

NO. A06-0425

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State of Minnesota  
**In Court of Appeals**

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David and Charlotte Goeman and  
Trade Lake Mutual Insurance Company,  
*Appellants,*

v.

Allstate Insurance Company,  
*Respondent.*

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**APPELLANTS' REPLY BRIEF**

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## TABLE OF AUTHORITIES

*United States Fidelity and Guarantee v. Commercial Union*, 430 F. 3d 929 (8th Cir. 2005).....2

## INTRODUCTION

Respondent fails to refute the fact that no Minnesota case has ever held that geographic scope of coverage is a factor in determining whether one insurance policy is “closer to the risk” than another. By holding that the Trade Lake policy is primary over the Allstate policy, the trial court impermissibly added a geographic scope factor to closeness to the risk analysis. The trial court’s order granting summary judgment to Allstate must be reversed and judgment entered in favor of Trade Lake.

## ARGUMENT

Leaving aside Appellee’s numerous red herrings,<sup>1</sup> the trial court’s error is best illustrated by analogy. Imagine two insurance policies issued to a United States citizen. They differ only in their area of coverage. Policy A limits its coverage to occurrences within the United States, where it does eighty percent of its business. Policy B insures against occurrences on a worldwide basis. If a damage-causing occurrence takes place in the United States, both policies are invoked.

What plausible ground would Policy B’s insurer have for refusing to share in the defense and indemnity obligation in the United States lawsuit? As to U.S. accidents, both insurers have made the same promise – to defend and indemnify their mutual insured for occurrences in the United States. True, it would be different had the global insurer

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<sup>1</sup>Chief among them being Appellee’s supposition that the absence of Minnesota law holding that geographic scope of coverage is a permissible factor in closeness-to-the-risk analysis must mean that insurers have all implicitly accepted that this is so. *Respondent’s Brief* at 5.

provided in its policy that its U.S. coverage was excess to otherwise concurrent coverage in other policies, but in the case of identical policies, there is no question that both policies would provide coverage.

The size of the area of coverage is the only difference between the facts of the hypothetical and the facts of this case. Whether a policy covers only liability claims in Wisconsin or covers them nationally, neither policy is closer to the risk of an accident in Wisconsin. The trial court erred in holding that the policies were not concurrent. The complete absence of Minnesota law holding that geographic area of coverage is a permissible factor in analyzing closeness to the risk proves this point.<sup>2</sup>

Similarly, Allstate's claim that the fact that the family dog bit the plaintiff in the Wisconsin cabin, rather than at a park, or in a car, or in the Minnesota primary residence, is of no probative value. The coverage in dispute is liability coverage for accidents ("occurrences"). It is, as in all homeowner policies, completely separate and distinct from the first party fire and property loss coverage under both policies. Put another way, both

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<sup>2</sup>In fact, as demonstrated by the Eighth Circuit's recent decision in *United States Fidelity and Guarantee v. Commercial Union*, 430 F. 3d 929 (8th Cir. 2005), Allstate greatly overstates the scope and applicability of the "closer to the risk" analysis and the "total policy insuring intent" analysis. *Fidelity* presented a dispute between two insurers with concurrent coverage. The trial court concluded that the USF&G policy was "closer to the risk" of a warehouse accident than the Commercial Union policy. The 8<sup>th</sup> Circuit reversed. In a thorough analysis of Minnesota law, it found the "[closer to the risk test] to be of little guidance" and the "total policy insuring intent" test inapplicable where, as here, "both policies provide general liability coverage rather than coverage for a specific risk" and "each policy equally contemplated the loss at issue." After an incisive analysis of the limited settings in which the two analyses are implicated, it concluded, as Trade Lake urges here, that both insurers were obliged to share the exposure on a pro rata basis.

policies insured against the liability of a dog that bites a person in Wisconsin – regardless of where that bite takes place.

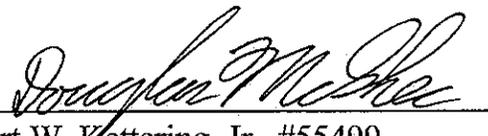
### CONCLUSION

The trial court erred in concluding that Trade Lake, the insurer of a Wisconsin seasonal cabin, had primary coverage for a bite by the family dog in Wisconsin even though Allstate, the insurer of the Minnesota primary residence, provided identical liability coverage for the very same occurrence. Each policy insured against personal liability arising from the same universe of risks in the same geographical area – Wisconsin. The trial court erred when it departed from well-settled Minnesota law obliging concurrent insurers to share the cost of defense and indemnity equally. Instead, it announced a new rule of common law holding that insurers issuing liability policies covering all fifty states are secondary to smaller, local insurers, who restrict their liability coverage to the state in which a seasonal home is located. Accordingly, Appellant Trade Lake respectfully requests that the judgment be vacated and remanded with instructions for entry of judgment in favor of Trade Lake for fifty percent of the costs of defense and indemnity in the underlying lawsuit.

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Respectfully submitted,

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