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Insurance - Commencement of Risk: Determining the Appropriate Trigger of Coverage under a First-Party Property Insurance Policy for Loss Due to Progressive Damage in North Dakota

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INSURANCE—COMMENCEMENT OF RISK: DETERMINING THE APPROPRIATE TRIGGER OF COVERAGE UNDER A FIRST-PARTY PROPERTY INSURANCE POLICY FOR LOSS DUE TO PROGRESSIVE DAMAGE IN NORTH DAKOTA

Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28 (N.D. 1995)

I. FACTS

In 1985, Plaintiff-Petitioner, Kief Farmers Cooperative Elevator Company (Kief), constructed a grain storage bin at its Butte facility.[1] However, the contractor installed the wall-side discharge flume hood incorrectly.[2] This particular flume system was used only once to load grain at the Butte facility on May 26, 1988.[3] Kief's professional engineer stated that this use immediately damaged the upper half of the bin's wall and roof.[4] This amount of damage to the bin increased with every subsequent load and unload cycle of the bin after the discharge flume's initial use.[5] Kief's engineer said the damage "would be difficult, if not impossible, . . . to observe or discover" by a non-expert.[6] The damage was brought to the attention of Kief's employees on May 15, 1992.[7] Kief subsequently incurred expenses repairing the bin and a loss of business income while the repairs were being done.[8]

Defendant-Respondent, Farmland Mutual Insurance Company (Farmland), provided one-year policies for property, casualty, and liability coverage to Kief continuously from July 1, 1984, through August 1, 1991.[9] Old Republic Insurance (Old Republic) covered

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1. Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 30 (N.D. 1995).
2. *Id.* A discharge flume hood is part of a system on a grain elevator used to load and unload unit trains. *See* Brief of Appellant at 2, *Kief Farmers Coop.* (No. 950011).
3. *Kief Farmers Coop.*, 534 N.W.2d at 30.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Kief Farmers Coop.*, 534 N.W.2d at 30.
9. Id. Kief's policy provided in part:

> h. Policy Period, *Coverage Territory*
> "Under this coverage section:
> "(1) *We cover loss* or damage commencing:
> "(a) During the policy period shown in the declarations; . . ."
> . . .
> "*We* will pay for the actual *loss* of Business Income *you* sustain due to the necessary suspension of *your operations* during the *period of restoration*. The suspension must be caused by direct physical *loss* of or damage to *property* covered under the *Real Property* and *Business Personal Property* and *Stock* coverage of this policy, caused by or resulting from any covered cause of *loss*."
> . . . The "period of restoration" is defined in part as:

certain specified losses at the Butte facility from August 1991 until August 1992.[10] On May 6, 1994, Kief sued Farmland and Old Republic, alleging both were jointly and severally liable for the damages to the grain bin.[11] Old Republic was dismissed from the action after settling with Kief, who proceeded against Farmland.[12] Kief then moved for partial summary judgment, asserting that the damage and loss which occurred during the Farmland policy periods were covered by the insurance contract.[13] Farmland resisted the motion, and a hearing was held in Burleigh County District Court.[14]

The trial court granted summary judgment in favor of Farmland.[15] The court concluded that the policy did not provide coverage for an accident or occurrence, which commenced during the policy period but did not yield loss or damage until after the coverage period had ended.[16] The trial court also ruled that the language of the contract was unambiguous and that, unless otherwise provided, coverage was triggered when the property damage becomes known to the owner.[17]

The North Dakota Supreme Court reversed and remanded, *holding* that summary judgment was inappropriate.[18] The court stated that when "[c]onstruing the policy as a whole, . . . a real but undiscovered loss or damage, proved in retrospect to have commenced during the policy period, [would] trigger[ ] coverage, irrespective of the time the loss or damage became manifest."[19]

II. LEGAL HISTORY

Although insurance law is theoretically a category of contract law, insurance law has developed to occupy a world of its own.[20] Furthermore, no area of insurance law creates more confusion for courts than

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"the period of time that:

"a. Begins with the date of direct physical *loss* or damage caused by or resulting from any Covered Cause of *Loss* at the described *premises*; and

"b. Ends on the date when the *property* at the described *premises* should be repaired, rebuilt or replaced with reasonable speed and similar quality.

. . .

"The expiration date of this policy will not cut short the *period of restoration*."

Id. at 31.

10. *Id.* at 30-31.

11. *Id.* at 31.

12. *Id.*

13. *Kief Farmers Coop.*, 534 N.W.2d at 31.

14. Brief of Appellee at 1, *Kief Farmers Coop.* (No. 95-0011).

15. *Kief Farmers Coop.*, 534 N.W.2d at 31.

16. *Id.*

17. *Id.* at 31.

18. *Id.* at 36.

19. *Id.*

20. Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373, 1375 (1995).

coverage disputes resulting from an insurer's policy language.[21] This confusion is only compounded by the differences in first-party and third-party property damage and by the existence of multiple insurers.[22]

Until *Kief Farmers Cooperative Elevator Co. v. Farmland Mutual Insurance Co.*,[23] there had been no first-party property damage cases dealing with the issue of progressive losses and successive insurance policies in North Dakota.[24] North Dakota has, however, dealt previously with issues of policy ambiguity.[25]

In 1971, the North Dakota Supreme Court in *Haugen v. Auto-Owners Insurance Co.*,[26] determined that by statute, insurance policies were to be interpreted as a whole.[27] This method of interpretation resolves ambiguities by giving meaning to all provisions if "reasonably practicable."[28] In *Mills v. Agrichemical Aviation, Inc.*,[29] a dispute arose after the plaintiffs' crops were damaged by defendant's aerial spraying.[30] The plaintiffs were insured by a policy which contained an exclusion for property damage arising from any substance discharged from any aircraft.[31] The court adopted the doctrine of "reasonable expectations" and extended coverage to the insured because of the ambiguity created by the exclusions.[32] However, no majority of the North Dakota Supreme Court since *Mills* has relied upon the doctrine of reasonable expectations for interpreting ambiguous policies.[33]

Generally, in North Dakota, the interpretation of an insurance policy is fully reviewable on appeal as a question of law.[34] In applying contract construction principles, courts will give effect to the mutual

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21. *Id.*
22. *Id.*
23. 534 N.W.2d 28 (N.D. 1995).
24. Brief of Appellee at 12, *Kief Farmers Coop.* (No. 95-0011).
25. *See, e.g.*, Haugen v. Auto-Owners Ins. Co., 191 N.W.2d 274 (N.D. 1971).
26. 191 N.W.2d 274 (N.D. 1971).
27. Haugen v. Auto-Owners Ins. Co., 191 N.W.2d 274, 280 (N.D. 1971) (citing N.D. CENT. CODE § 9-07-06 (1987)).
28. *Id. See* Kenneth J. Horner, Jr., Comment, *Insurance—Contracts—The Ambiguity in the Doctrine of Reasonable Expectations*, 62 N.D. L. REV. 423, 432 (1986) (stating that *Haugen* was the first surfacing of the doctrine of reasonable expectations in North Dakota). Under the doctrine of reasonable expectations, an insurance policy is interpreted to mean what a reasonable person in the insured's position would think it meant. *Haugen*, 191 N.W.2d at 279.
29. 250 N.W.2d 663 (N.D. 1977)
30. Mills v. Agrichemical Aviation, Inc., 250 N.W.2d 663, 666 (N.D. 1977).
31. *Id.* at 667.
32. *Id.* at 673-74.
33. Horner, *supra* note 28, at 433. *See also* Nunn v. Equitable Life Assurance Soc'y, 272 N.W.2d 780, 786 n.1 (N.D. 1978) (stating that the members of the "court have disagreed as to the applicability of the 'Doctrine of Reasonable Expectations'" when considering the status of insured).
34. *See, e.g.*, Hart Constr. Co. v. American Family Mut. Ins., 514 N.W.2d 384, 388 (N.D. 1994) (citing Miller v. Schwartz, 354 N.W.2d 685, 688 (N.D. 1984) and holding that the determination of a written contract's legal effect by its construction is a question of law for the court to decide).

intentions of the parties.[35] These intentions will be ascertained by courts through the specific language of the contract while giving effect to all of its provisions, if possible.[36]

Language in a policy which is unambiguous will be given its clear meaning.[37] However, ambiguities will be determined to exist when language can reasonably be construed to have at least two different meanings.[38] Courts will decide as a matter of law whether or not a contract is clear and unambiguous.[39]

Courts will consider whether a person who has no legal or insurance business training can clearly understand the policy language.[40] Because policies are generally drafted by insurance company experts, the company must assume the consequences of ambiguities and resulting confusion.[41] Therefore, in attempting to resolve ambiguities in an insurance contract, the equities are balanced in favor of the insured since insurance policies are adhesion contracts.[42]

The North Dakota Supreme Court previously dealt with an insurance coverage trigger case in *Friendship Homes, Inc. v. American States Insurance Cos.*[43] In *Friendship Homes*, the owner of a building damaged by fire attempted to recover from the fireplace installer's liability insurer for negligent installation.[44] The court rejected the owner's argument that the property damage occurred when the fireplace was negligently installed.[45] Instead, the court, in the context of third-party damage, found the policy clear and unambiguous and that the occurrence of the actual damage was the fire itself and not the wrongful act of negligent installation.[46]

In other jurisdictions, courts have developed several different theories to determine when loss or damage occurs within third-party

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35. *See* Continental Casualty Co. v. Kinsey, 499 N.W.2d 574, 577 (N.D. 1993) (citing N.D. CENT. CODE §§ 9-07-03, -04 (1987), and stating that the court will look at the mutual intentions of the parties at the time of contracting).

36. *Id.*

37. *See* State Farm Mut. Auto. Ins. Co. v. LaRoque, 486 N.W.2d 235, 237-38 (N.D. 1992) (citing N.D. CENT. CODE § 9-07-02).

38. *See, e.g.*, State Farm Fire and Casualty Co. v. Sigman, 508 N.W.2d 323, 325 (N.D. 1993) (finding language in an insurance policy ambiguous due to broad scope and a lack of express conditions).

39. *Id.* (citing *Continental Casualty Co.*, 499 N.W.2d at 577-78).

40. *See, e.g.*, Aid Ins. Servs., Inc. v. Geiger, 294 N.W.2d 411, 414-15 (N.D. 1980) (explaining how the doctrine of adhesion contracts is to be applied as tool for interpreting insurance policies).

41. *Id.*

42. *See, e.g.*, Northwest G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 181 (N.D. 1994) (finding that if uncertainty still exists after applying interpretation rules, the contract language "is to be construed most strongly against the party who drafted the contract").

43. 450 N.W.2d 778 (N.D. 1990).

44. Friendship Homes, Inc. v. American States Ins. Cos., 450 N.W.2d 778, 778 (N.D. 1990).

45. *Id.* at 780.

46. *Id.*

liability.[47] Problems of determining which event triggers coverage are compounded when the condition which causes the loss or damage takes place at a previous time, but the loss is manifested at a later time.[48]

One view is that coverage is triggered at the time of exposure: this is the "exposure" rule.[49] Under this theory, when manifestation is delayed, liability coverage is triggered at the first exposure to a harmful or injurious condition during the period that the policy is in effect.[50] The injury is considered to have occurred at the time of exposure to this harmful condition, even though the actual injury or loss occurs later.[51]

Another view is that coverage is triggered when an injury becomes manifest: this is the "manifestation" rule.[52] Under this rule, when a manifestation of injury is delayed, coverage is not triggered until the damage becomes known to the victim or property owner.[53] The policy which is in effect at the time "the loss or damage is discovered, or reasonably should [be] discovered," is triggered.[54] Because of this rule, the company which provides coverage at the time the damage becomes manifest pays the complete claim.[55]

The "continuous trigger" or "triple trigger" theory finds that delayed manifestation triggers coverage so "that insurance policies in effect during different time periods . . . all impose a duty to defend or indemnify."[56] This is often done to best represent the competing interests of both the insurer and insured.[57] This theory is actually a hybrid of the exposure, actual injury, and manifestation triggers.[58]

The final view is that coverage is triggered at the time of the injury—the "injury-in-fact" rule.[59] This theory states that when manifestation of injury is delayed, coverage is triggered when the actual

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47. *See* Martin J. McMahon, Annotation, *Event Triggering Liability Insurance Coverage as Occurring Within Period of Time Covered by Liability Insurance Policy Where Injury or Damage is Delay-Modern Cases*, 14 A.L.R. 5th 695 (1993 & Supp. 1995) (discussing cases involving issues of insurance coverage triggers). *See also* Industrial Steel Container Co. v. Firemen's Fund Ins. Co., 399 N.W.2d 156, 159 (Minn. Ct. App. 1987) (providing a summary of approaches to decide when damage or injury occurs).

48. Richmond, *supra* note 20, at 1429.

49. McMahon, *supra* note 47, § 3.

50. *Id.* This theory developed in asbestos litigation as these types of diseases are not discovered until many years after exposure to asbestos Richmond, *supra* note 20, at 1430. The exposure theory has since been used for general toxic torts and environmental litigation. *Id.*

51. McMahon, *supra* note 47, § 3.

52. *Id.* § 4.

53. *Id.*

54. Richmond, *supra* note 20, at 1431.

55. *Id.* at 1432.

56. McMahon, *supra* note 47, § 5; *see also* Richmond, *supra* note 20, at 1432 (discussing the "triple trigger" theory).

57. Richmond, *supra* note 20, at 1432.

58. *Id.*

59. McMahon, *supra* note 47, § 6.

property damage first occurred.[60] This theory triggers those policies in effect when the property damage or injury occurs, even if the loss is not discovered during the policy period.[61]

However, an important distinction must be made between first-party property insurance cases and third-party liability cases.[62] Third-party liability policies are predicated on tort negligence and cover more risks than first-party policies.[63] First-party property policies, conversely, turn on whether the policy language offers coverage for either an explicit or implicit claim.[64]

The leading case for the allocation of loss within the context of first-party property insurance is *Prudential-LMI Commercial Insurance v. Superior Court*.[65] The California Supreme Court in *Prudential-LMI* adopted the manifestation rule "because it provide[d] a well-defined standard for insurers and claimants."[66] Advocates of this rule argue that a well-defined standard is in the public interest because without the rule insurers could possibly contest every claim.[67] It is with this background the North Dakota Supreme Court decided *Kief*.

III. CASE ANALYSIS

Kief Farmers Cooperative Elevator Co. v. Farmland Mutual Insurance Co. was reviewed on an appeal from summary judgment.[68] As such, the North Dakota Supreme Court considered all facts in the light most favorable to Kief Farmers Cooperative.[69]

The court first stated that with property insurance, the occurrence and manifestation of damage is usually simultaneous, therefore avoiding this type of interpretation problem.[70] However, because the damage occurred well before its manifestation, the court stated there was an

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60. *Id.* *See* Sentinel Ins. Co. v. First Ins. Co., 875 P.2d 894, 917 (Haw. 1994) (finding that the injury-in-fact rule differs from the manifestation rule and the exposure rules only when the injury itself is not simultaneous with exposure or manifestation). *See also* Michael J. Brady & Kelly C. Franks, *Trigger of Coverage in Environmental Cases*, 45 FED'N INS. & CORP. COUNS. Q. 65, 73 (1994) (stating that the justification for the injury-in-fact rule is that it is most consistent with the language of the insurance policies).

61. Richmond, *supra* note 20, at 1430.

62. *Id.* at 1443.

63. *Id.* at 1443-44.

64. *Id.* at 1443.

65. Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230 (Cal. 1990). *See* Richmond, *supra* note 20, at 1444 (discussing the leading case on loss allocation for first-party property insurance). *See infra* note 82, and accompanying text (discussing *Prudential-LMI* further).

66. Richmond, *supra* note 20, at 1445.

67. *Id.*

68. Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 31 (N.D. 1995).

69. *Id.* at 31-32 (citing Roen Land Trust v. Frederick, 530 N.W.2d 355 (N.D. 1995)). *See also* N.D. R. CIV. P. 56(c).

70. *Kief Farmers Coop.*, 534 N.W.2d at 32.

ambiguity as to which event triggered policy coverage.[71] The court held that the contract in this factual situation was ambiguous, reversing the holding of the trial court.[72] The court stated that the ambiguity existed because both "Kief and Farmland . . . offered rational but different meanings for the policy coverage provision."[73] The court then turned to interpreting the ambiguous language.[74]

Although the policy provided by Farmland included first-party property insurance coverage,[75] the court looked to what other jurisdictions have done in the context of third-party liability insurance to resolve the trigger coverage ambiguity.[76] The court looked to the specific language of each of the coverage-trigger theories in the third-party liability context to lend guidance in interpreting the first-party property insurance policy.[77]

Kief asserted that the court had already adopted the injury-in-fact rule in *Friendship Homes, Inc. v. American States Insurance Cos.*[78] However, the court did not accept the argument because *Friendship Homes* was materially different.[79] The court stated that unlike *Kief*, *Friendship Homes* involved a third-party liability policy, and there was no delay in manifestation of the damage or loss.[80]

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71. *Id.*

72. *Id. See, e.g.*, Corwin Chrysler-Plymouth Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 642 (N.D. 1979) (holding that a fidelity loss policy was ambiguous as to determining when the loss occurred through employee embezzlement). Farmland attempted to prevent Kief from raising this ambiguity issue on appeal because Kief did not claim it was ambiguous in the trial court. Brief for Appellee at 4, *Kief Farmers Coop.* (No. 950011). However, the Supreme Court rejected this argument, finding that where "both parties to a contract contend [at trial] that [the] contract provisions are unambiguous, . . . the parties together necessarily raise an ambiguity issue." *Kief Farmers Coop.*, 534 N.W.2d at 32, n.2 (citing Johnson v. Mineral Estate, Inc., 343 N.W.2d 778 (N.D. 1984)). Thus, the court determined that the parties sufficiently raised the issue to preserve it on appeal. *Id.*

73. *Kief Farmers Coop.*, 534 N.W.2d at 32.

74. *Id.* at 35. The ambiguity largely revolved around the policy language which covered "loss or damage commencing . . . [d]uring the policy period." *Id.*

75. *Id.* at 30. A first-party property insurance contract has been defined as one which provides coverage for an insured's loss or damage to property where upon the happening of an insured risk, the insurer will pay money to the insured. *Id.* at 33 n.4 (citing Sentinel Ins. Co. v. First Ins. Co., 875 P.2d 894, 906 (Haw. 1994)).

76. *Id.* at 32-33. A third-party liability insurance policy is a policy which provides coverage for the insured's liability to another where the insurer provides a contractual obligation to pay judgments against the insured for the insured's negligence. *Id.* at 32-33 n.3 (citing *Sentinel Ins. Co.*, 875 P.2d at 906).

77. *Id.* at 33.

78. 450 N.W.2d 778, 779 (N.D. 1990) (construing an occurrence liability policy which defined damage or injury to property as to that which occurs during the policy period). *See* Brief for Appellant at 20, *Kief Farmers Coop.* (No. 950011) (discussing the applicability of the injury-in-fact rule in *Friendship Homes*).

79. *Kief Farmers Coop.*, 534 N.W.2d at 33.

80. *Id.*

Farmland urged the court to adopt the California Supreme Court's approach.[81] This would apply the manifestation rule to first-party property damage cases dealing with progressive losses and successive insurance policies.[82] The North Dakota Supreme Court refused, however, to adopt the manifestation rule as set forth in *Prudential-LMI*, based on the following reasons.[83]

First, the court found that while *Prudential-LMI* may provide more certainty within the insurance industry, it refused to believe that the manifestation rule was an industry-wide standard.[84] Second, the court further stated that it did not believe the benefits of certainty always outweigh the interests of justice and the rights of the party to a contract.[85]

The court thus concluded that in order to resolve ambiguities, policy language and the nature of the loss or damage must be examined to determine the appropriate trigger.[86] The court went on to find that a review of the entire insurance contract between Kief and Farmland not only highlighted the ambiguity, but also helped resolve it.[87]

The court noted that the insurance contract at issue covered "loss or damage commencing . . . [d]uring the policy period."[88] The court found no discovery-type language, language which placed conditions or language which connected property loss or damage to discovery of such damage.[89] In fact, the policy language did "not even hint that property

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81. Brief of Appellee at 10, *Kief Farmers Coop.* (No. 950011) (citing Prudential-LMI Ins. v. Superior Court, 798 P.2d 1230, 1243 (1990), which created fixed liability for first-party property losses solely on the insurer whose policy was in force at the time the progressive damage became appreciable or manifest).

82. *Id.* In *Prudential-LMI*, the California Supreme Court stated that the manifestation rule would promote certainty in the insurance industry, lower costs to the insured, and would enable the insured to reasonably expect their present carrier to provide coverage. 798 P.2d at 1246-47. *Prudential-LMI* involved an apartment building owner who sustained progressive property damage when the insured discovered an extensive crack in the building's foundation. *Id.* at 1232-33. The crack could have occurred over several policy periods, so the insured sued four companies which had insured the building over a fifteen year period. *Id.* at 1234. One of the companies, Prudential, provided coverage for a period prior to the manifestation of the damage. *Id.* The court found in favor of Prudential by limiting liability to the carrier which insured the property when the damage was manifest. *Id.* at 1232.

83. *Kief Farmers Coop.*, 534 N.W.2d at 35.

84. *Id.*

85. *Id. See* Savoy Medical Supply Co. v. F & H Mfg. Corp., 776 F. Supp. 703, 710 (E.D.N.Y. 1991) (holding that justice warranted the application of the injury-in-fact rule, despite the argument that use of the manifestation rule may decrease administrative costs).

86. *Kief Farmers Coop.*, 534 N.W.2d at 35. *See* Leafland Group-II, Montgomery Towers Ltd. Partnership v. Insurance Co. of N. Am., 881 P.2d 26, 28 (N.M. 1994) (using policy language to find that a diminution in a property's value due to asbestos was not a covered loss within the policy's insuring clause); Villella v. Public Employees Mut. Ins. Co., 725 P.2d 957, 958 (Wash. 1986) (finding that a homeowner's policy did not cover damage from a foundation failure occurring after the policy period).

87. *Kief Farmers Coop.*, 534 N.W.2d at 35.

88. *Id.*

89. *Id. See* American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983) (holding that the unambiguous intention of occurrence language requires the insured

damage must be known to anyone in order to trigger coverage, or that property damage did not exist unless someone knew about it."[90]

Because discovery language was absent in the policy's first-party property coverage section, and discovery language was present in a section concerning employee dishonesty, the court found that Farmland did know how to limit coverage.[91] Therefore, the court stated that discovery was not a prerequisite to the occurrence of a loss or damage under the property insurance policy.[92]

The court found that the language used for first-party property coverage closely resembled occurrence policy language in a third-party liability context.[93] The court further doubted "that a person not trained in the law or in the insurance business would construe" the policy language to require a manifestation trigger.[94] Thus, the court refused to rewrite the contract to exclude coverage based on the manifestation rule.[95]

The court concluded that under this policy, a real but undiscovered loss or damage, which commenced during the policy period, triggered coverage regardless of the time the loss or damage was discovered or manifested.[96] The court reversed the trial court's decision and held that the evidence suggested that some form of damage to the grain bin began

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to establish, on a case-by-case basis, the injury-in-fact to trigger occurrence liability), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984); SCSC Corp. v. Allied Mut. Ins. Co., 515 N.W.2d 588, 596 (Minn. Ct. App. 1994) (finding that dry-cleaning chemicals which damaged groundwater triggered coverage when the damage occurred, not when the damage was later discovered), *aff'd in part, rev'd in part on other grounds*, 533 N.W.2d 603 (Minn. 1995).

90. *Kief Farmers Coop.*, 534 N.W.2d at 35. *See* Dow Chem. Co. v. Associated Indem. Corp., 724 F. Supp. 474, 486 (E.D. Mich. 1989) (holding that where the manufacturer's general liability policy unambiguously dictated application of an injury-in-fact coverage trigger, the court was forced to enforce the contract as written under Michigan law); United States Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226, 1253-54 (Ill. App. Ct. 1994) (finding that a property owner's asbestos discovery was an inappropriate trigger because of a lack of requisite language in the occurrence policies).

91. *Kief Farmers Coop.*, 534 N.W.2d at 35-36. The other portion of the policy which was compared regarded "Crime Insurance relating to *Employee* Dishonesty." *Id.* at 36. This section provided that loss was "covered only if discovered not later than one year from the end of the policy period, and then th[e] insurance shall apply only to *loss* sustained during the policy period." *Id.*

92. *Id.* at 36.

93. *Id.* An occurrence policy coverage begins when the insured event occurs during the policy period, and coverage is generally not affected by when a claim is made. *Id.* (citing R. LONG, THE LAW OF LIABILITY INSURANCE § 1.08[4] (1995)). However, a "claims made" or "discovery" policy allows coverage only where an insured's claim is made to the insurer during this period. *Id.* This is significant because a "claims made" or "discovery" policy is designed to limit the liabilities of an insurance company. *Id.* (citing Sentinel Ins. Co. v. First Ins. Co., 875 P.2d 894, 918 (Haw. 1994)). The result is lower premiums for the insured than are charged for "occurrence" policy. *Id.*

94. *Id.*

95. *Id.* This reluctance of the court was based partly on an awareness that interpreting an "occurrence" policy to provide coverage only when the loss or injury has manifested, transforms the more expensive occurrence type policy into a less expensive "claims made or discovery" type policy. *Id.*

96. *Kief Farmers Coop.*, 534 N.W.2d at 36.

while the Farmland policies were in effect.[97] Summary judgment in favor of Farmland was therefore inappropriate.[98]

IV. IMPACT

In North Dakota, a court considering a first-party property damage case, where there is progressive damage, will first look to the specific policy language to determine what event, if any, should trigger coverage. If the policy is then found to be ambiguous on this issue, rather than applying a bright-line rule as have other jurisdictions, the court will look to the language of the entire policy and nature of the loss or damage to determine the appropriate coverage trigger.[99]

This approach will create uncertainty for some insurers within North Dakota. For those insurers who have or have had policies containing similar ambiguous language regarding when progressive damage coverage commences, liability could be extended beyond the expiration date of the policy. Because of the possibility of claims being brought after coverage has supposedly ended, insurers may not be able to predict risk or exposure to liability accurately in establishing necessary reserves.[100] This raises questions of how to calculate reserves and the cost of policies for North Dakota consumers.

This possible extended liability for insurers in North Dakota may not yet be very substantial because occurrence and manifestation of a loss or injury generally occur at the same time. The issue in *Kief*, thus, does not often arise. However, if the amount of environmental litigation does increase in North Dakota, more situations will arise where manifestation and occurrence are separated. North Dakota may someday also seek, as did California, a bright-line rule for certainty in this first-party context.

At the very least, insurance companies wishing to avoid this ambiguity in future first-party property policies will need to add language specifically defining what event triggers coverage for progressive damage, occurrence, or manifestation.

Aaron J. Dorrheim

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97. *Id.*
98. *Id.*
99. *Id.* at 35-36.
100. *See* Sentinel Ins. Co. v. First Ins. Co., 875 P.2d 894, 918 (Haw. 1994) (discussing public policy reasons for certainty in determining possible claims).