
NO. A08-1082

State of Minnesota
In Supreme Court

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.

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CARGILL TURKEY PRODUCTION, L.L.C.'S REPLY BRIEF**

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I. PRELIMINARY STATEMENT

Liberty Mutual's argument that it is exempt from the *Iowa National* rule because it refused to defend Cargill turns the law upside down by rewarding an insurer for failing to defend its insured. In *Iowa National* and its progeny, this Court resolved that an insurer with the duty to defend has no right to contribution from other insurers for defense costs. The bulk of Liberty Mutual's brief is devoted to arguing that the *Iowa National* rule applies only if the insurer voluntarily steps up to pay for the defense, but not when it refuses fully to perform that obligation. That argument is without legal support and, if accepted, would create a perverse incentive by punishing insurers that perform their duty to defend and rewarding insurers that refuse to do so.

This Court's precedent is devoted to protecting the insured's right to obtain a complete defense and preventing insurers from eroding that right by seeking to precondition a defense on rights to recovery from each other or, more importantly, their policyholders. Accordingly, this Court has never limited *Iowa National* as Liberty Mutual contends. In the cases Liberty Mutual relies upon to conjure such a limitation, the insurer either entered into a mutually-acceptable loan receipt settlement with its policyholder, or agreed with other insurers to waive the *Iowa National* rule, with no detriment to the policyholder's right to a complete and indivisible defense. This Court's holdings on how to allocate defense costs, when such recovery is available among insurers, stop far short of creating a general right of contribution among insurers with the duty to defend, much less a contribution right that would prejudice the insured. *Iowa*

National and its progeny reject such a right, and this Court has not abandoned the *Iowa National* rule *sub silentio* as Liberty Mutual postulates. (Point II.A.1.)

Even if the issue here were one of first impression, the correct result would still be to hold that insurers with the duty to defend have no right to recover from other insurers absent a loan receipt agreement. The duty to defend is an independent and personal obligation that runs from insurer to policyholder. It is supported by valuable premiums and is undertaken by insurers as a cost of doing business. There is nothing inequitable about requiring sophisticated insurers to perform their unambiguous contractual obligations as written. Abandoning *Iowa National* would disrupt the business of insurers and policyholders who have functioned for decades in reliance on *Iowa National* and its progeny. (Point II.A.2.)

Given that *Iowa National* is the law and should remain so, there is no basis for enabling insurers to subvert the rule (as the lower court decisions would allow Liberty Mutual to do here) by forcing their policyholders to enter into loan receipt agreements unilaterally drafted by the insurer. Neither the cooperation clause, subrogation clause, any other policy language, nor the duty of good faith require the policyholder to enter into a new contract, least of all when doing so would be detrimental to the policyholder.

There is also no basis for Liberty Mutual's assertion that the form of loan receipt agreement it proposed was "standard," and it certainly was not "neutral." Tellingly, Liberty Mutual fails to cite a single case from any jurisdiction that has used either term, let alone one that actually delineates the nature of this ethereal "standard" covenant. A

neutral loan receipt agreement would be one that left the policyholder no worse off than if the insurer performed its indivisible duty to defend.

At bottom, the issue here is whether Cargill can be required to execute a loan receipt agreement that would allow Liberty Mutual to recover some of its defense costs from Cargill via deductibles, retentions, retrospective premiums, reinsurance or the like. In point of fact, Cargill has never refused to enter into a loan receipt settlement agreement with Liberty Mutual or any other insurer in this action. It has only resisted being forced to enter into an agreement drafted unilaterally by Liberty Mutual that would prejudice Cargill. Under Minnesota law, Cargill is not *required* to enter into *any* type of loan receipt agreement. Cargill nevertheless in good faith proposed to Liberty Mutual a loan receipt settlement agreement that would have benefited Liberty Mutual while protecting Cargill. This reasonable compromise was summarily, and inappropriately, rejected by Liberty Mutual. (Point II.B.)

Accordingly, Cargill is asking this Court for one of two rulings: (1) under the Court's *Iowa National* doctrine, neither Liberty Mutual nor the courts can force Cargill to enter into a loan receipt settlement agreement or create a so-called "constructive" equivalent (which would be necessary for Liberty Mutual to recover from Cargill's other insurers), or (2) in no event can a policyholder be compelled to enter into a loan receipt agreement, unless the terms protect the policyholder's interests.

II. ARGUMENT

A. THIS COURT'S *IOWA NATIONAL* RULE CONTROLS AND REQUIRES EACH INSURER WITH A DUTY TO DEFEND TO PROVIDE A COMPLETE AND INDIVISIBLE DEFENSE

As set forth in Cargill's opening brief (at 16 – 36), under *Iowa National* and its progeny, (1) the duty to defend is an independent and personal obligation that runs from insurer to insured; (2) the duty requires a complete and indivisible defense; (3) when two or more insurers fail to fulfill their obligation to provide a complete and indivisible defense, the insured may choose to recover its defense costs from any one, or more, of them; (4) the insurers have no right of recovery from one another, absent a loan receipt settlement agreement; and (5) under the relevant policy language and law, Cargill cannot be coerced into entering into such an agreement. *See Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 367, 150 N.W.2d 233, 236 (1967); *see also Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006); *Home Ins. Co. v. Nat'l Union Fire Ins. Co.*, 658 N.W.2d 522, 527 (Minn. 2003); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986); *Nordby v. Atl. Mut. Ins. Co.*, 329 N.W.2d 820, 824 (Minn. 1983).

Of these five propositions, the first four commanded the agreement of the Court of Appeals majority as well as the dissent.¹ *All* of the judges below recognized that *Iowa*

¹ Even Liberty Mutual concedes the first three propositions when it states in its brief (at 18) that it “accepts the rule that Cargill can litigate its coverage rights and, if successful, recover its defense costs from any one insurer with a duty to defend (including, perhaps, Liberty Mutual).” But Liberty Mutual retreats even from these propositions, asserting that it did “not” agree “to *completely* finance a defense.” (*Id.* at 29) (emphasis in original). Liberty Mutual is necessarily wrong. Fulfilling the duty to

National controls. The majority disagreed with the dissent (and Cargill) only on the final issue of whether Cargill could be *compelled* to enter into a loan receipt agreement in a form unilaterally dictated by Liberty Mutual. Nevertheless, Liberty Mutual asserts a series of inconsistent arguments that even the Court of Appeals majority did not accept – namely, that this Court’s *Iowa National* rule: (1) does not apply when the insurer refuses to pay; or (2) “should” not apply to Liberty Mutual as a matter of “equity” under the facts here; or maybe (3) “does not retain vitality” (*i.e.*, is bad law under any facts), although this Court has continued to reaffirm the rule to the present. Liberty Mutual’s shifting arguments do not withstand scrutiny.²

1. Liberty Mutual Cannot Circumvent *Iowa National* Based on the Illogical Rationale that It Never Actually Defended Cargill

a. The *Iowa National* Rule Applies

In *Iowa National*, this Court categorically rejected any right of contribution or other recovery between insurers for defense costs. *Iowa National*’s insured was in an auto accident while driving a car owned by his employer and insured by another carrier, Universal. *Iowa Nat’l*, 276 Minn. at 363, 150 N.W.2d at 235. *Iowa National* provided a defense and then sought contribution from Universal, which refused. *Id.* at 364 – 65, 150 N.W.2d at 235. This Court held that the “obligation of defending an insured and paying

defend means providing a *complete* defense. *Iowa Nat’l*, 276 Minn. at 367-68, 150 N.W.2d at 237.

² No extensive reply from Cargill is necessary to the cookie-cutter amicus brief filed by a group of insurers calling themselves CICLA, which apparently includes and is funded by some of the defendants in this case. That brief parrots Liberty Mutual’s arguments in some places, and in others completely ignores Minnesota law.

for the defense is a separate obligation existing exclusively between the insurer and the insured.” *Id.* at 367, 150 N.W.2d at 236. Consequently, as this Court further held, one insurer cannot recover the cost of fulfilling that obligation from another insurer, with which it is not in privity, on the basis of contribution, subrogation, or otherwise. *Id.* at 368, 150 N.W.2d at 237. This rule is eminently reasonable because, “in the final analysis,” when an insurer fulfills its duty to defend or pay defense costs, it merely incurs those costs “in its business operation pursuant to its contract” with its insured. *Id.* at 370, 150 N.W.2d at 238. Here, Liberty Mutual unquestionably has (and recognized) the duty to defend Cargill, and, under *Iowa National*, that duty is indivisible and several; with no right of contribution or other recovery. *Id.* at 367 – 68, 150 N.W.2d at 237 – 38.

Liberty Mutual’s attempt to avoid *Iowa National* on the ground that the insurer in that case had “voluntarily” paid for the defense, whereas here, Liberty Mutual has paid nothing, turns insurance law upside down by rewarding insurers for failing to provide a defense. This Court did not formulate its *Iowa National* rule to state an exception for insurers that choose not to honor their duty until they are compelled to do so by law. To the contrary, this Court based its decision on the contractual “obligation of defending an insured” that each duty to defend insurer separately owes its insured. *Iowa Nat’l*, 276 Minn. at 367, 368, 150 N.W.2d at 236, 237; (rejecting contribution and subrogation claims because each insurer had a separate “obligation” to defend). What matters is the contractual obligation between insurer and insured, not whether a given insurer chooses to fight to the bitter end before it honors that obligation.

Liberty Mutual's attempted "distinction" of *Iowa National* is as illogical as it is lacking in legal support. Why should an insurer that does not defend its policyholder when obligated to do so be rewarded with the ability to seek recovery from other insurers, while an insurer that acts in good faith by defending and not prejudicing its policyholder is penalized by preclusion from this right? Liberty Mutual's argument turns the equities upside down. Common sense demonstrates that such a distinction would create a perverse incentive for insurers to delay and try to coerce detrimental concessions from their policyholders, precisely as Liberty Mutual has done in this case. Conversely, holding that *Iowa National* applies here would make clear that insurers situated like Liberty Mutual (1) must pay 100% of defense costs; (2) cannot reap the benefits of contribution when failing to defend; and (3) face significant risks if they fail to negotiate a loan receipt agreement or a waiver agreement with other insurers that does not prejudice the policyholder.

b. This Court's Decisions Explaining How to Allocate Defense Costs When Contribution Is Available Do Not Alter the Holding of *Iowa National* to Create a General Right of Recovery

Jostens, on which Liberty Mutual so heavily relies, does not change or narrow the *Iowa National* rule, and neither does any subsequent decision of this Court. In *Jostens*, the insured was sued by a former employee and tendered the defense to Wausau, which had issued a comprehensive general liability policy, and to Mission, which had issued an umbrella policy. Wausau loaned the insured an amount that covered its defense costs, and in return, the insured voluntarily entered into a loan receipt agreement with Wausau, under which it agreed that it would transfer to Wausau any sums (up to the entire cost of

the defense) it recovered from Mission. *Jostens*, 387 N.W.2d at 163. Because of the loan receipt agreement, allowing such recovery did not create a conflict with *Iowa National*. *See id.* The only issue in *Jostens* was how to allocate defense costs *after* the insured agreed to enter into a loan receipt agreement with one of the two insurers. Here, no such agreement has been reached.

Further, it was only in the context of determining an allocation formula *after* the insured enters into a loan receipt agreement that this Court commented that it was unfair to make Mission pay for the entire defense, adding 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.* at 167. Liberty Mutual and amicus try to turn this phrase into a sweeping holding that insurers have a right of recovery from one another, regardless of what their policyholders do. The phrase is taken out of context, and actually has no application here. Cargill is not capriciously trying to enter into a loan receipt agreement with other insurers that allocates the entire defense to Liberty Mutual. Cargill is merely saying that it will not enter into a loan receipt agreement with any insurer that forces Cargill to pay part of its own defense. *Jostens* does not require Cargill to pay for its own defense, or deprive Cargill of its bargained-for right to a complete and indivisible defense from Liberty Mutual.

Similarly, *Wooddale* does not support Liberty Mutual’s arguments. In that case, the insured, a home builder, faced claims by 60 different homeowners for construction defects over an eight-year period, insured by five different insurers. The insurers disputed coverage but became “involved to varying degrees in the investigation; defense

and settlement of the homeowners' claims," *Wooddale*, 722 N.W.2d at 289 n. 4, and eventually agreed among themselves to waive the *Iowa National* rule, *id.* at 302, n. 15. Because of that waiver, this Court had no occasion to consider limiting the *Iowa National* rule, and did not do so. Again, the effect of the decision is not to create a new, general right of recovery that insurers can force upon their insureds to their detriment. Instead, *Wooddale* merely left intact the existing incentive insurers have to work out a deal with each other or with their insured.

Further, contrary to Liberty Mutual's contention, neither *Jostens*, *Wooddale*, nor any other decision of this Court, limits in any way the ability of an insured, as Liberty Mutual phrases it, to "selectively tender" the defense of a claim to insurers of its choosing within its coverage program (*see, e.g.*, Liberty Mutual brief at 13, 18). To the contrary, *Iowa National* and *Jostens* hold that a policyholder can select a single insurer to defend it although multiple insurers share that obligation. *Jostens*, 387 N.W.2d at 167; *Iowa Nat'l*, 276 Minn. at 367 – 68, 150 N.W.2d at 236 – 237. Liberty Mutual agrees that Cargill can "recover its defense costs from any one insurer." (Liberty Mutual Brief at 18).

Significantly, neither *Jostens* nor *Wooddale* involved the situation here where Liberty Mutual and the other Duty to Defend Insurers have all failed to: (1) provide a complete and unconditional defense to Cargill, or (2) work out an accommodation among themselves, or (3) obtain a mutually-acceptable loan receipt settlement from Cargill.³

³ The fact that insurers can agree with each other to waive the *Iowa National* rule, as in *Wooddale*, illustrates the emptiness of the contention of Travelers and Travelers Casualty ("Travelers"), at page 11 of their brief, that they are disinterestedly opposing Cargill in order to advocate what they consider the "better rule of law." If they think

Liberty Mutual's entire argument is premised on its use of isolated phrases from those decisions, taken out of context, to create a distinction this Court did not intend nor express. It is not based on the holdings of *Jostens*, *Wooddale*, or any other case, all of which leave *Iowa National* intact.

Other cases affirm that the *Iowa National* rule is not (and logically cannot be) limited to situations where an insurer voluntarily defends. For instance, in *Home Insurance*, the insured was sued and tendered the defense to Home, its primary insurer. Home accepted the defense subject to a reservation of rights (as Liberty Mutual did in this case, Appx. 200 – 205, 206 – 213),⁴ and commenced a declaratory judgment action. *Home*, 658 N.W.2d at 525. It continued to dispute coverage, without paying, even *after* the insured prevailed in the declaratory action, so that the insured had to commence a further lawsuit to enforce the declaratory judgment. *Id.* This Court reaffirmed its *Iowa National* rule, but concluded that Home had standing to seek recovery from other insurers because the insured entered into a loan receipt agreement after starting the second coverage lawsuit. *Id.* at 527. The facts were very clear that Home, like Liberty Mutual here, did not pay any defense costs until after it lost the first coverage action. *Id.* at 535

Liberty Mutual should not have to fund Cargill's entire defense, they are free to agree to waive the *Iowa National* rule and assume part of the obligation to defend. What inhibits the insurers from agreeing to share the defense costs is their own calculation that they can do better by trying to exact detrimental concessions from Cargill. Beyond this, Travelers' arguments are the same as Liberty Mutual's and do not require a separate response.

⁴ Liberty Mutual stated it would provide a defense only on the condition that Cargill execute a loan receipt agreement, and refused to explain the basis for its partial tender of \$704,762.22 (Appx. 214). The record thus clearly refutes Liberty Mutual's assertion (in its brief at 3) that it agreed to fund Cargill's defense in full.

(“Home nominally agreed to defend and then never paid any defense costs until it faced an enforcement action six years later.”). Even then, it involved a situation where the insured voluntarily provided a loan receipt agreement. *Id.* at 525.

Thus, Liberty Mutual is stretching when it contends, in its brief at 26 – 27, that “[n]o case has applied the rule” (precluding recovery from other insurers absent a loan receipt agreement) where “the insurer declined to participate in the defense, and the insured later obtained a judgment” against the insurer. It is obvious from *Home* that the *Iowa National* rule applies even when insurers are unwilling to pay for a defense absent legal compulsion.

c. Applying *Iowa National* Here Is in Accord with Equitable and Public Policy Considerations

Unable to distinguish *Iowa National*, Liberty Mutual sheds crocodile tears of inequity when it complains that the *Iowa National* rule “should” not apply when the occurrence triggering coverage allegedly spanned more than one policy period and might trigger multiple policies. (Liberty Mutual brief at 29 – 31). Again, this Court expressed no such limitation in *Iowa National*. While the policies at issue there were concurrent and the triggering event was a discrete auto accident, this Court has followed the *Iowa National* rule when the triggering event unfolded over consecutive policy periods. In *Domtar, Inc. v. Niagara Fire Insurance Company*, 563 N.W.2d 724 (Minn. 1997), the occurrence, much like in this case, was continuous environmental damage that occurred between 1956 and 1970, and the issue was whether Continental, an insurer that was on the risk from 1967 to 1970, was entitled to contribution from Canadian General, another

insurer, which was on the risk from 1956 to 1965. This Court held that the insured could recover its defense costs “from *either or both* insurers,” which is an application of the *Iowa National* rule. *Id.* at 739 (emphasis in original)(citation and internal quotation omitted).⁵ This comports with the fundamental and widely recognized insurance law principle that an insurer is required to defend an entire cause of action even if some part of the claim falls outside the coverage of the policy. *See, e.g., Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 416 (Minn. 1997); *Jostens, Inc. v. CNA Ins.*, 336 N.W.2d 544, 545 (Minn. 1983).

Liberty Mutual may not like having to provide a complete defense in this case, but it could easily have reduced the amount of its defense obligation by accepting the loan receipt agreement Cargill proposed (Appx. 230 – 40), which would have enabled it to cut its exposure to a half, a third, or a quarter or less of the total, depending on the number of other insurers it pursued.⁶ The only thing that has kept Liberty Mutual from doing this is

⁵ Although the Court cited *Jostens*, the “either or both” holding in *Domtar* is an application of the *Iowa National* rule, as *Jostens* relies on *Iowa National* for that point. *See Jostens*, 387 N.W.2d at 167 (citing *Iowa National*). The Court’s remark in *Domtar* that “Continental’s remedy, *if any*, is to seek contribution from Canadian General,” 563 N.W.2d at 739 (emphasis added), further confirms its continuing adherence to *Iowa National* since if, as Liberty Mutual claims, a right of contribution normally existed, the Court would not have used the phrase “if any.”

⁶ Liberty Mutual suggests that since it provided coverage during just 4 years out of some 49 during which the events that led to the Underlying Actions allegedly occurred, it should in fairness be allowed to recover from the other insurers who provided coverage “92%” of the time. (Liberty Mutual brief, at 8 – 9, 14, 34). But even if Liberty Mutual obtains recovery, the result under *Wooddale* would not be to make its obligation proportional to its time on the risk. *See Wooddale*, 722 N.W.2d at 303 (requiring equal apportionment of defense costs among insurers). Whatever Liberty Mutual means to

its avaricious insistence on a loan receipt agreement that would enable it to funnel parts of its defense obligation back to its insured by allowing recovery from other insurers in Cargill's program whose "fronted" policies contain high deductibles or retentions, are reinsured by a Cargill subsidiary, or are subject to retrospective premiums. There is nothing "equitable" about allowing an insurer to undercut its policyholder's contractual right to a complete and indivisible defense, and to obtain contribution or subrogation from its policyholder, as Liberty Mutual is trying to do.

Liberty Mutual's argument that the *Iowa National* rule somehow diminishes an insurer's incentive to provide a prompt and complete defense (Liberty Mutual brief at 32) is completely without logic. Take away the deterrent of *Iowa National* (requiring a single insurer to pay 100% of defense costs without the right of recovery) and insurers that do not wish to defend their policyholder will have no reason to do so. After all, without *Iowa National*, the worst case scenario facing an obstreperous insurer is that it would be forced by judicial mandate merely to pay some portion of defense costs, at some time in the future, often after protracted litigation like the proceedings here. In this case, Liberty Mutual's withholding payment of defense costs until its insured signs a prejudicial loan receipt agreement demonstrates the disincentive for an insurer to timely step to the plate if *Iowa National* is disregarded.

Ultimately, there is no legal or equitable reason to strip policyholders of the already marginal protection they possess when trying to persuade their insurers to defend

suggest in pointing to the temporal length of its policy term, it has nothing to do with whether Liberty Mutual has a right to contribution, as it claims.

them in lawsuits. If the old adage “possession is 9/10 of the law” holds true, it certainly plays to Liberty Mutual’s advantage in this case, since it is holding on to money it is obligated to pay, while its policyholder shoulders the cost of defending the underlying litigation. The *Iowa National* rule protects policyholders, large and small, from having their defense held hostage by their insurers, as it leaves the policyholder with the ability, at least, to litigate the duty to defend while refusing to sign an unacceptable loan receipt agreement. The unprecedented rule adopted by the courts below strips policyholders of this protection.

2. Liberty Mutual Has Shown No Rational Basis for this Court to Abandon The *Iowa National* Rule

At bottom, Liberty Mutual’s actual contention is that the *Iowa National* rule “does not retain vitality.” (Liberty Mutual brief at 31). What this means in plain English is that Liberty Mutual thinks this Court – having recently reiterated the *Iowa National* rule in 2003, *see Home*, 658 N.W.2d at 527, and in 2006, *see Wooddale*, 722 N.W.2d at 302 – should now abandon it. The answer to this position is twofold.

First, even if this case were one of first impression, the Court would still arrive at the *Iowa National* rule and apply it based on the facts of this case. Liberty Mutual undertook both “the right and duty to defend any suit against [Cargill] seeking damages on account of . . . bodily injury or property damage” to which its policy applies. (Appx. 139). No language in the Liberty Mutual policy nor any legal authority excuses Liberty Mutual from its obligation to provide a complete, several and indivisible defense

to Cargill or arms Liberty Mutual with a right to obtain contribution toward that defense to the detriment of Cargill.

Second, this Court should adhere to *Iowa National* and its progeny because it is settled law on which insurers and insureds have based their plans and expectations. As this Court observed only weeks ago, it faithfully adheres to the rule of *stare decisis* in order to “promote[] stability, order, and predictability in the law.” *Fleeger v. Wyeth*, 771 N.W.2d 524, 529 (Minn. 2009)(citation omitted). This legal equilibrium, systemization, and consistency allows individuals and businesses alike to order their personal and commercial affairs in reliance on the law and its consequences. *See State ex rel. Foster v. Naftalin*, 74 N.W.2d 249, 264 (Minn. 1956). Indeed, in Minnesota, *stare decisis* is applied with the greatest force where individual and business rights and interests have been built up in reliance upon the Minnesota Supreme Court precedent at issue. *See Naftalin v. King*, 102 N.W.2d 301, 302 (Minn. 1960).

In furtherance of these bedrock principles, this Court has repeatedly stated that it will abandon the rule of *stare decisis* only when confronted with a “compelling reason” to sacrifice the stability of its prior cases. *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005)(quoting *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000)). A “compelling reason” exists to depart from established precedent where “social and economic changes” have made a precedent “unworkable,” *In re Gardner's Trust*, 123 N.W.2d 69, 74 (Minn. 1963), or where two lines of precedent create irreconcilable inconsistency and results that offend the Court’s sense of justice. *Oanes*, 617 N.W.2d at 405-06.

The rule of *stare decisis* should be faithfully applied to the *Iowa National* rule. Minnesota policyholders and insurers have ordered their legal relationships and commercial conduct on the basic and consistently reaffirmed rule that insurers have an independent and indivisible duty to defend. No economic or societal changes have called the *Iowa National* rule into question. There are no discordant or illogical lines of Minnesota Supreme Court precedent that must be harmonized to prevent unjust results. There simply is no “compelling reason” to disregard the rule of *stare decisis* and foster the legal instability, disorder, and unpredictability that would result.⁷

B. LIBERTY MUTUAL CANNOT OBTAIN CONTRIBUTION FROM ITS OWN POLICYHOLDER UNDER THE GUISE OF A “STANDARD” LOAN RECEIPT AGREEMENT

As Cargill showed in its opening brief (at 23 – 29), neither the cooperation clause, subrogation clause, any other language in the Liberty Mutual policy or the duty of good faith require Cargill to enter into a loan receipt settlement agreement. All of these express and implied policy covenants serve to protect existing rights the parties possess, not to create such rights out of whole cloth or shift the bargained-for rights between the insurer and insured. This is particularly true when the agreement demanded by Liberty

⁷ The best the amicus has to offer is that insurance companies would somehow be unable to assess and price risks if they were unable to count on contribution from other (then unknown) insurers who might issue subsequent policies. (CICLA Brief at 6 – 17, 16 – 17). This is nonsense. An insurer issuing a policy in 1970 that contained a duty to defend cannot possibly be relying on the policyholder to purchase similar policies in the future to share in its defense obligations years later. The policyholder could purchase no more insurance or have purchased coverage from insurers who are now insolvent. In such cases, as here, the original insurer is asked to do nothing more than it agreed to do in 1970 – namely, provide a complete defense to its policyholder.

Mutual would erode Cargill's recovery of defense costs by exposing Cargill to retentions and deductibles, reinsurance obligations, and/or retroactive premiums under other policies in Cargill's program.

Liberty Mutual obtusely counters (in its brief at 49) that it "was, and is, a stranger to those arrangements, which were entered into years after the Liberty Mutual policies had expired." This merely confirms that Liberty Mutual has no legal or equitable claim against the issuers of those policies. Indeed, this is certainly why this Court, in *Jostens*, 387 N.W.2d at 167, and elsewhere, has recognized that there is nothing unjust in holding an insurer to its agreement to fully defend its policyholder. This obligation is precisely what it incurred when it collected a premium as a primary insurer with a duty to defend.

Moreover, when Liberty Mutual "promises" (in its brief at 11), that it will never seek repayment of defense costs from Cargill, or "recompense from Cargill's captive insurance company as reinsurer of any primary policy issued to Cargill," its "generosity" is disingenuous at best. The reality is that under the loan receipt agreement Liberty Mutual proposed, it (or another insurer) will attempt to collect from Cargill's "fronted" policies. These other insurers would ultimately attempt to require Cargill to pay deductibles, retrospective premiums or retentions. In essence, Cargill would be paying its defense costs right back to Liberty Mutual. This is patently contrary to the settled rule that "an insurer cannot maintain a subrogation claim against its own insured." *United States Fire Ins. Co. v. Ammala*, 334 N.W.2d 631, 634 (Minn. 1983); *see also, e.g., Bigos v. Kluender*, 611 N.W.2d 816, 822 (Minn. Ct. App. 2000) ("An insurance company cannot subrogate against its own insured under general principles of insurance

law.”)(citation omitted).⁸ It is likewise contrary to the allied rule that “subrogation . . . will be denied prior to full recovery” by the insured. *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983). Unless and until Cargill is made whole in full, Liberty Mutual cannot invoke equitable principles to obtain payments from other insurers in order to diminish the cost of complying with its own contractual duties. And Cargill has resisted Liberty Mutual’s proposal solely in order to protect itself from having its recovery impaired.

In its amicus brief (at 6), CICLA cites a handful of cases from other jurisdictions in which an insurer can under certain circumstances recover defense costs from another insurer. Of course, this is not the law in Minnesota. Moreover, CICLA fails to point out the corollary that, even in those states, *an insurer cannot seek contribution from its own policyholder* as Liberty Mutual is, essentially, attempting to accomplish in this case.⁹

If Liberty Mutual honestly meant to defend Cargill without exposing its policyholder to serious financial detriment, it would have included an appropriate

⁸ The anti-subrogation rule is a staple of insurance law nationwide. *See, e.g.*, 22 – 141 *Appleman on Insurance* § 141.2 (2009) and cases cited therein at notes 44 – 46.

⁹ For instance, in *Aerojet-General Corp. v. Transport Indemnity Co.*, 948 P.2d 909 (Cal. 1997), the insured had bought “fronting” policies for certain periods, in which it was effectively self-insured. Under California law, if the insured had had coverage during those periods, other defending insurers could have obtained contribution from such policies. The California Supreme Court rejected the defending insurers’ claim for contribution from the insured for the period of the “fronted” policies, because contribution “has no place between insurer and insured, which have contracted the one with the other.” *Id.* at 930. *See also Avondale Indus., Inc. v. Travelers Indem. Co.*, 774 F. Supp. 1416, 1428 (S.D.N.Y. 1991) (disallowing contribution where the insurer “might be able to recover from [the insured] sums representing the would-be defense cost contributions” of other insurers).

limitation or indemnification in its proposed loan receipt agreement. The fact that it did not is further proof that, contrary to what Liberty Mutual claims, there is no such thing as a “standard,” let alone “neutral” loan receipt agreement. The terms under which an insured will enter into a new agreement with its insurer depend on the structure of the entire coverage program, the claim at issue, the consideration offered by the insurer, and other factors, and will vary accordingly. Absent controlling language in the insurance policy (and there is none here), such terms cannot simply be forced on the insured. *See, e.g., Druar v. Ellerbe & Co.*, 222 Minn. 383, 396, 24 N.W.2d 820, 826 (Minn. 1946) (courts cannot “create a contract” for parties “where they intentionally omitted to make one for themselves”)(citation and internal quotation omitted), and other cases cited in Cargill’s opening brief, at 32 – 34.

Liberty Mutual cites no case identifying the terms of a “standard” or “neutral” loan receipt agreement because no such appellation is recognized in law or equity. The loan receipt agreement Liberty Mutual proposed to Cargill differs from Cargill’s counterproposal (to say nothing of the district court’s variant, Add. 45-46), as shown by a redline in the record that Cargill created to clarify the conditions it asked Liberty Mutual to accept before it would enter into a loan receipt agreement. (Appx. 237 – 40). Far from being “devoid of the elements of a standard loan receipt agreement,” as Liberty Mutual maintains (in its brief at 40), Cargill’s counterproposal was created simply by revising Liberty Mutual’s version, from which it differs mainly in that it protects Cargill from having its recovery eroded by demands from other carriers for alleged deductibles, retentions, reinsurance, or retrospective premiums. (Appx. 239). There is absolutely no

reason Cargill should not have such protection and no case cited by Liberty Mutual holds a “standard” loan receipt agreement is one that fails to afford such protection.

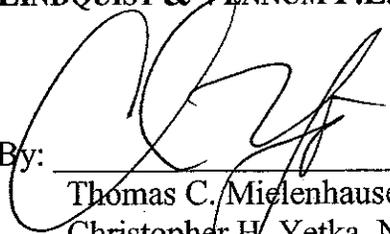
The issue in this case ultimately boils down to whether an insurer can unilaterally require its insured to enter into a loan receipt agreement on terms that prejudice its policyholder. If Liberty Mutual were not trying to force that outcome – which Minnesota courts have never recognized before the Opinion under review – Cargill would long since have entered into a loan receipt agreement. In keeping with its precedent, this Court can and should curtail Liberty Mutual’s effort to impose a one-sided loan receipt agreement that does not protect Cargill. Any other result would reward insurers for withholding a defense, contrary to settled law.

III. CONCLUSION

For all of the foregoing reasons, Cargill asks this Court to reverse the Opinion of the Court of Appeals, and direct the district court to grant partial summary judgment to Cargill declaring that Cargill is entitled to select Liberty Mutual to exclusively and fully defend Cargill in the Underlying Actions; that Liberty Mutual has no right of recovery from Cargill's other insurers absent a loan receipt agreement; that Cargill has no obligation to enter into a loan receipt agreement (in no event without language protecting Cargill's rights); and that with or without a loan receipt agreement, Cargill's insurers have no right to seek defense costs directly or indirectly from Cargill.

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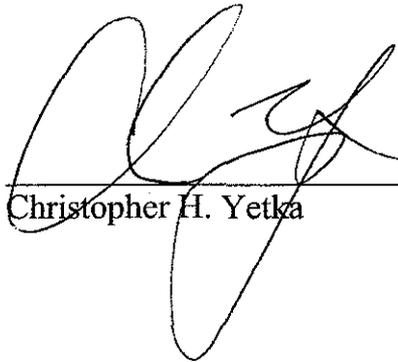
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CERTIFICATION

The undersigned hereby certifies that this brief conforms to the requirements contained in the Minnesota Rule of Civil Appellate Procedure 132.01 in that (a) the brief complies with the typeface requirements of said rule by being 13 point type on Microsoft Office Word 2003 Version 11.0, and (b) the length of this brief, not including the Cover Pages, Table of Contents or Table of Authorities, is 6,141 words, as automatically generated through the “word count” function of the software program used to prepare the brief.

Dated: October 30, 2009



A handwritten signature in black ink, appearing to read 'C. Yetka', is written over a horizontal line. The signature is stylized and cursive.

Christopher H. Yetka