NO. A08-1082

State of Minnesota

In Supreme Court

Cargill, Incorporated and Cargill Turkey Production, LLC,

Appellants,

v.

Ace American Insurance Company, a corporation; et al.,

Respondents.

BRIEF OF RESPONDENTS THE TRAVELERS INDEMNITY COMPANY; TRAVELERS CASUALTY AND SURETY COMPANY, F/K/A THE AETNA CASUALTY AND SURETY COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; AND ST. PAUL SURPLUS LINES INSURANCE COMPANY

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STATEMENT OF LEGAL ISSUES

1. The trial court certified the following question as important and doubtful:

> Can a court order primary insurers, who insure the same insured for the same risks and whose policies are triggered for defense purposes, to be equally liable for the costs of defense where there is otherwise no privity between the insurers?

The district court said yes, stating it would permit Liberty Mutual to seek contribution from other non-defending insurers in the absence of a loan receipt agreement. The district court said it would not order Cargill to enter into a loan receipt agreement.

The court of appeals also said yes but held that Liberty Mutual could not seek contribution absent a loan receipt agreement. Rather, the court of appeals held that if an insured refuses to enter into a loan receipt agreement, a court, when timely asked, may impose a constructive loan receipt agreement to protect the insurer.

Apposite authority: *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986).

STATEMENT OF THE CASE

This is an insurance coverage case addressing the issue of whether an insurer who has agreed to defend its insured under a reservation of rights may condition its offer to defend on the insured executing a loan receipt agreement in order to preserve the defending insurer's right to obtain contribution from other insurers who may also have a duty to defend. The Court of Appeals reasoned that based on well-established principles of insurance coverage law a district court has the authority to impose a constructive loan receipt agreement to permit a defending insurer to seek equitable contribution of defense costs.

This dispute arose when Appellants Cargill, Incorporated and Cargill Turkey Production, L.L.C., ("Cargill") sought a defense from some of its primary insurers after Cargill had been sued by the State of Oklahoma and a number of individuals in Arkansas, for damages arising out of Cargill's alleged handling of poultry litter (the "Underlying Actions"). The State of Oklahoma alleges that Cargill's practices have caused property damage to the natural environment (the "Oklahoma Lawsuit"). The individual lawsuits filed in Arkansas allege that Cargill's handling of poultry litter has caused bodily injury to a number of individuals (the "Arkansas Lawsuits").

Cargill brought this declaratory action against a number of insurers seeking a declaration that its insurers have an obligation to defend and indemnify Cargill in the Underlying Actions. Several of Cargill's insurers – The Travelers Indemnity Company ("Travelers"), Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company ("Travelers Casualty"), St. Paul Fire and Marine Insurance Company ("St. Paul"), St. Paul Surplus Lines Insurance Company ("St. Paul Surplus"), American Home Assurance Company ("American Home"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), and Liberty Mutual Insurance Company ("Liberty Mutual") – agreed to fund Cargill's defense in the Underlying Actions, subject to full and complete reservation of rights, and contingent upon Cargill entering into a loan receipt agreement to allow the defending insurers to pursue contribution for defense costs paid from any of Cargill's other insurers not participating in its defense.

Because Cargill had negotiated contracts with some of its insurers containing provisions by which Cargill would ultimately bear some of the costs advanced by those insurers (*e.g.*, by virtue of deductibles, self-insured retentions and/or retrospective premiums), or because in some instances Cargill's own captive insurance entity reinsured the risks underwritten by those insurers, Cargill refused to execute a loan receipt agreement and decided to pursue only Liberty Mutual (with whom Cargill had a limited deductible) for its defense costs. Cargill brought a motion for summary judgment seeking a declaration that: (a) Cargill could select Liberty Mutual alone to defend Cargill against the Underlying Actions; (b) Liberty Mutual could not, in the absence of a loan receipt agreement with Cargill, obtain contribution from any of Cargill's other insurers for defense costs incurred in the Underlying Actions; (c) Cargill has no obligation to provide Liberty Mutual with a loan receipt agreement; and (d) Liberty Mutual cannot, with or without a loan receipt agreement, directly or indirectly recover costs from Cargill.

Liberty Mutual filed a cross-motion for summary judgment which sought a declaration that: (a) Cargill was obligated to provide Liberty Mutual with a loan receipt agreement upon Liberty Mutual's payment of Cargill's defense costs in the Underlying Actions; and (b) Cargill's refusal to provide Liberty Mutual with a loan receipt agreement was a material breach of the terms and conditions of the Liberty Mutual policy, thereby relieving Liberty Mutual of any defense or indemnity obligations under its policies. In the alternative, Liberty Mutual sought a ruling that would provide it either a constructive loan receipt agreement or a declaration that a loan receipt agreement was not necessary for it

to seek equitable reimbursement of paid defense costs from other insurers owing Cargill a duty to defend.

Liberty Mutual also asserted cross-claims against Travelers, Travelers Casualty, One Beacon American Insurance Company ("One Beacon"), Northwestern National Insurance Company, National Union and American Home, seeking a declaration that Liberty Mutual would have a subrogation or contribution right against those other insurers to recover defense costs it may be obligated to pay, even absent a loan receipt agreement. Travelers and Travelers Casualty moved to dismiss Liberty Mutual's cross-claim on the grounds that Minnesota law does not permit an insurer to seek contribution to defense costs paid in the absence of a loan receipt agreement. One Beacon, National Union and American Home joined in Travelers and Travelers Casualty's arguments for dismissal.

The district court entered an order denying Cargill's motion for summary judgment, denying the motion to dismiss Liberty Mutual's cross-claims; and entering partial summary judgment in favor of Liberty Mutual. The court held that Liberty Mutual, even without a loan receipt agreement, has the equitable right to seek contribution for defense costs from any other insurer having a duty to defend Cargill; that the order was without prejudice to the rights of insurers to assert whatever claims they may have against Cargill to contribute to defense costs under their negotiated deductible or retrospective premium plans; and that the order should not be construed as preventing any party from seeking contribution for costs of defense from any other insurer, including, but not limited to, excess or umbrella carriers. The district court also certified

the following question for appellate review as important and doubtful: "Can a court order primary insurers, who insure the same insured for the same risks, and whose policies are triggered for defense purposes, to be equally liable for the costs of defense where there is otherwise no privity between the insurers?"

The Court of Appeals held that due to the lack of contractual privity between Liberty Mutual and the other primary insurers with a potential duty to defend, Liberty Mutual has no right to contribution in the absence of a loan receipt agreement. The Court of Appeals also held that if an insured refuses to execute a loan receipt agreement, a district court, when timely asked, may protect the insurer by imposing a constructive loan receipt obligation.

STATEMENT OF THE FACTS

I. Cargill's Alleged Liability in the Oklahoma and Arkansas Lawsuits.

Cargill has been named a defendant in a lawsuit brought by the State of Oklahoma and in a number of lawsuits brought in Arkansas. (CAppx 11[1], CAppx 89). The actions all seek damages due to Cargill's alleged handling of its poultry litter. (CAppx 56 ¶31, CAppx 98-99 ¶¶40-41).

In the Oklahoma action, the State of Oklahoma alleges that Cargill is one of the "Poultry Integrator Defendants" responsible for damage or injury to the Illinois River Watershed District due to Cargill's and the other defendants' poultry operations in that region. (CAppx 52, ¶13-14). In addition, Cargill has been named a defendant in a

[1] "CAppx" refers to the Appendix filed by Appellant Cargill.

number of Arkansas lawsuits in which the plaintiffs are claiming they incurred bodily injury due to their exposure to contaminated poultry litter. (CAppx 98 ¶38). In the Arkansas lawsuits Cargill is alleged to have participated in the poultry production activities which resulted in the contaminated litter. (CAppx 98-99 ¶¶40-41, CAppx 101 ¶¶46-50). The Oklahoma and Arkansas lawsuits are both ongoing and Cargill is defending itself.

II. Various Primary Insurers Offer to Defend Cargill

Cargill brought this action seeking coverage for policies which were issued to Cargill dating back as far as 1957. (T.A.[2] 156-167). Cargill's complaint in this action seeks, in part, a declaration that its insurers are obligated to defend Cargill in the Underlying Actions. (T.A. 21-22, T.A. 25-27). Cargill's complaint alleges that the following insurers have breached their duty to defend Cargill in the Underlying Actions: Travelers, Liberty Mutual, One Beacon Insurance Company, Travelers Casualty, National Union, American Home and St. Paul. (T.A. 27-28). Cargill's complaint alleges that its primary insurers owe Cargill "a complete and indivisible duty to defend" it in the Underlying Actions. (T.A. 19, ¶73). The complaint further alleges that each of the insurers who are alleged to have breached their contracts are "obligated to reimburse Cargill in full for the costs already incurred by Cargill in defending the Oklahoma/Arkansas lawsuits including attorney's fees, costs, and expenses." (T.A. 23,

[2] "T.A." refers to the Appendix filed by the Respondents herein, The Travelers Indemnity Company, Travelers Casualty and Surety Company, f/k/a The Aetna Casualty and Surety Company, St. Paul Fire and Marine Insurance Company, and St. Paul Surplus Lines Insurance Company.

¶92; T.A. 27, ¶109). Cargill seeks a declaration that all of the defendant insurance companies have a duty to undertake the complete and undivided defense of Cargill or pay Cargill's defense costs with respect to the Underlying Actions. (T.A. 21-22, ¶¶82-88; T.A.25-27, ¶¶101-07).

By letter dated May 8, 2007, several of Cargill's insurers—American Home, National Union, Travelers, Travelers Casualty, St. Paul, St. Paul Surplus, and Liberty Mutual—agreed to fund Cargill's defense in the Underlying Actions under their respective reservations of rights, and requested that Cargill issue a loan receipt to allow the carriers to pursue contribution from other non-participating carriers. (CAppx 206-207). On October 8, 2008, Liberty Mutual tendered to Cargill a check in the amount of $704,762.22 for partial payment of Cargill's defense costs and conditioned the payment on Cargill signing a loan receipt agreement. (CAppx 214-215). Cargill refused to sign the loan receipt agreement, stating that many of its primary or lower-level insurance policies contained certain fronting arrangements – such as deductibles, self-insured retentions, retrospective premiums or are reinsured by a Cargill captive insurer – such that Cargill believed it would ultimately be responsible for some of its own defense costs if Liberty Mutual was allowed to recover from those policies. (CAppx 7-8, ¶3-5).

Thereafter, Cargill brought its motion for summary judgment, asserting that only Liberty Mutual has a duty to defend Cargill in the Underlying Actions, and that Liberty Mutual has no right to seek contribution from any other carrier which may also have a defense obligation owing to Cargill. (CAppx 1-3). Liberty Mutual then asserted cross-claims against One Beacon, National Union, Travelers and Travelers Casualty, and

Northwestern National, seeking a declaration that it has the right to seek contribution from the other carriers even in the event that Cargill is not obligated to execute a loan receipt agreement. (T.A. 205-207).

III. District Court's Order and Memorandum.

On June 18, 2008, the district court issued an amended order for summary judgment and for certification. (CAdd[3] 49-67). In that order, the court granted partial summary judgment in favor of Liberty Mutual as follows:

> a. Liberty Mutual has the right to seek contribution for defense costs from any other insurer who has a duty to defend Cargill for the claims asserted against Cargill in the underlying litigation. Once a determination has been made regarding which insurers have a defense obligation, those insurers with such an obligation shall be responsible in equal shares for the cost of defense of those claims.
>
> b. This order is without prejudice to the rights of insurers to assert whatever claims they may have against Cargill to contribute to the defense costs. Cargill's motion to preclude Liberty Mutual or any other insured from seeking contribution from Cargill for defense costs is denied without prejudice to Cargill to assert its defenses to such claims if and when such claims are made.
>
> c. Nothing in this Order shall be construed to prevent any party from seeking contribution for costs of defense from any other or additional insurer, including, but not limited to excess and umbrella carriers.

(CAdd 49-50, ¶2).

In its memorandum accompanying the Order, the court found that Cargill's refusal to sign a loan receipt agreement was an attempt to avoid personal responsibility for defense costs. (CAdd 57, ¶1). The court further noted that it seemed "elementary and inequitable" that Cargill could by its own volition prevent the primary insurers from

[3] "CAdd" refers to Appellant Cargill's Addendum and the pages cited therein.

sharing defense costs on an equal basis when that is what courts have required. (CAdd 57, ¶3.) Thus, the court concluded that if the sharing of defense costs could not be done via a loan receipt agreement, it should result from some other court-ordered relief. (CAdd 57, ¶3.) The court further noted that while there was potential exposure to Cargill under the fronting policies, Cargill was a sophisticated business entity who created the insurance structure, and it would be inequitable were Cargill to now be permitted to avoid cooperating with Liberty Mutual because of the structure it created. (CAdd 59, ¶9).

The district court also certified the following question as important and doubtful:

> Can a court order primary insurers, who insure the same insured for the same risks, and whose policies are triggered for defense purposes, to be equally liable for the costs of defense where there is otherwise no privity between the insurers?

(CAdd 66-67).

IV. The Court of Appeals' Decision.

The Court of Appeals answered the certified question in the affirmative. (CAdd 20). The majority opinion first addressed the issue of whether Liberty Mutual could seek contribution in the absence of a loan receipt agreement. (CAdd 13-16). The court found that the issue was controlled by this Court's prior decision in *Iowa National Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 150 N.W.2d 233 (1967). (CAdd 16). The Court of Appeals determined that based on *Iowa National*, Liberty Mutual could not seek contribution from other insurers in the absence of a loan receipt agreement because there is no contractual privity among co-primary insurers who may have a defense obligation. (CAdd 16).

The Court of Appeals next addressed whether "a primary insurer with a duty to defend could condition its tender of defense on the insured's execution of a neutral[4] loan receipt agreement?" (CAdd 16-19). The Court of Appeals found that when multiple primary insurers have offered to defend in exchange for the insured executing a loan receipt agreement, those principles of good faith and fair dealing impose an affirmative obligation on the insured to cooperate by entering into a neutral loan receipt agreement that equitably apportions liability between primary insurers. (CAdd 19). The Court of Appeals noted that to permit Cargill to select one insurer to bear the burden of the defense when other insurers may also have an obligation to defend is incompatible with the underlying rationale in this Court's decision in *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986), which stated that the decision regarding which insurer should defend "should not depend on the whim or caprice of the insured. . ." (CAdd 17-18).

The Court of Appeals also found that Cargill had acted in bad faith in refusing to execute a loan receipt agreement and that requiring Cargill to enter into a loan receipt agreement comported with the cooperation clause in the Liberty Mutual policy. (CAdd

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[4] The term "neutral" was used by the court to describe a loan receipt agreement that did not contain conditions as to its use proscribed by the insured. Cargill had offered to provide Liberty Mutual with a conditional loan receipt agreement that could only be used by Liberty Mutual to obtain contribution for defense costs paid from other insurers owing a duty to defend who did not negotiate insurance contracts containing some form of charge-back provision to Cargill or which the Cargill captive insurer did not reinsure. In addition, the conditional loan receipt agreement proposed by Cargill contained provisions requiring Liberty Mutual to defend and indemnify Cargill against any charge-backs by its other insurers. (CAPPX 232-240). A "neutral" loan receipt would contain no such restrictions.

18). Thus, the Court of Appeals ultimately held that if an insured refuses to enter into a neutral loan receipt agreement, a court, when timely asked, can impose a constructive loan receipt agreement to protect an insurer. (CAdd 19).

Judge Larkin dissented, noting that it was her opinion that the policy language does not require Cargill to enter into a loan receipt agreement. (CAdd 21-25). She also opined that the majority decision extended existing law. (CAdd 21-25).

V. Travelers and Travelers Casualty's Interest in the Appeal.

If this Court affirms the Court of Appeals or, in the alternative, holds that Liberty Mutual can seek contribution from other insurers without a loan receipt agreement, Travelers and Travelers Casualty may have to pay for a portion of Cargill's defense in the Underlying Actions if Liberty Mutual does seek contribution. Conversely, if Cargill prevails in its appeal, Liberty Mutual will be solely responsible for Cargill's defense in the Underlying Actions and neither Travelers nor Travelers Casualty will be obligated to pay for Cargill's defense. Even though the position advocated by Cargill in this appeal will unquestionably benefit Travelers and Travelers Casualty in this particular case, Travelers and Travelers Casualty nonetheless argued to the district court, the court of appeals and argues again here, that the better rule of law is that announced by the majority of the Court of Appeals, and that Cargill should be obligated to execute a loan receipt agreement which would allow Liberty Mutual to seek contribution from other insurers who also may have a duty to defend Cargill.

ARGUMENT

I. This Court should affirm the Court of Appeals' decision because it is based on established precedent and important public policy considerations.

This Court should affirm the Court of Appeals' decision. The Court of Appeals' decision that the district court may impose a constructive loan receipt upon Cargill is well supported by Minnesota law which endorses the use of loan receipt agreements to dispose of insurance disputes and create equitable results. Indeed, the holding promotes the prompt resolution of coverage disputes as extolled by this court in *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161 (Minn. 1986). Cargill's arguments to the contrary ignore Minnesota public policy and attempt to impermissibly expand upon this Court's holding in *Iowa National Mut. Ins. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 150 N.W.2d 233 (1967).

Cargill argues that *Iowa National* permits Cargill to target one insurer – Liberty Mutual – for its defense and then refuse Liberty Mutual any recourse for seeking equitable contribution from other insurers who also may have a duty to defend Cargill. But *Iowa National*'s holding does not permit the result urged by Cargill. In *Iowa National* this Court adopted the minority approach with respect to whether or not a defending insurer can use contribution or subrogation to recover defense costs from another insurer who also has an obligation to defend a common insured.[5] There this

[5] Ostrager & Newman, *Handbook on Insurance Coverage Disputes*, § 6.01, p. 386-87 (14th Ed. 2008). Noting that while some cases have held that an insurer providing a defense cannot obtain contribution from a co-insurer that has refused to defend, those "cases very much represent the minority view."

Court disavowed the use of either contribution or subrogation to support a defending insurer's claim against another insurer for defense costs. *Iowa National Mut. Ins. Co. v. Universal Under. Ins. Co.*, 276 Minn. at 368, 150 N.W.2d at 237. But that holding neither explicitly nor implicitly permits Cargill to avoid its obligations under the insurance policies by allowing it to select one insurer to defend it without providing that insurer any recourse to seek contribution.

Moreover, *Iowa National* was not the last word regarding the sharing of defense costs among insurers who may have a duty to defend a common insured. While *Iowa National* held that no inherent right of contribution exists between insurers for defense costs, this Court has explicitly provided another mechanism – the use of a loan receipt agreement – to ensure that a defending insurer is not without recourse for seeking contribution from non-defending insurers. *See Blair v. Espeland*, 231 Minn. 444, 448, 43 N.W.2d 274, 277 (1950) (noting that loan receipts are "a device to permit the contribution action to be brought in the name of the insured rather than in the name of the insurer, who, except for the 'loan receipt' agreement, would be the real party in interest. . . ."); *see also Home Ins. Co. v. National Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 527 (Minn. 2003).

The endorsement of the loan receipt agreement in Minnesota to protect the rights of all parties to the contract and promote resolution of coverage disputes was thoroughly addressed by this Court in *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161 (Minn. 1986). In *Jostens*, this Court considered a challenge to the validity of a loan receipt agreement where an insured (Jostens) was initially not defended by either of two insurers.

Id. at 163. Jostens settled the lawsuit with the original plaintiff and then sought reimbursement in a suit against its two insurers. *Id.* Before trial, one non-defending insurer, Wausau, loaned money to Jostens under a loan receipt agreement and then Jostens continued its suit against the other non-defending insurer, Mission. *Id.* at 163-64. Rejecting Mission's argument that Jostens no longer had an interest in the claim after the loan receipt agreement was effectuated, this Court cited *Blair* for the proposition that the insured remained the real party in interest. *Id.* at 164. This Court then commented on the use of such agreements in general, stating that "[l]oan receipt agreements have long been recognized in this state and they are *a useful device in disposing of insurance disputes*." *Id.* at 164 (emphasis added).

In then determining from whom defense costs could be recovered, this Court took note of its prior decision in *Iowa National* but stated the *Iowa National* rule was not applicable because prior to the settlement with Wausau both insurers chose not to defend Jostens. *Id.* at 167. This Court determined that it would be unfair to conclude that Mission was responsible for the entire cost, for the reasons that both insurers had a duty to defend and the insured could have just as easily entered into an agreement with Mission rather than Wausau. *Id.* This Court stated that "[w]ho should pay the insured's defense costs should not depend on the whim or caprice of the insured, when, at the time the defense was needed, both insurers arguably had a duty to defend." *Id.* This Court observed: "any rule we fashion should not encourage two insurers with arguable coverage to adopt a 'wait and see' attitude while leaving the insured to defend himself. Not all

insureds can afford, like [this insured], to pay their own way initially . . . ." *Id.* Based on these policy considerations, this Court held:

> [W]here it can be argued, legitimately and in good faith, that either of two insurers has *primary* coverage for a claim, both insurers have a duty to defend that claim. If either insurer undertakes the defense, it is responsible for its own defense costs and cannot later seek reimbursement from the other. This is the *Iowa National* rule. If neither undertakes the defense and the insured defends himself, then the insured, as Jostens has done here, may bring an action and recover his costs in defending the claim from either or both insurers. If it is established that both insurers arguably had coverage at the time of the rejected defense tender, the insurers, as between them, shall be equally liable for the insured's defense costs; . . .

Id. at 167 (emphasis in original). This Court expressly stated that it hoped its holding would encourage insurers to promptly resolve duty to defend issues. *Id.*

Since *Jostens*, the use of loan receipt agreements has continuously been upheld by the Minnesota courts as a mechanism for resolving insurance disputes and achieving an equitable result. *See Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 527 (Minn. 2003); *Youngquist v. Cincinnati Ins. Co.*, 625 N.W.2d 186-87 (Minn. Ct. App. 2001); *Jerry Mathison Constr., Inc. v. Binsfield*, 615 N.W.2d 378, 381-82 (Minn. Ct. App. 2000); *Redeemer Covenant Church v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 82 (Minn. Ct. App. 1997). Without question, the Minnesota courts have endorsed the use of a loan receipt agreement as a means of addressing the inequities created by the fact that Minnesota law does not permit contribution claims between two parties who have no privity in contract.

Despite the policies set forth in *Jostens* and its progeny, Cargill seeks to have this Court ignore established public policy and adopt a rule which, while beneficial to Cargill,

Travelers and Travelers Casualty (as well as all other insurers besides Liberty Mutual) in this action, would have dire consequences for insureds and insurers alike in future coverage disputes. This Court should adhere to its prior decisions and adopt a rule that continues to promote equitable results and prompt resolution of coverage disputes.

The Court of Appeals holding unquestionably promotes an equitable result by ensuring that ***both*** the insurer's and insured's obligations are met under the policy. Cargill, in violation of the admonition of this Court in *Jostens*, has indeed acted upon its "whim and caprice" in the manner it has sought a defense. It initiated this declaratory judgment action against all of its insurers seeking a declaration that each had an obligation to defend and indemnify Cargill in the Underlying Actions. It later changed its mind and decided to only target Liberty Mutual for the defense[6] so that Cargill could avoid the contractual obligations it negotiated with its other insurers – including

[6] The district court's scheduling order phases this litigation so that issues regarding the duty to indemnify will not be addressed until after resolution of the duty to defend issues. However, the duty to defend should not be considered without some consideration regarding how a decision regarding defense will impact the duty to indemnify. While Cargill has sued all insurers regarding the indemnity obligation, based on its changing positions regarding which insurers it would seek a defense, it is not clear as to its position regarding whether or not it will continue to target all insurers or just one insurer for indemnity. In other cases which have permitted an insured to target one insurer, the courts have indicated that once an insured chooses not to involve a particular insurer in the underlying litigation, that insurer is relieved of its obligations to the insured with regard to that claim. *Cincinnati Cos. v. West American Ins. Co.*, 183 Ill.2d 317, 326, 701 N.E.2d 499 (1998); *see also Mutual of Enumclaw Ins. Co. v. USF Insurance Co.*, 191 P.2d 866, 873 (Wash. 2008)(noting that under a selective tender rule, when an insured has failed to tender the defense of an action to its insurer, the latter is excused from its duty to perform under its policy); *Casualty Indem. Exchange Ins. Co. v. Liberty National Fire Ins. Co.*, 902 F.Supp. 1235, 1239-40 (D. Mont. 1995) (holding that insurer was not entitled to equitable contribution from coinsurer since no tender was made to the coinsurer).

Travelers and Travelers Casualty. Cargill readily admits that its refusal to execute a loan receipt agreement is based on its desire to avoid incurring costs for its defense due to the fact it negotiated certain policies with deductibles, retentions, retrospective premiums or which are reinsured by Cargill's captive insurer. (Cargill's Brief at p. 39-40). The Court of Appeals correctly found that Cargill's ulterior motive for refusing to grant Liberty Mutual a loan receipt agreement – *i.e.,* to avoid contribution from policies which would result in Cargill incurring costs that it contractually agreed to pay – was in bad faith. As a result, the Court of Appeals correctly held that a Minnesota court may, when timely asked, protect an insurer by imposing a constructive loan receipt agreement. In short, Cargill's "whim or caprice" would not be allowed to dictate which insurer is liable for the defense costs. Rather, the issue of which insurer must defend and on what basis should be dictated by the contracts which were negotiated by the insured.

Finally, when this Court fully embraced the use of loan receipt agreements in *Jostens* as a means of encouraging insurers to step-up-to-the-defense-plate (as opposed to adopting a wait-and-see attitude in the hopes that another insurer would blink first or that the insured would target someone else), while at the same time providing a vehicle so that the cost of that defense would be shared equitably by all those who contracted to pay, this Court could never have intended that those laudable goals could be thwarted by the insured's simple refusal to enter into the agreement. A rule that requires an insured to execute a loan receipt agreement on behalf of a defending insurer advances and resolves each of the public policy concerns this Court has sought to address in its prior decisions regarding multiple insurers' duty to defend an insured. No purpose other than promoting

individual avarice is advanced by a rule which would leave it solely to the whim of the insured as to whether the loan receipt will be provided.

Thus, while the interests of Traveler and Travelers Casualty would arguably be better served in this particular case were this Court to adopt Cargill's arguments, the better rule of law, and that which unquestionably furthers Minnesota's public policy of encouraging quick and equitable resolutions of insurance disputes, is that embodied in the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals and hold that Cargill is obligated to execute a loan receipt agreement on behalf of any insurer who has agreed to defend Cargill under a reservation of rights and requested such an agreement from Cargill.

Respectfully submitted,

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By _____

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FORM AND LENGTH CERTIFICATION

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