7-31-2013

Poison in the Well: Creating Reasonable Expectations for Compensation after Scottsdale Indemnity Co. v. Village of Crestwood

Brian Reilly
Boston College Law School, brian.reilly.2@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Environmental Law Commons, Insurance Law Commons, State and Local Government Law Commons, and the Water Law Commons

Recommended Citation

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
POISON IN THE WELL: CREATING REASONABLE EXPECTATIONS FOR COMPENSATION AFTER SCOTTSDALE INDEMNITY CO. v. VILLAGE OF CRESTWOOD

BRIAN REILLY*

Abstract: In 2007 it came to light that town officials in Crestwood, Illinois had intentionally caused residents to use contaminated well water for more than twenty years. A group of residents sued the town and its officials and alleged that the contaminated water had caused illness (and in some cases death) to themselves and their relatives. In response, the town sought indemnification from its insurer, Scottsdale Indemnity Co. The insurance company refused to provide coverage on the grounds that the contamination had triggered the “pollution exclusion” included in Crestwood’s insurance contract. This Comment argues that when analyzing the applicability of a pollution exclusion, courts should adopt a “reasonable expectations” test. This test requires a court to look beyond the plain meaning of an insurance policy. Instead, courts should consider the reasonable expectations of the policyholder at the time the insurance policy was purchased. This test vindicates the rights of policyholders and ensures that victims of pollution harms are compensated for damage to their health and environment.

INTRODUCTION

If you have visited the town of Crestwood, Illinois in the past two decades, you might have unwittingly consumed cancer-causing chemicals. That is because from 1985 through 2007, Crestwood’s current mayor, its former mayor, its former water operator, and other town employees (“town officials”) secretly augmented the town’s water supply with water drawn from a well contaminated with perchloroethylene.


101
The money saved by substituting the clean water of Lake Michigan with contaminated well water helped Crestwood give a property tax rebate and earn a national reputation as one of the best run towns in America. Although town officials knew they were providing Crestwood residents contaminated water, the local newsletter proclaimed that “Crestwood water ha[d] passed all the tests prescribed by the EPA during the past year. The results were very favorable, and [the town had] safe drinking water.”

Eventually, the lies caught up with the town officials when the State of Illinois Environmental Protection Agency (EPA) mandated water quality checks for all of the emergency wells in the state. Once the state department of health published the news that the well had been contaminated for more than twenty years, and that town officials had facilitated its contamination, people started to believe that many illnesses in town had been caused by the water. Hundreds of Crestwood residents brought suit against the town of Crestwood and its officials. The plaintiffs ranged from people who merely drank the town’s water to those who had sustained particular harms.

Those responsible for keeping Crestwood safe perpetrated a wrong against its citizens. The question is this: Who should have to pay for the harms done to Crestwood’s residents? Immediately after the citizens brought lawsuits against Crestwood and its officials, town officials tried to insulate themselves from any negative consequences by seeking defense and indemnification from their insurers. The town officials argued that the insurance companies should pay for any health problems or lasting harms caused by Crestwood’s contaminated drinking water. In response, the insurance companies pointed to the absolute

---

2 Scottsdale II, 673 F.3d at 716; Scottsdale I, 784 F. Supp. 2d at 989–90.
3 Hawthorne, supra note 1, at 4.
4 Id.
6 Scottsdale II, 673 F.3d at 716.
7 Id.; Crestwood Groundwater Contamination and Health Consultation, supra note 1. It has not been conclusively proven that anyone was actually made sick by the contaminated water. Id.
8 Scottsdale I, 784 F. Supp. 2d at 990.
9 See Hawthorne, supra note 1, at 4 (interviewing a citizen who felt wronged by town officials).
10 See Scottsdale II, 673 F.3d at 716; Scottsdale I, 784 F. Supp. 2d at 993.
11 See Scottsdale II, 673 F.3d at 716; Scottsdale I, 784 F. Supp. 2d at 989–90.
12 Scottsdale I, 784 F. Supp. 2d at 990; see Scottsdale II, 673 F.3d at 716.
pollution exclusions in Crestwood’s comprehensive general liability insurance policies and refused to defend or indemnify the town officials.\textsuperscript{13}

Before long, the case of \textit{Scottsdale Indemnity Company v. Village of Crestwood} was in court, and it was up to the judicial system to sort out whether the pollution exclusion applied to the chemical mess in Crestwood.\textsuperscript{14} This Comment argues that the two most popular approaches to interpreting pollution exclusions are insufficient to protect the rights of insureds and insurers, and as a result, it can be very difficult to adequately compensate victims of environmental harms.\textsuperscript{15} The minority approach of using the “reasonable expectations” doctrine can better protect the parties’ rights.\textsuperscript{16} By more sufficiently protecting both the insured’s and insurer’s rights, and thereby allowing better planning and resource allocation, this approach would likely ensure that victims would be adequately compensated.\textsuperscript{17}

\section{I. Factual Background and Procedural History}

In 1985 or 1986, Illinois environmental authorities informed Crestwood town officials that one of Crestwood’s wells was contaminated.\textsuperscript{18} Town officials learned that one of Crestwood’s wells contained a number of chemicals, including perchloroethylene (“perc”), a known carcinogen, and dichloroethylene (“DCE”).\textsuperscript{19} Perc is commonly used in the dry cleaning process, and once it seeps into soil or water, it can be harder to clean than oil.\textsuperscript{20}

The town officials promised state inspectors that Crestwood would get all of its tap water from Lake Michigan, a clean source of water.\textsuperscript{21} They also agreed to use the contaminated well only in times of emerg-

\textsuperscript{13} \textit{Scottsdale I}, 784 F. Supp. 2d at 990; see \textit{Scottsdale II}, 673 F.3d at 716. Crestwood, as a public entity, had “public entity general liability policies,” which “cover analogous risks and contain the same pollution exclusion as the commercial general liability policy.” \textit{Scottsdale II}, 673 F.3d at 716. For purposes of legal analysis, this Comment treats Crestwood’s public entity general liability policy as a standard commercial general liability policy. \textit{See id.}

\textsuperscript{14} \textit{See Scottsdale I}, 784 F. Supp. 2d at 990.

\textsuperscript{15} \textit{See infra} notes 89–117 and accompanying text.


\textsuperscript{17} \textit{See infra} notes 89–117 and accompanying text.

\textsuperscript{18} \textit{Scottsdale II}, 673 F.3d at 716.

\textsuperscript{19} \textit{Id.; Scottsdale I}, 784 F. Supp. 2d at 990; \textit{Crestwood Public Drinking Water Supply Fact Sheet}, \textit{supra} note 5.

\textsuperscript{20} \textit{Scottsdale II}, 673 F.3d at 716.

\textsuperscript{21} Hawthorne, \textit{supra} note 1.
Under state regulations, the town officials were required to notify the EPA whenever water from the contaminated well was used to augment Crestwood’s water supply. The federal Safe Drinking Water Act did not require sampling of wells not in use, so the EPA ceased regular testing of the well. Despite their obligations to the EPA and to Crestwood, the town officials continued to draw water from the contaminated well for twenty-two years without informing the state or the public. For some months throughout that period, Crestwood received up to twenty percent of its drinking water from the contaminated well.

In 2007, the EPA implemented a statewide initiative to test the quality of all backup wells in case the wells would need to be used in an emergency. Although the state already knew the Crestwood emergency well was contaminated, the 2007 test showed a large spike in the level and kind of contamination. Throughout the twenty-two year gap in testing, the perc and DCE initially found in the well had begun breaking down into vinyl chloride, a more dangerous chemical. The EPA then undertook a more detailed inspection of Crestwood. By comparing Crestwood’s Lake Michigan billing data with its water consumption data, the EPA inspectors determined that the emergency well had been used illegally. As a result, EPA inspectors informed town officials that the well was too contaminated to use, even in emergency situations. When the EPA gave town officials the option to either pay the cost of decontaminating the well or to shut it down permanently, town officials chose the latter option and the well was officially sealed in 2009.

---

22 Id.
23 Crestwood Public Drinking Water Supply Fact Sheet, supra note 5.
25 Scottsdale II, 673 F.3d at 716.
26 Hawthorne, supra note 1; Crestwood Public Drinking Water Supply Fact Sheet, supra note 5.
27 Crestwood Public Drinking Water Supply Fact Sheet, supra note 5; see Hawthorne, supra note 1, at 4.
28 See Crestwood Public Drinking Water Supply Fact Sheet, supra note 5.
29 Id. When perc breaks down, one byproduct is DCE, and as DCE breaks down, it produces vinyl chloride. Id. This chemical degradation often takes many years to occur, thus the 1986 test failed to discover vinyl chloride in the well despite the presence of both perc and DCE. Id.
30 See id.
31 Id.
32 Id.
33 Scottsdale II, 673 F.3d at 716; Hawthorne, supra note 1.
After the lengthy deception came to light, Crestwood residents brought numerous lawsuits against Crestwood and its officials. In their consolidated lawsuit, the Crestwood residents sought compensatory, punitive, and statutory damages (as well as attorney’s fees exceeding $60,000). In addition, the State of Illinois simultaneously sued to get an injunction that would require Crestwood to finance a site inspection.

After these lawsuits were brought against Crestwood and its officials, Crestwood’s two insurance companies, Scottsdale Indemnity Company and National Casualty Company (“insurance companies”), sued Crestwood, its current mayor, its former mayor, its former water operator, and the Attorney General of the State of Illinois. The insurance companies were seeking a declaration that they had no duty to defend or indemnify Crestwood or its officials in the pending lawsuits. Crestwood and its officials brought a counterclaim seeking a declaration that the insurance companies were required to both defend and indemnify them from the pending suits. The insurance companies alleged that the harms caused by the contaminated well were excluded from coverage by the insurance policies’ absolute pollution exclusions, while Crestwood and its officials argued that the harms were not barred by the exclusions.

In 2011, the District Court for the Northern District of Illinois granted a summary judgment motion in favor of the insurance companies. The district court found that the harms caused by the contaminated well were eliminated from coverage under the absolute pollution exclusion and that the insurance companies therefore had no duty to defend or indemnify Crestwood and its officials. Following their loss at the district court level, Crestwood and its officials appealed the ruling to the Court of Appeals for the Seventh Circuit.

---

34 See Scottsdale II, 673 F.3d at 716.
36 Scottsdale II, 673 F.3d at 716.
37 Scottsdale I, 784 F. Supp. 2d at 989–90.
38 Id.
39 Id. at 990.
40 Id. at 994.
41 Id. at 998–99.
42 See id.
43 Scottsdale II, 673 F.3d at 715–16; see Scottsdale I, 784 F. Supp. 2d at 998–99.
II. Legal Background

A pollution exclusion is a written clause included in many Commercial General Liability (CGL) insurance policies.\(^{44}\) Pollution exclusions were first drafted into insurance policies beginning in the 1970s, largely as a response to Clean Air Act amendments.\(^{45}\) The amendments to the Clean Air Act included cleanup provisions that would force polluters to pay for any costs associated with their polluting.\(^{46}\) Many insurance companies were concerned that in response to the amendments, they would be forced to pay the exorbitant costs associated with environmental cleanups, especially those at Superfund sites.\(^{47}\) In 1985, the standard pollution exclusion from the 1970s was amended to eliminate its inclusion of arguably ambiguous words such as “accidental” and “sudden,” which had been responsible for a glut of lawsuits.\(^{48}\) This new subset of the pollution exclusion is known as the “absolute pollution exclusion.”\(^{49}\)

The standard absolute pollution exclusion says that coverage does not apply to “bodily injury, property damage, or personal injury arising out of wrongful act(s) which result in the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants at any time.”\(^{50}\) The absolute pollution exclusions defines “pollutants” as “any solid, liquid, gaseous or thermal irritant or con-

\(^{44}\) See Scottsdale Indem. Co. v. Vill. of Crestwood, 673 F.3d 715, 715 (7th Cir. 2012) (Scottsdale II); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 80 (Ill. 1997). The standard CGL policy provides coverage to an insured for harms suffered by a third party, including bodily injury or property damage. Reliance Ins. Co. v. Moessner, 121 F.3d 895, 899 (3d Cir. 1997).


\(^{46}\) See Koloms, 687 N.E.2d at 80; see, e.g., 42 U.S.C. § 7412 (listing hazardous air pollutants whose emissions polluters had to monitor and imposing criminal penalties of up to $1 million per year for willful violation).

\(^{47}\) Koloms, 687 N.E.2d at 80. Insurance providers became even more concerned after the costly environmental disasters at Times Beach, Love Canal, and Torrey Canyon. Id.

\(^{48}\) Id. at 80–81.

\(^{49}\) Id. at 81.

\(^{50}\) For purposes of legal analysis, this Comment treats the pollution exclusion in Scottsdale as a standard absolute pollution exclusion. The district court acknowledged that the pollution exclusion in several of the policies at issue had slightly different wording, but those differences did not influence the court’s analysis. See Scottsdale Indem. Co. v. Vill. of Crestwood (Scottsdale I), 784 F. Supp. 2d 988, 992 n.2 (N.D. Ill. 2011), aff’d, 673 F.3d 715 (7th Cir. 2012).
taminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste . . . .”

Although it is well settled that the absolute pollution exclusion was developed as a means of avoiding “the enormous expense and exposure resulting from the ‘explosion’ of environmental litigation,” the circuit courts have primarily used two drastically different approaches to analyze pollution exclusions. These two approaches are known as the “traditional environmental pollution” test and the “plain meaning” test. There is also a third approach to analyzing absolute pollution exclusions that has been adopted by a minority of jurisdictions called the “reasonable expectations” test.

The Seventh Circuit has adopted the “traditional environmental pollution” test. Courts applying the “traditional environmental pollution” test, such as the Seventh, First, Second, and Sixth Circuits, tend to find the wording of pollution exclusions ambiguous. Such courts give great weight to the historical purpose of the pollution exclusion so as to only bar coverage for those incidents that would be recognized as traditional environmental pollution. These courts reason that if the exclusions were literally applied, they would bar coverage for everyday occurrences such as tripping in spilled Drano or having an allergic reaction to chlorine in a pool.


52 Koloms, 687 N.E.2d at 79, 81.


54 See Nautilus, 566 F.3d at 456–57 (illustrating the “plain meaning” test); Koloms, 687 N.E.2d at 82 (illustrating the “traditional environmental pollution” test).

55 Reliance, 121 F.3d at 903; see Thomas J. Rueter & Joshua H. Roberts, Pennsylvania’s Reasonable Expectation Doctrine: The Third Circuit’s Perspective, 45 Vill. L. Rev. 581, 590 (2000) (explaining that the doctrine has been adopted in some form by ten to thirty-eight jurisdictions); Keeton, supra note 16, at 967 (stating that insurance law should adopt the principle that “the objectively reasonable expectations” of insureds “will be honored even though painstaking study of the policy provisions would have negated those expectations.”).

56 See Pipefitters, 976 F.2d at 1044.

57 See, e.g., Barney Greengrass, Inc. v. Lumbermens Mut. Cas. Co., 445 F. App’x 411, 413 (2d Cir. 2011); Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1183 (6th Cir. 1999); Nautilus Ins. Co. v. Jabar, 188 F.3d 27, 30 (1st Cir. 1999); Pipefitters, 976 F.2d at 1044; Koloms, 687 N.E.2d at 79.

58 Koloms, 687 N.E.2d at 82; see Pipefitters, 976 F.2d at 1043.

59 See Kellman, 197 F.3d at 1182; Pipefitters, 976 F.2d at 1043.
In the 1992 Seventh Circuit case, *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Company*, the plaintiff company sold a transformer to be taken apart for scrap.\(^{60}\) When the purchaser cut open the transformer, approximately eighty gallons of oil spilled onto the purchaser’s property.\(^{61}\) The purchaser filed suit against the plaintiff for cleanup costs, which led the plaintiff to request a defense and indemnification from its insurance company.\(^{62}\) The insurance company denied coverage and argued that the pollution fell under the pollution exclusion clause.\(^{63}\) The Seventh Circuit ruled in favor of the insurance company on the grounds that a reasonable person would have found the discharge of oil onto the purchaser’s property to be pollution.\(^{64}\)

In *American State Insurance Co. v. Koloms*, the Supreme Court of Illinois adopted the “traditional environmental pollution” test.\(^{65}\) In *Koloms*, a building had a faulty furnace that emitted carbon monoxide.\(^{66}\) The fumes made their way into an area occupied by one of the building’s tenants, and as a result, several of the tenant’s employees became ill.\(^{67}\) When the employees brought suit against their company, the company referred the complaints to its insurance.\(^{68}\) The insurance company denied the claim under the pollution exclusion clause.\(^{69}\) In an effort to limit the scope of the pollution exclusion, the court found that any “discharge, dispersal, release, or escape of a pollutant must be into the environment in order to trigger the pollution exclusion clause and deny coverage to the insured.”\(^{70}\) Thus, because the leak of carbon monoxide was not “traditional environmental pollution” the court held against the insurance company.\(^{71}\)

In contrast, the Fifth Circuit has adopted the “plain meaning” test.\(^{72}\) When courts apply the “plain meaning” test, they rely on the literal wording of the insurance policy itself without giving any weight to

\(^{60}\) *Pipefitters*, 976 F.2d at 1038–39.
\(^{61}\) Id. at 1039.
\(^{62}\) Id.
\(^{63}\) Id.
\(^{64}\) Id. at 1044.
\(^{65}\) *Koloms*, 687 N.E.2d at 82.
\(^{66}\) Id. at 74.
\(^{67}\) Id.
\(^{68}\) Id.
\(^{69}\) Id.
\(^{70}\) Id. at 81–82 (emphasis added).
\(^{71}\) Id. at 82.
\(^{72}\) *Nautilus*, 566 F.3d at 455–56; see RLI Ins. Co. v. Gonzalez, 411 F. App’x 696, 697 (5th Cir. 2011); Noble Energy, Inc. v. Bituminous Cas. Co., 529 F.3d 642, 645–46 (5th Cir. 2008).
the historical purpose of the pollution exclusion. Courts using this form of analysis—for example the Fifth, Eighth, Tenth, and Eleventh Circuits—generally find that the policy is unambiguous as written and simply apply it to the facts of the case.

For example, in *Nautilus Insurance Company v. Country Oaks Apartments*, the Fifth Circuit held that under the plain meaning test, developmental harms caused to a child as a result of *in utero* exposure to carbon monoxide were excluded from coverage. In *Nautilus*, a pregnant woman was exposed to high levels of carbon monoxide after a vent in her apartment building was blocked, causing the gas to enter her apartment. The court applied the plain meaning of the pollution exclusion and held that there had been seepage of a gas, which was an “irritant,” and therefore the pollution exclusion applied. The court looked only to the “eight corners” of the pollution exclusion and the plaintiff’s complaint, without showing any concern for whether or not this sort of harm would normally be understood as pollution. The court stated that “[i]t is irrelevant that a reasonable insured might not expect this result, or that, given sufficient imagination, we can think of ways—not presented here—in which enforcement of this exclusion would lead to absurd results.”

The Third Circuit, however, has eschewed both the “traditional environmental pollution” and “plain meaning” approaches in favor of a middle ground that looks to the insured’s reasonable expectations as a factor in interpreting the pollution exclusion. Courts using the “reasonable expectations” test apply the wording of the absolute pollution exclusion literally, but also take into account the insured’s “reasonable

---

73 See *Nautilus*, 566 F.3d at 458.  
74 *Id.*; see *Racetrac Petroleum, Inc. v. ACE Am. Ins. Co.*, 446 F. App’x 211, 212 (11th Cir. 2011); *Union Ins. Co. v. Mendoza*, 405 F. App’x 270, 275 (10th Cir. 2010).  
75 *Nautilus*, 566 F.3d at 453, 458.  
76 *Id.* at 453.  
77 *Id.* at 455–56, 457. The court reasoned that the carbon monoxide was a “pollutant” within the meaning of the pollution exclusion because it fell within the dictionary definition of an “irritant.” *Id.* at 455–56. Under the CGL policy at issue in the case, “pollutants” encompassed “irritants.” *Id.* at 454.  
78 *Id.* at 454.  
79 *Id.* at 458. The holding in *Nautilus* was in direct opposition to the “traditional environmental pollution” test, which is designed to specifically account for the sort of absurd, hypothetical results the *Nautilus* court refused to consider. See *Pipefitters*, 976 F.2d at 1043 (reasoning that the terms “irritant” and “contaminant” could apply to almost any substance because virtually anything could irritate or damage a person or property).  
80 See *Reliance*, 121 F.3d at 903.
expectations” for what the policy will cover. This approach gives courts the flexibility to decide that even though the absolute pollution exclusion would generally bar coverage for a particular harm, the insured’s reasonable expectation of coverage for that harm causes the insurer to be responsible for providing defense and indemnification.

In Reliance Insurance Company v. Moessner, a 1997 Third Circuit case, a policyholder purchased a CGL insurance policy specifically because he knew a machine used by his business produced large amounts of carbon monoxide. When a worker got sick from carbon monoxide inhalation and sued the policyholder, the district court granted summary judgment to the insurance company on the ground that harms caused by carbon monoxide inhalation were excluded by an absolute pollution exclusion. On appeal, the Third Circuit reasoned that the plain meaning of the policy language would negate coverage. The court went on to state, however, that there was a genuine issue of material fact as to whether the insured had a reasonable expectation of coverage, and therefore reversed the district court’s grant of summary judgment.

Further, the court stated that “even the most clearly written exclusion will not bind the insured where the insurer or its agent has created in the insured a reasonable expectation of coverage.”

III. Analysis

In 2012, the Seventh Circuit in Scottsdale Indemnification Co. v. Village of Crestwood affirmed the district court on the ground that the harms arising from the contaminated well fell under the absolute pollution exclusion. The district court in Scottsdale had held that the de-

---

82 Id.
83 See Reliance, 121 F.3d, at 902–03 (reasoning that although the harm at issue would be excluded under the plain meaning test, the court had to consider the insured’s reasonable expectations in determining coverage); Keeton, supra note 16, at 967 (discussing the principle that “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”).
84 Reliance, 121 F.3d, at 897–98.
85 Id.
86 Id. at 902–03.
87 Id. at 906, 908.
88 Id. at 897–98.
89 Scottsdale Indem. Co. v. Vill. of Crestwood (Scottsdale II), 673 F.3d 715, 721 (7th Cir. 2012).
fendants’ claims arose from water pollution and were thus “traditional environmental pollution.”

Although the district court in Scottsdale applied the “traditional environmental pollution” test developed in *American State Insurance Co. v. Koloms*, on appeal, the Seventh Circuit created a new test which is arguably even more subjective than the “traditional environmental pollution” test. In formulating its new test, the Seventh Circuit stated that “a more perspicuous formula than ‘traditional environmental pollution’ would be ‘pollution harms as ordinarily understood.’” The court justified this standard on the grounds that it would do a better job of protecting the interests of insurance policyholders and insurance providers than would the “traditional environmental pollution” test. 

Because environmental damage is incredibly difficult to predict, the court reasoned that the “pollution harms as ordinarily understood” approach would force those policyholders who are at high risk for pollution problems to purchase a pollution rider. This approach would create an incentive for potential polluters to self-identify or risk having to pay for pollution-related harms themselves. Furthermore, under this approach, insurance companies would be able to more accurately predict the cost of providing insurance to those insureds that self-identified as being at high risk of causing “pollution harms as ordinarily understood.” The end result would be a system in which insurance companies could charge fairer rates to all of their policyholders overall.

The Seventh Circuit noted that the contamination to Crestwood’s water would be excluded from coverage under its new test. Consequently, the insurance companies would not be liable to defend or indemnify Crestwood and its officials from the citizens’ claims. Although the outcome of this case would ultimately force the town officials to pay for the citizens’ harms, the citizens would not be able to recover any

---

91 *Scottsdale II*, 673 F.3d at 717; see *Scottsdale I*, 784 F. Supp. 2d at 1000; Am. States. Ins. Co. v. Koloms, 687 N.E.2d 72, 82 (Ill. 1997).
92 *Scottsdale II*, 673 F.3d at 717.
93 See id. at 717–19.
94 Id. at 719.
95 See id. at 719.
96 See id. at 717–19 (explaining the importance of accurately predicting the risks associated with providing coverage to potential polluters).
97 See id. at 719.
98 *Scottsdale II*, 673 F.3d at 721.
99 See id.
money from the insurance companies.\textsuperscript{100} The appellate court said that its new test was more “perspicuous,” and therefore easier to understand than the “traditional environmental pollution” test,\textsuperscript{101} but it is not necessarily clear that this test limits the pollution exclusion in a way that is different from the “traditional environmental pollution” test.\textsuperscript{102}

Whereas the “pollution harms as ordinarily understood” test is new and therefore undeveloped, the “reasonable expectations” doctrine has existed in some form for more than forty years.\textsuperscript{103} For instance, the “reasonable expectations” test has been used in the Third Circuit since at least 1978 and seems to have produced the fairest results for insureds.\textsuperscript{104}

Under the Third Circuit’s current framework, a court must ascertain whether, despite the fact that a harm should be excluded under a literal application of the pollution exclusion, the policyholder had a reasonable expectation that such a harm would be covered by the policy.\textsuperscript{105} In \textit{Reliance Insurance Co. v. Moessner}, the Third Circuit explicitly stated that the reasonable expectations doctrine is important because “when the insured does not know or have reason to know of the existence of an unfavorable provision, then the insured lacks the ability to negotiate a more favorable insurance policy.”\textsuperscript{106} There is a genuine fear that without a safety net allowing coverage for policyholders’ reasonable expectations, insurance companies would take advantage of unsophisticated—and even some sophisticated—customers, thus depriving them of their rights.\textsuperscript{107} Conversely, if policyholders are aware that the

\textsuperscript{100} See id. at 718–19; \textit{Scottsdale I}, 784 F. Supp. 2d at 990.
\textsuperscript{101} See \textit{Scottsdale II}, 673 F.3d at 717.
\textsuperscript{102} The “pollution harms as ordinarily understood” test, which has yet to be applied in subsequent cases, would seem to have the same pitfalls as the “traditional environmental pollution” test. See id.; \textit{Koloms}, 687 N.E.2d at 79. Namely, the “pollution harms as ordinarily understood” test still relies upon a generalized understanding of what constitutes pollution and is thus open to varying interpretations. See \textit{Scottsdale II}, 673 F.3d at 717; \textit{Koloms} 687 N.E.2d at 79.
\textsuperscript{103} Keeton, supra note 16, at 967 (articulating the doctrine of reasonable expectations in 1970); see \textit{Scottsdale II}, 673 F.3d at 717 (creating the “pollution harms as ordinarily understood” test in 2012).
\textsuperscript{104} See Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903–05 (3d Cir. 1997) (stating that “even the most clearly written exclusion will not bind the insured where the insurer or its agent has created in the insured a reasonable expectation of coverage”); Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353, 1360–61 (Pa. 1978) (stating that the reasonable expectations doctrine provides more fairness in insurance transactions, although it was not applicable to the case at bar); Rueter & Roberts, supra note 55, at 588 n.43 (explaining that a policy goal of the reasonable expectations test is to provide basic fairness).
\textsuperscript{105} \textit{Reliance}, 121 F.3d at 904.
\textsuperscript{106} Id. at 905.
\textsuperscript{107} See id.; Keeton, supra note 16, at 968; Rueter & Roberts, supra note 55, at 624–25.
reasonable expectations doctrine will protect them only if they have made their expectations clear; they will have an incentive to self-identify as potential polluters and to clearly express their desired coverage.\textsuperscript{108}

Given that the reasonable expectations doctrine is well established and that when it is consistently applied it meets the same policy objectives as the new “pollution harms as ordinarily understood” test, the courts should adopt the “reasonable expectation” test instead of the “pollution harms as ordinarily understood” test.\textsuperscript{109} Because different courts have applied the reasonable expectations doctrine in different ways, moving forward, the courts that adopt the “reasonable expectations” test should implement it as follows: first, the court should examine the language of the absolute pollution exclusion to determine if it is ambiguous;\textsuperscript{110} if the wording is unambiguous it should then apply a literal interpretation to the facts of the case.\textsuperscript{111} Then, if the Court finds that coverage would be excluded under the literal interpretation of the policy, it should look at the record and determine if the policyholder had a reasonable expectation of coverage for the type of harm being excluded as pollution.\textsuperscript{112} If the policyholder did have a reasonable expectation of coverage for the specific harm at issue, then the policyholder should be covered regardless of whether the harm would normally be excluded by the absolute pollution exclusion.\textsuperscript{113} This approach would be more favorable than the “pollution harms as ordinarily understood” test adopted by the Seventh Circuit because it would allow courts to fairly balance the parties’ rights in each unique case, as opposed to creating a blanket standard to apply to all cases.\textsuperscript{114}

\textsuperscript{108} Cf. Scottsdale II, 673 F.3d at 719 (applying the “pollution harms as ordinarily understood” test).

\textsuperscript{109} See Scottsdale II, 673 F.3d at 717–19; Reliance, 121 F.3d at 903; Keeton, \textit{supra} note 16, at 966–67; Rueter & Roberts, \textit{supra} note 55, at 591.

\textsuperscript{110} See Reliance, 121 F.3d at 902–03 (beginning its “reasonable expectations” test analysis by determining whether the policy language was ambiguous); Rueter & Roberts, \textit{supra} note 55, at 586–90 (discussing how courts differ in applying the “reasonable expectations” test); cf. Nautilus Ins. Co. v. Country Oaks Apartments Ltd., 566 F.3d 452, 455 (5th Cir. 2009) (beginning its “plain meaning” test analysis by determining whether the language was ambiguous on its face).

\textsuperscript{111} Cf. Nautilus, 566 F.3d at 455 (stating that when the language is unambiguous, it should be applied literally).

\textsuperscript{112} See Reliance, 121 F.3d at 903; Keeton, \textit{supra} note 16, at 967.

\textsuperscript{113} See Reliance, 121 F.3d at 903; Keeton, \textit{supra} note 16, at 967.

\textsuperscript{114} Compare Reliance, 121 F.3d at 903–05 (analyzing specific facts surrounding an insurance transaction to decide if coverage should be excluded), \textit{with} Scottsdale II, 673 F.3d at 717–21 (applying a rigid test that fails to account for specific facts concerning an individual insurance transaction).
Consistently applying the “reasonable expectations” test in the future will create fairer outcomes for both insureds and insurance providers by ensuring that both parties are acting with complete information. Insureds will be forced to self-identify by buying pollution riders to cover their risk of polluting (or risk paying for damages themselves), and insurance providers will therefore be able to more accurately calculate premiums for their customers. By increasing the likelihood that insureds will be covered for harms arising from pollution (either through pollution riders or the insureds’ reasonable expectations of coverage for those harms), the “reasonable expectations” test will in turn allow more victims of environmental harms to be adequately compensated by insurers.

CONCLUSION

After more than twenty years of daily exposure to toxic chemicals, the residents of Crestwood Village are understandably concerned about their health. Almost overnight, their exceptionally well-run town entered the national spotlight as a striking example of political corruption and incompetence. There is little doubt that the citizens of Crestwood were wronged and that they deserved compensation. Because the Seventh Circuit created and applied a new “pollution harms as ordinarily understood” test, it never even began a “reasonable expectations” analysis. In the long run, unless the courts adopt the reasonable expectations test, average citizens like those in Crestwood will be forced to endure the harms of pollution without receiving adequate compensation for those harms. Without this important compensation, it will be impossible for victims of pollution disasters to rebuild their lives and their environments. If courts fail to adopt the reasonable expectations test, then generations of people in many small towns like Crestwood will be faced with the health risks and daily hardship of living in a dangerously polluted environment.

115 See Scottsdale II, 673 F.3d. at 717–19 (discussing the importance of both insurers and insureds having more complete information about the insurance market and its attendant risks); Reliance, 121 F.3d at 903–07.
116 See Scottsdale II, 673 F.3d. at 717–19; Ruter & Roberts, supra note 55, at 591.
117 See Scottsdale II, 673 F.3d. at 717–19; Reliance, 121 F.3d. at 903–05; Keeton, supra note 16, at 967; Ruter & Roberts, supra note 55, at 590, 591. Because this test allows coverage in some instances where coverage would normally be barred, adopting this test would necessarily lead to a larger number of policyholders being covered. See Reliance, 121 F.3d at 903.