

NOS. A04-1442 AND A04-1612  
**STATE OF MINNESOTA  
IN THE SUPREME COURT**

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WOODDALE BUILDERS, INC.

Appellant,

v.

MARYLAND CASUALTY COMPANY,  
d/b/a ZURICH NORTH AMERICA,

Appellant,

v.

AMERICAN FAMILY INSURANCE GROUP, AND  
WESTERN NATIONAL INSURANCE GROUP,

Appellants,

WEST BEND MUTUAL INSURANCE COMPANY,

Respondent,

and

AMERICAN ECONOMY INSURANCE CO. (SAFECO),

Respondent

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DATE OF FILING OF COURT OF APPEALS'  
DECISION: MAY 3, 2005

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**MINNESOTA CHAMBER OF COMMERCE'S  
AMICUS CURIAE BRIEF**

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## STATEMENT OF LEGAL ISSUE

Whether an insurer's individual duty to defend its insured, once triggered, can ever be anything less than a complete and indivisible obligation owed to the insured to provide coverage for all of the insured's defense costs?

The Court of Appeals erred in holding that an insurer's duty to defend should be treated the same as its duty to indemnify. In so holding, the Court of Appeals has effectively eliminated the fundamental difference in the nature of an insurer's duty to defend as contrasted from its duty to indemnify. Under well-established Minnesota law, the duty to defend is distinct from and broader than the duty to indemnify, and each insurer owes its insured an absolute and indivisible duty to defend regardless of whether the insured is uninsured for a portion of the time on the risk, regardless of the ultimate allocation among multiple insurers as to indemnification responsibility, and regardless of whether the insurer may seek contribution from other insureds as to reimbursement of those defense costs.

### *Apposite Authority:*

Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 743 (Minn. 1997)

Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 167 (Minn. 1986)

Nordby v. Atl. Mut. Ins. Co., 329 N.W.2d 820, 824 (Minn. 1983)

## STATEMENT OF AMICUS CURIAE

The Minnesota Chamber of Commerce (“Chamber”) respectfully submits this amicus curiae brief seeking reversal of the Court of Appeals’ decision in Wooddale Builders, Inc. v. Maryland Casualty Co., 695 N.W.2d 399 (Minn. Ct. App. 2005), which erroneously held that an insurer’s duty to defend should be subject to the same standards and principles as its duty to indemnify. Id. at 407.

The Chamber serves as the voice of Minnesota business. Founded in 1909, the Chamber is the State of Minnesota’s largest business organization, representing approximately 2,500 businesses of all types and sizes on state public policy and regulatory issues. The Chamber works closely with local chambers and trade associations to understand and represent the priorities of businesses on a state-wide basis on a range of key business issues.

The Chamber comes to the important issue of insurance coverage for defense costs with the valuable and important perspectives of the general business community. In addition to building contractors and insurers, the Chamber’s diverse membership includes manufacturers, suppliers, and a wide array of other types of businesses located and operating in cities and towns throughout Minnesota. The Chamber’s members have a strong interest—an interest that is established under Minnesota law and supported by important underlying public policies—in preserving their established rights to insurance coverage for defense costs.

Counsel for the Chamber have authored this amicus curiae brief, and no other person or entity, other than the Chamber, its members, and their counsel, have made any monetary contribution to the preparation and submission of this amicus curiae brief.

## **STATEMENT OF THE FACTS AND CASE**

The Chamber adopts the statements of facts and the statements of the case contained in Appellants' respective briefs as well as the Court of Appeals' decision.

## STANDARD OF REVIEW

Insurance coverage issues, such as the scope and extent of an insurer's duty to defend and provide insurance coverage for its insureds' defense costs, are questions of law that are subject to a *de novo* standard of review. Franklin v. W. Nat'l Mut. Ins. Co., 574 N.W.2d 405, 406 (Minn. 1998); State Farm Ins. Cos. v. Seefeld, 481 N.W.2d 62, 64 (Minn. 1992); Meister v. W. Nat'l Mut. Ins. Co., 479 N.W.2d 372, 376 (Minn. 1992); Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 886-87 (Minn. 1978); A.J. Chromy Constr. Co. v. Commercial Mech. Serv., Inc., 260 N.W.2d 579, 582 (Minn. 1977).

## ARGUMENT

The Court of Appeals' holding that the insurer's duty to defend should be treated the same as its duty to indemnify threatens to eliminate the fundamental difference in the nature of these materially different duties and, in so doing, deprive insureds of their corresponding rights and interests with respect to complete insurance coverage of defense costs. The Court of Appeals' decision thus conflicts with the sound and well-established principles reflected in the Minnesota Supreme Court's decisions that have confirmed a single insurer may be responsible to its insured for all of that insured's defense costs and fees in a continuous injury situation notwithstanding the fact that policies issued by other insurers may also provide coverage. For example, in Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997), this Court affirmed a district court's decision to hold a single insurer liable for all of its insured's defense costs in a case that arose from environmental contamination that occurred continuously over a 64-year period. Id. at 730, 739. The Court so held notwithstanding the fact that the particular insurer in question had provided primary coverage for only six of those 64 years, while the insured also had primary coverage from another insurance company for ten of those years, and had been either uninsured or self-insured during 49 of those years. Id. See also Jostens, Inc. v. CNA Ins./Cont'l Cas. Co., 403 N.W.2d 625, 631 (Minn. 1987) (rejecting insurer's argument that defense costs should be apportioned by either the percentage of insured and uninsured settlement amounts or the fraction of uninsured years over the total period of alleged injury).

The Court of Appeals' decision poses particular threats to insureds who are uninsured during a portion, but not the entirety, of the timeframe in which continuous harm or damage has occurred. If this issue is not directly addressed and clarified by this Court, the Court of Appeals' holding could be utilized by insurers to prevent insureds from receiving full coverage for their defense costs by claiming that the duty to defend does not cover the uninsured periods. The Chamber respectfully requests the Court to reverse the Court of Appeals' decision insofar as it holds an insurer's duty to defend its insured should be equated to, and subject to the same standards and principles as, its duty to indemnify.

The duty to defend is one of the most important obligations imposed by the insurance policy. 1 Rowland H. Long, The Law of Liability Insurance § 5.01 (2005). An insured purchases insurance coverage not solely to cover any judgment that it might be obligated to pay but also to provide a defense and pay for any defense costs; this duty distinguishes liability insurance from most other forms of insurance. Id.

It is well established that the duty to defend is distinct from the duty to indemnify. Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822, 825 (Minn. 1980). Under Minnesota law, the duty to defend is broader than the duty to indemnify, and an individual insurer's duty to defend is absolute and indivisible as to its insured. Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 743 (Minn. 1997); Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 167 (Minn. 1986); Nordby v. Atl. Mut. Ins. Co., 329 N.W.2d 820, 824 (Minn. 1983); Brown, 293 N.W.2d at 825; see also Franklin v. W. Nat'l Mut. Ins. Co., 574 N.W.2d 405, 406 (Minn. 1998); Jostens, Inc. v. CNA Ins./Cont'l Cas. Co.,

403 N.W.2d 625, 631 (Minn. 1987), *overruled on other grounds*, N. States Power Co. v. Fid. & Cas. Co. of N.Y., 523 N.W.2d 657, 664 (Minn. 1994); Bituminous Cas. Corp. v. Bartlett, 240 N.W.2d 310, 312 (Minn. 1976), *overruled on other grounds*, Prahm v. Rupp Constr. Co., 277 N.W.2d 389, 391 (Minn. 1979); Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co., 150 N.W.2d 233, 236-37 (Minn. 1967); Mannheimer Bros. v. Kan. Cas. & Sur. Co., 184 N.W. 189, 190 (Minn. 1921).

An insurer's duty to defend an insured is contractual. Meadowbrook, Inc. v. Tower Ins. Co., 559 N.W.2d 411, 415 (Minn. 1997), (*citing* Inland Const. Corp. v. Cont'l Cas. Co., 258 N.W.2d 881, 883 (Minn. 1977)); *see also* 14 Lee R. Russ, et al., Couch on Insurance § 200:1 (3d ed. 2000). Accordingly, the issue of whether an insurer has a duty to defend is based on the existence of coverage under the policy. Id. However, while actual coverage often cannot be determined until after litigation has proceeded, the duty to defend is nonetheless distinct and broader than the duty to indemnify. Id. §§ 200:1, 200:3; *see also* St. Paul Fire & Marine Ins. Co. v. Lenzmeier, 243 N.W.2d 153, 156 (Minn. 1976). Specifically, the duty to defend is broader than the duty to indemnify in *at least* three ways:

First, the duty to defend extends to every claim that “arguably” falls within the scope of coverage. Second, the duty to defend one claim creates a duty to defend all claims. Third, the duty to defend exists regardless of the merits of the underlying claims.

Britton D. Weimer, et al., *Insurance Law and Practice*, 22 Minnesota Practice Series, § 3.3, at 55 (West Group 2001) (footnotes & citations omitted). Thus, an insurer may be required to defend an action for which it will not ultimately be required to indemnify the

insured. Meadowbrook, 559 N.W.2d at 415-16. Indeed, “[t]here can be a duty to defend without a duty to indemnify.” Id. (footnote & citations omitted). In situations in which two or more insurers have a duty to defend the same insured, “[e]ach insurer’s obligation to defend is separate and distinct from its duty to provide coverage and pay a judgment, irrespective of other insurance and irrespective of whether it provides primary or excess coverage.” Id. at 60.

The well-established principle that an insurer’s duty to defend is broader than its duty to indemnify is particularly significant given that, in circumstances in which there is indemnity coverage for continuous harm damages from more than one insurer, “[t]he insured would have the option to seek full indemnity from any insurer on the risk.” Wooddale Builders’ Brief at 21. The fact that “each insurer is fully liable” to its insureds enables insureds “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.” Id. (quoting Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1050 (D.C. Cir. 1981)). Thus, first and foremost, the insured shall be fully indemnified “between all of the policies on the risk,” with the insurers then sorting out—either by agreement or through litigation—the manner in which the total indemnity payments shall be allocated among themselves. Maryland Casualty’s Brief at 10. Bearing these principles in mind, the fact that the insurer’s duty to defend is broader than its duty to indemnify conclusively establishes that, *at a minimum*, the insured is necessarily entitled to full coverage of its

defense costs from any of its individual insurers—regardless of how those insurers might eventually resolve the allocation of those defense costs amongst themselves.

Thus, Minnesota law has developed a set of principles to assure insureds have complete coverage for defense costs and should not have to go out-of-pocket in defending claims they have insured against liability. Jostens, 387 N.W.2d at 167. “Each insurer’s obligation to defend is separate and distinct from its duty to provide coverage and pay a judgment, irrespective of other insurance and irrespective of whether it provides primary or excess coverage.” Nordby, 329 N.W.2d at 824; see also Iowa Nat’l Mut. Ins., 150 N.W.2d at 237. The Court of Appeals’ decision in the instant case threatens to undermine these basic propositions.<sup>1</sup>

The Court of Appeals’ decision poses a particular threat to insureds who are uninsured during part, but not all, of the timeframe in which the continuing harm or damage is alleged to have occurred. As demonstrated by Appellants’ briefs, such a situation may come about when an insured’s carrier excludes coverage once the continuous damage or harm becomes known. American Family’s Brief at 13-15; Wooddale Builders’ Brief at 14; Maryland Casualty’s Brief at 5-6, 18. By holding that an insurer’s duty to defend is subject to the same principles as its duty to indemnify, the Court of Appeals has provided that insurer with a basis upon which to argue that its

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<sup>1</sup> The Court of Appeals relied upon an ill-advised decision by the Sixth Circuit which purported to apply New Jersey and Illinois law and which, with virtually no analysis, suggested that the duty to defend could be less than absolute. Wooddale Builders, 695 N.W.2d at 407 (citing Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1225 (6th Cir. 1980)). This authority certainly *does not* reflect Minnesota law as to a liability insurer’s absolute and indivisible duty to defend. See, e.g., Domtar, 563 N.W.2d at 730, 739.

responsibility to cover the insured's defense costs should be reduced by the extent to which its insured was uninsured during a portion of the continuing harm.

Under the Court of Appeals' approach, an insured could also be denied its full right to coverage for defense costs when one of the insured's carriers for some portion of the time on the risk goes bankrupt. American Family's Brief at 13-14. Specifically, the other insurers might argue that, because the rules for allocating liability for indemnity among multiple insurers should be applied equally to the duty to cover costs of defense (as suggested by the Court of Appeals in its holding in the instant case), the insurer's obligation to pay its insured's defense costs should be reduced in proportion to the time on the risk. This would effectively mean the insured would receive no coverage for the defense costs allocated to the bankrupt insurer.

Prior to the Court of Appeals' decision, an insured who was uninsured during a portion of the time on the risk would nonetheless be entitled to full coverage for its defense costs under any of its other available policies. However, the Court of Appeals' holding that the duty to defend should be equated with the duty to indemnify has thrown insureds' rights to full insurance coverage for defense costs into uncertainty. In holding that the same method that applies to allocating indemnity costs should also be applied to defense costs, the Court of Appeals equated the insurer's duty to indemnify with its duty to defend, and thus injected a basis upon which insurers may limit their otherwise broader and indivisible duty to defend their insureds.

As Wooddale Builders correctly noted in its brief, failure to clarify and reaffirm the broad and indivisible duty of each individual liability insurer to cover all of its

insured's defense costs creates an unfair situation which would tempt insurers to take advantage of partially uninsured insureds. Wooddale Builders' Brief at 12, 13-14, 20. Specifically, insurers would be incited to use the Court of Appeals' distorted approach to argue their duty to defend is limited by their time on the risk and/or to delay action on a claim so as to extend the time on the risk and thereby dilute their own liability for defense costs as well as indemnity liability.

### CONCLUSION

The Chamber respectfully requests this Court to squarely address and confirm the legal principles previously set forth in cases such as Domtar, Jostens, and Nordby, which provide that the duty to defend is greater and broader than the duty to indemnify, and that each insurer's duty to defend is complete and indivisible as to its insured regardless of whether that insured is uninsured during a period of the risk, and regardless of any rights an insurer may have to seek contribution for payment of those defense costs from any other insurers.

Dated: August 29, 2005

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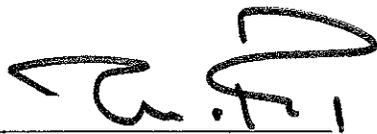
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**CERTIFICATION OF AMICUS CURIAE BRIEF LENGTH**

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I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a Brief produced with a proportional 13-point font. The length of this Brief is 2,595 words. This Amicus Brief was prepared using Microsoft Word 2000.

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