided in 1987, that "*Hionis* has not been overruled. The [Pennsylvania] Supreme Court simply rejected its application on the record presented in *Standard Venetian Blind* while indicating its continuing potential applicability under a different fact pattern." State Auto. Ins. Ass'n v. Anderson, 528 A.2d 1374, 1376 (Pa. Super. Ct. 1987). Nonetheless, there has been no other case since *Standard Venetian Blind* where the superior court relied upon its *Hionis* opinion as precedent. Indeed, in a prior decision, the superior court explicitly acknowledged that *Hionis* was overruled by the supreme court. *See* Bishop v. Washington, 480 A.2d 1088, 1092 (Pa. Super. Ct. 1984) (stating that *Hionis* is not followed).

136. *See* Joseph G. Lisicky, Note, *Failure of Insurance Agency to Promptly Issue Details of Coverage Releases Insured from Obligation to Pay Premiums*—Mears, Inc. v. National Basic Sensors, Inc., 60 TEMP. L.Q. 481, 497 n.148 (1987) (citing cases

the next decision by the Pennsylvania Supreme Court to address an insurance coverage issue, *Gene & Harvey Builders, Inc. v. Pennsylvania Manufacturers' Ass'n*,[137] the court relied exclusively on *Standard Venetian Blind*, again did not mention *Collister*, and upheld a clear and unambiguous policy exclusion.

In 1987, the Pennsylvania Supreme Court finally attempted to clarify the debate over reasonable expectations in *Tonkovic v. State Farm Mutual Automobile Insurance Co.*[138] In *Tonkovic*, the plaintiff applied for disability insurance coverage under the assumption that he would receive a policy that would cover him regardless of whether or not the injury incurred would make the insured eligible for worker's compensation benefits.[139] The insurance consumer never received a written copy of the policy, and it was later revealed that the insurance company had unilaterally changed the terms of coverage under the policy.[140]

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acknowledging confusion over correct application of law). One scholar has attempted to reconcile the opinion in *Standard Venetian Blind* with the Pennsylvania Supreme Court's earlier opinion by suggesting that *Standard Venetian Blind* significantly narrowed *Collister*. *See* Henderson, *supra* note 46, at 830 (claiming that *Standard Venetian Blind* narrowed *Collister*). Professor Henderson argued that the supreme court opinions were consistent in that they both endorsed the approach that a court would be justified in deviating from the policy language only where the contract was made under unconscionable circumstances. *See id.* (discussing cases separately).

For further evidence of the contradictory and confusing state of the law at this time in Pennsylvania, see *Mears, Inc. v. National Basic Sensors, Inc.*, 507 A.2d 32 (Pa. 1986). In *Mears*, the Pennsylvania Supreme Court had the opportunity to explain its decisions in *Collister* and *Standard Venetian Blind*. *See id.* at 37 (citing *Collister* for proposition that where there is no insurance policy, unclear, written words will be "construed liberally in favor of the insured"). In *Mears*, the insured requested increased coverage for a property. *See id.* at 36 (noting that Mears requested National increase its coverage from $160,000 to $190,000). When the insurance company did not issue documents reflecting the increased coverage on the correct property within a reasonable time, the insured refused to pay the premiums due. *See id.* (noting that National cancelled its policy and refused to pay increased and changed coverage). After a trial, a jury found that the insured was not liable for premiums. *See id.* at 36 (noting jury decision). The supreme court affirmed, holding that in a contract for insurance, there exists a constructive condition that the insurer must assure the insured of specific and particular coverage within a reasonable time. *See id.* at 38 (holding that "explicit, particular" assurances are required). Failure to provide such assurance essentially constitutes a breach of the insurance contract and relieves the insured from the duty to pay premiums. *See id.* at 38 n.5 (stating that failure to assure constitutes "substantial breach"). In upholding the verdict, the supreme court did not apply either the expectations approach or the traditional contract approach. In fact, it did not include any reference to either *Collister* or *Standard Venetian Blind*, the leading cases in this area of insurance law.

137. 517 A.2d 910 (Pa. 1986).

138. 521 A.2d 920 (Pa. 1987).

139. *See Tonkovic*, 521 A.2d at 921 (noting that plaintiff applied for such insurance in order to make mortgage payments).

140. *See id.* at 922.

Based on the facts of the case, the *Tonkovic* court distinguished *Standard Venetian Blind.*[141] It interpreted *Standard Venetian Blind* to stand for the proposition that the plain terms of a policy will be enforced when the insured received the coverage bargained for, but failed to read the terms of the policy.[142] The supreme court explained that "here [appellant] specifically requested a type of coverage that would have protected him in this instance, but was issued a policy quite different from that which he requested."[143] The court relied on the qualifying language contained in *Standard Venetian Blind* in rejecting the insurance company's contention that the court should rely on that case.[144] The court found further support for its decision in *Collister.* In fact, the *Tonkovic* court included extensive language from *Collister,* suggesting a desire to re-establish the reasonable expectations of the insured as the controlling standard.[145] In addition, the supreme court also relied on *Rempel v. Nationwide Life Insurance Co.*[146] Although *Rempel* was a negligent misrepresentation case, the *Tonkovic* court found it to be "clearly controlling on the instant facts."[147] After analyzing these cases, the court stated the following:

> We find a crucial distinction between cases where one applies for a specific type of coverage and the insurer unilaterally limits that coverage, resulting in a policy quite different from what the insured requested, and cases where the insured received precisely the coverage that he requested but failed to read the policy to discover clauses that are the usual incident of the coverage applied for. When the insurer elects to issue a policy differing from what the insured requested and paid for, there is clearly a duty to advise the insured of the changes so made. The burden is not on the insured to read the policy to discover such changes, or not read it at his peril.[148]

From the above passage, it is clear that the court left its holding intact in *Standard Venetian Blind,* but changed the standard to be applied when

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141. *See id.* at 923-24 (noting that appellant in this case never received a policy that was changed).

142. *See id.* at 924.

143. *Id.*

144. *See id.* at 924-25.

145. *See id.* at 925-26 (relying on *Collister* to support using reasonable expectations of insured). The court noted that *Collister* established that "[t]he reasonable expectation of the insured is the focal point of the insurance transaction involved here." *Id.* at 926 (quoting *Collister v. Nationwide Life Ins. Co.*, 388 A.2d 1346, 1353 (Pa. 1978) (citing *Beckham v. Travelers Ins. Co.*, 225 A.2d 532, 537 (Pa. 1967))). The court concluded by stating that "[c]ourts must examine the dynamics of the insurance transaction to ascertain what are the reasonable expectations of the consumer." *Id.* (quoting *Collister,* 388 A.2d at 1354 (citing *Rempel v. Nationwide Ins. Co.*, 370 A.2d 366 (Pa. 1977))).

146. 370 A.2d 366 (Pa. 1977).

147. *Tonkovic,* 521 A.2d at 925.

148. *Id.*

insurance companies take unilateral action to change the extent of coverage.[149] One scholar has characterized this standard as a limited application of the reasonable expectations doctrine, suggesting that "one could argue that the Pennsylvania decisions, at most, adopt a rather narrow application of the doctrine, one that provides relief only where in the application process the insured gets less than what was specifically promised."[150] Nonetheless, it is clear that, as Justice Flaherty noted in his dissenting opinion, the Pennsylvania Supreme Court revitalized the application of the reasonable expectations doctrine in some form in its decision in *Tonkovic*.[151]

Justice Flaherty criticized the *Tonkovic* majority for not following *Standard Venetian Blind* and promulgating "a new *Hionis*-like rule," holding "that an insured does not even have to read the policy."[152] The Justice criticized the "reasonable expectations" doctrine as applied in *Hionis*, by warning that "if writings do not memorialize the agreement of the parties, then all contract disputes, insurance and otherwise, would be reduced to conflicting remembrances and assertions of the parties."[153] Justice Zappala also dissented, criticizing the majority for relying heavily on *Rempel*, which was not a breach of contract case, but a tort case.[154]

Tonkovic presented the superior court with an opportunity to resurrect the dormant reasonable expectations doctrine. In *State Automobile Insurance Ass'n v. Anderson*,[155] the insurer filed an action against an insured seeking a declaration that it had no duty to defend or indemnify under a farmer's comprehensive personal injury policy.[156] The policy in question required the insurer to pay all sums that the insured became legally obligated to pay, for personal injury or property damage occurring and resulting from the operation of the farm.[157] This coverage, however, did not apply to any "farm employee" if the bodily injury arose out of and in the course of the employment of the injured.[158] The injured party was a friend of the insured's son and had come to the farm to assist in loading

149. *See* Henderson, *supra* note 46, at 829-31 (discussing progression of *Collister, Standard Venetian Blind* and *Tonkovic*).

150. *Id.* at 831.

151. *See Tonkovic*, 521 A.2d at 927 (discussing how majority holding ignored *Standard Venetian Blind*).

152. *Id.*

153. *Id.*

154. *See id.* at 928-29 (discussing differences between *Remple* and instant case). *See generally* Stewart L. Cohen, *Resolving Insurance Coverage Disputes in Pennsylvania Through Principles of Tort Law-A Bridge Over Muddied Waters*, 60 PA. B. Ass'n Q. 201 (1989) (discussing use of tort law to resolve insurance coverage disputes in Pennsylvania).

155. 528 A.2d 1374 (Pa. Super. Ct. 1987).

156. *See Anderson*, 528 A.2d at 1375.

157. *See id.* 1375-76.

158. *See id.* at 1375.

cut hay and corn into a silo.[159] Although usually paid for this work, the injured party did not get paid periodically, and he only sporadically assisted the insured with the chores on the farm.[160]

The trial court granted summary judgment in favor of the insurer, finding that the injured person was a "farm employee" and thus excluded from coverage.[161] Relying upon *Tonkovic* and *Collister*, the superior court reversed and held that the record established that the insured had a reasonable expectation of coverage under the circumstances.[162] Specifically, the court found that the insured's expectation of coverage was influenced by his discussions with the agent who sold the policy.[163] Furthermore, though the court found the policy exclusion "clear and unambiguous" upon its face, the court found that the term "employee" was not defined in the policy and was therefore ambiguous.[164] Accordingly, the court remanded the case to the trial court for further proceedings.[165]

Since the *Tonkovic* decision in 1987, the Pennsylvania Superior Court has rendered other decisions addressing the reasonable expectations doctrine. These decisions are too numerous to discuss on an individual basis. They all interpret the pronouncements of the state's highest court and reflect the current state of the reasonable expectations doctrine in Pennsylvania.[166] They can, however, be summarized.

First, Pennsylvania courts will continue to follow *Standard Venetian Blind* and enforce the clear and unambiguous language of an insurance contract even though the insured's reasonable expectations are frustrated by this strict approach.[167] As the Pennsylvania Superior Court has repeat-

159. *See id.* ("Lentz had come to appellant's farm that morning to assist in the loading of 'silage,' cut hay and corn for cattle feed, into a silo.").

160. *See id.* at 1377-78 (noting no common understanding between insured and injured parties on issue of compensation).

161. *See id.* at 1375.

162. *See id.* at 1379 (holding that "coverage of this occurrence should focus on the reasonable expectation of the insured and not on the subjective intent of the insurer").

163. *See id.* (stating that agent's discussion with appellant "influenced appellant's expectations as to his coverage under the policy in question").

164. *See id.* at 1377.

165. *See id.* at 1379 (vacating summary judgment order, remanding for further proceedings and relinquishing jurisdiction).

166. For a further discussion of the reasonable expectations doctrine, see *supra* notes 15-72 and accompanying text. A federal court applying Pennsylvania law must give proper regard, but not conclusive effect, to the decisions of the superior court. *See* Connecticut Mut. Life Ins. Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983) ("If the Pennsylvania Supreme Court has not yet passed on the question before us, we must consider the pronouncements of lower state courts. Such decisions should be given proper regard, but not conclusive effect."). "When ascertaining matters of state law, only the decisions of the state's highest court constitute the authoritative source." *Id.*

167. *See, e.g.*, Bubis v. Prudential Property & Cas. Ins. Co., 718 A.2d 1270, 1273 (Pa. Super. Ct. 1998) (noting party's failure to read is not excuse if language was clear); Nationwide Mut. Ins. Co. v. Johnson, 676 A.2d 680, 684 (Pa. Super. Ct. 1996) (stating that unambiguous policy language "dictates this result"); Britamco

edly stated: "While reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous."[168] The superior court has reasoned that enforcing clear and unambiguous policy language, regardless of whether the insured actually read and understood it, "avoids uncertain results, expedites the resolution of coverage disputes and reduces the costs of obtaining insurance."[169]

Second, Pennsylvania courts will construe ambiguous language in a policy in favor of the insured.[170] As the Pennsylvania Superior Court stated: "Where a provision of a policy is ambiguous, the policy is to be construed in favor of the insured, who typically lacks bargaining leverage regarding the terms of the coverage, and against the insurer, the drafter of the agreement."[171]

Underwriters, Inc. v. Grzeskiewicz, 639 A.2d 1208, 1212 (Pa. Super. Ct. 1994) (noting that provision "clearly and unambiguously excludes coverage").

168. *Bubis*, 718 A.2d at 1272 (quoting *Frain v. Keystone Ins. Co.*, 640 A.2d 1352, 1355 (Pa. Super. Ct. 1994)); *see* Insurance Co. v. Hampton, 657 A.2d 976, 978 (Pa. Super. Ct. 1995) (noting that insured cannot complain that his or her reasonable expectations were frustrated by policy limitations that are "clear and unambiguous"); Scott v. Southwestern Mut. Fire Ass'n, 647 A.2d 587, 590 (Pa. Super. Ct. 1994) (same); *Frain*, 640 A.2d at 1354 (same); *Britamco*, 639 A.2d at 1210 (same); Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649, 651 (Pa. Super. Ct. 1994) (same); St. Paul Mercury Ins. Co. v. Corbett, 630 A.2d 28, 30 (Pa. Super. Ct. 1993) (en banc) (same); Neil v. Allstate Ins. Co., 549 A.2d 1304, 1309 (Pa. Super. Ct. 1988) (same).

169. Koval v. Liberty Mut. Ins. Co., 531 A.2d 487, 489 (Pa. Super. Ct. 1987); *accord* Schneider v. Lindenmuth-Cline Agency, Inc., 620 A.2d 505, 509-10 (Pa. Super. Ct. 1993) (distinguishing facts of case from facts of *Tonkovic*); Banker v. Valley Forge Ins. Co., 526 A.2d 434, 436-37 (Pa. Super. Ct. 1987) (quoting *Tonkovic v. State Farm Mut. Auto. Ins. Co.*, 521 A.2d 920, 923-25 (Pa. 1987). In *J.H. France Refractories Co. v. Allstate Insurance Co*, the Pennsylvania Superior Court stated:

> Any reasonable expectation which would be imputed to the parties by this or any court must necessarily rely upon, and be reasonably consistent with, the written document and phraseology, simply because any interpretation advanced contrary to the contents of the written document could hardly be viewed as "reasonable" to assert; unless good reason in law is advanced for the disregarding of the clearly contrary phraseology.

578 A.2d 468, 472 (Pa. Super. Ct. 1990), *rev'd in part and aff'd in part*, 626 A.2d 502 (Pa. 1993).

170. *See, e.g.*, Bateman v. Motorists Mut. Ins. Co., 590 A.2d 281, 283 (Pa. 1991) (stating that where policy is unambiguous it should be interpreted in favor of insured); *Bubis*, 718 A.2d at 1272 (same); *Frain*, 640 A.2d at 355 (same).

171. Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142, 144 (Pa. Super. Ct. 1995) (finding pollution exclusion ambiguous and construing it against insurer). The superior court refused to apply the reasonable expectations doctrine, noting that the doctrine "does not command a majority of our supreme court." *Id.* at 144 n.1. This refusal to apply the reasonable expectations doctrine appears to be contrary to the supreme court's holding in *Collister* that the reasonable expectations of the insured must be the controlling principle "regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents." Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353 (Pa. 1978); *see* Gilderman v. State Farm Ins. Co., 649 A.2d 941, 944 (Pa. Super. Ct. 1994) ("In construing a

Third, the reasonable expectations of an insured will be honored and coverage will be found by Pennsylvania courts when an insurer accepts payment of a premium at the time the insurer takes the application and the insurer fails to establish that the consumer has no reasonable basis for believing he or she was purchasing insurance coverage.[172] This principle was announced by the Pennsylvania Supreme Court in *Collister* and continues to be applied to issues of coverage during the interim period between application and issuance of the policy.[173]

Fourth, the reasonable expectations of the insured will be honored despite the clearest written exclusion if: (1) as in *Tonkovic*, "the insured applied for a specific type of coverage or benefit and the insurer issued a policy materially different from the requested type";[174] or (2) as in *Rempel*, the insurer or its agent misrepresented the terms of coverage and the insured justifiably relied upon those assurances;[175] or (3) the insurance company failed to fulfill a duty to the insured and that failure caused the company to deny coverage.[176]

The only decision of the Pennsylvania Supreme Court after *Tonkovic* to mention the reasonable expectations doctrine was *Madison Construction Co. v. Harleysville Mutual Insurance Co.*,[177] decided on July 27, 1999. In

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policy, coverage provisions are interpreted to afford the greatest possible protection to the insured, and the insured's expectations are our focus."); Huffman v. Aetna Life & Cas. Co., 486 A.2d 1330, 1335 (Pa. Super. Ct. 1984) (finding policy provision ambiguous and remanding for trial court to ascertain reasonable expectations of insured).

172. *See, e.g.*, Dibble v. Security of Am. Life Ins., 590 A.2d 352, 356 (Pa. Super. Ct. 1991) (holding life insurance effective upon first payment); *Collister*, 388 A.2d at 1354 (holding that insurer failed to establish that appellant could not have expectation that insured was covered at time of first payments).

173. *See Dibble*, 590 A.2d at 356 (holding that insureds could have reasonably believed policy became effective when they paid first premium with application and that insurer did not unequivocally show that insureds were not receiving immediate benefits in return for their premium payment). *But see* Nationwide Mut. Ins. Co. v. Johnson, 676 A.2d 680, 683-84 (Pa. Super. Ct. 1996) (coverage did not become effective on date of insured's application and payment of premium to person who was not licensed agent or producer, but only when application was sent by licensed agent who filled in effective date of coverage on application as date and time of mailing).

174. *Koval*, 531 A.2d at 490.

175. *See* State Auto. Ins. Ass'n v. Anderson, 528 A.2d 1374, 1376-77 (Pa. Super. Ct. 1987) (quoting *Collister*, 388 A.2d at 1353-54).

176. *See* Everett Cash Mut. Ins. Co. v. Krawitz, 633 A.2d 215, 217 (Pa. Super. Ct. 1993) (refusing to recognize condition precedent to payment of insurance policy, which only insurance company could fulfill, when insurer refused to fulfill obligation and denial of coverage would "utterly destroy any reasonable expectations of the insured").

177. 735 A.2d 100 (Pa. 1999). There were two other decisions by the Pennsylvania Supreme Court after *Tonkovic* that addressed insurance coverage issues, but neither case discussed the reasonable expectations doctrine. In *Bateman v. Motorist Mutual Insurance Co.*, the supreme court found a clause in an automobile policy ambiguous, but before doing so emphasized the rule of *Standard Venetian Blind* that, in interpreting a contract of insurance, the courts must ascertain "the

Madison Construction, the supreme court was called upon to interpret a pollution exclusion clause in a comprehensive general liability policy.[178] In ruling against the insured, and in favor of the insurance company, the state's highest court began its analysis by stating the court's "only aim" in interpreting an insurance contract is "to ascertain the intent of the parties as manifested by the language of the written instrument."[179] The court reiterated what it stated in *Standard Venetian Blind*: "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language."[180] The court refused to consider the insured's argument "that the reasonable expectations of the insured must be considered, regardless of the express terms of the policy," because the issue was not fully briefed by the insured.[181] Nonetheless, the court, in dicta, questioned the merit of this argument, noting that accepting this contention "would entail a substantial expansion of the reasonable expectations doctrine, heretofore applied in very limited circumstances."[182] The court noted that in the two cases where the court applied the doctrine, it was "to protect [a] non-commercial insured" either from "policy terms not readily apparent," as in *Collister*, or "from deception," as in *Tonkovic*.[183] The court thus intimated that the doctrine may not apply to a commercial insured, such as a corporation. The statement that the doctrine would only apply when the policy terms are "not readily apparent" harks back to Professor Keeton's requirement that the reasonable expectations of the insured be honored "even though painstaking study of the policy provisions would have negated those expectations."[184] The court's comment that the doctrine would apply when there is deception recognizes that policy language will not be enforced when the insured affirma-

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intent of the parties as manifested by the language of the written instrument." 590 A.2d 281, 283 (Pa. 1991). Likewise, in *Mutual Benefit Insurance Co. v. Haver*, 725 A.2d 743 (Pa. 1999), the supreme court did not discuss the reasonable expectations doctrine, but instead cited to *Standard Venetian Blind* when upholding an exclusion in an insurance policy. *See Haver*, 725 A.2d at 746 (stating that context in which term "malpractice" was used indicated parties did not intend for such conduct to be covered).

178. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999) (stating that "no appellate court of this Commonwealth has considered whether the exclusion precludes coverage for an injury arising from exposure to the fumes of a useful product").

179. *Id.* at 108 (quoting *Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 517 A.2d 910, 913 (Pa. 1986)).

180. *Id.* at 106 (quoting *Gene & Harvey Builders*, 517 A.2d at 913).

181. *Id.* at 109 n.8.

182. *Id.*

183. *Id.*

184. Keeton, *supra* note 8, at 967.

tively creates a contrary expectation of coverage through fraud or negligent misrepresentation.[185]

III. THE THIRD CIRCUIT'S PERSPECTIVE

The United States Court of Appeals for the Third Circuit first addressed Pennsylvania's reasonable expectations doctrine in 1975.[186] Initially, the court of appeals grappled with the now-rejected *Hionis* doctrine. In *DaBurlos v. Commercial Insurance Co.*,[187] decided in 1975, the Third Circuit applied the *Hionis* case to find that an exclusion in an airline trip policy was unenforceable because the insurer did not prove that the insureds were aware of the exclusion.[188] In *Treasure Craft Jewelers, Inc. v. Jefferson Insurance Co.*,[189] decided in 1978, the Third Circuit distinguished *Hionis* and found no coverage for loss of jewelry pursuant to a policy issued to a jewelry store.[190] The court found that the undisputed facts demonstrated that the insured must have known of the limitation of the policy.[191]

In a third case, the Third Circuit declined to apply the reasonable expectations standard that existed at the time. In *Brokers Title Co. v. St. Paul Fire & Marine Insurance Co.*,[192] decided in 1979, the court addressed the question of whether a professional title insurance broker may avoid the consequence of an otherwise unambiguous clause in an insurance policy on the basis that the broker misunderstood the clause.[193] In the course of the insurance transaction, the insurance salesperson read the exclusions of the policy to the title broker, who was the insurance customer.[194] The title broker did not ask any questions about the policy after it was read to him.[195] At trial, the district court applied the rule in *Hionis* and held that the particular policy exclusion did not apply because it was never explained to the consumer, nor did the consumer understand the effect of the exclusion.[196]

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185. *See Madison Construction*, 735 A.2d at 109-10 (recognizing detrimental effect of fraud or negligent misrepresentation).

186. *See* DaBurlos v. Commercial Ins. Co., 521 F.2d 18, 30 (3d Cir. 1975) (stating that Pennsylvania law provides that insured's burden of proof includes demonstrating that exclusionary clause is applicable to circumstances of case and that insured was aware of provision relating to non-coverage).

187. 521 F.2d 18 (3d Cir. 1975).

188. *See id.* at 28 (holding coverage must be extended because defendants failed to meet burden of proof).

189. 583 F.2d 650 (3d Cir. 1978).

190. *See Treasure Craft Jewelers*, 583 F.2d at 654 (stating that situation in *Treasure Craft* is closely related to *Miller v. Prudential Ins. Co.*, 363 A.2d 1017 (1976)).

191. *See id.* (stating that all factors indicate court in *Treasure Craft* was aware of policy's limitation as to coverage).

192. 610 F.2d 1174 (3d Cir. 1979).

193. *See Brokers Title*, 610 F.2d at 1176 (describing issue facing court).

194. *See id.* at 1177.

195. *See id.*

196. *See id.* (stating procedural history).

The Third Circuit initially distinguished the "insurance consumer" in this case, a title broker, from the typical lay consumer with no knowledge or understanding of the terminology used in the insurance field.[197] The court accepted the argument that the purchaser in this case was proficient in insurance matters.[198] As a result, the court dismissed the underlying reasoning of *Hionis* as applied to this case because there was no apparent or actual unequal bargaining power or contract of adhesion.[199] Once the court dismissed any "adhesionary" arguments, it proceeded to interpret the contract under a "freedom of contract" analysis and determined that the clear written language of the policy should be enforced.[200]

In *Blair v. Manhattan Life Insurance Co.*,[201] decided in 1982, the Third Circuit applied the *Collister* decision and upheld a verdict for the insurance company, holding that the evidence was sufficient to support the jury's finding that an applicant for insurance did not have a reasonable expectation that he had obtained temporary or interim coverage under a policy between the time that the application was submitted and the time it was denied.[202] In *Selected Risks Insurance Co. v. Bruno*,[203] decided in 1983, the issue was whether a homeowner's insurance policy covered an intentional criminal act.[204] The Third Circuit explained that the reasonable expectations doctrine developed in *Hionis* and *Collister* applied only to objectively reasonable expectations and not unreasonable expectations.[205] The court also explained that "it is unreasonable as a matter of law for an insured to expect that a homeowner's insurance policy will provide liability coverage for intentional such criminal acts . . . ."[206] The court, therefore, enforced the policy language excluding coverage for intentional acts.[207]

The Third Circuit had another opportunity to address this issue in 1990.[208] By this time, however, the law in Pennsylvania had gone through significant change with the Pennsylvania Supreme Court's decision in

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197. *See id.*

198. *See id.*

199. *See id.* at 1177-80 (finding testimony of plaintiffs regarding own insurance experience persuasive in reaching decision).

200. *See id.* at 1180-81 (interpreting contract under freedom of contract analysis).

201. 692 F.2d 296 (3d Cir. 1982).

202. *See Blair*, 692 F.2d at 300 (holding that evidence was sufficient to support finding that insurance applicant did not have reasonable expectation that he had obtained temporary or interim coverage under policy).

203. 718 F.2d 67 (3d Cir. 1983).

204. *See Bruno*, 718 F.2d at 70 (stating issue).

205. *See id.* at 71 (reviewing applications of *Hionis* and *Collister*).

206. *Id.*

207. *See id.* at 70 (enforcing policy language excluding coverage for intentional acts).

208. *See* McMillan v. State Mut. Life Assurance Co. of Am., 922 F.2d 1073 (3d Cir. 1990).

Standard Venetian Blind.[209] In *McMillan v. State Mutual Life Assurance Co. of America,*[210] the Third Circuit was called upon to construe the phrase "on authorized business" in a group life insurance policy.[211] Dawn McMillan, a Trans World Airlines employee, was killed by her estranged husband after her shift ended and she exited the building where she worked.[212] The question was whether the victim was "on authorized business" when she was killed.[213] Without mentioning an insured's "reasonable expectations," the court adhered to a strict "ambiguity" analysis and determined that there were numerous interpretations of the controverted phrase, resulting in a construction most favorable to the insured.[214]

A more significant decision came a short time later, when the Third Circuit was called upon to interpret a stacking provision in an automobile insurance policy. In *West American Insurance Co. v. Park,*[215] the plaintiff, while operating her husband's automobile, had an accident with an uninsured motorist.[216] The automobile driven by the plaintiff was covered by a policy that limited coverage for liability to third parties at $100,000.[217] The policy contained an additional provision which granted uninsured/underinsured coverage of $100,000 for each vehicle covered under the policy, which in this case covered two vehicles.[218] After the accident, the insured filed a claim in which she "stacked" the uninsured motorist coverage for each vehicle covered by the policy, totaling $200,000.[219] This claim was contested by the insurance company because a Pennsylvania statutory provision limited the amount of uninsured motorist coverage that

209. *See* Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563 (Pa. 1983).

210. 922 F.2d 1073 (3d Cir. 1990).

211. *See McMillan,* 922 F.2d 1074 (noting that policy is silent on meaning of phrase).

212. *See id.*

213. *See id.*

214. *See id.* at 1075-77 (stating that "any reasonable interpretation offered by the insured . . . must control" when insurance policies include ambiguous terms). The United States Court of Appeals for the Third Circuit had previously interpreted Pennsylvania law as requiring any ambiguities to be construed in favor of the insured. *See* Little v. MGIC Indem. Corp., 836 F.2d 789, 794 (3d Cir. 1987) (stating that insured receives favorable interpretation of ambiguous policy even when both insured and insurer offer reasonable explanations to court); Pacific Indem. Co. v. Nationwide Mut. Fire Ins. Co., 766 F.2d 754, 760 (3d Cir. 1985) (requiring strict construction of ambiguities against insurer); Houghton v. American Guar. Life Ins. Co., 692 F.2d 289, 291 (3d Cir. 1982) (stating ambiguous terms must be interpreted in favor of insurer because of superior bargaining power of insurance companies).

215. 933 F.2d 1236 (3d Cir. 1991).

216. *See West Am.,* 933 F.2d at 1236.

217. *See id.*

218. *See id.*

219. *See id.* at 1237-38.

could be covered at the general policy limit of liability specified in the bodily injury section of the policy.[220]

At the outset of the court's discussion, the Third Circuit acknowledged the equitable principles underlying Pennsylvania insurance law.[221] The court, however, greatly expanded the scope of Pennsylvania law in its analysis. The court suggested the following:

> *Collister* and subsequent insurance cases expand traditional notions of equitable estoppel so that the insurer is bound not only by the expectations that it creates, but also by any other reasonable expectation of the insured. The insured's reasonable expectations control, even if they are contrary to the explicit terms of the policy.[222]

The Third Circuit cited *State Farm Mutual Automobile Insurance Co. v. Williams*,[223] a 1978 decision of the Pennsylvania Supreme Court, to support the above statement.[224] That decision, however, never mentioned the reasonable expectations doctrine. Indeed, this broad statement was and is contrary to the law in Pennsylvania.[225] Since the decision in *Standard Venetian Blind*, Pennsylvania courts have never suggested that the reasonable expectations of the insured *always* control—instead, they have held that the reasonable expectations will control only when they conflict with ambiguous policy language or in unique circumstances, such as when the insurance consumer is misled as to the meaning of a policy.[226] In fact, ever since the Pennsylvania Supreme Court overruled *Hionis* in *Standard Venetian Blind*, the Pennsylvania courts have repeatedly stated that "[w]hile reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain

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220. *See id.* at 1238 (citing 75 PA. CONS. STAT. ANN. § 1736 (West Supp. 1990)). The statute states that "[t]he coverages provided under this subchapter may be offered by insurers in amounts higher than those required by this chapter but may not be greater than the limits of liability specified in the bodily injury liability provisions of the insured's policy." 75 PA. CONS. STAT. ANN. § 1736 (West Supp. 1990).

221. *See West Am.*, 933 F.2d at 1239 ("Pennsylvania insurance law incorporates principles of equitable estoppel.").

222. *See id.*, 933 F.2d at 1239 (citations omitted).

223. 392 A.2d 281 (Pa. 1978).

224. *See West Am.*, 933 F.2d at 1239 (citing *Williams*, 392 A.2d at 286-87). In *Williams*, the supreme court refused to enforce an exclusion that limited the insurer's liability under an uninsured motorist provision of an automobile policy. *See id.* at 287 (holding that exclusion conflicted with Pennsylvania's Uninsured Motorist Act, as previously interpreted by state's highest court).

225. For a further discussion of Pennsylvania law regarding the reasonable expectations doctrine, see *supra* notes 186-214 and accompanying text.

226. *See* Bateman v. Motorists Mut. Ins. Co., 590 A.2d 282, 283 (Pa. 1991) (stating that when policy is ambiguous, it is construed in favor of insured); *see also* Neil v. Allstate Ins. Co., 549 A.2d 1304, 1311 (Pa. Super. Ct. 1988) (noting appellants' expectations were insufficient for court to invalidate exclusionary clause).

that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous."[227]

In *West American*, the Third Circuit, although making an overly-broad pronouncement on the reasonable expectations principle, applied the reasonable expectations principle in that case only as an equitable estoppel doctrine.[228] Noting that Pennsylvania insurance law incorporates principles of equitable estoppel, the court defined equitable estoppel as follows: "Reduced to its essence, equitable estoppel is a doctrine of fundamental fairness intended to preclude a party from depriving another of a reasonable expectation, when the party inducing the expectation knew or should have known that the other would rely to his detriment upon that conduct."[229] The court held that because the insurance policy issued to the insured created a reasonable expectation that uninsured motorist coverages would be stacked, and the insured relied on those representations to his detriment, the insurer would be equitably estopped from denying benefits, even though full stacking of the amounts of benefits would violate Pennsylvania's motor vehicle law.[230]

In the three years after *West American*, the Third Circuit barely mentioned the reasonable expectations doctrine in the several opinions it filed addressing insurance coverage issues.[231] In *St. Paul Fire & Marine Insurance Co. v. Lewis*,[232] decided in 1991, the Third Circuit construed the term "living with" in an umbrella policy providing coverage to a family member living with the insured.[233] Without discussing the reasonable expectations doctrine, the court found the term "living with" was unambiguous, and therefore, according to Pennsylvania law, the term was to be given its "plain and ordinary meaning."[234] The court held that for a person to be considered "living with" the insured, that person must "maintain regular personal contacts with the insured's home."[235] Then, in *Langer v. Monarch*

227. Bubis v. Prudential Property & Cas. Ins. Co., 718 A.2d 1270, 1272 (Pa. Super. Ct. 1998) (citations omitted). For a further discussion of cases supporting the proposition that clear and unambiguous language will control over an insured's reasonable expectations, see *supra* notes 167-69 and accompanying text.

228. *See* West Am. Ins. Co. v. Park, 933 F.2d 1236, 1239 (3d Cir. 1991) (noting Pennsylvania insurance law incorporates principles of equitable estoppel).

229. *Id.* (quoting *Straup v. Times Herald*, 423 A.2d 713, 720 (Pa. 1980)).

230. *See id.* at 1239.

231. For a discussion of Third Circuit cases involving insurance coverage, see *infra* notes 232-45 and accompanying text.

232. 935 F.2d 1428 (3d Cir. 1991).

233. *See St. Paul Fire & Marine*, 935 F.2d at 1431-33 (interpreting policy provisions).

234. *See id.* at 1431 (citing *Pennsylvania Mfrs. Ass'n Ins. Co. v. Aetna Cas. & Sur. Ins. Co.*, 233 A.2d 548, 551 (Pa. 1967)).

235. *Id.* at 1433 (interpreting "living with"). For a more recent example where the United States Court of Appeals for the Third Circuit has denied coverage pursuant to unambiguous policy language and gave no consideration to Pennsylvania's reasonable expectations doctrine, see *Visiting Nurse Ass'n v. St. Paul Fire & Marine Insurance Co.*, 65 F.3d 1097 (3d Cir. 1995).

Life Insurance Co.,[236] decided in 1992, the Third Circuit considered the question of whether an insurer's acceptance of an application form and first premium payment for a disability policy created a temporary insurance contract.[237] Applying the Pennsylvania Supreme Court's opinion in *Collister*, the Third Circuit held that the subjective expectations of the insured as to coverage "do not control"; rather, a factfinder must consider "what a reasonable person in [the insured's] shoes would have expected."[238] The court held that the question of whether the insured's belief was reasonable was one for the jury, and the district court erred in not submitting the question to the jury.[239]

In *Worldwide Underwriters Insurance Co. v. Brady*,[240] also decided in 1992, the Third Circuit held that the language of a family limitation exclusion in an automobile policy was unclear and thus had to be construed against the insurer and in favor of the insured as required by *Standard Venetian Blind*.[241] Although the court of appeals affirmed the district court, it refused to apply the reasonable expectations doctrine as the trial court did, explaining that the doctrine had been applied by the Pennsylvania Supreme Court only in "unique factual situations":

> Unlike the district court, we rest our decision purely on the legal pronouncement of *Standard Venetian* that unclear contractual provisions will be construed against the insurer and do not rely upon the holdings of the two Pennsylvania cases relied upon by the district court, *Collister v. Nationwide Life Ins.* and *Tonkovic v. State Farm Mutual Automobile Insurance Co.* We believe that the holdings of these cases were firmly rooted in their unique factual situations and decline to apply them to the facts here.[242]

In *Lucker Manufacturing v. Home Insurance Co.*,[243] decided in 1994, the Third Circuit interpreted a property damage provision of a comprehensive general liability policy.[244] The court did not discuss the reasonable expectations doctrine when determining coverage, but employed traditional rules of contract construction, including the principle that a court must construe ambiguous language to provide coverage.[245]

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236. 966 F.2d 786 (3d Cir. 1992).

237. *See Langer*, 966 F.2d at 798 (addressing contract formation by premium payment acceptance).

238. *Id.*

239. *See id.* (reversing district court ruling).

240. 973 F.2d 192 (3d Cir. 1992).

241. *See Worldwide Underwriters*, 973 F.2d at 196.

242. *Id.* at 196 n.3 (citations omitted).

243. 23 F.3d 808 (3d Cir. 1994).

244. *See Lucker Mfg.*, 23 F.3d at 810 (discussing general issue of case).

245. *See id.* at 814 (stating that traditional principles of insurance policy interpretation control inquiry into coverage).

It was not until 1994, in *Bensalem Township v. International Surplus Lines Insurance Co.*,[246] that the Third Circuit again discussed the reasonable expectations doctrine at length. In *Bensalem Township*, the township contracted with the insurance company for a policy covering all civil claims made against the township.[247] Included in the agreement was an exclusion that barred coverage on any claim arising from litigation initiated before the policy became effective.[248] When the township renewed its coverage in 1989, the insurance company inserted a provision broadening the exclusion to include all claims related to any prior matter.[249] In other words, the extent of the township's coverage was limited only to claims unrelated to any prior matter.[250] The township was sued by a third party and was subsequently denied coverage by the insurance company under the added provision in the policy.[251] The township contended that the language added by the insurance company was counter to its reasonable expectations because, although it was aware of the older exclusion, it believed it was receiving the same policy when it renewed coverage.[252]

During its lengthy discussion of the development of the reasonable expectations doctrine in Pennsylvania, the Third Circuit noted that, with the *Standard Venetian Blind* decision, the Pennsylvania Supreme Court "appeared to pull back from its enthusiastic endorsement of the [reasonable expectations] doctrine."[253] The court further acknowledged the difficulty in distinguishing those cases in which the Pennsylvania courts applied the reasonable expectations doctrine and those that enforced the unambiguous terms of the policy.[254] But the Third Circuit was confident that Pennsylvania would apply the doctrine in circumstances where equitable estoppel would be warranted, as when the insurer either actively provides misinformation about the scope of coverage provided by a policy or passively fails to notify the insured that it was receiving something other than what it thought it purchased.[255] The court stated the following:

> Faced with *Collister*, *Standard Venetian Blind*, and *Tonkovic*, we are unable to draw any categorical distinction between the types of cases in which Pennsylvania courts will allow the reasonable expectations of the insured to defeat the unambiguous language of an insurance policy and those in which the courts will follow the

246. 38 F.3d 1303 (3d Cir. 1994).

247. *See Bensalem Township*, 38 F.3d at 1304.

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.* at 1304-05.

253. *Id.* at 1310.

254. *See id.* at 1311 (discussing lack of consistency in courts' reasoning in applying different doctrines).

255. *See id.* at 1311-12 (acknowledging that in such circumstances, insured's reasonable expectations will prevail over policy's terms).

> general rule of adhering to the precise terms of the policy. One theme that emerges from all the cases, however, is that courts are to be chary about allowing insurance companies to abuse their position vis-a-vis their customers. Thus we are confident that where the insurer or its agent creates in the insured a reasonable expectation of coverage that is not supported by the terms of the policy that expectation will prevail over the language of the policy.[256]

The Third Circuit noted that in *Standard Venetian Blind*, the insurer neither misled the insured nor unilaterally changed the terms of coverage after the insured had agreed to purchase insurance.[257]

Although reversing the district court because it should have permitted the insured to pursue discovery to establish its reasonable expectations, the court of appeals in *Bensalem* made it clear that the Township could not defeat the unambiguous policy exclusion unless it showed that it was misled by the insurer or that the insurer failed in its duty to notify the Township of the changes in the renewal policy.[258] Judge Hutchinson, who, as a former Justice of the Pennsylvania Supreme Court participated in the *Standard Venetian Blind* decision, wrote a concurring opinion in which he attempted to reconcile *Standard Venetian Blind* with the reasonable expectations doctrine. He opined that the court in *Standard Venetian Blind* did not reject "the reasonable expectations principle foreshadowed in *Rempel v. Nationwide Life Ins. Co., Inc.*"[259] Rather, Judge Hutchinson concluded that the Pennsylvania Supreme Court "did no more" than reject the attempt of the Pennsylvania Superior Court in *Hionis* "to wholly divorce the construction of exclusionary clauses from their text."[260]

The Third Circuit next addressed the reasonable expectations doctrine in 1995, when it decided *Granite State Insurance Co. v. Aamco Transmissions, Inc.*[261] In *Granite*, the Third Circuit interpreted a provision of a comprehensive general liability insurance policy that provided coverage for "'personal injury or advertising injury . . . arising out of the conduct of'" the insured's business.[262] The insured, an automotive transmission repair business, was sued by its customers for using "deceptive advertising which did not describe its services accurately and which lured purchasers

256. *Id.* at 1311.

257. *See id.* at 1312 n.5 (stating that *Standard Venetian Blind* involved insured who had no reasonable expectation that policy provided coverage which, in fact, it did not).

258. *See id.* at 1312 (stating insurers must prevail unless they represented that coverage would not be reduced or they notified insured of change in coverage after policy was renewed).

259. *Id.* at 1315 (Hutchinson, J., concurring).

260. *Id.* (Hutchinson, J., concurring).

261. 57 F.3d 316 (3d Cir. 1995).

262. *Granite State Ins.*, 57 F.3d at 318 (quoting policy).

of transmission services into paying more than they should have paid and induced them to pay for unnecessary repairs."[263]

The insurance company brought a declaratory judgment action seeking a determination that it was not obligated to provide coverage to the automobile repair business for the claims made by the customer. The district court granted the insurer's motion for judgment on the pleadings, finding that the customer's claims did not constitute "advertising injury" as defined by the policy. The policy defined "advertising injury" as an "injury arising . . . in the course of . . . advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan."[264] The Third Circuit affirmed, concluding that the false advertising claims against the insured did not arise from "unfair competition."[265] Specifically, the court stated that "a competitor of the insured, but not its customer, can assert a claim which may be covered under the 'unfair competition' category of the 'advertising injury' coverage."[266] The court rejected the insured's reliance on the reasonable expectations doctrine and found, without the benefit of a record made in the trial court, that the insured could not have had a reasonable expectation of coverage.[267] The Third Circuit stated:

> We have not overlooked [the insured's] argument "that the proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured," as set forth in *St. Paul Mercury Ins. Co. v. Corbett.* Rather, we conclude that [the insured] could not have expected to have insurance coverage for the [customers'] claims under the portion of a policy protecting it against claims of "unfair competition." As we explained above, it would be expected that a claim arising from "competition" would be forwarded by a competitor of an insured. The [customers] were not competitors of [the insured].[268]

In contrast to the ruling in *Bensalem Township,* the court in *Granite* did not give the insured the opportunity to take discovery to develop its claim that its reasonable expectations of coverage were not fulfilled. As it did in *Selected Risks Insurance Co. v. Bruno,*[269] the Third Circuit held that it was un-

263. *Id.*

264. *Id.*

265. *See id.* at 319 (stating that "regardless of the nature of the insured's conduct, a claim by a consumer of its products or services arising from that conduct hardly can be characterized as a claim for unfair competition").

266. *Id.* at 320.

267. *See id.* at 321 (finding no reasonable expectation of coverage against unfair competition claim by noncompetitor).

268. *Id.* at 321 (citations omitted).

269. 718 F.2d 67 (3d Cir. 1983).

reasonable as a matter of law for the insured to expect coverage for the customer's claims.

The next opportunity for the Third Circuit to address insurance law came in *Reliance Insurance Co. v. Moessner*.[270] The issue presented in *Reliance* relevant to this discussion was whether Moessner's employer, Vapor Energy Service and Engineering Corporation ("VE"), had a reasonable expectation of coverage under a renewed policy when the original policy would have covered the type of injury suffered by Moessner.[271] Plaintiff, Moessner, sought monetary damages after he was overcome by carbon monoxide emitted by a VE evaporator.[272] VE submitted to Reliance a request for coverage for the Moessner claim, but was told that the Total Pollution Exclusion contained in the policy relieved Reliance of any obligation to defend or indemnify VE.[273] Under the original policy, Reliance would have been obligated to provide coverage for Moessner's claims.[274] VE contended that Reliance's interpretation of the policy and exclusions were contrary to the reasonable expectations of VE.[275]

The Third Circuit properly considered the threshold argument that the insurance policy was ambiguous;[276] the court concluded that the clear language of the policy was unambiguous and would bar coverage.[277] The court then turned to an examination of the reasonable expectations doctrine and offered a slightly modified and more accurate version of Pennsylvania's reasonable expectations doctrine than articulated by the *West American* court.[278] The court stated that "even the most clearly written exclusion will not bind the insured where the insurer or its agent has created in the insured a reasonable expectation of coverage."[279] The court also said that "[i]n light of *Standard Venetian Blind* and *Tonkovic*, Pennsylvania courts have consistently enforced the plain language of exclusions and limitations, despite the insurer's failure to make the insured aware of

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270. 121 F.3d 895 (3d Cir. 1997).

271. *See Selected Risks Ins.*, 121 F.3d at 897 (recognizing one of two important issues on appeal).

272. *See id.* at 898.

273. *See id.* The insurance policy at issue provided coverage for obligations of the insured as a result of bodily injury or property for products sold by VE. *See id.* at 899 (analyzing terms of insurance policy). The total pollution exclusion contained in the original policy would not have precluded coverage in this case. *See id.* The total pollution exclusion in the renewed policy excluded coverage for any bodily injury or property damage which would have not occurred but for the release of pollutants. *See id.* at 899-900.

274. *See id.* at 899.

275. *See id.* at 898.

276. *See id.* at 900-01 (stating that if insurance policy is ambiguous, it "should be construed in favor of the insured and against the insurer").

277. *See id.* at 901 (applying precedent from Pennsylvania Superior Court decisions).

278. *See id.* at 903-04 (analyzing reasonable expectations doctrine in Pennsylvania).

279. *Id.* at 903.

the provisions, where the circumstances indicate that the insured received exactly the coverage requested."[280] This interpretation, again, differs slightly from the more expansive description of the reasonable expectations doctrine by the Third Circuit in *West American.*[281] The language of *Reliance* is more closely analogous to the estoppel application of the reasonable expectations doctrine that was applied by the Pennsylvania Supreme Court in *Tonkovic* and by the Third Circuit in *West American* and *Bensalem Township.*[282]

The Third Circuit in *Reliance* also rejected the insurer's argument that the reasonable expectations doctrine should not apply to a commercial insured. Given the facts presented in *Reliance,* the court gave two persuasive reasons for its decision. First, even though sophisticated insureds may exercise more bargaining power over an insurer, "the rationale of the reasonable expectations doctrine is still applicable when the insurer unilaterally alters the insurance coverage requested by the insured."[283] When an insured has no reason to know that the insurer inserted an unfavorable provision in the policy, the insured lacks the ability to negotiate a more favorable policy and "its sophistication or putative bargaining power is meaningless."[284] Second, Pennsylvania courts have also construed ambiguous policy terms in favor of the insured, whether the insured was a commercial entity or an unsophisticated consumer.[285] The Third Circuit in *Reliance* correctly predicted that the Pennsylvania courts would apply the reasonable expectations doctrine to sophisticated insurers in the particular circumstances presented in *Reliance,* even though in *Madison Construction,* the Pennsylvania Supreme Court later intimated in dicta that the doctrine is limited to "non-commercial insureds."[286] As the Third Circuit

280. *Id.* at 904 n.7 (citations omitted).

281. *Compare Reliance,* 121 F.3d at 904 (stating that Pennsylvania courts enforce plain language of insurance agreement including all exclusions and limitations when insured receives coverage requested), *with* West Am. Ins. Co. v. Park, 933 F.2d 1236, 1240 (3d Cir. 1991) (stating that Pennsylvania law forbids insurer to use explicit language of insurance contract to defeat insured's reasonable expectations).

282. *See, e.g.,* Reliance Ins. Co. v. VE Corp., No. CIV.A.95-538, 2000 WL 217511, at *11 (E.D. Pa. Feb. 10, 2000) (noting VE reasonably expected coverage from first policy to continue to new policy). On remand, the district court also applied the estoppel principle and held that VE reasonably expected coverage so the total pollution exclusion was unenforceable. *See id.* (stating first policy provision controls over new one). The court noted, "[t]he insurer will be equitably estopped from asserting an exclusionary clause in a renewal policy unless it meets its burden of proving that it both notified the insured and explained the significance of the change." *Id.* at *9.

283. *Reliance,* 121 F.3d at 905.

284. *Id.*

285. *See id.* (citing numerous Pennsylvania cases constraining ambiguous insurance policies in favor of insured commercial entities over insurers).

286. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 109 n.8 (Pa. 1999) (suggesting limitation to reasonable expectations doctrine). Although dicta by the Pennsylvania Supreme Court may provide "a federal court with

explained, the insured's level of expertise in insurance matters will always be an important factor to consider when resolving whether the insured's expectation of coverage is reasonable.[287] In circumstances like those presented in *Tonkovic* and *Reliance*, however, the rationale for applying the reasonable expectations doctrine will always apply, even when the insured is a sophisticated consumer.[288]

The two most recent pronouncements of the Third Circuit on this matter take a more expansive view of Pennsylvania's reasonable expectations doctrine than the Third Circuit did in *Reliance*. In the first case, *Medical Protective Co. v. Watkins*,[289] the Third Circuit indicated a willingness to apply the reasonable expectations doctrine, even if the expectation of coverage was not created by the insurer.[290] *Medical Protective* involved a malpractice insurance policy issued to Watkins, a dentist.[291] The policy provided coverage for any claim of damage for services rendered by the insured or any other person for whom the insured was legally responsible.[292] The policy contained an important exclusion ("Exclusion 100"), which excluded coverage arising from the administration of any form of anesthesia in a dosage designed to render the patient unconscious, unless administered in a hospital.[293] The policy also contained a section that provided coverage for any liability incurred in rendering professional services under any contract with another dentist or other provider of professional services.[294] Reading these two provisions together, Dr. Watkins assumed that Exclusion 100 did not apply to him, and that he was protected from the actions of outside contractors for professional services performed in his office.[295]

As the Third Circuit noted, the facts of the case were tragic.[296] The case arose out of a wrongful death action filed against Dr. Watkins by the parents of a three-year old boy who died while under the care of Dr. Wat-

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reliable indicia of how the state tribunal may rule on a particular question," it is obviously not binding and, in fact, "a federal court should be circumspect in surrendering its own judgment concerning what the state law is on account of dicta." McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 662 (3d Cir. 1980).

287. *See Reliance*, 121 F.3d at 906 (predicting Pennsylvania Supreme Court's application of reasonable expectations doctrine).

288. *See* Tonkovic v. State Farm Mut. Auto. Ins. Co., 521 A.2d 920, 926 (Pa. 1987) (explaining that reasonable expectations doctrine applies in this case); *see also Reliance*, 121 F.3d at 906 (same).

289. 198 F.3d 100 (3d Cir. 1999).

290. *See Medical Protective*, 198 F.3d at 106 (stating analysis of reasonable expectations doctrine). According to Professor Henderson, application of the doctrine in this way can lead to great uncertainty. *See* Henderson, *supra* note 46, at 828 (discussing opinions from highest courts of several states).

291. *See id.* at 101.

292. *See id.*

293. *See id.* at 101-02.

294. *See id.* at 102.

295. *See id.*

296. *See id.*

kins and an outside anesthesiologist who had administered the anesthesia in Dr. Watkins' office.[297] The insurance company agreed to provide a conditional defense for Dr. Watkins against the charges that he did not obtain the consent of the parents before prescribing the anesthesia, and that he was negligent in the treatment of the boy after the child suffered cardiac arrest as a result of the anesthesia.[298]

The Third Circuit correctly started its analysis by considering whether there were any ambiguous terms in the policy.[299] The court then relied on *McMillan* in construing the policy provision against the insurer.[300] The court accepted the contention by Dr. Watkins that there was more than one reasonable interpretation of the clause contained in Exclusion 100, which excluded from coverage "any liability arising from the administration of any form of anesthesia in dosage designed to render the patient unconscious unless administered in a hospital."[301] The court reasoned that this clause failed to specify a person or class of persons to whom the exclusion applied.[302] The court further accepted Dr. Watkins' testimony at trial that he believed he was covered, based on his own interpretation of the clause, because he personally did not administer the anesthesia.[303] The court concluded that exclusionary clauses for professional services, such as Exclusion 100, must refer to a specific class of persons.[304]

Under Pennsylvania law, the inquiry could have ended with the court's conclusion that the provision was ambiguous and must be construed against the insurer. In several previous decisions, the Third Circuit ended its analysis after finding an insurance policy ambiguous.[305] Perhaps because the Third Circuit wished to reinforce its ambiguity analysis, however, it went on to devote a considerable discussion to the reasonable expectations doctrine as applied to this case, promoting a position close to

297. *See id.*

298. *See id.* at 102-03 (stating that insurance company sought declaratory judgment to determine its obligations).

299. *See id.* at 103 (discussing applicable Pennsylvania law governing insurance policy rules).

300. *See id.* at 104 (stating that policies that can be interpreted in many different ways are ambiguous). In *McMillan*, the Third Circuit remarked that "[a]mbiguous provisions in an insurance policy must be construed against the insurer and in favor of the insured; any reasonable interpretation offered by the insured therefore must control." McMillan v. State Mut. Life Ass'n, 922 F.2d 1073, 1075 (3d Cir. 1990).

301. *Medical Protective*, 198 F.3d at 104.

302. *See id.*

303. *See id.* (recounting testimony of Watkins).

304. *See id.* at 105.

305. *See, e.g.*, 12th St. Gym, Inc. v. General Star Indem. Co., 93 F.3d 115, 166 (3d Cir. 1996) (ending analysis and remanding after finding extrinsic evidence insufficient to resolve ambiguity in insurance policy); Worldwide Underwriters Ins. Co. v. Brady, 973 F.2d 192, 196 (3d Cir. 1992) (finding insurer entitled to policy benefits because of policy's ambiguity); *McMillan*, 922 F.2d at 1080 (same); Houghton v. American Guar. Life Ins. Co., 692 F.2d 289, 293 (3d Cir. 1982) (same).

one that advocates always adhering to the reasonable expectations of the insured regardless of clear policy provisions. The court suggested that Dr. Watkins' own impressions and assumptions regarding what was covered and what was not covered by his policy must prevail even if the court had not found the exclusion to be ambiguous.[306] In other words, the court suggested that the doctrine of reasonable expectations would apply even though the insurer did not create the insured's reasonable expectations of coverage.

In construing Pennsylvania law so broadly, the *Medical Protective* court relied upon the overly expansive language in *West American*, which misinterpreted Pennsylvania law to provide that "the insurer is bound not only by the expectations that it creates, but also by any other reasonable expectation of the insured. The insured's reasonable expectations control, even if they are contrary to the explicit terms of the policy."[307] As explained earlier when addressing the *West American* case, this statement expands the reasonable expectations doctrine beyond the limited applications authorized by the Pennsylvania Supreme Court. The Third Circuit in *Reliance*, on the other hand, correctly held that Pennsylvania law requires that policy language must be enforced when it is clear and unambiguous, unless the insurer has created by action, or omission when there is a duty to act, a contrary reasonable expectation of coverage. An insured cannot complain that his reasonable expectations are defeated by clear and unambiguous policy language, absent some misleading action by the insurer.

The most recent Third Circuit case to address Pennsylvania's reasonable expectations doctrine is *Bowersox Truck Sales & Service, Inc. v. Harco National Insurance Co.*[308] In that case, the insured sued a commercial property insurer for breach of contract and bad faith arising from the insurer's refusal to pay a business interruption claim for a period during which the insured's premises were being replaced.[309] The district court granted summary judgment in favor of the insurer because the insured did not file the action within the two-year limitations period contained in the policy.[310] The Third Circuit Court of Appeals reversed.[311] After reviewing the policy language, the court of appeals found that the district court erred in interpreting the policy to provide that the time period for filing suit began when the property was damaged, instead of when the necessary reconstruction was completed.[312] Although the court of appeals could have ended its analysis there, it did not. Instead, the court found

306. *See Medical Protective*, 198 F.3d at 106-07 (finding genuine issue of material fact).

307. *Id.* at 106 (quoting *West Am. Ins. Co. v. Park*, 933 F.2d 1236, 1239 (3d Cir. 1991)).

308. 209 F.3d 273 (3d Cir. 2000).

309. *See Bowersox*, 209 F.3d at 274.

310. *See id.* at 277.

311. *See id.* at 274.

312. *See id.* at 278.

that the course of dealing between the parties created a reasonable expectation in the insured that the two-year clock was not ticking until after the reconstruction was completed.[313] The court noted that two years after the damage, the insurance company was still requesting documentation from the insured about its losses.[314] Thus, application of the reasonable expectations doctrine by the court here, as in *West American*, *Bensalem Township* and *Reliance*, was in the nature of equitable estoppel.

Although Pennsylvania law applied to the case, the court of appeals, nonetheless, cited one of its previous cases interpreting New Jersey law[315] for the broad proposition that a court must interpret an insurance contract "to accord with the reasonable expectations of the insured, regardless of any ambiguity in the policy."[316] As noted earlier, this language is not precisely reflective of the limited application by Pennsylvania courts of the reasonable expectations doctrine.[317] Although the court of appeals reached the correct result in *Bowersox*, it unnecessarily injected overly broad language from New Jersey law to describe Pennsylvania's reasonable expectations doctrine.[318]

IV. CONCLUSIONS AND RECOMMENDATIONS

The United States Court of Appeals for the Third Circuit has faced a formidable task when applying Pennsylvania's reasonable expectations doctrine in diversity cases, in large part because the doctrine has undergone significant changes since being adopted by the Pennsylvania courts in 1974. Although the Third Circuit in *Bensalem Township* found it difficult to categorize those Pennsylvania decisions that applied the reasonable expectations doctrine and those which strictly applied *Standard Venetian Blind*, certain principles are constant and should be considered by the federal courts when applying this difficult area of Pennsylvania law.

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313. *See id.* at 279 (stating that "BTS could not have reasonably expected that the two-year clock was ticking").

314. *See id.* at 278-79.

315. *See id.* at 279 (citing *Murray v. United of Omaha Life Ins. Co.*, 145 F.3d 143, 154 (3d Cir. 1998)). In *Murray*, the court of appeals quoted from *Sparks v. St. Paul Insurance Co.*, that "[t]he interpretation of insurance contracts to accord with the reasonable expectations of the insured, regardless of the existence of any ambiguity in the policy, constitutes judicial recognition of the unique nature of contracts of insurance." 495 A.2d 406, 414 (N.J. 1985). In *Sparks*, the New Jersey Supreme Court held that an unambiguous "claims made" policy issued to a lawyer to cover malpractice claims, afforded no retroactive coverage during its initial year of issuance, did not accord with the objectively reasonable expectations of the purchasers of professional liability insurance and was violative of the public policy of New Jersey. *See id. Sparks* did not require any misrepresentations or omissions on the part of the insurer as a prerequisite to the recovery by the insured.

316. *Bowersox*, 209 F.3d at 279 (quoting *Murray*, 145 F.3d at 154).

317. For a further discussion of the limited application by Pennsylvania courts of the reasonable expectations doctrine, see *supra* notes 73-185 and accompanying text.

318. *See Bowersox*, 209 F.3d at 279 (citing New Jersey law).

First, although Pennsylvania appeared to enthusiastically endorse the reasonable expectations doctrine in *Collister*, as noted by the Third Circuit, it has since "pulled back" from this application of the doctrine.[319] What has emerged is a variation of the equitable estoppel doctrine that should be applied in "very limited circumstances," as suggested recently by the Pennsylvania Supreme Court.[320] This limited reasonable expectations doctrine can be summarized as follows: When the policy language is ambiguous, it must be construed in accordance with the insured's reasonable interpretation and there is no need to delve further into the reasonable expectations doctrine.[321] When the policy language is unambiguous, courts should presume, as the Third Circuit did in *Bensalem Township*, that in "most cases, the language of an insurance policy will provide the best indication of the content of the parties' reasonable expectations."[322] Courts should only deviate from the policy language if the insured can show that the language of the policy does not reflect the reasonable expectations of the insured because:

> The insurer has either passively or actively misled that insured as to the scope of coverage provided by the policy, or where the insurer has unilaterally made a change in the terms of coverage after the insured has agreed to purchase insurance without informing the insured of the change and its consequences.[323]

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319. *See* Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1310 (3d Cir. 1994) (citing *Standard Venetian Blind* for proposition that where coverage is clear, insured may not avoid consequences that they did not read).

320. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 109 n.8 (Pa. 1999) (declining to further expand on these limited circumstances).

321. *See, e.g.*, Worldwide Underwriters Ins. Co. v. Brady, 973 F.2d 192 (3d Cir. 1992) (using insured's reasonable interpretation avoided muddling Pennsylvania insurance coverage law with unnecessary exposition of reasonable expectations doctrine); Gamble Farm Ins., Inc. v. Selective Ins. Co., 656 A.2d 142 (Pa. Super. Ct. 1995) (same).

322. *Bensalem Township*, 38 F.3d at 1309.

323. Duff Supply Co. v. Crum & Forster Ins. Co., No. CIV.A.96-8481, 1997 WL 255483 at *12 (E.D. Pa. May 8, 1997) (Newcomer, J.). Several other judges in the Third Circuit have also suggested that Pennsylvania's reasonable expectations doctrine is essentially an estoppel principle applicable to insurance companies. *See, e.g.*, Nationwide Mut. Ins. Co. v. Reidler, No. CIV.A.99-4463, 2000 WL 424286, at *5 n.6 (E.D. Pa. Apr. 19, 2000) (Katz, J.) ("[T]here is both Third Circuit and Pennsylvania Supreme Court precedent suggesting the reasonable expectations doctrine should be applied in limited circumstances to protect individuals who are forced to rely on the oral representations of an insurance agent because of the document's complexity."); Reliance Ins. Co. v. VE Corp., No. CIV.A.95-538, 2000 WL 217511, at *9 (E.D. Pa. Feb. 10, 2000) (Scuderi, M.J.) ("The insurer will be equitably estopped from asserting an exclusionary clause in a renewal policy unless it meets its burden of proving that it both notified the insured and explained the significance of the change."); Britamco Underwriters, Inc. v. B & D Milmont Inn, Inc., No. CIV.A.95-CV-6039, 1996 WL 745297, at *3 (E.D. Pa. Dec. 23, 1996) (Kelly, J.) ("Two scenarios where the reasonable expectations of the insured are frustrated and the court will avoid an unambiguous exclusion in an insurance policy exist

Stated another way, if the insured has an expectation of coverage that is inconsistent with the language of the policy, this alone cannot defeat clear and unambiguous policy language unless the insurance company shares some blame for the erroneous expectation of coverage.[324] To the extent the Third Circuit in *West American, Medical Protective* and *Bowersox* suggested that an insured's reasonable expectation of coverage always should prevail over clear and ambiguous policy language, even when that expectation was not created by the insurer, that language should be rejected by the court as inconsistent with Pennsylvania law.

Second, Pennsylvania's reasonable expectations doctrine, although grounded in equitable estoppel, is a more relaxed standard for an insured to satisfy than the traditional equitable estoppel doctrine. Equitable estoppel applies "when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief" to his detriment.[325] Under Pennsylvania law, the party asserting estoppel must establish its application by "clear, precise and unequivocal evidence."[326] Pennsylvania's reasonable expectations doctrine does not require the insured to prove by such a high standard of proof that the insurer created a reasonable expectation of coverage. The cases seem to suggest that a preponderance of the evidence is all that is required.[327] Furthermore, given the nature of the insurance industry, the requirement of reliance is substantially lessened under the

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where 1) the insurer unilaterally changes the terms of a policy and does not make the insured aware of the change and 2) where the insured requests specific coverage that the insurer fails to provide."); Bensalem Township v. Coregis Indem. Co., CIV.A. No. 91-5315, 1995 WL 290438, at *7 (E.D. Pa. May 10, 1995) (Dalzell, J.) (stating that "[a]s the Third Circuit noted in *Bensalem Township*, underlying both *Collister* and *Tonkovic* are the more generic principles of estoppel"), *aff'd*, 77 F.2d 461 (3d Cir. 1996) (unpublished table decision); Gianchristoforo v. Mission Gas & Oil Prods., Inc., 776 F. Supp. 1037, 1041 (E.D. Pa. 1991) (Katz, J.) ("Pennsylvania law applies the doctrine of equitable estoppel to the construction of insurance policies where necessary to achieve fundamental fairness because the insurance public's reasonable expectations are the touchstone of contract interpretation, even if contrary to the policy's terms.").

324. *See* Minstretta v. Liberty Mut. Ins. Co., CIV.A. No. 87-5779, 1989 WL 97753, at *3 n.10 (E.D. Pa. Aug. 14, 1989) (suggesting that insured does not have to show intent to mislead on part of insurer). "An estoppel may arise even though there was no intent to mislead." *Id.*

325. Northwestern Nat'l Bank v. Commonwealth, 27 A.2d 20, 23 (Pa. 1942), *quoted in* Bearoff v. Bearoff Bros., Inc., 327 A.2d 72, 76 n.4 (Pa. 1974).

326. Chrysler Credit Corp. v. First Nat'l Bank & Trust Co., 746 F.2d 200, 206 (3d Cir. 1984); *accord* Continental Ins. Co. v. Alperin, Inc., No. CIV.A.97-1008, 1998 WL 212767, at *8 (E.D. Pa. Apr. 29, 1998) (discussing elements of equitable estoppel); Novelty Knitting Mills, Inc. v. Siskind, 457 A.2d 502, 504 (Pa. 1983) (same).

327. *Cf.* Medical Protective Co. v. Watkins, 198 F.3d 100, 106 (3d Cir. 1999) (suggesting that based upon questions in application for insurance and deposition testimony of insured, jury could find that insured reasonably believed he was covered under policy).

reasonable expectations doctrine.[328] Pennsylvania courts have recognized that because of the nature of insurance policies, insureds are not expected to read them and may reasonably rely upon the representations and summaries of insurance companies and their agents as to the scope of coverage.[329]

Finally, federal courts should be hesitant to expand the reasonable expectations doctrine beyond the estoppel principles just described. Only two members of the Pennsylvania Supreme Court who participated in the *Tonkovic* decision presently sit on the court. These two justices, Chief Justice Flaherty and Justice Zappala, both dissented in *Tonkovic.* No other member of the present supreme court has joined an opinion of that court endorsing the reasonable expectations doctrine. Furthermore, a majority of the court in *Madison Construction* recently expressed their reluctance to expand the doctrine beyond the unique facts of *Collister* and *Tonkovic.*[330] Therefore, although we cannot confirm the accuracy of the superior court's statement made in 1995 that the reasonable expectations doctrine "does not command a majority of our Supreme Court," it appears clear that the state's highest court will apply the doctrine only as an equitable estoppel principle, modified to address the unique relationship between an insurer and an insured.[331]

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328. *See, e.g.,* Rempel v. Nationwide Life Ins. Co., 370 A.2d 366, 369-70 (Pa. 1977) (discussing insurance industry).

329. *See, e.g., id.* at 368-70 (discussing facts of case and analysis of decision). The United States Court of Appeals for the Third Circuit, construing New Jersey's reasonable expectations doctrine, has suggested that "[t]he doctrine differs from estoppel in that it does not require proof of reliance; rather, courts examine contractual language from the point of view of 'the average member of the public.'" Van Orman v. American Ins. Co., 680 F.2d 301, 308 (3d Cir. 1982) (quoting *Kievit v. Loyal Protective Life Ins. Co.,* 170 A.2d 22, 26 (N.J. 1961)). The Third Circuit in *Reliance,* construing Pennsylvania law, held the reasonable expectations doctrine applies to sophisticated insureds, but suggested that reliance is still a consideration since it held that the level of sophistication of the insured is relevant to determine the reasonableness of the insured's expectation of coverage. *See* Reliance Ins. Co. v. Moessner, 121 F.3d 895, 905 (3d. Cir. 1997) (stating standard required for sophisticated insured). If an insured's expectation of coverage is based upon misrepresentations of coverage, a sophisticated insured would still be required to show that it relied on the representations and that it was reasonable to do so. *See id.* at 906 (noting that "it would deem the insured's status to be a factor considered when resolving whether the insured acted reasonably in expecting a given claim to be covered").

330. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 109 n.8 (Pa. 1999) (limiting reasonable expectations doctrine).

331. *See, e.g.,* Gamble Farms Ins., Inc. v. Selective Ins. Co., 656 A.2d 142, 144 (Pa. Super. Ct. 1995) (discussing manner in which ambiguities are resolved between insured and insurer).