

IN THE SUPREME COURT OF MISSOURI

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EAST END TRANSFER & STORAGE, )  
INC., et al., )  
and )  
NORTH AMERICAN SPECIALTY )  
INSURANCE COMPANY, )  
Respondents, )  
vs. )  
THE TRAVELERS INDEMNITY )  
COMPANY OF ILLINOIS, et al. )  
Defendants, )  
and )  
UNIGROUP, INC., )  
and )  
UNITED VAN LINES, L. L. C. )  
and )  
VANLINER INSURANCE COMPANY, )  
et al., )  
Appellants. )

Appeal No. SC87908

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APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI

THE HONORABLE KENNETH ROMINES

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SUBSTITUTE BRIEF OF RESPONDENT  
NORTH AMERICAN SPECIALTY INSURANCE COMPANY

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ARGUMENT

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I. The trial court did not err in entering summary judgment for NAS and against Vanliner, because NAS demonstrated there was coverage under the Vanliner policies for the Brouhard and Powell accidents and that NAS was entitled to judgment as a matter of law, in that:

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A. The Vanliner policies unambiguously provide coverage;

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B. Vanliner is not entitled to reformation;

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C. The Agency Agreements do not affect the insurers' coverage, and

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II. The trial court did not err in entering summary judgment for NAS and against Vanliner, because Vanliner was not entitled to reformation as a matter of law, in that the Vanliner policies are not ambiguous, there was no mutual mistake entitling Vanliner to reformation, any ambiguity must be construed in favor of coverage, the Acceptance Doctrine applies to this case, the trial court properly excluded extrinsic evidence, and NAS's motion for summary judgment properly demonstrated that NAS was entitled to judgment as a matter of law.

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- III. The trial court did not err in entering summary judgment for NAS and against Vanliner, because Section 379.195, R.S.Mo. 2000, which prohibits insurers from canceling or annulling coverage once the insured becomes responsible for a loss, bars Vanliner’s reformation claim as a matter of law, and the statute was properly brought to the trial court’s attention before the entry of judgment for NAS. 74
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- V. The trial court did not err in entering summary judgment for NAS and against Vanliner, because the indemnity language in the Agency Agreements does not affect or control the insurers’ obligations for the Brouhard and Powell claims, in that: 78
  - A. The indemnity provision in the Agency Agreements is unenforceable as a matter of law;
  - B. The decision in *Federal Ins. Co. v. Gulf Ins. Co.* does not alter the insurers’ coverage obligations based on the indemnity provision in the Agency Agreements; and

C. The Agency Agreements have no bearing on the insurance coverage afforded to Hiram Jackson, Paul Carroll, East End, and Fister under the Vanliner policies.

VI. The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the indemnity language in the Agency Agreements does not govern the insurer's obligations, in that:

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A. The indemnity language within the Agency Agreements is unenforceable as a matter of law;

B. The decision in *Federal Ins. Co. v. Gulf Ins. Co.* does not alter the insurers' coverage obligations based on the indemnity provision in the Agency Agreements; and

C. The Agency Agreements have no bearing on the insurance coverage afforded to Hiram Jackson, Paul Carroll, East End, and Fister under the Vanliner policies.

VII. The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the agreements between UVL and its agents do not affect NAS's standing to bring this action, in that:

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- A. The insurers agreed to litigate the coverage and allocation issues resulting from the Brouhard and Powell accidents;
- B. UniGroup has misapplied the language of the Agency Agreements;
- C. The Agency Agreements have no effect on the coverage obligations of the insurers; and
- D. This case is an equitable contribution action, and not a subrogation action in which NAS’s rights are derivative of the rights of NAS’s insureds, East End and Fister.

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**ABBREVIATIONS:**

- A. “Appendix”
- L.F. “Legal File”
- U.A.B. “UniGroup’s Appellant’s Brief”
- V.A.B. “Vanliner’s Appellant’s Brief”

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## **JURISDICTIONAL STATEMENT**

Plaintiff North American Specialty Insurance Company (“NAS”) accepts Vanliner Insurance Company’s jurisdictional statement.

But NAS rejects the jurisdictional statement of UniGroup, Inc., and United Van Lines, Inc. (collectively “UniGroup”). UniGroup seeks to appeal the trial court’s Judgment, Order and Decree of May 25, 2005, which denied UniGroup’s Motion for Partial Summary Judgment. UniGroup’s appeal arises out of two declaratory judgment actions to determine coverage obligations and allocation for two motor vehicle accidents involving the insureds of several insurers. (L.F. 19-40, 1673-96, A6-8) Vanliner added UniGroup and United Van Lines (“UVL”) as third-party defendants in these consolidated cases as part of its reformation claim. (L.F. 406-11, 1958-64) UniGroup is Vanliner’s parent company. (L.F. 1262-64, 1300-05, 2095, U.A.B. 9) Aside from its financial interest in seeking to limit Vanliner’s liabilities, UniGroup has no direct stake in this litigation. Neither UniGroup nor UVL is an insurer and neither is liable for the sums expended to settle the underlying claims. Therefore, NAS did not plead any claim against them. (L.F. 19-40, 1673-96, A6-8) Nor have UniGroup and UVL asserted any claims against NAS. (L.F. 1-18, 1660-72) Only *after* NAS responded to UniGroup’s summary judgment motion (L.F. 678-84, 766-95), did UniGroup seek leave to intervene in this action between NAS and the other insurers. (L.F. 2159-61, 2262)

The trial court denied UniGroup’s motion on May 25, 2005. (L.F. 3225-26) The order was not designated final for purposes of appeal. (L.F. 3225-26) Also, on May 25, 2005, the trial court sustained NAS’s motion against Vanliner. (L.F. 3217-24) The trial

court designated this judgment as final, declaring there is no just reason for delay. (L.F. 3224)

UniGroup's appeal should be dismissed. The denial of a summary judgment motion is not a final judgment and is not reviewable on appeal. *Metal Exchange Corp. v. J.W. Terrill, Inc.*, 173 S.W.3d 672, 677 (Mo. App. E.D. 2005); *Strain-Japan R-16 School Dist. v. Landmark Systems, Inc.*, 51 S.W.3d 916, 919 (Mo. App. E.D. 2001). Moreover, if the trial court had designated the denial of UniGroup's motion as final under Rule 74.01(b), there still would be no appellate jurisdiction. In *American Family Mut. Ins. Co. v. Descamps*, 48 S.W.3d 105, 107-08 (Mo. App. S.D. 2001), the Court dismissed an appeal despite the trial court's designation under Rule 74.01(b), explaining the designation had no effect because the denial of a summary judgment motion is unappealable even after the entry of a final judgment.

UniGroup seeks to attach its appeal to the separate Judgment for NAS and against Vanliner. (L.F. 3217-24) UniGroup, in its brief, asserts the denial of its summary judgment motion is "completely intertwined" with the trial court's Judgment for NAS and against Vanliner. (L.F. 3234, 3237) NAS's Judgment against Vanliner, however, has no effect on the appealability of the denial of UniGroup's motion. The denial of a summary judgment motion is not reviewable on appeal "even if the denial of the summary judgment motion is alleged contemporaneously with the granting of summary judgment in favor of the other party." *Strain-Japan R-16 School Dist.*, 51 S.W.3d at 920.

NAS acknowledges that in some instances Missouri's appellate courts have reviewed the denial of a party's summary judgment motion where the merits of that

motion are intertwined with the party's appeal from a summary judgment entered against it, as UniGroup argues in this case. In such cases, the courts have limited this narrow exception to cases involving cross-motions for summary judgment between the same parties. *See, e.g., THF Chesterfield North Development, L.L.C. v. City of Chesterfield*, 106 S.W.3d 13, 19 (Mo. App. E.D. 2003); *Nodaway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 824 (Mo. App. W.D. 2004); *Dollard v. Depositors Ins. Co.*, 96 S.W.3d 885, 887 (Mo. App. W.D. 2003); and *First Nat'l Bank of Annapolis, N.A. v. Jefferson Ins. Co. of N.Y.*, 891 S.W.2d 140, 141 (Mo. App. S.D. 1995). This exception has no application here. This case does not involve "intertwined," competing summary judgment motions filed by NAS and UniGroup against each other.

To the contrary, when UniGroup filed its motion and NAS filed its response, there were no claims pending between NAS and UniGroup. (L.F. 1-18, 1660-72) Moreover, there is no judgment for NAS and against UniGroup. More importantly, while UniGroup argues in its brief that the issues in its appeal are "completely intertwined" with the issues in Vanliner's appeal as a means of obtaining appellate jurisdiction, UniGroup has taken the exact opposite position in this very appeal. In its motion to extend oral argument in this case, UniGroup and Vanliner stated that "Appellants have filed separate briefs that together raise five issues. Of the five issues, only one is common to both appeals." (A.F. SC87908) Thus, not only are there no cross-motions for summary judgment between NAS and UniGroup, which is the only context in which Missouri courts have applied the "completely intertwined" exception, but overlap of one issue in common can hardly be considered "completely intertwined."

UniGroup cites *Bituminous Cas. Corp. v. McDowell*, 107 S.W.3d 327 (Mo. App. E.D. 2003), in support of appellate jurisdiction. (U.A.B. 3) But, the case is inapposite. The *Bituminous* case involved cross-motions for summary judgment, and the appellant appealed from *both* the denial of his summary judgment motion *as well as* the granting of the only other party's motion. Absent is a summary judgment for NAS and against UniGroup that would otherwise support the exercise of appellate jurisdiction.

UniGroup's appeal should be dismissed. The denial of UniGroup's summary judgment motion is not final and appealable. Absent is any authority supporting the exercise of appellate jurisdiction over a non-final order denying a motion for partial summary judgment based on a summary judgment against a separate and distinct party.

## STATEMENT OF FACTS

### A. Introduction

This case arises out of two declaratory judgment actions involving four insurance companies – NAS, Vanliner, American Guarantee & Liability Insurance Company, and Travelers Indemnity Company of Illinois. (L.F. 19-40, 1673-96, A6-8) This case is the second of at least three appeals that has been or will come before Missouri’s appellate courts on these claims. On November 15, 2005, the Missouri Court of Appeals, Eastern District, affirmed the trial court’s summary judgment for NAS and American Guarantee & Liability Insurance Company and against Travelers in Appeal No. ED85825, holding that a Truckers Policy purchased by UniGroup from Travelers provided primary coverage for the two underlying motor vehicle accidents. (A1-15)

The trial court’s two May 25, 2005 Judgments are the subject of this appeal. (L.F. 3217-26) In the one Judgment, the trial court entered summary judgment for NAS and against Vanliner. (L.F. 3217-24) The trial court found that Vanliner’s Truckers Policy and Umbrella Policy unambiguously provide coverage for the two underlying accidents, and that the NAS umbrella policy provides excess coverage over the Vanliner Truckers Policy. (L.F. 3221) In so ruling, the trial court rejected Vanliner’s reformation claim that its Truckers Policy should be transformed into a policy providing “hit-and-run” coverage only, a transformation that would have eliminated all coverage under the Vanliner policies for the underlying accidents. (L.F. 3221-22) In a separate Judgment entered on May 25, 2005, the trial court denied UniGroup’s summary judgment motion against NAS. (L.F. 3225-26)

The third set of appeals arises and will arise from the trial court's rulings on November 22, 2005. In that separate ruling, the trial court entered summary judgment for American Guarantee and against Vanliner. Vanliner has also appealed that Judgment, and that appeal is currently pending before the Missouri Court of Appeals, Eastern District, as Appeal No. ED87608.

A statement of the facts necessary to an understanding of the legal issues presented by this appeal follows.

**B. The Relationship Between Vanliner and UniGroup/UVL**

NAS brought this action to determine the coverage and allocation issues arising from two accidents involving UVL's agents. (L.F. 19-40, 1673-96, A6-8) In support of its argument that its policies do not or should not cover the underlying claims, Vanliner brought a third-party action against its insured, UniGroup, seeking reformation of its policies. (L.F. 406-11, 1958-64) UniGroup is Vanliner's parent company. (L.F. 1262-64, 1300-05, 2095, U.A.B. 9) The two entities operate out of the same headquarters, pool and share UniGroup's resources and departments, including UniGroup's legal department, and share many of the same officers and directors. (L.F. 1262-64, 1300-05) The interests of Vanliner and UniGroup in this lawsuit are identical. In the trial court and on appeal, UniGroup has acted to advance Vanliner's coverage position (L.F. 2069-77, 2128-48), even to the point of attempting to confess judgment on Vanliner's reformation claim as a means to rewrite Vanliner's policy language and save Vanliner from the multi-million dollar exposures resulting from the two accidents. (L.F. 623-26, 2039-42)

UniGroup has not taken this step, however, as to its other insurers such as Travelers and American Guarantee and Liability Insurance Company.

### **C. The Powell Accident**

On July 22, 2001, a tractor-trailer operated by Hiram Jackson collided with an automobile occupied by Larry Powell and Brenda Powell in Union County, Arkansas. (L.F. 2265, 2652, A7) The Powells sustained personal injuries in the accident. (L.F. 2265, 2652, A7)

Larry Powell and Gladys Sweat, the Guardian of the Estate and Person of Brenda Powell, as well as the children of Brenda Powell, Rebecca A. Powell and Coby Powell, brought suit against East End Transfer & Storage, Inc., Jackson, UniGroup, UVL, and others for their damages (“Powell lawsuit”). (L.F. 2265, 2308-17, 2652, A7) The Powells alleged claims against East End as well as against UniGroup/UVL and the vehicle’s driver, Jackson. (L.F. 2265, 2308-2317, 2652, A7)

When the accident occurred, East End was UVL’s agent operating under UVL’s bill of lading or authority. (L.F. 2031-38, 2265, 2308-17, 2653, A7) Jackson was driving a truck that East End leased to UVL under a written lease agreement. (L.F. 909-10, 920-21, 2031-38, 2265, 2308-17, 2653, A7) Jackson was operating the truck with the permission of both East End and UniGroup/UVL. (L.F. 909-10, 920-21, 2265, 2318, 2334, 2335, 2407-16, 2655, A7) Jackson was an independent contractor who, under an independent contractor’s agreement with East End, was required to meet certain UVL standards as a condition of his contract. (L.F. 2266, 2407-16, 2655) The Independent

Contractors Agreement states: “CONTRACTOR will be expected to comply with all United Van Lines and COMPANY policies.” (L.F. 2266, 2407-16, 2655)

UVL had significant control over Jackson’s rights and duties in driving under UVL’s authority. (L.F. 909, 938, 1355-56) Before East End approved Jackson as a driver and before permitting him to drive for UVL, Jackson’s application to be an independent contract driver had to be submitted to UVL for approval. (L.F. 1355-56, 2266, 2407-16, 2655) After Jackson was approved as a driver, UVL still required additional information to be sent to UVL about Jackson’s operation of vehicles under UVL’s authority and with its permission, including copies of his contract and his logbooks. (L.F. 1355-56, 2266, 2407-16, 2655) Moreover, the monies paid by customers for Jackson’s work were required to be made payable to UVL. (L.F. 912, 2407-16) UVL also required Jackson to report all claims involving the use of a vehicle being leased by UVL directly to UVL’s safety department. (L.F. 2266, 2407-16, 2655)

All claims in the Powell lawsuit were settled on behalf of East End, UniGroup, UVL, Jackson, and the other defendants for the sum of \$6.5 million. (L.F. 2267, 2460-73, 2657, A7) Before the Powell accident, Southern County Mutual Insurance Company had issued a coverage policy to East End, which was in effect at the time of the accident. (L.F. 2267, 2474-25, 2657, A7) Southern County agreed, without reservation, to pay its \$1 million policy limit to fund the \$6.5 million Powell settlement. (L.F. 2267, 2460-24, 2657, A7)

Also, before the Powell accident, NAS had issued to East End a commercial liability umbrella policy, which was in effect at the time of the accident. (L.F. 2266,

2417-60, 2656-57, A7) NAS tendered its \$2 million policy limits, under a reservation of rights, to settle the Powell lawsuit. (L.F. 2267, 2545-52, 2553, 2657-58, A7) American Guarantee, which had issued a policy to UniGroup that was also in effect on July 22, 2001 (L.F. 1864-1915), funded the remaining portion of the \$6.5 million settlement on behalf of its insureds, UniGroup and UVL. (L.F. 2267, 2545-52, 2553, 2657-58, A7)

Vanliner, whose named insureds are also UniGroup and UVL, took no part in funding the Powell settlement (L.F. 2267, 2545-52, 2553, 2657-58, V.A.B. 13), but did agree to litigate all coverage issues in the declaratory judgment action from which this appeal has been taken. (L.F. 2267, 2545-52, 2553, 2657-58) The trial court acknowledged this agreement among the insurers and concluded the insurers had the appropriate standing to bring their claims against Vanliner. (L.F. 2553)

#### **D. The Brouhard Accident**

On October 13, 2001, a tractor-trailer driven by Paul Carroll collided with an automobile occupied by Michael Brouhard and Toni Brouhard in Wabaunese County, Kansas. (L.F. 804, 1149, A6) Michael Brouhard sustained injuries resulting in his death; Toni Brouhard sustained bodily injuries. (L.F. 804, 1149, A6) The Brouhards' children then brought suit (the "Brouhard lawsuit") against UniGroup/UVL, Vincent Fister, Inc., and Carroll for their damages. (L.F. 804, 1149, A6) The Brouhard lawsuit contained independent allegations of negligence against Fister and UVL. (L.F. 804, 844-63, 1149-50, A6) The Brouhard lawsuit also alleged negligence for which UVL was responsible under written agreements. (L.F. 847-49, 850, 855-59, 919-20, 1354-56, 2407-17)

When the accident occurred, Fister was an agent of UVL operating under UVL's authority. (L.F. 804, 871-73, 909-10, 920-21, 1150-52, 1485-89, A6) Carroll was driving a truck that Fister had leased to UVL under a lease agreement. (L.F. 804, 871-73, 1152, A6) Carroll operated the truck with both Fister's and UVL's permission. (L.F. 804, 871-73, 909-10, 920-21, 1152, 1485-89, A6) Carroll was an independent contractor who, under an independent contractor's agreement with Fister, was required to meet certain UVL standards as a condition of his contract. (L.F. 804-05, 904, 906, 909-10, 920-21, 945-54, 1152-53) His Independent Contractors Agreement states: "CONTRACTOR will be expected to comply with all United Van Lines and COMPANY policies." (L.F. 805, 945-54, 1152-53)

UVL had significant control over Carroll's rights and duties as a driver under its authority. (L.F. 906, 909-10, 920-21, 1355-56) Before Fister approved Carroll as a driver and before permitting him to drive for UVL, Fister submitted Carroll's application to be an independent contract driver to UVL for approval. (L.F. 805, 945-54, 1152-53, 1354-56) After Carroll was approved as a driver for Fister and UVL, UVL still required additional information to be sent to UVL about his operation of vehicles under UVL's authority and with its permission, including copies of his contract and his logbooks. (L.F. 805, 945-54, 1152-53, 1354-56) Moreover, the monies paid by customers for Carroll's work were required to be made payable to UVL. (L.F. 912, 945-54) In addition, Carroll was required to report all claims involving the use of a vehicle being leased by UVL directly to the UVL safety department. (L.F. 805, 945-54, 1152-53, 1311)

The Brouhard lawsuit was settled on behalf of all of the named defendants for \$4.5 million. (L.F. 805-06, 996-1007, 1155, A6) Transguard Insurance Company of America, Inc., had issued a truckers coverage policy to Fister, which was in effect at the time of the accident. (L.F. 102-66, 806, 1155-56, A6) Transguard agreed, without reservation, to pay its \$1 million policy limit to fund a portion of the settlement. (L.F. 806, 1155-56, A6)

NAS had issued to Fister a commercial liability umbrella policy, which was in effect at the time of the accident. (L.F. 805, 955-95, 1154-55, A6) NAS and American Guarantee, which had issued an umbrella policy to UniGroup/UVL, as well as The Travelers Indemnity Company of Illinois and Vanliner, contributed to the Brouhard settlement on behalf of their respective insureds. (L.F. 806, 1073-84, 1156, A6-7)

The insurers made this payment under a full reservation of their rights, with each insurer agreeing to litigate the coverage and allocation issues in the declaratory judgment actions that are the subject of this appeal. (L.F. 806, 1073-84, 1156)

## **E. The Vanliner Policies**

### **1. The Truckers Policy**

Vanliner issued a Truckers Policy, Policy Number TRT 3281600 00, to UniGroup/UVL. (L.F. 806-07, 1086-1123, 1156-57, A18-23) The Truckers policy was in effect on the date of both the Brouhard and Powell accidents. (L.F. 806-07, 1086-1123, 1156-57, A19) The policy contains no language limiting its coverage to hit-and-run claims.

The Truckers Policy reads, in part:

**A. COVERAGE**

We will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from the ownership, maintenance or use of a covered “auto”.

\*\*\*

We have the right and duty to defend any “insured” against a “suit” asking for such damages.... Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

(L.F. 807, 1086-1123, 1158, A20)

The Truckers Policy defines an “insured,” in pertinent part, as follows:

**1. WHO IS AN INSURED**

The following are “insureds”:

- a.** You for any covered “auto”.
- b.** Anyone else while using with your permission a covered “auto” you own, hire or borrow ...

\*\*\*

- e.** Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.

(L.F. 807, 1086-1123, 1158, A21)

The liability limits under the Truckers Policy are \$1 million per accident. (L.F. 807, 1087, 1158) The policy's "Other Insurance - Primary and Excess Insurance Provisions" provides as follows:

**5. OTHER INSURANCE - PRIMARY AND EXCESS INSURANCE PROVISIONS**

- a. This Coverage Form's Liability Coverage is primary for any covered "auto" while hired or borrowed by you and used exclusively in your business as a "trucker" and pursuant to operating rights granted to you by a public authority.

(L.F. 807, 1099-1100, 1158, A22-23)

**2. The Umbrella Policy**

Vanliner also issued a Commercial Umbrella Policy, Policy Number UMT 3281600 01, to UniGroup/UVL, which was in effect at the time of the Brouhard and Powell accidents. (L.F. 808, 1124-36, 1159) The Umbrella Policy lists the Vanliner Truckers Policy on its "Schedule of Underlying Insurance." (L.F. 808, 1125-26, 1159) The Umbrella policy contains no provisions limiting its coverage to hit-and-run claims.

The Umbrella Policy provides, in part:

**COVERAGE A - Excess Follow Form Liability Over Occurrence Coverage**

We will pay, on behalf of an "Insured", damages in excess of the total limits of liability of underlying insurance as stated in the schedule of underlying insurance. The terms and conditions of the scheduled underlying

insurance are with respect to Coverage A. made a part of this policy, except for:

- A. Any definition, term or condition therein relating to:  
Any duty to investigate and defend, the limits of liability, premium, cancellation, "Other Insurance", our right to recover payment, or
- B. Any renewal agreement, and any exclusion or limitation attached to this policy by endorsement or included in the exclusions applicable under Coverage A and B of this policy.

With respect to A. and B. above, the provisions of this policy will apply.

With respect to all scheduled underlying policies, the injury or damage must be caused by an "Occurrence" which takes place on or after the effective date.

(L.F. 808-09, 1128, 1160)

The Umbrella Policy defines an "Insured," in part, as follows:

**Insured**

Each of the following is an "Insured" to the extent set forth below:

- A. The Named "Insured", meaning the Named "Insured" stated in the declarations and any subsidiary, owned or controlled companies as now or hereafter constituted.

\*\*\*

- D. Any person or organization (other than you) included as an "Insured" in the scheduled underlying insurance but not for

broader coverage than is available to them under the  
scheduled underlying insurance;

(L.F. 808-09, 1134-35, 1160)

The Umbrella Policy has an insurance limit of \$2 million per occurrence. (L.F. 810, 1125, 1160-61)

#### **F. The Claims and Summary Judgment Motions**

Following NAS's claim against Vanliner, Vanliner filed a third-party action against UniGroup, seeking reformation of its Truckers and Umbrella policies to eliminate coverage for the Brouhard and Powell accidents. (L.F. 406-11, 1958-64) Based on the relationship between Vanliner and UniGroup and their identical financial interests, UniGroup attempted to confess judgment on Vanliner's reformation claims. (L.F. 623-26, 2039-42)

NAS moved for summary judgment against Vanliner, claiming the Vanliner Truckers Policy provided primary coverage for the Brouhard and Powell accidents and asserting the Vanliner Umbrella Policy also provided coverage. (L.F. 803-14, 2264-76) UniGroup also moved for partial summary judgment against NAS. (L.F. 2069-77)

In opposition, NAS pointed out there were no claims pending between NAS and UniGroup upon which UniGroup could be granted summary judgment. (L.F. 678-84, 766-95) Thereafter, UniGroup obtained leave to intervene in the claims between NAS and the other insurance companies. (L.F. 2159-61, 2262) Other than intervening as a *defendant* in the claims between NAS and the other insurers, UniGroup has not asserted any claims or causes of action against NAS. (L.F. 1-18, 1660-72)

Also, after NAS filed its response to UniGroup's summary judgment motion, Vanliner filed a one-page memorandum attempting to "join in" UniGroup's motion against NAS. (L.F. 796) Aside from filing this memorandum, Vanliner has not sought summary judgment against NAS. (L.F. 1-18, 1660-72)

### **G. The Trial Court's Judgment**

On May 25, 2005, the trial court, the Honorable Kenneth Romines presiding, entered summary judgment for NAS and against Vanliner. (L.F. 3217-24) The trial court found the four insurers had reserved their rights under the various insurance policies and had agreed to litigate the coverage and allocation issues in the pending declaratory judgment actions. (L.F. 3220) Although the Court found East End and Fister were UVL's agents when the accidents occurred under their respective Agency Agreements, and that East End and Fister were leasing the vehicles involved in the accident to UVL, the trial court noted that the "Schedule A" referred to in the Lease Agreements was not before the court. (L.F. 3217-19)

The trial court's Judgment for NAS included the following findings:

- East End and Fister as well as Hiram Jackson and Paul Carroll are additional insureds under the Vanliner policies.
- Vanliner's Truckers Policy provides primary coverage for the Brouhard and Powell accidents.
- Vanliner's Umbrella Policy provides coverage for the two accidents after all underlying insurance has been exhausted.
- The Vanliner policies are unambiguous.

- Vanliner issued to its parent company, UniGroup, the policies that it intended to issue and was not entitled to reformation under the law merely because Vanliner and UniGroup did not contemplate, intend, or like the result of the policies they issued.
- There was no mutual mistake between Vanliner and UniGroup that would entitle Vanliner to reform its policies.
- As the policies were unambiguous, Vanliner was not entitled to offer extrinsic evidence for reformation purposes.
- Section 379.195, R.S.Mo. 2000, bars reformation of the Vanliner policies.
- The Agency Agreements between UVL and East End and Fister do not affect or eliminate the coverage afforded by the Vanliner policies because their indemnification language is insufficient as a matter of law and, in any event, does not affect the coverage available to the additional insureds, East End, Fister, Jackson, and Carroll under the Vanliner policies.
- The written agreements between UVL and its agents do not control or govern the coverage and allocation issues between NAS and Vanliner.
- Vanliner had a duty to defend and indemnify UniGroup, East End, Fister, Carroll, and Jackson for the claims arising out of the two accidents.

(L.F. 3217-24)

In a separate Judgment dated May 25, 2005, the trial court denied UniGroup's summary judgment motion against NAS. (L.F. 3225-26) The trial court did not set forth the basis for its decision. (L.F. 3225-26) But, the trial court did find that Vanliner's "Memorandum," in which it attempted to join in UniGroup's motion, did not satisfy the Rule 74.04 requirements for a summary judgment motion such that the "Memorandum" had no legal effect. (L.F. 3225-26)

The trial court's Judgment in favor of NAS was affirmed on May 2, 2006, by the Missouri Court of Appeals, Eastern District. This Court accepted transfer under Rule 83.04.

## POINTS RELIED ON

I. The trial court did not err in entering summary judgment for NAS and against Vanliner, because NAS demonstrated there was coverage under the Vanliner policies for the Brouhard and Powell accidents and that NAS was entitled to judgment as a matter of law, in that:

A. The Vanliner policies unambiguously provide coverage;

B. Vanliner is not entitled to reformation; and

C. The Agency Agreements do not affect the insurers' coverage

*Alea London Limited v. Bono-Soltysiak Enters.*, 186 S.W.3d 403 (Mo. App. E.D. 2006)

*Jenkad Enters., Inc. v. Transp. Ins. Co.*, 18 S.W.3d 34 (Mo. App. E.D. 2000)

*Christen v. Christen*, 38 S.W.3d 488 (Mo. App. S.D. 2001)

*Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151 (Mo. App. E.D. 2000)

Section 379.195, R.S.Mo. 2000

II. The trial court did not err in entering summary judgment for NAS and against Vanliner, because Vanliner was not entitled to reformation as a matter of law, in that the Vanliner policies are not ambiguous, there was no mutual mistake entitling Vanliner to reformation, any ambiguity must be construed in favor of coverage, the Acceptance Doctrine applies to this case, the trial acted properly in not considering extrinsic evidence, and NAS's motion for summary judgment properly demonstrated that NAS was entitled to judgment as a matter of law.

*Alea London Limited v. Bono-Soltysiak Enters.*, 186 S.W.3d 403 (Mo. App. E.D. 2006)

*Jenkad Enters., Inc. v. Transp. Ins. Co.*, 18 S.W.3d 34 (Mo. App. E.D. 2000)

*Christen v. Christen*, 38 S.W.3d 488 (Mo. App. S.D. 2001)

*Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151 (Mo. App. E.D. 2000)

- III. The trial court did not err in entering summary judgment for NAS and against Vanliner, because Section 379.195, R.S.Mo. 2000, which prohibits insurers from canceling or annulling coverage once the insured becomes responsible for a loss, bars Vanliner's reformation claim as a matter of law, and the statute was properly brought to the trial court's attention before the entry of judgment for NAS.

*Dyche v. Bostian*, 233 S.W.2d 721 (Mo. 1950)

Section 379.195, R.S.Mo. 2000

- IV. The trial court did not err in entering summary judgment for NAS and against Vanliner, because the trial court properly found that the Vanliner policies are unambiguous; therefore, the trial court rightly refused consideration of extrinsic evidence.

*Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151 (Mo. App. E.D. 2000)

- V. The trial court did not err in entering summary judgment for NAS and against Vanliner, because the indemnity language in the Agency Agreements does not affect or control the insurers' obligations for the Brouhard and Powell claims, in that:

- A. The indemnity provision in the Agency Agreements is unenforceable as a matter of law;
- B. The decision in *Federal Ins. Co. v. Gulf Ins. Co.* does not alter the insurers' coverage obligations based on the indemnity provision in the Agency Agreements; and
- C. The Agency Agreements have no bearing on the insurance coverage afforded to Hiram Jackson, Paul Carroll, East End, and Fister under the Vanliner policies.

*Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572 (8th Cir. 1988)

*Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160 (Mo. App. E.D. 2005)

VI. The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the indemnity language in the Agency Agreements does not govern the insurer's obligations, in that:

- A. The indemnity language within the Agency Agreements is unenforceable as a matter of law;
- B. The decision in *Federal Ins. Co. v. Gulf Ins. Co.* does not alter the insurers' coverage obligations based on the indemnity provision in the Agency Agreements; and
- C. The Agency Agreements have no bearing on the insurance coverage afforded to Hiram Jackson, Paul Carroll, East End, and Fister under the Vanliner policies.

*See* authorities cited under Points I and V above.

VII. The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the agreements between UVL and its agents do not affect NAS's standing to bring this action, in that:

- A. The insurers agreed to litigate the coverage and allocation issues resulting from the Brouhard and Powell accidents;
- B. UniGroup has misapplied the language of the Agency Agreements;
- C. The Agency Agreements have no effect on the coverage obligations of the insurers; and
- D. This case is an equitable contribution action, and not a subrogation action in which NAS's rights are derivative of the rights of NAS's insureds, East End and Fister.

*Heartland Payment Systems, LLC v. Utica Mut. Ins. Co.*, 185 S.W.3d 225 (Mo. App. E.D. 2006)

*Messner v. American Union Ins. Co.*, 119 S.W.3d 642 (Mo. App. S.D. 2003)

*Hagar v. Wright, Tire & Appliance, Inc.*, 33 S.W.3d 605 (Mo. App. W.D. 2001)

## STANDARD OF REVIEW

### A. Standard of Review

The Court reviews the grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). On appeal, the Court considers the evidence in the light most favorable to the party against whom the trial court ruled. *Volker Court v. Santa Fe Apartments*, 130 S.W.3d 607, 611 (Mo. App. W.D. 2004). The non-moving party is given the benefit of all reasonable inferences. *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 761 (Mo. banc 1996).

The propriety of summary judgment is an issue of law. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. The criteria, on appeal, for testing the propriety of summary judgment are no different from the criteria that should be employed by a trial court to determine the propriety of initially sustaining the motion. *Gorman v. Farm Bureau Town & Country Ins. Co. of Mo.*, 977 S.W.2d 519, 521 (Mo. App. W.D. 1998). A summary judgment will be upheld if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

Further, “[a]ppellate review, even from the grant of summary judgment, or in court-tried cases, is limited to those issues put before the trial court.” *Country Mut. Ins. Co. v. Matney*, 25 S.W.3d 651, 654 (Mo. App. W.D. 2000). An issue that is not presented to the trial court is not preserved for appellate review. *Id.* Finally, an appellate court must affirm a summary judgment if it is sustainable under any theory, *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 269 (Mo. App. W.D. 2002), even if “on an

entirely different basis than that used by the trial court.” *Peck v. Alliance General Ins. Co.*, 998 S.W.2d 71, 74 (Mo. App. E.D. 1999).

## **B. Rules of Policy Construction**

Resolution of this appeal requires the Court to review the terms of the several insurance policies. An insurance policy must be construed from its four corners. *Cole v. Kansas City Fire & Marine Ins. Co.*, 254 S.W.2d 304, 306 (Mo. App. 1953). “The interpretation of an insurance policy is a question of law for the court.” *Hobbs v. Farm Bureau Town & Country Ins. Co. of Mo.*, 965 S.W.2d 194, 196 (Mo. App. E.D. 1998). Therefore, insurance coverage questions are amenable to resolution by summary judgment motion. *Niswonger v. Farm Bureau Town and Country Ins. Co. of Mo.*, 992 S.W.2d 308, 312 (Mo. App. E.D. 1999).

It is a judicial function to interpret and enforce an insurance policy as written and not to rewrite the contract. *Chase Resorts, Inc. v. Safety Mut. Cas. Corp.*, 869 S.W.2d 145, 150 (Mo. App. E.D. 1993). Words are to be given their plain and ordinary meaning. *Id.* Unambiguous policy provisions should be enforced as written, unless a statute or public policy requires otherwise. *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 302 (Mo. banc 1993); *American Motorists Ins. Co. v. Moore*, 970 S.W.2d 876, 877 (Mo. App. E.D. 1998).

An ambiguity exists only where there is duplicity, indistinctness, or uncertainty of meaning. *Chase Resorts, Inc.*, 869 S.W.2d at 150. In deciding whether an ambiguity exists, “the words will be tested in light of the meaning which would normally be understood by the average layperson.” *Id.* A contract is not ambiguous merely because

the parties disagree over its meaning. *Atlas Reserve Temporaries, Inc. v. Vanliner Ins. Co.*, 51 S.W.3d 83, 87 (Mo. App. W.D. 2001).

The parties' intent is not to be considered absent an ambiguity. *See Peters*, 853 S.W.2d at 302. Moreover, parties cannot use extrinsic evidence to create an ambiguity.

The parties' subjective intent cannot be used to create an ambiguity. Only if the policy is ambiguous, can a question of fact arise requiring extrinsic evidence of the parties' intentions when the policy was purchased. If the policy is not ambiguous, the intent of the parties must be ascertained by the court from the policy itself.

*Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 400 (Mo. App. W.D. 1993). In the event that an ambiguity is found to exist, any such ambiguities must be construed in favor of coverage. *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 153 (Mo. App. E.D. 2000).

### **C. Reformation**

Reformation is an extraordinary equitable remedy, and is granted with great caution and only in clear cases of fraud or mutual mistake. *Alea London Ltd. v. Bob-Soltysiak Enterprises*, 186 S.W.3d 403, 415 (Mo. App. E.D. 2006). The remedy is permitted only upon clear, cogent, and convincing evidence that leaves no room for reasonable doubt. *Id.* Further, where an insured accepts a policy, the insured assents to the policy's terms and cannot later seek to have the policy reformed on mutual mistake grounds. *Jenkad Enters., Inc. v. Transp. Ins. Co.*, 18 S.W.3d 34, 38-39 (Mo. App. E.D. 2000). Similarly, absent an ambiguity, parties seeking reformation are bound by the

instrument's language and cannot invoke extrinsic evidence to establish an intent other than the intent found on the document's face. *Christen v. Christen*, 38 S.W.3d 488, 491 (Mo. App. S.D. 2001).

## **ARGUMENT**

- I. The trial court did not err in entering summary judgment for NAS and against Vanliner, because NAS demonstrated there was coverage under the Vanliner policies for the Brouhard and Powell accidents and that NAS was entitled to judgment as a matter of law, in that:
  - A. The Vanliner policies unambiguously provide coverage;
  - B. Vanliner is not entitled to reformation;
  - C. The Agency Agreements do not affect the insurers' coverage; and
  - D. NAS's rights are not derivative in any way of those of its insureds.

### **1. Introduction**

Vanliner devotes a substantial portion of its argument in refuting the decision of the Eastern District of the Missouri Court of Appeals that affirmed the trial court's summary judgment for NAS. Vanliner addresses at length the Eastern District's conclusion that Vanliner's reformation claim was barred by the doctrine of laches and sets forth its argument as to why the Eastern District so erred. But this issue is irrelevant to the case on transfer. The issue before this Court is whether the trial court properly granted summary judgment for NAS and not whether the Eastern District's prior opinion was correct. On transfer, the case is decided as if on original appeal, the decision of the Court of Appeals being a nullity. Rule 83.09. Thus, as NAS did not raise laches in its summary judgment motion, and because laches was not an issue before the trial court and was not mentioned in the trial court's judgment for NAS, Vanliner's arguments addressing laches are irrelevant and should be disregarded.

Vanliner and UniGroup also expend considerable argument addressing their reformation claim based on “mutual mistake” as well as their claim that the Agency Agreements between UVL and its agents eliminate coverage under the policies. They so argue in the face of plain and unambiguous policy language, which provides coverage for the Brouhard and Powell accidents, as found by the trial court in its judgment for NAS (and its subsequent November 2005 judgment for American Guarantee).

The material, undisputed facts demonstrate the arguments of Vanliner and UniGroup based on reformation and the Agency Agreements fail as a matter of law. This case, although subject to voluminous briefing, is simple and straightforward. Vanliner issued a Truckers Policy to UniGroup and UVL that provides primary liability insurance for UniGroup, UVL, Fister, East End, as well as their drivers, Jackson and Carroll, for trucking-related liabilities, including the underlying Brouhard and Powell lawsuits. Vanliner essentially so concedes. (L.F. 1245, A18-24) In an attempt to escape its multi-million dollar liability for these claims, Vanliner, in collusion with its corporate parent, UniGroup, argues that its Truckers Policy should be reformed to provide “hit-and-run” coverage only. Vanliner contends that this was its intent when it first provided UniGroup coverage over a decade ago. (V.A.B. 15-18, L.F. 1226-29, 3139)

Despite this claim, Vanliner fails to mention that the “intent” it is attempting to establish was not even on the same policy, or the same type of policy for that matter, as the Vanliner policies now at issue. This “intent” is based on an endorsement Vanliner claims was in a 1989 Business Auto policy (not a Truckers policy) that Vanliner issued to UniGroup. Though Vanliner claims its “hit and run” endorsement was in the initial

Business Auto policy it issued to UniGroup back in 1989, this endorsement is not referenced in any way on the schedule of forms for this 1989 policy.

At any rate, and even if it is true that this endorsement was at some point part of Vanliner's *Business Auto* coverage, this endorsement was never present in the Vanliner Business Auto policies issued after 1989. Nor was it included in the Vanliner Truckers policy at issue in this case. In the years following 1989, and at each renewal period, neither Vanliner nor UniGroup made any effort to alter the coverage to correct this purported mistake until after the Brouhard claim was made. (V.A.B. 20-21, L.F.1226-29, 1233, 1238, 1252-53, 1266) Their conduct over time bars Vanliner's reformation claim. Moreover, absent a policy ambiguity, parties seeking reformation are bound by their agreement, and cannot rely on extrinsic evidence to establish an intent other than the intent expressed on the policy's face. *Christen v. Christen*, 38 S.W.3d 488, 491 (Mo. App. S.D. 2001). Though Vanliner labors hard to render this principle of Missouri law inapplicable or irrelevant, it remains the law in Missouri and is directly applicable in this case.

Finally, Section 379.195, R.S.Mo. 2004, bars Vanliner's reformation claim. As a matter of public policy, insurers and their insureds are prohibited from entering into an agreement that would otherwise reduce or negate coverage for a loss once the insured becomes responsible for such a loss. Otherwise, the potential for fraud and collusion is too great, as is evidenced by the facts in this case.

The reasons why the trial court's judgment for NAS should be affirmed follow. In the remaining points of its brief, NAS separately addresses the points relied on advanced by Vanliner and UniGroup on appeal.

**2. The Vanliner policies provide coverage for the underlying accidents.**

Vanliner argues that its Truckers Policy is ambiguous. But the policy's plain language defeats its argument. The policy states there is coverage for those amounts an "insured" is legally obligated to pay for "bodily injury" caused by an "accident" and resulting from the ownership or use of a covered "auto." (L.F. 1093) The underlying accidents trigger these preconditions for coverage.

The Brouhard and Powell claims were "accidents" that resulted in "bodily injury." (L.F. 804, 844-63, 1149-50, 2265, 2308-17, 2652, A6-7, 20)

These claims also arose from accidents brought against "insureds." (L.F. 1086-1123, 1134-35, A20) The Truckers Policy makes clear in its "Who Is an Insured" section that UniGroup, United, East End, Fister, Jackson, and Carroll are all insureds under the policy. (L.F. 1086-1123, 1093-94, A20) UniGroup and United are the named insureds. Furthermore, as Carroll and Jackson were using vehicles when the accidents occurred that were hired or borrowed by UniGroup (L.F. 804, 871-73, 1150-52, 2265, 2308-17, 2653, A6-7), they are also insureds under the policy.

Moreover, East End and Fister are insureds under the Vanliner policies. East End and Fister, as UVL's hauling agents, are insureds under the policies because East End and Fister were using the vehicles under UVL's bill of lading at the time of the accidents.

(L.F. 804, 871-73, 909-10, 1150-52, 1485-89, 2031-38, 2265, 2318, 2334, 2335, 2407-16, 2655, A6-7) Further, under the Truckers Policy, anyone liable for the conduct of any “insured” is also an insured. (L.F. 807, 1086-1123, 1158, A20) Therefore, East End and Fister are insureds due to their liability for the conduct of Carroll and Jackson, as well as any assumption of UVL’s liability under the Agency Agreements.

Finally, the underlying accidents involved autos covered by the Truckers Policy. The policy denotes covered autos with Symbol 51. (L.F. 1087, A19, 24) The Truckers Coverage Amendment links Symbol 51 to the Composite Rate Endorsement. (L.F. 1123, A24) This endorsement provides automobile liability coverage without qualification. (L.F. 1121, 1231, A24) Absent in the Truckers Policy is any indication that the coverage provided by the policy is limited to hit-and-run claims. (L.F. 1319-20) Vanliner, on appeal, does not challenge this plain reading of the policy. (V.A.B. 22) Instead, Vanliner argues the policy should be reformed to reflect its original “intent” to provide hit-and-run coverage only, asserting, without support, that the policy does not define what autos are covered.

**3. Vanliner is not entitled to reformation.**

**a. Any ambiguities must be resolved in favor of coverage.**

Vanliner argues the Truckers Policy is ambiguous and does not adequately reflect the risk Vanliner intended to insure. Vanliner asserts the “autos” covered under the policy are not adequately defined. The policy uses Symbol 51, which the policy defines as “per composite rate endorsement.” (L.F. 1123, 1231) Vanliner maintains it intended

the policy, which is denominated a “truckers” policy, to provide “hit-and-run” coverage only. Vanliner’s argument should be denied.

Vanliner has not shown by clear, cogent, and convincing evidence that it is entitled to reform the Truckers Policy into a hit-and-run policy. *Alea London Ltd.*, 186 S.W.3d at 415. Reformation is an extraordinary equitable remedy, and is granted with great caution, and only in clear cases of fraud and mistake. *Id.* Vanliner cannot satisfy this heavy burden.

The Truckers Policy is not ambiguous. There is little question about the types of “autos” that are insured under a truckers policy, and both the record on appeal and Vanliner’s brief demonstrate that for more than a decade Vanliner covered *any* auto under the policies it issued to its parent company since 1989. (V.A.B. 20-21, L.F. 1222-30, 1233-34, 1238, 1369-79, 1388, 1415, 3132, 3143) More importantly, Vanliner invokes this purported ambiguity, which does not exist, to *eliminate* coverage and rid itself of two multi-million dollar liabilities. Vanliner’s argument is contrary to the rule that ambiguous policy provisions must be construed against the insurer, especially where the alleged ambiguous provision of the policy is designed to “cut down, restrict or limit insurance coverage already granted.” *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 153 (Mo. App. E.D. 2000).

If the Vanliner Truckers Policy contained ambiguities, which NAS denies, this case presents the very situation that requires the ambiguity to be construed against Vanliner. As acknowledged by Vanliner, its policies have covered *any* “auto” for more than a decade because the alleged “mistake” that Vanliner identifies goes back to 1989,

when the policy Vanliner issued to UniGroup was a Business Auto policy and not a Truckers policy. (V.A.B. 20-21, L.F. 1222-30, 1233-34, 1238, 1369-79, 1388, 1415, 3132, 3143) Indeed, Vanliner unilaterally added retroactive endorsements to all of its policies, which confirms that any “auto” was covered under the policies before Vanliner attempted to reform them. (L.F. 1228, 1233-34, 1244, 1249, 1251, 1313, 1391-92, 1399, 1425-27, 3122, 3143)

Thus, *if* the Vanliner policy issued to UniGroup was once a hit-and-run policy, and there is no conclusive evidence of this, Vanliner is attempting to use this purported ambiguity to restrict and eliminate coverage for two multi-million dollar exposures. (*Id.*) This Vanliner cannot do because any ambiguity that the Court may find must be construed in favor of coverage. *Lucas*, 24 S.W.3d at 153.

**b. Extrinsic evidence cannot be considered to interpret the Truckers Policy, despite Vanliner’s mutual mistake argument.**

The trial court refused to consider Vanliner’s extrinsic evidence because its policies were unambiguous and because Vanliner’s reformation claim was predicated on a purported mutual mistake based on the alleged ambiguity. (L.F. 3221-22) The trial court did not err in so ruling. Parties cannot use extrinsic evidence or evidence of their subjective intent to create an ambiguity, which is precisely what Vanliner is attempting to do in this case. *Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 400 (Mo. App. W.D. 1993). The fact that Vanliner is attempting to use extrinsic

evidence to create an ambiguity in the form of a reformation claim in no way alters this principle.

The trial court, in sustaining NAS's summary judgment motion, cited *Christen v. Christen*, 38 S.W.3d 488, 491-92 (Mo. App. S.D. 2001), holding that as the Truckers Policy was not ambiguous, Vanliner could not rely on extrinsic evidence to establish an intent other than the one expressed by the policy's plain language. Vanliner argues the *Christen* case does not support the trial court's ruling. Vanliner characterizes the "mistake" in *Christen* as a "unilateral drafting mistake rather than a mutual mistake" and bases its argument on this distinction. But, this is precisely the point because, as was true in *Christen*, there is no mutual mistake in this case that would otherwise entitle Vanliner to reformation.

If UniGroup and Vanliner truly intended the Truckers Policy to apply only to accidents involving unidentified or unknown UVL trucks, and if the first policy issued by Vanliner to UniGroup in 1989 did contain an endorsement or endorsements limiting the coverage this way (L.F. 3139), though this endorsement is not listed on the policy's schedule of forms (L.F. 3134), then the "mistake" was a unilateral mistake by Vanliner in failing to include the limiting language in all subsequent policy renewals since 1989. (V.A.B. 15-18, 20-21, L.F. 1226-29, 1233-34, 1238) Missouri makes clear that reformation is only allowed in the case of a unilateral mistake where "the mistake is accompanied by clear and convincing evidence of some sort of fraud, deception or other bad faith activities by the other party that prevented or hindered the mistaken party in the timely discovery of the mistake." *Alea London Ltd.*, 186 S.W.3d at 416.

In *Alea London Ltd.*, the Missouri Court of Appeals affirmed the denial of a reformation claim where the insurer sought to add a liquor liability exclusion to its binder after the occurrence of an alcohol-related fatality because the insurer erroneously classified its insured as a restaurant that did not serve alcohol, despite possessing accurate information concerning the true nature of the insured's business. After noting that a unilateral mistake is not grounds for reformation absent fraud, deception, or bad faith committed by one of the parties, the Court held that equity will not relieve against such a mistake where the complaining party had within its reach the true state of facts and neglected to act. *Id.*, quoting *Croy v. Reorganized School Dist. R-V*, 434 S.W.2d 517, 522 (Mo. banc 1968). Consider also *EBSCO Indus., Inc. v. Royal Ins. Co.*, 775 So.2d 128, 131 (Ala. 2000), where the Supreme Court of Alabama held an insurer was not entitled to reform its policy because the insurer's failure to remove the insured from its policy was a unilateral clerical error, despite the mutual agreement between the insurer and the insured that the insured would no longer be covered. This case warrants the same result.

Vanliner, although claiming to have intended to issue a hit-and-run policy, did not do so (L.F. 1319-20), and only sought reformation after it had been called upon to provide coverage for the Brouhard claim. (L.F. 1244, 1249, 1251, 1313, 1320, 1324, 1425-27) This case simply does not involve a *mutual* mistake. And any mistake was not made in the issuance of the Truckers Policy; the unilateral mistake that is being relied on by Vanliner was on a completely different line of Vanliner policies that dates back to more than a decade before the accidents at issue in this case. Moreover, UniGroup had

nothing to do with the issuance of the Truckers Policy or the forms comprising the policy. If Vanliner and UniGroup agreed in 1989 to insure only liability resulting from hit-and-run situations, and if Vanliner in 1990 mistakenly removed the pertinent endorsements from the policy, this mistake was Vanliner's alone and, as a matter of law, fails as a reformation ground. *Alea London Ltd.*, 186 S.W.3d at 415-16.

Indeed, the record demonstrates the unilateral nature of Vanliner's mistake. Vanliner's action in adding retroactive hit-and-run endorsements to the policies dating back to 1989 was done unilaterally without even consulting UniGroup. UniGroup did not request these restrictive endorsements; they were requested by Vanliner's senior management. (L.F. 1228, 1244-45, 1249) Only after Vanliner created these endorsements were they sent to UniGroup. (L.F. 1251) According to UniGroup's corporate designee, the first time she discussed these endorsements with Vanliner was in October 2002, which was at least two months after Vanliner added the endorsements to the policies. (L.F. 1313, 1391-92, 1399) After creating the endorsements, Vanliner then scheduled an after-the-fact meeting with UniGroup to obtain UniGroup's cooperation in Vanliner's efforts to retroactively reform the policies. Thus, Vanliner sought to unilaterally cure its unilateral mistake.

Further contrary to Vanliner's argument, if this case did involve a mutual mistake, reformation would still not be warranted. Mutual mistakes must occur at the time of contracting. *Alea London Ltd.*, 186 S.W.3d at 415. Here, the purported mistake did not occur at the time Vanliner issued the Truckers Policy that is the subject of this appeal.

Rather, the mistake, if there was one, occurred long before in 1990, when the hit-and-run endorsement was first purported omitted from the Vanliner policies issued to UniGroup.

These facts demonstrate the mistake was a unilateral one, which deprives Vanliner of the right to reformation. They also show that UniGroup and Vanliner acted in concert to escape Vanliner's unambiguous coverage obligations once Vanliner learned of the Brouhard accident.

**c. Vanliner and UniGroup cannot collude to “reform” the Truckers Policy to permit Vanliner to escape its contract obligations.**

UniGroup is Vanliner's corporate parent. (L.F. 1262-64, 1300-05, 2095, U.A.B. 9) UniGroup and Vanliner cooperated throughout this litigation. UniGroup's cooperation is shown by its attempted confession of judgment on Vanliner's reformation claim, although such a reformation would have eliminated substantial insurance coverage for UVL (and the other insureds under the Vanliner policies) for the underlying accidents. (L.F. 623-26, 2039-42) In fact, UniGroup admits in its brief that its financial interests in this case coincide with those of Vanliner's. (U.A.B. 5-6)

In addition, UniGroup selectively invoked portions of the indemnity agreements as defenses to NAS's claims against Vanliner, but did not do so as to the claims made against UVL's other insurers, namely, Travelers and American Guarantee. Aside from UniGroup's ownership of Vanliner, there is no reason for UniGroup to treat these insurers differently, yet although they hold identical positions vis-à-vis UniGroup, UniGroup saw no reason to intervene on their behalf.

The collusive litigation stratagem of Vanliner and UniGroup is nothing less than an unabashed attempt to protect and advance their mutual financial interests in eliminating the multi-million exposures that Vanliner faces because of the Brouhard and Powell accidents. Until Vanliner learned of its exposure in the Brouhard lawsuit (L.F. 1228-29, 1233-34, 1244, 1249, 1251), it had undertaken no effort to reform its policies, which had remained unchanged in salient form since the Business Auto line of policies was issued in 1989. (L.F. 1226-29, 1245, 1369-79, 1388, 1415) Absent UniGroup's status as Vanliner's corporate parent, no other insured would have acted in such a detrimental manner to its own interests.

Missouri public policy bars Vanliner and UniGroup from colluding to defeat coverage for the underlying lawsuits after these losses occurred and the resulting claims were resolved by settlement. Section 379.195, R.S.Mo. 2000, which states as follows, so provides:

2. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

As held by the Supreme Court of Missouri, Section 379.195 "forms a part of every insurance contract in Missouri as much as if it were fully set out therein." *Dyche v. Bostian*, 233 S.W.2d 721, 724 (Mo. 1950). Section 379.195 bars Vanliner and UniGroup from colluding to "reform" the Vanliner policies such that they provide no coverage for the Brouhard and Powell accidents. The very object of Section 379.195 is to thwart the

very machinations in which Vanliner and its corporate parent have engaged. As a matter of public policy, insurers and their insureds are prohibited from acts of collusion designed to defeat insurance coverage for an existing loss. Otherwise, a contrary rule would encourage fraud and collusion designed to retroactively avoid coverage obligations following the occurrence of covered events.

**d. The “Acceptance” Doctrine**

The quest of Vanliner and UniGroup to reform the Truckers Policy and avoid liability for the Brouhard and Powell accidents is also defeated by the “acceptance” doctrine. Vanliner and UniGroup ignore that an insured has a duty to read its policy. If either Vanliner and UniGroup had read any version of the Truckers Policy in effect since 1989, they would have discovered the policy was not written as a hit-and-run policy, if such a policy were truly their intention, and the purported “mistake” that they have advanced in this litigation could have been easily remedied, and long ago. (L.F. 1252-53, 1260) But they did not. (L.F. 1352-53, 1260, 1322-25, 1326, 1360-61, 1428-30)

In Missouri, the insured has a duty to promptly examine its policy to ensure it contains the terms of coverage desired or agreed upon, and if the policy does not, to reject it by promptly notifying the insurer of its dissatisfaction. *Jenkad Enters., Inc. v. Transp. Ins. Co.*, 18 S.W.3d 34, 38 (Mo. App. E.D. 2000). Once an insured accepts an insurance policy as written, it cannot later seek reformation, unless an examination of the policy would *not* have revealed the mistake. *Id.* at 38-39.

The acceptance doctrine defeats Vanliner’s reformation argument. There is no dispute that an examination of the Truckers Policy at any time over the decade that

passed between 1989 and the 2001 accidents by either Vanliner or UniGroup would have exposed the “mistake.”

Similarly, when the same policy is renewed annually, the insured is bound by the policy, regardless of whether the insured has actually read the policy. *Shelter Mut. Ins. Co. v. DeShazo*, 955 S.W.2d 234, 238 (Mo. App. S.D. 1997). Vanliner simply ignores these principles and simply argues in its brief that the acceptance doctrine does not apply to this case and applies only in an “offer/counter-offer” situation. To the contrary, *Jenkad* is an insurance case, and the *Jenkad* rule is directly applicable to the Vanliner policies.

The failure of Vanliner and UniGroup to read the Truckers Policy ratifies the policy’s plain and unambiguous terms. *Jenkad*, 18 S.W.3d at 38-39; *Secura Ins. Co. v. Saunders*, 227 F.3d 1077, 1081 (8th Cir. 2000). The alleged mistake concerning hit-and-run coverage, if any, occurred sometime between 1989 and 1993. (L.F. 1222-29) The mistake has nothing to do with the Truckers Policy in effect at the time of the Brouhard and Powell accidents. Year after year the policies were renewed without any effort by Vanliner or UniGroup to limit the coverage to hit-and-run claims. (L.F. 1222-29, 1369-79, 1388, 1415, 1428-30) Over a decade elapsed following the policy’s original issuance without such a change. UniGroup *never* examined the Vanliner policies until after the Brouhard and Powell accidents and after Vanliner was called upon to pay indemnity in conjunction with the settlement of the Brouhard claim in July 2002. (L.F. 1233-34, 1244-49, 1251, 1313, 1324, 1425-27) It was only then that Vanliner began taking steps to amend its policies. (V.A.B. 22-24, L.F. 1228, 1233-34, 1238, 1244, 1249, 1251) Under

these circumstances, the policy cannot be reformed into a hit-and-run policy after Vanliner has been called upon to satisfy its share of liability for the underlying accidents, for which its policies unambiguously provide coverage. As observed by the Missouri Court of Appeals in *Alea London, Ltd.*, “[e]quity will not relieve against mistake when the complaining party had within his reach the true state of facts, and, without being induced by the other party, neglected to avail himself of his opportunities of information.” 186 S.W.3d at 416.

**4. The Agency Agreements do not affect Vanliner’s coverage obligations.**

Vanliner and UniGroup rely on the UVL Agency Agreements with East End and Fister. They assert the indemnity provisions in these contracts alter the coverage afforded by the four corners of the Vanliner policies and eliminate coverage for the Brouhard and Powell accidents. In support, they principally rely on the decision of the Missouri Court of Appeals in *Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160 (Mo. App. E.D. 2005), in addition to many foreign authorities.

NAS acknowledges these contracts contain indemnity provisions. (L.F. 1485-89, 2031-38) But, these provisions have no bearing on Vanliner’s coverage obligations for the Brouhard and Powell accidents.

**a. Overview of the *Federal Ins. Co.* Case**

In *Federal Ins. Co.*, there were multiple insurance policies covering the accident, some of which were purchased by Sachs, the indemnitor, and one purchased by Hercules, the indemnitee. The contract between Sachs and Hercules required Sachs to indemnify

Hercules from all liability and claims arising out of the work called for in the contract *except for the sole negligence of Hercules*. After settling the claim, Sachs' excess insurer filed suit against Hercules' excess insurer for equitable contribution.

After citing the general rule governing the interpretation of "other insurance" clauses -- where the competing clauses are similar both insurers are required to pay their proportionate share of the loss -- the Court held, as a matter of first impression in Missouri, that indemnification agreements can nullify one insurer's right to contribution from another insurer. *Id.* at 164.

The Court in *Federal Ins. Co.* further noted that whether the indemnity agreement controls is case specific and dependent upon consideration of a series of factors, including: "1) the validity of the indemnification agreement; 2) an insurance policy that covers the settlement; and 3) the intentions and relationships of the parties and the absence of unfair prejudice to the insurers." *Id.* at 166. It is based on these factors as well as facts present in this case that were absent in *Federal Ins. Co.* that make clear that the rule in *Federal Ins. Co.* does not govern this case.

**b. The indemnity provisions in the Agency Agreements are not enforceable.**

The first factor to be considered is whether the indemnification agreement is valid. While Vanliner and UniGroup argue that the indemnity language is enforceable, this is not the case. The Agency Agreements are adhesion contracts. (L.F. 1349-50) *See Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572, 575 (8th Cir. 1988). Those doing

business with UVL have no choice but to enter into such agreements. (L.F. 1349-50, 1485-89, 2031-38) The indemnity provision in these agreements state:

The Agent will indemnify Carrier against, hold it harmless from and promptly reimburse it for, any and all payments of monies (fines, damages, settlement amounts, expenses, attorney's fees, court costs, judgments and the like), by reason of any claim, demand, tax, penalty or judicial or administrative investigation or proceeding arising from any actual or claimed occurrence involving the Agent or any act, omission or obligation of the Agent or anyone associated or affiliated with the Agent or acting on behalf of the Agent. At the election of the Carrier, the Agent shall also defend Carrier against the same. Carrier shall have the right, through counsel of its choice, to control any matter to the extent it could directly or indirectly affect the Carrier.

(L.F. 1485-89, 2031-38)

The Brouhard and Powell lawsuits, which were settled on behalf of all defendants, including UniGroup and UVL, included allegations of negligence against all defendants. (L.F. 804, 847-49, 850, 855-59, 904, 919-20, 996-1007, 1155, 1354-56, 2407-17, 2265, 2308-17, 2652, 2267, 2460-73, 2657, A6-7) Vanliner and UniGroup rely on the above indemnity language in arguing that East End and Fister are required to indemnify UniGroup. The trial court disagreed, concluding the indemnity language was unenforceable. (L.F. 3222-23)

Missouri law requires there be a clear and unequivocal expression of intent of someone to indemnify someone else for that other person's own negligent acts before such an agreement is enforceable. *K.C. Landsmen, LLC v. Lowe-Guido*, 35 S.W.3d 917, 921-22 (Mo. App. W.D. 2001).

Broad and seemingly all-inclusive language is not sufficient to impose liability for the indemnitee's own negligence. Indeed it would take clear language to show that a contract of indemnity was intended to cover conditions or operations under the control of the party indemnified.... In the absence of such clear expression or where any doubt exists as to the intentions of the parties, Missouri will not construe a contract of indemnity to indemnify against the indemnitee's own negligence.

*Id.* at 922.

Under these rules, the indemnity language in the Agency Agreements is unenforceable as to the claims against UniGroup and UVL based on their own negligence in causing the Brouhard and Powell accidents. Even if enforceable, and although the language is certainly broad, the more salient point is that the provision does not state that East End and Fister will indemnify UniGroup or UVL for claims alleging their own negligence. It is undisputed that part of the claims settled in the underlying lawsuits included allegations of negligence and claims directed against UniGroup and UVL. (L.F. 844-63, 904, 919-20, 1354-56, 2313-16) While Vanliner and UniGroup rely on the fact that both of the underlying lawsuits settled before trial and, thus, before any findings of negligence against UniGroup and UVL, this is irrelevant because the lawsuits were

settled on behalf of all defendants, including the pleaded claims against UniGroup and UVL.

As both the Brouhard and Powell lawsuits were settled on behalf of all defendants, including UniGroup and UVL, the holding in *Federal Ins. Co.* is inapplicable because the indemnity provisions may not be enforced to compel either Fister or East End to indemnify UniGroup and UVL for their own negligence. Restated, even if the Court were to apply the rule in *Federal Ins. Co.*, the indemnity provisions do not affect the amounts paid on behalf of UniGroup and UVL in the settlement of the underlying actions, which include claims based on their own negligence. Thus, the indemnity provisions cannot be read to render the Vanliner policies inapplicable to these claims.

**c. The *Federal Ins. Co.* case is factually distinguishable.**

Even if the Court concludes the indemnity language in the Agency Agreements is valid, this case is quite different factually from the situation in *Federal Ins. Co.* in several ways. First, the issue addressed in *Federal Ins. Co.* was how various policies were to be applied to a loss and when each policy was triggered. The indemnitee's insurer in that case, however, was not attempting to use the indemnity agreement in the same way that Vanliner has done in this case, namely, that the Vanliner policies *never* provide coverage.

More importantly, if the *Federal Ins. Co.* analysis were applicable and if East End and Fister did have a duty to indemnify UniGroup and UVL under the Agency Agreements, Vanliner and UniGroup ignore that East End and Fister, the "indemnitors," are also insureds under the Vanliner policies. (L.F. 3219-20) This fact is significant. Even if the Vanliner policies are not triggered by the claims made against their named

insured, UniGroup, in the Brouhard and Powell lawsuits, Vanliner has a separate duty to indemnify East End and Fister for the settlements in those lawsuits, which would include any amounts paid in indemnifying UniGroup and UVL. Restated, Vanliner and UniGroup ignore that East End and Fister are entitled to the benefit of all policies under which they are afforded insured status as a means of satisfying their obligation, including the Vanliner policies.

This situation was absent in *Federal Ins. Co.*, as well as in the cases from other jurisdictions addressed in *Federal Ins. Co.*, because the decision makes clear that, while the indemnitee was an additional insured under the indemnitor's policies, the indemnitor was not an additional insured under the indemnitee's policy, as East End and Fister are in this case. This fact alone makes the *Federal Ins. Co.* analysis irrelevant to this case. Thus, as Missouri law provides that the coverage afforded under an insurance policy must be applied separately as to each insured under the policy, *United Fire & Cas. Co. v. Gravette*, 182 F.3d 649, 658 (8th Cir. 1999) (citing *Baker v. DePew*, 860 S.W.2d 316, 320 (Mo. banc 1993)), the Agency Agreements have no effect on Vanliner's coverage obligations owed to East End and Fister for the Brouhard and Powell accidents.

Furthermore, the same would be true of Vanliner's obligations to its additional insureds, Carroll and Jackson, except more so as to them, because they are not parties to the Agency Agreements and have no contractual obligation to indemnify UniGroup or UVL. Therefore, as it is undisputed that Carroll and Jackson are insureds under the Vanliner policies -- Vanliner and UniGroup do not contest this fact -- and because the Agency Agreements do not affect Vanliner's duty to defend and indemnify Carroll and

Jackson for the Brouhard and Powell accidents, there can be no question that, as to the duties owed by Vanliner to additional insureds Carroll and Jackson, Vanliner's coverage is triggered for these two accidents.

The drivers' insured status under the Vanliner policies dispels any argument that coverage under the Vanliner policies is eliminated by the Agency Agreements based on this Court's decision in *Utility Serv. & Maintenance, Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910 (Mo. banc 2005). (See U.A.B. at 53-62) The drivers are insureds under the Vanliner policies, but they are not parties to the Agency Agreements. (L.F. 1485-89, 2031-38) Therefore, as the indemnity provisions do not apply to them, the Vanliner Truckers Policy provides the drivers primary coverage for the underlying accidents regardless of the enforceability of the indemnity provisions.

While it may be convenient for it to do so, Vanliner cannot limit its contractual obligations simply to the duties it owes its parent company and named insured, UniGroup. Indeed, Vanliner's actions in attempting to protect solely the interests of its parent company and not the other insureds under its policies can hardly be said to be done in good faith. Still, Vanliner ignores this issue and instead blindly relies on the ultimate holding in *Federal Ins. Co.* without addressing this issue and without any true analysis. Absent from Vanliner's and UniGroup's brief is any authority, in Missouri or otherwise, that alters the coverage afforded under the four corners of an insurance policy in a situation such as this one where: (1) the indemnitor is also an insured under the indemnitee's policy; or (2) there are additional insureds under the indemnitee's policy

that are entitled to coverage and who were under no obligation to indemnify the indemnitee.

**d. UniGroup's Selective Application of the Agency Agreements**

Should the Court determine that *Federal Ins. Co.* does apply to this case, UniGroup's selective use of the Agency Agreements merits attention, as this issue not only reflects the collusive efforts of Vanliner and UniGroup, but it also is relevant to the factors to be considered under the *Federal Ins. Co.* analysis.

Although three of the four insurance companies in this action -- Travelers, American Guarantee, and Vanliner -- sold insurance policies to UniGroup, UniGroup has opted to advocate for the enforcement of the indemnity provisions only on behalf of the insurance company that it owns, Vanliner. (L.F. 1262-64, 1300-05) UniGroup's argument demonstrates the collusion between itself and Vanliner in pursuit of their common financial interests in avoiding liability for the underlying settlements.

The indemnity language cited by UniGroup and Vanliner has nothing to do with any insurance requirements the agents were required to have, and the indemnity language contains no limit on the agent's liability for indemnifying UniGroup. That is to say, a plain language reading of the indemnity language would require an agent to indemnify UniGroup in an unlimited capacity and certainly beyond the three million dollars in insurance coverage that the agents were required to obtain.

To avoid the gross excess exposure to which the agents would be susceptible -- if the Agency Agreements are enforced as written -- UniGroup has elected to pick and

choose among which of its insurers that should benefit under the indemnity provisions. This stratagem is unsupported by the law, the facts, and the policy language. For example, the same arguments made by UniGroup on Vanliner's behalf could also be applied to American Guarantee's \$50 million policy. As the "indemnitee," UniGroup is the named insured under the American Guarantee policy. While UniGroup discusses its comprehensive insurance program as a justification for why it has *chosen* to assert this defense only on Vanliner's behalf, the only distinction that can be made between Vanliner and American Guarantee is that UniGroup does not own American Guarantee. But there is nothing in the Agency Agreements that authorizes the selective application advanced by UniGroup. Nor does the UniGroup insurance program have any bearing on how the contracts between UVL and its agents should be interpreted, especially given the broad and unlimited indemnity language.

UniGroup's selective advocacy for enforcement of the Agency Agreements is also demonstrated in the case of Travelers, which also sold UniGroup a "truckers" policy that covered the Brouhard and Powell accidents. (A6-12) Travelers was not as fortunate as Vanliner to have UniGroup argue on its behalf that its coverage was not triggered based on the Agency Agreements, although Travelers and Vanliner, as UniGroup's insurers, stand in identical positions vis-à-vis UniGroup, as both insurers issued truckers policies that plainly and unambiguously provide coverage for the underlying accidents.

UniGroup's conduct is significant because one of the factors to be considered under the *Federal Ins. Co.* analysis is an insurance policy that covers the settlement. However, if Vanliner and UniGroup are correct in their assertion that policies issued to

UniGroup do not provide coverage based on the agents' unlimited duty to indemnify UniGroup under the Agency Agreements, and if the Agency Agreements are enforced as written, then none of the UniGroup policies can be said to cover the two accidents at issue, and this would include the \$50 million umbrella policy issued to UniGroup by American Guarantee.

Such a conclusion would lead to excess exposure for the agents and would lead to absurd results. Such a result also again demonstrates why UniGroup is not entitled to pick and choose which of its insurers it wishes to protect, especially when the only insurer it claims to be protected by the Agency Agreements is the insurance company that it happens to own.

## **5. Conclusion**

The trial court did not err in granting summary judgment for NAS. The Vanliner policies unambiguously provide coverage for the underlying accidents. The remedy of reformation and the rule in *Federal Ins. Co.* do not support a contrary conclusion.

To establish entitlement to reformation, Vanliner had the burden to show by clear, cogent, and convincing evidence – leaving no room for doubt – that its policies were meant to provide hit-and-run coverage only. *Alea London Ltd.*, 186 S.W.3d at 415. Absent in the Vanliner policies is any suggestion -- much less an express provision -- demonstrating that the policies were meant to provide coverage for such a narrow class of claims. No such reading of the policies can be divined from their four corners. Vanliner's reformation claim is one that is rife with doubt and the product of a collusive, post-accident attempt to rewrite its policies to escape liability for a multi-million dollar

loss. As held in *Alea London, Ltd.*, equity will not relieve against mistake when the complaining party had within its reach the true state of facts, and without being induced by any other party, failed to avail itself of its opportunities of information. *Id.* Certainly, if the policies were meant to be hit-and-run policies only, Vanliner was in the position to discover the error in the decade-long period during which the policies were issued. The fact that Vanliner claims to have first discovered its mistake after the Brouhard claim certainly makes Vanliner's right to reformation doubtful, especially in the face of Section 379.195, which prohibits the post-loss nullification of coverage. Therefore, the trial court's judgment for NAS should be affirmed.

In the balance of its brief, NAS will address the specific issues raised by Vanliner and UniGroup on appeal, to the extent these issues have not already been addressed.

II. The trial court did not err in entering summary judgment for NAS and against Vanliner, because Vanliner was not entitled to reformation as a matter of law, in that the Vanliner policies are not ambiguous, there was no mutual mistake entitling Vanliner to reformation, any ambiguity must be construed in favor of coverage, the Acceptance Doctrine applies to this case, the trial acted properly in not considering extrinsic evidence, and NAS's motion for summary judgment properly demonstrated that NAS was entitled to judgment as a matter of law.

Much of Vanliner's argument in its first point is directed at allegations of error made by the Eastern District in affirming the trial court's summary judgment for NAS. However, for the reasons addressed above, the Eastern District's decision is a nullity. Hence, that portion of Vanliner's argument directed to the alleged errors of the Eastern District need not be considered.

Addressing the trial court's judgment, Vanliner argues the trial court erred in rejecting Vanliner's reformation claim because the trial court found the Vanliner policies to be unambiguous. Vanliner asserts that reformation is warranted even absent a finding of ambiguity, that the trial court erred in refusing to consider Vanliner's extrinsic evidence, and that the acceptance doctrine does not apply to Vanliner. Vanliner's arguments should be denied.

Vanliner first argues that its statement of additional material facts supporting its claim of mutual mistake stood uncontroverted and, at the very least, created a genuine issue of material fact. Specifically, Vanliner asserts that NAS did not properly respond to

the additional facts it asserted in its response to NAS's summary judgment motion. Vanliner's argument is without merit.

Vanliner has not preserved for appellate review the specific issue of whether its additional facts are deemed admitted. Vanliner did not raise the issue in the trial court. (L.F. 1642-1658) Moreover, if the issue were properly preserved for appellate review, Vanliner's argument still fails.

Contrary to Vanliner's assertions, NAS did reply, and did so properly under Rule 74.04, to the additional facts submitted by Vanliner. NAS responded to each additional fact and cited evidence from the record for each and every one of Vanliner's additional facts. (L.F. 1618-1624) In its Reply, NAS asserted, as it has done consistently throughout this litigation, that the Vanliner policies were unambiguous such that the extrinsic evidence advanced by Vanliner was irrelevant as a matter of law to Vanliner's reformation claim and, thus, that evidence was insufficient to create a genuine issue of material fact because that evidence could not be considered.

NAS argued that the Vanliner policies speak for themselves. The fact that Vanliner disagrees with NAS's position on this question of law does not establish that NAS's reply to these additional facts was improper under Rule 74.04 or that those facts are deemed admitted.

In a related argument, Vanliner argues that NAS's motion for summary judgment did not refute Vanliner's affirmative defenses. Vanliner also asserts that the acceptance doctrine was not properly before the trial court. However, contrary to Vanliner's argument, NAS did establish before the trial court that Vanliner's affirmative defenses

failed as a matter of law. Although NAS's summary judgment motions did not specifically reference Vanliner's affirmative defenses, NAS's statement of material, undisputed facts as well as its legal analysis demonstrate that Vanliner's affirmative defenses were legally insufficient to deprive NAS of judgment as a matter of law. Vanliner argues NAS failed to show that Vanliner was not entitled to reformation because NAS did not refute Vanliner's evidence of the purported "mutual mistake." This contention fails for multiple reasons.

First, NAS argued that an unambiguous policy must be enforced as written absent adverse public policy or statutes. *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 302 (Mo. banc 1993). This rule applies equally to reformation claims. *Christen v. Christen*, 38 S.W.3d 488, 491 (Mo. App. S.D. 2001). The trial court agreed, finding that as the Vanliner policies were unambiguous, Vanliner was not entitled to reformation and, thus, the extrinsic evidence that Vanliner claims NAS did not rebut was not to be considered. (L.F. 3217-24) Equally as important is the absence of mutual mistake. In this case, the mistake for which Vanliner sought reformation is not a mutual mistake but a unilateral one. Thus, consistent with NAS's position in the trial court, Vanliner's unambiguous policy language must be enforced as written without consideration of extrinsic evidence.

Further, Vanliner's reformation argument rests on the assumption that the Vanliner Truckers Policy is ambiguous. Absent a policy ambiguity, Vanliner's reformation claim fails as a matter of law. Consistent with the trial court's Judgment, NAS addressed the ambiguity issue and made clear in its summary judgment motion that

the Vanliner policies were not ambiguous; therefore, they must be enforced as written. (L.F. 803-14, 2264-76) Moreover, extrinsic evidence cannot be considered, even in the case of reformation, unless there is an ambiguity finding. *Christen*, 38 S.W.3d at 491. Finally, as addressed above, there was no mutual mistake, the existence of which was a question of law and not based on any disputed facts.

There is also no merit to Vanliner's claim that NAS failed to address its affirmative defense based on the interplay of the Agency Agreements between UVL and UVL's agents and Vanliner's coverage obligations. The coverage issues in this case are questions of law, and not of fact. In seeking summary judgment, NAS's motion and memorandum placed before the trial court the reasons why NAS was entitled to judgment as a matter of law. (L.F. 803-14, 2264-76, 2606-16) As addressed in the first point of this brief, NAS argued, in the face of unambiguous policy language, that the existence of coverage is a question of law for the court to decide and is to be determined from the policy alone, without recourse to extrinsic evidence, including the Agency Agreements. *Hobbs v. Farm Bureau Town & Country Ins. Co. of Mo.*, 965 S.W.2d 194, 196 (Mo. App. E.D. 1998); *Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 400 (Mo. App. W.D. 1993). Thus, NAS's motion properly addressed and disposed of Vanliner's affirmative defenses because NAS asserted the interpretation of the Vanliner policies was to be made from the four corners of the policy alone and without recourse to extrinsic evidence, including all of the extrinsic evidence relied upon by Vanliner as well as the Agency Agreements.

Vanliner states an issue must be placed before the trial court in order for that issue to be preserved for appellate review. *Country Mut. Ins. Co. v. Matney*, 25 S.W.3d 651, 654 (Mo. App. W.D. 2000). These issues were before the trial court and addressed in NAS's motion. Vanliner's argument that the trial court discussed authority not addressed by NAS in its pleadings does not support a contrary conclusion. NAS is unaware of, and Vanliner does not cite to, any authority barring the trial court, whose function is to decide questions of law, from undertaking its own research of the legal issues placed before it.

Finally, the Court's review of the trial court's summary judgment is *de novo*. *ITT Commercial Fin. Corp v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. Banc 1993). As shown above, Vanliner's affirmative defenses are without merit. Moreover, summary judgment is to be affirmed on any sustainable grounds. *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 269 (Mo. App. W.D. 2002), even if "on an entirely different basis than that used by the trial court." *Peck v. Alliance General Ins. Co.*, 998 S.W.2d 71, 74 (Mo. App. E.D. 1999). Thus, the applicability of the acceptance doctrine is properly before the Court.

As to the substance of its first point, Vanliner argues that reformation may be granted for reasons other than ambiguity, which is puzzling because Vanliner's claim in this case is that its policy should be reformed based on its ambiguity. Vanliner points to a scrivener's error, citing *Edwards v. Zahner*, 395 S.W.2d 185, 189 (Mo. 1965). This case is of no relevance to the present case because this case does not involve a scrivener's error case. Rather, Vanliner argues its policies lack an endorsement that would drastically alter the coverage afforded under its plain language and limit that coverage to

hit-and-run liability claims only. Absent in the Vanliner policies is any language suggesting that the policies provided so limited a species of coverage.

The reformation authorities cited by Vanliner have no application to this case. None involve the situation present in this case where an insurance company made a unilateral mistake that was inconsistent with the purported original agreement of the parties. First, although reformation has been granted in certain cases in the absence of an ambiguity, Vanliner overlooks that it sought reformation based solely on an alleged ambiguity. And, in the face of Vanliner's argument, the trial court rejected Vanliner's reformation claim based on the absence of any policy ambiguity, citing the decision in *Christen v. Christen*, 38 S.W.3d 488, 491 (Mo. App. S.D. 2001). *Christen* is factually analogous to this case. (L.F. 3221)

In addition, the cases cited by Vanliner in support of its extrinsic evidence argument should be rejected because they are all mutual mistake cases. *See, e.g., Walters v. Tucker*, 308 S.W.2d 673 (Mo. banc 1957); *CMI Food Service, Inc. v. Hatridge Leasing*, 890 S.W.2d 420 (Mo. App. W.D. 1995); *Duenke v. Brummett*, 801 S.W.2d 759 (Mo. App. S.D. 1991); and *Kopff v. Economy Radiator Service*, 838 S.W.2d 449 (Mo. App. E.D. 1992). They have no application because the mistake at issue is a unilateral one, as outlined in point one above. Consider the holdings in the factually similar cases decisions in *Alea London Ltd. v. Bono-Soltysiak Enters*, 186 S.W.3d 403, 415-16 (Mo. App. E.D. 2006) (reformation denied where the insurer sought to add a liquor liability exclusion after the occurrence of an alcohol-related fatality because the insurer had erroneously classified its insured as a restaurant that did not serve alcohol, despite

possessing accurate information from the insured to the contrary), and *EBSCO Indus., Inc. v. Royal Ins. Co.*, 775 So.2d 128, 131 (Ala. 2000) (reformation denied where the insurer failed to remove the insured from its policy despite the mutual agreement of the insurer and the insured that the insured would no longer be covered).

Though Vanliner argues otherwise, the trial court did not err in refusing to consider Vanliner's extrinsic evidence. While Vanliner attempts to create a distinction between the admission of extrinsic evidence in general to interpret an unambiguous policy and the use of such evidence to establish a mutual mistake so as to enable reformation of a policy, Missouri law recognizes no such distinction. As discussed in NAS's first point, "where there is no ambiguity in the contract the intention of the parties is to be gathered from it and it alone, and it becomes the duty of the court . . . to state its clear meaning." *Haggard Hauling & Rigging Co., Inc. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 400 (Mo. App. W.D. 1993). Furthermore, the parties' subjective intent cannot be used to create an ambiguity. *Id.* Thus, the trial court did not err in accepting the plain language of the Truckers Policy as the sole expression of the parties' agreement. Absent an ambiguity, there is no fact question that might otherwise permit consideration of extrinsic evidence of the parties' intentions at the time of contracting. *Id.* This rule bars Vanliner's reformation claim. *Alea London Ltd.*, 186 S.W.3d at 415-16; *Christen*, 38 S.W.3d at 491.

Vanliner also places much reliance on a recent decision from the First Circuit of the United States Court of Appeals, *OneBeacon America Ins. Co. v. Travelers Indem. Co.*

*of Ill.*, 465 F.3d 38 (1st Cir. 2006) (applying Massachusetts law), in support of its reformation claim based on mutual mistake. The case is inapplicable in many respects.

First, as with the other cases cited by Vanliner, the *OneBeacon America Ins. Co.* case is a true mutual mistake case. In *OneBeacon*, the policy issued by OneBeacon never provided the limited coverage that it and the insured apparently intended at the policy's inception. In contrast, Vanliner argues the initial policy that it issued to UniGroup in 1989 did reflect the limited coverage allegedly intended by both Vanliner and UniGroup. However, the mistake occurred later, as a result of Vanliner's unilateral mistake, which was repeated year-to-year over a decade-long period, by removing the endorsement from the policy that would have clearly shown that the policy provides hit-and-run coverage only. This distinction is significant.

The *OneBeacon* case, therefore, is inapposite factually to the most apt Missouri precedent, *Alea London Ltd.*, in which the Missouri Court of Appeals held that an insurer's unilateral mistake deprived it of the right to reformation. 186 S.W.3d at 416. As noted above, the Eastern District, in *Alea London Ltd.*, held that the insurer's error in incorrectly classifying its insured's business as a restaurant that did not serve alcohol was the insurer's mistake alone and was not a mutual mistake, although both parties knew the true facts.

As noted by the Eastern District in *Alea London Ltd.*, a mutual mistake only exists when both parties, “*at the time of contracting*, share a misconception about a basic assumption or vital fact upon which they based their bargain.” *Id.* at 415 (emphasis added). The Eastern District went on to state that “a unilateral mistake is a mistake on

the part of only one of the parties and is generally not an adequate basis for reformation.” *Id.* at 415-16. Thus, Vanliner’s reliance on *OneBeacon America Ins. Co.* is misplaced both because it involves a mutual mistake and also because, as interpreted by Vanliner, that case would conflict with Missouri law as addressed in *Alea London Ltd.*

Further, to the extent the *OneBeacon America* case can be said to be relevant, the First Circuit in that case made clear that even the established existence of a mutual mistake did not alone entitle the parties to reformation. Rather, because reformation is an equitable remedy, the First Circuit held that reformation still may not be proper under principles of equity even if a mutual mistake has been proven, if the requested reformation would prejudice the rights of third parties. 465 F.3d at 42.

Thus, under *OneBeacon America*, it is plain that Vanliner is not entitled to reformation because Vanliner’s actions, in attempting to reform its policies so as to benefit its named insured, and more importantly its corporate parent, would be a direct detriment to the interests of the additional insureds under the policy, East End, Fister, Carroll, and Jackson, and could, in fact, lead to excess exposure to those insureds for their liabilities for the two accidents.

Vanliner also argues it need not prove its reformation claim by clear and convincing evidence because UniGroup admitted the mistake, and that UniGroup’s admission establishes Vanliner’s right to reformation. Vanliner cites the decision in *Everhart v. Westmoreland*, 898 S.W.2d 634, 637 (Mo. App. W.D. 1995), in support. The case is inapposite. It does not show that Vanliner is entitled to reformation simply because Vanliner and UniGroup, the company that owns and controls it, “agree” that the

policy should be reformed to escape a substantial exposure covered by the plain language of the Vanliner policies. In addition to not standing for the proposition that an “agreement” eliminates the need to prove reformation by clear and convincing evidence, it is important to note that *Everhart* is another mutual mistake case and did not involve a unilateral mistake by an insurance company as this case does. Moreover, as addressed in NAS’s first point, the cases relied on by Vanliner do not discuss Section 379.195 which bars insurers and their insureds from colluding to defeat coverage after a loss.

Vanliner’s cited cases do not involve similar facts and do not authorize the collusive litigation stratagem undertaken by UniGroup and Vanliner to rewrite the Vanliner policies after the occurrence of losses covered by the Vanliner policies. Vanliner’s third-party claims against UniGroup served only one purpose – to enable UniGroup to confess to the post-loss revision of the Vanliner policies in order to eliminate Vanliner’s multi-million dollar liability for the underlying accidents. Absent UniGroup’s ownership and control of Vanliner, and its financial interest in the outcome of this litigation, no other insured would act in a way so detrimental to its interests as an insured under an insurance policy. UniGroup’s pleadings in the trial court and on appeal demonstrate the collusion at work. As this collusion has been detailed in Point I, those facts will not be repeated here.

Vanliner also argues the acceptance doctrine does not apply. Despite its claim, Vanliner has failed to adequately address this issue in its brief. *See, e.g., Jenkad Enters., Inc. v. Transp. Ins. Co.*, 18 S.W.3d 34, 38-39 (Mo. App. E.D. 2000). As noted in the first of NAS’s brief, although UniGroup had a duty to read its policies, it apparently did not

do so, or it would have discovered that the Vanliner policies cover risks other than hit-and-run claims, if such limited coverage was truly intended. (L.F. 1252-53, 1260, 1322-26, 1428-30) The purported mistake briefed by Vanliner occurred more than ten years before the underlying accidents occurred and involved a completely different type of policy. (V.A.B. 15-18, 22-24, L.F. 1222-29, 3132, 3139, 3143) Under these circumstances, no reformation is permissible. Both UniGroup and Vanliner, by their actions, accepted policy language providing broad covered truckers liability coverage, and not the limited niche coverage for hit-and-run claims that they contend was always their intention. (L.F. 1222-29, 1252-53, 1260, 1322-25, 1428-30)

Vanliner's argument for reformation is also contrary to the rules of construction. Ambiguities are not construed to restrict coverage. *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 153 (Mo. App. E.D. 2000). They are construed in favor of coverage. *Id.* If the Vanliner Truckers Policy were truly ambiguous, the policy must be construed in favor of coverage, and not in the restrictive manner advanced by Vanliner. *Id.* Therefore, Vanliner's point should be denied.

III. The trial court did not err in entering summary judgment for NAS and against Vanliner, because Section 379.195, R.S.Mo. 2000, which prohibits insurers from canceling or annulling coverage once the insured becomes responsible for a loss, bars Vanliner's reformation claim as a matter of law, and the statute was properly brought to the trial court's attention before the entry of judgment for NAS.

Vanliner, in its third point, argues the trial court erred in *sua sponte* basing its decision on Section 379.195, R.S.Mo. 2000, because the statute does not provide a defense to reformation. Vanliner's argument should be denied.

Vanliner suggests that NAS did not raise the application of Section 379.195 in the trial court. This is simply not true. The trial court did not invoke Section 379.195 on its own motion. Both NAS and American Guarantee raised the statute's application before NAS filed its summary judgment motion, (L.F. 1969-71, 2043-47) and they did so in response to UniGroup's collusive efforts to "confess judgment" on Vanliner's reformation claim. (L.F. 623-26, 2039-42)

Section 379.195 provides, in pertinent part, as follows:

2. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

Section 379.195 forms a part of every insurance contract in Missouri as much as if it were fully stated in the policy. *Dyche v. Bostian*, 233 S.W.2d 721, 724 (Mo. 1950). By

its terms, the statute bars Vanliner and UniGroup from “reforming” the Vanliner policies such that they provide no coverage for the Brouhard and Powell accidents.

Although Section 379.195 refers to cancellations and annulments, and not to reformation, the statute bars the attempted reformation of the Vanliner policies as a matter of law. The statute’s purpose is to prevent insureds and their insurers from colluding to defeat insurance coverage for a claim following a loss. The statute speaks to the very conduct engaged in by Vanliner and UniGroup. Indeed, the statute should be applied with particular vigor to the facts of this case. The prospect for collusion is so much greater in this case where the insured owns and controls the insurer and has a financial stake in limiting the insurer’s liability for the underlying accidents.

Finally, Vanliner’s recourse to the statute’s plain language defeats its argument. While it argues that its proposed reformation would not annul or cancel coverage, this is not so. The statute clearly prohibits the canceling or annulment of coverage after a specific accident or loss and is not speaking of coverage under a policy as a whole. Thus, the effect of Vanliner’s proposed reformation would, without question, be canceling the coverage for the two accidents at issue. Thus, when the ordinary meaning of the words “cancel” and “annul” are considered, it is plain these terms embrace the concept of reformation. The word “cancel” means to annul, to revoke, to abolish or make void. THE NEW AMERICAN OXFORD DICTIONARY 250 (2001). The word “annul” means to declare invalid. *Id.* at 63.

Vanliner’s attempted reformation, when divested of labels, was an attempt to cancel and annul the coverage under the Vanliner policies for the underlying Brouhard

and Powell claims as a means to change its coverage and avoid two multi-million dollar exposures. It is irrelevant for purposes of Section 379.195 what general coverage would remain under its policies in the future as Section 379.195 prohibits such acts as a means of eliminating specific coverage obligations. Under such circumstances, the trial court did not err in applying Section 379.195 to bar reformation.

IV. The trial court did not err in entering summary judgment for NAS and against Vanliner, because the trial court properly found that the Vanliner policies are unambiguous; therefore, the trial court rightly refused consideration of extrinsic evidence.

Vanliner, in its third point, revisits the ambiguity issue, claiming the trial court misinterpreted the Truckers Policy by failing to find the policy ambiguous and in refusing to consider extrinsic evidence. Vanliner's argument focuses on its contention that the policy is ambiguous based on its assertion that the policy definition for "covered 'auto'" is not clearly defined.

Vanliner's ambiguity argument does not advance its position. If the policy were ambiguous, which it is not, the result would not be the one Vanliner seeks. Any ambiguity would have to be construed in favor of coverage and not to restrict it. *Windsor Ins. Co. v. Lucas*, 24 S.W.3d 151, 153 (Mo. App. E.D. 2000). Moreover, the extrinsic evidence, if considered, supports this conclusion. Even Vanliner concedes that, absent the endorsement that has been allegedly missing since approximately 1989, the Vanliner policies covered any "auto." (V.A.B. 20-21, 27-28, L.F. 1222-29, 1231-34, 1245) Indeed, only after the claims were made following the Brouhard accident did Vanliner claim to become aware of the mistake and attempt to retroactively limit the autos covered by its policies to hit-and-run vehicles. (V.A.B. 1233-34, 1238, 1244, 1249, 1251, 1391-92, 1399, 1425-27) Therefore, Vanliner's point should be denied.

- V. The trial court did not err in entering summary judgment for NAS and against Vanliner, because the indemnity language in the Agency Agreements does not affect or control the insurers' obligations for the Brouhard and Powell claims, in that:
- A. The indemnity provision in the Agency Agreements is unenforceable as a matter of law;
  - B. The decision in *Federal Ins. Co. v. Gulf Ins. Co.* does not alter the insurers' coverage obligations based on the indemnity provision in the Agency Agreements; and
  - C. The Agency Agreements have no bearing on the insurance coverage afforded to Hiram Jackson, Paul Carroll, East End, and Fister under the Vanliner policies.

Vanliner, in its fourth point, argues the Agency Agreements between UVL and UVL's agents change Vanliner's coverage obligations and save it from liability for the Brouhard and Powell claims. Vanliner principally relies on the Court's decision in *Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160 (Mo. App. E.D. 2005), in addition to many foreign authorities.

But, as discussed in Point I above, the *Federal Ins. Co.* decision is not controlling. Nothing in Vanliner's point changes this analysis or supports the reversal of the trial court's judgment for NAS. Vanliner again focuses its argument on what it perceives to be the Eastern District's errors in affirming the trial court's summary judgment for NAS, but the Eastern District's reasoning is irrelevant to this appeal on transfer. As the trial

court correctly found, the indemnity language relied on by Vanliner is overly broad and, therefore, unenforceable. Moreover, even if this language were enforceable, the language is insufficient to compel East End or Fister to indemnify UniGroup and UVL for their own negligence. The Agency Agreements, by their terms, are silent on this type of indemnity. (L.F. 1485-89, 2031-38)

The agreements' failure to impose any indemnity requirements for the negligence of UniGroup and UVL is fatal to Vanliner's claim. The Brouhard and Powell settlements were executed to settle the claims of negligence asserted against each of the named defendants in those lawsuits, including UniGroup and UVL. (L.F. 844-63, 904, 919-20, 1354-56, 2313-16) As discussed in Point I, even if the indemnity provisions in the Agency Agreements are given effect, this case is factually distinguishable from the decision in *Federal Ins. Co.* Therefore, contrary to Vanliner's argument, consideration of the indemnity agreements does not change Vanliner's coverage obligations arising from the underlying accidents.

Vanliner argues the parties to the Agency Agreements are sophisticated businesses and claims "the language utilized was sufficient to support the indemnity obligations." (V.A.B. 75) Vanliner also asserts that the parties' intentions and relationships are documented in the record and make clear the agents' indemnity obligations. But nowhere does Vanliner allege, and indeed nowhere in the record can it be found, that East End or Fister intended to indemnify UniGroup and UVL for their own negligence. This type of indemnity is absent from the Agency Agreements, which were entered into more than twenty years ago and are, by definition, adhesion contracts. (L.F. 1349-50, 1485-89,

2031-38) Thus, while East End and Fister may have intended to indemnify UniGroup under the Agency Agreements for their individual negligence, it is another matter altogether to claim that East End and Fister agreed to indemnify UniGroup for its own negligence, or for that of UVL. (L.F. 1485-89, 2031-38)

As argued by Vanliner, “in a private contract, where the parties stand on a substantially equal footing, one may legally agree to indemnify the other against the results of the indemnitee’s own negligence.” *Federal Ins. Co.*, 162 S.W.3d at 166. But regardless of whether East End or Fister *could have* agreed to indemnify UniGroup for its own negligence, they simply did not do so. No such agreement appears on the face of the Agency Agreements.

Moreover, the record demonstrates the parties to the Agency Agreements were not on a substantially equal footing, as required by Missouri law. To the contrary, the record shows the Agency Agreements between UVL and its agents are uniform and are non-negotiable. (L.F. 1349-50, 1485-89, 2031-38) These contracts were drafted by UVL and each of UVL’s hundreds of agents must agree to the same terms. (L.F. 1349-50, 1485-89, 2031-38) There is no negotiation of the terms in these agreements, as evidenced by a comparison of the Agency Agreement between UVL and East End and the one with Fister. (L.F. 1349-50, 1485-89, 2031-38)

As the Agency Agreements are, by definition, adhesion contracts, it is plain that the contracts were not between parties of equal standing. *See Haines v. St. Charles Speedway, Inc.*, 874 F.2d 572, 575 (8th Cir. 1988). Therefore, any agreement requiring East End and Fister to indemnify UniGroup for UniGroup’s sole negligence or UVL for

its sole negligence would have had to be written in clear and unequivocal terms. But, no such terms appear in the agreements.

The more important issue, and the one that both Vanliner and UniGroup simply dismiss without actual analysis, is that the application of the Agency Agreements would not eliminate Vanliner's coverage responsibilities to its additional insureds -- East End, Fister, Carroll, and Jackson. Even if Fister and East End were found to have agreed to indemnify UniGroup under the agreements, East End and Fister would be entitled to satisfy their indemnity obligation through all policies under which they qualify as insureds, including the Vanliner policies, unless barred by an applicable exclusion. Therefore, this case differs from *Federal Ins. Co.*, where the indemnitor was not an additional insured under the indemnitee's policy. This factual difference removes this case from the holding in *Federal Ins. Co.*

Similarly, and as discussed in Point I above, the individual drivers, Carroll and Jackson, as insureds under the Vanliner policies, are entitled to coverage under the Vanliner policies for the Brouhard and Powell accidents. There is no dispute that they are insureds under the Vanliner policies. Moreover, there is no dispute that the Brouhard and Powell lawsuits were settled on their behalf, and that the Agency Agreements have no bearing on their status as insureds under the Vanliner policies. Indeed, they are not parties to the Agency Agreements and owe no contractual indemnity obligations to UniGroup or UVL. By ignoring its coverage obligations to its additional insureds, Vanliner demonstrates another example of not liking the results of the application of the policy language it issued to UniGroup.

- VI. The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the indemnity language in the Agency Agreements does not govern the insurer's obligations, in that:
- A. The indemnity language within the Agency Agreements is unenforceable as a matter of law;
  - B. The decision in *Federal Ins. Co. v. Gulf Ins. Co.* does not alter the insurers' coverage obligations based on the indemnity provision in the Agency Agreements; and
  - C. The Agency Agreements have no bearing on the insurance coverage afforded to Hiram Jackson, Paul Carroll, East End, and Fister under the Vanliner policies.

UniGroup, in its first point, argues the Agency Agreements qualify the coverage afforded by the plain language of the Vanliner policies and eliminate Vanliner's coverage obligations for the underlying accidents. UniGroup's point should be denied. Furthermore, as set forth in NAS's Jurisdictional Statement, UniGroup does not have standing to appeal the trial court's denial of its Motion for Partial Summary Judgment.

But, in the alternative and in the event the Court should consider UniGroup's appeal on the merits, UniGroup's point still should be denied. UniGroup's argument based on the Agency Agreements, which would eliminate Vanliner's coverage obligations, is selective. The argument logically applies to all policies purchased by UniGroup, including those issued by Travelers and American Guarantee. But, UniGroup makes this argument only on behalf of the insurance company that it owns and controls,

Vanliner. Restated, UniGroup invites the Court to pick and choose which of its insurers are shielded by the alleged indemnification language that appears in the Agency Agreements. UniGroup's conduct makes explicit the collusive litigation stratagem followed by UniGroup and Vanliner in this case.

As to the issue of the *Federal Ins. Co.* case not applying to this case because of the additional insured status of East End, Fister, Carroll, and Jackson, UniGroup almost ignores this issue entirely. They include a blanket cite to the *Federal Ins. Co.* case and cases from foreign jurisdictions in support of their statement that "whether or not an entity is an 'additional insured' is irrelevant to the rule set forth in *Federal Insurance.*" (U.A.B. 33-34) The cases cited say no such thing. UniGroup goes on to argue, and this time without citing any authority, that "all of the cases articulating the rule that indemnification agreements control insurance policies look to the identity of the actual named insured on the policy." (U.A.B. 34) Not only is this statement unsupported by any applicable law, but it also is directly contrary to longstanding Missouri law that requires that an insurer apply its policy separately and independently as to each insured under its policy. Hence, UniGroup's failure to substantively address this issue makes all the more clear that the *Federal Ins. Co.* analysis does not apply in this case.

UniGroup also cites the Court's decision in *Utility Serv. & Maintenance, Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910 (Mo. banc 2005), as controlling. (See U.A.B. at 53-62) However, UniGroup's argument ignores the unique facts in this case. The drivers' insured status under the Vanliner policies dispels any argument that coverage under the Vanliner policies is eliminated by the Agency Agreements based on the Court's

*Utility Serv.* decision The drivers are insureds under the Vanliner policies, but they are not parties to the Agency Agreements. (L.F. 1485-89, 2031-38) Therefore, as the indemnity provisions do not apply to them, the Vanliner Truckers Policy provides the drivers primary coverage for the underlying accidents regardless of the enforceability of the indemnity provisions.

Moreover, UniGroup argues for its selective application of the indemnity language in the Agency Agreements by asserting that even Vanliner is entitled to indemnity from hauling agents such as East End and Fister based on Vanliner being owned by UniGroup and, thus, being considered a “Carrier” under the Agency Agreements. This argument fails because “indemnity” for Vanliner is not an issue in this case. Vanliner was not a party to the underlying lawsuits and the underlying lawsuits were not settled on Vanliner’s behalf.

Vanliner inexplicably confuses its coverage obligations as an insurer with the principle of “indemnifying” a wrong or a liability and Vanliner’s alleged inclusion as a “Carrier” under the Agency Agreements that would require agents of UniGroup to indemnify Vanliner. If Vanliner’s assertion were taken as true and it was entitled to indemnity from the agents under the Agency Agreements because it is owned by UniGroup, then Vanliner would never have to pay on the hundreds of policies that it issues each year to UniGroup’s agents. This illustrates the absurdity of Vanliner’s argument.

Finally, UniGroup’s argument fails for the same reasons expressed in Points I and V above. Therefore, UniGroup’s point should be denied.

- VII. The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the agreements between UVL and its agents do not affect NAS's standing to bring this action, in that:
- A. The insurers agreed to litigate the coverage and allocation issues resulting from the Brouhard and Powell accidents;
  - B. UniGroup has misapplied the language of the Agency Agreements;
  - C. The Agency Agreements have no effect on the coverage obligations of the insurers; and
  - D. This case is an equitable contribution action, and not a subrogation action in which NAS's rights are derivative of the rights of NAS's insureds, East End and Fister.

UniGroup, in its final point, which is another demonstration of selective advocacy on Vanliner's behalf, essentially claims that NAS has no standing to bring this action. UniGroup bases its argument on the Agency Agreements. UniGroup contends that NAS, through subrogation, has assumed only the rights of its insureds, East End and Fister. Vanliner makes the same argument. These arguments should be denied.

UniGroup and Vanliner confuse the nature of this case. NAS is not seeking subrogation and its rights are not derivative of its insureds. Rather, NAS sought equitable contribution from three other insurance companies based on their policy language and the terms of their "other insurance" clauses. Previously, the insurers had agreed to reserve their rights and to litigate the coverage and allocation issues resulting from the underlying lawsuits once the claims were settled. (L.F. 806, 1073-84, 1156, 267, 2545-52, 2553,

A6-7) The trial court addressed this issue, finding the insurers had independent standing to assert their claims in this lawsuit, and that NAS and American Guarantee possessed the requisite standing to defend against Vanliner's reformation claim. (L.F. 2553)

Further, Missouri law makes plain that NAS has standing to bring these consolidated actions. "Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the indemnification of the common insured." *Heartland Payment Systems, LLC v. Utica Mutual Ins. Co.*, 185 S.W.3d 225, 232 (Mo. App. E.D. 2006). The decision in *Heartland Payment Systems* defeats the arguments of UniGroup and Vanliner as a matter of law.

The contention of Vanliner and UniGroup that NAS's action is a subrogation claim is not only puzzling, but it also does not support a contrary conclusion. Again, the decision in *Heartland Payment Systems* defeats their argument.

Moreover, their subrogation argument is not preserved for appellate review. In its Motion for Partial Summary Judgment against NAS, UniGroup never alleged or pleaded as an uncontroverted material fact that NAS is the subrogee of East End or Fister or that these two insureds had assigned any of their rights to NAS. (L.F. 2069-74). Instead, UniGroup simply assumes that NAS's status in this lawsuit is that of subrogee, without ever having alleged this fact, much less citing to evidence or affidavits as required by Rule 74.04. Other than a generic reference to NAS as a subrogee in the argument section of its summary judgment motion, UniGroup did not address why it contends NAS stands in its insureds' shoes as their subrogee. Thus, UniGroup is not entitled to summary

judgment against NAS under a legal theory that is premised on a fact that has not been alleged, much less properly supported with evidence under Rule 74.04.

Moreover, Missouri law demonstrates NAS is not a subrogee, that this is not a subrogation action, and that principles of subrogation do not apply and were not intended to apply to equitable contribution actions such as this one. “Subrogation substitutes another person in the place of a creditor, so that the party in whose favor subrogation is exercised succeeds to the rights of the creditor in relation to the debt.” *Messner v. American Union Ins. Co.*, 119 S.W.3d 642, 649 (Mo. App. S.D. 2003). This rule shows this action is not a subrogation matter and that NAS is not a subrogee.

Even if East End or Fister had assigned their rights to NAS, which they did not do, the assignment would be of no import because neither East End nor Fister is a “creditor” in relation to any debt or liability. Therefore, the argument made by Vanliner and UniGroup is confounding and lacks reason. Neither Vanliner nor UniGroup attempts to explain what rights they believe East End or Fister had that could be assigned to NAS. Absent in this case is any claim by NAS, standing in the shoes of East End and Fister, for reimbursement as their “creditor.”

Finally, regardless of UniGroup’s argument, NAS is not a subrogee and the two consolidated declaratory judgment actions are not subrogation actions for the simple reason NAS brought these actions on its own behalf, which would not have been possible if this were a subrogation action. Absent an assignment, a subrogation action remains the subrogor’s cause of action and the subrogor is the party that must bring the action as a party plaintiff, and not the subrogee insurer. *Hagar v. Wright, Tire & Appliance, Inc.*, 33

S.W.3d 605, 610 (Mo. App. W.D. 2001); *American Nursing Resources, Inc. v. Forrest T. Jones & Co., Inc.*, 812 S.W.2d 790, 798 (Mo. App. W.D 1991). There is no dispute that NAS is the party plaintiff in these consolidated actions.

In conclusion, this case has nothing to do with subrogation such that the waiver of subrogation provision in the Agency Agreements is irrelevant. NAS has independent standing to assert its claims against Vanliner. *Heartland Payment Systems*, 185 S.W.3d at 232. If UniGroup's argument that this is a subrogation action were true, then essentially all equitable contribution actions among insurers would have to be considered subrogation actions and, thus, would not be able to be brought. Such a rule would have the effect of eliminating all coverage litigation among insurers, which demonstrates the absurd results of applying UniGroup's argument on this issue. The contracts between UVL and its agents have no bearing on NAS's right to seek a declaratory judgment on the coverage and allocation issues resulting from the settlement of the underlying lawsuits. Therefore, in the event the Court concludes it has jurisdiction over UniGroup's appeal, UniGroup's final point should be denied.

## CONCLUSION

The trial court did not err in entering summary judgment for NAS and against Vanliner. Vanliner's policies unambiguously provide coverage for the Brouhard and the Powell accidents, and this coverage is not affected by the Agency Agreements relied upon by UniGroup and Vanliner. In addition, as the Court lacks appellate jurisdiction to review the denial of UniGroup's Motion for Partial Summary Judgment, UniGroup's separate appeal should be dismissed.

Respectfully submitted,

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The undersigned certifies that a copy of the foregoing brief and disk containing same were deposited on this 4th day of December, 2006, in the United States Mail, postage prepaid, addressed to: Mr. Thomas M. Buckley, Mr. Adrian Sulser, Noce & Buckley, L.L.C., Attorneys for Defendant Vanliner Insurance Company, 1139 Olive Street, Suite 800, St. Louis, Missouri 63101-1928; Mr. James W. Erwin, Thompson Coburn, Attorney for Defendant Vanliner Insurance Company, Suite 3400, One Mercantile Center, St. Louis, Missouri 63101-1693; Mr. Bradley J. Baumgart, Mr. Mike Brown, Kutak Rock, LLP, Attorneys for Defendant American Guarantee & Liability Insurance Company, Valencia Place, Ste. 200, 444 West 47<sup>th</sup> Street, Kansas City, MO 64112-1914; Mr. Fairfax Jones, Casserly Jones, P.C., Local Counsel for Defendant American Guarantee & Liability Insurance Company, 211 North Broadway, Suite 2150, St. Louis, Missouri 63102; Mr. Robert J. Selsor, Polsinelli, Shalton, Welte, Suelthaus, PC, Attorneys for Third Party Defendants UniGroup and United Van Lines, 7733 Forsyth Boulevard, Twelfth Floor, St. Louis, Missouri 63105-1814; and Mr. Theodore J. MacDonald and Mr. Bharat Varadachari, Burroughs, Hepler, Broom MacDonald, Hebrank & True, Co-Counsel for Defendant The Travelers Indemnity Company of Illinois, 1010 Market Street, Suite 500, Saint Louis, Missouri 63101.

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T. Michael Ward

Subscribed and sworn to me, a Notary Public, this 4th day of December, 2006.

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Notary Public

My Commission Expires:

## CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. This Substitute Respondent's Brief includes the information required by Rule 55.03.

2. This Substitute Respondent's Brief, which has 20,459 words, exclusive of the cover, the certificate of service, the Rule 84.06 certification, the signature block, and the appendix, complies with the word limitations authorized by Rule 84.06 of the Missouri Rules of Civil Procedure; and

3. The computer disk accompanying the Substitute Respondent's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

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T. Michael Ward    #32816

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