



Alerts

Minnesota Supreme Court Overrules Iowa National and Announces New Rule: Primary Insurers Have the Right to Contribution for Defense Costs

October 7, 2010

Insurance Coverage Alert

The use of a loan receipt agreement to fund the defense of an insured when more than one insurer owes a defense was common practice in Minnesota following the Minnesota Supreme Court's ruling in *Iowa National Mutual Ins. Co. v. Univ. Underwriters Ins. Co.*, 150 N.W.2d 233 (1967). Under the *Iowa National* rule, if a primary insurer had a duty to defend, it was non-delegable and a primary insurer was barred from seeking contribution against another primary insurer for defense fees and costs it paid to defend a mutual insured. Insurers adopted the practice of obtaining a loan receipt agreement from the insured, which would secure the insurer's right to recover defense fees and costs in a subsequent action brought against the other primary insurers under the name of the insured. This worked quite well, except when an insured, such as Cargill, Incorporated for example, refused to sign a loan receipt agreement. Recognizing that it was in the minority on this issue, the Minnesota Supreme Court took the opportunity to change the rules in *Cargill, Incorporated v. Ace Am. Ins. Co., et al.*, 784 N.W.2d 341 (2010).

Cargill was sued by the state of Oklahoma in 1995 for allegedly polluting land and water in the Illinois River Watershed as a result of its poultry waste practices. Cargill tendered the case to its insurers, including Liberty Mutual, and requested a defense and indemnity. Not liking the responses it received from the insurers, Cargill chose to defend itself and sued the insurers. Several insurers offered to pay their reasonable share of defense fees and costs if Cargill executed a loan receipt agreement. Cargill refused to sign, concerned that if it did so, the insurers would have the right of contribution against Cargill because some of its primary liability policies were "fronted." Under these policies, Cargill would owe as a retrospective premium the amount that some of its primary insurers paid to defend Cargill. The case went up to the Minnesota Supreme Court, which ultimately overruled its opinion in *Iowa National* and held that "where more than one primary insurer covers the same risk and an insurer discharges a common obligation also belonging to another insurer . . . a right to equitable contribution should exist in these circumstances." The Court adopted an equal shares approach to apportioning defense fees and costs amongst co-primary insurers. The Court also cautioned that if an insurer breaches its duty to defend, it may be precluded from seeking equitable contribution if the insurer is ultimately forced to pay.

Practice Note: In Minnesota, if an insurer owes a defense to an insured already being defended by another insurer, it should offer to contribute an equal share. An insurer paying for the entire defense is no longer dependent on the agreement of the insured to secure its rights to pursue the non-contributing insurer. There is no benefit for delaying or denying a defense if owed.

For further information, please contact your regular [Hinshaw attorney](#).

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