

Nos. A04-1442 and A04-1612

State of Minnesota
In Supreme Court

Wooddale Builders, Inc.,

Appellant,

vs.

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

Appellant,

vs.

American Family Insurance, and
Western National Insurance Group,

Appellants,

and

West Bend Mutual Insurance Company, and
American Economy Insurance Co. (SafeCo),

Respondents.

**BRIEF OF RESPONDENT
AMERICAN ECONOMY INSURANCE COMPANY (SAFECO)**

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STATEMENT OF ISSUE

Whether the district court abused its discretion in determining that the end date for allocating insurance coverage pro rata by time on the risk is when Appellant Wooddale Builders, Inc. received notice of potential water infiltration claims.

The district court concluded that coverage should be allocated pro rata by time on the risk and that allocation should run until Wooddale Builders received notice of the claims.

The Court of Appeals reversed, concluding: (1) that the abuse of discretion standard did not apply to its review of the district court's decision; and, (2) that the end date for allocation should be the date of remediation.

Apposite authority:

In re Silicone Implant Ins. Coverage Litigation, 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)

STATEMENT OF THE CASE

These consolidated appeals arise out of an insurance coverage dispute as to the proper responsibility among five insurers for water infiltration property damage claims asserted against their insured, Appellant Wooddale Builders, Inc. ("Wooddale Builders"). Wooddale Builders and four of the insurers, including Respondent American Economy Insurance Company ("SafeCo"),¹ contend that the district court properly resolved this matter and that its decision should be reinstated. SafeCo argues that the district court did not abuse its discretion in determining the end date in this declaratory judgment action for allocating coverage pro rata by time on the risk.

¹ Though originally sued incorrectly as SafeCo, American Economy Insurance Company actually provided coverage to Wooddale Builders for the relevant period.

Following cross-motions for summary judgment, the Hennepin County District Court determined that each insurer is responsible for its pro rata share for its time on the risk because the damage was not the result of a discrete and indivisible event, but was continuous and indivisible. Maryland Casualty Co. Appendix (“M.C.A.”) at 80. The district court also ruled that the insurers must equally share responsibility for the cost of defending Wooddale Builders. M.C.A.81. Only one party challenged the district court’s allocation decision – Respondent West Bend Mutual Insurance Group (“West Bend”).² West Bend also challenged the district court’s defense cost ruling.

The Court of Appeals reviewed the district court’s decision de novo and reversed. *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 695 N.W.2d 399, 404 n.1 (Minn. App. 2005). It decided that the proper end date for allocation purposes is when the alleged property damage is remediated. *Id.* at 406. It also concluded that defense costs should be allocated pro rata by time on the risk, just as indemnity payments are. *Id.* at 407.

STATEMENT OF THE FACTS

Given that the facts are undisputed and set forth fairly in the Court of Appeals’ decision and the parties’ other briefs, SafeCo adopts those factual recitations.

² Because of a concern that a Notice of Review might be insufficient given the number of other parties, *see* Minn. R. Civ. App. P. 106, and out of an abundant sense of caution, SafeCo also appealed. Though generally supportive of the district court’s ruling, SafeCo’s appeal simply sought clarification that all policies triggered by the underlying claims would be included fully in any pro rata allocation. SafeCo argued that if a policy is triggered, its coverage obligations should be apportioned on a pro rata basis according to the number of years an insurer assumed the risk. The Court of Appeals declined to consider this argument, ruling that SafeCo had failed to raise it properly below. *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 695 N.W.2d 399, 401 (Minn. App. 2005). SafeCo chose not to seek review of that ruling.

ARGUMENT AND AUTHORITIES

I. Summary of argument and standard of review.

This appeal concerns two issues, the end date for allocating indemnity payments and whether defense costs should be shared equally among the insurers or allocated pro rata by the insurers' respective time on the risk.

SafeCo contends that the district court did not abuse its discretion in concluding that the end date for allocation purposes was when Wooddale Builders received notice of a pending claim. SafeCo takes no position on the defense cost issue

Insurance coverage issues ordinarily present questions of law that an appellate court reviews de novo. *See State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). District courts, however, are given flexibility when allocation issues arise given the fact-dependent nature surrounding such claims. Accordingly, insurance coverage allocation decisions are reviewed under an abuse of discretion standard. *See In re Silicone Implant Ins. Coverage Litigation*, 667 N.W.2d 405, 417 (Minn. 2003).

II. Because the underlying damages were continuous and indivisible, indemnity coverage was appropriately allocated pro rata by time on the risk.

The district court concluded that the underlying homes sustained continuous and indivisible property damage. Specifically, it determined that the:

damage sustained by the[] homes is the result of repeated water intrusion events, occurring over an extended period of time, with continual, progressive, and indivisible damage occurring to the homes. The damage is not the result of a solitary, discrete, identifiable, water intrusion event.

M.C.A.79 (Finding of Fact ¶ 8).

Minnesota recognizes and has adopted allocation among insurers when damages are continuous and the damage sustained during different policy periods is indivisible. *Northern States Power Co. v. Fidelity & Cas. Co. of New York*, 523 N.W.2d 657, 663 (Minn. 1994) (“NSP”). The time on the risk allocation method is advantageous because it is a “more or less per se rule.” *Id.*

Because of this “more or less per se rule,” an insurer can avoid responsibility only when it shows that no appreciable damage occurred during a particular policy period where it provided coverage. *Id.* at 664. Here, the district court concluded that damages were continuous and indivisible. No insurer met its burden to show that appreciable damages did not occur during its policy period. Indeed, no insurer even attempted to make this showing because all parties stipulated that damages were continuous and indivisible. Additionally, the undisputed evidence from the various experts was that damages were continuous and indivisible. Thus, the district court correctly ruled that allocation was appropriate. All policies in effect when damage occurred were triggered, and liability was allocated correctly to each policy. *See Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732 (Minn. 1997); *NSP*, 523 N.W.2d at 664.

III. The district court did not abuse its discretion in concluding that the end date for allocation is when Wooddale Builders was put on notice of each individual damage claim.

SafeCo contends that the district court did not abuse its discretion in selecting the allocation end date as the date of notice to Wooddale Builders of a damage claim.

SafeCo does not believe that a notice end date rule should be adopted for all cases.

Instead, SafeCo asserts that the district court’s decision should be reinstated, but on the

narrow ground that it did not abuse its discretion. *See Economy Fire & Cas. Co. v. Iverson*, 445 N.W.2d 824, 827 (Minn. 1989) (“[j]udicial discretion indicates that we should not decide any issue not necessary for the disposition of a case”). While SafeCo agrees with other parties regarding the impracticability of implementing the end date the Court of Appeals selected, this Court need not resolve this case with a broad, one-size-fits-all rule. Instead, consistent with this Court’s recognition of the fact-intensive nature of complex insurance coverage matters, district courts must continue to be given the flexibility to apportion coverage “in a manner befitting each case.” *NSP*, 523 N.W.2d at 663.

The Court of Appeals erred in the standard of review it applied. The district court’s allocation decision is to be reviewed for an abuse of discretion. *See In re Silicone Implant Ins. Coverage Litigation*, 667 N.W.2d at 417 (determining that a district court’s allocation decision may only be reversed if it was an abuse of discretion); *NSP*, 523 N.W.2d at 663. Because there may be future matters where, on different factual records, other end dates will be more appropriate, district courts must continue to be afforded discretion to resolve complex insurance coverage disputes of this type. The Court of Appeals erred when it substituted its decision in place of the one the district court made. As this Court noted, allocation presents a judicially manageable and practical method for district courts to solve difficult coverage matters. *See Domtar*, 563 N.W.2d at 733-34.

Only West Bend challenges the district court’s decision; even Wooddale Builders agrees that the district court’s allocation decision was correct. West Bend cannot show that the district court abused its discretion in determining the end date for allocation.

Because the district court selected a reasonable end date for allocation purposes – indeed it selected a date this Court discussed in *NSP* – the district court did not abuse its discretion. Accordingly, this Court should reverse the Court of Appeals and reinstate the district court’s decision – but without adopting a hard and fast rule for all cases.

CONCLUSION

This Court should reverse the Court of Appeals’ decision and reaffirm the district court judgment that pro rata allocation is appropriate and that the allocation period runs until the time Wooddale Builders discovered or was put on notice of claims involving problems in the houses. This Court should do so because the district court did not abuse its discretion, and not because a conclusive rule as to an end date for allocation purposes is needed in all cases.

Dated: September 20, 2005

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