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Minnesota Supreme Court Issues Decision On *Pro Rata* Allocation Of Indemnity Costs

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On October 5, 2006, the Minnesota Supreme Court issued a significant decision allocating indemnification costs on a *pro rata* time-on-the-risk basis, and allocating defense costs equally among insurers in a construction defect case. This decision is significant in that it confirms the application of the "injury-in-fact" trigger to construction defect and faulty workmanship cases under Minnesota law, and provides firm guidance on the formula to be used for allocating defense and indemnity costs in such cases where multiple insurers are on the risk during the triggered policy periods.

In *Wooddale Builders, Inc. v Maryland Cas. Co.,* __ N.W.2d __, 2006 WL 2828672 (Minn. Oct. 5, 2006), the policyholder/plaintiff, Wooddale, was a general contractor that constructed single-family homes. The policyholder was notified in late 2000 of claims by 60 different homeowners of defective construction and/or faulty workmanship concerning homes it had built from 1991 to 1999. The claims involved water intrusion and mold growth problems in their homes. The policyholder tendered those claims to five different insurers on the risk from Nov. 13, 1990 until Nov. 13, 2002.

The parties agreed that the property damage began with respect to each home on the closing date of its sale and continued until the end of remediation, pursuant to the decision in *Northern States Power Co. v Fid. & Cas. Co. of N.Y.,* 523 N.W.2d 657, 662 (Minn. 1994) (wherein the court adopted the "actual injury" or "injury in fact" trigger of coverage). Therefore, the court reasoned that an insurer was on the risk with respect to a particular home if, during the period of one of its policies, there was property damage to that home resulting from a covered occurrence. However, because the terms of the policies precluded liability if the property damage was expected from the insured's standpoint before the policy period began, no coverage would exist after the policyholder received notice of a claim with respect to a particular home.

Turning to allocation of damages across the triggered policies, the court stated that, pursuant to *Northern States Power,* each triggered policy was to share the total damages "proportionate to the number of years it was on the risk relative to the total number of years of coverage triggered." *Id.* at

663. Consistent with *pro-rata* by time-on-the-risk allocation principles, which the parties agreed was the proper method of allocation, the entire policy period was to be considered for allocation purposes. Therefore, the insurers on the risk with respect to a claim were held to be those insurers that insured the policyholder between the closing date of the home involved and the date on which the policyholder received notice of the claim with respect to that home, and that all insurers on the risk are deemed to be on the risk for the entire period of each triggered policy.

Next, the court, citing *Domtar, Inc. v Niagara Fire Ins. Co.,* 563 N.W.2d 724 (Minn. 1997), reaffirmed that the policyholder is liable for damage occurring during periods where it lacked insurance. However, it distinguished between those periods when the policyholder was voluntarily self-insured and those where insurance was not available. If no insurance coverage was available during the uninsured periods, the liability allocation period would end with the end of the policy year in which the policyholder received notice of claim, or with the end of the last period of insurance coverage, whichever is earlier. If the policyholder was voluntarily self-insured during such periods, however, the allocation period would include the time period that the insured was voluntarily self-insured, and would end with the end of the policy year in which the insured received notice of the claim or with the date of notice of the claim, whichever was later.

Finally, the court held that when the *pro-rata* by time-on-the-risk allocation method applies for indemnification and insurers participate in providing a defense to a common insured, it was proper to apportion defense costs equally among insurers whose policies are triggered. The court saw this as the best approach, supported by policy and precedent, reasoning that it encouraged insurers to promptly resolve the duty to defend issue, and it was consistent with the general rule that the duty to defend is contractual and is broader than the duty to indemnify.

Should you have any questions about *Wooddale Builders* or trigger and allocation questions in general, please feel free to contact any member of Plunkett & Cooney's Insurance Practice Group. A practice group directory can be found at www.plunkettcooney.com, or call Ken Newa at (313) 983-4848 or Chuck Browning at (248) 594-6247.

For a complete copy of *Wooddale Builders, Inc. v Maryland Cas. Co.,* __ N.W.2d __, 2006 WL 2828672 (Minn. Oct. 5, 2006), click here.

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