

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 SafeCo,

*Respondents.*

APPELLANT WOODDALE BUILDERS, INC.'S  
BRIEF AND APPENDIX

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## STATEMENT OF THE LEGAL ISSUES

- I. Did the Minnesota Court of Appeals, by setting the end date for allocation purposes as the date of remediation, also overturn that portion of the district court's ruling, not on appeal, that all indemnity costs shall be allocated only among the insurers? Although the Court of Appeals did not expressly overturn the District Court's ruling, the Court of Appeals' silence on the issue can be interpreted as effectively overturning the District Court's ruling.

## STATEMENT OF THE CASE

These consolidated appeals stem from a June 15, 2004 district court order where the court determined that indemnity costs relating to water infiltration and mold growth claims should be allocated to certain Insurers pro rata by time on the risk, and that the start date for allocation purposes is the date of closing and the end date is the date the insured is put on notice that a homeowner is making a claim for damages to their home from alleged water infiltration. The district court also determined that defense and investigative costs relating to the claims were to be allocated equally and exclusively among the insurers.

On July 28, 2004, West Bend and Safeco appealed the district court's decision to the court of appeals. Both West Bend and Safeco limited their appeals to the appropriate allocation end date and allocation of defense costs. Neither 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.

On May 3, 2005, the court of appeals overturned the district court's finding that the appropriate allocation end date was the date the homeowner made the claim and that allocation of defense costs should be allocated equally among the Insurers. Rather, the court of appeals held that the appropriate end date for allocation is the date of remediation and that defense costs are to be allocated among the Insurers pro rata by time on the risk.

Subsequently, this court granted Petitions for Review by Wooddale, American Family, Maryland Casualty, and Western National. Wooddale seeks review of whether

the court of appeals, by setting the end date for allocation purposes as the date of remediation, also overturned that portion of the district court's ruling not on appeal that all indemnity costs shall be allocated only among the Insurers. Maryland Casualty and Western National not only challenge the allocation end date, but also seek review regarding defense cost allocation. American Family only appeals the allocation of defense costs.

## FACTS

This is a case about upholding basic insurance principles in a building construction context, and the negative consequences that will result if these principles are abandoned. Regardless of the industry, every insured has a reasonable and bargained for expectation that in exchange for timely payment of premiums, it will receive complete insurance coverage under its policy for covered loss. The district court in this case correctly ratified this fundamental principle of insurance when it found that the end date for allocation of liability among insurers in a water infiltration scenario is the date the homeowner makes a claim for damages instead of a later, undefined date when the insured may no longer have insurance coverage for water intrusion. Unfortunately, the court of appeals overturned the district court's ruling, and instead held that the appropriate end date for allocation is the date of remediation. In so ruling, the appellate court has gone beyond the bargained for language of the relevant insurance policies in question and casted a luminous shadow of uncertainty among both insurers and insureds in the construction industry as to the extent and amount of coverage a standard CGL policy provides as it relates to water intrusion damages.

Wooddale Builders, Inc. ("**Wooddale**") is a well-respected residential homebuilder in the Twin Cities Metropolitan area, and since 1990, has constructed hundreds of luxury homes. (A.21) Between 1990 and 2002, Wooddale purchased comprehensive general liability ("**CGL**") insurance policies from the following insurers: (1) West Bend Mutual Insurance Company ("**West Bend**"); (2) American Economy Insurance Company ("**Safeco**"); (3) Maryland Casualty Company ("**Maryland**")

Casualty"); (4) American Family Insurance Group ("American Family"); and (5) Western National Insurance Group ("Western National") (collectively referred to as the "Insurers"). (A.21) The respective policy periods are as follows:

American Family:	November 13, 1990-November 13, 1995
West Bend:	November 13, 1995-November 13, 1996
Safeco:	November 13, 1996-November 13, 1997
Maryland Casualty:	November 13, 1997-November 13, 2000
Western National:	November 13, 2000-November 13, 2002

(A.21) Each of the insurance policies issued by the Insurers contains standard language requiring the Insurers to defend and indemnify Wooddale with respect to any claim for property damages resulting from an occurrence to which the insurance applies. (A.21)

Around June 2000, owners of homes built by Wooddale began submitting numerous claims to Wooddale claiming that their homes were suffering water intrusion damage. (A.21) Wooddale promptly tendered these claims for coverage to its current insurer, Maryland Casualty. (A.5; A.21) As of June 2000, Wooddale had timely tendered approximately sixty (60) claims for coverage. (A.21)

Rather than pay the submitted claims, Maryland Casualty opted to take no action whatsoever. (A.5; A.21; A.22) Based on Maryland Casualty's inaction, on August 27, 2002 Wooddale commenced a declaratory judgment action in district court against Maryland Casualty.<sup>1</sup> (A.21) Wooddale brought the declaratory judgment action to enforce Maryland Casualty's contractual responsibility to repair the damaged homes. (A.21) Subsequent to the initiation of the declaratory judgment action, many homeowner

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<sup>1</sup> The court of appeals incorrectly referred to the initiation date of the declaratory action as October 2002.

claims were settled. (A.5; A.22) However, many claims remain unresolved, and as a result, on or about June 6, 2003 Maryland Casualty filed a third-party complaint against the other four Insurers, seeking contribution and/or indemnity with respect to any payments that Maryland Casualty might be required to pay under its policies with Wooddale. (A.5; A.21)

On April 12, 2004, Wooddale filed a Motion for Partial Summary Judgment, which was closely followed by cross-motions filed by several Insurers. (A.22)

Wooddale submitted the following two points for the district court's consideration:

(1) Was the water infiltration and mold growth ("**Injury**") caused by a multitude of factors resulting in continuous damage requiring a continuous trigger of coverage, or was the Injury caused by a discrete, identifiable event requiring a single policy trigger; and

(2) Whether the Insurers were liable for payment on claims on a pro rata, time on the risk basis or on a sole and exclusive basis.

(A.2)

Based on the parties' factual stipulation, and applying well-settled law, the district court first held that Minnesota follows the "actual injury" or "injury-in-fact" rule with regard to insurance coverage. (A.7; A.17) This rule provides that the time of occurrence is not the time the wrongful act is committed, but rather the time the injured party is actually damaged. (A.7; A.17) Applying Minnesota's actual injury rule to the stipulated facts, the district court held that because the Injury to the homes was continuous, and not the result of a discrete and identifiable event, that insuring obligations under each of the Insurers' policies were triggered. (A.7; A.17) Additionally, the district court found, and the parties stipulated under the unique facts of the case, that since the Injury was

continuous, the appropriate method for allocating damages to the Insurers was pro rata by time on the risk. (A.17) Pro rata by time on the risk apportions liability proportionate to the number of years an insurer is on the risk relative to the total number of years of coverage triggered. (A.8; A.9)

Although the parties stipulated to these findings, and also agreed that the starting date for allocation was the date of closing on the purchase of the affected homes, the Insurers disagreed about the end date for allocation. (A.17) On June 15, 2004, the district court granted summary judgment in favor of Wooddale, finding in relevant part:

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.

(A.18)

On July 28, 2004, West Bend appealed the district court's decision to the court of appeals. (A.23) On August 27, 2004, Safeco also appealed to the court of appeals. (A.23) West Bend and Safeco limited their appeals to the second sentence of the district court's decision quoted above. (A.23) West Bend argued that the appropriate end date was the date of remediation. (A.23) Safeco, in contrast, only sought review on the issue of whether the district court ruling "might suggest that allocation does not apply to the entire policies that were triggered by the underlying claims." (A.23) Additionally, West Bend and Safeco did not appeal the first sentence of the district court's order that the Insurers bore all indemnity costs. (A.23) All Insurers, save for West Bend and American

Family, maintained that the district court had appropriately fixed the end date of allocation as the date the insured receives notice of the homeowners' claim. (A.23)

In its decision dated May 3, 2005, the court of appeals overturned the district court's finding that the appropriate allocation end date was the date the homeowner made the claim. (A.29) Not only did the court of appeals overturn the district court's ruling, but it also declined to adopt West Bend's recommendation for end date allocation, ("the date the home is repaired or the expiration of the last policy on November 13, 2002, whichever occurred first"), holding instead that the appropriate end date when allocating liability among consecutive insurers is the date of remediation. (A.29) See also *Initial Brief of Third-Party Defendant-Appellant West Bend Mutual Insurance Company* dated September 27, 2004, p. 8. The court of appeals also rejected respondents' public policy argument that if the allocation date was extended to the date of remediation, both insurers and insureds could delay their repair efforts, stating "[n]either the insured nor the insurer has an incentive to delay." (A.26; A.27) Notably, the court of appeals' decision is silent on the issue of whether indemnity costs are to be allocated solely among the insurers as stipulated to by the parties and determined by the district court.

## **STANDARD OF REVIEW**

Allocation of defense obligations among insurers is a question of law subject to *de novo* review. *State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992).

## ARGUMENT

### **I. THE COURT OF APPEALS' DECISION LACKS CLARITY AS TO WHETHER WOODDALE WOULD BEAR ANY APPORTIONMENT OF LIABILITY IF THE END DATE FOR COVERAGE EXTENDS TO THE DATE OF REMEDIATION.**

Although Wooddale believes the Minnesota Court of Appeals endeavored to render a favorable decision for Wooddale, the decision is nevertheless vague as to whether Wooddale actually bears apportionment liability by virtue of the court of appeals extending the allocation end date to the date of remediation, or whether indemnity for damages to homes is borne solely by Insurers on the risk<sup>2</sup>. At first glance, the decision appears to benefit both Wooddale and the homeowners it sold homes to in that the ruling recognizes that Injury and associated costs could continue past the point where a homeowner places Wooddale on notice. To this end, the decision is commendable because it provides full compensation to homeowners from the date of closing to the date of remediation, and dictates that someone is responsible for all costs from these respective points.

However, where the decision falls critically short is that it does not establish with clarity those entities that are ultimately liable for these damages, once the full extent of the costs are monetarily quantified. To illustrate, suppose a homeowner closes on a home in 1995, discovers and provides notice of injury in 2000, and has the condition remediated in 2001 as depicted below:

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<sup>2</sup> Although the court of appeals did not define "remediation" in its opinion, for purposes of this discussion, Wooddale will assume that "remediation" means repair of the damage.



Upon closer reading, however, the court of appeals' decision may have a secondary and presumably unintended consequence not contemplated by any of the parties to the litigation. By extending the allocation date to the date of remediation, the court of appeals may have exposed Wooddale and insurers to unanticipated and unwarranted liability. Wooddale may face greater exposure because as of November 13, 2002, insurers ceased offering CGL insurance policies providing coverage for water infiltration claims. See *West Bend's Response Brief to Wooddale's Petition for Review*, dated June 21, 2005, p. 2, fn. 1, noting that "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 November 13, 2002." Therefore, with the extension of the allocation date, Wooddale, under one reading of the court of appeals' decision, may be deemed to have involuntarily inherited risk for self-insured years. With respect to the insurers, the extension of the end date allows certain insurers to stall out remediation efforts as more liability is born by other insurers on the risk.

To better appreciate the potentially severe impact of the court of appeals' decision, one must keep in mind that Wooddale initially brought the declaratory judgment action to spur the Insurers to repair the homes. The Insurers' delay in processing claims had prejudiced Wooddale's business reputation because under the terms of the CGL policies Wooddale had purchased, Wooddale was prohibited from remediating water infiltration damage on its own. Moreover, having procured coverage for the very water infiltration

problems that came to pass, Wooddale at no time believed that it had exposure for self-insured periods with respect to such risks.

Wooddale's belief that it carried no responsibility for homeowners' damages was also born out by the Insurers themselves. The parties stipulated to and the district court found that Wooddale would not bear any liability for damages. This issue was not appealed by any party. In fact, the focus of West Bend and Safeco at the appellate level was on the contribution of Western National, the last Insurer on the risk, not on any alleged contribution owed by Wooddale. West Bend specifically argued for an end date consistent with this very understanding, stating "the appropriate end date for allocation purposes should be the date the home is repaired or the expiration of the last policy on November 13, 2002, whichever occurred first." *Initial Brief of Third-Party Defendant-Appellant West Bend Mutual Insurance Company* dated September 27, 2004, p. 8. Notably, Wooddale's last date of CGL coverage was November 13, 2002 with Western National. Under the formula suggested by West Bend, therefore, Wooddale would be absolved of any liability.

If the court of appeals had adopted the exact end date language proposed by West Bend, the present appeal would be moot as far as Wooddale is concerned because it would have no exposure for self-insured years. In fact, some Insurers raise this very argument, and maintain that the court of appeals' decision does not extend to, nor does it expose Wooddale to, any future liability. This Court, however, should read such statements with caution, as other insurers have already taken the position that the court of

appeals' opinion effectively renders Wooddale liable for any self-insured years. Notably, West Bend acknowledged this trend in its Petition to this Court<sup>3</sup>.

Whether the court of appeals intended to expose Wooddale and other insurers by extending the allocation end date is secondary to the more critical inquiry of the real world impact the decision has had on Wooddale from a contribution standpoint. With due respect to the court of appeals, Wooddale maintains that its decision is flawed in that it fails to clarify Wooddale's exposure, if any. Additionally, and more importantly, the decision has the effect of potentially creating uninsured exposure for Wooddale which was not bargained for when Wooddale purchased the policies in question. This void has allowed insurers to take unfair advantage of Wooddale when settling homeowners' claims, a disturbing trend that prompted Wooddale's appeal. For example, in 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.

**II. EXTENDING THE ALLOCATION END DATE TO THE DATE OF REMEDIATION FRUSTRATES BASIC INSURANCE PRINCIPLES BECAUSE IT EXPOSES WOODDALE TO RISK THAT IT DID NOT BARGAIN FOR.**

The court of appeals extension of the allocation end date to the date of remediation improperly exposes Wooddale to risk that it did not voluntarily assume. This Court has previously emphasized the importance of meeting an insured's expectations under an

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<sup>3</sup> "To be fair to Wooddale, it appears that its petition was prompted by other insurers, who have apparently sought contribution from Wooddale on claims involving homes which have not yet been repaired." *West Bend Mutual Insurance Company's Response to Wooddale Builders Inc.'s Petition for Review* dated June 21, 2005, p. 2.

insurance policy, noting that the best approach when evaluating whether coverage exists "is to allocate respective policy coverage in light of the total policy insuring intent, as determined by the primary policy risks upon which each policy's premiums were based and as determined by the primary function of each party." *Integrity Mut. Ins. v. S. Auto & Cas.*, 239 N.W.2d 445, 446 (Minn. 1976). This Court has also adopted the reasonable expectations doctrine, which provides that because of unequal bargaining power and a lack of expertise on the part of insureds, the objectively reasonable expectations of insureds will be honored even if painstaking study of the policy provisions would have negated those expectations. *Atwater Creamery Co. v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985).

Other courts have upheld this basic premise of insurance law:

An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. By issuing the policy, the insurer agrees to assure the risk of the insured's liability in exchange for a fixed sum of money. At the heart of the transaction is the insured's purchase of certainty - a valuable commodity.

*Keene Corporation v. Ins. Co. of North America*, 667 F. 2d 1034, 1041 (D.C. Cir. 1981).

Stated another way:

In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.

Robert E. Keeton and Alan Widiss, *Insurance Law*, p. 633 (1988). At the heart of these statements is the basic insurance principle that places primary emphasis on meeting the reasonable expectations of the insured. *Keene*, 667 F.2d at 1041.

When Wooddale purchased the CGL insurance policies from its Insurers, it had every reason to believe that it would have full coverage stemming from any claims brought by homeowners. As stated earlier, Wooddale never thought when it initiated the declaratory judgment action that it would ultimately face exposure for such claims. Further support for this position is ironically offered by most of the Insurers, who in certain contexts have every incentive to argue to the contrary, at least with respect to this case, in that any liability attributed to Wooddale reduces their overall liability. Once again, however, the Insurers' support is somewhat of a double-edged sword, as some will undoubtedly benefit if the court of appeals' decision is affirmed.

Rather than ensuring that Wooddale has full coverage for covered claims, the court of appeals' decision has unnecessarily exposed Wooddale and other insureds to liability for gaps in water intrusion insurance coverage. The fact that Wooddale did not voluntarily cancel insurance coverage is critical because it further bolsters Wooddale's claim that it in no way anticipated exposure to claims made prior to cancellation of its policies. Extending the allocation end date to the date of remediation may improperly expose Wooddale to claims it never anticipated paying.

### **III. EXTENDING THE ALLOCATION END DATE REMOVES ANY INCENTIVE ON THE PART OF INSURERS TO REPAIR DAMAGE AS THEY BENEFIT FROM ALLOCATION EXTENDING TO INSURED AND ADDITIONAL INSURERS.**

Contrary to the court of appeals' statement that "[n]either the insured nor the insurer has an incentive to delay through extension of the end date," the reality is that, at least with respect to insurers, they have every incentive to delay. The decision has encouraged insurers to stall out remediation efforts on timely made claims because the longer insurers wait to repair, the more cost is born by additional insurers and/or Wooddale. Notably, Safeco recognized the risk of gamesmanship on the part of insurers if the appropriate end date was not selected, stating "Awaiting the conclusion of remediation or repair to the houses is not required, and would unnecessarily extend the period over which coverage is allocated and promote gamesmanship and delays." *Reply Brief of Appellant Safeco* dated November 9, 2004, p. 3.

The potential for abuse with an indeterminate remediation date is not difficult to envision. Any insurer on the risk would benefit by stalling out remediation efforts because it increases the likelihood of additional insurers, or self-insured homebuilders, coming on the risk and sharing in overall costs. More participants on the risk, in turn, equates to reduced liability for those insurers who opt to stall.

It is unclear how the court of appeals concluded that "neither the insured nor the insurer has an incentive to delay" as "any delay in commencing repair efforts will result in additional decay and additional expenses for the insured and the insurer on the risk." What the court of appeals fails to understand is that an insurer has every reason to delay

if the potential exists for other insurers to bear repair costs. In fact, this very stance by insurers is what prompted Wooddale to file the present appeal. Additionally, if an insured does not have water intrusion coverage at the time of discovery of the damage, it opens the door for insurance fraud because some insureds will make misrepresentations regarding loss in progress to obtain adequate coverage. Conversely, insureds may face defenses from insurers based on the “known loss” doctrine or other policy exclusions, creating an overall environment of uncertainty.

#### **IV. THIS COURT HAS NEVER DETERMINED THE APPROPRIATE ALLOCATION END DATE IN THE BUILDING CONSTRUCTION CONTEXT.**

This Court has never had the opportunity to determine what the appropriate allocation end date is in the building construction context. In *Silicone Implant Insurance Coverage Litigation*, 667 N.W.2d 405 (Minn. 2003), the subject matter of the lawsuit was silicone breast implants. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997) involved a massive environmental clean-up site. Another often cited case with respect to allocation of damages, *Northern States Power Co. v. Fidelity and Cas. Co. of New York*, 523 N.W.2d 657 (Minn.Ct.App. 1994), not only did not reach this Court on appeal, but involved soil and groundwater cleanup, rather than building construction.

Wooddale notes this distinction because those Insurers in support of the remediation end date will argue that *Domtar* is controlling on this issue, and that the decision reached by the Court conclusively supports the court of appeals' decision in the present case. In *Domtar*, the insured initiated action against fifteen insurers seeking in relevant part indemnity for environmental damage arising from the insured's operation of

a tar refining plant. *Domtar*, 563 N.W.2d at 728. The Minnesota Pollution Control Agency initially began a remedial investigation of the contaminated site, and ultimately ordered the insured to immediately clean up the area. *Id.* at 729. Although the insured had CGL coverage for a majority of the calculated contamination period, it did have exposure based on self-insured years stemming from pollution exclusions. *Id.*

In its decision, this Court agreed with the trial court that clean-up costs should be allocated evenly from the inception of the environmental damage to the inception of clean-up efforts, and that each insurer was liable only for damage during those years in which its policies were on the risk. *Id.* at 732-733. The court found that the insured's interpretation of *NSP*, that the decision did not indicate whether an insured was liable for self-insured periods, was too narrow. *Id.* at 732. Therefore, the court held that each insurer was liable only for that period of time it was on the risk compared to the *entire* period during which damages occurred, resulting in the insured bearing partial liability for those years it was self-insured. *Id.* at 732

In this case, *Domtar* is not controlling law because the critical public policy concerns present in this case were not present in *Domtar*. First, unlike *Domtar* where the insured was exposed to a solitary, one-time event, Wooddale and other homebuilders undeniably face repeated exposure over an indefinite period of time. This difference is critical because it magnifies the massive scope of homebuilders' potential liability. Second, in *Domtar* and other environmental clean-up cases, a regulatory agency always dictates the timeframe for repair. In these cases, insurers do not have the ability to stall remediation efforts due to strict regulatory oversight. In mold and water infiltration

cases, however, there is no agency present to ensure that repairs are made in a timely manner. Hence, insurers have every incentive to stall out remediation until others come on board to share in the costs associated with repair.

The Minnesota Court of Appeals has previously determined that courts must consider many factors when deciding how to allocate damages, including "the policy language, parties' intent or reasonable expectations, concerns of construction and public policy." *NSP* at 661. Based on the public policy principles that Wooddale has outlined above, and which are inherent and unique to the construction industry, the Court should find that the appropriate allocation end date is the date of notice. If the Court finds otherwise, or does not clarify the court of appeals' decision, insurers will continue to hold Wooddale hostage for self-insured years, and homes will never get repaired. The Court should take special note that several Insurers are supportive of Wooddale's position, although these same Insurers could possibly benefit at least short-term from the shifting of liability to other insurers or Wooddale. However, these Insurers recognize the dire long-term consequences of a remediation end date, as they at some point could find themselves at the wrong end of the equation.

**V. ESTABLISHING THE ALLOCATION END DATE AS THE DATE OF NOTICE WILL ENSURE THAT HOMES ARE TIMELY REPAIRED AND WILL ELIMINATE THE UNCERTAINTY OF ADEQUATE INSURANCE COVERAGE.**

By upholding the district court's finding that the appropriate end date is the date the homeowner provides notice of a claim, the Court will ensure that homes are timely repaired, and will also eliminate the current uncertainty surrounding those who are

responsible for contributing to the repair of the homes. As of the date of notice, all insurers on the risk from the date of closing to the date of notice would be liable for indemnity costs pro rata by time on the risk. The insured would have the option to seek full indemnity from any insurer on the risk. The insurers, in turn, could then seek contribution from the other insurers on the risk. The court in *Keene Corp.* fully appreciated the importance of allocating liability in this fashion:

Because each insurer is fully liable, and because [the insured] cannot collect more than it owes in damages, the issue of dividing insurance obligations arises. The only logical resolution of this issue is for [the insured] to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions of the policies that govern the allocation of liability when more than one policy covers an injury. That is the only way [the insured] can be assured the security that it purchased with each policy. Our holding each insurer fully liable to [the insured] is also consistent with other courts' allocation of liability when more than one insurer covers an indivisible loss.

*Keene*, 667 F.2d at 1050. The court emphasized that the above-described allocation was the only formula that made sense, and confirmed that “the primary duty of the insurers whose coverage is triggered by exposure or manifestation is to ensure that [the insured] is indemnified in full.” *Id.*

Allocating liability in this fashion eliminates the negative consequences that stem from extending the allocation end date to the date of remediation. First, it would remove any incentive on the part of insurers to stall out remediation efforts because those insurers on the risk would be locked in place and responsible for all damages as of the date of notice. By conclusively establishing those insurers on the risk, it would make no sense from a monetary standpoint for insurers to delay because although the costs of repair

would continue to rise with each passing day, those monetarily responsible for the repair would remain unchanged. Insurers would no longer have concerns of facing unbargained-for liability, and insureds could rest easy that they would not face exposure for any unanticipated self-insured years. Second, this allocation scheme would result in homeowners receiving timely repair of their homes because again, insurers would have no incentive to stall out such efforts. Timely repair of homes would also bring credibility back to the homebuilders, who pursuant to the CGL policies are currently prohibited from making repairs on their own.

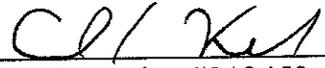
### CONCLUSION

It is absolutely critical that the Court fully appreciate the negative side-effects if the court of appeals' allocation end date is allowed to stand. Basic insurance principles dictate that those who purchase insurance, and timely remit premiums, receive what they originally bargained for when entering into insurance agreements. To find otherwise turns these basic insurance principles upside down.

In this case, there is no question that the allocation end date that makes the most sense is the date the homeowner makes a claim. Extending the end date to the date of remediation only causes confusion among insurers and insureds alike. This Court has the opportunity, based on public policy grounds, to ensure that allocation of liability in a building construction context is rational and fair to all parties involved.

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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).