

NOS. A04-1442 and A04-1612  
STATE OF MINNESOTA  
IN SUPREME COURT

Wooddale Builders, Inc.,

*Appellant,*

v.

Maryland Casualty Company, d/b/a Zurich North America,

*Appellant,*

v.

American Family Insurance  
and Western National Insurance Group

*Appellants,*

and

West Bend Mutual Insurance Company and SafeCo,

*Respondents.*

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**BRIEF OF *AMICUS CURIAE* BUILDERS ASSOCIATION OF MINNESOTA, AS  
UMBRELLA ORGANIZATION FOR BUILDERS ASSOCIATION OF THE  
TWIN CITIES AND MINNESOTA OUT STATE BUILDERS ASSOCIATIONS**

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## INTEREST OF *AMICUS CURIAE*

The Builders Association of Minnesota (“BAM”) is the umbrella organization for the Builders Association of the Twin Cities (“BATC”) and out state builders associations.<sup>1</sup> BAM, BATC, and the out state associations are nonprofit, voluntary trade associations representing the interests of approximately 4,000 members (including home builders, remodelers, developers, subcontractors, and suppliers working in the residential building industry throughout the State of Minnesota). BAM’s membership includes BATC’s members and the out state associations’ members. Collectively BAM, BATC, and the out state associations will be referred to as the “Builders Associations.”

The Builders Associations’ members are engaged in building and remodeling homes throughout Minnesota. In total, members employ more than 500,000 Minnesotans. The Builders Associations serve their members by developing and promoting programs and services to enhance members’ abilities to conduct individual businesses successfully, with integrity and competence, and to promote quality construction techniques thereby benefiting the home-buying public.

Under Minnesota law, all licensed residential contractors are required to purchase commercial general liability (“CGL”) insurance policies to protect themselves and the home-buying public against, among other things, property damage claims caused by

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<sup>1</sup> **Rule 129.03 Certification.** BAM’s and BATC’s legal counsel authored this brief. No other party’s counsel participated in or authored any portion of this brief. The Minnesota Developers and Builders Legal Action Fund (the “Fund”) paid the legal fees and costs for this *amicus curiae* brief on BAM’s and BATC’s behalf. The Fund consists of sixty-seven member companies that raise funds to support the legal interests of the residential building industry. These sixty-seven companies also are members of BAM, BATC, or the out state associations.

inadvertent construction defects. *See* Minn. Stat. § 326.94, subd. 2. The Court of Appeals' decision calls into question the effectiveness of CGL policies as applied to construction defect claims. The Builders Associations are vitally interested in the outcome of this case in order to ensure their members and the home-buying public receive the protections intended to be afforded by CGL insurance coverage.

### **LEGAL ISSUES**

#### **Issue I:**

When the doctrine of allocation pro rata by time on the risk is applied to a construction defect claim by stipulation of the parties, is the appropriate end date for allocating damages the date the insured is notified of the claim?

#### **Ruling Below:**

The Court of Appeals reversed the district court's decision that the appropriate end date is the date the insured is notified of the claim.

#### **Apposite Authority:**

*In re Silicone Implant Ins. Cov. Litig.*, 667 N.W.2d 405 (Minn. 2003)

*Northern States Power Co. v. Fidelity & Cas. Co. of New York*, 523 N.W.2d 657 (Minn. 1994)

#### **Issue II:**

When the doctrine of allocation pro rata by time on the risk is applied to the indemnification portion of an insurance claim by stipulation of the parties, should defense and investigation expenses be shared by the insurers equally?

**Ruling Below:**

The Court of Appeals reversed the district court's decision that the expenses should be shared equally by the insurers.

**Apposite Authority:**

*Franklin v. Western Nat'l Mut. Ins. Co.*, 574 N.W.2d 405 (Minn. 1998)

*Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161 (Minn. 1986)

**STATEMENT OF FACTS**

**I. The Underlying Litigation**

Wooddale Builders, Inc. ("Wooddale") is a general contractor that primarily constructs single-family homes. Wooddale App.<sup>2</sup> 15. In late 2000, the owners of Wooddale-built stucco homes began complaining about defective construction and faulty workmanship that resulted in water-infiltration and mold growth in the homes.

Wooddale received sixty complaints regarding homes it built between 1990 and 1996.

*Id.*

Wooddale submitted claims to its CGL insurance companies that had issued policies from November 13, 1990, through November 13, 2002. *Id.* This included American Family Insurance Group ("American Family"), West Bend Mutual Insurance Company ("West Bend"), American Economy Insurance Company ("SafeCo"), Maryland Casualty Company ("Maryland Casualty"), and Western National Insurance Group ("Western National"). *Id.* The insurers did not pay to repair the Wooddale-built homes. Consequently, Wooddale brought suit against Maryland Casualty which, in turn,

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<sup>2</sup> "Wooddale App." refers to the Appendix of Wooddale Builders, Inc.

filed third-party complaints against Wooddale's other insurers. *Id.*

The parties obtained expert opinions that the damages to the homes were the result of "repeated water intrusion events, occurring over an extended period of time" and could not be traced to a "solitary, discrete, identifiable, water intrusion event." Wooddale App. 16. The parties stipulated that liability for the claims should be allocated among the insurers pro rata by time on the risk. Wooddale App. 17. The parties agreed on a starting point for the allocation of damages, but could not agree on the ending point or the allocation of defense and investigation expenses for the claims. *Id.*

## **II. The District Court's Decision**

In a decision dated June 15, 2004, the district court concluded that the appropriate ending date for allocation of damages is the date the insured, Wooddale, is "put on notice that a homeowner is making a claim for damages to their home from alleged water infiltration." *Id.* (Based on the parties' agreement, the district court did not need to rule on the issue of whether allocation pro rata by time on the risk actually was appropriate.) The district court further concluded that "[t]he [i]nsurers will bear the cost of defending [Wooddale] and investigating the homeowner claims equally, not pro rata by their time on the risk." Wooddale App. 18.

## **III. The Appeal To The Court Of Appeals**

West Bend appealed to the Minnesota Court of Appeals, arguing that the district court erred: (1) by setting the end date for allocation of damages as the date when Wooddale received notice of a pending claim, and (2) in allocating defense and investigation expenses equally among the insurers. Wooddale App. 20. On the first

issue, the Court of Appeals reversed the district court's decision, concluding that the damages should be allocated past the date Wooddale was placed on notice of a claim, and through the remediation period for the claim. Wooddale App. 25-27. The Court of Appeals also reversed the district court's decision on the allocation of defense and investigation costs, concluding that such costs should be allocated pro rata by time on the risk. Wooddale App. 28.

By Order dated July 19, 2005, this Court granted the petitions of Wooddale, American Family, Maryland Casualty, and Western National for further review. By that same Order, the Court granted BAM's petition to file a *amicus curiae* brief arguing for reversal of the Court of Appeals' decision, and seeking confirmation from this Court that the appropriate end date for allocating damages in construction defect cases where the parties stipulate that the doctrine of allocation pro rata by time on the risk applies, is the date the insured-contractor receives notice of a third-party homeowner's claim. BAM further seeks confirmation that defense expenses should be shared equally by insurers when the parties stipulate that the doctrine of allocation pro rata by time on the risk applies to the indemnification issue.

## ARGUMENT

### **I. Standard Of Review**

In reviewing a district court's grant of summary judgment, this Court addresses two questions: (1) are there any genuine issues of material fact; and (2) did the lower court err in its application of the law? *Offerdahl v. Univ. of Minnesota Hosp. & Clinics*,

426 N.W.2d 425, 427 (Minn. 1988). In this matter, the sole question is whether the district court erred in its application of the law.

“Insurance coverage issues are questions of law for the court” and, as such, are reviewed *de novo*. *State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992); *see also The Home Ins. Co. v. Nat’l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 527 (Minn. 2003) (reviewing issue of apportioning defense costs among insurers under a *de novo* standard of review). A trial court’s “allocation decisions should be reviewed under an abuse of discretion standard,” however. *In re Silicone Implant Ins. Cov. Litig.*, 667 N.W.2d 405, 417 (Minn. 2003).<sup>3</sup>

## II. Analysis

### A. **Where Parties Stipulate to a Pro Rata by Time on the Risk Allocation of Damages Among Insurers, the Appropriate End Date for Allocating Damages is the Date the Insured is Notified of the Claim.**

Perhaps because of the flexibility necessarily granted to the district courts for making allocation decisions, *Silicone*, 667 N.W.2d at 417, this Court has never ruled on the appropriate end date when allocating damages pro rata by time on the risk.

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<sup>3</sup> The Court of Appeals erroneously applied a *de novo* standard of review to the district court’s allocation decision, distinguishing *Silicone* as follows: “The issue before the *Silicone* court was the district court’s decision to *apply* the pro-rata-by-time-on-the-risk method in allocating damages among multiple insurers. Here, the issue is the district court’s application of this [stipulated] method to the facts presented.” Wooddale App. 29. The Court of Appeals’ distinction is without substance and ignores the basis for this Court’s pronouncement in *Silicone*: “damages are very fact-dependent, so trial courts must be given the flexibility to apportion them in a manner befitting each case.” 667 N.W.2d at 417 (internal quotations omitted). Thus, contrary to the Court of Appeals’ statement, the district court’s application of the pro rata by time on the risk doctrine should be reviewed under an abuse of discretion standard. In the end, though, the Builders Associations believe that the district court’s decision was correct under any standard of review.

Nonetheless, the Court of Appeals reversed the district court's allocation decision concluding that the appropriate end date is the date damages are remediated. The Court of Appeals' decision is impractical and unrealistic. It also defies the parties' reasonable expectations and public policy reasons for requiring contractors to obtain insurance coverage.

In contrast, the district court's placement of the end date of the allocation period as the date the insured receives notice of the claim ensures consistency and certainty, discourages a "wait-and-see" approach from insurance companies, and comports with the parties' reasonable expectations. Moreover, adoption of the notice date furthers sound public policy. As a result, this Court should reverse the Court of Appeals' decision under any standard of review, and should reinstate the district court's determination.

1. Minnesota's Allocation Doctrine

As a threshold issue when discussing allocation, a court must "identify the triggered policies among which to allocate." *Silicone*, 667 N.W.2d at 420. "A policy is 'triggered' if the policy provides some coverage for damages." *N. States Power Co. v. Fidelity & Cas. Co. of New York*, 523 N.W.2d 657, 659-60 n.3 (Minn. 1994). To determine whether the policy provides coverage, a court must look at whether property damage occurred during the policy period. *Silicone*, 667 N.W.2d at 415. This is called the "actual injury" or "injury-in-fact" trigger, and "[u]nder such a rule, the time of the occurrence is not the time the wrongful act was committed but the time the complaining party was actually damaged." *Id.* (internal quotation omitted). In this case, the district

court properly recognized the “actual injury” trigger as the appropriate standard.

Wooddale App. 17.

As for allocation of damages, this Court has held that occurrence policies in place at the time of a distinct liability event from which continuing injury arises are responsible for all damages caused by the event. *Silicone*, 667 N.W.2d at 421-22; *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 318 (Minn. 1995). In limited circumstances, though, a court may allocate liability to insurers on the basis of the time the insurers were “on the risk” as a percentage of the entire period during which property damage occurred. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732-33 (Minn. 1997); *N. States Power*, 523 N.W.2d at 661-65. This Court has expressed a straight-forward analysis for making such a determination:

First, we determine whether the plaintiffs’ injuries are continuous. If they are not, under the actual-injury trigger theory, the policies on the risk at the time of the injury would pay all losses arising from that injury. Here, the court found that the injuries are continuous, so we move to the next determination: whether the continuous injury arose from some discrete and identifiable event. If it does, the policies on the risk at the time of that event are liable for all sums arising from the event. If not, allocation may be appropriate.

*Silicone*, 667 N.W.2d at 421. This Court cautioned, though, that “allocation is meant to be the exception and not the rule because ‘[i]t is only in those difficult cases’ that allocation is appropriate.” *Id.* (quoting *Domtar*, 563 N.W.2d at 733). Indeed, the Court stated that “[i]f we can identify a discrete originating event that allows us to avoid allocation, we should do so.” *Id.* at 421-22.

Wooddale and its insurers stipulated that allocation pro rata by time on the risk is appropriate and, therefore, it is not an issue on appeal.<sup>4</sup> Wooddale App. 17. The parties further agreed that the appropriate start date for the allocation determination is the date of closing on the purchase of the home at issue in a claim. *Id.* The only issue, therefore, is the end date for purposes of allocation.

This Court has never addressed the issue of the appropriate end date for an allocation period, although in *N. States Power* the Court recognized that the end date could be the date of notice of a claim: “This method assumes that the damages in a contamination case are evenly distributed (or continuous) through each policy period from the first point at which damages occurred to the time of discovery, cleanup or whenever the last triggered policy period ended.” 523 N.W.2d at 663. Moreover, the Court stressed the need for flexibility with respect to allocation decisions. *Id.* The Court

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<sup>4</sup> The Builders Associations disagree with Wooddale’s and its insurers’ stipulation. The Builders Associations believe that under this Court’s decision in *Silicone*, allocation pro rata by time on the risk is not appropriate in construction defect cases. Specifically, similar to the implantation of the silicone gel breast implant in *In re Silicone*, and the chemical spill in August 1977 in *SCSC*, the installation of a stucco exterior on a home is a discrete and identifiable event from which the claimed damages arose. Therefore, since “we can identify a discrete originating event that allows us to avoid allocation, we should do so.” *Silicone*, 667 N.W.2d at 421-22. Indeed, to the Builders Associations’ knowledge, the only two courts that have addressed this precise issue have done so. *See, e.g., Westfield Ins. Co. v. Weis Builders, Inc.*, No. Civ. 00-987, 2004 WL 1630871 at \*3-4 (Minn. July 1, 2004) (BAM App. 1-18); *Kootenia Homes, Inc. v. Federated Mut. Ins. Co.*, File No. CO-03-4872, Amended Order (Minn. Dist. Ct. December 16, 2004) (BAM App. 19-27). (The Kootenia matter is currently on appeal before the Court of Appeals.) BAM understands, though, that in some circumstances an insured may choose to stipulate that allocation pro rata by time on the risk is appropriate (usually to avoid a protracted dispute). In such circumstances, BAM believes the end date for construction defect claims should be the date the insured is notified of the claim.

also has stressed the need to look to “many factors” when making such determinations: “[W]ith all insurance contract-related issues, courts must consider many factors when deciding [how to allocate damages], including the policy language, parties’ intent or reasonable expectations, canons of construction and public policy.” *Silicone*, 667

N.W.2d at 418 (quoting *N. States Power*, 523 N.W.2d at 661).<sup>5</sup> Applying these factors, it is evident that the appropriate end date in construction defect cases is the date the insured is notified of the claim.

2. Use of the date of notice of a claim as the end date for the allocation period ensures consistency and certainty.

The district court’s determination that the appropriate end date for an allocation period is the date the insured is notified of the claim provides a vital measure of consistency and certainty to construction defect claims. This case, while involving “only” sixty homes and the respective rights to the parties involved in the litigation, affects the entire construction industry. Indeed, the types of claims alleged against Wooddale--construction defects resulting in moisture intrusion--are quite common at this time and have led to a number of lawsuits. *See, e.g., Westfield Ins. Co. v. Weis Builders, Inc.*, No. Civ. 00-987, 2004 WL 1630871 (Minn. July 1, 2004) (BAM App. 1-18); *Kootenia Homes, Inc. v. Federated Mut. Ins. Co.*, File No. CO-03-4872, Amended Order

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<sup>5</sup> The Court of Appeals appears to be concerned that use of the notice date would assign damages occurring between the notice date and the remediation date to post-tender insurers even though the damages occurred outside their policy period. Wooddale App. 24-25. Given that the allocation doctrine involves many assumptions regarding the amount of damage occurring during a policy period, *N. States Power*, 523 N.W.2d at 664 (“This method assumes that the damages in a contamination case are evenly distributed...”), such a concern is misplaced.

(Minn. Dist. Ct. December 16, 2004) (BAM App. 19-27). In most construction defect claims, insurance coverage is an issue in investigating and remedying a claim, and in many cases there is more than one insurance company involved (thereby implicating the issue of allocation). As a result, the Court of Appeals' decision, while about Wooddale and its insurers, has wide-ranging importance to the construction industry as a whole. Consequently, a decision that promotes a consistent and certain application of the allocation doctrine is a necessity.

Unlike the use of the remediation date, the date the insured is notified of a claim is ascertainable and static. Indeed, in contrast to the notice date, the remediation date can be affected by any number of factors, most of which are not subject to an insured's control because, under a standard CGL policy, the insurer has the right and duty to defend a claim. *See, e.g.,* Western Nat'l App.<sup>6</sup> 5, "[the Insurer] will have the right and duty to defend the insured against any suit." Further, "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [the insurer's] consent." *Id.* at 13. As a result, up until the end of remediation itself, the end date for allocation is a moving target for the insured, lending uncertainty and fostering dispute as to parties' respective obligations to a claim. In contrast, the fact of the date of notice of a claim is less likely to be the subject of dispute and is more conducive to a quick and efficient investigation and resolution of a construction defect claim.

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<sup>6</sup> "Western Nat'l App." refers to the Appendix of Western National Insurance Group.

The Court of Appeals' extension of the allocation end date from the date of notice of a claim to the end of remediation not only causes uncertainty as to parties' ultimate obligations, but also fosters dispute regarding the identity of parties who are responsible for indemnification in such a claim. Specifically, given the uncertain nature of the remediation date, the Court of Appeals' decision may (and likely will) lead insurers who are definitely on the risk to attempt to partially shift costs to subsequent insurers even though such insurers may have not issued a policy to the insured until after the insured is notified of the claim. Such attempts implicate policy provisions that limit an insurer's duty to indemnify for known or continuing claims. *See, e.g.*, Western Nat'l App. 25; BAM App. 28-32 (examples of endorsements to CGL policies affecting coverage for continuing claims).

For example, a common endorsement to a CGL policy, the "Amendment of Insuring Agreement – Known Injury or Damage," limits CGL coverage to "property damage which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured." Western Nat'l App. 25. The language of the endorsement deems property damage "to have been known to have occurred at the earliest time when any insured... (1) [r]eports all, or any part, of the... 'property damage' to us or any other insurer; [or] [r]eceives a written or verbal demand or claim for damages because of the... 'property damage.'" *Id.* (emphasis added).

Post-tender insurance companies undoubtedly will use this and similar endorsements to try to defeat liability claims for construction defect claims. As a result, the Court of Appeals' extension of the allocation period to the remediation date, coupled

with the insurance industry's work to limit its exposure through the above (and similar) exclusions, creates uncertainty for the insured and the home-buying public as to who will cover damages during the post-tender period. Post-tender insurance companies also likely will point to the common-law "known-loss" doctrine to attempt to defeat coverage. *See, e.g., Hooper v. Zurich Am. Ins. Co.*, 552 N.W.2d 31, 35 (Minn. Ct. App. 1996) ("Insurance is procured not to cover loss but to cover the risk of loss.... Because appellants acquired their Western policy not when they risked being sued but after they had been sued, their loss was in progress, and they could not at that point insure against it.").<sup>7</sup>

Such uncertainty regarding who is responsible for construction defect claims is evident in this case. The Court of Appeals limited the insurers' liability to their policy periods while noting that the last policy period implicated is Western National's which ended on November 13, 2002. Wooddale App. 21, 25-27. However, even at the time of the district court's decision in 2004, not all of the claims had been investigated and

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<sup>7</sup> The Court of Appeals dismissed the effect its decision would have on the "known-loss" doctrine. Wooddale App. 25-26. The court distinguished application of the doctrine by pointing to a discussion in *Domtar, Inc. v. Niagara Fire Ins. Co.*, 552 N.W.2d 738, 747 (Minn. Ct. App. 1996), *rev'd on other grounds* 563 N.W.2d 724 (Minn. 1997), in which the Court of Appeals "held that the known-loss rule was inapplicable because knowledge of a potential for loss did not have 'the same legal significance as knowledge that an insurable loss has occurred.'" Wooddale App. 25-26. The court analogized the situation here, noting that Wooddale "acknowledges... that it has not sought indemnification for the homeowner claims from insurers that issued policies to it after the homeowners tendered their claims to Wooddale," and that Wooddale "purchased each triggered policy with knowledge of a potential for loss and without knowledge of an actual loss." Wooddale App. 26. The court did not address the implications of its holding on other, similar cases (of which there are many), in which post-tender insurers are implicated. Its failure to do so only further breeds uncertainty in the construction industry.

remediated. Wooddale App. 22. Since Wooddale has not sought indemnification from post-tender insurers, Wooddale App. 26, who is liable for the for the years between notice and remediation?

Given this quandary, the Builders Associations and their members are concerned that the Court of Appeals' decision will prompt insurers to attempt to shift indemnification costs to the insured itself. In fact, according to Wooddale, this transpired after the Court of Appeals' decision. *See* Wooddale's Brief at 14 (“[I]n settling new claims, insurers are now demanding that Wooddale pay a share of damages because despite Wooddale submitting claims when it was insured, the homes were not remediated until Wooddale's policies for water intrusion expired and Wooddale became self-insured.”). As discussed more below, such a situation does not comport with insured-builders' reasonable expectations and harms not only insured-contractors but also the home-buying public. Moreover, the situation can easily be avoided by using the notice date as the end date for allocation decisions.

The use of the notice date as the end date for allocation of damages provides much needed consistency and certainty in construction defect matters. For this reason alone, this Court should reverse the Court of Appeals' decision and restore the district court's conclusion that the appropriate end date for allocation of damages in a construction defect claim is the date the insured is notified of the claim.

3. Use of the date of notice of a claim as the end date for the allocation period discourages a “wait-and-see” approach from the insurance companies.

In addition to the inconsistency and uncertainty the remediation date generates in a construction defect claim, and in contrast to the district court’s use of the notice date, the use of remediation end date in the allocation calculus fosters an environment in which it is advantageous for an insurer to delay repairing a home in order to implicate additional insurers or the insured (who, as discussed above, may be subject to more onerous policy provisions in subsequent policy periods). The Court of Appeals summarily dismissed the argument that “insurers could minimize their share of liability by extending the allocation period through delays,” naively stating that “these arguments fail to consider the nature of the claims at issue: any delay in commencing repair efforts will result in additional decay and additional expense for the insured and the insurer on the risk. Neither the insured nor the insurer has an incentive to delay.” Wooddale App. 27.

As a practical matter, such delay is a matter of course for insurance companies faced with construction defect claims and, given the nature of CGL coverage, unilateral repair of damage performed by an insured is risky. *See, e.g.,* Western Nat’l App. 13 (prohibiting an insured to undertake repairs except at its own cost). Indeed, this case’s facts demonstrate such delay: Wooddale initiated this litigation because its insurance companies were not expeditiously handling claims. Wooddale App. 15. The Court of Appeals’ decision makes such delay even more plain: “Some of the homeowner claims were investigated and repaired; some claims have yet to be investigated.” Wooddale App. 22 (emphasis added).

This Court previously recognized the possibility of such delay tactics and has encouraged measures that will eliminate delay. *See Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986) (“We need also keep in mind that any rule we fashion should not encourage two insurers with arguable coverage to adopt a ‘wait and see’ attitude while leaving the insured to defend himself.”). Yet, the Court of Appeals’ decision does just that: insurers will be inclined to adopt a “wait and see” attitude in investigating and remediating construction defect claims in order to implicate additional insurers or the insured itself. Of course, such an approach breeds delay and litigation. In the end, both the insured and the home-buying public lose.

In contrast, by using the notice date as the end date for an allocation period, none of the parties have any reason to delay remediation. Indeed, in such a circumstance, where all the facts necessary for determining an insurance claim are readily ascertainable, a “wait-and-see” attitude makes no sense.

4. Use of the date of notice of a claim as the end date for the allocation period comports with the parties’ reasonable expectations.

This Court has acknowledged the importance the parties’ “reasonable expectations” play in determining insurance coverage issues, *Atwater Creamery Co. v. Western Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 276-77 (Minn. 1985), and specifically in determining allocation issues, *Silicone*, 667 N.W.2d at 418. Yet the Court of Appeals’ adoption of a malleable end date is absolutely contrary to an insured’s expectations regarding its coverage, especially when considered in light of the policy provisions making their way into the CGL market. *See discussion supra.*

Wooddale and other insureds purchase CGL policies to insure, to the broadest extent possible, their risk for construction defect claims. While insureds are cognizant of the insurance industry's increasing propensity to limit or exclude certain types of risk from CGL coverage, *see, e.g.*, Western Nat'l App. 25; BAM App. 28-32, when a claim is otherwise covered they do not expect to be liable for a portion of the claim because of a judicially-created doctrine that allocates damages to a period after the insured is notified of the claim. This is especially true when the insured has little or no control over the remediation date. *See, e.g.*, Western Nat'l App. 5 & 13. Such a circumstance is flatly inconsistent with an insured's reasonable expectations that it is fully insured (and complying with the law requiring such insurance) by purchasing CGL coverage.

In contrast, the use of a readily ascertainable end date fulfills the expectations of the parties to the CGL contract. By using the notice date as the end date, an insured need only concern itself with whether the claim is covered by the insurance policy, and not with the potential that it could be liable for some of the claim because of the uncertain and largely uncontrollable nature of the remediation date.

5. Use of the date of notice of a claim as the end date for the allocation period furthers sound public policy.

The Minnesota legislature codified its intention to afford the home buying public some measure of protection in case of inadvertent construction defects. Minn. Stat. § 326.94, subd. 2. This statute requires residential contractors to purchase liability insurance in order to provide protection to the home-buying public. Yet the delay and uncertainty created by the Court of Appeals' decision eviscerates that protection.

As already discussed, the Court of Appeals' decision to use a remediation end date for allocation decisions will foster a "wait-and-see" attitude toward construction defect claims, especially if other parties, either insurers or insureds, can be forced to share the cost of such claims because the remediation is dragged out over an extended period. Given the restrictive nature of CGL coverage, the insured-contractor will not be able to orchestrate or expedite remediation without forfeiting coverage afforded by its policy. Therefore, it will be left to the homeowner—the exact person Minn. Stat. § 326.94 is designed to protect—to finance the remediation in hopes that he or she will be reimbursed later.

It also is important to recognize that if the Court of Appeals' decision is upheld and an insured-contractor is found liable for post-notification damages and investigation expenses (*see* discussion *infra*), the home-buying public will likely be financially harmed. Specifically, a majority of Minnesota's residential contractors are small businesses who build less than five homes annually; many may not have the financial ability to self-fund the investigation and remediation of inadvertent construction defect claims. Despite the legislature's intention to protect the home-buying public from such a lack of ability by requiring contractors to purchase insurance, the Court of Appeals' decision strips such protection (which would otherwise be available but for this judicially-created doctrine). And again, it is the homeowner who will have to fill the gap by financing his or her own remediation.

In contrast, the choice of the notice date as the end date for an allocation period leaves no reason to delay remediation and helps close any gap between the coverage

provided by the insurance required by Minn. Stat. § 326.94 and the cost of the construction defect. Indeed, use of the notice date fosters an environment in which the insured and insurers can reach a quick and efficient resolution of a claim, thus benefiting the home-buying public as intended by Minn. Stat. § 326.94.

In the final analysis, the district court's placement of the end date of the allocation period as the date of notice of the claim is appropriate because the decision ensures consistency and certainty, discourages a "wait-and-see" approach from the insurance companies, comports with the reasonable expectation of the parties, and further sound public policy. All these factors are important in the allocation decision. The Builders Associations consequently urge this Court to reverse the Court of Appeals' decision and confirm that the appropriate end date for allocating damages in construction defect cases in which the doctrine of allocation pro rata by time on the risk is applied is the date of notice of the claim.

**B. Where the Parties Stipulate that the Appropriate Method for Allocating Damages Among the Insurers with Respect to Indemnification is Pro Rata by Time on the Risk, the Defense and Investigation Expenses Should be Shared Equally by the Insurers.**

The Court of Appeals also reversed the district court's determination regarding the method for sharing defense and investigation expenses between the insurers when the parties agree to apply the doctrine of pro rata by time on the risk to the indemnification portion of a claim, concluding that such expenses likewise should be shared pro rata by time on the risk. In contrast to the Court of Appeals' decision, the district court's determination that such expenses be shared equally by the insurers complies with this

Court's long-standing authority regarding the broad nature of an insurer's duty to defend. Moreover, like the choice of the date of notice of a claim as the end date for allocation purposes, requiring insurers to share equally defense and investigation costs discourages a "wait-and-see" approach from the insurance companies and comports with the parties' reasonable expectations.

This Court has long held that an insurer's duty to defend an insured is separate from its duty to indemnify the insured for a loss; indeed, the duty to defend is broader than the duty to indemnify. *Franklin v. Western Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406-07 (Minn. 1998); *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 150 N.W.2d 233, 237 (Minn. 1967). The duty to defend "arises when any part of the claim against the insured is arguably within the scope of protection afforded by the policy." *Franklin*, 574 N.W.2d at 406-07 (emphasis added). Moreover, the duty to defend is separate for each insurer. In other words, if one insurer has a duty to defend the insured, it must do so regardless of whether other insurers share a similar duty. *See, e.g., Jostens*, 387 N.W.2d at 167; *Iowa Nat'l*, 150 N.W.2d at 236-37.

Given the broad and separate nature of the duty to defend, each one of Wooddale's insurers had an equal obligation to defend Wooddale against the moisture intrusion claims. As a result, the district court correctly concluded that the appropriate method for allocating the defense costs among the insurer was equally. Indeed, in similar circumstances, this Court held that "[i]f defense costs for the two sets of claims are so inextricably intertwined they cannot be fairly sorted out, the costs may be equally divided." *Jostens*, 387 N.W.2d at 168.

The Court of Appeals nonetheless dismissed *Jostens*, attempting to distinguish it because it pertained to insurers that were concurrently (versus consequently) liable (i.e., a primary and an excess insurer). Wooddale App. 27. Except for determining which insurer has the duty to defend a particular claim, *Jostens*, 387 N.W.2d at 165-68, the distinction between concurrent and consecutively liable insurers is not relevant in the issue of allocating defense costs among insurers. Rather, as already noted, once the duty to defend is established, it is separate for each insurer and if one insurer has a duty to defend the insured, it must do so regardless of whether other insurers share a concurrent or consecutive duty.

The court also dismissed *Jostens* because it believed that, consistent with *Jostens*, defense costs could be allocated pro rata by time on the risk so equal allocation was not necessary. Wooddale App. 27. Indeed, the court called equal division “a default only where allocation based on each insurer’s actual liability proved practically impossible.” *Id.* The pro rata by time on the risk doctrine is an assumption for purposes of indemnification, however. *N. States Power*, 523 N.W.2d at 663. In fact, it is used because of the difficulty in proving each insurer’s actual liability. *Id.* (“[A]s a matter of public policy, this court cannot ignore the enormous difficulty an insured would face if... they had the burden of proving the amount of damages for each policy at issue.”). As such, contrary to the Court of Appeals’ decision, when the parties agree that allocation pro rata by time on the risk is appropriate, the “defense costs for the... claims are so inextricably intertwined they cannot be fairly sorted out” and must, therefore, be “equally divided.” *Jostens*, 387 N.W.2d at 168.

In this case, the Court of Appeals also attempted to distinguish *Jostens* because the issue before it was among insurers, not an insured and its insurer (as in *Jostens*). The fact that this particular case does not involve the issue of an insurer seeking defense expenses from its insured does not save the decision, though. In fact, the Court of Appeals' decision--and its citation to *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), which did allocate defense expenses to an insured based on a pro rata by time on the risk method--opens exactly that question up for debate.

This Court previously determined that an insured can be liable for self-insured (not post-tender) periods when the doctrine of allocation pro rata by time on the risk applies to a claim. *Domtar*, 563 N.W.2d at 732-33. Given that an insured can be liable for the indemnification of a claim, and based on the Court of Appeals' conclusion that a pro rata by time on the risk allocation applies to defense and investigation costs as well, the insurance companies will leap to the conclusion that the insured also is liable for the defense and investigation of a claim for any period for which it is liable. *See, e.g., Forty-Eight Insulations*, 633 F.2d at 1224-25. For the reasons already discussed regarding the end date for allocation purposes, such a leap, and the authority the Court of Appeals' decision provides for the leap, encourages a "wait-and-see" approach from the insurance companies and negates an insured's reasonable expectation that its insurance company will be completely responsible for defending it against a construction defect claim.

Significantly, the possibility that an insured might be liable not only for indemnification of a construction defect claim but also defense and investigation

expenses for the claim creates an inherent tension between the insured's interest in a speedy investigation and remediation and an insurer's possible interest in a more drawn out remediation period. Such a tension, coupled with the insured's potential responsibility for its own defense and indemnification, raises the specter of an actual conflict of interest between the insured and its insurer. In such a circumstance, and in contrast to the general rule that a CGL insurer has the right and duty to defend the insured (including the right to choose counsel to defend the insured), the insurer may be required to fund legal work performed by counsel of the insured's choosing. See *Mut. Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368 (Minn. Ct. App. 1991) (stating that an insured will be entitled to counsel of its own choice when an actual conflict of interest arises). While that issue is not present in this appeal, it is just one more example of the litigation the Court of Appeals' decision will spawn.

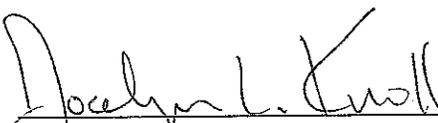
The Court of Appeals' decision with respect to allocation of defense and investigation expenses fails to apply the *Josten* Court's precedent and, for that reason alone, should be reversed. Moreover, the decision fosters an unacceptable atmosphere of delay in the construction industry to the detriment of the insured and the home-buying public as a whole. The decision also fails to comport with insureds' reasonable expectations. Accordingly, the Builders Associations urges this Court to reverse the Court of Appeals' decision and confirm that defense expenses should be shared equally by insurers when the doctrine of allocation pro rata by time on the risk is applied to the issue of indemnification of a construction defect claim.

**CONCLUSION**

The Builders Association of Minnesota, as umbrella organization for the Builders Association of the Twin Cities and for out state builders associations, respectfully requests that this Court reverse the decision of the Court of Appeals and restore the district court's decision.

Dated: August 29, 2005

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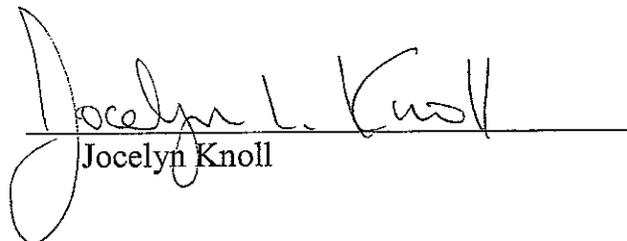
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FOR: **Brief of *Amicus Curiae* Builders Association of Minnesota, as Umbrella  
Organization for Builders Association of the Twin Cities and Minnesota Out  
State Builders Associations**

RE: *Wooddale Builders, Inc. v. Maryland Casualty Company, d/b/a Zurich North America  
v. American Family Insurance and Western National Insurance Group and West  
Bend Insurance Company and SafeCo*

State of Minnesota in Supreme Court Nos. A04-1442 and A04-1612

Dated: August 29, 2005

  
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Jocelyn Knoll

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).