DID YOU READ THE POLICY?:

THE KNOWN-LOSS AMENDMENT TO THE CGL INSURING PROVISION

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Most members of the defense bar have at least a passing familiarity with the standard CGL insurance policy forms drafted by Insurance Services Office, Inc., also known as ISO. From pharmaceutical product liability actions involving bodily injuries to construction defect lawsuits involving property damage, these commercial general liability policy forms dictate which insurer or insurers, if any, provide defense and indemnity coverage for the loss. And, for those members of the defense bar specializing in insurance coverage litigation, these policies provide the bedrock for their analysis in cases involving bodily injury or property damage.

It is surprising, then, that a significant change to the standard CGL insuring agreement more than a decade ago has attracted so little attention, either in the insurance defense and coverage bars or the Minnesota courts. This important amendment, which added what frequently is referred to as the "known-loss" or "known- and continuing-loss" provision, has two key components that affect almost all "continuing loss" cases—i.e., those in which the alleged bodily injury or property damage occurred over a period of time that spans multiple policy periods. This new CGL policy language:

1. Incorporates known-loss and loss-in-progress principles into the policy by expressly excluding coverage for bodily injury or property damage known by the insured to have occurred or to have begun to occur before the policy period, and incorporates two objective criteria for when the insured is deemed to have known about the bodily injury or property damage ("the known-loss element"); and
2. Extends coverage for bodily injury or property damage occurring after the end of the policy period if that injury or damage is a "continuation, change or resumption" of bodily injury or property damage that took place during the policy period, as long as the insured did not know that it had occurred or commenced before the policy took effect ("the subsequent-damage element").

These elements effect significant changes in Minnesota coverage law. The known-loss element supplants and/or supplements the common-law known-loss doctrine, which, as interpreted by Minnesota courts, is fraud-based and more restrictive than the contractual known-loss provision. And the subsequent-damage element, for the first time, provides coverage for bodily injury or property damage that occurs *after the policy period has expired* in continuing injury or damage situations, provided that the other conditions are met. Both changes accordingly will affect insurers' rights and duties vis-à-vis their insured and other insurers on the risk.

The Minnesota appellate courts addressed this new CGL language for the first time just a few months ago, when the Minnesota Court of Appeals held that there was no coverage for specified property damage in a construction defect case due to the known-loss provision. See *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438 (Minn. Ct. App. 2013). Other key decisions will certainly follow, given the importance of the issues and the frequency with which they occur in both bodily injury and property damage litigation.

1. THE CGL FORM

ISO is a non-profit trade association that provides drafting services to about 3,000 property or casualty insurers across the country. § 185 ISO (Insurance Services Office, Inc.), 2 Cal. Ins. Law Dictionary & Desk Ref. (2013 ed.). After being approved by the member insurers, ISO forms are

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submitted to state regulatory agencies for review and, when required, approval. *Id.* Most liability insurers use the basic ISO forms, either as drafted or as the foundation for their own policy language. *Id.*

The ISO commercial general liability coverage form (CG 00 01) is the backbone of liability insurance in the United States. See Randy J. Maniloff, Montrose Endorsement: Shining a light on the "Known Loss Doctrine," *FC&S Online*, Nov. 2003, www.nationalunderwriterpc.com/Pages/default.aspx. Given its widespread use, and the fact that the form is not frequently altered, any change in the policy language is likely to have significant consequences. *Id.* The effect of the known- and continuing-injury provision first included in the CG 00 01 form in October 2001, however, is even more significant than most.

2. THE KNOWN- AND CONTINUING-LOSS PROVISION

The October 2001 CGL policy revision added paragraphs (b)(3), (c) and (d) to the Coverage A Bodily Injury and Property Damage Liability insuring agreement. In addition to the existing requirements that the bodily injury or property damage be caused by an occurrence, and that it occur during the policy period, the insuring provision now also provides:

b. This insurance applies to "bodily injury" and "property damage" only if:

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   (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

   (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
   (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
   (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

See Commercial General Liability Policy, ISO Form CG 00 01 10 01. According to a January 7, 1999 circular, ISO developed the known-loss provision in response to the California Supreme Court decision in *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). Randy J. Maniloff, Montrose Endorsement, *supra*. In that case, the court held that the known-loss doctrine/loss-in-progress rule did not apply in continuous injury or damage cases as long as there was any uncertainty about the damage or injury that might result during the policy period or the insured's liability for that injury or damage. *Id.* The purpose of the known-loss provision, according to ISO, was to clarify that "the insurance never, under any circumstances, responds to injury or damage that is known by the insured prior to the policy period." *Id.*, (quoting Introduction of Various New and Revised Commercial General Liability Endorsement, ISO Commercial General Liability Forms Filing GL-99-O99FO, at 3). What ISO clearly is trying to do here, as one commentator has noted, is ensure that the policy on the risk when the insured first obtains knowledge that the bodily injury or property damage has occurred, or begun to occur, is the last policy that can be triggered to provide coverage. *Id.*

3. THE CONTRACTUAL KNOWN-LOSS PROVISION AND THE COMMON-LAW KNOWN-LOSS DOCTRINE

Paragraphs (b)(3) and (c) frequently are referred to as the "known-loss" provisions, borrowing their nomenclature from their commonlaw cousin, the "known-loss doctrine." But while these concepts are related, the known-loss provisions are somewhat broader than the common-law known-loss doctrine, particularly in jurisdictions like Minnesota, where the common-law known-loss doctrine is a fraud-based defense.

A. The known-loss doctrine

The known-loss doctrine is a common law defense arising from the fortuity element inherent in insurance contracts. Insurance is procured not to cover loss, but to cover the risk of loss. *Hooper v. Zurich American Ins. Co.*, 552 N.W.2d 31 (Minn. Ct. App. 1996)(citing *Waseca Mut. Ins. Co. v. Noska*, 331 N. W. 2d 917, 925 n. 6 (Minn. 1983)); *Oster v. Riley*, 276 Minn. 274, 287, 150 N.W.2d 43, 52 (1967)(Otis, J. dissenting). If the loss already has occurred, there is no transfer of "risk" and the insurance fails in its essential purpose. *See Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 737 (Minn. 1997). And, since carriers intend to insure against fortuities, not certainties, an insured who

procures coverage for a known loss is effecting a fraud on the insurance company. *See Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 10 F. Supp. 2d 771, 789 (E.D. Mich. 1998); *Domtar*, 563 N.W.2d. at 373 (where the loss occurred prior to the application for insurance, the insured's knowledge would be nearly conclusive evidence of bad faith)(citing *Waseca Mut. Ins. Co. v. Noska,* 331 N.W.2d 917, 924-25 n.6 (Minn. 1983)); *Franklin v. Carpenter,* 309 Minn. 419, 424, 244 N.W.2d 492, 496 (1976)(policy would be void if the insured attempted to retroactively insure a known loss at the time of the application; the rationale for the rule is that the disclosure of the accident is material to the risk assumed by the insurer).

Minnesota first recognized the known-loss doctrine in the context of back-dated policies in which the insured knew the loss had occurred (e.g., a fire), but failed to advise the insurer at the time of the application. See, e.g., *Waseca Mut. Ins. Co. v. Noska,* 331 N.W.2d 917, 924-25 (Minn. 1983) and cases cited therein. In *Nippolt v. Fireman's Ins. Co. of Chicago,* 57 Minn. 275, 59 N.W. 191 (1894), for example, the loss occurred a few days after an earlier policy expired. *See Waseca Mut.*, 331 N.W.2d at 925, citing *Nippolt*, 59 N.W. at 192. The insured then contacted the agent, who issued a renewal policy antedated to the expiration of the old policy, without being advised by the insured that the loss had occurred in the interim. *Id.* The Minnesota Supreme Court stated:

> *It was a fraud on [insured's] part…to enter into such a contract after the loss, knowing [about the] loss and failing to disclose it to the other party to the contract, whom he knew was ignorant of it, and thereby procure that other party to insure him against a loss which had already occurred.*

Id., citing *Nippolt*, 57 Minn. at 278, 59 N.W. at 192. While the courts subsequently expanded the known-loss doctrine to include non-backdated policies, the "known loss" doctrine remains a "fraud-based defense" under Minnesota law. *Domtar*, 563 N.W.2d at 737.

As a "fraud-based defense," the known-loss doctrine requires proof that the insured withheld material information from the insurer concerning the existence of bodily injury or property damage for which the insured subsequently obtained insurance. *Id.; Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 769 (Minn. Ct. App. 1999). The Minnesota courts accordingly have applied the known-loss doctrine to preclude coverage when the insured procured its policy after having been sued, *Hooper*, 552 N.W.2d at 34-35, and after having received notice of a claim for property damage to a particular residence. *See Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 296 n.12, 13 (Minn. 2006). The key Minnesota cases regarding the known-loss doctrine in liability insurance situations are *Domtar, Wooddale Builders and Gopher Oil.*

1. *Domtar*

In 1991, Domtar sued various insurers on the risk between 1956 and 1970 seeking coverage for environmental damage and groundwater contamination arising from Domtar's operation of a tar-refining plant from 1924-29 and 1934-48. *Domtar,* 563 N.W.2d at 728. The plant was dismantled and the property sold in 1955. *Id.* at 728-29. The parties did not dispute that pollution was discharged from the plant before 1955. *Id.* at 729.

Pollution was detected in 1979 and the MPCA began a remedial investigation of the site in 1987. The MPCA subsequently notified Domtar that it had been identified as a potentially-responsible party and issued it a Request for Response Action in March 1991. *Id.* at 729. Continental's policies apparently insured Domtar from February 18, 1965 to December 31, 1970. Continental argued that the known-loss doctrine precluded coverage. *Id.* at 731, 737.

The Minnesota Supreme Court saw no evidence in the record supporting a known-loss defense. The known-loss doctrine, it noted, was a fraud-based defense. *Id.* at 737. As such, it required proof that Domtar withheld material information from the insurer concerning the existence of property damage, including the initiation or continuation of soil or groundwater contamination, for which the insured subsequently obtained insurance. *Id.* The court noted:

> *The insured need not know of the exact nature or extent of the contamination, but there must be evidence that the insured knew of the property damage when it purchased insurance that would otherwise cover the loss.*

Id. Since there was no evidence in the record indicating that Domtar knew about the property damage for which coverage was being sought at the time it procured the policies, and withheld that information from Continental, the known-loss doctrine did not preclude coverage. *Id.*

2. *Wooddale Builders*

Wooddale Builders was a construction defect case that, like *Domtar*, involved allegations that the property damage at issue took place over an extended period of time. *See Wooddale,* 722 N.W.2d at 288-89. Wooddale Builders was a general contractor that constructed 60 single-family homes between 1991 and 1999. In late 2000, it began receiving claims that its construction had been defective; among other things, the homeowners alleged that leaky windows, inadequate flashing and other defects allowed water to intrude into the homes. *Id.* at 288. Wooddale subsequently sued the five carriers who had insured it from November 1990 to November 2002, seeking coverage for the homeowners' claims. *Id.* at 289. The parties agreed that damages should be allocated pro-rata by time on the risk, but disputed the appropriate end-date for the allocation period. *Id.*

The *Wooddale* court noted that the known-loss and loss-in-progress doctrines bar an insured from insuring against

an ongoing risk of which the insured already had notice. *Id.* It did not discuss the common-law doctrines or their underpinnings in any great detail, but held in summary fashion:

> *The practical effect of the policy language excluding expected damage and the rationale behind the known-loss/loss-in-progress doctrine is that no additional insurance policies are triggered by continuing damage to homes for which claims had been made before those policies took effect.*

Id. at 293.

3. *Gopher Oil*

In *Gopher Oil Co. v. American Hardware Mut. Ins. Co.*, 588 N.W.2d 756 (Minn. Ct. App. 1999), the Minnesota Court of Appeals addressed the known-loss doctrine in another environmental contamination case. Gopher Oil, the insured, refined used motor oil, which created oil sludge as a by-product. *Id.* at 761. It deposited that sludge at a number of dump sites, contaminating the soil. *Id.* at 761-62. The EPA and MPCA later required Gopher Oil to pay for the soil's removal. *Id.* Gopher Oil sought coverage for the clean-up costs. *Id.* at 761-762.

A jury found that actual injury had occurred during the insurers' policy periods and that Gopher State did not expect or intend the injury within the meaning of the expected or intended injury exclusion. *Id.* On appeal, the court affirmed the finding that Gopher State did not expect or intend the injury and also held that it was not entitled to judgment as a matter of law based on the known-loss doctrine. *Id.* at 766, 769.

As articulated by the *Gopher Oil* court, the known-loss doctrine provides that "[i]nsurance cannot be issued for a known loss because there is no longer a risk." *Id.* at 768 (citing *Waseca Mutual*, 331 N.W.2d at 925 n.6). The defense is available when "the insured knew of the loss when it applied for the policy," which "requires proof the insured withheld material information about known property damage for which the insured subsequently obtained insurance." *Id.*

The carrier argued that Gopher Oil knew the disposal of oil sludge at the site was causing actual property damage (specifically, soil and groundwater contamination). One of the witnesses had testified that Romness, who was a principal and part owner in Gopher Oil, knew about the "sludge lagoon and the dead vegetation surrounding it." *Id.* at 769. The court held, though, that "at best," the testimony demonstrated that Gopher Oil knew that "the oil sludge was unsightly and a risk to surface water:"

> It did not establish Gopher State knew that the oil sludge disposal was causing soil and groundwater contamination. *See Domtar, Inc. v. Niagara Fire Ins. Co.*, 552 N.W.2d 738, 747 (Minn.App.1996) (known-loss defense requires evidence that the insured knew of the loss, not that the insured knew of the acts leading to the loss), *aff'd in part, rev'd in part on other grounds*, 563 N .W.2d 724 (Minn.1997).

Id.

B. The known-loss contractual provision

Although the known-loss provision appears in the insuring agreement, and is proximal to requirements normally considered to be part of the coverage grant, such as the requirements that the injury or damage be caused by an occurrence and that the injury or damage occur during the policy period, courts and even insurer counsel appear inclined to treat the known-loss provision as an exclusion. *See, e.g., QBE Ins. Corp. v. Adjo Contracting Corp.*, 32 Misc. 3d 1231(A), 934 N.Y.S.2d 36 (NY Sup. Ct. 2011)(unpubl.) (noting that there was "no dispute among the parties that the "known loss" provision is an exclusionary clause or an exclusion, even though it is not described as such by the insurance contract); *Quanta Indem. Co. v. Davis Homes, LLC*, 606 F. Supp. 2d 941, 946-47 (S.D. Ind. 2009)(referring to the provision as exclusionary); *Harleysville Mut. Ins. Co. v. Dapper, LLC*, No. 2:09–cv-794-TFM, 2010 WL 2925779, *1, 8 (M.D. Ala.)(referring to the known-loss "exclusion" and noting that exceptions to coverage are narrowly construed in favor of the insured); but see *Arnett v. Mid-Continent Cas. Co.*, No. 8:08–cv-2373-T-27EAJ, 2010 WL 2821981 *4 (M.D. Fla.)("RBD [the insured] has not demonstrated that it was unaware of the damage before the effective dates of MCC's policies," suggesting that the insured had the burden of proving lack of prior knowledge of the damage). While this approach may or may not be what ISO intended in its placement of the provision, it may reflect a reluctance to require the insured to prove a negative in order to secure coverage — i.e., that it did not have any prior knowledge of the injury or damage when it purchased the policy.

Although only a handful of jurisdictions have interpreted the known-loss provision to date, there is a definite trend to find it unambiguous and apply it to preclude coverage when circumstances warrant. *See generally, City of Sterling Heights v. United Nat. Ins. Co.*, No. 03-72773, 2006 WL 212030 *10-11 (E.D. Mich.)(umbrella policy's known-loss provision precluded coverage because the insured had notified another carrier about the plaintiffs' claims that the City was interfering with their rights before the policy's inception); *Nautilus Ins. Co. v. Raatz*, No. 08 C 06182, 2012 WL 2525976 *5 (N.D. Ill.)(no duty to defend when the underlying complaint alleged that plaintiffs' counsel sent the insured letters advising of the construction defects, demanding repair and threatening legal action prior to the policy's inception); *Ohio Cas. Ins. Co. v. Mansfield Plumbing Prod., L.L.C.*, No. 2011-COA-009, 2011 WL 3930292 (Ohio Ct. App.)(since the insured knew in 2002 that defective resin was causing its toilets to malfunction, there was no coverage for property

damage occurring in 2003 and 2004 under the policies then in effect, because the property damage was a continuation or resumption of known property damage); *Quanta Indem. Co. v. Davis Homes, LLC,* 606 F. Supp. 2d 941 (S.D. Ind. 2009) (the known-injury provision is neither ambiguous nor contrary to public policy; it accordingly precluded coverage for self-inflicted death during the policy period that resulted from bodily injury and consequential depression reported to the insured prior to the policy's issuance); *Travelers Cas. and Surety Co. v. Dormitory Authority State of NY,* No. 07 Civ. 6915(DLC), 732 F. Supp. 2d 347, 361 (S.D.N.Y. 2010)(since the known-loss provision applies by its terms if "no insured listed under Paragraph 1. of Section II-Who Is An Insured" knew of the property damage, and Section II was amended to include an additional insured, the additional insured's knowledge precluded coverage for the property damage).

In *Harleysville*, for example, Dapper (the insured) performed work on property adjacent to property owned by Fantail. *Harleysville*, 2010 WL 2925779 at *6. In April 2006, Fantail's counsel contacted Palmer (the managing member of Dapper) to inform him that excavation on the Dapper property had caused erosion on Fantail's property. *Id.* Dapper began remediation of the property by moving dirt to the affected area in May and June 2006. *Id.* Throughout that time, Palmer negotiated with Fantail to resolve the matter and thought that it had been resolved to the satisfaction of both parties. *Id.*

In July 2006, during his policy renewal, Palmer requested that Dapper be added as an additional named insured to his current policies, with coverage retroactive to the policy inception date (September 20, 2005). *Id.* In November 2006, Palmer/Dapper's deal with Fantail fell apart and in October 2008, Fantail sued Dapper for the erosion and property damage. *Id.* at *7.

The United States District Court for the Middle District of Alabama held that the known-loss provision was unambiguous and had to be enforced as written. *Id.* Based on the events, it was clear that Dapper knew of the erosion issue when Fantail's counsel contacted it in April 2006. *Id.* Although Dapper may have believed it had resolved the issue with its tentative agreement with Fantail, that belief did not negate its knowledge of the alleged property damage, but instead confirmed it. *Id.*

The sine qua non of insurance, the court noted, is that a carrier is free to accept or reject the risks the company chooses to insure and set a corresponding premium, subject to some law or regulation to the contrary. *Id.* at *8. To assess the risk and set the appropriate premium, insurers either examine the risk, directly or through a third party, or require a certification from the potential insured that there is no known existing loss. It noted:

> *Contractual known-loss provisions serve a valuable societal interest inasmuch as they keep the costs of insurance lower by avoiding the costs of examinations by third parties and the insurance company which would be passed on to policy holders.*

Id. While there was no nefarious intent by Palmer/Dapper, there was "no good reason in law or equity…to shield Dapper from the unambiguous known-loss provision of the insurance contract." *Id.*

Although the courts are upholding this provision, they are focusing closely on the particular types of bodily injury or property damage known to the insured prior to the policy's inception and whether the type of injury or damage that occurred during the policy period is a continuation, change or resumption of that injury or damage. In other words, there must be a sufficient nexus between the injury or damage that was known prior to the policy and the injury or damage that occurred during the policy period for the provision to apply. The Minnesota Court of Appeals decision in *Wensmann* follows this trend.

The *Wensmann* coverage dispute arose out of construction-defect claims for a nine-building development of 18 townhomes. 840 N.W.2d at 441. Wensmann, the general contractor, was responsible for both the design and construction of the homes, which were built after 2003 and before April 1, 2007, the date on which the Westfield policy incepted. *Id.* at 441-42.

Each unit had decorative brick arches under the back deck. *Id.* at 442. Wensmann first became aware of cracks in the brick arches when one of the homeowners submitted a request for warranty work in September 2005.

The subcontractors who built the arches had not used a written design in doing so. After receiving the warranty claim, Wensmann hired a structural engineer to create a design plan for future arch construction, which he provided in September 2005; however, the design was not used to repair any of the existing arches. *Id.* Wensmann received another warranty-work request for repair of a brick arch in May 2006. *Id.*

The townhome association subsequently sued Wensmann for the failed arches and for water infiltration issues. *Id.* While the two homeowners had reported the masonry complaints prior to the April 1, 2007 policy period, the record did not reveal any prior water infiltration complaints. *Id.* at 443. The association's expert subsequently identified defective construction with respect to the siding, brick veneer, windows and doors, flashing, attics and caulking/sealing, in addition to the brick arch issue. *Id.* Westfield sought a declaratory judgment that its policy did not provide coverage for the claims due to the known-loss provision. *Id.* at 445.

The parties disagreed about whether the "known-loss doctrine" applied to the claims. *Id.* at 450-51. Citing to *Domtar*, the court noted that the doctrine precludes coverage for claims about which the insured had knowledge prior to the policy's inception date, as there is no "risk" against which to insure for a known loss. *Id.* It went on to state, however, that "[i]n our view, the plain language of the policy governs here," referring to the policy's known-loss provision. *Id.*

The court then separated the damages alleged in the underlying complaint into three categories: (1) damage resulting from the lack of an arch design; (2) damage resulting from the arches constructed using the arch design; and (3) damages from water infiltration. *Id.* The known-loss provision applies to preclude coverage, the opinion notes, if there was "property damage" and the insured had knowledge of that "property damage" prior to the policy's inception. *Id.*

The court first addressed whether the cracks in the arches constituted "property damage." The insured argued, and Westfield apparently did not contest, that if the damage of which Wensmann was aware prior to the policy period was minor or cosmetic, it did not constitute "property damage" within the meaning of the known-loss provision. *Id.* (Note, however, there is nothing in the standard "property damage" definition that would exclude "minor" damage from its scope).

Wensmann's site manager, who qualified as an "insured" under the known-loss provision, testified that he had concerns about how the arches were being built after seeing cracks in the existing arches. *Id.* The structural engineer, in turn, testified that the site manager had told him that Wensmann needed a new design because "the arches had failed" and that there was a "blowout at the arch post." *Id.* The association, though, argued that he could not have expected future damage, because the cracks were repaired. *Id.*

The court found that argument unpersuasive. Even if Wensmann were unaware of the extent of the structural damage, the cracks provided notice of "property damage" to the arches, and the known-loss provision requires only that the insured knew about the property damage "*in whole or in part*." *Id.* (emphasis added). There was no question but that there were numerous cracks on different arches, and thus a known problem with the arch design causing property damage, prior to the April 1, 2007 policy period. *Id.*

The court then commented that if the pre-2007 cracks and the damage alleged in the complaint did not share the same cause, the damage alleged could not be a "continuation, change or resumption" of the known, pre-2007 damage. *Id.* at 453. Since the record did not indicate any factual dispute about whether the same design and structural defects caused both the pre-2007 cracks and the arch-related damage at issue in the complaint, the known-loss provision precluded coverage for all such damages. *Id.*

But the same did not hold true for the two other types of damage at issue — i.e., the arches constructed using the subsequent design (if any) and the water infiltration claims. *Id.* at 453-54. The cracks in the brick arches could not be said, as a matter of law, to have provided Wensmann with knowledge that there was water infiltration resulting from improperly installed windows, doors and siding. With respect to those particular items of damage, then, the district court should not have granted summary judgment with respect to any brick arches that used the subsequent design and to any of the water infiltration issues. *Id.* at 455.

C. The subsequent damage element

While the incorporation of the known-loss language in the CGL policy form is significant, the addition of the "continuing injury or damage" language is even more noteworthy. As quoted above, this critical sentence provides that bodily injury or property damage that occurs during the policy period, and was not known to the insured to have occurred in whole or in part prior to the policy period, *includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period. See* Commercial General Liability Policy, ISO Form CG 00 01 10 01 (emphasis added). In other words, injury or damage that continues, changes or resumes after the end of the policy period will be deemed to be injury or damage that occurred *during* the policy period, and therefore, be covered by the policy. In continuing injury or damage situations, then, this

new policy language abrogates, at least in part, the oft-cited rule in Minnesota and other jurisdictions that CGL policies provide coverage only for bodily injury or property damage that occurs during the policy period.

Yet, after more than a decade of use, the caselaw interpreting this sentence is almost non-existent. The Indiana Court of Appeals appears to have been the first court to address it in *Grange Mut. Cas. Co. v. West Bend Mut. Ins. Co.*, 946 N.E.2d 593 (Ind. Ct. App. 2011).

In *Grange*, a subcontractor of the insured general contractor unknowingly fractured a drain pipe during the winter or spring of 2005 while installing a sanitary sewer and piping. 946 N.E.2d at 594. The owner subsequently experienced significant water damage on June 23, 2006, which was traced to the fractured drain pipe. *Id.* West Bend provided CGL coverage to the sub-contractor from May 23, 2004 to May 23, 2005, while Grange provided CGL coverage from May 23, 2005 to May 23, 2007. *Id.*

The court first held that the Grange policy covered the loss, because the earlier damage to the fractured pipe had not been known to the insured prior to the Grange policy period, and property damage occurred in June 2006 (during its policy period) due to flooding. *Id.* at 596. But that did not end the inquiry, because coverage under the Grange policy did not equate to a lack of coverage under West Bend's policy. *Id.*

Although the actual damage did not become evident until later, *some* property damage clearly occurred when the drain pipe was fractured during West Bend's policy period. *Id.* In addition, the known-loss provision stated that the initial property damage during the policy period includes any continuation, change or resumption of that property damage after the end of the policy period. *Id.* The court held, based on this language, that the West Bend policy also covers all damage that flowed from the original pipe damage, including the extensive flood damage. *Id.* Both policies, then, covered the resulting loss, and the court remanded with instructions to the trial court to apportion the damages pursuant to the other-insurance provisions, with each contributing equal shares until the limits were reached or the full loss paid. *Id.*

4. CONCLUSION

While the known-loss provision was incorporated into the standard CGL form more than a decade ago, its effects are just beginning to be recognized. The Minnesota Court of Appeals has now applied this language in accordance with its unambiguous terms to preclude coverage for property damage that was known to the insurer prior to the policy's inception. And, while the Minnesota courts have not yet addressed the continuing-damage element of the provision, that language, too, is likely to be found unambiguous and enforced as written. These provisions will have significant implications for Minnesota insurers and insureds in the years to come, both with respect to the coverage provided to the insured and the allocation of responsibilities between successive insurers.