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Qualified Litigation Attorneys

Splitting the Unwanted Pie - Allocation Among Liability Insurers For "Time-On-The-Risk" In Construction Defect Litigation

By Peter W. Wanning

During 2005, Minnesota courts considered several cases involving construction law, including allocation of the risk for multiple insurers in residential construction/water infiltration cases.

In *Wooddale Builders, Inc. v. Maryland Casualty Company, et al.*, 695 N.W.2d 399 (Minn. App. 2005), the Minnesota Court of Appeals addressed the issue of apportionment of damages among multiple liability insurers. Apportionment of damages among multiple insurers according to their respective time on the risk is often referred to as "pro-rata-by-time-on-the-risk." The court established that the end date for allocating "pro-rata-by-time-on-the-risk" for liability insurers was the date on which remediation was complete. Specifically, the court held that the proper period of time on the risk was from the closing for the purchase of the home/building through the date remediation construction was complete, rather than through the date on which the builder received notice of an owner's claim.

To support its holding extending the period of time-on-the-risk, the court in *Wooddale* characterized the water infiltration damage as "continuous, progressive and indivisible."

Additionally, the court held that "defense costs among consecutively liable insurers should be allocated according to the same method to apportion indemnity costs," according to time on the risk. Finding that allocation of defense costs equally based on the number of consecutive liability insurers would result in inequitable results, the court noted that it was possible, hypothetically, under the district court's reasoning, that "an insurer who was on the risk for 5% of the period during which damage occurred would be liable for 50% of the costs of investigation and defense."

The Minnesota Supreme Court granted review of *Wooddale* on July 19, 2005, and has yet to issue an opinion on the case. Despite the possibility that the supreme court may decide differently than the court of appeals, the recent decision in *Wooddale* illuminates possible trends or treatment that courts are inclined to consider with respect to allocation of time on the risk for multiple liability insurers involved with construction defect litigation.

As the holding presently stands in *Wooddale*, liability insurers should be aware of the following with regard to construction defect litigation, where the damage or defect is "continual, progressive and indivisible":

(1) Allocation of damages among consecutive liability insurers according to the pro-rata-time-on-the-risk method may begin with the closing date for the purchase of the home/building and end with the date of remediation completion; and

(2) Defense costs may be more fairly allocated by each liability insurers' pro-rata-time-on-the-risk.

Another recent decision of the Minnesota Court of Appeals, although unpublished, may also shed some light on the direction that courts may be leaning, with respect to allocation issues in construction defect litigation. In *Kootenia Homes, Inc. v. Federated Mutual Insurance Company*, 2006 WL 224162, No. A05-278 (Minn. App. Jan. 31, 2006), the court based its decision upon a

Allocation *continued on Page 3*

IN THIS *issue*

Splitting the Unwanted Pie 1

The Benefits of Voluntary Dissolution 2

Firm News 3

Subscription Information

A *referral* is the best compliment you can give an attorney. If you know of anyone who may be interested in receiving this newsletter, please complete the section below and return it via fax to 651-223-5070. You may also use the section below for a change of address, etc. Alternatively, you may e-mail the information to us at jlolaw@jlolaw.com.

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Comments or inquiries may be directed to Shannon Banaszewski.

GOING OUT OF BUSINESS? THE BENEFITS OF VOLUNTARY DISSOLUTION VERSUS ADMINISTRATIVE DISSOLUTION FOR CONSTRUCTION COMPANIES AND THEIR INSURERS

By Matthew P. Bandt

It is important for business owners to understand that they cannot shut down without considering future liabilities. However, a company going out of business will receive certain liability protections if it follows the procedure for voluntary dissolution outlined in Chapter 302A of the Minnesota Business Corporation Act, rather than just closing up shop.

Two-Year Limitation on Claims

Voluntary dissolution does not go into effect until the articles of dissolution are filed with the Minnesota Secretary of State. Prior to filing the articles of dissolution, a corporation dissolving voluntarily must first file their intent to dissolve. The corporation then can choose whether or not to provide notice of dissolution to its creditors and claimants. In either case, a two-year limitation to bring claims begins to run dating back to the date the intent to dissolve was filed.

If the corporation chooses to provide notice to its creditors and claimants, it must comply with Minnesota Statutes § 302A.727. Under the statute, the corporation is required to publish notice of its intent to dissolve while also providing written notice of its intent to its known creditors and claimants. After receiving notice, the creditor or claimant must submit its claim within 90 days. Otherwise, in most cases, the claim is permanently barred. If a claim is submitted within 90 days, the corporation has 30 days to accept or deny the claim. If rejected, the claimant has less than 180 days to pursue other remedies, or the claim is permanently lost.

If a corporation dissolving voluntarily chooses not to provide notice, the corporation can file the articles of dissolution after it has either made payment to all known creditors and claimants, or two years have lapsed from the date it filed its intent to dissolve.

The Courts Extend the Protection to Insurers

On November 23, 2005, the Minnesota Supreme Court decided *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49 (Minn. 2005). The court extended the protection of the two year limitation to the insurer for a corporation that voluntarily dissolved without providing notice to its creditors and claimants. Therefore, when a Minnesota corporation is going out of business, its liability insurer (to the extent feasible) should make sure the company voluntarily dissolves under the Minnesota dissolution statute, so as to trigger the benefits provided by the statute.

The protection offered by the court in *Camacho* has the potential to be very significant in residential construction cases that often involve a ten-year warranty period under the home construction statute. For example, in *Camacho*, the home at issue was built in the fall of 1993, but the plaintiffs did not discover the alleged breach until August 2003. They commenced their lawsuit on September 23, 2003. The general contractor previously filed a notice of intent to dissolve on April 29, 1997, and its articles of dissolution on May 6, 1999. Pursuant to the two-year limitation provided in the dissolution statute, and despite the ten-year warranty provided in the home construction statute, the court dismissed the plaintiffs' claims against the general contractor. Furthermore, the court held that the plaintiffs could not proceed against the liability insurer on the risk during the construction of their home.

Administrative Dissolution

There is a significant distinction between corporations that abide by the dissolution statute versus those that are administratively dissolved. According to Minnesota Statutes § 302A.821, the Minnesota Secretary of State shall dissolve a corporation for failure to register with the Secretary during three consecutive calendar years. It is important for a company going out of business to avoid administrative dissolution, because an administratively dissolved company is not entitled to the protections of the dissolution statute.

Unlike claims against corporations that voluntarily dissolve, the statute does not speed up the timeframe to bring claims against administratively dissolved corporations. In the case of residential construction cases, claims against **administratively** dissolved corporations are still governed by a ten-year warranty period.

Future Implications

As indicated above, important benefits under the dissolution statute extend to the liability insurer. Therefore, the distinction between a voluntary and administrative dissolution is as important to the insurer as it is to the company going out of business.

In light of the *Camacho* decision and other inherent risks associated with construction, homeowners should discuss with their insurance agent the possibility of purchasing secondary coverage for construction defects.

The *Camacho* decision has attracted significant media and legislative attention. A bill marked Senate File No. 3234, currently pending in the Minnesota Senate, is intended to preserve statutory homeowner warranties. And, during an election year it might be risky for a politician to vote against such a bill. •

NEWS FLASH - EDR Legislation

On March 1, 2006, a bill governing the use of event data recorder ("EDR") information was introduced in the Minnesota legislature. EDRs, which control the deployment of a vehicle's air bag system, have the capability to store relevant information such as vehicle speed and deceleration in the seconds prior to the deployment of the air bag. Many later model GM and Ford vehicles are equipped with EDRs. Recently, the use of information stored on EDRs has had a significant impact on auto accident litigation. To learn more about EDRs, the admissibility of EDR information, and recent legislation governing the ownership of EDR information, please visit our website at www.jlolaw.com.

Firm News

Congratulations to Alan Vanasek for being voted one of the Top 40 ADR Professionals in Minnesota in a poll conducted by *Minnesota Law and Politics*.

Thomas Cummings and **Marlene Garvis** will be part of the faculty for a seminar presented by Lorman Education Services on June 22, 2006 in Minneapolis. The seminar is entitled "The Basics of Employment Claims, Workers' Compensation Claims and the Interplay Between the Two in Minnesota." If you are interested in attending, please contact Lorman Education Services at (866) 352-9539.

Jim Golembeck and **Jason Koch** presented a seminar on "Water Intrusion Claims and General Water Law," at the annual West Central Claims Associates Insurance Seminar in Willmar. For more information on water related claims contact Jason or Jim.

Congratulations to Jessica Schwie for her recent Minnesota Court of Appeals victory in *Daryani et al. v. Rich Prairie Sewer and Water District,* wherein the court upheld the District Water Rate Structure.

JLO would like to thank everyone at the Northwest Loss Associates Trade Fair. If you forgot to grab a copy of our **ADA-FMLA-Workers' Compensation Comparison Chart** contact **Elisa Hatlevig** or **Marlene Garvis.**

Visit our new website at **www.jlolaw.com**. In February, we gave our website a major face-lift, changing the color scheme, upgrading the design layout, and adding content throughout the site. If you have questions or comments about the recent changes to the website contact Matthew Bass at mbass@jlolaw.com.

Allocation *continued from page 1*

narrow set of facts. Kootenia built a series of stucco-exterior homes from 1996 to 2000. Soon thereafter, a number of homeowners brought suit against Kootenia for various water intrusion and construction defect claims. Kootenia was insured by Federated Mutual Insurance Company from April 1, 1996 to April 1, 2002. After Federated's period of coverage ended, Kootenia obtained coverage through the Cincinnati Insurance Company. In defending the case, Federated's expert concluded that the damage to the home was caused by the improper use and application of stucco materials and that the damage in each home began to occur shortly after closing, during the period of Federated's coverage.

In *Kootenia*, the Minnesota Court of Appeals issued two major holdings:

(1) The court applied the "actual injury rule," which states that an occurrence for coverage purposes is when the party is damaged, not when the wrongful act was committed. The court affirmed the district court's decision which relied on Federated's admissions and expert findings that the damage to the home "occurred" shortly after completion of the homes. Federated's expert conceded the damage began shortly after completion of construction on each home. Therefore, the district court held that an occurrence took place during Federated's coverage period.

(2) The court of appeals interpreted the meaning of the "time-on-the-risk" rule, which states that loss shall be allocated among consecutive liability insurers where a continuous injury, such as environmental contamination, cannot be attributed to a discrete and identifiable occurrence. *In re Silicone Implant Insurance Coverage Litigation*, 667 N.W.2d 405 (Minn. 2003). The court in *Kootenia* refused to allocate damages on the ground that a discrete and identifiable event occurred when the stucco was installed. This event occurred during Federated's policy period. This holding differs from the outcome of the "time-on-the-risk" issue in *Wooddale* because the parties in *Wooddale* agreed to a pro-rata allocation of the damages. Therefore, the issue of whether the water intrusion was a continuous and repetitive injury with no discrete and identifiable cause was not before the court.

Allocation of damages is the exception, not the rule. In *Kootenia,* the court noted that the faulty stucco installation (the only evidence before the district court) was a "readily identifiable event from which all of the Plaintiffs' alleged injuries arose." Citing *In re Silicone*, the court stated that damages will *not* be allocated among multiple liability insurers if the damages are continuous and arise from a discrete and identifiable event. In *Kootenia*, a petition for review has been filed with the Minnesota Supreme Court.

Current allocation issues within construction defect litigation should pique the interests of liability insurers throughout Minnesota. These two cases represent possible trends in how issues of allocation of damages among multiple liability insurers may be treated. Insurers will need to monitor the Minnesota Supreme Court's decision in *Wooddale* to analyze its treatment of the following issues: the end date of the period of time on the risk, and the apportionment of defense costs. If the Minnesota Supreme Court accepts review of *Kootenia*, insurers should pay close attention to its holding with respect to allocation of the risk among consecutive liability insurers. Both cases will be significant for liability insurers, and their involvement in construction defect litigation. •

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Jardine, Logan & O'Brien, P.L.L.P. is committed to **service**...**service** to our **clients**…and **service** to our **community**. In 2006, JLO plans to participate in the following community service projects: a food drive to benefit a local food shelf organization; community gardening with the harvest given to a local food shelf; packaging food for children worldwide; a social event with a senior center; and volunteering at an animal shelter. JLO has also recently participated in a business-wear clothing drive.

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

Coming in the Summer 2006 Issue...

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