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VIII. INSURANCE

A. Pollution Exclusion Litigation

1. Introduction

The Minnesota Supreme Court has recently entertained numerous disputes involving environmental liability insurance law. The stakes in these disputes are high, given the retroactive application and potentially limitless liability imposed upon parties by both federal and state environmental cleanup statutes. The insurance industry, although acknowledging that its standard insuring agreements provide coverage for liability emanating from environmental contamination, faces a massive amount of potential liability. Consequently, litigation regarding the viability of pollution exclusion clauses within insurance contracts has been active, as parties disagree over the allocation and applicability of various liability policy provisions. This section is a summary and brief analysis of four recent Minnesota Supreme Court cases ruling on this ever-evolving area of law and policy in Minnesota.

† The author acknowledges and appreciates the generous assistance of Clarance E. Haglund and Britton D. Weimer in the selection of the Insurance Law cases summarized in this section.


4. Id.
2. Restricting the Reasonable Expectations Doctrine and Defining "Atmosphere"

Asbestos contamination of air within a building is not contamination of the "atmosphere." In Board of Regents of the University of Minnesota v. Royal Insurance Company of America, the Minnesota Supreme Court determined, within the context of the specific pollution exclusion at issue, that a "fine line" distinction can be made between asbestos-contaminated air that is within a building and contaminated air that is outside a building ("ambient air"). Thus, a pollution exclusion clause containing the term "atmosphere," without a qualification of where the air happens to be, does not exclude coverage for liability that arises from contaminated air within a building. Notwithstanding such liberal semantic construction, the court asserted the reasonable expectations doctrine is to be narrowly applied in Minnesota.

5. 517 N.W.2d 888 (Minn. 1994).
6. The pollution exclusion clause excludes coverage for the following: Bodily 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 the discharge, dispersal, release or escape is sudden and accidental. Id. at 890. The court's contextual analysis of the pollution exclusion clause was interesting. In describing other elements of the natural world, the court noted that the exclusion clause at issue used the word "land" rather than "property" and, with respect to "water," the clause used the terms "any watercourse or body of water." Id. at 893. The court thus reasoned that the use of "atmosphere" without qualifying terms, was intended to "encompass the natural resources of this planet in their natural setting, namely, land, the atmosphere, and bodies of water." Id.
7. Id. at 893.
8. Id.
9. The reasonable expectations doctrine is, arguably, the most liberal, insured-friendly policy construction doctrine available to litigants. Under the doctrine, the courts do not enforce hidden exclusions that are contrary to the insured's objectively reasonable expectation of coverage. CLARANCE E. HAGGLUND ET AL., MINNESOTA INSURANCE LAW, 18-20 (1995); see also Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985); Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495, 499 (Minn. Ct. App. 1988).

In other words, the "objectively reasonable expectations of the applicants and intended beneficiaries regarding the terms of insurance contracts will be honored, even though painstaking study of the policy or revisions would have negated those expectations." Atwater, 366 N.W.2d at 277 (quoting Robert E. Keeton, Insurance Law Rights at Variance With Policy Provisions, 83 HARV. L. REV. 961, 967 (1970)).
10. Board of Regents, 517 N.W.2d at 891.
In the early 1970s, the University of Minnesota installed fire-proofing materials that contained asbestos in some of its buildings, which had to be removed subsequently. The Board of Regents of the University and the State of Minnesota (Regents) sued, among others, the manufacturer of the fire-proofing materials and its successor in interest (manufacturer), seeking recovery of the cost of removing the asbestos from the buildings. The manufacturer's liability insurers denied coverage under their respective policies, claiming the pollution exclusions within both primary and excess liability policies precluded coverage. Thereafter, the parties entered into a "Miller Shugart" settlement agreement and the Regents brought an action against the manufacturer's insurers. The trial court granted summary judgment in the Regents' favor. However, the Minnesota Court of Appeals reversed, ruling that coverage was excluded by virtue of the pollution exclusion clauses in both the primary and excess insurance policies. The Regents petitioned the Minnesota Supreme Court for further review, focusing only on construction of the pollution exclusion clauses.

The exclusion clause in the primary policy was the first to be construed by the Board of Regents court. The clause excluded coverage for the following:

[B]ody 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 the discharge, dispersal, release or escape is sudden and accidental.

The Regents' central argument against the relevancy of the

11. Id. at 889.
12. Id.
13. Id. at 890.
14. "Miller Shugart" settlements were established in Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982). Basically, the insured confesses judgment in favor of the plaintiff in exchange for an assignment of the insured's claim against its insurer under the relevant policy. Id.
15. Board of Regents, 517 N.W.2d at 889-90.
16. Id. at 890.
17. Id.
18. Id.
19. Id.
clause was founded upon the reasonable expectations doctrine.\textsuperscript{20} Relying on a court of appeals opinion under a similar fact situation,\textsuperscript{21} the Regents argued that the insured could not have reasonably expected that its comprehensive general liability policy would exclude coverage for unexpected damages within the buildings caused by the installation of building materials.\textsuperscript{22}

The \textit{Board of Regents} court, however, significantly restricted the scope of the reasonable expectations doctrine to factual circumstances similar to \textit{Atwater Creamery Co. v. Western National Mutual Insurance Co.}\textsuperscript{23} and expressly overruled any contrary rulings of \textit{Grinnell Mutual Reinsurance Co. v. Wasmuth}.\textsuperscript{24} The pollution exclusion clause in \textit{Board of Regents} was found to plainly designate, as an exclusion in the comprehensive general liability policy, coverage for environmental pollution.\textsuperscript{25} In the court's words, "[t]he 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."\textsuperscript{26}

The \textit{Board of Regents} court, after disposing of two other arguments put forth by the Regents,\textsuperscript{27} finally agreed with the

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\item\textsuperscript{20} \textit{See supra} note 9.
\item\textsuperscript{21} \textit{See Grinnell Mut. Reinsurance Co. v. Wasmuth}, 432 N.W.2d 495, 499 (Minn. Ct. App. 1988). The \textit{Grinnell} court applied the reasonable expectations doctrine to provide coverage for damage caused by formaldehyde fumes that were emitted from insulation material installed in a residence. \textit{Id.} The court held the insureds could not have reasonably expected that their general liability policy could be read to exclude "unexpected damage due to installation of building materials in a home." \textit{Id.}
\item\textsuperscript{22} \textit{Board of Regents}, 517 N.W.2d at 891 (citing \textit{Grinnell Mut. Reinsurance}, 432 N.W.2d at 499).
\item\textsuperscript{23} The \textit{Board of Regents} court noted that the Iowa Supreme Court has also limited the reasonable expectations doctrine to "egregious situation[s]" similar to those in the \textit{Atwater Creamery} case. \textit{Id.} at 891 n. 4 (citing AID (Mut.) Ins. v. Steffen, 423 N.W.2d 189, 192 (Iowa 1988)).
\item\textsuperscript{24} \textit{Id.} at 891.
\item\textsuperscript{25} \textit{Id.}
\item\textsuperscript{26} \textit{Id.}
\item\textsuperscript{27} The first argument involved the "sudden and accidental" exception to the pollution exclusion. \textit{Id.} at 892. The court held the "sudden and accidental" exception did not apply to asbestos fibers that were released gradually over a period of time from the insured's product. \textit{Id.} (ruling "[t]he word 'sudden' is used in tandem with the word 'accidental,' and 'accidental' in liability insurance parlance means unexpected or unintended") (citing \textit{Bituminous Casualty Corp. v. Bartlett}, 307 Minn. 72, 76-77, 240 N.W.2d 910, 912-13 (1976), \textit{overruled in part on other grounds} by \textit{Prahm v. Rupp Constr. Co.}, 277 N.W.2d 389, 391 (Minn. 1979)). The court concluded that "thus to construe 'sudden' to mean 'unexpected' is to create a redundancy." \textit{Id.}

The second argument was that asbestos fibers are a naturally-occurring mineral and

\url{http://open.mitchellhamline.edu/wmlr/vol22/iss1/22}
Regents' construction of the exclusion clause language.\textsuperscript{28} The construction entailed a liberal reading of the word "atmosphere" to not include contaminated air within a building.\textsuperscript{29} The court found within the context of the exclusion language, that the term "atmosphere" was not intended to include air within a building.\textsuperscript{30} The court, with the help of the words of an infamous prince of Denmark,\textsuperscript{31} derived a temporal distinction between "atmosphere" and "air":

"Atmosphere" (in its ordinarily understood physical sense) is another name for "air," but—and this is what is important—it is air thought of as being in a particular place. We would not say that the atmosphere in a room is stuffy, but rather that the air is stuffy. We think of atmosphere as the air surrounding our planet, as when Hamlet spoke of "this most excellent canopy, the air." (Act II, Scene ii). So it is that we speak of releasing a balloon into the atmosphere.

The court then looked to the context of the term "atmosphere" within pollution exclusion clauses in general and noted that exclusions are directed primarily at claims involving pollution of the natural environment in its natural setting.\textsuperscript{32} Contaminated air within a building was deemed to not present a harm to the "surrounding natural environment, at least not until it escapes into that environment so as to cause personal

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\textsuperscript{28} Id.
\textsuperscript{29} Id. at 892-93.
\textsuperscript{30} Id. at 892.
\textsuperscript{31} Id. at 893.
\textsuperscript{32} The Board of Regents court borrowed a phrase from Shakespeare's "Hamlet": "this most excellent canopy, the air." Id. at 892. The context from which this phrase was derived seems particularly appropriate to modern environmental pollution litigation:

I have of late—but wherefore I know not—lost all my mirth, forgone all custom of exercises; and indeed it goes so heavily with my disposition that this goodly frame, the earth, seems to me a sterile promontory; this most excellent canopy, the air, look you, this brave o'erhanging firmament, this majestical roof fretted with golden fire, why, it appeareth nothing to me but a foul and pestilent congregation of vapors.

WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK 1156, lines 296-304 (G. BLAKEMORE EVANS ET AL., ED. THE RIVERSIDE SHAKESPEARE (1974)).

\textsuperscript{31} Board of Regents, 517 N.W.2d at 892-93; see E. Joshua Rosenkranz, The Pollution Exclusion Clause Through the Looking Glass, 74 GEO. L. J. 1297 (1986).
injury . . . ."³³ Therefore, consistent with other courts' conclusions on similar language,³⁴ a "fine line" was established, and the pollution exclusion clause within the primary policies of the present case³⁵ was ruled to not apply to asbestos-contaminated air within a building.³⁶

Justice Gardebring, writing a poignant dissent, was of the opinion that the "fine line" drawn by the majority was "one through which air passes freely."³⁷ Justice Gardebring agreed with the court of appeals' view of the distinction between air inside and outside of a building as being arbitrary, because buildings are not "hermetically sealed."³⁸ Finding nothing in the meaning of the word "atmosphere" to only include outdoor air, Justice Gardebring would not have found coverage under the policy.³⁹

The Board of Regents case stands for the assertion that the reasonable expectations doctrine will be narrowly applied by Minnesota courts and only in "egregious" situations. Given the majority's "fine line" construction of the language of the exclusion in Board of Regents, it is evident that liberal linguistic construction—limited (arguably) only by the creativity of the insured's counsel—is still available to insureds to eviscerate pollution exclusion clauses and thereby obtain coverage for their loss.

3. "Pro Rata by Time" Allocation of Liability Among Successively-Triggered Multiple Insurance Policies

Assume that a company is found to be liable for the abatement of a toxic chemical within a parcel of its land. Also, assume that the contamination occurred over several years and

³³ Board of Regents, 517 N.W.2d at 893.
³⁴ Id. (citing United States Fidelity & Guar. Co. v. Wilkin Insulation Co., 578 N.E.2d 926, 933 (Ill. 1991)).
³⁵ Id. The pollution exclusion clauses in the excess policies included language that referred to the natural environment only. Id. at 893-94. Thus, the excess policies' exclusion was found viable by the court. See id. One of the excess policy's pollution exclusion clause provided that "[t]his policy shall not apply . . . to liability for contamination or pollution of land, water, air, or real or personal property or any injuries or damages resulting therefrom caused by an occurrence." Id. at 893. The other excess policy pollution exclusion language was similar to the above clause. Id.
³⁶ Id.
³⁷ Id. at 895 (Gardebring, J., dissenting).
³⁸ Id.
³⁹ Id.
that the contamination was continuous for the entire period.\textsuperscript{40} If the company establishes multiple insurance policies were in effect during successive periods over the several years of contamination, what is the best means of allocating the total loss among the multiple insurance policies? A recent Minnesota Supreme Court case held that where multiple and successive insurance policies are concerned and where the pollution is continuous, each triggered policy must bear a share of the aggregate liability based on the period of time that the each policy was in effect.\textsuperscript{41} In the words of the \textit{Northern States Power Co. v. Fidelity and Casualty Co. of America} court, “each triggered policy . . . bears a share of the total damages proportionate to the number of years it was on the risk relative to the total number of years of coverage triggered.”\textsuperscript{42} However, given the complex and fact-specific nature of environmental pollution litigation, the \textit{Northern States Power} case is not expected to be the “last word” on this issue.\textsuperscript{43}

In 1981, the Minnesota Pollution Control Agency discovered that groundwater contamination had occurred at two properties located in Faribault, Minnesota, that were both owned by Northern States Power Company (NSP).\textsuperscript{44} The contamination was caused by coal tars and spent oxide wastes, which were produced by coal-tar gasification facilities located on the land in the early 1900’s.\textsuperscript{45} NSP was ultimately found liable for the cleanup costs.\textsuperscript{46} The company subsequently sought reimbursement of the cleanup costs from thirteen separate insurance companies from which NSP had purchased liability insurance.

\textsuperscript{40} In \textit{Northern States Power Co. v. Fidelity & Casualty Co. of Am.}, the contamination was by “coal tars and spent oxide waste” that percolated through the soil over time and contaminated the groundwater in the land. \textit{Northern States Power}, 523 N.W.2d 657, 659 (Minn. 1994). Another example would be an underground fuel storage tank that slowly leaks its contents into the soil over several years.

\textsuperscript{41} \textit{Id.} at 663-64.

\textsuperscript{42} \textit{Id.} at 663. This allocation is referred to by the court as a “pro-rata by time on the risk” allocation. \textit{Id}.

\textsuperscript{43} \textit{Id.} at 665. The court also noted that “environmental insurance law, like any other area of law, will have to develop over time and trial courts must be flexible in responding to new fact situations.” \textit{Id}.

\textsuperscript{44} \textit{Id.} at 659.

\textsuperscript{45} \textit{Id}.

\textsuperscript{46} NSP entered into a consent order and was required to pay over $1.6 million in remedial action costs. \textit{Id}.
during the relevant period of time. 47

Twelve of the insurance companies settled with NSP on terms which were analogous to a "Pierringer" agreement. 48 The one remaining insurance carrier, St. Paul Fire and Marine Insurance Company, (St. Paul) did not settle. 49 St. Paul chose to deny coverage, arguing, among other theories, that language in their policies referring to "other insurance" made the St. Paul policies excess policies to those of the settling carriers. 50 St. Paul further argued NSP failed to show that the settlement did not fully compensate for the loss and that therefore no excess coverage was required. 51

The trial court agreed with St. Paul's argument and granted summary judgment in its favor. 52 The Minnesota Court of Appeals reversed, holding that the "total policy insuring intent" of the parties indicated that the St. Paul policies were, in fact, primary policies. 53 The court of appeals also held that the total damages were to be allocated using a "pro rata by limits" allocation method among the carriers in proportion to the injury or harm that occurred during each policy period. 54

47. Id. The relevant period of time occurred from 1946 to 1985. Id.

48. Id.; see also Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963) (establishing an alternative form of release for defendants in multi-defendant litigation).

49. Northern States Power, 523 N.W.2d at 659.

50. Id. at 660.

51. Id.

52. Id. The trial court held the language in the St. Paul policies did not conflict with the "other insurance" clauses of the settling carriers' policies. Consequently, the St. Paul policies were "excess" to the other policies. Id. The subsequent failure of NSP to show that the settlement agreement with the other carriers was insufficient to meet NSP's costs was fatal to its claim. Id.


54. Northern States Power, 523 N.W.2d at 660. A "pro rata by limits" allocation method involves an allocation of liability to each policy, according to the actual harm that occurs during the policy period. Id. In other words, if damages are proven to have occurred during the policy period, then the insurance company is required to pay the damages, but only "as proven" by the policy holder. Id. at 663. The policy holder is therefore required to prove the amount of damages incurred during each applicable policy period, if scientifically possible. Id. The Northern States Power court noted that although this method is most consistent with CGL policy language, which limits liability to damages that are incurred "during the policy period," such an allocation scheme is nonetheless "unattractive given the scientific complexity of the issues involved, the extended period of time over which damages may have occurred before discovery, and the number of parties potentially involved." Id. at 663 (citing KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND
The Northern States Power court affirmed the appellate court's determination that the St. Paul policies were primary policies, but remanded the case on the allocation of damages issue. The court ruled that the "pro rata by limits" allocation method implemented by the court of appeals was inconsistent with prior Minnesota law. Minnesota uses an "actual injury" theory of determining whether a policy has been "triggered." A policy is triggered by an occurrence causing damage for which an insurance company is held liable.

Minnesota applies an "injury in fact" or an "actual injury" theory when determining whether sufficient damage has occurred to invoke coverage under a commercial general liability policy (CGL). The reasoning of the "actual injury" trigger theory is that under the theory, the insurer is liable only for "those damages which occurred during its policy period," no more and no less. Where the injury is continuous in nature and multiple policies are concurrent, the "pro rata by limits" allocation method would require the insured to prove the amount of damages incurred during each policy period, up to each policy limit. Thus, insurers with higher limits would be liable for damages incurred outside of the respective policy period.

The Northern States Power court deemed this allocation

Hazardous Waste Insurance Coverage Issues, 120 (1991)). The court further noted such an allocation method would be cost-prohibitive in cases involving relatively small amounts. Id. The fact-dependent nature of the value determination would reduce the likelihood of settlement. Id. Consequently, an insured would face "enormous difficulty" if required to prove the amount of damage that occur during each policy period. Id.

Id. at 659. The court found that no evidence was established by St. Paul to indicate NSP had any other insurance during the period of time that the St. Paul policies were in effect. Id. Thus, St. Paul's argument that its policies were "in excess" to the settling policies was found to be untenable, notwithstanding the fact that the policies were labeled "Excess Liability Polic[ies]." Id. at 600.

Id. at 664.

Id. at 662.


Northern States Power, 523 N.W.2d at 662.

Id. at 662-63.

Id. at 662.
method to be inconsistent with the "actual injury" trigger theory. The court chose instead to implement a "pro rata by time on the risk" allocation method. Under this method, the insured is initially required to establish that a policy is triggered by showing that at least "some damage occurred during the policy period." Where the pollution is continuous in nature, the insured must first establish the contamination period, a period of time beginning from when the contamination first starts and ending when the contamination ceased or was discovered. The insured then must show the relevant policy was in effect at some point of time within the contamination period. The court is then responsible for allocating the damage among the policies that are triggered.

The total damage is allocated among all the triggered policies according to each relevant policy period and in proportion to the aggregate period of time within which the pollution occurred. In other words, the contamination period (for example, ten years) is placed in the denominator, and the policy period at issue (for example, one year) is the numerator. The resulting fraction represents the total liability that is to be allocated to the specific policy at issue. If the policy requires the insured to pay a deductible prior to invoking actual payment

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62. Id.
63. Id. at 663.
64. Id. (citing 19 GEORGE COUCH ET AL., COUCH ON INSURANCE, § 79.345 (2d ed. rev. 1983)).
65. Id. at 664.
66. Id. at 663-64. If the insurer then wishes to establish that no appreciable damage occurred during its particular policy period, then the burden is upon the insurer. Id. at 664.
67. Id.
68. Id.
69. Id. The Northern States Power court provided the following example to illustrate the allocation method:

If, for example, contamination occurred over a period of 10 years, 1/10th of the damage would be allocable to the period of time that a policy in force for 1 year was on the risk and 3/10ths of the damage would be allocable to the period of time a 3-year policy was in force.

Id.

70. Extending the Northern States Power court's example further, 1/10th of the aggregate liability ($1.6 million) is equal to $160,000. This amount is the allocated portion of damages attributable to a policy with a period of one year. The $160,000 is further reduced by the applicable deductible provision in the particular policy, if one exists.
by the insurer, then the insured must pay the specified amount.\textsuperscript{71}

In \textit{Northern States Power}, the St. Paul policies provided that St. Paul would pay, on behalf of NSP, "all sums which [NSP] shall become legally obligated to pay as damages because of an injury to or destruction of tangible property, including the loss of use thereof."\textsuperscript{72} On remand, NSP will be required to demonstrate that some damage in fact occurred while the policy was in effect.\textsuperscript{75} Once established, the policy is deemed to have been "triggered," and St. Paul will subsequently be required, under the terms of the policy, to reimburse NSP.\textsuperscript{74} The terms of the St. Paul policies also provide that St. Paul is liable only for liability incurred in excess of various specified amounts, of which NSP must first pay.\textsuperscript{75}

The "pro rata by time on the risk" allocation method, as established by the court in \textit{Northern States Power}, is another addendum to an evolving body of jurisprudence involving environmental liability insurance law.\textsuperscript{76} This method is in accord with judicial economy. As courts respond with flexibility to new factual situations\textsuperscript{77} and arguments by various litigants, there is no doubt that the \textit{Northern States Power} court's prediction that this case will not be "the 'last word' in this area"\textsuperscript{78} will be proven accurate.

\begin{thebibliography}{99}
\item \textsuperscript{71} \textit{Northern States Power}, 523 N.W.2d at 664. The author notes it is likely that the amount owed by the insured, if any, will simply be used to offset the liability of the insurer in such circumstances.
\item \textsuperscript{72} \textit{Id.} at 659. The policies further limited the amount that St. Paul would pay to "$5,000,000.00 for each occurrence or series of occurrences arising out of one event . . . which occur during the policy period." \textit{Id.}
\item \textsuperscript{73} \textit{Id.} at 661.
\item \textsuperscript{74} \textit{Id.} at 661-62; \textit{see also id.} at 659 n.3 (quoting William R. Hickman & Mary R. De Young, \textit{Allocation of Environmental Cleanup Liability Between Successive Insurers}, 17 N. KY. L. REV. 291, 293 (1990)).
\item \textsuperscript{75} \textit{Id.} at 664. For instance, NSP must pay the first $25,000 of one policy and $100,000 of another. \textit{Id.}
\item \textsuperscript{76} \textit{Id.} at 665.
\item \textsuperscript{77} The Minnesota Supreme Court has, in fact, declined to apply the allocation method of \textit{Northern States Power} in a case where the contamination arose from a single spill. SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 318 (Minn. 1995). The SCSC court, however, had the benefit of a jury determination that the "damage was not divisible and that it was the result of a sudden and accidental occurrence." \textit{Id.}
\item \textsuperscript{78} \textit{Northern States Power}, 523 N.W.2d at 665.
\end{thebibliography}
4. **Equitable Estoppel does not Operate to Bar Application of Pollution Exclusion Clauses**

It is unreasonable for an insured to rely on representations that are contrary to the plain meaning of the language in an insurance policy. Thus, the doctrine of equitable estoppel cannot be invoked to preclude the effect of a standard pollution exclusion clause in an insurance policy. Even if representations to the contrary were made by the insurance industry with respect to the effect of the pollution exclusion clause, the doctrine will not apply.

Prior to developing a parcel of land in Minnetonka, Minnesota, the insured land owner in *Anderson v. Minnesota Insurance Guaranty Association* did an environmental assessment that disclosed the existence of a former dump site on two acres of the land. After the Minnesota Pollution Control Agency (MPCA) was notified, the land owner was required to pay for a remedial investigation regarding the nature and scope of contamination in the dump area. The land owner tendered a claim for defense and indemnification costs to its insurers; however, they both denied coverage. The land owner subsequently brought a declaratory judgment action, seeking a determination that the relevant policies provided coverage for the costs incurred.

The land owner moved the trial court for permission to amend the complaint to add a claim of equitable estoppel to preclude the insurers from invoking the standard pollution exclusions within the policies. The land owner asserted the insurance industry should not invoke the pollution exclusion clause in a manner inconsistent with representations made to insurance regulators in obtaining approval for the clause.

The trial court denied the land owner’s motion, finding that

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80. *Id.* at 710.
81. *Id.*
82. *Id.* at 708.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
the equitable estoppel claim lacked legal merit. On appeal, a split appellate court ruled that equitable estoppel was a viable claim to assert against the applicability of the pollution exclusion clause. The insurers appealed, and the Anderson court reversed.

The insurance policies in effect during the relevant time period were CGLs. The policies included a standard pollution exclusion clause promulgated by the Insurance Rating Board (IRB) and the Mutual Insurance Rating Board (MIRB). Prior to including the pollution exclusion clause in insurance policies, insurers are required to have the language approved by the Minnesota Commissioner of Insurance. Upon introduction of the exclusion clause to the Commissioner of Insurance, the IRB and the MIRB submitted findings on behalf of their members which included an explanation of the pollution exclusion clause.

The land owner argued that the insurer’s representations to the Commissioner of Insurance, regarding the pollution exclusion, mislead the insureds. The insurer should, therefore, be barred from applying the pollution exclusion clause in

88. Id. at 707.
89. Id. at 707-08 (citing Anderson v. Minnesota Ins. Guar. Ass’n., 520 N.W.2d 155, 165 (Minn. Ct. App. 1994) (Holton, J., dissenting)).
90. Id. at 710.
91. Id. at 708.
92. Id. The IRB and MIRB were insurance rating bureaus for the insurance companies involved in this case. Id. at 708 n.2. A joint committee, maintained by the bureaus, was involved in drafting the pollution exclusion clause. Id. (citing RONALD R. ROBINSON, THE BEST OF INTENTIONS: DRAFTING THE 1966 OCCURRENCE, AND THE 1973 POLLUTION EXCLUSION POLICY LANGUAGE 565, 575 (PLI Commercial Law & Practice Course Handbook Series No. 690, Environmental Insurance Coverage Claims and Litig., 1994)).
93. See MINN. STAT. § 70A.06, subd. 2 (1994).
94. Anderson, 534 N.W.2d at 708-09. The explanation was as follows:
Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended, and thus are excluded by the definition of occurrence. The above exclusion clarifies the situation so as to avoid any questions of intent. Coverage is continued for pollution or contamination-caused injuries when the pollution or contamination results from an accident, except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.
Id. at 708.
95. Id. at 708-09. The landowner contended the pollution exclusion was represented as a “clarification of existing coverage,” rather than a reduction. Id.
a manner not consistent with the representations. 96

The Anderson court first established that an essential element of equitable estoppel is reasonable reliance. 97 Given a prior supreme court construction of the pollution exclusion clause as "clear and unambiguous," 98 the Anderson court ruled that "reliance on any explanations contrary to the unambiguous meaning of the policy language is, as a matter of law, unreasonable." 99

The land owner in Anderson asserted a creative and potentially devastating argument against the application of the pollution exclusion clause. Accordingly, equitable estoppel, while given merit by the appellate court, did not persuade the supreme court. Equitable estoppel cannot be used to limit the application of the pollution exclusion clause.

5. Burdens of Proof Shift in Pollution Exclusion Clause Litigation

The application and effect of the terms of a pollution exclusion clause within a CGL policy involve a burden shifting interplay between the insurer and insured. The rule established by the SCSC Corp. v. Allied Mutual Insurance Co. 100 court closely adheres to the maxim that the insured must first establish coverage under the policy, while the insurer bears the burden of

96. Id.
97. Id. at 709 (citing Northern Petrochem Co. v. United States Fire Ins. Co., 277 N.W.2d 408, 410 (Minn. 1979); United States v. Aetna Casualty & Sur. Co., 480 F.2d 1095, 1099 (8th Cir. 1973)).
98. Id. (quoting Board of Regents v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (1994)). The Board of Regents case is summarized supra, part A.2.
99. Anderson, 534 N.W.2d at 709. The Anderson court also agreed with the dissenting appellate court justice's opinion that the following argument (made by one of the insurers) was persuasive:

A regulator, or insured, who reads only the endorsement heading CONTAMINATION OR POLLUTION EXCLUSION ENDORSEMENT and later claims to have been induced to conclude that the endorsement would not actually exclude coverage has, as a matter of law, acted unreasonably. See Anderson, 520 N.W.2d at 166 (Holtan, J. dissenting) (stating "[e]ven if there were misrepresentations, if the application of the pollution exclusion clause is clear . . . how can it be said that the Commissioner reasonably relied on the IRB? There can be no reason but a reliance . . . ").

Id.

100. 536 N.W.2d 305 (Minn. 1995). This opinion was issued by the Minnesota Supreme Court to amend and clarify its previous opinion, reported as SCSC Corp. v. Allied Mut. Ins. Co., 533 N.W.2d 603 (Minn. 1995).
The burden must accordingly fluctuate between the litigants in the context of determining the viability of a pollution exclusion clause.

The insured in SCSC operated a dry cleaning and laundry supply distribution center, which included the distribution and sale of a hazardous cleaning chemical. The chemical was found to have leaked into the soil underneath the insured's facilities, ultimately contaminating the groundwater. The insured incurred significant expense in remedying the contamination, as did the MPCA. The insured requested that its insurers reimburse it for the costs and pay for future costs associated with the cleanup. The insurers refused to take a position on coverage until more evidence could be established with respect to the nature of the contamination.

Subsequently, the insured brought an action seeking a declaration from the court that the relevant polices provided coverage for the cleanup expenses and further requested compensatory damages. The trial court denied summary judgment motions by the insurers and the jury returned a verdict in favor of the insured. The jury determined the contamination was the result of an "unintended, unexpected, sudden and accidental event, and that the damage was neither divisible nor attributable to an overriding cause." The trial court awarded the insured nearly $1,000,000 in damages, which included an enhanced award for attorney's fees. The Minnesota Court of Appeals affirmed in all respects, except for the enhanced


102. SCSC, 536 N.W.2d at 313-14.

103. Id. at 308.

104. Id. at 309.

105. Id. at 310.

106. Id. at 309.

107. Id.

108. Id. at 310. The MPCA also moved the court for reimbursement of expenses incurred after the insured was no longer able to pay for the cleanup costs. Id.

109. Id.

110. Id.

111. Id.
portion of the attorney fees award. The insurers appealed.

After ruling that summary judgment was properly denied by the trial court, the Minnesota Supreme Court responded in detail to the insurer's argument regarding the appropriate distribution of the burden of proof upon the litigants at trial. The court ruled that once the insured establishes a prima facie case of coverage under the terms of the policy, the insured is "entitled to go to a jury." The insurer then must prove, as an affirmative defense, the applicability of the exclusion, if it exists, within the policy. This will be narrowly interpreted by the court against the insurer. After the insurer has established the viability of the exclusion, the burden then returns to the insured to establish the applicability of any exceptions to the exclusion clause, which would operate to restore coverage. Finally, if an overriding, non-insured cause is involved, the burden rests upon the insurer to show that the non-covered cause is an overriding cause of the damages (another affirmative defense available to the insurer).

The rule established in SCSC with respect to the insured's burden to establish the applicability of an exception to the pollution exclusion clause is a marked departure from prior Minnesota case law. Previously, some courts have ruled the

112. The SCSC court agreed with the appellate court's ruling with respect to the enhanced portion of the attorney fees award. Id. at 319 (citing Morrison v. Swenson, 274 Minn. 127, 197-98, 142 N.W.2d 640, 647 (1966) (finding attorney fees recoverable in declaratory judgment action when there is a breach of a contractual duty); Lanoue v. Fireman's Fund Am. Ins. Cos., 278 N.W.2d 49, 55 (Minn. 1979) (defining breach of duty to defend under insurance contract)).

113. Id. at 310.

114. Id. at 311.

115. Id. at 313 (quoting Boedigheimer v. Taylor, 287 Minn. 323, 329, 178 N.W.2d 610, 614).

116. Id. at 313-14 (citing Boedigheimer, 287 Minn. at 329, 178 N.W.2d at 614 and Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (Minn. 1989)).

117. Id. at 314 (citing Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 928, 927 (Minn. 1993); Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 276 (Minn. 1989)).


119. Id. at 313 (citing Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645, 653 (Minn. 1986)). Under the facts of the SCSC case, the court determined, contrary to the insurers assertion, that the insurer must present evidence establishing an overriding cause, not the insured. Id. at 314.

120. Id. at 314.
insurer's burden of proving the applicability of the pollution exclusion clause includes establishing the non-applicability of an exception to the exclusion. The SCSC court squarely rejected this approach, ruling that it is better to require the insured to prove the applicability of an exception to the exclusion clause because the "insured is in a better position to obtain information regarding whether the [contamination qualifies under the exception]."

The shifting burdens of proof within the context of the construction of a pollution exclusion clause were analyzed and clarified by the SCSC court. Under SCSC, if the insured establishes coverage under the policy, the insurer must then show applicability of the exclusion. If the exclusion operates to exclude coverage for the loss, then the burden returns to the insured to, once again, establish coverage by virtue of any exceptions to the exclusion.

B. Intentional Act Exclusion Litigation

An insurance contract providing school administration "wrongful act" liability insurance, which is read to provide coverage for intentional age discrimination, is not a violation of public policy in Minnesota. In Independent School District No. 697, Eveleth v. St. Paul Fire and Marine Co, the Minnesota Supreme Court enforced an insurance contract that was deemed to "unambiguously provide[] coverage" for intentional age discrimination.

An employee of the Eveleth, Minnesota School District ("the district") filed a claim with the Minnesota Department of Human Rights ("the department"), alleging that the district had violated the Minnesota Human Rights Act. The depart-

121. Id. (citing Dakhue Landfill, Inc. v. Employers Ins. of Wausau, 508 N.W.2d 798, 802 (Minn. Ct. App. 1993)).
122. Id.
123. 515 N.W.2d 576 (Minn. 1994).
124. Id. at 579.
125. The district's official title is "School District Number 697, Eveleth, Minnesota." See id. at 576.
126. Independent Sch. Dist. No. 697 involved two separate and unrelated claims brought against the district. One claim was for age discrimination, and the other was for, among other damages, reinstatement pursuant to Minnesota Statutes § 125.12, subdivision 6b (1988) (describing the reinstatement mechanism for teachers placed on unrequested leave of absence). See id. at 577-79. Specifically, the employee alleged that
ment investigated the allegations and found that there was probable cause to believe the district had engaged in a discriminatory practice. Four months later, the district tendered a defense of the claim to its liability insurance carrier which, after an investigation of its own, denied coverage under the policy, due to an alleged intentional act exclusion within the language of the insurance contract.

The department subsequently issued a formal complaint against the district. The district again tendered a defense to its insurer, and the insurer denied coverage. The department and the district, upon notice to the insurer, began settlement discussions and eventually settled. The district then commenced an action against its insurer to recover the expenses it incurred in defending and settling the claim.

The trial court granted the district’s motion for summary judgment, ruling that the insurer had a duty to defend the claim due to her age, the district “altered her job duties, lowered her salary, improperly placed her on summer leave and otherwise subjected her to ongoing harassment,” all of which were in violation of Minnesota Statutes § 363.03, subdivision 1(2)(c) (1988). The claim for reinstatement and the court’s resolution of the duty to defend the reinstatement claim parallel the resolution of the age discrimination claim, but do not significantly contribute to this analysis of the case since it does not involve an intentional act. Discussion of the reinstatement claim is therefore excluded from this analysis.

127. Id. at 578.
128. Id. The relevant provisions of the insurance contract are as follows:

What This Agreement Covers

This agreement protects against losses and expenses that occur when claims or suits are brought against you or any protected person for a wrongful act based on

- An error or omission
- Negligence
- Breach of duty. Or
- Misstatement of misleading statement.

Your liability protection. We’ll pay amounts you’re legally required to pay as a result of claims or suits brought against you.

Legal costs and related expenses. We’ll defend any suit brought against you or any protected person for covered claims, even if the suit is groundless or fraudulent.

Id. at 577-78.
129. Id. at 578.
130. Id.
131. Id.
132. Id. at 578-79.
under the insurance contract. The Minnesota Court of Appeals affirmed. The insurer then sought review of the appellate court ruling with the Minnesota Supreme Court. The insurer argued language in the insurance contract did not include coverage for liability arising out of intentional acts of agents of the district. The insurer argued, in the alternative, if coverage was found under the contract, public policy should void the contract because it would provide insurance coverage for liability arising out of intentional wrongful acts that would "encourage wrongful acts by policy holders."

The Independent School District court disagreed with the insured's construction of the policy. The court first looked to the express language, which was read to provide coverage for "wrongful act[s]," based upon a "breach of duty." "Wrongful act" was then construed by the court to include criminal, willful, wanton, or reckless conduct. Intentional age discrimination was deemed by the court to be a "wrongful act" based upon a "breach of duty." Therefore, the contract was found to "unambiguously provide coverage for [the age discrimination] claim."

The Independent School District court also disagreed with the insured's assertion that providing insurance coverage for intentional age discrimination would encourage policy holders to commit wrongful acts. The insurer argued that a court of appeals case, which ruled on the insurability of tax liability, established a public policy based restriction on the insurability of any kind of intentional, wrongful act. The court, citing

133. Id. at 579.
134. Id. at 577.
135. Id. at 577-78
136. Id. at 580.
137. Id. at 579.
138. Id. (quoting BLACK'S LAW DICTIONARY 1612 (6th ed. 1990)).
139. Id.
140. Id. The court also distinguished the language in the contract from "errors and omissions" policies in other cases by noting that the contract at bar provided coverage for "wrongful acts" in general as opposed to more restrictive language normally found in "errors and omissions" policies. Id. (distinguishing Richards v. Fireman's Fund Ins. Co., 417 N.W.2d 663 (Minn. Ct. App. 1988); School Dist. No. 1, Multnomah County v. Mission Ins. Co., 650 P.2d 929 (1982)).
141. Id. at 580.
to similar federal court cases, 143 declined to adopt such a broad rule in the context of school district liability policies, since it did not believe that "a school district [would] discriminate against its employees simply because it carries wrongful act insurance coverage; nor [would] school districts carrying this type of insurance coverage have a license to commit intentional wrongs." 144

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143. *Id.* The court cited New Madrid County Reorganized School District No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990) and School District For Royal Oak v. Continental Casualty Co., 912 F.2d 844 (6th Cir. 1990).

144. *Independent Sch. Dist. No. 697*, 515 N.W.2d at 580.