North Dakota Law Review

Volume 62 | Number 3 Article 6

1986

Insurance - Contracts - The Ambiguity in the Doctrine of Reasonable Expectations

Kenneth J. Horner Jr.

INSURANCE — CONTRACTS — THE AMBIGUITY IN THE DOCTRINE OF REASONABLE EXPECTATIONS

Sometime between 9:30 p.m., Saturday, April 9, and 6:00 a.m., Monday, April 11, 1977, the Atwater Creamery Company (Atwater) was burglarized.[1] There were no visible marks of a forceful entry or exit.[2] Thereafter, Atwater filed a claim with Western National Mutual Insurance Company (Western) under its "burglary policy."[3] Western denied coverage because no visible marks of a forceful and violent entry or exit existed, as required by the policy definition of burglary.[4] The trial court, concluding that the burglary definition in the insurance policy excluded coverage of the burglary, granted judgment in favor of Western.[5] Atwater

1. Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 274 (Minn. 1985). Larry Poe, the plant manager at Atwater Creamery Company (Atwater), left at 9:30 p.m. on Saturday, April 9, after securing all locks. *Id.* The burglary was discovered Monday morning when Atwater's employees appeared for work. *See id.*

2. *Id.* On Monday morning company officials observed that a turnbuckle that secured an outside sliding door was loosened, thereby allowing that door to be easily opened or closed. *See id.* Also, two of three padlocks each securing inside storage doors were gone. *Id.*

3. *Id.* The policy that Western National Mutual (Western) issued to Atwater defined burglary, in relevant part, as follows:

> [T]he felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, *of which force and violence there are visible marks* made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry, or . . . (3) from within the premises by a person making felonious exit therefrom by actual force and violence *as evidenced by visible marks* made by tools, explosives, electricity or chemicals upon, or physical damage to, the interior of the premises at the place of such exit.

Id. at 275 (emphasis added).

4. *Id.* at 274.

5. *Id.* at 273-74. The trial court concluded that the insurance policy did not cover Atwater's claim and dismissed the jury for a lack of disputed issues of fact. *Id.* at 273. This was apparently done because a factual issue of whether there were any visible marks of a forceful and violent entry or exit did not exist. *See id.* at 273-74. The trial court also granted a directed verdict for the insurance agent who procured the policy. *Id.* at 273. The trial court concluded that "Atwater failed to establish an insurance agent's standard of care by expert testimony." *Id.*

appealed the trial court decision and presented the Minnesota Supreme Court with the issue of whether the reasonable expectations of an insured regarding coverage could override the literal language of an insurance policy.[6] The court *held* that the technical exclusion in the burglary policy definition would not be interpreted to defeat the reasonable expectations of the insured.[7] *Atwater Creamery Co. v. Western National Mutual Insurance Co.*, 366 N.W.2d 271 (Minn. 1985).

Since the early 1900's, the term "reasonable expectation" has been used as an interpretive tool in the construction of contracts.[8] Early decisions "established the rule that insurance contracts should provide that coverage which one would reasonably expect upon a reading of the policy."[9] The development of the reasonable expectations doctrine was based, in part, on the recognition that insurance contracts are adhesionary.[10]

Recently, a new doctrine of reasonable expectations has arisen to provide the insured with added protection.[11] The adoption of the new doctrine of reasonable expectations, however, has created

---

6. *Id.* at 275. Atwater also presented the issues of whether the policy conformity clause acted to substitute the statutory definition of the crime of burglary for the policy definition of burglary, and "whether expert testimony is necessary to establish an insurance agent's standard of care in advising customers of gaps in policy coverage." *Id.*

7. *Id.* at 278-79. The court also determined that the policy conformity clause did not operate to substitute the statutory definition of burglary for the definition of burglary set forth in the policy. *Id.* at 275. Further, the court determined that expert testimony is required in order to establish the insurance agent's standard of care with regard to advising customers. *Id.* at 279.

8. *See* Young, Lewis & Lee. *Insurance Contract Interpretation; Issues and Trends,* 625 INS. L.J. 71, 78 (1975) [hereinafter Young]. The authors note that insurance contracts are interpreted differently than other contracts, and also explain the various approaches used in the construction of insurance contracts. *See id.* at 71-81.

9. *Id.* at 78; *see, e.g.*, Watson v. Firemen's Ins. Co., 83 N.H. 200, ____, 140 A. 169, 170 (1928). In *Watson* the plaintiff's barn was burned to the ground when the plaintiff's son tried to fill a car with gasoline in the barn. *Id.* The plaintiff was insured under a fire policy that relieved the insurance company of liability if a fire was started while trying to fill a car with gasoline on the premises insured. *See id.* The policy, however, also contained the following provision: "[t]his policy shall not be affected by failure of the insured to comply with any of the warranties of this permit in any portion of the premises over which the insured has no control." *Id.* The court extended coverage to the insured. *Id.* In reaching this decision the court stated that "the test is . . . what a reasonable person in the position of the insured would have understood . . . [the provision] to mean," *Id.*; *see also* Cartier v. Cartier, 84 N.H. 526, ____, 153 A. 6, 7 (1931) (to determine the meaning of the policy the test is that of a reasonable person in the position of the insured). This older conception of the doctrine is, however, little more than a refinement of the uniform rule in insurance law that courts will construe any ambiguity in the policy against the drafter. *See* Young, *supra* note 8, at 78.

10. *See, e.g.*, C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 175 (Iowa 1975); Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 671 (N.D. 1977) (court explicitly recognized that insurance contracts are contracts of adhesion). For a discussion of *C & J Fertilizer,* see *infra* notes 34-38 and accompanying text.

11. *See* Keeton, *Insurance Law Rights at Variance With Policy Provisions,* 83 HARV. L. REV. 961, 967-68 (1970) [hereinafter Keeton]. Keeton presents a good explanation of how courts created the doctrine of reasonable expectations to combat the adhesionary nature of insurance contracts. *Id.* The North Dakota Supreme Court has recognized the significance of Keeton's article. *See Mills,* 250 N.W. 2d at 671 n.3.

problems because the courts have not applied the doctrine uniformly.[12] This lack of uniformity is exemplified by the appearance of three different applications of the doctrine.[13]

First, the courts have used the reasonable expectations doctrine when an ambiguity exists in an insurance policy.[14] Generally, courts construe ambiguities in favor of coverage for the insured, provided, however, "that the resulting coverage is within the reasonable expectations of the policyholder."[15] *Herzog v. National American Insurance Co.*[16] illustrates this application of the doctrine.

In *Herzog* the plaintiffs alleged that Gerald Mason negligently collided with a car driven by Kenneth Herzog.[17] The plaintiffs claimed that the defendant, an insurance company, should have provided coverage under the comprehensive personal liability provisions of a homeowner's policy issued to Robert Mason, Gerald Mason's father.[18] The policy, however, excluded any damages resulting from the use of land motor vehicles while away from the homeowner's premises or "ways immediately adjoining."[19] The court concluded that although "ways

12. *See* Note, *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts,* 13 U. MICH. J.L. REF. 603, 613-16 (1980) (tracing the evolution and criticizing the reasonable expectations doctrine).

13. *See id.* For a discussion of the three applications of the reasonable expectations doctrine, see *infra* notes 14-38 and accompanying text.

14. *See* Herzog v. Nat'l Am. Ins. Co., 2 Cal. 3d 192, 199, 465 P.2d 841, 844, 84 Cal. Rptr. 705, 708 (1970). For a discussion of *Herzog,* see *infra* notes 16-21 and accompanying text.

15. *See* Note, *supra* note 12, at 620. In the following jurisdictions, courts have refused to apply the doctrine of reasonable expectations unless an ambiguity exists in the insurance policy: Eighth Circuit (*see* Todd v. Dow Chem. Co., 760 F.2d 192, 196 (8th Cir. 1985)); Arizona (*see* Evenchik v. State Farm Ins. Co., 139 Ariz. 453, ____, 679 P.2d 99, 104 (Ct. App. 1984)); California (*see* State Farm Mut. Auto. Ins. Co. v. Ball, 127 Cal. App. 3d 568, 572, 179 Cal. Rptr. 644, 647 (Ct. App. 1981)); Delaware (*See* Sadlowski v. Liberty Mut. Ins. Co., 487 A.2d 1146, 1149 (Del. Super. Ct. 1984)); Iowa (*see* Chipokas v. Travelers Indem. Co., 267 N.W.2d 393, 396 (Iowa 1978)); Michigan (*see* Kinnavy v. Traill, 397 Mich. 521, 527, 244 N.W.2d 924, 926 (1976)); Minnesota (*see* Twin City Hide v. Transamerica Ins. Co., 358 N.W.2d 90, 93 (Minn. Ct. App. 1984)); Missouri (*see* Lawrence v. New York Life Ins. Co., 649 S.W.2d 461, 467 (Mo. Ct. App. 1983)); New Jersey (*see* Petronzio v. Brayda, 138 N.J. Super. 70, ____, 350 A.2d 256, 259 (Super. Ct. App. Div. 1975)); New Mexico (*see* Thompson v. Occidental Life Ins. Co., 90 N.M. 620, ____, 567 P.2d 62, 63 (1977)); North Dakota (*see* Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 673 (N.D. 1977)).

16. 2 Cal. 3d 192, 465 P.2d 841, 84 Cal. Rptr. 705 (1970).

17. Herzog v. Nat'l Am. Ins. Co., 2 Cal. 3d 192, 195, 465 P.2d 841, 842, 84 Cal. Rptr. 705, 706 (1970). Both Gerald Mason and Kenneth Herzog were killed in the accident. *Id.* The accident occurred on a highway three to five miles from the premises of Gerald Mason. *Id.* at 199 n.6, 465 P.2d at 844 n.6, 84 Cal. Rptr. at 708 n.6. The plaintiffs in the action were the heirs of Kenneth Herzog. *Id.* at 195, 465 P.2d at 842, 84 Cal. Rptr. at 706.

18. *Id.* at 196, 465 P.2d at 842, 84 Cal. Rptr. at 706. The homeowner's policy upon which the plaintiffs based their claim was actually owned by Robert Mason, the defendant's father. *Id.* at 195, 465 P.2d at 842, 84 Cal. Rptr. at 706. The policy, however, included all minor children of the insured. *Id.* at 196, 465 P.2d at 842, 84 Cal. Rptr. at 706. Gerald Mason was a minor child of the insured. *Id.* at 195, 465 P.2d at 842, 84 Cal. Rptr. at 706.

19. *Id.* The homeowner's policy contained the following provision under the caption of damages not subject to coverage: "[T]he ownership, maintenance, operation, use, loading or unloading of (1) automobiles [defined as a 'land motor vehicle'] or midget automobiles while away from the premises or the ways immediately adjoining. . . ." *Id.*

immediately adjoining'' might be imprecise, it was not so ambiguous that an insured could reasonably expect coverage in this context.[20] Thus, the court denied coverage for the accident under the homeowner's policy.[21]

Second, courts have used the reasonable expectations doctrine when the exclusionary language in the insurance policy is clear and unambiguous.[22] This application of the doctrine honors the insured's reasonable expectations even though a close examination of the exclusion would have negated those expectations.[23] This variation of the doctrine usually is applied if coverage is granted in broad, clear language and then restricted in a small exclusionary phrase of which the insured is not cognizant.[24] *Gray v. Zurich Insurance Co.*[25] is illustrative of this application of the doctrine.

The controversy in *Gray* stemmed from a complaint that was brought against the plaintiff for an alleged assault.[26] The plaintiff contended that the defendant, Zurich Insurance Company, was required to defend him under the ''Comprehensive Personal Liability Endorsement'' provision of his auto insurance policy.[27] The provision provided, in part, that the insurance company would ''defend any suit against the insured alleging . . . bodily injury or property damage. . . .''[28] The insurance policy also contained a provision, in fine print, which stated that the coverage did not

---

20. *Id.* at 198, 465 P.2d at 844, 84 Cal. Rptr. at 708.

21. *Id.* at 199, 465 P.2d at 844, 84 Cal. Rptr. at 708.

22. *See, e.g.*, Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 273, 419 P.2d 168, 174, 54 Cal. Rptr. 104, 110 (1966). For a discussion of *Gray*, see *infra* notes 25-31 and accompanying text.

23. *See* Keeton, *supra* note 11, at 967.

24. *See* Young, *supra* note 8, at 79. The following jurisdictions have case law that would support the application of the doctrine of reasonable expectations to defeat clear and unambiguous language in an insurance policy: Alabama (*see* Lambert v. Liberty Mut. Ins. Co., 331 So.2d 260, 263 (Ala. 1976)); Alaska (*see* Ina Life Ins. Co. v. Brundin, 533 P.2d 236, 242 (Alaska 1975)); Arizona (*see* Evenchik v. State Farm Ins. Co., 139 Ariz. 453, ____, 679 P.2d 99, 104 (Ct. App. 1984)); California (*see* Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 274, 419 P.2d 168, 174-75, 54 Cal. Rptr. 104, 110-11 (1966)); Delaware (*see* Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925, 927 (Del. 1982)); Michigan (*see* Bradley v. Mid-Century Ins. Co., 409 Mich. 1, 60-61, 294 N.W.2d 141, 162-63 (1980)); Missouri (*see* Estrin Constr. Co. v. Aetna Casualty & Sur. Co., 612 S.W.2d 413, 419 (Mo. Ct. App. 1981)); Nebraska (*see* Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 187 Neb. 720, 722, 193 N.W.2d 752, 754 (1972)); Nevada (*see* Prudential Ins. Co. of Am. v. Lamme, 83 Nev. 146, ____, 425 P.2d 346, 348 (1967)); New Jersey (*see* Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, ____, 170 A.2d 22, 30 (1961)); New Mexico (*see* Pribble v. Aetna Life Ins. Co., 84 N.M. 211, ____, 501 P.2d 255, 260 (1972)). Note that within some jurisdictions there are decisions that support the application of inconsistent variations of the reasonable expectation doctrine. *Compare* cases cited in notes 15 *and* 33 *with* the cases cited *supra*.

25. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

26. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 267, 419 P.2d 168, 170, 54 Cal. Rptr. 104, 106 (1966). The alleged assault occurred after a car driven by the plaintiff narrowly missed a car driven by the victim of the assault. *Id.* at 267 n.1, 419 P.2d at 170 n.1, 54 Cal. Rptr. at 106 n.1. The victim left his car in a menacing manner and jerked open the plaintiff's car door. *Id.* The plaintiff, fearing physical harm to himself and his passengers, rose from his car seat and struck the victim. *Id.*

27. *Id.* at 267, 419 P.2d at 170, 54 Cal. Rptr. at 106.

28. *Id.*

apply to any damages intentionally caused by the insured.[29] The court noted that the provision containing the duty to defend was broad, and that the exclusion clause disclaiming the duty to defend was inconspicuous.[30] Therefore, the court determined that the exclusion clause did not effectively negate the insured's reasonable expectation that the insurance company would defend him in suits brought against him for intentional acts.[31]

In the third and final variation of the reasonable expectations doctrine, courts allow the insured to recover although an objective policyholder could not reasonably expect the coverage from reading the policy.[32] Courts that apply the doctrine in this manner have allowed the insured to recover even though the language of an exclusion was clearly unambiguous and the insured knew or should have known of the exclusion.[33] This variation was adopted in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*[34]

In *C & J Fertilier* a building was burglarized by individuals who

---

29. *Id.* at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110. The actual provision excluding coverage stated as follows: "[T]his endorsement does not apply . . . to bodily injury or property damages caused intentionally by or at the direction of the insured." *Id.* at 267, 419 P.2d at 170, 54 Cal. Rptr. at 106.

30. *Id.* at 272, 419 P.2d at 173, 54 Cal. Rptr. at 109.

31. *Id.* The court stated that the language of an insurance exclusion provision must be "conspicuous, plain and clear" before the exclusion can effectively negate the reasonable expectations of an insured created by a broad provision granting coverage. *Id.* at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110.

32. *See* Note, *supra* note 12, at 613-14 (discussing cases applying the doctrine of reasonable expectations when unreasonable for insured to expect coverage).

33. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975). For a discussion of *C & J Fertilier,* see *infra* notes 34-38 and accompanying text. Several jurisdictions have case law that support the "even with notice" proposition. These decisions grant coverage even though the insured knew or should have known of the exclusion: California (*see* Smith v. Westland Life Ins. Co., 15 Cal. 3d 111, 126, 539 P.2d 433, 444, 123 Cal. Rptr. 649, 660 (1975) (coverage granted even after the insurance company had informed the insured that his application was rejected)); Iowa (*see* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W. 2d 169, 177 (Iowa 1975) (coverage granted even after the insured knew of the specific exclusion in the policy)); Pennsylvania (*see* Collister v. Nationwide Life Ins. Co., 479 Pa. 579, ____, 388 A.2d 1346, 1354-55 (1978) (coverage granted although the insured knew that a medical exam was required but had not been examined), *cert. denied,* 439 U.S. 1089 (1979)). Note that within some jurisdictions there are decisions that would support the application of inconsistent variations of the reasonable expectation doctrine. *Compare* cases cited in notes 15 *and* 24 *with* the cases cited *supra.* In *Brown v. Blue Cross & Blue Shield, Inc.*, the Mississippi Supreme Court went one step further and allowed the insured to recover even though it was clear that the policy no longer existed. Brown v. Blue Cross & Blue Shield, Inc., 427 So.2d 139, 141 (Miss. 1983).

34. 227 N.W.2d 169 (Iowa 1975). The Iowa Supreme Court's decision in *C & J Fertilizer* has been severely criticized. *See, e.g.,* Gardner, *Reasonable Expectations: Evolution Completed or Revolution Begun?,* 669 INS. L. J. 573, 580 (1978). Gardner criticizes the decision in *C & J Fertilizer* as follows:

> *C. & J. Fertilizer* clearly illustrates the urgent need for judicial endorsement of a well-defined test in this area lest we find more cases where the court "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."

Id. (emphasis in original) (footnote omitted).

left no visible marks of a forceful and violent entry.[35] The plaintiff was insured under a burglary policy that would allow recovery only if there was visible evidence of a forceful entry.[36] It was undisputed that the plaintiff knew the policy restricted coverage to burglaries evidenced by a forceful entry, thus indicating an "outside job."[37] The Iowa Supreme Court allowed the insured to recover under the guise of the doctrine of reasonable expectations despite the plaintiff's knowledge of the restriction on the burglary policy.[38]

In 1976 the Minnesota Supreme Court adopted the variation of the reasonable expectations doctrine that extends coverage when the policy contains ambiguities.[39] More recently the Minnesota Court of Appeals considered the reasonable expectations doctrine in *Twin City Hide v. Transamerica Insurance Co.*[40] In *Twin City* the plaintiff's cattle hides were damaged due to rotting.[41] The plaintiff was insured under an "all risk" insurance policy that contained a specific exclusion for rotting.[42] The plaintiff contended that, since it had purchased an "all risk" insurance policy, all damages should be covered because it reasonably expected coverage for any and all losses.[43] The court rejected this contention and therefore refused to extend coverage to the plaintiff.[44] The court's decision was

35. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 171 (Iowa 1975). There was evidence of a forceful and violent entry into an interior room. *Id.*

36. *Id.* at 172-73. The policy defined burglary as follows: " 'Burglary' means the felonious abstraction of insured property (1) from within the premises by a person making *felonious entry therein by actual force and violence,* of which force and violence there are visible marks. . . ." *Id.* (emphasis in original). The trial court concluded that this provision was unambiguous. *Id.* at 171.

37. *Id.* at 171, 176-77. The agent specifically told the insured that the policy required evidence of an "outside job." *Id.*

38. *Id.* at 177. The court's holding appears to be predicated on two rationales. *See id.* First, the court reasoned that the issue of coverage should not depend on the skill of the burglar. *Id.* Second, the court reasoned that coverage should be granted if the event the parties contemplated actually occurs. *Id.* The court found that a bona fide third party burglary had occurred. *Id.* Because the policy was intended to cover burglaries by third parties, the court concluded that the insured was entitled to recover. *Id.*

39. *See* Caledonia Community Hosp. v. St. Paul Fire & Marine Ins. Co., 307 Minn. 352, 354, 239 N.W.2d 768, 770 (1976). In adopting the variation of the reasonable expectations doctrine that requires an ambiguity in the insurance contract, the court relied upon Northwest Airlines, Inc. v. Globe Indem. Co., 303 Minn. 16, 26, 225 N.W.2d 831, 837 (1975). *Caledonia,* 307 Minn. at 354, 239 N.W.2d at 770. In *Northwest,* however, the court used the following standard to extend coverage to an insured: "[T]he rule is well settled that ambiguous language will be strictly construed in favor of the insured." *Northwest,* 303 Minn. at 26, 225 N.W.2d at 837. That court did not state that ambiguities in an insurance contract are interpreted according to the reasonable expectations of the insured. *See id.*

40. 358 N.W.2d 90 (Minn. Ct. App. 1984).

41. Twin City Hide v. Transamerica Ins. Co., 358 N.W.2d 90, 92 (Minn. Ct. App. 1984). Three different surveyors concluded that the hides were damaged by rotting. *Id.* It appeared that the rotting occurred because a leak in the roof of the storage building allowed water to drip on the hides. *Id.*

42. *Id.* The "all risk" insurance policy specifically excluded loss caused by "rust, mold, wet or dry rot, and contamination. . . ." *Id.*

43. *Id.* at 93. Twin City Hide argued that the insurance contract should be interpreted in light of the insured's reasonable expectations. *Id.*

44. *See id.*

consistent with a previous Minnesota Supreme Court decision which held that no interpretation of an insurance contract is allowed when the contract is unambiguous, even if the insured reasonably expected coverage.[45] The decision in *Twin City* illustrates the scope of the reasonable expectations doctrine as applied in Minnesota prior to *Atwater*.

In *Atwater* the Minnesota Supreme Court first addressed the issue of whether the statutory definition of burglary or the insurance policy definition of burglary should be applied to define the scope of the policy's coverage.[46] Atwater contended that the statutory definition of burglary should be substituted for the insurance policy definition of burglary pursuant to the policy's conformity clause.[47] A conformity clause is applied when an insurance contract provision conflicts with a statute.[48] Generally, a court will replace a conflicting insurance policy provision with the relevant statutory provision.[49] The court in *Atwater* determined that the conformity clause did not operate to substitute the statutory definition of burglary for the definition of burglary set forth in the policy.[50] The court reasoned that the statutory definition of burglary served a criminal function, whereas the policy definition served a risk limiting function;[51] therefore, the conformity clause did not apply.[52]

45. *See id.*; *see also* Simon v. Milwaukee Auto. Mut. Ins. Co., 262 Minn. 378, 115 N.W.2d 40 (1962) (refusing to interpret an insurance contract that is unambiguous).

46. 366 N.W.2d at 275.

47. *Id.* The conformity clause in Atwater's insurance policy stated as follows: "Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes." *Id.*

The Minnesota statutory provision defining burglary provides, in part, as follows: "Whoever enters a building without the consent of the person in lawful possession, . . . with intent to commit a crime in it, or whoever remains within a building without the consent of the person in lawful authority, with intent to commit a crime in it, commits burglary. . . ." MINN. STAT. § 609.58(2) (1982) (current version at MINN. STAT. ANN. §§ 609.581, 609.582 (West Supp. 1986)). For the definition of burglary contained in Atwater's insurance policy, see *supra* note 3.

48. *See* 366 N.W.2d at 275; *see also* 1 G. COUCH, R. ANDERSON & M. RHODES, CYCLOPEDIA OF INSURANCE LAW, § 13:7 (2d rev. ed. 1984) [hereinafter COUCH]. In discussing insurance contract conformity clauses, the authors state as follows: "As a general rule, stipulations in a contract of insurance in conflict with, or repugnant to, statutory provisions which are applicable to, and consequently form a part of, the contract, must yield to the statute, and are invalid, since contracts cannot change existing statutory laws." *Id.* at 827 (footnote omitted).

49. *See* COUCH, *supra* note 48, at 827.

50. 366 N.W.2d at 275. Western argued that the conformity clause should operate only when the statute in question is one that directly regulates insurance. *Id.* The court rejected this argument and concluded that a conformity clause may substitute statutory provisions for policy provisions even when the statute does not directly regulate insurance. *Id.*

51. *Id.*

52. *Id.* The court noted that the policy definition of burglary was more limited than the statutory definition, but concluded that the definitions did not conflict. *Id.* Although the court determined that the statutory definition of burglary did not apply in this case, the court stated that "[t]he difference between the two, however, has a bearing on the insured's reasonable expectations in purchasing burglary insurance." *Id.* The court, however, did not discuss what bearing the statutory definition of burglary had on the insured's reasonable expectations in purchasing burglary insurance. *See id.*

After reaching this conclusion, the court addressed the primary issue: whether Atwater was covered under the policy's definition of burglary.[53] The court first considered the language of the policy's definition of burglary[54] and, after discussing how other jurisdictions have interpreted this definition,[55] concluded that the policy definition was unambiguous.[56]

The court next discussed whether the doctrine of reasonable expectations should govern, even though the language of the policy was unambiguous.[57] In deciding this issue, the court placed great emphasis on the similarities between an insurance contract and a contract of adhesion.[58] The court noted that insurance contracts are akin to contracts of adhesion in three ways.[59] First, the court stated that there is a great disparity in bargaining power between insurance companies and those who seek insurance.[60] Second, the court acknowledged that, in a majority of cases, a lay person lacks the necessary skills to read and understand insurance policies.[61] Finally, the court recognized that when individuals purchase

53. *Id.* at 275-79.

54. *Id.* For the language of the policy's burglary definition, see *supra* note 3.

55. 366 N.W.2d at 275-76. The court considered four interpretations of the burglary definition contained in the policy. *Id.* at 276. First, some courts have determined that the definition is ambiguous and construed it in favor of coverage even absent visible marks of a forcible entry or exit. *Id.; see, e.g.,* United States Fidelity & Guar. Co. v. Woodward, 118 Ga. App. 591, ____, 164 S.E.2d 878, 880-81 (1968) (coverage granted under ambiguous provision despite no visible marks of a forceful entry).

Second, courts have concluded that the definition does not apply if the theft is clearly not an "inside job," or the result of insufficient security. *Atwater,* 366 N.W.2d at 276; *see, e.g.,* Kretschmer's House of Appliances, Inc. v. United States Fidelity & Guar. Co., 410 S.W.2d 617, 618 (Ky. Ct. App. 1966) (the removal of a padlock provided an inference of an outside job, therefore coverage was granted).

Third, courts have determined that the definition merely provides one form of evidence that may be used to prove burglary, and consequently, other evidence of a burglary may suffice to provide coverage. *Atwater,* 366 N.W.2d at 276; *see, e.g.,* Ferguson v. Phoenix Assurance Co., 189 Kan. 459, 469, 370 P.2d 379, 386 (1962) ("the 'visible marks' clause imposes a rule of evidence upon the assured to establish that entry was made . . . by actual force and violence").

Finally, other courts have determined that the definition is unambiguous. *Atwater,* 366 N.W.2d at 276; *see, e.g.,* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975). For a discussion of *C & J Fertilizer,* see *supra* notes 34-38 and accompanying text.

56. 366 N.W.2d at 276. The court reasoned that any other interpretation would ignore the policy definition altogether and would substitute the court's or the statute's definition of burglary. *Id.*

57. *Id.*

58. *Id.* at 277. Courts have long recognized that an insurance contract is very similar to a contract of adhesion. *See* Keeton, *supra* note 11, at 967-68; *see also* Hughes v. State Farm Mut. Auto. Ins. Co., 236 N.W.2d 870, 885 (N.D. 1975) (insurance contracts are contracts of adhesion).

59. 366 N.W.2d at 277.

60. *Id.; cf.* State *ex rel.* Hagen v. Bismarck Tire Center, Inc., 234 N.W.2d 224, 225 (N.D. 1975) (contract of adhesion results when employees are not allowed to bargain for an employment contract).

61. 366 N.W.2d at 277; *see* Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir.), *cert. denied,* 331 U.S. 849 (1947). *Gaunt* involved a factual situation that required the court to determine whether an insurance contract was in force from the date of application or the date of approval. *Id.* at 601. The court, in disucssing the convoluted provision, stated: "An underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially." *Id.*

insurance policies they rely on the expertise of the insurers.[62] The court noted that, due to these three factors, courts need to protect the reasonable expectations of the insured.[63]

The court, in making its determination, also relied heavily upon *C & J Fertilizer*.[64] The court's reliance was based, in part, on two factual similarities between the cases.[65] First, in both cases, the major purpose for the "visible marks of forcible entry" requirement was to ensure that the insurance companies were not defrauded through theft by employees, commonly referred to as an "inside job."[66] In both cases, however, the police had concluded that the burglaries were "outside jobs."[67] Therefore, enforcement of the provision would not have effectuated the purpose of the provision.[68]

The second similarity between the cases was that the burglary policy definitions predicated coverage on the skill of the burglar.[69] Consequently the basis for coverage in both policies was shifted from the event the parties had bargained for, a bona fide third party burglary resulting in a loss, to the relative skills of the burglar.[70] Because of the adhesionary nature of insurance contracts and the factual similarities existing between *Atwater* and *C & J Fertilizer*, the court in *Atwater* extended coverage to the insured under the doctrine of reasonable expectations.[71] The court noted that the doctrine "gives the court a standard by which to construe insurance contracts without having to rely on arbitrary rules which do not reflect real-life situations and without having to bend and stretch those rules to do justice in individual cases."[72]

62. 366 N.W.2d at 277; *see, e.g.*, Bekken v. Equitable Life Assurance Soc'y, 70 N.D. 122, 143, 293 N.W. 200, 212 (1940) (life insurer's implicit statement to insured is that policy was designed to meet the insured's purpose).

63. *See* 366 N.W.2d at 277. The court stated the reasonable expectations doctrine as follows: "[T]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Id.* (quoting Keeton, *supra* note 11, at 967). For a discussion of Keeton's article, see *supra* note 11.

64. 366 N.W.2d at 277. For a discussion of *C & J Fertilizer*, see *supra* notes 34-38 and accompanying text.

65. *See* 366 N.W.2d at 277-78.

66. *Id.* at 276. Another purpose of the "visible marks of forcible entry" requirement was to encourage insureds to reasonably secure the premises. *Id.*; *see* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 171 (Iowa 1975).

67. 366 N.W.2d at 278; *C & J Fertilizer*, 227 N.W.2d at 177.

68. 366 N.W.2d at 276.

69. *Id.* at 277-78; *C & J Fertilizer*, 227 N.W.2d at 177.

70. 366 N.W.2d at 277; *C & J Fertilizer*, 227 N.W.2d at 177.

71. *See* 366 N.W.2d at 279. The parties disputed whether Atwater had actual knowledge of the exclusion. *Id.* at 278. The court, however, stated that even if Atwater had knowledge of the "visible marks of forcible entry" requirement, they could reasonably expect that it meant there must be clear evidence of an outside burglary, not that there must be visible evidence of an "outside job" at the location of entry or exit. *Id.*

72. *Id.*

The extension of coverage in *Atwater* is a dramatic change in Minnesota insurance law. Before *Atwater,* the Minnesota Supreme Court had refused to apply the doctrine of reasonable expectations to unambiguous language even if the insured could reasonably have expected coverage under the policy.[73] After *Atwater,* courts may apply the doctrine of reasonable expectations to defeat even unambiguous contract provisions provided two conditions are satisfied.[74] First, the court in *Atwater* stated that the reasonableness of the insured's expectations will be governed by an objective standard.[75] Second, it appears that *Atwater* restricts the application of the doctrine of reasonable expectations to situations in which its application would effectuate the purpose of the provision.[76] Therefore, provided the insured's expectation is objectively reasonable and enforcement of the provision would effectuate the provisions purpose, Minnesota courts apparently will apply the doctrine of reasonable expectations to defeat unambiguous insurance contract provisions.[77]

In North Dakota, the doctrine of reasonable expectations surfaced in 1971.[78] The North Dakota Supreme Court, however, had not directly faced the issue of whether to adopt the doctrine of reasonable expectations until *Mills v. Agrichemical Aviation, Inc.*[79] In

73. For a discussion of Minnesota's application of the reasonable expectations doctrine before *Atwater,* see *supra* notes 39-45 and accompanying text.

74. *See* 366 N.W.2d at 278-79. *But see id.* at 279 (Simonett, Peterson, Kelley, JJ, concurring specially). The justices would not apply the reasonable expectations doctrine unless an ambiguity exists. *Id.* Because the three justices believed an ambiguity existed, they concurred with the majority opinion. *Id.*

75. *Id.* at 278. The court stated that the reasonableness of an insured's expectations are governed by an objective standard but did not expand on this statement. *See id.*

76. *Id.* at 276, 277-78. For a discussion of the requirement that the purpose for the provision in the policy be effectuated, see *supra* note 66-68 and accompanying text.

77. *See* 366 N.W.2d at 276, 277-78.

78. *See* Haugen v. Auto-Owners Ins. Co., 191 N.W.2d 274, 279-80 (N.D. 1971). In *Haugen* a construction company was insured under a policy that excluded liability for any completed operation. *Id.* at 277. The plaintiff was injured when a furnace that was completed months before leaked. *Id.* at 276. The court held that the plaintiff was not entitled to coverage. *Id.* at 280. In reaching its conclusion, the court stated as follows: "The rule that insurance policies are to be interpreted as a whole so as to give effect to all of the provisions of the policy if reasonably practicable, . . . is . . . the rule in this State. . . ." *Id.*

79. 250 N.W.2d 663 (N.D. 1977). *Mills* involved a dispute that arose when the plaintiff's crops were damaged by aerial spraying. Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 665 (N.D. 1977). The plaintiffs were insured under a "Top Brass" insurance policy. *Id.* at 667. The "Top Brass" policy contained the following exclusion to coverage:

> This Part shall not apply with respect to coverage (a):
>
> . . . .
>
> (b) to any liability arising out of the ownership, maintenance, operation or use, including loading or unloading, of any recreational motor vehicle or aircraft, except recreational motor vehicle or aircraft for which coverage is provided by an underlying policy listed in Schedule A and then not for broader coverage than is provided by such insurance.

Id. The underlying policy listed in Schedule A contained an exclusion for "property damage arising

Mills the court was divided on the question of whether to adopt the doctrine of reasonable expectations.[80] The opinion of the court, written by Justice Pederson with whom Justice Vogel concurred, specifically adopted the doctrine.[81] Justice Pederson's opinion, however, was predicated on the existence of an ambiguity in the insurance policy.[82] Chief Justice Erickstad, with whom Justices Sand and Paulson joined, wrote a special concurrence.[83] The Chief Justice's opinion decided the case on other grounds and specifically rejected the reasonable expectations doctrine.[84] Since *Mills,* no majority of the North Dakota Supreme Court has relied upon the doctrine of reasonable expectations as a basis for its holding, nor has a majority of the court recognized the doctrine as a legitimate interpretive aide in insurance coverage disputes.[85] Therefore, *Atwater* will have little effect on North Dakota insurance law as it presently exists. However, if a satisfactory factual situation arises, the North Dakota Supreme Court might adopt the doctrine in some form.

KENNETH J. HORNER, JR.

---

out of any substance released or discharged from any aircraft." *Id.* The issue before the North Dakota Supreme Court was whether coverage could be predicated on the "Top Brass" policy. *Id.* at 666.

80. *See id.* at 673-74. The opinion of the court extended coverage to the insured because of an ambiguity created by the two conflicting exclusions in the "Top Brass" policy. *Id.*

81. *See id.* at 671. It should be noted that these two justices are no longer on the North Dakota Supreme Court.

82. *Id.* at 672. Justice Pederson discussed the potential application of the doctrine to cases in which the exclusion of coverage is unambiguous. *Id.* He concluded, however, that it was unnecessary to reach this issue since the policy provision in question was ambiguous. *Id.*

83. *See id.* at 673 (Erickstad, C. J., concurring specially).

84. *See id.* Chief Justice Erickstad in his concurrence stated as follows:

> The view expressed by Justice PEDERSON seems to be that, as aerial spraying is a common practice among farmers today, when a farmer purchases a liability policy, he should be permitted to reasonably expect that such activity is covered by the policy unless he is informed to the contrary by the insured's agent, notwithstanding that the policy excludes such coverage.
>
> If this is to be the law, then those who sell insurance should be so informed; not by our court, but by the Legislature.

Id. (emphasis in original). The Chief Justice then proceeded to conclude that the insured should recover because the terms of the exclusion were ambiguous, and such ambiguities should be interpreted in favor of the insured. *See id.* at 673-74.

85. *See, e.g.,* Nunn v. Equitable Life Assurance Soc'y, 272 N.W.2d 780, 786 n.1 (N.D. 1978). In *Nunn* the issue was whether the named beneficiary in a life insurance policy was the rightful beneficiary. *Id.* at 781. Thus, *Nunn* did not involve a coverage dispute. *See id.* In *Nunn,* however, the North Dakota Supreme Court stated: "The members of this court have disagreed as to the applicability of the 'Doctrine of Reasonable Expectations and obligations arising from 'status' rather than contract." *Id.* at 786 n.1.