

Cargill Decision Requires Insurers to Cooperate in Sharing Defense Cost

by Mark K. Hellie

On June 30, 2010, the Minnesota Supreme Court issued its eagerly anticipated decision in *Cargill, Inc. v. Ace American Inc. Co.*, A08-1082, 2010 WL 2606020, __ N.W.2d __ (Minn. June 30, 2010). In its decision, the supreme court ruled that a primary insurer that has undertaken the defense of the insured has an equitable right to seek contribution for defense costs from any other primary insurer that also has a duty to defend that same insured.

Prior to the supreme court's *Cargill* decision, a primary insurer that undertook the duty to defend the insured generally did not have a right to directly seek contribution for defense costs from another primary insurer of the same insured. This general rule was established in *Iowa National Mut. Ins. Co. v. Universal Underwriters Inc. Co.*, 150 N.W.2d 233 (Minn. 1967).

Under the *Iowa National* rule, if an insurer undertook the duty to defend the insured and determined that a second insurer was also on the same risk, the insurer that undertook the duty to defend did not have a direct cause of action against the second insurer to collect defense costs. Rather, the insurer that undertook the defense would have to obtain a loan receipt agreement from the insured. Under 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 any other primary insurer that has a duty to defend. Once a loan receipt agreement was in place, the insurer that undertook the defense had a right of action against another primary insurer for a portion of the defense costs.

But what if the insured refuses to sign a loan receipt agreement? Is it fair for the insured to tender the defense of an action to only one insurer if other insurers may have a duty to defend? Although this situation was allowed under the *Iowa National* rule, in *Cargill*, the Minnesota Supreme Court overruled *Iowa National* and held that a primary insurer that undertook the defense of an insured had a right to seek contribution for defense costs from

other insurers, even without a loan receipt agreement.

In *Cargill*, Cargill was sued by the State of Oklahoma and several individuals in Arkansas for pollution of the land and water in the Illinois River Watershed that allegedly occurred from 1957 to 2006. Cargill tendered the defense to some of its insurers, one of which was Liberty Mutual. Liberty Mutual and some of Cargill's other insurers offered to pay for Cargill's defense costs in return for executing a loan receipt agreement. The loan receipt agreement would have allowed Liberty Mutual to seek recovery of its defense costs from other insurers that were determined to have a duty to defend Cargill. Cargill refused to execute the loan receipt agreement because it was partially self-insured and was concerned that the loan receipt agreement would allow Liberty Mutual or other insurers to seek contribution from Cargill.

Relying on the *Iowa National* rule, Cargill moved the district court for an order declaring that Cargill could select Liberty Mutual to fully and exclusively defend it without a loan receipt agreement and that Liberty Mutual could not obtain contribution from any other insurers, including Cargill. Cargill further sought an order declaring that Cargill had no obligation to enter into a loan receipt agreement with Liberty Mutual and that Liberty Mutual could not recover any defense costs from Cargill. Liberty Mutual filed a motion requesting that the court require Cargill to enter into a loan receipt agreement or that the court allow Liberty Mutual

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2010 Legislative Update by Nancy M. Aboyan

One of the more newsworthy events of the 2010 Minnesota legislative session was the Minnesota Supreme Court's ruling that Governor Pawlenty exceeded his allotment authority in order to balance the budget. The ruling, set forth in *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010), prohibits the Governor from relying on the allotment statute as a means of balancing the state budget when the budget has not been agreed upon by the Legislature and the Governor.

The legislative session ended with some changes impacting the insurance industry.

Home Warranty Law

The Legislature passed a new construction warranty law for real property "requiring performance guidelines for certain residential contracts; modifying statutory warranties; requiring notice and opportunity to repair; [and] providing for dispute resolution procedures".

This new law will take effect on January 1, 2011. It requires a home improvement contractor to provide a prospective customer (owner) written performance guidelines for services to be performed. After a notice of claim, the owner must allow an inspection for the purpose of the preparation of an offer to repair. The inspection must be performed within 30 days of the notice of claim. Any damage caused as a result of the inspection must be promptly repaired by the inspecting party.

The applicable statute of limitations and statute of repose for an action based on breach of warranty under this new section is tolled from the date the written notice is provided by the owner until the **latest** of:

- (1) date of completion of home warranty dispute resolution process under Minn. Stat. § 327A.051;
- or
- (2) 180 days.

The vendor or home improvement contractor must provide the owner with a written offer to repair within 15 days of the inspection. If the parties agree to the scope

of work, the vendor or home improvement contractor must perform the repair work in accordance with the offer to repair. If the parties do not agree to the scope of work, the owner must submit the matter to the homeowner warranty dispute process set forth in Minn. Stat. § 327A.051.

The homeowner may not bring a cause of action in district court until the **earlier** of the completion of the home owner dispute resolution process or 60 days after the written offer of repair is provided to the owner.

The home warranty dispute resolution process is begun by written application to the Commissioner of Labor and Industry. The parties will select a neutral from a panel of three qualified neutrals. The parties shall attend an in person conference, after which the neutral shall issue a non-binding, written determination including the scope and amount of repairs, if any. The neutral's billed time for review of documents, conference, and issuing a written determination must not exceed six hours.

The parties may agree to pursue an alternative dispute resolution (ADR) process in lieu of participating in the home warranty dispute resolution process. If they choose to pursue ADR, they must provide written notice of their agreement to the Commissioner of Labor and Industry.

The written determination of the neutral is considered confidential pursuant to Rule 48 of the Minnesota Rules of Evidence and may not be used as evidence of liability in any subsequent litigation.

It remains to be seen whether this compromise bill has the intended effect of reducing the number of residential moisture intrusion lawsuits.

Revised Minnesota Uniform Arbitration Act

A revised Minnesota Arbitration Act was signed into law by Governor Pawlenty and will take effect on August 1, 2011. Minnesota adopted, with few changes, the Revised Uniform Arbitration Act (RUAA) adopted by the National Conference of Commissioners on Uniform State Laws in 2000.

The revised act is intended to provide some guidance as to how a party can initiate an arbitration proceeding, whether arbitrators are required to disclose facts reasonably likely to affect impartiality, and the extent to which arbitrators are immune from civil action. It also provides a definitions section, sets forth notice requirements, and allows for the consolidation of separate arbitration proceedings under some circumstances.

Specifically, an arbitrator must disclose to all parties any known facts that a reasonable person would consider likely to affect the impartiality of the proceedings, including a financial or personal interest, and existing or past relationship with the parties, their counsel or representatives, witnesses or other arbitrators. Failure of the arbitrator to properly disclose may be grounds to vacate the arbitration award.

The arbitrator is also given immunity from liability to the same extent as a judge acting in a judicial capacity. If any provisions of the Minnesota Uniform Arbitration Act conflict with the No-Fault Automobile Act, the provisions of the No-Fault Automobile Act will prevail. *See* Minn. Stat. §§ 572.01 – 572B.31.

Insurance Claims for Residential Roofing

Effective August 1, 2010, a contractor providing residential roofing goods and services is prohibited from advertising or promising to pay or rebate all or part of the insured homeowner's insurance deductible. If the contractor violates this prohibition, then the insurer is not obligated to consider the contractor's estimate and the insurer or insured may bring an action for damages against the contractor. *See* Minn. Stat. § 325.66.

A person who has entered into a written contract for residential roofing goods and services to be paid by the insured from the proceeds of an insurance policy has the right to cancel the contract within 72 hours after receiving notice that the claim has been denied. *See* Minn. Stat. § 326B.811. •

Congratulations to Eugene J. Flick, Joseph E. Flynn, Gerald M. Linnihan, Pierre N. Regnier, Lawrence M. Rocheford, and Leonard J. Schweich for being named a 2010 "Super Lawyer" by *Minnesota Law & Politics*. •

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to obtain contribution for defense costs from other insurers, including Cargill.

While Cargill's and Liberty Mutual's motions were pending, Cargill proposed a revised loan receipt agreement preventing Liberty Mutual from pursuing Cargill for some of the defense costs and requiring Liberty Mutual to indemnify Cargill from potential claims from its other insurers that may also have a duty to defend. Liberty Mutual refused to accept Cargill's proposed loan receipt agreement.

The district court ruled in Liberty Mutual's favor, determining that it was unfair for Cargill to selectively tender the defense to only one insurer and expect that insurer to bear the burden of paying for all of the defense costs. The district court ruled that in spite of the *Iowa National* rule, equity allowed Liberty Mutual to seek contribution for defense costs from Cargill's other insurers as well as Cargill, as a self-insured. The district court further certified this issue for appellate review.

On appeal, Cargill argued that the district court's ruling ignored the long-standing *Iowa National* rule. The Minnesota Court of Appeals affirmed the district court's ruling. The court of appeals held that Cargill's refusal to enter into a loan receipt agreement was in bad faith, thereby creating a bad-faith exception to the *Iowa National* rule, and allowing Liberty Mutual to seek contribution for defense costs from Cargill's other primary insurers, including Cargill. Cargill appealed to the Minnesota Supreme Court.

The supreme court agreed with the court of appeals, but instead of affirming the bad-faith exception to the *Iowa National* rule, it overruled *Iowa National*. The supreme court reasoned that the *Iowa National* rule did little to encourage insurers to cooperate and promptly resolve any issues about the duty to defend. The supreme court also

determined that the *Iowa National* rule arose in the context of a two-car accident and was "ill-suited for the complexity of modern mass torts, multiple-party litigation, and disputes involving consecutive liability policies and injuries with long-latency periods."

Now, under *Cargill*, all of the insurers that have a duty to defend must cooperate in sharing the defense costs. If an insurer refuses to pay its share of the defense costs, the insurers that have undertaken the defense can seek contribution from those insurers that refuse to participate in the defense of the insured, regardless of whether the insured has signed a loan receipt agreement. •



Case Update

MN Supreme Court Decides that Negotiated-Discount Amounts are Collateral-Sources

In a decision filed June 30, 2010, *Swanson v. Brewster*, 2010 WL 2605951, __ N.W.2d __ (Minn. 2010), the Minnesota Supreme Court held that negotiated-discount amounts -- the amounts a plaintiff is billed by a medical provider but does not pay because the plaintiff's insurance provider negotiates a discount on the plaintiff's behalf -- are unambiguously included as a part of the collateral-source statute, Minn. Stat. § 548.251 (2008).

This statute partially abrogates the common-law collateral-source rule with the intent of preventing double recovery by plaintiffs. Under the statute, a district court may reduce an amount awarded to plaintiff by a jury by the medical bills paid by insurance, including amounts "written off or discharged." The court limits its holding to the collateral-source statute, noting that the result would be different under the No-Fault Act, because the No-Fault Act is different "in form, purpose, and function."

For example, if a hospital billed \$2,000 for an MRI, but accepted \$500 from Blue Cross Blue Shield Insurance in full payment, the \$1,500 difference is a collateral-source that is deducted from the award of past medical expenses. As before, the \$500 that Blue Cross paid is also deducted as a collateral-source under the statute, resulting in no recovery for the MRI by the plaintiff. Under *Swanson*, a plaintiff is still allowed to collect out-of-pocket expenses, copays, deductibles, and premiums. •

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Coming in the Fall 2010 Issue...

Comparative Fault (Joint and Several Liability)

Statute of Limitations (2 year warranty claims)

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