

State of Minnesota  
**In Court of Appeals**

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Columbia Casualty Company, and  
Continental Casualty Insurance Company,

*Respondents,*

v.

3M Company,

*Appellant,*

and

ACE American Insurance Company,

*Respondents.*

*(caption continued on next page)*

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**REPLY BRIEF OF APPELLANT 3M COMPANY**

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*Respondents,*

and

Atlanta International Insurance Company, Lumbermens Mutual Casualty Company, and Seaside Insurance Company,

*Defendants,*

and

3M Company,

*Third-Party Plaintiff,*

v.

Executive Risk Indemnity, Inc., Federal Insurance Company, Victoria Verischerungs Ag, AG, and TIG Insurance Company.

*Third-Party Defendants.*

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**REPLY BRIEF OF APPELLANT 3M COMPANY**

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## INTRODUCTION

No party disputes that if the Insurers' alleged actions violate only express provisions of the insurance policies, 3M's relief for such conduct will be for breach of contract. The corollary, however, also appears to be undisputed: if the wrongful acts 3M alleges do not violate express contract terms forbidding such conduct, then 3M is entitled to plead its claims for breach of the implied covenant of good faith and fair dealing. Similarly, neither side can dispute the import of *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494 (Minn. 1995) ("*Hennepin County*"). That decision holds that if it is unclear at the pleading stage whether the defendant's liability arises from breach of contract, breach of the implied covenant or both, then a party is entitled to plead both claims.

The Insurers' brief skates around the allegations actually encompassed in 3M's Counterclaim and Cross-Claims. The Insurers highlight portions of 3M's pleadings alleging their liability for failure to pay 3M's claims, but they ignore allegations that they took affirmative steps to harm 3M. Similarly, while the Insurers protest that 3M's brief somehow provides new "details" to support its implied-covenant claim, the Insurers do not – and cannot – contest that these and other facts are fairly included by the allegations in 3M's Counterclaim and Cross-Claims.

3M alleges conduct that does not violate the express terms of the policies. The Insurers can point to no express policy provisions that are breached when an insurer thwarts a settlement between its policyholder and another insurer; or when an insurer aids underlying plaintiffs by purporting to have special knowledge of the policyholder's

wrong-doing. Yet such conduct destroys the very protections 3M sought in purchasing liability insurance, violates accepted standards of fairness and reasonableness, and hinders 3M's own performance under the policies.

In order to protect wrongly-decided orders for dismissal, the Insurers advance arguments that are unsupported by fact and law. They begin by advocating a wrong standard of review. They next argue that implied-covenant claims and breach-of-contract claims cannot be pled simultaneously, but fail to find a way to distinguish the controlling precedent in *Hennepin County*. Ignoring allegations that they affirmatively acted to harm 3M, the Insurers repeatedly assert that 3M's claims are precluded because "express" contract terms govern their conduct and 3M's claims, yet they are unable to show any express contract terms that might apply. They essentially suggest that no misconduct by an insurer can ever breach the implied covenant, because the insurer's motivation is always to avoid its contract obligations. Finally, they dispute the remedies available for breach of the implied covenant (an issue that should have no bearing on what 3M is entitled to plead), even while acknowledging the exercise of equitable powers in *Cargill, Inc. v. ACE American Ins. Co.*, 766 N.W.2d 58 (Minn. App. 2009), *rev'd on other grounds*, 784 N.W.2d 341 (Minn. 2010).

None of the Insurers' arguments negates the substance of 3M's allegations or the established law that supports 3M's right to plead its implied-covenant claim. The Court should reverse the district court's dismissal orders.

## ARGUMENT

### I. The standard of review for the Rule 12.02(f) dismissals is *de novo*.

As stated in 3M's opening brief, the standard of review for a dismissal under Rule 12.02(f) of the Minnesota Rules of Civil Procedure is *de novo*. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). In this case, by orders dated June 16, 2010, and July 19, 2010, the district court dismissed 3M's counterclaim and cross-claims under Rule 12.02(f). In a separate order issued several months later, the district court directed the entry of final partial judgment under Rule 54.02 on the prior Rule 12.02 dismissals. Judgment was entered on those dismissals on July 20, 2011. It is from these final partial judgments of dismissal under Rule 12.02(f) that 3M appeals. These Rule 12.02(f) dismissals are subject to *de novo* review.

In a telling attempt to obtain a more favorable standard of review, the Insurers argue for "abuse of discretion" on the false premise that 3M is appealing from the denial of 3M's motion to reconsider. In essence, the Insurers claim that 3M somehow waived its right to *de novo* review through bringing an unsuccessful motion for reconsideration. If this proposition were true, no party would ever seek reconsideration because doing so could reduce the chances of a reversal on appeal, and this Court would be burdened with errors the district courts might have corrected on their own.

In any event, the Insurers' attempt to circumvent the *de novo* standard fails under the facts and the law. All of 3M's appeal documents, from the notice of appeal to its opening brief, consistently state that 3M is appealing from the Rule 12.02(f) judgment of dismissal. (*See* Notice of Appeal, Statement of the Case, Opening Brief.) In its order

retaining jurisdiction, this Court affirmed that 3M's appeal is from the Rule 12.02 judgment of dismissal, stating "[a]ppellant 3M seeks review of a partial judgment entered on July 20, 2011, that dismissed count III of 3M's counterclaims and cross-claims," and concluding that "the district court acted within its discretion in certifying the partial judgment dismissing the implied-covenant claims for immediate appeal pursuant to Rule 54.02." (See Jurisdictional Order filed October 5, 2011.) In sum, there is no factual support for the Insurers' claim that this appeal is from the denial of the motion to reconsider.

More importantly, an appeal from the denial of a motion to reconsider is not even permitted at this interlocutory stage. See Minn. R. Civ. App. P. 103.03 (listing all appealable orders and judgments). Indeed, an order denying a motion to reconsider might not be appealable at any stage, even when the lawsuit is fully concluded. See *Baker v. Amtrak Nat'l Railroad Passenger Corp.*, 588 N.W.2d 749, 754-55 (Minn. App. 1999). In *Baker*, this Court noted that appeals should be taken from judgments on the merits, and orders that involve the merits of the judgment. *Id.* at 756. Since a motion to reconsider is never required, and errors can be corrected through an appeal from the judgment or order affecting the merits, appellate jurisdiction does not extend to an appeal from the *denial* of a motion to reconsider. *Id.*

The cases cited by the Insurers do not alter this rule. The primary case they cite involved an award of Rule 11 sanctions, and the *grant* of a motion for reconsideration and reversal of the award. *Peterson v. Hinz*, 605 N.W.2d 414, 417-18 (Minn. App. 2000). The party who had pressed for sanctions argued the district court should not have

even entertained a motion for reconsideration and reversed the award of Rule 11 sanctions, because there were no “compelling circumstances” justifying reconsideration. *Id.* Here, in contrast, the district court *denied* the motion to reconsider. This denial is not appealable at this interlocutory stage, and possibly never. The insurers therefore have no basis for laying claim to any other standard of review.<sup>1</sup>

In the unpublished *Hanson* case, this Court examined the denial of a motion to reconsider following the grant of summary judgment, but seemed to address the issue only because the district court had previously *granted* a motion to reconsider for the opposing party. *Hanson v. Friends of Minnesota Sinfonia*, 2004 WL 1244229 (Minn. App. June 8, 2004).<sup>2</sup>

In short, 3M has consistently stated that it is appealing from the Rule 12.02(f) dismissals, this Court has acknowledged that procedural stance, and under Minnesota law, this is the only appeal allowed at this stage. The correct standard of review is *de novo*.

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<sup>1</sup> *Peterson* also involved review of the imposition of Rule 11 sanctions, which is a discretionary act of the trial court, while this case involves a Rule 12 dismissal, which decision does not involve the exercise of judicial discretion. In referencing the standard of review in *Peterson*, this Court appears to have applied the standard applicable to the central merits decision, and not to the grant of reconsideration. *Peterson*, 605 N.W.2d at 417-18.

<sup>2</sup> The federal court decision cited in the Insurers’ brief involves a motion to alter or amend the judgment, and not a motion to reconsider, and thus has no relevance to the discussion. *See United States v. Metropolitan St. Louis Sewer District*, 440 F.3d 930 (8<sup>th</sup> Cir. 2006).

**II. 3M has alleged facts sufficient to state a claim for breach of the implied covenant.**

At the Rule 12 stage, the only operative question for the Court is whether the plaintiff (in this case, the counter- and cross-claimant) has stated a legally cognizable claim for relief. Although they in effect argue otherwise, the Insurers cannot deny the covenant of good faith and fair dealing is implied in every contract, especially insurance contracts. *See Larson v. Anchor Cas. Co.*, 249 Minn. 339, 349-50, 82 N.W.2d 376, 383 (1957). 3M’s factual allegations must also be taken as true.

3M alleges, among other things, that the Insurers – beyond simply refusing to provide coverage they know they owe to 3M under the policies – have “engaged in deceptive and bad faith conduct toward 3M,” “acted contrary to 3M’s justified and reasonable expectations,” and “taken or participated in actions designed to harm 3M generally and in 3M’s defense of the [underlying] Mask/ACP Claims.”<sup>3</sup> (AA 8-10, 12-13.) The Insurers also “rejected 3M’s performance for unstated and unsupported reasons” (*id.*), which as explained in 3M’s opening brief, includes an attempt to preclude 3M from complying with the conditions of the policies by perpetually leaving 3M in doubt as to whether the Insurers required additional communications. For CNA in particular (the plaintiff in this case), 3M alleges that CNA has interfered with potential settlements and with 3M’s good faith relationships with its other insurers. (AA 10.) 3M further alleges that the Insurers, especially CNA, have deliberately disclosed to the

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<sup>3</sup> For a more complete exposition of 3M’s implied-covenant allegations, see 3M’s opening brief at pp. 6-9.

underlying plaintiffs the Insurers' contentions that 3M somehow intended to injure the underlying plaintiffs. (AA 10-11.)

By any standard, these allegations are sufficient to state a claim for breach of the implied covenant. Many of these allegations, such as interfering with 3M's settlements and poisoning 3M's underlying defense efforts, involve affirmative actions designed to harm 3M. These acts do not breach any express provisions of the policies, but they do violate the very purposes for which 3M purchased the insurance. They also interfere with 3M's performance under the contracts by making it impossible for 3M to comply with policy conditions, to fully defend the underlying claims or to minimize each insurer's liability by obtaining appropriate recoveries from others. 3M's allegations of insurer wrongdoing go far beyond what was held sufficient to state a claim for breach of the implied covenant in *Hennepin County* and, more recently, the policyholder conduct that supported the exercise of equitable powers in *Cargill*.

The Insurers attempt to explain away these allegations with self-serving assertions as to what they believe are the grounds for 3M's pleading and by offering their own purportedly harmless motivations in acting.<sup>4</sup> Such contentions are meaningless in the context of a Rule 12.02 motion to dismiss; what matters at this juncture are 3M's allegations. See *In re Milk Indirect Purchaser Antitrust Litig.*, 588 N.W.2d 772, 775 (Minn. App. 1999) (court is to consider facts alleged in claimant's pleading, not those

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<sup>4</sup> The Insurers' assertions in this respect are contrary to the record. For example, CNA attempts to characterize the motivation for its Amended Complaint as an attempt to address 3M's "manipulation" of its breast implant and Mask/ACP claims to the detriment of the Insurers. Nowhere in its Amended Complaint does CNA make any such allegation.

alleged by the party seeking dismissal). The Insurers also complain that 3M's opening brief adds "details" not found in the pleading. This argument is at odds with Minnesota's notice pleading standards. *See Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963) (a plaintiff may plead "a broad general statement which may express conclusions" and is not required to allege facts to support every element of a cause of action). The Insurers do not contend that the exposition of 3M's allegations in its briefing is not fairly encompassed by its Counterclaim and Cross-Claims.

**III. 3M is entitled simultaneously to plead claims for breach of contract and of the implied covenant, particularly where no term in the contracts expressly forbids the wrongful acts 3M alleges.**

*Hennepin County* is the leading authority in Minnesota on the implied covenant, and one of the only cases to consider the claim at the pleading stage. It holds that an implied covenant claim may be pled in tandem with a breach of contract claim and may be based on the same conduct. 540 N.W.2d at 503. The Supreme Court recognized that even if the alleged misconduct did not violate an expressly articulated covenant, it may violate the implied covenant of good faith and fair dealing. *Id.*

Similarly in *Cargill*, this Court's most recent pronouncement, the Court explained that the cooperation clause in the insurance policies supported an equitable remedy (or, as the Insurers express it, the use of equitable powers, Br. at 26-27) imposed pursuant to the implied covenant. 766 N.W.2d at 65.

Whether read separately or together, these decisions leave no question that, at least at the pleading stage (and in the case of *Cargill*, possibly beyond), 3M is entitled to assert simultaneous claims for breach of the implied covenant and for breach of contract, and

that it does not matter if the claims might be based on the same conduct (although, as discussed above, 3M's claims are *not* based solely on the same conduct).

The Insurers struggle to avoid these controlling authorities. Their brief leads the Court through a parade of irrelevant and unpublished decisions. (*See Br. at 10-16.*) They offer up unsupported public policy reasons, such as the need “to eliminate redundancy in pleadings” – a proposition that is not only directly at odds with Minn. R. Civ. P. 8.01 (providing that “[r]elief in the alternative or of several different types may be demanded”) but also with the Insurers’ own practice of pleading dozens of redundant affirmative defenses.<sup>5</sup> When they finally do confront the holding of *Hennepin County*, they admit that implied-covenant claims and breach-of-contract claims can be premised on the same conduct, but argue – in the end, to no effect – that the “crucial factor is whether an implied covenant claim alleges conduct *already governed by the express terms of a written contract.*” (Br. at 19 (emphasis in original).) As discussed in the next section, characterizing the question in this way only underscores the fallacy of the Insurers’ position and further demonstrates why 3M is entitled to plead its implied-covenant claim.

#### **IV. 3M alleges insurer misconduct that does not violate express contract provisions but does breach the implied covenant.**

While 3M's Counterclaim and Cross-Claims allege the Insurers have evaded or delayed payment under their policies, 3M's pleading also alleges the Insurers took

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<sup>5</sup> *See, e.g.,* Defendant Evanston Insurance Company's Answer, Affirmative Defenses, Counterclaim and Cross-Claim, filed June 31, 2009 (asserting more than 40 affirmative defenses).

affirmative steps to harm 3M. These wrongful acts contravene the nature and purpose of the insurance contracts even though there are no provisions in the contracts that expressly forbid the alleged misconduct. The premise repeated throughout the Insurers' brief – that 3M's "implied covenant claim alleges conduct already governed by the express terms of a written contract" (*see, e.g.*, Br. at 10-11) – is therefore a false one.

The Insurers never once point to a specific contract provision that expressly precludes any of the conduct that forms the basis of 3M's implied-covenant claims. In fact there is none.<sup>6</sup> The contracts are centered on the question of what the Insurers will and will not pay (and conditions regarding *policyholder* conduct, such as the cooperation clause cited in *Cargill*). There is no express provision in the policies that precludes the Insurers' from interfering with 3M's attempted recoveries from other insurers. There is no express provision that forbids the Insurers from disparaging 3M to the underlying plaintiffs and thereby increasing 3M's potential liabilities. There is no express provision that prevents the Insurers from contriving to prevent 3M's performance of policy conditions. None of this is new. Minnesota courts have long recognized that what

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<sup>6</sup> For this reason, the unpublished cases heavily relied upon by the Insurers are irrelevant. *See, e.g., Ambor Corp. v. Allina Med. Grp.*, 2008 WL 3289977 (Minn. App. 2008) (both implied-covenant claims and breach-of-contract claims were premised on same express non-compete provision in a lease); *Seren Innovations, Inc. v. Transcontinental Ins. Co.*, 2006 WL 1390262 (Minn. App. 2006) (recognizing on undisputed facts that insurer complied with implied covenant); *Kamboos Market, LLC v. Sherman Assocs., Inc.*, 2011 WL 2518972 (Minn. App. 2011) (landlord's decision to take over valuable improvements was within his contractual rights under the parties' lease agreement); and *Sports & Travel Marketing, Inc. v. Chicago Cutlery Co.*, 811 F. Supp. 1372 (D. Minn. 1993) (concluding on summary judgment that defendant had done nothing wrong).

prevents the insurers from acting against the interests of their insureds is not any specific policy provision, but the implied covenant of good faith and fair dealing.<sup>7</sup> *See, e.g., Larson*, 249 Minn. at 349-50, 82 N.W.2d at 383.

Unable to cite an express provision, the Insurers' argument boils down to the unsupportable contention that, because all of their actions were motivated by an intention to breach the insurance contracts, 3M cannot state a claim for breach of the implied covenant. (*See, e.g., Br.* at 15.) This argument fails for two reasons. First, it confuses liability for bad acts with liability for bad motives. Even if the Insurers could somehow demonstrate that their motives were benign, that would not allow them to escape liability for damages their conduct caused 3M. Thus, in *Hennepin County*, the validity of the County's motives in seeking an early redemption of the bonds was irrelevant to whether the bondholders had stated a claim for breach of the implied covenant. 540 N.W.2d at 502-03. The question was simply whether the County's acts constituted a breach. 3M's

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<sup>7</sup> Even if the Insurers could point to some term in their policies that might be relevant to 3M's implied-covenant claims, any contention that such a provision is expressly on point would reflect unjustified confidence in the clarity of their policies. The Supreme Court has already determined that even the first sentence of the basic insuring agreement in these types of policies is fraught with ambiguity. *See Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn. 1990), where insurers maintained that provision was unambiguous. The Court has no basis at this point to trust the Insurers' "express terms" argument and trump 3M's right to plead its implied covenant claims. The Insurers concede, moreover, that the implied covenant may aid in the interpretation of ambiguous policy provisions, citing *Hennepin County*. (*Br.* at 21.) Indeed, the principal and ultimate issue in this case – how to allocate 3M's costs among a large number of triggered insurance policies – is reflective of the fact that, as noted by the Minnesota Supreme Court, because of the very "*absence* of applicable policy language," a court is called upon to make "an equitable decision" that approaches allocation in "a judicially manageable way." *In re Silicone Implant Insurance Coverage Litigation*, 667 N.W.2d 405, 419-20 (Minn. 2003) (emphasis added).

allegations are even more compelling, because 3M asserts that the Insurers did not just breach the contracts, but took affirmative steps to harm 3M.

The second reason the Insurers' argument fails is because it would excuse all manner of misconduct. Under the Insurers' reasoning, there is no limit to the wrongful acts they may perpetrate upon their insured. So long as their actions are based on a desire to avoid paying the insured's claims, everything is permissible and the insured's only remedy is for breach of contract. Implicit in this argument is the suggestion that an insured can *never* state a claim for breach of the implied covenant, while the Insurers remain free under *Cargill* to assert covenant claims against their insureds. This is not the law. Minnesota has long recognized that insurers have a duty of good faith and fair dealing. *See, e.g., Larson*, 249 Minn. at 349-50, 82 N.W.2d at 383.

Although it is unnecessary to the Court's analysis of this appeal, it is noteworthy that the cases relied upon by the Insurers decide the merits of an implied covenant claim – including whether there is any overlap of facts between the implied-covenant and the contract claims – on summary judgment (and none is a decision by the Minnesota Supreme Court). *See, e.g., Ambor*, 2008 WL 3289977 at \*7 (deciding implied-covenant claims on summary judgment); *Seren*, 2006 WL 1390262 at \*7 (“Seren has not demonstrated there is a material fact issue as to this claim.”); *Kambo*, 2011 WL 2518972 at \*5 (landlord-tenant dispute decided on summary judgment); *and Sports & Travel Marketing, Inc. v. Chicago Cutlery Co.*, 811 F. Supp. 1372 (D. Minn. 1993) (concluding on summary judgment that defendant had done nothing wrong). *Hennepin County*, on the other hand, the only case to consider the issue at the pleading stage, holds

that the plaintiffs were entitled to plead and litigate their cause of action for breach of the implied covenant. All of the decisions, collectively, confirm that the district court erred by prematurely foreclosing 3M's validly-pled claims for breach of the implied covenant.

**V. 3M alleges interference with contract performance, but 3M is also entitled to allege additional grounds for relief.**

Minnesota courts do not limit the implied covenant to situations in which one party has unjustifiably hindered the performance of another. As noted in 3M's opening brief, *Hennepin County* cites the Restatement (Second) of Contracts, which recognizes that the covenant precludes "subterfuges and evasions," as well as "evasions of the spirit of the bargain, lack of diligence, slacking off, [and] willful rendering of imperfect performance." Restatement (Second) Contracts, § 205, Cmt. d (1981). In *Cargill*, moreover, the Court had no difficulty applying the implied covenant without any allegation that the policyholder unjustifiably hindered its insurer's performance under the contract. The Court took a broader view of the implied covenant and cited Minn. Stat. § 336.1-304 (2008), which provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." *Cargill*, 766 N.W.2d at 65. This is consistent with other decisions applying Minnesota law. See *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. App. 1998) ("'Bad faith' is defined as a party's refusal to fulfill some duty or contractual obligation based on an ulterior motive, not an honest mistake regarding one's rights or duties."); *White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 882

(D. Minn. 1997) (requiring that party act in good faith when exercising unlimited discretionary power under contract).

These pronouncements are especially compelling in the context of insurance, where the insured has paid for the insurer to serve as a protector. Thus in *Larson*, the Supreme Court explained: “[I]t is the duty of the insurance company to exercise good faith toward the insured, both in the investigation under a liability policy and in the defense of a lawsuit and in the payment of obligations under the insurance contract.” 249 Minn. at 349-50, 82 N.W.2d at 383.

The two cases cited by the Insurers are of no value in suggesting a contrary rule. *Lyon Financial Services, Inc. v. MBS Management Services, Inc.*, merely held that the covenant could not be used to renegotiate price terms explicitly stated in a lease contract. 2007 WL 2893612, \*7 (D. Minn. 2007) (“This covenant only relates to the performance of a contract.”). In *Miller v. ACE USA*, 261 F. Supp. 2d 1130, 1132, 1141 (D. Minn. 2003), it was unnecessary for the court to consider the scope of the implied covenant of good faith and fair dealing because it concluded on summary judgment that the insurer did not breach its contractual duties and the insured made no further allegations of wrongdoing. As with other cases cited by the Insurers, *Miller* actually undermines their position by observing that “an insured may assert a breach of the covenant of good faith and fair dealing in conjunction with a breach of contract claim.” *Id.*

Under any standard, 3M’s Counterclaim and Cross-Claims sufficiently plead a claim for breach of the implied covenant. Count III includes allegations effectively stating that the Insurers’ conduct hindered 3M’s performance. As explained above, 3M

alleges that the Insurers deliberately refused to tell 3M what they required to determine coverage as part of a strategy to later blame 3M for failing to comply with policy conditions. Similarly, 3M alleges that the Insurers may have simultaneously increased 3M's underlying liabilities while challenging the extent of those liabilities. 3M further alleges that the Insurers scuttled settlement opportunities between 3M and its other insurers, and deliberately attempted to damage 3M in connection with the underlying claims. All of this conduct interferes with 3M's general contractual obligations to minimize its liability.

While the Insurers complain that 3M's briefing adds details to its pleading, they cannot argue that those details are not fairly encompassed by its pleading. The effect of the Insurers' assertions is to concede that 3M has alleged sufficient facts and that their motion to dismiss Count III was wrongly decided. *See Northern States Power Co. v. Franklin*, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963) (a party is not required to allege facts to support every element of a cause of action, and a claim may be dismissed only if it is certain that no facts can be produced consistent with the claim to support granting the relief sought); *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (the function of a pleading is "to give the adverse party fair notice of the theory on which the claimant seeks relief"). 3M's Counterclaim and Cross-Claims easily meet both the requirements of pleading and the elements necessary for an implied-covenant claim.

**VI. Remedies for breach of the implied covenant are not limited to payment of what is owed under the insurance policies.**

As a further extension of the contention they are entitled to act with impunity, the Insurers suggest that, no matter what affirmative wrongdoing they may have committed, 3M's only remedy would be for breach of the Insurers' obligations to pay under the policies. (Br. at 23-24.) The remedy question is of course premature at this point and should not weigh into the question of whether 3M has properly pled a claim for breach of the implied covenant. 3M is entitled to litigate its case and to present to the district court – whether at summary judgment or at trial – a full explanation of what the measure of damages or other relief should be. For the Insurers to argue that the remedy must be decided now and further that it must control the pleadings is to demand that the tail wag the dog.

In *Hennepin County*, the relief sought by the bondholders for breach of the implied covenant was identical to the relief they sought for breach of contract. This had no bearing on the merits of their covenant claim. The Restatement (Second) of Contracts, which was cited by the court in *Hennepin County*, recognizes that “[t]he appropriate remedy for a breach of the duty of good faith also varies with the circumstances.” Restatement (Second) of Contracts, § 205, Cmt. a (1981).

Yet, even if the Court were to consider remedies here, there are numerous kinds of relief available to 3M. The Insurers ignore the specific allegations in 3M's implied-covenant claims involving affirmative, harmful acts against 3M going beyond a simple refusal to pay. Their argument also overlooks the fact that contract-based relief is not

limited to specific performance. For example, Minnesota law permits recovery of special or consequential damages that are the foreseeable result of a breach. *See DeRosier v. Utility Systems of America, Inc.*, 780 N.W.2d 1, 4-5 (Minn. App. 2010). Other courts have awarded consequential damages for an insurer's breach of the policy. *See, e.g., Lawrence v. Will Darrah & Assocs., Inc.*, 516 N.W.2d 43, 47 (Mich. 1994).<sup>8</sup>

This Court's decision in *Cargill* confirms that a breach of the implied covenant can also provide a basis for fashioning an equitable remedy based on the specific facts of the case. The Insurers make several attempts to avoid this holding. They begin by offering the unsupported assertion that equitable remedies cannot be awarded for breach of the covenant. *Cargill* states the opposite: "a district court has the equitable authority to award such relief when an insured refuses to cooperate." 766 N.W.2d at 60. In so holding, the *Cargill* court recognized that breach-of-contract and implied-covenant claims not only can coexist for the same wrongs but actually can serve to reinforce each other.

The Insurers next try to distinguish *Cargill* on the ground that "no party brought an implied covenant claim." (Br. at 26.) This distinction is meaningless. Whether the equitable relief awarded in *Cargill* arose from a claim asserted in the pleadings or was premised on the evidence before the court is irrelevant. A party may assert a plea for any

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<sup>8</sup> The Insurers cite *Wild v. Rarig* for the proposition that Minnesota law does not recognize a cause of action for bad faith termination of a contract. (Br. at 20.) Once again, the Insurers ignore that 3M's allegations extend beyond a mere bad faith refusal to pay and include affirmative actions taken by the Insurers to harm 3M, and that *Wild* dealt only with the question of whether punitive (extracontractual) damages could be awarded for a bad faith termination of contract. *Wild* and *Sports Travel* are therefore inapposite.

relief available under the law. The Insurers fail to offer any basis for a contrary rule.

(*See id.*)

In an even more convoluted argument, the Insurers argue that Cargill did not impose an “equitable remedy” but concede in the next sentence that the Court in Cargill “used its equitable powers.” (Br. at 26.) Because of that exercise of equitable powers, Cargill was required to execute an agreement that was not part of its original contracts with its Insurers; an agreement Cargill did not believe was in its financial interests to sign; and an agreement it was willing to litigate all the way to the Supreme Court to avoid. The Insurers agree that *Cargill* was rightly decided but say the relief against the policyholder was necessary because of “the unique predicament” facing the insurers in *Cargill*.<sup>9</sup> (Br. at 27.) The essence of their argument is that they do not actually dispute that the implied covenant can support equitable remedies, they just do not want equitable powers exercised against them.

## CONCLUSION

3M’s Counterclaim and Cross-Claims allege facts sufficient to support a claim for breach of the implied covenant of good faith and fair dealing. The Insurers’ attempted challenges only underscore 3M’s right to plead its implied-covenant claims. The Court

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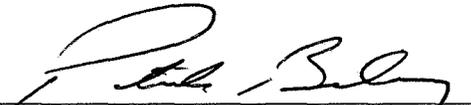
<sup>9</sup> Having effectively argued that *Cargill* was rightly decided, the Insurers’ arguments ring hollow when they suggest the decision has no precedential value. In any event, it is commonplace for courts to rely on decisions that are subsequently affirmed (or reversed) on other grounds. *See, e.g., In re Westby*, 639 N.W.2d 358, 366 (Minn. 2002) (citing decision reversed on other grounds to explain scope of communications privilege); *Schroeder v. St. Louis County*, 708 N.W.2d 497, 511 (Minn. 2006) (Hanson J. dissenting) (citing decision affirmed on other grounds to demonstrate proper analysis of governmental immunity from tort liability).

should therefore reverse the district court's orders dismissing 3M's claims for breach of the implied covenant.

Respectfully submitted,

Dated: October 24, 2011

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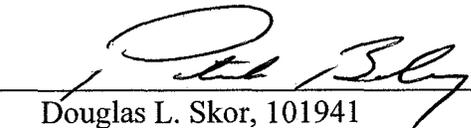
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**CERTIFICATION OF BRIEF LENGTH**

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, a proportional 13-point font, on 8 ½ x 11 inch paper with written matter not exceeding 6 ½ by 9 ½ inches. The resulting reply brief contains 5,272 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

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