

**CONTRACTS—BEATING THEM AT THEIR OWN GAME:  
THE BUSINESS RISK DOCTRINE AND THE  
BROADENING COVERAGE OF COMMERCIAL  
GENERAL LIABILITY INSURANCE—*THOMMES V.  
MILWAUKEE INSURANCE CO.***

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Insurance. An ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he is beating the man who keeps the table.<sup>1</sup>

I. INTRODUCTION

Read now, Ambrose Bierce's infamous definition of insurance falls short of the mark; players in today's insurance game do not even have "the comfortable conviction" that an insurer will welcome its contractual duties to defend<sup>2</sup> and indemnify.<sup>3</sup> The Minnesota Supreme Court

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1. AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* (Oxford University Press 1999) (1911).

2. BLACK'S LAW DICTIONARY 523 (7th ed. 1999) (defining the "duty to defend" clause in a liability insurance contract as that which obligates the insurer to "take over the defense of any lawsuit brought by a third party against the insured on a claim that falls

recently revisited the question of insurance coverage in *Thommes v. Milwaukee Insurance Co.*,<sup>4</sup> which involved a commercial general liability (CGL) policy.<sup>5</sup> As formally defined, CGL insurance is a class of insurance “that covers damages that the insured becomes legally obligated to pay to a third party because of bodily injury or property damage.”<sup>6</sup> Yet given the broad opening provision of a standard CGL contract, CGL insurance’s relatively narrow scope is not immediately apparent; a CGL insurer “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.”<sup>7</sup> A CGL policy

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within the policy’s coverage”). The duty to defend forms a crucial component of Comprehensive General Liability (CGL) coverage because “[w]hether a contractor lacking the resources necessary for protracted litigation can shift the cost of defending a counterclaim to the insurer may color or even determine the outcome” of a litigation. F. Malcolm Cunningham, Jr. & Amy L. Fischer, *Insurance Coverage in Construction—The Unanswered Question*, 33 TORT & INS. L.J. 1063, 1081 (1998).

3. BLACK’S, *supra* note 2, at 772 (defining “indemnify” as to “reimburse (another) for a loss suffered because of a third party’s act or default”). The duties to defend and indemnify are considered to be the two primary duties that an insurer owes its insured. 4 PHILIP L. BRUNER & PATRICK J. O’CONNOR, BRUNER & O’CONNOR ON CONSTRUCTION LAW § 11:19 (2002 & Supp. 2003) [hereinafter BRUNER & O’CONNOR]. The duty to defend is broader than the duty to indemnify in the sense that, even if an action that leads to a judgment against an insured turns out not to be covered, an insurer still may have been “obligated to defend its insured if one or more of the allegations in the complaint fall within coverage.” *Id.*

4. 641 N.W.2d 877 (Minn. 2002).

5. See generally 7 LEE R. RUSS ET AL., COUCH ON INSURANCE § 129:11 (3d ed. 1999 & Supp. 2003). As one commentator recounts, CGL used to stand for “comprehensive,” but changed to “commercial” in 1986; this is considered to be emblematic of the narrowing of coverage over the years. Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 89 (2001).

6. BLACK’S, *supra* note 2, at 809. CGL is one of multiple forms of insurance on a construction project. See 4 BRUNER & O’CONNOR, *supra* note 3, § 11:1. As opposed to CGL coverage for third party property, the owner of what is being worked on “often carries [first] party property coverage, generally in the form of a builder’s risk policy.” *Id.* The coverages carried by contractors and subcontractors are required by either state law, such as workers compensation coverage, or the parties’ contracts, such as CGL coverage, along with automobile liability and contractual liability insurance. See *id.* “Most contractors also carry excess or umbrella policies providing insurance for covered losses that exceed the limits of their primary coverage.” *Id.*

7. Insurance Services Office, Inc. (ISO) Commercial General Liability Form No. CG 00 02 07 98 [hereinafter CGL Policy]. The standard form policy provides that liability insurance does not cover:

That particular part of real property on which you or any contractors working directly or indirectly on your behalf are performing operations if the [third party’s property damage claim] arises out of those operations or

must realize the narrower purpose thrashed out for it through specialized definitions<sup>8</sup> and exclusions.<sup>9</sup> It is upon these exclusions that the *Thommes* decision turned. In the process of contending with the particular exclusions raised, the *Thommes* court forestalled one internal contradiction about the timing of damages but disregarded a second on how a CGL contract should be adjudicated.

Coverage under a CGL contract is determined as a matter of law.<sup>10</sup>

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That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it . . . .

“Property damage” to “your work” arising out of it or any part of it and included in the [complete operations hazard coverage] . . . .

[Property damage claims] arising out of:

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

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

Damages claimed for any loss, cost or expense insured by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of

- (1) “your product”
- (2) “your work” or
- (3) “impaired property”

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Keith A. Dotseth et al., *Evolution or Revolution: Thommes’ Role in the Development of the Business Risk Doctrine*, 29 WM. MITCHELL L. REV. 597, 599-600 (2002) (citing JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS § T4.2 (1994) (quoting INSURANCE SERVICE OFFICE, COMMERCIAL GENERAL LIABILITY FORM CG-00-01-11-88 (1988), reprinted in ALLIANCE OF AMERICAN INSURERS, POLICY KIT FOR STUDENTS OF INSURANCE 186-87 (1990) (paragraph labels omitted)).

8. An insurance policy commonly defines operative terms to achieve narrower coverage. 4 BRUNER & O’CONNOR, *supra* note 3, at § 11:11. “[I]t is possible that the same term may have different meanings depending upon the section of the policy in which it is found. If a term is not defined, then to the extent that it is clear and unambiguous, it is given its plain, ordinary and popular sense.” *Id.*

9. Though a standard insurance policy has standard exclusions, it may be tailored to increase or restrict coverage depending on the needs of a specific insured through the use of endorsements. 4 BRUNER & O’CONNOR, *supra* note 3, § 11:13.

10. *Thommes*, 641 N.W.2d at 879.

To interpret policies and their exclusions, courts examine not only the four corners of the document but also often reach beyond the document to what is known as the “business risk doctrine.”<sup>11</sup> The general concept behind the business risk doctrine is that an insured “should not look to its CGL insurer to cover business risks that are within its own control.”<sup>12</sup>

As one commentator has elaborated:

The risk of replacing and repairing defective materials or poor workmanship has generally been considered a commercial risk which is not passed on to the liability insurer. Rather liability coverage [through a CGL policy] comes into play when the insured’s defective materials or work cause injury to property other than the insured’s own work.<sup>13</sup>

In effect, a court that follows the business risk doctrine is to make a distinction between tort and contract claims; CGL policies provide coverage to an insured for tort claims from third parties, but not for contract liability arising from damages on the insured’s customer’s property.<sup>14</sup>

Whether the business risk doctrine merely aids the courts as an interpretative device or risks supplanting a contract’s actual language is a matter of controversy.<sup>15</sup> Regardless of which side one takes, however,

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11. It has been remarked that if you “[t]urn the CGL policy upside down and shake it vigorously . . . [w]hat won’t shake out is the ‘business risk doctrine.’ ” James Duffy O’Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21 CONSTRUCTION LAW 15, 15 (2001).

12. *Id.*

13. Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 TORT & INS. L.J. 785, 787 (1995).

14. Dotseth et al., *supra* note 7, at 601. One commentator has argued that the distinction between tort (covered) and contract (not covered) claims has little or no logical basis in fact because both arise from negligent or somehow defective work. See Clifford J. Shapiro, *Further Reflections—Inadvertent Construction Defects Are an “Occurrence” under Commercial General Liability Policies*, 686 PLI/LIT 73, 98 (2003); see also O’Connor, *supra* note 11, at 18. “So what that the insured was negligent? Isn’t that exactly why consumers buy insurance? . . . It is precisely to cover the risk that each of these insureds will fail to act in a reasonably prudent manner on occasion that each buys general liability insurance.” *Id.* Nevertheless, it is possible for a “contractual liability coverage” provision to be added to a CGL policy. See 7 RUSS, *supra* note 5, at § 103:19.

15. See 4 BRUNER & O’CONNOR, *supra* note 3, at § 11:37. “The problem with employing a ‘business risk’ concept in a coverage analysis is the danger that preconceived notions as to what risks insurance is intended to cover can distract one from objectively interpreting policy language.” *Id.* “The ‘business risk’ concept plays a more subtle interpretative role in jurisdictions that have not elevated it to a doctrine. In many cases, the concept is used to ‘explain’ the meaning of exclusionary language. This is often done in the guise of engaging in an objective interpretation of policy language.

the reality is that since the business risk doctrine came to be recognized just over thirty years ago, a court's incorporation of it into a decision has usually meant that an insured does not get coverage—until now.<sup>16</sup>

In a striking reversal of fortune, the Minnesota Supreme Court in *Thommes* held that the intent of the business risk doctrine rendered a CGL policy's language ambiguous and, as a result, the contract had to be construed in favor of the insured to provide coverage.<sup>17</sup> Yet given how earlier Minnesota cases presented the business risk doctrine, it is unclear on the face of the case how the court reached its decision. As originally formulated, the business risk doctrine dictated that a CGL policy should cover only *tort* liability for *completed* work that causes damages.<sup>18</sup> *Thommes* did indeed involve *tort*, but for damages that arose *during* the course of the insured's work.<sup>19</sup> By nevertheless allowing coverage, *Thommes* set forth a rule that the risk intended to be insured is for *tort* liability, no matter at what point it arises.<sup>20</sup> Without broadcasting it, *Thommes*' disregard for timing broke away from the rote formulation of the business risk doctrine.

*Thommes*' revision of the business risk doctrine must be inferred. It

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Yet, the 'business risk' rule is an insurance industry trade concept. By employing the 'business risk' rule to interpret exclusionary language, courts in reality are applying a 'custom and usage' process to determine the extent of coverage. Unfortunately, most insureds are not steeped in industry practice." *Id.*

16. See 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:37; see also O'Connor, *supra* note 11, at 15 (characterizing the business risk doctrine as a "tried and true weapon" of the insurance industry and "the main obstacle" to property damage coverage).

17. See *Thommes*, 641 N.W.2d 877, 883 (Minn. 2002). See also 27 DUNNELL MINN. DIGEST *Insurance* § 19.01(b) (4th ed. 1995) (stating Minnesota law as it currently stands on the issue of CGL coverage for third-party tort liability claims: "A contractor's general liability policy provides coverage for insurance risks, but not business risks. Where the insured's defective work causes property damage or personal injury to a third party, however, the third-party claim is covered by the policy and is not barred by the business risk doctrine." (citing *Sphere Drake Ins. Co. v. Tremco Inc.*, 513 N.W.2d 473 (Minn. Ct. App. 1994)).

18. Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971).

19. *Thommes*, 641 N.W.2d at 879.

20. The *Thommes* court essentially based its decision granting coverage as an attempt to follow the dictates of "the underlying purpose of CGL insurance." *Id.* at 883. The underlying purpose, as the court saw it, was to cover the risk that an insured's work will cause property damage to a third party's property that "may give rise to tort liability." *Id.* at 881 (citing *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co.*, 323 N.W.2d 58, 63-64 (Minn. 1982)). The court did not qualify this statement with any timing considerations. *Id.*

is therefore unclear whether the court changed the formulation of the business risk doctrine intentionally or unconsciously. Although the court in *Thommes* closely split over the holding, neither the majority opinion nor the dissent mentioned the issue of timing.<sup>21</sup> It appears that this disregard of timing reflects what the court—both majority and dissent—understood the business risk doctrine to mean all along, rendering a change within *Thommes* unconscious. Thus, even should either side reflect that *Thommes* did effect a change, neither would be prompted to reverse itself. *Thommes*' significance lies in the fact that the court finally managed to state what it thought.

Tracking the Minnesota courts' wording of the business risk doctrine, however, also reveals an intrinsic conundrum. On the one hand, coverage under a CGL contract is supposed to be decided as a matter of law.<sup>22</sup> Yet on the other hand, whether a tort such as negligence is committed is primarily a question of fact.<sup>23</sup> According to the business risk doctrine, insureds cannot receive coverage for damages from risks they could have avoided.<sup>24</sup> Whether a risk is avoidable usually comes down to whether or not the insured was negligent, inherently involving a question of fact.<sup>25</sup> The business risk doctrine can never be fully realized as long as the doctrine thrusts courts into the position of having to decide questions of fact as a matter of law.

This note first examines the theory behind the business risk doctrine in analyzing CGL insurance.<sup>26</sup> It then details the supreme court's holding in *Thommes*,<sup>27</sup> followed by an analysis of that decision.<sup>28</sup> Finally, the note concludes that, whatever problems may exist, the court

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21. Justice Page wrote the majority opinion. Justice Stringer wrote the dissent, joined by Chief Justice Blatz and Justice Paul H. Anderson. *Id.* at 884-85. Because the majority saw the underlying purpose of CGL insurance as a blanket means to cover potential tort liability to third parties, the majority's opinion did not contain any timing qualifications. *Id.* at 881-83. The dissent did not dispute the majority's characterization of the purpose of CGL insurance; rather, the dissent faulted the majority for relying on a conception of CGL insurance in place of the contract's actual language. *Id.* at 884-85.

22. *Id.* at 879 (citing *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001) and *Haarstad v. Graff*, 517 N.W.2d 582, 584 (Minn. 1994)).

23. *Glatt v. Feist*, 156 N.W.2d 819, 823 (N.D. 1968).

24. O'Connor, *supra* note 11, at 15.

25. In Minnesota, a CGL policy may be interpreted to cover negligence, but not intentional torts. *Ohio Cas. Ins. Co. v. Terrace Enters., Inc.*, 260 N.W.2d 450, 453 (Minn. 1977).

26. *See infra* Part II.

27. *See infra* Part III.

28. *See infra* Part IV.

has devised a manageable approach to CGL insurance coverage.<sup>29</sup>

## II. HISTORY

A CGL contract is the most common of the insurance industry's standard policy forms.<sup>30</sup> Standard insurance forms usually originate from the Insurance Services Office, Inc. (ISO), an organization supported by the insurance industry.<sup>31</sup> The first CGL policy was developed in 1940; major revisions occurred in 1943, 1955, 1966, 1973, and 1986.<sup>32</sup>

In 1971, Roger C. Henderson, a tort scholar who was then an associate professor at the Nebraska School of Law, produced an article that is credited with first articulating the business risk doctrine.<sup>33</sup> The phrase "business risk" did not originate with him, but with an exclusion that the insurance industry added to the CGL policy in 1966.<sup>34</sup> In the most influential section of the article, Henderson wrote that "[t]he risk intended to be insured is the possibility that the . . . work of the insured, once relinquished or completed, will cause . . . damage to property other than to the . . . completed work itself, and for which the insured may be found liable."<sup>35</sup> It is ironic that Henderson is known for articulating the

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29. See *infra* Part V.

30. 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:18. See generally Abraham, *supra* note 5 (discussing the history and development of CGL insurance since its origins in the nineteenth century).

31. 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:6.

32. *Id.* Reportedly, the CGL exclusions were narrowed over the years specifically to broaden coverage; insurance company publications made this clear. Yet "[d]espite the revised policy exclusions, or perhaps because of them, insurance companies are asserting new grounds for denying coverage." Shapiro, *supra* note 14, at 79, 96. See also 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:28.

33. Henderson, *supra* note 18, at 441. Henderson is currently a Professor of Law at the University of Arizona James E. Rogers College of Law.

34. *Id.* at 438. Today, the standard CGL policy is generally considered to have five business risk exclusions—2j, 2k, 2l, 2m, and 2n—that could be subject to interpretation through the business risk doctrine. See 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:37. In reality, exclusion j contains six subdivisions, two of which—j(5) and j(6)—operate as individual business risk exclusions. *Id.* These two, along with exclusion l, will be discussed later. See *infra* Part III.A. 2k excludes from coverage "[p]roperty damage 'to 'your product' arising out of it or any part of it." *Id.* 2m excludes damage to impaired property or property not physically injured. 2n excludes damage from having to recall products or somehow fix work done. *Id.*; see also Gregory G. Schultz, *Commercial General Liability Coverage of Faulty Construction Claims*, 33 TORT & INS. L.J. 257, 266 (1997).

35. Henderson, *supra* note 18, at 441. Henderson understood the rationale for the business risk exclusion to be that "the risks of . . . property damage arising from the planning stage of business are a business risk of the insured, that is, a responsibility which he must undertake just as he does for other business decisions." *Id.* at 440.

business risk doctrine because his article was written in part to criticize the 1966 revision.<sup>36</sup> Nevertheless, it is his formulation of how a business risk exclusion operates, not his criticism, that has carried the day. On the basis of this key passage, courts began to turn to the business risk doctrine to resolve questions of CGL coverage depending on whether the liability arose from tort or from contract.<sup>37</sup>

What influence the Henderson article has enjoyed until now appears to be due to the even more influential CGL decision that was cited it, *Weedo v. Stone-E-Brick, Inc.*<sup>38</sup> In *Weedo*, the New Jersey Supreme Court dealt with one construction company that had two claims brought against it under two different insurance companies' CGL policies.<sup>39</sup> Both involved claims of defective work: cracking stucco that had to be replaced and faulty roofing and gutter work.<sup>40</sup> First, the *Weedo* court recounted how the appellate court ruled that the insurers were obliged to defend their insured because "certain exclusions of the policy, when read together, were ambiguous and hence had to be resolved against the insurer."<sup>41</sup> Then, signaling the new age, the New Jersey Supreme Court quoted at length from Henderson to embrace the distinction between contract and tort.<sup>42</sup> The *Weedo* court reasoned that "the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor."<sup>43</sup> This left the court to conclude that "injury to persons and damage to other property constitute the risks intended to be covered under the CGL [policy]."<sup>44</sup>

Minnesota is one of several jurisdictions that have adopted the approach of the New Jersey Supreme Court.<sup>45</sup> So much so, it has been

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36. *Id.* at 441. Indeed, Henderson wrote that "the insurance industry would do well to eliminate the 'Business Risk' exclusion." *Id.*

37. Dotseth et al., *supra* note 7, at 598. The distinction that courts make between contract and tort has been criticized. *Id.* The continuing influence of Henderson's article for this idea has been criticized in particular: "The danger in relying upon an article written in 1971 is that the insurance industry and the coverages it markets have changed dramatically since the 1966 policy form, which was the subject of the [Henderson] article." 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:28.

38. 405 A.2d 788 (N.J. 1979).

39. *Id.* at 789.

40. *Id.*

41. *Id.*

42. *Id.* at 791.

43. *Id.*

44. *Id.* at 792.

45. *See, e.g.*, Ind. Ins. Co. v. DeZutti, 408 N.E.2d 1275 (Ind. 1980); Peerless Ins. Co. v. Brennon, 564 A.2d 383 (Me. 1989); Fisher v. Am. Family Mut. Ins. Co., 579 N.W.2d 599 (N.D. 1998); Vernon Williams & Son Constr., Inc. v. Cont'l Ins. Co., 591

said, that Minnesota is perhaps the jurisdiction most closely identified with the business risk doctrine.<sup>46</sup> The first Minnesota decision that manifested the doctrine's presence was the state supreme court's 1982 decision in *Bor-Son Building Corp. v. Employers Commercial Union Insurance Co. of America*.<sup>47</sup> *Bor-Son* involved a landowner bringing suit against a general contractor who had constructed a building, claiming faulty workmanship and materials.<sup>48</sup> Though the contractor had a CGL policy, the supreme court ruled that the insurer had no duty to defend because the damages arose out of the contractor's breach of contract.<sup>49</sup> The building owner had not received the product "for which it had bargained."<sup>50</sup> In laying out the business risk doctrine, the court quoted Henderson's formulation word for word—the same passage cited in *Weedo*—rather than somehow restating it.<sup>51</sup>

In 1986, the supreme court was willing to elaborate this formulation in *Knutson Construction Co. v. St. Paul Fire & Marine Insurance Co.*<sup>52</sup> Like *Bor-Son*, *Knutson* arose from a claim by a property owner against a general contractor for faulty workmanship and defective materials.<sup>53</sup> The court affirmed its earlier ruling in *Bor-Son*, holding that the contractor had no CGL coverage because the claims derived from breach of contract.<sup>54</sup> Yet even though *Knutson* quoted the same passage from Henderson as *Bor-Son*,<sup>55</sup> the reasoning within *Knutson* did deviate from the mantra of "once relinquished or completed." Apparently without realizing what would contradict its earlier quoted passage, the court stated, lost in a long paragraph, that a CGL policy could shift the risk to the insurer for tort liability for that period "during the course of the work or, if a completed operations endorsement is paid for, thereafter."<sup>56</sup> A determination as to whether the supreme court realized it had laid the groundwork for a potential contradiction about timing had to wait for

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S.W.2d 760 (Tenn. 1979); *Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 526 S.E.2d 28 (W. Va. 1999). See also Donald M. Zupanec, Annotation, *Scope of Clause Excluding from Contractor's or Similar Liability Policy*, 8 A.L.R.4th 563 (1981) (discussing insurance exclusions from contractor's coverage in different jurisdictions).

46. 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:37.

47. 323 N.W.2d 58 (Minn. 1982).

48. *Bor-Son*, 323 N.W.2d at 59-60.

49. *Id.* at 63.

50. *Id.*

51. *Id.*

52. 396 N.W.2d 229 (Minn. 1986).

53. *Id.* at 231.

54. *Id.* at 235.

55. *Id.* at 232.

56. *Id.* at 234 (emphasis added).

*Thommes*, a case that involved tort liability to a third party.

### III. THE *THOMMES* DECISION

#### A. *Facts*

Thommes & Thomas Land Clearing (Thommes) is a partnership that clears and grubs land for construction projects.<sup>57</sup> In September 1996, Thommes subcontracted to clear and grub land for a commercial development owned by Dean Morlock, Charles Vig, and HHA Development.<sup>58</sup> Adjoining the land to be cleared lay property owned by Morlock's sister and her husband, Donna and John Krajewski.<sup>59</sup> It was not until Thommes had cleared portions of the land that belonged to the Krajewskis that it found out it had damaged property belonging to a third party.<sup>60</sup>

In response to impending litigation by the Krajewskis, Thomas Benick, a partner of Thommes, made a handwritten statement about what had happened.<sup>61</sup> According to this statement, it was "[a]bout halfway through the job" of clearing land on the development that Thommes started clearing land near the Krajewskis' property.<sup>62</sup> Where the development ended and the Krajewskis' land began was unclear because no one had provided Thommes with written instructions. Further, unlike the rest of the property, no survey stakes marked the property lines.<sup>63</sup>

Benick asked Morlock how close they should clear to the Krajewskis' property.<sup>64</sup> As Benick later recalled, Morlock "pointed and made a line" and said to clear everything out.<sup>65</sup> Benick recounted that the land in question "looked like an area maintained by the homeowner [of the adjoining property]" and, as a result, "[he] questioned Morlock because it appeared [he] would be taking trees off the property" owned by the Krajewskis.<sup>66</sup> Benick remembered Morlock saying not to worry

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57. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002).

58. *Id.*

59. *Id.*

60. *Thommes v. Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 157 (Minn. Ct. App. 2001), *aff'd* 641 N.W.2d 877 (Minn. 2002).

61. Handwritten statement of Thomas Benick, Partner of Thommes & Thomas Land Clearing, Concerning the HHA Project (July 11, 1998) (on file with author).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

because it was his sister's house and she and her husband were away on vacation.<sup>67</sup> Still hesitant, Benick consulted with Knutson's construction supervisor, the contractor who had hired Thommes as a subcontractor.<sup>68</sup> After the Knutson supervisor walked down the same area and Benick showed him what Morlock told Benick to do, the supervisor also said "do it."<sup>69</sup>

Benick estimated that the process of clearing this portion of the land "could have taken one week," leaving Morlock plenty of opportunity to correct any error, but Thommes' work continued uninterrupted until the Krajewskis came back home.<sup>70</sup> After finding out that Thommes had indeed cut too far, Benick met with John Krajewski and Morlock, at which point Morlock denied ever having told Thommes to go so far.<sup>71</sup> By the end of the confrontation, Benick had agreed to look for replacement trees.<sup>72</sup> Afterward, however, as Benick recalled it, Morlock told him not to plant the trees until he, Morlock, had finished grading the land.<sup>73</sup> It is at this point that Benick wrote in his statement, "I thought this whole event was fishy . . . ."<sup>74</sup> Benick recorded his newfound belief that Morlock knew the Krajewskis' land had to be graded to finish his development, but that Morlock had not been able to get his brother-in-law's consent.<sup>75</sup>

After the Krajewskis brought an action against Thommes for damage to their property, Thommes tendered defense to its CGL insurance carrier, Milwaukee Insurance Co. (Milwaukee).<sup>76</sup> Milwaukee, however, declined either to defend or indemnify Thommes based on two exclusions<sup>77</sup> in the policy, 2j(5) and 2j(6).<sup>78</sup> 2j(5) stated that coverage

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67. *Id.*

68. *Id.* at 2.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002).

77. *See* Abraham, *supra* note 5, at 104-05. "[T]he current trend . . . is toward ever more narrow CGL coverage. The original 'comprehensive' general liability insurance policy contained only five exclusions. Over time the exclusions have proliferated. Today there are a minimum of fifteen exclusions in the standard-form CGL policy, occupying nearly four pages of fine print." *Id.*

78. *Thommes*, 641 N.W.2d at 879. *See generally* 9 LEE R. RUSS ET AL., COUCH ON INSURANCE § 129:12 (3d ed. 1997) (discussing exclusions 2j(5) and 2j(6)). If available, an insured may purchase a contractor's rework endorsement for "the insured's repair,

does not apply to “[p]roperty damage’ to . . . [t]hat particular part of real property on which you . . . are performing operations, if the ‘property damage’ arises out of those operations.”<sup>79</sup> 2j(6) stated that neither was there coverage for “ ‘property damage’ to . . . [t]hat particular part of any property that must be restored, repaired, or replaced because ‘your . . . work’ was incorrectly performed on it.”<sup>80</sup>

### B. *The Court’s Analysis*

The trial court granted Milwaukee’s summary judgment motion after concluding that “the plain language” of the CGL policy denied coverage.<sup>81</sup> Reversing on appeal, the court of appeals held that “the policy exclusions at issue are business risk exclusions that do not apply to injured third parties . . . .”<sup>82</sup> For its part, the supreme court began its decision by duly noting that the “interpretation of an insurance policy is a question of law reviewed *de novo*”<sup>83</sup> and that “[i]nsurance contract exclusions are construed strictly against the insurer.”<sup>84</sup>

Moving on to its analysis, the court cited *Bor-Son* for the proposition that there are two types of risk that a contractor faces.<sup>85</sup> The first type is that an insured may be liable through contract for defective work, in which case the business risk doctrine operates to exclude coverage.<sup>86</sup> The second type includes the risk that a contractor’s work will cause “property damage to other property.”<sup>87</sup> The court continued, “it was this type of risk, which may give rise to tort liability to third

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replacement, alteration, and/or removal” of defective work. “Depending upon how the coverage is written, it can significantly narrow or eliminate the j(5) and j(6) exclusions contained in the standard CGL policy.” Patrick J. O’Connor, Jr., *Commercial General Liability Coverage*, 19 CONSTRUCTION LAW 5, 15 (Apr. 1999) [hereinafter O’Connor, *Liability Coverage*].

79. *Thommes*, 641 N.W.2d at 882.

80. *Id.* at 883.

81. *Thommes v. Milwaukee Mut. Ins. Co.*, No. C-1999-22166, slip op. at 7 (Scott County Dist. Ct. June 13, 2000).

82. *Thommes v. Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 157 (Minn. Ct. App. 2001).

83. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). The question of whether an insurer has a duty to defend or indemnify is also a question of law reviewed *de novo*. *Metro. Prop. & Cas. Ins. Co. v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999).

84. *Thommes*, 641 N.W.2d at 880 (citing *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001)).

85. *Thommes*, 641 N.W.2d at 881.

86. *Id.*

87. *Id.*

parties,” against which CGL policies were intended to insure.<sup>88</sup> In contrast to its earlier decisions on CGL coverage, the court quoted Henderson only by way of quoting *Bor-Son*.<sup>89</sup>

Toward the beginning of its opinion, the court disclaimed slavish adherence to the business risk doctrine.<sup>90</sup> Reviewing its past decisions in *Bor-Son* and *Knutson*, the court commented: “[W]e used business risk principles as a means of illuminating the underlying purpose of CGL insurance. Notably absent from [these decisions] is any indication that these principles serve as the foundation for a separate ‘business risk doctrine’ that operates to override the express language of policy exclusions.”<sup>91</sup> Nevertheless, when considering the first exclusion at issue, 2j(5), the court reasoned that the “underlying purpose of CGL insurance” rendered the exclusion ambiguous.<sup>92</sup> Once the court found the exclusion ambiguous, it only needed to recite that “contract exclusions are to be construed strictly against the insurer” to hold that there was coverage.<sup>93</sup>

When it came to the other provision at issue, 2j(6), the court produced a slightly different analysis.<sup>94</sup> Instead of the business risk doctrine alone being sufficient to render the provision ambiguous, the court found multiple meanings within the policy’s actual language.<sup>95</sup> The court reasoned that the word “incorrect” could mean not only the manner in which work was conducted, but also the place where it was conducted.<sup>96</sup> Because the court could foresee multiple meanings, it came to the same conclusion that the exclusion was ambiguous and must be

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88. *Id.* The court does, however, admit the possibility that an insurer and insured could contract otherwise for different coverage. *Id.* at 882 (citing *Am. Family Mut. Ins. Co. v. Ryan*, 330 N.W.2d 113, 115 (Minn. 1983)).

89. *Id.* at 881.

90. *Id.* at 880.

91. *Id.*

92. *Id.* at 883.

93. *Id.* The court relied on recent precedent stating that exclusions in insurance contracts are construed strictly against the insurer. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). *See also* *Nathe Bros. v. Am. Nat’l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000). “Because most insurance policies are presented as preprinted forms, which a potential insured must usually accept or reject as a whole, ambiguities in a policy are generally resolved in favor of the insured.” *Id.* Nevertheless, when an insurance contract uses unambiguous language, the contract is given its plain and ordinary meaning. *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997).

94. *Thommes*, 641 N.W.2d at 883-84.

95. *Id.*

96. *Id.* at 883.

construed against the insurer to order coverage.<sup>97</sup> Yet even though the court found 2j(6) ambiguous on its face, the court would have applied the same analysis as it had for 2j(5), had it been necessary.<sup>98</sup> Thus, the majority's holding that the mere "purpose" of CGL insurance makes a contract clause fatally ambiguous inhabits the whole case. In effect, *Thommes* ruled that if an insured's work may give rise to tort liability to third parties, then a CGL policy provides coverage.<sup>99</sup>

#### IV. ANALYSIS OF THE *THOMMES* DECISION

##### A. *The Missing Step*

What is noticeably absent from the *Thommes* decision is the passage from Henderson, as quoted in *Weedo*, that had been cited in prior Minnesota CGL coverage decisions.<sup>100</sup> This absence, if not intentional, was certainly convenient, as it allowed the Minnesota Supreme Court to avoid a previous oversight in reasoning that would have become a full-blown internal contradiction in *Thommes*.

All three of the courts that adjudicated the *Thommes* case on its way up the chain—the district court, the court of appeals, and the supreme court—launched into an analysis of 2j(5) and 2j(6) without pausing to comment on why these exclusions in particular were at issue.<sup>101</sup> Of course, from the time when a claim on the policy was first made, Milwaukee settled upon 2j(5) and 2j(6) as the basis for denying coverage.<sup>102</sup> Perhaps each court only decided to refrain from interfering

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97. *Id.* at 884.

98. *Id.* (Stringer, J., dissenting). It is for this reason that, when speaking of the whole case, the *Thommes* dissent states that "[t]he ambiguity found by the majority regarding whether the exclusion applies to property owned by third parties comes not from the language of the exclusion, but rather from the majority's conception of the underlying purpose of CGL insurance . . . ." *Id.*

99. *Id.* at 883.

100. See *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am.*, 323 N.W.2d 58, 62 (Minn. 1982); *Knutson*, 396 N.W.2d at 232.

101. *Thommes v. Milwaukee Mut. Ins. Co.*, No. C-1999-22166, slip op. at 7 (Scott County Dist. Ct. June 13, 2000). The district court's memorandum states flatly that "there is no issue that the language of either exclusion 2j(5) or 2j(6) is ambiguous." *Id.* The court of appeals framed the issue outright as whether exclusions 2j(5) and 2j(6) barred coverage. *Thommes*, 622 N.W.2d at 157. Similarly, in the supreme court's decision, the court wrote that "[t]he question here is whether the damage to the Krajewskis' property is excluded from coverage by section 2j(5) or section 2j(6)"—not *which* exclusions might exclude coverage. See *Thommes*, 641 N.W.2d at 882.

102. *Thommes*, 622 N.W.2d at 157.

with Milwaukee's choice in defenses. Nevertheless, such cryptic writing by the courts means that the reasoning that went into accepting 2j(5) and 2j(6) as the exclusions in play must be deduced.

If the *Thommes* court had taken a step back to examine afresh all the exclusions in the policy, the initial uncertainty would have centered on whether 2l—another standard CGL policy exclusion, but not raised in the case—or 2j(5) and (6) applied. 2l excludes “ ‘[p]roperty damage’ to ‘your work’ arising out of it or any part of it and included in the ‘products-completed operations hazard.’ ”<sup>103</sup> The products-completed operations hazard to which 2l refers is defined as “property damage” except “work that has not yet been completed or abandoned.”<sup>104</sup> Through the products-completed operations hazard, it becomes clear that 2l presides over completed operations.<sup>105</sup> Unlike 2l, 2j(5)'s phrase “are performing operations” narrows 2j(5) to only ongoing operations.<sup>106</sup> Distinguishing between 2l and 2j(6) is done through the “products-completed operations hazard.”<sup>107</sup> 2j(6), commonly known as the “faulty workmanship” exclusion,<sup>108</sup> contains the disclaimer that coverage “does not apply to ‘property damage’ included in the ‘products-completed operations hazard.’ ”<sup>109</sup> Putting these two negatives together, 2j(6) is at issue only for ongoing operations. Thus a central difference between 2l and 2j(5) and (6) is one of timing: whether the damage occurred from ongoing or completed operations.<sup>110</sup>

When did the damage in *Thommes* happen? If *Thommes* started clearing the Krajewskis' land at the same time it was clearing the development's land, or before it had finished clearing the development's land, 2j(5) and (6) would apply because the damage would have occurred while operations were ongoing—the work itself would be the damage. However, if *Thommes* had finished doing all the work on the

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103. GCL Policy, *supra* note 7.

104. *Id.*

105. See Schultz, *supra* note 34, at 271.

106. O'Connor, *Liability Coverage*, *supra* note 78, at 8. See also *Spears v. Smith*, 690 N.E.2d 557, 559 (Ohio Ct. App. 1996) (exclusion 2j(5) does not apply to damages discovered after the work has been completed because the exclusion is written in the present tense); *Houston Bldg. Serv., Inc. v. Amer. Gen. Fire & Cas. Co.*, 799 S.W.2d 308, 311 (Tex. Ct. App. 1990); Franco, *supra* note 13, at 796. In *Action Auto Stores, Inc. v. United Capitol Ins. Co.*, a court rejected an insurer's attempt to argue that 2j(5)'s phrase “if the ‘property damage’ arises out of those operations” meant that the exclusion applies to completed operations. 845 F. Supp. 428, 434 (W.D. Mich. 1993).

107. CGL Policy, *supra* note 7.

108. O'Connor, *Liability Coverage*, *supra* note 78, at 8.

109. CGL Policy, *supra* note 7.

110. Compare CGL exclusion 2l with exclusions 2j(5) and 2j(6).

development's land and only then started working on the Krajewskis' property, a third-party property, then its work would have been considered complete under Definition 14b(1)—“When all of the work called for in your contract has been completed.”<sup>111</sup> In effect, Thommes' work would be considered complete when Thommes finished doing the work called for in the contract, not the work Thommes *thought* was called for in the contract.

From the statements available,<sup>112</sup> the sequence of Thommes' work is not entirely clear. As detailed above, Benick recalled that Thommes started working on the Krajewskis' property “about halfway” through its work.<sup>113</sup> This accounting indicates that the damage was discovered while operations were still ongoing. However, while Benick's statement records the discussions that went on after the damage was discovered, it makes no mention of having more work left to complete on the development's property.<sup>114</sup> Still, the insurer did choose 2j(5) and 2j(6) as the exclusions by which to deny coverage, thereby suggesting that damages did occur during Thommes' operations.<sup>115</sup>

The timing of the damage warrants investigation because, at first glance, it is a surprise that the business risk doctrine comes up at all in connection with 2j(5) and (6). In the article that originally formulated the business risk doctrine, Henderson asserts that the risk intended to be insured is the possibility that the insured's work will cause tort liability to a third party “*once relinquished or completed.*”<sup>116</sup> On the face of it, then, the business risk doctrine should not apply in *Thommes* as it involved an ongoing operation.

Indeed, at least one court, when faced with a CGL ongoing operation exclusion, incorporated the business risk doctrine that led to an outright contradiction in its holding. In *Glens Falls Insurance Co. v.*

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111. CGL Policy, *supra* note 7.

112. See handwritten statement of Thomas Benick, Partner of Thommes & Thomas, Concerning the HHA Project (July 11, 1998), *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877 (Minn. 2002) (No. C9-00-1393); handwritten statement of Gary Dawson, Agent for RKI, Concerning the HHA Project (August 5, 1998), *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877 (Minn. 2002) (No. C9-00-1393).

113. Handwritten statement of Thomas Benick, Partner of Thommes & Thomas, Concerning the HHA Project, dated July 11, 1998, *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877 (Minn. 2002) (No. C9-00-1393).

114. *Id.*

115. *Thommes*, 622 N.W.2d at 160. The court of appeals took it as settled that Thommes damaged the Krajewskis' property “in the course of clearing” the development's property. *Id.*

116. Henderson, *supra* note 18, at 441 (emphasis added).

*Donmac Golf Shaping Co., Inc.*, the Georgia Court of Appeals dealt with a fact situation strikingly similar to *Thommes*.<sup>117</sup> After a contractor completed construction of a golf course, the developer discovered that substantial parts of it had been built on federally protected wetlands.<sup>118</sup> In effect, the contractor had built on a third party's property and, as the court put it, this construction "obviously occurred contemporaneously with the work being performed on the project."<sup>119</sup> Like the court in *Thommes*, the Georgia Court of Appeals ultimately held that 2j(5) and (6) did not work to exclude coverage because the damages were "beyond the scope of the contractual expectations" in tort.<sup>120</sup> Nevertheless, the court's restatement of the business risk doctrine by which it justified its decision, taken as usual from *Weedo*, was that "[t]he risk intended to be insured is the possibility that the . . . work of the insured, *once relinquished or completed*, will cause . . . damage to property other than to the . . . *completed* work itself."<sup>121</sup> It escaped the court that a doctrine contingent on the existence of completed work cannot be applied to a fact situation involving contemporaneous work.<sup>122</sup>

The "once relinquished or completed" language perplexed both sides in *Thommes*. In its brief to the supreme court, Milwaukee argued that "[a] review of the law review article giving rise to the adoption of the business risk doctrine in Minnesota, as well as the New Jersey decision cited extensively by [the supreme court] when it adopted the doctrine . . ." revealed that the court of appeals had misinterpreted this illustrative phrase.<sup>123</sup> Namely, Milwaukee argued that the first line of the oft-quoted passage by Henderson in *Weedo* contains the "critical qualification" that coverage applies only after the work is complete.<sup>124</sup> To buttress its argument, Milwaukee then asserted that no coverage for

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117. 417 S.E.2d 197 (Ga. Ct. App. 1992).

118. *Id.* at 198.

119. *Id.* at 199.

120. *Id.* at 201.

121. *Id.* at 200 (emphasis added).

122. Though not directly dealing with the ongoing operations exclusions of 2j(5) and (6), *Knutson* also could be considered to have an internal contradiction. Although *Knutson* contains the Henderson quotation, "once relinquished or completed," the court later talks about a CGL policy being intended to cover third-party damage from both completed operations and also *during* the course of the insured's work. *Knutson*, 396 N.W.2d at 234. See also *Weaver v. Drew*, No. 96-0454, 1996 WL 588060, \*3 (Wis. Ct. App. 1996) (discussing 2j(6) exclusion while relying on precedent that quotes "once relinquished or completed" passage).

123. Appellant's Brief at 25, *Thommes v. Milwaukee Mut. Ins. Co.*, 641 N.W.2d 877 (Minn. 2002) (No. C9-00-1393) [hereinafter Appellant's Brief].

124. *Id.* at 26.

ongoing operations “dovetails with the purpose of the business risk doctrine . . .” because an insured “can control the risks to third-party property” while on the job.<sup>125</sup> “[T]he insured is present and can control his or her actions,” whereas later, an insured has “less control.”<sup>126</sup> Milwaukee even cited the *Weedo* pronouncement that CGL insurance “does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident” in support of its position.<sup>127</sup>

In its responding brief, Thommes asserted that Milwaukee’s argument failed because it was internally inconsistent.<sup>128</sup> Thommes argued that the nature of Milwaukee’s argument conceded that there could be coverage to third-party property arising from completed work, if not ongoing work.<sup>129</sup> However, according to Thommes, if the court adopted Milwaukee’s definition of “your work”—a phrase contained in the exclusions 2j(6) and 2l—then the court would never grant coverage for completed operations.<sup>130</sup> Thommes concluded that Milwaukee’s point had to be rejected because never granting coverage was an impossibility.<sup>131</sup> Thommes was responding to the fact that insureds

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125. *Id.*

126. *Id.* at 26-27.

127. *Id.* at 27 (quoting *Weedo*, 405 A.2d at 796). If Milwaukee had prevailed on its point of a literal reading of Henderson, it only would have created future problems. The business risk doctrine is founded on the concept that an insured should not receive coverage for damages arising from business risks that were within its own control. O’Connor, *supra* note 11, at 15. To realize this principle, courts have developed the practice of ruling no coverage for damages arising from a contract with a first-party property and for coverage for damages arising from tort suffered by a third party. Dotseth et al., *supra* note 7, at 601. In order to see Milwaukee’s argument through to a logical conclusion, courts would have to create a distinction between torts that (1) arise in the course of the insured’s work, and (2) those that arise from work after it is completed. The artificiality of this distinction is indicative of the criticism commentators have made of the business risk doctrine overall. The doctrine covers tort claims under CGL policies, but not contract claims, even though both can arise from negligent behavior. *See generally* Dotseth et al., *supra* note 7. And yet, a tort is a tort is a tort—a wrong or breach of duty, regardless of when it occurs. *See* BLACK’S, *supra* note 2, at 1496. Negligence is theoretically a wrong that can be avoided, regardless of the degree of control one has over the tortious behavior. Even when damages arise after work is completed, the wrongful act that led to damage still must have occurred during the course of work. Only the extent of damages can vary. *See* 7 COUCH ON INSURANCE § 102:23. *See also* O’Connor, *Liability Coverage*, *supra* note 78, at 14. If the court had addressed Milwaukee’s argument, such a reading would not have satisfied the business risk doctrine.

128. Respondent’s Brief at 22-23, *Thommes v. Milwaukee Mut. Ins. Co.*, 641 N.W.2d 877 (Minn. 2002) (No. C9-00-1393) [hereinafter Respondent’s Brief].

129. *Id.* at 22.

130. *Id.*

131. *Id.*

generally want a court to use as narrow a definition of “your work” as possible to make the corresponding exclusion as narrow as possible.<sup>132</sup>

Through the briefs from both sides in *Thommes*, the supreme court must have been aware of the dispute over timing. Yet strangely, nowhere in the opinion does the supreme court comment on this difference from *Henderson*, which had been quoted verbatim in earlier decisions.<sup>133</sup> Even though the explanation for the phrase “once relinquished or completed” lay there to be discovered, *Henderson* had been quoted out of context in previous court decisions.<sup>134</sup> The full passage from which *Henderson*’s oft-quoted language was plucked is one in which he is not discussing the business risk doctrine overall.<sup>135</sup> Instead, he is specifically discussing the “products hazard and completed operations” provision (today’s “products-completed operations hazard”).<sup>136</sup> Again, it is the products-completed operations hazard that limits 21’s application to completed work, completely distinct from 2j(5) and (6) exclusions that apply to ongoing operations.<sup>137</sup> When *Henderson* wrote of the “risk intended to be insured” that precedes the “once relinquished or completed” phrase, he was writing about the risk to be insured by the products-completed operations hazard, not the business risk doctrine generally.<sup>138</sup> Instead of proposing to limit CGL coverage to damages that arise after work is complete, *Henderson* was narrowly discussing a provision that, by its own terms, was confined to damages having arisen after completed work.<sup>139</sup>

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132. 4 BRUNER & O’CONNOR, *supra* note 3, at § 11:43.

133. See, e.g., *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am.*, 323 N.W.2d 58, 62 (Minn. 1982); *Knutson Constr. Co. v. St. Paul Fire and Marine Ins. Co.*, 396 N.W.2d 229, 235 (Minn. 1986). There is at least one decision from the court of appeals, though dealing with different versions of exclusions, that preceded the supreme court’s position in *Thommes*. See *Western World Ins. Co. v. H.D. Eng’g Design & Erection Co.*, 419 N.W.2d 630 (Minn. Ct. App. 1988). The *Western World* decision involved employees of a subcontractor who negligently placed materials on top of a partially completed building and caused it to collapse. *Id.* at 631. The court of appeals found the effect of the business risk doctrine in *Western World* distinguishable from *Bor-Son* and *Knutson*. *Id.* at 635. The court held that the subcontractor’s insurer had a duty to defend and indemnify because the damages arose from tort liability to a third party. *Id.* The court reached this decision despite the fact that the actions giving rise to the liability occurred while the work was still in progress. *Id.* at 631. The *Western World* decision did not comment on timing.

134. See *supra* notes 105-10 and accompanying text.

135. *Henderson*, *supra* note 18, at 441.

136. See CGL Policy, *supra* note 7.

137. *Id.*

138. *Henderson*, *supra* note 18, at 441.

139. *Id.*

The ritualized quoting of Henderson that has omitted this language ever after is part of *Weedo*'s lasting legacy, demonstrating the perils of taking key passages of another decision wholesale. Henderson stated elsewhere in his article that "there are no tenable distinctions [in whether to grant coverage] between errors in planning and production."<sup>140</sup> When, according to Henderson, "liability is imposed on the fault basis of negligence, the standard is one of ordinary care in each situation."<sup>141</sup> From Henderson's perspective, the timing of the damages would only be a factor like any other in determining what is ordinary care, not something that precluded coverage altogether. In speaking of the products hazard and completed operations provision, Henderson's point was to show that the impulse behind the provision was in keeping with its historical forerunner, the "premises and operations" provision that provided coverage for ongoing operations.<sup>142</sup> If Henderson considered the current form for exclusions 2j(5) and (6), his reasoning would lead him to concur with *Thommes* that if an insured's work may give rise to tort liability to third parties, then a CGL policy should provide coverage without regard to timing.<sup>143</sup> Thus, Milwaukee was correct that the meaning of the "once relinquished or completed" passage changed when the first sentence was restored to its rightful place, just not in the way that it hoped.<sup>144</sup>

The Minnesota Supreme Court skipped a step in reasoning when it failed to convey that it was dropping the "once relinquished or completed" qualification from its understanding of the business risk doctrine.<sup>145</sup> Nevertheless, the absence of any timing qualification did allow the court to avoid an outright contradiction between the business risk doctrine's formulation and application. *Knutson*'s aside about coverage during the course of an insured's work does perhaps suggest that the court had it clear for itself that CGL coverage applied without

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140. *Id.* at 440.

141. *Id.*

142. *Id.* at 417. The premises and operations provision is intended to cover "injuries to third persons arising out of conditions or activities on or near [an insured's] premises and for operations away from such premises but related thereto." *Id.*

143. *Id.* at 418. Henderson has detailed the distinction between exclusions based on timing in a passage on the history of CGL insurance. *Id.* The distinction is a function of the premises and operations provision having originated before, and being sold separately from, the products-completed operations hazard. *Id.*

144. See Appellant's Brief, *supra* note 123, at 25.

145. *Thommes*, 641 N.W.2d at 881. The *Thommes* court merely wrote that the risk intended to be insured by CGL policies is the risk that an insured's work will cause property damage to third-party property and may give rise to tort liability. *Id.*

regard to timing.<sup>146</sup> Whatever the case, the path from *Bor-Son* to *Thommes* only becomes clear after one considers the business risk doctrine in its original context. Thus, although *Thommes* does not announce that it has revised the business risk doctrine, a revised formulation still emerges from it, and one that states what the court actually thinks: the risk intended to be insured is that which may give rise to tort liability to third parties.<sup>147</sup>

*B. Trying to Have It Both Ways*

As a missing step, not a misstep, in the supreme court's reasoning, the above analysis does not affect the court's ultimate holding. Reconstructing this step, however, does reveal the incremental way in which the court has refined the business risk doctrine from *Bor-Son* to *Thommes*, possibly to the cast that the court is willing to see brought before it in the future. By not discarding a doctrine that some have criticized,<sup>148</sup> *Thommes* in essence recommitted Minnesota to the business risk doctrine framework. However, the Minnesota courts' present handling of the business risk doctrine precludes it from ever being fully realized.

As the *Thommes* court itself declared, the interpretation of an insurance contract must be decided as a matter of law, not fact.<sup>149</sup> The purported operating principle behind the business risk doctrine used to interpret an insurance contract—that one should receive coverage only for unavoidable damages—should make coverage depend on whether an insured has committed a tort.<sup>150</sup> After all, a tort is an avoidable consequence that arises through unreasonable behavior.<sup>151</sup> In Minnesota, courts have ruled that, of the spectrum of torts, a CGL policy may cover negligence, but not intentional torts.<sup>152</sup> Negligence alone does not necessarily make an action fall within a CGL policy's scope.<sup>153</sup> Yet, as

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146. 396 N.W.2d at 234.

147. 641 N.W.2d at 881.

148. See O'Connor, *supra* note 11, at 18; 4 BRUNER & O'CONNOR, *supra* note 3, at § 11:37.

149. 641 N.W.2d at 879.

150. O'Connor, *supra* note 11, at 15.

151. BLACK'S, *supra* note 2, at 1496.

152. See, e.g., *Ohio Cas. Ins. Co. v. Terrace Enter., Inc.*, 260 N.W.2d 450, 453 (Minn. 1997).

153. *W. Nat'l Mut. Ins. Co. v. Frost Paint & Oil Corp.*, No. C3-97-1118, 1998 WL 27247, at \*2 (Minn. Ct. App. Jan. 27, 1998) (stating that "faulty workmanship alone does not constitute an occurrence"). A CGL policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful

with other torts, determining negligence is primarily a question of fact.<sup>154</sup> Thus, bringing the business risk doctrine to its complete realization intrinsically involves deciding some question of fact.

If material facts are deemed not in dispute, as in a summary judgment decision, a court should in theory be able to attribute to them their legal significance and decide the case as a matter of law.<sup>155</sup> If, furthermore, a court ascribes to the business risk doctrine, it would appear that whether an insured received coverage would hinge on a court's determination of whether the insured was negligent. Yet *Thommes*, through a review of a summary judgment of what is in essence a negligence claim,<sup>156</sup> never mentioned whether the facts had to be viewed in the light more favorable to one claimant rather than the other.<sup>157</sup> This absence is in keeping with a court that does not feel the need to decide whether an insured has been negligent.

It is only to be expected that as a case rises through the appeals process, the substantive legal issues rise to the fore, while the facts recede into the background.<sup>158</sup> Still, it is beneficial to compare what facts the court of appeals found worthy of mention versus the supreme court. The court of appeals stated:

Before [Thommes'] employees commenced clearing, Dean Morlock pointed out a tree marking the property line up to which appellant was to cut and clear trees. When asked whether certain brush and trees were on the adjacent property, Morlock told [Thommes'] employees not to worry because his sister owned the property. [Thommes'] employees cleared the trees as instructed, but later learned they had destroyed trees on the Krajewski property.<sup>159</sup>

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conditions." CGL Policy, *supra* note 7.

154. *Glatt v. Feist*, 156 N.W.2d 819, 823 (N.D. 1968).

155. 73 AM. JUR. 2D *Appellate Review* § 37 (2001). "If there are no questions of fact, the court applies the law in accordance with the admitted facts." *Id.*

156. 73 AM. JUR. 2D *Summary Judgment* § 8 (2001). "Summary judgment is not usually as feasible in negligence cases as in other kinds of litigation because issues of negligence . . . are not ordinarily susceptible of summary adjudication for or against the plaintiff or claimant." *Id.*

157. *Thommes*, 641 N.W.2d at 879. Instead, the *Thommes* court wrote: "On a review of a summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court correctly applied the law . . . . The parties in this case agree as to the material facts." *Id.*

158. 5 AM. JUR. 2D *Appellate Review* § 662 (1995). Generally speaking, "an appellate court does not reweigh the evidence presented in the court below." *Id.*

159. *Thommes v. Milwaukee Mut. Ins. Co.*, 622 N.W.2d 155, 157 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 877 (Minn. 2002).

The court of appeals included enough facts to make Thommes' behavior appear reasonable.<sup>160</sup> In contrast, the supreme court's decision touched only briefly on the facts: "Complying with Morlock's instructions as to the area to be cleared and grubbed, Thommes cleared and grubbed approximately one-half acre of the Krajewskis' land . . . . That land was not a part of the HHA property and the Krajewskis did not consent to it being cleared and grubbed."<sup>161</sup> The supreme court's facts perhaps give the impression that Thommes was not negligent. Yet the relative lack of factual background in the supreme court's decision suggests that the supreme court did not want to appear swayed by the facts, one way or the other.

Despite the supreme court's pronouncement that "the material facts" were undisputed,<sup>162</sup> both Thommes and Milwaukee took the opportunity in their briefs to dispute those facts. The dispute centered on whether Thommes had been negligent, even though a settlement had already been reached between Thommes and the Krajewskis by the time their dispute came up on appeal.<sup>163</sup> For instance, in its brief, Milwaukee asserted that "[t]here is no dispute that Respondent [Thommes] had the ability to demand a survey from the general contractor or perform one at its own expense to establish boundaries."<sup>164</sup> Thommes countered in its own brief that "[t]his 'fact' has not been established."<sup>165</sup>

All of this suggests that the facts do matter. The court had Benick's statement available to it. Perhaps the court in *Thommes* unconsciously wanted to provide coverage for an insured that it did not consider negligent. There has been no harm in the *Thommes* case because it does not appear that the insured was negligent. But it is unclear that the supreme court will handle a future case in the same way as *Thommes* if it feels that an insured has been negligent.

An alternative to the approach adopted by Minnesota courts may be available. In *Utility Maintenance Contractors, Inc. v. West American Insurance Co.*, the Kansas Court of Appeals decided its own CGL coverage case.<sup>166</sup> The city of Offerle hired Utility, a contractor insured

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160. *Id.* at 157.

161. *Thommes*, 641 N.W.2d at 879.

162. *Id.* at 878.

163. Respondent's Brief, *supra* note 128, at 32. The Krajewskis' complaint had requested damages of \$35,000. *Id.* Thommes settled the Krajewskis' claim for \$15,000. *Id.*

164. Appellant's Brief, *supra* note 123, at 4.

165. Respondent's Brief, *supra* note 128, at 4.

166. 866 P.2d 1093 (Kan. Ct. App. 1994). Another case that decided the issue of

by West American, to remove a sewage clog in the city sewer line.<sup>167</sup> To remove the clog, Utility used a root cutter, which traveled over a hundred feet to reach the problem site.<sup>168</sup> Because a bolt fell off while traveling in the line, the root cutter was defective and caused damage to the sewer.<sup>169</sup>

As one of its defenses to providing coverage, the insurance company raised exclusion 2j(5).<sup>170</sup> While the court agreed with the insurer to bar coverage for the 115 feet of sewer line the root cutter had to travel to reach the clog site, the court decided differently for any damage past it.<sup>171</sup> The court reasoned that:

[a]ny damage that occurred beyond the clog site . . . may be excluded by section 2.J.(5), depending upon a factual showing on remand that it was the usual and necessary practice under similar circumstances to use the cutter beyond the initial point in the line where the clog is first noted.<sup>172</sup>

By asking what is “the usual and necessary practice,”<sup>173</sup> the court converted the question of coverage for any damage past 115 feet into a fact question.

Unlike *Thommes*, the damages in *Utility* occurred on the customer’s own property, not that of a third party.<sup>174</sup> Normally, a court following the business risk doctrine would decide the situation in *Utility* as a contract issue across the board, rather than tort.<sup>175</sup> In *Utility*, it is unclear whether the court is consciously trying to follow the business risk doctrine or not.<sup>176</sup> Yet whether on the contract or tort side of the

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coverage as a fact question is *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000). *Doerr* involved water contaminated by an oil refinery’s pollution, and determination of the coverage issue depended on how a pollution exclusion was interpreted. 774 So. 2d at 122-23. The court ruled that the determination of key terms, such as polluter, pollutant, and discharge, had to be decided by the trier of fact. *Id.* at 135-37.

167. *Utility*, 866 P.2d at 1095.

168. *Id.*

169. *Id.*

170. *Id.* at 1097.

171. *Id.*

172. *Id.*

173. *Id.*

174. Compare *Thommes*, 641 N.W.2d at 877 with *Utility*, 866 P.2d at 1093.

175. See, e.g., *Thommes*, 641 N.W.2d 889 (recognizing that “it is well established that general contract principles govern the construction of insurance policies . . .”).

176. *Utility*, 866 P.2d at 1096. The *Utility* decision never names the business risk doctrine. However, the court does include reasoning along the lines mentioned in *Thommes*, noting that the two types of risk involved for an insured contractor are: (1) the risk that “is in the warranties that arise under the contract,” and (2) the risk of “tort liability for ‘injury to people and damage to property other than the work performed.’ ”

business risk doctrine's distinction, this case still carries implications for a case like *Thommes*. As a case on the business risk doctrine's contract side, the Kansas Court of Appeals could have used the business risk doctrine's distinction between contract and tort to deny coverage out of hand, as Minnesota courts did in *Bor-Son* and *Knutson*.<sup>177</sup> The significance of the *Utility* analysis for the *Thommes* court is that the *Utility* court allowed a fact question to decide the issue of coverage.<sup>178</sup> A court could follow *Utility*'s lead to make coverage in tort situations also dependent on a fact inquiry.

The *Thommes* court has hedged the predicament of reconciling a type of claim that must be decided as a matter of law to another that must be decided as a question of fact. In *Thommes*, the court wrote that CGL policies are intended to insure against risk that *may* give rise to tort liability to third parties.<sup>179</sup> Yet if courts are to dictate coverage on the basis of what *may* give rise to tort liability, without regard to whether an insured was negligent, what is the point of bothering about the business risk doctrine at all? The business risk doctrine is seen as the great weapon of the insurance industry.<sup>180</sup> However, deciding coverage without a fact inquiry—which ensures that coverage is not a fact-dependent outcome—removes the possibility for the business risk doctrine to work at all. As in *Thommes*, courts will be able to find a CGL insurance contract “ambiguous” and construe its terms against the

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*Id.* (quoting *Owings v. Gifford*, 697 P.2d 865, 869 (Kan. 1985)).

177. See *Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am.*, 323 N.W.2d 58, 62 (Minn. 1982) (stating that “since the alleged building damages were the result of alleged breach of contract, there was no duty” on the insurer to defend its insured); *Knutson Constr. Co. v. St. Paul Fire and Marine Ins. Co.*, 396 N.W.2d 229, 235 (Minn. 1986) (“[T]he CGL policy does not provide coverage for claims of defective materials and workmanship giving rise to a claim for damage to the property itself which is the subject matter of the construction project.”).

178. *Utility*, 866 P.2d at 1097.

179. *Thommes*, 641 N.W.2d at 881. Currently, the law tries to relieve the insured of an obligation to prove any requisite facts in order to obtain a defense. See 4 BRUNER & O’CONNOR, *supra* note 3, at § 11:20 (discussing the duty to defend). Thus, one attraction of the supreme court’s approach in *Thommes* could be that coverage for what *may* give rise to tort liability avoids giving an insurer grounds to evade its duty to defend its insured. That is, if one could get CGL coverage only if non-negligent, a circular inquiry could develop in which an insured would need a trial to demonstrate that its insurer should defend. Of course, that is not too far off from what happened in *Thommes*, what with the insured *Thommes* having to go to court against its insurer to gain the duty to indemnify.

180. See O’Connor, *supra* note 11, at 15 (characterizing the business risk doctrine as a “tried and true weapon” of the insurance industry, even to the point of defeating the plain words in a CGL insurance policy).

drafter as long as the damage occurs on a third party's property.<sup>181</sup>

#### V. CONCLUSION

To reach a seemingly novel decision for providing coverage, the *Thommes* court simply returned to the sources of CGL insurance. By examining the troublesome phrase “once relinquished or completed” in its original context, it becomes apparent that *Thommes* reveals that the business risk doctrine does not have a restrictive timing distinction. Instead, the way timing interplays with a CGL policy's coverage depends on which provisions an insured has specifically purchased. However successful *Thommes*'s revisit of the doctrine is, the business risk doctrine still contains the intrinsic problem of having to decide a question of fact as matter of law. Perhaps the court is satisfied that its rendition of the business risk doctrine—coverage for third-party tort damages for which one *may* be found liable—sufficiently mitigates the paradox.

Insurance companies originally propagated the business risk doctrine before the courts as a way to narrow coverage.<sup>182</sup> And, indeed, this is what happened in such landmark Minnesota cases as *Bor-Son*<sup>183</sup> and *Knutson*,<sup>184</sup> because of this self-same business risk doctrine. In the end, however, the intent behind the doctrine, as the Minnesota Supreme Court understood it, has allowed an insured like *Thommes* to beat the insurers at their own game.

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181. 641 N.W.2d at 883.

182. See O'Connor, *Liability Coverage*, *supra* note 78, at 8-9.

183. 323 N.W.2d at 63.

184. 396 N.W.2d at 235.