A Modest Proposal: Conflicting Judicial Decisions Should Mandate Insurance Coverage for the Insured Under the Ambiguity Doctrine

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Commercial General Liability ("CGL") policies are the centerpiece of most contractors' risk management plans.[1] Although CGL policies are substantially uniform and standardized, the interpretation of these policies by the courts has been neither uniform nor standardized.[2] Even within the same jurisdiction, different judges have construed terms and provisions differently, resulting in widely disparate rulings that are frequently fundamentally irreconcilable. The result is uncertainty and expense for both insureds and insurers, who are forced to await a judicial ruling before they can reasonably predict the extent of policy coverage. Further, the inconsistencies in judicial interpretations substantially erode whatever precedential value these opinions might otherwise have.

Much of the confusion and uncertainty surrounding the interpretation of CGL policies stems from the failure of the courts to properly apply a doctrine familiar to every attorney: the ambiguity doctrine. Under this doctrine, where reasonable disagreement as to the meaning of a contractual term or provision exists, the term or provision is supposed to be construed against the drafting party and in favor of the nondrafting party.[3] This doctrine is supposed to be especially applied in the context of construction

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[1]Deutsch, Kerrigan & Stiles, Construction Industry Insurance Handbook, 173 (Wiley 1991) ("This type of coverage forms the cornerstone of the contractor's insurance.").

[2]Deutsch, Kerrigan & Stiles, Construction Industry Insurance Handbook, 174 (Wiley 1991).

[3]*See* Restatement Second, Contracts § 206.

insurance contracts as these standard form policies are frequently presented as being nonnegotiable.[4] In case after case, however, the courts have failed to apply this fundamental doctrine, instead substituting their judgment regarding the meaning of a term or provision for that of both insurer and insured. Particularly where the contract provision at issue has already been the subject of conflicting judicial interpretations, such disregard of the ambiguity doctrine is indefensible. That reasonable judges, steeped in the principles of contract interpretation, have been unable to agree as to the meaning of a term or provision of a CGL policy is, on its face, compelling if not dispositive evidence that the policy language is ambiguous, thus entitling the insured to its reasonable interpretation of the policy owed it under the ambiguity doctrine. Yet this obvious application of the doctrine is currently being lost in the host of cases in which courts have denied coverage to the insured notwithstanding the existence of conflicting judicial opinions which underscore the existence of reasonable disagreement as to how the provision should be construed.

Faithful application of the ambiguity doctrine where two or more conflicting judicial interpretations of the contract provision at issue exist would greatly streamline the resolution of disputes involving CGL policies. To be sure, deference to the insured's reasonable interpretation in disputed cases involving ambiguous language would likely have the effect of broadening insurance coverage beyond what is currently professed by the insurance defense bar to be the insurers' intent. Insurers, however, would not be without recourse. By modifying their standard form CGL policies, insurers could bring certainty and clarity to contractors' risk management plans by eliminating many of the ambiguities that currently condemn both insured and insurer to expensive litigation in order to determine finally what their insurance contract means.

THE PROBLEM:

To illustrate this problem, this article examines three different clauses of the CGL policy that are among the most frequently disputed. In each case, the courts have construed the subject clause in irreconcilable ways.

The disparity in the ways identical language in CGL policies has been construed is readily apparent in the numerous conflicting opinions construing the policy's "occurrence" definition. Typically, a CGL policy contains a provision that defines an "occur-

[4]*See* Bruner & O'Connor on Construction Law § 11:17 (hereinafter "Bruner and O'Connor").

rence" as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[5] Conflicts often arise as to whether or not faulty workmanship constitutes an "occurrence" warranting coverage under the CGL policy, with some jurisdictions interpreting the definition to allow coverage for faulty workmanship[6] and others denying, for a variety of reasons, that faulty workmanship constitutes an "occurrence."[7] Two recent cases illustrate the current confusion.[8]

In *Lennar Corporation v. Great American Insurance Company*,[9] the insured homebuilder sought a declaratory judgment that its CGL insurers owed a duty to indemnify it against liability for property damage caused by a subcontractor's defective application of a synthetic stucco "exterior insulating and finishing system." The insured argued that the damage caused by the subcontractor's faulty workmanship was unintended and unexpected, and thus constituted an "occurrence" warranting coverage under the terms of the policy. The insurers countered that, consistent with the "business risk doctrine," "damage to an insured's own work is economic loss sounding in contract only, and a breach

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[5]1 W. Jeffrey Woodward, Richard J. Scislowski, Maureen C. McLendon & Jack P. Gibson, "Commercial Liability Insurance," IV.T.201 (International Risk Management Institute, Inc. 2008).

[6]*See e.g.*, Auto Owners Ins. Co., Inc. v. Newman, 2008 WL 648546 (S.C. 2008), reh'g granted, (Aug. 22, 2008); U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007); Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 281 Kan. 844, 137 P.3d 486 (2006); Summit Custom Homes, Inc. v. Great American Lloyds Ins. Co., 202 S.W.3d 823 (Tex. App. Dallas 2006), reh'g overruled, (Oct. 20, 2006) and (abrogated on other grounds by, Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007)) and (abrogated on other grounds by, Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., 51 Tex. Sup. Ct. J. 1367, 2008 WL 3991187 (Tex. 2008)) and review withdrawn, (Sept. 26, 2008); American Family Mut. Ins. Co. v. American Girl, Inc., 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65 (2004). Bruner and O'Connor supra, note 4 lists at least 68 cases at § 11:26, fn. 17 that could be cited to support the conclusion that faulty or defective construction work would constitute an "occurrence" under a standard GCL policy.

[7]*See e.g.*, OneBeacon Ins. v. Metro Ready-Mix, Inc., 427 F. Supp. 2d 574 (D. Md. 2006), aff'd, 242 Fed. Appx. 936 (4th Cir. 2007); Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317, 908 A.2d 888 (2006). Bruner and O'Connor supra, note 4 lists at least 51 cases at § 11:26, fn. 2 that could be cited to support the conclusion that faulty or defective construction would not constitute an "occurrence."

[8]Compare Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 651 (Tex. App. Houston 14th Dist. 2006), review denied, (2 pets.) (Dec. 14, 2007) with French v. Assurance Co. of America, 448 F.3d 693 (4th Cir. 2006).

[9]Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 651 (Tex. App. Houston 14th Dist. 2006), review denied, (2 pets.) (Dec. 14, 2007).

of contract is not an 'occurrence.' "[10] The court ultimately ruled in favor of the insured, holding that "under the standard CGL policy, negligently created, or inadvertent, defective construction resulting in damage to the insured's own work which is unintended and unexpected can constitute an 'occurrence.' "[11] In reaching its decision, the court acknowledged that "Texas law is unsettled on whether defective construction can constitute an 'occurrence' " and stated that "[it had] found numerous cases and articles showing there is also a conflict nationwide on this issue."[12] Notwithstanding its awareness of these conflicting interpretations of the "occurrence" provision, there is no indication that the court considered applying the ambiguity doctrine as the basis for deferring to the non-drafting party's construction. Instead, the court interjected its own interpretation of the provision and found an unintended "occurrence."

In the nearly identical case of *French v. Assurance Company of America*,[13] the insured homebuilder argued, again, that property damage caused by a subcontractor's defective application of an exterior insulating and finishing system constituted an "occurrence" and thus warranted coverage. The insurer countered that faulty workmanship is insufficiently accidental to be considered an "occurrence." Once again, rather than consider whether the disputed language was ambiguous, warranting application of the ambiguity doctrine, the court chose simply to construe the language independently. In contrast to *Lennar Corp.*, however, the court in *French* agreed with the insurer's construction of the "occurrence" provision, finding that faulty workmanship does not constitute an "occurrence."

Another provision of the CGL policy that has been the subject of conflicting interpretation by the courts is the policy's "property damage" definition. The standard CGL policy defines "property damage" as: "physical injury to tangible property, including all resulting loss of use of that property."[14] Disputes arising from this definition frequently center on the question of when, if ever, diminution in value constitutes "property damage." Related to this issue is the question of whether or not the incorporation of a defective work product into a construction project, without any

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[10]Lennar Corporation, 200 S.W.3d at 664.

[11]Lennar Corporation, 200 S.W.3d at 664.

[12]Lennar Corporation, 200 S.W.3d at 664.

[13]French v. Assurance Company of America, 448 F.3d 693 (4th Cir. 2006).

[14]W. Jeffrey Woodward, Richard J. Scislowski, Maureen C. McLendon & Jack P. Gibson, *supra* note 5, at IV.T.202.

attendant physical injury, constitutes "property damage." Again, there is considerable disparity between jurisdictions on the interpretation of this clause, with some courts allowing coverage in cases of diminution in value or incorporation[15] and others denying it.[16] Two recent "incorporation cases" demonstrate the conflicting interpretations.

In *Swank Enterprises, Inc. v. All Purpose Services, Ltd.*,[17] a subcontractor hired to paint the tanks and pipes of a newly-constructed water treatment plant used a nonspecific paint product, which had to be stripped off and the plant repainted. The general contractor sued its insurer for the cost of the repair work, arguing that the subcontractor's application of improper paint caused "physical damage" to the tanks and pipes. The insurer argued that the application of improper paint was not "physical damage" because it did not in and of itself cause injury to the plant. The Montana Supreme Court ultimately decided in favor of the insured, holding that, despite the lack of any attendant physical injury, the plant was physically damaged by the faulty paintjob in that "the paint would not have sufficiently protected the pipes and tanks," thus necessitating the stripping and repainting of the plant.[18]

In *Esicorp, Inc. v. Liberty Mutual Insurance Company*,[19] a contractor installed defectively welded pipe sections that had been previously inspected and approved by a testing agency. The pipe sections had to be removed and repaired for a loss to the contractor of $3,000,000. The contractor sued the testing agency's insurer, claiming that the "incorporation of the defectively welded pipe sections into the partially completed pipe system was covered

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[15]*See e.g.*, Esicorp, Inc. v. Liberty Mut. Ins. Co., 266 F.3d 859, 32 Envtl. L. Rep. 20197 (8th Cir. 2001); In re San Juan Dupont Plaza Hotel Fire Litigation, 989 F.2d 36 (1st Cir. 1993); Diamond State Ins. Co. v. Chester-Jensen Co., Inc., 243 Ill. App. 3d 471, 183 Ill. Dec. 435, 611 N.E.2d 1083 (1st Dist. 1993); Wyoming Sawmills, Inc. v. Transportation Ins. Co., 282 Or. 401, 578 P.2d 1253 (1978); Aetna Life & Cas. v. Patrick Industries, Inc., 645 N.E.2d 656 (Ind. Ct. App. 1995); St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal. App. 3d 888, 145 Cal. Rptr. 836 (2d Dist. 1978); Barela v. Barela, 91 N.M. 686, 579 P.2d 1253 (1978).

[16]*See* Hamilton Die Cast, Inc. v. U. S. Fidelity & Guar. Co., 508 F.2d 417 (7th Cir. 1975); Aetna Life & Cas. v. Patrick Industries, Inc., 645 N.E.2d 656 (Ind. Ct. App. 1995).

[17]Swank Enterprises, Inc. v. All Purpose Services, Ltd., 2007 MT 57, 336 Mont. 197, 154 P.3d 52 (2007).

[18]Swank Enterprises, Inc., 154 P.3d at 56.

[19]Esicorp, Inc. v. Liberty Mut. Ins. Co., 266 F.3d 859, 32 Envtl. L. Rep. 20197 (8th Cir. 2001).

property damage."[20] The insurer argued that, absent other injury, such as water damage caused by burst pipes, no "property damage" had occurred. The Eighth Circuit agreed, holding that the mere incorporation of a defective product within a larger whole is not "property damage" as defined by the CGL policy. In arriving at its decision, the court took notice of contrary opinions issued by other courts, but, instead of seeing these conflicting opinions as evidence of ambiguity warranting application of the ambiguity doctrine (and, ultimately, deference to the insured's construction), the court shrugged them off and construed the provision independently.[21]

A third area of frequent conflicting interpretations involves the so-called "business risk" exclusions—exclusions j, k, l, m, and n in the 1986 and subsequent policy forms.[22] The general purpose of the "business risk" exclusions is to prevent an insured from obtaining coverage for the costs of having to repair or replace his own work due to faulty workmanship.[23] Conflicts of interpretation centering on the "business risk" exclusions generally arise over the extent of an exclusion's denial of coverage. An examination of two conflicting opinions construing the same provision of exclusion j illustrates the current confusion in the interpretation of the "business risk" exclusions by the courts.

In *Gardner v. Lakvold*,[24] the insured, hired to strip paint from a house, used caustic chemicals that caused new paint applied later by a separate contractor to dissolve. Under exclusion j(6) of the 1986 policy form, coverage is excluded for "property damage" to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The issue before the court was whether or not the new paint job counted as "that particular part" of the property

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[20]Esicorp, Inc., 266 F.3d at 862.

[21]Esicorp, Inc., 266 F.3d at 862. Conflicting opinions regarding property damage and incorporation sometimes appear in decisions interpreting the law of the same state and even the same parties. Compare Eljer Mfg., Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992) with Travelers Ins. Co. v. Eljer Mfg., Inc., 197 Ill. 2d 278, 258 Ill. Dec. 792, 757 N.E.2d 481 (2001).

[22]The grant and extent of coverage for defective work of subcontractors was initially placed in the Broad Form Property Damage (BFPD) endorsement, but starting in 1986 the Insurance Services Organization made BFPD coverage part of its standard GCL policy. See David Dekker, Douglas Green, Stephen Polley, The Expansion of Insurance Coverage for Defective Construction, 28:4 The Construction Lawyer 19, 20 (Fall 2008).

[23]Bruner and O'Connor, *supra* note 4, § 11:37.

[24]Gardner v. Lakvold, 521 So. 2d 818 (La. Ct. App. 2d Cir. 1988).

upon which the insured was working. The court ultimately decided that the exclusion did not apply, reasoning that the exclusion "excludes coverage for restoration, repair or replacement of property necessitated 'by faulty workmanship *thereon.*' The property of the plaintiffs that was damaged was the new paint job. [The insured] did not work on the new paint job at all, therefore the damages to it could not have been necessitated by his 'faulty workmanship *thereon.*' Rather, the damage to the new paint job was caused by [the insured's] faulty workmanship on the old paint and consequently damages to the new paint job are not excluded from coverage."[25]

In the very similar case of *Lusalon, Inc. v. Hartford Accident & Indemnity Co.*,[26] the insured, a masonry subcontractor, used caustic chemicals to clean accidentally spattered mortar from unpainted window frames, causing paint subsequently applied by a separate subcontractor to peel. In deciding the same issue as in *Gardner*—whether the damaged paint was "that particular part of any property" upon which the insured was working—the *Lusalon* court reached the opposite conclusion, holding that "that particular part" included the damaged paint.[27]

THE AMBIGUITY DOCTRINE APPLIED

In none of the cases discussed above did the court invoke the ambiguity doctrine to resolve the coverage dispute. Yet, the fact that judges—presumptively persons with experience in construing contract language—have arrived at conflicting interpretations of identical clauses is powerful evidence that the clauses are, in fact, ambiguous. Indeed, it is hard to envision more persuasive evidence of ambiguity. If courts—with all the resources at their disposal to assist in contract interpretation, including access to prior legal precedent as well as the argument and briefing of counsel—arrive at different interpretations of a standard contract provision, then it is hard to imagine how the provision could be said to be unambiguous.

Certainly, the existence of the conflicting opinions should establish the existence of alternative, reasonable readings sufficient

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[25]Gardner, 521 So.2d at 820. *See also* Frankel v. J. Watson Co., Inc., 21 Mass. App. Ct. 43, 484 N.E.2d 104 (1985); E & R Rubalcava Const., Inc. v. Burlington Ins. Co., 147 F. Supp. 2d 523 (N.D. Tex. 2000).

[26]Lusalon, Inc. v. Hartford Accident & Indemnity Co., 511 N.E.2d 595 (Mass. 1987).

[27]*See also* American Equity Ins. Co. v. Van Ginhoven, 788 So. 2d 388 (Fla. Dist. Ct. App. 5th Dist. 2001); Bituminous Cas. Corp. v. Northern Ins. Co. of New York, 249 Ga. App. 532, 548 S.E.2d 495 (2001).

to invoke the ambiguity doctrine. That doctrine (sometimes referred to as the doctrine of *contra proferentem*) is recognized universally. It instructs the courts that when a contract is ambiguous, it is to be construed against the drafter if the nondrafting party's interpretation is reasonable.[28] An ambiguity in this context is defined as a contract that can sustain more than one reasonable interpretation.[29] Differing reasonable interpretations, without more, "are sufficient to convince [a court] that there [is] a latent ambiguity."[30] To construe an ambiguous provision in a contract in favor of the nondrafting party, the nondrafting party's interpretation must only be reasonable, not necessarily superior to the drafter's interpretation.[31]

That two or more courts have found identical language in a CGL policy to be susceptible of different meanings should be sufficient to create at least a *prima facie* showing of ambiguity, provided both interpretations are reasonable. A court confronted with evidence of conflicting judicial opinions could, of course, choose to reject one or both opinions as unreasonable, thus negating applicability of the ambiguity doctrine. But where a thoughtful judge has rendered an opinion on the meaning of a contract provision, it should be rare that another would deem the interpretation so unreasonable as to be wholly inconsistent with the contract language. After all, to trigger application of the ambiguity doctrine, the nondrafting party's interpretation need only be

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[28]*See, e.g.*, Nationwide Mut. Ins. Co. v. Richardson, 270 F.3d 948 (D.C. Cir. 2001), certified question answered, 826 A.2d 310 (D.C. 2003), reh'g en banc granted, opinion vacated, 832 A.2d 752 (D.C. 2003) and vacated pursuant to settlement, 844 A.2d 344 (D.C. 2004); Seaboard Lumber Co. v. U.S., 19 Cl. Ct. 310, 36 Cont. Cas. Fed. (CCH) P 75794, 1990 WL 5438 (1990); Chris Berg, Inc. v. U. S., 197 Ct. Cl. 503, 514, 455 F.2d 1037, 1044 (1972).

[29]*See, e.g.*, Metropolitan Life Ins. Co. v. Aetna Cas. and Sur. Co., 255 Conn. 295, 765 A.2d 891, 897 (2001); Hammer v. Investors Life Ins. Co. of North America, 511 N.W.2d 6, 8 (Minn. 1994); accord Veit & Co., Inc. v. U.S., 56 Fed. Cl. 30 (2003), aff'd, 83 Fed. Appx. 322 (Fed. Cir. 2003) ("A contract term is 'unambiguous' when it is susceptible to but one reasonable interpretation; if more than one meaning is reasonably consistent with the contract language, . . . then the contract term is 'ambiguous.' ").

[30]Edward R. Marden Corp. v. U.S., 803 F.2d 701, 705, 33 Cont. Cas. Fed. (CCH) P 74642 (Fed. Cir. 1986).

[31]See, e.g., P.R. Burke Corp. v. U.S., 47 Fed. Cl. 340 (2000), aff'd, 277 F.3d 1346 (Fed. Cir. 2002).

reasonable, not necessarily superior to the drafter's (or another court's) interpretation.[32]

In the same way that the opinions of other courts may be significant in establishing ambiguity warranting application of the ambiguity doctrine, they may also be significant in establishing "reasonable expectations" of coverage warranting application of the reasonable expectations doctrine. In the majority of jurisdictions that subscribe to the reasonable expectations doctrine, the doctrine operates similarly to *contra proferentem*—*i.e.*, an ambiguous term should be construed in favor of the insured so as to satisfy his reasonable expectations of coverage.[33] In a minority of jurisdictions, the reasonable expectations doctrine operates to

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[32]P.R. Burke Corp. v. U.S., 47 Fed. Cl. 340 (2000), aff'd, 277 F.3d 1346 (Fed. Cir. 2002). See also Blasiar, Inc. v. Fireman's Fund Ins. Co., 76 Cal. App. 4th 748, 754, 90 Cal. Rptr. 2d 374, 377–78 (2d Dist. 1999) (noting that an ambiguity exists when a policy provision "is capable of two or more constructions, both of which are reasonable."); True v. Raines, 99 S.W.3d 439, 443 (Ky. 2003), as amended, (Apr. 2, 2003) (ambiguity when two or more reasonable interpretations); Gibbens v. Whiteside, 915 So. 2d 866, 870 (La. Ct. App. 1st Cir. 2005), writ denied, 917 So. 2d 1116 (La. 2005) (ambiguity doctrine applies if the interpretations are reasonable); Gies v. City of Gering, 13 Neb. App. 424, 695 N.W.2d 180, 189 (2005) (noting that "an insurance policy . . . is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings"); M. Mooney Corp. v. U.S. Fidelity & Guar. Co., 136 N.H. 463, 618 A.2d 793, 797 (1992) (finding an exclusionary clause ambiguous "if reasonable disagreement between the contracting parties is possible."); North Pacific Ins. Co. v. Hamilton, 332 Or. 20, 22 P.3d 739, 741–742 (2001) (noting that an insurance term will be construed against the insurer "if two or more plausible interpretations of that term . . . continue to be reasonable . . . ."); Entzminger v. Provident Life & Acc. Ins. Co., 652 S.W.2d 533, 535 (Tex. App. Houston 1st Dist. 1983) (stating that ambiguity exists in an insurance contract "when there are two or more interpretations, both of which are fair and reasonable."); Pilling v. Nationwide Mut. Fire Ins. Co., 201 W. Va. 757, 500 S.E.2d 870, 872 (1997) (noting that "language of an insurance policy provision [is ambiguous when it] is reasonably susceptible of two different meanings . . . ."); Folkman v. Quamme, 2003 WI 116, 264 Wis. 2d 617, 665 N.W.2d 857, 864 (2003) (stating that "[i]nsurance policy language is ambiguous if it is susceptible to more than one reasonable interpretation.").

[33]*See* Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 Ohio St. L.J. 823 (1990) ("decisions using [the reasonable expectations doctrine] solely to construe policy language . . . fall within the time-honored canon of construing ambiguities against the drafter of the contract—contra proferentem."). Cases in which courts equate the reasonable expectations doctrine to the ambiguity doctrine include: State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 312 (Ala. 1999); Wolf Machinery Co. v. Insurance Co. of North America, 133 Cal. App. 3d 324, 328, 183 Cal. Rptr. 695, 697 (2d Dist. 1982); Dupre v. Allstate Ins. Co., 62 P.3d 1024, 1028 (Colo. Ct. App. 2002); Kitmirides v. Middlesex Mut. Assurance Co., 65 Conn. App. 729, 783 A.2d 1079, 1084 (2001), judgment aff'd, 260 Conn. 336, 796 A.2d 1185 (2002); Salviejo v.

promote the insured's expectations of coverage regardless of the existence of ambiguity. Under this version of the doctrine, "[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

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State Farm Fire and Cas. Co., 87 Haw. 430, 958 P.2d 552, 564 (Ct. App. 1998); Eli Lilly and Co. v. Home Ins. Co., 482 N.E.2d 467, 470–471 (Ind. 1985); Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 906–907 (Iowa 1973); Liggatt v. Employers Mut. Cas. Co., 273 Kan. 915, 46 P.3d 1120, 1128 (2002); True v. Raines, 99 S.W.3d 439, 443 (Ky. 2003), as amended, (Apr. 2, 2003); Boudreaux v. Siarc, Inc., 714 So. 2d 49, 54 (La. Ct. App. 5th Cir. 1998), writ denied, 724 So. 2d 744 (La. 1998); Gunderson v. Classified Ins. Corp., 397 N.W.2d 922, 925 (Minn. Ct. App. 1986) (the doctrine of reasonable expectations does not apply where the terms of the policy are clear and unambiguous); Seeck v. Geico General Ins. Co., 212 S.W.3d 129, 132 (Mo. 2007); Wellcome v. Home Ins. Co., 257 Mont. 354, 849 P.2d 190, 194 (1993); Hemenway v. MFA Life Ins. Co., 211 Neb. 193, 318 N.W.2d 70, 74 (1982); Farmers Ins. Exchange v. Young, 108 Nev. 328, 832 P.2d 376, 379 n.3 (1992); Oliva v. Vermont Mut. Ins. Co., 150 N.H. 563, 842 A.2d 92, 95 (2004); Nationwide Mut. Ins. Companies v. Lagodinski, 2004 ND 147, 683 N.W.2d 903, 911–912 (N.D. 2004); Sulphuric Acid Trading Co., Inc. v. Greenwich Ins. Co., 211 S.W.3d 243, 254 (Tenn. Ct. App. 2006), appeal denied, (Dec. 18, 2006) (noting that as a matter of law, a person who reads an unambiguous exclusion term cannot reasonably expect that the policy would provide coverage); State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co., 199 W. Va. 99, 483 S.E.2d 228, 232 (1997); Pribble v. State Farm Mut. Auto. Ins. Co., 933 P.2d 1108, 1114 (Wyo. 1997). But see also, Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 928 (Del. 1982) (holding that "the doctrine of reasonable expectations is applicable in Delaware to a policy of insurance only if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print purports to take away what is written in large print."); Berlangieri v. Running Elk Corp., 132 N.M. 92, 2002-NMCA-046, 44 P.3d 538 (Ct. App. 2002) (stating that "[t]he doctrine of reasonable expectations is available where policy language is ambiguous. The doctrine is also available when the 'dynamics of the insurance transaction' make way for its application."); Slayko v. Security Mut. Ins. Co., 98 N.Y.2d 289, 746 N.Y.S.2d 444, 774 N.E.2d 208, 213 (2002) (refusing to adopt the reasonable expectations doctrine when the effect of the exclusion is neither surprising nor unfair); Max True Plastering Co. v. U.S. Fidelity and Guar. Co., 1996 OK 28, 912 P.2d 861, 870 (Okla. 1996) (holding that "[t]he doctrine of reasonable expectations may be applicable to the interpretation of insurance contracts in Oklahoma, and that the doctrine may apply to ambiguous contract language or to exclusions which are masked by technical or obscure language or which are hidden in a policy's provisions."); Matcon Diamond, Inc. v. Penn Nat. Ins. Co., 2003 PA Super 22, 815 A.2d 1109, 1114 (2003) (noting that the general principle is that the reasonable expectations doctrine will not apply if the policy language is unambiguous, but then stating that "[o]ur Supreme Court has identified only two limited exceptions to this principle: (1) protecting non-commercial insureds from policy terms which are not readily apparent; and (2) protecting non-commercial insureds from deception by insurance agents.").

would have negated those expectations."[34] Here, too, the opinion of another court finding an insured's coverage expectations to have been reasonable in a parallel situation should be considered relevant. After all, if a trial judge or appellate panel with the benefit of full briefing and all the other resources available to the judiciary has agreed that an insured's interpretation of coverage is reasonable, how can that interpretation or the insured's expectations of coverage be dismissed as unreasonable?

Consistent application by courts of the ambiguity or reasonable expectations doctrines to the disputed CGL provisions would have several beneficial consequences. First, it could finally provide a coherent construct that would allow insureds and insurers to more accurately predict the outcome of disputes over interpretation of the most litigated CGL provisions. At the moment, with so many contradicting opinions being issued, the parties have no way of predicting with any assurance how a court will decide a particular insurance provision. The application of these doctrines by all courts would produce coherence from the current chaos.

Prudent lawyers representing insurers, seeing the handwriting on the wall if a contract provision previously found to be the subject of conflicting opinions were to be litigated, would likely advise their clients to resolve out of court contract disputes involving language previously found by the courts to be susceptible to more than one interpretation, thus saving all parties from costly and unpredictable litigation.

Second, to avoid putting themselves in a position where the ambiguity doctrine might be invoked, consistent application of

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[34]Keeton, "Insurance Law Rights At Variance With Policy Provisions: Part One," 83 Harv. L. Rev. 961 (1970). Cases in which courts have not required an ambiguity in the policy before applying the reasonable expectations doctrine include: West v. Umialik Ins. Co., 8 P.3d 1135, 1138 (Alaska 2000) (stating that "[i]t is a settled principle that ambiguities in an insurance policy are construed in favor of the insured. The court need not find the policy ambiguous, however, to construe it under the reasonable expectations doctrine. To determine the parties' reasonable expectations, the court examines (1) the language of the disputed policy provisions; (2) the language of other provisions in the same policy; (3) extrinsic evidence; and (4) case law interpreting similar provisions."); Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co. of Maryland, 989 F.2d 635, 638 (3d Cir. 1993); Harrington v. Pulte Home Corp., 211 Ariz. 241, 119 P.3d 1044, 1050 (Ct. App. Div. 1 2005), review denied, (Feb. 7, 2006); Davidson v. Cincinnati Ins. Co., 572 N.E.2d 502, 508 (Ind. Ct. App. 1991) (stating that the reasonable expectations concept applies if the policy provided illusory coverage); Bland v. Bland, 629 So. 2d 582, 589 (Miss. 1993); Ranes v. American Family Mut. Ins. Co., 212 Wis. 2d 626, 569 N.W.2d 359 (Ct. App. 1997), aff'd, 219 Wis. 2d 49, 580 N.W.2d 197 (1998).

the ambiguity doctrine by the courts would encourage insurers to examine CGL policies and rewrite ambiguous language to avoid disputes. In short, policies would become clearer. In the past, insurers confronted with unfavorable decisions that threaten to broaden coverage beyond what they wish to provide have been quick to amend the CGL policy so as to clarify the extent of coverage.[35] Clarity in the contract language would obviously benefit both insured and insurer.

Third, application of the ambiguity doctrine would help to create coherence in an area of the law that is currently in a state of disarray. There is presently no way to reconcile the existing conflicting opinions construing disputed CGL provisions on any principled basis other than to attribute the results to differences in the way different judges construe ambiguous terms. Application of the ambiguity doctrine has the potential to make sense out of the confusing array of legal opinions by providing a uniformly accepted, reasoned justification for deciding which of two reasonable constructions should, as a matter of law, be preferred.

UNFOUNDED JUDICIAL RESISTANCE

According to WILLISTON ON CONTRACTS, "most courts" regard evidence of conflicting judicial interpretations as "at least evidence of ambiguity."[36] The Williston treatise explains that: "This rule is based on the understanding that one cannot expect a lay person to understand the meaning of a clause where judicial minds are in disagreement."[37] But evidence of conflicting judicial interpretations should be treated as more than just "some evi-

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[35]See for example the insurance industry's reaction to the adverse decisions in Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954) and Western Cas. & Sur. Co. v. Polar Panel Co., 457 F.2d 957 (8th Cir. 1972) holding that diminution in value constituted "property damage" as defined by the then-current CGL policy. In response to these decisions, the insurance industry amended the CGL policy to define property damage as being limited to "physical injury to tangible property." In the leading case of Federated Mut. Ins. Co. v. Concrete Units, Inc., 363 N.W.2d 751 (Minn. 1985), this simple change in policy language by the insurance industry was held to effectively bar coverage for diminution in value. See James Duffy O'Connor, Construction Defects: "Property Damage" and the Commercial General Liability Policy, 24:2 Constr. Law. 11 (Spring 2004) for a more thorough discussion of successful efforts to amend the CGL policy in order to eliminate unintended coverage. See also Bruner and O'Connor, supra note 4, § 11:31.

[36]WILLISTON ON CONTRACTS § 49:18 (4th ed.).

[37]WILLISTON ON CONTRACTS § 49:18 (4th ed.). The treatise goes on to note that this principle "has been announced or applied where the diversity of opinion is represented by the courts of more than one jurisdiction, as well as where the

dence" of ambiguity at least absent a finding that one or more of the conflicting judicial interpretations is not reasonable. The very definition of an ambiguity warranting application of the ambiguity doctrine is a provision susceptible of two or more reasonable interpretations. Applying this universally accepted standard, where two or more conflicting judicial interpretations exist, each of which is reasonable, ambiguity has been established.[38] The court need not look further. The threshold test for application of the ambiguity doctrine having been satisfied, the court should apply the doctrine and defer to the understanding of the nondrafting party provided the non-drafting party's interpretation is reasonable. As the Arizona Supreme Court held in *Federal Insurance Company v. P. A. T. Homes*,[39] "where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an established contract ambiguity is established."[40] In explaining its decision, the court reasoned that "if Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it."[41] The Oregon Supreme Court is of the same mind: "Where the language of a clause used in an insurance contract is such that courts of numerous jurisdictions have found it necessary to construe it and in such construction have arrived at conflicting conclusions as to the correct meaning, intent, and effect thereof, the question whether such clause is ambiguous ceases to be an open one."[42]

Given the clarity and the universality of the ambiguity doctrine, the reluctance of the courts to apply the doctrine definitively where ambiguity is established through conflicting judicial interpretations is perplexing. In *Fireman's Fund Insurance*

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diversity of opinion is represented by disagreement between judges of the same court or between courts of the same jurisdiction." WILLISTON ON CONTRACTS § 49:18 (4th ed.).

[38]As noted above in note 28, *supra*, in order to find ambiguity the court need not agree with the interpretations of the other courts, nor consider their constructions equal to its own—it must only consider their interpretations reasonable.

[39]Federal Insurance Company v. P. A. T. Homes, 547 P.2d 1050 (Ariz. 1976).

[40]Federal Insurance Company, 547 P.2d at 1051.

[41]Federal Insurance Company, 547 P.2d at 1051.

[42]Cimarron Ins. Co. v. Travelers Ins. Co., 224 Or. 57, 355 P.2d 742, 746 (1960).

Companies v. Ex-Cell-O Corporation,[43] for example, a federal district court in the Eastern District of Maryland rejected the argument that "conflicting judicial interpretations establish ambiguity as a matter of law," reasoning instead that: "conflicting judicial interpretations may indeed be some evidence of ambiguity. But if the policies are unambiguous, conflicting judicial interpretations do not prevent me from so finding."[44] This is doublespeak. If the language in a policy is subject to reasonable conflicting judicial interpretation, it could not possibly be unambiguous. The finding of conflicting reasonable judicial interpretations should be dispositive of the issue of ambiguity.

Other courts have rejected extension of the ambiguity doctrine to conflicting judicial decisions, but frequently without offering any satisfactory explanation for their resistance. The court in *Trinity Universal Insurance Company v. Robert P. Stapp, Inc.*,[45] for example, explained its refusal to accept "the rationale that . . . a split of authority among the various jurisdictions indicates that [a disputed term] is ambiguous" by stating that to carry this reasoning "to its logical conclusion . . . would mean that every time two reasonable courts disagreed on the interpretation of a policy of insurance, the issue should be resolved in favor of the insured."[46] Having made the point, the court missed it. The very definition of an ambiguity warranting application of the ambiguity doctrine is a provision susceptible of two or more reasonable interpretations. Moreover, that a faithful application of the ambiguity doctrine would result in a resolution in favor of the insured "every time two reasonable courts disagree on the interpretation of a policy of insurance" is no basis for declining to follow a settled rule of law.[47] The objection articulated in *Trinity Universal* is a wholly insufficient basis to decline to apply the ambiguity

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[43]Fireman's Fund Ins. Companies v. Ex-Cell-O Corp., 702 F. Supp. 1317, 19 Envtl. L. Rep. 20911 (E.D. Mich. 1988).

[44]Fireman's Fund Insurance Companies, 702 F. Supp. at 1323 n.7.

[45]Trinity Universal Ins. Co. v. Robert P. Stapp, Inc., 278 Ala. 209, 177 So. 2d 102 (1963).

[46]Trinity Universal Ins. Co., 177 So. 2d at 105.

[47]This is not to say, however, that a court (whether a trial court or an appellate court) could not reject evidence of conflicting judicial opinions on the same basis that it might properly reject other proffered evidence. As discussed above, if the court determined that an opinion was so far off the mark as to be unreasonable as a matter of law, the court might decline to accord weight to the opinion in its deliberations on grounds that the opinion lacked probative value. Thus, application of the ambiguity doctrine in this context does not usurp the right of a presiding trial judge or an appellate panel ultimately to decide issues of law before it.

doctrine. Indeed, the only "logical conclusion" to be feared from application of the ambiguity doctrine is that insurers will make their policies less ambiguous and clarity and efficiency will be brought to the market.

Although the courts that have resisted application of the ambiguity doctrine do not come out and say so, it is possible that their resistance to application of the doctrine in the face of conflicting judicial interpretations is driven in part at least by territorial turf concerns; that by resting their ruling on interpretations of contract language by other courts they are somehow ceding their authority to decide the legal issue in the cases before them. But this is clearly not the case. Application of the ambiguity doctrine based upon conflicting judicial interpretations does not deprive a presiding trial judge or an appellate panel from ultimately deciding the issues of law before it. By enforcing the ambiguity doctrine, the court will be deciding the case based on the existing law of its jurisdiction, as the ambiguity doctrine is a universally recognized rule of construction.[48] Thus, the court is only being asked to enforce existing law, not to avoid deciding a legal issue.

Moreover, the court retains the right to reject this evidence, just as it may reject other types of evidence, where the evidence is found to lack probative value or to be otherwise inadmissible. For example, as noted above, a court could determine that one or both of the conflicting judicial interpretations is so clearly wrong as a matter of law as not to be reasonable. But absent such a finding, evidence of conflicting judicial interpretations should be accorded the same weight as other types of interpretative aids commonly used by courts to construe contracts.[49] The fact that the ambiguity is evidenced by conflicting judicial opinions—as op-

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[48]See Williston on Contracts § 32:12 (4th ed.); Couch on Insurance 3d § 22:14 & n.23 (noting that "[t]he words, 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases. It purports to be an application of the rule contra proferentem [i.e., the ambiguity doctrine]."); 2 Eric Mills Holmes & Mark S. Rhodes, Appleman on Insurance 2d § 6.5 (describing the "traditional rule of interpreting any ambiguity in the policy language in favor of finding coverage [for the insured].").

[49]See Matter of Envirodyne Industries, Inc., 29 F.3d 301, 305, 25 Bankr. Ct. Dec. (CRR) 1447 (7th Cir. 1994) (noting that courts frequently look to dictionaries, treatises, articles, and other published materials, as well as evidence of trade usage, to help them construe contracts). As Judge Posner noted in the case, consideration of this type of evidence does not run afoul of the rule that bars the introduction of extrinsic evidence when a contractual provision is more or less clear "on its face." Envirodyne Indus., Inc., 29 F.3d at 305. "The object in excluding such evidence is to prevent parties from trying to slip out of their clearly stated, explicitly assumed contractual obligations through self-serving testimony or documents—which, though self-serving, might impress a

posed to some other type of evidence—is of no principled consequence in deciding whether to invoke the ambiguity doctrine.

The ambiguity doctrine is universally applied by courts in all 50 states in the course of fulfilling their mandate to decide legal issues before them. Nothing in the rule's long history suggests that courts are restricted as to the type of evidence they may consider in determining whether a contract provision is ambiguous. Evidence of conflicting judicial opinions construing an identical contract provision is clearly probative of the fact of ambiguity. Indeed, as discussed above, because judges are by education and experience apt to be more skilled in contract interpretation than the average lay person, the fact that judges cannot agree as to the meaning of a contract provision is persuasive (if not compelling) evidence that the term has no single clear, unequivocal meaning. Not only is there nothing the least bit objectionable about a court's consideration of such highly probative evidence bearing directly on an issue before it, the failure to consider evidence both material and relevant, without any legal basis for rejecting it, should itself be legal error.

Additionally, courts should not shy away from applying the ambiguity doctrine out of solicitude for the effect it may have on the trillion dollar insurance industry. One of the justifications for the ambiguity doctrine is the recognition that the insurance industry controls the contract form. As the considered expert, it should be required to clearly state its intent. It is the less experienced insured who needs the protection of the ambiguity doctrine, not the insurer. The foreseeable result of consistently applying the ambiguity doctrine should not be devastating to the insurance industry. The fact that the industry has not changed its standard form despite scores of decisions finding coverage the industry claims it did not intend to provide indicates that all these allegedly unfavorable decisions have not been contrary to the industry's underwriting expectations. Stated differently, if the industry's underwriters did not originally expect the result when coverage has been found, they would have already amended the policy to correct the supposed judicial mistake. Thus, it is logical to conclude that the industry is not troubled by these find-

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jury—purporting to show that the parties didn't mean what they said in the written contract. Contractual obligations would be too uncertain if such evidence were allowed. But dictionaries, treatises, articles, and other published materials created by strangers to the dispute, like evidence of trade usage, which is also admissible because it is also evidence created by strangers rather than by a party trying to slip out of a contractual bind, do not present a similar danger of manufactured doubts and are therefore entirely appropriate for use in contract cases as interpretive aids." Envirodyne Indus., Inc., 29 F.3d at 305.

ings of coverage. Similarly, if the industry expected and intended a finding of coverage in these disputed clauses, then it must be delighted to date by the windfall it has received from decisions in those jurisdictions finding no coverage from the same clauses. Therefore, a finding of coverage based on the ambiguity of inconsistent coverage decisions should not create an unexpected underwriting result for the industry. In any event, policies are renewed yearly, and if consistent application of the ambiguity doctrine causes the insurance industry concern, then there is a simple solution—the industry can clearly and unambiguously amend its standard policy.

CONCLUSION

Every year hundreds of appellate courts arrive at contrary interpretations of what are supposed to be standard, unambiguous insurance clauses. This is oxymoronic. If the clauses are unambiguous, their interpretation by the courts should be uniform. The fact that the decisions are split proves the clauses are ambiguous. Courts should not allow this state of affairs to continue. If there are hundreds of contrary appellate decisions, imagine the uncertainty that exists at the level of trial courts or at the level of claims administration that never get to litigation. Uncertainty about the extent of CGL coverage undercuts the useful social goal of reliable risk allocation and risk management. Not only are insureds uncertain about whether they have the coverage they were sold, but the cost of discovering that answer is extreme. Coverage litigation is a costly growth industry spawning the very uncertainty fueling its growth. Today's insureds are not only buying CGL policies, they are buying associated coverage litigation.

This is not supposed to be the result of risk management plans anchored by CGL policies. The only advantage of the tremendous conflict that exists in coverage decisions is that it provides the courts with the tool they need to correct the problem. Application of the ambiguity doctrine to CGL provisions that are shown to be susceptible to more than one reasonable judicial interpretation will simplify and streamline what is today a tangled thicket of contradictory judicial opinions. Rather than continue to expend its formidable resources on litigating the scope of CGL coverage, the industry should turn its energies inward and solve the problem by clearly rewriting its policies. As the industry has not undertaken this effort voluntarily, the courts should use the existing morass of conflicting coverage decisions as the means by which to force the industry to bring clarity to the scope of CGL insurance coverage.