

State of Minnesota
In Court of Appeals

CARGILL, INCORPORATED AND CARGILL TURKEY PRODUCTION, LLC,
Appellants,

vs.

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
COMPANY, et al., 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.

RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S BRIEF

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I. SUPPLEMENTAL STATEMENT OF ISSUES

Regarding Appellant Cargill's¹ "Issues Integral to the Certified Question," Liberty Mutual submits that Issue "B.II" is essentially subsumed within the scope of the district court's Certified Question. Meanwhile, Cargill's Issue "B.III" is more accurately presented as follows:

Upon Liberty Mutual's payment of Cargill's defense costs in the Underlying Actions, is Cargill obligated to execute a loan receipt agreement (or, alternatively, should a constructive loan receipt be recognized), such that Liberty Mutual can unquestionably preserve its ability to seek reimbursement of an equal-share portion of those defense costs from other insurers owing Cargill a duty to defend?

District Court Answer: Yes.

Standard of Review: De novo.

Most-Apposite Cases:

Wooddale Builders, Inc. v. Maryland Cas. Co., 722 N.W.2d 283 (Minn. 2006);
Domtar v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161 (Minn. 1986).

II. STATEMENT OF THE CASE

In the first phase of this litigation before the Honorable Thomas W. Wexler, District Court Judge for Hennepin County, the parties were instructed to address matters related to the defendant-insurers' alleged duties to defend Cargill in the Underlying Actions. Although Cargill alleges in its Complaint that several of its primary-level insurers (and some of its umbrella-level insurers) owe it a defense in relation to the

¹ "Cargill" shall refer collectively to Plaintiffs-Appellants Cargill, Incorporated and Cargill Turkey Production, LLC, and "Liberty Mutual" shall refer to Defendant-Respondent Liberty Mutual Insurance Company. Likewise, the phrase "the Underlying Actions" shall also have the same meaning as ascribed to it in Cargill's Brief before this Court, namely the Oklahoma and Arkansas lawsuits at issue. *See* Cargill Br. at 1.

Underlying Actions and have breached that duty, Cargill decided to move for summary judgment on the duty-to-defend issue only against Liberty Mutual. Liberty Mutual opposed Cargill's motion and cross-moved for summary judgment. In its cross-motion, Liberty Mutual alleged, *inter alia*, that Cargill's failure to execute a loan receipt in conjunction with Liberty Mutual's payment of Cargill's defense costs materially breached certain terms of the Liberty Mutual policies at issue.²

Contrary to Cargill's assertion, (Cargill Br. at 1, 6, 12, 26-27), most of Cargill's primary-level insurers (including Liberty Mutual) *have* agreed, on numerous occasions, to pay the full amount of Cargill's reasonable and necessary defense costs incurred in relation to the Underlying Actions under a complete reservation of rights.³ These insurers have merely sought concurrently to enforce Cargill's obligations, under their respective policies, to assist them in their pursuit of partial reimbursement of these defense payments from other parties that are equally liable to Cargill for these costs. Under current Minnesota law, such reimbursement is unquestionably allowed upon Cargill's execution of a loan receipt agreement, which the insurers have requested in conjunction with their payments. Cargill has simply refused to execute and deliver the requested loan receipt.

Consequently, the primary issue before the district court was whether an insured can unilaterally refuse to execute a loan receipt agreement upon its selected insurer's

² Accordingly, Liberty Mutual requested a declaration that it is relieved of any defense or indemnity obligations under its policies issued to Cargill in relation to the Underlying Actions. (See CA. at 288-89; 354-57)

³ An insured is required to show that the total costs claimed for its defense are indeed "reasonable and necessary" in order for them to be reimbursable from its insurers with a duty to defend. See *Domtar v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 738 (Minn. 1997).

payment of its defense costs, especially when the insured does so in a blatant attempt to make the insurer it selects absorb the entire share of its defense costs. None of Minnesota's prior appellate cases have addressed this specific issue.

In addressing Liberty Mutual and Cargill's respective obligations in this regard, the parties also debated whether Minnesota law should allow Liberty Mutual to seek reimbursement from other equally liable insurers of Cargill, even in the absence of Cargill executing a loan receipt agreement. This result would be accomplished either through the equitable construction of a neutral loan receipt agreement — which would achieve the same result as if Cargill had executed such a document, as it was obligated to do under Liberty Mutual's policies — or through a ruling that insurers who are equally liable to Cargill for defense costs shall simply be treated as such for contribution purposes, irrespective of a loan receipt artifice.

The district court correctly determined that, under the circumstances of this case and consistent with a long line of cases, including the Minnesota Supreme Court's decision in *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283 (Minn. 2006), once a determination is made regarding which insurers have defense obligations to Cargill for the Underlying Actions, those insurers will be liable in equal shares for the costs of defending those claims.⁴ (CA. 36-37). In conjunction with that holding, the

⁴ The district court's Amended Order clarifies that the issue of which insurers do, in fact, have a duty to defend Cargill in the Underlying Actions remains to be determined. These insurers include Liberty Mutual, which, as explained *infra* at § III.A, maintains that the issue of whether the claims against Cargill in the Underlying Actions involve property damage or bodily injury that occurred during Liberty Mutual's policy periods remains in dispute. Without such an occurrence during Liberty Mutual's policy periods, Liberty Mutual has no duty to defend or indemnify Cargill because, at that point, coverage is no longer "arguable." Any acknowledgement of a duty to defend by Liberty

district court stated that Liberty Mutual has the right to seek contribution for paid defense costs from these equally liable insurers. (*Id.*).

In so holding, the district court rejected Cargill's attempt to justify its refusal to execute a loan receipt based on certain beliefs Cargill had regarding the effect of alleged "fronted" policies it entered into with some of its primary-level insurers. Due to Cargill's arguments in this regard, the district court was compelled to correctly state:

The point here is that Cargill, a sophisticated business entity, has created this insurance structure, and it seems inequitable that they should now be permitted to avoid cooperating with Liberty Mutual (the insurer who they have self-chosen to defend their liability claims) because of their concern that the insurance structure that they have created may have some adverse consequences to go along with the benefits they have received.

(CA. 46, at ¶ C.9).

The district court further recognized that, even though Cargill's refusal to execute a loan receipt agreement is indeed an inequitable result, it still needed to address what powers it had to cause an equitable sharing of defense costs. (CA. 47-48, at ¶ C.12). Noting the Minnesota Supreme Court's instruction in *Wooddale* that courts must be flexible in responding to different facts in insurance coverage matters, (*id.*, quoting from *Wooddale*, 722 N.W.2d at 301), the court concluded that "the best approach to encouraging multiple insurers to promptly undertake the insured's defense is if the insurers know from the beginning that defense costs will be apportioned equally among

Mutual is premised only on the *currently* disputable nature of coverage under the Liberty Mutual policies and is done so under a complete reservation of rights. *Cf. Wooddale*, 722 N.W.2d at 302 ("the duty to defend extends to every claim that 'arguably' falls within the scope of coverage"); *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.*, 731 N.W.2d 154, 158-59 (Minn. Ct. App. 2007).

those insurers whose policies are triggered.” (CA. 48, at ¶ C.13). Then, acknowledging the Supreme Court’s recognition of an insurer’s right to recover defense costs from equally liable insurers through contribution, (CA. 49, at ¶ C.14 (quoting *Domtar v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997)), and distinguishing *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*, 150 N.W.2d 233 (Minn. 1967), on its facts, (CA. 49-50, at ¶¶ 16-17), the court further held:

To apply the *Iowa National* rule in the context of a *Wooddale* -type of situation, where multiple insurers participate in the same kind of risk, but mostly over different and extended periods of time (as opposed to multiple insurers being on the risk for a singular incident like an auto accident) creates obvious inequities. Thus it is more equitable to apply the *Wooddale* rationale of equal apportionment of defense costs among the multiple insurers under the facts of this kind of case.

(CA. 48-49, at ¶ C.13).

Considering the foregoing, the district court stated that it would accomplish the result of equal sharing of defense costs either by (a) declaring that a loan receipt is not necessary for Liberty Mutual to seek reimbursement of paid defense costs from other, equally liable insurers of Cargill, or (b) equitably constructing a neutral loan receipt agreement. (CA. 51-52, at ¶¶ D.1-D.3). As to these options, the court stated that the former one was what it would principally order, and the latter option would have been ordered in the alternative. (*Id.*). The court also suggested that Cargill’s failure to execute a neutral loan receipt agreement was indeed a failure to follow its policy obligations to Liberty Mutual. (CA. 53, at ¶ D.4). However, the court found there was no prejudice given that the delay on Cargill’s part did not compromise Liberty Mutual’s position in the

Underlying Actions, (*id.*), and, impliedly, given its current ruling in favor of Liberty Mutual.

In so ruling, the district court certified as “important and doubtful” a question related to the authority of courts to order primary-level insurers, who insure the same insured for the same risks and whose policies are triggered, to be equally liable to pay defense costs for that insured. (CA. 53-54, at ¶¶ D.2-D.3). While the question was framed in this regard, it was necessarily informed by all of the considerations animating the parties’ cross-motions for summary judgment, including Cargill’s failure to abide by its contractual obligations to cooperate and the inequity in a rule not requiring Cargill to execute a loan receipt upon Liberty Mutual’s payment of Cargill’s defense costs.

Cargill now appeals. Based on this Court’s August 19, 2008 Order, Cargill has essentially raised all of the issues facing the district court on summary judgment.⁵ Liberty Mutual agrees with Cargill that this Court’s consideration of all of these issues is helpful, if not integral, to its understanding and properly answering the Certified Question.

⁵ In its Rule 133.03 Statement of the Case, Cargill included an issue (its Issue 4) stated as: “Did the trial court err in not limiting any right of contribution or constructive loan receipt settlement agreement to eliminate the ability of Cargill’s insurers to directly or indirectly recover back from Cargill the very defense costs they paid to Cargill in the first place?” (CA. at 10). Putting aside for a moment the merits, Cargill now strategically contends that this issue is not relevant on appeal and that it “reserves its rights on this issue.” (Cargill Br. at 2 n.2).

Even assuming Cargill is correct that this issue is not necessary to the disposition of this appeal, Liberty Mutual objects to Cargill “reserving” this issue. As Cargill knows full well, if this Court affirms the district court’s decision, a ruling in favor of Cargill on this “reserved” issue would essentially gut any ruling in favor of Liberty Mutual on the issues currently argued before this Court. This is simply Cargill’s attempt to get “two kicks at the cat,” and it should not be permitted to do so. Rather, given this Court’s invitation, Cargill should have raised all issues it contends are integral to the review of the district court’s decision, which Cargill’s own inclusion of this issue in its Statement of the Case suggests it to be.

Despite the complexity of Cargill's "fronted policies" arguments made before the district court, the issues presently before this Court are relatively straightforward. The resolution of those issues, however, requires a more-discerning analysis of Minnesota law than what Cargill offers.

III. COUNTERSTATEMENT OF FACTS

Cargill's Statement of Facts is both incomplete and, in some instances, incorrect. The following highlights those omissions and errors that are material to the legal issues now before this Court.

A. Cargill's Alleged Liability in the Underlying Actions.

For the most part, Cargill seems to describe accurately the Oklahoma and Arkansas lawsuits that comprise the Underlying Actions. However, two matters deserve elaboration.

First, the defense costs Cargill seeks from Liberty Mutual are apparently quite large. While Cargill speaks generally about having incurred "significant" costs in connection with these lawsuits, (Cargill's Br. at 4-5), it does not disclose the actual amounts at issue. This omission may be related, at least in part, to Cargill's refusal to update the defendant-insurers on the actual amounts it has spent in defense of the Underlying Actions. (See Respondent Liberty Mutual Insurance Company's Appendix (hereinafter "LMA") at 46, ¶ 8). Given Cargill's failure to send its primary-level insurers any defense bills since February of 2007, (*id.*), Liberty Mutual is uncertain how much has been expended in total. However, as of a year-and-a-half ago, Cargill had already

allegedly spent \$5.4 million combined in defense costs in the Underlying Actions.⁶ (February 4, 2008 Affidavit of Michael J. Cohen, (hereinafter, “Cohen Aff.”), ¶ 2).⁷ The defense of these claims has continued in earnest since then. (See Cargill Br. at 4-5).

Second, there remains a significant question as to whether *any* bodily injury or property damage alleged in the Underlying Actions actually even occurred before the early 1980’s, so as to involve the Liberty Mutual policies in effect from June 1, 1969 to June 1, 1973. (Cf. CA. 38, at ¶ A.1). If investigation of the underlying claims shows that Cargill’s alleged liability is not based on damages during that period, and therefore is *not* covered under Liberty Mutual’s policies, Liberty Mutual’s defense obligations will cease. It is for this reason, among others, that Liberty Mutual’s (and other primary-level insurers’) recognitions of a current, although not a conclusive, duty to defend were made with a full reservation of rights.

Thus, there simply is no probative value to the fact of Liberty Mutual’s acknowledgements of a current defense obligation for purposes of resolving the issues currently before the Court, despite Cargill’s repeated intimations otherwise. Liberty Mutual has *never* made an unqualified admission that there is indeed coverage under its policies for the Underlying Actions. All that Liberty Mutual acknowledged — simply by

⁶ Of those costs that Cargill has incurred in its defense of the Underlying Actions and that *have* been submitted to Liberty Mutual, the parties currently dispute the reasonableness and necessity of some of those costs. (See generally CA. 364-65; LMA at 46-48, ¶ 9). In addition, due to Cargill’s significantly late notice, many of Cargill’s alleged defense costs were incurred pre-tender by Cargill and, therefore, are not recoverable from Liberty Mutual. See *Domtar*, 563 N.W.2d at 739; LMA at 46-48, ¶ 9.

⁷ Due to the number and size of the exhibits attached to the Cohen Affidavit, pursuant to Minn. R. Civ. App. P. 128.03, Liberty Mutual refers to the relevant portions of that document of record rather than simply reproduce its entirety in an appendix to this Brief.

being forthright regarding current Minnesota law (*see, supra*, n.4) — is that Cargill can select the Liberty Mutual policy it has and then demand that Liberty Mutual exclusively defend Cargill in the Underlying Actions. But this is true *only to the extent that* the underlying claims are, *and remain*, arguably within the scope of that policy's coverage *and* Cargill does nothing to void its coverage.

B. Cargill's General Liability Insurance Coverage During the Periods It Is Alleged to Have Caused Property Damage and Bodily Injury in the Underlying Actions.

Liberty Mutual only issued primary-level commercial general liability (“CGL”) coverage to Cargill from June 1, 1969 until June 1, 1973, a cumulative period of four years that was over 35 years ago.⁸ Although it is unclear when the activity involving Cargill allegedly causing the property damage or bodily injuries at issue began, in this lawsuit Cargill is asserting claims for coverage under policies issued as far back as 1957 and inclusive of those continuing, uninterrupted, through policies with coverage periods within 2006 — *i.e.*, nearly 50 total years of insurance coverage. (*See* LMA. at 32-43). At no point in this entire period was Cargill ever self-insured; rather, it was paying premiums to third-party liability insurers and receiving continuous coverage. (*Id.*).

All of these policies contain standard insuring agreements, including a right and duty to defend Cargill in any lawsuits alleging property damage or bodily injury for which the policies provide coverage. (*See* LMA. at 19, ¶ 72; *see, e.g.*, Cohen Aff., Exs. D, I, K, O, P, W and X). Policies issued by all of the primary-level insurers also contain

⁸ Cargill has invoked Liberty Mutual Policy No. LGI-641-004010-049 in its attempt to foist all of its defense costs in the Underlying Actions on Liberty Mutual. The policy is one of only two CGL policies that Liberty Mutual ever issued to Cargill. (For copies of the Liberty Mutual policies at issue, *see* CA. 206-66; LMA at 54-129).

“other insurance” clause language providing for contribution as between primary-level insurers by “equal shares.” (See, e.g., Cohen Aff., Exs. D, I, K, O, P, W and X). In addition to these primary-level policies, Cargill has purchased numerous excess and umbrella policies over the years that provide for coverage above that of its primary policies, some of which contain defense obligations. (LMA. at 20, ¶ 77, 32-43). On the basis of these policies, Cargill has sought a declaration that primary-level insurers named as defendants in this action *besides Liberty Mutual*, as well as certain umbrella-level insurers, also owe Cargill “a complete and indivisible defense” in the Underlying Actions, that they have breached their duty to defend, and that they are “obligated to reimburse Cargill in full for the costs already incurred by Cargill in defending the Oklahoma/Arkansas Lawsuit(s).” (LMA. at 4, 19-21, 23-25, 27-28 (¶¶ 3, 71, 73, 75-76, 83, 92-93, 97, 102, 111-12)).

C. Liberty Mutual’s Offer to Pay for Cargill’s Defense Costs in the Underlying Actions, Subject to Cargill Living Up to Its Contractual Obligations by Executing a Loan Receipt Agreement.

Liberty Mutual, as well as other insurers Cargill has sued in this action, has indeed offered a number of times to *fully* pay Cargill for its reasonable and necessary defense costs in the Underlying Actions. (CA. at 273-80; LMA. at 45, ¶ 5). It has done so under a typical reservation of rights and with the sole conditions that (a) Cargill executes a loan receipt agreement, and (b) Cargill otherwise live up to its contractual obligations. The loan-receipt condition, as explained below, is borne from the applicable insurance policies, is consistent with Minnesota law, and was made to ensure that Liberty Mutual’s rights to seek contribution and/or subrogation from other non-defending insurers are unquestionably protected. (See CA. at 273-80).

In fact, in October of 2007, Liberty Mutual again tendered a loan receipt agreement to Cargill in conjunction with its first payment towards providing a complete defense of Cargill in relation to the Underlying Actions. (See Cargill Br. at 7; CA. at 281-86; LMA. at 45, ¶ 5). Cargill refused to execute this document a mere day after receiving it, returned Liberty Mutual's check for defense costs, (CA. at 287), and then, a few weeks later, filed its summary judgment motion against Liberty Mutual. Cargill has since continued to refuse to execute any loan receipt agreement with Liberty Mutual that would fully protect Liberty Mutual's ability, under Minnesota law, to seek partial reimbursement from other equally liable insurers.⁹ In all, Cargill's repeated statements that Liberty Mutual has somehow not lived up to its obligations to pay for Cargill's defense costs ring hollow.

D. Cargill's "Beliefs" Regarding Its Alleged "Fronted Policies."

In its arguments before this Court, Cargill has jettisoned much of its prior contention that elements of its historic insurance program (consisting of so-called

⁹ On February 28, 2008, which was very shortly before Cargill's summary judgment response brief was due in the district court, Cargill suddenly pretended to be willing to enter into a "conceptual framework" of a loan receipt agreement with Liberty Mutual. However, this "framework" offered nothing more than what Cargill had been improperly demanding all along: namely, that Cargill can completely avoid its obligations to Liberty Mutual merely because its own sophisticated insurance program — under which it has received substantial economic and other tangible benefits for decades — apparently shifts certain costs back to Cargill after payment by those insurers, as part of Cargill's bargained-for contracts with those insurers. Cargill's self-serving "framework" was, and is, facially unacceptable to Liberty Mutual, because it ignores Cargill's obligations under the Liberty Mutual policies to protect Liberty Mutual's rights to seek repayment, on an equal-share basis, of defense costs from Cargill's other insurers who are equally liable for Cargill's defense costs in the Underlying Actions. Cargill's offer did not remotely represent the type of genuine, neutral loan receipt endorsed by the district court and that Cargill is required to provide. (See generally discussion at CA. 418-19, 436-38).

“fronted” insurance policies) somehow explain its refusal to execute and deliver a loan receipt to Liberty Mutual. In the district court, Cargill stridently argued that its “fronted policies” do not provide Cargill with any economic risk transfer of defense costs to the insurer and that, in all cases, defense costs incurred or paid by an insurer under these fronted policies are “ultimately born by Cargill.” (CA. 74-75, ¶ 4). Indeed, this was the sole premise Cargill offered to justify its refusal to accept payment of defense costs from Liberty Mutual.

Cargill no longer relies as strongly on such a notion, in part because the premise was wrong in numerous ways, both in fact and as a matter of law.¹⁰ However, Cargill still presents a “lighter” version of this notion to this Court, alluding many times to its “belief” that Liberty Mutual’s obtainment of partial reimbursement from some of Cargill’s other insurers will result in defense costs being charged back to Cargill. (*See* Cargill Br. at 2 & n.2, 7, 8, 20 n.5, 21 n.6). Undoubtedly, Cargill recognizes that its offering of *no* reason for its refusal to execute a loan receipt would be facially improper. So while Liberty Mutual will not recount here the substantial arguments and evidence against Cargill’s position on its alleged “fronted” policies, given Cargill’s continued allusion to its “beliefs” in this regard, a brief understanding of the issue helps greatly to inform this Court regarding the bases for some of the district court’s analyses.

¹⁰ In its current briefing, Cargill improperly characterizes Liberty Mutual’s quarrel with Cargill’s references to its “fronted policies” as merely being that an issue of fact exists with respect to Cargill’s assertions. (Cargill Br. at 2 n.2, 20 n.5, 21 n.6). While it is certainly true that numerous issues of fact exist regarding Cargill’s “fronted policies,” Liberty Mutual also thoroughly explained why Cargill’s arguments regarding these policies were wrong as a matter of law, especially with respect to the allegation of there being no economic risk transfer. (*See* CA. 314-326, 344-54).

As Liberty Mutual aptly explained to the district court, the simple fact is that Liberty Mutual has not and will never seek *any* repayment of defense costs directly from Cargill when it obtains partial reimbursement from other insurers who are equally liable for defense costs, whether through a loan receipt or otherwise. Nor has it, or will it, seek recompense directly from Cargill's captive insurance company as reinsurer of any primary policy issued to Cargill. Rather, Liberty Mutual seeks reimbursement *only* from other, third-party primary-level insurers who may be equally liable with Liberty Mutual for the payment of Cargill's defense costs, *as even Cargill has alleged in this case*. These are genuine insurers of Cargill's liability risks and to whom Cargill paid premiums. Cargill cannot have it both ways and hold itself out to the world as having real insurance for certain purposes (*e.g.*, tax treatment) but then cry foul merely because one of its insurers (Liberty Mutual) seeks reimbursement of a portion of defense costs it has paid to Cargill from these other third-party insurers.

IV. ARGUMENT

Twenty-two years ago, the Minnesota Supreme Court categorically stated: "Who should pay the insured's defense costs should not depend on the whim or caprice of the insured, when, at the time the defense was needed, both insurers arguably had a duty to defend." *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986). Two years ago, the Supreme Court further reaffirmed another holding of *Jostens* in stating that "when no insurer provides a defense to the insured, the insured may recover its defense costs from any of its insurers, and *as between the insurers, there is equal liability for defense costs.*" *Wooddale*, 722 N.W.2d at 302-03 (emphasis added) (having cited *Jostens*, 387 N.W.2d at 167).

In the present case, Cargill seeks relief against Liberty Mutual on grounds that contravene these very admonitions found in *Jostens* and *Wooddale*. In particular, Cargill argues that *it* may impose on Liberty Mutual, *and Liberty Mutual alone*, complete liability for Cargill's defense costs in the Underlying Actions by refusing to execute a loan receipt agreement upon Liberty Mutual's payment of Cargill's defense costs. This refusal substantially impairs — indeed, outright deprives — Liberty Mutual of its rights under Minnesota law and under the very insurance policies through which Cargill now demands a defense for the Underlying Actions.

As it is, Minnesota law has evolved such that an insurer's ability to voluntarily pay defense costs of its insured and then obtain reimbursement of those payments from other equally liable insurers appears to be contingent on that paying insurer having first acquired a loan receipt from its insured. This rule continues despite a number of recent court decisions eroding much of the formalism originally attendant to these loan receipt agreements, even to the degree where courts: (a) have ignored the need for the fiction of the insured, as the "real party in interest," actually making the claims against the third parties targeted for contribution; (b) have not even mentioned the need for such an agreement in order for an insurer to seek such reimbursement; and (c) have allowed insurers to agree, amongst themselves and, significantly, without the consent of the insured, that such an agreement is not needed for them to be equally liable.

Meanwhile, Cargill is contractually required to assist Liberty Mutual in its pursuit of reimbursement (whether through contribution or subrogation) from any other parties who are liable to Cargill for any payments that Liberty Mutual makes. All of Cargill's attempts to wipe away this obligation fail. Rather, to the extent Liberty Mutual fully

reimburses Cargill for all reasonable and necessary defense costs incurred in the Underlying Actions when other insurers are equally liable for that expense, Cargill is contractually obligated to cooperate and “execute and deliver instruments and papers,” such as a loan receipt under Minnesota law, necessary to secure Liberty Mutual’s ability to seek repayment of an equal share of those defense costs from those insurers. Indeed, Minnesota courts have specifically described the effect of a loan receipt as that of a contribution and/or subrogation tool. Fundamentally, Cargill’s arguments ignore the undeniable fact that, immediately upon Cargill’s execution of a loan receipt, Liberty Mutual *is able*, under Minnesota law, to obtain reimbursement from Cargill’s other insurers who are equally liable to Cargill for defense costs in the Underlying Actions.

In addition to these contractual bases for requiring Cargill to execute and deliver a loan receipt agreement, Minnesota public policy and prior case law regarding insurers’ defense obligations demand the same result. To the extent a loan receipt is always necessary for an insurer who pays defense costs to recover equitable portions of those costs from non-defending insurers (which Liberty Mutual contends, for reasons stated elsewhere in this Brief, is not the case), an insured’s refusal to execute a loan receipt agreement with its defending insurer destroys that insurer’s recourse of contribution. The effect would be that any insurer who refuses to defend but is *not* selected by the insured is rewarded by *never* having to pay for defense costs, while a defending insurer is inequitably punished for having defended the mutual insured. Such a result disregards Minnesota public policy concerning insurers’ defense obligations and the rule that insurers owing concurrent defense obligations for a claim are equally liable as between themselves, even though the insured may choose only one of the insurers to defend it. To

maintain consistent application of Minnesota law on insurance defense costs, and to not create perverse incentives, courts should require that an insured execute a loan receipt upon its defending insurer's request. Otherwise, absent this Court distinguishing the *Iowa National* rule, Liberty Mutual will be unable to recover *any* of the defense costs it pays on Cargill's behalf from any of the other primary-level insurers of Cargill — insurers whose policies constitute 45 of the 49 years of coverage (or 92%) allegedly at issue for the claims in the Underlying Actions.

Finally, even without Liberty Mutual obtaining the artifice of a loan receipt, whether from Cargill or by judicial construction, the district court was correct in declaring that Liberty Mutual can, under the circumstances of this case, obtain reimbursement of Cargill's defense costs from other primary-level insurers who are equally liable for those defense costs. The *Iowa National* rule that would seem to preclude this result is not applicable to the circumstances of this case. This rule's applicability is limited only to circumstances, unlike here, where an insurer *voluntarily* agrees to undertake the defense of an insured *without* having first demanded a loan receipt. Liberty Mutual never voluntarily agreed to defend Cargill — at least not absent it first obtaining the express ability to seek contribution from other insurers through a loan receipt. In addition, as the district court observed, a closer reading of *Iowa National* shows that the underlying facts in that case are materially different.

The circumstances of this case also highlight the growing disconcertment over a broad reading of the *Iowa National* rule. Minnesota appellate courts have noted in recent years that there is a questionable, perverse incentive inherent in the *Iowa National* rule, one that inspires an insurer who arguably has a duty to defend *not* to promptly undertake

the defense of an insured if (among other reasons) the insurer believes that other insurers are equally liable for those defense costs, lest that insurer be stuck with the whole bill without any recourse. Indeed, for many of the same reasons which support a holding that an insured should be required to execute a loan receipt agreement for the insurer it selects to pay all costs incurred in defending a claim, the very requirement of executing the “legal fiction” of a loan receipt agreement in order for there to be contribution between equally liable insurers is a bit anachronistic.

A. Cargill’s Obligation to Execute a Loan Receipt Is Created by the Intersection of Minnesota Law and the Language of the Insurance Policies, and This Obligation Is Not “Extra-Contractual” or Requiring of the Inapplicable Legal Analyses that Cargill Presents.

Cargill contends that it is not obligated to execute a loan receipt agreement upon Liberty Mutual’s request even if Liberty Mutual pays for Cargill’s complete defense. The district court properly refused to give this argument credence in its decision below.

Cargill’s arguments are flawed for two primary reasons. First, Cargill ignores the reality that, under clear Minnesota precedent, Cargill’s execution and delivery of a loan receipt agreement absolutely enables Liberty Mutual to seek contribution/subrogation from any other insurers who are equally liable for Cargill’s defense costs. In doing so, Cargill also ignores the uniqueness of Minnesota’s law on loan receipts in the context of insurance defense costs and the general rule that all insurers with a duty to defend a mutual insured are equally liable for those payment obligations. Meanwhile, much of Cargill’s arguments attempt to elevate form over substance in the course of ignoring this law, and they are otherwise inapposite.

Second, despite all of Cargill's protestations, it is simply being required to do what it already agreed to do when it entered into its insurance policies with Liberty Mutual. It is not being required to enter into a "new" contract, nor had it previously "contracted to enter into a contract." Rather, Cargill is being required to adhere to its already-contemplated obligation to "execute and deliver" a document necessary to secure Liberty Mutual's contribution or subrogation rights. It agreed to this obligation at the time it entered into the Liberty Mutual insurance policies.

1. It Is Undisputed that Cargill's Execution of a Genuine Loan Receipt Agreement Secures Liberty Mutual's Ability to Receive Reimbursement from Other Equally Liable Insurers of an Equitable Portion of Defense Costs It Pays to Cargill.

The beginning of the end for Cargill's argument that it is not required to execute a loan receipt is found in the undisputed fact that, under current Minnesota law, the execution of such a document undeniably secures Liberty Mutual's ability to seek reimbursement from Cargill's other insurers who are equally liable to Cargill for defense costs in the Underlying Actions. Cargill does not, and cannot, quarrel with this state of the law, so, instead, it misdirects this Court to an analysis that simply assumes away this aspect of Minnesota law.

- a. The History of Loan Receipt Agreements in Minnesota Insurance Coverage Cases.*

Since the seminal case of *Blair v. Espeland*, 43 N.W.2d 274 (Minn. 1950), Minnesota courts have endorsed an insurer's use of loan receipt agreements as a means for enabling it to recover payments made to its insured from parties also liable for the loss. While *Blair* did not involve an insurer's attempt to seek reimbursement from another insurer (but rather from a third-party tortfeasor), the case clearly approved of the

use of a loan receipt between an insured and its insurer so that the latter could collect the equitable portion of the loss that was the responsibility of another party. *Id.* at 277-78.

Originally, as in *Blair*, these loan receipts were used primarily “to permit a contribution action to be brought in the name of the insured, rather than in the name of the insurer, who, except for the ‘loan receipt’ agreement, would be the real party in interest and statutorily required to bring the claim in its name.” *Id.* at 276. Courts also generally held that “loan receipts” given by insurance companies evidenced valid loans, not payment, by the insurer. *Id.* (citing cases). Minnesota courts since *Blair* have consistently held that, when a loan receipt agreement exists between an insured and the insurer who pays for the insured’s defense costs, the paying insurer is not prohibited by the rule stated in the 1967 case of *Iowa National Insurance Co. v. Universal Underwriters Insurance Co.*, 150 N.W.2d 233 (Minn. 1967), that an insurer who 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. *See Wooddale*, 722 N.W.2d at 302 (restating the *Iowa National* rule in this manner).

The first Minnesota appellate case to address the use of loan receipts in the context of multiple insurers with competing defense obligations is *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161 (Minn. 1986). In *Jostens*, the Minnesota Supreme Court considered a challenge to the validity of a loan receipt agreement in circumstances where an insured, *Jostens, Inc.*, was initially not defended by either of its two insurers, Employers Insurance of Wausau (“Wausau”) and Mission Insurance Co. (“Mission”). *Id.* at 163. The insured settled the lawsuit with the underlying plaintiff and then sought reimbursement of its defense and settlement costs in a lawsuit against the two insurers.

Id. Before trial, one non-defending insurer, Wausau, entered into a loan receipt agreement with Jostens, at which time Jostens released its claims against Wausau and then continued its suit against Mission. *Id.* at 163-64. The Court commented generally on the use of such agreements, stating that “[I]loan receipt agreements have long been recognized in this state and *they are a useful device in disposing of insurance disputes.*” *Id.* (emphasis added).

Because both insurers had chosen not to defend the insured in *Jostens*, the Court was further required to determine how to allocate the insured’s defense and settlement costs from the underlying suit between them. Similar to the circumstances in this case, it reached this issue in a context where Jostens, the insured, was attempting to force Mission to pay for *the entire cost* of defense and settlement in the underlying action. *Id.* at 163-64. The Court chose to examine the position that Jostens was facing before it settled with the plaintiff in the underlying action, rather than the position it was in after the loan receipt agreement was executed with Wausau. *Id.* at 167. The Court concluded that it would be unfair to make Mission responsible for the entire costs sought, for the reasons that both insurers had a duty to defend and the insured could have just as easily entered into an agreement with Mission, rather than Wausau. *Id.* Specifically, the Court stated:

To repeat, we look at the situation as it was for Jostens at the time it was confronted with Wepler’s allegations. Viewed from this standpoint, it hardly seems fair Mission should now be responsible for the entire costs *simply because Jostens has selected Mission rather than Wausau to pay them. Who should pay the insured’s defense costs should not depend on the whim or caprice of the insured, when, at the time the defense was needed, both insurers arguably had a duty to defend.*

Id. (emphases added). The Court further observed that “any rule we fashion should not encourage two insurers with arguable coverage to adopt a ‘wait and see’ attitude while leaving the insured to defend himself.” *Id.* Based on these policy considerations, the Court determined that each insurer had to pay the costs for which they would have originally been liable had they both undertaken defense of the insured. *Id.* at 167-68.

Of critical importance to the present dispute, the Supreme Court in *Jostens* further explicated the meaning of the rule it had developed. It expressly stated that, when no insurer having a duty to defend a claim undertakes the defense:

the insured . . . may bring an action and recover his costs in defending the claim from either or both insurers. If it is established that both insurers arguably had coverage at the time of the rejected defense tender, *the insurers, as between them, shall be equally liable for the insured’s defense costs*[.]

Id. at 167 (emphasis added). Thus, the rule in Minnesota is that, in the context of primary-level insurance coverage, such as in this case, insurers who do not voluntarily undertake a defense are to share the insured’s defense costs equally. *Id.* at 168.

Since *Jostens*, Minnesota courts have continued to recognize the usefulness of loan receipts as a mechanism for insurers who agree to pay their insured’s defense costs to avoid any possible application of the *Iowa National* rule and be allowed to recover from other insurers with an equal liability to defend the insured. See *Wooddale*, 722 N.W.2d at 302-03; *Home Ins. Co. v. Nat’l Union Fire Ins. of Pitts.*, 658 N.W.2d 522, 528 (Minn. 2003); *Domtar*, 563 N.W.2d at 739; *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 186-87 (Minn. Ct. App. 2001); *Jerry Mathison Constr., Inc. v. Binsfield*, 615 N.W.2d 378, 381 (Minn. Ct. App. 2000); *Redeemer Covenant Church v.*

Church Mut. Ins. Co., 567 N.W.2d 71, 82 (Minn. Ct. App. 1997). The courts have done this in tandem with the continuing recognition that, as between insurers who share a duty to defend, they are “equally liable” for defense costs. *See, e.g., Wooddale*, 722 N.W.2d at 302-03 (“[R]egardless of which liability allocation methods used, *when no insurer provides a defense to the insured*, the insured may recover its defense costs from any of its insurers, **and as between the insurers, there is equal liability for defense costs.**”) (italicized emphasis in original; bold added); *Domtar*, 563 N.W.2d at 739.

b. *The “Fictional” Elements of Loan Receipt Agreements Under Minnesota Law.*

Against this backdrop, Minnesota courts have relaxed — or in some instances outright ignored — some of the formalities of the “real party in interest” concern that originally animated parties to execute loan receipt agreements. First, the cases frequently stated that, despite the “loan” premise of the entire loan receipt fiction, such agreements serve the purpose of enabling the insurer-party to the agreement to achieve contribution and/or subrogation rights, not merely rights as a “lender.” *See Home Ins. Co.*, 658 N.W.2d at 528 (“The loan receipt agreement in the instant case . . . gives Home [*i.e.*, the insurer] *standing to seek contribution*”) (emphasis added); *Domtar*, 563 N.W.2d at 739 (relying on *Jostens* and stating that insurer held liable for all of its insured’s defense costs had the remedy of seeking *contribution* from the other equally liable insurer); *Jerry Mathison Constr.*, 615 N.W.2d at 381 (“[a] *loan receipt agreement* is a device used to achieve an equitable result . . . and *is essentially a subrogation tool*”) (emphasis added); *Redeemer Covenant*, 567 N.W.2d at 82 (referring to the right conferred by the loan receipt agreements as being that of *contribution* among multiple liability insurers with

duties to defend). This has become the well-recognized rule despite the understanding, under a strict application of a loan receipt arrangement, that the insurer-party is technically a “lender,” not a payee of the insured from which subrogation rights normally would be derived. *Cf. Jostens*, 387 N.W.2d at 167 (stating that, under a loan receipt arrangement, the insurer-party is a lender, not a subrogee).

Likewise, courts have repeatedly characterized one result of a loan receipt agreement as being that the insurer-party to the agreement will *itself* be seeking repayment from other liable insurers, albeit “in the name of” the insured. *See Youngquist*, 625 N.W.2d at 187 (stating that if the insurer had obtained a loan receipt agreement, it could have proceeded against other insurer in insured’s name to recover defense costs paid); *Jerry Mathison Constr.*, 615 N.W.2d at 381 (because of a loan receipt agreement, the court held that an insurer properly brought suit itself to seek, in the insured’s name, recovery of the defense costs the insurer had paid); *see also Redeemer Covenant*, 567 N.W.2d at 82 (stating that the insured remained the “real party in interest” but then simply ordered that the paying insurers were entitled to have a non-defending insurer pay its proportional share of the defense costs). Some decisions have even dispensed with *any* mention that the insurer is proceeding under a loan receipt arrangement in the name of the insured. *See Home Ins. Co.*, 658 N.W.2d at 528 (agreeing that paying insurer itself had “standing” to seek reimbursement of defense costs paid from other insurers pursuant to loan receipt agreement, without any mention of it being in the insured’s name); *Domtar*, 563 N.W.2d at 739 (stating that paying insurer’s remedy is to seek contribution from the non-defending insured, with no mention of need for loan receipt agreement or the pursuit being done in the insured’s name). In addition, in

Wooddale, the Minnesota Supreme Court's latest pronouncement on the duty to defend among multiple primary-level insurers, the Court recognized the insurers' rights to waive the requirement of a loan receipt agreement, apparently without even the need to obtain the consent of the insured. 722 N.W.2d at 302 n.15 ("The insurers in this case have waived the *Iowa National* rule that bars recovery in the absence of a loan receipt agreement.").

The recognition by Minnesota courts that it is not necessary to continue the fiction of having the contribution/subrogation claim enabled by a loan receipt agreement be brought by the insured as the "real party in interest" is only sensible. In the original loan receipt cases, such as *Blair*, the insurer was looking for the benefit of a loan receipt in the sense that it enabled any contribution or subrogation claim to be actually brought by the insured (often an injured party) with the insurer (perceived as a less-sympathetic party) sitting on the sidelines, although funding the insured's prosecution of the claim. Unlike that situation, insurers looking to recover from other, equally liable insurers are simply not concerned with having their insured be involved in the fiction of bringing a claim that, in reality, is for the insurer's benefit and the insured usually has no interest in being involved. As just discussed, Minnesota courts have approved of this circumstance and dispensed with the original formalism.

2. Cargill's Arguments Ignore the Reality of Minnesota Law on Loan Receipts in the Context of Duty-to-Defend Insurance Cases.

Given the foregoing considerations, Cargill's argument that it is "in effect" the "real party in interest," and therefore cannot be compelled to execute a loan receipt agreement, (Cargill Br. at 2 n.1, 13 n.4, 26-27), is both a red herring and much too

formalistic. Liberty Mutual itself has brought, can bring, and will be prosecuting the claims against Cargill's other equally liable insurers. Even if Cargill is the "real party in interest" to any action to recover equal shares from Cargill's other insurers, courts have recognized that this is really a legal fiction. *See Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 556-57 (Minn. 1977) (stating that the loan receipt agreement permits the insured, "albeit fictitiously," to remain the real party in interest). To be sure, if Liberty Mutual reimburses Cargill for all of its reasonable and necessary defense costs incurred in the Underlying Actions,¹¹ as Liberty Mutual *has* offered to do, Cargill's interests are in no way impaired as the "real party in interest" in relation to contribution or subrogation claims by Liberty Mutual against Cargill's other primary level insurers — certainly no more so than Cargill suing those same primary insurers for defense costs on its own accord, which is precisely what it is presently doing in this very case.

The reality is that loan receipts are essentially a legal fiction under Minnesota law, at least in the context of their use to apportion an insured's defense costs among insurers who are, by law, equally liable for those costs. As just explained, Minnesota courts have both expressly recognized this characterization of loan receipts as a fiction and otherwise dispensed with the formalities of the traditional loan receipt concept. In fact, the language in *Jostens* to which Cargill cites calling the insurer a mere lender, and not subrogee, of the insured, (Cargill Br. at 22), has either not been repeated or not mentioned as of concern in subsequent cases that have dispensed with the formalities of this fine distinction. As a legal fiction, there is no need to do so. Nevertheless, for an

¹¹ Liberty Mutual's contractual obligations in this regard are discussed further footnotes 2, 3, 6, and 14-16 herein.

insurer to *voluntarily* pay defense costs to its insured and still secure rights to contribution or subrogation from other liable insurers, Minnesota law apparently continues to require that this fiction be followed.

3. Cargill Is Contractually Obligated by the Liberty Mutual Policies' Subrogation and Cooperation Provisions to Protect the Undisputed Rights of Contribution and/or Subrogation that Liberty Mutual Achieves from Cargill Executing a Loan Receipt Agreement.

a. *Cargill's Contractual Obligations Under the Liberty Mutual Policies.*

The express conditions of Liberty Mutual's policies require Cargill to cooperate in Liberty Mutual's attempt to seek any rights of contribution and/or subrogation, and not to impair those rights. This obligation would include, in the context of Minnesota insurance law, Cargill executing a loan receipt.

The duty to cooperate has both a narrow and a broad meaning in insurance policies. In the narrow sense, it refers to those obligations of the insured to work with the insurer in defense of the underlying claims, such as to provide prompt notice of a claim, to work jointly in settling claims, to share information truthfully relative to defense of the claims, not to collude with the opposing party in the underlying action, and similar "cooperation" in the defense of the claim. The cases that Cargill references in its discussion of the duty to cooperate primarily relate to these duties, (Cargill Br. at 19-20), which are not at issue in this case. Broadly understood, the duty to cooperate includes all conditions to coverage expressed in a policy. Relevant to this case, these include obligations of the insured related to not impairing, and indeed assisting, the insurer in its efforts to limit its own losses incurred by making payments to the insured. Most

commonly, this condition involves protecting the insurers' avenues of contribution and/or subrogation.

The Liberty Mutual policies issued to Cargill contain conditions to coverage that operate in precisely this manner. Section VIII.4(c) of Liberty Mutual's policies specifically requires, among other things, that Cargill cooperate with Liberty Mutual and, at Liberty Mutual's request, "assist . . . in enforcing any right of contribution." (CA. at 209). Meanwhile, Section VII.7 states:

Subrogation. 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.

(*Id.* (emphasis in italics; bold in original)). Based on these provisions, Liberty Mutual's policies explicitly recognize both (1) Liberty Mutual's right to contribution and/or subrogation upon any *payment* by Liberty Mutual under its policies, and (2) Cargill's clear contractual obligation to execute a loan receipt agreement, unquestionably a "*paper . . . necessary to secure such rights,*" upon request by Liberty Mutual.

b. *Cargill's Arguments for Avoiding Its Contractual Obligations Are Unavailing.*

Despite these clear and unambiguous terms, Cargill refuses to execute a loan receipt agreement as requested by Liberty Mutual. Cargill's arguments invoke largely inapposite legal doctrines and are otherwise unpersuasive. Moreover, Cargill has cited no Minnesota case that states it can unilaterally resist executing a loan receipt under the circumstances of this case. Quite simply, Liberty Mutual is no more "coercing" Cargill to execute a loan receipt, (Cargill Br. at 7), than Cargill is "coercing" Liberty Mutual into

providing it with a defense. Both obligations derive from the same applicable insurance contract, and Cargill's argument that its obligation to execute a loan receipt somehow is "extra-contractual" from the Liberty Mutual policies is disingenuous, at best, and simply untrue. Cargill cannot have it both ways by, in one breath, calling for the strict enforcement of Liberty Mutual's obligations under the policy at issue and, in another, disavowing its concomitant contractual obligations to Liberty Mutual.

What Cargill fundamentally fails to understand (or strategically chooses to disregard) is that, whatever the holdings of *Iowa National* as to the perceived lack of rights of contribution or subrogation in circumstances where an insurer chooses to undertake the defense of an insured, under Minnesota law, a loan receipt unquestionably eradicates those restrictions and enables contribution and/or subrogation claims between insurers.¹² Hence, a refusal to execute a loan receipt destroys those rights, which are the very concerns embodied in the subrogation and cooperation provisions in the policies. Cargill never explains how its view that there are no rights to subrogation or contribution prior to a loan receipt's execution can be reconciled with the clear understanding that, under Minnesota law, such rights *do* exist upon the execution of the document.¹³

¹² For reasons articulated below, Liberty Mutual questions the rationale of the *Iowa National* rule itself. *See, infra*, § IV.B.2. However, to be clear on this point, this Court is *not* required to reject the *Iowa National* rule to affirm the district court's Order.

¹³ As discussed above, contrary to Cargill's assertions, Minnesota law clearly recognizes that a loan receipt agreement is a contribution and subrogation tool that acknowledges "rights of recovery" against other insurers. Indeed, Cargill has alleged these very "rights of recovery" against its other primary-level insurers in this very case. It is *these* rights to which Liberty Mutual is to be subrogated. Thus, Cargill's continuing suggestion that Liberty Mutual is seeking contribution or subrogation against Cargill, its policyholder, (*see, e.g.*, Cargill Br. at 21 n.6), or that Liberty Mutual's rights under its

Indeed, Cargill's view that additional consideration is required in order to validate a loan receipt designed to permit a paying insurer to seek recovery from non-paying insurers would necessarily mean that *no* loan receipt designed for this purpose could ever be valid. That is clearly not the law. For example, in *Jostens*, query what was the additional consideration from the paying insurer (Wausau) to the insured (Jostens) that validated the loan receipt executed there? To the extent there was any additional "consideration," it was, as would be the case here, merely that the paying insurer would no longer resist its payment of defense costs. The same question could be asked of the numerous other cases subsequent to *Jostens*, none of which questioned the validity of a loan receipt between an insured and its insurer on consideration grounds.

Even if the contribution and subrogation rights acknowledged under Minnesota law are deemed merely inchoate until the formal execution of a loan receipt, the applicable language of Liberty Mutual's policies would still obligate Cargill to ensure that such a result obtains. After all, the applicable cooperation clause requires Cargill to "assist . . . 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." (CA. at 209) (Emphasis added). This language does not have a temporal element that limits Cargill's obligation to cooperate and assist until only after Liberty Mutual's own claim against a third party has fully accrued.

Likewise, Cargill's obligation to execute a loan receipt agreement with Liberty Mutual is not a "contract to enter into a contract," but rather is fully derivative of

policies' cooperation clauses should be limited because of some misperceived "conflict of interest," (*id.* at 20 n.5), are inaccurate and should be rejected. *See also infra*, at 31-32.

Cargill's obligations in the policies it entered into with Liberty Mutual. Cargill completely ignores the unequivocal fact that the language of the subrogation provisions in Liberty Mutual's policies expressly contemplates that Cargill will need to affirmatively "execute and deliver" documents that do not already exist (a loan receipt, clearly an "instrument and paper"), not to mention "do whatever else is necessary" so as to "secure" the right Liberty Mutual has to "be subrogated to all the insured's rights of recovery therefor against any person or organization." Cargill has not persuasively explained why such flexible terms should be completely read out of Liberty Mutual's policies, especially when courts are not permitted to simply ignore unambiguous policy terms. See *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 587 (Minn. 2003). Nor has Cargill even begun to explain how its refusal to execute a loan receipt can be reconciled with its clear contractual obligation to "do nothing after loss to prejudice such rights." Unsurprisingly, Cargill offers no case which has held that the same or a similar a subrogation clause is invalid because it requires future action on the part of the insured or somehow lacks consideration. That is because, to Liberty Mutual's knowledge, no such law exists. To the contrary, that is exactly what the unambiguous obligations of the subrogation provision in Liberty Mutual's policies require.

Indeed, the illogic of Cargill's position is inherent in the applicable holding of *Jostens* itself, which necessarily recognized that the loan receipt mechanism overcomes the several nature of an insurer's duty to defend, but only as to the liability *between insurers*. If *Jostens* did not accomplish this result, the question of whether a loan receipt alters the default rule of several liability would have been answered in the negative, and *Jostens would* have been able to cause Mission Insurance to pay for the entire cost of its

defense. This, of course, the Court refused to do. Rather, it recognized those insurers “arguably ha[ving] coverage at the time of the rejected defense tender” as being “equally liable for the insured’s defense costs.” *Jostens*, 387 N.W.2d at 167. In short, Cargill presents no compelling reconciliation of the blanket statement of several liability in *Iowa National* with the rulings of *Jostens*. It cannot do so, because Cargill improperly fails to recognize that *Wooddale* and *Jostens* clearly find as consistent the principles that, *as between an insured and its insurers*, the duty to defend is several for each insurer, but *as between the insurers* who refuse to voluntarily defend, they are equally liable for those defense costs.

Cargill also presents a number of poorly developed arguments (many in footnotes in its brief), all of which apparently attempt to ignore the foregoing law and the general facts of this case. For example, Cargill amazingly argues that the insurers who issued “fronted” policies are somehow *not* “liable” to Cargill for defense costs, such that the cooperation requirements in Liberty Mutual’s policies do not apply. (Cargill Br. at 20 n.5). This might come as a surprise to these insurers, all of whom *Cargill has named* as defendants in this action and against whom *Cargill has claimed* owe a duty to defend it in relation to the Underlying Actions and have breached that duty.

This same fact rebuts Cargill’s general allusion to “courts” having held that a “conflict of interest” between an insurer and its policyholder precludes application of a policy’s cooperation clause. (*Id.*). There is no conflict of interest, because Liberty Mutual is aligned with Cargill in the sense that *both* are alleging that Cargill’s other primary-level insurers are liable to Cargill for its defense costs. Moreover, the two cases Cargill cites for this proposition — one of which is an unpublished, federal district court

decision from New York — are readily distinguishable. All those cases did was apply the standard “anti-subrogation” rule, which provides that an insurer may not recover from its insured, or an employee/agent/tenant of the insured, the amount paid for the loss it explicitly agreed to assume in insuring the policyholder. *Nat. Cas. Co. v. Beth Abraham Hosp.*, No. 97 Civ. 8091 (LMM), 1999 WL 710780, at *5-6 (S.D.N.Y. Sept. 10, 1999); *St. Paul Cos. v. Van Beek*, 609 N.W.2d 256, 257 (Minn. Ct. App. 2000). The “conflict of interest” the courts spoke to was that of the insurer seeking liability against a person (*e.g.*, the insured-hospital’s own employee) for which the insured-hospital may be vicariously liable. In *Beth Abraham*, the court also expressly noted that the cooperation clause, with respect to contribution or indemnification actions, requires the insured’s assistance “in suits against third parties, *i.e.*, person other than the Hospital’s [*i.e.*, the insured’s] own employees.” *Id.* at *6. Here, Liberty Mutual is asserting claims against other third-party insurers of Cargill, entities that are not even remotely “Cargill” or its employees (or other additional insured under Liberty Mutual’s policies). Even more telling, Liberty Mutual’s pursuit of recovery from Cargill’s other insurers will do absolutely nothing to Cargill and Liberty Mutual’s shared interest in limiting Cargill’s liability in the Underlying Actions, the public policy concern to which the “anti-subrogation” rule truly applies.

Finally, Cargill’s citation to *Lubbers v. Anderson*, 539 N.W.2d 398 (Minn. 1995), and *Liberty Mutual Insurance Co. v. American Family Mutual Insurance Co.*, 463 N.W.2d 750 (Minn. 1990), to convey the notion that a loan receipt agreement involves complex settlements requiring substantial negotiations is both misplaced and unavailing. In fact, the Court in *Liberty Mutual* actually contrasted a loan receipt agreement from a settlement agreement. 463 N.W.2d at 756. In any event, neither case involved the almost

ministerial act involved here of executing a simple loan receipt as a condition to paying defense costs, so the paying insurer may pursue equal-share contribution against equally-liable insurers. (*Cf.* CA. at 52 (the district court's construction of a constructive loan receipt agreement)).

4. Prior Minnesota Case Law and Strong Public Policy Concerns Dictate that an Insured Should Be Required to Execute a Loan Receipt Agreement Upon Its Defending Insurer(s)' Request.

In addition to the contractual basis for this Court compelling a loan receipt agreement between Liberty Mutual and Cargill, a holding to the contrary would undermine several bedrock principles of Minnesota law. Based on the well-recognized policy considerations discussed above regarding both loan receipt agreements being a useful tool in settling insurance disputes and the equal allocation of defense costs among those insurers liable for a defense, the Minnesota Supreme Court clearly favors an insurance jurisprudence that equitably treats insurers while at the same time compensating insureds to the extent allowed under their respective policies. A rule that requires an insured to execute a loan receipt agreement on behalf of a defending insurer, in order for that insurer to protect its interests against non-defending insurers, is nothing more than an extension of Minnesota precedent regarding the allocation of defense costs among liable insurers.

In the Minnesota Supreme Court's recent decision in *Wooddale*, the Court briefly reiterated the *Iowa National* rule but with the caveat that a loan receipt agreement alleviates the severe effect of the rule on defending insurers. 722 N.W.2d at 302. Although the facts in *Wooddale* involved neither a loan receipt agreement nor application of the *Iowa National* rule (the latter of which was waived by agreement of the insurers),

the Court extended its past policy rationale regarding allocation of defense costs among insurers to the novel facts presented. *See id.* at 302-04 & n.15. The Court chose to apportion defense costs equally among the defending insurers in that case and, in so doing, relied on many of the same public policy considerations that it had previously articulated in *Jostens*. *See id.* at 302-04. These same public policy considerations naturally extend to a rule that an insured must execute a loan receipt agreement upon a defending insurer's request.

First, in *Wooddale*, the Court observed that:

allowing an insured to seek recovery of defense costs from any insurer, but making insurers equally liable among themselves, "will encourage [the] insurers, when tendered a defense, to resolve promptly the duty to defend issue either by some cooperative arrangement between them, or by a declaratory judgment action, or by some other means."

Id. at 303 (quoting *Jostens*, 387 N.W.2d at 167). The Minnesota Supreme Court clearly favors equal liability among insurers with a duty to defend. While equally apportioned liability encourages liable insurers to resolve disputes over the duty to defend expediently among themselves, it also eviscerates any incentive an insurer with an arguable duty to defend has to avoid undertaking an insured's defense, in a hope of escaping all liability. Requiring an insured to execute a loan receipt agreement achieves the same ends. If loan receipt agreements are required, insurers who honor their obligations to defend the insured will have definite recourse against any recalcitrant, non-defending insurers, who may otherwise believe they have something to gain by avoiding litigation. Consequently, any incentive such non-defending insurers might have to avoid litigation, such as hoping to take advantage of the harsh effects of a broad reading of the *Iowa National* rule —

which presumably was not adopted for the benefit of recalcitrant insurers — is gone. *See id.* at 303-04 (“no insurer will benefit from delaying or refusing to undertake a defense”) (quoting *Jostens*, 387 N.W.2d at 167).

With no incentive to remain in the background, all insurers with an arguable duty to defend have an incentive to collaborate and resolve coverage issues quickly. This would obviate the concern the Minnesota Supreme Court expressed in both *Wooddale* and *Jostens* of fashioning a rule that would encourage a “wait and see” attitude among insurers with an arguable duty to defend. *Id.* at 303; *Jostens*, 387 N.W.2d at 167. If an insured is required to sign a tendered loan receipt agreement, any insurer with an arguable duty to defend, regardless of how minimal it believes its portion of the defense costs might be based on the insured’s other policies, could immediately undertake defense upon the insured’s tender, because the insurer is guaranteed recourse against any insurer who chooses not to defend.

Therefore, a rule that requires an insured to execute a loan receipt agreement on behalf of a defending insurer advances and resolves each of the public policy concerns animating the Minnesota Supreme Court in *Wooddale* and *Jostens* regarding multiple insurers sharing a duty to defend an insured. The rule also adheres to the admonition in *Jostens*, which was invoked again by the Court in *Wooddale*, that the insurer who is liable for an insured’s defense costs should not be determined by “the whim or caprice of the insured,” especially when multiple insurers each have a duty to defend the insured at the time the defense is needed. 387 N.W.2d at 167. The question of who defends need no longer depend on the insured’s “whim or caprice.”

To see why such a rule would work consistent with the foregoing considerations, one need only look to this case. Liberty Mutual and other insurers did precisely what *Jostens* and *Wooddale* instructed and agreed to defend Cargill under their respective reservations of rights within a matter of a few months after this action was commenced so long as they could ensure their ability to seek reimbursement from other liable insurers. Cargill simply would not accept this offer for the same reasons it continues to refuse to execute a loan receipt agreement.¹⁴

In all, mandatory loan receipt agreements work for the benefit of both insurers and the insured: Insurers know that any other insurers with a duty to defend will pay their fair share of costs, while the insured knows that its defense will be immediately undertaken.

5. Liberty Mutual Has Properly Invoked the “Other Insurance” Clauses in the Applicable Insurance Policies to Support Its Arguments.

Cargill argues that the “other insurance” clauses in Liberty Mutual’s policies and in the policies issued by the other primary-level insurers do not create a right of

¹⁴ If Liberty Mutual is given a genuine loan receipt that permits it to seek equal shares of defense costs from Cargill’s other primary-level insurers, then Liberty Mutual will pay, subject to its deductible provisions, Cargill fully for all reasonable and necessary defense costs. However, Liberty Mutual is not required to potentially prejudice its rights by making such payment *before* Cargill gives it a loan receipt. The fact that Cargill has not yet collected any defense costs is due directly to its own decisions, first, not to agree to Liberty Mutual’s offered loan receipt (and accept Liberty Mutual’s payments) and, second, not to continue to seek payment (at least through a court judgment) from its other primary-level insurers. Cargill is not permitted to use its own improper refusal to grant a loan receipt as a basis for then saying that it “has been forced to defend itself,” (Cargill Br. at 7), it has not been paid, or that Liberty Mutual has breached its duty to defend.

contribution under Minnesota law. (Cargill's Br. at 16-18).¹⁵ Cargill's argument here does not join issue because it attempts to prove too much. Liberty Mutual has not argued that "other insurance" clauses *alone* create a right to contribution. However, what is salient to the issues at hand is that the "other insurance" clauses of all of the primary insurers — which Cargill does not dispute are mutually repugnant — represent a recognition by Cargill (and each of its primary insurers) at the time of contracting that, as between insurers, each is equally liable for defense costs.¹⁶ Moreover, this language is completely consistent and in full harmony with the acknowledgement under Minnesota law that insurers who share a duty to defend an insured are, *as between themselves*, "equally liable." *Jostens*, 387 N.W.2d at 167; *Wooddale*, 722 N.W.2d at 302-03.

6. The Issue of Cargill's Obligation to Execute a Loan Receipt Is a Novel Issue Under Minnesota Law and Is Peculiar to Minnesota's Law in the Domain of Insurance Defense Cost Jurisprudence.

As much as Cargill protests that there are no Minnesota cases directly stating that Cargill is required to execute a loan receipt agreement upon its paying insurer's request (so as to secure that insurer's recovery from other equally liable insurers), Cargill itself cannot cite to any case stating the contrary. This said, Liberty Mutual, unlike Cargill, has explained herein why existing principles in Minnesota insurance jurisprudence fully support a conclusion that an insured is obligated, upon its paying insurer's request, to

¹⁵ Paragraph 6 of the "Conditions" Section of the Liberty Mutual policies expressly states that all such applicable policies that provide for contribution by equal shares will share equally the cost of a covered loss. (*See* CA. at 309).

¹⁶ Cargill contends that the "other insurance" provisions in the Liberty Mutual policies relate solely to indemnity of settlements or judgments. (Cargill Br. at 18). However, no such limitation is found in the "other insurance" clause of those policies.

execute a loan receipt (or that such a loan receipt be constructively recognized) so as to secure that insurer's rights to equitable contribution from other, equally liable insurers.

It is also worth noting that a survey of other states' laws in this area is of little utility to a resolution of these issues. Minnesota is unique in its adoption of a "hybrid" rule that, at one level, apparently states that an insurer who chooses to undertake a defense of its insured cannot seek relief from other insurers because an insurer's obligation to defend is several, while, at another level, if a loan receipt exists, the rule is that all insurers with an arguable duty to defend at the time of tender are equally liable for the insured's defense costs. *See generally*, Allan D. Windt, *Ins. Claims & Disputes: Representation of Insurance Companies & Insureds* 4th ed. § 10:17 n.1 ("In Minnesota, unlike most states, one insurer is not allowed to sue another insurer for contribution with regard to defense costs that have been paid. The same result, however, can be obtained by the use of a loan receipt.") (citation omitted). In fact, in the minority of states that have adopted a rule akin to Minnesota's *Iowa National* rule, some courts have come out the opposite of the holding in *Jostens*, directly stating that they will *not* allow the fiction of a loan receipt to enable contribution claims between insurers. *See Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 236 S.E.2d 818, 820-21 (S.C. 1977). Minnesota's uniqueness on this issue explains why any non-Minnesota case suggesting that an insurer making payments pursuant to a loan receipt does not become subrogated, (Cargill Br. at 22-23), is of little consequence under Minnesota law. In fact, the "hybrid" nature of Minnesota's rule is what *requires* that an insured, upon request, execute a loan receipt so as to enable its paying insurer to seek reimbursement of equal shares.

B. Even If Cargill Refuses to Execute a Loan Receipt and a Constructive Loan Receipt Is Not Recognized, Liberty Mutual Still Should Have the Right to Recover an Equitable Share of Any Defense Costs It Pays to Cargill from Other Primary-Level Insurers with a Duty to Defend Cargill in the Underlying Actions.

Even in the absence of a loan receipt from Cargill (whether actually signed by Cargill or constructively recognized by the Court), the district court correctly held that Liberty Mutual should still be able to seek reimbursement from the other primary insurers that have a duty to defend Cargill in the Underlying Actions.¹⁷ This result should obtain on the basis of two alternative grounds, both relating to the *Iowa National* rule that would otherwise seemingly preclude this holding.

1. The *Iowa National* Rule is Inapplicable to the Facts of this Case.

The rule established by *Iowa National*, as properly understood, does not govern Liberty Mutual with respect to any payments it has attempted to make to Cargill or will make to Cargill at a later date, even if by virtue of a judgment in this action. Cargill is absolutely correct that, whenever Liberty Mutual has tendered any payment of Cargill's defense costs in the Underlying Action, it has *always* made any payment contingent on Cargill executing the loan receipt agreement. Liberty Mutual did this precisely because it viewed any payment made without obtaining a loan receipt agreement from Cargill as, under the *Iowa National* rule, potentially destroying its ability to otherwise obtain

¹⁷ Liberty Mutual has never believed that Cargill has standing to make the argument it is advancing on the ability of Liberty Mutual to seek contribution and/or subrogation claims from Cargill's other primary-level insurers. Liberty Mutual's ability to seek recovery of any defense costs paid by it to Cargill is a claim against those insurers, *not* Cargill. Cargill's presumption that it can (or needs to) argue on the behalf of parties that it has named as defendants in this case and sued for breach of the duty to defend is merely reflective of the overall infirmity of Cargill's arguments.

repayment of an equal-shares portion of those defense costs from other primary-level insurers.

So far as can be discerned by the Minnesota cases applying the *Iowa National* rule, it applies *only* when an insurer voluntarily “agrees” to defend, or “undertakes” a defense of, an insured, not, as here, where no insurer undertakes the defense of the insured and the insured then chooses which insurer to recover from through a court judgment. In *Jostens*, the Court deliberately noted that, in the cases having applied the *Iowa National* rule, “one of the two reluctant insurers *nevertheless overcame its reluctance and accepted tender* of the insured’s defense, and *then* later tried to recover its defense costs from the other insurer. In our case here, neither insurer undertook the insured’s defense.” *Jostens*, 387 N.W.2d at 166-67 (emphasis added). No case has applied the rule in circumstances where the insurer has agreed to defend under a reservation of rights, demanded a loan receipt, that request was refused by the insured, and the insured later obtained an judgment commanding that insurer to pay all of its defense costs without any “back-end” right of contribution and/or subrogation from equally liable insurers.

Even in *Andrew L. Youngquist, Inc. v. Cincinnati Insurance Co.*, 625 N.W.2d 178 (Minn. Ct. App. 2001), perhaps the closest case to this scenario (and a case cited by Cargill), the circumstances were materially different. In *Youngquist*, the injured party’s (Birtcher’s) own insurer (Reliance) had reimbursed it for the applicable loss and Birtcher later brought claims to collect on other insurance that was available to it under a subcontracting agreement with another party. *Id.* at 185-87. The court disallowed Birtcher’s attempted recovery from the second insurer on behalf of Reliance on the

grounds that no loan receipt agreement existed between Birtcher and Reliance. *Id.* at 187. However, there is no mention anywhere in the decision of Reliance having demanded a loan receipt from Birtcher; in fact, the conduct of Birtcher suggests it *was intending* to benefit Reliance, and that it would have agreed to such an arrangement, but the two simply failed to meet this formality.

Meanwhile, in *Domtar*, a case decided 30 years after *Iowa National*, an insurer (Continental) had denied coverage of an environmental insurance coverage claim and refused to defend, was then sued by the insured, and was ultimately held liable by judgment for the insured's defense costs. 563 N.W.2d at 729-30. In responding to Continental's argument that it should not bear all of the defense cost of its insured given that the insured had also sought those costs from another insurer, the Court made absolutely no mention of the *Iowa National* rule (or a loan receipt for that matter), but rather referenced *Jostens'* statement that, as between insurers that both have arguable coverage, they are equally liable, and concluded that "Continental's remedy, if any, is to seek contribution from Canadian General [*i.e.*, the other insurer]." *Id.* at 739. These circumstances are entirely applicable to Liberty Mutual's position in this case.

Cargill weakly downplays the *Domtar* Court's invitation for an insurer that is forced to pay more than its equitable share of defense costs to seek contribution from another, equally liable insurer. (See Cargill Br. at 16).¹⁸ Under Cargill's view, the Court

¹⁸ While Cargill states that "[n]either the district court in its memorandum opinion or 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," (Cargill Br. at 16), *Domtar* recognized just such a right. Both the district court and Liberty Mutual had cited to *Domtar* for that proposition before Cargill's made this assertion in its Brief in this Court.

in *Domtar* was encouraging a party to pursue a frivolous claim (or at least one that could not survive a motion to dismiss). It is doubtful the Supreme Court was doing that, especially if the *Iowa National* rule that Cargill claims is dispositive of the issues in this case would invariably defeat such claim. *Domtar* correctly recognizes that an insurer who is required to pay all of the insured's defense costs has a remedy, *i.e.*, contribution, because that remedy is consistent with well-established Minnesota law that "*as between the insurers, there is equal liability for defense costs,*" and is fully supported by ensconced equitable principles. *Wooddale*, 722 N.W.2d at 302-03; *Jostens*, 387 N.W.2d at 167.

Consistent then with Minnesota law, Liberty Mutual submits that, if Cargill succeeds, Liberty Mutual will be compelled to pay defense costs under a court order/ judgment, not through a "voluntary" agreement, especially when the sole reason why it will not pay defense costs is because Cargill, its insured, refuses to execute a loan receipt agreement. Accordingly, in no instance will Liberty Mutual "overcome its reluctance and accept tender of [Cargill's] defense," absent Cargill's sudden change of heart on signing a loan receipt. Therefore, *Iowa National* does not preclude Liberty Mutual's right to seek repayment from other equally liable insurers consonant with the principles in *Wooddale* and *Jostens*.¹⁹

¹⁹ As the district court aptly noted, *Iowa National* can be further distinguished on its facts on the basis that the case involved priority between two insurers who insured different insured entities, (CA. at 49-50, ¶¶ 16-18), unlike here, where the multiple primary-level insurers all insured the same entity and the same risks over successively-issued policies spanning decades.

2. Alternatively, the *Iowa National* Rule Does Not Retain any Continuing Vitality, and an Insurer that Makes Payments to an Insured for Defense Costs under a Liability Insurance Policy Should Not Be Precluded from Seeking Reimbursement from Other Insurers Equally Liable for those Defense Costs.

While the *Iowa National* rule continues to be mentioned in cases involving an insurer's payment of defense costs when other insurers also have duties to defend the insured, the soundness of its rationale has eroded through the years. Decided over 40 years ago, the case was based on a straight-forward application of principles of privity of contract. As stated by the Court in *Jostens*, "[t]he 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 protecting its own interests and is only doing what it agreed and was paid a premium to do." 387 N.W.2d at 166. The rationale for the rule is questionable, especially given the countervailing policy considerations discussed earlier in this Brief in the context of whether an insured should be required to execute a tendered loan receipt.

First, although the *Jostens* Court strove to reconcile the *Iowa National* rule, there is a fair argument that the rule is actually antithetical to the holding and spirit of the *Jostens* decision. As explained above, the Court in *Jostens*, while acknowledging the *Iowa National* rule, rejected an effort by the insured simply to choose one of two equally liable insurers to pay all of the costs it incurred in defending against a claim. *Id.* at 167. It did so precisely because it did not want to fashion a rule that encourages insurers to adopt a "wait and see" attitude while leaving the insured to defend itself. *Id.* A rule of law that discourages an insurer to undertake the defense of an insured voluntarily — as *Iowa National* most assuredly does — is inconsistent with this goal.

Second, a number of appellate cases since 1967 have either altogether ignored the *Iowa National* rule in their pronouncements or have questioned the perverse incentives of the rule. In the first category sits the *Domtar* case, which was discussed above. Meanwhile, other cases have openly questioned the wisdom of the rule, reasoning cogently that it provides for an undesirable incentive to insurers not to defend at the outset and it is unjust to the insurer actually paying for a defense. In *Redeemer Covenant Church*, the court reluctantly affirmed the trial court's holding as to one insurer who, because it did not have a loan receipt agreement in place with the insured, could not recover any of its defense costs from another, non-defending insurer, all pursuant to *Iowa National* and its progeny. 567 N.W.2d at 82 n.16. The court commented that it agreed with the trial court's "observation that precluding an insurer who defends from bringing an action against a non-defending insurer absent a loan agreement may reward insurers for refusing to defend." *Id.* Similarly, the court in *Youngquist* found criticism of the *Iowa National* rule "appealing," in that the rule "serve[s] to reward Cincinnati's breach by punishing insurers, like Reliance, who live up to their contractual obligation" and does not prevent "one insurer [from] profit[ing] from its wrongful failure to defend while another insurer is punished for performing its duty." 625 N.W.2d at 187. Put differently, the effect of the *Iowa National* rule is essentially the same as that of a rule whereby an insured is *not* obligated to execute a loan receipt agreement upon the defending insurer's request, and it is subject to the same criticisms discussed in Section IV.A.4, *supra*. In particular, it seems at odds with the admonition in both *Wooddale* and *Jostens* that "the best approach . . . is to have a rule that encourages insurers to 'resolve promptly the duty to defend issue.'" *Wooddale*, 722 N.W.2d at 303 (quoting *Jostens*, 387 N.W.2d at 167).

As a final consideration, the Court's basic logic for the rule seems somewhat flawed. After all, there is no contractual privity between an insurer of a victim and the tortfeasor who caused the victim's injuries either. Yet Minnesota law, as elsewhere, plainly recognizes that the insurer who pays for the victim's injuries becomes subrogated to the rights of the victim-insured, such that the insurer can pursue recovery directly from the tortfeasor. See *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997); *Travelers Indem. Co. v. Vaccari*, 245 N.W.2d 844, 846 (Minn. 1976). While it is true that, in these circumstances, the third party's liability sounds in tort, unlike the contractual basis for another insurer's duty to defend, in both instances the paying insurer and the third party share a liability to the insured related to the same loss. In fact, in the context of one or more insurers with concurrent duties to defend, they share the exact same type of liability to the same party (the insured) and, in that sense, are seemingly jointly and severally liable, as even Cargill reflexively referred to as the nature of their relationship in its summary judgment briefing, (*see* CA. at 59-60, 66-67).

V. CONCLUSION

For all of the reasons stated herein, Liberty Mutual respectfully submits that the District Court's Amended Order for Summary Judgment be AFFIRMED, thereby GRANTING Liberty Mutual's Motion for Partial Summary Judgment, and DENYING Cargill's Motion for Partial Summary Judgment.

Dated: September 25, 2008

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CERTIFICATION

The undersigned hereby certifies that this brief conforms to the requirements contained in Minnesota Rule of Civil Appellate Procedure 132.01 in that: (a) the brief complies with the typeface requirements of said rule, and (b) the length of this brief is 13,977 words, as automatically generated through the "word count" function of the Microsoft Word 2003 word-processing software program used to prepare the brief.

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