

NO. A11-1376

State of Minnesota  
**In Court of Appeals**

Columbia Casualty Company, and  
 Continental Casualty Insurance Company,

*Respondents,*

v.

3M Company,

*Appellant,*

and

ACE American Insurance Company,

*Respondents.**(caption continued on next page)***BRIEF AND APPENDIX OF RESPONDENTS**

Jeanne H. Unger (#131404)  
 Mark R. Bradford (#335940)  
 BASSFORD REMELE,  
 A Professional Association  
 33 South Sixth Street, Suite 3800  
 Minneapolis, MN 55402  
 (612) 333-3000

- and -

David E. Schoenfeld  
 Michael W. Kazan  
 Colin M. Seals  
 GRIPPO & ELDEN, LLC  
 111 South Wacker Drive  
 Chicago, IL 60606  
 (312) 704-7723

*Attorneys for Respondents Columbia Casualty Company,  
 and Continental Casualty Insurance Company*

Douglas L. Skor (#101941)  
 Paula Duggan Vraa (#0219137)  
 Patrick J. Boley (#275529)  
 LARSON KING, LLP  
 2800 Wells Fargo Place  
 30 East Seventh Street  
 Saint Paul, MN 55101  
 (651) 312-6500

*Attorneys for Appellant  
 3M Company*

*[Additional Counsel and Parties on following pages]*

*[caption continued from page one]*

Ace European Group, Ltd., Arrowood Indemnity Company, Century Indemnity Company, Centennial Insurance Company, Employers Insurance of Wausau, Employers Mutual Casualty Company, Evanston Insurance Company, Fairmont Premier Insurance Company, First State Insurance Company, Great American Insurance Company, One Beacon America Insurance Company, Republic Western Insurance Company, St. Paul Surplus Lines Insurance Company, Travelers Casualty and Surety Company, Twin City Fire Insurance Company, Utica Mutual Insurance Company, and Westport Insurance Company,

*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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## **BRIEF AND APPENDIX OF RESPONDENTS**

---

Richard D. Snyder  
Thomas Fraser  
FREDRIKSON & BYRON, P.A.  
200 South Sixth Street  
Suite 4000  
Minneapolis, MN 55402-1425  
(612) 402-7000

Paul W. Kalish  
Margot L. Green  
Christie S. Hudson  
CROWELL & MORING LLP  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2595  
(202) 624-2500

*Attorneys for ACE European Group, Ltd., as successor in interest to ACE Insurance SA-NV f/ k/ a CIGNA Insurance Company of Europe, SA-NV; Century Indemnity Company as successor to both CIGNA Specialty Insurance Company, f/ k/ a California Union Insurance Company and CCI Insurance Company, as successor to Insurance Company of North America, as successor to Indemnity Insurance Company of North America Ace American Insurance Company, f/ k/ a CIGNA Insurance Company*

Timothy J. O'Connor  
Laurie W. Meyer  
LIND, JENSEN, SULLIVAN &  
PETERSON, PA  
150 South Fifth Street, Suite 1700  
Minneapolis, MN 55402-4217  
(612) 333-3637

*Attorneys for Centennial Insurance Company*

Bryan S. Chapman  
Bruce D. Celebrezze  
SEDGWICK, DETERT, MORAN  
& ARNOLD LLP  
One North Wacker Drive  
Suite 4200  
Chicago, IL 60606-2841  
(312) 641-6050

- and -

Jacob M. Tomczik  
AAFEDT, FORDE, GRAY,  
MONSON & HAGER PA  
150 South Fifth Street  
Suite 2600  
Minneapolis, MN 55402-4226  
(612) 339-8965

*Attorneys for Arrowood Indemnity Company*

Skip Durocher  
Bryan C. Keane  
Tim Droske  
DORSEY & WHITNEY LLP  
50 South Sixth Street  
Suite 1500  
Minneapolis, MN 55402  
(612) 340-7855

*Attorneys for Employers Insurance of Wausau, a  
Mutual Company, f/ k/ a Employers Insurance  
Company of Wausau, f/ k/ a Employers Mutual  
Liability Insurance Company of Wisconsin*

Richard P. Mahoney  
MAHONEY, DOUGHERTY  
& MAHONEY, P.A.  
801 Park Avenue  
Minneapolis, MN 55404  
(612) 339-5863

-and-

Robert P. Siegel  
Vivian Villegas  
TRAUB LIEBERMAN STRAUSS  
& SHREWSBERRY LLP  
Mid-Westchester Executive Park  
Seven Skyline Drive  
Hawthorne, NY 10532  
(914) 347-2600

*Attorneys for Evanston Insurance Company*

Dyan J. Ebert  
QUINLIVAN & HUGHES PA  
Wells Fargo Center, Suite 600  
400 South First Street  
P.O. Box 1008  
St. Cloud, MN 56302-1008  
(320) 251-1414

- and -

John T. Harding  
MORRISON MAHONEY LLP  
250 Summer Street  
Boston, MA 02210-1181  
(617) 439-7558

*Attorneys for Fairmont Premier Insurance  
Company, d/ k/ a TIG/Transamerica Premier  
Insurance Company*

Charles E. Spevacek  
Amy J. Woodworth  
MEAGHER & GEER PLLP  
33 South Sixth Street, Suite 4400  
Minneapolis, MN 55402  
(612) 338-0661

*Attorneys for Great American Insurance Company*

Robert L. McCollum  
MCCOLLUM CROWLEY MOSCHET  
& MILLER, LTD.  
7900 Xerxes Avenue South, Suite 700  
Bloomington, MN 55431  
(952) 345-9700

- and -

Edward B. Parks II  
James P. Ruggeri  
Michele L. Backus  
Sonia M. Pedraza  
Katherine M. Hance  
SHIPMAN & GOODWIN LLP  
1133 Connecticut Avenue NW  
Third Floor – Suite A  
Washington, DC 20036-4305  
(202) 469-7750

*Attorneys for First State Insurance Company  
and Twin City Fire Insurance Company*

Thomas D. Jensen  
William L. Davidson  
LIND, JENSEN, SULLIVAN &  
PETERSON, P.A.  
150 South Fifth Street, Suite 1700  
Minneapolis, MN 55402-4217  
(612) 333-3637

- and -

Jan M. Michaels  
Scott M. Salerno  
Stephen A. Skardon  
MICHAELS & MAY PC  
300 South Wacker Drive, Suite 1800  
Chicago, IL 60606  
(312) 428-4720

*Attorneys for Employers Mutual Casualty  
Company and Utica Mutual Ins. Company*

James T. Martin  
Joel M. Muscoplat  
GISLASON MARTIN VARPNESS  
& JANES PA  
7600 Parklawn Avenue South, Suite 444  
Minneapolis, MN 55435  
(952) 831-5793

*Attorneys for Seaton Insurance Company*

Charles E. Spevacek  
Amy J. Woodworth  
MEAGHER & GEER PLLP  
33 South Sixth Street, Suite 4400  
Minneapolis, MN 55402  
(612) 347-9171

- and -

Charles W. Browning  
Amy L. Witt  
PLUNKETT COONEY  
38505 Woodward Ave.  
Suite 2000  
Bloomfield Hills, MI 48304  
(248) 594-6247

*Attorneys for Travelers Casualty and Surety  
Company f/k/a The Aetna Casualty and  
Surety Company St. Paul Surplus Lines  
Insurance Company*

Thomas P. Kane  
Michelle D. Mitchell  
HINSHAW & CULBERTSON LLP  
333 South Seventh Street, Suite 2000  
Minneapolis, MN 55402  
(612) 333-3434

*Attorneys for Republic Western Insurance  
Company*

Peter G. Van Bergen  
Jessica J. Theisen  
COUSINEAU McGUIRE Chartered  
1550 Utica Avenue South, Suite 600  
Minneapolis, MN 55416-5318  
(952) 546-8400

- and -

Joseph B. Royster  
Elizabeth Walker  
Brian M. Reid  
LITCHFIELD CAVO LLP  
303 West Madison Street, #300  
Chicago, IL 60606  
(312) 781-6608

*Attorneys for OneBeacon America Insurance  
Company and Atlanta International  
Insurance Company*

John M. Anderson  
Robin Ann Williams  
Jonathan C. Marquet  
Jeffrey R. Mulder  
BASSFORD REMELE,  
A Professional Association  
33 South Sixth Street, Suite 3800  
Minneapolis, MN 55402-3707  
(612) 333-3000

*Attorneys for Federal Insurance Company,  
International Surplus Lines Insurance  
Company and Victoria Versicherungs AG*

Paul R. Smith  
Lauris A. Heyerdahl  
LARKIN HOFFMAN DALY &  
LINDGREN LTD.  
1500 Wells Fargo Plaza  
7900 Xerxes Avenue South  
Minneapolis, MN 55431  
Tel.: (952) 896-3318  
Fax: (952) 842-1744

- and -

Alexander J. Mueller  
Robert M. Flannery  
Stephen T. Roberts  
MENDES & MOUNT LLP  
750 Seventh Avenue, 22nd Floor  
New York, NY 10019-6829  
Tel.: (212) 261-8383  
Fax: (212) 342-2107

*Attorneys for Westport Insurance Corporation  
f/ k/ a Puritan Insurance Company f/ k/ a The  
Manhattan Fire & Marine Insurance Company  
Certain London Market Insurance Companies*

Timothy P. Tobin  
Timothy J. Crocker  
GISLASON & HUNTER LLP  
701 Xenia Avenue South, Suite 500  
Minneapolis, MN 55416  
(763) 225-6000

- and -

Ira Revich  
Caroline van Oosterom  
CHARLSTON, REVICH  
& WOLLITZ LLP  
1925 Century Park East, Suite 1250  
Los Angeles, CA 90067  
(310) 551-7020

*Attorneys for Lumbermens Mutual Casualty  
Company*

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

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## STATEMENT OF THE ISSUE

### **WHETHER THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S MOTION TO RECONSIDER ORDERS DISMISSING 3M'S IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIMS ON THE GROUNDS THAT:**

- A. Minnesota does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when it arises from conduct governed by the express terms of a contract (*i.e.*, the express terms that give rise to a simultaneous breach of contract claim);
- B. 3M's claim for breach of the implied covenant alleges conduct already governed by the express terms of the insurance policies; and
- C. *Cargill, Inc. v. ACE American Ins. Co.*, 766 N.W.2d 58 (Minn. App. 2009), is inapposite to this case and provides no basis for vacating the dismissal of 3M's implied covenant claim.

## APPOSITE AUTHORITIES

*Wild v. Rarig*,

234 N.W.2d 775, 790 (Minn. 1975), *cert. denied*, 424 U.S. 902, 96 S.Ct. 1093, 47 L.Ed.2d 307 (1976)

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652 N.W.2d 46, 76 (Minn. App. 2002), *rev'd on other grounds*, 667 N.W.2d 405 (Minn. 2003)

## STATEMENT OF THE CASE AND OF THE FACTS

### **I. BACKGROUND OF THE COVERAGE LITIGATION**

Plaintiff Respondents Columbia Casualty Company and Continental Insurance Company (together, “CNA”) filed this action for declaratory relief pursuant to Minn. Stat. § 555.01, *et seq.* CNA seeks a determination as to the scope of its obligations under certain insurance policies issued to 3M with respect to tort claims against 3M that allege bodily injury from exposure to toxic substances caused by products that 3M designed, manufactured, marketed and/or sold. CNA included as parties other of 3M’s insurers in order to obtain a common declaration of 3M’s policy rights and obligations with respect to the underlying claims and to resolve any issues of allocation among insurers. Many of those insurers are respondents in this appeal, and we refer to CNA and these other insurer respondents collectively as “Respondents.”

#### **A. The Underlying Tort Claims**

For many years, 3M has been involved in thousands of lawsuits by claimants alleging that they were injured by products designed, manufactured, marketed and/or sold by 3M. (*See* AA 70.) These claims involve allegations that: (1) 3M designed, manufactured and sold defective respiratory masks that failed to prevent exposure to carcinogenic and non-carcinogenic materials such as asbestos, silica, coal dust and other dust, or to chemical fumes such as benzene (“Mask Claims”); and/or (2) 3M manufactured asbestos-containing products, such as dental products, pavement paint and resin (“ACP Claims”) (collectively, “Mask/ACP Claims”). (*See* AA 70.)

## **B. Respondents' Excess Policies**

Between 1950 and the present, 3M purchased hundreds of insurance policies from Respondents (the "Policies"). (*See* R.A. 90.) The Policies generally provide for reimbursement of the costs of defense of underlying claims and/or the costs of indemnifying 3M against judgments or settlements in the underlying cases. (*See* AA 8, 12.) Some of the Policies give Respondents the option to investigate, settle or defend claims against 3M. (*See* AA 43-44.) Some of the Policies impose certain duties on 3M, including the duty to provide timely notice of claims, the duty to cooperate in the defense of the underlying claims and the duty to make a "definite claim" for reimbursement within a certain period of time following payment. (*See* AA 41-42.)

## **C. CNA's Amended Complaint**

CNA's Amended Complaint includes twelve counts. Several counts allege that policy exclusions bar claims arising from pollution or asbestos. (*See* AA 45-46.) Others allege, based on the claims of underlying tort plaintiffs, that 3M's knowledge of its products' defects precludes coverage under several policy provisions that extend coverage only to fortuitous losses. (*See* AA 39, 45.) Finally, as 3M acknowledges in its brief (3M Brief at 5), the Amended Complaint alleged 3M improperly manipulated the apportionment of losses to its insurance coverage in order to benefit itself and force the Respondent insurers to pay more than their policies and Minnesota law require. (*See* AA 38-39, 49-50.) In particular, 3M deferred submission of over \$700 million in costs to its insurers while it pursued its own interests, such as preferentially tendering larger silicone breast implant claims to satisfy deductibles under certain policies. (*See* AA 38-39.) This

practice, in turn, deprived Respondents of the information necessary to properly track the accrual of claims and thus determine what, if anything, their policies must pay. (*See* AA 42, 44.) In addition, the Amended Complaint alleges significant responsibility for claim payments that must be allocated to 3M under the policies and Minnesota law. (*See* AA 49.) Because of practices such as this, the Amended Complaint also alleges 3M has not properly exhausted the coverage underlying Respondents' policies. (*See* AA 50.)

## **II. 3M'S IMPLIED COVENANT AND BREACH OF CONTRACT ALLEGATIONS**

3M filed a Counterclaim against CNA and Cross-Claims against the other insurer Respondents. Counts I and II of the Counterclaim are essentially identical to Counts I and II of the Cross-Claims. Those counts assert claims for declaratory relief and for breach of contract, respectively; both counts are based on the express terms of the Policies. Count III of the Counterclaim combined three purported claims, alleging abuse of process, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. (*See* AA 10.) Count III of the Cross-Claims asserts a claim for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. (*See* AA 14.) The district court dismissed all of 3M's abuse of process and fiduciary duty claims, and 3M does not appeal those rulings. (*See* ADD 1, 7.)

### **A. 3M's Breach of Contract Claim**

Count II of 3M's Counterclaim and Cross-Claims alleges that Respondents breached the various Policies at issue in this case by refusing to reimburse 3M for the cost of defending and settling the underlying tort claims:

48. Plaintiffs have failed and refused to provide 3M with the benefits of the insurance policies they issued to 3M and have failed and refused to provide 3M with defense and/or indemnity or to reimburse 3M for the fees and expenses incurred in defending the Underlying Claims and have thereby breached their insurance contracts with 3M.

(See AA 9 (allegations against CNA); *see also* Cross-Claims at AA 13 (identical allegation against Defendant Respondents)).

**B. 3M's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing**

Count III of 3M's Counterclaim and Cross-Claims alleges several nefarious "purpose[s]" for Respondents' alleged failure to "honor[ ] their obligations under their policies" (and, with respect to CNA, for seeking a judicial resolution of this dispute):

53. The Plaintiffs know they are obligated to provide 3M with a defense and/or to reimburse 3M for fees and costs incurred with respect to defense of the Underlying Claims and indemnify 3M from liability arising from the Underlying Claims.

54. Rather than honoring obligations under their policies, the Plaintiffs have engaged in a course of conduct with the improper or unlawful purpose of (a) evading, for as long as possible, their obligations to 3M for defense and indemnity in connection with the Underlying Claims; (b) furthering bad faith conduct committed by Plaintiffs; (c) attempting to create confrontation and dispute between 3M and its other insurers where none would otherwise exist; and/or (d) attempting to create undue delay and cost to 3M and thereby and with other means to gain leverage on 3M in order to exact compromises or concessions so that the Plaintiffs may avoid defending and indemnifying 3M to the full extent of their obligations under Plaintiffs' policies.

55. By their conduct, Plaintiffs have, among other things, placed their interests above 3M's, engaged in deceptive and bad faith conduct toward 3M; acted contrary to 3M's justified and reasonable expectations; engaged in subterfuges and evasions; lack of diligence; and rejection of performance for unstated and unsupported reasons; and taken or participated in actions designed to harm 3M generally and in 3M's defense of the Underlying Claims.

(See AA 10 (allegations against CNA); *see also* AA 14-15 (asserting allegations identical to ¶¶ 53 and 55, and a sub-set of the allegations of ¶ 54, against Defendant Respondents)).

Although 3M reiterates in its brief that it is not seeking a tort remedy for its implied covenant claim, it suggests that it may seek unspecified “equitable” apportionment of defense and settlement costs to the Respondents as its remedy for Respondents’ alleged breach of the implied covenant of good faith and fair dealing. (3M Brief at 20-21.) This assertion, ironically, brings the issue of apportionment (also referred to in the pleadings and case law as “allocation”) full circle. CNA brought this action in significant part because it appears that 3M has improperly manipulated its “apportionment” of defense and settlement costs to its advantage (*e.g.*, to avoid its deductible obligations and/or to minimize apportionment to post-1986 periods when 3M allegedly had more limited coverage than that provided by Respondents’ policies) and to the Respondents’ resulting disadvantage. 3M now asserts that the Respondents’ objection to 3M’s improper apportionment constitutes a failure of “good faith,” entitling 3M on “equitable” grounds to a more favorable apportionment than the insurance contracts and Minnesota law otherwise would permit.

### **III. MOTION PRACTICE RELATING TO 3M’S IMPLIED COVENANT CLAIM**

#### **A. The District Court Grants Respondents’ Motion To Dismiss Appellant’s Implied Covenant Claim**

On September 29, 2009, CNA moved to dismiss Count III of 3M’s Counterclaim in its entirety. (*See* AA 69.) The Defendant Respondents joined the motion by separate

filing, moving to dismiss Count III of 3M's Cross-Claims. 3M opposed the motions, arguing that Minnesota law permits an implied covenant claim based on the same conduct as a breach of contract claim, and that, in any event, its implied covenant claim was not based on the allegation that Respondents breached the Policies. (*See* AA 85.) The district court disagreed and granted CNA's motion on June 16, 2010. The district court found that 3M's implied covenant claim was based on nothing more than the allegation that Respondents breached the insurance policies and held that "Minnesota does not recognize a separate cause of action for the same when it arises from the same conduct as a breach of contract claim." (*See* ADD 1.) The district court issued a companion order on July 9, 2010, dismissing Count III of the Cross-Claims on the same basis. (*See* ADD 7.)

**B. The District Court Denies 3M's Motion To Reconsider The Dismissal Of Its Implied Covenant Claim**

In July 2010, 3M sought leave to file a motion to reconsider the orders dismissing Count III. (*See* ADD 9.) The district court declined to reconsider its rulings regarding the abuse of process and breach of fiduciary duty claims but agreed to hear 3M's motion to reconsider the dismissal of the implied covenant theory. (*See* ADD 16.)

In January 2011, 3M filed its motion to reconsider the orders issued on June 16 and July 9, 2010. Once again, 3M argued that Minnesota law permits an implied covenant claim based on the same conduct as a breach of contract claim, and that, in any event, its implied covenant claim was not based on the allegation that Respondents breached the Policies. (*See* AA 150.) 3M also raised a new theory, arguing that *Cargill*,

*Inc. v. ACE American Ins. Co.*, 766 N.W.2d 58 (Minn. App. 2009), broadened Minnesota implied-covenant law. (See AA 162.) On June 3, 2011, after briefing and argument, the district court denied 3M's motion. Once again, the district court held that "Minnesota does not recognize a separate implied covenant claim arising from the same conduct as a breach of contract claim." (See ADD 17.) The district court certified this question for appeal and further stated that there was no just reason for delay and directed entry of judgment. (See ADD 18.)

### **STANDARD OF REVIEW**

3M correctly states that "the standard for review for dismissal under Minn. R. Civ. P. 12.02(f) is *de novo*." (3M Brief at 11.) 3M, however, ignores the fact that this appeal is not from a dismissal under Rule 12.02(f) but rather from the district court's June 3, 2011 denial of its motion to reconsider the district court's dismissal orders dated June 16 and July 9, 2010. (See ADD 17.) ("IT IS ORDERED: That Defendant 3M's motion for reconsideration of the Court's prior orders of June 16th and July 9th, 2010 is hereby DENIED."). The June 16 and July 9, 2010 orders dismissing 3M's implied covenant, abuse of process and breach of fiduciary duty claims were *not* certified under Rule 54.02 and are not appealable at this time. 3M does not and cannot dispute this point. (3M Informal Memorandum at 15.) (stating that "the district court's Rule 54.02 certification" was a certification of its "June 3, 2011 order" as a partial final judgment); (see R.A. 62.) ("Date of entry of judgment or date of service of notice of order *from which appeal is taken*: July 20, 2011.") (emphasis added).

Under Minnesota law, denials of motions to reconsider are reviewed for abuse of discretion. *See Peterson v. Hinz*, 605 N.W.2d 414, 417-18 (Minn. App. 2000) (reviewing district court decision based on Minn. R. Gen. Pract. 115.11 for abuse of discretion); *Hanson v. Friends of Minnesota Sinfonia*, No. A03-1061, 2004 WL 1244229, at \*10 (Minn. App. Jun. 8, 2004) (reviewing both district court grant of respondent's motion to reconsider and denial of appellant's motion to reconsider for abuse of discretion); *see also U.S. v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (same standard for federal Rule 59(e) motions to alter or amend judgment). Because the July 20, 2011 order (originally filed on June 3, 2011) appealed here is a denial of 3M's motion to reconsider, the district court's ruling should be reviewed for abuse of discretion.

### ARGUMENT

The district court's denial of 3M's motion to reconsider raises three questions. *First*, did the district court err when it ruled that Minnesota law does not recognize claims for breach of the implied covenant of good faith and fair dealing arising out of conduct governed by the express terms of the contract in question; that is, the same terms that give rise to a simultaneous breach of contract claim? *Second*, did the district court abuse its discretion in concluding that 3M's implied covenant allegations in its Counterclaim and Cross-Claims are based on the same conduct as its simultaneous breach of contract claim? *Third*, should the district court have granted 3M's motion to reconsider based on the legal principles set forth in *Cargill, Inc. v. ACE American Ins. Co.*, 766 N.W.2d 58 (Minn. App. 2009)? Whether judged by a *de novo* or abuse of discretion standard, the district court's denial of 3M's motion for reconsideration of the dismissal of its claim for

breach of the implied covenant of good faith and fair dealing was correct and should be affirmed for the reasons set forth below.

**I. THE DISTRICT COURT CORRECTLY DENIED 3M'S MOTION FOR RECONSIDERATION BECAUSE 3M'S BREACH OF IMPLIED COVENANT CLAIM IS BASED ON THE SAME CONDUCT AS ITS BREACH OF CONTRACT CLAIM**

**A. Minnesota Law Bars Implied Covenant Claims Based On The Same Conduct As Simultaneous Breach Of Contract Claims**

Courts applying Minnesota law are clear: "Minnesota law does not recognize a separate cause of action for breach of the implied covenant of good faith when it arises from the same conduct as a breach-of-contract claim." *Ambor Corp. v. Allina Medical Group*, No. A07-1870, 2008 WL 3289977, at \*7 (Minn. App. Aug. 12, 2008); *see also Seren Innovations, Inc. v. Transcontinental Ins. Co.*, No. A05-917, 2006 WL 1390262, at \*8 (Minn. App. May 23, 2006) (affirming dismissal of implied covenant claim arising from same conduct as claim for breach of contractual duty to defend); *Sports and Travel Marketing, Inc. v. Chicago Cutlery Co.*, 811 F. Supp. 1372, 1383 (D. Minn. 1993) (granting defendant summary judgment because plaintiff's implied covenant claim arose "from the same conduct underlying a breach of contract claim").

The main reason for dismissing duplicative implied covenant claims is to eliminate redundancy in pleadings. If a breach of contract claim is based on conduct violating the express terms of the contract, there is no reason to consider an implied covenant claim based on the same conduct. Indeed, courts are unanimous that an *implied* covenant claim may not be based on conduct governed by *express* contract provisions. *See Ambor Corp.*, 2008 WL 3289977, at \*7 (upholding district court's dismissal of the

implied covenant claim because, like the breach of contract claim, it arose out of the violation of an express non-compete provision in the contract); *Bremer Bank, Nat'l Assoc. v. John Hancock Life Ins. Co.*, No. 06-1534, 2009 WL 702009, at \*8 (D. Minn. 2009) (applying New York law to find that “[c]ourts therefore dismiss claims for breach of the implied covenant of good faith as redundant or duplicative when the conduct allegedly violating the implied covenant is also the predicate for a claim of breach of an express provision of the underlying contract”) (citations omitted); *Hahn v. OnBoard LLC*, No. 2:09-03639, 2009 WL 4508580, at \*6 (D.N.J. Nov. 16, 2009) (“In . . . New Jersey, a plaintiff cannot maintain a claim for breach of the implied covenant of good faith and fair dealing when the conduct at issue is governed by the terms of an express contract or the cause of action arises out of the same conduct underlying the alleged breach of contract.”); see *ICD Holdings S.A. v. Frankel*, 976 F. Supp. 234, 243-44 (S.D.N.Y. 1997) (citations omitted) (“A claim for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of the underlying contract.”). Rather than as a claim that may be based on conduct violating express contract terms, courts have described the “concept of an implied covenant in contracts” as a way to “interpret the ambiguity” in the express terms of a contract. *International Travel Arrangers v. NWA, Inc.*, 723 F. Supp. 141, 153 (D. Minn. 1989); see also *J.J. Brooksbank Co. v. Budget Rent-a-Car*, 337 N.W.2d 372, 376 (Minn. 1983) (finding ambiguity in express terms of licensing agreement but using the implied covenant to interpret the agreement as including certain requirements).

This Court recently reaffirmed this principle in *Kamboo Market, LLC v. Sherman Associates, Inc.*, No. A10-1810, 2011 WL 2518972, at \*5 (Minn. App. July 27, 2011). *Kamboo* involved a landlord-tenant dispute regarding a five-year commercial lease, which provided for the tenant's right to renew the lease "subject to the landlord's right not to renew." *Id.* at \*1. In January 2009, the landlord provided notice that it did not intend to renew the lease when it expired in December 2009; the tenant waited until April 2009 to advise the landlord of its desire to renew, and the lease was not renewed. *Id.* The tenant sued the landlord alleging, *inter alia*, breach of contract and breach of the implied covenant of good faith and fair dealing. *Id.* To support the implied covenant claim, the tenant alleged that "the landlord acted in bad faith by misrepresenting the content of the lease and by intending to take over the exceedingly valuable improvements made by tenant, take over tenant's business contacts for itself, and otherwise profit from the tenant's labors." *Id.* at \*5.

The district court granted the landlord's motion for summary judgment on the implied covenant claim, and the Court of Appeals affirmed the decision. In doing so, this Court cited a long-held legal principle: "Minnesota law does not recognize a separate cause of action for breach of the implied covenant of good faith when it arises from the same conduct as a breach-of-contract claim." *Id.* at \*5 (citing *Wild v. Rarig*, 234 N.W.2d 775, 790 (Minn. 1975)). The court explained that the "[t]enant's breach-of-contract and breach-of-implied-duties-of-good-faith-and-fair-dealing claims arise from the same conduct: landlord's refusal to allow tenant to lease the property for an additional five-

year term.” As a result, this Court affirmed the lower court’s grant of summary judgment.

**B. The District Court Correctly Concluded That 3M’s Implied Covenant Claim Was Based On The Same Conduct As Its Simultaneous Breach Of Contract Claim**

Here, 3M’s claim for breach of implied covenant of good faith and fair dealing is plainly based on the same alleged conduct as 3M’s breach of contract claim. Before focusing on the allegations that are the subject of this appeal (that is, the allegations actually found in 3M’s pleadings), however, Respondents will briefly address the new allegations in 3M’s brief. In its Statement of the Case and of the Facts, 3M asserts two pages of new purported “details,” none of which appear, or are even alluded to, in 3M’s Counterclaim.<sup>1</sup> (*See* 3M Brief at 8-9.) It is black-letter law that allegations not pleaded in the complaint should not be considered. *See, e.g., Watson by Hanson v. Metropolitan Transit Commissioner*, 553 N.W.2d 406, 416 (D. Minn. 1996) (“[A] plaintiff cannot bring forth new allegations at the appellate level[.]”). Notably, 3M also tried this tactic in

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<sup>1</sup> For example, 3M attempts to bolster the allegation that “Insurers conjured up a pretended dispute” – found in paragraph 54 of its Counterclaim – with the “detail” in 3M’s Brief that “claim notices and updates were met by stony silence or occasional blanket reservation-of-rights letters.” (*See* 3M at 8.) This “detail” is not found anywhere in 3M’s Counterclaim, and 3M acknowledges as much by not providing a cite to any part of the record. (*See id.*) Similarly, 3M tries to augment the allegation that “Insurers have taken or participated in actions designed to harm 3M generally and in its defense of the Mask/ACP Claims” – found in paragraph 55 of its Counterclaim – with the purported “detail” that “Insurers – CNA in particular – have intentionally disclosed to the underlying plaintiffs the Insurers’ contentions that 3M somehow expected or intended to injure the underlying plaintiffs who have made claims against 3M.” (*See id.*) Unsurprisingly, this purported “detail” also is not found anywhere in 3M’s Counterclaim, which 3M admits by not providing any citation. (*See id.*)

its Opposition to Plaintiff Respondents' Motion to Dismiss (*see* AA 92-94), and its growing litany of unpleaded assertions in each round of briefs further underscores the inadequacy of its pleaded allegations.

In any event, 3M's new and old allegations together yield the same inescapable conclusion: the conduct upon which 3M bases its implied covenant claim is, at bottom, the same conduct that supports 3M's breach of contract claim, *i.e.*, conduct governed by the express provisions of the insurance policies. The only "conduct" actually alleged by 3M is Respondents' refusal to pay what 3M contends (erroneously, in Respondents' view) they are contractually obligated to pay and Respondents' election to seek a judicial resolution of that dispute. In Count II (breach of contract), 3M alleges:

48. Plaintiffs have failed and refused to provide 3M with the benefits of the insurance policies it issued to 3M and have failed and refused to provide 3M with defense and/or indemnity or to reimburse 3M for fees and expenses incurred in defending the Underlying Claims.

(*See* AA 9.) Count III (breach of the implied covenant), simply alleges iniquitous purpose or pernicious effect of that conduct:

53. The Plaintiffs know they are **obligated** to provide 3M with a defense and/or to reimburse 3M for fees and costs incurred with respect to defense of the Underlying Claims and indemnify 3M from liability arising from the Underlying Claims.

54. **Rather than honoring obligations under their policies**, the Plaintiffs have engaged in a course of conduct with the improper or unlawful **purpose of (a) evading, for as long as possible, their obligations to 3M for defense and indemnity in connection with the Underlying Claims;** (b) furthering bad faith conduct committed by Plaintiffs; (c) attempting to create confrontation and dispute between 3M and its other insurers where none would otherwise exist; and/or (d) attempting to create undue delay and cost to 3M and thereby and with other means to gain leverage on 3M in order to exact compromises or

**concessions so that the Plaintiffs may avoid defending and indemnifying 3M to the full extent of their obligations under Plaintiffs' policies.**

(See AA 10.)<sup>2</sup>

Hence both the breach of contract claim in Count II and the implied covenant claim in Count III are premised on the same fundamental allegation that Plaintiffs “refused” or “evad[ed]” their express contractual obligations to 3M for defense and indemnity. Count III also makes clear that the various allegations in paragraph 54 – including those supported by the adorning “details” in 3M’s appellate brief – amount to nothing more than improper “purpose(s)” for an alleged failure to “honor[] obligations under their policies,” *i.e.*, obligations to defend 3M and/or reimburse 3M for covered losses.<sup>3</sup> Thus 3M’s own Counterclaim confirms that its implied covenant and breach of contract claims are based on the same purported *conduct*.

Like the plaintiff in *Kamboo Market, LLC v. Sherman Associates, Inc.*, 3M levies several allegations in support of its breach of implied covenant claim, alongside a breach of contract claim. If anything, the *Kamboo* plaintiff’s specific allegations that the landlord “misrepresent[ed] the content of the lease, . . . intend[ed] to take over the exceedingly valuable improvements made by tenant, take over tenant’s business contacts

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<sup>2</sup> Emphasis added throughout.

<sup>3</sup> 3M’s reliance on *White Stone Partners, LP v. Piper Jaffray Cos., Inc.*, 978 F. Supp. 878, 885 (D. Minn. 1997), is misplaced. (See 3M Brief at 21.) The *White Stone* court applied the implied covenant because it was concerned that the contract’s one-sided escape clause granted one party “absolute discretion” to frustrate the agreement. See *White Stone*, 978 F. Supp. at 882-83. Here there is no allegation, much less any basis for concluding, that the express provisions of the insurance policy are so “one-sided” as to require application of the implied covenant of good faith.

for itself, and otherwise profit from the tenant's labors" sound *more* like an implied covenant claim than 3M's conclusory allegations of bad faith and improper purpose in refusing to "honor [] obligations" to pay for 3M's defense and/or covered losses. (*See supra* at I.A.) Nevertheless this Court concluded that the many allegations supporting the *Kamboo* plaintiff's implied covenant claim stemmed from the landlord's refusal to allow tenant to lease the property for an additional five-year term, which was the same alleged conduct underlying the plaintiff's breach of contract claim. *Kamboo Market LLC*, 2011 WL 2518972, at \*5. So too here, 3M's allegations that Respondents have "evad[ed] . . . their obligations to 3M for defense and indemnity in connection with the Underlying Claims," "conjured up a pretended dispute," or "rejected performance for unstated and unsupported reasons" unmistakably stem from Respondents' purported failure to honor its obligations under the policies to provide a defense and/or reimburse 3M for covered losses. (*See* AA 10-11.); *see also Aten v. Scottsdale Ins. Co.*, 2006 WL 2990476, at \*4 (D. Minn. Oct. 19, 2006), *rev'd on other grounds*, 511 F.3d 818 (8th Cir. 2008) ("Insofar as [policyholder] predicates his breach-of-implied-covenant claim on the same conduct as his breach-of-contract claim – [insurer's] failure to pay under the Policy – this claim must be dismissed").

The district court correctly found that "3M's breach of contract claim alleged in Count II and its breach of the implied covenant of good faith and faith dealing claim in Count III are premised on the allegation that Plaintiffs refused or evaded their contractual obligations to 3M for defense and indemnity." (*See* ADD 5.)

**C. Rather Than Support 3M's Argument, *In re Hennepin* And Its Progeny Confirm That Implied Covenant Claims May Not Be Based On The Same Conduct As Breach Of Contract Claims**

3M argues that the district court misinterpreted *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995), when it dismissed 3M's implied covenant claim. 3M argues that the *In re Hennepin* court allowed both the implied covenant claim and breach of contract claim arising out of the same conduct to proceed. (See 3M Brief at 13.) Thus 3M asserts that *In re Hennepin* permits an implied covenant claim based on the same conduct that gives rise to a breach of contract claim. 3M misreads *In re Hennepin* and disregards a Court of Appeals decision that directly contradicts 3M's interpretation of that case.

A brief summary of the facts and procedural history of *In re Hennepin* is in order. In 1986, Hennepin County issued bonds to finance construction of a recycling facility. *In re Hennepin*, 540 N.W.2d at 496. The County issued the bonds pursuant to several documents, including the bond certificates, a Loan Agreement, an Official Statement and a Trust Indenture between the County and Trustee. *Id.* The bonds matured on various dates between 1995 and 2010, but the Trust Indenture and Official Statement gave the County the right to redeem the bonds before maturity upon payment of a two-percent premium if redemption occurred prior to October 1, 1996. *Id.* The bonds were secured by a Letter of Credit that was scheduled to expire in October 1992.

In early 1992, after a dramatic decline in market interest rates, the County decided to refinance the recycling project at lower rates. *Id.* Rather than pay the two percent redemption premium, however, the County allowed the Letter of Credit to expire in

September 1992, which triggered involuntary redemption of the bonds pursuant to provisions in both the Loan Agreement and Trust Indenture. *Id.* The bondholders surrendered their bonds shortly thereafter; the County redeemed them at par plus interest through October 1992 and paid no redemption premium. *Id.*

The bondholders filed a class action complaint alleging, among other counts, breach of contract and breach of the implied covenant of good faith and fair dealing. *Id.* The district court dismissed the bondholders' breach of contract claim, concluding that the bond agreements "imposed no express duty upon defendants to seek renewal of the Letter of Credit." *Id.* at 497. The district court permitted the bondholders to maintain their implied covenant claim. The Court of Appeals reversed the district court's dismissal of the breach of contract claim on the grounds that "the bond agreements were ambiguous with respect to defendants' duties concerning renewal of the Letter of Credit, and with respect to whether defendants' conduct constituted a breach of those duties." *Id.* The Court of Appeals declined to reach the implied covenant issue. *Id.*

The Supreme Court ultimately faced two questions: (1) whether the bondholders stated a claim for breach of the express provisions of the contract; and (2) whether the bondholders stated a claim for breach of the implied covenant of good faith and fair dealing. *Id.* at 498. In answering the first question, the court held that the bondholders stated a claim because "the language of the bond agreements was ambiguous," which would permit "an interpretation that the County did not have the right to . . . invoke the . . . redemption provisions." *Id.*; *see also id.* at 500 ("[I]t is unclear whether the bond

agreements permit the County to voluntarily trigger mandatory redemption of the bonds”).

In answering the second question, the court ruled that the bondholders also stated a claim for breach of the implied covenant:

To allege an implied covenant claim, the bondholders need not first establish an express breach of contract claim – *indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached . . .* here, the bondholders properly stated a claim for breach of an implied covenant[.]

*Id.* at 503. Because the parties did not expressly articulate in the bond documents the covenant allegedly breached – *i.e.*, that the County was prohibited from invoking the redemption provision by allowing the Letter of Credit to expire – the court held that an implied covenant claim addressing the County’s invocation of the redemption provision was appropriate.

These facts bring into focus 3M’s misreading of *In re Hennepin*. The critical question is not, as 3M asserts, whether implied covenant claims and breach of contract claims “can coexist, side-by-side” or even whether “the same or similar conduct can support both.” (See 3M Brief at 22.) Instead, the crucial factor is whether an implied covenant claim alleges conduct *already governed by the express terms of a written contract*. Indeed, the Court of Appeals acknowledged this very point in 2008:

*In Hennepin County 1986 Recycling Bond Litigation*, the Supreme Court stated:

“In Minnesota, the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the underlying contract. Here, however, the bondholders’ implied covenant claims are based on the underlying bond agreements. To allege an implied covenant claim the bondholders need not first establish an express breach of contract claim—indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached.”

540 N.W.2d at 503. Here, *unlike in Recycling Litigation*, [Plaintiff’s] claim that [Defendants] violated the covenant of good faith and fair dealing arises from the exact same conduct as alleged in the breach-of-contract claim. Therefore, [Plaintiff’s] claim regarding this issue fails[.]

*Ambor*, 2008 WL 3289977, at \*7. The *Ambor* court upheld the district court’s ruling that the implied covenant claim should be dismissed because, like the breach of contract claim, it arose out of the violation of an express non-compete provision in the contract.

*Id.*

As the district court found, 3M’s implied covenant claim alleges the same essential conduct as it alleges in its breach of contract claim – *i.e.*, that Plaintiffs refused or evaded their contractual defense and indemnity obligations – and such alleged conduct clearly is governed by the express terms of the policies. Unlike the courts in *Wild v. Rarig*, 234 N.W.2d 775, 790 (Minn. 1975), *Ambor Corp.*, 2008 WL 3289977, at \*7 (Minn. App. Aug. 12, 2008), and *Seren Innovations, Inc. v. Transcontinental Ins. Co.*, 2006 WL 1390262, at \*8 (Minn. App. May 23, 2006), the *In re Hennepin* court never faced the question of whether an implied covenant was appropriate where there were express contract terms unambiguously governing the alleged conduct.<sup>4</sup>

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<sup>4</sup> 3M also contends that *Wild v. Rarig* and its progeny are inapposite to this case because they apply to prohibit only *tort* claims premised on the same conduct as an

Indeed, the *In re Hennepin* court found that “the language of the bond agreements was ambiguous,” with regard to whether the County had “the right to . . . invoke the . . . redemption provisions.” *In re Hennepin*, 540 N.W.2d at 498; *see also id.* at 500 (“[I]t is unclear whether the bond agreements permit the County to voluntarily trigger mandatory redemption of the bonds”). In permitting the implied covenant claim to proceed, therefore, the Supreme Court merely applied longstanding Minnesota law: when ambiguity exists in the express terms of an agreement, the implied covenant of good faith and fair dealing may aid the interpretation of that agreement. *J.J. Brooksbank Co.*, 337 N.W.2d at 376 (Minn. 1983). Accordingly, *In re Hennepin* and its progeny provide no support for 3M’s entirely duplicative implied covenant claim.

**D. Minnesota Courts Have Held That A Viable Implied Covenant Claim Must Include Allegations That A Party Hindered The Other Party’s Performance Of The Contract**

Contrary to 3M’s contention, several Minnesota courts have held that a free-standing implied covenant claim is viable only if the plaintiff alleges interference with its performance under the contract. *See Lyon Fin. Serv., Inc. v. MBS Mgmt. Serv., Inc.*, No. 06-4562, 2007 WL 2893612, at \*7 (D. Minn. Sep. 27, 2007) (applying Minnesota law

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accompanying breach of contract claim. Because 3M’s Counterclaim is based in contract only and does not allege a tort, 3M argues that *Wild* does not apply. (*See* 3M Brief at 19-20.) This argument is flawed. First, there is no Minnesota case confining the holding of *Wild v. Rarig* – that an implied covenant claim cannot be based on the same conduct as a breach of contract claim – to tort claims only. Second, at least three decisions rendered by the Court of Appeals have applied the holding of *Wild v. Rarig* to circumstances involving only implied covenant claims based in contract, not tort. *See Kamboo Market, LLC v. Sherman Associates, Inc.*, 2011 WL 2518972, at \*5 (Minn. App. July 27, 2011); *see also Ambor Corp. v. Allina Medical Group*, 2008 WL 3289977, at \*7 (Minn. App. Aug. 12, 2008); *Seren Innovations, Inc. v. Transcontinental Ins. Co.*, 2006 WL 1390262, at \*8 (Minn. App. May 23, 2006).

and ruling that plaintiff failed to state a claim for breach of implied covenant of good faith and fair dealing because the “complaint lack[ed] any allegations that [defendant] interfered with [plaintiff’s] performance of the lease contracts”); *Miller v. ACE USA*, 261 F. Supp. 2d 1130, 1140 (D. Minn. 2003) (granting summary judgment on good faith and fair dealing claim where no allegations or evidence was presented to show how insurer “unjustifiably hindered” insured’s performance of the contract).

Until 3M added so-called “detail” to its Brief, no allegations that Respondents unjustifiably hindered 3M’s performance of the contract had ever been made. For example, 3M now attempts – for the first time – to characterize its allegation that Respondents “rejected performance for unstated and unsupported reasons” as one that Respondents “frustrated 3M’s performance” “and thereby breached the implied covenant of good faith and fair dealing.” (See 3M Brief at 8.) Aside from the fact that 3M misstates the record by citing to a portion of CNA’s Amended Complaint that provides no support for its point,<sup>5</sup> 3M alleges nothing more than what is governed by the express terms of the contract: Respondents’ purported failure to pay for 3M’s defense and/or covered losses.

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<sup>5</sup> 3M cites to “AA 40-44” (*i.e.*, the Amended Complaint) for its unfounded contention that “the Insurers went long periods of time without identifying the additional information they claimed to need, yet later relied on their own silence as a basis for asserting the 3M failed to provide the allegedly needed information.” AA 40-44 contains CNA’s late notice allegations against 3M, which say *nothing* about waiting “long periods of time without identifying” information or using such a delay as a basis for the late notice claims. Under the guise of citing to “facts” in the pleadings, 3M once again seeks to put additional, unpleaded allegations before this Court.

Even if this Court were to accept this new interpretation of 3M's Count III, however, the implied covenant claim still should be dismissed. When an implied covenant claim rests on the allegation that a party hindered another party's performance, but that claim nevertheless arises from the same conduct underlying an accompanying breach of contract claim, the implied covenant claim fails. *See Sports and Travel Marketing, Inc. v. Chicago Cutlery Co.*, 811 F. Supp. 1372 (D. Minn. 1993) (granting defendant summary judgment on plaintiff's implied covenant claim because it arose "from the same conduct underlying a breach of contract claim" even though plaintiff alleged that "defendants breached [the implied covenant] by preventing [plaintiff] from fulfilling commitments for its customers" under the contract). Even if this Court chooses to consider 3M's re-interpreted allegations, the district court properly dismissed 3M's implied covenant claim as duplicative of its claim for breach of contract.

## **II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S ARGUMENT THAT AN IMPLIED COVENANT CLAIM COULD SUPPORT EQUITABLE REMEDIES**

### **A. The Remedy For A Breach Of The Implied Covenant Is Limited To Contract Damages**

As discussed above in Section I.B., Count III arises from the same conduct governed by the express provisions in the Policies that support 3M's breach of contract claims. To the extent that Count III differs from Count II, it adds only allegations as to the "purpose" behind Respondents' supposed breaches of contract,<sup>6</sup> or merely

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<sup>6</sup> "Rather than honoring obligations under their policies, the Plaintiffs have engaged in a course of conduct **with the improper or unlawful purpose** of (a) evading, for as

characterizes Respondents' alleged breaches as "deceptive and bad faith conduct toward 3M." (See AA 11.) Minnesota law is clear, however, that such allegations do not give rise to extra-contractual damages or support implied covenant claims. "The motives prompting the breach of a contract are immaterial, so far as the rule of damages is concerned, and, however malicious or wrongful, the measure of compensation remains the same." *Wild*, 234 N.W.2d at 790 (Minn. 1975) (refusing to find a separate implied covenant claim) (quoting *Indep. Grocery Co. v. The Sun Ins. Co.*, 178 N.W.2d 582, 583 (Minn. 1920)). Even if 3M could show that Respondents breached the Policies in "bad faith," its remedy still would be contractual damages and nothing more.

This principle is illustrated in *Sports and Travel Marketing, Inc. v. Chicago Cutlery Co.*, 811 F. Supp. 1372 (D. Minn. 1993), where the court stated as follows: "In paragraph 68 of [plaintiff's] complaint, it also alleges that defendants' conduct constitutes bad faith destruction of [plaintiff's] legitimate expectancies . . . Minnesota law, however, does not recognize bad faith termination of a contract as giving rise to a cause of action independent of the contractual claim." *Id.* (citing *Wild v. Rarig*, 234 N.W.2d 789-92 (Minn. 1975)).

The district court correctly rejected 3M's attempts to seek extra-contractual damages for a "bad faith" breach of contract.

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long as possible, their obligations to 3M for defense and indemnity in connection with the Underlying Claims[.]" (See AA 10.)

**B. *Cargill* Does Not Change Longstanding Minnesota Law; A Breach Of The Implied Covenant Does Not Give Rise To Equitable Remedies.**

Despite Minnesota law confining remedies for breach of the implied covenant to contract damages, 3M argues that the district court erred in denying its motion to reconsider because *Cargill, Inc. v. ACE American Ins. Co.*, 766 N.W.2d 58 (Minn. App. 2009), “appears . . . to represent [the Court of Appeals’] view of the breadth of implied-covenant obligations and remedies – a much broader view than that taken by the trial court in dismissing 3M’s claims.” (3M Brief at 16.) Specifically, 3M contends that *Cargill* departs from longstanding Minnesota jurisprudence by imposing an equitable remedy for a breach of the implied covenant, *i.e.*, a contract action. For the reasons set forth below, the district court correctly concluded that *Cargill* supplied no reason to alter its dismissal orders.

It is well-settled in Minnesota that “[e]quitable relief cannot be granted where the rights of the parties are governed by a valid contract.” *U.S. Fire Ins. Co. v. Minnesota State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981); *see also Cady v. Bush*, 283 N.W.2d 358, 362 (Minn. 1959) (“Courts are not warranted in interfering with the contract rights of parties as evidenced by their writings which purport to express their full agreement”); *Minneapolis Grand, LLC v. Galt Funding LLC*, 791 N.W.2d 549, 554 (Minn. App. 2010) (“A party may not have equitable relief where there is an adequate remedy at law available.”); *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46, 76 (Minn. App. 2002), *rev’d on other grounds*, 667 N.W.2d 405 (2003) (upholding the

lower court's denial of 3M's request for equitable relief to "make it whole" because "[b]reach of the implied covenant . . . give[s] rise only to traditional contract remedies").<sup>7</sup>

*Cargill* did not change this longstanding rule. First, no party in *Cargill* brought an implied covenant claim; whether an equitable remedy was an appropriate remedy for an implied covenant *claim* was never at issue. Moreover, with no pending implied covenant claim, *Cargill* had no occasion to address whether an implied covenant claim may be based on the same conduct as a breach of contract claim. Thus, on the dispositive questions before this Court – a party's right to bring duplicative breach of implied covenant and breach of contract actions, as well as the availability of equitable remedies for breach of contract claims – *Cargill* is silent.

Indeed, the Court of Appeals did not even impose an "equitable remedy" on *Cargill*; it merely approved the imposition of a "constructive loan receipt agreement" in aid of contribution claims "*among insurers with a duty to defend.*" *Cargill*, 766 N.W.2d at 66. Because there was no contract between the insurer seeking contribution (Liberty Mutual) and its co-insurers that would have allowed Liberty Mutual to seek a remedy at law, the Court used its equitable powers to imbue Liberty Mutual with rights against its co-insurers it did not otherwise have. *Id.* Importantly, this application of the court's equitable power imposed no financial obligation on *Cargill* or Liberty Mutual, the parties to the insurance contract at issue. Because there was no equitable remedy imposed on the

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<sup>7</sup> As 3M notes in its brief (fn. 4), it persuaded the district court in *In re Silicone/First State* to conduct a trial on 3M's implied covenant allegations. This Court's eventual rejection of 3M's "equitable relief" theory, however, rendered that trial a complete waste of time. The district court in this case correctly exercised its discretion in declining 3M's request to repeat that costly but pointless exercise.

parties between whom the implied covenant actually ran, *i.e.*, Cargill and Liberty Mutual, *Cargill* cannot plausibly be read to permit equitable remedies for a breach of the implied covenant.

Further, the unique predicament faced by the Court of Appeals aids in understanding why the court awarded equitable relief to Liberty Mutual. At that time, the Minnesota Supreme Court case governing contribution rights was *Iowa National Mutual Ins. Co. v. Universal Underwriters*, 150 N.W.2d 233, 236 (Minn. 1967), which required an insurer to be in privity with another insurer in order to pursue contribution. As discussed above, however, Liberty Mutual had no contractual relationship with its co-insurers and, more importantly, no *express* contractual right against Cargill to obtain a loan receipt agreement (which Cargill refused to provide). *Cargill*, 766 N.W.2d at 66. Because Liberty Mutual had no remedy at law, equity was the only vehicle that would allow Liberty to pursue contribution, and the *Cargill* court exercised its equitable power to impose a constructive loan receipt agreement in aid of contribution “*among insurers.*” *Id.* This critical fact distinguishes *Cargill* from the present case – unlike Liberty Mutual, 3M has a remedy at law against Plaintiffs and the other Insurers, as 3M itself alleges in its pending breach of contract claim.

Finally, as 3M concedes, the Supreme Court’s decision in *Cargill* does not even mention the implied covenant, let alone any equitable imposition of a loan receipt agreement. Instead, the Supreme Court simply did what this Court could not do and overruled *Iowa National*, rendering moot the entire loan receipt issue and this Court’s discussion thereof including all discussion of the implied covenant of good faith and fair

dealing. *Cargill, Inc. v. ACE American Ins. Co.*, 784 N.W.2d 341, 354 (Minn. 2010).

Thus this Court's decision in *Cargill* is far too slender a reed to support 3M's expansive speculation about the Court's "view of the breadth of implied covenant obligations and remedies." (3M Brief at 16.) This Court should decide the issue under existing well-settled Minnesota law, which does not recognize 3M's duplicative implied covenant claim.

### **CONCLUSION**

For the foregoing reasons, Respondents respectfully request that the Court of Appeals affirm the district court's denial of 3M's motion to reconsider the dismissal of its claim for breach of the implied covenant of good faith and fair dealing.

Dated: October 11, 2011

COLUMBIA CASUALTY COMPANY and  
CONTINENTAL INSURANCE COMPANY  
(on behalf of Respondents)

By: Jeanne Unger  
One of Their Attorneys

Jeanne H. Unger (131404)  
Mark R. Bradford (335940)  
**BASSFORD REMELE**  
33 South Sixth Street  
Minneapolis, Minnesota 55402  
Telephone: (612) 333-3000  
Facsimile: (612) 333-8829

David E. Schoenfeld  
Maile H. Solís  
Michael W. Kazan  
Colin M. Seals  
**GRIPPO & ELDEN LLC**  
111 South Wacker Drive  
Chicago, Illinois 60606  
Telephone: (312) 704-7700  
Facsimile: (312) 558-1195

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,067 words, and was prepared using Microsoft Word 2003.

Dated: October 11, 2011

Jeanne H. Unger  
Jeanne H. Unger (131404)