

# California's Approach to the Interpretation of Insurance Policies—*MacKinnon v. Truck Insurance Exchange*

By DANIEL SANCHEZ-BEHAR\*

AS WITH ALL other contracts, the goal of insurance policy interpretation is to give effect to the mutual intention of the parties.<sup>1</sup> This is a difficult goal to achieve based on the fact that most insurance policies utilize standardized forms, which are rarely bargained for or negotiated by the parties, and which often contain ambiguous terms and provisions. Due to their unique nature, insurance contracts are generally considered a specialized form of contract: "Because they are contracts, the general rules pertaining to the interpretation of contracts apply. Because they are specialized, they are subject to rules contained in the Insurance Code and its judicial interpretations."<sup>2</sup> As noted by one author, insurance contract interpretation is simply "the process by which a court determines the meaning that it will give the language used by the parties in a contract."<sup>3</sup> As the following sections will explain, the application of insurance contract interpretation rules can be as confusing as the insurance policies they seek to interpret.

Courts continue to struggle with the issue of insurance policy interpretation, often resulting in inconsistent and unpredictable outcomes. The much anticipated California Supreme Court decision of *MacKinnon v. Truck Insurance Exchange*<sup>4</sup> reaffirms California's approach to what is predominantly a confusing issue in insurance law. This Note argues that the *MacKinnon* decision is not only the proper approach to insurance policy interpretation, but remains consistent with California's previous approach which seeks to give effect to the

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\* Class of 2004. The author would like to dedicate this article to the memory of his uncle, Morry Behar. He also wishes to thank his parents, Dorothy Behar and Fernando Sanchez Barroso, for their endless love, faith, and support.

1. CAL. CIV. CODE § 1636 (West 1985).

2. 2 MATTHEW BENDER & CO., CALIFORNIA INSURANCE LAW & PRACTICE § 8.02(1) (2003).

3. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 126 (2d ed. 1996) (emphasis omitted).

4. 73 P.3d 1205 (Cal. 2003) [hereinafter *MacKinnon II*].

intent of the parties through an analysis that consists of three distinct, sequential parts: 1) a look at the plain meaning of the policy language as an initial inquiry; 2) a consideration of the insured's reasonable expectation of coverage; 3) and the doctrine that ambiguous policies are strictly construed against the drafter of the policy, typically the insurer.<sup>5</sup>

Part I of this Note provides an overview of California's approach to the interpretation of insurance policies. Part I.C describes a prevalent lack of judicial consensus on the issue of insurance contract interpretation. Part II discusses the recent case of *MacKinnon v. Truck Insurance Exchange*. Part III argues that *MacKinnon* reaffirms existing interpretative rules without creating a new approach to insurance policy interpretation. Finally, Part IV explains why California's approach to insurance contract interpretation is desirable.

## I. California's Approach to Insurance Contract Interpretation

The interpretation of an insurance policy is generally a question of law.<sup>6</sup> Although insurance contracts are considered standard contracts, most court decisions place "insurance contracts in a different category . . . applying some kind of heightened review or alternative interpretive principles."<sup>7</sup> By law, insurance companies traditionally have greater legal responsibility than do parties to ordinary contracts.<sup>8</sup> This, in part, is an effort to bridge the gap and create greater balance between two parties with significantly unequal bargaining power—the insurer and the policyholder.

Moreover, insurance coverage is "interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] . . . exclusionary clauses are interpreted narrowly against the insurer."<sup>9</sup> Although it is the burden of the insured to establish that a particular claim falls generally within the coverage of the policy, it is the insurer's burden to show that the claim is specifically excluded by clear and unambiguous language.<sup>10</sup>

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5. See *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990).

6. *Waller v. Truck Ins. Exch.*, 900 P.2d 619, 627 (Cal. 1995).

7. JERRY, *supra* note 3, at 134.

8. 2 MATTHEW BENDER & CO., *supra* note 2, § 8.02(1).

9. *MacKinnon II*, 73 P.3d at 1213 (alteration in original) (quoting *White v. W. Title Ins. Co.*, 710 P.2d 309, 313 (Cal. 1985)).

10. *Id.*

### A. California's Historical Approach—Construing the Insurance Policy Strictly Against the Insured

Prior to the 1990s, the interpretation of insurance policies in California followed the *contra proferentum* doctrinal approach.<sup>11</sup> Under this approach, the courts would construe ambiguous policies strictly against the insurer.<sup>12</sup> The application of this approach was typically mechanical in the sense that courts would often look at policy terms and provisions in the abstract in order to determine if the policy contained ambiguity.<sup>13</sup> If the court found ambiguity in the language of the policy, then it was construed strictly against the drafter of the policy.<sup>14</sup>

This pro-insured approach developed because courts greatly disfavored “careless draftsmanship of documents of insurance,” since lack of clarity in insurance policies created the “evil social consequences” of disillusioned insureds and anguished courts.<sup>15</sup> Consequently, prior to the 1990s, many courts adopted a strict pro-insured view of insurance contract interpretation and required insurers to “draw clear policies or suffer adverse consequences.”<sup>16</sup> The obvious result of this strict application was that policyholders typically won disputes against their insurers.<sup>17</sup>

### B. California's Modern Approach—The Three-Part Analysis

In recent years, the courts have shifted from a strict mechanical approach to a more contextual approach, where the ultimate goal is to give effect to the mutual intention of the parties.<sup>18</sup> This modern view holds that while interpreting the language of insurance policies, courts should not find ambiguity in the abstract, but rather “[the] language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case.”<sup>19</sup> California created its modern framework for insurance policy interpretation in

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11. See John K. DiMugno, *The Shifting Tides of Insurance Policy Interpretation: Does McKinnon [sic] v. Truck Insurance Exchange Change How Courts Will Interpret Insurance Policies?*, 25 INS. LITIG. REP., Nov. 14, 2003, at 567.

12. See *Allstate Ins. Co. v. Thompson*, 254 Cal. Rptr. 84, 87 (Ct. App. 1988); see also *State Farm Mut. Auto. Ins. v. Jacober*, 514 P.2d 953, 954 (Cal. 1973).

13. See DiMugno, *supra* note 11, at 566.

14. *Allstate Ins. Co.*, 254 Cal. Rptr. at 87.

15. *Bareno v. Employers Life Ins. Co.*, 500 P.2d 889, 890 (Cal. 1972).

16. *Id.*

17. See DiMugno, *supra* note 11, at 566.

18. See CAL. CIV. CODE § 1636 (West 1985).

19. *Bank of the West v. Superior Court*, 833 P.2d 545, 552 (Cal. 1992) (emphasis omitted).

the early 1990s, in a trilogy of supreme court cases.<sup>20</sup> In a three-part analysis, when interpreting insurance policies, courts must first look at the plain meaning of the policy language and then consider the insured's reasonable expectation of coverage. If the ambiguity is not resolved by looking at the language of the policy and the insured's reasonable expectation, then the policy is strictly construed against the insurer.<sup>21</sup>

As the primary objective of contract interpretation is to give effect to the mutual intent of the parties,<sup>22</sup> the mutual intent of the parties is to be inferred, if possible, solely from the written provisions of the contract.<sup>23</sup> Thus, the first interpretative step is always to look at the plain meaning of the policy's language. The language of the insurance policy will govern its interpretation "if the language is clear and explicit, and does not involve an absurdity."<sup>24</sup> Moreover, the words of the policy "are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning."<sup>25</sup> As previously noted, the court should not take individual terms out of context; rather, the terms must be viewed in the context of the policy as a whole and not analyzed in the abstract.<sup>26</sup> Therefore, "if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning."<sup>27</sup>

However, if a policy term or provision is considered ambiguous, then the court cannot interpret the policy using the plain meaning rule. Defining ambiguity is often a difficult interpretative process, since what is plain for one court may not be plain for another. In California, an insurance policy is considered ambiguous "when it is capable of two or more constructions, both of which are reasonable."<sup>28</sup>

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20. See *Cooper Cos. v. Transcon. Ins. Co.*, 37 Cal. Rptr. 2d 508, 511 (Ct. App. 1995). The three cases in the trilogy are: *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990); *Bank of the West*, 833 P.2d 545; and *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263 (Cal. 1993).

21. See *AIU Ins. Co.*, 799 P.2d at 1264; see also *Bank of the West*, 833 P.2d at 551-52.

22. See *AIU Ins. Co.*, 799 P.2d at 1264-66.

23. CAL. CIV. CODE § 1639.

24. *Id.* § 1638.

25. *Id.* § 1644.

26. *Bank of the West*, 833 P.2d at 552.

27. *AIU Ins. Co.*, 799 P.2d at 1264.

28. *Bay Cities Paving & Grading Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d. 1263, 1271 (Cal. 1993) (emphasis omitted) (quoting *Suarez v. Life Ins. Co. of N. Am.*, 252 Cal. Rptr. 377, 380 (Ct. App. 1998)).

Therefore, if the meaning of a policy is clear by looking at the language of the policy, the court will adopt such an interpretation. But if ambiguity is established, the dispute will not be resolved by the plain meaning rule. Instead, the court must move to the second part of the interpretative analysis and consider the insured's reasonable expectation of coverage.<sup>29</sup>

Most interpretation disputes are resolved by looking at the language of the policy or by considering the insured's reasonable expectation. But if ambiguity is not resolved after the application of the first two elements, then the court will apply the *contra proferentum* rule. This rule, as it existed in California prior to the 1990s, strictly construes an insurance policy against the party who caused the uncertainty to exist, typically the insurance company who wrote the contract.<sup>30</sup> The reasoning for this strict approach is that the insurer is the party that caused the uncertainty to exist and must, therefore, be held responsible for any confusion.

Prior to the creation of the three-part analysis set forth in *AIU Insurance Co. v. Superior Court*,<sup>31</sup> courts applied *contra proferentum* immediately after ambiguity was established, thus skipping the reasonable expectation analysis.<sup>32</sup> Under the modern approach, the doctrine "against the insurer" is only applied when the policy is unclear and the ambiguity cannot be resolved through the process of interpreting the insured's reasonable expectation.<sup>33</sup>

### C. A Lack of Consensus on the Question of Insurance Contract Interpretation

The question of how to interpret an insurance policy often leads to confusion, inconsistency, and unpredictability in judicial decisions: "[J]udicial opinions show many different approaches to interpretation, and the absence of a 'consensus methodology' means that results in particular cases are often difficult to predict."<sup>34</sup>

For example, consider the pollution exclusion in question before the California Supreme Court in *MacKinnon*. Pollution exclusions have been litigated extensively not only in California, but in most jurisdictions. The primary disagreement turns on whether the term

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29. See *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 389 (Cal. 2004).

30. See CAL. CIV. CODE § 1654; see also *AIU Ins. Co.*, 799 P.2d at 1264.

31. See 799 P.2d at 1264.

32. See *Allstate Ins. Co. v. Thompson*, 254 Cal. Rptr. 84, 87 (Ct. App. 1988).

33. See *E.M.M.I. Inc.*, 84 P.3d at 389; see also *AIU Ins. Co.*, 799 P.2d at 1264.

34. JERRY, *supra* note 3, at 129.

“pollution exclusion” is ambiguous. Insureds typically argue that pollution exclusions should only extend to industrial or environmental pollution, while insurers argue that the scope of the exclusion should be broader covering all types of pollutants such as the use of pesticides by individuals. Meanwhile, extensive litigation on issues such as pollution exclusion clauses has failed to create greater certainty in judicial decisions. Rather, it likely has created greater confusion. As the *MacKinnon* court stated, “[t]o say there is a lack of unanimity as to how the [pollution exclusion] clause should be interpreted is an understatement.”<sup>35</sup>

Although California’s three-part analysis for insurance contract interpretation is fairly straightforward, courts have experienced trouble interpreting insurance policies with consistency and predictability:

Historically, the courts have not followed a consistent pattern as to which principle of interpretation should be applied to policies with ambiguous terms. Some courts have applied only one of the principles while others have applied several. Moreover, the courts have sometimes blurred the distinctions between the principles. Because of the inconsistencies in application, it has been difficult to predict which principles a court will find determinative in interpreting the policy.<sup>36</sup>

Specifically, some courts suggest that the “plain meaning” of a policy provision cannot be determined in isolation or without considering the insured’s “reasonable expectation.”<sup>37</sup> A California appellate court held that “[i]n order to conclude that an ambiguity exists . . . it is necessary first to determine whether the coverage . . . is consistent with the insured’s *objectively reasonable expectations*.”<sup>38</sup> Additionally, some courts have placed too much emphasis on the insured’s reasonable expectation by combining the “plain meaning” and the “reasonable expectation” analysis.<sup>39</sup>

Remarking on the *MacKinnon* case, one commentator pointed out, “[m]any had hoped that the Supreme Court would clarify this

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35. *MacKinnon II*, 73 P.3d 1205, 1208 (Cal. 2003).

36. CONTINUING EDUC. OF THE BAR, CALIFORNIA, FUNDAMENTALS OF INSURANCE LITIGATION § 3.47(b) (2001) (citation omitted).

37. *See Cooper Cos. v. Transcon. Ins. Co.*, 37 Cal. Rptr. 2d 508, 515 (Ct. App. 1995); *see also Nissel v. Certain Underwriters at Lloyd’s of London*, 73 Cal. Rptr. 2d 174, 179 (Ct. App. 1998).

38. *Nissel*, 73 Cal. Rptr. 2d at 179.

39. *See H. WALTER CROSKY, CALIFORNIA PRACTICE GUIDE: INSURANCE LITIGATION* § 4:10 (2003).

area.”<sup>40</sup> The following discussion of the *MacKinnon* court’s reasoning and holding underscores how the disagreements between the appellate and the supreme courts’ opinions embody this “lack of consensus” that is so prevalent in most jurisdictions.

## II. A Much Anticipated Decision—*MacKinnon v. Truck Insurance Exchange*

On August 14, 2003, the Supreme Court of California decided *MacKinnon v. Truck Insurance*. The issue was whether a pollution exclusion in a comprehensive general liability insurance policy precluded coverage from injuries arising from spraying an apartment building with pesticides.<sup>41</sup> The supreme court unanimously held that the pollution exclusion did not preclude coverage, finding that the exclusion only precluded environmental pollution and not the residential spraying of pesticides.<sup>42</sup>

### A. Relevant Facts and Procedural Background

Jennifer Denzin was a tenant living in an apartment building owned by the John and Christel MacKinnon Family Trust (“MacKinnon”).<sup>43</sup> Denzin requested that MacKinnon spray the building in order to eradicate yellow jackets.<sup>44</sup> MacKinnon hired a pest control service that treated the building on several occasions in 1995 and 1996.<sup>45</sup> On May 19, 1996, Denzin died in MacKinnon’s apartment building.<sup>46</sup>

Jennifer Denzin’s parents subsequently filed a wrongful death suit against MacKinnon alleging that MacKinnon was negligent in failing to inform Denzin that her apartment was being sprayed with pesticides and neglecting to evacuate Denzin from the premises, resulting in her death from pesticide exposure.<sup>47</sup> MacKinnon’s insurance company, Truck Insurance Exchange (“Truck Insurance”), retained counsel and responded to the complaint.<sup>48</sup> Although Truck Insurance

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40. Rex Heeseman, ‘MacKinnon’ Case May Change How Courts Interpret Insurance Contracts, L.A. DAILY J., Sept. 8, 2003, at 7.

41. *MacKinnon II*, 73 P.3d 1205, 1207 (Cal. 2003).

42. *Id.* at 1217–18.

43. *MacKinnon v. Truck Ins. Exch.*, 115 Cal. Rptr. 2d 369, 371 (Ct. App. 2002) [hereinafter *MacKinnon I*].

44. *MacKinnon II*, 73 P.3d at 1207.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See id.*

informed MacKinnon that they were reserving all rights under the terms of the policy while they continued their investigation to determine if Truck Insurance was obligated to provide a defense under the claim in question.<sup>49</sup> Several months later, Truck Insurance notified MacKinnon that they had determined that the pollution exclusion clause precluded coverage for this action and Truck Insurance withdrew its defense of the claim.<sup>50</sup>

The relevant part of the pollution exclusion clause in the MacKinnon policy states:

We do not cover Bodily Injury or Property Damage (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants: (a) at or from the insured location.<sup>51</sup>

The term pollution or pollutants is defined in the policy as follows:

[A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed.<sup>52</sup>

After Truck Insurance withdrew its defense of the claim, MacKinnon retained counsel and settled the wrongful death action with Denzin's parents.<sup>53</sup> MacKinnon then filed the claim in question against Truck Insurance for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing.<sup>54</sup> Truck Insurance subsequently moved for summary judgment, arguing that the pollution exclusion clearly precluded coverage of the claim filed by Denzin's parents.<sup>55</sup> The trial court granted the motion for summary judgment holding that Denzin had died from exposure to the pesticide sprayed in the apartment building and that the pollution exclusion clearly and unambiguously precluded coverage since injury from the spraying of pesticides was excluded under the pollution exclusion.<sup>56</sup>

The court of appeal affirmed.<sup>57</sup> The question presented to the appellate court was whether, as a matter of law, the plain language of the pollution exclusion denied coverage. Since the appellate court was unaware of any California case addressing the issue of whether a

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49. *See id.* at 1207-08.

50. *Id.* at 1208.

51. *Id.* at 1207.

52. *Id.*

53. *Id.* at 1208.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

residential pesticide was “pollution” within the meaning of the exclusion, the court turned to other jurisdictions.<sup>58</sup> As the court noted, “the current general consensus appears to be that the exclusion is clear on its face, and in numerous instances the exclusion has been determined to be clear and applicable to nonenvironmental pollution such as pesticide exposure.”<sup>59</sup> The appellate court’s decision relied heavily on several out-of-state court decisions that had held generally that “pollution exclusion[s] clearly applied to spraying insecticide and was not limited to environmental pollution.”<sup>60</sup>

While applying the “plain meaning” approach, the appellate court also relied on a strict, and perhaps abstract, definition of the word “pollution.” The court of appeal found that the term “pollutant” as defined in the policy, included “irritants, contaminants, and chemicals.”<sup>61</sup> The court went on to reason that it was undisputed that the pesticide in question fell within the definition of an irritant, contaminant, or chemical.<sup>62</sup> As such, the spraying of pesticides fell within the policy definition of pollutant.<sup>63</sup>

Responding to MacKinnon’s argument that the pollution exclusion was limited to environmental pollution, the court noted that “there is nothing in the policy definition of pollutant that requires a pollutant to be recognized in industry or by governmental regulators as a toxic or particularly harmful material.”<sup>64</sup>

Moreover, in response to MacKinnon’s argument that an ordinary insured would reasonably expect their commercial general liability (“CGL”) policy to cover this type of injury, the court of appeal simply noted that an insured’s reasonable expectation is not considered when interpreting unambiguous insurance policies:<sup>65</sup>

MacKinnon’s assertion that precluding coverage under the pollution exclusion for spraying insecticide at his apartment building conflicts with his reasonable expectations is unavailing. Since the exclusion terms are clear and unambiguous, we do not reach the

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58. See *MacKinnon I*, 115 Cal. Rptr. 2d 369, 374 (Ct. App. 2002).

59. *Id.*

60. See *id.* at 376 (relying on *Protective Nat’l Ins. Co. v. City of Woodhaven*, 476 N.W.2d 374 (Mich. 1991) and *Deni Assocs. v. State Farm*, 711 So. 2d 1135 (Fla. 1998) for the proposition that pollution exclusion clauses exclude coverage for the spraying of pesticides).

61. *Id.* at 379.

62. *Id.*

63. *Id.*

64. *Id.*

65. See *id.* at 378.

level of analysis which allows us to consider the insured's expectations.<sup>66</sup>

The appellate court concluded that the pollution exclusion in MacKinnon's CGL policy clearly, unambiguously, and as a matter of law precluded coverage for the spraying of pesticides at MacKinnon's apartment building.<sup>67</sup>

## B. The Supreme Court's Unanimous Reversal

The California Supreme Court granted review. The court began its analysis by looking at how other jurisdictions have dealt with the issue of pollution exclusion. The supreme court noted that other courts were "roughly divided into two camps."<sup>68</sup> After considering the historical background and the drafting history of the pollution exclusion, the court considered the parties' arguments.

Truck Insurance contended that the pollution exclusion "plainly and clearly extend[ed] to virtually all acts of negligence involving substances that can be characterized as irritants or contaminants, that is, [substances that] are capable of irritating or contaminating so as to cause personal injury."<sup>69</sup> Specifically, Truck Insurance argued that pesticides are "chemicals" capable of causing irritation and therefore can be categorized as an "irritant" and a "pollutant."<sup>70</sup> They also claimed that the spraying of pesticides can be described as a "discharge" or "dispersal."<sup>71</sup>

The supreme court flatly rejected this literal reading of the word "pollutant" previously accepted by the court of appeal.<sup>72</sup> The court stated that this reading of the clause was "predicated on a basic fallacy, one shared by many of the courts on which it relies: the conclusion that the meaning of policy language is to be discovered by citing one of the dictionary meanings of the key words, such [as] 'irritant' or 'discharge.'"<sup>73</sup> The court went on to explain that although dictionary definitions are useful and may be considered while analyzing the plain meaning of the policy, they do not necessarily yield the "ordinary and popular" sense of the word.<sup>74</sup> Instead, the court "must attempt to put

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66. *Id.* at 380.

67. *Id.*

68. *MacKinnon II*, 73 P.3d 1205, 1208 (Cal. 2003).

69. *Id.* at 1214.

70. *See id.*

71. *Id.*

72. *See id.*

73. *Id.*

74. *See id.*

itself in the position of a layperson and understand how he or she might reasonably interpret the exclusionary language.”<sup>75</sup>

The court dismissed Truck Insurance’s argument as unreasonable because virtually any substance can act as an “irritant or contaminant,” as defined by the abstract and literal definition adopted by the appellate court.<sup>76</sup> Without “‘some limiting principle,’” the court noted, “‘the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.’”<sup>77</sup> Thus, the appellate court’s plain meaning interpretation of the pollution exclusion was rejected:

In short, because Truck Insurance’s broad interpretation of the pollution exclusion leads to absurd results and ignores the familiar connotations of the words used in the exclusion, we do not believe it is the interpretation that the ordinary layperson would adopt. . . . “‘Irritant’ is not to be read literally and in isolation, but must be construed in the context of how it is used in the policy . . . .”<sup>78</sup>

The court further noted that the terms “discharge, dispersal, release or escape” used in conjunction with “pollutant” commonly refer to environmental pollution.<sup>79</sup> Also, looking at the drafting history, “there appears to be little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from anti-pollution laws enacted between 1966 and 1980.”<sup>80</sup>

Unlike the appellate court, the supreme court found the “plain meaning” of the policy language to be ambiguous.<sup>81</sup> The analysis therefore turned to whether MacKinnon could have reasonably expected coverage under the circumstances. The court answered this question in the affirmative. “While pesticides may be pollutants under some circumstances, it is unlikely a reasonable policyholder would think of the act of spraying pesticides under these circumstances as an act of pollution.”<sup>82</sup>

The lack of consensus in insurance policy interpretation discussed in Part I.C was evident here. The supreme court and the court of appeal reached opposite decisions while analyzing the same insur-

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75. *Id.*

76. *See id.*

77. *Id.* (quoting *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1993)).

78. *Id.* at 1216 (quoting *Reg’l Bank v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494 (10th Cir. 1994)).

79. *See id.*

80. *Id.*

81. *See id.*

82. *Id.* at 1217.

ance policy. For the court of appeal, the decision was made primarily by looking at the “plain meaning” of the policy—the first step in the interpretative analysis.<sup>83</sup> Since the court of appeal found the exclusion unambiguous after adopting a literal definition of the pollution exclusion, there was no need to consider MacKinnon’s reasonable expectation of coverage. However, reviewing the exclusion’s drafting history, the supreme court found ambiguity in the pollution exclusion, determining that the pollution exclusion had at least two or more reasonable constructions.<sup>84</sup> Accordingly, the supreme court proceeded to the second part of the interpretative analysis and found that MacKinnon had a reasonable expectation of coverage under the circumstances.<sup>85</sup>

### III. Did *MacKinnon* Create a New Rule in California?

In the *MacKinnon* opinion, the supreme court properly invoked the three-part interpretative analysis set forth in *AIU Insurance*.<sup>86</sup> However, the court’s discussion failed to prioritize the three rules in their sequential order as is typically done.<sup>87</sup> As discussed in Part I.B, according to California’s interpretative rules, the court should have followed the prescribed order by beginning its analysis with the plain meaning and only considering the insured’s reasonable expectation after ambiguity in the policy is established.<sup>88</sup> Instead, the court began its analysis by looking at the history of the pollution exclusion and then proceeded to analyze the parties’ contentions.<sup>89</sup> At times, it is difficult to follow the court’s organization and reasoning; it also appears that the court placed too much emphasis on MacKinnon’s reasonable expectation. The court’s unusual reasoning has triggered a broad discussion as to whether the supreme court has created a new approach to insurance policy interpretation.

Some commentators have suggested that after *MacKinnon*, California’s traditional three-prong rule “may be a relic of the past.”<sup>90</sup> One author noted that language in the court’s opinion suggests that the expectation of the reasonable insured may be considered at the beginning of the interpretative analysis, which indicates that the court

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83. See *supra* text accompanying notes 61–63.

84. See *MacKinnon II*, 73 P.3d at 1210–11, 1218.

85. See *id.* at 1217.

86. See 799 P.2d 1253, 1264 (Cal. 1990).

87. See DiMugno, *supra* note 11, at 571–72.

88. See *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 389 (Cal. 2004).

89. *MacKinnon II*, 73 P.3d at 1209–11.

90. See Heeseman, *supra* note 40, at 7.

may have abandoned the three-part rule for a different analysis.<sup>91</sup> Thus, instead of the clearly distinct three-prong test that existed prior to *MacKinnon*, “an analysis using many concepts at once may develop.”<sup>92</sup> As a result of the *MacKinnon* opinion, “policy interpretation in California soon may become more complicated.”<sup>93</sup>

The creation of a new rule that allows the consideration of the insured’s reasonable expectation at the beginning of the interpretative analysis would greatly favor insureds, since the primary inquiry would shift from looking at the language of the policy to considering the insured’s expectations. But the *MacKinnon* decision is not likely to have the effect of creating a new rule in California. In its opinion, the supreme court did not expressly reject or repudiate the three-part analysis set forth in *AIU Insurance*, which has been the underlying framework for insurance policy interpretation in California for over a decade. One would expect that if the supreme court had intended to abandon this well-established interpretative framework, the opinion would state that intention. Not only did the supreme court not repudiate the rule, it actually invoked the three-part analysis in the *MacKinnon* opinion.<sup>94</sup> *MacKinnon*’s failure to prioritize the three rules may indicate imprecision in the court’s reasoned opinion, or perhaps that the court made a result-oriented decision in order to find for the insured in this particular case. Nevertheless, it should not be confused with the court’s abandonment of existing interpretative rules.

Moreover, a month after *MacKinnon* was decided, the California Supreme Court issued a “Modification of Opinion,” which seems to have weakened the notion that the three-part rule can be ignored by considering the reasonable expectation of the insured at the beginning of the analysis.<sup>95</sup> The following paragraph illustrates the original sentence in the opinion prior to the modification. The deleted portion of the sentence represents the change after the modification. “[I]n order to ascertain the scope of an exclusion we must first consider the coverage language of the policy .”<sup>96</sup>

Notably, the court deleted the reference to the insured’s reasonable expectation as a first step in the interpretative analysis. The origi-

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91. See DiMugno, *supra* note 11, at 571–72.

92. See Heeseman, *supra* note 40, at 7.

93. *Id.*

94. *MacKinnon II*, 73 P.3d at 1212–13.

95. See Modification of Opinion, *MacKinnon II*, 73 P.3d 1205 (Cal. 2003) (No. S104543), 2003 Cal. LEXIS 6933, at \*1 (2003). The court noted that the “Modification of Opinion” did not affect the judgment. Also, this was the only change in the modification.

96. *Id.*

nal sentence taken as a whole seemed to suggest that an evaluation of the insured's reasonable expectation should be the first step in the analysis. The modification corrects that perception by striking out any reference to reasonable expectation as a first step in the analysis. The modification changes the emphasis of the sentence to the words "language of the policy," which directs the court to follow an initial "plain meaning" approach in accordance with California's existing rule.

Furthermore, cases decided after *MacKinnon*, which also address the issue of insurance policy interpretation, support the notion that California has not abandoned the three-part analysis. For example, in *E.M.M.I. Inc. v. Zurich American Insurance Co.*,<sup>97</sup> the policy in question protected the policyholder against loss or theft of certain jewelry. The policy contained an exception where the insurer would not pay for loss resulting from "[t]heft [of the jewelry] from any vehicle unless, you [the insured], an employee, or other person whose only duty is to attend to the vehicle are *actually in or upon* such vehicle at the time of the theft."<sup>98</sup> The issue was whether the insured could recover for theft when a man drove away in the insured's vehicle with the jewelry when the insured was not inside the vehicle but had momentarily stepped out to inspect the rear of the vehicle.<sup>99</sup>

The California Supreme Court found for the insured.<sup>100</sup> In reaching this decision, the court in *E.M.M.I.* delineated California's three-part analysis and adequately applied it to the facts at hand. The court held that the provision was ambiguous since it failed to plainly and clearly notify the insured that there was no coverage if theft occurs when the insured had simply stepped out of the vehicle, even if the insured remains in close proximity to the vehicle.<sup>101</sup> Accordingly, the *E.M.M.I.* court found that a reasonable insured would have expected coverage under the circumstances.<sup>102</sup>

Only time will tell whether *MacKinnon* has created the groundwork for a change in California's approach to insurance policy interpretation. In the meantime, the fact that courts continue to invoke

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97. See *E.M.M.I., Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 388–89 (Cal. 2004).

98. *Id.* at 388 (second and third alteration added).

99. *Id.*

100. *Id.* at 399–98.

101. See *id.* at 391.

102. See *id.* at 391–92. See generally *Fire Ins. Exch. v. Superior Court*, No. B169455, 2004 WL 377359 (Cal. App. Mar. 2, 2004) (relying on the three-part analysis). This provides further evidence that *MacKinnon II* did not abandon existing interpretation rules in California.

the three-part analysis suggests that *MacKinnon* was consistent with existing rules.

#### IV. Why *MacKinnon* Is the Proper Approach

The *MacKinnon* decision reaffirms existing interpretative rules in California by its proper use of the “plain meaning” and the “reasonable expectation” doctrines. In addition, California’s interpretative approach serves in part to address important public policy concerns.

##### A. The Proper “Plain Meaning” Application with Consideration of Relevant Extrinsic Evidence

Scholars have noted that the “plain meaning” rule is “a source of confusion within California law on contract interpretation.”<sup>103</sup> In fact, one author has stated that the plain meaning approach “actually holds little value.”<sup>104</sup> This criticism is based on the notion that words alone do not have “absolute and constant referents,” and as such, it is difficult to “discover contractual intention in the words themselves and in the manner in which they were arranged.”<sup>105</sup> The meaning of a particular term or word depends on the “verbal context and surrounding circumstances and purposes.”<sup>106</sup>

This criticism is also based in part on concerns over judicial discretion. When analyzing the language of an insurance contract, what is plain for one judge may not be plain for another. This potentially gives the judge the ability to engage in “tortured construction” of insurance policies in order to achieve the court’s desired result.<sup>107</sup> The broader consequence of this is greater uncertainty in judicial opinions.

Moreover, as Truck Insurance argued in *MacKinnon*, under traditional contract principles, “extrinsic evidence is inadmissible to interpret, vary or add to the terms of an unambiguous integrated written instrument.”<sup>108</sup> Some courts have “declared drafting history irrelevant, usually under the reasoning that the history cannot be used to create ambiguities in what is otherwise clear, unambiguous language.”<sup>109</sup>

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103. Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the “Just Result” Principle*, 31 *LOV. L.A. L. REV.* 557, 569 (1997).

104. *Id.* at 570.

105. *Id.* at 575.

106. *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968).

107. *MacKinnon I*, 115 Cal. Rptr. 2d 369, 373 (Ct. App. 2002).

108. *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 568–69 (9th Cir. 1988).

109. JERRY, *supra* note 3, at 137.

However, a plain meaning approach with consideration of limited extrinsic evidence is desirable as it helps avoid a strict literal reading of the policy and assists in determining the intent of the parties. Extrinsic evidence should be considered to determine the parties' intent when courts are deciding a question of ambiguity in an insurance policy: "[T]he intent of the parties is the element of primary importance, rather than the strict language used in the contract."<sup>110</sup> If the intent of the parties is unclear by the language of the policy but can be clearly ascertained by the relevant drafting history of the policy, such evidence should be considered when deciding the question of ambiguity: "As in the case of contracts generally, the cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control."<sup>111</sup> Contractual obligations flow not from the words of the contract, but from the intention of the parties.<sup>112</sup> As California's highest court stated, "the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone."<sup>113</sup>

While some courts strictly deny the use of any extrinsic evidence when deciding the question of ambiguity,<sup>114</sup> other courts, such as *MacKinnon*, look at relevant extrinsic evidence:

Most courts considering the issue have held that evidence of the drafting history of standardized forms and other available interpretive materials (such as, for example, speeches of insurance executives at the time forms were being changed, essays and articles by drafters or members of drafting committees, etc.) are relevant to the meaning of disputed policy language.<sup>115</sup>

Although the *MacKinnon* decision is not likely to result in the abandonment of existing interpretative rules in California, courts are more likely to use extrinsic evidence during the ambiguity analysis as a result of *MacKinnon*. Prior to *MacKinnon*, it was unclear whether extrinsic evidence could be used to prove ambiguity.<sup>116</sup> *MacKinnon* sug-

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110. 2 MATTHEW BENDER & CO., *supra* note 2, § 8.02(3)(d) (citations omitted).

111. 39 BANCROFT WHITNEY, CALIFORNIA JURISPRUDENCE § 41 (3d. ed. 1996).

112. *See id.*

113. Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968).

114. *See* JERRY, *supra* note 3, at 137.

115. *Id.* at 136-37 (relying on a number of cases, including Montrose Chem. Corp. v. Admiral Ins. Co., 897 P.2d 1 (Cal. 1995)).

116. *See* DiMugno, *supra* note 11, at 573.

gests that extrinsic evidence, such as the drafting history of an exclusion, is a critical element in the ambiguity analysis.

Furthermore, an adequate application of the plain meaning rule should place a limit on the importance given to dictionary or other literal definitions of policy terms. Courts often use dictionary definitions to interpret policies. Although a useful tool, dictionary definitions are not necessarily controlling, because a dictionary definition can easily disregard the context in which the term is found within the insurance policy.<sup>117</sup> The court cannot define a word in the abstract without considering its context.<sup>118</sup> In *MacKinnon*, the appellate court relied heavily on the dictionary-like literal definition of the word pollutant to hold that it included pesticides, thus denying coverage.<sup>119</sup> The supreme court responded that it is a "basic fallacy" to find that the "meaning of policy language is to be discovered by citing one of the dictionary meanings of the key words."<sup>120</sup> Thus, a proper consideration of extrinsic evidence should limit the weight given to dictionary definitions.

Moreover, *MacKinnon* reminds the courts how the question of ambiguity should be analyzed. The question of whether ambiguity exists in a policy is not whether the insured can persuade the court to agree with the insured's interpretation of the policy. Rather, the question is whether the insurance term or provision is capable of two or more constructions, both of which are reasonable.<sup>121</sup> The policyholder is not required to present the only reasonable interpretation, but only one among several reasonable interpretations.<sup>122</sup>

As the court stated in *MacKinnon*, even if Truck Insurance's interpretation that the pollution exclusion excluded coverage for the use of pesticides was considered reasonable, "[Truck Insurance] would still not prevail, for in order to do so it would have to establish that its interpretation is the *only* reasonable one."<sup>123</sup> *MacKinnon's* interpretation that the pollution exclusion excluded only environmental or industrial pollution was at least as reasonable as Truck Insurance's interpretation. If at least two reasonable interpretations exist, then

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117. See *MacKinnon II*, 73 P.3d 1205, 1214 (Cal. 2003).

118. See CROSKY, *supra* note 39, § 4:19; *Bank of the West v. Superior Court*, 833 P.2d 545, 552 (Cal. 1992).

119. See *MacKinnon II*, 73 P.3d at 1214.

120. *Id.*

121. See *id.* at 1218.

122. See *id.*

123. *Id.*

ambiguity is established, and the court must proceed to analyze the insured's reasonable expectation.<sup>124</sup>

The *MacKinnon* court's application of the plain meaning rule effectively seeks to give effect to the intent of the parties. By considering relevant extrinsic evidence such as surrounding circumstances and purposes, the courts can adequately determine the intent of the parties and avoid the harsh results that can flow from a strict reading of policy language.

### B. The Expectation of the Reasonable Insured Is a Critical Interpretative Factor

An interpretative approach that considers the reasonable expectation of the insured is desirable, as it seeks to create greater balance between two parties with significantly unequal bargaining power. Although the insured ideally should read the entire policy, in reality "only a hearty soul would . . . plow through all the fine print."<sup>125</sup> In fact, sometimes policyholders do not receive "the actual contract, the insurance policy, until after agreeing to buy insurance and perhaps paying the first premium."<sup>126</sup> *MacKinnon* reaffirms the proper use of the insured's reasonable expectation. California's application of the insured's reasonable expectation, as illustrated in *MacKinnon*, strikes an important balance between the traditional strong reasonable expectation doctrine and the *contra proferentum* doctrine that existed in California prior to the three-part analysis.<sup>127</sup>

Robert Keeton, an insurance law scholar, expounded his famous principle of reasonable expectation in a 1970 article and wrote: "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."<sup>128</sup> Thus, Keeton's reasonable expectation approach dictates that the insured will receive coverage even "if a technical reading of the policy would negate coverage."<sup>129</sup> In other

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124. See *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 389 (Cal. 2004).

125. Nicholas R. Andrea, *Exposure, Manifestation of Loss, Injury-in-Fact, Continuous Trigger: The Insurance Coverage Quagmire*, 21 PEPP. L. REV. 813, 825 (1994).

126. Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1475 (1989).

127. See John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank of the West v. Superior Court Places the Fox in Charge of the Henhouse*, 29 CAL. W. L. REV. 83, 112 (1992).

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

129. Romaker & Prieto, *supra* note 127, 100-01.

words, this approach suggests that the reasonable expectation of the insured is the primary element of insurance policy interpretation. Keeton's doctrine proposes that "an individual can have reasonable expectations of coverage that arise from some source *other* than the policy language itself, and that such an extrinsic expectation can be powerful enough to override any policy provisions no matter how clear."<sup>130</sup>

California maintained its distance from Keeton's application of the reasonable expectation approach, since it basically renders the language of the policy useless. Instead, California recognizes the importance of the insured's reasonable expectation but considers it only after ambiguity is established.<sup>131</sup> Therefore, the policy is not rendered pointless. Before considering the insured's reasonable expectation, the parties must prove ambiguity in the policy:

California's hybrid formula retained the requirement that an ambiguity exist before the contra-insurer rule applies, but the policy is then construed in light of the insured's reasonable expectations. The additional requirement that the policyholder have reasonable expectations that arise because of ambiguous terms, strikes a balance between traditional *contra proferentum* and the "strong" Keeton reasonable expectations doctrine.<sup>132</sup>

Moreover, a finding of ambiguity in a policy does not automatically entitle the insured to coverage.<sup>133</sup> There can be occasions when ambiguity in a policy is established, yet the insured fails to show a reasonable expectation. An ambiguous policy will not be construed strictly against the insurer. The insured has the burden of showing that it has a reasonable expectation of coverage.<sup>134</sup>

It should be noted that California's application of the reasonable expectation doctrine allows for a determination of the insured's sophistication. Typically, courts will refuse to apply the reasonable expectation doctrine where there is sufficient bargaining between a sophisticated policyholder and the insurer.<sup>135</sup>

One of the reasons that courts construe ambiguous terms against insurers is because most policyholders lack the same resources, bargaining strength, and information as insurance companies. However, the fact that large commercial entities that purchase

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130. JERRY, *supra* note 3, at 142 (quoting Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 335 (1986)).

131. See *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 84 P.3d 385, 389 (Cal. 2004).

132. Romaker & Prieto, *supra* note 127, at 112.

133. See *AJU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990).

134. See *E.M.M.I. Inc.*, 84 P.3d at 389.

135. Romaker & Prieto, *supra* note 127, at 113.

insurance often possess "risk management divisions" possessing "sophistication [rivaling] that of the insurance companies themselves" justifies applying a strict construction to those entities.<sup>136</sup>

The test for determining the level of sophistication of the insured is not always clear, although some courts have held that the insured's reasonable expectation can only be ignored if there is evidence that the insurance policy was drafted jointly.<sup>137</sup> Evidence that the policy was negotiated or that the insured had legal sophistication or bargaining power is insufficient.

### C. California's Interpretative Rules Serve in Part to Address Important Public Policy Considerations

In the classical model of contract law, contracts are negotiated freely by parties with roughly equivalent bargaining power.<sup>138</sup> Instead, insurance contracts are rarely bargained for or negotiated by the parties. Therefore, the reasonable expectation approach seeks to create a fair balance between the two parties to the insurance contract. Courts generally interpret insurance contracts in favor of insureds partly because the insurer writes the policy, and thus the insurer should be held responsible for its own ambiguous policy language.<sup>139</sup>

[A] contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it basis" carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties.<sup>140</sup>

Insurance companies are typically held to higher standards than parties to ordinary contracts.<sup>141</sup> This is justified in part because "a higher probability exists that the party with less bargaining power will be subjected to oppressive, unjust or unexpected provisions."<sup>142</sup> As a matter of public policy, courts are more "active in policing the bargain to counterbalance the potential detriment to the weaker parties."<sup>143</sup>

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136. Andrea, *supra* note 125, at 824–25 (alteration in original).

137. See *AIU Ins. Co.*, 799 P.2d at 1265–66; see also Dimugno, *supra* note 11, at 574.

138. See JERRY, *supra* note 3, at 139.

139. *AIU Ins. Co.*, 799 P.2d at 1265.

140. Romaker & Prieto, *supra* note 127, at 99 (quoting *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 171 (Cal. 1966)).

141. See 2 MATTHEW BENDER & CO., *supra* note 2, § 8.02(1).

142. JERRY, *supra* note 3, at 139.

143. *Id.*

An additional public policy consideration is a recognition that the insurer is in a better position to solve this type of dispute. This is the so-called “best loss avoider” doctrine.<sup>144</sup> Courts often determine which party was the “best loss avoider” in a dispute and shift any loss to that party.<sup>145</sup> In cases in which a dispute arises over imprecision of language in an insurance policy, the problem could probably have been avoided if the organization or the terms of the policy had been prepared more carefully.<sup>146</sup> “It is . . . a fundamental rule that the insurer is in duty bound to use such language as to make the conditions, exceptions and provisions of the policy clear to the ordinary mind, and in case it fails to do so, any ambiguity or reasonable doubt must be resolved in favor of the insured and against the insurer.”<sup>147</sup> In fact, insurers can take steps to minimize exposure to liability:

[I]nsurers that train their agents to deal with insureds in good faith, promote sensitivity to the needs of their customers, encourage full disclosure of information rather than the minimal amount necessary to complete the sale, and strive for clarity in the language of their policies reduce the risk that the insurer will fail to satisfy the reasonable expectations of their insureds.<sup>148</sup>

Commenting on *AIU Insurance*, one author stated that “[w]hile the decision may not have been policy-based, its effect clearly is.”<sup>149</sup> Particularly with environmental issues, the question may be who can best bear the cost of cleanup with the least impact in our society.<sup>150</sup> Since insurers are in a better position than individuals or corporations to “accept the risk without severe adverse effects,” the burden of cost is placed on the insurance companies.<sup>151</sup> Eventually individuals and corporations will bear the costs through increased insurance premiums, but this cost will be spread through the large pool of insureds and through premium payments as opposed to one large financial liability.<sup>152</sup> This is precisely the function of the insurance industry—to spread risk.

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144. Shawn McCammon, *Just What Does “Arising out of the Operation, Use or Maintenance” Actually Mean in Automobile Insurance Agreements?*, 28 W. ST. U. L. REV. 177, 197 (2001).

145. *Id.*

146. See JERRY, *supra* note 3, at 129.

147. Romaker & Prieto, *supra* note 127, at 88–89.

148. JERRY, *supra* note 3, at 147.

149. Deane S. Shokes, *AIU Ins. Co. v. Superior Court: Insurers Liable for Environmental Response Costs*, 28 SAN DIEGO L. REV. 711, 725 (1991).

150. See *id.*

151. *Id.*

152. See *id.*

Thus, as a matter of public policy, insurers are typically held to a higher standard than insureds or than parties to ordinary contracts. This is a response to the "public's apparent desire for simplicity and greater certainty in legal matters" relating to insurance disputes.<sup>153</sup>

## Conclusion

Although *MacKinnon* has an obvious and important impact on environmental pollution exclusions, "[t]he decision may be much more important, however, in connection with how courts interpret the language in insurance contracts or, at least, policy exclusions."<sup>154</sup> This decision will likely have limited favorable implications for California policyholders since courts are more likely to find ambiguity by allowing relevant extrinsic evidence during the plain meaning analysis.

Courts generally continue to struggle with the issue of insurance policy interpretation, resulting in unpredictable judicial outcomes. *MacKinnon v. Truck Insurance Exchange* rightly reaffirms California's approach to what is predominantly a confusing issue in insurance law. *MacKinnon's* decision is not only the proper approach to insurance policy interpretation, but it is also consistent with California's previous approach which seeks to give effect to the intent of the parties by looking at the plain meaning of the policy language and considering the insured's reasonable expectation of coverage. Although judicial opinions show many different approaches to insurance policy interpretation, California's approach advanced by *MacKinnon*, if applied adequately, can create greater consistency and predictability in insurance coverage litigation.

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153. JERRY, *supra* note 3, at 136.

154. See Heeseman, *supra* note 40, at 7.