IN THE SUPREME COURT OF FLORIDA



DEN1 ASSOCIATES OF FLORIDA, INC.,

Petitioners,

vs.

CASE NO.: 89,115

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

Reepondent.
_____ _____/

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL (En *Banc*) OF FLORIDA
4th DCA Case No. 94-2354

# BRIEF *OF AMICUS CURIAE* FLORIDA DEFENSE LAWYERS ASSOCIATION

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## STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association (hereinafter referred to as "FDLA") relies on the Statement of the Case and Facts as set forth in the opinion below and the briefs of the parties.

Because the construction of the pollution exclusion is well briefed, FDLA limits its brief to the issue of whether the reasonable expectations doctrine should be adopted in Florida and whether it has any application to the facts of this case.

## CERTIFIED QUESTION ON APPEAL[1]

WHERE AN AMBIGUITY IS SHOWN TO EXIST IN A CGL POLICY, IS THE COURT LIMITED TO RESOLVING THE AMBIGUITY IN FAVOR OF COVERAGE, OR MAY THE COURT APPLY THE DOCTRINE OF REASONABLE EXPECTATIONS OF THE INSURED TO RESOLVE THE AMBIGUITIES IN CGL POLICIES?

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[1] FDLA suggests that this Court may decline to accept the certified question because there is no actual controversy before the Court. The certified question is a request for an advisory opinion, and the parties do not have standing. See, e.g., *Department of Revenue v. Kuhnlein, 646 so.* 2d 717, 720-721 (Fla. 1994); *Interlachen* Lakes *Estates, Inc. v. Brooks,* 341 So. 2d 993 (Fla. 1976); *Department of Administration v. Horne,* 325 So. 2d 405 (Fla. 1976); *State Farm Fire & Casualty Ins. Co.* v. *Kambara,* 667 So. 2d 831, 832 n.1 (Fla. 4th DCA 1996).

In discussing the reasonable expectations doctrine in the opinion below, the Fourth District noted that the doctrine is "usually only applied where the court finds the policy language ambiguous." *State Farm Fire & Casualty Co. v. Deni Associates, 678 So.* 2d 397 (Fla. 4th DCA 1996) . The Fourth District did not decide the certified question because the court found no ambiguity in the language of the pollution exclusions before it. See G. Kogan and R. Waters, *The* Operation *and* Jurisdiction *of the Florida Supreme Court,* 18 Nova L.Rev. 1151 (1994), for a discussion on the "obvious" reasons why advisory opinions are disfavored in Florida. (More recently an excerpt of the article was reprinted in Vol.V., no.2., *The Record,* Journal of Appellate Practice and Advocacy Section 1,3 (1996).

## SUMMARY OF THE ARGUMENT

This Court is urged to reject the reasonable expectations doctrine. Florida insureds are well-protected by existing insurance contract and equitable principles. The adoption of the doctrine would interfere with freedom of contract, cause instability in the insurance industry, and increase insurance costs and litigation over the interpretation of insurance contracts.

Assuredly, the adoption of this doctrine would make sweeping changes in the interpretation of insurance contracts and the insurance industry in Florida. The courts should not interfere materially with an industry already heavily regulated by the Florida legislature.

In any event, the doctrine has no application to insurance contract language which is clear and unambiguous.

## ARGUMENT

I. THE DOCTRINE OF REASONABLE RXPECTATIONS SHOULD NOT BE ADOPTED IN FLORIDA AND, IN ANY EVENT, DOES NOT APPLY TO THE FACTS OF THIS CASE.

### A. History of the Reasonable Expectations Doctrine

The doctrine of "reasonable expectations" has spawned confusion and ever burgeoning litigation since the principle was first recognized and examined by Professor Robert E. Keeton twenty-seven years ago. He described the principle[2] as:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Although various courts have attempted to distill his concept into a legal rule through case by case analysis, many different versions now exist.[3]

As the *en banc* decision below notes, the majority of states have adopted a version which applies "only where the court finds the policy language ambiguous, . . ." *Deni, supra,* at 402, relying on *2 Couch on Insurance* 3d §22:11, nn. 89 & 90.[4] See *"Expansive*

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[2]Keeton, *"Insurance Law Rights at Variance with Policy Provisions,"* 83 Harv. L. Rev. 961 (part 1) and 83 Harv. L. Rev. 1281 (part 2) (1970).

[3]The doctrine and its many versions have been the subject of numerous articles. See, *e.g.* Roger C. Henderson, *"The Doctrine of Reasonable Expectations in Insurance Law After Two Decades,"* 51 Ohio St. L.J. 823, 823-24 nn.6-8 (1990), which lists over 40 articles written in the 1970's - 1980's.

[4]*See Max* True *Plastering Co. v. United States Fidelity & Guaranty cc.,* 912 P.2d 861, 868 n.35 (Okla. 1996) for a list of decisions where jurisdictions have applied the "reasonable expectations" doctrine where

*Coverage and Reasonable Expectations,"* December 1991, For the Defense 11, 12. In these cases, the courts generally hold that the doctrine cannot create coverage which does not exist under the plain and clear terms of the policy. See, e.g., *National Union Fire Insurance Co. v. CBI Industries, Inc., 907* S.W.2d 517 (Tex. 1995) (wherein the Texas high court refused to apply the reasonable expectation doctrine to the absolute pollution exclusion which was unambiguous); Page Wellcome, Professional Service Corn., 758 F. Supp. 1375 (D. Mont. 1991). AS many of the amici have pointed out, policy holders in Florida are already protected by the rule of insurance construction that ambiguities in insurance policies are construed against the insurer. See, e.g. *Stuyvesant Ins. Co. v. Butler,* 314 *So. 2d 567* (Fla. 1975); *Praetorians v. Fisher, 89 So,* 2d 329 (Fla. 1956). Of course this rule of construction mandates a pro-insured response.

Some commentators and cases assert that the version of the reasonable expectations doctrine based on ambiguity "does not mandate either a pro-insurer or pro-insured result because only reasonable expectations of coverage are warranted." See, e.g., Max *True Plastering, supra,* at 869 n.39. The crux of the doctrine is that the insurance policy is to be construed to "carry out the true intentions of the parties." *See "Expansive Coverage and Reasonable Expectations," supra* at 11. Other commentators and cases support

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an ambiguity is found in the policy language.

a version of the doctrine that only the intentions and expectations of the insured are relevant. See, e.g. *"The Insurance Fallout Following Hurricane Andrew: Whether Insurance Companies* axe Legally *Required to Pay fox Building Code Upgrade Despite the 'Ordinance or Law* Exclusion Contained in Most Homeowners Policies."* 48 Univ. Miami L. Rev. 949, 957-958 (1994), citing Macon *Light House Revival Ctr. Inc. v. Continental Ins. Co., 651* F. Supp. 417, 420 (M.D. Fla. 1987) .

In yet another version of the doctrine, some courts have applied the reasonable expectations doctrine to situations where the exclusions are obscure, technical, or hidden in complex policy language.[5] In Florida, insureds are already protected by section 627.4145, Florida Statutes (1991), which sets stringent requirements for "readable language in insurance policies." The statute requires every policy to achieve a minimum score of 45 on the Flesch reading ease test which is described fully in the statute. Section 627.4145(1)(a) & (5). The statute mandates, among many other requirements, that each policy "avoid(s) [sic] the use of unnecessarily long, complicated, or obscure words, sentences, paragraphs, or constructions." Section 627.4145 (1) (d), Florida Statutes (1991). Even in those cases applying this last version of the doctrine, plain and clearly stated policy provisions

[5] *See Max True Plastering Co., supra,* at 868 n.36, for a list of out of state cases where courts have applied the doctrine based on exclusions which are obscure, technical or hidden in complex policy language.

are not disturbed. See, e.g., *Max True Plastering Co. v. United States Fidelity and Guaranty Co., supra* at 870 ("it is equally imperative that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations *of* the company are based, should be maintained unimpaired by loose and ill-considered judicial interpretation.") Since the Florida legislature has manifested its intent to strictly and extensively regulate the insurance industry, including strict requirements for the drafting and formation of insurance contracts, any material changes should be left to the legislature as discussed more fully below.

Another version of the reasonable expectations doctrine has emanated from section 211 of the Restatement (Second) of Contracts (1979) which allows "reformation of an insurance contract . . . if the insurer has reason to believe that the insured would not have signed the contract if the inclusion of certain limitations had been known." *Max True Plastering Co., supra,* at 867, In Florida, the remedy of reformation after application of equitable estoppel, mutual mistake, and fraud theories protects the insured in situations contemplated by the Restatement. *Crown Life Ins. Co. v. McBride, 517 So. 2d* 660, 662 (Fla. *1987); Lumbermens Mutual Ins. Co. v. Martin, 399 So. 2d* 536, 537 (Fla. 3d DCA 1981); *Samet v. Prudential Insurance Co.,* 294 So. 2d 35, 36 (Fla. 1974). *See also Standard Fire Insurance Co. v. Marine Contracting & Towing Co., 392*

S.E.2d 460 (S.C. 1990) (wherein the court held that coverage under an insurance policy can be created by estoppel if the insurer has misled the insured into believing the particular risk is within the coverage).

### B. Arguments Against the Adoption of the Reasonable Expectations

The apparent difficulty the parties and amici have had in articulating a workable version of the concept, its scope and application forecasts the confusion and increased litigation which will certainly result if a vastly unrefined doctrine is adopted in Florida.[6]

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[6]The positions of the policy holders and amici are:

(1) Petitioner Deni argues that the reasonable expectations doctrine should be applied "only when the court feels no construction of the exclusion provides for coverage." (Initial Brief of Deni Associates of Florida, Inc., page 35.)

(2) The Department of Insurance filed an amicus brief in this case and urges the Court to stick to traditional contract construction guidelines. (Amicus Brief of the Department of Insurance, pages 12-15.)

(3) Petitioners Fogg, in the companion case, Supreme Court case no. 89-300, summarily argue that the court should adopt the doctrine of reasonable expectations and "ambiguity is not an essential element in the reasonable expectations doctrine." (Initial Brief of Fogg, page 33.(1).)

(4) The Academy of Florida Trial Lawyers requests the Court to "adopt the reasonable expectations doctrine to provide coverage consistent with the objectively reasonable expectations of the insured, where the courts determine the policy language is not ambiguous." (Amicus Brief of the Academy of Florida Trial Lawyers, page 31.)

(5) The Associated Builders and Contractors, Inc. urges this Court to adopt a doctrine similar to the one used in commercial sales contexts--"an implied warranty of coverage for incidents involving the normal usage of its product or service, similar to the implied warranties that merchants are deemed to give purchasers under common law." (Brief of Amicus , Associated Builders and Contractors, Inc., page 15.)

In rejecting the adoption of the reasonable expectations doctrine, the Supreme Court of Utah concluded that "a number of states have struggled with the doctrine's scope, leaving a trail of inconsistent decisions and creating an obviously uncertain future for the doctrine in those states [footnotes omitted]." *Allen v. Prudential* Pxopexty & *Casualty Insurance Co.,* 839 P.2d 798 (Utah *1992).* The Utah Court illustrated its point by detailing over 20 years of inconsistent decisions from the New Jersey and Iowa Supreme Courts. ***Id.*** at 802 n.3. The Court further described the flip-flopping by courts in Idaho and Pennsylvania which may have initially accepted broad species of the doctrine only to later retreat to more traditional stances. ***Id.*** at 802-803. The *Allen* court concludes its examination of the doctrine by remarking:

> Today after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and details of its application.

***Id.*** at 803.

At least seven states have rejected the doctrine or expressly declined to apply the doctrine:

1) **IDAHO** - Meckext v. Txansamexica *Insurance Co., 701* P.2d 217 (Idaho 1985) ("[T]he doctrine of reasonable expectations has not been adopted as the law in Idaho); *Casey v. Highlands Ins. Co.,* 600 P.2d 1387, 1391 (Idaho 1979) (wherein the Court expressly declines to adopt the doctrine and follows dissenting opinion in *Coxgatelli v. Globe Life & Accident Ins. Co., 96* Idaho 616, 533

P.2d 737, 742-743 (Idaho *1975)); Wells v. U.S. Life Ins. Co., 804* P. 2d 333 (Idaho App. 1991) (wherein the Court reaffirms that the Supreme Court of Idaho has declared the doctrine of reasonable expectations "not to be the law in Idaho.");

2) ILLINOIS - *Allen v. State Farm Mutual Insurance Co., 574* N.E.2d 55, 60 (Ill. App. 1 Dist. 1991) ("Illinois courts do not apply the reasonable-expectations doctrine to insurance contracts."); *American Country Ins.* Co. v. *Cash,* 171 Ill. App. 3d 9, 524 N.E.2d 1016, 1018 (1988) ("Illinois courts have declined to apply the reasonable expectations doctrine to insurance contracts.");

3) OHIO - *Sterling Merchandise Co. v. Hartford Ins. Co., 30* Ohio App. 3d 131, 506 N.E.2d 1192, 1196 (1986) ("Such judicial activism [adoption of reasonable expectations doctrine] has not been adopted in Ohio by its courts and the courts' use of liberal rules of construction");

4) SOUTH CAROLINA - *Allstate Ins. Co. v. Magnum, 383* S.E.2d 464, 466-467 (Ct. App. S.C. 1989) ("the [reasonable expectations] view has never been accepted by the Supreme Court of the state. In South Carolina, insurance policies are subject to the general rules of contract construction.");

*5) UTAH - Sosa* v. *Paulos, M.D.,* 924 P.2d 357, 362 n. (Utah 1996) (wherein the court reaffirmed its rejection of the reasonable expectations doctrine); *Allen v. Prudential Property & Casualty Ins. Co., supra* at 807 (wherein the Utah Supreme Court stated:

"[W]e reject the various versions of the reasonable expectations doctrine advanced by . . . [plaintiff ]");

6) **WASHINGTON** - *Keenan v. Industrial Indemnity Ins. Co., 108* Wash. 2d 314, 322; 738 P.2d 270, 275 (1987) ("We have not adopted a "reasonable expectations" doctrine with respect to insurance policies."); *Cook v. Evanson,* 83 Wash. App. 149, 920 P.2d 1223 (Wash. App. Div. 1 1996); and

7) WYOMING - *St. Paul Fire & Maxine Insurance Co. v. Albany County School District No.* 1, 763 P.2d 1255, 1263 (Wyo. 1988) ("We decline to adopt or apply the doctrine of reasonable expectations in this state.").

The Utah high court in *Allen v. Prudential, supra,* refused to adopt "a new doctrine with unknown ramifications" because: (1) the traditional equitable doctrines were adequate to provide relief to insureds; and (2) it was reluctant to interfere with the legislature's heavy regulation of the insurance industry, *Id.* at 806. The *Allen* plaintiff alternatively. asked the Utah Court to adopt one of three proposed versions of the doctrine. In rejecting all three versions of the reasonable expectations doctrine, the Court expressed its unwillingness to make "sweeping modifications in the public policy that underlies the regulation of the insurance industry in the absence of legislative directions." *Id.* at 804. The Court was persuaded by the dominant role Utah's legislative and

executive branches have taken in the regulation of the insurance industry.

Likewise, Florida's insurance industry and its insurance contracts are "strictly regulated" by the legislature in the Florida Insurance Code,' *See Hughes v. Professional Ins. Corp., 140* So. 2d 340 (Fla. 1st DCA), *cert. denied* 140 So. 2d 340 (Fla. 1962). Florida's Department of Insurance has broad general regulatory powers. See Sections 624.307-308, 624.316, Florida Statutes (1991). Chapter 27, Part II, regulates "The Insurance Contract." Sections 627.401-429, Florida Statutes (1991). All insurance forms must be approved by the Department of Insurance before a policy is delivered or issued for delivery in this state. Section 627.410, Florida Statutes (1991). There are provisions relating to required contents of every policy (section 627.413), and to construction of policies (section 627.419). Section *627.4145,* Florida Statutes (1991), contains comprehensive provisions requiring readable language in insurance policies. Florida's Insurance Code, like Utah's, contains a provision allowing the Department of Insurance to disapprove any form filed, or withdraw previous approval if the policy contains "any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purporting to be

'The Code is comprised of Chapters 624 through 632, 634, 637, 638, 641, 648, and 651. Section 624.01, Florida Statutes (1995).

assumed in the general coverage of the contract." Sections 627.410 and 411, Florida Statutes (1991).

Any substantive changes to insurance law should be left to the Florida legislature, *Cf. Walker v. United States Fidelity & Guaranty Co.*, 101 So. 2d 437 (Fla. 1st DCA) *cert. denied 102 So.* 2d 728 (1958). ("This Court is charged only with interpretation of the law. It cannot subtract from or amplify the terms of a statute.") Florida's insurance industry is heavily regulated by an insurance code which has implemented many safeguards to protect policy holders.[8] These safeguards, including the requirement of easy to read policies without hidden exclusions, provide the same type of protection afforded by the reasonable expectations doctrine in states which may not have legislated in these areas.

The Idaho Supreme Court has declined to adopt the reasonable expectations doctrine finding it to be in conflict with basic principles used in construing contracts, Casey *v. Highlands Ins. Co., supra* at 1391, following the rationale of dissenting opinion in *Corgatelli v. Globe Life & Accident Ins. Co., supra* at 742-743. The dissenting opinion reviews the established rules of contract construction in Idaho. *Corgatelli v. Glove Life & Accident Ins.*

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[8]The heavy regulation of the insurance industry, including agents, in Florida is one of the obvious differences between U.C.C. contracts and insurance contracts. This difference alone compels the rejection of the argument of Amicus, Associated Builders & Contractors, that a similar reasonable expectations doctrine exists in commercial sales contexts which should be applied to the insurance industry.

*Co., supra.* The Idaho Supreme Court determined that the traditional rules of construction protect the insured so that "it becomes unnecessary to adopt a new theory of recovery where, conceivably, the periphery of what losses would be covered could be extended by an insured's affidavit of what he 'reasonably expected' to be covered," *Casey v. Highlands Ins. Co., supra,*

Florida has consistently followed the same basic time honored contract principles relied on by the Idaho Court. These principles include:

1) When ambiguities to a contract exist, insurance policies are construed against the insurer who drafted the contract. See *e.g., Stuyvesant Ins. Co. v. Butler, 314 So. 2d 567 (Fla. 1975).*

2) The rule requiring construction of ambiguities in favor of the insured does not allow insurers to add meaning to language which is clear. *Rigel v. National Casualty Co., 76 So,* 2d 285 (Fla. 1954); *St. Paul Guardian Ins. Co. v. Canterbury School of Florida, Inc., 548* So. 2d 159 (Fla. 2d DCA 1989);

3) Generally courts will interpret an insurance policy based on the definitions contained in the policy. *Grant v. State Farm Fire & Casualty Ins. Co.,* 638 So. 2d 936 (Fla. 1994); and

4) Contracts of insurance should be construed to reach a reasonable, practical and feasible result. *United States Fire Ins. Co. v. Pruess, 394 So.* 2d *468* (Fla. 4th DCA *1981); United States Fidelity & Guaranty Co. v. Hazen, 346 So.* 2d 632 (Fla. 2d DCA

*1977)*; *Fernandez v. United* States *Fidelity & Guaranty Co., 308 So.* 2d 49 (**Fla.** 3d DCA 1975). *See generally, Excelsior Insurance Co. v. Pomona Park Bar & Package Store, 369 So.* 2d 938, 941-942 (Fla. *1979)* (wherein the Court described the traditional contract principles used to interpret insurance contracts).

Adoption of the doctrine would interfere with the parties' freedom to contract by subjecting insurers to reformation of a contract based on a policy holder's expectations created after the loss. Parties to an insurance contract are well protected by the rules of construction routinely applied by Florida courts to enforce the rights of a party to a contract. The adoption of the reasonable expectations doctrine would upset the workable framework and application of Florida's well-established contract principles.

In addition, the adoption of the reasonable expectations doctrine would likely increase the transaction costs for negotiating contracts and the amount of supervision of agents who negotiate the contracts. The inevitable increased litigation over an undefinable principle will also have the effect of increasing insurance costs in Florida -- a state which has already seen dramatic increases in insurance premium charges. See e.g., Section 766.201, Florida Statutes (1991).

### C. The Reasonable Expectations Doctrine has no Application to this Case

Notwithstanding, the reasonable expectations doctrine has no application to the facts of this case. The doctrine does not apply to an exclusion which is clear, unambiguous and which avoids the

use of any complicated or obscure words. Furthermore, the exclusion is not hidden in the policy. See e.g., ***Cook v. Evanson, supxa*** at 1227, (wherein the court concluded that the absolute pollution exclusion is unambiguous); ***National Union Fire Insurance Co. v. CBI Industries, Inc.,*** 907 S.W.2d 517 (Tex. 1995) (wherein ***Texas*** high court determines absolute pollution exclusion is unambiguous and therefore expectations of parties cannot be used to create ambiguity).

The concept has no application to this case,

## CONCLUSION

Adoption of the reasonable expectations doctrine -- an uncertain concept which courts have been unable to fashion into a coherent doctrine in twenty-seven years -- poses a great risk of creating instability in Florida's insurance law and undermining freedom of contract. The doctrine leaves insurers vulnerable to reformation of contracts to conform with expectations of the insureds too often formed **after** the loss.

Florida insureds are well-protected by traditional rules of insurance policy construction, equitable principles **and** the **state's** strict regulation of the insurance industry, Such a broad change to the insurance industry should not be effectuated without legislative sanction.

This Court is respectfully requested to decline to adopt the reasonable expectations doctrine.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 11th day of February, 1997, to:

RAYMOND T. ELLIGETT, JR., ESQUIRE
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