

NO. A08-1082

7

State of Minnesota
In Supreme Court

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 AND ADDENDUM**

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. Mielenhausen (#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)*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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

STATEMENT OF ISSUE..... 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS..... 5

 A. THE UNDERLYING ACTIONS..... 5

 B. LIBERTY MUTUAL’S INSURANCE POLICY, AND REPUDIATION
 OF ITS SEVERAL AND INDIVIDIBLE DEFENSE OBLIGATION 7

 C. THIS COVERAGE ACTION, AND LIBERTY MUTUAL’S INSISTENCE
 ON A NON-NEGOTIABLE, PREJUDICIAL LOAN RECEIPT
 “AGREEMENT” 8

 D. LIBERTY MUTUAL’S REJECTION OF A PROPOSED LOAN-RECEIPT
 AGREEMENT THAT WOULD HAVE BENEFITED IT WHILE NOT
 PREJUDICING ITS POLICYHOLDER 10

 E. THE DISTRICT COURT’S ORDER..... 11

 F. THE COURT OF APPEALS’ DIVIDED OPINION 12

ARGUMENT 14

 A. UNDER THE POLICY, LIBERTY MUTUAL OWES CARGILL A
 COMPLETE DEFENSE 16

 B. LIBERTY MUTUAL IS NOT ENTITLED TO RECOVER FROM OTHER
 INSURERS WITHOUT A LOAN RECEIPT AGREEMENT 19

 C. CARGILL CANNOT BE FORCED TO ENTER INTO A LOAN RECEIPT
 AGREEMENT 23

 1. The Cooperation Clause Does Not Require Cargill To Enter Into A
 Loan Receipt Agreement..... 23

 2. The Subrogation Clause Does Not Require Cargill To Enter Into A
 Loan Receipt Agreement..... 26

 3. The Duty Of Good Faith And Fair Dealing Does Not Require Cargill
 To Enter Into A Loan Receipt Agreement 29

 4. Requiring Cargill To Enter Into A Loan Receipt Settlement Agreement
 Is Inimical To Basic Principles Of Contract Law 32

 a. Courts Can Only Enforce Contractual Terms On Which Parties
 Actually Agree 32

 b. Parties Cannot Contract To Enter Into A Contract 33

 c. A Loan In Lieu Of Providing A Defense Is Not Consideration..... 35

D. THE PUBLIC POLICY BEHIND THIS COURT'S *IOWA NATIONAL* RULE
REQUIRES LIBERTY MUTUAL TO PROVIDE CARGILL A COMPLETE
DEFENSE AND THE DOCTRINE SHOULD NOT BE NULLIFIED ... 36

CONCLUSION.....43

TABLE OF AUTHORITIES

	Page(s)
<i>168th & Dodge, LP v. Rave Reviews Cinemas, LLC</i> , 501 F.3d 945 (8th Cir. 2007)	4
<i>Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.</i> , 625 N.W.2d 178 (Minn. Ct. App. 2001).....	20, 21
<i>Blair v. Espeland</i> , 231 Minn. 444, 43 N.W.2d 274 (Minn. 1950).....	28, 30
<i>Cady v. Bush</i> , 283 Minn. 105, 166 N.W.2d 358 (Minn. 1969).....	31
<i>City of Minneapolis v. Ames & Fischer Co. II, LLP</i> , 724 N.W.2d 749 (Minn. Ct. App. 2006).....	32, 33
<i>Continental Cas. Co. v. Reserve Ins. Co.</i> , 307 Minn. 5, 238 N.W.2d 862 (Minn. 1976).....	31
<i>Deli v. Hasselmo</i> , 542 N.W.2d 649 (Minn. Ct. App. 1996).....	35, 36
<i>Domtar, Inc. v. Niagara Fire Ins. Co.</i> , 563 N.W.2d 724 (1997)	1, 17, 19
<i>Druar v. Ellerbe & Co.</i> , 222 Minn. 383, 24 N.W.2d 820 (Minn. 1946).....	33
<i>E.J. Baehr v. Penn-O-Tex Oil Corp.</i> , 258 Minn. 533, 104 N.W.2d 661 (Minn. 1960).....	35
<i>Fleeger v. Wyeth</i> , No. A08-2124, 2009 WL 2778211 (Minn., Sept. 3, 2009)	38
<i>Franklin v. Carpenter</i> , 309 Minn. 419, 244 N.W.2d 492 (Minn. 1976).....	35
<i>Growers Refrigeration Co., Inc. v. Pacific Electrical Contractors, Inc.</i> , 996 P.2d 521 (Or. Ct. App. 2000)	28
<i>Home Ins. Co. v. National Union Fire Ins. Co.</i> , 658 N.W.2d 522 (Minn. 2003)	20, 21, 38

<i>In re Hennepin Co. 1986 Recycling Bond Litig.</i> , 540 N.W.2d 494 (Minn. 1995)	29, 30
<i>Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.</i> , 276 Minn. 362, 150 N.W.2d 233 (Minn. 1967).....	<i>passim</i>
<i>Johnson v. City of Shorewood</i> , No. A03-621, 2004 WL 193212 (Minn. Ct. App. Feb. 3, 2004).....	35
<i>Johnson v. Johnson</i> , 228 Minn. 282, 284, 37 N.W.2d 1 (Minn. 1949).....	23, 24
<i>Jostens, Inc. v. CNA Ins.</i> , 336 N.W.2d 544 (Minn. 1983)	17, 18
<i>Jostens, Inc. v. Mission Ins. Co.</i> , 387 N.W.2d 161 (Minn. 1986)	1,5,13,17,19, 22,27,28,37,38,39, 40,41,42
<i>Juvland v. Plaisance</i> , 255 Minn. 262, 96 N.W.2d 537 (Minn. 1959).....	23
<i>Liberty Mut. Ins. Co. v. American Family Mut. Ins. Co.</i> , 463 N.W.2d 750 (Minn. 1990)	21, 22, 30
<i>Lubbers v. Anderson</i> , 539 N.W.2d 398 (Minn. 1995)	21
<i>Meadowbrook, Inc. v. Tower Ins. Co.</i> , 559 N.W.2d 411 (Minn. 1997)	18
<i>Minneapolis League of Catholic Women v. Schafhausen</i> , 162 Minn. 165, 202 N.W. 705 (Minn. 1925).....	33
<i>NAD, Inc. v. Eighth Judicial Dist. Court</i> , 976 P.2d 994 (Nev. 1999).....	28
<i>Nordby v. Atlantic Mut. Ins. Co.</i> , 329 N.W.2d 820 (Minn. 1983)	17, 20,25, 38
<i>Richie Co., LLP v. Lyndon Ins. Group, Inc.</i> , 316 F.3d 758 (8th Cir. 2003)	34
<i>Shepard v. Carpenter</i> , 54 Minn. 153, 55 N.W. 906 (Minn. 1893).....	33, 34

Short v. Dairyland Ins. Co.,
334 N.W.2d 384 (Minn. 1983) 31

St. Paul Fire & Marine Ins. Co. v. Ruddy,
299 F. 189 (8th Cir. 1924) 33

St. Paul School Dist. No. 625 v. Columbia Transit Corp.,
321 N.W.2d 41 (Minn. 1982) 20, 25, 27

Sterling Capital Advisors, Inc. v. Herzog,
575 N.W.2d 121 (Minn. Ct. App. 1998)..... 31

Tony Eiden Co. v. State Auto Prop. & Cas. Ins. Co.,
No. A07-2222, 2009 WL 233883 (Minn. Ct. App. Jan. 26, 2009) 21

Warner v. Krage Agency,
No. CX-99-293, 1999 WL 618993 (Minn. Ct. App. Aug. 17, 1999)..... 33

Westendorf v. Stasson,
330 N.W.2d 699 (Minn. 1983) 28

Wooddale Builders, Inc. v. Maryland Cas. Co.,
722 N.W.2d 283 (2006)..... 1,10,17,19, 21, 22, 37, 38, 39, 40, 41, 42

I. STATEMENT OF ISSUE

Whether lower courts may circumvent this Court's *Iowa National* rule and abrogate a liability insurance policyholder's right to a complete, several and indivisible defense by forcing the policyholder to enter into a new contract – a non-negotiable loan receipt settlement agreement – that will substantially prejudice the policyholder's interests.

The Court of Appeals held that the district court has the authority to impose such a new contract on the insured.

Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co., 276 Minn. 362, 150 N.W.2d 233 (Minn. 1967); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161 (Minn. 1986); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997); *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283 (Minn. 2006).

II. STATEMENT OF THE CASE

Cargill, Inc. and Cargill Turkey Production, L.L.C. (together, "Cargill") appeal from the May 26, 2009 opinion of the Court of Appeals (the "Opinion," Add. 5-25), holding that the district court had the authority to compel Cargill to enter into a loan receipt "agreement" with non-negotiable terms unilaterally dictated by the district court. That holding is a radical departure from cases in which this Court has repeatedly held that a comprehensive general liability ("CGL") insurer owes its policyholder a complete, several, and indivisible defense; that, absent a loan receipt settlement agreement between a defending insurer and its policyholder, the insurer is not entitled to recover its costs

from other insurers; and that courts may not alter the terms of a bargained-for contract by forcing parties to negotiate or accept new terms that were not part of their agreement.

Cargill is a defendant in a lawsuit instituted by the State of Oklahoma alleging property damage, and in several lawsuits filed by individuals in Arkansas alleging bodily injury, relating to poultry litter allegedly emanating from Cargill's historical turkey operations (the "Underlying Actions"). The defendant insurers in this action (the "Insurers") issued insurance policies that require them to defend and/or indemnify Cargill in the Underlying Actions. None of the Insurers that issued a policy containing a duty to defend ("Duty to Defend Insurers") unconditionally agreed to defend Cargill or fully pay Cargill's past and future costs in defending itself in the Underlying Actions, so Cargill commenced this coverage action.

After settlement discussions between Cargill, Liberty Mutual, and several other insurers failed, Cargill selected Liberty Mutual to fulfill its duty to provide a complete and indivisible defense, as required by its CGL insurance contract and *Iowa National*. Although Liberty Mutual acknowledged its duty to defend, it refused to pay Cargill's defense costs in full unless Cargill signed a new contract unilaterally drafted by Liberty Mutual – a loan receipt settlement agreement with terms prejudicial to Cargill. Liberty Mutual also 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 settlement agreement.

A loan receipt agreement is a contract used in the settlement of insurance coverage disputes between an insurer and policyholder. Under the specific terms and for the consideration negotiated in such a settlement, an insurer advances funds that a policyholder contends the insurer is obligated to pay, while the insurer gains an ability to pursue and recover some of those funds from third parties in the policyholder's name. The loan receipt settlement allows the insurer to step into the policyholder's shoes and pursue only those rights that the policyholder specifically and voluntarily assigns.

Here, Cargill refused to sign Liberty Mutual's proposed form of loan receipt agreement because doing so may allow Liberty Mutual to seek recovery from policies with deductibles, retrospective premiums, and other terms that would ultimately result in Cargill paying significant portions of the full and indivisible defense owed by Liberty Mutual.

Cargill filed a motion for partial summary judgment seeking a declaration that Cargill is entitled to select Liberty Mutual to exclusively and fully defend Cargill in the Underlying Actions; that Liberty Mutual has no right of recovery from Cargill's other Duty to Defend Insurers absent a loan receipt agreement; that Cargill has no obligation to enter into a loan receipt settlement agreement with Liberty Mutual; and that with or without such an agreement, Liberty Mutual could not seek defense costs directly or indirectly from Cargill. Liberty Mutual filed a cross-motion for summary judgment against Cargill on substantially the same issues.

The district court denied Cargill's motion and entered partial summary judgment in favor of Liberty Mutual, holding, contrary to this Court's precedent, that Liberty

Mutual does not need a loan receipt agreement in order to obtain contribution from Cargill's other insurers. (Add. 26-46). The district court further stated that, in the alternative, had it not ordered contribution without a loan receipt agreement, it would have imposed on Cargill an unprecedented "constructive loan receipt agreement" under terms, drafted by the district court, to which Cargill never agreed. (Add. 42, 45-46).

Subsequently, the district court modified its order and certified for appellate review, as important and doubtful, the question of whether a court can "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." (Add. 66-67).

In the Opinion under review here, a divided Court of Appeals answered the certified question in the affirmative. (Add. 6). In an initial holding that Cargill does not fault, the majority held that because co-primary liability insurers with the duty to defend are not in contractual privity with one another, they cannot obtain contribution from one another unless the insured enters into a loan receipt agreement with the insurer seeking contribution. (Add. 13-16). In so holding, the majority necessarily recognized that the controlling authority on this issue is this Court's ruling in *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*, 276 Minn. 362, 150 N.W.2d 233 (Minn. 1967) and its progeny, and that Liberty Mutual's attempts to distinguish *Iowa National* were without merit.

Despite its acknowledgement of this Court's *Iowa National* rule, the majority further held, based largely on undefined "principles of good faith and fair dealing" and

public policy reasons purportedly underlying *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161 (Minn. 1986), that courts may compel an insured to enter into a “neutral loan receipt agreement that equitably apportions liability between primary insurers.”

(Add. 16-19). This holding – which is without support in any contractual language or in *Jostens* or any case decided by this Court, and which effectively eviscerates this Court’s *Iowa National* rule – is the focus of the present appeal.

Judge Larkin, dissenting from the Opinion, would have adhered to the holding of *Iowa National* and therefore answered the certified question in the negative. (Add. 21-25). The dissent would have held that it “is inappropriate for the district court to impose a loan-receipt agreement when the parties’ contract does not require one” and that “[a]bsent such an agreement, Liberty Mutual is not entitled to contribution.” (Add. 25).

Cargill petitioned for review of the Opinion, and Liberty Mutual petitioned for cross-review. This Court granted both petitions in an order dated August 11, 2009. (Add. 1-4).

III. STATEMENT OF FACTS

A. THE UNDERLYING ACTIONS.

In June and August 2005, the State of Oklahoma filed a complaint and amended complaint against Cargill and others in the United States District Court for the Northern District of Oklahoma (the “Oklahoma Lawsuit”). (Appx. 11-88). The amended complaint asserts that Cargill is among the “Poultry Integrator Defendants,” which are allegedly responsible for damage or injury to the Illinois River Watershed including the biota, lands, waters, and sediments therein (Appx. 52, at ¶¶ 13-14), resulting from

historical poultry operations in the region. (Appx. 56, 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. (Appx. 46-88, *passim*).

Cargill has also been named as a defendant in at least eight nearly identical lawsuits filed in the Circuit Court of Washington County, Arkansas (the “Arkansas Lawsuits”) relating to its historical poultry operations. (*See, e.g.*, First Amended Complaint in *Ginger L. Belew et al. v. Alpharma Inc. et al.*, Appx. 89-138). Cargill and others are alleged to have been: (1) poultry producers involved in the growth and production of eggs, chicks, and chickens (*e.g.*, Appx. 98-99, at ¶ 40); (2) involved in the production of poultry (*e.g.*, Appx. 99, at ¶ 41); and (3) manufacturers of their own feed formula (*e.g.*, Appx. 101, at ¶ 46). The Arkansas Lawsuits further allege that the feed formulas have contained high concentrations of organic arsenic, and that “[t]he arsenic passes through the chickens into the litter.” (*E.g.*, Appx. 98, at ¶ 38; Appx. 101, 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.*, Appx. 102, at ¶ 53; Appx. 124-25, at ¶ 130).

Cargill timely notified Liberty Mutual and other Duty to Defend Insurers of the Oklahoma and Arkansas Lawsuits, but no Insurer unconditionally agreed to accept its several and indivisible obligation to defend Cargill and pay Cargill’s defense costs in full. (Appx. 204-07; February 14, 2007 Complaint for Declaratory Judgment and Other Relief (“Cargill Complaint”), pp. 21, 23, ¶¶ 85, 86, 92-94). Cargill has therefore incurred

significant fees and costs over the past four years in defending itself against the Underlying Actions. (*Id.*). These Underlying Actions are currently ongoing and Cargill will necessarily incur additional defense costs. (*Id.*)

B. LIBERTY MUTUAL'S INSURANCE POLICY, AND REPUDIATION OF ITS SEVERAL AND INDIVISIBLE DEFENSE OBLIGATION.

Liberty Mutual issued CGL Policy number LG1-641-004010-049, effective June 1, 1969 to June 1, 1972, to Cargill (the "Policy"). (Appx. 139-99). The Policy contains the following standard insuring agreement and duty-to-defend 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,*

(Appx.139, at § I, emphasis added).

Liberty Mutual contends the Policy contains provisions that obligate Cargill to enter into a loan receipt settlement agreement, although in fact they say nothing directly or even indirectly about any such obligation (*see infra*, Argument section, Point C).

Specifically, the cooperation provision of the Policy provides:

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; . . .*

(Appx. 142, at § VII, 4 (c), emphasis added).

The subrogation provision of the Policy provides:

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.

(Appx. 142, at § VII, 7, emphasis added).

Cargill notified Liberty Mutual of the Underlying Actions in September 2005.

(Appx. 200). In response, Liberty Mutual agreed only “to *participate* in the defense of Cargill” and only to “*pay its share* of reasonable and necessary defense costs.” (Appx. 204, emphasis added). Liberty Mutual refused to fully undertake Cargill’s defense in the Underlying Actions.

C. THIS COVERAGE ACTION, AND LIBERTY MUTUAL’S INSISTENCE ON A NON-NEGOTIABLE, PREJUDICIAL LOAN RECEIPT “AGREEMENT.”

Cargill commenced this coverage action in February 2007, alleging claims against multiple insurance carriers for declaratory relief and breach of contract in connection with the Underlying Actions. (Cargill Complaint, *passim*). The coverage action was bifurcated, with Phase I relating only to the duty to defend. Cargill, Liberty Mutual, and several other Insurers were unable to reach agreement on defense issues. Thereafter, on May 8, 2007, Liberty Mutual sent a letter to Cargill recognizing its duty to defend, but asserting a full reservation of rights and agreeing to pay only those past defense costs that it and other insurers would, upon review, unilaterally deem to be “reasonable and necessary” (despite having failed to defend Cargill). (Appx. 206). Moreover, in this

letter, Liberty Mutual conditioned its agreement to defend on the requirement that “Cargill execute a loan receipt in the attached form.” (Appx. 206-07).

Subsequently, on October 8, 2007, Liberty Mutual tendered to Cargill a check for a fraction of Cargill’s defense costs. (Appx. 214-15). Liberty Mutual claimed its check, in the amount of \$704,762.22, was a “partial payment,” but did not specify what was being paid. (Appx. 215). This check was also conditioned on Cargill executing the loan receipt agreement unilaterally drafted by Liberty Mutual. (Appx. 214-15).

Cargill rejected this attempt to coerce it into entering a loan receipt settlement agreement that would benefit only Liberty Mutual and prejudice Cargill. Cargill explained to Liberty Mutual, as it had explained in previous unsuccessful attempts to reach an agreement, that many of Cargill’s other 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. (Appx. 7-8, at ¶¶ 3-5). Thus, if Liberty Mutual were allowed to recover from those policies, much of the defense costs that Liberty Mutual is severally and indivisibly obligated to pay in full would ultimately be borne by Cargill. (*Id.*) Liberty Mutual nonetheless insisted that Cargill sign its prejudicial loan receipt “agreement.”

Cargill thereafter moved for partial summary judgment, seeking a declaration that (1) Cargill is entitled to select Liberty Mutual to exclusively and fully defend Cargill in the Underlying Actions; (2) Liberty Mutual is not entitled to obtain recovery from Cargill’s other insurers, absent a loan receipt agreement; (3) Cargill is not required to enter into a loan receipt settlement agreement with Liberty Mutual; and (4) Liberty

Mutual cannot recover defense costs from Cargill. (Appx. 1-3). Liberty Mutual cross-moved on essentially the same issues. (Appx. 4-6).

D. LIBERTY MUTUAL'S REJECTION OF A PROPOSED LOAN-RECEIPT AGREEMENT THAT WOULD HAVE BENEFITED IT WHILE NOT PREJUDICING ITS POLICYHOLDER.

While the cross-motions for summary judgment were pending, Cargill presented Liberty Mutual with a counterproposal for a loan receipt agreement that would have avoided prejudice to Cargill while benefiting Liberty Mutual. (Appx. 230-40). In contrast to Liberty Mutual's proposed loan receipt agreement, Cargill's proposal would have made clear, among other things, that Liberty Mutual admitted it had the duty to defend Cargill (Appx. 237); that Liberty Mutual agreed not to make a claim for defense costs against Cargill or any of its subsidiaries (Appx. 238, at ¶ A); and that if Liberty Mutual attempted to obtain repayment from other carriers, and that attempt precipitated claims by such carriers against Cargill, Liberty Mutual would indemnify Cargill and hold it harmless against such claims (Appx. 239, at ¶ B(i)). If Liberty Mutual had agreed to Cargill's proposal, it would have retained the ability to seek recovery of defense costs from other insurers, but without prejudicing Cargill. (Appx. 238). By doing so, Liberty Mutual could have reduced its liability by one-half if it had pursued a single additional insurer; by two-thirds if it had pursued two, and so on. *See Wooddale*, 722 N.W.2d at 304 (applying equal apportionment of defense costs solely as between insurers who waived *Iowa National* rule among themselves, without prejudice to policyholder).

Despite Cargill's overture, the coverage dispute remained at an impasse and the district court decided the summary judgment motions in an order dated April 25, 2008 (Add. 26-46), which it modified on June 18, 2008 (Add. 49-67).

E. THE DISTRICT COURT'S ORDER.

In its Amended Order for Summary Judgment and for Certification, the district court held 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." (Add. 49, at ¶ 2.a). Contrary to this Court's precedent, the district court held 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." (Add. 64, at ¶ D.1).

The district court further declared that, had it not found that Liberty Mutual can seek contribution without a loan receipt agreement, it would have imposed on Cargill a "constructive" loan receipt agreement that the district court itself had drafted. (Add. 65, at ¶ D.3; Add. 45-46). The district court also opined, 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." (Add. 66, at ¶ D.4) (emphasis added). The district court reached these conclusions despite its recognition "Cargill is concerned" about the possibility 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.'" (Add. 54, at ¶ A.10).

The district court certified as important and doubtful the question of whether a court can “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.” (Add. 66-67). The Court of Appeals subsequently issued an order clarifying the scope of the issues under review. (Appx. 241-49).¹

F. THE COURT OF APPEALS’ DIVIDED OPINION.

In the Opinion under review, a divided Court of Appeals answered the certified question in the affirmative. (Add. 6). The majority identified the first issue as “whether a primary insurer with a duty to defend must normally enter into a loan receipt agreement in order to obtain contribution from other primary duty-to-defend insurers.” (Add. 13). The majority agreed with Cargill that under *Iowa National* and its progeny, contribution is not available absent such an agreement, and principles of subrogation likewise do not apply. (Add. 13-16). The majority rejected Liberty Mutual’s contentions that this Court has somehow departed from or limited its *Iowa National* rule. (Add. 14-16).

¹ Cargill advised the Court of Appeals that certain related issues, such as whether the district court could properly force Cargill to enter into a loan receipt agreement, are integral to the certified issue. In an order dated August 19, 2008, the Court of Appeals clarified that Cargill would be permitted to brief all of the issues raised in Cargill’s statement of the case. (Appx. 248). In response to notices of review filed by certain Duty to Defend Insurers, the Court of Appeals further held that review would be limited to issues on which Cargill and the insurers are adverse to one another, in contrast to issues on which the adversarial relationship was between different insurers. (Appx. 247-49).

The majority identified the second issue as whether a primary insurer with the duty to defend can “condition its tender of defense on the insured’s execution of a neutral loan receipt agreement.” (Add. 16). Although no such condition is expressed or even hinted at anywhere in the Policy or governing case law, the majority concluded, without citation to authority, that “principles of good faith and fair dealing impose an affirmative obligation on the insured to cooperate by entering into a neutral loan receipt agreement that equitably apportions liability between primary insurers.” (Add. 17). The majority did not define or explain what “neutral” means, particularly where the loan receipt “agreement” is unilaterally drafted by the insurer and substantially prejudices the policyholder.

The majority held that allowing Cargill to select one insurer to pay the defense costs “is incompatible with the underlying rationale of” *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161 (Minn. 1986). (Add. 18). Based on this misinterpretation of the rationale of *Jostens* – a case in which the insured *voluntarily* executed a loan receipt agreement, and the issue was merely how to apportion defense costs among insurers, not whether the insured should be forced to enter into such an agreement – the majority went so far as to conclude that Cargill “acted in bad faith” when it refused to execute a loan receipt agreement. (Add. 18). The majority further postulated that allowing insurers to insist that their insured sign a loan receipt agreement before they provide a defense as required by the plain policy language would benefit policyholders by eliminating “an insurer’s incentive to delay or refuse to undertake a defense.” (Add. 19).

Judge Larkin, dissenting, would have adhered to this Court's holding in *Iowa National* and therefore answered the certified question in the negative. (Add. 21-25). The dissent noted that Cargill "has a contractual right to a defense from Liberty Mutual irrespective of other insurance" and there is nothing "harsh or unfair" in holding Liberty Mutual, a sophisticated party, to the bargain it made. (Add. 23). Further, the dissent would have held that because Liberty Mutual had no right of contribution as to defense costs, the provision of its insurance policy that requires Cargill to cooperate with and assist Liberty Mutual "in enforcing any right of contribution" does not require Cargill to enter into a loan receipt agreement. (Add. 23-24). Judge Larkin explained that courts cannot require parties to add terms to their existing contracts. (Add. 24-25). As Judge Larkin summarized:

Liberty Mutual and Cargill entered into a contractual agreement, whereby Liberty Mutual was to undertake a defense of Cargill and for which Liberty Mutual received premium payments. It is inappropriate for the district court to impose a loan-receipt agreement when the parties' contract does not require one. Absent such an agreement, Liberty Mutual is not entitled to contribution.

(Add. 25).

This Court thereafter granted the parties' petitions for review and cross-review.

(Add. 1-4).

IV. ARGUMENT

The Court of Appeals erred when it held that Cargill could be required to enter into a loan receipt agreement. Such a requirement has no basis in the Policy or in any applicable case law. To the contrary, under this Court's *Iowa National* rule, the law is

clear that the duty to defend is personal – each insurer with the duty to defend owes its insured an independent and complete defense (Point A, below) – and that insurers, which are not in contractual privity with one another, have no right of recovery against one another unless the insured enters into a loan receipt settlement agreement conferring such a right (Point B).

While recognizing that *Iowa National* is this Court's governing precedent and that Cargill did not enter into a loan receipt agreement, the Court of Appeals majority attempted to cobble together an obligation for Cargill to enter into such an agreement based on the cooperation clause in the Policy and an implied covenant of good faith and fair dealing. But the cooperation clause only requires Cargill to cooperate with Liberty Mutual in the enforcement of its existing legal rights, not to create new rights it does not have, such as a right of contribution. (Point C.1). Liberty Mutual's reliance on Policy language entitling it to subrogation, where applicable, fails for essentially the same reason: Liberty Mutual has no subrogation rights against any other insurer. (Point C.2). The implied covenant of good faith and fair dealing does not change the result because it would at most mean that Cargill should not hinder Liberty Mutual from performing under the contract (and Cargill has done nothing of the sort), and because the implied covenant cannot create obligations beyond the scope of the actual contract, which is exactly what Liberty Mutual is demanding. (Point C.3). Indeed, the requirement to enter into a loan receipt agreement is not only without support in the Policy, but also contrary to basic principles of contract law, which require that a contract must be the product of mutual

agreement between the parties, cannot leave key terms to be negotiated later, and cannot be made or amended without consideration. (Point C.4).

At bottom, the Court of Appeals majority and Liberty Mutual are advocating nothing less than the repeal of the *Iowa National* rule, based on ill-conceived equitable or public policy concerns. If the Opinion is affirmed, this Court's *Iowa National* rule will become merely an historical curiosity, because insurers will routinely force their insureds to enter into prejudicial loan receipt "agreements" as a condition to paying any defense costs, despite the insurers' several and indivisible obligation to pay those costs. But equity and public policy are best served by adhering to settled Supreme Court precedent, in particular the *Iowa National* rule, which was well known to Liberty Mutual when it issued the Policy, has been repeatedly upheld by this Court, and remains just as sound today as it was in 1967. (Point D).

A. UNDER THE POLICY, LIBERTY MUTUAL OWES CARGILL A COMPLETE DEFENSE.

Liberty Mutual acknowledged its duty to defend the Underlying Actions, and – as the courts below recognized – an insurer with that duty must provide a complete, several, and indivisible defense, and cannot diminish that duty by trying to pass part of it to other insurers.

Under *Iowa National*, the "obligation of defending an insured and paying for the defense is a separate obligation existing exclusively between the insurer and the insured." 276 Minn. at 367, 150 N.W.2d at 237 (Minn. 1967). The "obligation is 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 (citation omitted).

Accordingly, where two or more insurers owe an insured a defense, the insured “may call upon either or both carriers to fulfill their policy obligations . . .” *Id.* (citation omitted).

This Court has repeatedly adhered to and reaffirmed *Iowa National*. See *Wooddale Builders*, 722 N.W.2d at 302 (“It is well-established under Minnesota case law that each insurer owes its insured an independent duty to defend . . .”)(citation omitted); *Jostens*, 387 N.W.2d at 167 (where two insurers have the duty to defend, the insured may recover defense costs “from either or both” of them); see also *Domtar*, 563 N.W.2d at 739 (following *Jostens* “either or both” holding)(citation omitted); *Nordby v. Atl. Mut. Ins. Co.*, 329 N.W.2d 820, 824 (Minn. 1983) (“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.”).

This Court’s *Iowa National* rule is founded both on policy language and on a recognition of the business reality underlying that language. As the Court observed, insurers receive premiums in exchange for agreeing to provide a defense; they insist on the right to control the defense in order to “protect [their] own interests”; and the costs they thereby incur are simply an “expense of doing business.” *Iowa Nat’l*, 276 Minn. at 369, 150 N.W.2d at 238. Requiring an insurer to provide a complete defense based on its policy language, regardless of other insurance, is thus entirely fair. It is also consistent with other basic principles concerning the duty to defend, such as the principle that an insurer with the duty to defend any claim in a complaint must provide a complete defense even if it may not ultimately be responsible for some or all of the underlying claims. See,

e.g., Jostens, Inc. v. CNA Ins., 336 N.W.2d 544, 545 (Minn. 1983) (where insurer sought apportionment of attorneys' fees paid to defend underlying claims, court held that the insured was "not required to share any portion" of the bill); *see also Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 416 (Minn. 1997) (insurer must provide a defense until "all arguably covered claims have been dismissed with finality"). There is no such creature as partial fulfillment of the duty to defend, either from the perspective of the insured – who has bargained for and expects to receive a defense – or of the law, which takes insurers at their word when, as here, they bargain for "the right and duty to defend any suit" (Appx. 139) against the insured.

The Court of Appeals majority recognized *Iowa National* and other controlling authorities in its progeny when – in an initial holding with which Cargill has no quarrel – it observed that "each insurer has a separate and distinct obligation to defend an insured." (Add. 16). For that matter, Liberty Mutual itself has admitted its duty to defend Cargill. First, Liberty Mutual acknowledged its duty to defend in a letter to Cargill dated October 28, 2005. (Appx. 204). 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. (Appx. 206, 214-15). Such admissions, with various lawyerly qualifications, continued to appear regularly in Liberty Mutual's briefs to the courts below. (*E.g.*, February 4, 2008 Defendant Liberty Mutual Insurance Company's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment as to Liberty Mutual's Duty to Defend and in Support of Liberty Mutual's Motion for Summary Judgment Against Cargill ("Liberty Mutual Summary Judgment

Brief”), pp. 28-29) (stating that “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]”). These admissions are simply the least Liberty Mutual can say given that the complaints in the Underlying Actions (Appx. 46-88, 89-138) squarely seek damages for bodily injury and property damage within its Policy’s coverage grant (Appx. 139).

Thus, despite this Court’s well-settled precedent and Liberty Mutual’s recognition that it has a duty to defend, Liberty Mutual has refused to provide Cargill with a complete defense in the Underlying Actions and is instead attempting to sidestep its duty by trying to force Cargill to enter into a loan receipt settlement agreement. This Court has determined that, 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*, 563 N.W.2d at 739; *Jostens*, 387 N.W.2d at 167.

This is exactly what Cargill has done. Cargill is merely seeking what it is entitled to under the express terms of the Policy and well-established Supreme Court holdings: payment of all defense costs in the Underlying Actions by Liberty Mutual, an insurer that owes Cargill a duty to defend.

B. LIBERTY MUTUAL IS NOT ENTITLED TO RECOVER FROM OTHER INSURERS WITHOUT A LOAN RECEIPT AGREEMENT.

Because each insurer with the duty to defend owes its insured a complete and indivisible defense, and each insurer has a contract with the insured alone, rather than

with other insurers, it follows that – absent some further agreement – insurers are not entitled to seek contribution from each other for defense costs. Here again, the Court of Appeals agreed with Cargill, and this Court’s precedent is well-settled: “[O]ne insurer cannot pursue reimbursement from another insurer for defense costs incurred in defending a mutual insured.” *Home Ins. Co. v. Nat’l 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*, 276 Minn. at 368, 150 N.W.2d at 237. No legal relationship exists between the insurers to support a right of contribution with respect to an insurer’s obligation to defend its policyholder. *Id.* at 367-68, 150 N.W.2d at 237. *See also Nordby*, 329 N.W.2d at 824 (“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,” so insurers cannot obtain contribution from one another). To the extent that such a settled legal rule requires justification, the rationale boils down to “Minnesota’s express preference that each insurer fulfill its independent duty to cover a mutual insured.” *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 187 (Minn. Ct. App. 2001) (citing *Iowa National* and rejecting “public policy” argument for contribution).

This Court has, however, “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 (citing *Jostens*, 387 N.W.2d at 167 and 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); *see also Wooddale*, 722 N.W.2d at 302 (under the *Iowa National* rule, “absent 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.”). Before the Opinion under review, the lower courts, as recently as earlier this year, had continued to recognize that loan receipt agreements are just that – “agreements” – and are a narrow exception to the rule, not the rule. *See, e.g., Tony Eiden Co. v. State Auto Prop. & Cas. Ins. Co.*, No. A07-2222, 2009 WL 233883, at *6 (Minn. Ct. App. Jan. 26, 2009) (unpublished, attached at Appx. 250) (confirming that each insurer’s duty to defend is independent and that, without a loan receipt agreement, insurer who provides defense is not entitled to recovery from other insurers); *Andrew L. Youngquist*, 625 N.W.2d at 186-87 (absent a loan receipt agreement, insurer has no claim for recovery from another insurer for defense costs).

This exception arises if, and only if, the insured and the insurer do what is inherent in the very phrase “loan receipt agreement”: they mutually *agree* to a further contract, most likely in settlement of a coverage dispute. *See Lubbers v. Anderson*, 539 N.W.2d 398, 400 (Minn. 1995) (explaining that the parties settled their claim pursuant to 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.”); *Jostens*, 387 N.W.2d at 164 (loan receipt agreements “are a useful device in disposing of insurance disputes”).

Indeed, settlement – which enables the insured, *if it so prefers*, to obtain disputed defense funding sooner or more surely than if it litigated a coverage action to judgment – is virtually the only context in which an insured, knowing that it is entitled to a complete defense from one insurer, would enter into a loan receipt agreement. The insured needs some meaningful consideration to induce it to confer on one insurer the right to seek recovery from another insurer, perhaps to the detriment of the insured’s relationship with the second carrier. Of course, absolutely nothing in the Policy requires (or legally or logically could require) Cargill to agree to settle its coverage dispute with Liberty Mutual if Cargill believes its interests are better served by pressing on to judgment in a lawsuit that it initiated because Liberty Mutual failed to provide it with a defense.

In sum, other than cases in which the insured voluntarily enters into a loan receipt agreement, *see, e.g., Jostens*, 387 N.W.2d at 163, or where the insurers waive the *Iowa National* rule as it applies to their dispute with each other, *see, e.g., Wooddale*, 722 N.W.2d at 302, n. 15 – neither of which has happened here – this Court simply has never recognized an insurer’s right to obtain recovery of defense costs from other insurers.

Up to this point in the Opinion, the Court of Appeals majority at least paid lip service to this Court’s *Iowa National* rule. Citing *Iowa National*, the majority held that “[d]ue to the lack of contractual privity between Liberty Mutual and its co-primary duty-

to-defend insurers, Liberty Mutual has no right to contribution in the absence of a loan receipt agreement.” (Add. 16). Since Cargill has not executed such an agreement for any of its insurers, and – as shown next – no such agreement is required by any of the Policy language, this should have been the end of the Opinion.

C. CARGILL CANNOT BE FORCED TO ENTER INTO A LOAN RECEIPT AGREEMENT.

1. The Cooperation Clause Does Not Require Cargill To Enter Into A Loan Receipt Agreement.

The Court of Appeals majority was patently wrong when it opined that requiring Cargill to enter into a loan receipt agreement “comports with” the cooperation clause in the Policy. (Add. 18). The cooperation clause does not require Cargill to enter into new and different agreements with Liberty Mutual, and such a requirement does not “comport” with any policy language.

Although Minnesota courts recognize that an insured must cooperate with its insurer, this obligation does not require a policyholder to enter into a non-negotiable loan receipt settlement agreement, unilaterally drafted by the insurer, that would prejudice the policyholder’s interests. It has long been recognized by this Court 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) (citation omitted). The intent of a cooperation clause is to ensure “there shall be a fair and frank disclosure of information reasonably 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, 2 (Minn. 1949) (citation omitted). A loan receipt agreement serves none of these purposes and there is no precedent from this Court or any other court supporting the contention that refusing to enter into such an agreement is a violation of the cooperation clause.

The cooperation provision of the Policy provides:

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; . . .

(Appx. 142, at § VII, 4 (c), emphasis added). Thus, the provision on its face requires the insured to cooperate with the insurer in enforcing any right of contribution or indemnity against other persons “liable to the insured because of bodily injury or property damage,” but does not require the insured to assist the insurer in obtaining additional rights, to which it is not already entitled, against other insurers.

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

defend, their obligations arise “under separate contractual undertakings which 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.* See also *St. Paul Sch. Dist.*, 321 N.W.2d at 48 (“We have specifically rejected contribution and subrogation as bases for recovery of attorneys fees in a similar case and we do so in this case.”) Thus, Liberty Mutual has no right of contribution to be enforced under the cooperation clause of the Policy.

In some of its briefing below, Liberty Mutual tried to bridge the gap between the cooperation clause and the demand it has made for a loan receipt agreement by arguing that the “other insurance” clause in its Policy entitled it to contribution. No such entitlement is expressed in the other insurance clause, which relates only to the impact of other insurance on Liberty Mutual’s duty to indemnify Cargill for a “loss,” (Appx. 142, at § VII, 6), and not to its duty to defend (Appx. 139, at § I). Moreover, this Court has squarely rejected insurers’ arguments based on “other insurance” clauses in circumstances exactly analogous to this case. See *Nordby*, 329 N.W.2d at 824 (rejecting insurer’s claim for contribution for defense costs from other insurer based on other insurance clause, because “[e]ach insurer’s obligation to defend is separate and distinct from its duty to provide coverage and pay a judgment, *irrespective of other insurance. . .*”) (emphasis added); *Iowa National*, 276 Minn. at 367, 150 N.W.2d at 236-37 (rejecting a claim for contribution for payment of defense costs the court states: “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. The obligation to defend is a separate undertaking from the duty to provide coverage and pay a judgment”). An “other insurance” clause cannot create a right of contribution where none exists, and hence cannot avail Liberty Mutual as it tries to conjure such a right out of the cooperation clause.

In sum, the Policy’s cooperation clause applies only when the insurer has an existing contribution or indemnity right that it needs the insured’s help to enforce against parties liable for bodily injury or property damage. Here, by contrast, Liberty Mutual is seeking to force Cargill to *create* a right of contribution for Liberty Mutual through a loan receipt settlement agreement. Liberty Mutual has no such right, and it cannot perform an end run around this Court’s decisions by creating a nonexistent duty under the cooperation clause.

2. The Subrogation Clause Does Not Require Cargill To Enter Into A Loan Receipt Agreement.

Liberty Mutual likewise cannot coerce Cargill into a loan receipt settlement agreement under the subrogation provision of the Policy, because Liberty Mutual has no subrogation rights against any other insurer. This Court, as well as the Court of Appeals majority, has rejected Liberty Mutual’s position on this point.

The subrogation clause provides:

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.

(Appx. 142, at § VII, 7, emphasis added).

This 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. at 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 provision in the policy, Iowa National had acquired the policyholder's rights. *Id.* at 365-66, 150 N.W.2d at 236. This 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. *See also St. Paul Sch. Dist.*, 321 N.W.2d at 48 (following *Iowa National* and rejecting subrogation). 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 provide a complete defense to 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 this 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. Pac. Elec. 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. Ct.*, 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, . . .” (Appx. 142, at § VII, 7) (emphasis added). This 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.” (Appx. 217, at ¶ A). Liberty Mutual offered to make a loan to Cargill, not a payment under the Policy, and for this reason, too, the subrogation provision is not applicable here.

Finally, subrogation is “an offspring of equity,” and “even when the right to subrogation arises by virtue of an agreement,” subrogation will nonetheless be governed by equitable principles. *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983). Subrogation is never applied when the equities are equal. *Id.* As this Court makes clear in *Iowa National*, the equities between insurers having a duty to defend “are at best

equal” because each insurer has a separate and distinct obligation to defend the insured. *Iowa Nat’l*, 276 Minn. at 368, 150 N.W.2d at 237. Thus, Liberty Mutual has no subrogation rights here, and, as such, the subrogation clause provides no basis to require Cargill to enter into a loan receipt agreement.

3. The Duty Of Good Faith And Fair Dealing Does Not Require Cargill To Enter Into A Loan Receipt Agreement.

Unable to identify language in the Policy or in this Court’s rulings that supports requiring Cargill to enter into a loan receipt settlement agreement, the Court of Appeals majority rested its holding largely on obliquely stated “principles of good faith and fair dealing” that it believed support that requirement. (Add. 17). However, Cargill did not violate the covenant of good faith and fair dealing, and the covenant cannot create obligations inconsistent with the parties’ express contractual rights.

The “implied covenant of good faith and fair dealing” requires “that one party not ‘unjustifiably hinder’ the other party’s performance of the contract” or “take advantage of the failure of a condition precedent when the party itself has frustrated performance of that condition.” *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (citations omitted). Cargill has not violated the implied covenant of good faith and fair dealing because it has not “hindered” Liberty Mutual from performing its contractual obligation or taken advantage of the failure of any conditions precedent.²

² The Court of Appeals made its holding that Cargill violated the implied covenant in the context of the court’s *de novo* review of the issues presented by the district court in its certified question. (Add. 17-18). Thus, as with its other holdings, the Court of Appeals based its holding on the requirements of good faith and fair dealing as a matter of law, and this Court should review that holding accordingly.

To perform, all Liberty Mutual has to do is write checks to Cargill equal to the full amount of Cargill's defense costs, as it agreed to do. Nothing is preventing Liberty Mutual from writing those checks. As for conditions precedent, Cargill has not claimed that Liberty Mutual failed to fulfill one, so Cargill cannot possibly be trying to "take advantage" of such a failure.³

Moreover, "the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the underlying contract." *Id.* at 503. Requiring Cargill to enter into a loan receipt agreement – which is nothing less than a new contract⁴ – is plainly "beyond the scope of the underlying contract." *Id.*

The Court of Appeals majority defined "bad faith" as a party's refusal "to fulfill some duty or contractual obligation based on an ulterior motive, not an honest mistake regarding one's rights and duties" and concluded that Cargill had an ulterior motive because it wanted to "avoid contribution for defense costs from its 'fronted policies.'" (Add. 18). But Cargill's preference to avoid having to pay more of its own money for a defense for which it has already paid in full is based firmly on the Policy and *Iowa National*, and Cargill has always stated it forthrightly, so no "ulterior motive" or bad faith

³ In point of fact, this lawsuit arose because Liberty Mutual, having issued a policy chock full of conditions precedent that *Cargill* must allegedly perform to obtain coverage (Appx. 141-42), now wants to impose retroactively one more condition that it did not bother to put in its Policy back in 1967 – execution of a loan receipt agreement in a form satisfactory solely to Liberty Mutual.

⁴ There can be no doubt that a loan receipt agreement is a contract under this Court's holdings. *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).

of any kind are implicated. Indeed, even the case the majority cited, *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. Ct. App. 1998), actually proves Cargill's point, as the court there held that the defendants did not violate the covenant of good faith and fair dealing when they exercised their plain right under a brokerage contract to reject offers for the purchase of an asset. *See also Cady v. Bush*, 283 Minn. 105, 110, 166 N.W.2d 358, 362 (Minn. 1969) (no basis to afford plaintiff equitable relief where "defendants did no more than exercise rights which were granted to them under the plain provisions of their written agreement").

Furthermore, the Court of Appeals majority's holding overlooks that the covenant of good faith and fair dealing imposes *mutual* obligations on the parties. An insurer "owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify." *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983). This Court has repeatedly held that, in the context of an insurer's defense of its policyholder, the "duty to exercise 'good faith' includes the obligation . . . to give equal consideration to the financial exposure of the insured." *Id.* at 387-88; *citing Continental Cas. Co. v. Reserve Ins. Co.*, 307 Minn. 5, 8, 238 N.W.2d 862, 864 (Minn. 1976). Cargill made clear that it was unwilling to sign Liberty Mutual's proposed loan receipt agreement because, as offered, that agreement would potentially increase Cargill's financial exposure. Many of the primary or lower-level insurance policies in Cargill's coverage program contain high deductibles or retentions, are reinsured by a Cargill subsidiary, or are subject to retrospective premiums paid by Cargill, such that if Liberty Mutual is allowed to recover from those policies, the money would ultimately come out of Cargill's pocket. (Appx.

7-8, at ¶¶ 3-5). The covenant of good faith and fair dealing requires Liberty Mutual not to increase Cargill's financial exposure with respect to such policies, yet when Cargill made a counterproposal for a loan receipt agreement that would protect Cargill, Liberty Mutual was unwilling to budge. Placing its own pecuniary interest above its policyholder's is not fair dealing by Liberty Mutual, and the Court of Appeals majority erred when it ignored this and turned the covenant's mutual obligations into a one-way street.

In short, given that Cargill has not hindered Liberty Mutual from performing, and there is no express or implied duty to enter into new contracts anywhere in the Policy, Cargill's refusal to enter into a loan receipt settlement agreement unilaterally drafted by Liberty Mutual is not a violation of the covenant of good faith and fair dealing.

4. Requiring Cargill To Enter Into A Loan Receipt Settlement Agreement Is Inimical To Basic Principles Of Contract Law.

The Court of Appeals' holding requiring Cargill to enter into a loan receipt agreement was not only without support in any express or implied Policy terms, but also contrary to elementary contract law. Specifically, imposing such a requirement is contrary to the principles that (i) parties must actually agree on the terms of their contracts; (ii) parties cannot contract to negotiate and enter into a further, future contract; and (iii) parties cannot make or amend a contract without consideration.

a. Courts Can Only Enforce Contractual Terms On Which Parties Actually Agree.

It should go without saying that courts may only enforce contracts that were formed by mutual agreement between the parties. *See, e.g., 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). Accordingly, courts cannot “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) (Appx. 257); *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. Yet the courts below incorrectly held that non-negotiable terms of a loan receipt settlement agreement dictated by Liberty Mutual can be forced upon Cargill to its financial detriment. Such a result is simply contrary to bedrock principles of contract law.

b. Parties Cannot Contract To Enter Into A Contract.

Furthermore, and in keeping with the principles stated above, this Court has recognized for over a hundred years that parties cannot contract to enter into a contract. *Druar v. Ellerbe & Co.*, 222 Minn. 383, 396, 24 N.W.2d 820, 826 (Minn. 1946) (holding agreement-to-agree unenforceable because “the law cannot finish what the parties have left unfinished and thereby create a contract where they intentionally omitted to make one for themselves”) (citation omitted); *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.”); *Shepard v. Carpenter*, 54 Minn. 153, 155-56, 55 N.W. 906, 906 (Minn. 1893) (“[A]n 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.”).

This remains the universal common law rule to this day. *See, e.g., Richie Co., LLP v. Lyndon Ins. Group, Inc.*, 316 F.3d 758, 760-61 (8th Cir. 2003) (applying Minnesota law) (“Such agreements are generally unenforceable because they provide neither a basis for determining the existence of a breach nor for giving an appropriate remedy.”) (citation omitted); *see also 168th & 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”).

Here, neither the subrogation nor contribution provisions (nor any other express or implied covenant) 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. Therefore, none of these provisions can form a basis for the parties to enter into such an agreement in the future. Tellingly, Liberty Mutual’s refusal of Cargill’s counter-proposal for a loan receipt settlement agreement that would have been acceptable to Cargill (Appx. 230-40) illustrates why agreements to agree are not enforceable. Parties inevitably do *not* agree on what a new agreement should say, and they and the courts are thrown back upon their actual, explicit agreements, which must be enforced as written, not as one of the parties (or a court), with hindsight, think they should have been written. In this case, the parties’ explicit agreement is the Policy, and the Policy affords no basis to require any loan receipt agreement, much less to prefer Liberty Mutual’s proposed loan receipt agreement over Cargill’s proposal. The Court of Appeals majority’s acceptance, without

any analysis, that Liberty Mutual's proposal was a purported "neutral" loan receipt agreement (Add. 18-19) was as conceptually flawed as the district court's astonishing suggestion that it could properly do what the parties never did and draft a "constructive loan receipt agreement" for them (Add. 45-46, 65).

Simply put, Liberty Mutual cannot compel its policyholder to enter into a new contract, and the courts cannot by fiat create a new and different contract for the parties. For this reason, prior to the Opinion under review, there has never been a case in Minnesota (or, as far as Cargill is aware, in any other jurisdiction) where a loan receipt agreement was imposed on an unwilling policyholder.

c. A Loan In Lieu Of Providing A Defense Is Not Consideration.

Additionally, imposition of a loan receipt agreement is contrary to the consideration requirement this Court has repeatedly recognized. Liberty Mutual has not offered any new consideration for its proposed loan receipt settlement agreement. "When there is lack of consideration, no valid contract is ever formed." *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). *See also Johnson v. City of Shorewood*, No. A03-621, 2004 WL 193212, at *3 (Minn. Ct. App. Feb. 3, 2004) (Appx. 260) ("Consideration is an essential element of a contract."); *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, when Liberty Mutual proposed to begin paying defense costs (or, worse yet, its “share” of defense costs), subject to Cargill’s signing of a loan receipt agreement, it was not offering anything to Cargill other than to perform the obligations it had already admittedly agreed to under the Policy. In fact, by demanding a loan receipt settlement agreement, Liberty Mutual offered to do *less* than it agreed to do under the Policy. Rather than provide Cargill the complete defense that it bargained for, Liberty Mutual instead attempted to “loan” Cargill a small fraction of its defense costs, while also insisting on a non-existent right of contribution to recover some defense costs from other insurers or even Cargill. (Appx. 214-19). It is axiomatic that loaning Cargill defense costs that Liberty Mutual already owes Cargill cannot constitute new consideration.

In sum, forcing Cargill to enter into a loan receipt agreement violates the consideration requirement, like the prohibition on “agreements to agree” and other basic contract law doctrines.

D. THE PUBLIC POLICY BEHIND THIS COURT’S *IOWA NATIONAL* RULE REQUIRES LIBERTY MUTUAL TO PROVIDE CARGILL A COMPLETE DEFENSE AND THE DOCTRINE SHOULD NOT BE NULLIFIED.

Since neither the express language of the Policy nor any implied covenant requires Cargill to enter into a loan receipt agreement, the Court of Appeals majority ultimately attempted to base such a requirement on statements this Court made, in radically different contexts, concerning policy considerations and the incentives that legal rules create for

parties. Meanwhile, in its briefs below (*e.g.*, Liberty Mutual Summary Judgment Brief, p. 37), Liberty Mutual made clear that its real argument is that this Court's precedent prohibiting insurers to seek contribution from other insurers without first obtaining a loan receipt agreement from a willing insured is merely an outmoded "formality" that lower courts can and should disregard. Neither the majority's misguided "policy" rationale, nor Liberty Mutual's contention that this Court's *Iowa National* rule should simply be ignored, has merit.

As discussed in Points A and B, above, the foundations of the *Iowa National* rule are sound and have been stated by this Court over and over again. Briefly, the grounds for the rule are that:

- The duty to defend is an independent obligation that runs from insurer to insured, *see Iowa Nat'l*, 276 Minn. at 367, 150 N.W.2d at 236; *see also Wooddale*, 722 N.W.2d at 302;
- Fulfilling the obligation to defend means providing a complete defense, *see Iowa Nat'l*, 276 Minn. at 367-68, 150 N.W.2d at 237;
- Insurers assume the duty to defend in exchange for valuable premiums, and in order to protect their own interests, as a cost of doing business, *see Iowa Nat'l*, 276 Minn. at 369, 150 N.W.2d at 238;
- Because insurers must provide an independent and complete defense, when they fail to do so, the insured has the right to choose whether to collect from one insurer, or another, or none, or all, *see Iowa Nat'l*, 276 Minn. at 368, 150 N.W.2d at 237; *see also Jostens*, 387 N.W.2d at 167;

- Because insurers must provide an independent and complete defense and are not in privity with each other, when an insured sues one of its insurers seeking a defense, the selected insurer has no right to obtain contribution from other insurers, *see Iowa Nat'l*, 276 Minn. at 367-68, 150 N.W.2d at 237; *see also Wooddale*, 722 N.W.2d at 302; *Home*, 658 N.W.2d at 527; *Jostens*, 387 N.W.2d at 167; *Nordby*, 329 N.W.2d at 824.

Nothing has happened to change any of this Court's holdings, considerations and rationale, or to alter the consequent principle that the only way an insurer may obtain recovery of defense costs is if the insured voluntarily enters into a loan receipt agreement (usually in settlement, for consideration that the insured deems adequate), *see, e.g., Jostens*, 387 N.W.2d at 163, or the other insurer from which recovery is sought waives the *Iowa National* rule (typically also in settlement, and without compromising any right of the insured), *see, e.g., Wooddale*, 722 N.W.2d at 302, n. 15. Any departure from these settled rules would be inimical to the principle of *stare decisis* and would frustrate the expectations of both policyholders and insurers who have entered into their contracts based on the existing law. *See Fleeger v. Wyeth*, No. A08-2124, 2009 WL 2778211, at *5 (Minn., Sept. 3, 2009) (Appx. 265) (holding Court requires "compelling reason" to overrule precedent, because following precedent "promotes stability, order, and predictability in the law.").

Nonetheless, the Court of Appeals majority, following Liberty Mutual's lead, took phrases from *Jostens* and *Wooddale* out of context and grafted them on to the present dispute, which is very different because Cargill has not agreed to a loan receipt

agreement and no waiver has occurred. No holding of this Court has abandoned *Iowa National*, or even suggested a trend contrary to *Iowa National* as suggested by Liberty Mutual. (E.g., Liberty Mutual Summary Judgment Brief, pp. 63-5). Indeed, from *Iowa National* through *Wooddale*, this Court has steadily rejected the very same arguments that Liberty Mutual is making now and that were the basis for the Opinion under review.

The first step the Court of Appeals majority took on its ill-fated journey into making “policy” contrary to *Iowa National* was its misunderstanding of the “underlying rationale” of *Jostens*. The majority cited this Court’s statement that “[w]ho 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*, 387 N.W.2d at 167. The critical point the Court of Appeals majority overlooked, however, is that in *Jostens*, the insured settled with one of its insurers, entering into a loan receipt agreement, and the salient issue was whether the loan receipt agreement meant that the non-settling insurer should be required to pay for the entire defense. *Id.* at 164. Under those specific circumstances, where the insured had been paid and had willingly entered into an agreement that enabled one insurer to recover from the other, the insured had no stake in how the two insurers allocated the defense costs, and that is why this Court said that the allocation should not depend on the insured’s “whim or caprice.” *Id.* at 167.

Here, by contrast, Cargill has never been paid, has never settled or granted a loan receipt agreement to any insurer, and in good faith believes that doing so would result in financial harm to Cargill because some of its 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. Under these circumstances, Cargill's position is not "whim or caprice"; it is merely a principled assertion of Cargill's bargained-for rights. There is no possibility for "whim or caprice" to affect the allocation of defense costs among insurers here, because nothing has happened to make such an allocation possible. Allocation is impossible because Cargill's Duty to Defend Insurers are not in privity with each other and Cargill has not entered into a loan receipt agreement with any of them, so *Jostens* is not implicated. That the Court did not intend *Jostens* to open the gate to a revocation of *Iowa National* – or to adopting a rule that renders the *Iowa National* rule meaningless, as the Court of Appeals majority has done – is clear from *Jostens*, where this Court discussed *Iowa National* and its progeny without signaling any departure from precedent. *See id.* at 166-67.

The Court of Appeals majority took its second step into creating "policy" contrary to this Court's holdings when it cited *Wooddale* for the proposition that making insurers "equally liable among themselves" for defense costs would encourage them "to resolve promptly the duty to defend issue," and then speculated that requiring insureds to enter into loan receipt agreements might have the same effect, benefiting insurers and insureds alike. (Add. 18-19, citing *Wooddale*, 722 N.W.2d at 303 and *Jostens*, 387 N.W.2d at 167). Here again, the fallacy is the majority's assumption that this Court's discussion of policy considerations in a case determining how to apportion defense costs among insurers where apportionment was possible and appropriate has any bearing on this case, where contribution and hence apportionment is precluded by the *Iowa National* rule. As

in *Jostens*, this Court said nothing in *Wooddale* to suggest that its discussion of apportionment was intended to indicate the slightest departure from *Iowa National*, which this Court discussed as “well-established” law. *Wooddale*, 722 N.W.2d at 302. The Court had no occasion even to consider departing from the *Iowa National* rule, because in *Wooddale* the insurers had waived their right to object to contribution under that rule. *Id.* at 302, n. 15. No such waiver has occurred here. The Court discussed how apportionment methods affect the incentives of insurers to defend promptly (or not) strictly in the context of a dispute among insurers, without addressing the very different considerations that apply here.

It should be more than sufficient to repeat that *Iowa National* is “well established,” *id.* at 302, and is at least as well-founded in this era of complex, multi-insurer litigation as it ever was in the past. If the Opinion is affirmed, this Court’s *Iowa National* rule will immediately become a dead letter because insurers will always insist on receiving a unilaterally drafted loan receipt agreement before they pay any defense costs that could possibly be divided with other insurers. But to the extent that the Court of Appeals majority has raised the question of how to give insurers an “incentive” to defend promptly (Add. 19), the answer is that the solution is not to nullify the *Iowa National* rule by enabling insurers to force unwilling policyholders to “agree” to loan receipt agreements. Under existing law, which allows the insured to choose whether and when to enter into a loan receipt settlement agreement, the insured retains some leverage against insurers that refuse to provide a defense. It can litigate, if necessary, and it can

settle if the insurer(s) will agree to acceptable terms that do not prejudice the policyholder.

Taking that bargained-for right away from the policyholder would merely mean that insurers will have more leverage in the negotiation about coverage. That would be a windfall to insurers like Liberty Mutual, which issued the Policy after *Iowa National* was decided, and received premium payments that it calculated knowing the legal background. There is no basis to conclude that granting insurers that windfall will improve their incentives to defend promptly, or otherwise result in any protection to Minnesota policyholders.

In short, under existing law, insurers that have the duty to defend a common insured already have the incentive “to resolve promptly the duty to defend issue either by some cooperative arrangement, or by a declaratory judgment action, or by some other means.” *Wooddale*, 722 N.W.2d at 303 (quoting *Jostens*, 387 N.W.2d at 167). Giving insurers the ability to force their insured to enter into a new contract and, in cases like this one, to compel the insured to absorb a substantial part of its own defense, will not improve the insurers’ incentives. Rather, it will merely harm policyholders and eviscerate this Court’s settled precedent.

The Underlying Actions began in the summer of 2005 and this coverage action began in February 2007. Liberty Mutual acknowledged its duty to defend, yet to this day it has paid none of Cargill’s defense costs. And this is so even though Cargill offered Liberty Mutual a loan receipt agreement that would have reduced Liberty Mutual’s defense-costs liability while avoiding prejudice to Cargill. Under these circumstances,

the argument that the Court of Appeals majority Opinion – allowing insurers to force insureds into non-negotiable loan receipt settlement “agreements” unilaterally drafted by the insurers – will encourage insurers to honor their contractual obligations rings especially hollow. If the Court were to accept that argument – or any of Liberty Mutual’s arguments – it would reduce *Iowa National* to a meaningless relic. The Court should not reward Liberty Mutual for its rejection of a reasonable loan receipt settlement agreement by casting aside settled legal precedent that Liberty Mutual knew about when it sold its duty-to-defend Policy to Cargill.

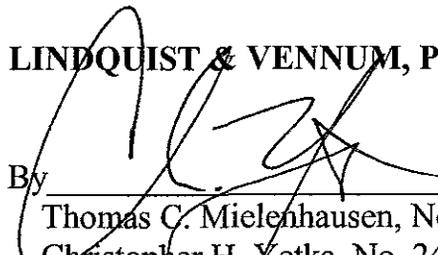
V. CONCLUSION

For all of the foregoing reasons, the Opinion of the Court of Appeals should be reversed, and partial summary judgment should be granted to Cargill declaring that Cargill is entitled to select Liberty Mutual to exclusively and fully defend Cargill in the Underlying Actions; that Liberty Mutual has no right of recovery from Cargill’s other insurers absent a loan receipt agreement; that Cargill has no obligation to enter into a loan receipt agreement; and that with or without a loan receipt, Cargill’s insurers have no right to seek defense costs directly or indirectly from Cargill.

Dated: September 10, 2009

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

By



Thomas C. Mielenhausen, No. 160325
Christopher H. Yetka, No. 241866
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 APPELLANTS
CARGILL, INCORPORATED
AND CARGILL TURKEY
PRODUCTION, L.L.C.**