

NO. A08-1082

State of Minnesota
In Court of Appeals

Cargill, Incorporated and Cargill Turkey Production, L.L.C.

Appellants,

v.

Ace American Insurance Company, et al., Affiliated FM Insurance Company, et al., Allianz Underwriters Insurance Company, et al., Allied World Assurance, et al., American Guarantee and Liability Insurance Company, et al., American Home Assurance Company, et al., American Employers' Insurance Company, et al., Arch Reinsurance Ltd., Associated International Insurance Company, Everest Reinsurance Company, et al., Great American Assurance Company, Certain Underwriters at Lloyd's, et al., Employers Mutual Casualty Company, et al., General Security Indemnity Company of Arizona, et al., Hartford Accident and Indemnity Company, et al., Pennsylvania Lumbermens Mutual Insurance Company, et al., Minnetonka Insurance Company, Liberty Mutual Insurance Company, Northwestern National Insurance, St. Paul Fire and Marine Insurance Company, et al., The Orion Insurance Company, PLC., et al., and XL Insurance America, Inc.,

Respondents.

APPELLANTS CARGILL, INCORPORATED AND CARGILL TURKEY PRODUCTION, L.L.C.'S BRIEF

PROSKAUER ROSE LLP
Paul L. Langer (IL #6189216)
222 South Riverside Plaza
29th Floor
Chicago, IL 60606-5808
(312) 962-3550

LINDQUIST & VENNUM P.L.L.P.
Thomas C. Meilenhausen (#160325)
Christopher H. Yetka (#241866)
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-2416

*Attorneys for Appellants Cargill Incorporated and Cargill Turkey Production, L.L.C.
(Additional Counsel Listed on following page)*

STICH, ANGELL, KREIDLER
& DODGE, P.A.
Kenneth W. Dodge (#2319X)
Louise A. Behrendt (#201169)
The Crossings, Suite 120
250 Second Ave. South
Minneapolis, MN 55401
(612) 333-6251

*Attorneys for Respondents One Beacon
American Ins. Co., f/k/a Commercial Union
Ins. Co. and American Employers Ins. Co.*

MEISSNER TIERNEY FISHER
& NICHOLS S.C.
Michael J. Cohen (WI #1041454)
111 E. Kilbourn Avenue, 19th Floor
Milwaukee, WI 53202
(414) 273-1300

ARTHUR, CHAPMAN, KETTERING,
SMETAK, PIKALA
Robert W. Kettering (#55499)
Theodore J. Smetak (#102155)
500 Young Quinlan Building
81 South 9th Street
Minneapolis, MN 55402
(612) 375-5921

*Attorneys for Respondent Liberty Mutual
Insurance Company*

MEAGHER & GEER, P.L.L.P.
Charles E. Spevacek (#126044)
Amy J. Woodworth (#26166X)
33 South Sixth Street
Suite 4400
Minneapolis, MN 55402
(612) 338-0661

*Attorneys for Respondents St. Paul Fire
and Marine Ins. Co.; St Paul Surplus
Lines Ins. Co.; Travelers Cas. & Sur. Co.,
f/k/a The Aetna Cas. & Sur. Co.; and
The Travelers Indemnity Co.*

CLAUSEN MILLER P.C.
Margaret J. Orbon
10 South LaSalle Street
Chicago, IL 60603-1098
(312) 606-7480

JOHNSON & CONDON, P.A.
Dale O. Thornsjo (#162048)
Michael M. Skram (#340145)
Suite 600
7401 Metro Boulevard
Minneapolis, MN 55439
(952) 831-6544

*Attorneys for Respondents American Home
Assurance Company and National Union
Insurance Company of Pittsburgh, PA.*

TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES	vi
A. CERTIFIED QUESTION.....	vi
B. ISSUES RAISED BY CERTIFIED QUESTION	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
I. The Underlying ACTIONS	4
A. The Oklahoma Lawsuit	4
B. The Arkansas Lawsuits.....	4
II. The Policy Issued by Liberty Mutual	5
III. LIBERTY MUTUAL’S COVERAGE POSITION	6
IV. THE DISTRICT COURT’S ORDER AND MEMORANDUM OPINION	7
V. THE APPELLATE COURT’S AUGUST 19, 2008 ORDER.....	8
ARGUMENT	9
I. CARGILL CAN SELECT LIBERTY MUTUAL UNDER THE POLICY TO SOLELY AND COMPLETELY DEFEND CARGILL IN THE UNDERLYING ACTIONS.....	10
II. LIBERTY MUTUAL HAS NO RIGHT TO CONTRIBUTION FROM CARGILL’S OTHER INSURERS	12
A. Under Minnesota Law, An Insurer With A Duty To Defend Cannot Seek Contribution From Another Insurer Without A Loan Receipt Agreement.....	13
B. The “Other Insurance” Clause Of The Policy Does Not Create A Right Of Contribution With Respect To Liberty Mutual’s Duty To Defend	16
III. CARGILL CANNOT BE FORCED TO ENTER INTO A NEW CONTRACT WITH LIBERTY MUTUAL IN THE FORM OF A LOAN RECEIPT SETTLEMENT AGREEMENT	18

A.	Cargill Is Not Obligated To Enter Into A Loan Receipt Agreement With Liberty Mutual Under The Terms Of The Policy	19
B.	Any Purported Agreement To Enter Into A Future Contract Under The Terms Of The Insurance Policy Would Be Unenforceable	23
C.	Liberty Mutual Is Not Entitled To A So-Called “Constructive” Loan Receipt Agreement.	24
	CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>168th and Dodge, LP v. Rave Reviews Cinemas, LLC</i> , 501 F.3d 945 (8th Cir. 2007)	24
<i>Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.</i> , 625 N.W.2d 178 (Minn. Ct. App. 2001).....	11, 12, 15
<i>Auto-Owners Ins. Co. v. Forstrom</i> , 684 N.W.2d 494 (Minn. 2004)	9
<i>Blair v. Espeland</i> , 231 Minn. 444, 43 N.W.2d 274 (Minn. 1950).....	23, 25
<i>City of Minneapolis v. Ames & Fischer Co. II, LLP</i> , 724 N.W.2d 749 (Minn. Ct. App. 2006).....	25
<i>Coleman v. New Amsterdam Cas. Co.</i> , 160 N.E. 367 (N.Y. 1928)	20
<i>Deli v. Hasselmo</i> , 542 N.W.2d 649 (Minn. Ct. App. 1996).....	26
<i>Domtar, Inc. v. Niagra Fire Ins. Co.</i> , 563 N.W.2d 724 (Minn. 1997)	11, 12, 16
<i>E.J. Baehr v. Penn-O-Tex Oil Corp.</i> , 258 Minn. 533, 104 N.W.2d 661 (Minn. 1960).....	26
<i>Fahrendorff v. North Homes, Inc.</i> , 597 N.W.2d 905 (Minn. 1999)	9
<i>Franklin v. Carpenter</i> , 309 Minn. 419, 244 N.W.2d 492 (Minn. 1976).....	26
<i>Growers Refrigeration Co., Inc. v. Pacific Electrical Contractors, Inc.</i> , 996 P.2d 521 (Or. Ct. App. 2000)	23
<i>Home Ins. Co. v. National Union Fire Ins. Co.</i> , 658 N.W.2d 522 (Minn. 2003)	13, 14
<i>Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.</i> , 276 Minn. 362, 150 N.W.2d 233 (Minn. 1967).....	11, 13, 14, 17, 18, 21, 22

<i>Johnson v. City of Shorewood</i> , No. A03-621, 2004 WL 193212 (Minn. Ct. App. Feb. 3, 2004)	26
<i>Johnson v. Johnson</i> , 228 Minn. 282, 37 N.W.2d 1 (Minn. 1949).....	20
<i>Jostens, Inc. v. Mission Ins. Co.</i> , 387 N.W.2d 161 (Minn. 1986)	12, 14, 15,16, 23, 27
<i>Juvland v. Plaisance</i> , 255 Minn. 262, 96 N.W.2d 537 (Minn. 1959).....	19
<i>Liberty Mutual Ins. Co. v. American Fam. Mut. Ins. Co.</i> , 463 N.W.2d 750 (Minn. 1990)	14, 25
<i>Lubbers v. Anderson</i> , 539 N.W.2d 398 (Minn. 1995)	14
<i>Minneapolis League of Catholic Women v. Schafhausen</i> , 162 Minn. 165, 202 N.W. 705, (Minn. 1925).....	24
<i>NAD, Inc. v. Eighth Judicial Dist. Court</i> , 976 P.2d 994 (Nev. 1999).....	23
<i>National Cas. Co. v. Beth Abraham Hosp.</i> , 97 Civ. 8091, 1999 WL 710780 (S.D.N.Y. Sept. 10, 1999).....	20, 21
<i>Norby v. Atlantic Mut. Ins. Co.</i> , 329 N.W.2d 820 (Minn. 1983)	11, 14, 17
<i>Northland Temps., Inc. v. Turpin</i> , 744 N.W.2d 398 (Minn. Ct. App. 2008).....	10
<i>Richie Co., LLP v. Lyndon Ins. Group, Inc.</i> , 316 F.3d 758 (8th Cir. 2003)	24
<i>Shepard v. Carpenter</i> , 54 Minn. 153, 55 N.W. 906 (Minn. 1893).....	24
<i>St. Paul Cos. v. Van Beek</i> , 609 N.W.2d 256 (Minn. Ct. App. 2000).....	22
<i>St. Paul Fire & Marine Ins. Co. v. Ruddy</i> , 299 F. 189, (8th Cir. 1924)	26

St. Paul School Dist. No. 625 v. Columbia Transit Corp.,
321 N.W.2d 41 (Minn. 1982) 14

Warner v. Krage Agency,
No. CX-99-293, 1999 WL 618993 (Minn. Ct. App. Aug. 17, 1999) 25

Wooddale Builders, Inc. v. Maryland Cas. Co.,
722 N.W.2d 283 (Minn. 2006) 10, 12, 14, 15, 16

OTHER AUTHORITIES

Minn. R. Civ. P. 56.03 9

Minn. R. Civ. P. 17.01 13

STATEMENT OF ISSUES

A. CERTIFIED QUESTION

- I. CAN A COURT ORDER PRIMARY INSURERS, WHO INSURE THE SAME INSURED FOR THE SAME RISKS, AND WHOSE POLICIES ARE TRIGGERED FOR DEFENSE PURPOSES, TO BE EQUALLY LIABLE FOR THE COSTS OF DEFENSE WHERE THERE IS OTHERWISE NO PRIVITY BETWEEN THE INSURERS?**

District court: Yes. **Standard of review:** De novo.
Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co., 150 N.W.2d 233 (Minn. 1967); *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161, 167 (Minn. 1986); *Domtar, Inc. v. Niagra Fire Insurance Co.*, 563 N.W.2d 724, 739 (Minn. 1997); *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283 (Minn. 2006).

B. ISSUES INTEGRAL TO THE CERTIFIED QUESTION

- I. CAN CARGILL SELECT LIBERTY MUTUAL TO PROVIDE IT A COMPLETE DEFENSE IN THE UNDERLYING ACTIONS UNDER POLICY LG1-641-004010-049?**

District court: Yes. **Standard of review:** De novo.
Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co., 150 N.W.2d 233 (Minn. 1967); *Domtar, Inc. v. Niagra Fire Insurance Co.*, 563 N.W.2d 724, 739 (Minn. 1997); *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283 (Minn. 2006).

- II. WITHOUT A LOAN RECEIPT AGREEMENT, CAN LIBERTY MUTUAL SEEK CONTRIBUTION FROM CARGILL'S OTHER INSURERS FOR AMOUNTS PAID IN FULFILLING ITS DUTY TO DEFEND?**

District court: Yes. **Standard of review:** De novo.
Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co., 150 N.W.2d 233 (Minn. 1967); *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161, 167 (Minn. 1986); *Domtar, Inc. v. Niagra Fire Insurance Co.*, 563 N.W.2d 724, 739 (Minn. 1997); *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283 (Minn. 2006).

- III. CAN THE COURT REQUIRE CARGILL TO ENTER INTO A LOAN RECEIPT AGREEMENT OR IMPOSE UPON CARGILL A "CONSTRUCTIVE" LOAN RECEIPT "AGREEMENT" CONTAINING**

TERMS TO WHICH CARGILL DID NOT AGREE?

District court: Yes.

Standard of review: De novo.

Franklin v. Carpenter, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (Minn. 1976);
City of Minneapolis v. Ames & Fischer Co. II, LLP, 724 N.W.2d 749, 756 (Minn.
Ct. App. 2006).

STATEMENT OF THE CASE

This appeal involves a dispute over a comprehensive general liability (“CGL”) insurer’s indivisible duty to provide its policyholder a complete defense, a duty repeatedly reaffirmed by the Minnesota Supreme Court over the past 40 years and now disregarded by the district court below.

Cargill is a defendant in a lawsuit instituted by the State of Oklahoma alleging property damage (the “Oklahoma Lawsuit”) and in several lawsuits filed in Arkansas by individuals alleging bodily injury (the “Arkansas Lawsuits”) relating to poultry litter allegedly emanating from Cargill’s turkey operations. The defendant insurers in this action (the “Insurers”) all issued insurance policies to Cargill that require them to defend and/or indemnify Cargill in the Oklahoma Lawsuit and Arkansas Lawsuits (the “Underlying Actions”). None of the Insurers have agreed to fully pay the amounts that have been or will be incurred by Cargill in connection with the Underlying Actions. Specifically, none of the Insurers that issued policies containing a duty to defend (“Duty to Defend Insurers”) have unconditionally agreed to defend Cargill or pay Cargill’s past and future costs in defending itself. In fact, certain of these Duty to Defend Insurers, including Liberty Mutual Insurance Company (“Liberty Mutual”), while acknowledging their duty to defend, have demanded that Cargill first enter into a new contract – a loan receipt agreement with terms unilaterally drafted by these insurers – before they will

assume their existing obligation to defend Cargill in full.¹ As noted by the district court, Cargill has refused to sign Liberty Mutual's proposed form of loan receipt agreement because Cargill believes it may allow Liberty Mutual to seek contribution from "fronted" policies, which would ultimately result in Cargill paying for portions of its own defense.² (CA. 41, ¶ A.10; CA. 44, ¶ C.1).

Cargill filed a Complaint for Declaratory Judgment and Other Relief in the district court to enforce its rights under the Insurers' policies. (CA. 38, ¶ A.1). The district court bifurcated the proceedings, with Phase I related solely to the Duty to Defend Insurers' obligations to defend Cargill in the Underlying Actions. (CA. 39, ¶ A.3). Liberty Mutual filed cross claims against certain other Duty to Defend Insurers, seeking a declaration that Liberty Mutual would have subrogation or contribution rights against those insurers to recover some of the defense costs it incurs on behalf of Cargill, even in the absence of a loan receipt agreement. Some of those other Duty to Defend Insurers

¹ A loan receipt agreement is a contract used in the settlement of insurance coverage disputes, under which an insurer advances funds to a policyholder while maintaining the ability to seek from third parties amounts the insurer is otherwise obligated to pay. Because the contract deems the advanced funds to be a loan, the policyholder remains the real party-in-interest. *See Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 166-67 (Minn. 1986).

² In its summary judgment briefs, Liberty Mutual posited that the issue of whether or not these policies are fronted creates a question of fact. While Cargill maintains there is no disputed question of fact, this issue is not relevant in this appeal because the principals of law at issue here do not depend on whether any of the policies are fronted. For this reason, this brief does not address one of the issues raised by Cargill in earlier filings submitted to this Court – specifically, whether the district court erred in failing to limit any defending insurer's right of contribution so as to eliminate the possibility that a defending insurer will directly or indirectly recover defense costs from Cargill. Cargill reserves its rights on this issue.

moved to dismiss Liberty Mutual's claims. Cargill filed a motion for partial summary judgment seeking a declaration that Liberty Mutual was obligated to fully defend Cargill, that Liberty Mutual has no right of contribution from Cargill's other Duty to Defend Insurers absent a loan receipt agreement, that Cargill has no obligation to enter into a loan receipt agreement with Liberty Mutual, and that with or without a loan receipt agreement, the insurers could not seek defense costs directly or indirectly from Cargill. (CA. 56-73). Liberty Mutual filed a cross-motion for summary judgment against Cargill on substantially the same issues. (CA. 288-366).

The district court denied Cargill's motion for partial summary judgment and entered partial summary judgment in favor of Liberty Mutual. Contrary to well-established Supreme Court precedent, the district court held that Liberty Mutual does not need a loan receipt agreement in order to obtain contribution from Cargill's other insurers. The district court further stated that, in the alternative, had it not ordered contribution without a loan receipt agreement, it would have imposed an unprecedented "constructive loan receipt agreement" upon Cargill under terms to which Cargill never agreed and for which it received no consideration. The district court's grant of partial summary judgment in favor of Liberty Mutual should be reversed, and partial summary judgment should be granted to Cargill.

STATEMENT OF FACTS

I. THE UNDERLYING ACTIONS

A. The Oklahoma Lawsuit

On June 13, 2005, the State of Oklahoma filed a complaint against Cargill and others in the United States District Court for the Northern District of Oklahoma (the “Oklahoma Lawsuit”). (CA. 78). On August 19, 2005, the State of Oklahoma filed an amended complaint. (CA. 113). The amended complaint alleges that Cargill is among the “Poultry Integrator Defendants,” who are responsible for damage or injury to the Illinois River Watershed including the biota, lands, waters, and sediments therein, (CA. 119, at ¶¶ 13-14), resulting from poultry operations in the region. (CA. 123, at ¶ 31). The State of Oklahoma is seeking to hold Cargill liable under the Comprehensive Environmental Response, Compensation and Liability Act; Solid Waste Disposal Act; state law nuisance; federal common law nuisance; trespass; and other state law claims. (CA. 113, passim). Cargill has incurred significant defense costs in connection with the Oklahoma Lawsuit. The Oklahoma Lawsuit is currently ongoing and Cargill will necessarily incur additional defense costs.

B. The Arkansas Lawsuits

Cargill has been named as a defendant in at least eight nearly identical lawsuits filed in the Circuit Court of Washington County, Arkansas (the “Arkansas Lawsuits”). (See, e.g., First Amended Complaint in *Ginger L. Belew et al. v. Alpharma Inc. et al.* including Cargill, CA. 156.). Cargill and others are alleged to: (1) be poultry producers involved in the growth and production of eggs, chicks, and chickens, (E.g., CA. 165-66,

at ¶ 40); (2) be involved in the production of poultry, (*E.g.*, CA. 166, at ¶ 41); and (3) manufacture their own feed formula. (*E.g.*, CA. 168, at ¶ 46). The Arkansas Lawsuits further allege that the feed formulas contain high concentrations of organic arsenic, and that “[t]he arsenic passes through the chickens into the litter.” (*E.g.*, CA. 165, at ¶ 38; CA. 168, at ¶ 46). Plaintiffs allege that they have been exposed to the litter and that this exposure has caused or contributed to the Plaintiffs’ alleged bodily injuries. (*E.g.*, CA. 169, at ¶ 53; CA. 191-92, at ¶ 130). The Arkansas Lawsuits are on-going and Cargill has incurred and will continue to incur substantial defense costs.

II. THE POLICY ISSUED BY LIBERTY MUTUAL

Liberty Mutual issued Policy number LG1-641-004010-049, effective June 1, 1969 to June 1, 1972, to Cargill (the “Policy”). The Policy contains the following coverage clause:

[Liberty Mutual] will pay on behalf of [Cargill] all sums which [Cargill] shall become legally obligated to pay as damages because of Coverage A. personal injury or Coverage B. property damage to which this policy applies, caused by an occurrence, and [Liberty Mutual] **shall have the right and duty to defend any suit against [Cargill] seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent,**

(CA. 206, at p. 1, § I. “Coverage”) (emphasis added).

The Policy contains provisions that Liberty Mutual contends obligate Cargill to enter into a loan receipt agreement. (CA. 336-38). Specifically, the cooperation provision of the Policy provides as follows:

The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; ...

(CA. 209, at p. 4, § VII, 4 (c)).

The subrogation provision of the Policy provides as follows:

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

(CA. 209, at p. 4, § VII, 7).

III. LIBERTY MUTUAL'S COVERAGE POSITION

Cargill provided notice of the Oklahoma Lawsuit and Arkansas Lawsuits to Liberty Mutual. On October 28, 2005, Liberty Mutual sent a letter to Cargill in which it stated that "Liberty agrees to participate in the defense of Cargill under CGL policies issued to Cargill effective June 1, 1969 to June 1, 1971, ..." and that "Liberty Mutual will pay its share of reasonable and necessary defense costs..." (CA. 271, at p. 5) (emphasis added). However, Liberty Mutual did not agree to fully undertake Cargill's defense in the Underlying Actions.

On May 8, 2007, Liberty Mutual, and several other Duty to Defend Insurers, sent a letter to Cargill recognizing their duty to defend, but asserting a full reservation of rights and agreeing only to pay those costs that they would at some later point deem to be

“reasonable and necessary,” (despite having failed to fully defend Cargill or even participate in Cargill’s defense). (CA. 273, at p. 1). Moreover, in this letter, Liberty Mutual conditioned its agreement to defend on the requirement that “Cargill execute a loan receipt in the attached form.” (CA. 273-74, at p. 1-2).

Subsequently, on October 8, 2007, Liberty Mutual tendered to Cargill a check in the amount of \$704,762.22, which Liberty Mutual claimed was “partial payment” (without specifying what was being paid) also conditioned on Cargill executing Liberty Mutual’s loan receipt agreement. (CA. 281-82, at pp. 1-2). Cargill rejected this attempt to coerce it into entering the loan receipt agreement proposed by Liberty Mutual. Cargill explained that it believes many of the primary or lower-level insurance policies contain high deductibles or retentions, are reinsured by a Cargill captive insurer, or are subject to retrospective premiums paid by Cargill, such that if Liberty Mutual is allowed to recover from those policies, Cargill believes that the money would ultimately come out of Cargill’s pocket. (CA. 74-5, at ¶ 3-5). Liberty Mutual nonetheless insisted that Cargill sign the loan receipt “agreement” on terms unilaterally drafted by Liberty Mutual and benefitting only Liberty Mutual. Cargill has continued to refuse Liberty Mutual’s demand to enter into a new contract for the reasons set forth above. Because none of Cargill’s Duty to Defend Insurers, including Liberty Mutual, has stepped forward to fully and completely defend their policyholder, Cargill has been forced to defend itself.

IV. THE DISTRICT COURT’S ORDER AND MEMORANDUM OPINION

On June 18, 2008, the district court, in its Amended Order For Summary Judgment And For Certification, ordered that Liberty Mutual “has the right to seek contribution for

defense costs from any other insurer who has a duty to defend Cargill for the claims asserted against Cargill in the underlying litigation.” (CA. 36, at ¶ 2.a). The court’s order was without prejudice to the rights of any party to assert claims for contribution against any other party. (CA. 37, at ¶ 2.b). In the memorandum opinion that the district court incorporated into the Order, it declared that “a loan receipt agreement is not necessary for Liberty Mutual to seek reimbursement of paid defense costs from other, equally liable insurers of Cargill.” (CA. 51, at ¶ D.1). The district court further held that had it not found that Liberty Mutual can seek contribution without a loan receipt agreement, it would have imposed a “constructive” loan receipt agreement upon Cargill. (CA. 52, at ¶ D.3). The district court also stated, without citing Minnesota law or any provision of the Policy, that “Cargill’s failure to execute a neutral loan receipt agreement is, *in all likelihood*, a failure to cooperate with its policy obligations to Liberty Mutual.” (CA. 53, at ¶ D.4) (emphasis added). The district court reached these conclusions despite its recognition that “Cargill is concerned that [a loan receipt agreement] would expose Cargill to claims that it is obligated to pay a share of defense costs to the extent that Cargill utilized ‘fronted policies.’” (CA. 41, at ¶ A.10). The district court certified as important and doubtful the certified question set forth in the statement of issues. (CA. 454, at lines 1-2; CA. 459, at lines 17-18; CA. 36-37).

V. THIS COURT’S AUGUST 19, 2008 ORDER

Cargill filed the instant appeal on July 27, 2008. Subsequently, this Court raised the issue of whether the June 25 judgment is immediately appealable and, if not, whether the direct appeal is limited to the certified question. (CA. 479). Further, this Court

questioned whether the notices of review filed by certain insurers should be dismissed because they raised an issue on which the parties seeking review are adverse to a co-respondent, Liberty Mutual. (CA. 479). Pursuant to this Court's direction, the parties submitted memoranda addressing jurisdictional issues. On August 19, 2008, this Court entered an Order holding that Cargill may brief all of the proposed issues raised in its statement of the case, that the decision on whether to review issues in addition to the certified question is referred to the panel assigned to consider the appeal on the merits, that the notices of review filed by certain insurers are dismissed, and that respondents' briefs shall be limited to issues on which respondents are adverse to appellants. (CA. 482-83).

In accord with the August 19, 2008 Order, Cargill submits this brief addressing the certified question. In order to answer the district court's certified question, each of the arguments below should be considered – namely, whether Cargill can recover all defense costs from Liberty Mutual, whether Liberty Mutual can seek contribution from other insurers without a loan receipt agreement, and whether the district court can require or impose a loan receipt settlement agreement.

ARGUMENT

An appellate court must reverse a district court's ruling on summary judgment if the judgment is contrary to law. *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 909 (Minn. 1999). The district court's legal conclusions are reviewed de novo. *Auto-Owners Ins. Co. v. Forstrom*, 684 N.W.2d 494, 497 (Minn. 2004). Reversal is proper if the district court made an error of law. Minn. R. Civ. P. 56.03; *Northland Temps., Inc. v.*

Turpin, 744 N.W.2d 398, 400 (Minn. Ct. App. 2008).

Here, the district court committed reversible error by ruling that Liberty Mutual has the right to seek contribution for defense costs from Cargill's other insurers who have a duty to defend Cargill in the Underlying Actions in the absence of a loan receipt agreement. The district court also erred to the extent it stated it could in the alternative impose a "constructive" loan receipt agreement upon Cargill. Deciding this case is purely a matter of applying *de novo* the proper canons of Minnesota precedent concerning Liberty Mutual's obligation to fully defend its policyholder. The district court reached the following erroneous conclusions which require reversal: 1) Liberty Mutual may seek contribution from Cargill's other insurers in the absence of a loan receipt agreement; 2) the district court had the option of imposing a constructive loan receipt agreement on Cargill; and 3) that Cargill is "in all likelihood" obligated under the Policy to enter into a loan receipt agreement with Liberty Mutual. For the reasons that follow Liberty Mutual cannot seek contribution from Cargill's other insurers absent a loan receipt agreement with Cargill, and Cargill cannot be forced to enter into a loan receipt settlement agreement, nor can the district court constructively impose a loan receipt agreement upon Cargill.

I. CARGILL CAN SELECT LIBERTY MUTUAL UNDER THE POLICY TO SOLELY AND COMPLETELY DEFEND CARGILL IN THE UNDERLYING ACTIONS

"It is well-established under Minnesota case law that each insurer owes its insured an independent duty to defend." *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006). The Minnesota Supreme Court has repeatedly made

clear that a liability insurer's duty to defend its policyholder is several, and that an insurer with a duty to defend owes its policyholder a complete defense. *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 367-68, 150 N.W.2d 233, 237 (Minn. 1967). The policyholder's right to select one insurer to pay all defense costs is a long-standing rule in Minnesota. *Id.* See also *Norby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820, 824 (Minn. 1983); *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 186 (Minn. Ct. App. 2001) (holding "[s]eparate insurers with a mutual insured have an independent duty to cover the insured.").

The district court recognized that Cargill is entitled to a judgment that it may select any triggered policy or policies that provide a duty to defend and have the selected policy or policies pay all defense costs with respect to the Underlying Actions. (CA. 49, at ¶ C.14) (quoting *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997)). Indeed, Liberty Mutual has acknowledged its duty to defend Cargill. As the district court noted, "Liberty Mutual does not deny its duty to defend." (CA. 41, at ¶ A.10). First, Liberty Mutual acknowledged its duty to defend in a letter to Cargill dated October 28, 2005. (CA. 271, at 5). Subsequently, on May 8, 2007, and October 8, 2007, Liberty Mutual acknowledged a duty to defend, but insisted that its duty was subject to Cargill entering into a loan receipt agreement. (CA. 273, at 1; CA. 281-82). Liberty Mutual then acknowledged its duty to defend in its summary judgment briefs below. (CA. 326-27, at pp. 28-29) (stating "Liberty Mutual does not dispute that the claims and allegations made against Cargill in the Underlying Actions arguably fall within the scope of the Policy so as to trigger Liberty Mutual's duty to defend under the [Policy].")

Despite the well-settled Minnesota law and Liberty Mutual's recognition that it has a duty to defend, Liberty Mutual has refused to fully and completely undertake Cargill's defense in the Underlying Actions and has attempted to sidestep its duty by trying to force Cargill to enter into a loan receipt settlement agreement. Under Minnesota law, if no insurer with a duty to defend voluntarily undertakes the defense of the policyholder and the policyholder defends itself, as Cargill has done here, the policyholder may bring an action and recover its costs from any one of its insurers. *Wooddale*, 722 N.W.2d at 303; *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997); *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161, 167 (Minn. 1986). "An insured may recover attorney fees from its insurer if such fees are incurred defending itself against claims by a third party when the insurer has a contractual duty to defend the insured, but has refused to do so." *Youngquist*, 625 N.W.2d at 187-88. Cargill is merely seeking what it is entitled to under the express terms of the Policy and well-established Minnesota law: payment of all defense costs in the Underlying Actions by Liberty Mutual, one of Cargill's insurers that owes it a duty to defend.

Thus, this Court should affirm the district court's judgment that Cargill may select any triggered policy or policies that provide a duty to defend and have the selected policy or policies pay all defense costs with respect to the Underlying Actions.

II. LIBERTY MUTUAL HAS NO RIGHT TO CONTRIBUTION FROM CARGILL'S OTHER INSURERS

The district court erred in holding that a loan receipt agreement is not necessary for Liberty Mutual to seek reimbursement of paid defense costs from Cargill's other

insurers. (CA. 51, at ¶ D.1) (declaring that “a loan receipt agreement is not necessary for Liberty Mutual to seek reimbursement of paid defense costs from other, equally liable insurers of Cargill.”). The district court’s ruling must be reversed because it plainly disregards controlling Minnesota Supreme Court precedent which holds that an insurer with a duty to defend may not seek contribution from the policyholder’s other insurers.³

A. Under Minnesota Law, An Insurer With A Duty To Defend Cannot Seek Contribution From Another Insurer Without A Loan Receipt Agreement

Under established Minnesota law, “one insurer cannot pursue reimbursement from another insurer for defense costs incurred in defending a mutual insured.” *Home Ins. Co. v. National Union Fire Ins. Co.*, 658 N.W.2d 522, 527 (Minn. 2003) (citation omitted). The duty to defend is contractual in nature and exists exclusively between the policyholder and the insurer. *Iowa Nat’l*, 267 Minn. at 368, 150 N.W.2d at 237 (Minn. 1967). No legal relationship exists between the insurers to support a right of contribution with respect to an insurer’s obligation to defend its policyholder.⁴ *Id.* at 367-68, 150 N.W.2d at 237. The duty to defend “is personal to each insurer,” each insurer has a “a separate and distinct obligation to defend,” and “[t]he obligation [to provide a defense] is

³ The district court’s reliance on general propositions of law as described in the treatise *Couch on Insurance* with respect to this issue is misplaced given the extensive and controlling Minnesota Supreme Court precedent. (CA. 50, at ¶ C.18).

⁴ The district court’s ruling also fails to conform to Minnesota Rule of Civil Procedure 17.01, which requires that “every action shall be prosecuted in the name of the real party in interest.” The rule defines a “real party in interest” as 1) an executor, administrator, guardian, bailee, or trustee of an express trust; 2) a party with whom or in whose name a contract has been made for the benefit of another; or 3) a party authorized by statute. Minn. R. Civ. P. 17.01. Liberty Mutual cannot directly seek reimbursement from Cargill’s other insurers under this rule because it is not “a real party in interest.”

several and the carrier is not entitled to divide the duty nor require contribution from another absent a specific contractual right.” *Id.* at 368, 150 N.W.2d at 237 (citations omitted). *See also Nordby*, 329 N.W. 2d at 824 (Minn. 1983) (“An insurer has no right of action against another insurer to recover the cost of defending the insured, since there is no contractual obligation between insurers.”); *St. Paul School Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41, 48 (Minn. 1982) (explaining that the “obligation of defending an insured and paying for the defense is a separate obligation existing exclusively between the insurer and the insured.”). Each insurer owing a duty to defend its policyholder has an individual obligation to defend an action in its entirety. *Wooddale*, 722 N.W.2d at 303 n.16 (citing *Domtar*, 563 N.W.2d at 741). Unlike the duty to indemnify, an insurer’s duty to defend is not measured by the time on the risk. *Id.*

Minnesota courts have “recognize[d] an exception to this general rule prohibiting contribution when a loan receipt agreement is in place.” *Home Ins. Co.*, 658 N.W.2d at 527 (Minn. 2003) (citing *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986)) (holding that an insurer had standing to sue other insurers for reimbursement of defense costs where the policyholder had entered into a loan receipt agreement). A loan receipt agreement is a settlement agreement negotiated between the parties. *Cf. Lubbers v. Anderson*, 539 N.W.2d 398, 400 (Minn. 1995) (explaining that the parties settled their claim pursuant under a “loan receipt and contract for release” agreement); *Liberty Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 463 N.W.2d 750, 756 (Minn. 1990) (“[W]e see no reason why the parties could not rewrite their settlement agreement and recast it in the terms of a loan receipt agreement.”). Here, however, Cargill has not executed such an

agreement for any of its insurers. “[A]bsent a loan receipt agreement, an insurer that undertakes the defense of its insured may not seek recovery of defense costs from the insured’s other insurers who also owed a duty to defend but failed to provide a defense.” *Wooddale*, 722 N.W.2d at 302 (referring to this as “the Iowa National rule”).

In *Andrew L. Youngquist, Inc. v. Cincinnati Insurance Co.*, the Minnesota Court of Appeals rejected the argument that Reliance Insurance Company (“Reliance”), an insurer with a duty to defend, could recover its costs from another insurer in the absence of a loan receipt agreement. 625 N.W.2d 178, 186-87 (Minn. Ct. App. 2001). The court noted that if the policyholder had entered into a loan receipt agreement with Reliance, then Reliance could have proceeded against the other insurer to recover amounts it had paid, but the parties did not enter into a loan receipt agreement, and thus any claim of contribution was foreclosed. *Id.* at 187. The court reiterated the Minnesota Supreme Court’s reasoning in *Jostens*, stating that the “rationale is that there is no contractual relationship between the two insurers, and the insurer assuming the defense has no cause to complain because it ... is only doing what it agreed and was paid a premium to do.” *Id.* at 186 (quoting *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 166 (Minn. 1986)). The court further explained that Minnesota law expressly prefers “that each insurer fulfill its independent duty to cover a mutual insured.” *Id.* at 187 (emphasis added).

Here, the district court plainly erred in interpreting the Minnesota Supreme Court’s decisions in *Wooddale* and *Domtar* as somehow overruling the *Iowa National* rule under the circumstances presented here. First, *Wooddale* makes clear that the insurers in that case waived the *Iowa National* rule. *Wooddale*, 722 N.W.2d at 302 n.15.

Thus, the question of whether an insurer having a duty to defend could seek contribution from other insurers in the absence of a loan receipt agreement was not before the court and it was presumed that, given the waiver, the insurers would have contribution rights. Second, as noted by the district court here, in *Wooddale* the Supreme Court expressly held that defense costs are apportioned equally among insurers whose policies are triggered only where recovery of defense costs is not prohibited by the *Iowa National* rule. *Id.* at 302 n.15, 303-04. Similarly, *Domtar* simply stands for the proposition that a policyholder may recover all of its defense costs from any insurer that owes it a duty to defend. *Domtar*, 563 N.W.2d at 739 (Minn. 1997). The question of whether that insurer could seek contribution from another insurer in the absence of a loan receipt agreement was not before the court. *Id.*

The Minnesota cases that enforce a right of contribution between defending insurers all involve circumstances where either the policyholder has voluntarily entered into a loan receipt agreement or where the insurers have waived the *Iowa National* rule that bars recovery in the absence of a loan receipt agreement. *See, e.g., Wooddale*, 722 N.W.2d at 302 n.15 (noting that insurers had waived *Iowa National* rule); *Jostens*, 387 N.W.2d at 163 (noting that insured entered into a loan receipt agreement with one of its insurers). Neither the district court in its memorandum opinion nor Liberty Mutual in its briefs have cited a single Minnesota case allowing an insurer with a duty to defend to seek contribution from another insurer in the absence of a loan receipt agreement.

B. The “Other Insurance” Clause Of The Policy Does Not Create A Right Of Contribution With Respect To Liberty Mutual’s Duty To Defend

In its summary judgment briefs, Liberty Mutual argued that an “other insurance” clause contained in an insurance policy entitles an insurer to contribution. The Minnesota Supreme Court has, however, rejected this argument. In *Iowa National*, the Iowa National insurance policy contained an “other insurance” clause stating that the policy was excess over other valid and collectible insurance. 150 N.W.2d at 235. Despite that fact, the Supreme Court held that “while it is true that a policy may limit coverage to excess insurance over collectible insurance, that does not limit the obligation of the excess insurer to defend.” *Id.* at 236. The Supreme Court held that the duty to defend “is a separate undertaking from the duty to provide coverage and pay a judgment.” *Id.* at 236-37. The duty to defend is a “contractual right of the insured irrespective of other insurance and irrespective of primary or excess coverage.” *Id.* at 237. Thus, even though the policy in *Iowa National* contained an “other insurance” clause, the Supreme Court held that the defense “obligation is several and the carrier is not entitled to divide the duty nor require contribution from another absent a specific contractual right.” *Id.*

Likewise, in *Nordby*, the Minnesota Supreme Court held that “each insurer’s obligation to defend is separate and distinct from its duty to provide coverage and pay a judgment, *irrespective of other insurance* and irrespective of whether it provides primary or excess coverage.” 329 N.W.2d at 824 (emphasis added). The insurance policies at issue in *Nordby* contained “other insurance” clauses. *Id.* at 823. The Supreme Court further held “an insurer has no right of action against another insurer to recover the cost of defending the insured, since there is no contractual obligation between insurers.” *Id.*

The “other insurance” provision contained in the Liberty Mutual Policy relates solely to indemnity of settlements or judgments, and not to payment of defense costs. (See CA. 209, at p. 4, § VII, 6). The provision plainly uses the term “loss” in connection with the Policy’s limits of liability, which are the limit of Liberty Mutual’s obligation to indemnify Cargill for damages. (*Id.*) Liberty Mutual’s duty under the Policy to pay expenses in the defense of Cargill is a separate obligation that is not addressed by the “other insurance” provision, (CA. 207, at p. 2, § II (a)). See *Iowa Nat’l*, 276 Minn. 362, 367, 150 N.W.2d at 236-37 (“The obligation to defend is a separate undertaking from the duty to provide coverage and pay a judgment.”).

III. CARGILL CANNOT BE FORCED TO ENTER INTO A NEW CONTRACT WITH LIBERTY MUTUAL IN THE FORM OF A LOAN RECEIPT SETTLEMENT AGREEMENT

Liberty Mutual has refused to defend Cargill unless Cargill enters into a loan receipt settlement agreement on Liberty Mutual’s demanded terms (CA. 274, at p. 2; CA. 282, at p. 2). In considering this issue, the district court erred and must be reversed because it:

- ignored basic contract law in stating that, in the alternative, had it not held that Liberty Mutual was entitled to contribution without a loan receipt agreement, the court would have ordered a “constructive” loan receipt agreement; and
- incorrectly held that Cargill’s refusal to enter into a loan receipt agreement “in all likelihood” violates Cargill’s obligations under the Policy.

The district court did not cite to any authority or explain how the Policy language supports either conclusion. (CA. 52-3, at ¶¶ D.3-5). In fact, there is no authority under Minnesota law or any language in the Policy requiring Cargill to enter into a loan receipt agreement with Liberty Mutual.

A. Cargill Is Not Obligated To Enter Into A Loan Receipt Agreement With Liberty Mutual Under The Terms Of The Policy

In its opinion, the district court did not explain what provisions of the Policy could somehow require Cargill to enter into a loan receipt settlement agreement. (CA. 52-3, at ¶¶ D.3-5). Based on Liberty Mutual's arguments on summary judgment, the only possible contractual obligations would come from the cooperation and subrogation clauses. Neither, however, support the district court's erroneous conclusions.

1. The Cooperation Clause

Although Minnesota courts recognize that an insured must cooperate with its insurer, they have not extended this obligation to require a policyholder to enter into a demanded loan receipt agreement unilaterally drafted by the insurer. It has long been recognized in Minnesota that the duty to cooperate is "designed to afford the insurer an opportunity to defend, and to protect it against possible collusion between the insured and persons claiming covered damages." *Juvland v. Plaisance*, 255 Minn. 262, 266, 96 N.W.2d 537, 540 (Minn. 1959) (quoting from 5A Am. Jur., *Automobile Insurance*, § 134, p. 136). The intent of a cooperation clause is to ensure "there shall be a fair and frank disclosure of information [r]easonably demanded by the insurer to enable it to determine whether there is a genuine defense" to the claim against the insured. *Johnson v. Johnson*,

228 Minn. 282, 284, 37 N.W.2d 1, 3-4 (Minn. 1949) (quoting from *Coleman v. New Amsterdam Cas. Co.*, 160 N.E. 367, 369 (N.Y. 1928)). A loan receipt agreement serves none of these purposes.

The cooperation provision of the Policy provides as follows:

The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and **in enforcing any right of contribution or indemnity** against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; ...

(CA. 209, at p. 4, § VII, 4 (c)) (emphasis added).

The cooperation provision simply does not entitle Liberty Mutual to force Cargill to enter into a new contract in the form of a loan receipt agreement because, under Minnesota law, Liberty Mutual has no right of contribution to enforce against other insurers that owe Cargill a duty to defend.⁵ As explained above, the Minnesota Supreme Court has held that an insurer's duty to defend is personal to each insurer; the obligation

⁵ Cargill refuses to enter into a loan receipt settlement agreement because it believes that many of the duty to defend policies are subject to deductibles, retentions, retrospective premiums, or are reinsured by a Cargill subsidiary that charges Cargill retrospective premiums. (CA. 41, at ¶ A.10). Although Liberty Mutual claims this is a question of fact, to the extent it is true, Cargill would ultimately bear some of the defense costs under such "fronted" policies. The insurers that issued such policies would not ultimately be liable to Cargill. Given that the cooperation clause applies only with respect to rights of contribution against parties liable to Cargill, the cooperation clause cannot apply with respect to any such policies. Furthermore, courts have held that an insurer's rights under a cooperation clause are limited where there is a conflict of interest between the insurer and its policyholder. *National Cas. Co. v. Beth Abraham Hosp.*, 97 Civ. 8091, 1999 WL 710780 at *3-6 (S.D.N.Y. Sept. 10, 1999) (CA. 462-66) (holding that neither the duty to cooperate nor the doctrine of subrogation applied where an insurer demanded its policyholder bring a third-party action against one of its employees).

is several and indivisible and an insurer is not entitled to contribution from another insurer absent a specific contractual right. *Iowa Nat'l*, 276 Minn. 362, 367-68, 150 N.W.2d at 237. In fact, the Minnesota Supreme Court has plainly held that because an insurer's duty to defend is a separate contractual undertaking, it "would not support a common obligation for the purpose of invoking the principle of contribution." *Id.* at 368, 150 N.W.2d at 237. *Iowa National* establishes that an insurer with an indivisible duty to defend has no inherent right of contribution against other insurers. *Id.* Thus, absent a loan receipt agreement, Liberty Mutual has no right of contribution to be enforced under the cooperation clause of the Policy. Instead, Liberty Mutual is seeking to force Cargill to *create* a right of contribution for Liberty Mutual through a loan receipt agreement. Liberty Mutual has no such right under the cooperation clause.

2. The Subrogation Provision.

Similarly, Liberty Mutual is not entitled to a loan receipt from Cargill under the subrogation provision of the Policy.⁶ This clause provides as follows:

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and

⁶ As with the cooperation clause, Liberty Mutual's rights under the subrogation provision are derivative of Cargill's rights, and Cargill cannot have a right of recovery against itself. As noted above, although Liberty Mutual asserts it is a question of fact, Cargill believes that some of the duty to defend policies are subject to deductibles, retentions, retrospective premiums, or are reinsured by a Cargill subsidiary, and some or all of the defense costs allocated to such policies would ultimately be borne by Cargill. Thus, the subrogation provision cannot apply with respect to any such policies. "Under general principles of insurance law, an insurer cannot subrogate against its own insured." *St. Paul Cos. v. Van Beek*, 609 N.W.2d 256, 257 (Minn. Ct. App. 2000).

do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

(CA. 209, at p. 4, § VII, 7) (emphasis added).

The Minnesota Supreme Court has concluded that principles of subrogation do not provide a basis for an insurer that has a duty to defend to seek recovery of defense costs from another insurer. *Iowa Nat'l*, 276 Minn. 362, 368, 150 N.W.2d at 237. In that case, Iowa National argued that if the policyholder had prevailed in an action against a second insurer, the policyholder would have recovered defense costs, and thus, based on the subrogation agreement in the policy, Iowa National had acquired the policyholder's rights. *Id.* at 365-66, 150 N.W.2d at 236. The Supreme Court concluded that Iowa National did not have any right of recovery based on either legal or conventional principles of subrogation, "since each of the [insurance] companies had a separate and distinct obligation to defend." *Id.* at 368, 150 N.W.2d at 237. Under *Iowa National*, Liberty Mutual has no subrogation rights against other insurers with respect to costs it incurs in fulfilling its several and indivisible duty to defend Cargill, and thus it cannot use the subrogation provision to demand Cargill enter into a loan receipt agreement.

Moreover, Cargill is not obligated to enter into a loan receipt agreement with Liberty Mutual under the subrogation provision of the Policy because, as the Minnesota Supreme Court explained, if Liberty Mutual loans the defense costs to Cargill, Liberty Mutual "is a lender, not a subrogee, and nothing more." *Jostens*, 387 N.W.2d at 167 (Minn. 1986). *See also Growers Refrigeration Co., Inc. v. Pacific Electrical Contractors, Inc.*, 996 P.2d 521, 522 (Or. Ct. App. 2000) ("[A]n insurer who makes

payments to its insured and receives a loan receipt in return does not become subrogated to its insured's claims."); *NAD, Inc. v. Eighth Judicial Dist. Court*, 976 P.2d 994, 997 (Nev. 1999) (“[W]e join the majority of jurisdictions that recognize that a loan receipt agreement is a proper means for an insurer to *avoid* subrogation, ...”) (emphasis added). The subrogation provision of the Policy only applies “[i]n the event of any **payment** under this policy, ...” (CA. 209, at p. 4, § VII, 7) (emphasis added). The Minnesota Supreme Court has recognized that “courts generally hold that ‘loan receipts’ given by insurance companies are evidences of valid loans and **not of payment by the insurer.**” *Blair v. Espeland*, 231 Minn. 444, 448, 43 N.W.2d 274, 277 (Minn. 1950) (emphasis added). The loan receipt agreement that Liberty Mutual proposed to Cargill on October 8, 2007, plainly characterizes its anticipated conveyance as a loan, stating that “Liberty Mutual has loaned and may loan in the future to Cargill certain defense costs. ...” (CA. 284, at ¶ A). Liberty Mutual is offering to make a loan to Cargill, not a payment under the Policy, and thus the subrogation provision is not pertinent here.

B. Any Purported Agreement To Enter Into A Future Contract Under The Terms Of The Insurance Policy Would Be Unenforceable

The idea that Cargill is obligated to enter into a loan receipt agreement under the subrogation and cooperation provisions of the Policy is also incompatible with the principle that parties cannot contract to enter into a contract. *Minneapolis League of Catholic Women v. Schafhausen*, 162 Minn. 165, 166, 202 N.W. 705, 705 (Minn. 1925). An agreement to “attempt to contract in the future” is “no contract at all.” *Id.* Thus,

Minnesota law provides that an “agreement to agree” is not enforceable. *Id.* “Such agreements are generally unenforceable because they provide neither a basis for determining the existence of a breach nor for giving an appropriate remedy.” *Richie Co., LLP v. Lyndon Ins. Group, Inc.*, 316 F.3d 758, 760-61 (8th Cir. 2003) (applying Minnesota law) (citation omitted).

Therefore, “an agreement that [the parties] will in the future make such contract as they may then agree upon amounts to nothing ... to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.” *Shepard v. Carpenter*, 54 Minn. 153, 155-56, 55 N.W. 906, 906 (Minn. 1893). *See also 168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 950 (8th Cir. 2007) (applying Nebraska law) (“a ‘meeting of the minds’ must occur at every point, with nothing left open for future agreement”). Neither the subrogation nor contribution provisions of the Policy can be read with sufficient specificity to create a meeting of the minds as to the terms and conditions of a future loan receipt settlement agreement, and therefore these provisions cannot form a basis for the parties to enter into such an agreement in the future.

Thus, the district court’s grant of summary judgment to Liberty Mutual should be reversed to the extent it suggests that Cargill has failed to meet its obligations to cooperate under the Policy, and partial summary judgment should be granted to Cargill declaring that it is not required to enter into a loan receipt with Liberty Mutual.

C. Liberty Mutual Is Not Entitled To A So-Called “Constructive” Loan Receipt Agreement.

The district court erred in holding that it could impose a “constructive” loan receipt agreement on Cargill.⁷ (CA. 52, at ¶ D.3). This notion flies in the face of basic contract law. Simply put, Liberty Mutual cannot compel its policyholder to enter into a contract.⁸ *City of Minneapolis v. Ames & Fischer Co. II, LLP*, 724 N.W.2d 749, 756 (Minn. Ct. App. 2006) (“mutual acceptance is essential” to form a contract). The district court did not and could not cite to any case where a “constructive” loan receipt agreement was imposed on a policyholder. The district court ignored the fact that Minnesota courts “will not create a contract where the parties have failed to do so.” *Warner v. Krage Agency*, No. CX-99-293, 1999 WL 618993 at *2 (Minn. Ct. App. Aug. 17, 1999) (CA. 468). *See also St. Paul Fire & Marine Ins. Co. v. Ruddy*, 299 F. 189, 196 (8th Cir. 1924) (“It is not within the province of courts to create contracts.”); *City of Minneapolis*, 724 N.W.2d at 756.

Moreover, Liberty Mutual has not offered any new consideration for its proposed loan receipt settlement agreement. “Consideration is an essential element of a contract.” *Johnson v. City of Shorewood*, 2004 WL 193212 at *3 (Minn. Ct. App. Feb. 3, 2004) (CA. 472). “When there is lack of consideration, no valid contract is ever formed.”

⁷ The amended order did not include the referenced constructive loan receipt referenced as Exhibit A, however the document is attached to the original order at CA. 32-3.

⁸ There can be no doubt that a loan receipt agreement is a contract under Minnesota law. *Blair v. Espeland*, 231 Minn. 444, 450, 43 N.W.2d 274, 278 (Minn. 1950) (discussing “freedom of [insured] and his insurer to contract, through the device of a ‘loan receipt’ agreement”); *Liberty Mutual Ins. Co. v. American Fam. Mut. Ins. Co.*, 463 N.W.2d 750, 756 (Minn. 1990) (discussing consideration for loan receipt agreement).

Franklin v. Carpenter, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (Minn. 1976).

“Consideration requires that a contractual promise be the product of a bargain It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other.” *E.J. Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 538-39, 104 N.W.2d 661, 665 (Minn. 1960); *Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn. Ct. App. 1996) (“A promise to do something that one is already legally obligated to do does not constitute consideration.”).

Liberty Mutual already has an indivisible duty to fully defend Cargill. Hence, Liberty Mutual is not offering anything to Cargill other than to perform the obligations it has already admittedly agreed to under the Policy. In fact, by demanding a loan receipt settlement agreement, Liberty Mutual is offering to do *less* than it agreed to do under the Policy. Rather than provide Cargill the complete defense that it bargained for, Liberty Mutual says it will instead “loan” Cargill a small fraction of its defense costs, while also obtaining a right of contribution to recover some defense costs from other insurers or even Cargill. (CA. 281-86). It is axiomatic that loaning Cargill defense costs that Liberty Mutual already owes Cargill cannot constitute new consideration.

Finally, requiring that Cargill enter into a loan receipt settlement agreement would fundamentally change the contractual relationship between Cargill and Liberty Mutual from one of insurer/policyholder to that of lender/borrower. Executing a loan receipt agreement would effectively defeat Cargill’s right to seek a complete defense from any of the insurers that owe it a duty to defend. A loan receipt agreement would in effect result in Cargill, as the real party in interest, pursuing its other insurers for recovery to allow

repayment to Liberty Mutual. *See Jostens*, 387 N.W.2d at 164 (ruling that because of the loan receipt agreement, the insured “is a real party in interest entitled to maintain in its name the claim for ... defense costs...”). Given Liberty Mutual’s independent obligation to defend its policyholder, Cargill cannot be required to pursue its other insurers simply for the benefit of an insurer that failed to undertake its defense obligation.

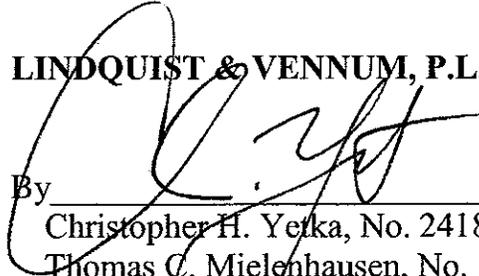
Thus, the district court’s grant of summary judgment to Liberty Mutual should be reversed to the extent it contemplates imposing a “constructive” loan receipt on Cargill, and partial summary judgment should be granted to Cargill declaring that it is not required to enter into a loan receipt with Liberty Mutual.

CONCLUSION

For the foregoing reasons, the district court’s orders granting partial summary judgment to Liberty Mutual should be REVERSED, partial summary judgment should be GRANTED to Cargill on all coverage issues addressed in the district court’s orders.

Dated: August 27, 2008

LINDQUIST & VENNUM, P.L.L.P.

By 

Christopher H. Yerka, No. 241866
Thomas C. Mielenhausen, No. 160325
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 371 2416
Facsimile: (612) 371 3207

Paul L. Langer, (Ill. No. 6189216)
PROSKAUER ROSE LLP
222 South Riverside Plaza
29th Floor
Chicago, IL 60606-5808
Telephone: (312) 962 3550
Facsimile: (312) 962 3551

**ATTORNEYS FOR APPELLANT
CARGILL, INCORPORATED
AND CARGILL TURKEY
PRODUCTION, L.L.C.**