

State of Minnesota
In Court of Appeals

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

Appellants,

v.

Ace American Insurance Company, et al., Affiliated FM Insurance Company, et al., Allianz Underwriters Insurance Company, et al., Allied World Assurance, et al., American Guarantee and Liability Insurance Company, et al., American Home Assurance Company, et al., American Employers' Insurance Company, et al., Arch Reinsurance Ltd., Associated International Insurance Company, Everest Reinsurance Company, et al., Great American Assurance Company, Certain Underwriters at Lloyd's, et al., Employers Mutual Casualty Company, et al., General Security Indemnity Company of Arizona, et al., Hartford Accident and Indemnity Company, et al., Pennsylvania Lumbermens Mutual Insurance Company, et al., Minnetonka Insurance Company, Liberty Mutual Insurance Company, Northwestern National Insurance, St. Paul Fire and Marine Insurance Company, et al., The Orion Insurance Company, PLC., et al., and XL Insurance America, Inc.,

Respondents.

APPELLANTS CARGILL, INCORPORATED AND CARGILL TURKEY PRODUCTION, L.L.C.'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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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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INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

Liberty Mutual's entire argument is based on the false premise that Cargill has refused to enter into a loan receipt agreement. To the contrary, Cargill offered Liberty Mutual a loan-receipt agreement that would have significantly reduced Liberty Mutual's liability for defense costs while also protecting Cargill's interests. (See SCA¹ 10). But Liberty Mutual rejected that reasonable offer. Instead, Liberty Mutual insisted on forcing Cargill to sign a loan receipt "agreement" with terms unilaterally chosen by Liberty Mutual, knowing that those terms would prejudice Cargill. This despite the fact that Liberty Mutual's Policy and *Iowa National* (the law in effect both today and when Liberty Mutual sold its policy to Cargill) obligates Liberty Mutual to provide Cargill with a complete defense, independent of the duties of Cargill's other insurers.

Once Liberty Mutual's false premise is exposed, its argument disintegrates. Beyond Liberty Mutual's disregard for the facts, it goes to great lengths to contort what it knows to be the controlling law -- namely that without a loan receipt agreement, it cannot seek contribution from Cargill's other insurers. Liberty Mutual has failed to cite a single case that stands for the proposition that an insurer can recover defense costs from its policyholder's other insurers without a loan receipt agreement from its policyholder. All of the cases that Liberty Mutual relies on are distinguishable. None addressed circumstances where an insurer with a duty to defend sought contribution from other insurers without obtaining either a loan receipt agreement from its insured or a waiver of

¹ References to 'SCA' refer to Cargill's supplemental appendix, attached to this Reply.

the *Iowa National* rule by the other insurers with a duty to defend. No such case exists because *Iowa National* is based on bedrock principles of contract law and an insurer's indivisible obligation to provide its policyholder with a full and complete defense.

Moreover, as is plain from the Policy's language and Minnesota case law, the principles of subrogation and contribution do not endow Liberty Mutual with the right under the Policy to force Cargill into signing a loan receipt settlement agreement, with terms unilaterally dictated by Liberty Mutual, that would prejudice Cargill's interests. Nonetheless, Liberty Mutual misapplies the policy language and case law in a circular argument postulating that since Liberty Mutual can recover defense costs under the auspices of a loan receipt agreement, this somehow retroactively imbues it with rights of subrogation or contribution, or the right to force Cargill to sign a loan receipt agreement with prejudicial terms solely of Liberty Mutual's choosing. As the Minnesota Supreme Court has made clear in *Iowa National*, however, Liberty Mutual has no such rights, and thus Cargill has no such obligation. *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 368, 150 N.W.2d 233, 237 (Minn. 1967).

At bottom, this Court can resolve the instant dispute by focusing on three indisputable points. First, Liberty Mutual has an independent obligation under the Policy, which it drafted, to provide Cargill with a complete defense in the Underlying Actions. Second, under well-established Minnesota Supreme Court precedent, Liberty Mutual cannot obtain contribution from Cargill's other insurers because it has no contractual relationship with those insurers. *Id.* Finally, Liberty Mutual has no right under the Policy to force Cargill into a new contract in the form of a loan receipt

settlement agreement, and in no event one unilaterally drafted by Liberty Mutual and prejudicial to Cargill's interests. Liberty Mutual had an opportunity to enter into a loan receipt agreement negotiated with Cargill, one that would have protected both parties' interests. Liberty Mutual refused that reasonable offer, and consequently is now in no position to seek relief from this Court.²

ARGUMENT

I. DESPITE NO OBLIGATION TO DO SO, CARGILL OFFERED TO PROVIDE LIBERTY MUTUAL WITH A LOAN RECEIPT AGREEMENT THAT ALLOWED LIBERTY MUTUAL TO SEEK APPROPRIATE CONTRIBUTION FROM CARGILL'S OTHER INSURERS WHILE SIMULTANEOUSLY PROTECTING CARGILL'S INTERESTS.

Liberty Mutual sheds crocodile tears when it asserts to this Court that Cargill "refused" to enter into a supposedly "neutral" loan receipt agreement. Cargill has not refused to enter into an equitable settlement agreement with Liberty Mutual. Rather, Cargill legitimately refused to enter into the loan receipt agreement with terms that were unilaterally dictated by Liberty Mutual and that would prejudice Cargill.³ In fact, as Liberty Mutual grudgingly admits, albeit buried in a footnote (Liberty Mutual Br. at p. 11 n.9), Cargill offered to enter into a loan receipt agreement as long as this agreement does not prejudice Cargill's interests. Quite simply, Cargill rightfully declined to enter into a

² The Travelers Indemnity Company and Travelers Casualty and Surety Company (collectively referred to herein as "Travelers") have also filed a brief in this appeal. As discussed below, their arguments largely echo those of Liberty Mutual and likewise fail.

³ It should also be noted that, while Cargill agreed in principle to enter into an equitable loan receipt agreement with Liberty Mutual as an accommodation, Cargill expressly reserved its rights and asserted that Liberty Mutual had no right to require Cargill to enter into one. (SCA 11, Ex. T, at p. 2). As set forth below, Cargill has no obligation to enter into a loan receipt agreement with Liberty Mutual.

loan receipt agreement that allows Liberty Mutual to proceed against Cargill's fronted policies.

Liberty Mutual's protest is premised on the assumption that it somehow can unilaterally determine what constitutes a "neutral" loan receipt agreement. This conduct hardly makes Liberty Mutual deserving of the purported "equity" it seeks from this Court.⁴ Liberty Mutual's recognition of the inequity of its own position was demonstrated in a telling moment at the February 14, 2008 hearing before the district court in which Liberty Mutual stated that "what Cargill should be doing is identifying for us which policies aren't fronting and give us a loan receipt on those policies for those insurers so they can proceed – so we can proceed against those insurers for their equal share." (SCA 7, Ex. I, at p. 21). Cargill agreed with Liberty Mutual's suggestion and, shortly after the hearing, presented Liberty Mutual with a revised version of Liberty Mutual's proposed loan receipt agreement accomplishing precisely what Liberty Mutual suggested. This version limited Liberty Mutual's rights to collect only against Cargill's non-fronted insurers. (SCA 10, Ex. T). Indeed, had Liberty Mutual agreed to Cargill's proposal it could have reduced its liability by one-half if it had pursued a single additional insurer, two-thirds if two, and so on.

⁴ Indeed, in a similar vein, Liberty Mutual's claim that its demand for a loan receipt agreement was made in conjunction with "its first payment towards providing a complete defense of Cargill" strains credulity. (Liberty Mutual Br. at p. 11.) In fact, Liberty Mutual's conditional offer of payment of \$704,762.22 (CA. 282), was made at a time when Liberty Mutual knew Cargill had incurred \$5.4 million in defense costs. Liberty Mutual has never undertaken Cargill's complete defense, despite admitting the duty to do so.

Rather than accept an agreement consistent with its own representation to the district court, Liberty Mutual changed its position and rejected Cargill's proposed loan receipt agreement. (Liberty Mutual Br. at p. 11 n.9) (describing Cargill's offer as an unacceptable "conceptual framework"). Thus, it is not Cargill that has declined to enter into a "neutral" loan receipt agreement. Rather, it is Liberty Mutual that is refusing to enter into an equitable and negotiated settlement agreement which does not prejudice Cargill's rights, yet would allow Liberty Mutual to recover defense costs from the appropriate insurers. Significantly, Liberty Mutual fails to, and cannot, point to any standard-form "neutral" loan receipt agreement, because no such thing exists. Given the parties' very substantial differences in opinion regarding what constitutes an acceptable loan receipt agreement, it is absurd for Liberty Mutual to describe entering into such a settlement agreement as: "the almost ministerial act involved here of executing a simple loan receipt." (Liberty Mutual Br. at pp. 32-33).

Liberty Mutual's refusal is all the more unreasonable in the context of its position that Cargill's other policies are not really fronted. (Liberty Mutual Br. at pp. 11-12) (referring to Cargill's "so-called 'fronted' insurance policies" and contending that Liberty Mutual has put forth "substantial arguments and evidence against Cargill's position on its alleged 'fronted' policies"). If that is the case, Liberty Mutual has no reason to reject a loan receipt agreement protecting Cargill from amounts it or its subsidiaries might owe under the fronted policies, since, by Liberty Mutual's own admission, there would be no risk to Liberty Mutual.

This conduct illuminates Liberty Mutual's true intent. Liberty Mutual attempts to camouflage this change in position and refusal to fulfill its contractual obligation by casting it, ironically, as the requirement that "Cargill otherwise live up to its contractual obligations," and as the right to seek contribution from "any other insurers." (Liberty Mutual Br. at pp. 10, 17). Despite Liberty Mutual's rhetoric, Cargill cannot be required to enter into an agreement unilaterally drafted by Liberty Mutual that is materially contrary to Cargill's own interests, especially when Liberty Mutual is already obligated under its contract of insurance to provide a separate and complete defense to Cargill.

Liberty Mutual suggests that Cargill engaged in some type of nefarious conduct by having fronted policies. (Liberty Mutual Br. at p. 13). Contrary to the aspersions Liberty Mutual endeavors to cast upon Cargill's insurance program, arrangements such as deductibles, retentions, retrospective premiums and captive reinsurance are hardly unusual. In fact, Cargill's insurance program was instituted with *Iowa National* as the backdrop. Liberty Mutual issued the Policy after 1967, and thus was on notice of the *Iowa National* doctrine. Liberty Mutual could have modified its policies to require equal sharing of defense costs among insurers. Cargill seeks here merely what the contract provides – a full and indivisible defense to the Underlying Actions.

II. LIBERTY MUTUAL'S POSITION CONSTITUTES A BREACH OF ITS DUTY TO GIVE ITS POLICYHOLDER'S INTERESTS AT LEAST AS MUCH CONSIDERATION AS IT GIVES ITS OWN.

In another spin on the facts, Liberty Mutual attempts to convince this Court that Cargill has somehow breached its duty to cooperate, when in fact it is Liberty Mutual that has breached its duty to Cargill. Minnesota case law is clear that an insurer "owes a

fiduciary duty to the insured to represent his or her best interests and to defend and indemnify.” *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983) (explaining that in the context of responding to a within-policy-limits settlement offer, an insurer’s right to control settlement negotiations “*must be subordinated to the purpose of the insurance contract* – to defend and indemnify the insured within the limits of the insurance contract.” (emphasis added)).

This duty includes, for example, giving “equal consideration to the financial exposure of the insured” when negotiating settlements on behalf of the policyholder. *Id.* at 387-88; *Continental Cas. Co. v. Reserve Ins. Co.*, 307 Minn. 5, 8, 238 N.W.2d 862, 864 (Minn. 1976) (affirming that an insurer settling a case owes its policyholder the duty to give equal consideration to the financial exposure of the policyholder); *Lange v. Fidelity & Cas. Co. of New York*, 290 Minn. 61, 65, 185 N.W.2d 881, 884 (Minn. 1971).

These duties are rooted in the principle that every contract in Minnesota, including insurance contracts, contains the implied covenant of good faith and fair dealing. *See Seren Innovations Inc. v. Transcontinental Ins. Co.*, No. A05-917, 2006 WL 1390262 at *8 (Minn. Ct. App. May 23, 2006) (SCA 21) (citing *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995)); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983). In the context of an insurer’s defense of its policyholder and consideration of settlement offers, the “duty to exercise ‘good faith’ includes the obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured.” *Short*, 334 N.W.2d at 387-88.

Liberty Mutual's duty to Cargill requires it to represent Cargill's best interests, which includes giving equal consideration to the financial exposure of Cargill in the defense of the Underlying Actions. An insurer's clear duty to equally consider its insured's financial interests in settlement already presumes that the insurer has stepped up to the plate to defend its insured, and thus an insurer's duty to give equal consideration to its insured's interests can be no less when considering the duty to defend. By insisting on a loan receipt agreement that deliberately disregards Cargill's financial exposure through any fronted policies, and that ultimately seeks to take advantage of Cargill's financial exposure for Liberty Mutual's sole benefit, Liberty Mutual's argument constitutes a breach of its duties to Cargill.

Liberty Mutual's position is one that necessarily places its own interests before the interests of Cargill. While no party disputes that loan receipt agreements can be "a useful device in disposing of insurance disputes" (Travelers Br. at p. 12; Liberty Mutual Br. at p. 20.), Liberty Mutual is, in this case, plainly overreaching in its attempt to resolve this insurance dispute by fiat, unilaterally imposing its chosen terms and conditions, irrespective of Cargill's interests. Cargill has made it clear to Liberty Mutual that it is prepared to negotiate a mutually beneficial loan receipt agreement (SCA 10), but Liberty Mutual is demanding a loan receipt agreement that benefits only Liberty Mutual and is prejudicial to Cargill.

Against this backdrop, Liberty Mutual's invocation of equitable principles rings hollow. Liberty Mutual is refusing to comply with its legal obligation to provide a complete defense based upon the argument that the responsibility should be assumed by

others, including its policyholder. Minnesota law does not view this as equitable. *See* Minn Stat. § 72A.201, subd. 4(10) (defining unfair settlement practices to include a refusal to settle a claim on the basis that the responsibility should be assumed by others). It is Liberty Mutual's actions that are inequitable, putting its interests ahead of Cargill's, and should be rejected by this Court as a matter of law and public policy.

III. UNDER MINNESOTA LAW, AN INSURER IS NOT ENTITLED TO CONTRIBUTION FROM OTHER INSURERS WITHOUT A LOAN RECEIPT AGREEMENT.

Plainly failing in its attempt to cast Cargill as obstreperous in refusing to enter into a one-sided loan receipt settlement agreement (which Cargill is not required to execute in the first instance), Liberty Mutual resorts to inverting Minnesota law by claiming it can obtain contribution from Cargill's other insurers even in the absence of a loan receipt agreement. Liberty Mutual's response brief takes more than 40 pages to finally reach, at page 43, what Liberty Mutual is really urging – a rejection of the Minnesota Supreme Court's *Iowa National* rule. However, other than flippantly characterizing a loan receipt agreement as a “legal fiction,” an “artifice,” “formalistic,” “flawed,” or “harsh” (*see, e.g.*, Liberty Mutual Br. at pp. 16, 17, 22, 24, 34, and 43), Liberty Mutual fails to cite a single case allowing an insurer to obtain contribution without a valid loan receipt agreement or waiver of the *Iowa National* rule by other insurers.⁵

⁵ In its brief, Travelers on one hand essentially admits that there is no authority requiring an insured to enter into a loan receipt agreement, while on the other, misleadingly claims, without citation to authority, that “Minnesota jurisprudence overwhelmingly supports requiring the insured to enter into a loan receipt agreement when a defense has been offered and a loan receipt requested.” (Travelers Br. at p. 10.)

As the Minnesota Supreme Court has held, the underlying rationale for the loan receipt requirement is that there is no contractual relationship between the insurers, and in providing its policyholder with a full defense, a defending insurer is only doing what it agreed and was paid a premium to do under the contract of insurance. *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 166 (Minn. 1986). An insurer's duty to defend its insured "is a separate obligation existing exclusively between the insurer and the insured." *Iowa Nat'l*, 276 Minn. at 367, 150 N.W.2d at 236. Because this contractual obligation is exclusively between the insurer and the insured, an insurer has no independent right to seek contribution of defense costs from other insurers owing a duty to defend. *Id.* at 368, 150 N.W.2d at 237. Thus, the general rule under Minnesota law is that "one insurer cannot pursue reimbursement from another insurer for defense costs incurred in defending a mutual insured." *Home Ins. Co. v. National Union Fire Ins. of Pittsburgh, Pennsylvania*, 658 N.W.2d 522, 527 (Minn. 2003). The loan receipt agreement, a separate contract, creates a new relationship between the insurer and policyholder, one that allows the insurer to seek reimbursement of the loan from other insurers.

Liberty Mutual hypothesizes that there is a countervailing trend in the subsequent case law that has abandoned these basic principles of contract law (Liberty Mutual Br. at pp. 19-22), but the cases do not support this supposition because none of them dispense with the requirement of a loan receipt agreement. Liberty Mutual may mischaracterize

It is difficult to fathom how Minnesota jurisprudence can "overwhelmingly support" a premise that has never been addressed by any Minnesota case.

the Minnesota Supreme Court's logic in *Iowa National* as "flawed," but the fact remains that it is the law in Minnesota. Had Liberty Mutual wished to avoid the *Iowa National* rule, it should have drafted policies that took the *Iowa National* ruling into account.

In *Jostens*, the policyholder voluntarily entered into a loan receipt agreement with one of its insurers, so the question of whether a loan receipt agreement is required for an insurer to recover defense costs was not before the court. *Jostens*, 387 N.W.2d at 163-164. The rights of the insurers in *Jostens* flowed from and did not precede the loan receipt agreement. Rather, the issue before the Court in *Jostens* was whether an insurer that loans defense costs to a policyholder can then seek to recover all of the policyholder's defense costs from another insurer. *Id.* at 166-7.

The critical distinction between *Iowa National* and *Jostens* is that the policyholder in *Jostens* voluntarily entered into a loan receipt agreement. *Id.* The *Jostens* court's "whim or caprice" remark must be understood in the context of a loan receipt agreement already being in place. *Id.* at 167. Liberty Mutual would have it that *Jostens* essentially jettisoned the *Iowa National* rule, but what the Court actually held was that even a loan receipt agreement does not permit an insurer to shift all of the defense costs that it incurs on behalf of its insured onto another insurer. *Id.* at 166-67.

Similarly, the *Wooddale* decision is inapposite because the Court did not address whether an insurer could seek contribution in the absence of a loan receipt agreement, as Liberty Mutual admits (Liberty Mutual Br. at p. 24), the insurers in that case waived the *Iowa National* rule "that bars recovery in the absence of a loan receipt agreement." *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 n.15 (Minn. 2006).

Instead, the issue before the Court was, given the waiver of the *Iowa National* rule, whether defense costs should be allocated between insurers on a pro rata basis or in equal shares. *Id.* at 301-02. Thus, *Jostens* and *Wooddale* together stand for the proposition that, where a loan receipt agreement is in place or where insurers have waived the requirement of a loan receipt agreement (neither of which occurred in the case at bar), defense costs shall be apportioned equally among the insurers as opposed to a pro-rata basis. *Id.* at 304.

Tellingly, both the *Jostens* and *Wooddale* decisions acknowledged the *Iowa National* rule that an insurer that voluntarily undertakes the defense of its insured cannot seek contribution from its other insurers. *Jostens*, 387 N.W.2d at 166; *Wooddale*, 722 N.W.2d at 302. The Minnesota Supreme Court's continuing recognition of the *Iowa National* rule in these cases starkly undercuts Liberty Mutual's assertion that the Minnesota Supreme Court "favors equal liability among insurers with a duty to defend" in the context of this case. Liberty Mutual Br. at 34; *Id.* See also *Home*, 658 N.W.2d at 527; *Nordby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820, 824 (Minn. 1983). At best, these decisions may hold that when there is a loan receipt agreement or waiver of its requirement, then as between the responsible insurers, liability should be allocated equally.

Similarly, the issue of the loan receipt agreement was not before the Minnesota Supreme Court in *Domtar, Inc. v. Niagara Fire Insurance Company*. 563 N.W.2d 724, 739 (Minn. 1997). Instead, in a single four sentence paragraph, the Court addressed an insurer's argument that it could not be held liable for all its policyholder's defense costs

where the policyholder was proceeding against another insurance company. *Id.* The Court rejected this argument, reaffirming that a policyholder can recover all its defense costs from a single insurer. *Id.* This is the proposition for which *Domtar* stands. The Court then observed, in dicta, that the protesting insurer's remedy, "if any," was to seek contribution from the policyholder's other insurer. *Id.*

Liberty Mutual takes a quantum leap by inferring that the Court's remark means that one insurer was entitled to contribution from another insurer. This interpretation of *Domtar* does not account for the fact that the Court plainly indicated, by including the words "if any," that the insurer in such circumstances may have no remedy at all. *Id.* The better reading of the Court's comment, recognizing the Court's specific choice of words, is that it was acknowledging that the policyholder might be prepared to enter into a loan receipt agreement, thus enabling the insurer to seek to recover some of its defense costs. It is also instructive that the *Domtar* Court does not as much as cite *Iowa National*, which one would expect if the Court were overruling a decades-old precedent in the span of a four sentence paragraph.

Liberty Mutual glosses over the specific questions at issue in *Wooddale*, *Jostens*, and *Domtar*, in an attempt to invent a blanket principle requiring equal contribution among insurers having a duty to defend. (Liberty Mutual Br. at p. 34.) This argument, when viewed in light of the Minnesota Supreme Court's repeated affirmation of *Iowa National*, cannot withstand judicial scrutiny. The post-*Iowa National* cases stand for the simple proposition that, where a policyholder has voluntarily entered into a loan receipt agreement, or where the insurers have voluntarily agreed to waive the *Iowa National* rule,

defense costs shall be shared equally among insurers having a duty to defend. But without a loan receipt agreement, one insurer cannot pursue reimbursement from another insurer for defense costs. *Home*, 658 N.W.2d at 527.

Liberty Mutual posits that this subsequent line of cases has limited *Iowa National* to circumstances where an insurer has voluntarily stepped forward to defend its insured.⁶ As explained above however, all of those cases involve situations where there was a voluntary loan receipt agreement or where the insurers had waived the *Iowa National* rule. Because the issue of a loan receipt agreement was not before these courts, they did not address the principles of contract law that underlie the *Iowa National* rule. Liberty Mutual fails to explain how these cases have silently brushed aside the contractual foundations of the *Iowa National* rule or why these principles of contract law should now be ignored.

Liberty Mutual is intentionally oblique in its description of its own recognition of its duty to defend. Where it suits Liberty Mutual's argument, it characterizes itself as the dutiful insurer that tried to do the right thing in accepting Cargill's defense (Liberty Mutual Br. at pp. 10-11) (claiming it tendered a loan receipt agreement to Cargill as a condition to its "first" payment towards providing a complete defense of Cargill), while elsewhere Liberty Mutual attempts to backpedal from its admitted duty, leaving that determination to another day (Liberty Mutual Br. at pp. 8-9). Liberty Mutual cannot have it both ways. The facts in the record are clear that while admitting a complete duty to

⁶ This attempt to distinguish *Iowa National* has no merit. An insurer's obligation to defend is contractual, not "voluntary."

defend and admitting Cargill can properly select it to defend, Liberty Mutual has not paid any amount toward Cargill's defense without qualifications.

IV. LIBERTY MUTUAL CANNOT FORCE CARGILL TO ENTER INTO A LOAN RECEIPT AGREEMENT UNDER THE POLICY OR MINNESOTA LAW.

Liberty Mutual's house of cards is built on the fundamentally flawed foundation that under the terms of the Policy, it can extract a loan receipt agreement from Cargill without Cargill's agreement. The Minnesota Supreme Court has addressed the provisions that Liberty Mutual invokes, principally in the reasoning that laid the ground for the *Iowa National* rule. *Iowa Nat'l*, 276 Minn. at 368, 150 N.W.2d at 237. The Court has rejected the idea that generic subrogation or contribution provisions entitle an insurer to subrogation or contribution rights with respect to the insurers' duty to defend its policyholder.⁷ *Id.*

A. The Subrogation Clause Of The Policy Does Not Create An Obligation For Cargill To Enter Into A Loan Receipt Agreement.

Liberty Mutual erroneously argues that Cargill is required to enter into a loan receipt agreement of Liberty Mutual's design under the subrogation clause of the Policy. (Liberty Mutual Br. at p. 27.) Liberty Mutual fundamentally misapprehends the doctrine of subrogation. Simply put, Liberty Mutual has no subrogation rights against other insurers in this case, with or without a loan receipt agreement, and thus Liberty Mutual

⁷ Travelers similarly alleges that Cargill is attempting to "avoid its contractual obligations" (Travelers Br. at p. 15), but neglects to specify the contractual obligations to which it refers. Travelers' failure to identify any policy language at any point in its brief is undoubtedly due to the fact that there is no language in the Policy that supports an argument that Cargill can be forced into the insurers' version of a loan receipt agreement.

cannot rely upon the subrogation clause as a basis for forcing Cargill into a loan receipt settlement agreement.

Subrogation is “an offspring of equity,” and “even when the right to subrogation arises by virtue of an agreement,” subrogation will nonetheless be governed by equitable principles. *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983). Subrogation is never to be applied when the equities are equal. *Id.* (quoting *Northern Trust Co. v. Consolidated Elevator Co.*, 142 Minn. 132, 138, 171 N.W. 265, 268 (Minn. 1919)). As *Iowa National* made absolutely clear, the equities between insurers having a duty to defend a mutual insured “are *at best* equal” because each insurer has a separate and distinct obligation to defend the insured. *Iowa Nat’l*, 276 Minn. at 368, 150 N.W.2d at 237 (emphasis added). Thus, Liberty Mutual has no subrogation rights here.

Moreover, a loan receipt agreement would not change the fact that Liberty Mutual has no subrogation rights with respect to its duty to defend. As the *Jostens* Court explained, a loan receipt agreement makes an insurer “a lender, not a subrogee, and nothing more.” *Jostens*, 387 N.W.2d at 167. Liberty Mutual’s reliance on dicta in the appellate court opinion in *Jerry Mathison Construction, Inc. v. Binsfield* referring to a loan receipt agreement as “a subrogation tool” is unavailing because that case did not involve the duty to defend or any dispute over defense costs of any kind. 615 N.W.2d 378 (Minn. Ct. App. 2000). Instead, the case involved an insurer’s pursuit of subrogation rights with respect to amounts paid for a judgment. *Id.* at 380. This is fundamentally different from the duty to defend at issue here and thus the court’s remark is inapposite.

Under the Minnesota Supreme Court decisions in *Westendorf* and *Iowa National*, Liberty Mutual has no subrogation rights relating to its duty to defend for Cargill to “secure” or that Cargill could prejudice. Thus, Liberty Mutual’s reliance on the subrogation provision of the policy as a basis to require a loan receipt settlement agreement is misplaced. The Minnesota Supreme Court’s analysis of the subrogation issue confirms that Liberty Mutual’s repeated protestations regarding the equities are specious. The Minnesota Supreme Court has already made clear that the equities between insurers having a duty to defend are “at best, equal.” This is because the insurer drafted a contract of insurance that obligated it to provide a complete defense of its insured. Liberty Mutual is being asked to do nothing more and nothing less than what it bargained for.

B. The Cooperation Clause Of The Policy Does Not Create An Obligation For Cargill To Enter Into A Loan Receipt Agreement.

Liberty Mutual appears to argue that the Policy’s cooperation clause applies because Liberty Mutual **would** have a right to contribution **if** the parties entered into a loan receipt agreement. By advancing this argument, Liberty Mutual places the cart before the horse. (Liberty Mutual Br. at pp. 28-29.) The Minnesota Supreme Court has held that when multiple insurers owe an insured the duty to defend, that obligation arises “under separate contractual undertakings which would not support a common obligation for the purpose of invoking the principle of contribution.” *Iowa Nat’l*, 276 Minn. at 368, 150 N.W.2d at 237 (emphasis added). Thus, Liberty Mutual has no right of contribution that would trigger a duty under the cooperation clause. The fact that Liberty Mutual

could seek to recover a portion of its defense costs under a loan receipt agreement does not remotely suggest that, absent a loan receipt agreement, Liberty Mutual has any right of contribution under the Policy, let alone the right to unilaterally dictate the terms of a loan receipt agreement that prejudices its policyholder's interests. Liberty Mutual's circular argument appears to be as follows:

- 1) Cargill has a duty to cooperate with Liberty Mutual to enforce Liberty Mutual's right of contribution against Cargill's other insurers, even though,
- 2) Liberty Mutual has no right of contribution from Cargill's other insurers until Cargill provides Liberty Mutual with a loan receipt agreement, nonetheless,
- 3) Cargill is obligated, under a right of contribution that Liberty Mutual does not have, to provide Liberty Mutual with a loan receipt agreement so that Cargill's duty to cooperate will be established.

Logically, Liberty Mutual's recognition that an insurer is permitted to seek recovery of defense costs only upon execution of a loan receipt agreement (Liberty Mutual Br. at p. 28), compels the opposite conclusion: namely, that no such right exists absent, or prior to execution of a loan receipt agreement. Otherwise, what is the purpose and meaning of the loan receipt agreement? Surely, if Liberty Mutual had an inherent right to contribution under the Policy, it would have no need for any such agreement.

Liberty Mutual's claim that Cargill is imposing a "temporal element" on the cooperation clause misses the point. Cargill cannot have an obligation to assist Liberty Mutual in enforcing a right to contribution that Liberty Mutual does not have. And yet this is precisely the argument that Liberty Mutual is advancing. This is not a question of

timing, as Liberty Mutual would have it, but rather a question of whether any such right exists at all. The Minnesota Supreme Court has made clear that no such right exists.

Iowa Nat'l, 276 Minn. at 368, 150 N.W.2d at 237.⁸

C. As Liberty Mutual Recognizes, The “Other Insurance” Clause Of The Policy Does Not Create An Obligation For Cargill To Enter Into A Loan Receipt Agreement.

Liberty Mutual recognizes that the “other insurance” clause of the Policy cannot independently create a right to contribution. (Liberty Mutual Br. at p. 37.) Because the subrogation and cooperation clauses do not create any right of contribution, Liberty Mutual’s acknowledgement effectively dispenses of this issue with respect to the “other insurance” clause. Nonetheless, Liberty Mutual attempts to reframe the meaning of the clause as suggesting a “recognition” by Cargill that its insurers are equally liable for defense costs. The “other insurance” clause simply does not bear the weight that Liberty Mutual attempts to place upon it. As Cargill has explained (Cargill Br. at pp. 17-18), the “other insurance” clause is limited to “loss” in connection with the Policy’s limits of liability, which are the limit of Liberty Mutual’s obligation to indemnify Cargill for damages. (CA. 209, at p. 4, § VII, 6). Liberty Mutual’s duty to defend Cargill is an obligation separate from its duty to indemnify. *See Iowa Nat'l*, 276 Minn. at 367, 150

⁸ Liberty Mutual baldly asserts that the duty to cooperate “includes all conditions of coverage expressed in a policy,” but then fails to cite to any authority in support of this proposition. (Liberty Mutual Br. at p. 26.) Liberty Mutual’s position, taken to its natural conclusion, would render the policyholder’s duty to cooperate so expansive as to include cooperating in the insurer’s efforts to undermine the policyholder’s own interests. Such an interpretation cannot be countenanced. L. Russ & T. Segalla, *Couch On Ins.* 3d § 196:1 (the duty to cooperate is limited by reasonableness and balanced against the policyholder’s right to privacy, protection and payment of insurance proceeds).

N.W.2d at 236-37 (“The obligation to defend is a separate undertaking from the duty to provide coverage and pay a judgment.”) Liberty Mutual has not pointed to any policy language or case law that suggests otherwise. Thus, the “other insurance” clause of the Policy does not bear on the question at hand.

V. THE PUBLIC POLICY BEHIND THE IOWA NATIONAL RULE REQUIRES LIBERTY MUTUAL TO FULLY DEFEND ITS INSURED.

Liberty Mutual and Travelers argue that public policy considerations favor mandatory loan receipt agreements with terms unilaterally dictated by the insurer, and equal contribution under the duty to defend, when, in fact, they have turned the public policy underlying *Jostens* on its head. (Liberty Mutual Br. at pp. 35; Travelers Br. at pp. 14.) The Minnesota Supreme Court’s public policy concern focused on the **policyholder’s** interest in receiving a prompt and complete defense from its insurers. *Jostens*, 387 N.W.2d at 167-68. (explaining the rule should not encourage insurers to “sit and wait”); *see also Wooddale*, 722 N.W.2d at 303. The insurers’ reliance on the public policy interest in assuring policyholders a prompt defense is ironic, given that Cargill clearly has not received a prompt defense even though it proposed a reasonable loan receipt agreement that would have preserved Liberty Mutual’s rights while protecting Cargill’s interests.

The insurers are ignoring the overarching public policy interest expressed in *Jostens* and *Wooddale* that the policyholder receives the prompt and complete defense to which it is entitled. This public policy cannot paradoxically lead to the conclusion that a policyholder should be forced by its insurers into a loan receipt settlement agreement

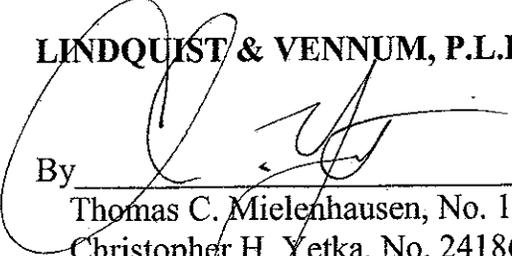
with terms that are unilaterally chosen by the insurers and that are prejudicial to the policyholder's interests. Rather, these public policy interests simply reinforce the basic principles of contract law that require Liberty Mutual to step forward and provide Cargill with the full and complete defense for which Cargill paid premium.

CONCLUSION

For the foregoing reasons, the district court's orders granting partial summary judgment to Liberty Mutual should be REVERSED, partial summary judgment should be GRANTED to Cargill on all issues addressed in Cargill's Motion For Partial Summary Judgment.

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