INTRODUCTION

This book germinated in discussions among members of the ABA-TIPS Insurance Coverage Litigation Committee (ICLC) about the varied approaches used in different states to interpret and apply insurance policies. (We may have been gathered around the fire pits at the Arizona Biltmore after a long day at the ICLC mid-year conference—what else would a bunch of coverage geeks be discussing? But we digress.) While there are obviously many similarities in how policies are construed, we also realized there are significant differences in the interpretative processes used by the states. In particular, various states give differing degrees of deference to the “reasonable expectations” or “reasonable interpretations” of the insured. But while we were all aware of many articles and treatises discussing how policies “should” be interpreted—generally or with a focus on a particular jurisdiction—none of us had a book that compiled under one cover the rules and procedures actually applied by each American jurisdiction.

So, we embarked on a 50-state survey, which then expanded to include common law interpretation in Canada and the United Kingdom, as well as the Restatement currently being developed by the American Law Institute. The chapters are all written by practicing lawyers—some, like editor Lyndon Bittle, generally represent policyholders and other insureds in coverage matters, while others, like editor Tim Thornton, generally represent insurers. Each author was charged with objectively describing the law as it is actually applied in a specific jurisdiction, rather than opining on what the law “should” be or trying to describe a “universal” theory of construction. (The one obvious exception is the chapter on the draft Restatement, which is not—yet—the law in any jurisdiction and does make judgments about the “best” rules.)

Every jurisdiction, of course, recognizes that insurance policies are contracts, generally construed under the same principles applied to other commercial contracts. The key word is “generally”—some jurisdictions diverge more than others from those principles in resolving disputes over the meaning of particular policy provisions.

The reasonable expectations doctrine was outlined in two articles by the Hon. Robert E. Keeton in 1970: Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961 (1970) and Insurance Law Rights at Variance with Policy Provisions: Part Two, 83 Harv. L. Rev. 1281 (1970). He sought to identify principles by which courts and others protected insureds in light of the unequal bargaining power between insureds and insurers. He described these rights as “at variance with policy provisions.” Two significant rationales Keeton identified for the doctrine of reasonable expectations were protecting the detrimental reliance interest of an insured or applicant and preventing one party—the insurer—from taking unconscionable advantage of the other—the insured. Professor Keeton’s second article focused on legislative, judicial, and administrative regulation of defenses based on warranty, representation, and concealment.

As these concepts have been developed by the courts over time, there has been a strong tendency to limit use of the concept of “reasonable expectations of the insured” to situations where an ambiguity has already been perceived. This is the middle view of the doctrine. A more conservative view would be a simple “plain language” view that
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does not consider reasonable expectations of the insured. A more liberal view would be one that considers the insured’s expectations even where there is no apparent ambiguity. This range of approaches is reflected in the rules of policy construction articulated by the states and other common law jurisdictions.

Several chapters address permutations on the doctrine of the “reasonable expectations of the insured” as it is applied in California, New York, and other jurisdictions. Other chapters analyze policy construction in states such as Texas, which rejects the “reasonable expectations” doctrine in favor of the “plain meaning” of the language used, yet defers to the insured where the terms are ambiguous.

Ultimately, the goal of this book is to provide a resource for lawyers who do not routinely practice insurance coverage law in a particular jurisdiction and need to know how that jurisdiction would likely construe a policy provision, identifying the key cases and terms to use as a springboard for further research. The chapters vary considerably in length, if only because there are a lot more cases in some states than in others. Each author was asked to answer the following questions and discuss the extent to which each of these issues is relevant to policy construction in a specific jurisdiction, though not necessarily in this order:

1. Does the jurisdiction expressly apply the doctrine of reasonable expectations, and if so, how is it articulated and applied?
   a. Is evidence of the insured’s actual, subjective expectation required or relevant?
   b. Must the expectations be objectively reasonable?
2. Does the jurisdiction apply another rule of construction (such as adhesion or contra proferentem) that defers to the insured’s interpretation of policy provisions in certain circumstances? If so, what is required to trigger deference to the insured’s interpretation?
3. Does the jurisdiction generally construe insurance policies under the rules governing other contracts, seeking the “plain meaning” of the words? If so, does the jurisdiction favor the insured’s interpretation under certain circumstances?
4. Does the jurisdiction require a finding of ambiguity before deference to the insured is authorized?
5. Does ambiguity create a fact issue for a jury, or is the ambiguity resolved by the court through application of a principle of construction?
6. Under what circumstances, if any, does the jurisdiction allow reliance on extrinsic evidence to determine the meaning of policy language?
7. Does legal uncertainty (differing decisions among the courts of other states) create ambiguity, particularly in determining the duty to defend?
8. Does the jurisdiction’s approach to policy construction take into account the “sophistication” of the insured? If so, how is sophistication determined?
9. Does the jurisdiction apply different rules of construction if the policyholder or its broker negotiated or otherwise participated in the drafting or selection of specific policy terms? If so, what evidence is admissible to assess the extent of participation by the policyholder?
10. Does the jurisdiction’s approach to policy construction vary with respect to different types of policies, e.g., CGL, property, life, health, D&O, E&O, excess/umbrella?
11. Does the jurisdiction’s approach to policy construction vary with respect to different industries or businesses environments, e.g., construction, professional liability, consumer transactions?
12. Does the jurisdiction generally follow the rules of policy construction of other state(s)? If so, which one(s)?
13. Are there other aspects of the jurisdiction’s approach to interpreting and applying insurance policies that a practitioner should know?

As demonstrated in the varying answers to these questions, the rules of construction are applied to the full range of policy provisions and circumstances, sometimes resulting in conflicting outcomes. If Professor Keeton’s articles were written today, other doctrines might be seen as manifesting the doctrine of "rights at variance with policy provisions." For example, though the Cumis decision, and decisions of similar import in other jurisdictions, do not use a “reasonable expectations of the insured” argument or rationale, they arguably create a right at variance with policy provisions.

Another type of case that might be seen to manifest this doctrine are those interpreting absolute and total pollution exclusions. Many states apply a plain meaning interpretation to the broad language of these exclusions and the definition of pollutants. But other courts seek some limiting principle. They parse the language in detail, compare it to environmental cleanup laws (hardly a layperson’s plain meaning approach), and perceive that the real intent or purpose of the exclusions is to eliminate coverage for environmental cleanup cases, and not for other discharges of pollutants. These differences presumably reflect the courts’ differing approaches to the “reasonable expectations” or “reasonable interpretations” of the insured. Other examples, such as the meaning of illegal acts exclusions in personal lines coverage, will spring to the mind of lawyers who wrestle with these issues.

The editors are indebted to the many authors who contributed chapters on one or more jurisdictions, and to other ICLC members who helped us develop the concept and locate authors for each of the chapters and encouraged us to keep going when our energies flagged. We also thank the members of the TIPS Book Board (particularly Judi Goodman, who planted and watered the seed) and the TIPS and ABA Publishing staff (particularly Sarah Forbes Orwig, who guided us to the harvest) for their patience and assistance in turning this concept into reality.

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