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Contracts: An Ambiguous Standard for Resolving Ambiguity in Insurance Contracts: The Continuing Uncertainty of Policy Interpretation in Minnesota-Carlson v. Allstate Insurance Co

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**CONTRACTS: AN AMBIGUOUS STANDARD FOR
RESOLVING AMBIGUITY IN INSURANCE CONTRACTS:
THE CONTINUING UNCERTAINTY OF POLICY
INTERPRETATION IN MINNESOTA—*CARLSON V.
ALLSTATE INSURANCE CO.***

Scott Cody[†]

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I. INTRODUCTION

The interpretation of insurance contracts has been a tumultuous legal issue in recent decades. Courts have long accepted and applied the doctrine of *contra proferentem*, requiring any ambiguity in a contract to be construed against the drafter, especially where insurance policies are concerned.¹ However, an influential law review article argued in 1970 that *contra proferentem* had not been enough for courts seeking to protect insureds: they had gone beyond simply construing ambiguities and had taken to creating ambiguities where none existed.² It was proposed that courts adopt a new approach to policy interpretation that would render such maneuvering unnecessary: the doctrine of reasonable expectations, which effectuates the reasonable expectations of the insured even in the face of unambiguous policy language.³

Minnesota joined many states in taking that advice and put its proposition into practice, incorporating the doctrine of reasonable expectations into the state's common law in 1985.⁴ Almost immediately, though, the doctrine as formulated fell out of favor,

1. Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729, 735 (2000) (noting that *contra proferentem* is a "widely recognized rule of contract interpretation").

2. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 970-72 (1970) (arguing that *contra proferentem* is "an inadequate explanation of the results of some cases" because it has been applied to unambiguous contracts).

3. *See id.* at 973.

4. *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985) (holding that, although business' insurance policy expressly required a burglary to be "evidenced by visible marks," the policy nonetheless included a burglary not evidenced by visible markings because the business reasonably expected such a loss to be included in the policy).

replaced by rules resembling *contra proferentem* in some cases, and a hybrid *contra proferentem*/reasonable expectations rule in others. It remained unclear for over two decades when, if ever, the original formulation of the doctrine was to be applied.⁵

Carlson v. Allstate Insurance Co. is the Minnesota Supreme Court's latest attempt to resolve that confusion.⁶ The court affirmed a summary judgment ruling in favor of an insurer, and held that the doctrine of reasonable expectations is to be used to reject unambiguous policy language only when there is a "hidden" exclusion; otherwise, ambiguity is required for the doctrine's application.⁷ Even after *Carlson*, though, questions remain as to whether the doctrine is the exclusive method of interpreting ambiguity and, if so, how it is to be applied.⁸

This note begins by exploring the history of insurance contract interpretation in Minnesota, from *contra proferentem* to the different manifestations of the doctrine of reasonable expectations.⁹ It then examines the supreme court's *Carlson* decision¹⁰ and analyzes the impact of the case on this body of law.¹¹ It concludes that, although *Carlson* resolved the issue of the doctrine of reasonable expectations *vis à vis* unambiguous policy language, it did little to clear the general confusion that continues to surround the interpretation of ambiguous language.¹²

II. HISTORY

A. *The Interpretation of Insurance Contracts in Minnesota Prior to 1985*

1. *Early Decisions Embrace Contra Proferentem*

Minnesota courts noted long ago that "it is of paramount public policy not lightly to interfere with freedom of contract."¹³ Notwithstanding that sentiment, those courts also decided long ago to treat insurance contracts as a prominent exception. By the late

5. See *infra* Part II.A.2.

6. 749 N.W.2d 41 (Minn. 2008).

7. See *id.* at 49.

8. See *infra* Part IV.

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Parts IV; V.

13. Nat'l Benefit Co. v. Union Hosp. Co., 45 Minn. 272, 276, 47 N.W. 806, 807 (1891).

nineteenth century, the Minnesota Supreme Court had declared a bias against insurers in the realm of contract interpretation, adopting the doctrine of *contra proferentem*, a rule of construction that requires contract ambiguity to be construed against the drafter.¹⁴

That doctrine, the court remarked in 1874, “is more applicable to the conditions and provisos of policies of insurance than to almost any other instruments.”¹⁵ The court reasoned that, because an insurance company has sole control over the preparation and wording of its policies, those policies “should be drafted with the most scrupulous exactness . . . [and] be absolutely free from ambiguity.”¹⁶ If ambiguity existed in an insurance policy after it left the company’s hands, then the company could not legitimately complain of ill treatment when the policy’s terms were resolved in favor of the insured.¹⁷

At times, however, the court’s bias against insurers was not limited to construing policy ambiguity against them, but exhibited creativity in finding policy ambiguity where none was immediately apparent. An early example came in *Price v. Phoenix Mutual Life Insurance Co.*¹⁸ In that case, the questionnaire for a life insurance policy asked applicants to disclose whether they had certain diseases, one of which was rheumatism.¹⁹ One insured answered the question in the negative even though he suffered from sub-acute rheumatism.²⁰ When his affliction was discovered, the insurer denied him coverage.²¹

The supreme court held that the insured should be covered by the policy, reasoning that the questionnaire was ambiguous as to whether the disease of rheumatism specifically encompassed sub-acute rheumatism; the ambiguity was then construed against the insurer and coverage was ordered.²² The court’s finding of ambiguity, perhaps questionable on its own, was made more so by

14. See 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 1999) (“[*Contra proferentem*] is a generally accepted principle that any ambiguity in [contract] language will be interpreted against the drafter.”).

15. *Chandler v. St. Paul Fire & Marine Ins. Co.*, 21 Minn. 85, 87 (1874).

16. *Id.* at 88.

17. *Id.* at 87–88.

18. 17 Minn. 497 (1871), *rev’d on other grounds*, *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495, 67 N.W. 367 (1896).

19. *Id.* at 502.

20. *Id.* at 508.

21. *Id.*

22. *Id.* at 518.

the analogy upon which the majority supported its decision: to say that the disease of “rheumatism” necessarily included the insured’s condition would be equivalent to saying that a person who bit her tongue would be required to report that she had the disease of “spitting of blood.”²³

2. *Mid-twentieth Century Decisions Exhibit Confusion in the Application of Contra Proferentem*

Into the mid-twentieth century, the Minnesota Supreme Court stopped using the term *contra proferentem* but continued to endorse the doctrine’s thrust, that ambiguous policy language is to be construed against the insurer.²⁴ At the same time, the court at least nominally purported to temper any zeal toward finding ambiguity, holding just as consistently that ambiguity is not to be read into an insurance contract, and that unambiguous policy language is to be read according to its plain language so as to effectuate the intentions of the parties.²⁵ The rulings of the court, however, were not as consistent in applying that principle on a case-by-case basis. A survey of decisions from the 1950s and 1960s shows that the Minnesota Supreme Court upheld freedom of contract principles in some cases, but strove to create ambiguity in others, with no discernible pattern. Six cases are described below to exemplify the confusion.

a. *Tomlyanovich v. Tomlyanovich*

Even in the face of policy language that is plausibly ambiguous, the court has sometimes refused to construe it in the insured’s favor if the language’s intention is clear, although *contra proferentem* does not allow this. For example, in *Tomlyanovich v. Tomlyanovich*, two adult brothers lived in the same house with their parents.²⁶ The older brother, the defendant in the case, was driving his car

23. *Id.*

24. *See, e.g.*, *Bobich v. Oja*, 258 Minn 287, 294, 104 N.W.2d 19, 24 (1960) (“Inasmuch as the language of an insurance policy is that of the insurer, any reasonable doubt as to its meaning must be resolved in favor of the insured.”).

25. *See, e.g., id.* (“[T]he court has no right to read an ambiguity into plain language of an insurance policy in order to construe it against the one who prepared the contract.”); *Tomlyanovich v. Tomlyanovich*, 239 Minn. 250, 253, 58 N.W.2d 855, 857 (1953) (explaining that, in the absence of ambiguity, terms in an insurance contract are to be understood in their plain and ordinary sense).

26. 239 Minn. at 252, 58 N.W.2d at 856–57.

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with the younger brother, the plaintiff, as a passenger, when there was an accident and the plaintiff was injured.²⁷ The defendant's insurer refused to pay the plaintiff's award because the defendant's automobile insurance policy excluded coverage for "any member of the family of the insured residing in the same household as the insured."²⁸

The plaintiff argued that the policy exclusion was ambiguous and offered several possible constructions: for example, "family of the insured" might refer to the family of which the insured is the head;²⁹ or, "family of the insured" could refer solely to the insured's spouse and children.³⁰ The court was not persuaded, noting that the exclusion was obviously intended to "exempt the insurer from liability to one who would naturally and inevitably be partial to another because of the close filial ties which exist between members of the same family circle living in the same household."³¹

b. *Bolduc v. New York Fire Insurance Co.*

As compared to *Tomlyanovich*, a strong argument exists that the intentions of the parties were not given effect in *Bolduc v. New York Fire Insurance Co.*³² In that case, a construction company was building a bridge over water, and its equipment was covered against collision damage that occurred when the equipment was "moving under its own power."³³ The company's pile driver was placed on some pilings in the water, and connected by cable to more pilings on the shore so that it could pull them into the water as needed.³⁴ An accident occurred during the construction; instead of the pile driver pulling the pilings from the shore as intended, the pilings on the shore became stuck and the cable pulled the pile driver itself into the water.³⁵ The insurer denied coverage, arguing that the pile driver was not "moving under its own power" and that, in any event, no "collision" occurred when it fell into the water.³⁶

The court held for the plaintiff construction company,

27. *Id.* at 250–51, 58 N.W.2d at 856.

28. *Id.* at 252, 58 N.W.2d at 856.

29. *Id.* at 256, 58 N.W.2d at 859.

30. *Id.* at 260, 58 N.W.2d at 861.

31. *Id.* at 265, 58 N.W.2d at 864.

32. 244 Minn. 192, 69 N.W.2d 660 (1955).

33. *Id.* at 195–96, 69 N.W.2d at 663.

34. *Id.* at 195, 69 N.W.2d at 663.

35. *Id.* at 196, 69 N.W.2d at 664.

36. *Id.* at 196–97, 69 N.W.2d at 664–65.

reasoning that when words in insurance contracts are even remotely ambiguous, they are to be construed liberally, even if contrary to their literal meanings, to provide coverage.³⁷ The term “moving under its own power” was therefore held to be ambiguous, and the court gave effect to the insured’s interpretation that the term included the situation where a jammed piling caused the pile driver to pull itself down.³⁸ “Collision,” to the contrary, was held to be unambiguous, but in a non-obvious way. According to the court, it was “well established” that when an object fell into water there was a “collision” within the meaning of an insurance policy.³⁹

c. *Quaderer v. Integrity Mutual Insurance Co.*

Next, in *Quaderer v. Integrity Mutual Insurance Co.*, the court confronted an automobile insurance policy.⁴⁰ The plaintiff in that case purchased a policy covering his two vehicles, one of which was used by his son.⁴¹ Later on, the plaintiff’s son acquired his own automobile. A week after that, the son was involved in an accident while driving his new car.⁴² The plaintiff’s insurer refused to undertake the son’s defense on the ground that the policy covered only those vehicles owned by the plaintiff.⁴³

The court took a broad view of the policy terms “ownership” and “owned automobile,” finding them ambiguous.⁴⁴ According to the court, “[t]he apparent purpose . . . of this policy was to insure plaintiff against all risks. . . . Thus the terms, as used in the provisions in question, were intended to have a broader meaning than legal title.”⁴⁵ The owner of an automobile, as the policy was interpreted, was not only the “registered owner, or one having legal title to the vehicle,” but also “simply one who may be exposed to liability as a registered owner pursuant to statutes governing motor vehicle registration.”⁴⁶ Hypothetically, the plaintiff could have

37. *Id.* at 198, 69 N.W.2d at 665.

38. *Id.* at 200, 69 N.W.2d at 666.

39. *Id.* at 198–99, 69 N.W.2d at 665.

40. 263 Minn. 383, 116 N.W.2d 605 (1962).

41. *Id.* at 384, 116 N.W.2d at 606.

42. *Id.* at 385, 116 N.W.2d at 606. Although the plaintiff did not immediately notify his insurer of the new vehicle, the policy allowed him thirty days from the time of acquisition to do so. *Id.* at 385–87, 116 N.W.2d at 607–08.

43. *Id.* at 385–86, 116 N.W.2d at 606–07.

44. *Id.* at 388, 116 N.W.2d at 608.

45. *Id.* at 388, 116 N.W.2d at 608–09.

46. *See id.* at 388, 116 N.W.2d at 608. According to the court, “a finding by the jury that plaintiff was the owner for the purposes of the Safety Responsibility

been held vicariously liable when his son was in an accident with his own vehicle; thus, the plaintiff possessed an “insurable interest in the automobile” and an ownership interest.⁴⁷ As the court concluded: “[a]lthough we believe the [trial] court was correct in finding that [the plaintiff’s son] owned the [automobile], this finding cannot be taken to mean that he was the sole owner.”⁴⁸

d. Holtz v. Mutual Service Casualty Co.

The court was less favorable to the insured in *Holtz v. Mutual Service Casualty Co.*⁴⁹ The plaintiff and his wife were covered under the same automobile policy, and his wife was injured when another driver struck her car.⁵⁰ She was awarded \$48,400 in damages for her injuries, and the plaintiff was awarded over \$5800 for his wife’s medical expenses; however, the insurer refused to pay the plaintiff any more than \$1600 because the policy set the insurer’s limit of liability at \$50,000 “for all damages . . . arising out of bodily injury . . . sustained by one person in any one accident.”⁵¹

The parties disputed the meaning of that policy language.⁵² The insurance company argued that \$50,000 was the limit of its liability for “bodily injury . . . sustained by one person.”⁵³ Therefore, because both the plaintiff’s award and his wife’s arose from the same bodily injury, there was no duty to pay their combined awards beyond the \$50,000 limit.⁵⁴ The plaintiff countered that the policy should read “damages . . . sustained by one person.”⁵⁵ Thus, insofar as his wife’s medical expenses were separate damages than those he suffered himself, he was entitled to full payment.⁵⁶ The court cited the proposition from *Quaderer* that ambiguities are to be construed against the drafter of an insurance policy;⁵⁷ however, despite the plaintiff’s suggestion of a plausible construction, the court held

Act would not have been unlikely, even though the trial court reached a contrary finding under the evidence before us.” *Id.* at 389, 116 N.W.2d at 609.

47. *See id.* at 389, 116 N.W.2d at 609.

48. *Id.*

49. 264 Minn. 121, 117 N.W.2d 767 (1962).

50. *Id.* at 121, 117 N.W.2d at 768.

51. *Id.* at 121-23, 117 N.W.2d at 768-69.

52. *Id.* at 121-22, 117 N.W.2d at 768.

53. *Id.* at 123, 117 N.W.2d at 769 (emphasis added).

54. *Id.*

55. *Id.* (emphasis added).

56. *Id.*

57. *Quaderer v. Integrity Mut. Ins. Co.*, 263 Minn. 383, 388-89, 116 N.W.2d 605, 608 (1962).

that there was no ambiguity.⁵⁸ The policy “clearly” indicated that \$50,000 would be the insurer’s limit of liability for all damages sustained by virtue of a bodily injury.⁵⁹

e. Struble v. Occidental Life Insurance Co. of California

In *Struble v. Occidental Life Insurance Co. of California*, the plaintiff suffered from severe depression and was unable to maintain employment.⁶⁰ His disability insurance policy provided him with benefits if his illness rendered him “necessarily and continuously *confined within the house* and therein regularly visited and attended by a legally qualified physician or surgeon other than himself.”⁶¹ However, the plaintiff’s psychiatrist recommended that he work outdoors as much as possible, whether repairing his house or as a laborer.⁶² If the policy language was taken as mandatory, it would contradict the advice of the plaintiff’s physician and possibly worsen his condition.⁶³

The court noted that the likely purpose of the “regularly visited and attended” language was to prevent fraud or malingering; the evidence disallowed the possibility that such was the case with the plaintiff.⁶⁴ Therefore, reasoning that the parties must have contemplated that the insured would follow his physician’s advice, the court concluded that the policy language was ambiguous and construed it in the insured’s favor, granting coverage.⁶⁵

The dissent found the holding incompatible with the policy’s terms, but also pointed out an interesting fact: the plaintiff often left his home both for work and recreation.⁶⁶ By focusing on the evidence that the plaintiff was not a malingerer, the majority essentially ignored the policy’s plain “necessarily and continuously confined language” and, in doing so, “eliminate[d] as practically

58. *Holtz*, 264 Minn. at 126, 117 N.W.2d at 770.

59. *Id.* The court relied heavily upon similar decisions in other jurisdictions considering similar policy language. *Id.* at 124–25, 117 N.W.2d at 769–70.

60. 265 Minn. 26, 28–31, 120 N.W.2d 609, 612–13 (1963).

61. *Id.* at 27, 120 N.W.2d at 611 (emphasis added). The plaintiff had already exhausted twenty-four months of coverage provided by the policy for total disability that did not necessitate confinement to his home. *Id.* at 29, 120 N.W.2d at 612.

62. *Id.* at 30, 120 N.W.2d at 613.

63. *Id.* at 32, 120 N.W.2d at 613–14.

64. *Id.* at 37, 120 N.W.2d at 616–17.

65. *Id.* at 38, 120 N.W.2d at 617.

66. *Id.* at 39, 120 N.W.2d at 618 (Otis, J., dissenting).

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meaningless a substantial provision in the contract of the parties.”⁶⁷

f. Employers Mutual Liability Insurance Co. v. Eagles Lodge

In *Employers Mutual Liability Insurance Co. v. Eagles Lodge*, the defendant held an automobile race at a county fairground.⁶⁸ Deo Waldron, the local chief of police, was there in his official capacity, without the request of the organizers, to patrol the racetrack and keep spectators off of it.⁶⁹ During one of the races, there was a pileup.⁷⁰ Waldron attempted to prevent spectators and additional vehicles from entering the track, but another accident occurred and a car struck Waldron, killing him.⁷¹

The city’s worker’s compensation insurer won a default judgment against the defendant and attempted to recover from the defendant’s insurer, Continental.⁷² Continental denied on the ground that the policy it issued to the defendant excluded coverage for injury to “policemen . . . employed on or about the premises” of the racetrack.⁷³ The plaintiff argued that “policemen” must be construed to include only those officers associated with or employed by the defendant; otherwise even an off-duty officer who was enjoying a race would be excluded from the policy’s coverage.⁷⁴

The supreme court took a strong position against the plaintiff, explaining that, even with an insurance contract, “parties are free to contract as they see fit and that the language of the contract is to be given its plain and ordinary meaning.”⁷⁵ Because Waldron was undisputedly a policeman, there could be no argument that the contract’s plain terms excluded him from coverage. The court would not go so far as to say that even an off-duty officer would be excluded; such a construction would absolve the insurer of all liability.⁷⁶ At the same time, though, it would not construe the policy “so strictly against the insurer as to create a new contract

67. *Id.*

68. 282 Minn. 477, 478, 165 N.W.2d 554, 555 (1969).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 479, 165 N.W.2d at 556.

73. *Id.* at 478–79, 165 N.W.2d at 556.

74. *Id.* at 479, 165 N.W.2d at 556.

75. *Id.*

76. *See id.*

imposing additional liability on it.”⁷⁷

B. The Doctrine of Reasonable Expectations

1. Keeton Formulates the Doctrine of Reasonable Expectations

If the Minnesota Supreme Court seemed willing at times to stretch to find ambiguity in insurance contracts and apply *contra proferentem*, it was not alone. In a seminal 1970 article, Robert E. Keeton noted that, over time, many courts had apparently become willing to reach in order to declare policy terms ambiguous, and were sometimes even open to inventing ambiguity when it could not be found.⁷⁸ They would then construe the purported ambiguities against the insurance companies.⁷⁹ No existing doctrine, such as *contra proferentem*, could adequately explain the rationale behind those decisions, leading Keeton to suggest that a new, but unnamed and implicit, doctrine had arisen, one that came to be known as the doctrine of reasonable expectations: “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.”⁸⁰

Keeton proposed that, in reality, courts were giving effect to policyholders’ reasonable expectations, regardless of their policies’ actual language.⁸¹ However, they were also creating confusion by cloaking their decisions in the guise of *contra proferentem*.⁸² To avoid that confusion and promote certainty, Keeton advocated that “insurance law ought to embrace”⁸³ the doctrine of reasonable expectations, allowing courts to construe insurance policies against

77. *Id.*

78. Keeton, *supra* note 2, at 972 (“The conclusion is inescapable that courts have sometimes invented ambiguity where none existed, then resolving [sic] the invented ambiguity contrary to the plainly expressed terms of the contract document.”).

79. *Id.*

80. *See id.* at 967.

81. *See id.* Keeton used the Minnesota Supreme Court’s ruling in *Struble*, *see supra* Part II.A.2.e, as one example of decisions “where courts have disallowed literal enforcement of policy provisions without regard to whether the individual policyholder read or had ample opportunity to read the restrictive provision in question.” *See id.* at 975, n.24.

82. *See id.* at 970.

83. *Id.* at 967.

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insurers even in the face of unambiguous policy language.⁸⁴ The doctrine was attractive because of the disparity in bargaining power between insurer and insured,⁸⁵ the adhesive nature of insurance contracts,⁸⁶ and the average layperson's inability to read or comprehend complex policy language.⁸⁷ Courts throughout the United States followed Keeton's lead and began to adopt the doctrine of reasonable expectations in one form or another during the 1970s and 1980s.⁸⁸

The Minnesota Supreme Court did not immediately espouse Keeton's position, but began to tend in the direction of reasonableness in *Canadian Universal Insurance v. Fire Watch*.⁸⁹ Fire Watch installed an automatic fire extinguisher system in a restaurant; however, the system malfunctioned during a fire, causing the restaurant to be largely consumed by flames.⁹⁰ Prior to the fire, Fire Watch's insurance policy was amended by an endorsement from its insurer. The original policy would have provided coverage for damage arising from negligent installation of the extinguisher system; the endorsement unambiguously excluded

84. *Id.* at 972.

(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 results in such cases are supportable at all, generally it is because the principle of honoring policyholders' reasonable expectations applies.)

85. See James F. Hogg, *The Tale of a Tail*, 24 WM. MITCHELL L. REV. 515, 568 (1998).

86. It was pointed out that the adhesive effect of insurance contracts is often compounded by the fact that some consumers, such as drivers and home owners, have no choice but to purchase insurance. See Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 368 (1992).

87. See Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1476-80 (1989).

88. See, e.g., *Estrin Const. Co. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 418 (Mo. Ct. App. 1981) (adopting "strong" version of the doctrine, looking for the insured's reasonable expectations even when a policy is unambiguous); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 927 (Del. 1982) (adopting "weak" version of the doctrine, honoring the insured's reasonable expectations in situations of ambiguity and when important terms are hidden in fine print); see also Laurie Kindel Fett, Note, *The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditional Tools of Contract Interpretation*, 18 WM. MITCHELL L. REV. 1113, 1123 n.64 (1992) (categorizing the positions of states adopting the doctrine). But see *Casey v. Highlands Ins. Co.*, 600 P.2d 1387, 1391 (Idaho 1979) (rejecting the doctrine of reasonable expectations in any form).

89. 258 N.W.2d 570 (Minn. 1977).

90. *Id.* at 571.

such coverage.⁹¹ When it received the endorsement, Fire Watch expressed confusion to its insurer as to the effect on its coverage, but received no response or explanation.⁹²

Although the endorsement's exclusionary language was unambiguous, the court refused to enforce it, noting that "[t]he terms of an insurance policy should be construed according to what a *reasonable* person in the position of the insured would have understood the words to mean."⁹³ To that end, the court invalidated the terms of the endorsement, adopting the rule that, when an endorsement "substantially reduces the prior insurance coverage," written notice to the insured is required for the reduction to be effective.⁹⁴

2. Atwater Creamery Co. v. Western National Mutual Insurance Co.

The Minnesota Supreme Court formally adopted the doctrine of reasonable expectations in 1985 in *Atwater Creamery Co. v. Western National Mutual Insurance Co.*⁹⁵ The plaintiff in *Atwater* obtained burglary insurance, but was unaware that the policy's definition of burglary required visible marks of forced entry in order for coverage to exist.⁹⁶ When a burglary occurred without any such

91. *Id.* at 574 ("[W]e conclude that under the policy as originally issued, Fire Watch was afforded coverage for losses arising from negligent installation of the extinguisher system and that the endorsement removed this protection . . .").

92. *See id.* at 573. The court also noted that Fire Watch's premium was not reduced following the endorsement, likely adding to its confusion over the meaning of the new language. *See id.* at 574.

93. *See id.* at 572 (emphasis added). The court would not be willing to automatically accept an insured's reading as reasonable, though. For example, in *Farmers Home Mut. Ins. Co. v. Lill*, 332 N.W.2d 635, 637-38 (Minn. 1983), the insured's policy included a confusingly arranged table of coverage that led the insured to mistakenly conclude that farm employees were covered. The court held for the insurer, explaining that the insured should have read the policy more carefully, after which it would have realized that it did not provide coverage for farm employees.

94. *Fire Watch*, 258 N.W.2d at 575.

95. 366 N.W.2d 271 (Minn. 1985). Although the *Atwater* court described the *Fire Watch* holding as an application of "reasonable-expectations-of-the-insured analysis," *id.* at 278, *Atwater's* holding is widely recognized as introducing the doctrine of reasonable expectations to Minnesota law. *See* John M. Bjorkman, *The Reasonable Expectations Doctrine: An Overview*, 29 A.B.A. THE BRIEF 38, 40 (2000); Fett, *supra* note 88, at 1124-25; Hogg, *supra* note 85, at 567; Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 196-97 (1998).

96. 366 N.W.2d at 275. Another provision of the policy indicated that

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marks, the plaintiff filed a claim; however, its insurer, Western National, denied coverage.⁹⁷

The policy's language was undoubtedly unambiguous, rendering *contra proferentem* inapplicable to allow the court to find coverage.⁹⁸ However, the absence of ambiguity did not preclude a finding for the plaintiff; as Justice Wahl explained for the court, in certain circumstances an unambiguous policy could still be construed in the insured's favor to protect the insured's reasonable expectations:

The doctrine of protecting the reasonable expectations of the insured is closely related to the doctrine of contracts of adhesion. Where there is unequal bargaining power between the parties so that one party controls all of the terms and offers the contract on a take-it-or-leave-it basis, the contract will be strictly construed against the party who drafted it. Most courts recognize the great disparity in

“[t]erms 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.* Atwater argued that this language required the court to substitute the policy's definition of burglary with the statutory definition, which did not require visible marks of forced entry. *Id.* The court disagreed, noting that “[a]n insurer may limit the risks against which it is willing to indemnify the insured. . . . [T]here is no conflict between the two [definitions] given their disparate functions.” *Id.* Importantly, though, the court also remarked that the difference between the policy and statutory definitions of burglary “has a bearing on the insured's reasonable expectations in purchasing burglary insurance.” *Id.*

97. There was no sign of forced entry on any of the exterior entrances to Atwater's building. *Id.* at 274. Although the padlocks of the interior storage bins were missing, there were no visible signs that they had been forced off. *See id.*

98. The policy's definition of burglary was, in fact, quite common, and though unambiguous, the court noted that the language had often been circumvented to find coverage in other jurisdictions. *Id.* at 275–76. The court described three methods by which that had been accomplished. *Id.* at 276. First, other courts held the language to be ambiguous despite its clear language, and then interpreted it in favor of the insured. *Id.* This technique was perfunctorily rejected. *Id.*

Second, other courts looked to the purpose of the policy language: to protect insurers from “inside jobs” and to encourage insureds to secure their premises. *Id.* In a case like *Atwater*, where evidence showed that the burglary was not an inside job and that the insureds' premises were indeed secure, those courts would find coverage, reasoning that to do so would not offend the purpose of the policy exclusion. *Id.* The court again rejected the technique, explaining that it was “uncomfortable . . . with this analysis given the right of an insurer to limit the risk against which it will indemnify insureds.” *Id.*

Finally, other courts had chosen to treat the policy language as creating an evidentiary standard, and gone on to ignore the language when other evidence showed that a burglary had occurred. *Id.* The *Atwater* court again refused to treat the exclusion as anything other than what it unambiguously was. *See id.*

bargaining power between insurance companies and those who seek insurance. Further, they recognize that, in the majority of cases, a lay person lacks the necessary skills to read and understand insurance policies, which are typically long, set out in very small type and written from a legalistic or insurance expert's perspective. Finally, courts recognize that people purchase insurance relying on others, the agent or company, to provide a policy that meets their needs.⁹⁹

Justice Wahl employed Keeton's reasoning, pointing out that the doctrine of reasonable expectations would allow the court to interpret the insurance policy in favor of finding coverage "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."¹⁰⁰ Although the burglary exclusion plainly required visible signs of forced entry, it had the effect of a hidden exclusion that "defeat[ed] the reasonable expectations of the purchaser of the policy" that coverage would be provided whether a "break-in [was] accomplished by an inept burglar or by a highly skilled burglar."¹⁰¹

Along with Keeton's reasoning, Justice Wahl's opinion invoked Keeton's own language: insureds would still be required to read the terms of their insurance policies,¹⁰² but their reasonable expectations would "be honored even though painstaking study of the policy provisions would have negated those expectations."¹⁰³ Although ambiguity would no longer be required in practice to construe a policy in the insured's favor, it would remain part of the analysis as "a factor in determining the reasonable expectations of the insured," along with the obscurity of the challenged provision and the public's general knowledge of the particular provision.¹⁰⁴ The court's holding adopted the "strong" version of the doctrine of reasonable expectations, allowing coverage to be found even

99. *Id.* at 277.

100. *Id.* at 278.

101. *See id.*

102. *See id.*

103. *Id.* at 277 (quoting Keeton, *supra* note 2, at 967).

104. *See id.* at 278. Justice Simonett filed a special concurrence, in which three others joined, advocating adoption of the "weak" version of the doctrine of reasonable expectations, which would require policy ambiguity before the doctrine could be applied. *See infra* note 105. In *Atwater*, Justice Simonett found the policy's definition of burglary to be ambiguous. *See id.* at 279 (Simonett, J., concurring).

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when policy language unambiguously excluded it.¹⁰⁵

Identifying ambiguity as a factor in the reasonable expectations analysis had an interesting, but unnoted, consequence: a court could not consistently use both the new doctrine and *contra proferentem*.¹⁰⁶ The *Atwater* court noted that the doctrine of reasonable expectations did not guarantee pro-insured outcomes, but could also result in pro-insurer findings, based on the insured's objectively reasonable expectations.¹⁰⁷ *Contra proferentem*, of course, precludes a pro-insurer finding.¹⁰⁸ Accordingly, *Atwater* seemed to mark the end of *contra proferentem*.

C. *The Interpretation of Insurance Contracts in Minnesota After 1985*

1. *Post-Atwater Decisions Exhibit Confusion in the Application of the Doctrine of Reasonable Expectations*

Finally accepted in Minnesota, the doctrine of reasonable

105. See *id.* at 278–79; see also James M. Fischer, *The Doctrine of Reasonable Expectations is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L.J. 151, 155 (1998). The “weak” version of the doctrine requires ambiguity in the policy language. Fischer, *supra*. Once ambiguity is established, “[t]he policyholder’s reasonable expectations may be considered to determine which version of the ambiguous language should be adopted by the court.” Fischer, *supra*.

106. See *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 646 (Minn. 1986) (Coyné, J., dissenting) (“[I]nherent in the doctrine of reasonable expectations is the rejection of the traditional rule that ambiguities are automatically construed most favorably to the insured. . .”).

107. See *Atwater*, 366 N.W.2d at 278 (“In our view, the reasonable-expectations doctrine does not automatically mandate either pro-insurer or pro-insured results. It does place a burden on insurance companies to communicate coverage and exclusions of policies accurately and clearly. It does require that expectations of coverage by the insured be reasonable under the circumstances. Neither of those requirements seems overly burdensome. Properly used, the doctrine will result in coverage in some cases and in no coverage in others.”).

108. Apart from the logical incompatibility of the two doctrines, the language of *Atwater* supports this conclusion. The majority’s opinion remarked that the doctrine of reasonable expectations would require all insurance policies to be construed “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.” *Id.* at 278. Those “arbitrary rules” were not identified, but it is likely that *contra proferentem* was included. Keeton argued that some courts were willing to “strain the outer limits of the theory of resolving ambiguity” to find ambiguity. Keeton, *supra* note 2, at 970. Others “have sometimes invented ambiguity where none existed.” Keeton, *supra* note 2, at 972. In other words, courts “stretch[ed]” to create opportunities to use *contra proferentem* in ways that “do not reflect real-life situations.” *Atwater*, 366 N.W.2d at 278. The *Atwater* majority relied heavily on Keeton’s reasoning, raising a strong probability that it was also referring to *contra proferentem*. *Id.*

expectations fell immediately into disuse. One year after *Atwater*, the court heard *Rusthoven v. Commercial Standard Insurance Co.*¹⁰⁹ The case involved a trucking company whose insurance policy was amended by two endorsements.¹¹⁰ The first endorsement limited uninsured motorist coverage to \$25,000 for one person in one accident; the second set the limit of uninsured motorist coverage at the sum of the limits of each insured vehicle.¹¹¹ One of the company's employees was injured by an uninsured motorist; with sixty-seven insured vehicles, the company argued that its coverage limit should be determined by the second endorsement and set at \$1,675,000.¹¹²

Because both endorsements could not consistently be given effect, the supreme court found that the policy was ambiguous.¹¹³ Instead of applying the doctrine of reasonable expectations, though, the court used *contra proferentem* to construe the policy against the insurer, explaining that "the policy is ambiguous and, therefore, is to be strictly interpreted against the insurer."¹¹⁴ The court noted a proviso to its application of *contra proferentem*, though: "[t]he result . . . must not be beyond the reasonable expectations of the insured."¹¹⁵ Equipped with that rule, the majority construed the ambiguity against the insurer and held that it was reasonable for the trucking company to expect a coverage limit of \$1,675,000.¹¹⁶

The dissent was clear in its disapproval of that holding. Justice Coyne wrote, "the conceded presence of an ambiguity in the . . . policy would seem to mandate application of the doctrine of reasonable expectations."¹¹⁷ The majority's decision, however, was incompatible with the doctrine. The doctrine of reasonable expectations, as described in *Atwater*, did not require pro-insured results, and the trucking company could not reasonably have expected such a high coverage limit when its premiums reflected a

109. 387 N.W.2d 642 (Minn. 1986).

110. *See id.* at 644.

111. *See id.*

112. *Id.* at 643.

113. *Id.* at 644–45.

114. *See id.* The court, in fact, referred to the rule as an "ancient principle." *See id.* at 645.

115. *Id.* at 645 (citing *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985)).

116. *See id.*

117. *Id.* at 646 (Coyne, J., dissenting).

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lower one.¹¹⁸ Justice Coyne argued that the majority, despite citing *Atwater* in its opinion, had in reality used that case's language to justify a result that it had already reached by use of *contra proferentem*:

The rule adopted in *Atwater* . . . does not provide a way to validate a decision already made under the doctrine of [construing ambiguity strictly against the insurer]. The doctrine of reasonable expectations provides a method for resolving disagreements over contractual provisions on the basis of the parties' reasonable expectations about their transaction. To put it another way, the doctrine of reasonable expectations contemplates the application of an objective standard based on what parties such as [the trucking company] and [its insurer] reasonably expected from their agreement when they made it, not on the subjective expectations formed by a truck driver after he has been injured in the course of his employment by one of the contracting parties.¹¹⁹

In reaching its decision, according to the dissent, the *Rusthoven* majority had effectively "abandoned" the doctrine of reasonable expectations.¹²⁰

Following *Rusthoven*, the court's application of *Atwater*'s reasonable expectations doctrine, or even *Rusthoven*'s *contra proferentem*/reasonable expectations hybrid rule, was as inconsistent as its application of *contra proferentem* had been prior to *Atwater*. *Minnesota Mining & Manufacturing Co. v. Travelers Indemnity Co.*¹²¹ involved insurance policies under which the defendant insurers agreed "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies."¹²² Each of the plaintiff corporations was found to have contaminated the soil and groundwater with chemical waste over a period of decades; by order of state and federal government regulatory agencies, each of the corporations proceeded to spend great sums of money investigating and cleaning the waste sites in return for release from statutory liability.¹²³ Each of the corporations then brought suit

118. *See id.*

119. *Id.* at 647.

120. *Id.* at 646.

121. 457 N.W.2d 175 (Minn. 1990).

122. *Id.* at 177.

123. *Id.*

against its insurer seeking compensation for the cleanup costs.¹²⁴

The insurance companies argued that “the term ‘damages’ should be interpreted in the insurance policies to contemplate amounts paid as monetary compensation for injuries to third parties, and should not cover amounts paid to comply with injunctive orders.”¹²⁵ The supreme court disagreed; finding “damages” to be ambiguous, it applied the *Rusthoven* rule: “[a]mbiguous terms in an insurance policy are to be resolved against the insurer and in accordance with the reasonable expectations of the insured.”¹²⁶ The court then explained that the insured corporations “could reasonably expect the policy to provide coverage for any economic outlay compelled by law to rectify or mitigate damage caused by the insured’s acts or omissions.”¹²⁷

The dissents disagreed that the policy language was ambiguous and argued that, even if it was, the insureds could not reasonably have expected coverage.¹²⁸ Justice Kelley wrote that, in the context of the policy, “[t]he plain meaning of the term as so employed refer[red] to legal damages, and not to equitable-like remediation damages.”¹²⁹ Justice Coyne viewed the majority’s decision as “ignoring the plain, ordinary and traditionally accepted meaning of the term ‘damages’ as ‘only payments to third persons when those persons have a legal claim for damages. . . .’”¹³⁰ As to the reasonableness of expecting coverage, Justice Kelley’s dissent pointed out that “the policies in question were negotiated between large corporations, each of which had access to sophisticated insurance and legal departments or advice.”¹³¹ At the time of contract the risk of enormous liability for polluters “was neither

124. *Id.*

125. *Id.* at 178.

126. *Id.* at 179 (citation omitted).

127. *Id.* at 181-82 (citing *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich. 1988)).

128. *See id.* at 185, 187 (Coyne, J. & Kelley, J., dissenting).

129. *Id.* at 184 (Kelley, J., dissenting).

130. *See id.* at 186 (quoting *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (Coyne, J., dissenting) (internal quotation marks omitted)). The majority’s stance on this issue was that “the legal proceedings commenced by [the regulatory agency] against the insureds [was] equally coercive as a civil judgment The fact that the legal obligation is . . . mandated by [an administrative order] rather than a civil judgment does not change the nature of the obligation.” *Id.* at 183.

131. *Id.* at 185 (Kelley, J., dissenting).

contemplated nor was its assumption by the insurers bargained for when the premium was set.”¹³² Justice Coyne was more direct on the issue:

[I]t is difficult to accept a claim by these sophisticated parties that they “reasonably expected” coverage and then delayed for a period from four to eight years in informing their insurers of either the ongoing investigations and negotiations with the state to remedy or eliminate any environmental harm occasioned by their activities or their unilateral compliance with governmental cleanup directives. As a practical matter, the actions of the insureds are wholly inconsistent with their claim that coverage was contemplated.¹³³

In *Bob Useldinger & Sons, Inc. v. Hangsleben*,¹³⁴ when faced with no policy ambiguity, the court refused to apply the doctrine of reasonable expectations without making reference to *Atwater*.¹³⁵ The case involved defective potato seed; the seed sellers’ insurance policy excluded coverage for “[f]ailure of seed to conform to the variety or quality specified.”¹³⁶ When some potato seed was found to have ring rot, the plaintiffs argued that “quality specified” should be construed to refer to “a particular ‘grade’ of seed and . . . not [to] include seed which is contaminated by disease.”¹³⁷ The insurer refused to cover the damages, though, contending that the exclusion referred to all warranty claims, and that the seed simply “did not fulfill . . . [its] purpose or expectation.”¹³⁸ Despite the apparent reasonableness of each interpretation, the court sided with the insurer and held that the policy unambiguously excluded coverage.¹³⁹

The plaintiffs then argued that the doctrine of reasonable expectations should apply because the seed sellers specifically “requested coverage for diseased seed and were assured that this coverage was included.”¹⁴⁰ Now echoing the dissent in *Minnesota Mining & Manufacturing*, but not referring to that case or explaining the distinction, the court rejected the reasonable

132. *Id.*

133. *Id.* at 187 (Coyne, J., dissenting).

134. 505 N.W.2d 323 (Minn. 1993).

135. *See id.* at 327.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.*

140. *Id.*

expectations argument, pointing out that the seed sellers “were experienced business people.”¹⁴¹

2. *The End of Atwater and the Doctrine of Reasonable Expectations in Minnesota?*

The Minnesota Court of Appeals also had difficulty with *Atwater*. Where unambiguous policy language was concerned, uncertainty over the case’s precedential value led them to disregard the doctrine of reasonable expectations altogether¹⁴² except where a policy contained a hidden provision.¹⁴³

One case dealing with such a “hidden provision” involved a contractor’s insurance policy that included a pollution exclusion.¹⁴⁴ When insulation installed by the contractor deteriorated and emitted noxious levels of formaldehyde, injuring a home’s occupants, the contractor’s insurer claimed that the damage fell within the policy’s exclusion.¹⁴⁵ Explaining that the purpose of the exclusion was “to deny coverage . . . to those who knew or should have known their actions would cause harm,”¹⁴⁶ the court described the dispute as “the *unusual* case requiring application of *Atwater* [The contractor] purchased insurance to protect himself from damage resulting from the installation of insulation. Under the broad coverage afforded, he would reasonably expect coverage.”¹⁴⁷

That decision, the unusual case requiring application of *Atwater*, was overruled by the Minnesota Supreme Court in *Board of Regents of the University of Minnesota v. Royal Insurance Co. of America*.¹⁴⁸ Faced with a similar pollution exclusion provision, the

141. *Id.*

142. *See, e.g.,* *Merseth v. State Farm Fire & Cas. Co.*, 390 N.W.2d 16, 17 (Minn. Ct. App. 1986) (“In light of this uncertainty, we decline to apply the reasonable-expectations-regardless-of-ambiguity doctrine beyond the facts of *Atwater*.”).

143. *See, e.g.,* *Sonneman v. Blue Cross & Blue Shield of Minn.*, 403 N.W.2d 701, 708 (Minn. Ct. App. 1987) (“The reasonable expectations doctrine does not apply since the policy here does not contain a ‘hidden exclusion’ in the definitions section”); *Ross v. City of Minneapolis*, 408 N.W.2d 910, 914 (Minn. Ct. App. 1987) (“Subsequent decisions by this court, however, have limited the reasonable expectations doctrine to cases involving contracts with hidden exclusions.”) (citations omitted).

144. *Grinnell Mut. Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495 (Minn. Ct. App. 1988), *overruled by* *Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn. 1994).

145. *Id.* at 497.

146. *Id.* at 498.

147. *Id.* at 499 (emphasis added).

148. 517 N.W.2d 888.

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court had to decide whether or not liability for asbestos claims would be covered.¹⁴⁹ Characterizing *Atwater* as a “unique situation”¹⁵⁰ in which the doctrine of reasonable expectations was limited to “exclusions hidden in the definitions section,”¹⁵¹ the court stated:

The reasonable expectations test of *Atwater* . . . has no place here, and the contrary ruling of *Grinnell* is overruled [I]n this case, the pollution exclusion is plainly designated as such; consequently, the wording of the exclusion should be construed, if a claim of ambiguity is raised, in accordance with the usual rules of interpretation governing insurance contracts. The reasonable expectation test is not a license to ignore the pollution exclusion in this case nor to rewrite the exclusion solely to conform to a result that the insured might prefer.¹⁵²

As for “the usual rules of interpretation governing insurance contracts,”¹⁵³ the court did not specify whether it was referring to *contra proferentem* or *Rusthoven’s* hybrid rule.¹⁵⁴ Following *Board of Regents*, the interpretation of insurance contracts in Minnesota remained in that state of uncertainty for over a decade, and it was

149. The policy excluded coverage for:

[B]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 890.

150. *Id.* at 891 n.4.

151. *See id.* at 891 (“In *Atwater*, we held that ‘where major exclusions are hidden in the definitions section, the insured should be held only to reasonable knowledge of the literal terms and conditions.’” (quoting *Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985))).

152. *Id.* at 891.

153. *Id.*

154. A later case underlined the confusion. Stating the rule of insurance contract interpretation, a majority of the supreme court wrote that “[i]f [a policy] is ambiguous, it will be construed against the insurance company, as drafter of the contract.” *Progressive Specialty Ins. Co. v. Widness ex rel. Widness*, 635 N.W.2d 516, 518 (Minn. 2001) (citing *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995)). The dissent characterized the rule as: “[a]mbiguous terms in an insurance policy are to be resolved against the insurer and in accordance with the reasonable expectations of the insured.” *Id.* at 524 (Gilbert, J., dissenting) (quoting *Minn. Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn. 1990)) (internal quotation marks omitted).

thus that the supreme court decided *Carlson v. Allstate Insurance Co.*¹⁵⁵

III. THE CARLSON DECISION

A. *Facts and Procedural History*

Robert Carlson leased a 2002 Ford Focus for his son, Aaron, to drive.¹⁵⁶ Robert made all of the payments for the vehicle and obtained and paid for its insurance from Allstate.¹⁵⁷ The policy listed Robert and his wife as “named insureds,” and Aaron as a “driver.”¹⁵⁸ In 2003, Aaron parked the Focus and began to walk across a street; in the middle of the road he was struck by a car driven by an uninsured motorist.¹⁵⁹ Aaron’s injuries required surgery and rendered him unable to work for several months.¹⁶⁰ He obtained a default judgment against the driver for \$170,000;¹⁶¹ however, when Robert submitted the claim to Allstate, the company refused to provide coverage.¹⁶²

The Carlsons’ policy stated that “[Allstate] will pay damages for bodily injury . . . which an insured person is legally entitled to recover from the owner or operator of an uninsured auto.”¹⁶³ The question was whether Aaron was an “insured person.” The only policy definition of “insured person” that could have included Aaron was “you,”¹⁶⁴ which was further defined as “the *policyholder*

155. 749 N.W.2d 41 (Minn. 2008).

156. *Id.* at 43. The insurance agent who issued the policy was informed that Aaron would be the car’s primary driver. *Id.* at 44.

157. *Id.* at 43.

158. *Id.* at 43–44.

159. *Id.* at 43. There was no discussion between Robert and the agent regarding coverage in the situation that Aaron was struck as a pedestrian by an uninsured motorist. *Id.* at 44.

160. *Id.* at 43.

161. *Id.*

162. *Id.* at 44.

163. *Id.* at 43 (internal quotation marks omitted).

164. “Insured persons” was defined in the policy as “[y]ou and any resident” and “[a]ny person while in, on, getting into or out of an insured auto with your permission.” *Id.* Aaron did not reside with Robert and did not argue that he was “in, on, getting into or out of” the Focus at the time of the accident; thus, he could only be covered if he fell within the definition of “you.” *Id.* at 44 n.1. Because he did not reside with Robert, Aaron also did not qualify as an insured by the language of Minnesota’s no-fault statute. *See* MINN. STAT. § 65B.43 subd. 5 (2006) (defining “insured” to require that a person “not identified by name as an insured . . . resid[e] in the same household with the named insured . . .”).

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named on the Policy Declarations.”¹⁶⁵ The policy declarations page, however, did not include the word “policyholder;” it identified “named insureds” and “drivers.”¹⁶⁶

Only one fact was contended. Robert stated in a deposition that his insurance agent told him that his children would be covered “the same as I and my wife.”¹⁶⁷ Robert’s insurance agent claimed that he did not specifically say that.¹⁶⁸ The trial court, considering Allstate’s motion for summary judgment, took Robert’s account as true, but granted the motion nonetheless, holding that there was no coverage;¹⁶⁹ the court of appeals affirmed.¹⁷⁰ The Minnesota Supreme Court affirmed the court of appeals, finding no coverage under the terms of the policy.¹⁷¹

B. *The Court’s Holding*

The Carlsons first argued that, because the declarations page did not contain the word “policyholder,” it was reasonable to assume that the term included both the “named insureds” and “drivers.”¹⁷² The court disagreed, explaining that a reasonable person would understand “policyholder” to refer only to the owner

165. *Carlson*, 749 N.W.2d at 43 (emphasis added).

166. Robert was notified by his insurance agent at the time he obtained the policy that Aaron could not be listed as a named insured because he had no ownership interest in the car. *Id.* at 44.

167. *See id.* (internal quotation marks omitted).

168. *See id.*

169. *Id.* at 43.

170. *Id.*

171. *Id.* at 49. The supreme court rejected the Carlsons’ argument, not examined in the text of this case note, that Minnesota statutory law required coverage. The Minnesota No-Fault Automobile Insurance Act provides that a pedestrian injured by an automobile “is entitled to select any one limit of liability for any one vehicle afforded by a policy under which the injured person is insured.” MINN. STAT. § 65B.49 subdiv. 3a(5) (2006). The Carlsons argued that the Act mandated coverage for Aaron because he was “insured” under the Allstate policy. *See Carlson*, 749 N.W.2d at 46. However, the court dismissed this argument, concluding that “the subdivision describes . . . which policy an injured person may look to for coverage, rather than describing what coverage each of those policies must provide. Under this reading, the meaning of ‘insured’ for purposes of an injured pedestrian depends upon the policy rather than the statute.” *Id.* The court’s reading of the statute was supported by a previous decision, which held that the statute was not intended to broadly define “insured,” but to establish a hierarchy by which a person insured by the terms of a policy could select a policy for coverage. *See id.* at 46-47 (citing *Becker v. State Farm Mut. Auto. Ins. Co.*, 611 N.W.2d 7, 13 (Minn. 2000)).

172. *Carlson*, 749 N.W.2d at 45-46.

of the policy.¹⁷³ A policy term is ambiguous, it noted, only if it is “susceptible to two or more reasonable interpretations.”¹⁷⁴ Because the Carlsons’ interpretation of the policy was not reasonable, “policyholder” was held to be unambiguous.¹⁷⁵

The Carlsons next argued that, even if the policy was not ambiguous, the doctrine of reasonable expectations should be applied to provide coverage for Aaron.¹⁷⁶ The court clearly distanced itself from *Atwater*, confirming that its decision in *Board of Regents* had all but erased the doctrine of reasonable expectations from Minnesota law:

In declining to apply the doctrine of reasonable expectations [in *Board of Regents*], we noted that *Atwater* “presented a unique situation,” suggesting that the doctrine was not broadly applicable *Board of Regents* limits *Atwater*, if not to its specific facts, at least to circumstances where the exclusion from coverage was unreasonably hidden.¹⁷⁷

The court expressed concern that the doctrine created confusion and could be used to ignore unambiguous contract terms¹⁷⁸ in order to achieve judicially-preferred outcomes in the name of public policy and the policyholder’s expectations.¹⁷⁹ To

173. *Id.* at 46 (“We conclude that a reasonable person, even one unversed in the law or insurance, would understand that ‘policyholder’ referred to the policy’s owner.”).

174. *Id.* at 45 (citing *Medica, Inc. v. Atl. Mut. Ins. Co.*, 556 N.W.2d 74, 77 (Minn. 1997)).

175. *Id.* The only other interpretation considered was Allstate’s: that the policyholder is the “named insured.” *Id.* The court noted that this definition comported with dictionary definitions of “policyholder.” *See id.* (citing BLACK’S LAW DICTIONARY 1196 (8th ed. 2004); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1497 (2d ed. 1987)).

176. *Id.* at 47.

177. *Id.* at 48–49 (quoting *Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 891 n.4 (Minn. 1994)).

178. *Id.* at 48. Ambiguity was only one factor in the reasonable expectations analysis, according to *Atwater*, not a necessary condition for its application. *See Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985). The majority in *Carlson* conceded, however, that the supreme court had not used the doctrine to award coverage in the absence of ambiguity since that case. *Carlson*, 479 N.W.2d at 49. (“[I]n no case since *Atwater* have we used the doctrine to provide coverage in contravention of unambiguous policy terms.”). Furthermore, the court of appeals had also refused to apply the doctrine of reasonable expectations in the absence of ambiguity. *See cases cited supra* notes 142–44. Thus, the court’s concern seems somewhat unnecessary.

179. *See Carlson*, 479 N.W.2d at 49 (citing Bjorkman, *supra* note 95, at 39; Fischer, *supra* note 105, at 165).

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promote coherency in the law and to protect the freedom of contract, the court ruled that the doctrine of reasonable expectations would thereafter be applicable in only two situations:

[W]e are unwilling to expand the doctrine of reasonable expectations beyond its current use as a tool for resolving ambiguity and for correcting extreme situations like that in *Atwater*, where a party's coverage is significantly different from what the party reasonably believes it has paid for and where the only notice the party has of that difference is in an obscure and unexpected provision.¹⁸⁰

The court did not remark upon the question of whether or not the policy exclusion denying Aaron coverage resulted in "significantly different" coverage than what the Carlsons reasonably believed they had. However, it pointed out that the policy did differentiate between "named insureds" and "drivers," and that the Carlsons' insurance agent had informed Robert that the two were treated differently.¹⁸¹ Concluding that to use "the doctrine of reasonable expectations to cover such a situation would expand *Atwater* considerably," the court affirmed the lower judgments denying coverage.¹⁸²

180. *Id.* Earlier in the opinion, the court remarked that *Board of Regents* had limited *Atwater* to its specific facts. *See id.* That remark seems inconsistent with *Carlson's* holding that the doctrine would apply in cases of ambiguity, given that there was no ambiguity in the *Atwater* policy. However, the court's remark was not necessary for *Carlson's* ultimate holding and can be considered dicta.

181. *Id.* The court did not consider the case's sole disputed fact at this point: whether the Carlsons' insurance agent did tell Robert that Aaron would be insured "the same as I and my wife." *Id.* at 44. The court indicated earlier that it would accept Robert's account because summary judgment was granted for Allstate. *Id.* at 44. Given the procedural posture, it is curious that the court later credited the agent's testimony in reaching its conclusion, rather than Robert's.

182. *Id.* at 50. The three-justice dissent argued that the policy was, in fact, ambiguous, and that the Carlsons' reasonable expectations should be honored. *Id.* at 50 (P. Anderson, J., dissenting) ("Both ['named insured' and 'driver'] are terms of art in an insurance contract, and neither bears any obvious relationship to the term 'policyholder.' Therefore, in the mind of an ordinary person with no expertise in the law and insurance, the 'policyholder' could plausibly include [either term]."). However, the dissent did not discuss the majority's treatment of *Atwater*, instead citing to the hybrid rule of insurance contract interpretation that "[a]mbiguous terms . . . are to be resolved against the insurer and in accordance with the reasonable expectations of the insured." *See id.* at 51 (P. Anderson, J., dissenting) (quoting *Progressive Specialty Ins. Co. v. Witness ex rel. Witness*, 635 N.W.2d 516, 524 (Minn. 2001)) (internal quotation marks omitted).

IV. ANALYSIS OF *CARLSON*

Minnesota jurisprudence has limited the applicability of *Atwater* for over two decades; *Carlson* continues, and perhaps concludes, that process. Given the rarity of cases involving hidden exclusions,¹⁸³ the doctrine of reasonable expectations remains practically viable only when policy terms are ambiguous.¹⁸⁴ The *Atwater* decision is left as a seeming aberration. However, two problems remain, neither of which is resolved by *Carlson*.

A. *How is Ambiguity in an Insurance Contract to Be Interpreted?*

It remains unclear exactly how ambiguous policy terms will actually be interpreted in a given case. *Carlson* endorses the doctrine of reasonable expectations for the task, but its statement on the matter is weak: it refers to the doctrine as “a tool for resolving ambiguity.”¹⁸⁵ Two conceptual problems arise. First, the court does not sufficiently define that tool.¹⁸⁶ Second, the court’s statement implies that the doctrine might be used concurrently and consistently with *other* tools, as well.¹⁸⁷

First, it is unclear whether the *Carlson* court was referring to the doctrine of reasonable expectations of *Atwater* or one of the doctrine’s later manifestations, especially given the confusion of

183. Since *Atwater*, no case before the Minnesota Supreme Court has rejected policy terms on this ground. *Id.* at 49.

184. Although cases necessitating application of the doctrine of reasonable expectations might be rare, the doctrine is nonetheless valuable as a veritable last line of defense for consumer rights. *Contra proferentem* and other rules of construction do not allow unambiguous contract language to be construed in an insured’s favor, no matter how onerous (although unconscionability might apply in severe cases). See also RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981) (“Where the other party has reason to believe that the party manifesting such assent [to a standardized contract] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”). Thus, leaving the doctrine intact as a mechanism for handling those rare cases is important for the protection of consumer rights. This consideration, which prompted Keeton to formulate the doctrine and the *Atwater* court, among others, to adopt it, played a role in the *Carlson* court retaining it, even if in a limited fashion. See *id.* (describing the doctrine of reasonable expectations as “a tool . . . for correcting extreme situations like that in *Atwater*”). See also Fett, *supra* note 88, at 1134 (“The reasonable expectations doctrine should be applied only when other interpretive and constructive doctrines such as the doctrine of ambiguity do not apply and the facts indicate a need for consumer protection.”).

185. *Id.*

186. *Id.*

187. See *id.*

the common law in formulating and applying the reasonable expectations analysis.¹⁸⁸ On one hand, the *Carlson* court could be referring to the “weak” version of the doctrine, which holds that the insured’s reasonable expectations control the interpretation of ambiguous policy language.¹⁸⁹ On the other hand, it could have just as easily had in mind the *Rusthoven* hybrid of *contra proferentem* limited by the insured’s reasonable expectations, which still appears to be good law,¹⁹⁰ or some other rule.¹⁹¹

Second, if the court was referring to the “weak” version of the doctrine of reasonable expectations, then a contradiction arises from the suggestion that it can be used in some cases while another rule like that of *Rusthoven* can be used to interpret ambiguous policy language in other cases.¹⁹² The doctrine of reasonable expectations, “weak” or “strong,” need not result in a pro-insured interpretation; it might lead to a pro-insurer outcome if the insured’s expectations require such a result.¹⁹³ For example, the doctrine allows a court considering an ambiguous policy to avoid awarding coverage to an insured when to do so would be obviously contrary to the parties’ intentions.¹⁹⁴ In this way, the doctrine relieves the strictness of *contra proferentem*.¹⁹⁵

However, that characteristic of the doctrine of reasonable

188. See *supra* Part II.C.

189. See Fischer, *supra* note 105, at 155.

190. For example, the *Carlson* dissent, having found the policy language ambiguous, proceeded to analyze what it thought the proper outcome should have been. It began with what it presumably thought was the correct rule for interpreting ambiguous policy terms: they are to be construed against the insurer according to the insured’s reasonable expectations. See *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 50 (Minn. 2008) (P. Anderson, J., dissenting) (quoting *Progressive Specialty Ins. Co. v. Widness ex rel. Widness*, 635 N.W.2d 516, 524 (Minn. 2001)).

191. Much of the resulting confusion on this issue comes from the fact that the court, in finding that the Carlsons’ policy contained no ambiguous language, had no need to specify what standard it would use if it *had* found ambiguity.

192. See *Carlson*, 749 N.W.2d 41, 49–50.

193. See *Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985); see also Stempel, *supra* note 95, at 204 (“Ironically, the reasonable expectations concept in Minnesota today may possess greatest decisional strength when used against a policyholder.”).

194. See Bjorkman, *supra* note 95, at 42.

195. See Fischer, *supra* note 105, at 157 (“[The doctrine of reasonable expectations] can actually benefit the [insurer] since use of the weak version may ameliorate the traditional rule of *contra proferentem*, which is that ambiguity is construed against the drafter, here the [insurer]. If a policyholder would not have a reasonable expectation of coverage in any event, then the policy will not be construed in the policyholder’s favor by use of a formal rule of construction.”). *Id.*

expectations creates the contradiction. Other analyses, such as *contra proferentem* or the *Rusthoven* hybrid, strictly disallow the possibility of a pro-insurer interpretation of ambiguous policy language.¹⁹⁶ These analyses require that ambiguous language be construed against the insurer¹⁹⁷ and differ only as to the extent that it should be done.¹⁹⁸ The doctrine of reasonable expectations, to the contrary, seeks to objectively determine what coverage was expected without bias in either direction.¹⁹⁹ Although application of the doctrine might reach the same result as the other rules, the basic premises of the different “tools” are conceptually incompatible.

The *Carlson* decision leaves open the possibility that different rules might be employed to resolve contract ambiguity in different cases.²⁰⁰ At best, this can only perpetuate the confusion that exists in the law of contract interpretation in Minnesota.

B. How Are an Insured's Reasonable Expectations to Be Defined?

Assuming that the insured's reasonable expectations are relevant and determinative in the interpretation of ambiguous policy language, whatever the rule of construction, there is the basic problem of identifying what those expectations are.²⁰¹ Giving effect to the insured's reasonable expectations is meant to provide an objective standard for interpreting insurance contracts.²⁰²

196. *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 644–45 (Minn. 1986) (“[T]he policy is ambiguous and, therefore, is to be strictly interpreted *against the insurer*.”) (emphasis added).

197. *Id.*

198. *See id.* *Contra proferentem* puts no limit on the extent to which a policy may be construed against the insurer. *Id.* “The result of such a construction,” according to the *Rusthoven* court, “must not be beyond the reasonable expectations of the insured.” *Id.* at 645. *See also* Fett, *supra* note 88, at 1127 (“[T]he [*Rusthoven*] court expounded a new proposition that the doctrine of reasonable expectations is a limitation on the doctrine of [*contra proferentem*].”).

199. *Atwater*, 366 N.W.2d at 278 (“In our view, the reasonable-expectations doctrine does not automatically mandate either pro-insurer or pro-insured results.”).

200. *See Carlson*, 749 N.W.2d 41, 49–50.

201. *See Fischer*, *supra* note 105, at 161 (noting that the evidence that would support an assertion of an average insured's reasonable expectations is largely indefinable).

202. *Davenport Peters Co. v. Royal Globe Ins. Co.*, 490 F. Supp. 286, 291 (D. Mass. 1980) (“The most distinctive feature of the doctrine is that it applies to expectations that are objectively reasonable”); Keeton, *supra* note 2, at 967 (“The *objectively* reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though

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However, empirical research suggests that insureds do not actually form expectations for their coverage.²⁰³ The average insured does not shop around and misunderstands not only the coverage that she purchases, but what options were available to be purchased.²⁰⁴ Against this backdrop, it becomes difficult for a court to factually determine what an insured's *a priori* reasonable expectations in any given situation might have been.²⁰⁵

As a result, it is left to the court to determine the insured's reasonable expectations itself; lacking factual evidence, the court is forced to rely on its own perception of what is fair or just.²⁰⁶ This eliminates the objectivity that was the foundation of the doctrine. The doctrine can be used as a *deus ex machina*²⁰⁷ to promote the court's conception of public policy, or to provide a "veil of legitimacy"²⁰⁸ in which to cloak the dissolution of the freedom of contract.²⁰⁹

Carlson eliminated the possibility of such misuse where unambiguous policy language is concerned,²¹⁰ but it did not address the issue of how the insured's reasonable expectations are to be established when the doctrine is used as a tool to interpret

painstaking study of the policy provisions would have negated those expectations.") (emphasis added).

203. See Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 323 (1998).

204. *Id.* It might be argued that an insured's attempt to shop for attractive policy terms is hindered by the high costs of understanding complex information, and that those costs are created by the insurance companies themselves, justifying the doctrine of reasonable expectations. See Dudi Schwartz, *Interpretation and Disclosure in Insurance Contracts*, 21 LOY. CONSUMER L. REV. 105, 133 (2008). However, Professor Thomas's research suggests that insureds exhibit the characteristics of a low-involvement consumer, and that if they have any specific expectation, it is that the policy terms will exclude coverage for any particular claim. See *id.*

205. See Fischer, *supra* note 105, at 161.

206. See *id.* at 164. See also *Curtis v. Home Ins. Co.*, 392 N.W.2d 44, 46 (Minn. Ct. App. 1986) (providing a rare example of coverage being denied on the basis of evidence showing that the insured's *ex ante* expectations were against it).

207. Fischer, *supra* note 105, at 163.

208. Bjorkman, *supra* note 95, at 42.

209. See *Ware*, *supra* note 87, at 1490 ("[A] court's refusal to enforce policy language imposes duties on the parties to which they did not consent and deprives them of rights to which they are entitled.").

210. *Carlson v. Allstate Ins. Co.* 749 N.W.2d 41, 49 (Minn. 2008). Assuming, of course, that a court applying the doctrine of reasonable expectations to unambiguous policy language is truly faced with a situation where the insured's coverage is "significantly different" than what was expected due to "an obscure and unexpected" policy provision. See *id.*

ambiguous language.²¹¹ The potential use of the doctrine of reasonable expectations as a stratagem for injecting the court's subjectivity into policy interpretation was a primary concern of the *Carlson* court.²¹² Ironically, then, *Carlson's* language leaves the possibility as open as it ever was.

Without guidance on how to objectively identify the insured's reasonable expectations, Minnesota case law remains unclear on this matter, as well.

V. CONCLUSION

Minnesota's law of insurance contract construction has long been inconsistent. Even during the time of *contra proferentem*, it was difficult to predict when and how the court would find ambiguity in a policy. *Atwater* purported to do away with "arbitrary rules which do not reflect real-life situations."²¹³ However, the treatment of *Atwater* by both the Minnesota Supreme Court and the court of appeals simply added confusion to the inconsistency, and that confusion was enhanced by the supreme court's inability to decide upon a clear rule in *Atwater's* aftermath.²¹⁴

Carlson provided the court with an opportunity to settle this area of law, and it did in at least one respect: *Carlson* settled *Atwater's* subordinate status in Minnesota law.²¹⁵ However, other than Allstate's responsibility to Aaron Carlson, it settled little else beyond that status. Fundamental questions remain unanswered. What interpretational analysis should a court use to resolve ambiguous policy language? If the insured's reasonable expectations are to be considered, how are they to be determined? These questions, even after *Carlson*, await further answer by the court.

211. *Id.*

212. *See id.*

213. *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985).

214. *See supra* Part II.C.

215. *Carlson*, 749 N.W.2d at 49.