

NO. A11-693

STATE OF MINNESOTA
IN COURT OF APPEALS

Farm Bureau Mutual Insurance Company,

Appellant,

vs.

Earthsoils, Inc., Laverne Ptacek and Jeffrey S. Ptacek

Respondents,

Brief of Respondent Earthsoils, Inc.

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STATEMENT OF LEGAL ISSUES

1. Whether the Ptaceks' claims against Earthsoils, asserting damage by Earthsoils to their corn crop, are covered by Farm Bureau's Commercial General Liability Policy?

The district court held in the affirmative.

APPOSITE CASES:

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

Western World Insurance Co. v. H.D. Engineering Design & Erection Co., 419 N.W.2d 630 (Minn. App. 1988).

Ferrell v. West Bend Mut. Insur. Co., 393 F.3d 786 (8th Cir. 2005).

2. Whether the claims of the Ptaceks that Earthsoils damaged their corn crop is a "physical injury" to "tangible property?"

The district court held that the damages complained of were physical injury to tangible property.

APPOSITE CASES:

Ferrell v. West Bend Mut. Insur. Co., 393 F.3d 786 (8th Cir. 2005).

Triple U Enterprises v. New Hampshire Insur. Co., 576 F. Supp. 798 (D.S.D., 1985).

3. Whether Farm Bureau is required to indemnify Earthsoils for all damages awarded

against it in the underlying action?

The district court, granted summary judgment to Earthsoils and held that Farm Bureau must indemnify Earthsoils for all damages awarded against it in the underlying lawsuit. (Order at 7-8).

APPOSITE CASE:

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

STATEMENT OF THE CASE

Laverne Ptacek and Jeffery Ptacek, Steele County farmers, commenced the underlying action in early March, 2008 in a lawsuit entitled Ptacek v. Earthsoils, Inc. and Michael A. McCormack, Steele County District Court File No. 74-CV-08-3731.

Subsequently, in June, 2010, Farm Bureau commenced this action against Earthsoils, Inc. and the Ptaceks, seeking a declaratory judgment that it was not required to defend or indemnify Earthsoils, Inc.

Farm Bureau then moved for summary judgment, asserting that it was entitled to judgment as a matter of law on the insurance coverage dispute. On February 18, 2011, the Steele County District Court, Judge Joseph A. Bueltel denied the motion for summary judgment and granted judgment in favor of Defendant Earthsoils, Inc., ruling that there

was coverage.

Farm Bureau has appealed, asserting it is not required to defend or indemnify Earthsoils, Inc. The notice of appeal is dated April 15, 2011.

STATEMENT OF FACTS

The underlying Complaint alleges that in 2007, Respondents Laverne and Jeffrey Ptacek utilized Earthsoils, Inc., to analyze their farmland and make recommendations as to fertilizer to use for their corn crops, which Earthsoils sold to them. See Order and Memorandum of Law, *Farm Bureau Mutual Insurance Company v. Earthsoils, Inc., Laverne Ptacek, and Jeffrey Ptacek*, February 18, 2011, p. 3, A. Add. 3. Earthsoils advised the Ptaceks concerning how much nitrogen fertilizer they should use to yield 180-200 bushels of corn per acre. *Id.*

For the 2007 growing season, the Ptaceks purchased fertilizer from Earthsoils and applied it to their property in the amounts advised by Earthsoils. See Complaint, *Laverne W. Ptacek and Jeffrey S. Ptacek v. Earthsoils Inc. and Michael A. McCornack*, March 5, 2008, at ¶4, A. App. 17. In the fall of 2007, however, the Ptaceks' alleged a corn yield that was only half of what should have been produced based upon the preceding year. See Order, February 18, 2011, p. 3, A. Add. 3. In fact, the crop was largely brown and dry, and Earthsoils' owner, Michael McCornack, was surprised that there was any corn in the field at all. See Deposition of Michael McCornack, p. 39 ll. 4-13, A. App. 45.

Ptacek v. Earthsoils

On March 5, 2008, Respondents Laverne and Jeffrey Ptacek filed suit against Earthsoils and its owner, Michael McCornack, for damaging their 2007 corn crop (Steele County District Court File No. 74-CV-08-3731). In their complaint, the Ptaceks alleged causes of action including negligence. See Complaint, March 5, 2008, A. App. 16-23.

In their complaint, the Ptaceks claimed, among other allegations that the negligence of Earthsoils, caused in inadequate amount of fertilizer to be applied to be applied to their corn fields, and that the quality of fertilizer that Earthsoils supplied was insufficient to produce the yield that they anticipated for 2007. See Complaint, March 5, 2008, at ¶¶9-10, A. App. 17; and see Order, February 18, 2011, p. 3, A. Add. 3.

According to the Ptaceks, the loss yield in 2007 was estimated to be 113,608 bushels, which they allege amounted to lost sales of \$539,000.00 at a price of \$4.75 per bushel. See Complaint, March 5, 2008, at ¶12, A. App. 3.

Earthsoils tendered defense of the Ptaceks' lawsuit to Farm Bureau, and a non waiver agreement with a reservation of rights was executed on March 24, 2008. See Order, February 18, 2011, p. 3.

Discovery has been completed. The matter is scheduled for trial in early 2011.

Farm Bureau v. Ptaceks and Earthsoils

On June 15, 2010, Farm Bureau commenced this declaratory judgment action against the Ptaceks. See Complaint, *Farm Bureau Mutual Insurance Company v. Earthsoils, Inc., Laverne Ptacek and Jeffery Ptacek*, Steele County District Court File No.

74-CV-10-1417. (A. App. 25). Farm Bureau moved for summary judgment alleging that it had no duty to defend or indemnify Earthsoils under the CGL policy.

Respondents maintain that the alleged “lost yield” of the 2007 corn crop constituted “property damage” and not merely economic harm under the Farm Bureau CGL policy, and that, consequently, coverage under the policy should apply.

Respondents also allege that Exclusion “m” was not a bar to coverage under the policy since there was physical injury to the Ptaceks’ corn crop itself, which could not be repaired or replaced and was not the result of any breach of contract by Earthsoils.

The Farm Bureau policy provides, in pertinent part:

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.

See Policy, Paragraph 1A, A. App. 2. The policy also defines “property damage” as: “(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.” It also provides: “All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.” *Id.* at p. 13, A. App. 17.

The policy’s Exclusion m, Damage to Impaired Property or Property Not Physical

Injured, does not provide coverage for damage to “impaired property” or property that is not physically injured that causes a loss of use of the property if it can be restored to use by “repair, replacement, adjustment, or removal of the insured’s ‘product’ or ‘work,’” or “the fulfillment of the terms of a contract or agreement.” *Id.* at p. 4, A. App. 5.

The liability coverage also defines “your product” as: “any goods or products, other than real property, manufactured, sold, handled, distributed or disposed by: (1) You; (2) ‘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.

On February 18, 2011, A. Add. 1, the district court ruled against Farm Bureau and held that the Earthsoils’ recommendations for insufficient fertilizer quantity and supply of nitrogen deficient product, which resulted in decreased corn yields, constituted “property damage” as defined under Farm Bureau’s insurance agreement. *Order*, A. Add. 7.

The *Order* addressed whether Earthsoils’ recommendations regarding fertilizer quantity and the quality of the fertilizer supplied by Earthsoils, which caused decreased corn yields in 2007, constituted “property damage” under the CGL policy. See *Order*, February 18, 2011, p. 4, A. Add. 4.

In its *Order*, the district court denied Farm Bureau’s motion and granted summary judgment for Earthsoils and the Ptaceks. The Court found that there were no material issues of fact, since the interpretation and construction of an insurance policy is a

question of law in Minnesota. *Id.*, A. Add. 8.

The district court held that the provisions of the Farm Bureau policy were “straightforward and concise and [could not] be fairly described as ambiguous.” See *Id.*, Order, February 18, 2011, p. 5 fn. 1, A. Add. 5. The Court noted that the insured bears the burden of proving coverage under the policy, citing Travelers Indemnity Co. v. Bloomington Steel & Supply Co., 718 N.W.2d 888, 894 (Minn. 2006), and held: “Earthsoils has met its burden of establishing coverage under the insurance policy.” See Order, February 18, 2011, p. 7. The Court found that the misapplication of fertilizer and the alleged nitrogen deficiency constituted “‘physical injury’ to the corn crop and the soil.” *Id.*, Order, p. 7. The Court said: “[T]he alleged misapplication of fertilizer due to Earthsoils recommendations and supply of nitrogen-deficient product, leading to decreased yields, constitutes ‘property damage’” under the Farm Bureau policy. *Id.*

The Court also found that Exclusion m of the policy did not apply because “[t]he physically injured corn crops were not otherwise ‘impaired,’ so as to exclude coverage under exclusion (m) [...] because the fields and harvested corn cannot be restored to use by the ‘repair, replacement, adjustment, or removal’ of Earthsoils [sic] fertilizer.” *Id.*, Order, February 18, 2011, citing Commercial General Liability Form 11. The Court held that the Ptaceks’ claims for harm to their crops and the resulting damages are within the scope of coverage under the policy, and that Farm Bureau has a duty to defend Earthsoils in the lawsuit by the Ptaceks. *Id.*, Order, February 18, 2011, p. 7, A. Add. 7.

The Court said: “Farm Bureau’s duty to defend and duty to indemnify has been decided as a matter of law.” *Id.*, Order, February 18, 2011, p. 8, A. Add. 8.

Here, Farm Bureau appeals the Court’s Order of February 18, 2011, granting summary judgment for Earthsoils and the Ptaceks. See, Notice of Appeal, April 15, 2011.

STANDARD OF REVIEW

“On appeal from summary judgment, [the court] must determine whether there are any genuine issues of material fact, and whether the lower court erred in its application of the law.” Olmanson v. LeSueur County, 693 N.W.2d 876, 879 (Minn. 2005). The Minnesota Supreme Court has said: “On appeal from summary judgment, we review de novo whether ‘a genuine issue of material fact exists, and whether the district court erred in its application of the law.’” See Peterka v. Dennis, 764 N.W.2d 829, 832 (Minn. 2009), citing STAR Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002).

On appeal, the Courts “view the evidence in the light most favorable to the one against whom summary judgment was granted” (Peterka, *supra*, citing Offerdahl v. University of Minnesota Hospitals & Clinics, 426 N.W.2d 425, 427 (Minn. 1988)); however, the Court of Appeals “will affirm a district court’s grant of summary judgment if it can be sustained on any grounds.” Winkler v. Magnuson, 539 N.W.2d 821, 827 (Minn. App. 1995).

ARGUMENT

I. PRINCIPLES OF INSURANCE POLICY INTERPRETATION.

A. Burden of proof.

An insurer has a duty to defend and indemnify its insured St. Paul Fire & Marine Insurance Co. v. National Insurance, 496 N.W.2d 411, 415 (Minn. App. 1993), and the burden of proof concerning the duty to defend. Lanoue v. Fireman's Fund American Insurance Companies, 278 N.W.2d 49, 52 (Minn. 1979), reh'g denied (Minn., May 9, 1979). 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 Mutual Insurance Co. v. Judd Co., 380 N.W.2d 122, 126 (Minn. 1986).

Exclusions in insurance policies are “read narrowly against the insurer.” Atwater Creamery Co. v. Wester National Mutual Insurance Co., 366 N.W.2d 271 (Minn. 1985).

B. Duty to defend.

The duty to defend comes into play when the lawsuit is based on a claim that is covered under the insurance policy. Weis v. State Farm Mutual Automobile Insurance Co., 64 N.W.2d 366 (Minn. 1954). An insurer's duty to defend is broader than its duty to indemnify. Florists Mutual Insurance Co. v. Wagners Greenhouses, Inc., 535 F.Supp.2d 947, 950 (D. Minn. 2008). For an insurer to successfully show that it has no duty to defend, it must prove that all parts of the cause of action fall clearly outside the scope of

coverage of the insurance policy. See Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 165 (Minn. 1986). In Brown v. State Auto & Casualty Underwriters, 293 N.W.2d 822, 825-826 (Minn. 1980), the Court said that an insurer has a duty to defend if any part of the claim against the insured is arguably within the scope of coverage.

The extent of coverage under an insured's CGL policy "must be determined by the specific terms of the insurance contract." Wanzek Construction, Inc. v. Employers Insurance of Wausau, 679 N.W.2d 322 (Minn. 2004). An insurer can determine whether there is an "arguably covered" claim by comparing the policy language to the allegations of the underlying complaint. See Ross v. Briggs and Morgan, 540 N.W.2d 843, 847 (Minn. 1995). "[T]he words of the complaint need not precisely match the words of the policy, they must simply put the insurance company on notice of a claim within the policy coverage." Franklin v. Western National Mut. Ins. Co., 574 N.W.2d 405, 407 (Minn. 1998). When a claim alleges facts that, if proven, would support recovery against the insured under the policy, then a duty to defend exists. St. Paul Fire & Marine, *supra* at 415.

Once an insurer agrees to defend an insured under a reservation of rights, then that duty to defend lasts until it is established that no element of the claim is within the coverage under the policy. Franklin v. Western National Mutual Insurance Co., 558 N.W.2d 277, 280 (Minn. App. 1997). Once a duty to defend one claim is shown, the insurer has a duty to defend all claims, regardless of their merits. Wooddale Builders,

Inc. v. Maryland Casualty Co., 772 N.W.2d 283, 302 (Minn. 2006). If any claim against the insured is arguably covered by the terms of the policy, “the insurer must defend and reserve any arguments regarding coverage.” Brown, supra at 825, quoted in SCSC, supra, at 316.

II. THE CLAIMS OF PTACEKS AGAINST EARTHSOILS, ASSERTING DAMAGE BY EARTHSOILS TO THEIR CORN CROP, ARE COVERED BY FARM BUREAU’S COMMERCIAL GENERAL LIABILITY POLICY.

The claims by the Ptaceks against Earthsoils do not seek damages for a “business risk” which should be borne by Earthsoils as a cost of doing business. As pointed out by Farm Bureau, CGL policies are intended to cover tort liability 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).

The claims of the Ptaceks fall neatly within these parameters of the Farm Bureau insurance policy sold to Earthsoils. The Ptaceks are claiming damages to their corn crop for goods or work of the insured, (the fertilizer sold by Earthsoils), which has been relinquished and completed, and has since (allegedly) caused damage to property (to the corn crop), other than to the product (the fertilizer) itself.

In Western World Insurance Co. v. H.D. Engineering Design & Erection Co., 419 N.W.2d 630, 634 (Minn. App. 1988), cited by Appellant at p. 7 of its brief, the Court of

Appeals discussed Bor-Son Building Corporation v. Employers Commercial Union Insurance Company of America, 323 N.W.2d 58 (Minn. 1982). The Court in Western World said that under a GCL policy, “coverage is for tort liability for physical damage to others and not for contractual liability [...] for economic loss because the product or completed work is not that for which the damaged person bargained.” Id., quoting Bor-Son, at 63-64. In Bor-Son, the Court held that an insured risk is where “the accidental injury to property [...] substantially caused by [...] unworkmanlike performance exposes the contractor to almost limitless liabilities.” Id., at 64, quoting Weedo v. Stone-E Brick, Inc., 405 A.2d 788, 791 (N.J. 1979).

The Court stated in Western World, that: “Risks not covered by a general liability policy are those which arise out of breach of contract for failure to provide the type of work contemplated in the contract itself” (Id., at 634), and that “[b]usiness risks are those which the insured has ability to control.” Id. According to the Court, if damages claimed by the injured party are the cost of correcting the work itself, then the CGL policy will not cover the claim. Id., at 635.

In that case, the Court affirmed the District Court’s holding that the insurer had the duty to defend and indemnify because the insured was negligent in placing heavy materials on an only partially completed addition to a warehouse, which caused the structure to collapse. The Court said: “This is the type of risk general liability coverage is intended to insure against.” Western World, *supra*, at 636.

Here, as discussed more fully below, the Ptaceks have alleged claims for property damage that fall under the terms of the Farm Bureau policy so as to warrant coverage. They do not claim risks that are business risks, or damages arising out of any breach of contract by Earthsoils. Rather, as the Court held in its Order of February 18, 2011, p. 1: “As a matter of law, under the terms of policy nos. 1504952 and 7462104, Farm Bureau is obligated to defend Earthsoils against the claims raised by Laverne Ptacek and Jeffrey Ptacek in the case Ptacek v. Earthsoils, Inc., et al.” A.Add. 1.

In this case, the Ptaceks allege damages against Earthsoils which are clearly covered under the Commercial General Liability policy issued by Farm Bureau. CGL policies are intended, as admitted by Farm Bureau on page 13 of its brief, 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 Building Corp. v. Employers Commercial Union Insur. Co., 323 N.W.2d 58, 63 (Minn. 1982).

Here, the Ptaceks have alleged that the product sold by Earthsoils has damaged its corn crop. This is something that is clearly covered, and is not merely a “business risk, which is not covered by insurance.

The argument of Farm Bureau might make more sense if the Ptaceks were suing for damages of bad weather or something they had done to the crops themselves. However, the Ptaceks are claiming damages caused by application of Earthsoils’ product.

This is clearly not a “business risk” but a claim for property damage for which coverage is owed.

In support of its proposition, Farm Bureau cites the unpublished decision of North Branch Mut. Insur. Co. v. Bloom Lake Farms, Inc., unpublished (Minn. App. September 19, 1995).¹ That case is easily distinguishable because the damage in that case was to the herd that was sold, not to any other property of the buyer. Hence, it is clearly inapplicable to the facts of this case.

This case is much more similar to the case of Stark Liquid. Co. v. Florists’ Mut. Insur. Co., 243 S.W.2d 385 (Mo. App. 2007), where the court held that claims of negligent misrepresentation, negligent selling of trees were covered by CGL policies. The court stated it is well settled law that a liability policy covers injury caused by the negligence of the insured. In accord is Ferrell v. West Bend Mut. Insur. Co., 393 F.3d 786 (8th Cir. 2005), that held a CGL policy was required to cover damage to a tomato crop caused by the insured manufacturer’s defective plastic film. This is not a “business risk” that either the insured nor the buyer was required to carry themselves. This is, clearly, an

¹Of course, Minn. Stat. §480A.08, Subd. 3(b), provides that unpublished opinions of the Court of Appeals are not precedential. Dynamic Air, Inc. v. Block, 502 N.W.2d 796 (Minn. App. 1983), admonishes courts against utilizing unpublished decisions. It points out because the full fact situation is seldom set out in unpublished opinions, the danger of miscitation is great. The court declared, at 502 N.W.2d 801, that the Legislature has unequivocally provided that unpublished opinions are not precedential. The Court explained to both the “bench and bar” firmly that “neither the trial courts nor practitioners are to rely on unpublished opinions as binding precedent.”

insured loss.

In the underlying matter, the plaintiffs, Laverne Ptacek and Jeffrey Ptacek essentially allege injury to their corn crop by Earthsoils, Inc. While the complaint speaks of corn yields, corn yields, of course, arise as a result of damage to the individual corn stalks.

III. THE CLAIMS OF THE PTACEKS THAT EARTHSOILS DAMAGED THEIR CORN CROP IS A CLAIM OF “PHYSICAL INJURY” TO “TANGIBLE PROPERTY”.

Farm Bureau admits that the 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 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.” Farm Bureau asserts, however, that loss of anticipated yield does not in and of itself constitute “tangible property” or “physical injury.”

Minnesota Courts have held that mere economic loss is not “property damage” under CGL policies (see e.g. Tschimperle v. Aetna Cas. & Sur. Co., 529 NW 2d 421, 425 (Minn. App. 1995). However, tort liability is covered under such policies. Bor-Son, supra at 63. Notably, “[T]he words of the complaint need not precisely match the words of the policy, they must simply put the insurance company on notice of a claim within the

policy coverage.” Franklin, supra at 407.

In Bor-Son, the Court said: “The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable.” Id., at 63. In this case, the allegations of the Ptaceks implicated the goods, products, or work of the insured, after relinquished or completed, caused damage to property other than to the product or completed work itself. Under these terms, the insurance company must clearly cover the claims.

A. Less than anticipated yield caused by damage to the crop is “tangible property.”

The sum and substance of the defense by Farm Bureau against its obligation to defend or indemnify Earthsoils, Inc., in the underlying action is its argument that the insurance policy does not cover these types of claims. Farm Bureau repeatedly claims that the Ptaceks do not seek any damages for property damage sustained by the Ptaceks, but rather only to the “crop yield.”

This nearly exact argument was rejected by the Eighth Circuit Court of Appeals in Ferrell v. West Bend Mut. Insur. Co., 393 F.3d 786 (8th Cir. 2005). In that case, the court examined a CGL policy issued by West Bend, and the argument that the damages awarded in the underlying action were not covered by the insurance policy because they were not awarded on a count of “property damage.”

The policy, as in this case, covers “damages” that the insured is legally obligated to pay because of “property damage” that is caused by an “occurrence.” In the West Bend case, the underlying claim was between the tomato growers and high tech film which produced a plastic film meant to prevent soil from splashing onto the plants and causing blight. After the tomato plants were planted, the film began to deteriorate, leaving large holes in some spaces. The holes made it difficult to irrigate the plants properly, because the exposed soil dried out quickly while the covered areas became waterlogged. The holes also allowed rain water to splash dirt on the plants causing early blight. These problems resulted in stunted plants that produced less fruit, and the tomatoes that did grow were smaller than normal and suffered from sun burn, rain damage and cracked stems. As in this case, the insurance company argued that the damages were for “economic losses,” which are not covered by CGL policies, rather than for “covered property damage” resulting from “occurrences,” which are covered.

The Eighth Circuit Court of Appeals rejected this claim by the insurance company in Ferrell. The Court stated that the fact that damages are measured in terms of lost profits or diminished gross receipts does not change the fact that property was damaged. The measure of damages, as in this case, is distinct from whether there was “property damage” under the policy. Id., 393 F.3d at 795. The Court said we see nothing about the manner in which damages were calculated (or which are claimed in this case) which preclude a finding of “property damage” based on damage to the plants. The Court cited

an Arkansas decision, McCorkle Farms, Inc. v. Thompson, 79 Ark. App. 150, 84 S.W.3d 884, 892 (2002), for the proposition that in a negligence action, “the measure of damages to the crops is the value of the difference between what was actually produced and what would otherwise have been produced, less the difference between the cost of producing and gathering what was produced and the cost of producing and gathering an undamaged crop. Id.

In this case, while the complaint may describe the damage in terms of lost yield, that is really a measure of damages, not the type of harm which occurred. Regardless, it is clear that these damages are covered under the CGL policy.

Farm Bureau is absolutely wrong where it alleges that, as on page 15, the underlying “lawsuit alleges liability and damages arising only from the quality and quantity of fertilizer that Earthsoils provided to the Ptaceks.” There is absolutely no place in the complaint where this type of damage is complained. Rather, the Ptaceks are consistent in contending that their damage is a result from decreased crop production, that is physical damage to the corn which they assert was the result of actions of Earthsoils, Inc.

While Earthsoils denies liability in this case, it is clear that the complaint asserts damages which are covered by the insurance policy and for which a defense should be required, and, if necessary, indemnification provided.

In Triple U Enterprises v. New Hampshire Insur. Co., 576 F. Supp. 798 (D. S.D.

1985), the court held that the insurance company had a duty to defend the insured against a lawsuit and breached its duty by failing to do so. The court determined that damage to calves by an insured's sale of unfit breeding stock constituted "damages because of . . . physical injury to . . . tangible property" caused by "occurrence" within the meaning of the liability policy, a CGL policy, which were not excluded from coverage. Consequently, the insurance company had a duty to defend.

In Triple U Enterprises, the insurance company also contended that the measure of damages excluded damage to tangible property. The court rejected this and held that, for the sake of clarity, the measure of damages was diminution or depreciation of the value of the calves. But, the court held, more importantly, this measure is a measure of damages for "physical to tangible property." It cited a California decision on this very principal.

A complaint seeking to recover [economic losses] from an insured falls within the scope of insurance coverage only where these intangible economic losses provide "a measure of damages to physical property which is within the policy's coverage." Hogan v. Midland Nat'l Insur. Co., 3 Cal.3d 553, 562-63, 91 Cal. Rptr. 153, 476 P.2d 825; Geddes Inc. v. St. Paul Mercury Indem. Co., 63 Cal.2d 602, 609, 47 Cal. Rptr. 464, 407 P.2d 868.

The court held that, therefore, the type or measure of damages is not dispositive. It is injury to tangible property. In Triple U Enterprises, the court determined that the physical injury, a disease to tangible property, that the calves were born, for which the damage is measured by diminution in value was insured. 576 F. Supp. at 807.

In this case, the Ptaceks' corn crop was tangible property. See, St. Paul Fire & Marine v. Nat'l Computer, 490 N.W.2d 626, 631 (Minn. App. 1992). St. Paul Fire &

Marine defines “tangible” as “discernable by the touch.” In the underlying complaint, the Ptaceks allege Earthsoils’ nitrogen-deficient fertilizer caused a corn crop to be less than half as productive as it would have been had the fertilizer contained sufficient nitrogen. Complaint, ¶ 10, A. App. 17.. A reasonable inference from this allegation is that the fertilizer physically injured the corn crop, causing the crop to grow half as well as it would have had it received sufficient nitrogen.

In St. Paul Fire & Marine Insurance Co. v. National Computer, 490 N.W.2d 626, 631 (Minn. App. 1992), the Court of Appeals defined “tangible” as “discernible by touch.” In Triple U Enterprises, Inc. v. New Hampshire Insurance Co., 576 F.Supp. 798 (D.S.D. 1983), aff’d in part, vacated in part on other grounds, 766 F.2d 1278 (8th Cir. 1985), the Court said that “tangible” is “[h]aving or possessing physical form. Capable of being touched or seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial.” Id., at 805-806, citing Black’s Law Dictionary 1305 (5th Ed. 1979).

The fact that the ultimate injury suffered by the Ptaceks was financial does not preclude coverage. Consequential damages, including lost profits, are covered if they are causally related to an item of “property damage” which satisfies the policy’s definition. Federated Mut. Insur. Co. v. Concrete Units, 363 N.W.2d 751, 757 (Minn. 1985).

In General Insurance Company of America v. Gauger, 13 Wash. App. 928, 538 P.2d 563 (1975), cited by Appellant, barley seed sold by the insured supplier did not

produce the crop expected by the buyers. The parties settled and the supplier sought to have its damages indemnified by its insurer, claiming that the failure to produce a normal crop was “property damage” under its insurance policy. The insurer maintained that there was only an economic loss alleged by the buyers, which was excluded from coverage. The Court found that there was injury to tangible property since the wrong type of seed that was provided to the buyers resulted in injury to the wheat field and crop, which it said was tangible property under the policy. *Id.*, at 931.

In its Order for summary judgment, the District Court stated: “Corn plants and the soil they are planted in are ‘tangible property,’ as both have physical forms and characteristics.” Order, February 18, 2011, p. 5, A. Add. 5, citing Safeco Insurance Company v. D.E. Munroe, 165 Mont. 185 (1974). In Safeco, the Court held that wheat and a wheatfield were “tangible property” in a declaratory action by an insurance company against its insured, a seed salesman who sold the wrong seed to the plaintiff, which caused a crop yield that was less than anticipated. In its Order, the District Court noted that Black’s Law Dictionary defines “tangible property” as “property that has physical form and characteristics” (*Id.*, p. 5) and said that it was “beyond dispute that a Montana wheat field and the crop therein, is tangible property” that was damaged as a result of the insured’s conduct. *Id.*, at 192. It held that in this case, too, the Ptaceks’ corn plants and soil were tangible property. See Order, February 18, 2011.

Here, the Ptaceks’ claim damages to their corn crop, which was deficient as a

result of the fertilizer provided by Earthsoils. The damage was to the corn crop itself, which, like the wheat field and crop in General Insurance v. Gauger, supra, is tangible property, as the Court held in the summary judgment Order of February 18, 2011. Consequently, this Court should affirm and hold that less than anticipated crop yield is “tangible property” under the Farm Bureau policy and that coverage applies.

B. Damages for “Physical injury” to the corn crop are claimed.

Farm Bureau attempts to exclude cases issued before 1993, when CGL policies did not define “property damage” as “physical injury to tangible property.” A review of recent cases shows that allegations, such as made by the Ptaceks continue to be covered.

In arguing “physical injury” the insurance company cites another unpublished Minnesota decision, Madison Farmers Mill & Elevator Co. v. Mutual Service Cas. Insur. Co., unpublished (Minn. App. February 7, 1989), for the proposition that changing pheasant feed damaged egg production. The court did not find, as implied by Farm Bureau, that the case had anything to do with the revised definition of “property damage” in the standard CGL policy. It noted that the complaint did not directly allege any physical damage to the pheasants. The farmer alleged only that his “egg production was significantly reduced thereby resulting in damage to the Plaintiff . . .” He alleged that the decrease in egg production could be the result of damage to the bird’s reproductive system. The court noted that the duty to defend is initially based upon the complaint.

However, if the insurer is aware of facts or obligations outside the complaint, these

cannot be ignored. Crum v. Anchor Cas. Co., 264 Minn. 378, 385-86, 119 N.W.2d 703, 708-09 (1963). The court noted that it saw no good reason why an insurer should not be obligated to defend where it has knowledge outside the complaint that the facts, if established, will bring the cause of action within the insurance coverage. Consequently, the court determined that the trial court correctly held that MSI had a duty to defend Madison. The court noted that indemnification for any judgment the farmer must show breach of warranty and that the breach caused the loss. Physical damage must be shown. In the case of Western Heritage Insur. Co. v. Green, 137 Idaho 832, 54 P.3d 948 (2002), is miscited by Farm Bureau in several aspects. In Western Heritage, it was held that loss of use of soil in potato field following the policyholder's misapplication of chemicals was property damage under the policy. However, soil in the field was in the care, custody and control of policyholders, thus exclusion regarding property damage to the property in care, custody, or control of insured applied.

In this case, the property was not in the care, custody, or control of the insured, which is Earthsoils, not Ptaceks. Consequently, the case is wholly inapplicable.

In General Insurance v. Gauger, supra, the Court held that the poor crop yield was property damage. The Court said that the defendant's "contention that crop loss is not covered by the policy" failed because the defendant "confuse[d] the injury to tangible property with the nature of the damages flowing therefrom. Crop loss is merely a measure of the damage, albeit intangible, flowing from the injury to tangible property and

not, itself the injury.” Id., at 931. Likewise, in Triple U, supra, the Court cited the Rest. 2d Torts §7, which provides: “The words ‘physical harm’ are used throughout the Restatement of Torts to denote the physical impairment of...chattels.” Id., at 807.

Here, the corn and soil damaged by the fertilizer supplied by Earthsoils was discernable by touch and thus tangible property that was physically injured. The damage to the corn crop resulted from the injury to the tangible property itself and should be covered as “property damage” under the Farm Bureau policy. Since the lost profits claimed by the Ptaceks’ were caused by the “property damage” as a result of this physical injury, Farm Bureau cannot show that all parts of the Ptaceks’ claims fall outside the scope of coverage under the policy (see Atlantic Mutual Insur. Co. v. Judd Co., supra at 126) and should be required to defend and if necessary, indemnify, Earthsoils in the underlying action.

Appellant relies on Triple U in support of its argument; however, as discussed above, that case is distinguishable from this one. In Triple U, the insured sold a herd of buffalos to be bred, but the purchaser claimed that the herd was diseased and unable to breed. The Court found that the insurance policy covered damages for calves that were unable to breed and born after the sale was completed, but not for the claims related to the loss of anticipated calves and the risk of infection to other buffalo because these did not constitute property damage to “tangible property.” Id., at 806.

In North Branch Mutual Insurance Company v. Bloom Lake Farms, Incorporated,

1995 Minn. App. LEXIS 1206, cited by Appellant, the Court discussed Triple U, and noted that in Triple U, the only claim for which relief was granted to the insurance company was “for the dropped calves that were unfit for breeding.” Id., at *8. In Bloom Lake Farms, the claims were for reduced milk and calf production and decreased quality of the herd itself, “not the poor quality of any calves that were subsequently produced” as in Triple U. Id.

Here, like in Triple U, the Ptaceks’ claims are for property damage to “tangible property,” that is, the corn that grew after Earthsoils sold Its fertilizer which the Ptaceks applied to their soil. In Triple U, the Court allowed recover for damages for calves born after the sale by the insured to the buyer, which were found to be unable to breed. Likewise, here, the Ptaceks’ allegations related to corn grown after Earthsoils provided fertilizer, and unlike in Bloom Lake Farms, here the claims were not for a decreased quality of the fertilizer alone, but for the diminished corn yield, that is, a physical injury to the corn crop itself. Consequently, the claims of the Ptaceks should be covered as “property damage” under the Farm Bureau policy.

C. Measure of damages.

Farm Bureau seems to argue that loss of yield damages do not constitute damages when defined as tangible injury to physical property. As noted above, this circular argument has been thoroughly rejected.

In their complaint, the Ptaceks claim lost yield and sales as a result of Earthsoils’

conduct. See Complaint, March 5, 2008, ¶5, A. App 17. They allege that the nitrogen-deficient fertilizer provided by Earthsoils in an insufficient quantity caused their corn crop to be less than half of what it should have been if the fertilizer had contained the proper amount of nitrogen and been sufficiently applied. *Id.*, ¶10, A. App. 17.

Under these circumstances, the obligation of the insurance company is clear. It is obligated to defend and indemnify against these types of claims, regardless of how they are described.

In General Insurance v. Gauger, *supra*, the Court said that crop loss is a measure of the damages that result from injury to tangible property. *Id.*, at 931. In Safeco, *supra*, the Court held that the seed buyer's losses, including the costs for loss of use of property, replanting the crop and preparing the soil, were all losses resulting from the injury to tangible property suffered by the buyer. *Id.*, at 192. Further, the Court said that consequential damages, which include lost profits, are covered under a CGL policy if they are causally related to the "property damage" sustained, as defined under the policy. Federated Mutual Insurance Co. v. Concrete Units, 363 N.W.2d 751, 757 (Minn. 1985). Economic damage alone may not be covered under a policy, but only if there is no causal relationship between the damages and the "physical injury to tangible property" covered under the policy. See Tschimperle, *supra*.

In St. Paul Fire and Marine Insurance Co. v. Northern Grain Co., 365 F.2d 361, 368 (8th Cir, 1966). farmers claimed that wheat seed sold by the insured grain elevator was less

productive than anticipated. They sought damages for the diminished yield in their wheat crops. The Eighth Circuit implied a broad meaning to the term “property” and held that the diminished productivity of the wheat crop because of the deficient wheat seed constituted property damage under the policy. *Id.*, at 366. The Court said that the measure of the property damage was the diminution in the wheat crop’s yield. *Id.*

In Triple U, *supra*, the Court said that the measure of damages where there is a physical injury to tangible property, damage is measured by diminution in value. *Id.*, at 808.

In this case, the CGL policy plainly provides that Farm Bureau shall indemnify Earthsoils, its insured, for “sums that [Earthsoils] becomes legally obligated to pay as damages because of ‘property damage’ to which [the] insurance applies.” See Commercial General Liability Coverage Form, p. 1. Accordingly, Farm Bureau should be required to defend and subsequently indemnify Earthsoils in the underlying suit for the diminished value of the corn yield and related losses caused by and related to physical injury to the Ptaceks’ tangible property, that is, their corn crop.

IV. FARM BUREAU IS REQUIRED TO INDEMNIFY EARTHSOILS FOR DAMAGES AWARDED IN THE UNDERLYING ACTION.

An insurer has a duty to indemnify its insured for claims actually covered under its policy. Reinsurance Ass’n v. Timmer, 641 N.W.2d 302, 308 (Minn. App. 2002). As set forth above, Farm Bureau has a duty to defend Earthsoils in the underlying action, and

should damages be awarded against Earthsoils, to indemnify it against those damages.

The Ptaceks claim that their damages arose from lost profits caused by “property damage” under the insurance policy, which is covered under the policy as “damages because of [...] ‘property damage’ to which this insurance applies.” Accordingly, Farm Bureau should be required to defend and indemnify Earthsoils as the District Court ordered. See Order, February 18, 2011. A.Add. 1.

Further, Farm Bureau should be estopped from denying coverage under the doctrine of laches, which Earthsoils plead as an affirmative defense in its Answer in the underlying matter. See Answer of Earthsoils, ¶22. The equitable doctrine of laches prevents relief from being granted to any party that has delayed in its assertion of a legal right and “thereby prejudiced others and made it inequitable for the court to grant the relief requested.” State ex rel. Sviggum v. Hanson, 732 N.W.2d 312, 317 (Minn. App. 2007).

Farm Bureau knew of the terms of the policy at issue at the time the Ptaceks instituted their lawsuit, but still tendered defense in March 2008, but Farm Bureau waited over two years to seek a declaratory judgment that it had no duty to defend or indemnify Earthsoils against the Ptaceks’ claims.

Farm Bureau’s claim that it has no duty to defend or indemnify is unreasonable, untimely and prejudicial to Earthsoils. Earthsoils understood that Farm Bureau would defend and indemnify it in the underlying case, since Farm Bureau did just that for over two years. That nearly two years later, Farm Bureau decided to assert that there should be

no coverage under the terms of the policy should not warrant reversal of the Order of the District Court, which held that Farm Bureau must defend and indemnify Earthsoils.

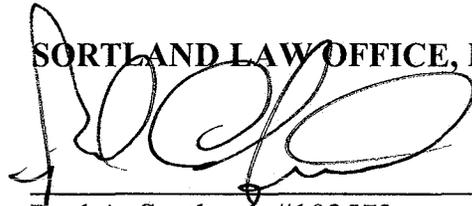
As noted above, the damages claimed by the Ptaceks are all claims for which coverage and insurance should be provided under the terms of the insurance contract with Farm Bureau. As such, the damages, if awarded, should be paid by Farm Bureau.

CONCLUSION

The Ptaceks seek damages in their Complaint which are clearly covered by the CGL policy issued by Farm Bureau. The law suit does not allege only business risks not covered. There is clearly “property damage” alleged by the plaintiffs. Loss of crop yield is a description of property damage sustained. The holding of the district court should be affirmed.

Dated this 31st day of October, 2011.

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