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., 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.

BRIEF AND APPENDIX OF RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY

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STATEMENT OF ISSUES

The issue on review from Liberty Mutual's[1] cross-petition is:

> Does *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*, 276 Minn. 362, 150 N.W.2d 233 (1967), govern the allocation of liability for defense costs between insurers either (a) when no insurer undertakes a defense, or (b) when the insurers issued policies to the same insured but over successive time periods, all of which policies are allegedly implicated by property damage or bodily injury spanning years?

The court of appeals essentially answered this question in the affirmative. Meanwhile, the district court stated that the circumstances of this case did not call for application of the "*Iowa National* rule." Rather, the district court applied the rule of an equal sharing of defense costs between insurers having a mutual duty to defend, as occurred in *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161 (Minn. 1986), and *Wooddale Builders, Inc. v. Maryland Casualty Co.*, 722 N.W.2d 283 (Minn. 2006).

The issue on review from Appellant Cargill's petition is more accurately presented as follows:

> When one insurer undertakes a complete defense of its insured, is the insured then obligated, upon request, to execute a loan receipt that preserves the defending insurer's right to an equitable sharing of defense costs with other insurers who are equally liable for the defense?

The court of appeals affirmed the district court in ruling that such an obligation exists.

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[1] "Liberty Mutual" shall refer to Defendant-Respondent Liberty Mutual Insurance Company and "Cargill" shall refer collectively to Plaintiffs-Appellants Cargill, Incorporated and Cargill Turkey Production, LLC. "The Underlying Actions" shall have the same meaning as ascribed to it in Cargill's Brief, namely the Oklahoma and Arkansas lawsuits at issue. (*See* Cargill Br. at 2).

Most-Apposite Cases for Both Issues:

Wooddale Builders, Inc. v. Maryland Casualty Co., 722 N.W.2d 283 (Minn. 2006); *Domtar, Inc. v. Niagara Fire Insurance Co.*, 563 N.W.2d 724 (Minn. 1997); *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161 (Minn. 1986); *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*, 276 Minn. 362, 150 N.W.2d 233 (1967).

STATEMENT OF THE CASE

In the first phase of this litigation, the Honorable Thomas W. Wexler, District Court Judge for Hennepin County, instructed the parties to address the defendant-insurers' alleged duties to defend Cargill in the Underlying Actions. (Add. 52, ¶3; Add. 9). Although Cargill's Complaint alleges that several of its primary-level insurers (and some umbrella-level insurers) owe it a defense and have breached that duty, it moved for summary judgment on the duty-to-defend issue only against Liberty Mutual. Cargill argued, *inter alia*, that the holdings in *Iowa National* have created a rule whereby, after it selects one insurer to defend all of the Underlying Actions, the selected insurer does not have the right to seek an equitable share of these defense costs from other insurers who are equally liable.

Liberty Mutual opposed Cargill's motion and cross-moved for summary judgment. Liberty Mutual alleged, *inter alia*, that Cargill's failure to execute a loan receipt in conjunction with Liberty Mutual's proposed payment of Cargill's millions of dollars in defense costs materially breached certain terms of the Liberty Mutual policies at issue and was otherwise inequitable. Liberty Mutual also argued that, under the circumstances of this case and existing Minnesota law, all of Cargill's insurers with a duty to defend it

in the Underlying Actions are liable, in equal shares, for Cargill's defense, even without a loan receipt from Cargill.

Contrary to Cargill's assertion, (Cargill Br. at 2, 6, 8), most of its primary-level insurers (including Liberty Mutual) *have* agreed to pay the *full* amount of Cargill's reasonable and necessary defense costs incurred in relation to the Underlying Actions under a complete reservation of rights.[2] These insurers have merely sought concurrently to enforce Cargill's obligations, under their respective policies and in equity, to assist them in preserving their right to partial recovery of these costs from other parties that are equally liable for them. Under Minnesota law, such recovery is unquestionably allowed upon Cargill's execution of a standard loan receipt agreement, which the insurers have requested in conjunction with any payments. Cargill rejected the loan receipts.

Consequently, there were two primary issues before the district court. First, does the *Iowa National* rule, which only applies to an insurer who affirmatively undertakes an insured's defense, somehow abrogate Liberty Mutual's right to an equal sharing of defense costs with Cargill's other insurers having a duty to defend, when no insurers have agreed to defend? Second, can an insured unilaterally refuse a loan receipt agreement from a defending insurer, especially when the insured does so in a blatant attempt to deprive the selected insurer of any opportunity to seek an equitable share from other insurers who are equally liable for the defense?

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[2] It is the insured's burden (not yet met by Cargill) to establish that its defense costs are "reasonable and necessary." *See Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 738 (Minn. 1997). Cargill's quarrel with this proposition, (Cargill Br. at 8), is unfounded.

The district court correctly determined that, under the circumstances of this case and Minnesota law, including *Wooddale*, once a determination is made regarding which insurers have defense obligations to Cargill for the Underlying Actions, those insurers will be liable in equal shares for the costs of defending those claims, assuming no insurer had previously invoked its right to control Cargill's defense.[3] (Add. 62-63). In conjunction with that ruling, the court stated that Liberty Mutual has the right to seek equal-share contribution for defense costs from these equally liable insurers if it is forced to pay all of Cargill's defense costs without Cargill having first agreed to a standard loan receipt. (*Id.*).

In so holding, the district court rejected Cargill's attempt to justify its refusal to execute a loan receipt based on certain beliefs Cargill has regarding the effect of alleged "fronted" policies it apparently entered into with some of its primary-level insurers. In response, the court correctly stated:

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

(Add. 59, at ¶C.9).

The court further recognized that, even though Cargill's refusal to execute a loan receipt agreement is an inequitable result, it still needed to address what powers it had to

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[3] The district court's Amended Order clarifies that the issue of which insurers, including Liberty Mutual, have a duty to defend Cargill in the Underlying Actions remains to be determined. (*See also, infra*, at 8).

achieve an equitable sharing of defense costs. (Add. 60-61, at ¶C.12). Noting this Court's instruction in *Wooddale* that courts must be flexible in responding to different facts in insurance coverage matters, (*id.*, quoting from *Wooddale*, 722 N.W.2d at 301), the court concluded that "the best approach to encouraging multiple insurers to promptly undertake the insured's defense is if the insurers know from the beginning that defense costs will be apportioned equally among those insurers whose policies are triggered." (Add. 61, at ¶C.13). Then, acknowledging this Court's repeated recognition of an insurer's right to recover defense costs from equally liable insurers, (Add. 62, at ¶C.14 (quoting *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997))), and properly distinguishing *Iowa National* on its facts, (Add. 62-63, at ¶¶16-17), the court further held:

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

(Add. 61-62, at ¶C.13).

Considering the foregoing, the district court said it would accomplish the result of equal sharing of defense costs by (a) declaring, consistent with *Jostens* and *Wooddale*, that a loan receipt is unnecessary for Liberty Mutual to seek reimbursement of defense costs from other, equally liable insurers of Cargill, or (b) alternatively, by equitably constructing a standard loan receipt agreement. (Add. 64-65, at ¶¶D.1-D.3). The court

also suggested that Cargill's refusal to execute a standard loan receipt agreement was a failure to follow its policy obligations to Liberty Mutual. (Add. 66, at ¶D.4).

The court then certified as "important and doubtful" the following question: "Can a court order primary insurers, who insure the same insured for the same risks, and whose policies are triggered for defense purposes, to be equally liable for the costs of defense where there is no privity between the insurers?" (Add. 66-67, at ¶¶D.2-D.3).

Cargill appealed. The court of appeals answered the certified question in Liberty Mutual's favor, effectively affirming the district court's summary judgment rulings. *Cargill, Inc. v. ACE Am. Ins. Co.*, 766 N.W.2d 58 (Minn. App. 2009). The court reasoned that

> an insured, as a part of its contractual duty to cooperate, has an affirmative obligation to preserve the insurer's opportunity to obtain contribution from other primary insurers with a similar duty to defend, and...a district court has the equitable authority to award such relief when an insured refuses to cooperate[.]

Id. at 60. The court of appeals' ruling was based on a correct, equitable concept that, "Whenever a primary insurer with a duty to defend offers to tender a defense on behalf of an insured, the insured has a reciprocal duty to allow the insurer to seek contribution from other primary insurers with a similar duty to defend." *Id.* at 59. It deemed this outcome derivative of Cargill's contractual duties to cooperate and to deal in good faith, as well as general principles of equity. *Id.* at 65-66. The court also recognized that Cargill's intent to foist on Liberty Mutual, and Liberty Mutual alone, defense costs that exceed well over $5.4 million, (*see, infra*, at 7-8), is inconsistent with this Court's more-recent jurisprudence on the insuring of defense costs in general liability policies. *Id.* at 65-66.

The court of appeals also ruled that, in the absence of a loan receipt agreement with Cargill, Liberty Mutual has no right to recover an equitable share of Cargill's defense costs from other insurers owing Cargill a duty to defend. *Id.* at 63-64. Liberty Mutual disagrees with this latter conclusion. (*See, infra*, Argument, Section I).

Subsequently, this Court accepted Cargill's Petition for Review and Liberty Mutual's conditional Cross-Petition for Review. (Add. 1-4).

COUNTERSTATEMENT OF FACTS

Cargill's Statement of Facts is both incomplete and, in some instances, incorrect. The following highlights those omissions and errors material to this appeal.

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

For the most part, Cargill accurately describes the lawsuits comprising the Underlying Actions. However, two matters deserve elaboration.

First, the defense costs that Cargill seeks only from Liberty Mutual are quite large. While Cargill speaks generally about having incurred "significant" fees and costs in connection with these lawsuits, (Cargill Br. at 7), it does not disclose the amounts at issue. This omission may be partially related to Cargill's refusal to update the defendant-insurers on the amounts it has spent defending the Underlying Actions. (*See* Respondent Liberty Mutual Insurance Company's Appendix (hereinafter "LMA"), 46, ¶8). Given Cargill's failure to send its primary-level insurers *any* defense bills since February of 2007, (*id.*), Liberty Mutual is uncertain how much has been expended in total. However, as of over two-and-a-half years ago, Cargill had already allegedly spent $5.4 million in defense costs in the Underlying Actions. (February 4, 2008 Affidavit of Michael J.

Cohen ("Cohen Aff."), ¶2). The defense has continued in earnest since then, (*see* Cargill Br. at 6-7), including trial in the Oklahoma lawsuit that commenced September 24, 2009. (LMA 130-31).

Second, there remains a significant question as to whether *any* bodily injury or property damage alleged in the Underlying Actions actually occurred before the early 1980's, so as to involve the Liberty Mutual policies, which were in effect from June 1, 1969 to June 1, 1973. (*Cf.* Add. 51, at ¶A.1). If investigation shows that Cargill's alleged liability is not based on an occurrence during Liberty Mutual's policy periods, Liberty Mutual has no duty to defend or indemnify Cargill because, at that point, coverage is no longer "arguable." *Cf. Wooddale*, 722 N.W.2d at 302; *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.*, 731 N.W.2d 154, 158-59 (Minn. App. 2007). It is for this reason, among others, that Liberty Mutual's (and other primary-level insurers') recognition of any duty to defend was made with a full reservation of rights. These are not "lawyerly qualifications," (Cargill Br. at 18), but rather standard means for insurers to adequately secure their rights while dealing in good faith with insureds.

Thus, Liberty Mutual has *never* made an unqualified admission that there is indeed coverage under its policies for the Underlying Actions *nor* has it undertaken Cargill's defense (due to Cargill's refusal to execute a standard loan receipt agreement).

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

As noted above, Liberty Mutual only issued primary-level commercial general liability ("CGL") coverage to Cargill for a cumulative period of four years that was over

36 years ago. Although it is presently unclear when Cargill allegedly began causing the property damage or bodily injuries at issue, in this lawsuit Cargill asserts claims for coverage under policies issued as far back as 1957 and inclusive of those continuing, uninterrupted, through policies with coverage periods within 2006—*i.e.*, nearly 50 total years of insurance coverage. (*See* LMA 32-43). At no point in this entire period was Cargill ever self-insured; rather, it was paying premiums to third-party liability insurers and receiving continuous coverage. (*Id.*).

All of these policies contain standard insuring agreements, including a right and duty to defend Cargill in any lawsuits alleging property damage or bodily injury for which the policies provide coverage. (*See* LMA 19, ¶72; *see, e.g.*, Cohen Aff., Exs. D, I, K, O, P, W, X). In addition to these primary-level policies, Cargill has purchased numerous excess and umbrella policies over the years providing coverage above its primary policies, some of which contain defense obligations. (LMA 20, ¶77, 32-43).

On the basis of these policies, Cargill sought a declaration that: primary-level insurers named as defendants in this action *besides Liberty Mutual*, as well as certain umbrella-level insurers, also owe Cargill "a complete and indivisible defense" in the Underlying Actions; they breached their duty to defend; and they are "obligated to reimburse Cargill in full for the costs already incurred by Cargill in defending the Oklahoma[/Arkansas] Lawsuit[s]." (LMA 4, 19-21, 23-25, 27-28). No insurer has undertaken Cargill's defense, short of Cargill executing a loan receipt agreement, or waived any coverage defenses.

III. Liberty Mutual's Willingness to Undertake Cargill's Defense in the Underlying Actions Subject to Cargill Executing a Loan Receipt Agreement.

Liberty Mutual, as well as certain other primary insurers Cargill sued in this action, offered to *fully* pay Cargill for its reasonable and necessary defense costs in the Underlying Actions. (Appx. 206-13; LMA 45, ¶5). It has done so under a typical reservation of rights and with the sole conditions that (a) Cargill executes a standard loan receipt agreement, and (b) Cargill otherwise lives up to its contractual obligations. The loan-receipt condition, as explained below, is consistent with the applicable insurance policies, with Minnesota law and equity, and was made to ensure that Liberty Mutual's rights to seek equitable shares from other non-defending insurers are unquestionably protected. (*See* Appx. 206-13).

In fact, in October of 2007, Liberty Mutual again tendered a loan receipt agreement to Cargill in conjunction with its first payment towards providing a complete defense of Cargill. (*See* Cargill Br. at 9; Appx. 214-19; LMA 45, ¶5). Cargill refused this agreement a mere day after receiving it, returned Liberty Mutual's check for defense costs, (Appx. 220), and then, a few weeks later, moved for summary judgment against Liberty Mutual. Cargill has since continued to refuse any loan receipt agreement with Liberty Mutual that would actually protect Liberty Mutual's right to participate in the defense *and* its right, under Minnesota law, to seek an equitable share from other insurers who are equally liable for the defense costs.

IV. Liberty Mutual Only Seeks an Equal-Shares Allocation of Defense Costs from Cargill's Other Insurers with a Duty to Defend.

The simple fact is that Liberty Mutual has not and will never seek *any* repayment of defense costs from Cargill when it obtains equitable shares from other insurers who are equally liable for Cargill's defense costs, whether through its existing rights to such an allocation or a loan receipt. Nor has it, or will it, seek recompense from Cargill's captive insurance company as reinsurer of any primary policy issued to Cargill. Rather, consistent with Minnesota law, *see, e.g., Wooddale*, 722 N.W.2d 283; *Jostens*, 387 N.W.2d 161, Liberty Mutual will receive an equitable share *only* from other, third-party primary-level insurers who are equally liable for the payment of Cargill's defense costs, *as even Cargill has alleged in this case*. These are genuine insurers of Cargill's liability risks and to whom Cargill paid premiums.

ARGUMENT

Twenty-three years ago, this Court categorically stated: "Who should pay the insured's defense costs should not depend on the whim or caprice of the insured, when, at the time the defense was needed, both insurers arguably had a duty to defend." *Jostens*, 387 N.W.2d at 167. Three years ago, this Court reaffirmed this principle, stating the rule established in *Jostens* as: "*when no insurer provides a defense to the insured*, the insured may recover its defense costs from any of its insurers, and *as between the insurers, there is equal liability for defense costs*." *Wooddale*, 722 N.W.2d at 303 (second emphasis added).

Both courts below properly recognized that Cargill seeks relief on grounds that contravene these very holdings. In particular, Cargill argues that *it* may effectively impose on Liberty Mutual *alone* complete liability for Cargill's millions of dollars in defense costs in the Underlying Actions. Cargill's view is that a loan receipt agreement is always necessary for an insurer who ultimately pays for an insured's defense to obtain an equal-share contribution from other insurers with a similar duty to defend. (Cargill Br. at 22, 38). Cargill is wrong. Rather, Cargill's refusal to enter into a loan receipt results only in (1) Cargill not receiving payments for its defense earlier in time from insurers willing to undertake its defense; and (2) concurrently, Liberty Mutual being unable to exercise its *right* to defend Cargill in the Underlying Actions. Under Minnesota law, Cargill's refusal has *no* effect on Liberty Mutual being equally liable with Cargill's other insurers with a duty to defend and having rights of recovery consistent with that allocation. This is true even if Liberty Mutual is eventually required to pay for Cargill's defense costs.

Iowa National simply does not provide to the contrary. The "*Iowa National* rule" provides only that an insurer opting to undertake an insured's defense—usually to protect its own interests by controlling the defense and limiting its indemnity exposure—may not later seek reimbursement from a non-defending insurer. *See Jostens*, 387 N.W.2d at 167. Liberty Mutual has *not* undertaken Cargill's defense in the Underlying Actions. It has always conditioned any such defense upon first receiving a standard loan receipt agreement from Cargill, and Cargill has refused to provide one. So while Cargill may ultimately be able to select which insurer (or insurers) with a proven duty to defend must

reimburse *it* for all of its covered defense costs, that obligation does nothing to affect the selected insurer's right to seek an equitable share of those costs from other duty-to-defend insurers who likewise did not undertake Cargill's defense. *Jostens* and *Wooddale* clearly state as much.

Truth be told, the contrary rule Cargill advocates is "selective tender." Under this rule, an insured is allowed not only to select which insurer(s) must provide a defense *but also*, in doing so, immunize other insurers with a duty to defend from any liability to the defending insurer. *See generally* 14 Couch on Ins. § 200:37 (explaining rule). For good reason, this Court has never adopted such a rule; indeed, the holdings in *Jostens* and *Wooddale* are clearly to the contrary. This is the fatal flaw in Cargill's entire argument.

Independent of the foregoing, Cargill is required to assist Liberty Mutual in its pursuit of contribution from any other parties who are equally liable to Cargill for its defense in the Underlying Actions. Cargill's attempts to wipe away this obligation fail. Rather, upon Liberty Mutual's offer to undertake Cargill's defense, Cargill is contractually obligated to cooperate and "execute and deliver instruments and papers," such as a loan receipt under Minnesota law, necessary to secure Liberty Mutual's right to seek an equitable share from other insurers who are equally liable for the defense costs. Indeed, Minnesota courts have specifically described and treated a loan receipt as a contribution and/or subrogation tool.

Beyond these contractual bases for requiring Cargill to execute a loan receipt agreement, public policy and this Court's prior decisions regarding insurers' defense obligations demand the same result. To the extent a loan receipt is *always* necessary for a

defending insurer to recover equitable shares of defense costs from non-defending insurers (which Liberty Mutual contends is *not* the case, Argument, Section I, *infra*), an insured's refusal to execute a standard loan receipt agreement with its defending insurer destroys that insurer's right to seek an equitable share from other equally liable insurers. The effect would be that any insurer who refuses to defend but is *not* selected by the insured is rewarded by *never* having to pay for defense costs, while a defending insurer is inequitably punished for having defended the mutual insured. Such a result disregards well-established Minnesota public policy concerning the incentives for insurers providing timely defenses and not taking a "wait and see" attitude.

To maintain consistent application of Minnesota law on these issues, and not to create perverse incentives, this Court should require, as both lower courts did here, that an insured execute a standard loan receipt upon a defending insurer's request. At a minimum, individual courts should be permitted to order this result when the circumstances and equities warrant, as here. These considerations would include whether the underlying claim involves property damage or bodily injury over many years (as here), as opposed to, for example, the discrete auto accident underlying *Iowa National.* Otherwise, absent this Court finding this case outside the scope of the *Iowa National* rule (which it should, *see* Argument, Sections I.A and I.B, *infra*), Liberty Mutual will be unable to recover *any* defense costs from any of Cargill's many other primary-level insurers—insurers whose policies constitute 45 of the 49 years of coverage (or 92%) allegedly at issue.

The circumstances of this case also highlight the growing discontentment over the *Iowa National* rule. Minnesota courts have noted that there is a questionable, perverse incentive inherent in the rule, one that inspires an insurer who arguably has a duty to defend *not* to promptly undertake the defense of an insured if it believes that other insurers are equally liable for those defense costs, lest that insurer be stuck with the whole bill without any recourse. In fact, for many of the same reasons that an insured should be required to execute a standard loan receipt agreement for a defending insurer, the very requirement of a loan receipt agreement as a condition for contribution between equally liable insurers is questionable. In all events, this Court's decisions after *Iowa National* make clear that, irrespective of whether a loan receipt exists, an insurer that contests coverage and does *not* undertake a defense remains equally liable with other non-defending insurers for those defense costs.

The various principles Liberty Mutual advocates for disposing of this appeal are fully consistent with Minnesota law, are just, effectuate important public policy interests, and are otherwise superior to the unprecedented paradigm Cargill advances.

I. ALL INSURERS HAVING A DUTY TO DEFEND CARGILL IN THE UNDERLYING ACTIONS ARE EQUALLY LIABLE FOR CARGILL'S DEFENSE COSTS.

A. The *Iowa National* Rule Is Inapplicable to this Case; Rather, this Court's Holdings in *Jostens* and *Wooddale* Govern.

Throughout this case, Cargill has sought to misapply Minnesota law on the rights between insurers for the payment of defense costs to a mutual insured. In particular, Cargill has over-read the scope of *Iowa National*. Meanwhile, Cargill misreads this

Court's further application of *Iowa National* and other duty-to-defend principles in cases such as *Jostens* and *Wooddale*, by under-appreciating their direct applicability to the circumstances here. Instead, Cargill essentially advocates a rule of "selective tender," which this Court has previously refused to adopt. When these cases are properly understood, the rights of insureds and their various insurers, including the true role that loan receipts play in this context, are clear, and they do not support Cargill's position. In particular, these cases show that Liberty Mutual does not need a loan receipt for there to be an equal-shares allocation of defense costs among Cargill's primary insurers who have a duty to defend Cargill. Liberty Mutual *already* has that right.

1. The *Iowa National* Rule Applies Only Where an Insurer Exercises Its Right to Defend an Insured and Thereby Participates in the Insured's Defense.

Irrespective of Liberty Mutual obtaining a loan receipt (whether from Cargill or by court order), the district court correctly declared that Liberty Mutual can, under the circumstances of this case, obtain an equitable sharing of Cargill's defense costs with other primary-level insurers who are equally liable for those costs.

The *Iowa National* rule is inapplicable. It applies only in circumstances, unlike here, where an insurer undertakes the defense of an insured, but *without* securing a loan receipt, either prior to undertaking the defense or thereafter.[4] The rule is based not only on the notions that the insurer opting to undertake the defense is doing "what it agreed to do" or that its defense obligation is several, but more so on the fact that the insurer is choosing to "protect its own interests" by controlling the defense and limiting its

[4] *See also, infra,* Section I.A.2.d.

indemnity exposure. *See, e.g., Jostens*, 387 N.W.2d at 166; *Iowa Nat'l*, 276 Minn. at 369, 150 N.W.2d at 238 (noting that the insurer's costs in undertaking the defense "were primarily expended to protect its own interests"). An insurer who accepts a tendered defense is, unlike non-defending insurers also with a duty to defend, invoking its concurrent *right* to defend any suit against the insured. (*See* Appx. 139, at § I). In such circumstances, *Iowa National* deems the insurer to have forfeited its rights to have other insurers contribute to the defense in equal shares.

Liberty Mutual is not willing to undertake Cargill's defense without first obtaining a standard loan receipt agreement from Cargill. Thus, the *Iowa National* rule does not govern Liberty Mutual with respect to any payments it has attempted to make to Cargill or will make to Cargill in the future, even if by virtue of a judgment in this action.

2. *Jostens* and *Wooddale* Reject Cargill's Attempted "Selective Tender" Rule and Provide that, As Between Non-Defending Insurers Found To Have Coverage, They Are Equally Liable for the Insured's Defense Costs.

Cargill requests a "selective tender" rule.[5] This unique rule, sometimes referred to as "targeted tender," has been rarely applied. It provides that, for an insurer to be able to seek contribution from other insurers with a duty to defend, the insured must not affirmatively state that just one of its insurers will provide its defense, *i.e.*, "selectively tender" to one insurer the defense of the case. *See generally* 14 Couch on Insurance §

[5] While the substance of Cargill's arguments makes this clear, one passage from its brief highlights this point well: "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*." (Cargill Br. at 22) (emphasis added). The latter concern is typical of a selective-tender rule.

200:37 ("If the insured does in fact make a selective tender, the selected insurer has the sole responsibility to defend...the insured and is foreclosed from making a claim for equitable contribution from other insurers. However, *the selective tender rule is only applicable to concurrent insurance coverage* and not consecutive, primary or excess coverage policies where other primary coverage is available." (emphasis added)).

Neither *Iowa National* nor other Minnesota law follows the "selective tender" rule. Rather, this rule (and Cargill's iteration of it) is antithetical to the principle of Minnesota law that, "*when no insurer provides a defense to the insured*, the insured may recover its defense costs from any one of its insurers, and as between the insurers, there is equal liability for defense costs." *Wooddale*, 722 N.W.2d at 303; *see also Jostens*, 387 N.W.2d at 167. Moreover, the rule does not apply here because Cargill *has* already tendered its defense to all primary insurers, claiming in this very action that each has breached its "indivisible" duty to defend.

To be clear, Liberty Mutual accepts the rule that Cargill can litigate its coverage rights and, if successful, recover its defense costs from any one insurer with a duty to defend (including, perhaps, Liberty Mutual). But that right is a far cry from an additional, new rule providing that such an election means the selected insurer cannot then recover equitable shares of those costs from other insurers who arguably had coverage at the time the insured tendered the defense. This Court has soundly rejected this latter proposition, as *Jostens* makes clear. Rather, *Jostens* explains that the default rule is that, where no insurer voluntarily undertakes an insured's defense, all insurers

having a duty to defend are equally liable for those costs. *Id.* at 167. *Jostens* also highlights the aforementioned, limited scope of the *Iowa National* rule.

a. Jostens *Plainly Defeats Cargill's Arguments.*

In *Jostens*, Jostens, Inc. was not defended by either of its two insurers, Employers Insurance of Wausau ("Wausau") and Mission Insurance Co. ("Mission"), in a lawsuit brought by a discharged employee. *Id.* at 163. Jostens defended, settled the lawsuit, and then sought reimbursement of its defense and settlement costs in a separate lawsuit against the two insurers. *Id.* Before trial, Wausau entered into a loan receipt agreement with Jostens, at which time Jostens released its claims against Wausau and then continued its suit against Mission. *Id.* at 163-64. As a threshold matter, the Court concluded that both insurers arguably had primary coverage for the alleged claim at the time of the tendered defense. *Id.* at 165-66.[6] Because both insurers had chosen not to defend Jostens, the Court needed to determine how to allocate the insured's defense and settlement costs from the underlying suit between the insurers. *Id.* at 166. Similar to the circumstances here, it reached this issue in a context where Jostens was enabling a result whereby Mission would pay for *the entire cost* of defense in the underlying action. *Id.* at 163-64.

The Court chose to examine the position facing Jostens *before* it settled with the underlying plaintiff, rather than its position after executing the loan receipt agreement with Wausau. *Id.* at 167. In doing so, the Court concluded that it would be unfair to

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[6] If anything, the *Jostens* rationale is stronger here. All the insurers from which Liberty Mutual will seek equitable shares are clearly primary-level insurers with, if established, an equal obligation to primarily defend Cargill in the Underlying Actions.

make Mission responsible for the entire costs sought, because both insurers had a duty to defend. *Id.* Specifically, the Court stated:

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

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

This Court further explained the meaning of the rule it had developed by stating that, when no insurer having a duty to defend a claim undertakes the defense:

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

Id. at 167 (emphases added). Furthermore, the Court expressly distinguished *Iowa National*, deliberately noting that the rule in *Iowa National* and related cases[7] is limited to instances in which "one of the two reluctant insurers *nevertheless overcame its reluctance and accepted tender* of the insured's defense, and *then* later tried to recover its defense

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[7] *Nordby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820 (Minn. 1983); *St. Paul Sch. Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41 (Minn. 1982).

costs from the other insurer. In our case here, neither insurer undertook the insured's defense." *Id.* at 166-67 (emphasis added).

Cargill's attempts to explain away *Jostens'* tremendous relevance on the basis that a loan receipt existed in the case (or on any other basis) necessarily fail. (Cargill Br. at 22, 38-40). An honest reading of *Jostens* merely highlights the true limit of the *Iowa National* rule, which Cargill ignores. The Court simply acknowledged the proper role that *Iowa National* plays: If either insurer overcomes its reluctance and accepts tender of the insured's defense, only then is it solely responsible for those defense costs and unable to seek reimbursement from other insurers. *Jostens*, 387 N.W.2d at 166-67. In *Jostens*, as here, no insurer provided a defense.

Even more compelling, *Jostens* rejected both the selective-tender rule Cargill now wrongly reads into Minnesota law as well as the aggressive reading of *Iowa National* upon which Cargill bases its proposed rule. The Court found that, as between Jostens and Mission, Jostens could *not* effect an outcome whereby Mission would be required to pay *all* of Jostens defense costs. If anything, the fact that a loan receipt existed between Jostens *and Wausau* could have given the Court more reason to follow Cargill's now-proposed selective-tender rule. Namely, Jostens, still as the "real party in interest" and retaining its right to seek an "indivisible" defense *from Mission, would,* under Cargill's view, have been able to cause Mission to pay for the entire cost of its defense.

This, of course, the Court refused to do. Rather, it recognized those insurers "arguably ha[ving] coverage at the time of the rejected defense tender" as being "equally liable for the insured's defense costs." *Id.* at 167. This holding was stated in general

terms, not as being limited to the context of a loan receipt or other settlement existing between the insured and another insurer. The generality of this holding is further realized from the Court's prefatory comment that its analysis of the insurers' responsibility for defense costs focuses on the period *prior to* the loan receipt—specifically, back "at the time [the insured] was confronted with [the underlying claimant's] allegations." *Id.*

In short, Cargill presents no valid reconciliation of the blanket statement of several liability in *Iowa National* with the equal-shares rulings of *Jostens*. For the reasons explained above, the *Jostens* Court had no reason to deal with the *Iowa National* rule, because neither insurer had undertaken the defense. With respect to the loan receipt, *Jostens* stands only for the principle that an insured and an insurer loaning it sums under a loan receipt agreement cannot use that mechanism to cause another insurer to pay for *all* of the defense costs. (*See* Cargill Br. at 39) (recognizing this very limitation to *Jostens*). Certainly, the fact that there was a loan receipt between Jostens *and Wausau* does not answer why Jostens (and Wausau) was not able to rely upon its right to seek a defense only from Mission and require Mission to bear *all* of Jostens' defense costs. That is because the principles causing the Court both to reject that effort and to order an equal sharing of defense costs were unaffected by the existence of the loan receipt agreement.

b. Wooddale *Reaffirms* Jostens *and the Rule of Equal-Share Liability Between Non-Defending Insurers.*

This Court's recent decision in *Wooddale* echoed the relevant analysis and holdings of *Jostens* and applied them in circumstances informative to this case. In *Wooddale*, the insurers participated in the insured's defense of an underlying claim

involving property damage over multiple years and multiple policy periods. *Wooddale*, 722 N.W.2d at 288. The issue facing the Court relevant to the instant case was determining "the apportionment of defense costs among insurers that *have* participated in providing a defense to their common insured, *but* are entitled to recovery from each other despite the absence of a loan receipt agreement." *Id.* at 303 (emphasis added). The insurers had retained a right to recover from each because, as between them, they had waived any applicability of the *Iowa National* rule. *Id.* at 302 n.15.

This Court found instructive the holdings in *Jostens* and *Domtar*, even though those cases were not dispositive under the *Wooddale* facts. It concluded that "when liability is allocated pro rata by time on the risk and the insurers on the risk have participated to some degree in providing a defense to their common insured, defense costs should be apportioned equally." *Id.* at 303. In doing so, this Court rejected a rule allocating defense costs between insurers in the same pro-rata-by-time-on-the-risk method applied to their indemnity obligations.

In reaching this result, this Court explicated the state of Minnesota law on defense obligations for liability insurers. This Court's own language best highlights Liberty Mutual's basic contention for why, in this case, all of Cargill's insurers with a duty to defend it in the Underlying Actions will equally share liability for Cargill's covered defense costs:

> In contrast with the *Iowa National* rule that bars recovery of defense costs by an insurer that provides a defense to its insured, when *no insurer* undertakes the defense of an insured, the *insured* may recover its defense costs from *any* of its insurers, and "the insurers, as between them, shall be equally liable for the insured's defense costs." *Jostens*, 387 N.W.2d at 167.

> West Bend argues that the rule in *Jostens* of equal liability among insurers that fail to provide a defense is not applicable when the pro-rata-by-time-on-the-risk liability allocation method applies. But in *Domtar*, when no insurer provided a defense of the insured, and liability was allocated pro rata by time on the risk, we reiterated and applied the rule of *Jostens*, stating: "an insured 'may * * * recover his costs * * * from *either or both* insurers' and that only '*as between [the insurers]*' are insurers equally liable for such costs." *Domtar*, 563 N.W.2d at 739. Accordingly, regardless of which liability allocation method is used, *when no insurer provides a defense to the insured*, the insured may recover its defense costs from any one of its insurers, and as between the insurers, there is equal liability for defense costs.

Id. at 302-03 (footnote omitted).

The *Wooddale* Court further observed that strong public policy considerations support an equal sharing of liability for defense costs. Among various considerations, this Court stated that

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

Id. at 303 (quoting *Jostens*, 387 N.W.2d at 167). This statement commands equal-share liability among insurers with a duty to defend. While equally apportioned liability encourages insurers to resolve disputes over the duty to defend expediently among themselves, it also eviscerates any incentive an insurer with an arguable duty to defend has to avoid undertaking an insured's defense, in a hope of escaping all liability.

As it does with *Jostens* and *Iowa National*, Cargill cherry-picks certain phrases and concepts from the *Wooddale* decision in an attempt to support its incorrect view of Minnesota law. However, the foregoing analysis shows that Cargill is ignoring essential

elements of Minnesota law in order to prop up a rule of selective tender. Moreover, Cargill misapprehends the import of the insurers in *Wooddale* waiving the *Iowa National* rule. (Cargill Br. at 41). The insurers needed to waive the rule because they *had* undertaken the insured's defense. That the insurers in *Wooddale* could "waive" that rule amongst themselves only underscores that the insured does not have the ability to unilaterally effect a change in the default rule of equal shares liability found in *Jostens*.

c. Liberty Mutual's Attempt to Defend Was Contingent on Cargill Entering into a Loan Receipt, and Cargill's Refusal Is Irrelevant to Liberty Mutual's Rights Vis-a-Vis Cargill's Other Insurers.

Cargill is correct about one thing. Whenever Liberty Mutual has tendered any payment of Cargill's defense costs in the Underlying Action or otherwise has offered to undertake Cargill's defense, it has always done so contingent on Cargill executing a loan receipt agreement that would maintain Liberty Mutual's rights to seek equal shares from Cargill's other insurers. Cargill has repeatedly refused to execute such a loan receipt. As a result, neither Liberty Mutual nor *any* of Cargill's other insurers have participated in Cargill's defense but rather continue to assert their coverage defenses. In no instance will Liberty Mutual "overcome its reluctance and accept tender of [Cargill's] defense," *Jostens*, 387 N.W.2d at 166, absent Cargill's sudden change of heart on signing a standard loan receipt. Liberty Mutual acted in this manner precisely because it viewed any acceptance of Cargill's defense without first obtaining a loan receipt as potentially destroying its right to attain an equal-shares allocation of defense costs with other primary-level insurers.

That Cargill dislikes this result because of "prejudice" resulting from its own business decisions to enter into "fronting" arrangements with its other insurers allegedly having a duty to defend is immaterial to the holdings of *Jostens* and *Wooddale*. Even assuming *arguendo* that these circumstances permit Cargill to refuse a standard loan receipt with Liberty Mutual, which Liberty Mutual denies (*see, infra,* Section II), that refusal does not remotely alter the fact that, having not received a genuine loan receipt agreement, Liberty Mutual has *not* undertaken Cargill's defense and, therefore, remains unencumbered by the *Iowa National* rule. Moreover, *Jostens* shows that *any* motives of the insured to effect a result different than an equal sharing of liability for defense costs are irrelevant. Whether based on whim, caprice or some other reason, "it hardly seems fair [Liberty Mutual] should now be responsible for the entire costs simply because [Cargill] has selected [Liberty Mutual] rather than [the other duty-to-defend insurers] to pay them." 766 N.W.2d at 65 (brackets original) (quoting *Jostens*, 387 N.W.2d at 167).

d. Other Cases Are Consistent with the Rule of Equal Shares and the Limited Scope of Iowa National.

Consistent with the foregoing, cases implicating the *Iowa National* rule involve instances where one or more insurers have undertaken/participated in the defense.[8] No case has applied the rule in circumstances where an insurer has agreed to defend under a reservation of rights and/or upon a standard loan receipt being executed, that request was

[8] *See, e.g., Home Ins. Co. v. Nat'l Union Fire Ins. Co.*, 658 N.W.2d 522, 525 (Minn. 2003); *Nordby*, 329 N.W.2d at 824; *St. Paul Sch. Dist.*, 321 N.W.2d at 43; *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 187 (Minn. App. 2001); *Redeemer Covenant Church v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 74 (Minn. App. 1997); *Tony Eiden Co. v. State Auto Prop. & Cas. Ins. Co.*, No. A07-2222, 2009 WL 233883, at *1 (Minn. App. Jan. 26, 2009).

refused by the insured, the insurer declined to participate in the defense, and the insured later obtained a judgment finding a breach of a duty to defend.

Even in *Andrew L. Youngquist, Inc. v. Cincinnati Insurance Co.*, 625 N.W.2d 178 (Minn. App. 2001), perhaps the closest case to this scenario (and which Cargill cites), the circumstances were materially different. In *Youngquist*, the injured party's (Birtcher's) own insurer (Reliance) undertook its defense and Birtcher later brought claims to collect on other insurance available to it under a subcontracting agreement with another party. *Id.* at 185-87. The court disallowed the attempted recovery from the second insurer on the grounds that no loan receipt agreement existed between Birtcher and Reliance before the latter undertook the defense. *Id.* at 187. However, there is no mention anywhere in the decision of Reliance having demanded a loan receipt from Birtcher before undertaking the defense; in fact, the conduct of Birtcher suggests it *was intending* to benefit Reliance, and that it would have agreed to such an arrangement, but the two simply failed to meet this formality.

Meanwhile, in *Domtar*, a case decided 30 years after *Iowa National*, an insurer (Continental) had refused to defend its insured for an underlying environmental claim, was then sued by the insured, and was ultimately held liable by judgment for the insured's defense costs. 563 N.W.2d at 729-30. In responding to Continental's argument that it should not bear all of the insured's defense cost, given that the insured had also sought those costs from another insurer, this Court made no mention of the *Iowa National* rule (or a loan receipt for that matter), but rather referenced *Jostens'* statement that, as between insurers that both have arguable coverage, they are equally liable, and concluded

that "Continental's remedy, if any, is to seek contribution from Canadian General [*i.e.*, the other insurer]." *Id.* at 739.

The court of appeals, in adopting Cargill's argument on this point, downplayed the *Domtar* Court's invitation for an insurer that is required to pay more than its equitable share of defense costs to seek contribution from another, equally liable insurer. 766 N.W.2d at 64. Under this view, *Domtar's* "if any" comment improperly reads this commonly used qualifier to mean that only if the insured agrees to a loan receipt will the non-defending insurer have the ability to pursue a contribution claim. In light of the analysis provided in *Jostens* and *Wooddale*, as explained above, this result finds no support. Rather, *Domtar* correctly recognized that an insurer who does not undertake the defense but then is required to pay all of the insured's defense costs has a remedy, *i.e.*, contribution, because that remedy is fully supported by ensconced equitable principles. *Wooddale*, 722 N.W.2d at 302-03; *Jostens*, 387 N.W.2d at 167. On this particular issue of whether a loan receipt is even required for Liberty Mutual to have a right to equal-shares contribution, the court of appeals failed to recognize the primacy of *Wooddale* and *Jostens*, not *Iowa National*, in the context of this case.

In sum, *Iowa National* does not preclude Liberty Mutual's right to an equal-shares allocation of defense costs with other equally liable insurers consonant with the principles in *Wooddale* and *Jostens*. Cargill improperly fails to recognize that those cases find as consistent the principles that, *as between an insured and its insurers*, the duty to defend is several for each insurer, but *as between the insurers* who refuse to voluntarily defend, they are equally liable for those defense costs. Thus, absent an insurer affirmatively

undertaking its insured's defense, the *Iowa National* rule has no affect in creating a result to the contrary. Accordingly, the district court's judgment is in full harmony with *Iowa National*, as well as *Jostens*, *Wooddale* and all other precedent of this Court, and should be affirmed.

B. *Iowa National* Should Apply Only to Settings Involving Concurrent Policies Triggered by a Discrete Injury, Not to Successive Policies Triggered by a Continuous Occurrence.

Independent of the foregoing, there is another compelling reason why the *Iowa National* rule is not dispositive of insurers' rights in cases such as here. As the district court aptly noted, *Iowa National* is distinguishable on the basis that it involved priority between two insurers, one a primary insurer and the other an excess insurer, who insured different entities at the same time. (Add. 39-40, at ¶¶16-18). This contrasts with this case, where multiple primary-level insurers all insured the same entity and the same risks over successively issued policies spanning five decades. Moreover, unlike in *Iowa National*, here, the underlying occurrences are alleged to have occurred over 50 years of triggered policy periods.

These are material distinctions that warrant a result different than in *Iowa National*. Insurers, such as Liberty Mutual, bargain to provide a defense for claims involving an occurrence *during* their policy periods, not to *completely* finance a defense based predominantly on property damage or bodily injury during periods insured solely by other carriers. It is on upon *this* understanding that Cargill paid premiums to Liberty Mutual. Put differently, Cargill is spending *millions* of dollars in defense costs in the Underlying Actions not because some property damage or bodily injury allegedly

occurred during only Liberty Mutual's four years of coverage, but rather because Cargill is defending against claims involving facts, witnesses and damages allegedly spanning decades in time. As this Court has recognized, the cost of defense can often exceed an insurer's ultimate indemnity obligations. *See Jostens*, 387 N.W.2d at 165. This is especially true for policies issued decades ago, for which their indemnity limits have been significantly impaired, if not outright exhausted. These realities highlight the questionable basis for applying the *Iowa National* rule in the context of "long-tail" claims involving occurrences spanning many successive policy periods.

Furthermore, the *Iowa National* rule was founded largely on the notion that there was no right of contribution or subrogation between the primary and excess insurers in that case because the two insurers, who issued coverage to two different insureds, had no joint liability or common obligation. *Iowa Nat'l*, 276 Minn. at 237, 150 N.W.2d at 368. In the circumstances of multiple primary insurers insuring the same insured for the same risk over successive years, it is clearly more accurate to characterize their defense obligations as "joint and several," *i.e.*, each being responsible to the insured for the full amount, *see, e.g.*, *Holmgren v. Heisick*, 287 Minn. 386, 392-93, 178 N.W.2d 854, 859 (1970), but, as between each other, being equally liable, *Jostens*, 387 N.W.2d at 167; *Wooddale*, 722 N.W.2d at 302. Unlike the disparate insurers of different insureds in *Iowa National*, the common obligation each insurer may owe to Cargill for the full amount leads equitably to a right of contribution when one primary insurer, as between the others, has paid more than its "equal share." *See Hartford Acc. & Indem. Co. v. Anderson*, 192 Minn. 200, 201, 256 N.W. 185, 185 (1934) (one who pays more than his

share of a common liability has the "equality of equity which is always condition precedent to contribution."), *cited in Iowa Nat'l*, 276 Minn. at 368, 150 N.W.2d at 237; *see also Univ. Underwriters Ins. Co. v. Allstate Ins. Co.*, 592 A.2d 515, 517-18 (N.H. 1991) (insurance companies that have a joint obligation to defend the insured must share equally in defense costs).

C. Alternatively, the *Iowa National* Rule Does Not Retain Vitality, and an Insurer that Undertakes Its Insured's Defense Should Not Be Precluded from Obtaining an Equal Share of Those Defense Costs from Other Equally Liable Insurers.

Separate from correctly understanding the limited scope of *Iowa National*, Liberty Mutual respectfully submits that the "rule" itself deserves scrutiny. Decided over 40 years ago, *Iowa National* was based on a very simple application of perceived principles of contractual privity. This focus was perhaps motivated by the facts of the case, where, as noted above, two insurers issued concurrent policies to two different named insureds and were disputing whose coverage was primary over the other in the context of an automobile accident. As stated in *Jostens*, "[t]he rationale is that there is no contractual relationship between the two insurers, and the insurer assuming the defense has no cause to complain because it is protecting its own interests and is only doing what it agreed and was paid a premium to do." 387 N.W.2d at 166. The rationale, in terms of its effect on cutting off insurers' rights of contribution, is questionable, especially given the countervailing policy considerations and holdings discussed in this Brief.

First, although *Jostens* reconciled the *Iowa National* rule (because neither insurer had undertook the defense), there is a fair argument that the rule is actually antithetical to

the holding and spirit of *Jostens*. *Jostens* rejected an insured's effort to choose one of two equally liable insurers to pay all of the costs it incurred in defending against a claim. *Id.* at 167. The Court did so precisely because it did *not* want to fashion a rule that encourages insurers to adopt a "wait and see" attitude while leaving the insured to defend itself. *Id.*; *see also Wooddale*, 722 N.W.2d at 303. A rule of law that discourages an insurer from voluntarily undertaking an insured's defense—as *Iowa National* most assuredly does—is inconsistent with this goal.

If contribution rights exist in the first instance, defending insurers will have definite recourse against any recalcitrant, non-defending insurers who may otherwise believe they gain by avoiding the defense. Consequently, any incentive that insurers might have in this regard, such as hoping to take advantage of the harsh effects of the *Iowa National* rule, is gone. *Cf. Wooddale*, 722 N.W.2d at 303-04 ("no insurer will benefit from delaying or refusing to undertake a defense"). Conversely, insurers can immediately undertake a defense upon the insured's tender and all insurers with an arguable duty to defend have an incentive to collaborate and resolve coverage issues quickly. This would be true regardless of how minimal any insurer believes its portion of defense costs might be based on the number of the insured's other triggered policies.

Second, Minnesota courts have questioned the perverse incentives of the *Iowa National* rule. They have cogently reasoned that it creates an undesirable incentive for insurers not to defend at the outset and is unjust to the insurer actually defending. For example, in *Redeemer Covenant Church v. Church Mutual Insurance Co.*, 567 N.W.2d 71, 82 n.16 (Minn. App. 1997), the court of appeals reluctantly affirmed the trial court's

holding as to one insurer who, because it did not have a loan receipt agreement in place with the insured, could not recover any of its defense costs from another, non-defending insurer, all pursuant to *Iowa National* and its progeny. The court commented that it agreed with the trial court's "observation that precluding an insurer who defends from bringing an action against a non-defending insurer absent a loan agreement may reward insurers for refusing to defend." *Id.* Similarly, the court in *Youngquist* found criticism of the *Iowa National* rule "appealing," in that the rule "serve[s] to reward Cincinnati's breach by punishing insurers, like Reliance, who live up to their contractual obligation" and does not prevent "one insurer [from] profit[ing] from its wrongful failure to defend while another insurer is punished for performing its duty." 625 N.W.2d at 187.

There also are legal considerations militating against the rule. First, as to *Iowa National's* focus on principles of contractual privity, it can be noted that there is no contractual privity between an insurer of a victim and the tortfeasor who causes the victim's injuries. Yet Minnesota law, as elsewhere, recognizes that insurers who pay for a victim's injuries become subrogated to the rights of the victim-insured, such that those insurers can pursue recovery directly from the tortfeasor. *See Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997); *Travelers Indem. Co. v. Vaccari*, 310 Minn. 97, 99, 245 N.W.2d 844, 846 (Minn. 1976). It is true that, in the aforementioned circumstances, the third party's liability sounds in tort, unlike the contractual basis for another insurer's duty to defend. However, in both instances the paying insurer and the third party share a liability to the insured related to the same loss. In fact, in the context of insurers with mutual duties to defend, they share the exact same type of liability (duty

to defend) to the same party (the insured) and, in that sense, are more-accurately jointly and severally liable, as even Cargill reflexively stated in its summary judgment briefing, (November 2, 2007 Plaintiff Cargill's Memorandum in Support of Motion for Partial Summary Judgment as to Liberty Mutual's Duty to Defend, 1-2, 8-9).

Second, as explained above (Argument, Section I.B, *supra*), the *Iowa National* analysis regarding contribution and subrogation principles is not accurate in all cases. For example, in underlying cases involving "long-tail" claims in which the a continuous occurrence spans numerous policies periods, the equities as between insurers are *not* always equal. *Cf. Iowa Nat'l*, 276 Minn. at 368, 150 N.W.2d at 237 (finding "[t]he equities between [the insurers] are at best equal."). A primary-level insurer who undertakes a defense under a policy covering only one year of a 20-year period of continuous property damage or bodily injury should obtain at least an equal sharing of defense costs with an insurer that was on the risk for the other 19 years. The facts of this case are analogous to this hypothetical. To be sure, this Court has held that all insurers with triggered policies are liable in equal shares, regardless of their respective time on risk. *Domtar*, 563 N.W.2d at 739; *Wooddale*, 722 N.W.2d at 302-03. However, the far-different concept that a defending insurer *forfeits* its right to share equally in any liability for defense costs in such contexts appears grossly inconsistent with the considerations animating this Court in *Jostens* and *Wooddale*.

Finally, since *Iowa National*, it has become clear that "[a] majority of courts permit a subrogation action by one co-insurer seeking contribution for defense costs from a non-performing co-insurer." Ostrager & Newman, 1 *Handbook on Ins. Coverage*

Disputes § 6.01 (14th ed. 2008) (stating that contrary cases "very much represent the minority view"); *see also* 1 Law and Prac. of Ins. Coverage Litig. § 4:23 (updated June 2009) ("[T]he majority of courts permit contribution of the defense costs incurred by the defending co-insurer from a non-defending co-insurer."); *Nat'l Cas. Co. v. Great Southwest Fire Ins. Co.*, 833 P.2d 741, 747 (Colo. 1992) (recognizing this as the majority rule). The majority view is based on strong equitable and public-policy principles, consistent with those espoused in *Jostens* and *Wooddale*. As explained by the Utah Supreme Court:

> Where it can be shown that a co-insurer failed to defend or failed to pay its share of the defense expenses, that insurer should not be rewarded and payment excused when another co-insurer has taken upon itself the provision of that defense. Holding otherwise would not only lead to an inequitable result but may also conflict with [the] policy of encouraging prompt payment to the insured....

Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 138 (Utah 1997); *see also Marshall v. Raritan Valley Disposal*, 940 A.2d 315, 320 (N.J. Super. Ct. App. Div. 2008); *Nat'l Cas. Co. v. Vigilant Ins. Co.*, 466 F. Supp. 2d 533, 540 (S.D.N.Y. 2006); *Employers Ins. Co. of Wausau v. Travelers Indem. Co.*, 141 Cal. App. 4th 398, 403 (2006); *Nat'l Indem. Co. v. St. Paul Ins. Cos.*, 724 P.2d 544, 545 (Ariz. 1986). In the view of a well-respected insurance treatise, the minority view is "indefensible" because it

> ignor[es] realities and encourage[es] insurers who are not concerned with their obligations to their insured in the hope that someone else will step into the breach. .... Further, as a matter of public policy, courts should be demanding that insurers give prompt defense of claims to policyholders rather than to tolerate the shifting of responsibility with such impunity.

Sharon Steel, 931 P.2d at 137 (quoting 7c Appleman, *Insurance Law and Prac.* § 4691, at 278 (1979)).

For all of these reasons, Liberty Mutual respectfully submits that the *Iowa National* rule, even as correctly understood and limited, is of questionable efficacy and is at odds with the central premises of this Court's more-recent jurisprudence on insurer liability for defense costs. At a minimum, the rule should not apply to this case in the manner Cargill suggests so as to effect a selective tender by Cargill, and, instead, Liberty Mutual should share Cargill's defense equally with other primary-level insurers having a duty to defend.

II. CARGILL'S OBLIGATION TO EXECUTE A LOAN RECEIPT IS CREATED BY THE INTERSECTION OF MINNESOTA LAW, THE LANGUAGE OF THE INSURANCE POLICIES AND EQUITY.

Any of the foregoing arguments are a sufficient and proper basis on which to dispose of the current appeal, answer the certified question in the affirmative, and affirm the judgment of the district court stating that, once a determination is made regarding which insurers actually have a defense obligation, those insurers shall be responsible in equal shares for the costs of Cargill's defense. (Add. 49-50). This is true irrespective of the subsidiary issue on which Cargill has petitioned, because Liberty Mutual, not having undertaken Cargill's defense, is not even required to obtain a loan receipt agreement from Cargill in order to preserve its existing right to share equally in Cargill's defense.

Still, because Liberty Mutual (and other insurers) has the *right* to defend Cargill, it endeavored to do just that, and, in doing so, requested that Cargill first secure Liberty Mutual's contribution rights by entering into a standard loan receipt, the question remains

as to whether Cargill properly refused such a loan receipt. The court of appeals and district court properly found Cargill's refusal to be improper.

A. Cargill's Execution of a Standard Loan Receipt Secures Liberty Mutual's Right To Receive Equal-Shares Contribution from Other Insurers Equally Liable for Cargill's Defense Costs.

Under current Minnesota law, a standard loan receipt agreement would undeniably secure Liberty Mutual's existing right to an equitable sharing of defense costs with Cargill's other insurers who are equally liable for Cargill's defense. Cargill does not, and cannot, quarrel with this state of the law. Instead, it misdirects this Court to an analysis that assumes away this aspect of Minnesota law and additionally denies that the right preexists any loan receipt.

1. Loan Receipt Agreements in Minnesota Insurance Coverage Cases.

Since the seminal case of *Blair v. Espeland*, 231 Minn. 444, 43 N.W.2d 274 (1950), Minnesota courts have endorsed loan receipt agreements as a means for enabling insurers to recover payments made to their insured from parties also liable for the loss. The first Minnesota appellate case to address loan receipts in the context of multiple insurers with competing defense obligations is *Jostens*. Before the Court's holding regarding equal-share allocation of liability between insurers with a duty to defend (*see supra* at 19-22), this Court separately upheld the validity of a loan receipt agreement as a mechanism for one insurer to resolve a coverage dispute with its insured and then have the insured, as the real party interest, seek claims for defense costs from another insurer with a duty to defend. *Jostens*, 387 N.W.2d at 164-65.

Since *Jostens*, Minnesota courts have continued to recognize the usefulness of loan receipts as a mechanism for insurers who participate in their insured's defense to avoid application of the *Iowa National* rule and be allowed to recover from other insurers equally liable for defending an insured. *See, e.g., Youngquist*, 625 N.W.2d at 186-87. Courts have done this in tandem with a continuing recognition that, barring the applicability of the *Iowa National* rule (which, of course, the loan receipt avoids), as between insurers who share a duty to defend, they are "equally liable" for defense costs. *See, e.g.*, *Wooddale*, 722 N.W.2d at 302-03; *Domtar*, 563 N.W.2d at 739.

2. Precedent and Strong Public Policy Dictate that Cargill Be Required to Enter into a Standard Loan Receipt Agreement Upon Liberty Mutual's Willingness to Undertake a Full Defense of Cargill.

In *Jostens* and *Wooddale*, this Court chose to apportion defense costs equally among insurers with a duty to defend. *See Wooddale*, 722 N.W.2d at 302-04; *Jostens*, 387 N.W.2d at 167; *see also, supra*, 19-25. Both decisions relied on the same public policy considerations. Namely, this Court reasoned that equally apportioned liability encourages insurers to resolve defense disputes quickly, and it also eliminates any incentive an insurer with an arguable duty to defend has to avoid undertaking an insured's defense, so as to escape all liability.[9] While Cargill remarkably calls these public policy concerns "ill-conceived," (Cargill Br. at 16), they come directly from this Court's own statements.

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[9] While Cargill asserts that, under existing law, insurers already have these incentives, (Cargill Br. at 42), it cannot explain how that is true against the backdrop of the *Iowa National* rule. Indeed, this is precisely why Minnesota courts have questioned the rule and its perverse incentives. (*See, supra*, at 32-33).

Requiring an insured to execute a standard loan receipt agreement on behalf of a defending insurer achieves the same ends. It advances and resolves each of this Court's policy concerns in *Wooddale* and *Jostens* regarding multiple insurers sharing a duty to defend an insured. The rule also adheres to the admonition in *Jostens*, invoked again in *Wooddale*, that the insured's motives should not determine which insurers are ultimately liable for an insured's defense costs. *Jostens*, 387 N.W.2d at 167.

The merit of such a rule is evident in this case. Liberty Mutual and other insurers did precisely what *Jostens* and *Wooddale* instructed, agreeing to defend Cargill under their respective reservations of rights within a matter of a few months after this action was commenced, conditioned upon ensuring their ability to seek equal shares for defense costs from any other liable insurers. Cargill simply has not accepted this offer.

3. The Basic Purpose of a Loan Receipt Agreement Is What Constitutes the Necessary and Sufficient Elements of a "Genuine," or "Standard," Loan Receipt Agreement.

Cargill is dissuaded of the concept of a "standard" loan receipt, or at least that such a thing can exist in this case. The notion of a "standard" or "neutral" loan receipt is very straightforward. Namely, an insurer makes full payment (ostensibly a "loan") towards all previously incurred, reasonable and necessary defense costs to its insured and/or agrees to an ongoing defense of a claim. The defending insurer then retains the right to obtain equal shares from non-defending insurers for sums paid in providing the defense. This is the essence of loan receipt agreements in the Minnesota cases addressing them; it is also the essence of the loan receipt Liberty Mutual (and the other insurers)

tendered, as well as the constructive loan receipt that the district court would have ordered in the alternative.

Cargill's citation to *Lubbers v. Anderson*, 539 N.W.2d 398 (Minn. 1995), and *Liberty Mutual Insurance Co. v. American Family Mutual Insurance Co.*, 463 N.W.2d 750 (Minn. 1990), to convey the notion that loan receipt agreements involve complex settlements requiring substantial negotiations is unavailing. In fact, the Court in *Liberty Mutual* actually contrasted a loan receipt agreement from a settlement agreement. 463 N.W.2d at 756. Moreover, neither case involved the almost ministerial act involved here of executing a standard loan receipt as a condition to paying defense costs, so the defending insurer may pursue equal-share contribution against equally liable insurers. (*Cf.* Add. 45-46 (the district court's constructive loan receipt agreement)). If customary loan receipts really required meaningful give-and-take negotiations, as Cargill suggests, this Court would not have recognized the ability of insurers to avoid the insured's involvement altogether by simply stipulating amongst themselves that no loan receipt is required. *See Wooddale*, 732 N.W.2d at 302 n.15.

Furthermore, Cargill's later-conceived, alternative loan receipt was only, by Cargill's own characterization, a "conceptual framework." (Appx. 230-31). This "framework" was devoid of the elements of a standard loan receipt agreement and offered nothing more than what Cargill had been improperly demanding all along: namely, that Cargill can completely avoid its obligations to Liberty Mutual merely because its own sophisticated insurance program—under which it has received substantial economic and other tangible benefits for decades—apparently shifts certain

costs back to Cargill *after payment by those insurers*, as part of Cargill's bargained-for contracts with those insurers.

As the district court properly recognized, Cargill's self-serving "framework" was, and is, facially unacceptable, because it ignores Cargill's contractual obligations to protect Liberty Mutual's rights to an equal-shares allocation of defense costs with Cargill's other insurers having a duty to defend the Underlying Actions. Cargill's offer was not remotely the type of genuine, standard loan receipt endorsed by the district court and that Cargill is required to provide.

B. Cargill Is Contractually Obligated to Protect Liberty Mutual's Rights to Equal-Shares Contribution by Executing a Standard Loan Receipt Agreement.

1. The Liberty Mutual Policies' Cooperation and Subrogation Provisions Require Cargill to Provide Liberty Mutual with a Standard Loan Receipt Agreement.

As both lower courts recognized and the court of appeals correctly held, requiring Cargill to execute a standard loan receipt agreement "comports with the terms of the cooperation clause contained in the Liberty Mutual policy." 766 N.W.2d at 65; *see also* Add. 66, at ¶D.4. The clause broadly and unambiguously 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]." (Appx. 142) (emphasis added).

The duty to cooperate has both narrow and broad aspects. The cases Cargill references primarily relate to the narrower duties of working with the insurer in defending the underlying claims. (Cargill Br. at 23-24). Contrary to its assertion, Cargill *is* failing to cooperate in even this narrow sense. Namely, Cargill's requirement that

Liberty Mutual waive its rights to an equal sharing of defense costs if it undertakes Cargill's defense is keeping Liberty Mutual from its *right* to participate in Cargill's defense, including the ongoing trial in the Oklahoma lawsuit.

Broadly understood, the duty to cooperate includes all conditions to coverage expressed in a policy. These include the insured's obligations not to impair, and indeed to assist, in the insurer's efforts to limit its own losses incurred in making payments to the insured. Most commonly, this condition involves protecting the insurers' opportunities for contribution and/or subrogation.

The Liberty Mutual policies contain conditions to coverage that operate in precisely this manner. In addition to requiring Cargill to cooperate with Liberty Mutual and, at Liberty Mutual's request, "assist...in enforcing *any* right of contribution or indemnity against *any* person or organization who may be liable to [Cargill]," (Appx. 142), Liberty Mutual's policies also require Cargill to execute and deliver documents necessary to secure Liberty Mutual's rights against others and to do nothing to impair or otherwise prejudice those rights:

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

(*Id.*) (emphasis in italics; bold in original). These provisions required Cargill to grant Liberty Mutual's request for a standard loan receipt agreement.

Furthermore, Liberty Mutual is accorded some legal remedy for Cargill's failure to fulfill its contractual obligations. Minnesota courts have long recognized that "where a

trial court has determined that the prevailing party is entitled to relief, it may fashion such remedies, legal and equitable, as are necessary to effectuate such relief." *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979); *see also Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005) ("A court of equity is to be accorded broad latitude in fashioning remedies to meet the particular needs of each case."); *Beliveau v. Beliveau*, 217 Minn. 235, 245, 14 N.W.2d 360, 366 (1944) (creating a constructive trust, and stating, "The judicial creation of a trust to afford an adequate remedy, where there otherwise would be none, for a right is but a manifestation of equity's capacity to grow and to fit its remedies to the demands of justice in the particular case."). Such relief is consistent with the longstanding principle that a non-breaching party to a contract is to be put in the position it would have been but for the breach, *see, e.g., Logan v. Norwest Bank Minn., N.A.*, 603 N.W.2d 659, 663 (Minn. App. 1999), which is all that a standard, constructive loan receipt—endorsed by both courts below—accomplishes.

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

Cargill's arguments ignore the fact that Liberty Mutual currently has the right to an equal sharing of Cargill's defense costs, disregard the express terms of the Liberty Mutual policies, invoke largely inapposite legal doctrines, and are otherwise unpersuasive. Moreover, Cargill cites no Minnesota case stating it can unilaterally resist a loan receipt under the circumstances of this case.

Fundamentally, Cargill is wrong in its basic premise that Liberty Mutual has no current right to an equal sharing of Cargill's defense costs with those insurers having a duty to defend. As explained above, *those rights exist **before** the execution of a loan receipt agreement*; at best, the loan receipt is needed to *preserve* those rights.

Cargill also disregards the fact that—(1) whatever *Iowa National* holds as to the perceived lack of contribution or subrogation rights in circumstances where an insurer chooses to undertake an insured's defense, (2) whether those holdings even apply to the circumstances presented here, or (3) if so, whether those holdings should be revisited—under Minnesota law, a loan receipt unquestionably eradicates those restrictions and enables contribution and/or subrogation claims between insurers.[10] Hence, a refusal to execute a loan receipt destroys those rights if an insurer nonetheless undertakes the defense, which are the very concerns embodied in the policies' cooperation and subrogation provisions.

Even assuming the contribution and subrogation rights acknowledged under Minnesota law are merely inchoate until formal execution of a loan receipt, the Liberty Mutual's policies would still obligate Cargill to ensure that such a result obtains. The cooperation clause broadly requires Cargill to "assist . . . in enforcing ***any*** right of contribution or indemnity against any person or organization who *may be liable* to [Cargill.]" (Appx. 142) (emphasis added). The policies further require Cargill to, in fact,

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[10] Minnesota's uniqueness on insurance defense obligations, loan receipts, and a default rule of equal sharing of defense cost, explains why any non-Minnesota case suggesting that an insurer making payments pursuant to a loan receipt does not become subrogated, (*see, e.g.,* Cargill Br. at 28, 35), is of little consequence.

take future action—*i.e.*, to "execute and deliver instruments and papers and do whatever else is necessary *to secure such rights*." (*Id.*) (emphasis added). Neither provision has a temporal element that limits Cargill's obligation to cooperate and assist. Again, under Minnesota law, such rights *do* unquestionably exist upon the execution of the document.

In addition, Cargill's other primary-level insurers are indeed parties "who may be liable to the insured because of bodily injury or property damage." (*Cf.* Cargill Br. at 24). Cargill alleges just this in this action, *i.e.*, that each defendant-insurer is liable to it *because of* claims in the Underlying Actions for bodily injury or property damage. Moreover, any sums Liberty Mutual gives Cargill under a loan receipt agreement are effectively a "payment," insofar as Cargill is never required to "pay back" the "loan" unless and until sums equal to, or less than, the "loan" are recovered from other insurers owing it a duty to defend. Cargill's arguments rely on a formalism not adhered to in most loan-receipt-agreement cases.[11] (Cargill Br. at 28).

Likewise, Cargill's obligation is not a "contract to enter into a contract," but rather is fully derivative of Cargill's contractual obligations. Again, Cargill ignores how Liberty Mutual's policies expressly contemplate that Cargill will need to affirmatively "*execute and deliver*" documents that do not already exist (a loan receipt, clearly an "*instrument and paper*"), not to mention "*do whatever else is necessary*" so as to "*secure*" Liberty Mutual's rights. Such flexible terms should not be completely read out

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[11] *See, e.g., Jerry Mathison Constr.*, 615 N.W.2d at 381 ("[a] loan receipt agreement is a device used to achieve an equitable result . . . and is essentially a subrogation tool"); *Redeemer Covenant*, 567 N.W.2d at 82 (stating that the insured remained the "real party in interest" but then simply ordering that the defending insurers were entitled to have a non-defending insurer pay its proportional share of the defense costs).

of the policies, especially when courts are not permitted to ignore them. *See Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 587 (Minn. 2003). Nor has Cargill explained how its refusal to execute a loan receipt agreement can be reconciled with its contractual obligation to "*do nothing after loss to prejudice such rights.*" Unsurprisingly, Cargill offers no case invalidating the same or similar clauses because they require future action by the insured.

Lastly, Cargill's view that additional consideration is required in order to validate a loan receipt designed to protect a defending insurer's rights to seek recovery from non-defending insurers would necessarily mean that *no* loan receipt designed for this purpose could ever be valid. That is not the law. For example, to the extent there was any additional "consideration" in *Jostens*, it was, as would be the case here, that the defending insurer would no longer resist providing a defense and the insured would receive the benefit of a paid-for defense earlier. None of the cases subsequent to *Jostens* questioned the validity of a loan receipt on consideration grounds. Indeed, in every instance where an insurer requests a loan receipt in relation to defense costs, that insurer at least arguably already had a contractual duty to defend its insured.

Overall , Liberty Mutual is no more "coercing" Cargill to execute a loan receipt, (Cargill Br. at 9), than Cargill is "coercing" Liberty Mutual into providing it with a defense. Both obligations derive from the same contract.

3. Cargill's Obligation Also Results from Its Implied Covenant of Good Faith and Fair Dealing.

As the court of appeals correctly held, although each insurer has a separate defense obligation, in situations like here, where multiple primary insurers who issued successive policies over five decades have offered to undertake an insured's defense contingent on a loan receipt agreement, "the 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." 766 N.W.2d at 65. Cargill's argument that its implied covenant of good faith and fair dealing does not support such an obligation fails.

Under Minnesota law, every contract imposes an obligation of good faith and fair dealing between the parties in its performance and enforcement. *See* Minn. Stat. §§ 336.1-304 (2008). The covenant requires, *inter alia*, "that one party not 'unjustifiably hinder' the other party's performance of the contract." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995). It also "prohibits a party from failing to perform for the purpose of thwarting the other party's rights under the contract." *Team Nursing Servs., Inc. v. Evangelical Lutheran Good Samaritan Soc'y*, 433 F.3d 637, 641-42 (8th Cir. 2006) (applying Minnesota law). In addition, "[t]he duty embraces, among other things, an implied obligation that neither party shall do anything to injure or destroy the right of the other party to receive the benefits of the agreement." Williston on Contracts § 63:22 (4th ed. 2002).

Liberty Mutual has both a contractual duty to defend *and* enjoys a *right* to defend Cargill in relation to any suit seeking damages. (Appx. 139 at § I). As demonstrated above, Liberty Mutual's policies also recognize (1) Liberty Mutual's right to contribution and/or subrogation upon any *payment* by Liberty Mutual under its policies, and (2) Cargill's obligation to execute a customary loan receipt agreement, unquestionably a "*paper . . . necessary to secure such rights,*" upon Liberty Mutual's request. Given this bundle of contractual rights, and Cargill's steadfast insistence that Liberty Mutual endure Cargill's entire multi-million-dollar defense without recourse from other equally liable insurers, Cargill's argument that it has not hindered Liberty Mutual's performance under its policies is incredible. It is equally difficult to conclude that Cargill has not adversely affected Liberty Mutual's rights against other equally liable primary-level insurers, particularly when *Cargill believes* that its withholding of a loan receipt agreement accomplishes exactly that. (Cargill Br. at 19-23). Use of the implied covenant of good faith and fair dealing to impose upon Cargill an obligation "to cooperate by entering into a neutral loan receipt agreement that equitably apportions liability between primary insurers," 766 N.W.2d at 65, was in complete harmony with the scope of the covenant's principles under Minnesota law and the parties' contracts.

Cargill's contention that it was "bad faith" for Liberty Mutual to request a loan receipt as a condition to undertaking Cargill's defense is without merit. The authority Cargill relies upon to argue that Liberty Mutual is a "fiduciary" and "must give equal consideration to the financial exposure of the insured," (Cargill Br. at 31), involve wholly inapposite circumstances and legal principles—*e.g.*, an insurer assuming control of the

right to settle claims must exercise "good faith" in considering offers to settle the claim within policy limits. *See, e.g., Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (1983).

Moreover, as the district court recognized, (Add. 59, at ¶C.9), given this Court's "equal shares" rule in *Jostens* and *Wooddale*, Cargill has no one but itself to blame for potentially increasing its own "financial exposure" to its other primary insurers, (Cargill Br. at 31), by agreeing to sophisticated "back-end" arrangements such as high deductibles, self-insured retentions, retrospective premiums and certain "fronting" features—all which unquestionably provided other economic benefits to Cargill. Liberty Mutual was, and is, a stranger to those arrangements, which were entered into years after the Liberty Mutual policies had expired. As such, Liberty Mutual had no "fiduciary obligation" to advise Cargill not to enter into those contracts or, now, to concern itself with those arrangements; Cargill made that bed. Rather, Liberty Mutual contracted only to pay covered defense costs, which it *has* attempted to do (but Cargill has rejected) or, at a later date, may be required to do if a court determines it *does* have a duty to defend. Either way, Liberty Mutual is *not* attempting to avoid or "diminish," (Cargill Br. at 16), any "several" obligation it may have for Cargill's defense. Liberty Mutual's request for a standard loan receipt agreement as a condition of undertaking Cargill's defense is not remotely conduct evincing "bad faith." Rather, it is well-supported by existing principles of Minnesota law, the terms and obligations of the insurance policies, and equity.

CONCLUSION

For the foregoing reasons, Liberty Mutual submits that certified question be answered in the AFFIRMATIVE and, further, that the district court's Amended Order for Summary Judgment be AFFIRMED, thereby GRANTING Liberty Mutual's Motion for Partial Summary Judgment, and DENYING Cargill's Motion for Partial Summary Judgment.

Dated: October 9, 2009

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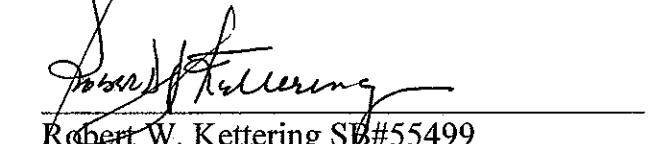

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CERTIFICATION

The undersigned hereby certifies that this brief conforms to the requirements contained in Minnesota Rule of Civil Appellate Procedure 132.01 in that: (a) the brief complies with the typeface requirements of said rule, and (b) the length of this brief is 13,997 words, as automatically generated through the "word count" function of the Microsoft Word 2007 word-processing software program used to prepare the brief.

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