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Insurance - Contract and Policy - The Doctrine of Reasonable Expectations Applied to Void a Crop Spraying Exclusion

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right to speak with his attorney before making a decision to take or refuse to take a chemical test of his blood-alcohol content following an arrest for an alcohol-related driving offense.[53] Because of the availability of a statutory basis for deciding *Prideaux*, the question of a constitutional right to speak with an attorney was not decided. None of the states, as yet, have held that a defendant has a constitutional right to speak with an attorney in such a situation.[54]

While the practical exigencies of blood-alcohol dissipation place significant restraints upon the time in which a test can be executed with probative results,[55] the flat refusal to allow prior consultation with an attorney seems arbitrary. The utility of counsel in assuring a knowing refusal is readily recognizable.[56] Although the implied-consent advisement does indicate some of the consequences of a refusal,[57] as a matter of fairness the state should not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel.[58]

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INSURANCE—CONTRACT AND POLICY—THE DOCTRINE OF REASONABLE EXPECTATIONS APPLIED TO VOID A CROP SPRAYING EXCLUSION

Dennis and David Mills brought an action against Walter Small, Agrichemical Aviation, Inc., and Gene Engel to recover for damages to their crops caused by aerial crop spraying conducted on Small's land. A judgment was issued in favor of the Mills brothers. Small then brought a third party action against St. Paul Fire and Marine Insurance Company, Small's liability insurance carrier. There were two insurance policies involved: the first policy was a farmer's comprehensive insurance policy which provided coverage for buildings and personal property owned by Small and personal liability coverage up to $200,000; the second policy was an umbrella policy which

53. ——Minn.——, ——, 247 N.W.2d 385, 394 (1976).

54. The United States Supreme Court, in Bell v. Burson, 402 U.S. 535 (1971), recognized that suspension of an issued drivers license involves state action that adjudicates important interests of the licensees and that in such cases licenses are not to be taken away without the procedural due process required by the fourteenth amendment.

55. *See* Schmerber v. California, 384 U.S. 757, 770-71 (1966).

56. The licensee's choice to submit to or refuse the chemical test certainly involves legal implications of some importance to the licensee; loss of driving privileges for six months and increased possibility of criminal conviction. *See* Prideaux v. State Dept. of Public Safety, ——Minn.——, ——, 247 N.W.2d 385, 388 (1976).

57. *See supra* note 40, and text accompanying.

58. People v. Ianniello, 21 N.Y.2d 418, 425, 235 N.E.2d 439, 443, 288 N.Y.S.2d 462, 468 (1968).

expanded the personal liability coverage to $1,000,000.[1] The comprehensive policy excluded coverage for "property damage arising out of any substance released or discharged from any aircraft."[2] The umbrella policy contained a clause which excluded coverage for "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 . . . and then not for broader coverage than is provided by such insurance.' "[3] The terms "recreational motor vehicle" and "aircraft" were defined in a different section of the policy.[4] Small had never read the policy, nor was he aware of the exclusionary clauses in it. The lower court decided that the two policies were unambiguous, but because it was reasonable for Small to expect coverage for normal farming operations when he purchased his policies, and because crop spraying was a normal farming operation, his reasonable expectations prevailed. Judgment was entered in favor of Small, and St. Paul appealed.[5] In affirming the lower court's holding, the North Dakota Supreme Court *held* that the exclusionary clauses were ambiguous, and that although honoring an insured's reasonable expectations is not necessarily applicable in cases where there is no ambiguity, it is appropriate where ambiguity can be found.[6] *Mills v. Agrichemical Aviation, Inc.*, 250 N.W.2d 663 (N.D. 1977).

The Doctrine of Reasonable Expectations was first articulated by Justice Cardozo in *Bird v. St. Paul Fire and Marine Insurance Co.*[7] In this case an explosion on land had caused damage to a canal boat 1,000 feet away. In determining the scope of coverage of the

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1. Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 666, 667 (N.D. 1977).
2. *Id.*
3. *Id.*
4. The definitions were as follows:

> 12. Recreational Motor Vehicle: The term "Recreational Motor Vehicle" means a golf cart or snowmobile or if not subject to motor vehicle registration, any other land motor vehicle designed for recreational off public roads.
>
> 13. Aircraft: The term "Aircraft" wherever used herein, shall mean any heavier than air or lighter than air aircraft designed to transport persons or property.

"Top Brass" Policy, Appendix at 5, from Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663 (N.D. 1977) (slip sheet opinion only).

5. Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 666, 667 (N.D. 1977). The lower court based much of its opinion on C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., ——Iowa——, 227 N.W.2d 169 (1975). That case applied the Doctrine of Implied Warranty of Fitness as well as the Doctrine of Reasonable Expectations. For that reason, many writers have severely criticized the opinion. *See* Note, *Reasonable Expectation: The Insurer's Dilemma*, 24 DRAKE L. REV. 853 (1975); 9 AKRON L. REV. 584 (1976); 64 GEO. L.J. 987 (1976).

6. N.D. CENT. CODE § 9-07-19 (1975) provides as follows: "In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." N.D. CENT. CODE § 9-07-14 (1975) provides as follows: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it." *See* Nodak Mut. Ins. Co. v. Loeffler, 225 N.W.2d 290 (N.D. 1974); Conlin v. Dakota Fire Ins. Co., 126 N.W.2d 421 (N.D. 1964).

7. 224 N.Y. 47, 120 N.E. 86 (1918).

marine insurance policy, the court stated as follows: "Our guide is the reasonable expectations of the ordinary businessman when making an ordinary business contract."[8]

Since *Bird*, the doctrine has generally been considered an expansion of the Doctrine of Adhesion[9] and has been approached from three different standpoints. Under the first approach, the doctrine is applied to the interpretation of the specific terms of the policy.[10] This approach in its actual application is little more than a refinement of the well-established rule of construing ambiguities against the author.[11]

In *Golding-Keene Co. v. Quality Phoenix Fire Insurance Co.*,[12] the insured sought coverage for damages to a warehouse caused by a bulldozer driven by an employee of a temporary contractor of the insured. The policy extended coverage to include damage caused by vehicles, but excluded coverage for damage caused by vehicles operated by employees of the insured while at work.[13] The court applied the first approach in honoring the insured's reasonable expectations by stating that in construing the words of an insurance contract, "the test is not what the insurance company intended the words of the policy to mean, but what a reasonable person in the position of the insured would have understood them to mean."[14] The court then stated that there was ample evidence to support the conclusion that the driver of the bulldozer was not an employee of the insured, and therefore decided in favor of the insured.[15]

The second approach to the Doctrine of Reasonable Expectations emerged in the early 1960's. This approach is based on the premise that the insured is entitled to all the coverage he might reasonably expect to be provided under a given policy. Under the second approach the expectation arises out of the nature of the policy and not out of any particular wording.[16] Therefore, only an unequivocally conspicuous, plain, and clear manifestation of the company's intent to exclude the coverage will defeat that expectation.[17]

This second approach was taken in *Gray v. Zurich Insurance Co.*,[18] where the insured was accused of assault and battery and contended that he had acted in self-defense.[19] The liability policy

8. *Id.* at 51, 120 N.E. at 87.
9. *See* Young, Lewis & Lee, *Insurance Contract Interpretations: Issues and Trends*, 625 INS. L.J. 71, 74 (1975).
10. Perlett, *The Insurance Contract and the Doctrine of Reasonable Expectations*, 6 FORUM 116, 122 (1971).
11. Young, Lewis & Lee, *supra* note 9, at 78. *But see* Maryland Cas. Co. v. Morrison, 151 F.2d 772 (10th Cir. 1945).
12. 96 N.H. 64, 69 A.2d 856 (1949).
13. *Id.* at ——, 69 A.2d at 858.
14. *Id.*
15. *Id.* at ——, 69 A.2d at 860-61.
16. Perlett, *supra* note 10, at 122.
17. *Id.* at 123.
18. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).
19. *Id.* at 267, 419 P.2d at 170, 54 Cal. Rptr. at 106.

contained language which required the insurer to defend the insured in any suit even if the allegations were false or fraudulent, but other language in the policy excluded the duty to defend if the insured's acts were intentional.[20] On the basis of the exclusion, the insurer refused to defend.[21] The court held that the policy was ambiguous because the relationship of the exclusionary clause to the coverage provided by the policy was not conspicuous, plain, and clear.[22] The court then concluded that it would be reasonable for the insured to expect coverage in the face of such an ambiguity, and therefore those reasonable expectations should govern.[23]

A similar situation occurred in *Steven v. Fidelity & Casualty Co. of New York*.[24] In this case, the insured purchased air travel insurance from a vending machine at an airport.[25] The policy did not cover alternative air transportation not chartered by a scheduled air carrier.[26] When a portion of the insured's flight was cancelled on his return trip, he obtained a connection for the remainder of his trip aboard a small airplane. The insured was killed when the light plane crashed.

The court found that travel by the substituted light airplane was reasonable under the circumstances.[27] Since the exclusion was not plainly and clearly brought to the insured's attention, the court declared the policy ambiguous[28] and decided against the insurance company.

Apparently, the distinction between the first and second approaches to the Doctrine of Reasonable Expectations is that under the first approach the courts have applied the doctrine in determining what an insured would reasonably expect a particular word or phrase to mean, while the second approach applies the doctrine to determine the insured's reasonable expectations of the general coverage afforded under a given type of policy. It should be noted that both approaches generally require a finding of ambiguity before they will be applied.[29]

The second approach, as exemplified by *Gray* and *Steven*, has been criticized as straining the issue of ambiguity and perhaps even

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20. *Id.*
21. *Id.* at 268, 419 P.2d at 170, 54 Cal. Rptr. at 106.
22. *Id.* at 273, 419 P.2d at 174, 54 Cal. Rptr. at 110.
23. *Id.* at 274, 419 P.2d at 175, 54 Cal. Rptr. at 111.
24. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1963).
25. *Id.* at 866, 377 P.2d at 286, 27 Cal. Rptr. at 174. The policy could not have been examined by the insured until it had already been purchased because it was inside the vending machine. *Id.*
26. *Id.* at 866, 867-868, 377 P.2d at 286, 287, 27 Cal. Rptr. at 174, 175.
27. *Id.* at 869-70, 377 P.2d at 288-89, 27 Cal. Rptr. at 176-77. The court found that in the type of standardized conduct involved, the insured could reasonably expect coverage for the entire trip, including reasonable substituted transportation necessitated by an emergency. *Id.* at 868-69, 377 P.2d at 288, 27 Cal. Rptr. at 176.
28. *Id. at* 872, 377 P.2d at 290, 27 Cal. Rptr. at 178.
29. Young, Lewis & Lee, *supra* note 9, at 79.

inventing ambiguity where none exists.[30] A third approach to the Doctrine of Reasonable Expectations has been proposed as a realistic alternative to a finding of ambiguity where none may actually exist. Professor Robert Keeton has stated the third approach as follows: "The objectively reasonable expectations of the applicants and intended beneficiaries regarding the terms of the insurance contract will be honored even though a painstaking study of the policy provisions would have negated those expectations."[31] This approach, which first emerged in the early 1970's, differs from the first and second approaches in that it does not require a finding of ambiguity.[32] The third approach has been articulated in a comparatively small number of cases.

In *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*,[33] the insured's theft insurance policy stipulated that in order for a burglary to be covered under the policy, it had to evidenced by "visible marks made by tools, explosions, electricity, or chemicals or physical damage to the exterior of the premises at the place of entry."[34] The insured's place of business was burglarized but there were no marks on the exterior of the premises. The court applied the third approach to the Doctrine of Reasonable Expectations and found that since the insured had no knowledge of the specific exclusionary language in the policy, his expectations of coverage were reasonable.[35] The court also found that the policy definition of burglary unambiguously denied the insurer's liability,[36] but to enforce literally the policy language would render an unconscionable result and would violate the reasonable expectations of the insured.[37] The court, therefore, decided in favor of the insured.[38]

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30. *See* Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 970-72 (1970), where the author states as follows:

> [T]he principle of resolving ambiguities against the draftsman is simply an inadequate explanation of the results of some cases. The conclusion is inescapable that courts have sometimes invented ambiguity where none existed, then resolving the invented ambiguity contrary to the plainly expressed terms of the contract document. To extend the principle of resolving ambiguities against the draftsman in this fictional way not only causes confusion and uncertainty about the effective scope of judicial regulation of contract terms but also creates an impression of unprincipled judicial prejudice against insurers. If the results in such cases are supportable at all, generally it is because the principle of honoring policyholders' reasonable expectations applies.

Id. at 972 (footnotes omitted).

31. *Id.* at 967.

32. *Id.* at 968. Keeton cites several policy reasons for applying this doctrine even absent a finding of ambiguity. Those reasons are as follows: policy holders seldom if ever actually read insurance contracts because of their length and complexity; the policies can never be fully understood without detailed, in depth study; and furthermore, a policy holder seldom sees his insurance policy until some time after the policy has been made. *Id.*

33. ——Iowa——, 227 N.W.2d 169 (1975).

34. *Id.* at ——, 227 N.W.2d at 171.

35. *Id.* at ——, ——, 227 N.W.2d at 172, 177.

36. *Id.* at ——, 227 N.W.2d at 173.

37. *Id.* at ——, ——, 227 N.W.2d at 177, 179.

38. *Id.* at ——, 227 N.W.2d at 181. The court in Bryan Construction v. Employers' Sur-

It should be noted that this third approach has been criticized as carrying the Doctrine of Reasonable Expectations too far in the modification of the specific language of the written insurance contract.[39]

The North Dakota Supreme Court had not formally adopted the Doctrine of Reasonable Expectations until the *Mills* decision. However, a number of North Dakota Supreme Court decisions have interpreted ambiguous terms of insurance policies in a manner implying the court's willingness to adopt the first approach to the doctrine.

In *Schmitt v. Paramount Fire Insurance Co.*[40] the insured's policy covered water damage resulting from accidental discharge from *within* a plumbing system.[41] After a heavy rain, water seeped between the insured's water piping and the insulation surrounding it and was converted into steam, thereby causing damage to the insured's basement.[42] The North Dakota Supreme Court stated that while it is improper to strain the words of an insurance contract to impose liability on the insurer, language should be construed liberally where it is reasonable to do so.[43] The court then construed the word "within" to include the space between the insulation and the piping, and held in favor of the insured.[44]

The North Dakota Supreme Court made a somewhat more direct reference to honoring an insured's reasonable expectations in *Haugen v. Auto Owners Insurance Co.*[45] In that case, the insured installed an oil-burning furnace in a customer's home. While the furnace was being loaded, a pipe installed by the insured separated and oil ran out into the basement, causing damage.[46] When the insured asked his insurer to defend him in the resulting lawsuit, the insurer refused, stating that the insurance policy excluded the duty to defend pursuant to a "Products and Completed Operations Haz-

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plus Lines Ins. Co., 60 N.J. 375, 290 A.2d 138 (1972), also applied Keeton's definition of the Doctrine of Reasonable Expectations to an umbrella policy and stated that this approach was proper in determining coverage under policies of this type, even though the court had declared that the policy was ambiguous and thus could have based its decision on another approach to the doctrine. *Id.* at ——, 290 A.2d at 140.

39. *See, e.g.*, Squares, *A Skeptical Look at the Doctrine of Reasonable Expectations*, 6 FORUM 252 (1971); Note, *Reasonable Expectations: The Insurer's Dilemma*, 24 DRAKE L. REV. 853 (1975).

40. 92 N.W.2d 177 (N.D. 1958).

41. *Id.* at 178 (emphasis added).

42. *Id.*

43. *Id.* at 179.

44. *Id.* This approach was reapplied recently in Kooker v. Benefit Ass'n of Railway Employees, 246 N.W.2d 743 (N.D. 1976), which involved coverage for "total disability." The insured slipped on a boxcar ladder while working and injured his arm. Although the insured was not completely disabled in a strict sense, he was unable to work at his job. The insurer denied benefits on the basis of a requirement of "total disability." The court construed "total disability" in a reasonable or practical manner, *Id.* at 745, and held in favor of the insured. *Id.* at 747.

45. 191 N.W.2d 274 (N.D. 1971).

46. *Id.* at 276.

ard Exclusion" contained in an attached endorsement.[47] The supreme court stated that "an insurance policy is held to mean what a reasonable person in the position of the insured would think it meant."[48] However, the court went on to state that an insurance policy must be interpreted as a whole if reasonably practicable.[49] Although the court implied that the policy might have been somewhat unclear, it was not ambiguous, and the judgment for the insurer was affirmed.[50]

The North Dakota Supreme Court expressly adopted the Doctrine of Reasonable Expectations in *Mills v. Agrichemical Aviation, Inc.*[51] The court's decision was split, with a majority of the judges agreeing with a special concurring opinion rather than with the articulated opinion of the court.[52] Both opinions were based upon a finding of ambiguity, although each opinion arrived at the finding of ambiguity in a different manner.

The articulated opinion of the court found an ambiguity because the relationship between the two exclusionary clauses was uncertain and perplexing.[53] The policy was designed for farm and ranch liability.[54] The court, therefore, felt that the policy would give rise to a reasonable expectation of coverage for damages caused during the course of ordinary farming operations, including crop spraying.[55] The insured would have been justified in assuming that if the policy

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47. *Id.* at 276-77. The endorsement provided as follows: "It is agreed that the policy does not apply to the Products Hazard or Completed Operations Hazard as defined therein." *Id.* at 277. "Products Hazard" was defined in the policy as follows:

> [It] shall mean goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and if such bodily injury or property damage occurs away from premises owned, rented or controlled by the named insured provided, such goods or products sall be deemed to include any container thereof, other than a vehicle, but shall not include vending machines or any property, other than such container, rented to or located for use of others but not sold.

Id.

"Completed Operations Hazard" was defined in the policy as follows:

> [It] shall mean operations including reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. 'Operations' include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
>
> (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed, ...

Id.

48. *Id.* at 279.
49. *Id.* at 280.
50. *Id.* at 278-80.
51. 250 N.W.2d 663, 673 (N.D. 1977).
52. The opinion of the court was signed by only two justices; Justice Pederson, the author, and Justice Vogel. Chief Justice Erickstad and Justices Sand and Paulson concurred specially.
53. 250 N.W.2d 663, 668 (N.D. 1977). *See supra* notes 2-3, and text accompanying.
54. *Id. See supra* note 1, and text accompanying.
55. *Id.*

did not cover all his farming operations, any exclusion would have been called to his attention.[56] The opinion of the court seems to have adopted the second approach to the Doctrine of Reasonable Expectations, requiring an unequivocally conspicuous, plain and clear exclusion of coverage. The opinion relied heavily on the *Steven* and *Gray* decisions in determining the existence of ambiguity.[57]

The special concurring opinion, on the other hand, found ambiguity within the wording of the exclusionary clause of the umbrella policy, and stated that the word "recreational" as used in the phrase "recreational motor vehicle or aircraft" created an ambiguity.[58] The specially concurring justices rejected the statement in the opinion of the court that a farmer might reasonably expect coverage under a farm and ranch liability policy for damage caused by aerial crop spraying, even though the policy excluded such coverage, and found that such a determination should be made by the legislature, not the court.[59] Unlike the opinion of the court, the special concurring opinion would not allow the reasonable expectations of the insured to be given effect unless there is ambiguity in the specific terms of the policy. This position seems to be an articulation of the first approach to the Doctrine of Reasonable Expectations.

It should be noted that the lower court in *Mills* found that the policy exclusions, when read together with the contract definitions, were not ambiguous.[60] The lower court relied heavily on *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*[61] and the third approach to the Doctrine of Reasonable Expectations, stating that even though there was no ambiguity in the policy, it was reasonable for the insured to expect coverage.[62] Since both opinions of the North Dakota Supreme Court found an ambiguity in the policy, the reasoning of the lower court was rejected because it was unnecessary to apply the third approach to the doctrine.[63]

After the decision in *Mills v. Agrichemical Aviation, Inc.*, it is difficult to ascertain the North Dakota Supreme Court's position on the Doctrine of Reasonable Expectations. The court appears to have rejected the third approach to the doctrine.[64] But, because of the

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56. *Id.*
57. *Id.* at 672.
58. *Id.* at 673. (Erickstad, C.J., concurring specially). Justice Erickstad stated that an ordinary person who read the provision "might reasonably be misled to believe that only recreational activity was excluded from coverage." *Id.*
59. *Id.*
60. *Id.* at 667.
61. *Id.* at 672. The *C & J Fertilizer* decision is discussed at text accompanying notes 33-38 *supra*.
62. *Id.* at 666.
63. *Id.* at 672 (opinion of the court), and 673 (special concurrence).
64. The propriety of the third approach to the Doctrine of Reasonable Expectations in North Dakota might be seriously questioned because of the language in several state statutes. For example, N.D. CENT. CODE § 9-07-02 (1975) requires that "[t]he language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity."

split decision in *Mills*, it cannot be said with any certainty whether the first or second approach to the doctrine is the accepted view in North Dakota. When either of the opinions of the supreme court is considered in conjunction with prior North Dakota decisions,[65] it seems that the court is willing to apply the doctrine as an aid in determining and construing ambiguity.[66]

In the future, if the North Dakota Supreme Court applies the first approach to the Doctrine of Reasonable Expectations, as espoused by the special concurring opinion in *Mills*, the doctrine will have no more effect in North Dakota than the well-established rule of construing ambiguous language in a policy against the insurer. However, if the second approach to the doctrine is followed, as expressed by the opinion of the court, it might prove to have a significant effect on the written insurance contract in North Dakota.

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The third approach to the Doctrine of Reasonable Expectations allows the reasonable expectations of the insured to govern, even in the absence of ambiguity. This approach seems to be in direct conflict with the statute, because the statute requires clear and explicit language to govern. *See also* N.D. CENT. CODE § 9-07-06 (1975). *See generally* N.D. CENT. CODE tit. 26—Insurance (1970), *as amended*, (Supp. 1975).

65. Kooker v. Benefit Ass'n of Railway Employees, 246 N.W.2d 743 (N.D. 1976); Haugen v. Auto Owners Ins. Co., 191 N.W.2d 274 (N.D. 1971); Schmitt v. Paramount Fire Ins. Co., 92 N.W.2d 177 (N.D. 1958), discussed at notes 40-50 *supra* and text accompanying.

66. The opinion of the court relied on the logic of Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1963) and Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966), decisions which have been criticized for straining the finding of ambiguity. *See supra* note 30.