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I. INTRODUCTION

Courts and commentators have frequently cited a long list of the special risks shared by insured parties in today’s insurance industry. Insurance form contracts are contracts of adhesion, prepared by the insurance company and offered to the insured on a take-it-or-leave-it basis, giving the insurer a special opportunity for “overreaching” in drafting the contract. These contracts are typically lengthy, written in fine print, and difficult to understand, especially since established contract law mandates courts construe policy language in light of the whole contract, regardless of the placement of policy provisions. It is well accepted that insured parties neither understand their insurance policies, nor are they reasonably expected to read them. Most only worry about the few terms that are actually negotiated, such as the general coverage the policy purports to offer, the cost, and the policy limits. Notwithstanding these realities, the traditional law of contracts assumes the fiction that the insured has read the contract, understood it, and has assented to its terms.

To protect insured parties against the potential overreaching of insurance companies in drafting insurance contracts, courts have long applied equitable doctrines, which may at times grant an insured party rights that are at variance with the policy provisions. The especially prevalent application of equitable doctrines in insurance contract settings resulted in criti-
cism that courts were straining some doctrines beyond their justifiable limits to reach results in favor of insured persons. However, Professor (now United States District Judge) Robert E. Keeton, in a series of law review articles, argued there were "compelling currents of principle" among these seemingly deviant insurance law decisions. One such principle advanced by Professor Keeton was that courts would honor the "objectively reasonable expectations" of insured persons, even where these expectations were at variance with the policy provisions.

This early statement of what Professor Keeton recognized as an emerging principle has since evolved into a doctrine of law which a majority of courts who have considered its adoption have accepted. The Utah Supreme Court, however, rejected the application of the reasonable expectations doctrine by a closely divided decision in *Allen v. Prudential Property & Casualty Insurance Co.* Rather than accept the reasonable expectations doctrine, the majority of the court instead decided to proceed "interstitially" by relying on common law equitable doctrines which had "yet to be fully developed in Utah" to protect the insured party against overreaching insurers.

The purpose of this comment is to first evaluate the *Allen* court's reasoning and then the effectiveness of the court's "interstitial" approach in light of recent Utah appellate court case law. Part II will begin by providing a brief history of the development and general acceptance of the reasonable expectations doctrine. Part III will provide an overview of *Allen v. Prudential Property & Casualty Co.* and the opinions of the divided court which resulted in the rejection of the reasonable expectations doctrine. Part IV then analyzes the majority's reasoning leading to the rejection of the doctrine, and thereafter analyzes the effectiveness of the *Allen* majority's "interstitial" approach by briefly surveying appellate decisions applying this approach. Finally, Part V concludes the Utah Supreme Court should abandon *Allen*'s interstitial approach in favor of fully adopting the reason-

7. See *id.* at 961.
10. For a recent survey of jurisdictions who have considered the reasonable expectations doctrine, see *Max True Plastering Co. v. United States Fidelity & Guar. Co.*, 912 P.2d 861 (Okla. 1996), which noted that at the time of the court's decision to adopt the reasonable expectations doctrine, thirty six jurisdictions had considered its application, with only four courts (including Utah) clearly rejecting the doctrine. See *infra* note 29.
11. 839 P.2d 798 (Utah 1992) (rejecting the reasonable expectations doctrine by a three-two decision) (Stewart, J., concurring) (concurring in the result but dissenting in the rejection of the reasonable expectations doctrine) (Durham, J., dissenting).
12. *Id.* at 806. The court cited estoppel, waiver, unconscionability, the duty of good faith and fair dealing, the doctrine of construing ambiguities against the drafter, and tort remedies such as fraud, negligent misrepresentation, and the breach of fiduciary duty as doctrines which could provide adequate protection to the insured. *Id.* at 805-06 & n.16.
able expectations doctrine in Utah as set forth by the Arizona Supreme Court.

II. THE HISTORY AND DEVELOPMENT OF THE REASONABLE EXPECTATIONS DOCTRINE

A. Origins and Nature of the Reasonable Expectations Doctrine

In a broad survey of case law recognizing insurance law rights of insured parties which were at variance with policy provisions, Professor Keeton offered two broad, overarching principles as an explanation for "what might otherwise appear to be deviant decisions."13 The first principle was that courts will deny the insurer an unconscionable advantage in an insurance transaction, in spite of the informed consent of the insured.14 The second principle, which Professor Keeton recognized as an emerging principle which arose in insurance contexts "with distinctive frequency," was that "the reasonable expectations of applicants and intended beneficiaries will be honored."15 Professor Keeton described the reasonable expectations principle16 in the following way: "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."17 Professor Keeton argued this second principle explained the reasoning for many decisions which were otherwise unjustified deviations of similar equitable principles, most notably the principle of construing ambiguities against the drafter.18

Professor Keeton's review of court decisions and description of how the reasonable expectations principle should be applied demonstrates that the primary concern of the reasonable expectations principle is objective fairness to both parties.19 Thus, Professor Keeton's statement of the general principle does not offer an exhaustive "bright line" rule; rather, his analysis shows that the applicability of the reasonable expectations princi-

13. Keeton, supra note 1, at 961.
14. See id. at 963.
15. Id. at 961-62. Professor Keeton has been credited as the first to recognize the emergence of this principle by viewing cases involving disparate subject matters. See, e.g., Henderson, supra note 3, at 825.
16. See infra Part II.B. for a discussion on the evolution of the reasonable expectations "principle" into a "doctrine."
17. Keeton, supra note 1, at 967.
18. See id. at 972. While these equitable doctrines are similar to the reasonable expectations principle, Professor Keeton argued the reasonable expectations principle was broader in scope. See also id. at 967.
19. See id. at 966-77.
ple should be determined on a case-by-case basis with a careful analysis of each factual situation. 20

For example, Professor Keeton explained that although courts will honor an insured's reasonable expectation even though a "painstaking study" of the contract would negate that expectation, whether the insured "sufficiently examined the policy" is still a factor in the "objectively reasonable" analysis. 21 The structure and nature of the insurance contract's provisions must, therefore, be considered when determining whether an insured's expectation is objectively reasonable. 22 Professor Keeton argued this objectively reasonable standard "produces an essential degree of certainty and predictability about legal rights, as well as a method of achieving equity not only between insurer and insured but also among different insureds whose contributions through premiums create the funds that are tapped to pay judgments against insurers." 23

However, Professor Keeton also argued that where policy language is inconsistent with the objectively reasonable expectations of a person having "an ordinary degree of familiarity with the type of coverage involved," or where a clause is "fundamentally unconscionable because it misleads the great majority of policyholders," the reasonable expectations principle should apply even if the provisions were "very explicit and unambiguous." 24 Thus, while the insurer is not denied the right to limit the coverage of the policy, this right is qualified by the limits of reasonableness and unconscionability. 25 Accordingly, Professor Keeton demonstrated a flexible analysis to achieve the overriding concern of fairness to the parties under the facts of a given case. This analysis in fact foreshadows the principles of the reasonable expectations doctrine which would later emerge in court decisions, which is best modeled by the RESTATEMENT (SECOND) OF CONTRACTS, § 211. 26

Finally, Professor Keeton also demonstrated that by explicitly recognizing the reasonable expectations principle, courts could avoid distorting other equitable principles to reach a fair result. 27 Accordingly, he argued that by openly recognizing this principle as a guide to future decisions, courts could provide more security for the insurance industry since the in-

20. See Keeton, Rights at Variance: Part Two, supra note 8, at 1320.
21. Keeton, supra note 1, at 967. Factors relevant in this analysis include the length of the contract, its complexity, and whether the insured receives the policy provisions long after paying the premiums and after the policy has been issued. See id. at 968.
22. See id. at 967-68.
23. Id. at 968.
24. Id. at 968-69.
25. See id.
26. See infra Part II.B. for a discussion of the evolution of the reasonable expectations doctrine and section 211 of the RESTATEMENT (SECOND) OF CONTRACTS.
27. See Keeton, supra note 1, at 966-74.
tegrity of other equitable doctrines, such as waiver, estoppel, and the rule that ambiguities are to be construed against the drafter, would not be stretched beyond the breaking point to avoid an unfair result. 28

B. General Acceptance of the Reasonable Expectations Doctrine

Since Professor Keeton's early recognition of the reasonable expectations principle, the vast majority of courts who have considered its application to insurance contracts have adopted it in some form. 29 The basic principle of honoring the reasonable expectations of the non drafting party has also been adopted by the American Law Institute in section 211 of the RESTATEMENT (SECOND) OF CONTRACTS, 30 which has been considered a key factor in the acceptance of the doctrine. 31 More importantly, the current draft of Revised Article 2 of the UNIFORM COMMERCIAL CODE includes what is arguably an expansive version of the reasonable expectations doctrine which would be applicable to all consumer contracts, 32 making wide

28. See Keeton, Rights at Variance: Part Two, supra note 8, at 1322.

29. For a fifty state survey of the acceptance of the reasonable expectations doctrine as of 1990, see Henderson, supra note 3. See also Max True Plastering Co. v. United States Fidelity & Guar. Co., 912 P.2d 861 (Okla. 1996) (concluding prior to adopting the reasonable expectations doctrine that of the thirty six jurisdictions which have considered the application of the reasonable expectations doctrine, only four courts (including Utah) have rejected its adoption). Although some commentators have noted the acceptance of the doctrine is nothing more than a restatement of the principle that ambiguities are construed against the drafter, see Henderson, supra note 3, at 826-27, it is significant to note for the purpose of this comment the small number of outright rejections of the doctrine noted in Max True Plastering Co. Moreover, while the court in Max True Plastering Co. cited Illinois as one of the four states which had rejected the reasonable expectations doctrine, see 912 P.2d at 864 n.6, it is meaningful to note that recent Illinois case law suggests this conclusion is at least open to question. See, e.g., Stone Container Corp. v. Hartford Steam Boiler Inspection Co., 936 F. Supp. 487, 501 n.13 (N.D. Ill. 1996) (concluding the Illinois Supreme Court would “likely” hold the reasonable expectations doctrine applicable in Illinois in light of recent case law holding the court may consider the policyholder’s “reasonable expectations” in determining when coverage is appropriate).

30. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979). Section 211 provides as follows:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

Id.

31. See Henderson, supra note 3, at 11, 15.

spread legislative adoption of the reasonable expectations doctrine probable in the future.

Many courts who have adopted the reasonable expectations doctrine have done so because of the inadequacies of other equitable doctrines normally applied to form contracts, which are seen as failing to account for the realities of the modern insurance industry. Commentators have also noted there is no “true” assent to the boilerplate terms of form contracts, and have therefore recommended applying the reasonable expectations doctrine as an objective method of finding the true intent of the parties. Since the object is to discover the parties’ true intent, it “does not automatically favor either the drafter or the consumer, but attempts to give both parties full freedom of contract together.” While the doctrine has received some criticism from camps relying on an economic analysis, a majority of the commentary has been favorable.

(a) In a consumer contract, if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record.

(b) Before deciding whether to exclude a term under subsection (a), the court, on motion of a party or its own motion, shall afford the parties a reasonable and expeditious opportunity to present evidence on whether the term should be included or excluded from the contract. The court may exclude a term under this section only if it finds that the term is bizarre or oppressive [harsh or “one-sided”] by industry standards or commercial practices, abrogates or substantially conflicts with other negotiated terms, or conflicts with other consumer protection laws.

(c) This section shall not operate to exclude an otherwise enforceable term disclosing or modifying an implied warranty.

Alternative B

(a) In a consumer contract, a consumer adopts the terms of a record by manifesting assent to the record after having an opportunity to review. However, a term does not become part of the contract if it is unconscionable or conflicts with any negotiated term of the agreement between the parties.

(b) This section shall not operate to exclude an otherwise enforceable term disclosing or modifying an implied warranty.

Id.

33. See, e.g., Max True Plastering Co., 912 P.2d at 865.
34. See, e.g., Henderson, supra note 3, at 8.
35. See Max True Plastering Co., 912 P.2d at 865.
36. Meyerson, supra note 3, at 1266 (emphasis added).
37. See generally James J. White, Form Contracts Under Revised Article 2, 75 WASH. U. L.Q. 315 (1997) for a discussion criticizing the application of the reasonable expectations doctrine to consumer contracts. See also Stephen J. Ware, Comment, A Critique of the Reasonable Expectations Doctrine, 56 U. CHI. L. REV. 1461 (1989). However, the reach of the reasonable expectations doctrine has not been as far as critics have predicted, and generally has been applied in a conservative manner. See Henderson, supra note 3, at 841.
Of the courts\textsuperscript{38} who have rejected the adoption of the reasonable expectations doctrine, some have done so out of concern that the "periphery of what losses would be covered" would be expanded too far through the insured's assertions of what he "reasonably expected."\textsuperscript{39} Some of these courts have also expressed concern that the doctrine calls for the judicial rewriting of insurance contracts, which is criticized as impermissible judicial activism.\textsuperscript{40} Other courts have noted resistance to the doctrine for fear of increasing uncertainty in the insurance industry and spawning additional litigation.\textsuperscript{41} Finally, some of these courts have reasoned that the protection offered by the rule is not necessary in light of the rule construing ambiguities in favor of the insured.\textsuperscript{42}

Many versions of the reasonable expectations doctrine have developed since Professor Keeton's early recognition of the principle, which has resulted in some confusion (and criticism) about the scope of the doctrine.\textsuperscript{43} As Roger C. Henderson explained in his twenty-year overview of the reasonable expectations doctrine, some confusion is inevitable in the evolution of the early recognition of a "principle" into a full-blown doctrine, or a "body of law from which particular cases can be readily resolved."\textsuperscript{44} Some uncertainty of the doctrine has therefore been inevitable in the case-by-case evolution of the reasonable expectations doctrine. However, the nature and scope of the doctrine will become increasingly clear, as other equitable doctrines have done in the past, and "one may predict with con-
siderable confidence that... any confusion over the nature of the doctrine itself will rapidly dissipate.45

III. THE REASONABLE EXPECTATIONS DOCTRINE IN UTAH

A. Early Indications of Acceptance

The case law prior to Allen indicated a general acceptance by Utah Courts of the principles underlying the reasonable expectations doctrine. Some of the early Utah Supreme Court cases regarding binding receipts in life insurance contracts, for example, showed a willingness of the court to grant the intended beneficiaries of insurance contracts rights at variance with express policy provisions, without regard to the equitable doctrine of construing ambiguities against the drafter.46 An early case on the ambiguity doctrine also showed an example of the court stretching to find the word “theft” ambiguous in order to give effect to the “reasonable expectations of an ordinary business man.”47 Significantly, case law regarding life insurance binding receipts and the stretching of the ambiguity doctrine were two areas where Professor Keeton first recognized the principle of honoring reasonable expectations at variance with policy provisions.48 Finally, it is also significant to note that Justice Zimmerman, the author of Allen, authored an opinion which relied on the principle of recognizing the “reasonable expectations” of the insured to determine the foreseeability of damages in insurance bad faith actions.49

The most formal pronouncements of recognition of the reasonable expectations doctrine came first from the Utah Supreme Court in Farmers Insurance Exchange v. Call, where the court held the failure to disclose household exclusions in an automobile liability policy invalidated the ex-

45. Id.
46. See, e.g., Long v. United Benefit Life Ins. Co., 507 P.2d 375 (Utah 1973) (holding that temporary insurance created by binding receipt notwithstanding express language in the receipt to the contrary); Prince v. Western Empire Life Ins. Co., 428 P.2d 163 (Utah 1967) (holding a contract for insurance was created where insured complied with all requirements on binding receipt and insurer delayed in approval process, notwithstanding express language to the contrary on binding receipt; no ambiguity discussed or relied upon in decision).
47. P.E. Ashton Co. v. Joyner, 406 P.2d 306, 307 (Utah 1965) (quoting National Fire Ins. Co. of Hartford v. Slayden, 85 So. 2d 916, 917 (Miss. 1956)). While the court did not discuss precisely how the term “theft” was ambiguous, the court stated:

This court is committed to the policy that, in case of ambiguity, uncertainty, or doubt, the terms of an insurance contract will be construed strictly against the insurer and in favor of the insured, and that the insured is entitled to the broadest protection that he could reasonably believe the commonly understood meaning afforded him.

P.E. Ashton Co., 406 P.2d. at 308 (emphasis added). The court thereafter gave the word “theft” a definition which included the unauthorized taking of the insured’s vehicle by his thirteen year old son, thereby granting the insured coverage under the theft provision of the policy. Id.
48. See Keeton, supra note 1, at 970-71 & n.17.
elusions because the failure to notify "fails to 'honor the reasonable expec-
tations' of the purchaser."50 The reasonable expectations doctrine was
again addressed in State Farm Mutual Automobile Insurance Co. v.
Mastbaum, although only by Justice Durham in her dissenting opinion.51
It was not until the Utah Court of Appeals' decision in Wagner v. Farmers
Insurance Exchange that the doctrine received any in depth discussion.52
In Wagner, the court concluded the following factors should be considered
when determining whether the reasonable expectations of an insured
should be honored: "first, whether the insurer knew or should have known
of the insured's expectations; second, whether the insurer created or
helped to create these expectations; and third, whether the insured's expec-
tations are reasonable."53

B. Allen v. Prudential Property & Casualty Insurance Co.: The Rejection
of the Reasonable Expectations Doctrine

Whether the doctrine of reasonable expectations doctrine should be
formally recognized in Utah was not fully discussed by the Utah Supreme
Court until Allen v. Prudential Property & Casualty Insurance Co.54 The
following analysis will outline the facts of Allen, and will then summarize
the reasoning of the majority, concurring, and dissenting opinions.

1. Facts

Blaketta Allen and her husband purchased a homeowner's insurance
policy from Prudential Property and Casualty Insurance Company ("Pruden-
tial") in 1981.55 This policy contained a "household exclusion" in an
attached endorsement, which excluded from coverage members of the
Allens' household.56 The Prudential agent who sold the policy did not
mention the existence of the household exclusion; however, he did inform
Mr. Allen that the policy provisions would be mailed to him and advised
Mr. Allen to review the policy when he received it.57 While the policy,
with the attached endorsement containing the household exclusion, was
received two months after meeting with the agent, neither of the Allens
read the endorsement.58 A year later, upon purchasing a trampoline, Mr.

50. 712 P.2d 231, 237 (Utah 1985) (quoting Transamerica Ins. Co. v. Royle, 656 P.2d 820,
824 (Mont. 1983)).
53. Id. at 766.
55. See id. at 799.
56. Id.
57. See id.
58. See id.
Allen met with an agent of Prudential to increase the policy coverage. Mr. Allen testified in depositions that he informed the Prudential agent his reason for increasing coverage was "to make sure anyone who got hurt on the trampoline would be covered."

After the policy coverage was increased, the Allens' two year old son was injured when Mrs. Allen spilled a pot of boiling water on him. Mr. Allen contacted the Prudential agent to seek recovery against the policy, and was then orally informed for the first time of the household exclusion. Prudential denied coverage based on the exclusion, after which Mrs. Allen filed a declaratory judgment action seeking to invalidate the household exclusion because it violated her reasonable expectations. Prudential moved for summary judgment, arguing the policy was unambiguous and did not violate public policy. Prudential's motion was granted by the district court. Allen then appealed to the Utah Supreme Court, where the court affirmed the district court's ruling on summary judgment.

2. Reasoning

In affirming the district court's grant of summary judgment, the majority took occasion to evaluate the merits of the reasonable expectations doctrine. The majority first gave a brief overview of the development of the reasonable expectations doctrine, as well as a brief overview of the uncertainty that has surrounded the doctrine. The court then analyzed what it felt were three formulations of the doctrine advanced by Allen, and thereafter rejected the application of the reasonable expectations doctrine in Utah.

Two of the "versions" of the reasonable expectations doctrine advanced by Allen were disposed of in a summary fashion by the court.

59. See id. at 803.
60. Id. at 809.
61. See id. at 799.
62. See id. at 799-800.
63. See id. at 800.
64. See id.
65. See id. at 807. The court was divided by a three-two split on the issue of whether Utah should formally adopt the reasonable expectations doctrine, with Justice Stewart concurring only in the result but dissenting in the rejection of the reasonable expectations doctrine, and Justice Durham dissenting. See infra Parts III.B.3., 4.
66. See id. at 801-03. The majority mainly relied on a brief survey of the New Jersey and Iowa Supreme Courts for its conclusions as to the uncertainty of the doctrine. See id. at 802. See supra Part II.B. for a discussion on the development of the reasonable expectations doctrine.
67. Prior to the majority's analysis, the court explicitly assumed Allen had raised a factual issue as to whether her expectations for coverage were reasonable. Id. at 801. Justice Stewart expressly disagreed with the majority's assumption as unfounded in fact. See id. at 808 (Stewart, J. dissenting).
68. The Allen majority referred to Allen's arguments as advancing three separate theories, or "versions" of the reasonable expectations doctrine, and then proceeded to analyze each separate
The first version the court addressed was Allen’s argument that Prudential’s homeowners policy was an adhesion contract, and consequently “the court should have enforced her allegedly reasonable expectations as a matter of course.” 69 The court stated that this reason, by itself, was not enough to enforce an insured’s reasonable expectations, noting that it knew of no authority to “take[] such an expansive view of the reasonable expectations doctrine.” 70

The third argument advanced by Allen was that the household exclusion provision was ambiguous. 71 The majority noted “[a]lthough [Allen’s] brief is unclear as to the consequences of the alleged ambiguity, we assume that she wants the court to find that the exclusion is ambiguous and therefore enforce her reasonable expectations.” 72 With this assumption, the court then held this argument was similar to the version of the reasonable expectations doctrine recognized in several states which requires a finding of an ambiguity before courts will enforce the reasonable expectations of an insured party. 73 While the court noted its doubts about whether this version of the doctrine differed from the rule that ambiguities are construed against the drafter, the court held there was no occasion to consider this issue, since “the disputed exclusion is not ambiguous.” 74

Only during the discussion of Allen’s “second version of the reasonable expectations doctrine” did the majority fully discuss the propriety of adopting the reasonable expectations doctrine in Utah. 75 Allen argued the Utah Supreme Court should adopt the Utah Court of Appeals’ formulation of reasonable expectations doctrine as set forth in Wagner v. Farmer’s Insurance Exchange. 76 Although the majority noted Allen’s arguments of how she satisfied the three elements of the Wagner formula of the reasonable expectations doctrine, 77 the court did not analyze or discuss the merits of the Wagner formula. 78 Rather, the court focused more on whether ac-

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69. Id. at 803.
70. Id.
71. See id. at 807.
72. Id.
73. See id. See also supra note 18 and accompanying text for a discussion of the difference between the reasonable expectations doctrine and the rule that ambiguities are construed against the drafter.
74. Id. at 807.
75. Id. at 803-07.
76. 786 P.2d 763 (Utah Ct. App. 1990). For a discussion of Wagner and the Court of Appeals’ formulation of the reasonable expectations doctrine, see supra Part III.A.
77. Allen, 839 P.2d at 803-07.
78. Justice Stewart, in his concurrence, criticized the majority opinion for rejecting the reasonable expectations doctrine without defining the doctrine except only in the most general terms, “leaving the reader with the impression that the reasonable expectations doctrine would allow courts to engage in wholesale rewriting of insurance policies simply because an insured expected coverage.” Id. at 810 (Stewart, J., concurring).
cepting the reasonable expectations doctrine was permissible under Utah's law governing the insurance industry.

The court began by finding "legislative and executive...occupation" of the field of the insurance industry in Utah's insurance code. The court noted the Code establishes an "Insurance Department" headed by a Commissioner, and that "[p]reprinted policies for household insurance" such as Prudential's must under the code be filed with the Commissioner. The majority then noted that under the insurance code, the Commissioner "may disapprove a preprinted policy at any time if it is found to be 'inequitable, unfairly discriminatory, misleading, deceptive, obscure or encourages misrepresentation." Based on this procedure, the court held "the validity of preprinted insurance contracts is premised on executive approval, a regulatory mechanism that the Wagner version of the reasonable expectations doctrine would largely undermine."

To buttress the conclusion of legislative and executive deference, the majority reviewed prior case law on the issue of upholding the validity of insurance policy provisions. The majority concluded these cases showed the court's "tradition of deferring to the legislature on questions of general policy when considering the validity of insurance policies," and an "unwillingness [of the court] to alter fundamentally the terms of insurance policies in the absence of legislative direction." The majority also concluded these cases demonstrated an "uneasiness of the majority of this court with the notion of a reasonable expectations doctrine."

In spite of the above analysis, the majority also stated: "[n]otwithstanding our deference to legislative policy in this area, we necessarily retain authority to invalidate insurance provisions that are found contrary to public policy as expressed in the common law of contracts that has not been preempted by legislative enactment." The majority noted

79. Id. at 804; see generally UTAH CODE ANN. § 31A-1-101 to -29-123 (1991) for the 1991 provisions of the code which were relied upon by the majority (current version at § 31A-2-101 to -34-111 (1994 & Supp. 1997)).
80. Allen, 839 P.2d at 804.
81. Id. (quoting UTAH CODE ANN. § 31A-21-201(2)(a)(I) (1991)) (current version at § 31A-21-201(2)(a)(I) (1994)).
82. Allen, 839 P.2d at 804.
83. See id. at 804-05. The court cited three decisions in support of this proposition: General Motors Acceptance Corp. v. Martinez, 668 F.2d 498 (Utah 1983) (invalidating an exclusion due to the insured's failure to deliver the policy); Farmers Insurance Exchange v. Call, 712 P.2d 231 (Utah 1985) (invalidating exclusions, but properly only to the extent the exclusion contradicted policy; portion of case relying on reasonable expectations argument dismissed as erroneous by the Allen majority); and State Farm Mutual Automobile Insurance Co. v. Mastbaum, 748 P.2d 1042 (Utah 1987) (invalidating a household exclusion based on its inconsistency with statute).
84. Allen, 839 P.2d at 804.
85. Id. at 805.
86. Id.
87. Id.
that while the reasonable expectations doctrine has been advanced because of "the supposed inadequacy of the existing equitable doctrines available to courts confronted with overreaching insurers[,] ... no such inadequacy has been shown to exist in Utah." The majority reasoned that since Utah "has yet to address and develop fully any of the existing equitable doctrines available to an aggrieved insured," there was not yet any theoretical inadequacy of these equitable doctrines to protect insured parties. The majority mentioned the doctrines of "estoppel, waiver, unconscionability, breach of the implied duty of good faith and fair dealing, and the rule that ambiguous language is to be resolved against the drafter," as well as tort remedies which "may be available to an aggrieved insured under appropriate circumstances," as possible doctrines which could provide adequate protection.

Finally, the majority relied on notions of freedom of contract for its decision to reject the reasonable expectations doctrine, which the majority found to be expressed in the "legislative policy underlying the insurance code." The majority reasoned "our decision today to proceed interstitially with existing equitable doctrines rather than to adopt a new doctrine with unknown ramifications is consistent with [this] legislative policy."

3. Justice Stewart’s concurring opinion

In his concurring opinion, Justice Stewart concurred only in the "conclusion that the household exclusion contained in plaintiff’s homeowner’s insurance policy is valid." He refused, however, to adopt what he characterized as "the majority’s wholesale disavowal of the reasonable expectations doctrine," which he argued was "dicta and not binding in any other case." He did, however, respond to the court’s "dicta" rejecting the reasonable expectations doctrine, arguing that the future adoption of the reasonable expectations doctrine may be "essential to reach a fair result" in cases where existing equitable doctrines are inapplicable. Justice Stewart also took issue with the court’s argument that the reasonable expectations doctrine interfered with the freedom of contract, arguing that the doctrine

88. Id.
89. Id. at 806 (emphasis added).
90. Id. at 805-06 (footnotes omitted).
91. Id. at 806 n.16 (mentioning fraud, negligent misrepresentation, and breach of fiduciary duty as potentially available tort remedies to an aggrieved insured).
92. Id. at 806(citing UTAH CODE ANN. § 31A-1-102(7) (1991)).
93. Allen, 839 P.2d at 806.
94. Id. at 807 (Stewart, J., concurring).
95. Id. at 807-08.
96. Id. at 810-11. In support of this argument, Justice Stewart cited Tonkovic v. State Farm Mutual Automobile Insurance Co., 521 A.2d 920 (Pa. 1987), where an insured received different coverage than requested, as an example of a situation where none of the equitable doctrines cited by the majority would apply. Allen, 839 P.2d at 811.
"does not interfere with the freedom of contract, but merely ensures that the parties’ intent be effectuated." 97 Finally, Justice Stewart disagreed with the majority’s position that the legislative and executive role in the insurance industry precluded acceptance of the reasonable expectations doctrine, as well as the majority’s argument that adopting the doctrine conflicted with past decisions. 98 Instead, Justice Stewart argued the reasonable expectations doctrine is consistent with the statutory policy of ensuring all parties are treated fairly and equitably. 99

In his analysis of the facts of this case, Justice Stewart concluded Allen had failed to establish any “objective basis to show her expectation was reasonable,” and he therefore took issue with the majority’s assumption that this expectation was reasonable to reach the issue of the validity of the reasonable expectations doctrine. 100 Accordingly, Justice Stewart would have affirmed the district court’s grant of summary judgment, but would have saved the issue of whether Utah should adopt the reasonable expectations doctrine for another day.

4. Justice Durham’s dissenting opinion

In contrast with Justice Stewart, Justice Durham would have taken the opportunity to “hold that the doctrine of reasonable expectations as applied to insurance contracts is viable in Utah.” 101 However, her arguments against the majority’s rejection of the reasonable expectations doctrine were similar to those of Justice Stewart. Justice Durham argued the majority’s reliance on freedom of contract principles was “anachronistic and unrealistic,” and that the majority erred in its view that the legislative and executive branches had occupied the field of insurance regulation in such a way as to render “court development of applicable contract principles illegitimate.” 102 Justice Durham noted that “the majority of . . . scholarly commentary on the doctrine of reasonable expectations is favorable,” 103 and proceeded to argue that societal changes and the special risks to the insured in the insurance industry warranted the application of the reasonable expectations doctrine. 104 Consequently, Justice Durham would have adopted a detailed version of the reasonable expectations doctrine advanced by Professor Mark C. Rahdert, which seeks to balance the rights of the parties by subjecting “policy provision[s] that arbitrarily serve[s] the

97. 839 P.2d at 809.
98. See id. at 811-12.
99. See id. at 812 (citing UTAH CODE ANN. § 31A-1-102(2) (1991)).
100. Allen, 839 P.2d at 808 (emphasis added).
101. Id. at 812 (Durham, J., dissenting).
102. Id.
103. Id. at 813.
104. See id. at 813-16.
insurer's interest without furthering a legitimate underwriting purpose” to close scrutiny.105

IV. ANALYSIS OF THE REASONING OF ALLEN AND THE APPLICATION OF THE INTERSTITIAL APPROACH

Part A of this analysis examines the reasoning of the Allen majority’s decision to reject the reasonable expectations doctrine and concludes the majority failed to consider the most recent statutory changes of the Insurance Code, failed to consider the Rules of the Utah Insurance Commissioner, was inconsistent in its reasoning, and failed to give adequate consideration for the policy of the Insurance Code to “ensure that policy holders, claimants, and insurers are treated fairly and equitably.”106 Part B then examines whether the Allen majority reached its stated goal of providing the insured adequate protection through the interstitial approach by reviewing the effects of Allen in recent Utah appellate court decisions.

A. Basis for Rejecting the Reasonable Expectations Doctrine

In rejecting the reasonable expectations doctrine, the majority relied primarily on three propositions: first, the reasonable expectations doctrine constitutes improper judicial intrusion on the executive and legislative branches; second, notwithstanding the executive and legislative branches’ occupation of the field of insurance law, the court has authority to review and invalidate provisions using “traditional equitable principles;” and third, the reasonable expectations doctrine impermissibly impinges on the legislative policy of maintaining the freedom of contract. Each of these propositions will be discussed in turn.

1. Improper judicial intrusion on the executive and legislative branches

The majority found evidence of the “legislative and executive branches’ occupation of this field” from the fact that the Utah Code creates an Insurance Department and section 31A-21-201 requires the filing of all preprinted policies with the Department.107 More specifically, it appears the majority relied primarily on the authority of the Commissioner of the Insurance Department to disapprove a preprinted policy under section 31A-21-201 of the Code to conclude that preprinted insurance policies

105. Id. at 816-17 (citing Mark C. Rahdert, Reasonable Expectations Reconsidered, 18 CONN. L. REV. 323, 374-92 (1986)).
receive "executive approval." This finding of executive approval of insurance forms enabled the majority to infer that the reasonable expectations doctrine would improperly intrude upon the providence of the executive branch, the Commissioner, or the legislative branch, who established this procedure.

The majority's finding of "approval" of these forms from the filing requirement of section 31A-21-201 is erroneous for two reasons. First, the conclusion is not supported by the statute itself. This section of the Code provides a mechanism whereby the insurance Commissioner "may" disapprove of a given policy if it is found to be "inequitable, unfairly discriminatory, misleading, deceptive, obscure or encourages misrepresentation." This language indicates the exercise of the Commissioner's power to disapprove preprinted policies is discretionary. Accordingly, the Commissioner may also decline to disapprove a preprinted policy, even if the Commissioner found the policy to be inequitable, unfairly discriminatory, misleading, deceptive, obscure, or encouraging misrepresentation. The discretionary nature of the exercise of the Commissioner's power in this statute suggests further review of the courts is appropriate.

Moreover, the statute further states this discretionary power may be exercised "at any time," which also suggests the discretionary powers of the Commissioner in disapproving preprinted forms may be exercised long after the policy has been in effect. This further suggests the Commissioner's review of preprinted policies is an ongoing process, rather than a one time affair. In contrast, the majority assumes that the Commissioner has approved of all preprinted forms in use, thereby making judicial review of these terms an inappropriate intrusion on the executive branch. Since the statutory language suggests that the Commissioner's review may take place after the policy has been in effect, judicial review once again seems appropriate.

Significantly, at the time of the Allen decision, which was dated June 22, 1992, the 1992 amendment to section 31A-21-201 was effective. However, the majority cited to the 1991 version of this statute. The 1992 amendments explicitly set forth two instances where preapproval of preprinted forms may be required, as opposed to all other forms where

109. See id.
111. Id.
112. See Allen, 839 P.2d at 804.
113. Id at 798.
115. See Allen, 839 P.2d at 804.
116. Subsection (3)(b) provides that "[i]n case a form has been disapproved, it may not be used
merely filing the form with the Commissioner is sufficient.\footnote{117} This contrast suggests again that other forms are not "approved" when they are filed, but instead are only subject to a discretionary review of the Commissioner. These amendments make the contrast between filing and approval more apparent, and therefore may have affected the majority's willingness to assume the "executive approval"\footnote{118} of preprinted forms.

Another key addition to section 31A-21-201 in the 1992 amendments is subsection (2), which states: "In filing a form for use in this state the \textit{insurer} is responsible for assuring that the form is in compliance with this title and rules adopted by the commissioner."\footnote{119} This subsection contrasts with the majority's apparent assumption that it is the \textit{Commissioner's} responsibility, not the insurer, to ensure compliance with the law. This also contrasts with the majority's assumption that preprinted policies are approved by the executive branch.\footnote{120}

The second reason the majority's assumption of approval is erroneous is found in the Insurance Rules of the Insurance Department. The Unfair Marketing Practices Rule sets forth practices which the Insurance Commissioner finds are "misleading, deceptive, unfairly discriminatory, provide an unfair inducement, or unreasonably restrain competition."\footnote{121} Rule 590-154-5, entitled "Claiming or Representing Department Approval," states in pertinent part the following:

No licensee may represent either directly or indirectly that the Utah Insurance Department, the Insurance Commissioner, or any employee of the department, \textit{has approved, reviewed, endorsed, or in any way favorably passed upon} any marketing program, insurance product, insurance company, practice or act.

A licensee may report the fact of the filing of any form, financial report, or other document with the Insurance Department, \ldots{} but may not misrepresent their effect or import.\footnote{122}

Accordingly, not only does this rule counter the majority's presumption of "executive approval" based on the filing requirements of section 31A-21-
201, but this rule further states that the Commissioner finds representations of the commissioner’s approval of pre-filed forms to be misleading and deceptive.

As mentioned above, the majority further relied on past decisions for additional support of the conclusion that judicial intrusion in the field of insurance is inappropriate.123 The majority relied on three decisions in support of this proposition: General Motors Acceptance Corp. v. Martinez,124 Farmers Insurance Exchange v. Call,125 and State Farm Mutual Automobile Insurance Co. v. Mastbaum.126 Although Call held that a policy provision was invalid because it violated the insured’s reasonable expectations,127 the Allen majority dismissed this holding of “[t]wo members of this court and a district judge sitting by designation” as erroneous.128 Aside from whether these cases do in fact “show [the court’s] unwillingness to alter fundamentally the terms of insurance policies in the absence of legislative direction,”129 conspicuously absent from the court’s analysis are the many decisions invalidating policy provisions based on common law doctrines, including the cases discussed above in Part III.A. that invalidate clear policy provisions under principles consistent with the reasonable expectations doctrine without legislative direction.130

As a result, the majority’s assumption of executive approval is apparently erroneous in light of both the 1992 amendments and the Insurance Rules. Furthermore, the majority’s arguments that prior case law demonstrates an unwillingness to alter policy provisions absent legislative direction is at least inconsistent with the entire body of Utah case law on insurance. Since the majority’s conclusion that the reasonable expectations doctrine constitutes an improper judicial intrusion on the executive and legislative branches is based on these two arguments, this conclusion is similarly questionable.

2. Retention of authority to review insurance contract provisions

The second proposition relied on by the Allen majority in refusing to adopt the reasonable expectations doctrine is the majority’s opinion that

123. See supra notes 83-86 and accompanying text for a brief discussion of the cases cited below and the majority’s reliance on these cases.
124. 668 P.2d 498 (Utah 1983).
125. 712 P.2d 231 (Utah 1985).
126. 748 P.2d 1042 (Utah 1987).
127. 712 P.2d at 236-37.
129. Allen, 839 P.2d at 805. But see id. at 812 (Stewart, J., dissenting) (contending that the cited cases "simply do not say" that the court is unwilling to alter policy language absent legislative direction).
130. Supra Part III.A.
the existing common law equitable doctrines, which have yet to be fully developed in Utah, are sufficient to protect insured parties against "over-reaching insurers." The majority reasoned that "notwithstanding" the court's deference to the executive and legislative occupation of this field, the court "retained authority" to review and invalidate provisions which violated these equitable common law doctrines. Thus the majority of the Allen court chose to "proceed interstitially with existing equitable doctrines" rather than adopt the reasonable expectations doctrine.

The line the majority seeks to walk in this reasoning is indeed a precarious one. As discussed above, the majority opinion relies on the assumption that, because of the regulatory mechanisms of the Insurance Code, the legislative and executive branches of the government occupy the field of insurance, thus making judicial review of insurance form contracts via the reasonable expectations doctrine an inappropriate intrusion. It is at least somewhat inconsistent for the Allen majority to then rely on judicial review via equitable principles of the common law as a basis for refusing to apply the reasonable expectations doctrine. It is similarly inconsistent for the court to argue judicial alteration of policy provisions is inappropriate "absent[t] legislative direction," and then hold that courts retain the authority to review policy provisions under a laundry list of equitable doctrines without citing any statutory authority for this proposition.

Moreover, one of the reasons the majority rejected the application of the reasonable expectations doctrine is that there was "great uncertainty" in the scope and application of the doctrine, and that the doctrine had "unknown ramifications." However, if Utah has "yet to address and develop fully any of the existing equitable doctrines available to an aggrieved insured," it is difficult to assess how reliance on undeveloped equitable doctrines will provide greater certainty in scope and application, since one cannot discern the limits or direction of the court's apparent intention to expand these doctrines for the benefit of insured persons.

Finally, absent from the court's decision is an attempt to apply any of the equitable doctrines of the interstitial approach. Such a demonstration would have perhaps caused the court to face and resolve some of the above inconsistencies. Indeed, the above inconsistencies demonstrate a fundamental problem with the overall effect of Allen. Lower courts are faced...
with the dilemma of choosing between strong statements that judicial alteration of insurance contracts constitutes an impermissible infringement on the legislative and executive branches, and language from the court suggesting (without providing guidance by example) that courts should apply and develop common law equitable doctrines to protect an aggrieved insured.  

3. Freedom of contract

In rejecting the reasonable expectations doctrine the majority also relied on the notion that the doctrine impermissibly impinges on the "legislative policy underlying the Insurance Code . . . that 'freedom of contract' be maintained, and that written contracts be the primary means by which this freedom to contract be exercised." The majority concluded without analysis that the "[a]doption of the reasonable expectations doctrine poses a much greater risk of broadly undermining these legislative goals [of maintaining the freedom of contract] than our continued use of existing equitable doctrines applied on a case-by-case analysis."  

However, since the court stated earlier that Utah courts have "yet to address and develop fully any of the existing equitable doctrines available to an aggrieved insured," it is at least somewhat unclear how applying these doctrines will afford better protection of the principle of freedom of contract in the face of uncertain development. It is also unclear why the singular reasonable expectations doctrine, as opposed to multiple equitable doctrines, cannot also be applied "on a case-by-case basis" in such a manner as to afford similar protection of the freedom of contract.

Furthermore, as discussed above, the strict application of traditional contract law assumes assent where it does not exist, thus subverting the intent of the parties. By contrast, one of the objects of the reasonable expectations doctrine is to objectively discover the parties' intent and honor this intent, thus giving "both parties full freedom of contract together." The reasonable expectations doctrine, therefore, also affords protection for the principle of freedom of contract for both parties.

140. See infra Part IV.B. regarding the effect of the court's "interstitial" approach in the past five years; see infra Part IV.A.3, for further discussion on the court's unwillingness to interfere with the insurance industry.

141. Allen, 839 P.2d at 806 (citations omitted) (quoting UTAH CODE ANN. § 31A-I-102(7) (1991)).

142. 839 P.2d at 807.

143. Id. at 806 (emphasis added).

144. Id.

145. See supra Part II.B

146. See Meyerson, supra note 3, at 1236.

147. Id. at 1266 (emphasis added).
More importantly, as noted by Justice Stewart in his concurring opinion, the majority opinion fails to address the “other policies underlying the Insurance Code, including ‘to ensure that policyholder, claimants, and insurers are treated fairly and equitably.’”148 While section 31A-1-102 does not place any priority in the list of eleven purposes of the Insurance Code, the analysis of the majority places heavy reliance on the legislative policy of freedom of contract and fails to address the ramifications of fairness and equity, a legislative policy expressed in this same statute. Indeed, as discussed above,149 the main objective of the reasonable expectations doctrine is to satisfy this policy of fairness to both contracting parties.

Finally, as mentioned by Justice Durham in her dissent, all of the equitable doctrines relied upon by the majority in its interstitial approach have been opposed at one time as an intrusion on the principle of freedom of contract.150 However, as noted by Professor David Slawson, the principle of freedom of contract should not be used as a “license to defraud or, at least, to mislead.”151 Instead, the reasonable expectations doctrine can be applied in a manner that “does not interfere with freedom of contract, but merely ensures that the parties’ intent be effectuated.”152


Notwithstanding the above criticisms of the Allen majority’s reasoning, the effects of the Allen decision could still be that the objectively reasonable expectations of the insured are honored as the courts respond to the Utah Supreme Court’s affirmation of its “responsibility” to develop the common law doctrines relating to insurance law. However, none of the reported insurance law decisions that have cited to Allen’s interstitial approach have resulted in granting coverage to the insured.153 Two of these

148. 839 P.2d at 812 (Stewart, J., concurring) (quoting UTAH CODE ANN. § 31A-1-102(2) (1991)).
149. See supra Part II.A.
151. Slawson, supra note 150, at 55.
152. Allen, 839 P.2d at 810 (Stewart, J., concurring).
decisions are particularly insightful on how the Allen majority’s reasoning inhibits the court application of equitable doctrines and the review for fairness to insurance contracts.

1. Unconscionability: Nielsen v. O’Reilly

Shortly after the Utah Supreme Court’s decision in Allen v. Prudential Property & Casualty Co., the court decided Nielsen v. O’Reilly.154 In Nielsen, Richard Nielsen purchased an insurance policy from Metropolitan Property & Liability Insurance Co. (“Metropolitan”) which provided uninsured motorist protection on two of his vehicles, limited to $250,000 for each person and $500,000 for each accident.155 Nielsen was later involved in an automobile accident with two uninsured motorists, which ultimately resulted in a damages award for Nielsen against the uninsured motorists for $707,590.156 After trial, Nielsen sought to recover the full judgment against Metropolitan; Metropolitan, however, argued it was not liable for payment in excess of the $250,000 policy limits.157

On appeal, Nielsen argued, inter alia, that the policy provision prohibiting the stacking of his uninsured motorist coverage was contrary to public policy and his reasonable expectation of being able to stack the policy limits.158 In support of this argument, Nielsen pointed out “that uninsured motorist coverage, unlike liability coverage, is not linked to a particular vehicle but is a floating coverage that covers the insured for injuries and damages caused by uninsured motorists in all circumstances.”159 Hence, because Nielsen paid two separate premiums for this coverage, he argued he should be permitted to stack the two policy limits for a total of $500,000, notwithstanding the language of the policy providing otherwise.160

The majority of the court refused to accept Nielsen’s arguments, reasoning that the provision in the policy prohibiting the stacking of policy limits was unambiguous.161 The court then analyzed Nielsen’s policy and reasonable expectations arguments as advancing an “unrecognized” version of the reasonable expectations doctrine which “link[s] a reasonable provision of auto insurance policy not ambiguous). While the Supreme Court does cite to Allen’s interstitial approach in Sosa v. Paulos, 924 P.2d 357 (Utah 1996), and thereafter successfully applies the doctrine of unconscionability to the protection of the non-drafting party, this case deals with an arbitration contract and not an insurance contract, and is therefore inapposite to the issue of Allen’s effectiveness in protecting insured persons.

155. See id. at 665.
156. See id.
157. See id.
158. See id. at 667.
159. Id. at 666.
160. See id.
161. See id. at 666-67.
expectation of greater coverage to the payment of an additional amount in premiums. 162 The court then relied on the reasoning and analysis of Allen to reject the application of this “version” of the reasonable expectations doctrine. 163

However, in the dissenting opinion of Justice Stewart, in which Justice Durham joined, Justice Stewart did not revisit the issue of the viability of the reasonable expectations doctrine in Utah. Rather, Justice Stewart analyzed the case under the doctrine of unconscionability, which was noted by the Allen majority as a promising alternative to the reasonable expectations doctrine to protect insured parties against overreaching insurers. 164 Justice Stewart noted that because of the “floating” nature of uninsured coverage, an insured who pays two separate premiums for uninsured motorist coverage will always be covered under two policies; however, if the policy language prohibits the stacking of the two policies, then the insurer will be able to collect premiums for the second policy while never giving the insured the benefit of that policy. 165 Justice Stewart therefore argued it was fraudulent and unconscionable “to allow an insurance company to collect a second premium and give nothing in return on the ground that the insured consented to the fraud by virtue of a provision in the insurance contract.” 166 Moreover, because this coverage is statutorily mandated for all vehicles, Justice Stewart reasoned the prohibition of stacking was contrary to the intent of the legislature. 167

Justice Stewart noted that the inequity of prohibiting stacking in this instance “has led a large majority of courts to allow insureds to ‘stack’ two or more coverages,” in spite of clear and unambiguous policy language prohibiting stacking. 168 Given the large body of case law holding anti-stacking provisions unconscionable, it is perplexing that the majority did not at least address this argument, especially in light of the majority’s reasoning that “case-by-case development of Utah’s traditional equitable remedies suffices to protect against overreaching insurers.” 169


The Utah Court of Appeals addressed the applicability of the principle that ambiguities must be construed against the drafter of the contract in

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162. Id. at 668-69.
163. Id.
166. Id.
167. See id. at 673.
168. Id. at 671-73 (Stewart, J., dissenting) (citing cases that permit stacking under similar circumstances in multiple jurisdictions in the country).
169. Id. at 667.
Goetz v. American Reliable Insurance Co. Adam Goetz collided with a moose while driving the vehicle of a friend. Goetz collected the $3,000 maximum no fault benefits under the insurance policy covering his friend's vehicle, and thereafter sought to collect the no fault benefits under his own auto insurance policy with American Reliable. American Reliable denied coverage, claiming the policy exclusion under the "other insurance" portion of its policy applied. Goetz thereafter brought suit, claiming, inter alia, that the provisions prohibiting stacking of no fault benefits were ambiguous and therefore must be construed against the insurer and in favor of coverage, and that the exclusion violated his reasonable expectations.

Goetz's reasonable expectations arguments were quickly dismissed in light of Allen. His ambiguity argument, however, received a detailed analysis. Although the court held there were ambiguities in the "other insurance" clause which could reasonably be construed as permitting the coverage Goetz sought, the court held this ambiguity was irrelevant when the clause was read as a whole. The court gave a lengthy and detailed analysis of the three paragraph "other insurance" clause, and concluded that while other ambiguities may exist, such ambiguities were irrelevant since they did not specifically apply to Goetz's peculiar factual situation.

The effect, if any, of the Allen court's holdings is unclear from the Goetz decision; however, it seems clear the Court of Appeals did not follow the Utah Supreme Court's affirmation in Allen and reaffirmation in Nielsen to further develop equitable doctrines to provide protection for insured persons. A reading of Goetz shows the Court of Appeals did not read the clause at issue as the average, reasonable purchaser of insurance,

171. See id. at 367.
172. See id.
173. Id. at 368-69. The "other insurance" provision provided as follows:
   [1] No eligible injured person shall recover duplicate benefits for the same elements of loss under this or any similar insurance.
   [2] If an eligible injured person who is a named insured, a relative, or person who is injured in an accident involving the use of an insured motor vehicle, has other similar insurance applicable to the accident, the maximum recovery under all such insurance shall not exceed the amount which would have been payable under the provisions of the insurance providing the highest dollar limit. We shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this coverage and such other insurance.
   [3] If an eligible insured is also an insured under any other policy, primary coverage is given by the policy insuring the motor vehicle in use during the accident.
Id. at 367-68.
174. See id. at 368.
175. See id. at 371.
176. See id.
177. Id. at 369-70.
178. Id. at 370.
as traditionally required under the doctrine of ambiguity.\textsuperscript{179} This is evident from the fact that the court was required to dissect each section of the three paragraph clause and explain its meaning to support its interpretation.\textsuperscript{180} Moreover, the fact that the court was willing to dismiss ambiguities that supported coverage because other admittedly cloudy clauses could be read as denying coverage indicates a very narrow application of the doctrine. While a close reading of the “other insurance” clause does support the Court of Appeal’s decision, it is the court’s analysis, and not its holding, which is most troublesome. Rather than further developing this “undeveloped” equitable doctrine as suggested by the \textit{Allen} majority,\textsuperscript{181} the Court of Appeals’ analysis is a direction toward a more limited application of the ambiguity doctrine where the understanding of an appellate court judge is substituted for the reasonable understanding of the consumer.

V. \textbf{RETHINKING THE INTERSTITIAL APPROACH AS A SAFEGUARD AGAINST OVERREACHING INSURERS}

\textbf{A. The Future of the Interstitial Approach of Allen as Adequate Protection for the Insured}

Again, the analysis of the above two decisions, and not the conclusions, is what proves to be most troubling about the future of the interstitial approach as the method of protection in Utah against an insurer’s potential overreaching. As in \textit{Allen},\textsuperscript{182} the \textit{Nielsen} majority only rejects the reasonable expectations doctrine and thereafter neglects to discuss the application of the “other” equitable doctrines which are purportedly adequate protection for the insured. And in \textit{Goetz}, rather than adhering to the Utah Supreme Court’s affirmations of the courts’ duty to “further develop” equitable doctrines to protect the insured, the court applied a more restricted version of the ambiguity doctrine. Moreover, as noted above, no decision which has cited to \textit{Allen} and the majority’s interstitial approach has been decided in favor of the insured.\textsuperscript{183} Only Justices Stewart and Durham, who both disagreed with the \textit{Allen} majority’s rejection of the reasonable expectations doctrine, have attempted to offer an insured protection under the majority’s interstitial approach when a case cites to \textit{Allen}.\textsuperscript{184}

The inevitable conclusion appears to be that Utah courts are not able to apply equitable doctrines in favor of insured parties in the face of the

\textsuperscript{179} See United States Fidelity & Guar. Co. v. Sandt, 854 P.2d 519, 523 (Utah 1993) (“[T]he policy must be construed in light of how the average, reasonable purchaser of insurance would understand the language of the policy as a whole.”).

\textsuperscript{180} See \textit{Goetz}, 844 P.2d at 370-71.


\textsuperscript{182} See supra Part IV.A.2.

\textsuperscript{183} See supra note 153.

\textsuperscript{184} See supra Part IV.B.1.
majority’s contradictory reasoning in *Allen*. The court’s strong statements that judicial review of policy provisions is inappropriate “absent legislative direction”\(^{185}\) seems to overshadow the court’s weaker affirmation of a duty to further apply and develop the common law for the protection of the insured.\(^{186}\) To the contrary, the above analysis supports the conclusion that an insured person who cites to the interstitial approach of *Allen* while seeking to invoke insurance law rights for his protection is less likely to have those rights honored than if he avoided any reference to *Allen*’s interstitial approach or the reasonable expectations doctrine.\(^{187}\)

**B. Affirming the Judicial Duty to Review Insurance Contracts**

Arguably, this retreat from applying equitable doctrines to insurance form contracts is not the result intended by the *Allen* majority. Certainly this result runs contrary to the legislative policy of the Insurance Code “to ensure that policyholder, claimants, and insurers are treated fairly and equitably.”\(^{188}\) However, even if the courts were to attempt a more active application of *Allen*’s interstitial approach, this direction likely leads down a path of painful litigation, exploring the yet unexplored areas of Utah’s “undeveloped” equitable doctrines in an effort to prove that Utah courts can do what a majority of other courts and commentators have conceded cannot be done: achieve fairness to both parties in today’s world of form contracts without unduly distorting yesterday’s equitable doctrines. It seems unlikely that this path of the unknown can afford better predictability for either the insurers or the insured than the reasonable expectations doctrine.

But even if theoretically Utah courts could further develop the available equitable doctrines without unduly distorting them in an effort to achieve fairness, the review of cases citing to *Allen*’s interstitial approach demonstrates that the Utah Supreme Court needs to clarify that courts may appropriately review insurance contracts to realize the statutorily expressed policy of equity and fairness to both parties. Rather than attempt to walk the fine line between the two inconsistent arguments relied on by the *Allen*

186. See id.
187. For cases that do not cite *Allen*, but do invoke insurance law rights for the protection of the insured, see United States Fidelity & Guar. Co. v. Sandt, 854 P.2d 519 (Utah 1993) (construing ambiguous policy provision in favor of coverage for the insured); Travelers Ins. Co. v. Keal, 896 P.2d 644 (Utah Ct. App. 1995) (reversing trial court’s grant of summary judgment where material issue of fact existed on whether facts were sufficient to support elements of estoppel); Andreasen v. Aetna Cas. & Surety Co., 848 P.2d 171 (Utah Ct. App. 1993) (affirming jury award of damages based on estoppel); van der Heyde v. First Colony Life Ins. Co., 845 P.2d 275 (Utah Ct. App. 1993) (reversing trial court’s grant of summary judgment where material issue of fact existed on whether facts were sufficient to support elements of estoppel).
majority, the court should affirmatively embrace its duty of reviewing insurance contracts for fairness to the parties by formally adopting the reasonable expectations doctrine.

While protection of the freedom of contract, or (in this context) the right of an insurer to insert clauses into the policy as he chooses, remains a legitimate legislative policy, it is clear that this is not an unqualified right. Indeed, the history of heavy regulation of the insurance industry by all three traditional branches of government is ample evidence that this right in the insurance industry has been limited. However, since the reasonable expectations doctrine looks for the true intent of the parties while simultaneously seeking fairness to both parties, this doctrine supports and balances both legislative goals of fairness and preserving the freedom of contract. 189

Since Professor Keeton's early recognition of the reasonable expectations doctrine, few courts have had as much experience as the Arizona courts in applying the doctrine. 190 The Arizona decisions, therefore, can provide meaningful guidance to Utah's application of the reasonable expectations doctrine. Rather than start from ground zero, Utah can seek to build on the experience of the Arizona courts and thereby minimize concerns of uncertainty in the application of the doctrine. The Arizona Supreme Court has summarized when the reasonable expectations doctrine will grant the insured rights at variance with provisions, even where the provision is unambiguous:

1. Where the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer who might check on his or her rights, the court will interpret them in light of the objective, reasonable expectations of the average insured;

2. Where the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage;

3. Where some activity which can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured;

4. Where some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe

189. See supra Part IV.A.3.
190. See Henderson, supra note 3, at 842-52 (summarizing Arizona's history and law on the reasonable expectations doctrine).
that he has coverage, although such coverage is expressly and unambiguously denied by the policy . . . .191

Any potential uncertainties which may remain to be answered from Arizona's case law should be left, as the Allen majority said of the development of the interstitial approach, for development on a "case-by-case" basis,192 building on what the Arizona courts have established. While these potential uncertainties may invoke criticism, it is worth noting that concerns for far reaching and broad decisions having unknown impacts on the insurance industry seem particularly unlikely, given both the conservative application of the doctrine in general193 and Utah's especially conservative application of Allen's interstitial approach.

VI. CONCLUSION

The reasonable expectations doctrine, which has as its driving policy a concern for equity and fairness to both parties, is likely to continue to be adopted on a large scale in the majority of jurisdictions. The Utah Supreme Court's rejection of the reasonable expectations doctrine failed to consider the most recent statutes of the Insurance Code, failed to consider the Rules of the Insurance Commissioner, failed to be consistent in its reasoning, and failed to give adequate consideration for the legislatively expressed policy of equity and fairness to both parties. More significantly, the inconsistent reasoning of Allen has caused courts to abstain from applying equitable doctrines to insurance contracts, leaving the final review for fairness and equity largely to the discretion of the drafters of insurance contracts. Utah should abandon the "interstitial" approach of Allen in favor of the reasonable expectations doctrine in order to take an affirmative stand that Utah courts will apply principles of equity and fairness, and not just that of maintaining the freedom of contract.194 In that regard, the experience of the courts of Arizona with the reasonable expectations doctrine can serve as guidance to Utah courts in seeking to apply the reasonable expectations doctrine.

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192. Allen, 839 P.2d at 806.
193. See Henderson, supra note 3, at 841.