

NO. A08-1082

State of Minnesota
In Court of Appeals

Cargill, Incorporated and Cargill Turkey Production, LLC,
Appellants,

v.

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

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

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TABLE OF CONTENTS

STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	5
I. Cargill’s Alleged Liability in the Oklahoma and Arkansas Lawsuits.	5
II. Various Primary Insurers Offer to Defend Cargill	6
III. District Court’s Order and Memorandum.....	8
IV. Travelers and Travelers Casualty’s Interest in the Appeal.	9
ARGUMENT	10
I. Minnesota Law and Public Policy Obligate Cargill to Execute a Loan Receipt Agreement on Behalf of any Insurer Who Has Agreed to Defend it Under a Reservation of Rights.....	10
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Blair v. Espeland</i> , 231 Minn. 444, 43 N.W.2d 274 (Minn. 1950).....	11, 12
<i>Domtar, Inc. v. Niagra Fire Ins. Co.</i> , 563 N.W.2d 724 (Minn. 1997)	1
<i>Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh</i> , 658 N.W.2d 522 (Minn. 2003).....	13
<i>Iowa National Mut. Ins. v. Universal Underwriters Ins. Co.</i> , 276 Minn. 362, 150 N.W.2d 233 (1967).....	12, 13, 14
<i>Jerry Mathison Constr., Inc v. Binsfield</i> , 615 N.W.2d 378 (Minn. Ct. App. 2000)	14
<i>Jostens, Inc. v. Mission Ins. Co.</i> , 387 N.W.2d 161 (Minn. 1986).....	1, 11, 13, 14
<i>Redeemer Covenant Church v. Church Mut. Ins. Co.</i> , 567 N.W.2d 71 (Minn. Ct. App. 1997).....	14
<i>Youngquist v. Cincinnati Ins. Co.</i> , 625 N.W.2d 186 (Minn. Ct. App. 2001).....	14

STATEMENT OF LEGAL ISSUES

Certified Question:

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."

Standard of Review: De Novo

Apposite authority: *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997).

Issue integral to the Certified Question:

2. Is an insured obligated to enter into a loan receipt agreement with an insurer who has agreed to provide a defense in order to permit the defending insurer to seek defense costs from those insurers who arguably have a duty to defend but who have not agreed to defend the insured?

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

Standard of Review: De Novo

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

STATEMENT OF THE CASE

This appeal addresses the issue of whether an insurer who has agreed to defend its insured under a reservation of rights may obtain contribution from other insurers who may also have a duty to defend the insured and, if yes, by what mechanism.

Various lawsuits have been commenced against Appellants Cargill, Incorporated and Cargill Turkey Production, L.L.C., (“Cargill”) by the State of Oklahoma and by a number of individuals in Arkansas, arising out of Cargill’s alleged handling of poultry litter. 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”).

In this action, Cargill has sued a number of insurers, alleging that these insurers owe it either a defense and/or indemnity for the Oklahoma Lawsuit and the Arkansas Lawsuits (the “Underlying Actions”). Phase I of the bifurcated proceedings in this action relate solely to the duty to defend Cargill against the Underlying Actions.

Several of Cargill’s insurers – St. Paul Surplus Lines Insurance Company (“St. Paul Surplus”), St. Paul Fire and Marine Insurance Company (“St. Paul”), American Home Assurance Company (“American Home”), National Union Fire Insurance Company of Pittsburgh, PA (“National Union”), Liberty Mutual Insurance Company (“Liberty Mutual”), The Travelers Indemnity Company (“Travelers”) and Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company and incorrectly named herein as successor in interest to The Aetna Casualty

and Surety Company (“Travelers Casualty”) – 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.

Cargill refused to execute a loan receipt agreement and brought a motion for summary judgment against Liberty Mutual. Cargill’s motion for summary judgment sought 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; (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 Liberty Mutual had no right 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 which denied Cargill's motion for summary judgment, denied the motion to dismiss the cross-claim of Liberty Mutual and entered 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 costs¹; and that the order should not be

¹ While the proceedings at the court below indicated that issues *may* arise between Cargill and its insurers other than Liberty Mutual as to those insurers' rights, pursuant to the specific terms of their contracts and agreements with Cargill, to assert claims against it to contribute to defense costs, should those insurers be required to contribute to defense

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. Judgment on the amended order was entered on June 25, 2008.

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. (C.A.² 78, C.A. 156). The actions all seek damages due to Cargill's alleged handling of its poultry litter. (C.A. 123 ¶31, C.A. 166, ¶41, C.A. 165-66, ¶40, C.A. 168 ¶46).

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. (C.A. 119, ¶13-14). In addition, Cargill has been named a defendant in a number of Arkansas lawsuits in which the plaintiffs are claiming they incurred bodily injury due to their exposure to contaminated poultry litter. (C.A. 165 ¶38). In the Arkansas lawsuits Cargill is alleged to have participated in the poultry production activities which resulted in the contaminated litter. (C.A. 166, ¶41, C.A. 165-66, ¶40, C.A. 168 ¶46). The Oklahoma and Arkansas lawsuits are both ongoing and Cargill is defending itself.

costs incurred by Liberty Mutual, those issues are not before this Court on Cargill's appeal. (Cargill's Brief at p. 2, fn. 2).

² "C.A." refers to the Appendix filed by Appellant Cargill.

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.³ 156-167). 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, ¶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 Surplus, St. Paul and Liberty

³ "T.A." refers to the Appendix filed by the Respondents herein, St. Paul Fire and Marine Insurance Company, St. Paul Surplus Lines Insurance Company, Travelers Casualty and Surety Company, f/k/a The Aetna Casualty and Surety Company, and The Travelers Indemnity Company.

Mutual—agreed to fund Cargill’s defense in the Underlying Actions under their respective reservations of rights⁴, and requested that Cargill issue a loan receipt to allow the carriers to pursue contribution from other non-participating carriers. (C.A. 273-74). 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. (C.A. 281-82). Cargill refused to sign the loan receipt agreement and stated that it believes that many of the primary or lower-level insurance policies contain 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. (C.A. 74-75, ¶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. (C.A. 56-73). Liberty Mutual then asserted cross-

⁴ Cargill’s Brief mistakenly asserts that these insurers acknowledged their duty to defend. (Cargill’s Brief at p. 1). The insurers did not acknowledge that any of their policies obligated them to defend Cargill. Rather, the insurers offered to defend Cargill under a complete reservation of rights. In fact, the issue of whether or not any insurer has an obligation to defend Cargill under any policy has yet to be litigated and was the very basis for which Travelers and Travelers Casualty sought reconsideration of the district court’s initial order in this case which arguably made such a finding in the absence of any argument regarding that issue. (T.A. 220). Travelers and Travelers Casualty’s reconsideration motion was granted, and the district court’s initial order was revised to remove any reference to the insurers having a duty to defend. (C.A. 36). No appeal was taken from the court’s order granting reconsideration.

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. (C.A. 36). 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.

(C.A. 36-37, ¶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. (C.A. 44, ¶1). The court further noted that it seemed "elementary and inequitable" that Cargill could by its own volition prevent the primary insurers from

sharing defense costs on an equal basis when that is what courts have required. (C.A. 44, ¶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. (C.A. 44, ¶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. (C.A. 46, ¶9).

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

The effect of the district court's order is that if it is upheld or, in the alternative, this Court finds that Cargill is obligated to enter into a loan receipt agreement, Liberty Mutual will have the right to seek contribution from Travelers and Travelers Casualty for the defense of Cargill, and, thus, Travelers and Travelers Casualty may have to pay for a portion of Cargill's defense in the Underlying Actions. 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, and argues again here, 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. Minnesota Law and Public Policy Obligate Cargill to Execute a Loan Receipt Agreement on Behalf of any Insurer Who Has Agreed to Defend it Under a Reservation of Rights.

Cargill's argument that there is no Minnesota authority that would require Cargill to enter into a loan receipt agreement with Liberty Mutual⁵ or any other defending insurer ignores a long line of Minnesota cases which endorse the use of loan receipt agreements to dispose of insurance disputes and create equitable results. Rather than acknowledge those cases and the public policy espoused therein, Cargill distorts Minnesota law. Cargill asserts that an insured's right to select one insurer to pay all defense costs is a longstanding rule in Minnesota⁶ and that rule, therefore, supports its argument that it can select Liberty Mutual to defend it without providing Liberty Mutual any recourse to seek contribution from any other insurer which may also have a duty to defend Cargill. Cargill's argument overstates the law and runs contrary to public policy.

While Minnesota law does allow an insured who has defended itself to seek recovery of its defense costs from one or more of its insurers⁷, there is no authority directly addressing whether an insured can select one insurer to defend it and refuse the defending insurer any recourse for seeking contribution from non-defending insurers. Although no Minnesota appellate decision has addressed this issue, 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. Indeed, any

⁵ Cargill's Brief at p. 19.

⁶ Cargill's Brief at p. 11.

⁷ See *Jostens, Inc. v. Mission Insurance Co.*, 387 N.W.2d 161, 167 (Minn. 1986).

holding to the contrary would be adverse to Minnesota's policy of encouraging insurers to expeditiously defend their insureds and resolve coverage disputes.

Minnesota first upheld the validity of a loan receipt agreement in 1950 in *Blair v. Espeland*, a case involving an insurer, insured and a third-party tortfeasor. 231 Minn. 444, 43 N.W.2d 274 (Minn. 1950). In *Blair* the insured plaintiff was involved in a car accident with the third party. *Id.* at 445, 43 N.W.2d at 275. Passengers in the third party's car brought suit against the plaintiff insured which resulted in a judgment. *Id.* The plaintiff's insurer subsequently paid the judgment. *Id.* The insured and his insurer executed a loan receipt agreement for the amount paid to the third party's passengers and then, pursuant to the agreement, the insured brought an action in his name seeking the same amount in a claim against the third party. *Id.* at 445-46, 43 N.W.2d at 275-76. The Court upheld the validity of the claim against the third party so that the insurer could collect the equitable portion of the loss against another potentially responsible party. *Id.* at 449-50, 43 N.W.2d at 277-78. The Court noted 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. . . ." *Id.* at 448, 43 N.W.2d at 277.

Following *Blair*, the Minnesota Supreme Court addressed loan receipt agreements again in *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161 (Minn. 1986). In *Jostens* the 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, the Court cited *Blair* for the proposition that the insured remained the real party in interest. *Id.* at 164. The 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, the Court took note of its prior decision in *Iowa National Mut. Ins. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 150 N.W.2d 233 (1967) in which it held that "when there is a bona fide dispute between two carriers with overlapping coverage as to which is primary, whichever undertakes to defend cannot pass on its defense expense to the other carrier."⁸ It then 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. The Court determined that it would be unfair to conclude that Mission was responsible for the entire

⁸ In *Iowa National*, the Minnesota Supreme Court held that there is no right of contribution between two insurers absent a specific contractual right because the duty to defend is personal to each insurer and based on the individual insurer contracts. 276 Minn. at 368, 150 N.W.2d at 237. Because the duty to defend is personal to the individual insurers, the Court found there was no joint liability or common obligation to support a basis for the right to seek contribution. *Id.* Likewise, the Court found the individual defense obligation precluded a subrogation claim since the equities between insurers individually liable for the defense were equal. *Id.*

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.* The 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.* The 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, the 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). The Court 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 the traditional rules of contribution do not apply to two parties who have no privity in contract.

Unquestionably, the same public policy considerations set forth in *Jostens* support holding that Cargill must enter into a loan receipt agreement with any insurer who offers to defend Cargill under a reservation of rights and requests such an agreement. First, if loan receipt agreements are required to be entered into when requested by a defending insurer, the “wait and see” attitude with which the Court expressed concern in *Jostens* would no longer exist. Under such a rule, any insurer with an arguable duty to defend could immediately undertake the defense upon the insured’s tender without concern that it would have no recourse against a recalcitrant insurer who chooses not to defend. Second, if all insurers with an arguable duty to defend know they may be liable through implementation of loan receipt agreements – and cannot simply hope to take advantage of the *Iowa National* rule – they have an incentive to resolve coverage issues early in litigation.

Moreover, the Court stated in *Jostens* that an insurer liable for an insured’s defense costs should not be determined by “the whim or caprice of the insured,” especially when multiple insurers have a duty to defend the insured at the time the

defense is needed. 387 N.W.2d at 167. When an insurer with an arguable duty to defend has recourse through the loan receipt agreement against any recalcitrant insurers with a similar duty, that insurer will agree to undertake the defense, confident that the allocation of defense costs will be resolved in an equitable manner. As a result, the insured's "whim or caprice" would not be able to dictate which insurer is liable for the defense costs. Rather, the issue of which insurer must defend and on what basis would be dictated by the contracts which were negotiated by the insured.

Indeed, in this case, Cargill attempts to rely on its whim in selecting Liberty Mutual so it can avoid the contractual obligations it negotiated with other insurers who may be equally liable for its defense. Cargill admits that its refusal to sign a loan receipt agreement is based on its concern that it will ultimately bear some of the defense costs due to the fronting arrangements it negotiated under some of its policies.⁹ The fronting arrangements in the policies Cargill negotiated should have no bearing on whether it is required to enter into a loan receipt agreement. As the district court aptly noted, Cargill's basis for its refusal to execute a loan receipt agreement is nothing more than an attempt to circumvent an insurance structure Cargill created. Cargill cannot escape a situation of its own making – especially when allowing Cargill to avoid its contractual obligations would run counter to longstanding Minnesota public policy.

⁹ Cargill's Brief, p. 20, fn. 5.

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 the Minnesota Supreme Court has sought to address in its prior decisions regarding multiple insurers' duty to defend an insured. The rule unquestionably furthers Minnesota's public policy of encouraging quick and equitable resolutions of insurance disputes.

CONCLUSION

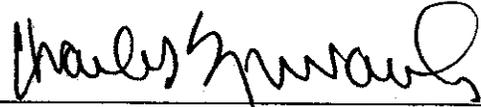
For the foregoing reasons, this Court should hold that Cargill is obligated to execute a loan receipt agreement on behalf of any insurer who has agreed to defend Cargill under a reservation of rights and requested such an agreement from Cargill.¹⁰

¹⁰ To the extent the Court does not hold that Cargill is required to execute a loan receipt agreement, Travelers and Travelers Casualty urge the Court to uphold the district court's order on the basis that this case presents an exception to the *Iowa National* rule prohibiting contribution in the absence of a loan receipt agreement in that no insurer has agreed to defend Cargill without the condition of a loan receipt agreement being entered into and, thus, no insurer has voluntarily forfeited its rights to contribution by providing an unconditional defense to Cargill.

While such a rule would have the same effect of ordering Cargill to enter into a loan receipt agreement, Travelers and Travelers Casualty respectfully submit that such a ruling would not further all of the public policy considerations previously advocated by the Minnesota courts and, thus, the rule advocated here is the better outcome. If the rule becomes that insurers only have a right of contribution when no insurer has agreed to defend, then the only mechanism for settling a dispute regarding the duty to defend would be forcing the insured to bring a declaratory judgment action against its insurers to obtain a defense. Thus, the rule would not encourage insurers to provide a defense to their insureds and then resolve coverage disputes among themselves. While some insureds, like Cargill, have the resources available to defend themselves and bring a declaratory judgment action, that is not the case for all insureds.

Respectfully submitted,

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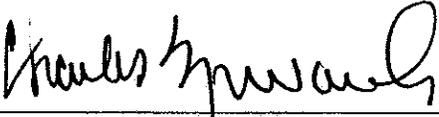
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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2002. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 4,612.

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