

NO. A08-1082

State of Minnesota
 In Supreme Court

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

Appellants,

v.

Ace American Insurance Company, et al.,

Respondents.

AMICUS CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION
 ASSOCIATION IN SUPPORT OF RESPONDENTS

Thomas C. Mielenhausen (#160325)
 Christopher H. Yetka (#241866)
 LINDQUIST & VENNUM P.L.L.P.
 4200 IDS Center
 80 South Eighth Street
 Minneapolis, MN 55402
 (612) 371-3211

Laura A. Foggan (DC #375555)
 Amanda Schwoerke (DC #974588)
 WILEY REIN LLP
 1776 K Street, N.W.
 Washington, D.C. 20006
 (202) 719-7000

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

Chad A. Snyder (#288275)
 LAW OFFICES OF
 CHAD A. SNYDER LLC
 333 Washington Avenue North, Suite 326
 Minneapolis, MN 55401
 (612) 349-2737

*Attorneys for Appellants Cargill Incorporated
 and Cargill Turkey Production, L.L.C.*

*Attorneys for Amicus Complex Insurance Claims
 Litigation Association*

(Additional Counsel Listed on following page)

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

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

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

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

*Attorneys for Respondent Liberty Mutual
Insurance Company*

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

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

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

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

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

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE.....	1
ARGUMENT.....	3
I. Equity Supports Contribution Rights for the Insurer That is Asked to Pay More than Its Fair Share of Defense Costs.....	3
II. <i>Iowa National</i> Is Not Inconsistent with an Insurer’s Equitable Rights to Contribution and, to the Extent of Any Conflict Should, Be Reconsidered.	5
III. Cargill’s “Whim and Caprice” Should Not Determine Its Insurers’ Defense Obligations.	8
A. Requiring Cargill to Execute a Loan-Receipt Agreement Achieves the “Equitable Result” for which the Agreement Was Designed.....	9
B. Requiring Cargill to Execute a Loan-Receipt Agreement Encourages the Resolution of Insurance Disputes.	10
IV. Cargill Has a Contractual Obligation to Execute a Loan-Receipt Agreement, Thereby Preserving Liberty Mutual’s Opportunities to Obtain Contribution.	12
A. The Cooperation Clause Obligates Cargill to Execute a Loan-Receipt Agreement.....	12
B. Contract Certainty is a Matter of Great Public Importance; Parties Rely on the Courts to Enforce Their Agreements as Written and Not to Depart from Clear Policy Terms.	16
CONCLUSION	19

TABLE OF AUTHORITIES

MINNESOTA CASES

Andrew L. Youngquist, Inc. v. Cincinnati Insurance Co.,
625 N.W.2d 178 (Minn. App. 2001)..... 7

Blair v. Espeland,
43 N.W.2d 274 (Minn. 1950) 9, 10

Canadian Universal Insurance Co. v. Fire Watch, Inc.,
258 N.W.2d 570 (Minn. 1977) 13

Cargill Inc. v. ACE American Insurance Co.,
766 N.W.2d 58 (Minn. App. 2009)..... 10, 13, 14, 15

Carlson v. Allstate Insurance Co.,
749 N.W.2d 41 (Minn. 2008) 13

Home Insurance Co. v. National Union Fire Insurance of Pittsburgh,
658 N.W.2d 522 (Minn. 2003) 14

*Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance
Co.*, 150 N.W.2d 233 (Minn. 1967).....*passim*

Jerry Mathison Construction, Inc. v. Binsfield,
615 N.W.2d 378 (Minn. App. 2000)..... 9, 10, 11

Jostens v. Mission Insurance Co.,
387 N.W.2d 161 (Minn. 1986) 7, 8, 10, 11

Juvland v. Plaisance,
96 N.W.2d 537 (Minn. 1959) 14

Lobeck v. State Farm Mutual Automobile Insurance Co.,
582 N.W.2d 246 (Minn. 1998) 13

Pacific Indemnity Co. v. Thompson-Yaeger, Inc.,
260 N.W.2d 548 (Minn. 1977) 14

*Redeemer Covenant Church of Brooklyn Park v. Church Mutual Insurance
Co.*, 567 N.W.2d 71 (Minn. App. 1997)..... 7, 11, 14

Steen v. Those Underwriters at Lloyds,
442 N.W.2d 158 (Minn. App. 1989)..... 15

Weston v. McWilliams & Associates, Inc.,
716 N.W.2d 634 (Minn. 2006) 14

NON-MINNESOTA AUTHORITIES

14 Couch on Insurance § 199:1 (3d ed. 1999) 14

Aetna Casualty & Surety Co. v. Chicago Insurance Co.,
994 F.2d 1254 (7th Cir. 1993) 6

America Casualty Co. of Reading, Pennsylvania v. Health Care Indemnity, Inc., 520 F.3d 1131 (10th Cir. 2008) 4

America Home Products Corp. v. Liberty Mutual Insurance Co.,
565 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) 18

Baltimore & Ohio Railroad Co. v. Walker,
16 N.E. 475 (Ohio 1888) 3

Certain Underwriters at Lloyd's London v. Superior Court,
16 P.3d 94 (Cal. 2001) 17

City of Edgerton v. General Casualty Co. of Wis.,
517 N.W.2d 463 (Wis. 1994), *overruled on other grounds by, Johnson Controls, Inc. v. Employers Insurance of Wausau*, 665 N.W.2d 257 17

Continental Casualty Co. v. Zurich Insurance Co.,
366 P.2d 455 (Cal. 1961) 6

Doerr v. Mobil Oil Corp.,
774 So.2d 119 (La. 2000) 17

Ducote v. Koch Pipeline Co.,
730 So. 2d 432 (La. 1999), *overruled on other grounds by, Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La. 2000) 17

Executive Risk Indemnity, Inc. v. Charleston Area Medical Center, Inc.,
No. 2:08-cv-00810, 2009 WL 2357114 (S.D.W. Va. July 30, 2009)..... 6

<i>Fireman's Fund Insurance Co. v. Maryland Casualty Co.</i> , 65 Cal. App.4th 1293 (Cal. Ct. App. 1998).....	4, 8
<i>Forum Insurance Co. v. Ranger Insurance Co.</i> , 711 F. Supp. 909 (N.D. Ill. 1989).....	6
<i>Garvey v. State Farm Fire & Casualty Co.</i> , 770 P.2d 704 (Cal. 1989).....	18
<i>Herring v. Jackson</i> , 122 S.E.2d 366 (N.C. 1961).....	14
<i>Indiana Insurance Cos. v. Granite State Insurance Co.</i> , 689 F. Supp. 1549 (S.D. Ind. 1988).....	6
<i>J.H. France Refractories Co. v. Allstate Insurance Co.</i> , 626 A.2d 502 (Pa. 1993).....	6
<i>Johnson Controls, Inc. v. Employers Ins. of Wausau</i> , 665 N.W.2d 257 (Wis. 2003).....	17
<i>Krupnick v. Hartford Accident & Indemnity Co.</i> , 28 Cal. App.4th 185 (Cal. Ct. App. 1994).....	12
<i>Lexington Insurance Co. v. Allianz Insurance Co.</i> , 177 Fed. Appx. 572 (9th Cir. 2006).....	6
<i>McClain v. National Fire & Marine Insurance Co.</i> , No. 2:05-cv-00706-LRH-RJJ, 2008 WL 5501105 (D. Nev. June 23, 2008).....	6
<i>Miller-Wohl Co. v. Commissioner of Labor & Industry</i> , 694 F.2d 203 (9th Cir. 1982).....	2
<i>Mutual of Enumclaw Insurance Co. v. USF Insurance Co.</i> , 191 P.3d 866 (Wash. 2008).....	3, 6
<i>National Casualty Co. v. Great Southwest Fire Insurance Co.</i> , 833 P.2d 741 (Colo. 1992).....	6
<i>Northern Insurance Co. of New York v. Allied Mutual Insurance Co.</i> , 955 F.2d 1353 (9th Cir. 1992).....	6

<i>OneBeacon America Insurance Co. v. Fireman's Fund Insurance Co.</i> , 175 Cal. App.4th 183 (Cal. Ct. App. 2009).....	5
<i>Pennsylvania General Insurance Co. v. Park-Ohio Industrial, Inc.</i> , 902 N.E.2d 53 (Ohio Ct. App. 2008).....	3
<i>Pan Pacific Retail Properties, Inc. v. Gulf Insurance Co.</i> , 471 F.3d 961 (9th Cir. 2006)	8
<i>Rhone-Poulenc Inc. v. International Insurance Co.</i> , 71 F.3d 1299 (7th Cir. 1995)	4
<i>Security Insurance Co. of Hartford v. Lumbermens Mutual Casualty Co.</i> , 826 A.2d 107 (Conn. 2003)	6
<i>Sharon Steel Corp. v. Aetna Casualty & Surety Co.</i> , 931 P.2d 127 (Utah 1997).....	6
<i>State Farm Fire & Casualty Co. v. Zurich Insurance Co.</i> , 111 F.3d 42 (6th Cir. 1997)	6
<i>St. Paul Fire & Marine Insurance Co. v. Valley Forge Insurance Co.</i> , No. 1:06-CV-2074-JOF, 2009 WL 7879612 (N.D. Ga. Mar. 23, 2009).....	6
<i>Travelers Indemnity Co. v. Acadia Insurance Co.</i> , No. 1:08-cv-92, 2009 WL 1320965 (D. Vt. May 8, 2009).....	6
<i>UnitedHealth Group, Inc. v. Lexington Insurance Co.</i> , No. 05-1289, 2006 WL 2620620 (D. Minn. Sept. 12, 2006).....	12
<i>Universe Life Insurance Co. v. Giles</i> , 950 S.W.2d 48 (Tex. 1997).....	17
<i>U.S. Fidelity & Guaranty Co. v. Thomas Solvent Co.</i> , 683 F. Supp. 1139 (W.D. Mich. 1988)	6
<i>Valley Insurance Co. v. Wellington Cheswick, LLC</i> , No. C05-1886RSM, 2006 WL 3030282 (W.D. Wash. Oct. 20, 2006).....	7
<i>Waste Management, Inc. v. International Surplus Lines Insurance Co.</i> , 579 N.E.2d 322 (Ill. 1991).....	15
Windt, 1 <i>Insurance Claims & Disputes</i> § 10:3 (4th ed. 2001)	6, 7

INTEREST OF THE AMICUS CURIAE

Amicus curiae Complex Insurance Claims Litigation Association (“CICLA”) respectfully submits this brief in support of the Respondent Insurers and the Court of Appeals’ decision holding that Petitioners Cargill, Inc. and Cargill Turkey Production, LLC (together “Cargill”) have an affirmative duty to preserve Respondent Liberty Mutual Insurance Company’s (“Liberty Mutual”) opportunities to obtain contribution toward defense expenditures. CICLA is a trade association of major property and casualty insurers that write a substantial amount of the property and casualty insurance policies issued in Minnesota and elsewhere.¹ Many of these policies contain provisions substantially similar to those appearing in the policies at issue here. Accordingly, CICLA’s members have an important stake in the outcome of this appeal.

CICLA seeks to show that equity supports contribution rights for Liberty Mutual here. CICLA believes that the Court of Appeals’ decision imposing a constructive loan-receipt agreement on Cargill to preserve Liberty Mutual’s opportunities to obtain contribution comports with settled Minnesota law, authority in other jurisdictions, and sound public policy. Moreover, imposing a constructive loan-receipt agreement protects the specific bargain made between Liberty Mutual and Cargill. CICLA further believes that *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*, 150

¹ This brief is filed on behalf of the following CICLA members: Arrowpoint Capital Corp.; Chartis, Inc.; Chubb & Son – a Division of Federal Insurance Company; Selective Insurance Company of America; and TIG Insurance Company. This brief is not filed on behalf of CICLA members Liberty Mutual Insurance Company or The Travelers Indemnity Company and Travelers Casualty and Surety Company, which remain parties in this case, or on behalf of Chartis, Inc., subsidiaries of which remain parties in this case.

N.W.2d 233 (Minn. 1967), is not inconsistent with Liberty Mutual's equitable right to contribution and to the extent of any conflict should be reconsidered. CICLA seeks to assist this Court in resolving these important insurance issues and to fulfill "the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."

Miller-Wohl Co. v. Comm'r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982).

ARGUMENT

I. EQUITY SUPPORTS CONTRIBUTION RIGHTS FOR THE INSURER THAT IS ASKED TO PAY MORE THAN ITS FAIR SHARE OF DEFENSE COSTS.

CICLA urges this Court to affirm Liberty Mutual's equitable right to contribution in this case. "Since the doctrine of contribution has its bases in the broad principles of equity, it should be liberally applied." *Pa. Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 902 N.E.2d 53, 59 (Ohio Ct. App. 2008). An insurer's right to contribution for defense costs is "designed to accomplish ultimate justice in the bearing of a specific burden." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 191 P.3d 866, 872 (Wash. 2008) (en banc) (quoting *Signal Cos., Inc. v. Harbor Ins. Co.*, 27 Cal.3d 359, 369 (Cal. 1980)) (reversing lower court's ruling that insurer could not seek contribution for defense costs from other insurer on the risk). Contribution "rests upon the broad principle of justice, that where one has discharged a debt or obligation which others were equally bound with him to discharge, and thus removed a common burden, the others who have received a benefit ought in conscience to refund to him" a share. *Pa. Gen. Ins. Co.*, 902 N.E.2d at 59 (quoting *Baltimore & Ohio RR. Co. v. Walker*, 16 N.E. 475, 481 (Ohio 1888)) (holding that insurer was not precluded from bringing equitable-contribution claim against other insurer to recoup a portion of its defense expenditures).

Leaving Liberty Mutual to hold the bag for all of Cargill's defense costs is inconsistent with widely-recognized equitable principles. Liberty Mutual issued only two CGL policies to Cargill with policy periods from June 1, 1969 until June 1, 1973—a cumulative period of four years over thirty-five years ago. Although it is unclear whether

any property damage alleged in the underlying litigation occurred prior to the 1980s, Cargill has asserted claims for coverage under policies issued from 1957 through 2006, inclusive, and has targeted the Liberty Mutual policy in effect from June 1, 1969 until June 1, 1971, which covered Cargill for only a very small fraction of this period, to pay the entirety of its defense costs. On these facts, equity demands that Liberty Mutual be able to seek contribution for the defense costs from other primary insurers that may owe Cargill a duty to defend.

Cargill offers no compelling reason why each of its primary insurers, which it sued for breach of the duty to defend, should not “pay [its] fair share of [the] common obligation.” *Am. Cas. Co. of Reading, Pa. v. Health Care Indem., Inc.*, 520 F.3d 1131, 1139 (10th Cir. 2008) (applying Oklahoma law) (quoting *U.S. Fid. & Guar. Co. v. Federated Rural Elec. Ins. Corp.*, 37 P.3d 828, 832 (Okla. 2001)). That Cargill has targeted Liberty Mutual to defend it does not alter the fact that each of the primary insurers arguably has an equal obligation to defend Cargill in the underlying litigation, subject only to the terms and conditions of the insurer’s respective policies. Contribution

exists independently of the rights of the insured. It is predicated on the commonsense principle that where multiple insurers or indemnitors share equal contractual liability for ... the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant.

Fireman’s Fund Ins. Co. v. Md. Cas. Co., 65 Cal. App.4th 1293, 1295 (Cal. Ct. App. 1998). The right is “founded not on the concept of third-party beneficiaries of contracts ... [or] on ‘the wishes of the insured’ but rather on notions of equity and unjust enrichment.” *Rhone-Poulenc Inc. v. Int’l Ins. Co.*, 71 F.3d 1299, 1305 (7th Cir. 1995).

Non-defending insurers should not be unjustly enriched at the expense of a targeted insurer. Recognizing Liberty Mutual's equitable right to contribution "accomplish[es] substantial justice by equalizing the common burden shared" by Cargill's primary insurers. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal. App.4th 183, 199 (Cal. Ct. App. 2009) (quoting *Fireman's Fund Ins.*, 65 Cal. App.4th at 1294). CICLA thus urges this Court to affirm Liberty Mutual's equitable right to contribution for defense expenses here.

II. IOWA NATIONAL IS NOT INCONSISTENT WITH AN INSURER'S EQUITABLE RIGHTS TO CONTRIBUTION AND, TO THE EXTENT OF ANY CONFLICT SHOULD BE RECONSIDERED.

In *Iowa National*, an insurer undertook the insured's defense and thereafter attempted to obtain another concurrent insurer's contribution for its defense costs without first having requested a loan-receipt agreement from the insured. 150 N.W.2d at 233. The case is limited to that specific circumstance. Here, from the outset Liberty Mutual set out to fairly apportion defense costs and to preserve its right to seek contribution from other parties on the risk who issued successive policies to Cargill over almost fifty years. Several of Cargill's insurers, including Liberty, agreed to fund Cargill's defense subject to a reservation of rights and on the condition that Cargill issue a loan-receipt to the carriers. Cargill refused the proffered defense. Liberty Mutual subsequently tendered partial payment of Cargill's defense costs, conditional on Cargill's execution of a neutral loan-receipt agreement. Cargill has refused to execute this agreement. *Iowa National* does not control on these facts.

To the extent that *Iowa National* may be in conflict with an insurer's equitable rights to contribution, CICLA respectfully submits that it should be reconsidered. Equitable contribution for defense costs has been widely accepted across the country. Windt, 1 *Ins. Claims & Disputes* § 10:3 (4th ed. 2001) (“[m]ost courts” have affirmed the “better-reasoned view” that “there is a right to contribution” for defense costs). The Supreme Courts of Washington,² Connecticut,³ Utah,⁴ Pennsylvania,⁵ Colorado,⁶ and California⁷ recognize a targeted insurer's right to seek contribution for defense costs, as do many of the federal circuits courts,⁸ as well as state and federal lower courts.⁹

Equitable rights to contribution avoid any possible incentive for an insurer to delay in stepping forward to provide a defense. See *St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co.*, No. 1:06-CV-2074-JOF, 2009 WL 7879612, at *10 (N.D. Ga. Mar. 23,

² *Mut. of Enumclaw Ins. Co.*, 191 P.3d at 872.

³ *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 123-24 (Conn. 2003).

⁴ *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 137-38 (Utah 1997).

⁵ *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 509 (Pa. 1993).

⁶ *Nat'l Cas. Co. v. Great S.W. Fire Ins. Co.*, 833 P.2d 741, 747-48 (Colo. 1992).

⁷ *Cont'l Cas. Co. v. Zurich Ins. Co.*, 366 P.2d 455, 460-62 (Cal. 1961).

⁸ See, e.g., *Lexington Ins. Co. v. Allianz Ins. Co.*, 177 Fed. Appx. 572, 574 (9th Cir. 2006); *State Farm Fire & Cas. Co. v. Zurich Ins. Co.*, 111 F.3d 42, 44 (6th Cir. 1997); *Aetna Cas. & Sur. Co. v. Chi. Ins. Co.*, 994 F.2d 1254, 1257 n.2 (7th Cir. 1993); *Northern Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992).

⁹ See, e.g., *Exec. Risk Indem., Inc. v. Charleston Area Medical Ctr., Inc.*, No. 2:08-cv-00810, 2009 WL 2357114, at *8 (S.D.W. Va. July 30, 2009); *Travelers Indem. Co. v. Acadia Ins. Co.*, No. 1:08-cv-92, 2009 WL 1320965, at *10 (D. Vt. May 8, 2009); *St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co.*, No. 1:06-cv-2074-JOF, 2009 WL 789612, at *8-10 (N.D. Ga. Mar. 23, 2009); *McClain v. Nat'l Fire & Marine Ins. Co.*, No. 2:05-cv-00706-LRH-RJJ, 2008 WL 5501105, at *6 (D. Nev. June 23, 2008); *Ind. Ins. Cos. v. Granite State Ins. Co.*, 689 F. Supp. 1549, 1553 (S.D. Ind. 1988); *Forum Ins. Co. v. Ranger Ins. Co.*, 711 F. Supp. 909, 914 (N.D. Ill. 1989); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1173, 1175 (W.D. Mich. 1988).

2009); see *Valley Ins. Co. v. Wellington Cheswick, LLC*, No. C05-1886RSM, 2006 WL 3030282, at *6-7 (W.D. Wash. Oct. 20, 2006) (“no indemnitor should have any incentive to avoid paying” defense costs); Windt at § 10:3 (“denying contribution encourages a waiting game by [] insurers”). This Court was cognizant in *Jostens v. Mission Ins. Co.* that “any rule [it] fashion[ed] should not encourage two insurers with arguable coverage to adopt a ‘wait and see’ attitude” to defending a common insured. 387 N.W.2d 161, 167 (Minn. 1986). The “wait and see” approach is exactly what denying equitable rights to contribution engenders, however, by permitting “losses [to] fall irrevocably on” the first insurer to defend. Windt at § 10:3; see *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 187 (Minn. App. 2001) (questioning whether *Iowa National* incentivizes delay by “punishing insurers ... who live up to their contractual obligation”); accord *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 82 (Minn. App. 1997).

Recognizing an insurer’s equitable rights to contribution for defense costs also protects the vital but fragile insurance mechanism. Insurance can spread risk, even an enormous one, over a large number of policyholders provided that the risk can be actuarially predicted. Excessive uncertainty as to the nature of the risk assumed undercuts this vital risk-spreading function. If an insurer does not have recourse to contribution from other triggered policy years, predicting the probability and scope of a loss event would be substantially more difficult. That is precisely what has happened here. If Liberty Mutual cannot seek contribution from other triggered policy years, Liberty

Mutual will end up paying defense expenditures from *forty-eight years* of harm not indemnifiable under the Liberty Mutual policies.

Iowa National is inapplicable to this case and does not require Liberty Mutual to pay more than its fair share of Cargill's defense costs. Moreover, for the reasons discussed herein, CICLA urges this Court to reconsider *Iowa National* to the extent that it is viewed as inconsistent with an insurer's equitable right to contribution.

III. CARGILL'S "WHIM AND CAPRICE" SHOULD NOT DETERMINE ITS INSURERS' DEFENSE OBLIGATIONS.

From the outset Liberty Mutual set out to fairly apportion defense costs and to preserve its right to seek contribution from Cargill's primary insurers that may have a duty to defend. Liberty Mutual repeatedly offered to provide a defense to Cargill on the condition only that Cargill execute a loan-receipt agreement. Cargill should not be permitted to rebuff Liberty Mutual's efforts to resolve this dispute by refusing to execute a neutral loan-receipt agreement. This Court in *Jostens* recognized that it is not fair:

that [one insurer] should ... be responsible for the entire costs [of an insured's defense] simply because [the insured] has selected [that insurer] rather than [the other] to pay them. Who should pay [an] 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.

387 N.W.2d at 167; *see also Pan Pac. Retail Props., Inc. v. Gulf Ins. Co.*, 471 F.3d 961, 974 (9th Cir. 2006) (quoting *Fireman's Fund Ins.*, 65 Cal. App.4th at 1295) ("Where multiple insurers or indemnitors share equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss

claimant.”). Permitting the “whim and caprice” of the insured to bar its chosen insurer’s recourse to contribution from other equally liable insurers by refusing to execute a loan-receipt agreement leads to inequitable results. It also may encourage insurers to wait and see whether another carrier will undertake the insured’s defense so that they are not left holding the bag for a common obligation.

By contrast, loan-receipt agreements eliminate any incentive for a “wait and see” approach, and ensure that each insurer on the risk pays its fair share of the defense costs. Such an agreement “is a device used to achieve an equitable result.” *Jerry Mathison Constr., Inc. v. Binsfield*, 615 N.W.2d 378, 381 (Minn. App. 2000). Cargill should not be allowed to thwart Liberty Mutual’s recourse to contribution from other equally liable insurers by refusing to execute a loan-receipt agreement. In so doing, insureds like Cargill circumvent the “equitable result” for which the loan-receipt agreement was designed. CICLA therefore urges this Court to affirm the Court of Appeals’ decision to impose a constructive loan-receipt agreement, thereby preserving Liberty Mutual’s opportunities to obtain contribution for its defense expenditures.

A. Requiring Cargill to Execute a Loan-Receipt Agreement Achieves the “Equitable Result” for which the Agreement Was Designed.

Minnesota courts have long recognized the utility of loan-receipt agreements. *See Blair v. Espeland*, 43 N.W.2d 274, 277 (Minn. 1950). In *Blair*, this Court approved the loan-receipt agreement “as a device 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 ... agreement, would be the real party in interest.” 43 N.W.2d at 277. At its core, a loan-

receipt agreement “is a device used to achieve an equitable result.” *Jerry Mathison Constr.*, 615 N.W.2d at 381.

As a “device to permit [a] contribution action” where the “dispute [is] primarily between the two insurers,” *Blair*, 43 N.W.2d at 277; *Jostens*, 387 N.W.2d at 165, loan-receipt agreements mitigate against the inequitable consequences of any rule that denies equitable rights of contribution to a targeted insurer. These agreements would cease to serve this vital function if insureds like Cargill were permitted to thwart their defending insurers’ recourse to seek contribution from other triggered policies by refusing to execute a loan-receipt agreement.

In its decision below, the Court of Appeals correctly noted that placing insurers “at the mercy of the insured who could unilaterally select an insurer or insurers to defend” without “preserving the opportunity to recover an equitable apportionment of defense costs” would undoubtedly cause insurers to adopt the ‘wait and see’ approach that *Jostens* hoped to avoid.” *Cargill v. ACE Am Ins. Co.*, 766 N.W.2d 58, 66 (Minn. App. 2009). Consequently, “because it eliminates an insurer’s incentive to delay or refuse to undertake” the defense, “protecting the rights of an insurer through a court-ordered loan receipt agreement is also beneficial to the insured.” *Id.* Cargill’s “whim and caprice” should not be permitted to undermine these important benefits.

B. Requiring Cargill to Execute a Loan-Receipt Agreement Encourages the Resolution of Insurance Disputes.

Minnesota courts have long endorsed loan-receipt agreements as a “useful device in disposing of insurance disputes.” *Jostens*, 387 N.W.2d at 164; *see Blair*, 43 N.W.2d at

277. Allowing a policyholder to refuse to execute a loan-receipt agreement encourages needless litigation. Courts recognize that under an approach where an insurer that “undertakes to defend cannot pass on its defense expenses to [an]other carrier,” *Jostens*, 387 N.W.2d at 166 (citing *Iowa Nat’l Mut. Ins.*, 150 N.W.2d at 233), the result is to encourage “insurers with arguable coverage to adopt a ‘wait and see’ attitude” to their defense obligations, *id.* at 167, and “reward insurers for refusing to defend,” *Redeemer Covenant Church of Brooklyn Park*, 567 N.W.2d at 82. By providing insurers a right to “de facto contribution,” loan-receipt agreements eliminate these problems. The agreements are “used to achieve an equitable result,” *Jerry Mathison Constr.*, 615 N.W.2d at 381.

Here, several of Cargill’s insurers agreed to fund Cargill’s defense in the underlying litigation, contingent upon Cargill executing commonly-used loan receipt agreements. These loan-receipt agreements would have effectively disposed of this insurance dispute, while providing Cargill a defense in the underlying actions. However, Cargill refused to enter into a loan-receipt agreement and put an end to this issue. Subsequently, on October 8, 2007, Liberty Mutual tendered to Cargill a check in the amount of \$704,762.22 in partial payment of Cargill’s defense, again subject only to the execution of a valid loan-receipt agreement by Cargill. Again, Cargill refused to accept Liberty Mutual’s defense. Instead, Cargill chose to sue its primary insurers, as well as many of its umbrella carriers, giving rise to a protracted, two-year battle through the Minnesota courts.

Litigation costs will increase if insureds like Cargill are allowed to create insurance disputes where none properly exist, and where their insurers stand ready to provide a defense. These increased costs will ultimately be borne by consumers of insurance in the form of higher premiums. See, e.g., *UnitedHealth Group, Inc. v. Lexington Ins. Co.*, No. 05-1289, 2006 WL 2620620, at *3 (D. Minn. Sept. 12, 2006) (recognizing that higher litigation costs are reflected in increased insurance premiums); *Krupnick v. Hartford Accident & Indem. Co.*, 28 Cal. App.4th 185, 195 (Cal. Ct. App. 1994) (stating that the “public ultimately will be affected by the additional drain on judicial resources” and “will indeed suffer from escalating costs of insurance coverage” as a result of “costly litigation”). CICLA therefore urges this Court to preserve Liberty Mutual’s right to recover a portion of its defense expenditures from Cargill’s other carriers by imposing a constructive loan-receipt agreement on Cargill.

IV. CARGILL HAS A CONTRACTUAL OBLIGATION TO EXECUTE A LOAN-RECEIPT AGREEMENT, THEREBY PRESERVING LIBERTY MUTUAL’S OPPORTUNITIES TO OBTAIN CONTRIBUTION.

A. The Cooperation Clause Obligates Cargill to Execute a Loan-Receipt Agreement

According to the policies’ plain terms, Cargill has a duty to cooperate with Liberty Mutual to preserve Liberty Mutual’s opportunity to obtain contribution for the defense expenditures. The policies’ cooperation clause requires Cargill to assist Liberty Mutual in “enforcing any right of contribution or indemnity against any person or organization who may be liable to [Cargill].” Policies, Section VIII.4(c). Because Cargill breached

this duty, CICLA respectfully requests that this Court impose a constructive loan-receipt agreement on Cargill in fulfillment of its obligation under the cooperation clause.

When the state of Oklahoma and the plaintiffs in Arkansas sued Cargill, Liberty Mutual offered to fund Cargill's defense, asking only that Cargill execute a loan receipt agreement—a “commonly used” device that “essentially allows insurers to seek contribution from other duty-to-defend insurers [in] the absence of privity between them.” *Cargill*, 766 N.W.2d at 61 n.1. Nonetheless, despite Cargill's contractual duty to cooperate with Liberty Mutual to enforce Liberty Mutual's contribution rights, Cargill has repeatedly refused to “execute a customary and neutral loan receipt agreement to allow Liberty Mutual to seek contribution from the more than 50 other non-participating insurers for the multi-million dollar litigation costs in defending against the lawsuits.” *Id.* at 60-61.

In refusing to execute the loan-receipt agreement, Cargill has violated the plain terms of the cooperation clause. Under Minnesota law, “[g]eneral principles of contract interpretation apply to insurance policies.” *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (citing *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998)). “When a policy's language is clear and unambiguous,” Minnesota courts “interpret the policy according to plain, ordinary sense so as to effectuate the intention of the parties.” *Carlson*, 749 N.W.2d at 45 (internal quotation marks omitted) (citing *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977)). Here, the cooperation clause clearly and unambiguously obligates Cargill to assist Liberty Mutual in “enforcing any right of contribution or indemnity against any person or

organization who may be liable to [Cargill].” Policies, Section VIII.4(c). This is precisely what Liberty Mutual has requested: Cargill’s assistance in enforcing its contribution rights against “any person or organization who may be liable to [Cargill]”—here, Cargill’s other insurance carriers—by executing a loan-receipt agreement. Such agreements give an insurer “standing to seek contribution” from other insurers that may share the duty to defend the insured. *Home Ins. Co. v. Nat’l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 527 (Minn. 2003); *see Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 557 (Minn. 1977), *superseded by statute on other grounds as recognized in, Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006) (noting that loan-receipt agreements are regularly used to gain “de facto contribution”); *Cargill*, 766 N.W.2d at 61 n.1 (stating that a loan-receipt agreement “essentially allows insurers to seek contribution from other duty-to-defend insurers”); *Redeemer Covenant Church of Brooklyn Park*, 567 N.W.2d at 74 (affirming the district court’s ruling that “the loan receipt agreements that two defending insurers had with the insured *entitled those insurers to contribution* of part of the defense costs” (emphasis added)); *Herring v. Jackson*, 122 S.E.2d 366, 371 (N.C. 1961) (“The purpose of [a] ‘Loan Receipt’ agreement ... is to confer upon [the insurer] a right to enforce contribution.”).

The purpose of a cooperation clause in an insurance policy is to protect the insurer’s interests. *Juvland v. Plaisance*, 96 N.W.2d 537, 540 (Minn. 1959). “[O]nce [a] claim is made, both the insurer and the insured have the theoretical power to act in a way that will prejudice the other in its attempts to avoid or minimize their respective liability” 14 Couch on Ins. § 199:1 (3d ed. 1999). Because the relationship between the

insurer and insured is “interspersed with activities that can affect each other’s rights,” *id.* at 199-9, a cooperation clause ensures that the insured does not act to prejudice the interests of its insurer.

In *Steen v. Those Underwriters at Lloyds*, 442 N.W.2d 158 (Minn. App. 1989), for example, the insured settled the underlying claim without its insurer’s consent. Even though the settlement was non-binding on the insurer, the Court of Appeals held that the settlement breached the cooperation clause because it obligated the insured and its counsel to testify on behalf of the claimants as to the settlement’s reasonableness. *Id.* at 163. The court reasoned that, as a result of the settlement, the insurer “would no longer have the right to the insured’s cooperation in any defense of the [it]s interests.” *Id.*

In *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322 (Ill. 1991), the policy contained a cooperation clause substantially similar to that here. The Illinois Supreme Court held that the insured breached the cooperation clause by refusing to provide its litigation files in the underlying lawsuits to the insurer. According to the court, the insurer was prejudiced by the insured’s failure in part because “any potential recovery for contribution” by the insurer against third-parties depended on the insurer reviewing the files. *Id.* at 329. Similarly, here, “[b]y declining to execute a neutral loan receipt agreement customarily used in the insurance industry in order to impose upon [Liberty Mutual] the liability for the entire multi-million defense costs,” *Cargill, Inc.*, 766 N.W.2d at 65, Cargill denied Liberty Mutual the possibility of recovery, breaching the cooperation clause.

B. Contract Certainty is a Matter of Great Public Importance; Parties Rely on the Courts to Enforce Their Agreements as Written and Not to Depart from Clear Policy Terms.

The cooperation clause was intended to reinforce Minnesota's rule of equal shares and prevent Cargill from leaving Liberty Mutual "holding the bag" for all defense costs without any recourse to contribution from other triggered policy years. CICLA urges this Court to interpret the policies according to their plain and unambiguous terms, and affirm Cargill's contractual obligation to assist Liberty Mutual in enforcing its contribution rights. Failure to enforce contracts as written would have significant destabilizing effects for both insurers and insureds.

As previously discussed, risk calculation becomes next to impossible when liability is extended indefinitely into the future. The well-settled rule that "defense costs are apportioned equally among insurers whose policies are triggered" when "recovery of defense costs is not barred by the *Iowa National* rule" reins in these uncertainties. Likewise, the cooperation clause enables Liberty Mutual to perform the rational risk assessment upon which the insurance mechanism depends by maximizing the possibility that, if Cargill targets Liberty Mutual to defend it, Cargill's other triggered insurers will be required to reimburse Liberty Mutual for their fair share of defense expenditures.

All parties—individuals and business, small commercial interests and large—expect that courts will enforce the plain language of contracts, and conduct their affairs based on such expectations. "Judicial fidelity to basic principles of contract interpretation is therefore vital to retain the confidence of both the public at large[,] and the business community" in particular, that the bargain made will be the bargain

enforced. *Ducote v. Koch Pipeline Co.*, 730 So.2d 432, 437 (La. 1999), *overruled on other grounds by, Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La. 2000). The California Supreme Court has affirmed that “rewrit[ing] any provision of any contract, including the standard [insurance] policy ... might have untoward effects generally on individual insurers and individual insureds and also on society itself.” *Certain Underwriters at Lloyd’s London v. Super. Ct.*, 16 P.3d 94, 108 (Cal. 2001).

Like any business, insurers must be able to rely on established principles of contract law. Insurers underwrite contracts only for specific risks, and policies contain provisions such as the cooperation clause at issue here to limit the risks assumed. Courts would create great uncertainty if they disregarded express, unambiguous provisions defining and circumscribing the liabilities that the insurer agreed to assume. Insurers must have confidence that unambiguous policy language will be enforced as written, and not be subjected to arbitrary interpretation. No insurer could agree to cover a risk if courts could impose liability notwithstanding the plain language of the policy by abrogating important safeguards, like the cooperation clause, that minimize the insurer’s risk.

The consequences of failing to give effect to the language of insurance contracts are potentially far-reaching. Because “the insurance industry is peculiarly affected with a public interest,” *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 53 (Tex. 1997), the expansion of liability does not affect only insurers. First, the failure to enforce insurance can again disrupt the stability of contracting with insurers by undercutting insurance’s vital risk-spreading function. *See City of Edgerton v. Gen. Cas. Co. of Wis.*, 517 N.W.2d 463, 477 n.26 (Wis. 1994), *overruled on other grounds by, Johnson Controls, Inc. v.*

Employers Ins. of Wausau, 665 N.W.2d 257 (Wis. 2003) (an insurer’s “original risk assessment becomes a nullity” if judicial or legislative intervention “expand[s] coverage beyond what was planned for by the insurer in the contract of insurance”).

Moreover, if courts ignore the risks that an insurer assumed—and did not assume, the insurer must necessarily account for such new liabilities in the insurance premiums they charge, ultimately impacting consumers. Here, Liberty Mutual relied on the cooperation clause to limit its liability for defense costs where other carriers share the duty to defend. The plain terms of this provision require Cargill to assist Liberty Mutual to enforce its contribution rights against other triggered policy years. Imposing full liability on Liberty Mutual for millions of dollars in defense expenses without recourse to contribution rights against other triggered policies would contravene the plain terms of the insurance policies agreed to by Liberty Mutual and Cargill, exposing Liberty Mutual to greater risk. This would leave “ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insure[r’s] potential liabilities.” *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989); accord *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1511 (S.D.N.Y. 1983), *aff’d as modified*, 748 F.2d 760 (2d Cir. 1984) (“[T]he persons whom [insurers] now cover may well be grievously hurt in future years by the lower coverage that results, or by the bankruptcies caused by companies becoming self-insured in an effort to avoid the higher rates required to pay for broader theories of coverage.”).

Fundamental policy considerations therefore reinforce what Minnesota law requires—that this Court enforce the policies as written and require Cargill to preserve the contribution rights of Liberty Mutual against other responsible parties.

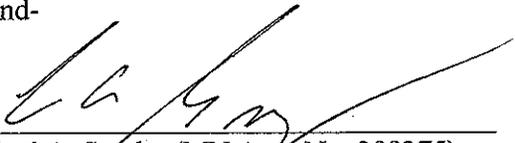
CONCLUSION

For the foregoing reasons, CICLA respectfully requests that this Court affirm the decision of the Court of Appeals preserving Liberty Mutual's opportunities to obtain contribution for its defense expenditures, and impose a constructive loan-receipt agreement on Cargill.

Dated: October 19, 2009

Laura A. Foggan (DC #375555)
Amanda Schwoerke (DC #974588)
Admitted Pro Hac Vice
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

-and-



Chad A. Snyder (MN Atty. No. 288275)
LAW OFFICES OF CHAD A. SNYDER LLC
333 Washington Ave. N, Suite 326
Minneapolis, MN 55401
(612) 349-2737

**ATTORNEYS FOR THE COMPLEX
INSURANCE CLAIMS LITIGATION
ASSOCIATION**

FORM AND LENGTH CERTIFICATION

This Memorandum of Law was prepared in Word 2003. The font is 13-point Times New Roman, and the word count is 4,999.

Dated: October 19, 2009


Chad A. Snyder (#288275)