

## Applying Proximate Cause And Ensuing Loss Principles

*Law360, New York (November 01, 2012, 3:40 PM ET)* -- In *Friedberg v. Chubb & Son Inc.*, 691 F.3d 948 (8th Cir. 2012), the court rejected the homeowners' appeal of a summary judgment in Chubb's favor in a case where they sought insurance coverage for extensive damage to their home's exterior framing and insulation. Water penetrating through defects in the house's exterior cladding system and through a defective roof had caused most of the damage.

The homeowners claimed that Chubb Indemnity Insurance Company had responsibility to cover the loss under the policy it issued covering the house. But that policy excluded "any loss caused by [faulty] ... planning, construction or maintenance" but covered "ensuing loss" unless otherwise excluded. Chubb moved for summary judgment, arguing that the claimed loss fit squarely within the plain language of this exclusion. The U.S. District Court for the District of Minnesota agreed and found that the policy excluded the loss.

Homeowners Joseph and Carolyn Friedberg built their home in 1989 using an exterior insulation and finishing system (EIFS), also known as synthetic stucco. The system installed on the Friedbergs' home is no longer sold. According to both parties' experts, this system was defective because it allowed moisture to penetrate the exterior surface without providing a way for the moisture to escape once it got in. Moisture trapped beneath exterior cladding causes mold, rot and deterioration of the structural elements of a house.

In 2002, the manufacturer of the EIFS system entered into a class action settlement in which these homeowners participated. But in the years following that settlement, these homeowners chose not to do any repairs. Instead, they claimed that they first became aware of the damage to their home in late 2006, following an attempt to repair a small hole in the side of their house.

During that repair, the contractor discovered extensive damage to the house's exterior structure. The homeowners then made a claim to Chubb under their homeowners' policy.

Chubb's expert's inspection revealed multiple cracks in the cladding and water damage and rot in the home's architectural beams, roof deck, sheathing and framing members. Chubb's expert concluded that the damage had occurred over time due to defects in the cladding as well as a defective roof.

Chubb denied coverage of the homeowners' claim. Chubb based its denial on exclusions within the policy, including the faulty planning, construction or maintenance exclusion, which the court called the "construction defects exclusion" in its opinion. That exclusion provided:

Faulty planning, construction or maintenance. We do not cover any loss caused by the faulty acts, errors or omissions of you or any other person in planning, construction or maintenance. It does not matter whether the faulty acts, errors or omissions take place on or off the insured property. But we do insure ensuing covered loss unless another exclusion applies ... "Construction" includes materials, workmanship, and parts or other equipment used for construction or repair.

The policy defined "caused by" to mean: "any loss that is contributed to, made worse by, or in any way results from that peril."

The homeowners originally brought suit in a Minnesota state court, but Chubb removed to federal district court. Following discovery, both sides moved for summary judgment. On Oct. 25, 2011, the district court entered the decision granting summary judgment in Chubb's favor. *Friedberg v. Chubb & Son Inc.*, 832 F. Supp. 2d 1049 (D. Minn. 2011). The Friedbergs appealed this decision to the Eighth Circuit Court of Appeals.

On appeal, the Friedbergs made two arguments: first, they argued that Minnesota had adopted a "concurrent cause" rule in property insurance cases, and second, they argued that the damage to the materials below or behind the defective materials was a covered "ensuing loss."

## **Causation**

The seminal Minnesota case on causation in a property insurance context is *Henning Nelson Construction Co. v. Fireman's Fund American Life Insurance Co.*, 383 N.W.2d 645 (Minn. 1986). There, the Minnesota Supreme Court held that unless an excluded cause is the "overriding cause," a property loss is covered.

The Henning court stated, "the insurer could not deny coverage, because 'the testimony established there were eight possible causes of the collapse, but no one factor was considered to be the overriding cause.'"

Henning did not define "overriding cause," but it cited *Fawcett House Inc. v. Great Central Insurance Co.*, 280 Minn. 325, 159 N.W.2d 268 (Minn. 1968), and *Anderson v. Connecticut Fire Ins. Co.*, 231 Minn. 469, 43 N.W.2d 807 (Minn. 1950) as authority for the rule it applied. Both *Fawcett House* and *Anderson* applied the "efficient and proximate cause" rule to the facts at issue in those cases.

The Eighth Circuit then determined that Henning's "overriding cause" was another way of stating the "efficient proximate cause" rule the Minnesota Supreme Court previously applied. The court stated, "[t]he faulty construction of the Friedbergs' house, like the vandals in *Fawcett House* and the windstorm in *Anderson*, was the efficient and proximate cause of the loss. But for the faulty construction, the water damage would not have taken place."

The court held that the faulty construction exclusion applied to Friedberg' loss.

## **Ensuing Loss**

Because of its holding as to cause, the Eighth Circuit next considered the question of whether the Friedbergs' loss was an "ensuing loss" under the terms of the policy. The Eighth Circuit relied in part on *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997), reversed in part on other grounds, 615 N.W.2d 819 (Minn. 2000).

There, the Minnesota Supreme Court held that ensuing loss provisions cover "distinct, separable losses." Because the water damage to the materials beneath or behind the defective construction was not a separable or distinct loss, the Eighth Circuit rejected the Friedbergs' contrary argument.

The court also looked to two unpublished Minnesota Court of Appeals decisions to support its conclusion. In *Bloom v. Western National Mutual Insurance Co.*, No. A05-2093, 2006 Minn. App. (Minn. Ct. App. 2006), the court held:

[W]hen water enters a home because of defective design, faulty workmanship, or faulty materials furnished in connection with construction or remodeling and causes damages, ... the damages are excluded from coverage under ... the 'errors, omissions, and defects' ... exclusion" — an exclusion that encompassed errors relating to construction or workmanship."

The court also relied on *Koskovich v. American Family Mutual Insurance Co.*, No. A11-2206, 2012 Minn. App. (Minn. Ct. App. June 25, 2012), a decision handed down after oral argument to the Eighth Circuit, that applied Bloom's rationale to a mold claim under a property insurance policy. Notably, the Koskovich court adopted the district court's Friedberg opinion as correctly stating the law of Minnesota.

Finally, the Eighth Circuit held that the words "however we do" or "but we do" followed by a general reference to ensuing losses do not create an exception to the exclusion in which they are found. Rather, these phrases point out that the exclusion should not be applied beyond its terms.

## **Conclusion**

The Eighth Circuit clarified that Minnesota applies the majority rule — efficient and proximate cause — in interpreting property insurance policies. The court also clarified Minnesota law on ensuing loss, holding that the ensuing loss must be a loss distinct and separable from the excluded loss to be covered. Minnesota joins the majority of jurisdictions in each.

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