

2011

# Cargill v. Ace American Ins. Co.: The Minnesota Supreme Court Reminds Us of the Value of Every 2-Year-Old's Favorite Question

Chad Snyder

Follow this and additional works at: <http://open.mitchellhamline.edu/lawandpractice>

 Part of the [Insurance Law Commons](#)

## Recommended Citation

Snyder, Chad (2011) "Cargill v. Ace American Ins. Co.: The Minnesota Supreme Court Reminds Us of the Value of Every 2-Year-Old's Favorite Question," *Journal of Law and Practice*: Vol. 4, Article 6.

Available at: <http://open.mitchellhamline.edu/lawandpractice/vol4/iss1/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Journal of Law and Practice by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

---

# Cargill v. Ace American Ins. Co.: The Minnesota Supreme Court Reminds Us of the Value of Every 2-Year-Old's Favorite Question

## **Keywords**

Insurance law, Liability insurance

## CARGILL V. ACE AMERICAN INS. CO.: THE MINNESOTA SUPREME COURT REMINDS US OF THE VALUE OF EVERY 2-YEAR-OLD'S FAVORITE QUESTION

**4 Wm. Mitchell J. L. & P. 6**

**Chad Snyder\***

### **WHY?**

That, I learned in one of the more productive hours of my law school experience, is the answer any lawyer should be ready to give in support of any legal argument.<sup>1</sup> And, as one of my fellow students learned the hard way in one of those hard-to-watch Socratic moments, “because another case says so” is not always or even often a good enough “why.” Common law, by its nature, evolves. So it is not enough to rest on the argument that a court should apply your proposed rule because it happens to be the rule that has been applied before. A lawyer making an argument or, though my professor did not say so, a judge issuing a decision, should be able to articulate a reason the legal rule she advocates should be adopted or maintained, and why it functions better than the alternative or alternatives.

While this idea in its broadest conception may not fuel much controversy, it does not always find its way into practice. Law schools often teach students to rely on the rules that have already been formed by centuries of work by their predecessors. It is natural, then, that when we leave law school we make many of our legal arguments by simply citing cases that articulated or reiterated the rule we hope favors our clients. Most of the time, this has little practical impact because those rules were crafted for reasons that were good at the time and remain good today. But there is a real risk that by not remaining conscious of the “why” behind the rules, we will slide into reliance on the idea that a rule should be applied because it is the rule that was quoted time and again by other courts in other disputes presenting different facts.

When this happens, a tension can develop between two approaches to the law. On the one hand is what this article refers to as “formalistic” law, the adherence to established law in a given case not because it is the better rule, but because it is the existing rule, a sort of jurisprudential version of “that’s the way we’ve always done it.” On the other is “pragmatic” law, the crafting of new legal rules because established law

---

\* Chad Snyder is a partner at Snyder Gislason Frasier L.L.C., a firm representing individuals, businesses, and artists. Prior to forming this firm, he was a solo practitioner for a few years, and before that he was an attorney with Zelle Hofmann Voelbel & Mason, L.L.P in Minneapolis. His practice has focused on litigation, including a significant practice in insurance coverage representing both insurance companies and insureds in cases ranging from a homeowner’s claim for a few thousand dollars in hail damage to multi-million dollar disputes over damaged products or destroyed commercial buildings. Chad graduated from the University of Iowa College of Law in 1998 with highest distinction.

<sup>1</sup> It is, I think, purely happenstance that the professor was teaching a course on insurance law and that this article is inspired by a decision in an insurance dispute. Though insurance jurisprudence is infused with public policy concerns, I’m reasonably certain my professor did not intend to limit his advice to insurance litigation.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

no longer serves the purpose it was designed for and maybe never did. There is some risk that through the course of this article, the formalistic approach will come off poorly. That is largely because in the case of the legal rule at issue in the Minnesota Supreme Court decision that prompted me to write this article (or, more precisely, prompted someone to ask me to write this article), *Cargill, Inc. v. Ace American Insurance Co.*,<sup>2</sup> I believe the formalistic rule the court overturned is inferior to the more practical approach it adopted.<sup>3</sup> Do not assume such is always the case. Common law is, after all, a body of jurisprudence that is largely the product of evolving pragmatism. Today's formalistic rules were crafted out of a need for pragmatic solutions to yesterday's legal quandaries, and should not be tossed aside or even significantly modified on a whim. Being open to pragmatism should not be mistaken for advocating legal rule-making on a case-by-case, results-oriented basis. New is not always better. One answer to "why" that threads its way through virtually every area of law is that citizens, businesses and governments should have a shared sense of the rules. Precedent and stare decisis may even be a presumed answer to "why" because of the value of "stability in the law."<sup>4</sup>

But that does not mean the established rules should be followed simply because they are established. It is an old maxim that "[n]o rule of the common law could survive the reason on which it was founded,"<sup>5</sup> and so even established rules, at least every now and then, should be checked to make sure their "why" is still valid.

Because, as the decision in *Cargill* demonstrates, sometimes it isn't.

Even then, a lawyer or court should be able to articulate why the benefit of changing or replacing the rule outweighs the disruption that results from overturning precedent. The *Cargill* decision is a good example of a case providing that explanation. It is not the only case to do so; common law tradition is marked by these evolutions, yielding rules that are "continually changing and expanding with the progress of society."<sup>6</sup> But this particular decision brought my law professor's words to mind because courts are divided over the issue the *Cargill* court resolved (contribution rights among liability insurers), and that division rests on a tension between a pragmatic and a formalistic approach to the question presented.

This article, therefore, will not focus entirely on the *Cargill* decision itself. The decision is relatively short, worth reading, and should be an easy read even for those who do not practice in the area of insurance law. While some discussion of the decision is needed for context, much of this article will look at the

---

<sup>2</sup> 784 N.W.2d 341 (Minn. 2010).

<sup>3</sup> I should also disclose at this point that I was local counsel for amicus curiae Complex Insurance Claims Litigation Association in the briefing submitted to the Supreme Court, which argued against application of the formalistic rule to the facts of the *Cargill* case. Though the vast majority of the work on that brief was performed by attorneys at Wiley Rein, I certainly shared the view that the rule existing at the time (which will be discussed below) should not have been applied to the dispute between *Cargill* and its insurers.

<sup>4</sup> See *Cargill*, 784 N.W.2d at 352.

<sup>5</sup> *Funk v. United States*, 290 U.S. 371, 384 (1933) (quoting *Ketelsen v. Stilz*, 184 Ind. 702, 708, 111 N.E. 423, 425 (1916)).

<sup>6</sup> *Ketelsen v. Stilz*, 184 Ind. 702, 708, 111 N.E. 423, 425 (1916).

broader tension between the analysis of those courts that permit contribution<sup>7</sup> among insurers and those that do not as a way of providing a concrete example of the value of the lesson I absorbed years ago in a law school classroom.

### THE *CARGILL* LITIGATION

The *Cargill* case has its origins in Oklahoma and Arkansas.<sup>8</sup> In 2005, Oklahoma sued Cargill under the Comprehensive Environmental Response, Compensation and Liability Act (generally known as CERCLA) and the Solid Waste Disposal Act.<sup>9</sup> The state sought recovery for damage to land and water in the Illinois River Watershed that it alleged was caused by Cargill's disposal of poultry waste.<sup>10</sup> In a series of suits in Arkansas, Cargill also faced personal injury and wrongful death claims also arising out of the company's waste disposal practices.<sup>11</sup>

Cargill notified the insurance companies that had provided it with comprehensive general liability (CGL) coverage between 1956 and 2006, a total of about 50 carriers. None of those carriers were willing to provide a defense to Cargill in the Oklahoma and Arkansas litigation without contribution from the other insurers, or at least a right to seek such contribution. Liberty Mutual had agreed to pay its share of the defense costs, but Cargill rejected that offer. Instead, it filed suit in February 2007, asking the court to declare that each of the insurers had a "duty to provide a complete and undivided defense."<sup>12</sup> What Cargill sought was the right to pick one insurance company from the 50 that had provided coverage over the previous half-century and require it to pay for all the costs incurred in defending the Arkansas and Oklahoma lawsuits. As of February 2007, that sum was \$5.4 million, according to Cargill.<sup>13</sup> Cargill selected Liberty Mutual as its unwilling champion.<sup>14</sup>

A brief discussion of some basics of insurance law will be helpful here. The fight between Cargill, Liberty Mutual and the other insurers focuses on one of the two contractual duties imposed by a CGL policy – the duty to defend. Under long-established law, "[t]he duty to defend is distinct from and broader than the duty to indemnify."<sup>15</sup> As general rule, an insurer's duty to defend is "determined by comparing the "complaint"

---

<sup>7</sup> The term "contribution" is used somewhat loosely and should not be construed as enveloping the body of law governing the doctrine of contribution. This is in large part because, as is noted below, courts have tended to use the term flexibly and interchangeably with "subrogation" to explain the basis for the right of one liability insurer to seek a share of defense costs from another. It is also in part because using the phrase "the right of one liability insurer to seek a share of defense costs from another" time and time again would be cumbersome for both writer and reader.

<sup>8</sup> See *Cargill*, 784 N.W.2d at 343.

<sup>9</sup> See *id.* at 344.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at 344.

<sup>13</sup> *Id.* at 344 n.3.

<sup>14</sup> See *Cargill*, 784 N.W.2d at 344.

<sup>15</sup> SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 316 (Minn. 1995).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

with the terms of the policy language.”<sup>16</sup> Once “the insured comes forward with facts showing arguable coverage, or the insurer becomes independently aware of such facts, the insurer must either defend or further investigate the potential claim,”<sup>17</sup> and “[t]he burden is on the insurer to prove that it has no duty to defend.”<sup>18</sup> The reasoning behind this rule is that the insured’s right to a defense in an underlying suit should not be put in limbo while the insured and its insurer fight out the question of coverage. Not all insureds have Cargill’s ability to fund their own defense.

While Liberty Mutual and the other insurers have not conceded there is coverage for the claims against Cargill, they did recognize a duty to provide a defense.<sup>19</sup> The question was how that duty would be honored. In May 2007, several of the companies offered to pay the costs of defense in the Oklahoma and Arkansas suits if Cargill executed a loan receipt agreement.<sup>20</sup> Cargill refused.<sup>21</sup> Five months later, Liberty Mutual went so far as to send Cargill a check in partial payment of defense costs, again conditioning the payment on Cargill’s signing a loan receipt.<sup>22</sup> Cargill again refused, returning the check.<sup>23</sup>

### LOAN RECEIPTS: A USEFUL FICTION

Those loan receipts are at the heart of the *Cargill* litigation. The use of loan receipts can be traced to admiralty. In *Lukenbach v. W.J. McCahan Sugar Refining Co.*,<sup>24</sup> the Supreme Court explained that under such an agreement shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.<sup>25</sup>

Though the defendant in *Lukenbach* asked the Court to disregard the loan receipt as a “fiction and subterfuge,” the Court found the arrangement to be an entirely acceptable solution to the problem of how an insured shipper could be promptly paid for a loss while preserving the right of the insurer to pursue

---

<sup>16</sup> *Id.* (citing *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 256 (Minn. 1993)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (citing *Lanoue v. Fireman's Fund Am. Ins. Cos.*, 278 N.W.2d 49, 52 (Minn. 1979)).

<sup>19</sup> *See Cargill*, 784 N.W.2d at 345.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> 248 U.S. 139 (1918).

<sup>25</sup> *Id.* at 147-48.

recovery against the party potentially at fault for the loss.<sup>26</sup> “It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.”<sup>27</sup>

In modern use, particularly in Minnesota,<sup>28</sup> “[u]nder a loan receipt agreement, an insurer makes a loan to the insured for defense costs, which the insured agrees to repay from amounts recovered from another insurer.”<sup>29</sup> These “loans” were largely a fiction with it being generally understood that the insurers owed the duty to defend, which is why the “loans” were only to be repaid to the extent of a recovery from other insurers, but a fiction made necessary by the need to find a practical solution to the Minnesota Supreme Court’s formalistic decision in *Iowa National Mutual Insurance Co. v. Universal Underwriters Insurance Co.*<sup>30</sup>

## THE IOWA DECISION

*Iowa National* started with a car accident.<sup>31</sup> H.H. Kneeland, insured by Iowa National, was driving a car owned by Mitchell Boyer, Inc., which was insured by Universal Underwriters.<sup>32</sup> Kneeland was sued, and Iowa National paid for his defense and sought a share of the defense costs from Universal.<sup>33</sup> According to the Supreme Court decision, Iowa National’s complaint was styled in terms of breach of contract, but its arguments and the trial court’s decision awarding Iowa National a judgment of \$3,703.83 were based in equitable principles of indemnity, contribution or subrogation, “growing out of a circumstance by which Universal is said to have been unjustly enriched by reason of the expenses incurred by Iowa National.”<sup>34</sup>

The trial court may have been persuaded by Iowa National’s appeal to equitable principles, but the Minnesota Supreme Court was not. It reversed Iowa National’s judgment, basing its decision in bright-line principles of contract law, essentially holding that in the absence of a contract between itself and Universal, Iowa National had no grounds to seek a recovery.<sup>35</sup> Universal may well have breached its own duty to defend Kneeland, but, the court observed, “no contractual obligation existed to make one insurer accountable to the other for a breach of its independent obligation to the insured,” and “[t]he obligation of

---

<sup>26</sup> *See id.* at 148-49.

<sup>27</sup> *Id.*

<sup>28</sup> Research found them discussed in other jurisdictions, but not with the same frequency as Minnesota.

<sup>29</sup> *Cargill*, 748 N.W.2d at 345 n.5.

<sup>30</sup> 150 N.W.2d 233 (Minn. 1967).

<sup>31</sup> *See id.* at 235.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See Iowa Nat’l*, 150 N.W.2d at 236.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

defending an insured and paying for the defense is a separate obligation existing exclusively between the insurer and the insured.”<sup>36</sup>

The court was utterly unpersuaded by, and even dismissive of, the argument that Iowa National was entitled to recovery based on an equitable doctrine such as contribution or subrogation.<sup>37</sup> The court stated:

We dispose of the contention that recovery may be supported on the basis of contribution by observing that the two companies have no joint liability or common obligation. Both were obligated to defend under separate contractual undertakings which would not support a common obligation for the purpose of invoking the principle of contribution.<sup>38</sup>

Subrogation was likewise rejected “since each of the companies had a separate and distinct obligation to defend. The equities between them are at best equal.”<sup>39</sup> The court’s adherence to formal rules of privity found some practical support in the nature of the underlying loss. As it observed, the “charges upon which Iowa National’s judgment is based grow out of expenses any automobile liability insurer would be expected to incur.”<sup>40</sup> The company, in exchange for a premium, had agreed to pay the cost of defending its insured in any lawsuit arising from an auto accident.<sup>41</sup> It was not being asked or compelled to do any more than it had contracted to do. The fact that another company had entered the same contract really had no bearing on the agreement between Iowa National and its customer. The defense costs the insurer paid “are Iowa National’s expense of doing business.”<sup>42</sup>

The *Iowa National* reasoning was subsequently applied twice by the Minnesota Supreme Court. In *St. Paul School District v. Columbia Transit Corp.*,<sup>43</sup> the underlying loss again arose from an auto accident involving a school bus. The court again reversed a trial court’s order awarding the insurer that paid for defense costs contribution from the insurer that refused a defense. The decision relied on *Iowa National*, again asserting that the defense costs were the insurer’s “expenses of doing business.”<sup>44</sup> Less than a year later, in *Nordby v. Atlantic Mutual Insurance Co.*,<sup>45</sup> in yet another auto accident case, the court reached the same conclusion for the same reasons: “An insurer has no right of action against another insurer to recover the cost of

---

<sup>36</sup> *Id.*

<sup>37</sup> *See id.* at 237.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See Iowa Nat’l*, 150 N.W.2d at 237.

<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

<sup>43</sup> 321 N.W.2d 41 (Minn. 1982).

<sup>44</sup> *Id.* at 48.

<sup>45</sup> 329 N.W.2d 820 (Minn. 1983).

defending the insured, since there is no contractual obligation between insurers.<sup>46</sup> Nordby's presence as a plaintiff did not alter the court's analysis because, having had his defense costs paid by one insurer, he suffered no actual loss that would give rise to a claim against the non-defending insurer.<sup>47</sup>

### **PRACTICAL PROBLEMS BEGIN TO CHIP AWAY AT *IOWA NATIONAL***

The first chink in the *Iowa National* rule appeared in the Supreme Court's decision in *Jostens, Inc. v. Mission Insurance Co.*<sup>48</sup> Factually, *Jostens* offered a potentially significant difference from *Iowa National*, *St. Paul School District* and *Nordby*: *Jostens*, the insured, did pay its own way in defending the underlying lawsuit and employment action.<sup>49</sup> *Jostens* then sued two of its insurers, *Wausau* and *Mission*.<sup>50</sup> While summary judgment motions were pending, *Wausau* entered a loan receipt agreement with *Jostens*, and the case against *Wausau* was dismissed.<sup>51</sup> *Jostens* agreed to maintain its action against *Mission* and to repay the *Wausau* "loan" from any recovery it received against *Mission*.<sup>52</sup> The Minnesota Supreme Court upheld the arrangement, affirming the trial court's judgment in favor of *Jostens* and ultimately *Wausau*.<sup>53</sup> It distinguished the case from *Nordby* because *Jostens*, unlike the insured in *Nordby*, had actually incurred defense costs in the underlying suit before being fully compensated by *Wausau*.<sup>54</sup> This frankly seems a bit of a distinction without a difference. In both *Nordby* and *Jostens*, the court considered a case in which the insured had been made whole by one of its insurers. Indeed, the court seemed to acknowledge this in *Jostens*, stating that "the dispute is primarily between the two insurers."<sup>55</sup> Its reasoning, however, disregarded that reality, and the court chose "to analyze the coverage issues between the insurers with *Jostens* as the real party plaintiff."<sup>56</sup>

However, the court's ultimate decision did seem to deviate from *Iowa National*. *Wausau* (through *Jostens*) sought full indemnity for the defense costs. Under the reasoning of *Iowa National*, this should have been available as a remedy. *Jostens*, as the nominal "real party plaintiff," had a right to demand full defense cost

---

<sup>46</sup> *Id.* at 824.

<sup>47</sup> *See id.*

<sup>48</sup> 387 N.W.2d 161 (Minn. 1986).

<sup>49</sup> *See id.* at 162.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 163.

<sup>53</sup> *See Jostens*, 387 N.W.2d at 168.

<sup>54</sup> *Id.* at 165 (citing *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 556-57 (Minn. 1977) (the loan receipt agreement permits the insured, "albeit fictitiously," to remain the real party in interest)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

coverage from either insurer independently. According to *Iowa National*, neither insurer had any recourse against the other; thus, Jostens should have been permitted to recover the entirety of its claim from Mission, and then pay all of that to Wausau under the terms of the loan receipt. Nevertheless, the court rejected the demand for full indemnity, holding instead that though an insured may recover its defense costs from either insurer or both, “the insurers, as between them, shall be equally liable for the insured’s defense costs.”<sup>57</sup> The court reasoned that:

it hardly seems fair Mission should now be responsible for the entire costs simply because Jostens has selected Mission rather than Wausau to pay them. Who 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.<sup>58</sup>

The Supreme Court reaffirmed this approach nearly two decades later in *Home Insurance Co. v. National Union Fire Insurance of Pittsburgh*.<sup>59</sup> In *Home Insurance*, as in *Jostens*, the insured and one of its insurers entered a loan receipt agreement after coverage litigation had been commenced.<sup>60</sup> The remaining insurers challenged the standing of Home Insurance to pursue a claim for defense costs.<sup>61</sup> Though reasserting the “general rule” that “one insurer cannot pursue reimbursement from another insurer for defense costs incurred in defending a mutual insured,”<sup>62</sup> the court also noted that “we recognize an exception to this general rule when a loan receipt agreement is in place.”<sup>63</sup>

So over time, the impact of the *Iowa National* rule was mitigated by the availability of loan receipts. By entering such an agreement, an insurer could meet its contractual obligation to provide a defense to its insured and preserve the ability to offset that cost by pursuing a claim against any more recalcitrant co-insurers. For most insureds, a loan receipt agreement is not a big deal. The insured gets the defense cost coverage it is entitled to, and leaves to the insurers the question of who should be ultimately responsible for how much of it. Most of the litigation over allocation of defense costs, in fact, is between insurers; the insureds are only nominally parties. Despite what the court said in *Jostens*, the real parties in interest are the insurers. An insured seldom has any incentive to take a side in the fight. *Cargill* broke that mold.

---

<sup>57</sup> *Id.* at 167.

<sup>58</sup> 387 N.W.2d at 167.

<sup>59</sup> 658 N.W.2d 522 (Minn. 2003). *Cargill* (through three of its subsidiary companies) was also the insured in *Home Insurance*.

<sup>60</sup> *See id.* at 526.

<sup>61</sup> *See id.* at 527.

<sup>62</sup> *Id.* (citing *Iowa Nat'l*, 150 N.W.2d at 237).

<sup>63</sup> *Id.* (citing *Jostens*, 387 N.W.2d at 167).

**CARGILL'S INSURANCE PROGRAM MADE LOAN RECEIPTS POTENTIALLY COSTLY**

The *Cargill* case came about because of the way Cargill structured its insurance coverage, and the company's concern that it might find itself liable for a share of the defense costs in Oklahoma and Arkansas. As Cargill stated in its brief to the court of appeals, it refused to sign a loan receipt because many of the policies containing a duty to defend were "fronted" policies, and it believed that those policies "are subject to deductibles, retentions, retrospective premiums, or are reinsured by a Cargill subsidiary that charges Cargill retrospective premiums."<sup>64</sup> As a practical matter, what that means is that Cargill could ultimately bear the cost of defense under those policies. The precise nature of the Cargill fronting arrangement has not been set forth in the *Cargill* decisions,<sup>65</sup> but as the Supreme Court noted, fronting, "in general, is a situation where 'an insurer, for a fee, issues a policy with the intent of passing most or all of the risk back to the policyholder, or to an unlicensed reinsurer or captive insurer.'"<sup>66</sup>

What matters for our purposes is that because Cargill did not want to pay a share of its defense costs, the Minnesota Supreme Court was confronted with the question of whether *Iowa National*, with the exceptions that had been carved out over the intervening decades, still made sense, or if it ever did. The *Cargill* decision would probably never have come about had Cargill not employed a fronting strategy for its insurance program. The loan receipt mechanism may have been built upon a legal fiction, but insurers had adjusted to it and most insureds had no reason to care enough to rock the boat. Cargill, though, sought for insureds the power to control the loan receipt arrangement in a way that would have greatly diluted its value for insurance companies.

There is an oft-repeated maxim that bad facts make bad law.<sup>67</sup> For a lawyer standing within the confines of a given case, there may be an addendum to that maxim: Somebody else's facts are bad facts. That is often the case in the law of insurance coverage. There is a practical difference between the coverage afforded sophisticated insureds like Cargill and that granted to small businesses or the auto and home coverage purchased by individuals and families.<sup>68</sup> But because so many more policies are issued to individuals, families and small businesses, and because there is a public policy concern about the power imbalance between those insureds and the large companies issuing the insurance policies, much of insurance law arises

---

<sup>64</sup> Brief of Appellant at n.5, *Cargill, Inc. v. Ace American Ins. Co.*, 766 N.W.2d 58 (Minn. Ct. App. 2009) (No. A08-1082).

<sup>65</sup> At this point, in fact, there does not appear to have been a determination that Cargill would ultimately bear any share of defense costs under the fronting policies. Liberty Mutual argued that Cargill's liability under the policies remained a question of fact. While that may ultimately mean that Cargill started this fight for nothing, it was probably a good litigation strategy. The company's first line of argument was that it had the right to make the insurer of its choice pay all of the defense costs. Having lost that argument, it may still be able to argue that under the terms and conditions of the fronting policies, it is not liable for any share of the allocated defense costs. It was – and continues to be – a costly strategy in terms of litigation expense, but with millions of dollars at stake that is potentially a worthwhile expense.

<sup>66</sup> *Cargill*, 784 N.W.2d at 345 n.6 (quoting John F. O'Connor, *Insurance Coverage Settlements and the Rights of Excess Insurers*, 62 Md. L. Rev. 30, 47 n.86 (2003)). There are varied motives for entering these fronting arrangements, but that particular issue is beyond the scope of this article.

<sup>67</sup> A Westlaw search for "bad facts make bad law" in the ALLCASES database on February 24, 2011 yields 81 cases in which the court has employed this maxim.

<sup>68</sup> See *Home Ins. Co.*, 658 N.W.2d at 533.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

from factual scenarios that have little relevance to a dispute like that between Cargill and Liberty Mutual.<sup>69</sup> Sometimes that leads to the creation of a legal rule that made pretty good sense when applied to coverage for a single loss, but is more difficult to justify for a catastrophic loss encompassing millions of dollars and potentially years of accumulated damage. That distinction, in a practical sense, is what the Minnesota Supreme Court found itself contemplating when Cargill petitioned for review. In a jurisprudential sense, the distinction could be described as part of the ongoing tension between formalistic and pragmatic rule-making.

The *Iowa National* decision was a largely formalistic decision. It was a clean application of established rules of contract law. The court reasoned that the right to defense cost coverage was “a contractual right of the insured irrespective of other insurance” and that a “controversy between the two insurance carriers who have no contractual relationship to each other cannot operate to alter the obligation that each owes unto the insured, with whom they each have a contract.”<sup>70</sup> And, frankly, the court was right, formally at least. Iowa National sought a right based upon contribution, but contribution arises from a “joint liability or common obligation,” which these two insurers did not share.<sup>71</sup> Rather, “[b]oth were obligated to defend under separate contractual undertakings.”<sup>72</sup> In the context of the case’s facts, a single auto accident potentially insured by two companies,<sup>73</sup> adherence to this black-letter law appeared reasonable. There was no apparent inequity in the decision; the court was correct when it observed that Iowa National was being held to no more than what it had agreed to do when it accepted premium payments and issued its policy.<sup>74</sup> That remained true of the subsequent cases applying the *Iowa National* rule.<sup>75</sup> Both *St. Paul Schools*<sup>76</sup> and *Nordby*<sup>77</sup> involved auto accidents, and even *Jostens*<sup>78</sup> and *Home Insurance Co.*<sup>79</sup> in which the Court reaffirmed *Iowa National* even as it carved out the loan receipt exception arose from discrete losses (an employment dispute in *Jostens*<sup>80</sup> and a patent claim in *Home Insurance Co.*)<sup>81</sup>

---

<sup>69</sup> *See id.*

<sup>70</sup> *Iowa Nat’l*, 150 N.W.2d at 237 (quoting *St. Paul Mercury Ins. Co. v. Huitt*, 336 F.2d 37 (6th Cir. 1964)).

<sup>71</sup> *See id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* at 238.

<sup>75</sup> *See Home Ins. Co.*, 658 N.W.2d 522 (Minn. 2003); *Jostens*, 387 N.W.2d 161 (Minn. 1986); *Norby*, 329 N.W.2d 820 (Minn. 1983); *St. Paul Sch.*, 321 N.W.2d 41 (Minn. 1982).

<sup>76</sup> 321 N.W.2d at 43.

<sup>77</sup> 329 N.W.2d at 821.

<sup>78</sup> 387 N.W.2d at 167.

<sup>79</sup> 658 N.W.2d at 527.

<sup>80</sup> 387 N.W.2d at 162.

<sup>81</sup> 658 N.W.2d at 524.

## CARGILL'S LOSS COMPLICATED THE SITUATION

Cargill's case presented a much more complex scenario.<sup>82</sup> There was not a discrete occurrence prompting the underlying claim.<sup>83</sup> There were potentially tens of millions of dollars in losses caused by conduct that spanned decades, over the course of which dozens of insurers issued policies that might offer coverage.<sup>84</sup> When Cargill commenced its action against Liberty Mutual and its other insurers, the law in Minnesota was that:

absent a loan receipt agreement, an insurer that undertakes the defense of its insured may not seek recovery of defense costs from the insured's other insurers who also owed a duty to defend but failed to provide a defense.<sup>85</sup>

Under this rule, Cargill had a good argument. There was no loan receipt agreement, and there could be none without Cargill's consent<sup>86</sup> so any of its insurers that provided a defense would have no right of contribution, subrogation or recovery of any kind against any other insurer for defense costs.<sup>87</sup> The result of strict application of that rule to these facts, however, was obviously unpalatable. An insurer that provided coverage and received premiums for only a few years could end up footing the bill for the defense of claims involving decades of alleged misconduct.<sup>88</sup>

Formally, there was no difference between the circumstances in *Iowa National* and those in *Cargill*. In both cases, each insurer had an independent duty to defend.<sup>89</sup> Neither case involved a contractual relationship between the insurers that would give rise to some sort of direct claim for contribution.<sup>90</sup> The court itself noted this, recognizing that in *Iowa National* it had "rejected, on every theory possible, the contention that an insurer has a right to recovery of defense costs" from another insurer, and concluding that it "is accurate to say that under *Iowa National*, Liberty Mutual does not currently possess a right to have defense costs shared among insurers."<sup>91</sup>

Pragmatically, however, the difference was significant. The shallow analysis in *Iowa National* was enabled

---

<sup>82</sup> See *Cargill*, 784 N.W.2d at 344.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006).

<sup>86</sup> See *Cargill*, 784 N.W.2d at 345.

<sup>87</sup> See *Wooddale Builders, Inc.*, 722 N.W.2d at 302.

<sup>88</sup> See *Cargill*, 784 N.W.2d at 353-54.

<sup>89</sup> See *id.* at 358; *Iowa Nat'l*, 276 N.W.2d at 368.

<sup>90</sup> 784 N.W.2d at 353; 276 N.W.2d at 367.

<sup>91</sup> 784 N.W.2d at 349.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

by the discrete nature of the loss. The decision could reasonably be rested, in part, on the idea that the paying insurer was doing no more than paying what it had agreed to pay when it issued the auto policy and collected its premium.<sup>92</sup> But if *Iowa National* were applied to the Cargill claim, the court observed, “we cannot say that any insurer that undertakes to defend Cargill in any of these lawsuits would be ‘answering for only his own just and proper share’ of the defense.”<sup>93</sup> In its policy, Liberty Mutual had agreed to provide Cargill with a defense only where there was an occurrence which resulted “during the policy period, in bodily injury or property damage.”<sup>94</sup> Confronted with its application to these facts, the Court concluded, “[T]he *Iowa National* rule is contrary to principles of equity.”<sup>95</sup> It is interesting that this decision was driven, at least in part, by concerns for fairness, not only to the insureds, the usual guiding principle in insurance law, but also to the insurers.<sup>96</sup> In *Jostens*, the Court had observed that a determination of which insurance company would bear the cost of the insured’s defense “should not depend on the whim or caprice of the insured.”<sup>97</sup> In *Cargill*, the Court reasserted its concern “with fairness to the insurers and the insured” in seeking “a rule that encouraged insurers to fulfill their respective duties to defend.”<sup>98</sup>

**MOST COURTS HAVE FOUND PRACTICAL APPROACHES TO COMPLICATED INSURANCE LOSSES**

It seems likely that this concern for fairness to insurers was guided by the same interrelated pragmatic principles that underlie the decisions of the majority of courts in other jurisdictions that have recognized a contribution or subrogation right among insurers. Confronted with the question of why insurers should be permitted to recover defense costs from non-participating co-insurers, despite clear rules of contract law to the contrary, these courts have landed upon two overlapping answers: a) to promptly afford an insured the defense it is entitled to under its policies, and b) to not incentivize insurers to find a reason to deny or delay coverage.

In one of the earliest decisions finding that a liability insurer who honors its duty to defend should be able to require other insurers “to share in the costs of the insured’s defense,” the California Supreme Court

---

<sup>92</sup> See generally *Iowa Nat’l*, 276 N.W.2d at 362.

<sup>93</sup> *Id.* at 351.

<sup>94</sup> *Id.* (emphasis in decision).

<sup>95</sup> *Id.* at 352.

<sup>96</sup> *Id.* at 351.

<sup>97</sup> 387 N.W.2d at 167.

<sup>98</sup> 784 N.W.2d at 351. In *Cargill*, application of the newly adopted rule does create some likelihood that the insured itself will bear some of the defense costs. Though the Supreme Court did not address this issue directly, it may have shared the view of the trial court that “Cargill, a sophisticated business entity, has created this insurance structure, and it seems inequitable that they should now be permitted to avoid cooperating with Liberty Mutual (the insurer who[m] they have self-chosen to defend their liability claims) because of their concern that the insurance structure that they have created may have some adverse consequences to go along with the benefits they have received.” *Id.* at 346 (quoting the trial court opinion).

acknowledged the competing views on the right of one insurer to seek contribution from another.<sup>99</sup> The court rejected as practically unrealistic the view that such contribution is impermissible.<sup>100</sup> First, it addressed one of the more formalistic reasons given for denying the contribution right – the idea that the duty to defend is personal to each insurer.<sup>101</sup> Though such a characterization is consistent with the language of the policies, the court took the more realistic view “that any services contemplated by the agreement to defend are not personal in the sense that the services of any specifically named individual would be personal. Rather, such services necessarily contemplate the employment by the company of competent licensed attorneys.”<sup>102</sup> In other words, the duty to defend is, in a practical sense, no more personal than writing a check.<sup>103</sup>

The California court took a similarly pragmatic approach in analyzing the merits of whether to allow contribution among insurers, concluding that permitting contribution would best serve the purposes of liability insurance:

Under general principles of equitable subrogation, as well as pursuant to the rule of prime importance – that the policy is to be liberally construed to provide coverage to the insured – it is our view that all obligated carriers who have refused to defend should be required to share in costs of the insured's defense, whether such costs were originally paid by the insured himself or by fewer than all of the carriers. A contrary result would simply provide a premium or offer a possible windfall for the insurer who refuses to defend, and thus, by leaving the insured to his own resources, enjoys a chance that the costs of defense will be provided by some other insurer at no expense to the company which declines to carry out its contractual commitments.<sup>104</sup>

As the court observed, the fact that “each insurer independently owes” its insured a duty to defend “constitute[s] no excuse for any insurer’s failure to perform.”<sup>105</sup>

This concern that insurers not be rewarded for delaying or denying a defense appears in many of the decisions granting insurers a right of contribution. The Alaska Supreme Court worried that a rule not permitting contribution or subrogation “would make it attractive for insurance companies to disavow responsibilities, and to find reasons, in the inevitable ambiguity of the fine print of their policies, to deny coverage to the insured,” and reasoned that a “breach of the obligation to defend should not be encouraged

---

<sup>99</sup> *Continental Cas. Co. v. Zurich Ins. Co.*, 366 P.2d 455, 461 (Cal. 1961).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Continental*, 366 P.2d at 461.

<sup>103</sup> The Alaska Supreme Court took a similar view of the “personal service” argument. “We do not think the matter should turn upon the fiction that the insurance policy is a contract for the rendition of personal services in the usual sense.” *Marwell Constr., Inc. v. Underwriters at Lloyd’s, London*, 465 P.2d 298, 313 (Alaska 1970).

<sup>104</sup> *Continental*, 366 P.2d at 461.

<sup>105</sup> *Id.* at 461.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

by a rule under which there is everything to gain and nothing to lose.”<sup>106</sup> The Arizona Supreme Court expressed the same concern in *National Indemnity Co. v. St. Paul Insurance Companies*,<sup>107</sup> concluding that:

[w]hen an insurer has a duty to defend the insured, there should be no reward to the insurer for breaching that duty. A breach of the obligation to defend should not be encouraged, but the rule which allows an insurer to avoid the costs of defense tends to encourage an avoidance of the insurer's responsibilities.<sup>108</sup>

Colorado's high court likewise held that the effect of a rule denying a participating insurer a right of recovery against a non-participating insurer “would be to reward an insurer for refusing to honor its contractual obligations by failing to defend a lawsuit brought against the insured that falls within the terms of the policy.”<sup>109</sup>

In *Sharon Steel Corp. v. Aetna Cas. & Surety Co.*, the Utah Supreme Court considered a case not dissimilar to *Cargill*. The underlying claim was for environmental damage that spanned multiple coverage periods, and the court was concerned about giving insurers a perverse incentive by denying a contribution or subrogation right.<sup>110</sup> The court noted that “the trend in other jurisdictions has been to allow an insurer, under the doctrines of contribution or equitable subrogation, to recover costs of defense from other insurers who were equally obligated to defend yet failed to do so.”<sup>111</sup> It adopted the same rule, holding that “[w]here it can be shown that a co-insurer failed to defend or failed to pay its share of the defense expenses, that insurer should not be rewarded and payment excused when another co-insurer has taken upon itself the provision of that defense.”<sup>112</sup> The court was concerned with how a contrary rule might ultimately affect insureds. “Holding otherwise would not only lead to an inequitable result but may also conflict with our stated policy of encouraging prompt payments to the insured, leaving disputes concerning coverage to be determined later.”<sup>113</sup> This concern that allowing insurers who delay or deny a defense to their insureds to avoid any liability for that defense could well have the effect of delaying or denying the insured any defense runs through most decisions allowing subrogation or contribution among insurers. California was express about it, noting that “the rule of prime importance” is that a policy should be “liberally construed to provide coverage to the insured.”<sup>114</sup> Alaska's court expressed a similar concern that a rule denying a right of contribution among insurers would be “contrary to the important principle that the policy should be

---

<sup>106</sup> *Marwell*, 465 P.2d 298 at 313.

<sup>107</sup> 724 P.2d 544, 545 (Ariz. 1985).

<sup>108</sup> *Nat'l Indemnity Co. v. St. Paul Ins. Co.*, 724 P.2d 544, 545 (Ariz. 1985).

<sup>109</sup> *Nat'l Cas. Co. v. Great Sw. Fire Ins. Co.*, 833 P.2d 741, 748 (Colo. 1992).

<sup>110</sup> 931 P.2d 127, 139 (Utah 1997).

<sup>111</sup> *Id.* at 137.

<sup>112</sup> *Id.* at 138.

<sup>113</sup> *Id.*

<sup>114</sup> *Continental*, 366 P.2d at 461.

construed liberally to provide coverage to the insured.”<sup>115</sup>

The Minnesota Supreme Court had expressed similar concerns even before the *Cargill* decision. In *Jostens*, the court was very pragmatic in identifying the issues that needed to be addressed, noting that “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 [it]self.”<sup>116</sup> This was particularly important because, realistically, not all insureds have the ability, as did Cargill and Jostens, to “pay their own way initially.”<sup>117</sup> Any rule, therefore, should “encourage two insurers, when tendered a defense, to resolve promptly the duty to defend issue either by some cooperative arrangement between them, or by a declaratory judgment action, or by some other means.”<sup>118</sup> The Court did not seem to see the conflict between this sound reasoning and the *Iowa National* rule, which it reaffirmed in *Jostens*.<sup>119</sup> This may have been because the facts of *Jostens* simply did not require it to directly confront the implications of *Iowa National*.

In *Cargill*, though, those implications were front and center, and the Court had no difficulty seeing that its reasoning in *Jostens* did not fit with its decision in *Iowa National*:

The *Iowa National* rule does little to encourage insurers to “resolve promptly the duty to defend issue.” *Jostens*, 387 N.W.2d at 167; accord *Wooddale*, 722 N.W.2d at 303. Rather, the *Iowa National* rule encourages any insurer whose policy is arguably triggered to deny its insured a defense and, essentially, play the odds that, among all insurers on the risk, it will not be selected by the insured to defend.

We conclude that the *Iowa National* rule, even as we have modified it over the years, is no longer an appropriate result when multiple insurers may be obligated to defend an insured. There is little incentive for any single carrier to voluntarily assume the insured's defense. To the contrary, under *Iowa National* an insurer who voluntarily assumes the defense finds itself bearing the entire cost of the insured's defense unless the insured enters into a loan receipt agreement. As this case demonstrates, that the insured will enter into a loan receipt agreement is by no means assured.<sup>120</sup>

### **MOST COURTS FOLLOWING THE IOWA NATIONAL APPROACH HAVE GIVEN THE PRACTICAL EFFECT OF THE RULE OF LITTLE CONSIDERATION**

This careful consideration of the practical impact of denying insurers a right of contribution or subrogation stands in contrast to the vast majority of the cases that have actually adopted that rule. Most, like *Iowa National*, give little or no consideration to the practicalities of the rule. They rely instead on a formalistic

---

<sup>115</sup> *Marwell*, 465 P.2d at 313.

<sup>116</sup> *Jostens v. Missions Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986).

<sup>117</sup> *Id.* at 167.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Cargill, Inc.*, 784 N.W.2d at 352.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

adherence to principles of contract law. *Sloan Construction, Inc. v. Central National Insurance Co. of Omaha*, for example, was factually similar to *Iowa National*.<sup>121</sup> The underlying case arose out of an auto accident, and two insurers had issued policies providing coverage.<sup>122</sup> One, Liberty Mutual, provided a defense and the other, Central, declined.<sup>123</sup> The South Carolina Supreme Court held that because the contractual duty to defend is personal to each insurer, and not joint, “the insurer is not entitled to divide the duty nor require contribution from another absent a specific contractual right.”<sup>124</sup> In language quite similar to that in *Iowa National*, the court reasoned that by providing a defense, Liberty Mutual “was doing no more than it was obligated to do under the terms of its contract.”<sup>125</sup>

*Brayman v. Northwestern Mutual Insurance Co.* was another auto accident case.<sup>126</sup> The court rejected the insurer’s contribution claim on grounds largely indistinguishable from *Iowa National*. “The duty to defend is personal to each insurer. The obligation is several and the carrier is not entitled to divide the duty nor require contribution from another absent a specific contractual right.”<sup>127</sup> The decision in *Transamerica Insurance Group v. Empire Mutual Insurance Company* was made on essentially the same basis.<sup>128</sup> The plaintiff insurer had provided a defense to an insured in a suit arising out of a personal injury claim. Another insurer declined to provide a defense or to contribute to the defense costs. The court, citing *Iowa National*, held that the paying insurer did not have a right to seek contribution because the two insurers did not have a contractual relationship.<sup>129</sup>

The same formalistic approach was employed in *Barton & Ludwig, Inc. v. Fidelity & Deposit Co. of Maryland*.<sup>130</sup> The underlying suit there arose out of the collapse of a deck. Hartford provided a defense, but

---

<sup>121</sup> 236 S.E.2d 818 (S.C. 1977).

<sup>122</sup> *Id.* at 819.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 820.

<sup>125</sup> *Id.* The continued vitality of this rule in South Carolina was recognized in *Transcontinental Ins. Co. vs. MAJ Enterprises, Inc.*, No. 2:05-2594, 2005 U.S. Dist LEXIS 37928, at \*8 (D. S.C. Dec. 19, 2005), in which the court, relying upon *Sloan*, denied an insurer’s demand for contribution from a co-insurer when an insured sued for a construction defect.

<sup>126</sup> 381 F.Supp. 362 (D. Colo. 1974).

<sup>127</sup> *Id.* at 363 (quoting *U.S. Fid. and Guar. Co. v. Tri-State Ins. Co.*, 285 F.2d 579 (10th Cir. 1960)). The Colorado Supreme Court rejected both *Brayman* and *United States Fidelity in National Casualty Co. v. Great Southwest Fire Insurance Co.* 833 P.2d 741, 748 (Colo. 1992).

<sup>128</sup> 327 A.2d 734 (Ct. Super. 1974).

<sup>129</sup> at 735. The Connecticut Supreme Court revisited this issue in 2003 in *Security Insurance Co. of Hartford v. Lumbermens Mutual Casualty Co.*—a case that, like *Cargill*, involved a coverage claim (asbestos in this case) that spanned multiple coverage periods. The court noted, with no real discussion, that under Connecticut law equitable contribution requires all primary insurers to pay a pro rata share of defense costs. 826 A.2d 107, 123 (Conn. 2003).

<sup>130</sup> 570 F.Supp. 1470 (N.D. Ga. 1983). A quarter-century later, the same federal court reversed course and adopted the pragmatic analysis employed by a majority of courts. In *St. Paul Fire & Marine Insurance Co. v. Valley Forge Insurance Co.*, “the court finds that the principles of equity that underlie the rule of contribution with respect to the

the insured's other insurers refused one. The court rejected Hartford's demand for contribution or subrogation, reasoning, like the courts in *Iowa National* and *Sloan*:

When Hartford undertook the defense of Barton & Ludwig in the *Jenkins* action, it was doing no more than it was obligated under the terms of its contract with Barton & Ludwig. The fact that there may have been other insurance coverage did not relieve Hartford of its obligation to defend its insured in the tort action.<sup>131</sup>

It also rejected the idea of subrogation because it was Hartford, not the insured, that incurred the defense costs.<sup>132</sup>

That last piece of reasoning highlights the concerns that prompted the Minnesota Supreme Court to overturn *Iowa National*. Strictly applied, the Georgia court's reasoning would encourage insurers to wait to pay for defense costs until after the insured had incurred them, then indemnify the insured in exchange for a subrogation agreement. The insurer might, then, be able to recover a share of those defense costs. For a large, well-funded insured, this delayed approach may not pose a significant problem. But, as the Minnesota court noted in *Jostens* and again in *Cargill*, not all insureds have the wherewithal "to pay their own way initially."<sup>133</sup> Insurers are thus left with trepidation about providing any defense for fear of bearing more than their fair share of its cost, and insureds find themselves trying to maintain a defense without the insurance coverage they purchased. From this reality, the pragmatic basis for the *Cargill* decision is distilled into a distinctly practical observation: "If Liberty Mutual (or the other insurers) knew that Minnesota recognized an equitable right of contribution, and absent the *Iowa National* rule, we would likely not have this present case before us."<sup>134</sup>

## A CONTRARY VIEW: PRAGMATIC REASONS TO REJECT CARGILL?

Though the accuracy of this observation seems largely indisputable, the pragmatism underlying the *Cargill* decision is not universally accepted. As discussed above, the vast majority of the courts that have denied a contribution right among insurers have done so on formalistic contractual grounds, with little or no discussion of why the outcome is now or ever was appropriate. In Florida, however, courts have addressed the issue a number of times, and over the years have developed their own jurisprudence rejecting contribution for what they may describe as their own pragmatic reasons.

---

ultimate loss apply equally to the costs to defend. Absent a right to contribution, an insurer has no incentive to perform its duty to defend when it knows that the insured has another primary insurer. The non-performing insurer may simply wait out an insured without suffering any consequences, as the insured is unlikely to face a breach of contract suit from an insured whose needs are ultimately met by another party." No. 1:06-CV-2074-JOF, 2009 US Dist. LEXIS 23663, \*29 (N.D. Ga. March 23, 2009).

<sup>131</sup> *Id.* at 1472.

<sup>132</sup> *Id.* at 1473.

<sup>133</sup> 784 N.W.2d at 350 (quoting *Jostens*).

<sup>134</sup> *See id.* at 352.

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

The Third District Court of Appeals decision in *Argonaut Insurance Co. v. Maryland Casualty Co.*,<sup>135</sup> gives the same formalistic reason for rejecting an insurer's contribution claim that has been cited in other jurisdictions. Noting that there "is no contractual relationship between" the insurers, the court held that the "duty of each insurer to defend its insured is personal and cannot inure to the benefit of another insurer. Contribution is not allowed between insurers for expenses incurred in defense of a mutual insured."<sup>136</sup> The decision is rooted in the formalistic rule that "[a]n insurer's obligation to defend its insured is contractual and does not arise from common law."<sup>137</sup>

In *Argonaut*, however, the court went on to give some consideration to the pragmatic concerns that were ultimately relied upon in *Cargill*. It rejected the idea that its formal, contract-based rule might encourage "defaults on contractual agreements to defend" because there are other disincentives in the law to discourage such conduct.<sup>138</sup>

If an insurance company refuses to defend or provide contractual coverage to its insured, then it may expose its policy limits to a third party and faces a breach of contract suit with other statutory remedies (e.g., Section 627.421(1), Florida Statutes) By [sic] the insured. . . . All necessary remedies and protection to the proper parties are available to enforce all necessary rights.<sup>139</sup>

This reasoning appears crafted more to justify adherence to the formalistic rule than to realistically address the pragmatic concerns. While it is true that most jurisdictions provide a remedy for insureds who are denied a defense by their liability insurers, the *Argonaut* decision fails to recognize that under its rule: a) once an insured gets a defense from one insurer, it is unlikely to pursue claims against any other insurer; b) the insurer that provides the defense (either voluntarily or under court order) is denied the ability pursue those other insurers; and so, c) all of the insurers have an incentive to play a litigious game of chicken, delaying any coverage in the hope that one of their compatriots will end up footing the entire bill.

*Argonaut* did not address this issue directly, but Florida's Fifth District did in *Continental Casualty Co. v. United Pacific Insurance Co.*<sup>140</sup> Continental Casualty argued that the *Argonaut* rule should be rejected on public policy grounds to prevent insurers from "shirking" or "lagging behind" in the hope that some other insurer would pick up the defense obligation.<sup>141</sup> The appellate court was unimpressed:

We begin by refusing simply to assume the premise on which the public policy rationale for creating a right of contribution has been based. Continental contends broadly that, without the creation of this rule [the right

---

<sup>135</sup> See 372 So. 2d at 963 (Fla. Dist. Ct. App. 1979).

<sup>136</sup> See *id.* at 963 (citations omitted).

<sup>137</sup> See *id.* at 963–64.

<sup>138</sup> See *id.* at 964.

<sup>139</sup> See *id.*

<sup>140</sup> See 637 So. 2d 270 (Fla. Dist. Ct. App. 1994).

<sup>141</sup> See *id.* at 273.

to contribution among insurers], insurers will seek with impunity to evade their responsibilities to defend their Florida insureds. No evidence was offered below, however, that Florida's current rule disallowing contribution has led to "shirking," "lagging behind" or "bad faith" on the part of insurers. Presumably, Continental, one of the most prominent liability insurers in Florida, would deny it has ever been induced to act in such a manner. Several factors discourage such misconduct, including exposure to greater loss if the other insurer is ineffective in its defense, and the risk of suits by its own insured on theories of breach of contract and statutory and common law "bad faith." It is important to keep in mind that insurers have not only the duty to defend but often contractually reserve the right to defend. Insurers know the ability to control the defense of a liability case is the most effective way to limit their loss and protect themselves from extra-contractual claims.<sup>142</sup>

The court reasoned that there were adequate measures in place to prevent insurers from acting in bad faith, and supported that conclusion with the absence of evidence that insurers had been abusing the existing rule disallowing contribution.<sup>143</sup> A dissent was less convinced, worrying that "[u]nder *Argonaut*, insurers play the game of 'chicken,' forcing the other equally obligated insurer to undertake the defense first, while flirting around the edges of bad faith breach of their duty to defend."<sup>144</sup> The responsible insurer is thus "penalized" while "the unresponsive insurer is saved from any bad faith suit by its insured, or any other third party, by the diligence and effort of the other insurer."<sup>145</sup>

The dissent's concerns have not altered the law in Florida. In 2009, a federal court applied the *Argonaut/Continental* rule to a dispute between two companies that each insured a health care professional who was sued for wrongful death in *American Casualty Company of Reading Pennsylvania v. Health Care Indemnity, Inc.*<sup>146</sup> American Casualty had provided defense and indemnity to the insured, and the court acknowledged that HCI also had duty to defend. Nevertheless, relying on *Argonaut* the court held that American Casualty did not have a right to pursue contribution.<sup>147</sup> The court did acknowledge that the ruling "may appear to reward HCI's behavior of ignoring its insured's requests for coverage."<sup>148</sup> However, the federal court found persuasive Continental's conclusion that the *Argonaut* rule does not act as an incentive for insurers to delay or deny coverage – though it did not deny that HCI had, in fact, benefited from its recalcitrance.<sup>149</sup>

While their persuasiveness may be questionable, these decisions do highlight a couple of issues relevant to

---

<sup>142</sup> *See id.*

<sup>143</sup> *See id.* at 273.

<sup>144</sup> *See id.* at 276.

<sup>145</sup> *See id.* at 276–77.

<sup>146</sup> 613 Fla. Supp.2d 1310 (M.D. Fla. 2009).

<sup>147</sup> *Id.* at 1322.

<sup>148</sup> *Id.* at 1323.

<sup>149</sup> *Id.* *See also* Pennsylvania Lumbermen's Mut. Ins. Co. v. Indiana Lumbermens Mut. Ins. Co., 43 So. 3d 182 (Fla. Dist. Ct. App. 2010) (denying insurer's right to obtain indemnity for defense costs, citing *Argonaut* and *Continental*).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

this article. First, having an answer to the “why” question, even a good answer, does not guarantee victory. And second, the reason you lose may be that your answer prompts more questions than you are prepared to answer.

The court in *Continental* did not merely reject the public policy grounds that had been advanced by Continental. It went on to question the pragmatic value of a rule permitting contribution among insurers. The adoption of such a rule, the court worried, would simply spawn more litigation over the scope of the rule.<sup>150</sup> As an example, the court cited the Idaho case of *Aetna Casualty & Surety Co. v. Mutual of Enumclaw Insurance Co.*,<sup>151</sup> in which each insurer paid defense costs, but one paid less than the other. The Idaho court held that because the defendant insurer had provided a defense, no contribution right arose. The Florida court opined that all the creation of a right of contribution had accomplished was to encourage “insurers in multiple coverage cases to defend, but permitting them to defend as little as possible in hopes another carrier will pick up the slack.”<sup>152</sup>

**CANS OF WORMS: ANSWERING THE FIRST QUESTION MAY LEAD TO MORE QUESTIONS**

The Minnesota Supreme Court preempted this particular dispute with its *Cargill* decision by ruling that defense costs are to be shared equally by all insurers with a defense obligation.<sup>153</sup> While the ultimate fairness of this rule could be questioned – it leaves an insurer that covered the insured for only a single year paying as much as one that was on the loss for a decade – that concern may be outweighed by the value of a clear rule. Regardless of how you come down on that particular question, for purposes of this article it is worth noting that the question exists, and it isn’t the only one. By crafting a new rule governing the sharing of defense costs among liability insurers, the Court leaves unanswered (or only partially answered) a number of issues that may need to be addressed in future cases. These include:

- Is the right created by *Cargill* truly a right of contribution—as the Court seems to say in the final page of the opinion—or is it in the nature of subrogation? Does it matter? Many courts have used the terms almost interchangeably in discussing the general issue of whether an insurer can recover a share of defense costs. However, in *Mutual of Enumclaw Insurance Co. v. USF Insurance Co.*,<sup>154</sup> the court rejected an insurer’s contribution claim against co-insurers to whom the insured had not tendered the defense, but left open the possibility that it might recover against those same insurers in subrogation.

- Who decides which insurers are liable for defense costs? In a footnote, the *Cargill* decision maintains the

---

<sup>150</sup> One pragmatic value of the no-contribution rule is its clarity. There may be legitimate questions about its fairness or even its efficacy, but it does have the benefit of allowing everyone to know what to expect, and dissuading litigation like the *Cargill* case.

<sup>151</sup> See *Aetna Cas. & Sur. Co. v. Mut. of Enumclaw Ins. Co.*, 826 P.2d 1315 (Idaho 1992).

<sup>152</sup> *Continental*, 637 So. 2d at 274.

<sup>153</sup> See 784 N.W.2d at 354.

<sup>154</sup> See *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 191 P.3d 866 (Wash. 2008).

rule “that an insurer's duty to defend is not triggered until the insured has provided the insurer ‘with notice of a suit and opportunity to defend.’”<sup>155</sup> If an insured fails to provide that notice, does an insurer that accepts its defense have the right to notify the other insurers? Could an insured like Cargill limit its own liability under fronted policies by being deliberately selective about which insurers it notifies?<sup>156</sup> Or would doing so be a breach of the insured's duty to cooperate or of good faith? Does an insured have a duty, when it submits the defense to one of its insurers, to notify that insurer of the other insurance companies that may have a defense obligation?

- What is the interplay between the contribution right and the Court's instruction that “breach of a duty to defend precludes application” of that right? While this rule seems necessary to satisfy the public policy purposes underlying the *Cargill* decision, its precise application remains in question.<sup>157</sup> If an insured seeks defense coverage from one of its insurers, is it a breach of the duty to defend if that insurer pays its share of those costs promptly, but waits to pay the balance until the co-insurers contribute their share? It seems that it probably should be if the goal is to be sure the insured's defense is not delayed; but this also may shift to the insurer the potential expense of litigating the coverage disputes with the other insurers. Indeed, in *Cargill*, because of the structure of Cargill's insurance program, it may lead to the unusual situation in which Cargill, the insured, is arguing that some number of its fronting insurers do not have a duty to defend and so do not have to contribute to defense costs.

- The purpose of this article is not to answer these, or any questions of substantive law. The purpose is to point out that in every case, the “why” questions should be asked. Winning may depend on your ability to give the court not just a rule that favors your client, but a good reason to apply that rule. Judges want to follow the law, but they also want to be just. As Bryan Garner and Justice Scalia point out in their excellent book on legal argument, “[i]t is therefore important to your case to demonstrate, if possible, not only that your client does prevail under applicable law but also that this result is reasonable.”<sup>158</sup> It is even more important if your client does not “prevail under applicable law” to be ready to explain why that applicable law needs to change.

One of the common law's oldest maxims is that “where the reason for a rule ceases the rule should also

---

<sup>155</sup> 784 N.W.2d at 354 n.14 (quoting *Home Ins. Co. v. Nat. Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 534 (Minn. 2003)). See also *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997) (reiterating “the general rule that an insured does not invoke its insurer's duty to defend until it properly tenders a defense request”).

<sup>156</sup> See *Inst. of London Underwriters v. Hartford Fire Ins. Co.*, 234 Ill. App. 3d 70, 599 N.E.2d 1311, 175 Ill. Dec. 297 (Ill. App. Ct. 1992) (denying contribution right against co-insurer from whom the insured chose not to seek coverage).

<sup>157</sup> Some light may yet be shone on this particular issue in the *Cargill* litigation. On remand, Cargill seized upon this portion of the Supreme Court's decision and filed a motion for summary judgment arguing that Liberty Mutual is barred from seeking contribution, even under *Cargill*, because it breached its duty to defend when it declined to pay all of Cargill's defense costs in 2005. As of this writing, the trial court has not made a decision on that motion; regardless of the trial court's decision, given the stakes it seems reasonable to expect the question to find its way to the state's appellate courts.

<sup>158</sup> Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 27 (2008).

WILLIAM MITCHELL JOURNAL OF LAW AND PRACTICE

cease.”<sup>159</sup> A natural corollary to that maxim is that “when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place which was based upon reason and justice as then conceived.”<sup>160</sup> Before that new and (hopefully) better rule can spring up, somebody has to ask – and be ready to answer – a very short, very complicated question:

Why?

---

<sup>159</sup> The Supreme Court collected a number of decisions extolling this maxim in *Funk v. United States*, 290 U.S. 371, 384 (1933).

<sup>160</sup> *Ketelsen v. Stilz*, 184 Ind. 702, 708, 111 N.E. 423, 425 (1916).