MINNESOTA STATE LAW LIBRARY

CASE 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 AMERICAN,

Appellant,

vs.

AMERICAN FAMILY INSURANCE GROUP, AND
WESTERN NATIONAL INSURANCE GROUP,

Appellants,

and

WEST BEND MUTUAL INSURANCE COMPANY AND
AMERICAN ECONOMY INSURANCE CO. (SAFECO),

Respondents.

BRIEF OF RESPONDENT WEST BEND MUTUAL INSURANCE COMPANY

LEONARD, O'BRIEN, SPENCER,
GALE & SAYRE, LTD.
Ernest F. Peake, Esq. (#212453)
Chad A. Kelsch, Esq. (#0300794)
100 South Fifth Street, Suite 2500
Minneapolis, Minnesota 55402
(612) 332-1030

Attorneys for Wooddale Builders, Inc.

OSKIE, REUTER, HAMILTON &
SOFIO, P.A.
David Oskie, Esq. (#144265)
James M. Hamilton, Esq. (#167526)
970 Raymond Avenue, Suite 202
Saint Paul, Minnesota 55114
(651) 644-8037

Attorneys for American Family Insurance Group

(Additional Counsel Listed on Following Page)

2005-EXECUTEAM / LAWYER SERVICES DIV., 2573 No. Hamline Ave., St Paul, MN 55113 · 651-633-1443 · 800-747-8793

COUSINEAU, McGUIRE &
ANDERSON, CHARTERED
Peter G. Van Bergen, Esq. (#112033)
Andrea E. Reisbord, Esq. (#22411X)
600 Travelers Express Tower
1550 Utica Avenue South
Minneapolis, Minnesota 55416-5318
(952) 546-8400

Attorneys for Maryland Casualty Company d/b/a Zurich North American

JOHNSON, PROVO- PETERSEN,
L.L.P.
Gregory J. Johnson, Esq. (#202678)
First National Bank Building
332 Minnesota Street, Suite W975
Saint Paul, Minnesota 55101
(651) 227-2534

Attorneys for West Bend Mutual Insurance Company

WINTHROP & WEINSTINE, P.A.
Thomas H. Boyd, Esq. (#200517)
Christianna L. Finnern, Esq. (#310724)
225 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402-1498
(612) 604-6400

Attorneys for Amicus Minnesota Chamber of Commerce

HELLMUTH & JOHNSON, P.L.L.C.
Erik F. Hansen, Esq.
J. Robert Keena, Esq.
10400 Viking Drive, Suite 500
Eden Prairie, Minnesota 55344
(952) 941-4005

Attorneys for Amicus Defective Construction Homeowners of Minnesota

GISLASON, MARTIN &
VARPNESS, P.A.
James T. Martin, Esq. (#68044)
7600 Parklawn Avenue South
Suite 444
Edina, Minnesota 55435
(952) 831-5793

Attorneys for Western National Insurance Group

LIND, JENSEN, SULLIVAN &
PETERSON, P.A.
Ted E. Sullivan, Esq. (#122452)
William L. Davidson, Esq. 201777)
150 South Fifth Street, Suite 1700
Minneapolis, Minnesota 55402
(612) 333-3637

Attorneys for American Economy Insurance Company (Safeco)

DORSEY & WHITNEY, L.L.P.
Jocelyn Knoll, Esq. (#02298X)
Katie Pfeifer, Esq. (#0309709)
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402-1498
(612) 340-2600

Attorneys for Amicus Builders Association of Minnesota

OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
Alan C. Williams, Esq.
Assistant Minnesota Attorney General
900 Bremer Tower
445 Minnesota Street
Saint Paul, Minnesota 55101
(651) 296-7200

Attorneys for Amicus Office of the Minnesota Attorney General

TABLE OF CONTENTS

Page(s):

Table of Contents i

Table of Authorities . . . . . ii-v

Statement of Legal Issues 1

Statement of the Case and Relevant Facts 3

Standard of Review 10

Legal Analysis 11

A. The Court of Appeals Correctly Determined the Allocation Period End Date Would Extend to the Date of Remediation. 11

B. The Court of Appeals Correctly Determined that Defense Costs Should be Apportioned According to the Same Methodology as Indemnity Costs, Pro-Rata Based on Each Insurer's Time on the Risk. 29

Conclusion 38

Certification of Brief Length 39

TABLE OF AUTHORITIES

Page(s):

Case Law:

Budd Co., v. Travelers Indem. Corp.,
820 F.2d 787 (6th Cir. 1987) 33

Centennial Ins. Co. v. United States Fire Ins. Co.,
88 Cal.App.4th 105, 105 Cal.Rptr.2d 559 (Cal. Ct. App. 1st Dist. 2001) . 2, 33, 34, 36, 38

Champion Dyeing & Finishing Co., Inc. v. Centennial Ins. Co.,
810 A.2d 68 (N.J. Ct. App. 2002) 23, 25

Continental Gas Co. v. Medical Protective Co.,
859 S.W.2d 789 (Mo. Ct. App. 1993), *reh'g denied and/or transfer denied*
(Jul. 19, 1993), *transfer denied* (Sept. 28, 1993) 33, 37

Crown Center Redevelopment Corp. v. Occidental Fire & Cas. Co. of N. Carolina,
716 S.W.2d 348 (Mo. Ct. App. 1986) 31

Dayton Ind. Sch. Dist. v. Nat'l Gypsum Co.,
682 F.Supp. 1403 (E.D. Tex. 1998),
rev'd, W.R. Grace & Co. v. Continental Cas. Co.,
896 F.2d 865, *reh'g denied,* (Apr. 9, 1990) 14

Domtar, Inc. v. Niagara Fire Ins. Co.,
563 N.W.2d 724 (Minn. 1997) 1, 12, 15, 16, 17, 18, 20, 24, 27, 28, 29, 30, 31, 35, 36

Domtar v. Niagara Fire Ins. Co.,
unpublished opinion, 2004 WL 376951
(Minn. Ct. App. Mar. 2, 2004), *rev. denied,* (May 18, 2004) . . . . . .

EEOC v. Southern Publ'g Co., Inc.,
894 F.2d 785 (5th Cir. 1990) 33

TABLE OF AUTHORITIES
(continued)

Fairview Hosp. and Health Care Serv. v. St. Paul Fire & Marine Ins. Co.,
535 N.W.2d 337 (Minn. 1995), *reh'g denied,* (Minn. Sept. 20, 1995) 12

Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.,
662 F.Supp. 71 (E.D. Mich.1987) 1, 32, 33

Franklin v. Carpenter,
309 Minn. 419, 244 N.W.2d 492 (1976) 15

Frost - Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n,
358 N.W.2d 639 (Minn. 1984) 11

Gen. Accident Fire & Life Assurance Corp. v. Continental Cas. Co.,
287 F.2d 464 (9th Cir. 1961) 32

Gen. Housewares Corp. v. Nat'l Sur. Corp.,
41 N.E.2d 408 (Ind. Ct. App. 2000) 15

Gulf Chem. & Metallurgical Corp. v. Associated Metals and Minerals Corp.,
1 F.3d 365 (5th Cir. 1993) 33

Hooper v. Zurich Am. Ins. Co., 5
52 N.W.2d 31 (Minn. Ct. App. 1996), *rev. denied*, (Minn. Sept. 20, 1996) 1, 16, 18

In re Schmidt,
443 N.W.2d 824 (Minn 1989) 23

In re Silicone Implant Ins. Coverage Litig.,
667 N.W.2d 405 (Minn. 2003), *reh'g denied,*(Minn. Sept. 29, 2003) 1, 11, 12

Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.,
633 F.2d 1212 (6th Cir.1980),
decision clarified on reh'g by 657 F.2d 814 (6th Cir. 1981),
cert. denied, 454 U.S. 1109 (1981), *reh'g denied,* 455 U.S. 1009 (1982) 32-33, 36

TABLE OF AUTHORITIES
(continued)

Jasper v. Comm'r of Public Safety,
642 N.W.2d 435 (Minn. 2002) 23

Jenoff, Inc. v. New Hampshire Ins. Co.,
558 N.W.2d 260 (Minn. 1997) 12

Josten's Inc. v. Mission Ins. Co.,
387 N.W.2d 161 (Minn. 1986) 30, 35, 36

Lafarge Corp. v. Hartford Cas. Ins. Co.,
61 F.3d 389 (5th Cir. 1995) 33

Lafarge Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.,
935 F.Supp. 675 (D. Md. 1996) 33

Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co.,
210 F.3d 672 (6th Cir. 2000) 24

Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.,
145 Md. App. 256, 802 A.2d 1070 (Md. Ct. App. 2002), *cert. granted,*
Baltimore v. Utica Mut., 371 Md. 613, 810 A.2d 961 (Md. Nov. 8, 2002),
appeal dismissed, 374 Md. 81, 821 A.2d 369 (Md. Mar. 6, 2003) 13-14, 23, 25

NL Indus., Inc., v. Commercial Union Ins. Co.,
935 F.Supp. 513, 520-21 (D. N.J. 1996) 37

Northern States Power Co. v. Fidelity & Cas. Co. of New York,
523 N.W.2d 657 (Minn. 1994) 1, 16, 17, 32

Okada v. MGIC Indem. Corp.,
823 F.2d 276 (9th Cir. 1986) 33

Olin Corp v. Ins. Co. Of N. Am.,
211 F.3d 307 (2d Cir. 2000) 26-27, 37

Oster v. Riley,
276 Minn. 274, 150 N.W.2d 43 (1967) 15

TABLE OF AUTHORITIES
(continued)

Owens-Illinois, Inc. v. United Ins. Co.,
625 A.2d 1 (N.J. Super. A.D. 1993),
rev'd, 138 N.J. 437, 650 A.2d 974 (N.J. Dec. 22, 1994) 14, 23, 24

Owens-Illinois, Inc. v. United Insurance Co.,
650 A.2d 974 (N.J. 1994) 2, 33

Scott v. Forest Lake Chrysler-Plymouth-Dodge,
611 N.W.2d 346 (Minn. 2000) 11

Security Ins. Co. of Hartland v. Lumbermans Mut. Cas. Co.,
826 A.2d 107 (Conn. 2003) 24, 33, 37

State by Cooper v. French,
460 N.W.2d 2 (Minn. 1990) 11

Stonehenge Eng'g Corp. v. Employers Ins. of Wausau,
201 F.3d 296 (4th Cir. 2000) 13

Stonewall Ins. Co. V. Asbestos Claims Managment Corp,
73 F.3d 1178 (2d Cir. 1995) 23, 27, 37

Waseca Mut. Ins. Co. v. Noska,
331 N.W.2d 917 (Minn. 1983) 15, 24

Wooddale Builders, Inc., v. Maryland Cas. Co.,
695 N.W.2d 399 (Minn. Ct. App. 2005) 9, 15, 17, 19, 21-22, 28, 30-31, 37

W.R. Grace & Co v. Continental Gas Co.,
896 F.25 865 *reh'g denied,* (Apr. 9, 1990) 14

Secondary Authorities:

William R. Hickman & Mary R. DeYoung, *Allocation of Environmental Cleanup Liability Between Successive Insurers,* 17 N.Ky. L.Rev. 291 (1990) 32

Allan D. Windt, *Insurance Claims & Disputes,* (4th ed.) 23, 24

STATEMENT OF LEGAL ISSUES

A. Whether the allocation period relative to the homeowner claims at issue should extend over the entire period when damages occur (as opposed to the date the homeowner placed the insured on notice of a claim) when the unrebutted expert opinions established that multiple water intrusion events have contributed to an ongoing and progressive process of decay in the homes and this Court, in Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997), held that the allocation period should extend over "the entire period during which damages occurred?"

The Court of Appeals held in the affirmative.

List Of Apposite Cases And Statutory Provisions:

1. Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997).

2. In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405 (Minn. 2003), *reh'g denied,* (Minn. Sept. 29, 2003).

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

4. Hooper v. Zurich Am. Ins. Co., 552 N.W.2d 31 (Minn. Ct. App. 1996), *rev. denied,* (Minn. Sept. 20, 1996).

B. Whether defense costs should be apportioned according to the same methodology as indemnity costs, the rule recognized by a majority of jurisdictions that apply the pro-rata time on the risk allocation method?

The Court of Appeals held in the affirmative.

List Of Apposite Cases And Statutory Provisions:

1. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir.1980), *decision clarified on reh'g by* 657 F.2d 814 (6th Cir. 1981), *cert. denied,* 454 U.S. 1109 (1981), *reh'g denied,* 455 U.S. 1009 (1982).

2. Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F.Supp. 71 (E.D. Mich.1987).

3. Owens-Illinois, Inc. v. United Insurance Co., 650 A.2d 974 (N.J. 1994).

4. Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 105 Cal.Rptr.2d 559 (Cal. Ct. App. 1st Dist. 2001)

STATEMENT OF THE CASE AND RELEVANT FACTS

This appeal arises out of an insurance coverage dispute as to the proper responsibility among five insurance companies for water infiltration property damage claims asserted against Appellant Wooddale Builders, Inc. ("Wooddale").

Wooddale is a general contractor engaged primarily in the business of constructing single family homes. Beginning in late 2000, Wooddale began receiving complaints of defective construction and/or faulty workmanship in some of the stucco homes it built in the 1990's. The current owners of sixty homes alleged defective construction and/or faulty workmanship by Wooddale and/or its subcontractors resulted in water infiltration and mold growth problems in the homes. (See West Bend's Separate Appendix at 57, 64-71.)[1] The homeowners presented claims against Wooddale to recover the costs necessary to repair the homes. The claims of these sixty homeowners are the subject of this declaratory judgment action.

Initially, upon receiving notice of the claims, Wooddale began performing repairs on the homes. After not receiving payment for some of the repairs from Appellant Maryland Casualty Company d/b/a Zurich North American ("Maryland Casualty"), Wooddale commenced immediate action for declaratory relief against Maryland Casualty. Maryland Casualty, in turn, filed a third party complaint against Respondent West Bend Mutual Insurance Company ("West Bend") as well as against Appellants American Family Insurance Group ("American Family"), Western National Insurance Group ("Western National"), and

[1]Hereinafter "West Bend App. at ___."

American Economy Insurance Co. ("Safeco"), seeking contribution and/or indemnity with respect to any payments Maryland Casualty was required to pay under its insurance policies with Wooddale. The insurance companies disputed any obligation to indemnify Wooddale and/or the extent of their alleged obligation, but the insurers have been involved in the investigation of the homeowner claims, repairs of the homes and settlements. In settling the claims, the insurers reserved their right to seek total or partial reimbursement from each other, depending on the outcome of this lawsuit.

Several homeowners commenced lawsuits against Wooddale in various district courts in the seven county metropolitan area. (See West Bend App. at 9-56.) In the lawsuits, the homeowners allege that the water infiltration and/or mold growth problems were attributed to one or more of the following:

1. Defective windows and defectively installed windows;
2. Improper flashing of windows and doors;
3. Lack of kickout flashings;
4. Failure to install weep screens;
5. Failure to seal or caulk around window and door frames; and
6. Defective application of stucco exterior.

(See, generally, Id.) The insurers have defended the homeowner lawsuits and have reserved their rights to seek total or partial reimbursement from each other depending on the outcome of this declaratory judgment action.

The five insurers involved in this declaratory judgment action issued commercial general liability insurance policies to Wooddale during various periods of time from

November 13, 1990 through November 13, 2002, as follows:

Insurance Company	Policy Period(s)	Property Damage Limits Occurrence/Aggregate
American Family	11/13/90-11/13/91	$500,000/$1,000,000
American Family	11/13/91-11/13/92	$500,000/$1,000,000
American Family	11/13/92-11/13/93	$500,000/$1,000,000
American Family	11/13/93-11/13/94	$500,000/$1,000,000
American Family	11/13/94-11/13/95	$500,000/$1,000,000
West Bend Mutual	11/13/95-11/13/96	$500,000/$1,000,000
Safeco	11/13/96-11/13/97	$500,000/$1,000,000
Maryland Casualty	11/13/97-11/13/98	$500,000/$1,000,000
Maryland Casualty	11/13/98-11/13/99	$500,000/$1,000,000
Maryland Casualty	11/13/99-11/13/00	$500,000/$1,000,000
Western National	11/13/00-11/13/01	$500,000/$1,000,000
Western National	11/13/01-11/13/02	$500,000/$1,000,000

Each of the policies issued by the insurers contains standard language calling upon each insurer to defend and indemnify Wooddale with respect to property damages resulting from an occurrence.

The parties filed cross-motions for summary judgment. Unrebutted expert opinions were introduced which established that the damage to the homes started at or near the time of original construction upon the first water intrusion event and that subsequent water intrusion events have contributed to an ongoing process of decay in the homes which continues until the time of remediation. (See West Bend App. at 57-85.) According to the affidavit of McGregor Pearce, M.P.H., an environmental health consultant, the moldy surfaces that exist in the homes are the product of a series of events and conditions over time, including the required presence of mold spores, a food source, water and warmth. (West Bend App. at 77-81.)

Multiple sources of water intrusion exist, including, but not limited to: windows that

leak, inadequate flashing, penetrations through building paper, and wind-driven water entering through vents. (Id. at 79.) Although a mold colony will become dormant when it does not have sufficient food, heat and moisture, a wetting event will reinvigorate fungal growth and begin to grow again. (*Id.* at 78-79.) Because the damage caused by water intrusion is a continuous process requiring the presence and absence of certain natural elements, damage in the way of mold cannot be determined to have occurred at a specific time or times or as the result of discrete and identifiable events. (*Id.* at 79-81.)

Mr. Pearce further opined:

> The problem with water intrusion is that it continues until the paths for water intrusion are closed. The water intrusion documented in the Wooddale claim files is characteristic of an ongoing process that begins when a pathway opens and continues until it is closed. * * * All that one can say with a degree of reasonable scientific certainty is that the mold damage to any given building began at some point during or after construction and that it continued or will continue until such time as the mold colonies are deprived of one or more of the conditions required for continued growth: food, water and warmth.

(West Bend App. at 79-80.)

According to the Affidavit of Joseph Lstiburek, Ph.D., P. Eng., a building science engineer, the "damage involved in the claims occurred as a continuous process that is indivisible over time from initial water intrusion to the time of remediation." (West Bend App. at 83.) "This degree of damage at several locations [of the homes] is the product of multiple water intrusion events contributing to an ongoing process of decay. The older the home, the more extensive is the observed damage." (Id. at 84-85.)

The last insurance policy issued to Wooddale which afforded coverage for the water infiltration claims at issue was the Western National policy which expired on November 13,

2002. Although the policy or policies Wooddale subsequently obtained were not introduced below, Wooddale was apparently unable to obtain a policy after November 13, 2002 which would extend coverage for water infiltration claims arising out of homes that Wooddale had built prior to that date. In any event, no party claimed Wooddale (or the insurer(s) that issued a policy or policies to Wooddale after the expiration of Western National's policy) would be responsible to pay a pro-rata share of any indemnity (or defense) costs relative to any of the sixty claims at issue.

The parties' cross motions for summary judgment were heard before the Honorable Robert A Blaeser of the Hennepin County District Court on May 10, 2004. The Court issued an Order dated June 15, 2004, wherein the Court made the following relevant findings of fact:

> 8) Expert opinion establishes that the damage sustained by these 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.
>
> * * *
>
> 12) The Parties agree that liability is allocated among the Insurers pro rata by time on the risk. The Parties agree that the start point for allocation of damages is the date of closing. However, the parties are in disagreement concerning the end point for the allocation of damages.
>
> 13) The Parties are also in disagreement regarding the allocation of defense and investigative costs.

(West Bend App. at 3-4.)

The Court also made the following relevant conclusions of law:

> 3) Since the damage sustained to these homes was not the result of a

discrete and identifiable event, but rather so continuous and indivisible as to make it impossible to identify one such event, the appropriate method of allocating damages to the Insurers in this case is pro rata by time on the risk. . . .

4) The start date for allocation purposes is the date of closing on the purchase of the home. The end date for allocation purposes is the date the insured, Plaintiff [Wooddale], is put on notice that a homeowner is making a claim for damages to their home from alleged water infiltration.

5) The Insurers will bear the cost of defending Plaintiffs [Wooddale] and investigating the homeowner claims equally, not pro rata by their time on the risk. . . .

(West Bend App. at 4-5.)

Finally, the Court made the following Order for Judgment:

1) The indemnity costs relating to the sixty Claims which are the subject of this declaratory judgment action shall be allocated among the Insurers pro rata by time on the risk. The start date for allocation purposes shall be the date of closing and the end date shall be the date the insured is put on notice that a homeowner is making a claim for damages to their home from alleged water infiltration.

2) The defense and investigative costs relating to the sixty Claims which are the subject of this declaratory judgment action shall be allocated equally among the Insurers. . . .

(West Bend App. at 5.)

No party appealed the trial court's determination to apply the pro-rata-by-time-on-the risk method to allocate indemnity costs. Further, no party appealed the trial court's determination that the indemnity and defense costs would be "allocated among the insurers." (West Bend App. at 5.) West Bend filed an appeal contending that the trial court: (a) erred in its application of this allocation method by setting the end date for the allocation period as the date when Wooddale received notice of a pending claim, and (b) erred in holding that

defense costs should be allocated equally based on the number of insurers. In light of the unrebutted expert opinions establishing the damages were continuing and progressive in nature and the fact Wooddale had available liability coverage through November 13, 2002, West Bend contended the appropriate end date for the allocation period should be the earlier of: (a) the date the home was repaired; or (b) the expiration of Western National's policy on November 13, 2002. West Bend further contended defense costs should be allocated among the insurers in the same fashion as indemnity costs – pro-rata based on each insurer's "time on the risk".

In a decision released on May 3, 2005, the Court of Appeals reversed the trial court. The Court of Appeals determined that the appropriate allocation period end date was the date of remediation, not the date that a homeowner placed Wooddale on notice of a potential claim of water infiltration damages. Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399, 406 (Minn. Ct. App. 2005).

The Court of Appeals did not hold that Wooddale would be obligated to pay a pro-rata share of any indemnity (or defense) costs for any "uninsured" periods that may fall within the allocation period. Presumably, in keeping with the parties' stipulation at the trial court level – ("[t]he parties agree that liability is allocated among the Insurers pro rata by time on the risk") – and based on the fact that no insurer had ever advanced a pro-ration to the insured claim or had appealed the trial court's decision to allocate liability "among the insurers," the Court of Appeals intended for any "uninsured" periods to be ignored by the insurers when calculating their respective obligations. In that fashion, each insurer would be liable for the period of time it was on the risk compared to the entire period of time

between the closing date and the *earlier* of: (a) November 13, 2002, or (b) the date of repairs – the position that West Bend advanced throughout these proceedings. Although that result is implicit within the Court of Appeals' opinion and the procedural posture of the case, some of the insurers have now taken the position that Wooddale is somehow obligated to pay a pro-rata share for the time period after November 13, 2002, when Wooddale became "uninsured".

The Court of Appeals also concluded defense costs should be allocated according to the same method used to apportion indemnity costs, pro-rata by time on the risk. Id.

This Court granted the various Appellants' Petitions for Review on July 19, 2005.

West Bend requests this Court affirm the Court of Appeals' decision, but clarify the same to make clear Wooddale is not required to contribute a pro-rata share for any uninsured periods that may fall within the allocation period as determined by the Court of Appeals. In other words, each insurer in this case would be liable for the period of time it was on the risk compared to the entire period of time between the closing date and the *earlier* of: (a) November 13, 2002, or (b) the date of repairs.

STANDARD OF REVIEW

On an appeal from a summary judgment, a reviewing court determines whether there are any genuine issues of material fact in dispute, and whether the district court erred in applying the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). When, as here, the material facts are not in dispute, this Court need not defer to the trial court's application of the law and questions of law are reviewed *de novo*. Scott v. Forest Lake Chrysler-Plymouth-Dodge, 611 N.W.2d 346, 350 (Minn. 2000); Frost - Benco Elec. Ass'n v.

Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

In insurance coverage cases implicating multiple insurance policies, a trial court's determination of whether to allocate damages among multiple insurers is subject to an abuse of discretion standard. In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 415 (Minn. 2003), *reh'g denied*, (Minn. Sept. 29, 2003). Here, however, the issue is not whether the trial court abused its discretion in deciding whether to apply the pro-rata-by-time-on-the risk method of allocation, but rather the trial court's application of this method to the facts presented. This Court's review is *de novo*.

LEGAL ANALYSIS

A. The Court of Appeals Correctly Determined the Allocation Period End Date Would Extend to the Date of Remediation.

While some amicus curiae suggest that the trial court erred in its decision to apply the pro-rata-by-time-on-the risk method of allocation to the sixty moisture intrusion claims at issue, the parties in this case agreed liability should be allocated among the insurers based on their respective time on the risk and no party appealed the trial court's decision to apply this allocation method.

The Court of Appeals correctly determined that the allocation period end date extended to the date of remediation. This holding was consistent with Minnesota law and the undisputed facts of the case. Under the "injury-in-fact" rule, all policies in effect when property damage occurred are triggered, (see, e.g., In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 415 (Minn. 2003), *reh'g denied*, (Minn. Sept. 29, 2003) (citing Jenoff, Inc. v. New Hampshire Ins. Co., 558 N.W.2d 260, 261 (Minn. 1997); Fairview Hosp.

and Health Care Serv. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995), *reh'g denied*, (Minn. Sept. 20, 1995)), and each insurance company is required to pay for "that period of time it was on the risk compared to the *entire* period during which damages occurred." Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 732 (Minn. 1997) (emphasis in original.) The expert opinions offered into evidence in this case conclusively established the "damage involved in the [homes] occurred as a continuous process that is indivisible over time from initial water intrusion to the time of remediation." (West Bend App. at 83.)[2]

Contrary to the arguments raised by Maryland Casualty and Western National, nothing in a standard commercial general liability ("CGL") policy suggests the policy will cease to afford liability coverage on the date continuing and progressive damages are discovered or on the date a homeowner places a residential contractor on notice of a potential claim. While a liability insurer may have a defense to payment under the policy if the insured had knowledge of the claim for property damages prior to purchasing the policy (under the common law "known loss" doctrine and/or a special "known injury or damage" endorsement, discussed below), standard "CGL policies do not impose, as a condition of coverage, a requirement that the damages or injury be discovered at any particular point in time" nor

---

[2]Although Appellants contend the allocation period end date should be the date the homeowner placed Wooddale on notice of a potential property damage claim, no party introduced evidence to support the proposition that no appreciable damage had occurred in the involved homes after that date. It is well established that any "party seeking to demonstrate that no appreciable damage occurred during a particular time period," bears the burden of proof on that issue. Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 730 (Minn. 1997).

provide that coverage will cease when damages are discovered. Mayor and City Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070, 1095 (Md. Ct. App. 2002). Similar to the Court of Appeals in this case, courts in other jurisdictions have recognized the allocation period for cases involving progressive damages will extend from the date of the initial damage until such time as the damage is repaired, removed or contained. See, e.g., Stonehenge Eng'g Corp. v. Employers Ins. of Wausau, 201 F.3d 296 (4th Cir. 2000) (applying South Carolina law) (noting the absence of legal support for the proposition "that the trigger period for coverage under a commercial general liability policy ends upon discovery of the property damage rather than continuing as long as the progressive damage continues to occur"); Mayor and City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070 (Md. Ct. App. 2002), *cert. granted,* Baltimore v. Utica Mut., 371 Md. 613, 810 A.2d 961 (Md. Nov. 8, 2002), *appeal dismissed,* 374 Md. 81, 821 A.2d 369 (Md. Mar. 6, 2003) (rejecting the argument insurance policies issued after asbestos was discovered could not be obligated to indemnify the insured – "the continued presence of ACBMs in the buildings may cause continuous property damage during the coverage periods of policies that take effect subsequent to the moment that the City initially discovered the harmful effects of the asbestos"); Owens-Illinois, Inc. v. United Ins. Co., 625 A.2d 1, 25 (N.J. Super. A.D. 1993), *rev'd on other grounds,* 138 N.J. 437, 650 A.2d 974 (N.J. Dec. 22, 1994) ("an ongoing process of property damage triggers every policy during the destructive process"); Dayton Ind. Sch. Dist. v. National Gypsum Co., 682 F.Supp. 1403, 1409-10 (E.D. Tex. 1988), *rev'd on other grounds,* W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865, *reh'g denied,* (Apr. 9, 1990) (applying continuous trigger until the products were

removed or contained).

Appellants confuse the insuring requirements of a CGL policy with "known-loss" doctrine concepts. A standard CGL policy will apply if "'property damage' is caused by an 'occurrence' . . . [and] [t]he . . . 'property damage' occurs during the policy period." (See Western National App at 5). A CGL defines the term "occurrence" to mean "an accident . . .". (Id. at 16.) Maryland Casualty's assertion that "[o]nce an insured is placed on notice of property damage . . . any continuation of that damage . . . cannot be considered accidental" within the meaning of a CGL policy is erroneous. (See Brief of Maryland Casualty at 18.) Property damage does not cease to be "caused by an [accident]" within the meaning of a CGL policy simply because damage is discovered. The "occurrence" or "accident" referred to in the policy relates to the conduct which gave rise to the property damage, not the resulting damage.

It is true, as noted above, that a policy which comes into effect ***after*** an insured has knowledge of a claim for property damage may not afford coverage. The reason the subsequent policy may not apply is not, however, because the insured cannot establish an "an occurrence" or "an accident" as required by the insuring clause of the policy. Rather, it is because an insured generally cannot purchase insurance for a known loss or a loss in progress – the classic statement being that one cannot purchase insurance for a house that has already burned down.[3] The known loss doctrine is not based on any insurance policy provisions.

---

[3]In Minnesota, the doctrine of "'known loss' is a fraud-based defense." Domtar, Inc., v. Niagra Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997) (citing Franklin v. Carpenter, 309 Minn. 419, 424-25, 244 N.W.2d 492, 496 (1976); Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917, 924-25, n. 6 (Minn. 1983); Oster v. Riley, 276 Minn. 274, 280-81, 150 N.W.2d

Rather, "courts limit coverage, without additional policy language, by requiring that the claimed loss must be 'accidental' or 'fortuitous', not one that is already known to the insured when the coverage is purchased." Domtar, Inc. v. Niagra Fire Ins. Co., 552 N.W.2d 738, 746 (Minn. Ct. App. 1996), *rev'd in part on other grounds,* Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997).

The known loss doctrine does not support the trial court's use of an allocation period end date based on notice to the insured of a potential claim. The doctrine only applies where the insured knew of the loss ***prior*** to purchasing the policy. The doctrine has no application to a loss that is discovered ***during*** an insurer's policy period. A policy in effect at the time ongoing and progressive property damage is discovered will continue to afford coverage for the damages at least through the duration of the policy period. This Court acknowledged as much in Northern States Power Co. v. Fidelity & Cas. Co., 523 N.W.2d 657, 664 (Minn. 1994), wherein it observed an appropriate allocation period end date could be "whenever the last triggered policy period ended."[4] Thus, contrary to Appellants' arguments, there is no

---

43, 48-49 (1967)). The known loss doctrine applies "where the loss has occurred prior to the application for insurance" and "the insured knew of the loss at the time of application." Domtar, Inc., v. Niagra Fire Ins. Co., 563 N.W.2d 724, 731 (Minn. 1997). Additionally, the doctrine is "inapplicable if the insurer knew of the circumstances on which it bases the defense." General Housewares Corp. v. National Sur. Corp., 741 N.E.2d 408, 416 (Ind Ct. App. 2000) (stating summary judgment was not appropriate where "the question of whether or not [the insurer] also had knowledge of [the insured's] environmental liabilities prior to issuing the policies" remained).

[4]It is, however, "inaccurate to conclude that a CGL insurer is never liable for damages occurring outside of the policy period." Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 733 (Minn. 1997). "CGL policies come in many forms and it is a mistake to read our case law as if the scope of coverage has been resolved for all such policies, no matter what their language." Id.

textual support in a CGL policy for the proposition that a CGL policy will cease to afford liability coverage on the date continuing and progressive property damages are discovered, much less on the date the insured is placed on notice of a potential claim.

And, as in Domtar, "nothing in the record supports the conclusion [damage] abruptly discontinued at any point before [the initial policy period] or after [the last policy period]." 563 N.W.2d at 733. Indeed, the evidence established the mold growth and ongoing process of decay worsen over time: "[t]he older the home, the more extensive is the observed damage." (West Bend App. at 84-85.)

In contending that a CGL policy should not afford coverage for property damage that continues to occur after the date the insured has received notice of a claim, Appellants are, in essence, advocating a "post-manifestation cut-off theory" – an extension of the known-loss doctrine. Under this theory, an insurer who issued a policy for the period of November 13, 2001 to November 13, 2002 could claim it was on the risk for ***one day*** if the homeowner reported a claim to the insured on November 14, 2001, despite the fact "appreciable" damages continue to occur and the policy would otherwise afford coverage for those damages through November 13, 2002. The "essence of the actual injury trigger theory is that each insurer is held liable for . . . those damages which occurred during its policy period." Northern States Power Co. v. Fidelity & Cas. Co., 523 N.W.2d 657, 662 (Minn. 1994). Yet, under the Appellant's theory, adopted by the trial court, an insurer would not be liable for all damages that occur during its policy period. The "post-manifestation cut-off theory" is,

therefore, inconsistent with the "injury-in-fact" rule and was properly rejected by the Court of Appeals. Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399, 405-06 (Minn. Ct. App. 2005).[5]

Appellants and amicus curiae raise public policy type arguments in support of their position that the allocation period should end on the date the insured received notice of the claim. They contend that if the Court followed Domtar, a residential contractor would have an incentive to unreasonably delay repair efforts until the start of a new policy in an effort to maximize insurance coverage. (See, e.g., Western National Brief at 9.) However, a contractor would gain nothing by unreasonably delaying repair efforts. If the contractor had knowledge of a property damage claim before submitting an application for insurance, the contractor would not be entitled to any coverage under the new policy by virtue of the common law "known loss" or "loss in progress" doctrines. See, e.g., Domtar, Inc., v. Niagra Fire Ins. Co., 563 N.W.2d 724, 731 (Minn. 1997) (the known loss doctrine applies "where

---

[5]The "post-manifestation cut-off theory" is also inconsistent with the language of the endorsement Western National claimed was added to its policy. As noted by this Court noted in Domtar, "[i]t is inaccurate to conclude that a CGL insurer is never liable for damages occurring outside of the policy period." Domtar, 563 N.W.2d at 733. "CGL policies come in many forms and it is a mistake to read our case law as if the scope of coverage has been resolved for all such policies, no matter what their language." Id. Here, the Western National endorsement provided that ***"'property damage' which occurs during the policy period . . . includes any continuation, change or resumption of that . . . 'property damage' after the end of the policy period"*** (See Western National App. at 25) (emphasis supplied). Under this endorsement, Western National would not only be obligated to contribute a pro-rata share of the damages occurring during its policy period, but also damages occurring thereafter. It is unknown when this endorsement (Form CG 00 57 09 99) was added to the policy. It was not referenced on Western National's declarations page. (Id. at 4.)

the loss has occurred prior to the application for insurance" and "the insured knew of the loss at the time of application"); Hooper v. Zurich Am. Ins. Co., 552 N.W.2d 31 (Minn. Ct. App. 1996), *rev. denied*, (Minn. Sept. 20, 1996) ("because appellants acquired their Western policy . . . after they had been sued, their loss was in progress, and they could not insure against it").[6]

Other Appellants, including Wooddale, suggest if this Court followed Domtar such that the allocation period end date was the date of remediation, liability insurers would not have any incentive to make timely repairs to a home after being notified of a potential claim against the insured. (See Wooddale Brief at 17.) Wooddale claims that insurers who issued policies to the general contractor prior to the discovery of the damage (such as the insurers who are parties in this declaratory judgment action) would delay repair efforts in an effort to join later insurers, so as to minimize their potential liability: "Insurers have every incentive to stall remediation efforts until others come on board to share in the costs associated with repair." (Id. at 20.) This argument ignores the fact that: (a) any policies subsequently issued to the insured would not apply by virtue of the common law "known loss" or "loss in progress" doctrines and/or "known injury or damage" endorsements;[7] and (b) the damage to

---

[6]Additionally, as Western National points out in its Brief, "[m]any insurers . . . now include . . . endorsements in their policy so as to clearly bar coverage for any claim of damage which was known to the insured before the inception date of the policy." (See Brief of Western National at 9.)

[7]No insurer in this case has delayed repair efforts in an effort to join later insurers, so as to minimize potential liability for repair costs. Indeed, as Maryland Casualty points out, "[n]o other insurers were joined, because no one, Wooddale included, reasonably expected any subsequent insurers would be obligated to provide coverage for the claims." (See Brief of Maryland Casualty

the homes increase with the passage of time. If the home is not repaired, the mold growth and decay can, and does, spread into previously unaffected portions of the home, driving up the costs of repairs. As noted by the Court of Appeals, this argument "fail[s] to consider the nature of the claims at issue: any delay in commencing repair efforts will result in additional decay and additional expense. . . ." Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399, 406 (Minn. Ct. App. 2005.)

Appellants further contend that Wooddale would be obligated to contribute a pro-rata share of indemnity (and defense costs) for the time period after November 13, 2002 (the date Western National's policy expired) if the allocation period extended to the date of remediation, . Maryland Casualty contends "adoption of a notification end date . . . [affords] the greatest protection to the insured" because otherwise "liability for the share of damages occurring between notice and remediation will be assigned to the insured." (See Brief of Maryland Casualty at 13.)

For several reasons, this argument fails.

First, this Court has previously recognized that an insured may be required to contribute for self-insured periods falling within the allocation period. See, Domtar, 563 N.W.2d at 733, n.5 (citing several cases and noting "[i]n pro-rata jurisdictions, many courts . . . allocate losses to self-insured periods.") Thus, the fact an insured may be obligated to pay a pro-rata share does not provide a basis for ignoring the progressive nature of the

---

at 14.)

damages and assigning an allocation end date which has no relationship to those damages or the language of the policy.

Second, Appellants' argument implies that an insured would not be obligated to contribute a pro-rata share if the allocation period end date coincided with the date the insured received notice of a claim. Yet, this argument is not necessarily true. The fact that an insured may have to contribute a pro-rata share is possible in ***any*** case where a court allocates damages under the pro-rata "time on the risk" method – regardless of whether the end date is the date the insured received notice of the claim or the date the damages were repaired – because damages may continue to occur after the expiration of the last policy affording coverage. If, for example, the allocation period end date was based on the date the insured received notice of the claim, the insured would be faced with the potential of having to contribute a pro-rata share on any claim which was reported to the insured after the expiration of the last policy affording coverage – here, Western National's policy on November 13, 2002. Thus, if Wooddale was sued for water infiltration damages on November 13, 2005 relating to a home it had built in 1995, it would have no coverage for the three year period between November 13, 2002 and November 13, 2005. Presumably, Maryland Casualty and Western National would contend that Wooddale would be obligated to pay a pro-rata share of indemnity costs for the three years it was "on the risk" – despite the fact that Wooddale was unable to obtain liability coverage for water infiltration claims after November 13, 2002.

Third, and more importantly, the issue of whether Wooddale could be required to contribute a pro-rata share of indemnity (and defense) costs is not even involved in this case. No insurer ever advanced the argument that pro-ration to the insured was appropriate and there is nothing in the Court of Appeals' opinion which suggests, much less requires, Wooddale to contribute a pro-rata share. The trial court, in its summary judgment order, determined both indemnity and defense costs were to be allocated ***"among the [i]nsurers"***. (See West Bend's App. at 5) (emphasis added.) That determination was based on the parties' stipulation. As the Court of Appeals observed, "[t]he parties agreed that liability should be allocated ***among the insurers*** pro rata by time on the risk". Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399, 402 (Minn. Ct. App. 2005) (emphasis supplied.) And, although no insurer appealed the trial court's determination, some of the Appellant insurers have taken the position – since the release of the Court of Appeals' opinion – that Wooddale is somehow obligated to contribute.

Those same insurers now urge this Court to adopt a notification end date, claiming it "affords the greatest protection to the insured." (See Brief of Maryland Casualty at p. 13.)

Wooddale is absolutely correct in its position that no insurer "raised nor argued that Wooddale was responsible for allocation costs or otherwise challenged the district court's ruling that costs were to be allocated solely among the insurers." (See Wooddale Brief at 2.) Wooddale is insulated from any liability on these sixty claims by virtue of the parties' stipulation.

Fourth, implicit within Appellants' argument is the erroneous assumption that a court's determination of the allocation period – the period over which the damages occurred – requires the insured to contribute a pro-rata share for any "uninsured" periods that may fall within that allocation period. Maryland Casualty suggests "the practical effect of the Court of Appeals' ruling is that the insured inevitably will bear responsibility for the period between the end of the last triggered policy and remediation . . ." (Id. at 20.) Why? A court's decision on the allocation period issue has nothing to do with the issue of whether the insured will be obligated to contribute a pro-rata share for any "uninsured" periods. The allocation period issue only addresses the question of when "appreciable" damages began and when they stopped. That determination is entirely distinct from the question of whether the insured should be legally required to contribute to indemnity (or defense) costs. Numerous courts, in cases involving the pro-rata by time on the risk allocation method, have recognized that periods of time when liability insurance coverage was not available to the insured in the marketplace are not counted when calculating each insurer's pro-rata obligation. See, e.g., Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178 at 1203-04 (2d Cir. 1995) (court modified the judgment of the trial court so as not to require the insured to contribute for years after 1985, the point at which asbestos liability insurance ceased to be available); *modified on other grounds*, 85 F.3d 49 (2d Cir. 1996).[8]

---

[8]Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 479, 650 A.2d 974, 995 (N.J. 1994) ("[a] fair method of allocation appears to be one that is related to both the time on the risk and degree of risk assumed. When periods of no insurance reflect a decision by an actor

See, also, Windt, *Insurance Claims & Disputes,* §6.47 (4th ed. 2004) ("[a]n insured is not obligated to pay . . . for periods of time where it could not have obtained insurance in the marketplace or those years in which the existence of insurance coverage would have been irrelevant such as where the insurer has no obligation to pay by virtue of the known loss or loss in progress rule").[9]

Here, no insurer ever raised a pro-ration to the insured claim. No insurer raised such a claim for good reason. First, if Wooddale received notice of the claim ***prior*** to November 13, 2002 (the date Western National's policy expired), even a standard CGL policy issued thereafter would likely not afford coverage by virtue of the known loss doctrine. See, e.g., Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917, 924-25, n. 6 (Minn. 1983) (known loss

---

to assume or retain a certain risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable"); Mayor and City Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070, 1101-1102, 1104, n. 54 (Md. Ct. App. 2002) ("[w]e further agree that such allocation would not be appropriate in that case where coverage was not available"); Champion Dyeing & Finishing Co., Inc. v. Centennial Ins. Co., 810 A.2d 68 (N.J. Ct. App. 2002) (insurer must prove that insurance was available and affordable to pro-rate to the insured).

[9]On the other hand, courts have held an insured responsible for a pro-rata share if it chose to forego insurance (was uninsured or self-insured) or cannot identify the insurer. See, e.g., Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 733, n. 5 (Minn. 1997) (citing numerous cases for proposition that "[i]n pro-rata jurisdictions, many courts . . . allocate losses to self-insured periods"); Security Ins. Co. of Hartford v. Lumbermans Mut. Cas. Co., 826 A.2d 107, 125 (Conn. 2003) (citing numerous cases and holding that "it is proper for the trial court to order the insured to reimburse its insurer . . . for periods of self-insurance"); Lincoln Elec. Co. v. St. Paul Fire and Marine Ins. Co., 210 F.3d 672, 690 (6th Cir. 2000) (insured responsible for period where the insured decided to "go bare" with self-insurance); Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 479, 650 A.2d 974, 995 (1994) ("[w]hen periods of no insurance reflect a decision by an actor to assume or retain a certain risk . . . to expect the risk-bearer to share in the allocation is reasonable")

doctrine bars coverage "where the loss occurred prior to the application for insurance" and the insured "knew of the loss at the time of the application"). As Maryland Casualty points out in its Brief, "[n]o other insurers were joined, because no one, Wooddale included, reasonably expected that any subsequent insurers would be obligated to provide coverage for the claims." (*See* Maryland Casualty Brief at 14.) Thus, with regard to claims that were reported to Wooddale prior to November 13, 2002, neither Wooddale or its insurer would have any obligation. See, e.g., Windt, *Insurance Claims & Disputes,* §6.47 (4th ed. 2004) ("[a]n insured is not obligated to pay . . . [for] those years in which the existence of insurance coverage would have been irrelevant such as where the insurer has no obligation to pay by virtue of the known loss or loss in progress rule").

Second, with regard to the homeowner claims reported to Wooddale ***after*** the expiration of Western National's policy on November 13, 2002, any insurer that wanted to claim Wooddale (or its subsequent CGL insurer) was required to contribute to any claim, needed to present evidence at the summary judgment hearing that Wooddale could have obtained liability insurance to cover the claim. See, e.g., Champion Dyeing & Finishing Co., Inc. v. Centennial Ins. Co., 810 A.2d 68 (N.J. Ct. App. 2002) (insurer must prove that insurance was available and affordable to pro-rate to the insured). "[L]osses will be prorated to the insured, unless a gap in coverage is due to the insured's inability to obtain insurance." Mayor and City Council of Baltimore, 802 A.2d at 1104. No insurer claimed proration to the insured was appropriate in this case, much less presented evidence Wooddale could have

obtained a CGL policy after November 13, 2002 which would afford coverage for water infiltration claims. Although the CGL policies Wooddale obtained subsequent to November 13, 2002 (when Western National's policy expired) were never introduced below, Wooddale was apparently unable to obtain a policy after November 13, 2002 which would extend coverage for water infiltration claims arising out of homes Wooddale had already built.

Maryland Casualty contends a "remediation end date creates a very real conflict between insurers and the insured regarding the speed and scope of repair efforts." (See Brief of Maryland Casualty at 20.) Maryland Casualty suggests an insurer may want to "minimize the insured's liability and damages by defending the case regardless of how long that might take" while the insured would want to "settle the claims or repair the property damage as quickly as possible" to limit or avoid any "personal exposure." (Id. at 20-21.) This argument is, of course, predicated on Maryland Casualty's mistaken belief a residential contractor would be obligated to contribute for "uninsured" periods of time.

While the issue of whether an insured (Wooddale) could be required to contribute a pro-rata share for damages that occurred during periods of time when it could not reasonably obtain liability insurance in the marketplace would present an important question, the issue was never raised below and, thus, was not addressed by the Court of Appeals.[10] Since no

---

[10]The Supreme Court does not issue advisory opinions on hypothetical questions, nor decide cases merely to establish precedent. Jasper v. Commissioner of Public Safety, 642 N.W.2d 435 (Minn. 2002); State v. Arens, 586 N.W.2d 131 (Minn.1998); In re Schmidt, 443 N.W.2d 824 (Minn.1989).

insurer ever raised a pro-ration to the insured claim with respect to any of the sixty homeowner claims at issue, the time period ***after*** November 13, 2002 (when Western National's policy expired) is disregarded in determining each insurer's pro-rata obligation relative to a claim where the home was not repaired prior to that date. The calculation is simple: "to determine the amount an insurer must [contribute], one multiplies the [damages (or defense costs)] by a fraction. That fraction 'has as its denominator the number of years in which both injury-in-fact was occurring and insurance was available, and as its numerator the number of years within that period when the insurance was in effect'." Olin Corp. v. Insurance Co. of N. Am., 211 F.3d 307, 327 (2d Cir. 2000) (quoting Stonewall Ins. Co., 73 F.3d at 1204).

Based on the foregoing, each insurer is liable for the period of time it was on the risk compared to the entire period of time between the closing date and the *earlier* of: (a) November 13, 2002, or (b) the date of repairs – the position West Bend has advanced throughout these proceedings. Adoption of this approach – which is implicit in the Court of Appeals' decision, and consistent with Minnesota case law, the language of the insurance policies, and the procedural posture of this case, would mean Wooddale would have no uninsured exposure for the sixty homeowner claims at issue. Thus, West Bend's analysis would afford "the greatest protection to the insured." (See Brief of Maryland Casualty at 13.

While Maryland Casualty contends the Court of Appeals, in adopting the remediation end date, recognized its selection of a particular date would create a gap (between the time the insured received notice and repair) for which liability would need to be assigned to either the insured or one or more of its insurers," West Bend submits the Court of Appeals was aware of the procedural posture of the case and it intended – in accordance with the parties' stipulation at the trial court level – for the parties to allocate the indemnity (and defense) costs ***"among the [i]nsurers,"*** not Wooddale. (*See* West Bend's App. at 5) (emphasis added).

Finally, contrary to the arguments of amicus curiae Minnesota Attorney General Office, the Court of Appeals did not hold "the 'known loss' doctrine did not apply to policies acquired by Wooddale after discovery of the loss." (See Brief of Minnesota Attorney General Office at 18.) At the trial court level, Western National, the last carrier that afforded coverage for the claims, did not contend its policy did not afford coverage for any of the sixty homeowner claims at issue by virtue of the known loss doctrine. Nor did Western National introduce evidence suggesting that Wooddale had "withheld material information concerning the existence of property damage . . . for which ["Wooddale"] subsequently obtained insurance" from Western National. See, e.g., Domtar, Inc. v. Niagra Fire Ins. *Co.*, 563 N.W.2d 724, 737 (Minn. 1997) (rejecting defense where the insurer failed to present evidence "that the insured knew of the property damage when it purchased insurance that

would otherwise cover the loss").[11]

The Court of Appeals' properly held the allocation period end date extended to the date of remediation. The Court of Appeals' holding is consistent with the undisputed facts and this Court's holding in Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 732 (Minn. 1997), which requires a district court to look to "the *entire* period during which damages occurred" when resolving the allocation period issue. Id. Appellants' position that CGL policies should cease to afford coverage the moment a homeowner places the insured on notice of a claim finds no support in the policy language and is inconsistent with the "injury-in-fact" rule. While the issue of whether an insured could be required to contribute a pro-rata share for "uninsured" periods of time that fall within the allocation period would present an important issue, the issue was neither raised by any party nor decided by the Court of Appeals.

West Bend requests this Court affirm the Court of Appeals' decision, but clarify the lower couert's ruling to make clear Wooddale is not required to contribute a pro-rata share for any uninsured periods that may fall within the allocation period. In other words, each insurer would be liable for the period of time it was on the risk compared to the entire period of time between the closing date and the *earlier* of: (a) November 13, 2002 or (b) the date

---

[11]The Court of Appeals, when discussing the known loss doctrine in its opinion, was doing so only in the context of Appellants' argument that the principles underlying the known loss doctrine – that once the insured is placed on notice of a claim, the loss is known and cannot be insured – "compel[led] the district court's conclusion that the ending date for purposes of allocation is the date the insured received notice of a homeowner's intent to file a claim." Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399 (Minn. Ct. App. 2005).

of repairs.

B. The Court of Appeals Correctly Determined that Defense Costs Should be Apportioned According to the Same Methodology as Indemnity Costs, Pro-Rata Based on Each Insurer's Time on the Risk.

American Family, Maryland Casualty and Western National, which insured Wooddale for a period of five years, three years and two years, respectively, seek reversal of the Court of Appeals' holding that defense costs should be allocated pro-rata based on each insurer's time on the risk. These insurers contend that defense costs should be allocated based on the number of involved insurers, rather than taking both an insurer's time on the risk and the degree of risk assumed, into consideration.

As noted by the Court of Appeals, there is no Minnesota authority which directly addresses the allocation of defense costs among consecutively liable insurers. Appellants rely heavily on Josten's Inc. v. Mission Ins. Co., 387 N.W.2d 161 (Minn. 1986) and Domtar, Inc., v. Niagra Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997), in support of their position that defense costs must be shared equally based on the number of involved insurers. However, neither case supports their argument.

In Jostens, this Court merely held that "where it can be argued, legitimately and in good faith, that either of two [concurrently liable] insurers has primary coverage for a claim, both insurers have a duty to defend that claim" and "[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". Id. at 168. This case, by contrast, involves consecutively liable insurers

and the cost of defending the insured can be readily apportioned between the insurers based on their time on the risk. If anything, the Josten's case supports the Court of Appeals' decision by its recognition that "equal division of the defense costs was a default only where the allocation based on each insurer's actual liability proved practically impossible." Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399, 406 (Minn. Ct. App. 2005).[12]

In Domtar, Canadian General insured Domtar from 1956 to 1965 and Continental insured Domtar from 1965 to 1970. At the time of trial, Domtar's dispute with Canadian General had not been resolved because personal jurisdiction over the company was still in dispute. After the jury determined that Continental had breached its duty to defend, the trial court entered judgment against Continental for all of the defense costs Domtar had incurred. On appeal, Continental contended that the trial court erred in holding it liable for all defense costs because Domtar was also proceeding against Canadian General. The Supreme Court rejected the argument, noting that "Continental's remedy, if any, is to seek contribution from Canadian General". Id. at 739. Whether the defense costs should be apportioned between Continental and Canadian General based on their respective time on the risk was not raised, nor decided.

---

[12]Western National's contention that the "the insurers have agreed that their rights inter se will be determined as if a proper loan receipt agreement were in place" (see Western National Brief at 6) finds no support in the record and, in any event, represents an argument that was never raised, nor decided, below.

Although this Court has not specifically addressed the issue, the majority of courts that have done so have held that defense costs should be apportioned according to the same formula that is used to apportion indemnity costs. See, e.g., Allan D. Windt, *Insurance Claims & Disputes,* at §7:6 (4th ed.) For example, in Crown Center Redevelopment Corp. v. Occidental Fire & Cas. Co. of N. Carolina, 716 S.W.2d 348 (Mo. Ct. App. 1986), the Missouri Court of Appeals apportioned defense costs in the same manner as it apportioned liability payments. Id. at 364 (citing General Accident Fire & Life Assurance Corp. v. Continental Cas. Co., 287 F.2d 464, 468 (9th Cir. 1961). This Court, when adopting the "time on the risk" method of allocating indemnity costs in Northern States Power Co. v. Fidelity & Cas. Co. of New York, 523 N.W.2d 657 (Minn. 1994), cited with approval two federal appellate decisions in which the court had applied the "time on the risk" method to allocate defense costs. See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir.1980), decision clarified on reh'g by 657 F.2d 814 (6th Cir. 1981), cert. denied, 454 U.S. 1109 (1981), reh'g denied, 455 U.S. 1009 (1982) (noting that "there is no reason why this same theory should not apply to defense costs". Id. ; Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F.Supp. 71 (E.D. Mich.1987). As noted by commentators, the time on the risk method would appear to be applicable to both defense and indemnity costs. See William R. Hickman & Mary R. DeYoung, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N.Ky. L.Rev. 291, 307(1990).

Moreover, numerous courts have recognized that the fairest and most equitable

formula to be applied in cases involving progressive damages is one whereby the defense obligations are apportioned based on each carrier's time on the risk. See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir.1980) (apportioning indemnity costs in claims related to inhalation of asbestos fibers according to the number of years the workers were exposed and noting that "[t]here is no reason why this same theory should not apply to defense costs"), decision clarified on reh'g by 657 F.2d 814 (6th Cir. 1981), cert. denied, 454 U.S. 1109 (1981), reh'g denied, 455 U.S. 1009 (1982); Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co., 264 Conn. 688, 826 A.2d 107 (2002) (citing numerous cases and adopting the pro rata approach to the allocation of defense costs in long term latency loss claims that implicate multiple insurance policies); Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 105 Cal.Rptr.2d 559 (Cal. Ct. App. 1st Dist. 2001); Lafarge Corp. v. National Union Fire Ins. Co. of Pittsburgh, P.A., 935 F.Supp. 675 (D. Md. 1996); Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389 (5th Cir. 1995); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994); Gulf Chem. & Metallurgical Corp. v. Associated Metals and Minerals Corp., 1 F.3d 365, 371-73 (5th Cir. 1993); Continental Cas. Co. v. Medical Protective Co., 859 S.W.2d 789, 793 (Mo. Ct. App. 1993), reh'g and/or transfer denied, (Jul. 18, 1993), transfer denied, (Sept. 28, 1993) ("it is appropriate to apportion the cost of defense on the same basis as the apportionment of the settlement of the claim for damages"); EEOC v. Southern Publishing Co., 894 F.2d 785 (5th Cir. 1990); Budd Co., v. Travelers Indem. Corp., 820 F.2d 787, 790-91 (6th Cir. 1987); Fireman's Fund Ins.

Cos. v. Ex-Cell-O Corp., 662 F.Supp. 71 (E.D. Mich.1987); Okada v. MGIC Indem. Corp., 823 F.2d 276, 282 (9th Cir. 1986). Indeed, one court has noted that allocating defense costs on an equal share basis "would [be] patently arbitrary and inequitable". Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 114, 105 Cal.Rptr.2d 559, 564 (Cal. Ct. App. 1st Dist. 2001).

Allocating defense costs based on the number of involved insurers (rather than on each carrier's time on the risk, or even the number of insurance policies) leads to illogical and unfair results. A hypothetical illustrates the point. Under the trial court's ruling, if an insured obtained annual insurance policies from ABC Company over a 50 year period of time and obtained a single one year policy with XYZ Company (or was uninsured for one year) and was sued for progressive damages which extended over that 51 year period, ABC Company and XYZ Company (or the insured, if uninsured) would each be required to pay 50% of the defense costs, despite the fact ABC Company issued 50 separate insurance contracts (each of which contained a provision obligating ABC Company to defend the insured) and collected 50 separate premiums to insure the risk.

The unfairness issue was squarely raised in the case of Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 105 Cal.Rptr.2d 559 (Cal. Ct. App. 1st Dist. 2001). There, the sole issue on appeal was whether the trial court erred in allocating defense costs among several insurance carriers responsible for the defense of a mutual insured on the basis of the relative amount of time each insurer was "on the risk", rather than on an "equal shares"

basis. 105 Cal.Rptr.2d at 561. The underlying lawsuit involved claims for construction defects and property damage to a residential condominium unit. Id. at 560-61. The court had no difficulty in holding the time on the risk allocation method was more equitable than the equal shares approach because one of the insurers on the risk was responsible for less than six months of the total insurance coverage of four and one-half years. Id. at 564. The court further stated:

> In order to adopt the equal shares method of allocation advanced by Centennial, the trial court would have been required simply to ignore the relative length of time each of the several insurers was actually responsible for insuring the acts of Lincoln and was receiving insurance premiums for bearing that risk."

Id.

In response to the argument that each of the involved insurers owed their mutual insured a "complete duty to defend" the entire claim, the court stated:

> Although insurers must respond in full to a contractual policy holder's tender of defense, their respective obligations for contribution to other insurers for the costs of defense are entirely separate from their obligations to their insured and are adjusted equitably on the basis of all the circumstances of the case.

Id. at 562-64.

Appellants contend defense costs must be allocated equally based on the number of insurers involved, as opposed to each insurer's respective time on the risk, because each insurer was contractually obligated to defend Wooddale, even against claims for damage that occurred outside of their respective policies periods. While this statement may not necessarily

be accurate,[13] an insurer's obligation ***to its insured*** does not have any bearing on its obligation ***to other insurers*** or the determination of how the costs of defending the insured should be apportioned ***between consecutively liable insurers***. See, e.g., Domtar, Inc. v. Niagra Fire Ins. Co., 563 N.W.2d 724, 739 (Minn. 1997) (holding that insurer, Continental, was liable for defense costs incurred by insured and stating "Continental's remedy, if any, is to seek contribution from Canadian General"). As noted by the court in Centennial Ins. Co., 105 Cal.Rptr.2d at 565: "Although insurers must respond in full to a contractual policy holder's tender of defense, their respective obligations for contribution to other insurers for the costs of defense are entirely separate from their obligations to their insured and are adjusted equitably on the basis of all the circumstances of the case." (Emphasis in original.)

Appellants suggest it would be difficult to allocate defense costs between the insurers based on each insurer's time on the risk. (See Brief of American Family at 12) (citing Jostens for the proposition 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"). While the

---

[13]To the extent some damage occurs within an insurer's policy period, the insurer will have an obligation to defend its insured. See, e.g., Domtar, Inc., v. Niagra Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997). It does not appear, however, the Supreme Court has specifically held that apportionment of defense costs between an insurer and an insured can *never* occur. See, e.g., Jostens, Inc., v. CNA Insurance/Continental Cas. Co., 403 N.W.2d 625, 631 (Minn. 1987) (although noting strong policy in favor of requiring defense where there is even arguable coverage, facts indicated that "a great deal of the defense costs were incurred in general defense preparation and cannot be separated by claimants or time periods"). The immediate case does not involve a duty to defend issue nor an apportionment to the insured issue.

apportionment issue discussed in Jostens was vastly different than that involved here, nothing could be simpler than applying the same allocation formula to both indemnity and defense costs and having each insurer pay a percent of the total fees. As the court noted in Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1225 (6th Cir.1980), decision clarified on reh'g by 657 F.2d 814 (6th Cir. 1981), cert. denied, 454 U.S. 1109 (1981), reh'g denied, 455 U.S. 1009 (1982), "there is no reason why this same theory should not apply to defense costs".

Appellants question how defense costs are to be calculated if damages occur during a period of time for which insurance coverage was not available (i.e., from November 13, 2002 to the date of repairs in some of the claims). That is not difficult. The trial court and Court of Appeals addressed the allocation period – i.e., the period of time over which damages occurred – so the defense (and indemnity) costs could be allocated among the insurers, not Wooddale. Indeed, the Court of Appeals specifically noted in its opinion the ***"the district court was allocating each insurer's respective contribution to the defense among the insurers".*** Wooddale Builders, Inc., v. Maryland Cas. Co., 695 N.W.2d 399, 407 (Minn. Ct. App. 2005) (emphasis added).[14] Because no pro-ration to the insured issue is

[14]In jurisdictions which pro-rate defense costs to the insured for periods of time where the insured was either uninsured or self-insured, the insurers are generally required to pay for the defense up front and then afterward may seek contribution for claims pertaining to the uninsured or self-insured periods. See, e.g., NL Indus., Inc., v. Commercial Union Ins. Co., 935 F.Supp. 513, 520-21 (D. N.J. 1996) (citing Continental Cas. Co. v. Rapid Am. Corp., 593 N.Y.S.2d 966, 609 N.E.2d 506 (1993)); Security Ins. Co. of Hartford v. Lumbermans Mut. Cas. Co., 826 A.2d 107 (Conn. 2003) (compiling cases). This issue is not, however, involved here.

present, the time period after November 13, 2002 would be disregarded in calculating each insurer's pro-rata obligation on claims where the homes were not repaired prior to that date. See Olin Corp. v. Insurance Co. of N. Am., 211 F.3d 307, 327 (2d Cir. 2000) (quoting Stonewall Ins. Co., 73 F.3d at 1204). As a practical matter, then, on claims giving rise to defense costs, each insurer would be liable for the period of time it was on the risk compared to the period of time between the closing date and the earlier of: (a) November 13, 2002, or (b) the date of repairs, the same calculation used to determine each insurer's indemnity obligation.

The Court of Appeals decision should be affirmed. As noted by the court in Centennial Ins. Co. v. United States Fire Ins. Co., 88 Cal.App.4th 105, 105 Cal.Rptr.2d 559, 652-64 (Cal. Ct. App. 1st Dist. 2001):

> In order to adopt the equal shares method of allocation advanced by [American Family, Maryland Casualty and Western National], the [Court] would have been required simply to ignore the relative length of time each of the several insurers was actually responsible for insuring the acts of [Wooddale] and was receiving insurance premiums for bearing that risk.

CONCLUSION

For all of the foregoing reasons, Third-Party Defendant - Respondent West Bend Mutual Insurance Company respectfully requests the Supreme Court affirm the Court of Appeals' determination that the end date for allocating indemnity costs among the insurers is the date of repair and, also, the Court of Appeals' determination that defense costs be apportioned based on each insurer's "time on the risk." West Bend further requests that this

Court clarify the lower court's ruling to make clear Wooddale is not required to contribute a pro-rata share for any uninsured periods that may fall within the allocation period as set forth herein.

Respectfully submitted,

Dated: October 20, 2005

JOHNSON • PROVO-PETERSEN, LLP

Gregory J. Johnson (#202678)
332 Minnesota Street
First National Bank Building
Suite West 975
Saint Paul, Minnesota 55101
(651) 227-2534
Attorneys for West Bend Mutual Insurance Company

CERTIFICATION OF APPELLANT'S BRIEF

Pursuant to Minn. R. Civ. App. P. 132.01, subd. 3 (2005), it is hereby certified that the foregoing brief was prepared using WordPerfect 12 in compliance with the typeface requirements of this rule. It is further certified that the foregoing brief contains 10,848 words, as calculated by the WordPerfect 12 software, exclusive of the table of contents, table of citations and this certification.

Dated: October 20, 2005

JOHNSON • PROVO-PETERSEN, LLP

Gregory J. Johnson (#202678)
332 Minnesota Street
First National Bank Building
Suite West 975
Saint Paul, Minnesota 55101
(651) 227-2534
Attorneys for West Bend Mutual Insurance Company