

NO. A11-693

State of Minnesota
In Court of Appeals

Farm Bureau Mutual Insurance Company,

Appellant,

vs.

Earthsoils, Inc., Laverne Ptacek and Jeffrey Ptacek,

Respondents.

APPELLANT'S BRIEF, ADDENDUM, AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

I. Whether the Ptaceks' claims – that Earthsoils' fertilizer application was of insufficient quality and quantity to produce the promised crop yield – are covered by Farm Bureau's commercial general liability policy or instead allege business risks to be borne by Earthsoils?

Farm Bureau argued that the underlying lawsuit by the Ptaceks' – alleging that Earthsoils provided an insufficient quality and quantity of fertilizer to produce the crop yield it had contracted and warranted to provide – alleged a business risk to be borne by Earthsoils and not damages covered by Farm Bureau's commercial general liability ("CGL") policy. (Appellant's App. ("A. App.") 54-55, Pl.'s Mem. for Summ. J. at 9-10; D. Ct. Tr. at 3:15-23.)

The district court's judgment and order, while not expressly deciding the issue, necessarily held that the Ptaceks' Complaint alleged conduct and damage covered by a CGL policy.

Apposite cases:

Bor-Son Bldg. Corp. v. Employers Comm'l Union Ins. Co.,
323 N.W.2d 58 (Minn. 1982).

Western World Ins. Co. V. H.D. Eng'g Design & Erection Co.,
419 N.W.2d 630, 634 (Minn. App. 1988).

North Branch Mut. Ins. Co. v. Bloom Lake Farms, Inc.,
No. C9-95-762, 1995 Minn. App. LEXIS 1206 (Minn. App. Sept. 19,
1995).

II. Whether alleged less-than-anticipated crop yield – resulting from insufficient quality and quantity of fertilizer – is "physical injury" to "tangible property"?

Farm Bureau argued that the Ptaceks' underlying lawsuit failed to allege any "property damage," as defined by Farm Bureau's CGL policy because less-than-anticipated crop yield is not "physical injury" and it is not "tangible property." (A. App. at 52-53, Pl.'s Mem. for Summ. J. at 7-8; D. Ct. Tr. at 4:23-7:9.)

The district court's judgment and order held:

"Corn plants and the soil they are planted in are 'tangible property.' " . . . "[T]he alleged misapplication of fertilizer due to Earthsoils' recommendations and supply of nitrogen-deficient product constitutes 'physical injury' to the corn crop and the soil." "The physical injury was manifested in visibly poor plant development (yellowing) and resulted in decreased yields." (Appellants Addendum ("A. Add.") at 5; 7; Order at 5; 7.)

Apposite cases:

North Branch Mut. Ins. Co. v. Bloom Lake Farms, Inc.,
No. C9-95-762, 1995 Minn. App. LEXIS 1206 (Minn. App. Sept. 19,
1995).

Triple U Enter., Inc. v. New Hampshire Ins. Co., 576 F. Supp. 798 (D.S.D.
1983), *aff'd in relevant part*, 766 F.2d 1278 (8th Cir. 1985).

III. Whether alleged less-than-anticipated crop yield – resulting from insufficient quality and quantity of fertilizer – is “[l]oss of use of tangible property that is not physically injured.”

Farm Bureau argued that the Ptaceks' underlying lawsuit failed to allege any “property damage,” as defined by Farm Bureau’s CGL policy because the Ptaceks planted their corn seeds and used their field to grow the seeds. (A. App. at 53-54, Pl.’s Mem. for Summ. J. at 8-9; D. Ct. Tr. at 7:10-8:20.)

The district court's judgment and order did not address this argument because it found coverage based on "physical injury to tangible property."

Apposite cases:

Tschimperle v. Aetna Cas. & Surety Co.,
529 N.W.2d 421, 425 (Minn. App. 1995).

North Branch Mut. Ins. Co. v. Bloom Lake Farms, Inc.,
No. C9-95-762, 1995 Minn. App. LEXIS 1206 (Minn. App. Sept. 19,
1995).

Western Heritage Ins. Co. v. Green,
54 P.3d 948 (Idaho 2002).

IV. If less-than-anticipated crop yield – resulting from insufficient quality and quantity of fertilizer – is “[l]oss of use of tangible property that is not physically injured,” does Exclusion m. apply?

Farm Bureau argued that if there was any “loss of use,” such damage was excluded because any “loss of use” of the corn, crop yield, or soil arose out of defective, deficient, or inadequate fertilizer recommended and provided by Earthsoils. Any such “loss of use” arose out of Earthsoils’ failure to perform its agreement with the Ptaceks in accordance with its terms. (A. App. at 55-56, Pl.’s Mem. for Summ. J. at 10-11; D. Ct. Tr. at 8:21-10:3.)

The district court’s judgment and order held that Exclusion m. did not apply because it found “physical injury to tangible property” and that property was not “impaired.” (A. Add. 7, Order at 7.)

Apposite cases:

Bethke v. Assurance Co. of Am., No. C9-02-751, 2002 Minn. App. LEXIS 1293 (Minn. App. Nov. 26, 2002).

Madison Farmers Mill & Elevator Co. v. Mut. Serv. Cas. Ins. Co., No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. App. Feb. 7, 1989).

Modern Equip. Co. v. Continental Western Ins. Co., 355 F.3d 1125, 1129 (8th Cir. 2004).

V. Whether Farm Bureau is required to indemnify Earthsoils for all damages awarded against it in the underlying action when the Ptaceks’ Complaint alleges causes of action not covered under Farm Bureau’s CGL policy.

The district court, sua sponte, granted summary judgment to Earthsoils and the Ptaceks and held that Farm Bureau must indemnify Earthsoils for all damages in the underlying suit. (A. Add. 7-8, Order at 7-8.)

Apposite cases:

Reinsurance Ass’n of Minn. v. Timmer, 641 N.W.2d 302 (Minn. App. 2002).

STATEMENT OF THE CASE

In March 2008, Laverne Ptacek and Jeffrey Ptacek (“the Ptaceks”) brought suit against Farm Bureau Mutual Insurance Company’s (“Farm Bureau”) insured, Earthsoils, Inc. (“Earthsoils”) and its owner, Michael McCornack. The Ptaceks alleged that Earthsoils recommended an inferior quality and insufficient quantity of nitrogen fertilizer, causing the Ptaceks’ actual crop yield in the 2007 growing season to be one-half of its anticipated crop yield. Earthsoils tendered defense to Farm Bureau, and a “Non-Waiver Agreement,” reserving all of Farm Bureau’s rights under the policy, was executed on March 24, 2008.

Farm Bureau filed this declaratory action against Earthsoils and the Ptaceks. Farm Bureau moved for summary judgment, asking the district court to hold Farm Bureau had no contractual obligation to defend and/or indemnify Earthsoils.

The Steele County District Court, the Honorable Joseph A. Bueltel presiding, denied Farm Bureau’s motion for summary judgment and, sua sponte, granted summary judgment to Earthsoils and the Ptaceks in the declaratory judgment action. The court held: (1) that Farm Bureau had a duty to defend; and (2) that Farm Bureau must indemnify Earthsoils for all damages awarded against Earthsoils in the underlying action.

STATEMENT OF THE FACTS

Ptacek v. Earthsoils, Inc., and Michael A. McCornack, No. 74-CV-10-1417
(Steele Cty. Dist. Ct. filed Feb. 18, 2011)

Laverne and Jeffrey Ptacek, a father and son, together operate Ptacek farm, a family hog and grain farm in Owatonna, Minnesota. (A. App. 16; Ptacek Compl. at ¶ 1.) Beginning in the spring of 2005, the Ptaceks hired Earthsoils to make fertilizer recommendations for the production of corn. (A. App. 17, Ptacek Compl. at ¶ 4.) It is alleged that Earthsoils expressly represented to the Ptaceks that the fertilizer it recommended was of sufficient quality and quantity to produce 180-200 bushels of corn per acre. (A. App. 17, Ptacek Compl. at ¶ 8.)

But, according to the Ptaceks, the nitrogen fertilizer provided by Earthsoils to the Ptacek farm in 2007 was of inferior quality and insufficient quantity, causing the crop to suffer from nitrogen deficiency and producing less than half the expected crop yield. (A. App. 17-18, Ptacek Compl. at ¶ 10.) The corn stalks also look distressed, with large swaths of dry brown and yellowing foliage. (A. App. 40-43, Laverne Ptacek Dep. Tr. at 156:7-8, 176:24-177:5; A. App. 44-45, McCornack Dep. Tr. at 45:4-46:2.)

The Ptaceks sued Earthsoils for the alleged lost yield and diminished sales of their corn crop. (A. App. 16-23, Ptacek Compl.) The complaint alleged six causes of action: (1) breach of contract; (2) consumer misrepresentation; (3) negligence; (4) breach of expressed warranty; (5) breach of warranty and merchantability; and (6) breach of warranty of fitness. (*Id.*) Each cause of action

alleged that Earthsoils had contracted – or expressly and impliedly warranted – that the fertilizer provided to the Ptaceks was of “sufficient quality and quantity to generate a corn yield of 180-200 bushes per acre.” (*Id.* at ¶¶ 14, 19, 23, 26, 32, 39.) The fertilizer did not produce the promised yields. (*Id.*)

Earthsoils tendered defense to Farm Bureau, and a “Non-Waiver Agreement,” reserving all of Farm Bureau’s rights under the policy, was executed on March 24, 2008. (A. App. 24, Non-Waiver Agreement.)

Farm Bureau Mut. Ins. Co. v. Earthsoils, Inc., Laverne Ptacek and Jeffrey Ptacek, No. 74-CV-10-1417 (Steele Cty. Dist. Ct.)

Farm Bureau filed this declaratory action against Earthsoils and the Ptaceks, asking the court to hold the Ptaceks’ alleged damages were caused by, arose out of, or resulted from acts or events not covered by – or excluded from – coverage under the Farm Bureau policy. (A. App. 19, Farm Bureau Compl. at ¶ 19.)

Farm Bureau’s Insurance Policy

During the relevant time period, Farm Bureau insured Earthsoils under policy #1504952. (A. App. 1-15.) This policy’s general liability form states:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply (A. App. 2.)

The policy defines “property damage” to mean:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it. (A. App. 14.)

However, the policy excludes:

m. Damage to Impaired Property or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use. (A. App. 5.)

The liability coverage also defines “your product:”

“Your product” means:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed by:
 - (1) You;

“Your product” includes:

- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”. (A. App. 14.)

Farm Bureau also issued a comprehensive catastrophe excess liability policy under policy # 7462104. Because this excess policy provides substantively identical coverage, it is not reproduced herein.

Summary Judgment

Farm Bureau brought a motion for summary judgment, arguing that the alleged damages sustained by the Ptaceks were caused by, arose out of, or resulted from Earthsoils' failure to provide the property quality and quantity of fertilizer to produce the results it had contracted and warranted to provide. (A. App. 54-55, Pl.'s Mem. for Summ. J. at 9-10; D. Ct. Tr. at 3:15-23.) Farm Bureau's CGL policy issued to Earthsoils does not guarantee Earthsoils work; that is a business risk to be borne by Earthsoils. (*Id.*)

Earthsoils countered that the Ptaceks' Complaint should be read to allege tort liability – that Earthsoils' negligence caused damage to the Ptaceks' anticipated corn crop yield – even though the complaint only alleges breach of contract. (D. Ct. Tr. at 15:13-17:14.) The district court did not specifically address this argument in its Summary Judgment Order. But it held, as a matter of law, that Farm Bureau had a duty to defend and indemnify for any liability in the underlying suit. (A. Add. at 8, Order at 8.)

Second, Farm Bureau argued that it had no duty to defend or indemnify because the Ptaceks did not allege “property damage” as defined by Farm Bureau's policy. (A. App. at 52-54, Pl.'s Mem. for Summ. J. at 7-9; D. Ct. Tr. at 4:23-7:9; 7:10-8:20.) Less-than-anticipated crop yield is not “physical injury” and

it is not “tangible property”; it is solely an economic loss not recoverable as “property damage.” (*Id.*; A. App. 89-91, Pl.’s Reply Br. for Summ. J. at 1-3.)

Earthsoils and the Ptaceks countered that the fertilizer did not enhance the seeds’ performance as the correct fertilizer would have, and that the resulting “loss of use of corn” and less-than-anticipated crop yield are “physical injury to tangible property.” (A. App. 65-67, Earthsoils’ Mem. Opp’n Summ. J. at 9-11; A. App. 82, Ptaceks’ Mem. Opp’n Summ. J. at 6; D. Ct. Tr. at 19-22.) The Ptaceks and Earthsoils also argued that there was “physical injury” because the corn’s foliage was dry and yellowing during the growing season. (A. App. 83, Ptaceks’ Mem. Opp’n Summ. J. at 7; D. Ct. Tr. at 13:3-21, 19-22.)

The district court held that “[c]orn plants and the soil they are planted in are ‘tangible property.’ ” (A. Add. at 5, Order at 5.) Further, “the alleged misapplication of fertilizer due to Earthsoils’ recommendations and supply of nitrogen-deficient product constitutes ‘physical injury’ to the corn crop and the soil.” (A. Add. at 7, Order at 7.) “The physical injury was manifested in visibly poor plant development (yellowing) and resulted in decreased yields.” (*Id.*)

Third, under the second definition of “property damage,” Farm Bureau argued that it had no duty to defend or indemnify Earthsoils because there had been no “[l]oss of use of tangible property that is not physically injured.” (A. App. at 53-54, Pl.’s Mem. for Summ. J. at 8-9; D. Ct. Tr. at 7:10-8:20.) The Ptaceks planted their corn seeds in the Spring of 2007. (*Id.*) They used their field to grow the corn seeds. (*Id.*) Further, there could be no “loss of use” of corn

yield, because “loss of use” is a temporary state. (*Id.*) Any loss of corn yield during the 2007 growing season was permanent. (*Id.*)

Earthsoils countered that the Ptaceks suffered the “loss of use” of their 2007 corn yield – they lost half the expected bushels of corn. (A. App. 69, Earthsoils’ Mem. Opp’n Summ. J. at 13.) Neither the Ptaceks nor the district court addressed this argument because they limited their arguments to “physical injury to tangible property.”

Fourth, Farm Bureau argued that even if there was “property damage” resulting from “[l]oss of use of tangible property that is not physically injured,” coverage was excluded under Exclusion m. because it was damage to “property not physically injured.” (A. App. at 55-56, Pl.’s Mem. for Summ. J. at 10-11; D. Ct. Tr. at 8:21-10:3.) Any “loss of use” of the corn-crop yield or soil arose out of defective, deficient, or inadequate fertilizer recommended and provided by Earthsoils. (*Id.*) Any such “loss of use” arose out of Earthsoils’ failure to perform its agreement with the Ptaceks in accordance with its terms. (*Id.*)

Earthsoils countered that Exclusion m. does not apply because the diminished corn-crop yield did not occur while the fertilizer was in Earthsoils’ care, custody, or control, but only when the crop was harvested. Earthsoils also argued there was no defect or failure to perform on its contract or agreement with the Ptaceks. (A. App. 71-72, Earthsoils’ Mem. Opp’n Summ. J. at 15-16.) Earthsoils and the Ptaceks also argued – and the district court agreed – that Exclusion m. does not apply because the less-than-anticipated corn yield was

“physical injury to tangible property.” (A. App. 84, Ptaceks’ Mem. Opp’n Summ. J. at 8; A. Add. 7, Order at 7; D. Ct. Tr. at 14:1-14.)

Finally, the district court, sua sponte, granted summary judgment to Earthsoils and the Ptaceks and held that Farm Bureau must indemnify Earthsoils for all damages in the underlying suit.¹ (A. Add. 7-8, Order at 7-8.)

ARGUMENT

I. STANDARD OF REVIEW

On an appeal from summary judgment the Court considers “whether there are any genuine issues of material fact and whether the district court erred in applying the law.” *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004). “Where there is no dispute as to the material facts, this court independently reviews the district court’s interpretation of the insurance contract de novo.” *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 183 (Minn. App. 2001).

II. PRINCIPLES OF INSURANCE POLICY INTERPRETATION

A. Burden of Proof

In a claim for insurance coverage under Minnesota law, “the initial burden of proof is on the insured to establish a prima facie case of coverage.” *SCSC Corp v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995). The burden then shifts to the insured to prove a policy exclusion applies. *Hubred v. Control Data*

¹ Sua sponte orders of the district court can provide a basis for appeal. See, e.g., *Woida v. North Start Mut. Ins. Co.*, 306 N.W.2d 570, 571 (Minn. 1981) (plaintiff appealed from district court’s sua sponte grant of summary judgment).

Corp., 442 N.W.2d 308, 310 (Minn. 1989). If the insurer meets its burden, the burden of proof then shifts to the insured to show that an exception to the exclusion “restores” coverage. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995).

“General principles of contract interpretation apply to insurance policies.” *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). Absent ambiguity, the language of an insurance policy is given its usual and accepted meaning. *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960). If policy language is ambiguous, it is interpreted in favor of coverage. *Wanzek*, 679 N.W.2d at 325.

B. Duty to Defend

“If any claim is arguably covered under a policy, the insurer must defend” its insured. *SCSC Corp v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995). The duty to defend “extends until it can be concluded as a matter of law that there is no basis on which the insurer may be obligated to indemnify the insured.” *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 416 (Minn. 1997). “The insurer bears the burden of demonstrating that no duty to defend exists by showing that all parts of the cause of action fall clearly outside the coverage afforded by the policy.” *Atlantic Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 126 (Minn. 1986).

III. THE PTACEKS' UNDERLYING LAWSUIT ALLEGES ONLY BUSINESS RISKS NOT COVERED BY FARM BUREAU'S COMMERCIAL GENERAL LIABILITY POLICY.

CGL policies are intended to cover tort liability created when “ ‘the goods, products or work of the insured, once relinquished or completed, [] cause bodily injury or damage to property other than to the product or completed work itself.’ ” *Bor-Son Bldg. Corp. v. Employers Comm'l Union Ins. Co.*, 323 N.W.2d 58, 63 (Minn. 1982) (quoting Henderson, *Insurance Protection for Products Liability and Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971)).

But CGL policies are not intended to cover liability imposed on an insured – as a matter of contract law – “ ‘to make good on product or work which is defective or otherwise unsuitable because it is lacking in some capacity.’ ” *Id.* CGL policies do not insure for “economic loss because the product or completed work is not that for which the damaged person bargained.” *Id.* (emphasis added). The risk of contractual liability, whether express or implied, arising from the quality of goods or services supplied, is a business risk to be borne by the insured. *Id.* at 64. This is the type of risk which an insured has the ability to control. *Western World Ins. Co. v. H.D. Eng'g Design & Erection Co.*, 419 N.W.2d 630, 634 (Minn. App. 1988).

In *North Branch Mut. Ins. Co. v. Bloom Lake Farms, Inc.*, the Minnesota Court of Appeals upheld the district court's determination that claims for less-than-anticipated milk production and calf production alleged business risks not

covered by a farm general liability policy. No. C9-95-762, 1995 Minn. App. LEXIS 1206, at *2, 5 (Minn. App. Sept. 19, 1995) (attached as A. App. 114-17).² In the case, the Radels alleged the herd they purchased from Bloom Lake Farms “was in poor condition upon delivery and did not produce milk or calves at the level anticipated.” *Id.* at *2. The complaint alleged: “(1) breach of express or implied warranties; (2) negligence in the care of the herd after the oral contract for sale but prior to delivery; and (3) intentional or negligent misrepresentation.” *Id.* at *4. Bloom Lake Farms’ insurer, North Branch, defended under a reservation of rights and brought a declaratory judgment action to determine coverage. *Id.* at *2. The district court granted summary judgment to North Branch, finding no coverage because the Radels’ Complaint only alleged a business risk. *Id.* This Court affirmed, holding that Bloom Lake Farms had “control over the health of the dairy herd prior to its sale, and they failed to provide a herd of the quality indicated in the sale contract.” *Id.* at *5-6, 9. The damages arose “from the faulty performance of the sale contract and constitute[d] an economic loss, not property damage.” *Id.* at *6.

This case parallels *Bloom Lake Farms*. The Ptaceks’ Complaint alleges breach of contract, negligence, breach of warranty, and misrepresentation. The

² *Bloom Lake Farms* is unpublished and therefore not binding precedent. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). But the case does analyze a policy and fact pattern similar to that analyzed here and provides persuasive analysis for this Court. *Reinsurance Ass’n v. Timmer*, 641 N.W.2d 302, 312 n.3 (Minn. App. 2002) (citing to *Bloom Lake Farms* as persuasive).

complaint is premised on the allegation that the fertilizer that Earthsoils provided was of insufficient quality and quantity to produce the yield that Earthsoils had contracted and warranted to provide. Earthsoils had control over the fertilizer before providing it to the Ptaceks, and Earthsoils failed to provide fertilizer of sufficient quality and quantity. The less-than-anticipated crop yield arose from Earthsoils' faulty performance. It is an economic loss; it is not property damage.

Earthsoils and the Ptaceks will likely argue— although not alleged — that the complaint should be read to seek compensation for damage to the Ptaceks' property. During the 2007 growing season, the corn stalks looked distressed, with large swaths of dry brown and yellowing foliage.

But the Ptaceks' Complaint does not allege any damage to — or seek any compensation for — the brown and yellowing foliage. It has never been alleged that Earthsoils' fertilizer — or the brown and yellowing foliage:

- made the foliage unfit for use or sale as it otherwise would have been;
- caused the Ptaceks' corn seeds not to germinate;
- damaged the corn seeds, causing them to yield less corn crop than would have been produced if no fertilizer had been applied; or
- damaged the actual 2007 corn crop yield or rendered it unmarketable.

The underlying lawsuit alleges liability and damages arising only from the quality and quantity of fertilizer that Earthsoils provided to the Ptaceks. It alleges only that Earthsoils' fertilizer failed to perform in that it failed to enhance the corn seeds to produce the yield that Earthsoils had assured the Ptaceks would be produced. The damages claimed are the cost of correcting Earthsoils' work in

order to provide the Ptaceks with the profit they would have realized if Earthsoils' fertilizer had performed as Earthsoils represented that it would. This type of liability is a business risk to be borne by Earthsoils.

Liability insurance exists to protect against casualty-type losses, not to warrant the insured's product or work. To hold that the alleged loss in this case is not a business risk would in effect convert Farm Bureau's liability policy into a crop insurance policy designed to make up the difference between any warranted yield offered by Earthsoils and the actual production of the crop. This risk is far beyond the scope of any anticipated loss for which Farm Bureau collected a premium. As a matter of law, it is not the type of risk designed to be covered by a CGL policy.

IV. LESS-THAN-ANTICIPATED CROP YIELD IS NOT "PROPERTY DAMAGE" – DEFINED BY FARM BUREAU'S POLICY AS "PHYSICAL INJURY" TO "TANGIBLE PROPERTY."

Farm Bureau's insurance policy covers damages Earthsoils is legally obligated to pay because of "property damage." "Property damage," is defined as: (1) "physical injury to tangible property"; or (2) "loss of use of property that is not physically injured". Under the policy's first definition of "property damage," there must be: (1) "tangible property" that (2) is "physically injured." While loss-of-anticipated yield can be a way to measure "property damage," loss-of-anticipated yield is not in and of itself "tangible property" or "physical injury."

A. Less-than-anticipated crop yield is not "tangible property."

"Tangible" is defined as:

having or possessing physical form. Capable of being touched and seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial.

Triple U Enter., Inc. v. New Hampshire Ins. Co., 576 F. Supp. 798, 806 (D.S.D. 1983), *aff'd in relevant part*, 766 F.2d 1278 (8th Cir. 1985) (quoting Black's Law Dictionary 1305 (5th Ed. 1979)) (attached as A. App. 95-113). "Webster's Third New International Dictionary 2337 (1966) defines 'tangible property' as 'property (as real estate) having physical substance apparent to the senses,' while Black' Law Dictionary 1305 (5th Ed. 1979) describes 'tangible property' as 'that which may be felt or touched, and is necessarily corporeal.' " *Id.*

Generally, "loss of investment" is not "damage to tangible property." *Tschimperle v. Aetna Cas. & Surety Co.*, 529 N.W.2d 421, 425 (Minn. App. 1995). "[S]trictly economic losses, like lost profits, loss of the anticipated benefit of a bargain, loss of an investment, and loss of goodwill, reputation, or business standing, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy." *Triple U*, 576 F. Supp. at 806 (string citation omitted).

Loss of expected calf crop and increased risk of disease are not "tangible property." *Id.* at 806. In *Triple U*, the Heppers alleged the 650 head of buffalo purchased from Triple U were infected with brucellosis, making them unfit for breeding. *Id.* at 800. The complaint alleged breach of express and implied warranty and fraudulent misrepresentation, alleging that Triple U had warranted

the buffalo to be fit for breeding, to yield an 80 to 90% calf crop from its four-year-old cows, and to be free of disease. *Id.* at 800-01. The Heppers sought damages for: (1) the loss-of-anticipated 180 calves that should have been born; (2) the difference in value of the calves that were born because they had contracted the herds disease during the birthing process and were unfit for breeding; and (3) the risk of infection to the Heppers' other stock. *Id.* at 801.

The court held, on summary judgment, that loss-of-expected calf crops – calves that were never born – and the risk of infection to other stock – did not fall within the “plain, usual, and ordinary meaning” of “tangible property.” *Id.* at 806. In contrast, the alleged damage to the calves that were born after the sale – and were unfit for breeding because they had contracted brucellosis during the birthing process – was damage to “tangible property.” *Id.*

In *Bloom Lake Farms*, the Minnesota Court of Appeals likened the Radels less-than-anticipated milk and calf production claims to the Heppers' “loss of expected calf crops and the risk of infection of other buffalo” in *Triple U*. 1995 Minn. App. LEXIS 1206, at *2 (Minn. App. Sept. 19, 1995). The Court upheld summary judgment to the insurer, finding no property damage to “tangible property.” *Id.*

Here, the Ptaceks' underlying complaint alleges only “property damage” of less-than-anticipated crop yields. As established by *Triple U* and *Bloom Lake Farms*, less-than-anticipated crop yield is not “tangible property.” On this basis, the Court should hold, as a matter of law, Farm Bureau has no duty to defend

and/or indemnify Earthsoils because the Ptaceks have not alleged “property damage.”

B. Less-than-anticipated crop yield is not “physical injury.”

Before 1973, CGL policies did not define “property damage” as “physical injury to tangible property.” Therefore, courts interpreted the word broadly to include “consequential or intangible damages,” in addition to “direct physical damages to other property.” *St. Paul Fire & Marine Ins. Co. v. N. Grain Co.*, 365 F.2d 361, 367 (8th Cir. 1966).³ For example, in *Northern Grain*, Northern Grain was sued by its customers after it mistakenly sold less-productive Conley seed wheat instead of Selkirk seed wheat. *Id.* at 363-64. The court held that “the diminution in the productivity of the wheat crop, as the result of an inferior and deficient quality of seed wheat, constitute[s] property damage within the coverage of th[e] policy.” *Id.* at 366. The policy could have excluded this type of consequential or intangible property by defining “property damage” as “physical injury to or physical destruction of tangible property.” *Id.* at 367 n.6 (citing *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co. of N.Y.*, 281 F.2d 538 (3d Cir. 1960)).

³ Citing *Labberton v. Gen. Cas. Co. of Am.*, 332 P.2d 250 (Wash. 1958); *Aerial Agricultural Service of Montana, Inc. v. Till*, 207 F. Supp. 50 (N.D. Miss. 1962); *Hauenstein v. Saint Paul-Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954) (diminished market value to building caused by presence of defective plaster was “property damage”); *Dakota Block Co. v. W. Cas. & Surety Co.*, 132 N.W.2d 826 (S.D. 1965) (same).

Under similar policy language, *Gen. Ins. Co. of Am. v. Gauger*, 538 P.2d 563 (Wash. 1975), and *Safeco v. Ins. Co. v. D.E. Munroe*, 527 P.2d 64 (Mont. 1974) – the cases relied on here by the district court – found “property damage” when sale of the wrong seed diminished or completely destroyed a crop. In so holding, the *Munroe* court found it “of utmost importance to note that the policy does not, by any stretch of the imagination, require that there be tangible damage to tangible property.” 527 P.2d at 68. If the insurer had intended to exclude consequential damages, it should have said so in the policy. *Id.* The *Gauger* court applied *Munroe*. 538 P.2d at 564-66.

“[I]n 1973, the definition of ‘property damage’ in the standard CGL policy was changed to ‘physical injury to or destruction of tangible property.’ ” *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 266 F.3d 859, 862 (8th Cir. 2001). Under the 1973 definition, “[d]iminution in value” is not “physical injury,” and therefore, is not “property damage.” *Federated Mut. Ins. Co. v. Concrete Units, Inc.*, 363 N.W.2d 751, 756 (Minn. 1985). The revised definition does not cover consequential or intangible damage, such as depreciation in value. *Triple U*, 576 F. Supp. at 806.

Under the revised definition of “property damage,” less-than-anticipated yield is not “physical injury.” *Madison Farmers Mill & Elevator Co. v. Mut. Serv. Cas. Ins. Co.*, No. C9-88-1620, 1989 Minn. App. LEXIS 106 (Minn. App. Feb. 7, 1989) (attached as A. App. 118-19). In *Madison Farmers*, Krump, a pheasant farmer, sought to recover for decreased egg production allegedly caused because Madison Farmers had changed the composition of feed provided to Krump. *Id.*

Krump's claim for decreased egg production was not "physical injury," and thus not covered. *Id.* at *3. But the court still found a duty to defend because, during discovery, there was testimony that change in feed formula could physically damage the pheasant's reproductive system, and that this damage could be the cause of reduced egg production. *Id.* at *2. Any duty to indemnify was conditioned on a trial finding that there was actual physical damage to the reproduction system and that this damage caused decreased egg production. *Id.* at *4.

While alleged "less-than-anticipated yield" is not "physical injury," actual damage to an actual crop can be physical injury. In *Triple U*, the court held the "tangible property" – the calves born after the sale infected with the herds' disease during the birthing process – were "physically injured" by the insured's product. 576 F. Supp. at 806-07. The diseased herd (the defective product) caused actual physical damage to other actual property, infecting the newborn calves with the disease. *Id.* The alleged damage to these newborn calves was "physical injury" to "tangible property." *Id.*

In cases of fertilizer application, physical injury occurs when the fertilizer causes actual physical injury to the actual crop. For example, in *Western Heritage Ins. Co. v. Green*, insufficient fertilizer was applied on potato plants. 54 P.3d 948, 950 (Idaho 2002). As a result, large weeds grew, the potato foliage yellowed and started to die, fewer potatoes were harvested, and many of the potatoes actually harvested were unmarketable because they were slimmer, rougher, blemished, and

hooked. *Id.* In *Auto Owners Ins. Co. v. Harrell's Fertilizer, Inc.*, the court found a duty to defend claims alleging fertilizer “damaged, stunted the growth of, or destroyed Stoner Nursery’s plants, making them unmarketable or unsalvageable.” No. 4:05-cv-39, 2006 U.S. Dist. LEXIS 3021, at *3 (E.D. Ten. Jan 20, 2006) (attached as A. App. 123-26). While some claims were for “economic loss,” others were for property damage. *Id.* at *10.

Here, even if the Court would find that less-than-anticipated crop yield is “tangible property,” it should hold that Farm Bureau has no duty to defend and/or indemnify Earthsoils because there has been no “physical injury” to that “tangible property.” The only injury resulting from less-than-anticipated crop yield is intangible – as was the damage in *Northern Grain*, *Munroe*, and *Gauger* – the cases upon which the district court relied to find “physical injury.” But such damage is not covered by a policy requiring “physical injury.”

Further, the fertilizer did not cause actual injury to the actual corn seeds or to the actual corn crop. Unlike the disease transmitted to the calves in *Triple U*, the unmarketable potatoes and plants in *Green* and *Harrells*, or the damage alleged to the reproductive system of the pheasants in *Madison Farmers* causing reduced egg production, here, it has never been alleged that the fertilizer:

- caused the Ptaceks’ corns seeds not to germinate;
- damaged the corn seeds, causing them to yield less corn crop than would have been produced if no fertilizer had been applied; or
- damaged the 2007 actual corn crop yield or rendered it unmarketable.

The only damage alleged is that the fertilizer did not enhance the corn-crop yield as much as Earthsoils had represented that it would. This is not “physical damage.”

C. Measure of damages

In determining coverage, “the type or measure of damage [alleged in a complaint] is not dispositive; it is the type of injury to tangible property.” *Triple U*, 576 F. Supp. at 808. In *Triple U*, the complaint plead “diminution or depreciation in value of the calves” – not “physical injury to tangible property.” *Id.* at 807-08. The court found the claim for disease transmitted to newborn calves was “physical injury, a disease, to tangible property.” *Id.* The damages for this “physical injury to tangible property” was measured by diminution in value.

The Ptaceks’ Complaint alleges that loss-of-anticipated corn yield is “property damage.” But loss-of-anticipated yield is not “property damage” when defined as “tangible injury to physical property.” It is only a measure of damages. Therefore, loss-of-anticipated crop yield is not recoverable.

Earthsoils and the Ptaceks will likely argue, as the district court appeared to hold, that the “corn plants” were “tangible property” that were “physically injured” because the foliage was brown and yellowing. The district court reasoned that loss-of-anticipated corn yield was the measure of damages for the brown and yellowing foliage.

Even if this Court would consider this alleged damage to the “corn plants” as “tangible property” that is “physically injured,” the Ptaceks do allege any

damages caused by this “property damage.” The measure of damages for the brown or yellowing corn foliage would be any loss of anticipated use of the foliage or any loss of anticipated revenue because the foliage was rendered unmarketable. In such case, damages may be covered by a CGL policy even though the damages are intangible. But no such damages have ever been alleged. Therefore, Farm Bureau has no duty to defend or indemnify Earthsoils for any “physical injury” to the “corn plants.”

V. LESS-THAN-ANTICIPATED CROP YIELD IS NOT “PROPERTY DAMAGE” – DEFINED BY FARM BUREAU’S POLICY AS “LOSS OF USE OF PROPERTY THAT IS NOT PHYSICALLY INJURED.”

Just as the loss alleged by the Ptaceks is not “property damage” under Farm Bureau policy’s first definition of “property damage,” the complaint also fails to allege damages under the second definition: “loss of use of property that is not physically injured.” The Court need not substantively consider whether there is any such “loss of use” because the Ptaceks do not seek any damages recoverable for “loss of use.” However, if the Court does find “loss of use,” it should then also consider whether Exclusion m. applies, and if an exception to the exclusion restores coverage.

A. The Ptaceks do not seek any damages recoverable for “loss of use.”

While “consequential damages” may be recovered when there is physical injury to tangible property, the same is not true for “loss of use” damages. *Tschimperle v. Aetna Cas. & Surety Co.*, 529 N.W.2d 421, 425 (Minn. App.

1995). Loss-of-investment or other intangible damages are not a measure of damages for “loss-of-use” “property damage.” *Id.*

For “loss of use” of property, a party can recover the “rental value of similar property which the plaintiff can hire for use during the period when he is deprived of the use of his own property.” *Collin v. American Empire Ins. Co.*, 26 Cal. Rptr. 2d 391, 408 (Cal. Ct. App. 1994). For “loss of property,” a party can recover replacement damages. *Id.* For example, if a vehicle is stolen, the value of “loss of use” of the car is the rental value of a substitute vehicle, whereas the value of the “loss of the car” is its replacement cost. *Id.* The distinction under the CGL policy is that “loss of use of property” damages may be covered; “loss of property” damages, without physical injury, are not.

Here, the Ptaceks are not seeking to recover for any temporary replacement of seeds or soil. Rather, they are seeking damages to replace the profit they expected from their 2007 corn yield. These types of damages are not recoverable “loss of use” damages. Therefore, regardless of whether the Ptaceks suffered any loss of use, they have not sought to recover for any such loss.

B. No “loss of use” has been alleged.

Claims of less-than-anticipated crop or milk production are not loss-of-use claims, but rather, allege business risks. *Bloom Lake Farms*, 1995 Minn. App. LEXIS 1206, at *5-6. Here, the Ptaceks’ Complaint did not allege loss of use of their corn seeds, corn crop, or soil. It only alleged loss-of-anticipated crop yield.

Therefore, as in *Bloom Lake Farms*, the Court should find the Ptaceks alleged damage to be a business risk borne by Earthsoils.

Further, the Ptaceks did not suffer any “loss of use.” As illustrated by the types of damages recoverable, “ ‘[l]oss of use’ of property is different from ‘loss’ of property.” *Collin*, 26 Cal. Rptr. 2d at 408. Here, the Ptaceks still planted their corn seed and still used their fields. The corn seeds still germinated, grew, and produced a crop. The Ptaceks are not seeking to recover the rental value of temporary replacement property, but rather the full replacement value of the anticipated yield. Any damage caused by a loss of yield was permanent, not temporary.

The Ptaceks and Earthsoils may allege the Ptaceks suffered a loss of use of their soil during the 2007 growing season. But the Ptaceks are not seeking to recover for the value of renting other farmland. Further, a similar argument was made in *Green*, where it was alleged the insufficient application of fertilizer caused a “loss of use” of the soil because the soil lacked nutrients and weed control. 54 P.3d at 952. The Idaho Supreme Court concluded that that damage for “loss of soil” was excluded from coverage by Exclusion m. *Id.* at 953-54. Similarly here, if the Court finds a “loss of use” of the soil, it should also conclude that any damage for such “loss of use” falls within Exclusion m.

C. Any “loss-of-use” “property damage” is excluded by Exclusion m.

Exclusion m. of the Farm Bureau policy excludes coverage for:

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms. (A. App. 5.)

The liability coverage defines “your product” as:

- a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed by:
 - (1) You;
- “Your product” includes:
- a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”. (A. App. 14.)

“Exclusion (m)’s effect is to exclude damages for the loss of use of property – other than the insured’s product – that is less useful because of a defect in the insured’s product, except when the loss of use is caused by a sudden accident after the insured’s product is put to its intended use.” *Modern Equip. Co. v. Continental Western Ins. Co.*, 355 F.3d 1125, 1129 (8th Cir. 2004).

Preliminarily, it is undisputed that the damage here is not to “impaired property.” Rather the damage analyzed here – as required by the second definition of “property damage” – is for “property that has not been physically injured.”

- i. ***Any “loss-of-use” “property damage” “arises out of” “a defect, deficiency, [or] inadequacy” in “Earthsoils’ product.”***

As defined by the Farm Bureau policy, the fertilizer provided by Earthsoils to the Ptaceks was Earthsoils' "product" manufactured, sold, and/or distributed by Earthsoils. Earthsoils' "product" also includes "[w]arranties or representations made" about the "fitness, quality, durability, [or] performance" of the fertilizer.

Next, any loss of use" to the Ptaceks "arose out of" Earthsoils' product. The phrase "arising out of" – as used in Exclusion m – has been defined to mean " 'causally connected with' and not 'proximately caused by.' " *Bethke v. Assurance Co. of Am.*, No. C9-02-751, 2002 Minn. App. LEXIS 1293, at *4 (Minn. App. Nov. 26, 2002) (quoting *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 419 (Minn. 1997)) (attached as Ex. 120-22). " 'But for' causation satisfies the 'arising out of' requirement. *Id.* (quoting *Faber v. Roelofs*, 250 N.W.2d 817, 822 (Minn. 1977)). In *Bethke*, alleged "loss of use" was excluded by Exclusion m. because "all the claims in the underlying complaint [were] causally connected with appellants' failure to fulfill the terms of the agreement." *Id.* at *5. But for the agreement, and the failure to meet the agreement, the lawsuit would not have been brought. *Id.*

Here, as in *Bethke*, all of the claims alleged in the Ptaceks' Complaint are causally connected to a defect, deficiency, or inadequacy in the fertilizer sold by Earthsoils to the Ptaceks. If the fertilizer had performed as the Ptaceks allege Earthsoils represented that it would, the Ptaceks' lawsuit would not have been brought.

Finally, the alleged “loss of use” arose out of a “defect, deficiency, [or] inadequacy” in Earthsoils’ “product.” In *Madison Farmers*, the Minnesota Court of Appeals held that, if at trial, Krump could not show a physiological damage to the pheasants’ reproductive system that caused the reduced egg production, the claim for decreased egg production would fall within Exclusion m. No. C9-88-1620, 1989 Minn. App. LEXIS 106, at *5 (Minn. App. Feb. 7, 1989). The damage would have been caused only because “the feed did not perform as anticipated.” *Id.*

Here, as in *Madison Farmers*, the alleged diminished crop yield was caused only because “the fertilizer did not perform as anticipated.” Specifically, it is alleged that the fertilizer was of insufficient quality and quantity to produce the yield Earthsoils represented it would. Therefore, any “loss-of-use” “property damage” falls within Exclusion m.(1) because it “arises out of” “a defect, deficiency, [or] inadequacy” in “Earthsoils’ product.”

ii. Any “loss of use” “property damage” “arises out of” a “failure by [Earthsoils] to perform a contract or agreement in accordance with its terms.”

Any alleged “loss-of-use” “property damage” “arises out of” a “failure by [Earthsoils] to perform a contract or agreement in accordance with its terms.” In *Bethke*, the court alleged “loss of use” was excluded by Exclusion m. because “all the claims in the underlying complaint [were] causally connected with appellants’ failure to fulfill the terms of the agreement.” 2002 Minn. App. LEXIS 1293, at *5.

But for the agreement to build a house for the underlying complaintant, and the failure to meet that agreement, the lawsuit would not have been brought. *Id.*

Here, as in *Bethke*, all of the claims alleged in the Ptaceks' Complaint are causally connected with Earthsoils' failure to fulfill the terms of its agreement with the Ptaceks. But for Earthsoils' agreement to provide fertilizer to the Ptaceks of sufficient quality and quantity to allegedly produce a yield of 180-200 bushels of corn per acre – and its failure to meet this agreement – this lawsuit would not have been brought. Therefore, any “loss-of-use” “property damage” falls within Exclusion m.(2) because it “arises out of” a “failure by [Earthsoils] to perform a contract or agreement in accordance with its terms.”

D. The exception to Exclusion m. does not apply

An exception to Exclusion m. provides:

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use. (A. App. 5.)

For this exception to apply, there must be: (1) loss of use of (2) other property (3) caused by sudden and accidental physical injury to Earthsoils' product that (4) occurs after Earthsoils' product has been put to its intended use.

“[L]oss of use of other property” was analyzed in *Modern Equipment*, 355 F.2d at 1126. Nebraska Beef sued Modern after a storage-rack system designed by Modern to store Nebraska Beef product in its refrigerated warehouse broke. *Id.* Nebraska Beef replaced the broken parts with smaller racks, reducing the amount

of beef products that could be stored. *Id.* Nebraska Beef alleged damages of decreased cooler capacity and loss of sales. *Id.* The Court held Exclusion m applied because the reduced storage was caused by the loss of use of Modern's rack system. *Id.* at 1130-31. The exception to Exclusion m. did not apply because, even after the broken racks, Nebraska Beef did not lose any ability to use the warehouse as a freezer. *Id.* at 1130. "[T]he dimensions of the warehouse's functioning refrigerator and freezer space remained precisely the same." *Id.* at 1131. Any loss-of-use of the warehouse "was due to the loss of the use of Modern Equipment's rack system" and the rack system's failure to perform as promised. *Id.*

In contrast to *Modern Equipment*, in *Ellsworth-William Coop. Co. v. Un. Fire & Cas. Co.*, the court found the exception to Exclusion m. applied. 478 N.W.2d 77 (Iowa Ct. App. 1991). Meyerhoff constructed four storage bins and a conveyer system necessary to operate the bins. *Id.* at 78. The conveyer system was also necessary to operate three preexisting bins. *Id.* After grain had been loaded in the four bins constructed by Meyerhoff, it was discovered the bins were defective and needed to be repaired before any use. *Id.* The conveyer system was inoperable during the repairs, and so the preexisting three bins could not be used either. *Id.* at 78-79. Damage for the loss of use of the three preexisting bins was covered. *Id.* at 79. Ellsworth lost use of other property not constructed by Meyerhoff. *Id.* at 82. The loss of use was caused by injury to Ellsworth's product

– the four bins it had constructed. *Id.* The loss occurred after Meyerhoff had begun to use the four bins. *Id.*

Here, there has been no “loss of use” of other property. As argued above, the Ptaceks still used their corn seeds and their farm land. They still had a corn crop. Further, if there was any “loss of use,” it was not to “other property.” As in *Modern Equipment* – and unlike *Ellsworth* – the decreased yield was caused because Earthsoils’ fertilizer did not enhance the seeds as it was represented that it would. After the fertilizer was applied, the corn seeds and soil remained undamaged. It was not damage to the soil or to the corn seeds that caused the reduced yield. The yield was only reduced because the fertilizer purchased from Earthsoils’ did not perform as promised.

Further, there has been no sudden and accidental physical injury to Earthsoils’ fertilizer that occurred after the fertilizer was put to its intended use. There are no allegations of damage to the fertilizer after it left Earthsoils’ control and was used to fertilize the Ptaceks farmland.

The exception to Exclusion m. does not apply because there has been no loss of use of other property caused by sudden and accidental physical injury to Earthsoils’ product that occurred after Earthsoils’ product has been put to its intended use. Therefore, any “loss-of-use” “property damage” is excluded by Exclusion m.

V. EVEN IF A DUTY TO DEFEND EXISTS, FARM BUREAU IS NOT REQUIRED TO INDEMNIFY EARTHSOILS FOR ALL DAMAGES AWARDED AGAINST EARTHSOILS IN THE UNDERLYING ACTION BECAUSE THE PTACEKS' COMPLAINT ALLEGES CAUSES OF ACTION NOT COVERED BY FARM BUREAU'S CGL POLICY.

The insurer only has a duty to indemnify its insured for claims actually covered under the policy. *Reinsurance Ass'n v. Timmer*, 641 N.W.2d 302, 308 (Minn. App. 2002), *review denied* (Minn. May 14, 2002). Therefore, “to establish a duty to indemnify, the insured must prove that all claims alleged in the complaint fall within the policy coverage.” *Id.* “Otherwise, the possibility that the insured’s liability might ultimately be based solely on a non-covered claim presents genuine issues of material fact that preclude summary judgment.” *Id.* “[I]f any one of the claims alleged in the complaint falls outside of the policy coverage, the question of the duty to indemnify is not ripe and the district court’s judgment must be deferred until the decision in the underlying action is final.” *Id.*

In *Timmer*, the Court analyzed each cause of action – breach of warranty, fraud, and consumer fraud, including intentional and negligent misrepresentation – and analyzed whether there would be a duty to indemnify for damages arising out of each claim. *Id.* at 311-12. The district court’s holding that the insurer’s duty to indemnify would not extend to fraud, intentional misrepresentation, or knowing transfer of diseased animals was not appealed. *Id.* at 312. The Court of Appeals held the CGL policy did not cover breach of warranty claims. *Id.* at 312. The policy did cover claims for negligent misrepresentation and negligent violation of

the Consumer Fraud Act. *Id.* at 313, 315. Therefore, there was a duty to defend. *Id.* at 315. But this Court reversed the district court's holding that the insurer was also obligated to indemnify the insurer. *Id.* Because the complaint brought claims arguably not indemnifiable, the Court of Appeals held the district court should not have ruled on the issue of indemnification until the underlying action was determined. *Id.*

Here, the Ptaceks' Complaint alleged (1) breach of contract; (2) consumer misrepresentation; (3) negligence; (4) breach of expressed warranty; (5) breach of warranty and merchantability; and (6) breach of warranty of fitness. (*Id.*) Each cause of action alleged that Earthsoils had contracted to – or expressly and impliedly warranted that – that the fertilizer provided to the Ptaceks was of “sufficient quality and quantity to generate a corn yield of 180-200 bushes per acre.” The fertilizer did not produce the promised yields.

The district court held that Farm Bureau has a duty to indemnify Earthsoils for all liability imposed against Earthsoils in the underlying suit “because all of the Ptaceks claims are premised on the allegation that the fertilizer recommended and supplied by Earthsoils was of inferior quality and insufficient quantity, and caused decreased yields.” (A. Add. 7-8, Order at 7-8.)

Of the claims alleged against Earthsoils, all of them as plead, allege claims arguably not indemnifiable by a CGL policy. Therefore, as instructed in *Timmer*, the district court should have withheld a ruling on Farm Bureau's duty to indemnify until the underlying claim has been determined.

CONCLUSION

For the foregoing reasons, Farm Bureau Mutual Insurance Company respectfully requests that this Court reverse the district court's judgment and order granting summary judgment to Earthsoils and the Ptaceks and hold that (1) the Ptaceks' underlying lawsuit alleges only business risks not covered by Farm Bureau's CGL policy. Alternatively, there is no coverage because there is no "property damage." Less-than-anticipated crop yield is not "physical injury" to "tangible property." It is not "loss of use of property that is not physically injured." Further, "loss-of-use" damages, if any, would be excluded by Exclusion m. It is premature to hold that Farm Bureau is required to indemnify Earthsoils for all damages awarded against Earthsoils in the underlying lawsuit because the Ptaceks's Complaint alleges causes of action not covered under Farm Bureau's policy.

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Dated: 9-26-2011



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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record, pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate procedure hereby certifies that the attached brief has been prepared using Microsoft Word, Times New Roman, with a font size of 13 pt. and a word count of 9,812.

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