COCHRAN REVISITED: THE REASONABLE EXPECTATIONS OF THE INSURED AND THE VISIBLE MARKS OF FORCIBLE ENTRY LIABILITY LIMITATION

INTRODUCTION

Insurance is purchased by insureds to cover losses caused by the occurrence of a specific undesired event.[1] Naturally, insureds are shocked when the insured event occurs and they discover that insurance coverage is nonexistent.

Depending on the circumstances, courts provide insureds with relief from the unexpected lack of coverage by applying rules of construction to insurance policies.[2] However, courts traditionally have not relieved insureds from the unexpected lack of coverage occasioned by an insurance policy provision known as a visible marks clause.[3] A visible marks clause is usually found in burglary or theft insurance policies and requires visible marks of forcible entry on an automobile or a building before the insured may recover for a loss.[4] However, some courts have allowed the insured to recover on the policy despite the lack of visible marks of forced entry.[5] In not enforcing the visible marks provisions, these courts have found that such provisions defeat the insured's objectively reasonable expectations of insurance coverage.[6]

The Nebraska Supreme Court has twice addressed the issue of the enforceability of visible marks provisions in insurance coverage

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1. BLACK'S LAW DICTIONARY 721 (5th ed. 1979). Insurance is defined as "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." *Id.*

2. *See* notes 26-34 and accompanying text *infra*.

3. Note, *Theories of Unconscionability, Reasonable Expectations, and Implied Warranty Defeat Policy Clause Limiting Recovery to Burglary Evidenced by Exterior Marks*, 64 GEO. L. J. 987, 989 (1976) ("courts traditionally enforce the provision and deny recovery"); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975). *See generally* Annot., 99 A.L.R.2d 129, 134 (1965). It is well settled that a rule of construction favoring the insured will not be applied to unambiguous visible marks clauses. *Id.*

4. *See, e.g.*, American Sur. Co. v. Southern Oil Stores, 24 Ala. App. 114, 113 So. 298 (1930); Jackson Steam Laundry v. Aetna Casualty & Sur. Co., 156 Miss. 649, 126 So. 478 (1930); Annot. 99 A.L.R.2d 129, 131 (1965).

5. *E.g.*, C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 171-72, 181 (Iowa 1975).

6. *Id.* at 176-77.

disputes.[7] In both instances, the Nebraska Supreme Court enforced the visible marks provisions.[8] Yet, in both Nebraska visible marks cases, the insureds failed to assert that the enforcement of the visible marks provisions would defeat their objectively reasonable expectations of coverage. Instead the insureds in both cases asserted that the provisions were ambiguous so that they might take advantage of a rule of construction which interprets ambiguities in favor of the insured. Since the reasonable expectations of an insured have not been directly addressed in previous Nebraska visible marks disputes, an insured may prevail in a future Nebraska case by asserting that such a provision defeats his objectively reasonable expectations of coverage.[9]

Using *Cochran v. MFA Mutual Insurance Co.*[10] as a backdrop, this Comment examines the possible impact of the reasonable expectations doctrine on visible marks insurance provisions in Nebraska. This review of *Cochran*, the most recent visible marks appellate decision in Nebraska, is somewhat limited because the insured failed to raise the reasonable expectations doctrine on appeal.[11] Since the insured failed to raise the doctrine, its role remains largely undeveloped in Nebraska. This Comment also examines various applications of the reasonable expectations doctrine to illustrate the approaches that the Nebraska Supreme Court may consider in developing the doctrine.

FACTS AND HOLDING

In *Cochran*, the Nebraska Supreme Court refused to allow an insured recovery on his insurance policy for theft.[12] The insured, a hardwareman and locksmith, sued to recover the value of the tools which were allegedly stolen from his locked car.[13] A thief allegedly stole the car from its parking space near the insured's work place.[14] The police recovered the abandoned car unscathed; however, the tools stored in the car were missing.[15]

The insurance policy provided coverage for personal property stolen from the insured's locked car.[16] However, the insurance com-

7. Cochran v. MFA Mut. Ins. Co., 201 Neb. 631, 632, 271 N.W.2d 331, 332 (1978); Hazuka v. Maryland Cas. Co., 183 Neb. 336, 339, 160 N.W.2d 174, 177 (1968).

8. *Cochran*, 201 Neb. at 634, 271 N.W.2d at 333; *Hazuka*, 183 Neb. at 342-43, 160 N.W.2d at 178.

9. *See C & J Fertilizer*, 227 N.W.2d at 177.

10. 201 Neb. 631, 271 N.W.2d 331 (1978).

11. *See* notes 20-22 and accompanying text *infra*.

12. *Cochran*, 201 Neb. at 634, 271 N.W.2d at 333.

13. *Id.* at 632, 271 N.W.2d at 332.

14. *Id.*

15. *Id.* at 632-33, 271 N.W.2d at 333.

16. *Id.* at 632, 271 N.W.2d at 332. *See* note 18 *infra*.

pany refused to pay for the missing tools because there were no visible marks of forced entry on the car.[17] The insurance policy specifically required visible marks of forced entry on the car in order to recover the loss caused by theft.[18]

The insured argued that coverage existed despite the visible marks clause.[19] The insured asserted: 1) that the visible marks clause was unconscionable;[20] and 2) that the visible marks clause was ambiguous.[21] The Nebraska Supreme Court, in denying the insured coverage, held that the visible marks clause was neither unconscionable nor ambiguous.[22]

BACKGROUND

Insurance Policy Construction

Generally, rules of contract construction are applied to insurance policies.[23] However, courts have developed other specialized rules of construction for insurance policies.[24] Special rules of construction applicable to insurance policies are the ambiguity rule and the reasonable expectations rule.[25]

The ambiguity rule of construction provides that if an insurance contract is ambiguous, then the language should be interpreted most favorably for the insured.[26] The rationale for this rule is that since the insurer has control of the language of the policy, the insurer

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17. *Id.* at 633, 271 N.W.2d at 333.

18. Brief for Appellant at 2, Cochran v. MFA Mut. Ins. Co., 201 Neb. 631, 271 N.W.2d 331 (1978). The policy provided as follows:

> HOMEOWNER'S POLICY — BROAD FORM
> SECTION I
> DESCRIPTION OF PROPERTY AND INTERESTS COVERED.
> COVERAGE C — UNSCHEDULED PERSONAL PROPERTY
> PERILS INSURED AGAINST
> No. 11. Theft — which states:
> c. Theft exclusions applicable to property away from the described premises of: . . . (2) property while unattended, in or on any motor vehicle . . . unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked provided there are visible marks of forcible entry upon the exterior of such vehicle . . .

19. *Cochran*, 201 Neb. at 633, 271 N.W.2d at 333.

20. Brief for Appellant at 8-13, *Cochran*.

21. *Id.* at 13-18.

22. *Cochran*, 201 Neb. at 634, 271 N.W.2d at 333.

23. *E.g.*, Dairyland Ins. Co. v. Esterling, 205 Neb. 750, 752, 290 N.W.2d 209, 211 (1980) ("As a general rule, an insurance policy should be considered as any other contract. . . .").

24. R. KEETON, INSURANCE LAW—BASIC TEXT 341-439 (1971).

25. *Id.* at 351.

26. *E.g.*, Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 565, 156 N.W.2d 133, 136 (1968) (insured recovered under automobile insurance policy by court's holding that insurance company denied coverage when it failed to defend insured or pay the judgment); Funke Estate v. Law Union & Crown Ins. Co., 150 N.W. 262, 263 (Neb. 1914)

should not benefit from the policy's ambiguous language.[27] However, courts may not not create ambiguity when the language of the policy is clear.[28] For example, the visible marks clause in *Cochran* was not found to be ambiguous, and therefore, the ambiguity rule was not applicable.[29]

A separate rule of insurance construction, the reasonable expectations rule, does not require the presence of ambiguities for its application.[30] The objectively reasonable expectations of the insured at the time of contract is a rule of insurance construction separate from the ambiguity rule.[31] Professor Keeton has recognized the effect of the rule as: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though a painstaking study of the policy provisions would have negated those expectations."[32] The rationale for the rule is that insurance policies often contain long and complicated provisions which require careful study for complete understanding;[33] thus, insurance companies should not be allowed to use surprising limitations to defeat the insured's reasonable expectations of the type of coverage provided by the policy.[34]

(insured covered by policy for loss of rents if building burned; inconsistent provisions on extent of coverage interpreted favorably for the insured).

27. Hemenway v. MFA Life Ins. Co., 211 Neb. 193, 199, 318 N.W.2d 70, 74 (1982) (insured recovered for medical expenses associated with heart condition by court's interpretation of effective date of policy favorably for insured).

28. Wyatt v. Woodmen Accident and Life Co., 194 Neb. 614, 618, 234 N.W.2d 217, 220 (1975) (insured attempted a recovery for accidental death benefit not within coverage period; court refused to allow recovery).

29. *Cochran*, 201 Neb. at 634, 271 N.W.2d at 333 ("We hold . . . [the visible marks provision] . . . is unambiguous . . . .").

30. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

31. *See* Modern Sounds & Sys., Inc. v. Federated Mut. Ins. Co., 200 Neb. 46, 49, 262 N.W.2d 183, 186 (1978):

> We examine the insurance policy in the light of two basic rules of interpretation. An insurance policy should be interpreted in accordance with reasonable expectations of the insured at the time of the contract. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.

Id. (doubt indicates ambiguity in the language of the policy); Keeton, *supra* note 30, at 969 (The ambiguity rule operates only if there is ambiguous language in the policy. The reasonable expectations rule operates to protect the insured's objectively reasonable expectations of coverage. "For example, even though the contractual language was ambiguous, there might be no expectation at all, or the expectation might be unreasonable, thus defeating a claimed expansion of coverage beyond the letter of the contract.").

32. Keeton, *supra* note 30, at 967.

33. *Id.* at 968.

34. *See id.* Professor Keeton stated:

> An important corollary of the expectations principle is that insurers ought not to be allowed to use qualifications and exceptions from coverage

Nebraska adopted the reasonable expectations rule in *Nile Valley Cooperative Grain & Milling Co. v. Farmers Elevator Mutual Insurance Co.*[35] The Nebraska Supreme Court relied upon Professor Keeton's article in adopting the rule of reasonable expectations.[36] However, the court indicated that the rule is subject to limitations in its application,[37] but the court did not specify these limitations.[38]

Since courts are more comfortable in applying the reasonable expectations rule when ambiguities are present,[39] the Nebraska Supreme Court may require ambiguities for the operation of the rule. The Nebraska Supreme Court has adopted both the ambiguity and reasonable expectations rules and has indicated that the two rules are distinct.[40] Nevertheless, the court has not yet made clear

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> that are inconsistent with the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved. This ought not to be allowed even though the insurer's form is very explicit and unambiguous, because insurers know that ordinarily policyholders will not in fact read their policies. Policy forms are long and complicated and cannot be fully understood without detailed study; few policyholders ever read their policies as carefully as would be required for moderately detailed understanding. Moreover, the normal processes for marketing most kinds of insurance do not ordinarily place the detailed policy terms in the hands of the policyholder until the contract has already been made. In life insurance marketing, for example, the policyholder does not ordinarily see the policy terms until he has signed the application (his offer to contract with the company) and has paid a premium, and the company has approved the application and has executed and issued the policy. This often means a delay of weeks, and occasionally even longer, between making an application and having possession of the policy — a factor enhancing the policyholder's disinclination to read his policy carefully or even to read it at all. Thus, not only should a policyholder's reasonable expectations be honored in the face of difficult and technical language, but those expectations should prevail as well when the language of an unusual provision is clearly understandable, unless the insurer can show that the policyholder's failure to read such language was unreasonable.

Id.

35. 187 Neb. 720, 722, 193 N.W.2d 752, 754 (1972) (The insured sued for recovery under a fire insurance policy. The insured's two buildings were covered in the same policy. The insured removed fixtures from one building for temporary storage in the second building. The second building burned with these fixtures. The fixtures were removed for cleaning of the first building. The policy did not explicitly provide for coverage under these circumstances. The court determined the liberal provisions for coverage of fixtures of the first building created a reasonable expectation of coverage for the fixtures while stored in the second.).

36. *Id.*

37. *See id.* The court stated: "[T]he circumstances of this case relieve us the burden of spelling out limitations." *Id.*

38. *Id.*

39. Note, *Theories of Unconscionability, Reasonable Expectations, and Implied Warranty Defeat Policy Clause Limiting Recovery to Burglary Evidenced by Exterior Marks*, 64 GEO. L. J. 987, 994-95 (1976) ("Courts appear more willing to apply the doctrine of reasonable expectations when ambiguous policy provisions are present.").

40. Modern Sounds & Sys., Inc. v. Federated Mut. Ins. Co., 200 Neb. 46, 49, 262 N.W.2d 183, 186 (1978). The court stated:

> We examine the insurance policy in the light of two basic rules of interpretation. An insurance policy should be interpreted in accordance with rea-

whether it will require ambiguities for the application of the reasonable expectations rule.

If the Nebraska Supreme Court requires ambiguities for the application of the reasonable expectations rule, the court's approach would be directly opposite to that of Professor Keeton.[41] Keeton's approach does not require the presence of ambiguities for the application of the reasonable expectations rule.[42] Under Keeton's approach, the reasonable expectations rule applies if the provision is surprising and defeats the reasonable expectations of the insured at the time of contract.[43]

The issue of whether the Nebraska Supreme court does or does not require ambiguities for the application of the reasonable expectations rule was not decided in *Cochran*. In *Cochran*, the insured raised two arguments on appeal: first, that the visible marks clause was unconscionable;[44] and second, that the visible marks clause was ambiguous.[45] The court rejected both arguments.[46]

The insured's appellate brief did contain, however, a reference to the reasonable expectations of the insured.[47] Nevertheless, the insured discussed reasonable expectations only in terms of the ambiguity rule.[48] Thus, the insured did not place the issue of reasonable expectations squarely before the court.[49] Consequently, the Nebraska Supreme Court has not determined whether the reasonable expectations rule applies in the absence of ambiguities.

Comparative Views of the Reasonable Expectations Doctrine in Other Jurisdictions

Courts have ruled differently on disputes involving visible marks

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sonable expectations of the insured at the time of the contract. A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured.

Id. (citations omitted).

41. *See* note 30 and accompanying text *supra*; note 60 and accompanying text *infra* (citing Keeton).

42. *Id.*

43. *Id.*

44. Brief for Appellant at 8-13, *Cochran*.

45. *Id.* at 13-18.

46. *Id.* at 13-18. *Cochran*, 201 Neb. at 634, 271 N.W.2d at 333.

47. Brief for Appellant at 16, *Cochran*.

48. *Id.* at 13, 16. The appellant argued:

> The question then, is whether the provisions in the insurance policy about "visible marks" are ambiguous. . . .
>
> The cardinal rule of construction of insurance policies is that all ambiguities will be resolved against the company. The object of such a rule of construction is to give effect to the reasonable expectations of the insured.

Id.

49. *See* notes 26-30, 47-48 and accompanying text *supra*.

clauses. Visible marks clauses have and have not been enforced for a variety of reasons.[50]

The insured in *Cochran* relied on *C & J Fertilizer v. Allied Mutual Insurance Co.*[51] The insured in *C & J Fertilizer* recovered against his insurance company in a suit involving losses sustained from a burglary of his business.[52] The policy's definition of "burglary" contained a requirement similar to that in *Cochran*,[53] that is, that visible marks of forcible entry exist before recovery is allowed.[54]

In *C & J Fertilizer*, the Iowa Supreme Court allowed recovery despite the absence of visible marks on the insured's building.[55] The court based its holding on three alternate rationales.[56] The court held the visible marks provision: 1) was unconscionable; 2) failed an implied warranty of fitness for insurance coverage; and 3) defeated the reasonable expectations of the insured.[57] The court's definition of reasonable expectations did not require ambiguities for its application.[58] Thus, the court recognized the separateness of the ambiguity and reasonable expectations rules.

The Idaho Supreme Court likewise has recognized the separateness of the ambiguity and reasonable expectations rules. In *Corgatelli v. Globe Life & Accident Insurance Co.*,[59] the Idaho Supreme Court stated: "While ambiguities may be highly relevant in determining the reasonable expectations of an insured, nevertheless we deem it clear that the invocation and application of the doctrine of reasonable expectations does not depend for its existence upon the presence of ambiguities."[60]

In *Corgatelli*, the insurance policy contained an apparent and inclusive list of injuries covered.[61] The insured, a part-time rodeo bull

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50. *See* notes 52-78 and accompanying text *infra*.

51. *Cochran*, 201 Neb. at 633, 271 N.W.2d at 333 (citing C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975)).

52. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 171 (Iowa 1975).

53. *See* note 18 *supra*.

54. *C & J Fertilizer*, 227 N.W.2d at 171.

55. *Id.* at 171, 181.

56. *Id.* at 177-81 (the visible marks provision was unconscionable and unenforceable under a theory of implied warranty of fitness). Nebraska does not view these provisions as unconscionable. *See Cochran*, 201 Neb. at 634, 271 N.W.2d at 333. The theory of implied warranty of fitness applied to insurance contracts has been criticized for removing insurance policies from the realm of contracts. *See* Note, *supra* note 3, at 998-1005.

57. *C & J Fertilizer*, 227 N.W.2d at 176.

58. *See id.* at 171, 176-77 (the provision was not ambiguous) (citing Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 905-08 (Iowa 1973), citing Keeton, *supra* note 30, at 351).

59. 96 Idaho 616, 533 P.2d 737 (1975).

60. *Id.* at —, 533 P.2d at 740.

61. *Id.* at —, 533 P.2d at 741.

rider, separated a shoulder, an injury not on the list.[62] The Idaho Supreme Court held that the policy created the reasonable expectation of coverage for the injury.[63]

Four years later, the Idaho Supreme Court, in *Casey v. Highlands Insurance Co.*,[64] overruled *Corgatelli* and refused to hold that a visible marks provision in a burglary policy defeated the insured's reasonable expectations of coverage.[65] The court rejected the reasonable expectations rule as a rule of insurance construction in Idaho,[66] and it appears that Idaho continues to reject the reasonable expectations rule.[67]

In *Markline Co. v. Travelers Insurance Co.*,[68] the Supreme Judicial Court of Massachusetts denied the insured recovery for burglary loss in the absence of visible marks, as required by the policy.[69] The court refused to adopt the reasonable expectations rule but gave no reason for its refusal.[70] Further, the court stated that "[e]ven if we were to adopt the theory of reasonable expectation, the plaintiff [insured] would not prevail."[71] A strong dissent faulted the court for refusing to adopt the reasonable expectations rule and for the court's *dictum* that the insured would not prevail even if the rule were adopted.[72] The dissent noted that the agent had assured the insured of the policy's comprehensive coverage and that the face of the policy provided coverage for burglary.[73] The dissent also argued that by placing the visible marks provision several pages into the policy, under the definition of burglary, the reasonable expectations of the insured were defeated.[74]

The jurisdictions examined above have dealt differently with

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62. *Id.* at —, 533 P.2d at 738-39.

63. *Id.* at —, 533 P.2d at 742.

64. 100 Idaho 505, 600 P.2d 1387 (1979).

65. *Id.* at —, 600 P.2d at 1390.

66. *Id.* at —, 600 P.2d at 1391. The court noted that the acceptance of the reasonable expectations rule in *Corgatelli* was not by majority. *Id.* Two justices concurred in the result without expressly adopting the rule and two justices dissented. *Id.* The court gave no rationale for rejecting the rule.

67. Foremost Ins. Co. v. Putzier, 102 Idaho 138, 627 P.2d 317 (1981). The Idaho Supreme Court refused to exclude coverage despite the absence of ambiguities in the written policy. *Id.* at —, 627 P.2d at 321-24. Although the court continued to reject the reasonable expectations rule the court determined the oral contract of insurance controlled because the written contract was not delivered before the loss. *Id.*

68. 384 Mass. 139, 424 N.E.2d 464 (1981).

69. *Id.* at —, 424 N.E.2d at 464-65.

70. *Id.* at —, 424 N.E.2d at 465-66.

71. *Id.* at —, 424 N.E.2d at 466 (the court did not explain why the insured would not prevail).

72. *Id.* at —, 424 N.E.2d at 468.

73. *Id.* at —, 424 N.E.2d at 466, 469.

74. *Id.* at —, 424 N.E.2d at 468 (quoting Rodman v. State Farm Mut. Auto. Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973)).

whether a visible marks provision defeats the reasonable expectations of the insured.[75] The Iowa Supreme Court and the Idaho Supreme Court, at least for the period in which Idaho applied the rule, did not require ambiguities for the application of the reasonable expectations rule in visible marks clause disputes.[76] The Supreme Judicial Court of Massachusetts has rejected the rule of reasonable expectations; furthermore, even if the rule were accepted, the court would refuse to apply the rule in disputes involving a visible marks clause.[77]

ANALYSIS

Since the reasonable expectations rule was not squarely raised in *Cochran*,[78] the question of whether the Nebraska Supreme Court will enforce a visible marks clause to defeat the reasonable expectations of the insured remains open. Although the Nebraska Supreme Court adopted the reasonable expectations rule in *Nile Valley Cooperative*, the court noted that limitations exist on the application of the rule.[79] In applying the rule of reasonable expectations, Nebraska may follow the lead of either Iowa or Massachusetts, positions representing opposite applications of the reasonable expectations rule.[80] On the other hand, the Nebraska Supreme Court may adopt a modified approach of either of these positions.[81]

Undoubtedly, Nebraska will not apply the reasonable expectations rule in a visible marks clause dispute to the extent of the Iowa Supreme Court's application in *C & J Fertilizer*.[82] The Iowa Supreme Court defined reasonable expectations as Professor Keeton proposed.[83] The court apparently applied the reasonable expectations rule in *C & J Fertilizer* when the insured was actually aware of the visible marks clause.[84] However, Professor Keeton suggested

75. *See* notes 50-74 and accompanying text *supra*.
76. *See* notes 59, 61 and accompanying text *supra*.
77. *See* notes 68-74 and accompanying text *supra*.
78. *See* notes 44-45 and accompanying text *supra*.
79. 187 Neb. at 722, 193 N.W.2d at 754. *See* notes 35-38 and accompanying text *supra*.
80. *See* notes 56-59, 69-72 and accompanying text *supra*.
81. *See* notes 83-91 and accompanying text *infra*.
82. *See* notes 83-87 and accompanying text *infra*.
83. *See* notes 57-58 *supra*.
84. *C & J Fertilizer*, 227 N.W.2d at 182 (LeGrand, J., dissenting). The dissent stated:

> I dissent from the result reached by the majority because it ignores virtually every rule by which we have heretofore adjudicated such cases and affords plaintiff ex post facto insurance coverage which it not only did not buy but which it knew it did not buy. . . .
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> Yet here the majority would extend the doctrine far beyond the point of refusal in *Rodman*. Here we have affirmative and unequivocal testimony

that the insured's actual knowledge of the visible marks clause does not necessarily preclude recovery.[85] His rationale is that the combination of unconscionability and reasonable expectations allows recovery despite the requisite surprise element in the reasonable expectations rule.[86] The Nebraska Supreme Court has held that visible marks clauses are not unconscionable.[87] It follows, therefore, that in Nebraska, an insured could not assert the surprise of a visible marks provision if the insured actually knew the provision was in the policy. To remain consistent, the Nebraska Supreme Court should, when addressing the issue, modify the Iowa court's interpretation; the Nebraska Supreme Court should not allow the application of the reasonable expectations rule in disputes over the enforceability of a visible marks clause when the insured has actual knowledge of the clause.

Knowledge or the absence of knowledge would not prevent the enforceability of a visible marks clause in Massachusetts. In *Markline*, the Supreme Judicial Court of Massachusetts stated that the reasonable expectations rule does not apply in visible marks clause disputes.[88] The dissent in *Markline* criticized the majority's *dictum* on its application of the reasonable expectations rule.[89] The dissent would adopt the reasonable expectations rule in visible marks clause disputes because the policy on its face purported to cover burglary and the surprising limitation was in the later pages of the multi-page insurance contract.[90] If the Nebraska Supreme Court chooses to follow the Massachusetts application, the court will not apply the reasonable expectations rule in visible marks disputes.[91]

Another interpretation that the Nebraska Supreme Court may consider when addressing the next visible marks dispute lies between

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from an officer and director of the plaintiff corporation that he knew the disputed provision was in the policies because "it was just like the insurance policy I have on my farm."

Id. at 182, 184 (emphasis in original).

85. Keeton, *supra* note 30, at 974. He stated:

> It would seem that knowledge of the limiting provisions should defeat any claim based alone on the principle of honoring reasonable expectations, since such knowledge negates the surprise that would be the basis for departing from ordinary contract principles. But this principle combines with the principle of disallowing unconscionable advantage to support recovery in some cases even in the face of the claimant's unusual knowledge of the surprising provisions.

Id.

86. *Id.*

87. *See* notes 44-45 and accompanying text *supra*.

88. *Markline*, 384 Mass. at —, 424 N.E.2d at 466. *See* text at notes 69-71 *supra*.

89. *Markline*, 384 Mass. at —, 424 N.E.2d at 468. *See* text at note 72 *supra*.

90. *Markline*, 384 Mass. at —, 424 N.E.2d at 466, 468-69. *See* text at notes 73-74 *supra*.

91. *See* note 88 and accompanying text *supra*.

the Iowa and Massachusetts applications of the reasonable expectations rule. This modified approach requires an initial holding that the reasonable expectations rule operates despite the absence of ambiguities. This modified application separates the reasonable expectations rule from the ambiguity rule. If ambiguities were prerequisites for the operation of the reasonable expectations rule, then the reasonable expectations rule is unnecessary. Instead, the ambiguity rule could operate separately to protect the insured. The Idaho Supreme Court in *Corgatelli* clearly separated the reasonable expectations and ambiguity rules as it did not require ambiguities for the operation of the reasonable expectations rule. If ambiguities are not necessary prerequisites, then this modified approach requires that the visible marks clause be perceived as a surprising limitation on the insurer's liability. The Iowa Supreme Court in *C & J Fertilizer*, the Massachusetts dissent in *Markline*, and the Idaho Supreme Court in *Corgatelli* found the visible marks clause surprising to the insured.[92] These courts unfortunately did not specify the standard for determining surprise to the insured. However, Professor Keeton indicated that the method for determining surprise must be from the viewpoint of an insured "having an ordinary degree of familiarity with the type of coverage involved."[93]

This modified approach has two inherent strengths. First, the insurance company is forced to bring the surprising limitations of liability to the insured's attention either by discussing them at the time of contracting or by placing them up front in the contract's terms of coverage. Second, the insurer still has the freedom to limit its liability by a visible marks provision, since the limitation is not unconscionable, if the purchaser could reasonably be aware of the provision without a painstaking study of the policy.

The modified approach would require the Nebraska Supreme Court to recognize that ambiguities in an insurance contract are not prerequisites for the application of the reasonable expectations rule. In addition, the court would have to determine if the visible marks clause is surprising to an insured who has an ordinary degree of familiarity with the type of coverage involved.

CONCLUSION

Although the Nebraska Supreme Court has adopted the reasonable expectations rule, it is uncertain whether the court will limit the application of the rule by requiring ambiguities in the insurance policy as prerequisites. *Cochran* provided an opportunity for this uncer-

92. *See* notes 55-58, 61-63, 72-74 and accompanying text *supra*.
93. Keeton, *supra* note 30, at 968.

tainty to be resolved. However, the insured did not adequately raise the issue, and, consequently, this uncertainty remains.

A future Nebraska dispute over the enforceability of a visible marks provision will provide the opportunity for the Nebraska Supreme Court to determine if ambiguities are necessary prerequisites for the application of the reasonable expectations rule. The Nebraska Supreme Court will also have the opportunity to determine if the reasonable expectations rule should be applied in visible marks provisions disputes.

The Nebraska Supreme Court may choose to follow the leads of a number of jurisdictions that have rules, albeit disparate ones, on these issues. However, a better alternative would be to adopt a modified approach which lies between the paths followed in other jurisdictions. The Nebraska Supreme Court should not limit the application of the rule by requiring the presence of ambiguities in the insurance policy. On the other hand, the court should not apply the reasonable expectations rule when, for one reason or another, the insured could reasonably have known of the visible marks provision without a painstaking study of the policy. Otherwise, the necessary surprise element for the application of the rule would be defeated.

Before the Nebraska Supreme Court can make any decision in this area, the insured must first place the issue of the application of the reasonable expectations rule squarely before the court. This will ensure that an important area of Nebraska law will receive definitive treatment and that the rights of insureds and insurers will be clarified.

Guy Lawson—'86