STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1775

St. Paul Mercury Insurance Company, et al.,
Plaintiffs,

vs.

Northern States Power Company
d/b/a Xcel Energy, Inc., et al.,
Defendants,

and

Fidelity & Casualty Company of New York,
Third Party Plaintiff,

vs.

Admiral Insurance Company, et al.,
Third Party Defendants,

American Reinsurance Company,
n.k.a Munich Reinsurance America, Inc., third party defendant,
Respondent,

Federal Insurance Company, third party defendant,
Respondent,

TIG Insurance Company, et al., third party defendants,
Respondents,

Mt. McKinley Insurance Company,
f/k/a Gibraltar Casualty Company, third party defendant,
Respondent,

Royal Indemnity Company,
as successor in interest to Globe Indemnity Company,
Respondent,

Lexington Insurance Company, et al., third party defendants,
Respondents,

Old Republic Insurance Company, third party defendant
Respondent,

Puritan Insurance Company, third party defendant,
Respondent,

Northern States Power Wisconsin
d/b/a Xcel Energy, Inc., third party defendant,
Appellant,

and

Associated Electric & Gas Insurance Services, Limited,
Fourth Party Plaintiff,

vs.

Columbia Casualty Company, et al.,
Fourth Party Defendants.

Filed August 25, 2009
Affirmed; motion denied
Collins, Judge[*]
Concurring in part, dissenting in part, Minge, Judge

Hennepin County District Court
File No. 27-CV-03-017809

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Considered and decided by Worke, Presiding Judge; Minge, Judge; and Collins, Judge.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

On appeal from judgment in favor of respondent-insurers, appellant-insured argues that the district court (1) abused its discretion by denying appellant's motions to dismiss for forum non conveniens, (2) erred by concluding that Minnesota law should apply after conducting a choice-of-law analysis, and (3) misapplied allocation law. Respondents moved to dismiss the appeal because appellant failed to serve an adverse party when the issues are indivisible. We affirm the judgment and deny the motion to dismiss.

FACTS

Appellant Northern States Power Company, a Wisconsin corporation (NSP-WI), has been a subsidiary of defendant Northern States Power Company[1], a Minnesota corporation, (NSP-MN), since 1923. NSP-WI formerly operated four manufactured-gas plants in Wisconsin that caused environmental contamination requiring cleanups. It notified its insurers and sought coverage for the cleanup costs.

In October 2003, two of NSP-WI's insurers, St. Paul Mercury Insurance Company and St. Paul Fire and Marine Insurance Company (the St. Paul insurers), brought this

[1] NSP-MN is now known as Xcel Energy, Inc.

declaratory-judgment action against NSP-MN to determine coverage.[2] About two weeks later, NSP-WI brought a similar lawsuit in Wisconsin state court against the St. Paul insurers and some 34 other insurance companies.

Although this case has an extensive procedural history, we summarize only the matters at issue in this appeal. During the course of the district court proceedings, NSP-WI brought two motions to dismiss based on forum non conveniens. In October 2005, the district court denied the first motion and instead granted an "anti-suit" injunction to prevent NSP-WI from pursuing its action in Wisconsin pending resolution of the Minnesota lawsuit, and this court affirmed. *St. Paul Mercury Ins. Co. v. N. States Power Co.*, No. A05-0486, 2005 WL 3529139 (Minn. App. Dec. 27, 2005), *review denied* (Minn. Mar. 14, 2006). In May 2006, the district court denied the second motion to dismiss.

In a July 2007 order for partial summary judgment, the district court addressed the issue of whether Wisconsin or Minnesota law should apply in determining the method to be used to allocate damages over policy years. The district court ruled that Minnesota allocation law applied and then ordered summary judgment in favor of certain excess insurers because the allocated damages did not reach the lower limits of their policies. NSP-WI settled with the remaining insurers, final judgment was entered, and this appeal followed.

[2] The St. Paul insurers later obtained leave to amend the complaint to add NSP-WI as a party defendant.

Several respondent-insurers then moved this court to dismiss the entire appeal on the ground that NSP-WI had failed to serve one of the insurers who had prevailed on summary judgment with a notice of appeal, based on the argument that the issues were indivisible; the motion was deferred to this panel for decision.

We then stayed this appeal pending decision by the Wisconsin Supreme Court on questions certified by the Seventh Circuit relating to the allocation issue; once the Wisconsin Supreme Court issued its decision in *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009), this appeal was reinstated and is now presented for decision.

D E C I S I O N

I.

We first address NSP-WI's argument that the district court abused its discretion by denying NSP-WI's motions to dismiss based on forum non conveniens. An appellate court will not reverse the decision of a district court resolving a claim of forum non conveniens absent an abuse of discretion. *Bergquist v. Medtronic, Inc.*, 379 N.W.2d 508, 511-12 (Minn. 1986).

A litigant may "bring an action wherever it chooses, . . . so long as the court has subject matter and personal jurisdiction over the defendant and venue and statutes of limitations requirements are met." *Kennecott Holdings Corp. v. Liberty Mut. Ins. Co.*, 578 N.W.2d 358, 360 (Minn. 1998). The doctrine of forum non conveniens is "an equitable principal based largely on the convenience of the parties and other considerations." *Id.* at 361. Generally, there is a strong presumption in favor of the

plaintiff's choice of forum. *Bergquist*, 379 N.W.2d at 511. The district court must balance "a series of public and private interest factors" to determine whether the defendant has successfully rebutted the presumption. *Id*. at 511-12 & n.4 (setting out relevant factors).

NSP-WI contends that the district court's two decisions denying its motions to dismiss based on forum non conveniens were an abuse of discretion and erroneous as a matter of law. We have exhaustively reviewed the decisions and the law and conclude that, contrary to NSP-WI's claims, the district court extensively addressed and weighed the relevant factors in great detail. We specifically note that although NSP-WI argues generally as to the lack of Minnesota contacts, the insurers are able to cite to specific portions of the record to support the district court's analysis of the relevant factor.

Next, NSP-WI asserts that the district court, in its second order denying the motion to dismiss, erroneously applied the law-of-the-case doctrine in analyzing the forum non conveniens issue. The district court stated that it might be inclined to agree with NSP-WI had it been writing on a clean slate, but it cited this court's affirmance of the anti-suit injunction, in which we considered and rejected similar arguments made by NSP-WI in the context of its appeal of the anti-suit injunction, *see St. Paul Mercury Ins.*, 2005 WL 3529139, at *1-*4, as well as the supreme court's denial of a petition for review of our decision.

Under the law-of-the-case doctrine, "issues considered and adjudicated on a first appeal become the law of the case and will not be reexamined or readjudicated on a second appeal of the same case." *Lange v. Nelson-Ryan Flight Serv., Inc.*, 263 Minn.

152, 155, 116 N.W.2d 266, 269 (1962) (applying doctrine to appeal from order denying a motion for a new trial and earlier appeal from an order granting judgment notwithstanding the verdict). We see no error in the district court's consideration of our prior reasoning on similar issues. Thus, as discussed above, we uphold the district court's decision, finding no abuse of discretion.

II.

The next issue concerns NSP-WI's challenge to the district court's July 2007 choice-of-law decision. Choice-of-law issues are reviewed de novo. *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. App. 2004).

A. Whether a conflict of laws exists

"Before a choice-of-law analysis can be applied, a court must determine that a conflict exists between the laws of two forums." *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 93-94 (Minn. 2000) (footnote omitted). "A conflict exists if the choice of one forum's law over the other will determine the outcome of the case." *Id.* at 94. The district court first ruled that there was no conflict because, at the time of its decision, Wisconsin did not yet have controlling law on the issue; the Wisconsin Supreme Court subsequently ruled on the issue and adopted an "all sums" allocation method. *Plastics Eng'g*, 759 N.W.2d at 625-26. Minnesota applies the pro-rata method. *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 295-96 (Minn. 2006). It is undisputed that this presents a conflict of laws, requiring a choice-of-law analysis. Because the district court, in the alternative, conducted a choice-of-law analysis and concluded that Minnesota law should apply, we review this decision on the merits.

B. Whether the laws of Minnesota can be applied constitutionally

Before Minnesota law may be applied in "a constitutionally permissible manner," Minnesota must have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S. Ct. 633, 640 (1981), *quoted in Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469-70 (Minn. 1994).

As we noted in our decision affirming the anti-suit injunction, "there are abundant Minnesota connections to this dispute," and contrary to NSP-WI's claim of forum shopping, we concluded that "St. Paul had every right to bring this action in Minnesota to resolve the coverage dispute." *St. Paul Mercury Ins.*, 2005 WL 3529139, at *3.

NSP-WI argues that any Minnesota connections ceased to exist when the St. Paul insurers, the original plaintiffs, settled and were dismissed from the lawsuit. But the insurers note that other Minnesota contacts exist. Key witnesses to the procurement of insurance for NSP-MN and its subsidiaries were from the Minneapolis office of NSP-MN; complex or serious insurance claims against NSP-WI were handled by NSP-MN employees, and since 2000, a NSP-MN employee has been involved in the remediation of the four sites. Furthermore, NSP-MN is the entity named as the insured under several policies at issue, and it is a named defendant in the litigation. We agree that there is no constitutional impediment to applying Minnesota law because sufficient contacts exist within the state.

C. Choice-of-law analysis

We next review the choice-of-law analysis. There are five factors cited as relevant to this analysis: "(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law." *Jepson*, 513 N.W.2d at 470.

1. Predictability of results

"The first factor, predictability of results, represents the ideal that litigation on the same facts, regardless of where the litigation occurs, should be decided the same to avoid forum shopping." *Nodak*, 604 N.W.2d at 94. "The heart of the bargain between the insurer and the insured is the coverage the insured purchased." *Jepson*, 513 N.W.2d at 470.

NSP-WI argues that allocating insurer responsibility pursuant to Wisconsin law, in a dispute involving damage to Wisconsin properties allegedly caused by NSP-WI, resulting from exposure to conditions in Wisconsin, would "preserve the parties' justified contractual expectations." *Nodak*, 604 N.W.2d at 94.

Here, as noted by the district court, the substantial involvement by NSP-MN in the acquisition and negotiation of the insurance contracts at issue undermines NSP-WI's claim of unfair surprise that its contracts would be construed under Minnesota law. Further, the insurance contracts involve insurers and insureds in multiple states, and the district court found that it "strains credulity" to conclude that the law of each state where the properties were located would control insurance coverage. *See Cargill, Inc. v.*

Evanston Ins. Co., 642 N.W.2d 80, 89 (Minn. App. 2002) (addressing insurance contract between a Minnesota company, an Illinois insurer, and environmental damage in Georgia), *review denied* (Minn. June 26, 2002). The court here ruled that NSP and the insurers could have fairly anticipated that the insurance contracts might be construed under Minnesota law, and thus the predictability of results supports the determination that Minnesota law applies to the allocation of damages.

NSP-WI also argued that the language of the policies at issue here "evinces the intent" to provide coverage for all losses that a Wisconsin insured incurs due to damages resulting from continuous or repeated exposure to harmful conditions over time, while to impose a pro rata allocation, this court would have to rewrite the policies. *See Plastics Eng'g*, 759 N.W.2d at 627 (containing language to this effect as to the policy at issue there). But here, for example, the St. Paul Mercury policy, which insured NSP-MN and its subsidiaries and allied corporations from 1958 through 1961, applied only to "occurrences which occur during the policy period." This has the same language as in the policies analyzed in the case in which the supreme court adopted the *pro rata* allocation method where the court reasoned that allocating damages pro rata was "completely consistent with [comprehensive general liability] policy language limiting liability to damages incurred during the policy period." *N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657, 662-63 (Minn. 1994) (quotation omitted) (*NSP*).

2. Maintenance of interstate order

The next factor, concerning maintenance of interstate order, is primarily concerned with whether the application of Minnesota law would "manifest disrespect" for the other

state's sovereignty or vice versa, or impede the interstate movement of people and goods. *Jepson*, 513 N.W.2d at 471.

After the St. Paul insurers and NSP-WI settled, the litigation was described by the district court as having

> blossomed into a multi-joinder lawsuit involving close to 200 policies and insurers from all over the world. There are over 70 witnesses scheduled to testify in a four week trial over complex coverage issues involving multiple insurance contracts—few witnesses have Minnesota addresses, and the parties are proceeding to trial over multiple insurance policies in which neither the insurer nor insured are based in Minnesota.

The district court nonetheless recognized that contract-coverage issues were "inextricably tied to how the underlying pollution occurred, and involve substantial testimony tied to witnesses and events in the State of Wisconsin." The district court concluded that while there were strong arguments on both sides, it felt constrained to follow the law of the case and found that the second factor tipped in favor of applying Minnesota law. *See St. Paul Mercury Ins.*, 2005 WL 3529139, at *3 (noting abundance of Minnesota connections).

3. Simplification of judicial task

NSP-WI asserts that loss apportionment in Minnesota is a daunting task, because Minnesota's pro rata methodology requires a fact-intensive assessment of whether and when coverage was available, while the application of Wisconsin's all-sums standard is far simpler to allocate. But the Minnesota Supreme Court recognized Minnesota's pro rata time-on-the-risk allocation was the superior allocation method in part due to its

simplicity. *NSP*, 523 N.W.2d at 663. The district court properly deferred to the supreme court's ruling.

4. Advancement of the forum governmental interest

The district court again cited this court's decision in the anti-suit injunction appeal as to the statement that St. Paul had every right to file suit in Minnesota and that there are abundant Minnesota connections. Moreover, it cited the supreme court's declaration that the pro rata by time-on-the-risk method is the better method for allocating risk. *Id.* Nonetheless, the district court cited the fact that this case involves environmental damage in Wisconsin from four Wisconsin power plants, and millions of dollars in remediation costs through the efforts of Wisconsin and federal regulatory agencies. And it found that "[w]hile this case involves contracts of insurance, the evidence relating to coverage issues is intimately related to how the environmental damage occurred." The district court held that,

> while Minnesota has a significant interest in resolving the contract dispute, the balance tips toward Wisconsin because of its paramount interest in and connection to the underlying environmental disputes and the strong nexus to Wisconsin-based evidence in addressing the underlying coverage issues.

5. Better rule of law on allocation

NSP-WI asserts that it is unnecessary to reach this factor, in light of the fact that the first four factors are determinative and, in any event, asserts that Wisconsin's law is better for a number of reasons. We must again defer to our supreme court's determination that pro rata time-on-the risk method is the most logical, fair, and efficient

way to allocate damages in environmental cases where the property damage is long-term, continual, and indivisible. *Id.* at 663-64.

In conclusion, the district court ruled that these factors, balanced as a whole, supported applying Minnesota law as to allocation.

6. Motion to dismiss

Before we reach our conclusion, we consider the motion to dismiss by respondent-insurers on the ground that NSP-WI failed to serve notice of appeal on one of its adverse parties below, defendant Harbor Insurance Company, as it applies to the choice-of-law issue. The district court granted summary judgment in favor of Harbor Insurance as to all but one policy, and NSP-WI then reached a settlement as to that policy. NSP-WI explained that it inadvertently failed to serve Harbor Insurance with a notice of appeal. After the time to serve the notice of appeal had run, several respondents moved this court to dismiss the entire appeal on the ground that the issues on appeal are indivisible such that NSP-WI's failure to include Harbor Insurance as a respondent on appeal required dismissal of the entire appeal.

First, this court has no jurisdiction over Harbor Insurance because NSP-WI failed to timely serve it with a notice of appeal pursuant to Minn. R. Civ. App. P. 103.01, subd. 1. *See Hansing v. McGroarty*, 433 N.W.2d 441, 442 (Minn. App. 1988) (holding that when an appellant fails to serve the respondent with timely notice of appeal, appellate court has no jurisdiction over that respondent), *review denied* (Minn. Jan. 25, 1989). "Where the order appealed from is indivisible, and must be affirmed, modified, or reversed as to all parties to the action or proceeding, the appeal must be dismissed if they

are not all made parties to the appeal." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005) (quotation omitted). But absent a claim where the issues are indivisible or upon a determination the claims are divisible, when only one of several adverse parties is served, the appellate court may address the appeal but is limited to deciding issues arising between the appellant and the properly served respondents. *Id.* at 765-66.

The insurers note that the issuance of *Plastics* by the Wisconsin Supreme Court brought to fruition the concerns expressed in their motion to dismiss. They assert that, were this court to determine that Wisconsin law governs the allocation issue, the insurers' policies would be subject to an all-sums damage allocation, while NSP-WI's failure to serve Harbor with a notice of appeal means that Harbor's policies would still be subject to pro-rata allocation. In that case, they contend they would be severely prejudiced under these inconsistent rulings because they would not be permitted to seek contribution from Harbor. While we decline to grant the motion to dismiss, this argument lends weight to the claim that under the choice-of-law analysis, Minnesota law should apply. In addition, as noted above, we are guided by our decision in *Cargill*. While Wisconsin undoubtedly has a strong interest in cleaning up the NSP-WI sites, "it has comparatively minimal interest in determining who should pay for the cleanup of that contamination." *Cargill*, 642 N.W.2d at 89. As in *Cargill*, the insurance contracts involve insurers and insureds in multiple states, and it would similarly "strain[ ] credulity" to conclude that the law of

each state where insured properties are located would necessarily control insurance coverage. *Id.*[3]

In conclusion, we hold that the district court decision that Minnesota law should be applied to the allocation issue is not error.

III.

After the district court determined that Minnesota law would apply, it addressed the allocation issue and determined that NSP-WI failed to raise a genuine issue of material fact and ruled as a matter of law that NSP-WI was not covered by certain policies. NSP-WI challenges this decision.

On appeal, we will address whether genuine issues of material fact exist and whether the district court erred as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The evidence will be viewed in the light most favorable to the nonmoving party, here NSP-WI. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). To defeat a motion for summary judgment, the nonmoving party must demonstrate that a genuine material issue exists for trial. *Krogness v. Best Buy Co.*, 524 N.W.2d 282, 285 (Minn. App. 1994), *review denied* (Minn. Jan. 25, 1995).

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[3] We note that the Restatement (Second) of Conflict of Laws § 188 (1971) governs the choice-of-law rule for contracts in general, and that the Restatement (Second) of Conflict of Laws § 193 provides that, for casualty insurance contracts, the law of the state "which the parties understood was to be the principal location of the insured risk during the term of the policy" should apply, unless another state has a "more significant relationship" under Restatement (Second) of Conflict of Laws § 6. *See, e.g.*, *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 629 A.2d 885, 888-89 (N.J. 1993) (directing courts to consider these sections). Because our supreme court has not directed that these sections should be considered in the choice-of-law analysis and because none of the parties raised these provisions, we do not address them.

We now review the district court's allocation decision to determine whether there are genuine issues of material fact and, if not, whether the district court erred as a matter of law. First, when environmental damages are continuous and indivisible, damages will be allocated across policy years. *NSP*, 523 N.W.2d at 663-64. Minnesota applies the pro-rata-by-time-on-the-risk allocation method, "in which damages are to be allocated among the multiple policies in effect during the period over which damages occur." *Wooddale*, 722 N.W.2d at 296. Thus, "[i]nsurers that provided coverage to the insured during the liability allocation period are liable for a proportionate share of damages." *Id.* at 294-95.

Viewing the facts in the light most favorable to NSP-WI, and relying on NSP-WI's own expert, the district court ruled that "damages at each site began when each of the respective sites began operations." As to the endpoint, the district court, while noting that NSP-WI argued many potential dates, relied on record evidence from NSP-WI's expert, who proposed two different years (1972 and 1986) as potential years when NSP-WI could no longer purchase the relevant coverage for environmental damage and, thus, insurance was unavailable. The district court then made two sets of allocation calculations—one assuming an allocation period ending in 1972 and one in 1986—to address the two scenarios proposed by NSP-WI's expert. Relying on evidence of policy coverage submitted by NSP-WI, the district court concluded that "the excess policy amount for virtually all of the insurance policies at issue cannot be triggered or attached under the 1972 or 1986 allocation periods."

NSP-WI asserts that the district court erred as a matter of law in determining the start date for allocations. It argues that, under *Wooddale*, 722 N.W.2d at 297, because insurance was not available in the early years, those years should not be included in the period considered for allocation and asserts that the district court failed to address this issue. For those periods in which the insured chose to be uninsured (or voluntarily self-insured), the insured is liable for its pro rata share of loss, and "the total period over which liability is allocated *must include* any times during which damages occurred but [the insured] was voluntarily self-insured." *Wooddale*, 722 N.W.2d at 297-98 (emphasis added). But for periods during which insurance was not available for the insured, that insured will not be assessed a pro rata share of the damages. *Id.* at 297. The insured has the burden of establishing that no insurance coverage for the particular risk at issue was available. *Id.* at 298.

The district court specifically ruled that NSP-WI had not shown that there were genuine issues of material fact as to whether insurance coverage was available and that, in the alternative, even if it adopted NSP-WI's argument, virtually none of the excess policy limits at issue would attach. The district court ruled that NSP-WI's expert failed to establish that coverage was unavailable and, rather, that "NSP has actively sought coverage during this litigation for policies that it now claims provide no coverage." The district court correctly ruled that NSP-WI's expert's opinion that the existence of the coverage before 1955 was questionable did not create a fact dispute as to whether coverage was unavailable; the nonmoving party must demonstrate that specific facts exist showing a genuine issue exists for trial. *Krogness*, 524 N.W.2d at 285. In contrast, the

insureds provided specific and competent expert opinion that insurance coverage was available back to the time of the operation of the sites.

NSP-WI argues that the district court failed to recognize that the factual question of whether, before 1962, damages were caused by an "accident," such that coverage was available. However, the issue under *Wooddale* is not whether the policies actually provided coverage based on the specific facts of the claim but, rather, whether the coverage for the particular risk was generally available in the marketplace. *See Wooddale*, 722 N.W.2d at 301 (remanding for determination of whether water-intrusion insurance coverage was available to insured during a particular period).

Finally, NSP-WI argues that the district court erred by failing to resolve particular fact issues, including (1) the time period during which insurance coverage was available; (2) the number and identity of the triggered policies; and (3) the timing, nature, and extent of the property damage. But even assuming the existence of all of the facts in NSP-WI's favor, based on NSP-WI's evidence, the district court correctly ruled that under the pro-rata-time-on-the-risk analysis, the claimed damages would not implicate the underlying limits of respondent-insurers' policies. The district court's grant of summary judgment as to these insurers was correct as a matter of law, and NSP-WI has not demonstrated that there were genuine issues of material fact.

Affirmed; motion denied.

MINGE, Judge (concurring in part, dissenting in part)

I concur in the portions of the opinion affirming the district court's rejection of appellant's motions to dismiss based on forum non conveniens and denying respondents' motion to this court to dismiss based on appellant's failure to serve one of the adverse parties below, Harbor Insurance Company. I dissent from the choice of Minnesota law and would remand the allocation issue.

This case involves the liability of numerous insurers to appellant NSP-Wisconsin for coverage for environmental damage at sites in Wisconsin where it and its predecessors conducted gas-manufacturing operations for regulated utilities. The cleanup costs are estimated at almost $120 million. The relevant insurance policies contain no choice-of-law provision. The policies were issued by insurers headquartered in numerous states and foreign countries incident to brokerage agreements and insurance-placement efforts of parties in several states, including Illinois and Texas. NSP, a public utility headquartered in Minnesota, largely controlled and negotiated insurance policies for appellant and its other subsidiaries operating in all states where they did business. Appellant is the operating subsidiary doing business in Wisconsin.

I agree with the majority that Minnesota courts use the choice-influencing-considerations analysis to determine the governing law in a conflict-of-laws situation. *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 470 (Minn. 1994). The first consideration is predictability of result. *Id.* Here, the risks that gave rise to the claims are environmental contamination of sites used incident to the operation of a regulated utility. One would expect that the governing law would be the law of the jurisdiction that is the

location of the wrongful conduct of the operating utility, of the ratepayers, and of the regulatory body. Although corporate headquarters of the public utility may negotiate for insurance coverage, the headquarters state is subject to change. Regardless, that state has little relevance or contact to this risk. Although given the multi-state operations of the subsidiary utilities, insurers would face the possibility of different laws in the different states applying to risks covered by a single comprehensive policy, such complexities would be anticipated.

The second factor is maintenance of interstate order. *Id.* The Wisconsin nexus just summarized makes inappropriate the application of Minnesota law as to allocation among insurers of a Wisconsin risk. Ultimately, this is a struggle among Wisconsin (and federal) environmental clean-up duties, ratepayer assessments, shareholder loss, and insurer liability. Absent a federal preemption rule, the state whose laws and regulatory authority govern local land use, environmental cleanup, and regulated utilities has an immediate responsibility for handling such matters. If Minnesota utilities and their customers were told that North Dakota law governed insurance coverage for a toxic spill in Minnesota written by insurance companies from around the world, Minnesotans would find the displacement of our laws and rules unsettling. Interstate order supports applying Wisconsin law.

The third choice-influencing consideration is simplification of the judicial task. *Id.* Now that the Wisconsin Supreme Court has articulated a Wisconsin rule of law to decide the issue of allocation of risk among the insurers, we do not have to attempt to anticipate the legal rule in Wisconsin. *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759

N.W.2d 613, 625-27 (Wis. 2009). I recognize that it is easier for Minnesota courts to find and to apply a Minnesota rule to a complex controversy than to fathom how to apply the Wisconsin rule. However, in accepting jurisdiction of the litigation and in dismissing the forum non conveniens challenge, Minnesota courts are stating that they can fairly perform the legal analysis under whatever state's law governs. This factor appears largely neutral in this case.

The fourth factor addresses the law that advances the interest of the forum. *Jepson*, 513 N.W.2d at 470. Here, Minnesota's interest is in providing an impartial forum. Although Minnesota is the home of the public utility, certainly we recognize that the regulation of utilities and environmental clean-up tasks are state specific and that we do not have a strong interest in how neighboring states allocate risks among insurers for such liability—as long as we are neither applying a law that has an anti-insurer animus or would defeat responsible rules of coverage.

The last factor is determining the better rule of law. *Id.* Minnesota has developed principles for allocating risk among insurers. *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 291-301 (Minn. 2006). In 2009, the Wisconsin supreme court adopted an allocation principle that apparently exposes insurers to greater liability. *Plastics Eng'g*, 759 N.W.2d at 626. Although the parties have not explained the fine points of the difference in the rules in our two states as applied to this $120 million cleanup, it is inappropriate for us to conclude that our state's rule is better. The rules are simply different. To tell the state of Wisconsin and its supreme court that in 2009 they got it wrong and we Minnesotans got it right on a contemporary issue would engender

resentment that detracts from the respect that each state should accord the laws and court decisions of the other. I would conclude that on this complex issue, we should simply determine that each state has selected a rule and not try to judge the comparative merits of the rules.

The conclusion that Wisconsin's allocation rule should be applied in this insurance-allocation/environmental-clean-up litigation when the place of the insured risk is Wisconsin is consistent with litigation elsewhere. *See, e.g.*, *Lafarge Corp. v. Travelers Indem. Co.*, 927 F. Supp. 1534, 1537 (M.D. Fla. 1996); *MAPCO Alaska Petroleum, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 795 F. Supp. 941, 944 (D. Alaska 1991); *Chesapeake Utils. Corp. v. Am. Home Assurance Co.*, 704 F. Supp. 551, 556-57 (D. Del. 1989); *Gilbert Spruance Co. v. Pa. Mfrs.' Ass'n Ins. Co.*, 629 A.2d 885, 893 (N.J. 1993). These cases cite the Restatement (Second) of Conflicts of Laws § 193 (1971), applicable specifically to casualty-insurance contracts. The rights under such insurance contracts "are determined by the local law of the state which the parties understood was to be the principal location of the insured risk," unless another state had a more significant relationship. Restatement (Second) of Conflicts of Laws § 193 (1971).

Thus, applying Wisconsin law would comport with the respected synthesis of the common law rules developed by the courts in our country, as set out in section 193.

I recognize that this court applied Minnesota law to the insurer's liability for the cleanup of a waterway in Georgia when the insured was headquartered in this state and the subsidiary generating the liability was located in Georgia. *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). That

decision did not deal with a public utility and it appears that Minnesota law favored insured liability for clean-up costs. *Id.* at 89. Here, Wisconsin law apparently results in greater monetary risk to the insurer. On these important bases, the *Cargill* case and the analysis in our earlier opinion are distinguishable and should not govern the result in this case.

I agree with the majority that the failure to serve Harbor Insurance Company complicates our appeal. I would remand with instructions that appellant stand in the position of a self-insurer with respect to the relevant Harbor policy and that other insurers' liability be determined on that basis. Similarly, assuming application of Wisconsin law, it appears certain policy thresholds would be reached. Accordingly, I would remand for determination of the allocation of liability among insurers.