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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY SC Court of Appeals  
Court of Common Pleas  
R. Markley Dennis, Jr., Circuit Court Judge  
Civil Action No. 2013-CP-10-6771

Appellate Case No. 2016-001359

MI Windows and Doors, LLC, f/k/a MI Windows &  
Doors, Inc., f/k/a MI Home Products, Inc., ..... Plaintiff,

v.

National Union Fire Insurance Company of Pittsburgh,  
Pa., and Commerce and Industry Insurance Co., ..... Appellants,

v.

Liberty Mutual Fire Insurance Co., and Zurich American  
Insurance Co. & American Zurich Insurance Co., ..... Respondents.

**INITIAL BRIEF OF APPELLANTS**

COLLINS & LACY, P.C.  
PETER H. DWORJANYN  
pdworjanyn@collinsandlacy.com  
CHRISTIAN STEGMAIER  
cstegmaier@collinsandlacy.com  
KELSEY J. BRUDVIG  
kbrudvig@collinsandlacy.com  
Post Office Box 12487  
Columbia, South Carolina 29211  
(803) 256-2660 (voice)  
(803) 771-4484 (facsimile)

ATTORNEYS FOR APPELLANTS

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## **STATEMENT OF ISSUES ON APPEAL**

1. Whether the Circuit Court erred in holding National Union and Commerce's request for declaratory relief would have no practical legal effect.
2. Whether the Circuit Court erred in holding National Union and Commerce lacked standing to assert causes of action for declaratory judgment.
3. Whether the Circuit Court erred in holding National Union and Commerce's claim for equitable distribution fails as a matter of law.
4. Whether the Circuit Court erred in holding Liberty and Zurich are not proper third-party defendants under Rule 14 of the South Carolina Rules of Civil Procedure.

## **STATEMENT OF THE CASE**

MI Windows and Doors, LLC, f/k/a MI Windows & Doors, Inc., f/k/a MI Home Products, Inc. (“MIWD”), filed suit against Appellant National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”), Appellant Commerce & Industry Insurance Company (hereinafter “Commerce”), Respondent Liberty Mutual Fire Insurance Company (hereinafter “Liberty”), Respondent Zurich American Insurance Company and American Zurich Insurance Company (collectively “Zurich”), and Fireman’s Fund Insurance Company on November 15, 2013, in the Court of Common Pleas in Charleston County. MIWD sought declaratory and ancillary relief, alleging each insurer had a duty to indemnify MIWD for damages arising out of a collection of class action lawsuits filed against MIWD. (MIWD’s Compl.).

Subsequent to the filing of the initial Complaint, MIWD settled its claims against Liberty, Zurich, and Fireman’s Fund. These parties were voluntarily dismissed from suit. MIWD also released its claims for further indemnity and defense payments as part of the settlement agreements with Liberty and Zurich.

On March 19, 2015, MIWD filed an amended supplemental complaint, naming only National Union and Commerce as Defendants. National Union and Commerce subsequently filed separate Third-Party Complaints against Liberty and Zurich. (National Union and Commerce's Third-Party Compls.).

In their third-party complaints, National Union and Commerce sought: (1) a declaration that Liberty and Zurich had a continuing duty to defend and indemnify MIWD; (2) a declaration as to the number of occurrences giving rise to the underlying class action lawsuit "in order to determine the applicable limits owed by" Liberty and Zurich; and (3) equitable contribution from Liberty and Zurich for monies National Union and Commerce may pay to MIWD in the future for defense costs and indemnity related to the underlying class action lawsuit.

On or about March 25, 2016, Liberty moved for summary judgment on the following grounds: (1) National Union and Commerce lacked standing to assert claims on MIWD's behalf against Liberty; (2) National Union and Commerce and Liberty do not insure the "same risk," and, therefore, National Union and Commerce's claim for equitable contribution fails; (3) National Union and Commerce's causes of action against Liberty are improper under Rule 14 of the South Carolina Rules of Civil Procedure, because the claims

are premised on primary, as opposed to derivative, liability; and (4) Liberty settled its claims with MIWD, MIWD released Liberty from any further liability, and MIWD voluntarily dismissed Liberty from the action, with prejudice. (Liberty's Motion for Summary Judgment).

On or about April 1, 2016, Zurich moved for summary judgment, asserting virtually identical grounds as Liberty asserted in its motion. (Zurich's Motion for Summary Judgment).

The Circuit Court granted Liberty and Zurich's separate motions by orders dated May 18, 2016 and May 23, 2016, respectively. The Circuit Court held the following:

- National Union and Commerce lacked standing as to Counts I-III, National Union and Commerce's declaratory judgment claims, as each count asserts rights that arise under contracts to which National Union and Commerce were not a party. The Circuit Court held, "Only MIWD ... may compel the insurers with which it contracts for primary insurance coverage to pay benefits due under the contract." The Circuit Court further held National Union and Commerce may not challenge MIWD's decision to settle and release Liberty and Zurich from their contractual obligations absent a specific legal or contractual right to do so.
- National Union and Commerce's claim for equitable contribution failed as a matter of law. The Circuit Court noted that a claim for equitable contribution between insurers will only lie where both insurers cover the same

risk. The Circuit Court held National Union and Commerce's excess policies do not cover the same risk as Liberty or Zurich's primary policies. Therefore, National Union and Commerce is not entitled to equitable contribution. The Circuit Court further held National Union and Commerce cannot seek equitable contribution for sums that have National Union and Commerce have not paid. With specific regard to Liberty, the Circuit Court further noted the policies covered mutually exclusive policy periods (Liberty's policies periods are from 2000 to 2003; National Union and Commerce's policies periods are from 2004-2010).

- Liberty and Zurich are not proper third-party defendants under Rule 14 of the South Carolina Rules of Civil Procedure. The Circuit Court noted National Union and Commerce assert Liberty and Zurich should remain primarily liable to MIWD, rather than derivatively liable to National Union and Commerce.
- Finally, the Circuit Court held National Union and Commerce's request for declaratory relief would have no practical legal effect due to the settlement agreements entered into by and between Liberty and MIWD and Zurich and MIWD.

This appeal follows.<sup>1</sup>

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<sup>1</sup> National Union and Commerce filed separate Notice of Appeals in the Liberty and Zurich matters. By Order dated July 21, 2016, the appeals were consolidated.

## STATEMENT OF THE FACTS

The instant case concerns the potential defense and indemnity obligations of National Union and Commerce to their insured, MIWD, in connection with various underlying class action lawsuits filed in multiple states. The underlying collection of class action lawsuits, In re: MI Windows and Doors, Inc. Product Liability Litigation, consolidated as multi-district litigation (the “MDL”), involved several product liability claims against MIWD. Plaintiffs in the MDL alleged that MIWD designed, manufactured and supplied vinyl windows which relied upon adhesive-coated foam tape to prevent water intrusion through the glazing. As a result, the products allegedly suffer a loss of seal at or near the glazing which can: (1) result in the formation of a residue line on the sash of the windows; (2) cause other damage to the windows; and (3) stain or degrade the building materials adjacent to the window openings. The damages claimed in the MDL occurred between 2000 and 2010.

The period of damages in the MDL implicated Liberty as MIWD’s primary insurer from 2000-2003; Fireman’s Fund as MIWD’s excess insurer from 2000-2004; Zurich as MIWD’s primary insurer from 2003-2010, and National Union and Commerce as MIWD’s excess insurer from 2004-2010.

The MDL litigation involved protracted settlement negotiations lasting nearly two years.<sup>2</sup> MIWD subsequently sought coverage from National Union, Commerce, Liberty, Zurich, and Fireman's Fund under various policies that had been issued and delivered in Florida to Florida-based JT Walker Industries, of which MIWD is a wholly-owned subsidiary.

MIWD allegedly qualifies as an insured under Liberty and Zurich primary commercial insurance policies from 1998 to 2003 and 2003-2010, respectively. Each year policy had limits of insurance of \$1 million each occurrence and \$2 million in the aggregate. The policies further provide that Liberty and Zurich have a duty to defend MIWD against lawsuits seeking covered damage. The policies require Liberty and Zurich to pay, in addition to its limits of liability, "supplementary payments," i.e., defense costs and other expenses. The Liberty and Zurich policies also state that "Our right and duty to defend end when we have used up the applicable limit of insurance in payment of judgment or settlements ...."

National Union and Commerce issued the following commercial umbrella insurance coverage to MIWD:

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<sup>2</sup> On July 22, 2015, a final order and judgment was entered in the MDL approving the class action settlement. On July 23, 2015, an order was entered awarding \$9,045,000 in attorneys' fees and costs and service fees in the MDL.

- Limits of insurance of \$25 million each occurrence and in the aggregate, in excess of scheduled Retained Limits for general liability coverage in the amount of \$1 million per occurrence, \$5 million in the aggregate, and \$2 million in the aggregate for products/completed operations, with effective dates of April 1, 2004 to April 1, 2005, and renewing for 2005/2006, 2006/2007, 2007/2008, 2008/2009, 2009/2010, 2010/2011, and 2011/2012.

National Union's umbrella policies provide coverage to MIWD only for those sums in excess of each policy's Retained Limit that MIWD becomes legally obligated to pay by reason of liability imposed by law because of Bodily Injury, Property Damage, Personal Injury, or Advertising Injury. The policies provide:

We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay by reason of liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury, or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III Limits of Insurance.

The Commerce policy provided identical coverage.

The Umbrella Policies further state that National Union and Commerce have no duty to defend until the limits of the underlying insurance have been exhausted through payment of judgments or settlements with the

underlying claimants. The Commerce policy specifically provided that Commerce will not “make any payment under the policy unless and until the total applicable Retained Limit(s) and any applicable Other Insurance have been exhausted by the payment of Loss” to which the policy applies. Until such times as these Retained Limits are exhausted by indemnity payments for covered claims made to persons with claims against MIWD through court judgments or through settlements with those claimants, National Union and Commerce have no obligation to provide any defense or indemnity with respect to the MDL.

On November 15, 2013, MIWD filed this action against National Union, Commerce, Liberty, Zurich, and Fireman’s Fund. On March 19, 2015, MIWD filed an amended supplemental complaint, naming only National Union and Commerce as defendants. According to the Amended Complaint, MIWD entered into settlement agreements with Liberty and Zurich<sup>3</sup> whereby MIWD purportedly released the insurers from all future coverage obligations in exchange for upfront cash payments.

Pursuant to the agreement between MIWD and Zurich, Zurich agreed to pay an amount sufficient to “exhaust” the aggregate limit under its 2003-

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<sup>3</sup> The settlement amounts are subject to confidential settlement provisions in the settlement agreements and will be provided to the Court upon directive by the Court.

2004 policy year, the per-occurrence limits under the remaining at-issue policy years (2004-2012), and a certain sum relating to recurred defense costs.

MIWD alleges that the payments made pursuant to the settlement are sufficient to exhaust the “each occurrence” limit of Liberty and Zurich’s policies and the aggregate limit. Accordingly, the Amended Complaint seeks a declaration that the coverage obligations of National Union and Commerce have been triggered through exhaustion of the other insurers’ policies via the settlements between MIWD and Liberty and MIWD and Zurich.

On August 5, 2015, National Union and Commerce filed separate Third Party Complaints against Liberty and Zurich, seeking declaratory judgment with regard to Liberty and Zurich’s duty to continue to defend and indemnify MIWD and the number of occurrences. The Third Party Complaints further sought equitable contribution.

## **STANDARD OF REVIEW**

When reviewing a grant of summary judgment, this Court applies the same standard applied by the Circuit Court pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. See Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2003).

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id. In determining whether any triable issues of fact exist, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. South Carolina Property and Cas. Guar. Ass'n, 345 S.C. 345 S.C. 512, 518, 548 S.E.2d 880, 882 (Ct. App. 2001) (citing Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000)).

## LAW/ANALYSIS

### **I. The Circuit Court Erred in Holding National Union and Commerce's Request For Declaratory Relief Would Have No Practical Legal Effect**

The Circuit Court held that the settlement entered into between Liberty and MIWD and Zurich and MIWD renders any judgment the court would have entered moot because it would have no practical legal effect on the parties. The Circuit Court held that the declarations sought by National Union and Commerce in the Third Party Complaints, specifically that Liberty and Zurich had a continuing duty to defend and indemnify MIWD and Liberty and Zurich owe additional limits to satisfy MDL-related claims because of the number of occurrences at issue, were the very matter that Liberty and Zurich resolved via settlement with MIWD. The Circuit Court further noted MIWD released Liberty and Zurich from any further liability for the MDL lawsuits and dismissed Liberty and Zurich from suit. The Circuit Court concluded that “[MIWD’s] release with Liberty [and Zurich] is res judicata as to all issues arising from, or related to, the Liberty [and Zurich] policies.” The Circuit Court concluded that the “practical effect of Liberty[] [and Zurich’s] settlement with [MIWD] is that the issues framed in [National Union and Commerce’s] counts for declaratory judgment are moot,

warranting their dismissal via summary judgment.”

However, jurisprudence holds that an insurer cannot escape liability to a fellow insurer through a settlement with the insured. Accordingly, MIWD’s release of Liberty and Zurich is not a defense against claims by National Union and Commerce.

This issue was addressed in Ross Development Corp. v. Fireman’s Fund Insurance Corp., 809 F. Supp. 2d 449 (D.S.C. 2001), in which an insurer unsuccessfully attempted to escape liability to a claimant against its insured by relying on a release between the insurer and insured. The court found that while the insured could give up any rights it may have against the insurer, it could “not extinguish the rights of any individuals or entities who are not parties to the agreement.” Id. at 457. South Carolina law does not bind parties to releases that they did not take part in.

Other courts and commentators similarly have found that a release by an insured of one insurer is not a complete shield from claims against the insurer by other insurers on the risk. E.g., Century Indemn. Co. v. Liberty Mut. Ins. Co., 815 F. Supp. 2d 508, 512 (D.R.I. 2011) (“The few courts and commentators to have pondered the issue have roundly rejected Liberty Mutual’s proposed bright line rule that ‘one insurer’s settlement with the

insured is [always] a bar to a separate action against the insurer by the other insurer or insurers for equitable contribution or indemnity .... Accordingly, for purposes of equitable contribution, the ... settlement had no effect on Liberty Mutual's duty to defend [its insured]."); Liberty Mut. Ins. Co. v. Lumbermens Mut. Cas. Co., 525 F. Supp. 2d 993, 996 (N.D. Ill. 2007); Evrax Oregon Steel Mills, Inc. v. Cont'l Ins. Co., No. CV-08-447-JE, 2009 WL 789658 (D. Or. March 20, 2009); Emp'rs Ins. Co. of Wausau v. Travelers Indem. Co., 141 Cal. App. 4th 398 (2006); St. Paul Fire & Marine Ins. Co. v. Lexington Ins. Co., No. CV-11-1954, 2014 WL 4053402, \*6 (D. Ariz. Aug. 15, 2014); 15 Couch On Insurance (3d ed.) § 218:29 (West 2010) ("One liability insurer's settlement with the insured is not a bar to a separate action against that insurer by other liability insurers for equitable contribution."); 44A Am. Jur. 2d Insurance § 1768 ("A contract of settlement that an insurer enters into with the insured cannot affect the rights of another insurer who is not a party to it because whatever obligations or rights to contribution may exist between two or more insurers of the same event flow from equitable principles.").

The same principle has been applied to the context currently at issue, with courts finding that a release of a primary insurer by the insured could

not prevent an excess insurer from seeking contribution from the primary. For example, in Steadfast Insurance Co. v. Agricultural Insurance Company, 304 P.3d 747 (Okla. 2013), the Supreme Court of Oklahoma answered a certified question from the Tenth Circuit as to whether a release between an insurer and the insured defeated a claim of equitable subrogation brought against the insurer by a higher-tiered excess insurer. The court found that the release did not defeat a claim for equitable subrogation because an excess insurer has a reasonable economic expectation that it would not be responsible on its policy until the primary insurance had been exhausted in accordance with the express provisions and obligations in the insurance contracts. Id. at 750. Accordingly, the court determined that it would be inequitable to allow the insured and primary insurer to alter the rights and expectations of the excess insurer and then to rely on the release to bar the excess insurer from recovery. Id.

The equities in the current dispute are exactly the same as those at issue in Steadfast: the lower-tiered insurers have attempted to alter the rights and reasonable expectations of higher-tiered insurers National Union and Commerce, and they now attempt to shield themselves from paying their fair share via a release to which National Union and Commerce were not a party.

The insurance program contemplated that Liberty and Zurich would pay MIWD's defense costs as "supplementary payments," in addition to limits, until the underlying litigation was resolved. MIWD should not be permitted, at the expense of National Union and Commerce, to discharge Liberty and Zurich from its obligations prematurely in exchange for an up-front cash payment. Instead, this Court should recognize that it would be inequitable to allow MIWD and the other insurers to unilaterally alter the risk borne by National Union and Commerce and then to shield themselves from redress with a release made without the consent of National Union or Commerce.

Furthermore, the Circuit Court's holding presumes that the releases between Liberty and MIWD and Zurich and MIWD are dispositive. That presumption may later turn out to be mistaken. *E.g.*, Vanderhall v. State Farm Mut. Auto. Ins. Co., 2015 WL 7770187 (4th Cir. Dec. 3, 2015) (finding a release to be invalid under South Carolina law); Young v. Cooler, 347 S.C. 362 (Ct. App. 2001) (same); Rakip v. Paradise Awnings Corp., 514 Fed. Appx. 917, 920 (11th Cir. 2013) (release is an affirmative defense which can be waived).

Therefore, because it is inequitable for a lower-tiered primary insurer to attempt to alter the rights and reasonable expectations of the higher-tiered

Carolina law, which allows insurers to seek declarations regarding contracts between other parties where coverage turns on the effect of those contracts. Perhaps the most extreme example of this was Motsinger v. Nationwide Mutual Insurance Co., 920 F. Supp. 2d 637 (D.S.C. 2013), in which the insurer's duties to the insured's alleged spouse depended upon the validity of the marriage contract. While the insurer was obviously not a party to the marriage contract, the court made the commonsense determination that the insurer nonetheless had a right to seek a declaration regarding it so as to know if its obligations were triggered:

First, Nationwide has a legally protected interest in knowing its coverage obligations. Furthermore, Nationwide has an interest in paying only those claims that are legitimate. Nationwide would be injured if it were required to pay Motsinger based on her unvalidated claims of Class I insured status under the Nationwide policies resulting from an alleged common law marriage. Additionally, Nationwide's coverage obligations are not peripheral, as Motsinger argues, but are directly dependent on a determination of Motsinger's marital status. Finally, if the court determines that Motsinger did not have a common law marriage at the time of the accident, Nationwide will not only know its coverage obligation, but it will avoid the injury of having to pay stacked coverage claimed by an alleged Class I insured.

Id. at 643.

Like the insurer in Motsinger, National Union and Commerce have an interest in knowing their coverage obligations and in paying only those

claims that are legitimate. National Union and Commerce would be further injured if required to pay MIWD based upon legally-faulty claims that the primary insurers had already exhausted, and their coverage obligations are directly dependent upon a determination of the fulfillment of Liberty and Zurich's duties. Finally, if the Court determines that Liberty failed to exhaust its policy limits, National Union and Commerce will not only know their coverage obligations, but will avoid the injury of having to pay the claims incorrectly alleged by MIWD.

The reasoning of Motsinger applies with even greater force here, for if an insurer is entitled to a declaration as to something as intimate as a marriage contract, then it certainly must be entitled to a declaration of an insurance contract – particularly to a contract which was expressly contemplated in the terms of the insurer's own policy. See also Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 274, 705 S.E.2d 73, 77-78 (Ct. App. 2010) (holding South Carolina law does not require one to be a party to a contract to seek a declaratory judgment regarding it, but instead holds that any person "interested" in such a contract may have determined any question of construction or validity arising under it and obtain a declaration of rights, status or other legal relations thereunder).

The obvious interest of National Union and Commerce in this matter falls well-within the scope of the South Carolina Declaratory Judgment Act, the purpose of which is to “settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations” and which is “to be liberally construed and administered.” S.C. Code Ann. § 15-53-130; see also Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 748 S.E.2d 781 (2013) (declaratory judgment on an insurance contract may be sought either before or after a breach occurs). Moreover, South Carolina law states that interested parties such as Liberty and Zurich should be named as parties to this action. S.C. Code § 15-53-80 (stating that when declaratory relief is sought, **all persons** shall be made parties who have or claim any interest which would be affected by the declaration). Liberty and Zurich clearly have an interest in the interpretations of their own policies.

Therefore, National Union and Commerce have demonstrated standing to seek a declaration of Liberty and Zurich’s duties under its policies and have properly joined Liberty and Zurich as parties. Accordingly, the Circuit Court erred in granting summary judgment on this issue.

### **III. National Union and Commerce Are Entitled to Equitable Contribution**

The Circuit Court held National Union and Commerce were not entitled to equitable contribution where National Union and Commerce do not insure the same risk as Liberty and Zurich. The Circuit Court found that by definition, the risk covered by National Union and Commerce's policies does not begin until the policy limits of the primary insurers are exhausted. With specific regard to Liberty, the Circuit Court noted National Union and Commerce's policies and Liberty's policy covers mutually exclusive policy periods. Finally, the Circuit Court held National Union and Commerce's claims for equitable contribution fail because a party may not seek equitable contribution for sums that it has not paid.

However, South Carolina law does not bar contribution actions by excess carriers against primary carriers. Moreover, contingent claims of equitable subrogation and contribution can be asserted prior to any payment by the excess carrier. Accordingly, National Union and Commerce's claims of equitable contribution are permitted.

#### **A. South Carolina Law Does Not Bar Contribution Actions by Excess Carriers Against Primary Carriers**

The jurisprudence cited by the Circuit Court fail to address whether

South Carolina bars contribution actions by excess carriers against primary carriers. For example, the dispute at issue in Auto-Owners Insurance Co. v. Great American Insurance Co., 479 Fed. App'x 228 (11th Cir. 2012) (Florida law) was about whether an “other insurance” clause contained in a primary policy elevated it to the same tier of coverage as an excess policy (it did not). In no way was the decision a declaration that excess carriers inherently lacked the right to seek contribution from primary carriers.

Furthermore, while not cited by the Circuit Court in its orders granting summary judgment, but relied upon by Liberty and Zurich, Sloan Construction Co. v. Central National Insurance Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977) was a contribution action between two primary insurers – one which had issued a policy to Sloan Construction Company, and another which had issued a policy to an agent of Sloan. Accordingly, both insurers had an obligation to fund 100% of Sloan’s defense costs in the underlying litigation (which involved a vehicle collision). Sloan’s own insurer defended it and then brought a contribution action against the agent’s insurer, which had refused.

The South Carolina Supreme Court determined that Sloan’s insurer had no cause of action for contribution because in undertaking the defense, it was

doing no more than it was obligated to under the terms of its contract with Sloan. In effect, Sloan's insurer had suffered no damages by undertaking 100% of the defense costs because that was precisely what it had contracted to do. The fact that the insurer for Sloan's agent had also agreed to insure the same risk was a mere fortuity and did not detract from the fact that Sloan's insurer had done no more than it had contracted to do. As such, Sloan's insurer had suffered no damages and, therefore, had no cause of action.

The South Carolina Court of Appeals has recognized that Sloan is limited to the context where the party seeking contribution is a primary insurer with an independent contractual obligation to defend the insured. Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, n.2, 436 S.E.2d 182 (Ct. App. 1993); see also Assurance Co. of America v. Penn-America Ins. Co., No. 4:11-CV003425, 2013 WL 1282141) (concerning the obligations of two primary carriers and does not address the rights of excess carriers against primary carriers).

Sloan, thus, is inapplicable, because neither National Union nor Commerce were primary insurers, and because neither had an independent duty to defend MIWD. To the contrary, any duty to defend that they may have had was **dependent** upon Liberty and Zurich exhausting first. In other

words, unlike in Sloan, neither National Union nor Commerce agreed to undertake 100% of MIWD's defense costs. Instead, both agreed to undertake only those defense costs which were incurred **after** Liberty and Zurich completely exhausted their policies through payment of the underlying claims (which has not yet occurred). Accordingly, the current case is not like Sloan, in which the insurer seeking contribution had contracted to pay for all defense costs and was seeking a windfall by having another insurer share in costs that it had agreed to shoulder alone. Instead, Liberty, Zurich, and MIWD are seeking to make National Union and Commerce do more than they were obligated to under the terms of their contract with MIWD: they are seeking to make National Union and Commerce pay MIWD's defense costs prior to the proper exhaustion of the primary policies. Where, as here, an insurer seeks contribution because the insured is in fact attempting to make it pay more than it agreed to (specifically, to make payments that should be made by another insurer), then under the reasoning of Sloan, a cause of action for contribution is completely equitable.

In sum, the relationship between an excess carrier and a primary carrier is significantly different than the relationship between primary carriers, and no South Carolina state court has explicitly addressed whether an excess

carrier may sue a primary carrier for equitable contribution. The best guidance on the issue comes from Royal Insurance Co. of America v. Reliance Insurance Company, 140 F. Supp. 2d 609, 618 (D.S.C. 2001), which – although finding that the facts at hand did not support a claim for equitable contribution – predicted that the South Carolina Supreme Court would allow excess carriers to bring such a claim. Id. at 618 (“South Carolina has not had occasion to decide upon the availability of equitable subrogation in cases between primary and excess insurance carriers .... Confronted with the facts of this case, it seems both logical and likely that the South Carolina Supreme Court would apply the principles of equitable subrogation, since the parties both are tied to CMH, the insured, by duties of good faith and fair dealing.”).

Accordingly, decisions like Sloan, which are solely based on the relationship between primary carriers, are inapplicable, and the Court should instead be guided by the reasoning of Royal Insurance Co. that equity requires that excess carriers be allowed to bring equitable contribution claims against primary carriers.

Therefore, because no South Carolina court has addressed the relationship between primary and excess carriers, the Circuit Court erred in holding National Union and Commerce’s claims for equitable contribution

fail as a matter of law.

**B. National Union and Commerce's Request for Equitable Contribution is Not Premature**

The Circuit Court's holding that National Union and Commerce's request for equitable contribution is premature runs contrary to the very point of third-party claims, which by their nature are contingent upon the success of the principle claim.

National Union and Commerce acknowledge they have not currently paid anything to MIWD, but if this Court orders them to (which it should not), Liberty and Zurich would have an equitable obligation to reimburse them. That is the essence of a third-party claim.

The issue was extensively addressed under similar factual circumstances in Essex Builders Group, Inc. v. Amerisure Insurance Company, 429 F. Supp. 2d 1274 (M.D. Fla. 2005), in which insurer, OneBeacon, erroneously contended that insurer Amerisure was barred from seeking contribution because OneBeacon had not yet paid any money to their mutual insured. The court flatly rejected the argument, citing a litany of decisions under state and federal law holding that contingent claims of equitable subrogation and contribution could be asserted prior to making

payment. Id. at 1288-89.

Although Essex Builders Group was decided under Florida law, the impleader requirements under Florida and South Carolina law both closely mirror Federal Rule 14. All three rules allow defendants to bring a claim against a party who “may be liable” for all or part of the plaintiff’s claim, and courts across the country have held that this language allows impleader claims that are contingent upon a future finding against the third-party plaintiff in the principle action. E.g., Glens Falls Indem. Co. v. Atlantic Blg. Corp., 199 F.2d 60, 63 (4th Cir. 1952) (“It generally is held that it is no obstacle to a third-party action that the liability, if any, of the third-party defendant can be established only after that of the original defendant and after the satisfaction of plaintiff’s claim when subrogation is the basis of the claim.”); Community Fed. Sav. & Loan Ass’n v. Transamerica Ins. Co., 559 F. Supp. 536, 537 (E.D. Mo. 1983) (fact that obligor on a bond had not yet paid any sum pursuant to obligee’s demand did not bar obligor’s third-party complaint for subrogation). See also Wright and Miller, § 1451 When a Third-Party Action Is Proper—Acceleration of Contingent Claims, 6 Fed. Prac. & Proc. Civ. § 1451 (3d ed. updated April 2015) (“The words ‘may be liable’ mean that defendant is permitted to join someone against whom a cause of

action has not yet accrued, provided that the claim is contingent upon the success of plaintiff's action and will accrue when defendant's liability is determined in the main action or plaintiff's claim is satisfied.”).

Therefore, National Union and Commerce's claim for equitable contribution is ripe. Accordingly, the Circuit Court erred in holding National Union and Commerce's claim for equitable contribution fail as a matter of law.

#### **IV. National Union and Commerce's Third-Party Complaints Against Liberty and Zurich are Proper**

The Circuit Court held Liberty and Zurich are not proper third-party defendants under Rule 14 of the South Carolina Rules of Civil Procedure. Specifically, the Circuit Court held National Union and Commerce's claims against Liberty and Zurich were founded on primary liability, rather than derivative liability as required by Rule 14, SCRPC. The Circuit Court stated National Union and Commerce's contention that Liberty and Zurich should remain primarily liable to MIWD for damages associated with the MDL and that National Union and Commerce's liability has not yet ripened due to lack of primary exhaustion are affirmative defenses, not derivative liability claims; thus, National Union and Commerce's claims do not serve as a basis

for impleading Liberty and Zurich under South Carolina law.

However, National Union and Commerce seek declaratory judgment, and South Carolina courts do not predicate declaratory judgments sought under Rule 14(a) on any finding of primary or derivative liability. To the contrary, South Carolina law clearly states that interested parties such as Liberty should be named as parties to this action. S.C. Code Ann. § 15-53-80 (2015) (stating that when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration).

Furthermore, the Circuit Court's order granting summary judgment failed to recognize that the contribution claim is contingent upon a judgment in MIWD's favor against National Union and/or Commerce. At the time of the Circuit Court orders granting summary judgment, no such judgment had been entered. As discussed above, this type of contingent third-party claim satisfies the requirements of Rule 14. See Wright & Miller § 1451, When a Third-Party Action Is Proper—Acceleration of Contingent Claims, 6 Fed. Prac. & Proc. Civ. § 1451 (3d ed. updated April 2015) (“The words “may be liable” mean that defendant is permitted to join someone against whom a cause of action has not yet accrued, provided that the claim is contingent

upon the success of plaintiff's action and will accrue when defendant's liability is determined in the main action or plaintiff's claim is satisfied. In this context, resort to impleader has the effect of accelerating the determination of the third-party defendant's liability.”); see also Insurance Fin. Servs., Inc. v. South Carolina Ins. Co., 275 S.C. 155, 160, 268 S.E.2d 113, 116 (1980) (impleader is proper where third-party defendants would have been unable to complain of joinder had the defendant insurer filed the suit as the plaintiff).

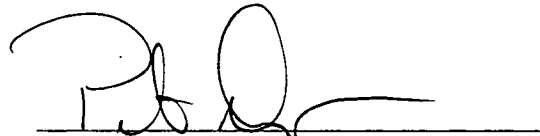
Accordingly, Rule 14(a) permits joinder of Liberty and Zurich. Therefore, the Circuit Court erred in holding Liberty and Zurich are not proper third-party defendants.

**CONCLUSION**

For the foregoing reasons, National Union and Commerce respectfully request this Court reverse the Circuit Court's order granting summary judgment in favor of Liberty and Zurich.

Respectfully submitted,

COLLINS & LACY, P.C.



PETER H. DWORJANYN  
pdworjanyn@collinsandlacy.com  
CHRISTIAN STEGMAIER  
cstegmaier@collinsandlacy.com  
KELSEY J. BRUDVIG  
kbrudvig@collinsandlacy.com  
Post Office Box 12487  
Columbia, South Carolina 29211  
(803) 256-2660 (voice)  
(803) 771-4484 (facsimile)

ATTORNEYS FOR APPELLANTS

Columbia, South Carolina  
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