

IN THE SUPREME COURT OF MISSOURI

EAST END TRANSFER & STORAGE, INC., ET. AL., and
NORTH AMERICAN SPECIALTY INSURANCE COMPANY,
Plaintiffs/Respondents

vs.

THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS, Defendant
AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY,
Defendant
UNIGROUP, INC., Defendant/Appellant
UNITED VAN LINES, LLC, Defendant/Appellant
and VANLINER INSURANCE COMPANY, Defendant/Appellant

Case No. SC87908

Eastern District Appeal No. ED86576 (Consolidated with No. ED86577)
Appeal from the Circuit Court for the County of St. Louis, State of Missouri
Cause No. 02cc-003089/Cause No. 03cc-005166

SUBSTITUTE OPENING BRIEF OF
APPELLANTS UNITED VAN LINES, LLC AND UNIGROUP, INC.

POLSINELLI SHALTON WELTE SUELTHAUS PC
ROBERT J. SELSOR (#33245)
rselsor@pswslaw.com
GRAHAM L.W. DAY (#45687)
gday@pswslaw.com
7733 FORSYTH BOULEVARD, 12th Floor
Clayton, Missouri 63105
(314) 889-8000
Fax: No. (314) 727-7166
ATTORNEYS FOR DEFENDANTS/APPELLANTS
UNITED VAN LINES, LLC and UNIGROUP, INC.

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INSURANCE COMPANY,**

Plaintiff/Respondent,

v.

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COMPANY OF ILLINOIS,**

Defendant,

&

**AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY,**

Defendant,

&

UNITED VAN LINES, LLC,

&

UNIGROUP, INC.,

&

**VANLINER
INSURANCE COMPANY,**

Defendants/Appellants.

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Eastern District Appeal No. E.D. 86576
(Consolidated with No. E.D. 86577)
St. Louis County, Missouri
Judge Kenneth M. Romines
Circuit Court Cause Nos. 02cc-003089
03cc-005166

TABLE OF CONTENTS

Table of Authorities..... iv

Statement of Grounds on Which Jurisdiction of This Court Is Invoked..... 1

Statement of Facts 6

 a. The Powell Accident..... 6

 b. The Brouhard Accident..... 7

 c. The Fister and East End Agency Agreements and Lease Agreements..... 8

 d. The Fister Insurance Policies 12

 e. The East End Insurance Policies..... 13

 f. The UniGroup and UVL Insurance Policies..... 13

 g. The Circuit Court Proceedings 14

 h. The Appeal 19

Points Relied On..... 21

Standard of Review 22

Argument..... 23

I. The Trial Court erred in failing to honor the indemnification provisions in the UVL Agency Agreements and find that such indemnification provisions control the insurance allocation questions at issue in this case. 23

A. Fister, East End and their insurer/subrogee, NASI, agreed as a matter of law to indemnify and hold harmless UVL, UniGroup and Vanliner in the Agency Agreements.23

B. Under Missouri law, as set forth in Federal Insurance Company v. Gulf Insurance Company, 162 S.W.3d 160, the indemnification provisions in the Agency Agreements control over the insurance policies at issue in this case.25

C. Federal Insurance is not distinguishable from the case at bar in any meaningful way.32

D. The overwhelming majority of jurisdictions that have confronted the issue have ruled, consistent with Federal Insurance that indemnification provisions control over insurance policies.....35

E. Respondent’s arguments, raised for the first time on appeal, regarding the purported unenforceability and/or insufficiency of the indemnification provisions in the UVL Agency Agreements are unavailing.46

1. The indemnification agreements contained in the Agency Agreements are not unenforceable “contracts of adhesion.”47

2. The indemnification agreements contained in the Agency Agreements are not unenforceable or inapplicable on the basis that they indemnify UniGroup and UVL for their own negligence.....53

3.	The indemnification agreements contained in the Agency Agreement are not being “selectively applied” by UniGroup and UVL.	62
4.	NASI’s rights are derivative of its insureds, East End and Fister, and it is bound by the Agency Agreements pursuant to <u>Federal Insurance</u>.	65
II.	The Trial Court erred in failing to grant summary judgment in favor of UniGroup, UVL, and Vanliner because the Agency Agreements signed by Fister and East End operate to waive any right of subrogation that Fister, East End, and thus their insurer/subrogee NASI had against UniGroup, UVL, and Vanliner inasmuch as waiver of subrogation provisions such as those contained in the Agency Agreements are valid and enforceable in Missouri.	68
	Conclusion.....	74
	Certificate of Service	77
	Certificate of Compliance.....	79
	Appendix - Submitted Currently Herewith	

TABLE OF AUTHORITIES

Cases

American Indemnity Lloyds v. Travelers Prop. & Cas. Ins. Co.,
335 F.3d 429 (5th Cir. 2003) 44

Bituminous Cas. Corp. v. McDowell, 107 S.W.3d 327 (Mo. App. 2003) 3

Burke v. Goodman, 114 S.W.3d 276 (Mo. App. 2003)..... 48

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995)21,72

Continental Cas. Co. v. Auto-Owners Insurance Co., 238 F.3d 941 (8th Cir. 2000).39-40

Country Mut. Ins. Co. v. Matney, 25 S.W.3d 651 (Mo. App. 2000).....46, 75

Disabled Veterans Trust v. Porterfield Construction, Inc.,
996 S.W.2d 548 (Mo. App. 1999) 21, 71-72

Federal Insurance Company v. Gulf Insurance Company,
162 S.W.3d 160 (Mo. App. 2005) 21, 25-28, 30-35, 45, 59-60,
..... 65-66

Freeman v. Leader Nat. Ins. Co., 58 S.W.3d 590 (Mo. App. 2001)..... 67

Haines v. St. Charles Speedway, 874 F.2d 572 (8th Cir. 1988) 50

Hume v. United States, 132 U.S. 406, 415, 10 S. Ct. 134, 33 L. Ed. 393 (1889) 51

ITT v. Commercial Finance Corp. v. Mid-America Marine Supply Corp.,
855 S.W.2d 371 (Mo. banc 1993) 22

Kansas City Power and Light Co. v. Federal Const. Corp.,
351 S.W.2d 741 (Mo. 1961) 60-61

<u>K.C. Landsmen, L.L.C. v. Lowe-Guido</u> , 35 S.W.3d 917 (Mo. App. 2001)	55-56
<u>Messner v. American Union Insurance Company</u> ,	
119 S.W.3d 642 (Mo. App. 2003)	21, 68
<u>Modine Manufacturing Co. v. Carlock</u> , 510 S.W.2d 462 (Mo. banc. 1974)	70
<u>Monsanto Chemical Co. v. American Bitumuls, Co.</u> , 249 S.W.2d 428 (Mo. 1952)	25
<u>Monsanto Co. v. Gould Electronics, Inc.</u> , 965 S.W.2d 314 (Mo. App. 1998)	58
<u>Murphy v. Carron</u> , 536 S.W.2d 30 (Mo. banc 1976).....	22
<u>Parks v. Union Carbide Corp.</u> , 602 S.W.2d 188 (Mo. banc 1980)	61
<u>Purcell Tire & Rubber Co., Inc. v. Exec. Beechcraft, Inc.</u> ,	
59 S.W.3d 505 (Mo. banc 2001).....	59
<u>Reliance Nat’l Indemn. Co. v. General Star Indem. Co.</u> ,	
72 Cal.App.4th 1063 (1999)	40, 45
<u>Rossmoor Sanitation, Inc. v. Pylon, Inc.</u> ,	
13 Cal.3d 622, 119 Cal.Rptr. 449, 532 P.2d 97 (1975)	45
<u>State Farm Mutual Auto. Insurance v. Esswein</u> ,	
43 S.W.3d 833, 842 (Mo. App. 1999)	70
<u>St. Paul Fire & Marine Insurance Company v. American International Specialty</u>	
<u>Lines Insurance Co.</u> , 365 F.3d 263 (4th Cir. 2004)	43-45
<u>Swain v. Auto Services, Inc.</u> , 128 S.W.3d 103 (Mo. App. 2003).....	50-52
<u>Swearengin v. Swearengin</u> , 202 S.W. 556 (Mo. 1918)	66, 69

<u>THF Chesterfield North Development, L.L.C. v. City of Chesterfield,</u> 106 S.W.3d 13 (Mo. App. 2003)	4
<u>Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.,</u> 423 U.S. 28 (1975)	29-30, 55
<u>Utility Service and Maintenance, Inc. v. Noranda Aluminum, Inc.,</u> 163 S.W.3d 910 (Mo. banc 2005)	21, 53, 56-62
<u>Wal-Mart Stores, Inc. v. RLI Insurance Company,</u> 292 F.3d 583 (8th Cir. 2002)	21, 26, 32-45
<u>Statutes and Constitutional Provisions</u>	
Article V, Section 10 of the Missouri Constitution.	3
<u>Secondary Sources</u>	
15 Couch on Insurance § 219:1	44

**STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS
COURT IS INVOKED**

This appeal arises out of two consolidated cases concerning the proper allocation of insurance coverage for claims arising out of two separate auto accidents involving United Van Lines' agents. The underlying personal injury suits were settled in conjunction with an agreement to seek allocation of responsibility among the various insurance companies by way of the consolidated declaratory judgment actions in the Circuit Court of St. Louis County.

Plaintiff/Respondent North American Specialty Insurance Company (hereinafter "*NASI*" or "*Respondent*") is one of several insurance companies involved in the underlying suits and has sought to avoid liability under its policy based upon, among other things, its assertion that another insurer, Vanliner Insurance Company ("*Vanliner*"), is instead responsible. In turn, United Van Lines, LLC ("*UVL*")¹ and its parent company, UniGroup, Inc. ("*UniGroup*")², have sought to enforce provisions in the UVL agency agreements, which they

¹ UVL is an interstate motor carrier operating in interstate commerce under the authority of the Department of Transportation and the Surface Transportation Board pursuant to the ICC Termination Act of 1995, the Federal Motor Carrier Safety Administration Rules and Regulations and UVL's duly published tariff.

² UniGroup is also the parent corporation of Vanliner.

assert determine the applicability of certain of the various insurance policies at issue.

Pursuant to Notice of Appeal filed in this matter on July 5, 2005, UniGroup and UVL appealed to the Missouri Court of Appeals for the Eastern District from a judgment rendered in the Circuit Court of St. Louis County on May 25, 2005 by the Honorable Kenneth Romines. In that May 25, 2005 judgment, the trial court, without the benefit of oral argument, denied UniGroup and UVL's Motion for Summary Judgment against NASI in conjunction with granting NASI's related Motion for Summary Judgment.

This matter was fully briefed and argued in the Missouri Court of Appeals for the Eastern District. On May 2, 2006, a panel of the Missouri Court of Appeals for the Eastern District entered its Order and Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b). That Order affirmed both the Circuit Court's denial of UniGroup and UVL's Motion for Summary Judgment against NASI and the Circuit Court's grant of summary judgment in favor of NASI.

On August 8, 2006, after unsuccessfully seeking transfer to this Court or rehearing by the Missouri Court of Appeals for the Eastern District, UniGroup and UVL filed an Application for Transfer in this Court. This Court granted the

Application for Transfer on September 26, 2006, and accordingly has jurisdiction over this appeal pursuant to Article V, Section 10 of the Missouri Constitution.

Respondent previously asserted that the Missouri Court of Appeals lacked jurisdiction of the instant appeal because it concerns the denial of a motion for summary judgment. See Respondent NASI's Motion to Dismiss Appeal, filed in the Court of Appeals on July 26, 2005; see also Brief of Respondent NASI, filed in the Court of Appeals on January 24, 2006 (the "Response Brief"), at 12-14. It can be expected that Respondent will make the same arguments with respect to the jurisdiction of this Court. However, the case at bar falls under a well-established exception to the general rule that a denial of a motion for summary judgment is ordinarily not appealable.

Specifically, if the merits of a denied motion for summary judgment are inextricably intertwined with the issues in an appealable summary judgment in favor of another party, then such denial may be reviewable. See Bituminous Cas. Corp. v. McDowell, 107 S.W.3d 327 (Mo. App. 2003). Such is precisely the case here, where the very grounds relied upon by UniGroup and UVL in their Motion for Summary Judgment, denied by the trial court in its Judgment, Order and Decree dated May 25, 2005 (see L.F. Vol 10, 1625-1634), are not merely intertwined with, but are indeed identical to critical issues embodied in the trial court's corresponding grant of summary judgment in favor of opposing party

NASI by way of the related Judgment, Order and Decree, also entered on May 25, 2005 (see L.F. Vol 10, 1625-1632).³ Because this case falls squarely under the “inextricably intertwined” exception, the trial court’s denial of summary judgment is appealable, and this Court has jurisdiction of this matter.

NASI has contended that the relevant exception is inapplicable in this case because the two summary judgment motions at bar were not, strictly speaking, “cross-motions” for summary judgment. However, there is no authority for the proposition that the exception at issue is limited to “cross-motions” for summary judgment. Instead, the threshold requirement is, as noted above, that the issues in the counterpart summary judgment motions be “inextricably intertwined.” See, e.g., THF Chesterfield North Development, L.L.C. v. City of Chesterfield, 106 S.W.3d 13, 19 (Mo. App. 2003). In the instant case, the issue presented by UniGroup and UVL’s appeal of the denial of their summary judgment motion against NASI -- *i.e.*, the effect of certain indemnification provisions upon the

³ Vanliner’s appeal of the May 25, 2005 Judgment granting NASI’s Motion for Summary Judgment, Appeal No. ED85677, was consolidated with UniGroup and UVL’s appeal, Appeal No. ED85678, below. Vanliner filed an Application for Transfer on August 8, 2006, which was granted by this Court on September 26, 2006 in conjunction with the grant of UniGroup and UVL’s Application for Transfer.

determination of a proper insurance allocation -- is not merely intertwined with, but is, in fact, the very same issue presented (along with many others) by Vanliner's consolidated appeal of the grant of summary judgment in favor of NASI against it. A cursory reading of NASI's Response Brief (in which NASI makes the identical arguments in response to the points raised by UniGroup and UVL, on one hand, and Vanliner, on the other) makes this clear.

In short, while the "inextricably intertwined" exception will arise most typically in the context of cross-motions for summary judgment, there is no requirement that the motions have been denominated as "cross-motions" or that there be complete identity of the parties in order for the exception to apply. Instead, the *sine qua non* of the exception is that the issues be "inextricably intertwined" – a standard that is easily satisfied here.

Moreover, despite NASI's facile contentions below, UniGroup and UVL, both third-party defendants as well as co-defendants in the underlying case, have a substantial vested interest in this matter entirely separate and apart from their respective status as Vanliner's parent and affiliate. Namely, UniGroup and UVL have carefully constructed an insurance program with their agents (the "***UVL Insurance Program***") that is designed to unambiguously earmark certain claims to certain coverages based on the type of claim and the amounts at issue. The Agency Agreements, including the indemnification provisions thereof that are at

issue here, constitute an integral component of the UVL Insurance Program. Quite plainly, NASI's claims (*e.g.*, NASI's newly minted argument in the Court of Appeals that the Agency Agreements are "contracts of adhesion" and "unenforceable") could have an extraordinarily disruptive impact on the UVL Insurance Program, and foment further expensive litigation in which UniGroup and UVL will likely be necessary parties. This is a matter of great significance to UniGroup and UVL. Thus, UniGroup and UVL have a profoundly direct stake in this litigation quite apart from any shared financial interests with Vanliner.

STATEMENT OF FACTS

a. The Powell Accident

On July 22, 2001, Larry and Brenda Powell sustained personal injuries when they collided with a truck driven by Hiram Jackson, on U.S. Highway 82 in Union County, Arkansas. (L.F. Vol. 11, 1700). Mr. Jackson was driving a vehicle owned by East End Transfer and Storage, Inc. ("***East End***") and leased for use to UVL. (L.F. Vol. 11, 1676, 1700; L.F. Vol. 14, 2334). East End was operating the leased vehicle as an agent of UVL, an interstate motor carrier of household goods. (L.F. Vol. 3, 407; L.F. Vol. 14, 2280).

Larry Powell and Brenda Powell, through her guardian, filed suit against East End, Hiram Jackson, UVL and others in the Circuit Court for Union County, Arkansas. (L.F. Vol. 11, 1697). The case was removed to federal court where it

settled for \$6.5 million. (L.F. Vol. 14, 2267, 2279). Various insurance companies, including Southern County Mutual and NASI, paid this amount, reserving their rights to litigate the underlying allocation issues. (L.F. Vol. 14, 2267).

b. The Brouhard Accident

On October 13, 2001, there was an accident on Interstate 70 in Wabaunsee County, Kansas in which Mr. Michael Brouhard was killed and Mrs. Toni Brouhard was injured by a commercial vehicle driven by Paul Carroll. (L.F. Vol. 1, 41-43). Mr. Carroll was driving the vehicle as an independent contractor of Vincent A. Fister Inc. ("***Fister***"), a household goods motor carrier. (L.F. Vol. 7, 1139). Fister, like East End, had leased the vehicle to UVL and was operating the vehicle as an agent of UVL, under UVL's interstate operating authority. (L.F. Vol. 5, 818, 871). Toni Brouhard filed a bodily injury and wrongful death action in the Circuit Court of Jackson County, Missouri, against UVL and Fister. (L.F. Vol. 1, 41). In the course of the mediation process, the Brouhard action was settled for \$4.5 million. The various insurers paid this amount as follows:

Transguard	\$ 1,000,000
NASI	750,000
Vanliner	1,000,000
Travelers	1,000,000
American Guarantee	750,000

(L.F. Vol. 7, 1073-4).

As in the Powell matter, this settlement was paid with the insurance companies specifically reserving their rights to litigate the allocation issues. (L.F. Vol. 7, 1140).

c. The Fister and East End Agency Agreements and Lease Agreements

Well before the accidents in question, on December 15, 1988, Fister and UVL entered into a contract that was to define their business relationship. (L.F. Vol. 7, 1190). Pursuant to this Agency Agreement (the “*Fister Agency Agreement*”), Fister was appointed a household goods agent for UVL. (L.F. Vol. 7, 1190).⁴

⁴ UVL, along with its parent company UniGroup, is affiliated with hundreds of local moving agents nationwide (“*Agents*” or “*Affiliated Agents*”), including Fister and East End. (L.F. Vol. 12, 1959; L.F. Vol. 13, 2097). The Agents are sizeable interstate moving and storage companies. (See, e.g., L.F. Vol. 6, 878-886). In fact, UniGroup (and, by extension, UVL) is owned by its Agents -- the very same Agents, such as Fister and East End, who are parties to the Agency Agreements. (See, e.g., L.F. Vol. 6, 923-924). As discussed further herein, UVL has created a multi-faceted insurance program, the UVL Insurance Program, for these Affiliated Agents that, among other things, requires them to obtain three million dollars worth of original coverage for claims involving those affiliates as well as for the benefit of UVL and UniGroup. (L.F. Vol. 10, 1512-13). Additional

Likewise, on January 16, 1988, East End and UVL had also entered into an Agency Agreement (the “*East End Agency Agreement*”), whereby East End was appointed a household goods agent for UVL. (L.F. Vol. 12, 2007). The Fister Agency Agreement and the East End Agency Agreement (collectively referred to hereinafter as the “*Agency Agreements*”) each provide at section 1.A. that:

“**Carrier**” shall mean UVL, its parent corporation and any corporation or entity which is or may be under the common ownership or control of either of them, including subsidiaries or affiliates of their respective successors and assigns.

(L.F. Vol. 7, 1186; L.F. Vol. 12, 2003). UniGroup is the parent corporation of UVL. (L.F. Vol. 3, 469). UniGroup is also the parent corporation of Vanliner Insurance Company. (L.F. Vol. 13, 2095).

Pursuant to the Fister Agency Agreement, Fister is the “Agent.” (L.F. Vol. 7, 1190). Pursuant to the East End Agency Agreement, East End is the “Agent.” (L.F. Vol. 12, 2007). The Agency Agreements provide in section 2.I that:

layers of insurance are then available under the program for claims exceeding the three million dollar amount. (L.F. Vol. 10, 1515).

Agent shall at all times have in effect insurance coverage required by Carrier Policies.⁵ The Agent shall furnish a certified copy of all required insurance policies in force, naming the persons insured and certifying that the coverage may not be cancelled, altered or permitted to lapse or expire without thirty (30) days advance written notice to Carrier. Minimum requirements shall be that such insurance coverage shall name carrier as an additional-named insured and shall provide for a waiver of subrogation against the Carrier.

(L.F. Vol. 7, 1190; L.F. Vol. 12, 2007).

The Agency Agreements further provide in section 5.M as follows:

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, attorneys' 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

⁵ The specific "Carrier Policies" referenced in this language are set forth in the UVL Insurance Requirements document(s), discussed below. (L.F. Vol. 7, 1211; L.F. Vol. 9, 1350-54).

with the Agent or acting on behalf of the Agent. At the election of 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 Carrier.

(L.F. Vol. 7, 1190; L.F. Vol. 12, 2007).

In addition, on February 27, 1985, Fister and UVL entered into a Lease Agreement (the “*Fister Lease Agreement*”), which provides that “Agent agrees to maintain insurance as set forth in attached Schedule A, entitled ‘UVL Insurance Requirements,’ incorporated herein by reference.” (L.F. Vol. 5, 871). Likewise, on April 22, 1985, East End and UVL entered into a Lease Agreement (the “*East End Lease Agreement*”), which provides that “Agent agrees to maintain insurance as set forth in attached Schedule A, entitled ‘UVL Insurance Requirements,’ incorporated herein by reference.” (L.F. Vol. 14, 2334). (Collectively, the Fister Lease Agreement and the East End Lease Agreement are referred to hereinafter as the “*Lease Agreements*.”)

The referenced UVL Insurance Requirements stated at the time of the accidents in question that the Agents were to carry automobile coverage with “minimum limits of \$3,000,000 ...(Such limits may be met by a combination of primary and excess policies.)” (L.F. Vol. 7, 1211). These Lease Agreements, like

the Agency Agreements, also contain a broad indemnity provision at paragraph thirteen, stating that:

Agent further agrees it will indemnify and save UVL harmless from any and all liability of any nature whatsoever occasioned by any act or failure to act which may occur or happen as the result of the performance of services under this Agreement.

(L.F. Vol. 5, 871; L.F. Vol. 14, 2334).

d. The Fister Insurance Policies

In order to comply with UVL's Insurance Requirements, Fister purchased and had in place during the period in question a \$1 million dollar automobile liability insurance policy issued by Transguard Insurance Company, Inc. (the "***Transguard Policy***"). (L.F. Vol. 1, 102; L.F. Vol. 6, 885-86). Fister also purchased and had in place during the time period in question a Commercial Liability Umbrella Policy number BBU0000102-01, issued by NASI (the "***NASI Fister Policy***"). (L.F. Vol. 1, 61; L.F. Vol. 6, 885-886). The NASI Fister Policy has policy limits of \$5,000,000. (L.F. Vol. 1, 61). The NASI Fister Policy lists only the Transguard Policy in its Schedule of Underlying Insurance. (L.F. Vol.1, 62).

e. The East End Insurance Policies

Also in compliance with the UVL Insurance Requirements mandating \$3 million of original coverage, East End purchased and had in place during the time period in question a \$1 million automobile liability insurance policy issued by Southern County Mutual Insurance Company (the “***Southern County Mutual Policy***”). (L.F. Vol. 11, 1677, 1751). In addition, East End purchased and had in place during the time period in question a Commercial Liability Umbrella Policy Number BBU0000079-00, issued by NASI (the “***NASI East End Policy***”). (L.F. Vol. 11, 1707). The NASI East End Policy has policy limits of \$2,000,000 and lists only the Southern County Mutual Policy in its Schedule of Underlying Insurance. (L.F. Vol. 11, 1708).

f. The UniGroup and UVL Insurance Policies

UniGroup and UVL also had various types of insurance coverage in place in order to protect their interests and those of the public, including specialty policies covering particular events and types of claims. Among those policies were a Commercial Automobile Policy TRT 3281600-00, issued by Vanliner (the “***Vanliner Trucker’s Policy***”), and a Commercial Umbrella Policy UMT 3281600 01, also issued by Vanliner (the “***Vanliner Umbrella Policy***”). (L.F. Vol. 2, 168, 206). The policy limits of the Vanliner Trucker’s Policy are \$1,000,000 and the policy limits of the Vanliner Umbrella Policy are \$2,000,000. (L.F. Vol. 2, 168,

206; L.F. Vol. 3, 407-08). The applicability and scope of these policies are at the heart of this litigation.⁶

g. The Circuit Court Proceedings

Two declaratory judgment actions were filed in the Circuit Court of St. Louis County, Missouri to resolve the insurance coverage and allocation disputes that arose out of the two aforementioned motor vehicle accidents. (L.F. Vol. 5, 817; L.F. Vol. 11, 1673). Because the Powell case and the Brouhard case concerned essentially identical issues, the Circuit Court of St. Louis County consolidated the two declaratory judgment actions, which were originally docketed by the Circuit Court of St. Louis County as separate Cause Nos. 02CC-003089 and 03CC-005166. (L.F. Vol. 10, 1469).

⁶ As discussed further herein, Vanliner, UniGroup, and UVL agree that these policies were issued to cover only “hit and run” accidents where an Affiliated Agent could not be identified but where a claim was nevertheless brought against UVL and/or UniGroup. (L.F. Vol. 7, 1167). Hence, because the identity of the Affiliated Agents involved in the underlying accidents is known in the instant case(s), Vanliner has asserted (and UniGroup and UVL agree) that its policies would not provide coverage for the Brouhard and Powell accidents. (L.F. Vol. 7, 1167-68).

In the underlying case, Respondent NASI asserted that the Trucker’s insurance policy issued by Vanliner to UVL and UniGroup should provide primary coverage—before the NASI policies, for the accidents in question. (L.F. Vol. 7, 1143). Vanliner countered, among other things, that its policies were not even at issue, since they were obtained by UVL only for “hit and run” accidents where the Affiliated Agent could not be identified, and thus did not apply to either of the accidents in question. (L.F. Vol. 3, 407, 410).

Vanliner initially brought UVL and UniGroup into the consolidated suits as third party defendants on its third party claim seeking reformation of its insurance policies based on mutual mistake because those policies, as written, inadvertently omitted an endorsement defining “covered autos” (an endorsement that was present when the policies were originally issued); this omitted endorsement made plain the “hit and run” nature of the policies. (L.F. Vol. 3, 401, 407, 432).⁷ NASI argued that, without the omitted endorsement, the Vanliner policies were transformed into general automobile liability policies. (L.F. Vol. 4, 671).

UVL and UniGroup agree that under the UVL Insurance Program, the Vanliner insurance policies were, in fact, intended to cover only “hit and run”

⁷ Because of this omitted endorsement, the Vanliner Policies lack any definition of the term “covered auto.” Instead, there is only an undefined “Symbol 51.” (L.F. Vol. 3, 427, 432).

accidents and, accordingly, they confessed judgment on Vanliner's third party reformation claim. (L.F. Vol. 4, 623).

In the "Statement of Facts" contained in its Response Brief, NASI sought to cast aspersions on the reasons for UniGroup and UVL's confession of judgment, arguing that, "[b]ased on the relationship between Vanliner and UniGroup and their identical financial interests, UniGroup attempted to confess judgment on Vanliner's reformation claims." Response Brief at 25; see also id. at 17 ("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, even to the point of attempting to confess judgment on Vanliner's reformation claim as a means to rewrite Vanliner's policy language").

In fact, UniGroup and UVL confessed judgment on Vanliner's reformation claim because of the shared understanding between the parties to the Vanliner insurance policies (UniGroup, UVL and Vanliner) that such policies were meant only to cover "hit and run" accidents where the Agent remains unidentified. The original Vanliner insurance policy contained such an endorsement, which was mistakenly not included in subsequent issuances of the written policy. (L.F. Vol. 20, 3139; L.F. Vol. 8, 1226, 1229, 1252, 1260, 1282-84). Witnesses have provided sworn, un rebutted testimony that the intent and agreement of the parties to the Vanliner policies was that the policies only provide such "hit and run"

coverage. (L.F. Vol. 4, 490-495, 499-506; L.F. Vol. 8, 1233, 1261, 1277; L.F. Vol. 9, 1327, 1340-44, 1413-14). The documentary evidence supports such an interpretation. (L.F. Vol. 3, 351, 355; L.F. Vol. 10, 1591). Notably, there is no definition of “covered auto” in the Vanliner policy at issue; instead, there is only an undefined “Symbol 51.” (L.F. Vol. 3, 427; L.F. Vol. 8, 1231-32, 1260; L.F. Vol. 9, 1326, 1389-91, 1393, 1416, 1440-41). While UniGroup undoubtedly shares a financial interest with its subsidiary, Vanliner, the reasons for its confession of judgment are premised upon the facts of record.

UVL and UniGroup also intervened in the main claim of the consolidated suits on the basis that its outcome could have a ruinous impact on the carefully constructed UVL Insurance Program. (L.F. Vol. 5, 798-799, 801). The UVL Insurance Program has long been in place for hundreds of UVL’s Affiliated Agents nationwide and was designed to provide a rational and straightforward apportionment of coverage and responsibility between the affiliates and UVL, as well as their various insurers. (L.F. Vol. 5, 798; L.F. Vol. 14, 2159). UVL and UniGroup believe that NASI’s theories in the suits at bar imperil the entire structure of the UVL Insurance Program, and by their intervention, UVL and UniGroup sought to enforce their own intent regarding their program’s structure and meaning. (L.F. Vol. 5, 799).

UVL and UniGroup moved the Circuit Court for partial summary judgment against NASI based upon the argument that NASI was not entitled to any recovery from UVL, UniGroup, or Vanliner because, as a cornerstone of the UVL Insurance Program, Fister and East End entered into the Agency Agreements, pursuant to which Fister and East End agreed to indemnify UVL, UniGroup, and Vanliner, and to waive any and all subrogation rights against any of them with respect to accidents such as those at issue here. (L.F. Vol. 13, 2074-75).

Separately, NASI moved for summary judgment against Vanliner, asserting that the Vanliner policies, absent their defining endorsements, provided coverage for the settlement of the underlying wrongful death and personal injury actions (L.F. Vol. 14, 2264).

Vanliner, in turn, opposed NASI's motion for summary judgment against it and also sought to join in UVL's and UniGroup's motion for summary judgment (L.F. Vol. 7, 1149; L.F. Vol. 5, 796).

On May 25, 2005, the Circuit Court ruled on both summary judgment motions without the benefit of any oral argument.⁸ (L.F. Vol. 10, 1625, 1633). The Circuit Court granted NASI's Motion for Summary Judgment against

⁸ Oral argument had been scheduled to occur with respect to both UniGroup and UVL's Motion and NASI's Motion for Summary Judgment on June 13, 2005. (L.F. Vol. 16, 2650).

Vanliner (L.F. Vol. 10, 1629). In its Judgment, Order and Decree granting NASI's motion, the Circuit Court considered and ruled upon the issue of whether the Agency Agreements affected, eliminated, or limited Vanliner's liability to provide coverage under its policies—the very issue that serves as the basis for UniGroup and UVL's motion for summary judgment against NASI. (L.F. Vol. 10, 1630-32). The Circuit Court also certified its judgment as final for appellate review. (L.F. Vol. 10, 1632).

On the same day, the Circuit Court issued a Judgment, Order, and Decree that denied UVL's and UniGroup's Motion for Summary Judgment without any elaboration or analysis. (L.F. Vol. 10, 1633).

h. The Appeal

On July 1, 2005, Vanliner appealed the Circuit Court's grant of NASI's motion for summary judgment to this Court. This appeal was docketed as Appeal No. ED86577. On July 5, 2005, UniGroup and UVL appealed the Circuit Court's denial of their motion for partial summary judgment. This appeal was docketed as Appeal No. ED86576, and was consolidated with Vanliner's appeal. (L.F. Vol. 20, 3234; docket entry July 26, 2005).

On July 26, 2005, NASI filed a Motion to Dismiss UniGroup and UVL's appeal. UniGroup and UVL filed Suggestions in Opposition to the Motion to

Dismiss on August 2, 2005. The Court of Appeals stated that it would take those issues with the case on appeal. (See docket, appeal No. ED86576).

On May 2, 2006, a panel of the Missouri Court of Appeals for the Eastern District, comprised of the Honorable Nanette A. Baker, the Honorable Robert G. Dowd, Jr. and the Honorable Sherri B. Sullivan, entered its Order and Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b). That Order affirmed both the Circuit Court's denial of UniGroup and UVL's Motion for Summary Judgment against NASI and the Circuit Court's grant of summary judgment in favor of NASI.

On May 17, 2006, UniGroup and UVL jointly moved the Missouri Court of Appeals for rehearing and/or transfer to this Court (as did Vanliner). On July 26, 2006, the Missouri Court of Appeals denied both the motion for rehearing and the alternative application for transfer filed by UniGroup and UVL (as well as the motion for rehearing and the alternative application for transfer filed by Vanliner).

On August 8, 2006, UniGroup and UVL filed an Application for Transfer in this Court. That same day, Vanliner filed an Application for Transfer in this Court. On August 30, 2006, NASI filed its Suggestions in Opposition to Appellants' Applications for Transfer. This Court granted the Applications for Transfer on September 26, 2006.

POINTS RELIED ON

- I. The Trial Court erred in failing to honor the indemnification provisions in the UVL Agency Agreements and find that such indemnification provisions control the insurance allocation questions at issue in this case.**

Fed. Ins. Co. v. Gulf Ins. Co., 162 S.W.3d 160 (Mo. App. 2005)

Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583 (8th Cir. 2002)

Utility Service and Maintenance, Inc. v. Noranda Aluminum, Inc., 163 S.W.3d 910 (Mo. banc 2005)

- II. The Trial Court erred in failing to grant summary judgment in favor of UniGroup, UVL, and Vanliner because the Agency Agreements signed by Fister and East End operate to waive any right of subrogation that Fister, East End, and thus their insurer/subrogee NASI had against UniGroup, UVL, and Vanliner inasmuch as waiver of subrogation provisions such as those contained in the Agency Agreements are valid and enforceable in Missouri.**

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

Disabled Veterans Trust v. Porterfield Const., Inc., 996 S.W.2d 548 (Mo. App. 1999)

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995)

STANDARD OF REVIEW

When considering an appeal from summary judgment, the standard of review for this Court is *de novo*. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp. 855 S.W.2d 371, 376 (Mo. banc 1993). Under the *de novo* standard of review, this Court must review the record in the light most favorable to the party against whom judgment was entered. Id. In this case, the record must be reviewed in the light most favorable to UniGroup and UVL. The criteria on appeal for determining whether summary judgment was proper are no different from those criteria employed by the trial court in its initial determination of the case, and accordingly this Court need not defer to the trial court's order granting summary judgment. Id. This Court must reverse the judgment of the trial court if there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

ARGUMENT

I. The Trial Court erred in failing to honor the indemnification provisions in the UVL Agency Agreements and find that such indemnification provisions control the insurance allocation questions at issue in this case.

A. Fister, East End and their insurer/subrogee, NASI, agreed as a matter of law to indemnify and hold harmless UVL, UniGroup and Vanliner in the Agency Agreements.

UVL, UniGroup and Vanliner are entitled to prevail against NASI in this coverage allocation based upon the indemnification provisions found at Section 5.M. of the Agency Agreements. (See L.F. Vol. 7, 1190; L.F. Vol. 12, 2007). First and foremost, it is beyond cavil that the plain language of the indemnification provisions in the Agency Agreements covers the underlying Brouhard and Powell claims. Section 5.M. of the Agency Agreements provides as follows:

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, attorneys' fees, court costs, judgments and the like), by reason of any claim, demand, tax, penalty, or judicial or administrative investigation or proceeding 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 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 Carrier.

(L.F. Vol. 7, 1190; L.F. Vol. 12, 2007) (emphasis added). As noted above, “Carrier” encompasses by definition UVL as well as UniGroup and Vanliner (L.F. Vol. 7, 1186; L.F. Vol. 12, 2003), while “Agent” refers to Fister for purposes of the Fister Agency Agreement and East End for purposes of the East End Agency Agreement (L.F. Vol. 7, 1190; L.F. Vol. 12, 2007). Furthermore, the settlements for the Brouhard and Powell claims are “payments of monies . . . by reason of any claim.” Moreover, these claims resulted “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.” (Emphasis added.) Indisputably, the accidents (or “occurrences”) involved the Agents (Fister and East End) or the acts of someone acting on their behalf (drivers Paul Carroll and Hiram Jackson, respectively). NASI did not dispute below (and cannot now dispute) that the indemnification provisions plainly apply to the Brouhard and Powell accidents.

Hence, there can be no doubt that the indemnification provisions in the Agency Agreements apply to the claims at issue here. Moreover, in asserting its claims against the other parties hereto, NASI is subrogated to the rights of -- and therefore stands in the shoes of -- its insureds, East End and Fister. It is axiomatic that NASI's rights can be no greater than those of its subrogors/insureds. See, e.g., Monsanto Chemical Co. v. American Bitumuls Co., 249 S.W.2d 428, 431 (Mo. 1952) (The rights of a subrogee are not greater than those of the insured). Accordingly, NASI is bound by the terms of the indemnification provisions of the Agency Agreements.⁹

B. Under Missouri law, as set forth in Federal Insurance Company v. Gulf Insurance Company, 162 S.W.3d 160, the indemnification provisions in the Agency Agreements control over the insurance policies at issue in this case.

A very recent case in the Missouri Court of Appeals for the Eastern District renders Missouri law on the critical issue in this appeal abundantly clear, and

⁹ If NASI is heard to complain that it was unaware that its insured was contractually bound in this fashion, then it must look to either its insured for failing to disclose those circumstances or its underwriters for failing in their due diligence prior to issuing the policies. NASI's possible oversight is not the responsibility or fault of UVL and UniGroup.

compels reversal of the trial court's denial of summary judgment in favor of UniGroup, UVL, and Vanliner (as well as reversal of the trial court's grant of summary judgment in favor of NASI). Specifically, Federal Insurance Company v. Gulf Insurance Company, 162 S.W.3d 160 (Mo. App. 2005), held that Missouri law follows the rule, articulated in Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583 (8th Cir. 2002) (applying Arkansas law) and several other cases around the nation, that indemnification agreements control over insurance policies. Fed. Ins. Co., 162 S.W.3d at 166.

In the Federal Insurance case, the Eastern District ruled that Federal Insurance Company ("**Federal**") was barred from recovery in its contribution action against Gulf Insurance Company ("**Gulf**") for the amounts Federal paid in settlement of a personal injury action because of the existence of an indemnification agreement between Federal's insured, S.C. Sachs Company, Inc. ("**Sachs**") and Gulf's insured, Aqualon Company ("**Aqualon**"). Id. at 168.

The facts in Federal Insurance are analogous to the facts in the case at bar. In Federal Insurance, Gulf appealed from the trial court's entry of summary judgment in favor of Federal on Federal's claim for equitable contribution for money paid by Federal on behalf of its insured under the excess coverage of its commercial umbrella policy. Id. at 162. Under a contract between Gulf's insured

and Federal's insured, Federal's insured had agreed to indemnify Gulf's insured for all losses and liabilities arising out of the work performed. Id.

Specifically, Federal's insured, Sachs, contracted with Gulf's insured, Aqualon, to do electrical work at Aqualon. Id. The contract between Sachs and Aqualon contained an indemnification provision whereby Sachs agreed to hold Aqualon harmless for all liability for personal injury or death sustained in the performance of the work. Id. In accordance with this contract, Sachs obtained a general liability policy from The Fireman's Fund, as well as a separate umbrella policy from Federal. Id. Aqualon obtained a commercial excess occurrence policy from Gulf. Id. at 163.

An employee of Sachs working at Aqualon pursuant to the aforementioned contract was injured on the job and later died. Id. In litigation arising out of the death, a \$3.5 million dollar settlement was approved. After payment, Federal filed a petition for declaratory judgment against Gulf seeking contribution for amounts paid. Id. Summary judgment was initially granted in favor of Federal, but the Court of Appeals ultimately reversed, finding that the rights and liabilities of Gulf and Federal were governed by the indemnity obligations of their respective insureds, Sachs and Aqualon. Id. As the Eastern District held in Federal Insurance, Sachs' obligation to indemnify Aqualon required Sachs' insurers to cover the entire settlement amount. Id. at 168.

Federal Insurance, in keeping with previous decisions on this issue, identified several considerations in determining whether an indemnity agreement controls over insurance policies, including (1) the validity of the indemnification agreement; (2) the existence of 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 166-67.

Here, as in Federal Insurance, all of the relevant considerations lead to the inescapable conclusion that the indemnification agreements contained in the Agency Agreement control the insurance allocation issues.

First, the indemnification provisions of the Agency Agreements are valid and enforceable under Missouri law, and unequivocally provide that Fister and East End will indemnify and hold harmless UniGroup, UVL, and Vanliner with respect to any claim “arising from any actual or claimed occurrence involving [Fister or East End] or any act, omission or obligation of [Fister or East End] or anyone associated or affiliated with [Fister or East End] or acting on behalf of [Fister or East End].” (L.F. Vol. 7, 1190; L.F. Vol. 12, 2007). The underlying personal injury and wrongful death claims are clearly encompassed by the broad sweep of the indemnification provisions of the Agency Agreements.

Despite the lack of any challenge to the validity of the indemnification agreements by NASI (or anyone else in this case) at the trial court level, the trial

court somehow came to the unfounded conclusion that “[t]he indemnification language in the Agency Agreement is insufficient as a matter of law.” (LF Vol. 10, 1630). The trial court offered no basis for its ruling in this regard, and careful review of the indemnification agreements and, indeed, the record as a whole reveals no such basis.

Nonetheless, NASI took up the trial court’s suggestion on appeal, constructing arguments in its Response Brief that the indemnification agreements are unenforceable or inapplicable either because they are “contracts of adhesion” or because they operate to indemnify UniGroup and UVL for their own negligence. As the discussion below in Section I.E., *infra.*, demonstrates, NASI’s arguments in this regard are not only untimely, but also bereft of merit. Under well-established Missouri (and federal) law, the indemnification agreements -- which clearly and unequivocally express the intent that Fister and East End, respectively, are to indemnify UVL, UniGroup and Vanliner for any accident or occurrence involving Fister and East End -- are valid,¹⁰ and the trial court’s ruling to the contrary is manifestly erroneous.

¹⁰ Indeed, indemnification agreements such as those at issue in the instant case are a staple of the interstate hauling industry, and have been recognized and approved by the United States Supreme Court as serving a valid and effective purpose. See Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S.

Second, there is no dispute that NASI's insurance policies covered the underlying settlements. As in Federal Insurance, NASI "does not dispute that its policy covered the settlement; rather, it claims that [Vanliner's policy] also covers it." Id. at 167.

Finally, like the situation in Federal Insurance, the "indemnity agreement reflects the intentions of a relationship between the parties and does not unfairly prejudice the insurers." Id. at 167-68. As described above, the Agency

28 (1975) (holding that indemnification agreements involving interstate carriers operating under the auspices of the ICC such as those in the Agency Agreements and Lease Agreements are valid and enforceable and that "[a]lthough one party is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in law to the injured or damaged person may seek indemnity from the party responsible in fact"). Hence, as observed in Transamerican, it is only logical and appropriate for the Affiliated Agents -- the entities who actually perform the hauling services and are thus directly responsible for any negligent acts or omissions that may occur -- to undertake the indemnification obligations set forth in the Agency Agreements. Indeed, it is even more appropriate that they do so when one considers that the Agents collectively own UniGroup. See L.F. Vol. 6, 923-924.

Agreements, and the indemnification provisions thereof, constitute a critical part of the carefully constructed UVL Insurance Program and serve as the fundamental basis of the relationship between UniGroup and UVL on one hand, and their agents, including Fister and East End, on the other. The clear intent of the parties to require Fister and East End to fully indemnify UVL, UniGroup (and Vanliner) for all manner of claims arising out of their relationship is also made manifest by the broad indemnity provision at paragraph thirteen of the Lease Agreements, another critical component of the relationship between the parties. (L.F. Vol. 5, 871; L.F. Vol. 14, 2334). No insurer will experience unfair prejudice as a result of giving effect to the foundational agreements between the insureds. In light of the Federal Insurance case, the law in Missouri clearly mandates reversal of the trial court's ruling(s).

It is entirely unclear from the trial court's opinion why it believed that Federal Insurance does not control this case. Aside from its unsupported assertion, discussed above, that the indemnification provisions are insufficient as a matter of law, the trial court opinion merely concludes that, "application of the rule in Fed. Ins. Co. depends on the facts and circumstances at issue. Absent in this case are facts triggering the rule in Fed. Ins. Co." (L.F. Vol. 10, 1631). However, as set forth in detail above, the relevant facts and circumstances of this case are, in fact, essentially identical to those in Federal Insurance. Hence, the court's ultimate

finding that “the Agency Agreement and indemnification language at issue do not govern the coverage and allocation issues in these actions and do not control the obligations of the parties hereto” was erroneous. Therefore, its denial of UniGroup and UVL’s motion for summary judgment (and its grant of NASI’s motion for summary judgment, which is likewise dependent on this erroneous finding) should be reversed.

C. Federal Insurance is not distinguishable from the case at bar in any meaningful way.

As with all of its arguments pertaining to the indemnification provisions of the Agency Agreements, NASI never argued at the trial court level that Fed. Ins. Co., 162 S.W.3d 160, was distinguishable from the case at bar. Although it certainly could have done so (the Federal Insurance decision was handed down on March 8, 2005 and discussed at length in UniGroup and UVL’s Reply Brief in support of their Motion for Summary Judgment, filed on April 14, 2005, and NASI did not file its reply papers in support of its Motion for Summary Judgment against Vanliner until May 25, 2005), NASI never expanded upon its lone contention below that Missouri did not adhere to the principle that indemnification agreements control insurance policies as set forth in Wal-Mart, 292 F.3d 583. Of course, Federal Insurance demonstrated that NASI’s sole argument was incorrect.

However, in its Response Brief on appeal, NASI sought to elaborate on the bare conclusion in the trial court’s Judgment that “application of the rule in Fed. Ins. Co. depends on the facts and circumstances at issue. Absent in this case are facts triggering the rule in Fed. Ins. Co.” (L.F. Vol. 10, 1631). NASI first rather confusingly contended that the cases are different because “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 way that Vanliner is, which is to argue the Vanliner policies never provide coverage.” Response Brief at 53. UniGroup and UVL fail to comprehend the distinction that NASI attempts to draw in this regard; here, as in Federal Insurance, the issue is the effect of the indemnification agreement upon the insurance allocation issues.

NASI next argued that the rule of Federal Insurance is not applicable because the Agents, East End and Fister, and the truck drivers, Hiram Jackson and Paul Carroll,¹¹ qualify as “additional insureds” under NASI’s reading of the Vanliner policies (a reading with which UniGroup and UVL obviously disagree). However, whether or not an entity is an “additional insured” is irrelevant to applying the rule set forth in Federal Insurance. Wal-Mart, Federal Insurance,

¹¹ Note that Paul Carroll was not sued and, accordingly, no amounts were paid on his behalf in settlement. (L.F. Vol. 1, 41-60; L.F. Vol. 5, 707-717).

and, indeed, 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. That is the party who actually entered into both the indemnification agreement and the insurance agreement at issue. Further, that is the party who, of course, will have to bear the burden of any increase in premiums resulting from a payout by its insurance company. It would unnecessarily complicate the rule of Federal Insurance and would not make logical sense if every entity who potentially or arguably qualifies as an “additional insured” could be considered in making the indemnification determination.

Furthermore, NASI again ignores the fact that, pursuant to the plain language of the Agency Agreements, Vanliner is itself an indemnitee. Therefore, it makes no difference who could arguably qualify as an “additional insured” under the Vanliner policies -- the Agents and their insurer, NASI, are required to indemnify Vanliner pursuant to the Agency Agreements in any event. Thus, accepting NASI’s theories would only lead to the undesirable circuitry of action that the rule that indemnification provisions control insurance policies is meant to avoid. See Wal-Mart, 292 F.3d at 394-95 (discussed in detail at Section I.D. immediately below).

In short, the rule of Federal Insurance applies to this case, and is even more appropriately applied here given that the plain language of the Agency

Agreements requires that the Agents -- and, consequently, their insurer, NASI -- indemnify Vanliner.

D. The overwhelming majority of jurisdictions that have confronted the issue have ruled, consistent with Federal Insurance, that indemnification provisions control over insurance policies.

It is highly instructive to consider the Eighth Circuit's well-reasoned decision in Wal-Mart, 292 F.3d 583 (relied upon in Federal Insurance) that indemnification provisions such as those set forth in the Agency Agreements control over insurance policies such as the Vanliner and NASI policies. Like the instant case, Wal-Mart concerned a "a dispute between several insurers and an insured" in which the "parties disagree[d] about the interpretation of multiple insurance contracts and an indemnity clause in a vendor agreement." Id. at 585.

Specifically:

Wal-Mart and its insurer, National Union, brought this action for declaratory judgment in the District Court for the Western District of Arkansas to determine their responsibility for an \$11 million products-liability settlement. Wal-Mart and National Union argued that they were protected from liability by an indemnity clause in the vendor agreement between Wal-Mart and its supplier, Cheyenne, and that RLI Insurance

Company, which insured Cheyenne and Wal-Mart, had no claim against them for any part of the settlement.

Id. The District Court had ruled against Wal-Mart and National Union, ordering them to pay RLI, Cheyenne's excess insurer, \$10 million.

As described by the Eighth Circuit, the Wal-Mart litigation arose out of a sales agreement between Cheyenne and Wal-Mart under which Cheyenne would supply halogen lamps for Wal-Mart to sell at its retail stores. Id. The agreement contained an indemnification clause where by agreement, Cheyenne promised to indemnify Wal-Mart from any liability resulting from its sales of the lamps and was required to demonstrate proof of at least \$2 million of liability insurance. Id. In compliance with the agreement, Cheyenne was covered by two insurance companies: a \$1 million primary policy with St. Paul and a \$10 million excess policy with RLI. Id. Wal-Mart was a covered insured under both the St. Paul and RLI policies and additionally has its own separate \$10 million policy with National Union. Id.

The underlying litigation concerned an allegedly defective "lamp, distributed by Cheyenne and purchased at Wal-Mart" which caused a fire that severely injured a young girl. Id. The girl's family sued Wal-Mart, Cheyenne, and other parties in a California state court for personal injuries, a suit that was ultimately settled for \$11 million. Id. Everyone agreed that St. Paul was liable for

the first \$1 million of the settlement. Cheyenne, Wal-Mart, and their insurers disagreed, however, about their respective responsibilities for the remaining \$10 million of the settlement. Id. at 586.

Wal-Mart and National Union contended that the vendor agreement containing the indemnity clause governed the apportionment of liability between Wal-Mart and Cheyenne's insurers. Id. at 586. The District Court disagreed, based on its interpretation of the “other insurance” provisions of the relevant insurance policies, which it held controlled the indemnity clause. Id. Ultimately, the Eighth Circuit reversed the District Court, holding that:

In our opinion, on the facts of this case, the indemnity agreement controls the outcome, not the ‘other insurance’ clauses. Three reasons persuade us this is the correct result. First, *examination of the relationships between the parties has convinced us that Cheyenne intended to and did make a valid promise to indemnify Wal-Mart for claims arising from the halogen lamps, and that RLI provided liability insurance to Cheyenne that covers both the [underlying] settlement and Cheyenne's indemnification obligation.* In this situation we think consideration of the indemnity agreement reflects the intention of the parties and does not unfairly prejudice the insurers. Second, we believe that to make Wal-Mart, an insured of RLI, liable to its insurer, RLI, for

the settlement would turn the nature of insurance on its head and violate the principle that insureds cannot be liable to insurers for covered losses. Third, we conclude that *to make Wal-Mart or National Union liable to RLI would simply be the first step in a circular chain of litigation that ultimately would end with RLI still having to pay the \$10 million*. To avoid these results, we hold that Wal-Mart and National Union have no obligation to RLI for any part of the \$10 million settlement.

Id. at 587 (emphasis added) (reaching this conclusion “despite the language in RLI’s policy . . . that purports to make RLI an excess insurer when an insured, such as Wal-Mart, has other insurance, as it does here with National Union”). Among other things, the Eighth Circuit relied upon the “broad” language of the indemnity provisions at issue (which was very similar to the language in Section 5.M of the Agency Agreement in the present case), holding that:

The language of the provisions is clear. Cheyenne has promised to indemnify Wal-Mart for any liability or loss resulting from Wal-Mart's sale of its lamps. A judgment against Wal-Mart to pay the Boykin settlement is a liability to Wal-Mart resulting from its sale of Cheyenne's goods.

Id. at 587-88. Significantly, the Wal-Mart court further observed that “[s]ubrogated to Wal-Mart's right, National Union could also sue Cheyenne to enforce the indemnity agreement if found liable to RLI for the Boykin settlement” and held that “[t]he indemnity agreement squarely applies to obligate Cheyenne to protect Wal-Mart and National Union from liability arising from the [underlying] settlement.” Id. at 588.

In reaching its decision, the Wal Mart court looked to Continental Cas. Co. v. Auto-Owners Ins. Co., 238 F.3d 941 (8th Cir. 2000) (applying Minnesota law).

In Continental:

[A] dispute arose between multiple insurers about how to allocate liability for a settlement from an accident that occurred during a railroad salvage project. The insureds (Fitzsimmons and Burlington Northern) were not parties to the case, but had signed an indemnity agreement in which Fitzsimmons, the salvage company, agreed to indemnify Burlington Northern. The Court considered the indemnity clause because it noted that the provision allowed Burlington Northern's insurer, ‘Interstate, being subrogated to Burlington Northern's rights, [to] reach Fitzsimmons and, through it, Fitzsimmon's CGL carrier, Auto-Owners.’ Based on this chain of relationships, we held that ‘Auto-Owners is obligated to bear the entire loss, and not, as the district

court concluded, just a portion of it.’ We reached this result notwithstanding the fact that Interstate’s policy covered the loss at issue. Wal-Mart, 292 F.3d at 589 (citing Continental, 238 F.3d at 945).

In light of the holdings of Continental and several other cases from various jurisdictions, the Wal-Mart court easily dispensed with RLI’s argument that Arkansas courts would follow the lone case that had reached the opposite result, Reliance Nat’l Indemn. Co. v. General Star Indem. Co., 72 Cal.App.4th 1063 (1999) (itself contrary to at least one other California case). Id. (“The District Court cited only Reliance to support its resolution of the case, and it seems to be the only relevant case that uses the approach urged by RLI. In the other cases cited by RLI, the insureds were not bound by an indemnity agreement”). The Wal-Mart decision also rejected the notion that “excess” and “primary” labels in the insurance policies at issue could have any effect on the indemnification provision. Id. (“We are unconvinced that an indemnitee loses its ability to have the effect of an indemnity contract considered in an insurance-allocation dispute because of how the insurers characterize themselves in the abstract”).

In addition to the plain language of the indemnification agreement, the Eighth Circuit focused on the fact that “the District Court’s resolution of the case would lead to circular litigation that would ultimately place the parties back in the positions they were in at the filing of this suit.” Id. at 593. It held that:

[W]e believe the District Court's result was incorrect because it would produce circuitous litigation that would still result in RLI being ultimately liable for the \$10 million. This could occur in two ways, depending on whether Wal-Mart or National Union satisfied the judgment for which the District Court made them jointly liable. If Wal-Mart paid the judgment, it would sue Cheyenne to enforce the indemnity provisions in their vendor agreement. As discussed above, Wal-Mart would win this suit and obtain a judgment against Cheyenne. Cheyenne would then look to its insurer, RLI, to cover this loss because the policy covers contractual indemnity liability. The end result would be that RLI would have to pay out \$10 million. A similar course of events would occur if National Union satisfied the judgment, except that it would step into Wal-Mart's shoes and bring a subrogation action against Cheyenne asserting Wal-Mart's contractual right to indemnification.

Under either scenario, two ultimate results would occur, neither of which we think is permissible. If Cheyenne ended up paying Wal-Mart or National Union, RLI would have accomplished indirectly what it could not accomplish directly. It would have made its insured liable to itself, an insurer, for a covered loss. We have already explained why

this result is illogical and unfair to the insured, who paid premiums to its insurer exactly to avoid liability for these claims. To allow Cheyenne to be liable would prevent Cheyenne from receiving the benefit of its insurance policy with RLI. If Cheyenne succeeded in getting RLI to cover the \$10 million claim resulting from the enforcement of the indemnity provisions, the parties would be back in the situation they were in before this action was brought--RLI is liable for the \$10 million Boykin settlement.

Id. at 594. The Eighth Circuit concluded that:

We think this potential circuitry of action is significant, in that it reveals the true nature of the parties' obligations and relationships with each other. RLI will ultimately be liable for the \$10 million because of Cheyenne's promise to indemnify Wal-Mart and RLI's contractual-liability coverage in its policy covering Cheyenne. To prevent such wasteful litigation and to give effect to the indemnification agreement between the parties, we hold that RLI cannot recover against National Union or Wal-Mart. We reverse the District Court's decision to the contrary.

Id. at 594-95.

This potential circuitry of action identified in Wal-Mart and the cases cited therein is present here, and demonstrates why UniGroup, UVL and Vanliner are entitled to reversal of the trial court's ruling: NASI will ultimately be liable for the settlement payments because of the existence of Fister's and East End's promises to indemnify UniGroup, UVL and Vanliner and the existence of NASI's contractual-liability coverage in its policies covering Fister and East End. (L.F. Vol. 17, 2769; L.F. Vol. 7, 1190; L.F. Vol. 12, 2007). To prevent such wasteful litigation and to give effect to the indemnification agreement between the parties, this court should hold that NASI cannot recover against Vanliner, UVL or UniGroup. See Wal-Mart, 292 F.3d at 594-5. Hence, application of the indemnification provision set forth in Section 5.M. of the Agency Agreements (L.F. Vol. 7, 1190; L.F. Vol. 12, 2007) compels reversal of the trial court's rulings denying summary judgment in favor of UniGroup, UVL and Vanliner and granting summary judgment in favor of NASI.

Significantly, the rule of law articulated in Wal-Mart and adopted by Federal Insurance has been accepted in all jurisdictions that have addressed the issue. The rule is rapidly becoming the majority view. For example, in St. Paul Fire & Marine Ins. Co. v. American Intern. Specialty Lines Ins. Co., 365 F.3d 263, 272-273 (4th Cir. 2004), the Fourth Circuit predicted that the Virginia Supreme Court would follow Wal-Mart and accordingly held that an indemnification

agreement controlled over insurance policies and relieved certain insurers of the obligation to pay. In so doing, the Fourth Circuit remarked that “a prominent treatise has acknowledged the ‘well recognized’ principle applied in Wal-Mart Stores.” St. Paul Fire, 365 F.3d at 272 (citing American Indemnity Lloyds v. Travelers Prop. & Cas. Ins. Co., 335 F.3d 429, 436 (5th Cir. 2003) (citing 15 Couch on Insurance § 219:1)).

In American Indemnity, the Fifth Circuit likewise predicted that Texas would follow the “clear majority of jurisdictions . . . [which] give[] controlling effect to the indemnity obligation of one insured to the other insured over “other insurance” or similar clauses in the policies of the insurers, particularly where one of the policies covers the indemnity obligation.” Id. at 436. As the Fourth Circuit observed in St. Paul, “all indications are that most, if not all, jurisdictions to have faced the question of whether an indemnification agreement could relieve particular insurers of an obligation to pay, without resort to a separate action to enforce the indemnification agreement, have answered in the affirmative.” See St. Paul Fire, 365 F.3d at 272 (citing American Indemnity, 335 F.3d at 436-41 and Wal-Mart, 292 F.3d at 588-94).

The Fourth Circuit further remarked that:

In particular, the Wal-Mart Stores court thoroughly canvassed the relevant precedents in determining that the majority of jurisdictions

having addressed the subject apply an indemnification agreement between parties in determining the factually-related obligations of insurers to cover those parties' liabilities, see id. at 588. In fact, the court identified only one contrary case involving insureds bound by an indemnification agreement, id. at 591 (citing Reliance Nat'l Indem. Co. v. General Star Indem. Co., 72 Cal.App.4th 1063, 85 Cal.Rptr.2d 627 (1999)), and noted that the case was itself in apparent conflict with an earlier decision of the Supreme Court of California. See id. at 592 (citing Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal.3d 622, 119 Cal.Rptr. 449, 532 P.2d 97 (1975)).

Id. at 272, n.5.

In sum, UniGroup, UVL and Vanliner are entitled to a reversal of the trial court's ruling and an entry of summary judgment in favor of UniGroup, UVL, and Vanliner. Pursuant to the indemnification agreements set forth in the Agency Agreements, NASI must provide coverage for the Brouhard and Powell claims pursuant to the NASI East End Policy and the NASI Fister Policy ahead of, and prior, to any coverage provided by the Vanliner policies. The holding in the Federal Insurance case and the corresponding support for that holding in other jurisdictions mandates this result.

E. Respondent’s arguments, raised for the first time on appeal, regarding the purported unenforceability and/or insufficiency of the indemnification provisions in the UVL Agency Agreements are unavailing.

At several different points throughout its Response Brief filed in the Court of Appeals, NASI made essentially identical arguments as to why it believes the indemnification provisions of the Agency Agreements do not control the insurance allocation determination in this matter. See NASI’s Response Brief at Sections 1.C., VII., and IX. The fact that NASI made the very same arguments in response to both Vanliner’s opening Brief and that of UniGroup and UVL demonstrates that, as discussed above in the Statement of Grounds on Which Jurisdiction of This Court Is Invoked, the issues on the two appeals are indeed “inextricably intertwined” and, therefore, NASI’s jurisdictional arguments with respect to the instant appeal should be rejected.

Even more significantly, NASI raised none of these issues in the Circuit Court. As NASI itself stated in its Response Brief, “appellate 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. 2000). An issue that is not presented to the trial court is not preserved for appellate review.” NASI Response Brief at 34. For that reason alone, NASI’s

arguments on appeal with respect to the purported unenforceability and/or inapplicability of the Agency Agreement should be rejected. In any event, NASI's arguments are also substantively untenable, as discussed in more detail below.

1. The indemnification agreements contained in the Agency Agreements are not unenforceable “contracts of adhesion.”

In its Response Brief, NASI asserted that the Agency Agreements are invalid and/or unenforceable. In this regard, NASI contended that “Vanliner and UniGroup skip over this step and merely state the indemnification language is enforceable, this is not the case.” NASI Response Brief at 50. However, the record is clear that NASI never once argued that the indemnification agreements contained in the Agency Agreements were invalid or unenforceable in the Circuit Court proceedings. (See, e.g., L.F. Vol. 5, 766-795; see also, e.g., L.F. Vol. 10, 1618-1624). As discussed above, that fact alone is fatal to NASI's contentions on appeal.

Nonetheless, the trial court's May 25, 2005 Judgment granting NASI's Motion for Summary Judgment found that the indemnification provisions of the Agency Agreements were “insufficient as a matter of law” and “unenforceable” by way of naked conclusions, with nothing in the way of discussion or elucidation. (L.F. Vol. 10, 630-631). NASI, of course, picked up on the trial court's

suggestion by arguing -- for the first time on appeal -- that the indemnification agreements are unenforceable because they are “contracts of adhesion.” Not only was there no such allegation or argument made below, but the plain fact is that NASI’s tardily created contention is entirely lacking in merit.

First, the Agency Agreements and the indemnification agreements are hardly contracts of adhesion. All of the parties thereto are sophisticated commercial actors, not consumers. The Agents are sizeable interstate moving and storage companies. (See, e.g., L.F. Vol. 6, 878-886). In this regard, it is important to note that UniGroup (and, by extension, UVL) is *owned* by its Agents -- the very same Agents who are parties to the Agency Agreements.¹² (See, e.g., L.F. Vol. 6, 923-924). Hence, neither the “unequal bargaining power” nor the “take it or leave it” paradigms necessary to find a contract of adhesion exists with respect to the Agency Agreements. See Burke v. Goodman, 114 S.W.3d 276, 280 (Mo. App. 2003) (“An adhesive contract is one in which the parties have unequal standing in terms of bargaining power (usually a large corporation versus an individual) and often involves take-it-or-leave-it provisions in printed form contracts”). The Agency Agreements are standardized for the simple reason that it would make no

¹² If the issue had been so much as raised at the trial court level, then undoubtedly there would have been more evidence adduced below regarding the non-adhesive nature of the Agency Agreements.

sense to treat Agents differently from one another. In short, there is no basis for finding -- and there was no finding or even argument below -- that the Agency Agreements are contracts of adhesion.¹³

¹³ In its Memorandum, the Eastern District Court of Appeals incredibly seemed willing to give some credence to NASI's contract of adhesion argument, although it ultimately declined to address the issue. See Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) at 20, n. 5. In any event, the Order of the Court of Appeals, like the trial court's Judgment before it, sanctions the willful disregard of commercial contracts between sophisticated, consenting parties -- all at the behest of a third party sizeable property and casualty insurer that is only pursuing its own narrow monetary interests. The UVL Insurance Program, of which the indemnification agreements at issue are a cornerstone, has long been in place for hundreds of UVL's Agents nationwide. It was designed to provide a rational and straightforward apportionment of comprehensive coverage and responsibility between the Agents, UVL, the drivers, as well as their various insurers, for liabilities arising from UVL's business of the interstate transportation of household goods. (L.F. Vol. 5, 798; L.F. Vol. 14, 2159). This business, conducted under UVL's DOT-granted authority and carried out by Agents such as Fister and East End, involved Respondent as an insurer of the Agents and of UVL and UniGroup. The insurance requirements under

Second, and even assuming, arguendo, that the Agency Agreements could somehow be characterized as contract of adhesion, it must be emphasized that contracts of adhesion are by no means unenforceable under Missouri law. NASI simply asserts that the Agency Agreements are contracts of adhesion as if that alone would render the Agency Agreements unenforceable. However, in the very case it cites, Haines v. St. Charles Speedway, 874 F.2d 572, 575 (8th Cir. 1988), the Eighth Circuit found that, while constituting a contract of adhesion, the release/indemnity provision at issue was nonetheless enforceable. Id.

The discussion in Swain v. Auto Services, Inc., 128 S.W.3d 103 (Mo. App. 2003), regarding the necessity and effect of contracts of adhesion is instructive:

[Adhesion contracts] are not “inherently sinister and automatically unenforceable.” Hartland Computer, 770 S.W.2d at 527. Because the bulk of contracts signed in this country are form contracts --“a natural concomitant of our mass production-mass consumer society”--any rule

UniGroup’s Agency Agreements benefit the public as well as the UniGroup-affiliated parties. They are not and were never designed for the benefit of the insurers of UniGroup or its Agents’ insurers, such as Respondent. The decisions of the trial court and the Court of Appeals unfortunately inflict real harm upon the UniGroup/UVL Insurance Program and the carefully constructed apportionment of liability that it represents.

automatically invalidating adhesion contracts would be “completely unworkable.” Id. Rather, our courts seek to enforce the reasonable expectations of the parties. Id. Only those provisions that fail to comport with those reasonable expectations and are unexpected and unconscionably unfair are unenforceable. Id. at 528. “Because standardized contracts address the mass of users, the test for ‘reasonable expectations’ is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual adherent.”

Id. at 107.

As the court held in Swain, a contract of adhesion must meet a high standard of unfairness and unconscionability in order to be unenforceable. See id. at 108 (an unenforceable adhesive agreement is one “such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other...”) (citing Hume v. United States, 132 U.S. 406, 415, 10 S. Ct. 134, 33 L. Ed. 393 (1889) (defining unconscionable contract)). The agreed apportionment of liability between sophisticated commercial enterprises that is embodied in the indemnification provisions of the Agency Agreement simply does not present “an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an

exclamation at the inequality of it” such that it would be unenforceable as an unconscionable contract of adhesion. See id. Furthermore, the reasonable expectations of the average person looking at the indemnification provisions would be that the Agents are required to indemnify the Carrier -- defined as UVL and its parents and affiliates, including UniGroup and Vanliner -- with respect to liability for accidents such as those at issue in the underlying personal injury actions.

Aside from reasonable expectations, it is noteworthy that the entities who would most logically have challenged the Agency Agreements as adhesion contracts -- the two Agents in question, Fister and East End -- made no such claim in the trial court.

In the absence of any challenge to the enforceability of the Agency Agreements or their indemnification agreements contained therein at the trial court level, it was hardly incumbent upon UniGroup, UVL or Vanliner to present evidence that the Agency Agreements were not unenforceable contracts of adhesion. This points up the rank unfairness of NASI’s *post hoc* assertions on appeal. Nevertheless, there is simply no basis for finding the Agency Agreements -- entered into between sophisticated business entities and clearly spelling out the reasonable expectations of the parties -- to be unenforceable. The trial court erred

in finding that the indemnification agreements were “insufficient” and its Judgment should be reversed.

2. The indemnification agreements contained in the Agency Agreements are not unenforceable or inapplicable on the basis that they indemnify UniGroup and UVL for their own negligence.

NASI next argued in its Response Brief that the indemnification agreements set forth in the Agency Agreements are either unenforceable or inapplicable in the circumstances because they do not explicitly provide that UniGroup and UVL are being indemnified for their own negligence. Again, NASI made this argument for the first time on appeal and, accordingly, this argument should not be given any consideration; again, NASI’s argument should be rejected for the additional reason that it is substantively lacking in merit. Indeed, a recent *en banc* decision of this Court, Utility Service and Maintenance, Inc. v. Noranda Aluminum, Inc., 163 S.W.3d 910 (Mo. banc 2005), controls this issue, and compels that NASI’s arguments be rejected out of hand. Unfortunately, despite the clear mandate of Utility Service (not to mention the fact that such argument was never raised by NASI in the trial court), the Eastern District Court of Appeals accepted NASI’s contentions in this regard and accordingly affirmed the erroneous decision of the trial court.

It initially should be emphasized that there was no determination that UniGroup, a holding company, and UVL (much less Vanliner)¹⁴ were negligent in the underlying personal injury actions. While there were allegations of negligence raised against all defendants in the petitions filed in those matters, any such allegations against UVL and UniGroup were premised on the allegedly negligent acts of UVL's Agents or their drivers for which UniGroup or UVL might be held legally responsible, not on any direct negligence on the part of UVL or UniGroup. (L.F. Vol. 1, 41-60; L.F. Vol. 11, 1697-1706).

In other words, the Agents rely on the interstate authority of UVL to haul. However, it is the Agents who do the actual hauling and the drivers for those Agents who do the actual driving. Hence, if there is an accident, as in these cases, any negligent act or omission could only be done by the Agent or driver, not UniGroup or UVL -- even though, as the carrier under whose interstate authority the Agents and drivers operate, UVL (or, less likely, UniGroup) could ultimately be liable as a legal matter. That, of course, is the very reason for the existence of

¹⁴ Vanliner is independently entitled to indemnification pursuant to the indemnification agreements set forth in Section 5.M. of the Agency Agreements inasmuch as it falls within the plain definition of "Carrier" set forth in Section 1.A. of the Agency Agreement.

the indemnification agreements. See Transamerican, 423 U.S. 28 (1975) (“Although one party is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in law to the injured or damaged person may seek indemnity from the party responsible in fact”).

In any event, both of the underlying personal injury cases were settled directly by the various insurance companies who are parties to the instant declaratory judgment actions before any determination of negligence was made, and there never was any allocation of liability as between the various defendants. Indeed, there was no finding of negligence made with respect to any of the defendants. (L.F. Vol. 5, 707-717, 743-756). The multi-defendant aspect of the underlying personal injury actions (not to mention UniGroup and UVLs’s lack of direct connection to the alleged negligent acts in question) renders this matter distinguishable from K.C. Landsmen, L.L.C. v. Lowe-Guido, 35 S.W.3d 917 (Mo. App. 2001), heavily relied upon by NASI.

In K.C. Landsmen, the Western District found an indemnification provision in an automobile contract insufficient to indemnify K.C. Landsmen d/b/a Budget Rent-a-Car from the consequences of its own negligence. Id. at 921-22. However, in that case, unlike the case at bar, there was no “suggest[ion] that there is any other source of [Budget’s] liability to [the plaintiff in the underlying action]

(for which it seeks indemnification) other than its own negligence.” Id. Under those circumstances, the court observed that the fact “there was a settlement rather than a legal determination of its negligence is of no consequence under the facts.” But, given the posture of the underlying personal injury cases, where several defendants – including, most notably, the Agents and at least one of the Agents’ drivers who were directly involved in the accidents at issue – were sued on grounds of negligence, it cannot be said that UniGroup and UVL are necessarily seeking indemnification for their own negligent acts as was the case in K.C. Landsmen.

Of course, the primary and most significant difference between the case at bar and K.C. Landsmen is that the indemnification agreements at issue in this case were made by and between sophisticated commercial actors while the indemnification agreement in K.C. Landsmen was between a car rental agency and a relatively unsophisticated consumer. Missouri courts have long treated the two situations very differently, and, in the recent case of Utility Service, 163 S.W.3d 910, this Court left no doubt that this distinction still obtains.

Most importantly for present purposes, the Court in Utility Service held that a sophisticated commercial actor, Utility Service & Manufacturing, Inc. (a company engaged in the painting of high voltage electrical equipment for industrial clients), would be required to indemnify another sophisticated

commercial actor, Noranda Aluminum, Inc. (the operator of an aluminum manufacturing plant), for the consequences of Noranda's own negligence based on an indemnification agreement no more conspicuous or explicit than the indemnification agreement at issue in this case. Id. at 911-914. In other words, Utility Service demonstrates that NASI's arguments, although apparently accepted by the Eastern District Court of Appeals, are, in fact, entirely lacking in merit.

The indemnification agreement at issue in Utility Service, contained in the "standard terms and conditions" of Noranda's bid solicitation, provided that:

Seller [Utility] shall indemnify and save Purchaser [Noranda] free and harmless from and against any and all claims, damages, liabilities or obligations of whatsoever kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with Seller's performance hereunder or any default by Seller or breach of its obligations hereunder.

Utility Service, 163 S.W.3d at 911-912. This provision is no more explicit than the indemnification provisions at bar, which provide that:

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, attorneys' 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 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 Carrier.

(L.F. Vol. 7, 1190; L.F. Vol. 12, 2007).

Utility's insurer, TIG (represented by the same law firm that represents NASI here), claimed, just as NASI does here, that the indemnification provision between Utility and Noranda did not require Utility to indemnify Noranda for Noranda's own negligence because it did not explicitly provide as much. Id. at 912. This Court disagreed, holding that:

There is nothing ambiguous about a requirement that one party indemnify the other for "any and all claims" in a commercial contract. Claims for Noranda's negligence are included within the phrase "any and all claims." See Monsanto Co. v. Gould Electronics, Inc., 965 S.W.2d 314, 316-17 (Mo. App. 1998). This language was sufficient to require Utility, a sophisticated commercial entity, to indemnify Noranda for all claims, including those alleging negligence by Noranda.

Id. at 914; to similar effect, Fed. Ins. Co., 162 S.W.3d at 166. In reaching its decision, the Utility Service Court acknowledged the principles that NASI seeks to rely upon here, but held that “[d]espite these general principles regarding contracts that eschew liability, this Court has drawn a distinction between contracts with consumers and contracts between businesses of equal power and sophistication.” Id. at 913. In this regard, the Utility Service Court addressed at length its earlier decision in Purcell Tire & Rubber Co., Inc. v. Exec. Beechcraft, Inc., 59 S.W.3d 505 (Mo. banc 2001). In that case, the court upheld a limitation of liability provision in an airplane maintenance contract, holding that, while limitations of liability for one's own negligence must be clear, unambiguous, unmistakable, and conspicuous, “[s]ophisticated businesses that negotiate at arm's length may limit liability without specifically mentioning ‘negligence,’ ‘fault,’ or an equivalent.” Id. at 509 (cited in Utility Service, 163 S.W.3d at 914). In Utility Service, this Court also held that:

The fact that Noranda and Utility did not bargain for the indemnification clause is irrelevant. ‘Courts enforce the objective terms of contracts between sophisticated businesses, without regard to the parties’ subjective intent. The character and quality of negotiations do not vary the terms of a written contract between sophisticated businesses.’ [Internal citation omitted.] In such a contract, the economic reality is

that the price for the work may well include the cost of insurance for Utility to indemnify Noranda for “any and all claims.” A contract between sophisticated businesses that does not include indemnification would presumably carry a different price than a contract that does include such a provision.

Id. at 914.

Thus, Utility Service controls the instant case, and mandates rejection of NASI’s arguments. Even if one assumes that UniGroup and UVL were somehow directly negligent with respect to the underlying accidents (as discussed above, an assumption that is attenuated at best), the plain language of the indemnification provisions of the Agency Agreements nonetheless explicitly and conspicuously makes clear that the Agents -- in fact, the collective owners of UniGroup and UVL -- were to indemnify them for “any and all” liability arising out of such accidents. See Utility Service; 163 S.W.3d at 914; see also Fed. Ins. Co., 162 S.W.3d at 166. Moreover, there is no claim whatsoever that Vanliner seeks indemnification for its own negligence. In short, there was no basis for the trial court to hold the indemnification agreements unenforceable (or for the Court of Appeals to affirm such ruling), and its erroneous decision should be reversed.

Regrettably, as noted above, the Eastern District Court of Appeals was apparently convinced by NASI’s arguments in this regard. Relying upon Kansas

City Power and Light Co. v. Federal Const. Corp., 351 S.W.2d 741, 745 (Mo. 1961) and Parks v. Union Carbide Corp., 602 S.W.2d 188, 190 (Mo. banc 1980), the Eastern District found in this case that “[i]n 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.” See May 2, 2006 Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b), at 19-20; see also id. at 19 (“The indemnity provision cannot be read to render the Vanliner policies inapplicable to the Brouhard and Powell claims and compel Fister or East End to indemnify UniGroup and UVL for their own negligence.”)¹⁵ Indeed, this faulty conclusion -

¹⁵ Not only are Kansas City Power and Light Co. and Parks both much older cases than Utility Service, but neither specifically addresses the issue of what language is sufficient to provide indemnity for one’s own negligence in the context of a contract between sophisticated commercial actors opposed to a garden variety contract, as does Utility Service. In fact, Utility Service cites *both of these cases* for the broad general propositions that they set forth before making clear the operative distinction between consumer contracts and contracts between commercial entities that is critical in the instant case! See Utility Service, 163 S.W.3d at 913. There is no logical explanation for why the Eastern District chose to ignore Utility Service.

- directly at odds with this Court's *en banc* decision in Utility Service -- is the only basis asserted by the Eastern Court for ruling as it did on the indemnification issue.

Accordingly, UniGroup and UVL respectfully request that this Court remedy the manifest error of the trial court (an error which was only compounded by the Eastern District's acceptance of an argument that is not only contrary to a recent *en banc* decision of this Court, but also was never even raised in the trial court) by entering judgment against NASI in favor of UniGroup, UVL and Vanliner.

3. The indemnification agreements contained in the Agency Agreement are not being "selectively applied" by UniGroup and UVL.

In its Response Brief, NASI asserted, yet again for the first time on appeal, that UniGroup and UVL are "selectively applying" the Agency Agreements. NASI does not appear to seek any relief based on this purported selective application, nor could it. As discussed above, the indemnification agreements set forth in the Agency Agreements are fully enforceable and applicable. Instead, NASI raises the issue of "selective application" in order to further buttress its argument that UniGroup and UVL are somehow acting collusively with their subsidiary/affiliate Vanliner.

Despite NASI's suggestions, there is nothing improper or collusive about the fact that UniGroup and UVL have made good faith arguments throughout this litigation that will also advance the interests of Vanliner. UniGroup and UVL confessed judgment on Vanliner's reformation claim not because of their shared financial interest with Vanliner, as cynically asserted by NASI, but instead because UniGroup and UVL agree that the Vanliner policies were and are "hit and run policies;" *i.e.*, they are intended only to cover "hit and run" accidents where the precise identity of the Affiliated Agent cannot be determined but where the claimant nevertheless brings a claim against UVL and/or UniGroup because, for example, a witness identified the "hitting and running" vehicle in question as bearing only the UVL logo, with no further identifying marks.

The evidence of record convincingly bears out the validity of Vanliner's claims, and UniGroup's and UVL's confession of judgment regarding same. Indeed, a limiting endorsement was present when the policies were originally issued that made plain their "hit and run" nature, but it inadvertently was not included in subsequent issuances of the written policy. (L.F. Vol. 20, 3139; L.F. Vol. 8, 1226, 1229, 1252, 1260, 1282-84). The testimony of record stands un rebutted that the agreement of the parties to the Vanliner policies was that the policies were to only provide such "hit and run" coverage. (L.F. Vol. 4, 490-495, 499-506; L.F. Vol. 8, 1233, 1261, 1277; L.F. Vol. 9, 1327, 1340-44, 1413-14).

This testimony is corroborated by the documentary evidence of record, including explicit references in the American Guarantee umbrella policy to the Vanliner Trucker's Policy as the "UniGroup Hit and Run" policy and to the Vanliner Umbrella Policy as the "United Hit and Run" policy. (L.F. Vol. 3, 351, 355; L.F. Vol. 10, 1591).¹⁶ NASI should seek to confront that evidence head on (of course, it cannot) instead of making unfounded accusations of collusion.

With respect to the alleged selective application of the Agency Agreements, NASI neglects to mention that Vanliner is in a very different position from other insurers such as American Guarantee and Travelers inasmuch as Vanliner is itself an indemnitee pursuant to the plain language of the indemnification agreements. See Agency Agreements at Section 5.M. (providing that Agent indemnifies

¹⁶ Notably, there is no definition of "covered auto" in the Vanliner policies at issue; instead, there is only an undefined "Symbol 51." (L.F. Vol. 3, 427; L.F. Vol. 8, 1231-32, 1260; L.F. Vol. 9, 1326, 1344, 1389-91, 1393, 1416, 1440-41). Thus, despite the trial court's erroneous ruling, the Vanliner policies are ambiguous with respect to the critical question of what constitutes a "covered auto." Accordingly, resort to extrinsic evidence is required to interpret the policies – even apart from the claim for reformation, which also requires consideration of extrinsic evidence (again, in spite of the trial court's incorrect ruling to the contrary).

“Carrier”) and Section 1.A. (defining “Carrier” to include Vanliner). (L.F. Vol. 7, 1186, 1190; L.F. Vol. 12, 2003, 2007). Hence, Vanliner is expressly entitled to indemnification.

Moreover, NASI’s argument that the “plain language reading of the indemnity language would require an agent to indemnify UniGroup in an unlimited capacity” is beside the point. The indemnification agreements must be read in context of the other agreements between the parties, including the UVL Insurance Requirements, which require the Agents to have \$3 million in coverage and which are themselves incorporated in the Agency Agreements. (L.F. Vol. 4, 499-506, 510-12, 536-42; L.F. Vol. 6, 882-886; L.F. Vol. 9, 1345-46, 1351-52, 1414, 1439-1440). However, the situation posed by NASI is not before the Court. The only issue before the court is whether NASI must provide insurance coverage ahead of Vanliner. In view of the plain language of the indemnification agreements, it must.

4. NASI’s rights are derivative of its insureds, East End and Fister, and it is bound by the Agency Agreements pursuant to Federal Insurance.

In spite of NASI’s apparent confusion regarding the matter, UniGroup and UVL have never argued that NASI lacks standing to bring the declaratory

judgment actions at issue.¹⁷ Of course, it does. Nevertheless, NASI's rights and obligations as determined in this action are necessarily limited and defined by those of its insureds. If not for its policies insuring Fister and East End, NASI would have no involvement, much less potential liability, in this case. NASI's rights and obligations necessarily must stem from East End and Fister. Regardless of whether this action is denominated as a subrogation action or an equitable contribution action, NASI cannot claim "independent" rights greater than those possessed by its insureds as a means of escaping the effects of the indemnification provisions agreed to by its insureds in their respective Agency Agreements (and Lease Agreements). If NASI's argument were accepted, then the Missouri Court of Appeals could not have ruled as it did in Federal Insurance that Federal was barred from recovery in its equitable contribution action against Gulf Insurance Company for the amounts Federal paid in settlement of a personal injury action because of the existence of an indemnification agreement between Federal's insured and Gulf's insured. Fed. Ins. Co., 162 S.W.3d at 166.

NASI's agreement and entitlement to litigate the instant coverage allocation issues -- like its participation in the settlement of the underlying Brouhard and

¹⁷ Although, as a non-party not in privity to the Vanliner insurance policies, NASI does lack standing to challenge reformation of those policies by UnigGroup/UVL and Vanliner. See Swarengin v. Swarengin, 202 S.W. 556 (Mo. 1918).

Powell matters -- did not simply spring from the ether. Rather, NASI is in this case because it issued insurance policies to East End and Fister. Consequently, its rights arise through them, and are the very definition of “derivative” rights¹⁸ -- even if it has an “independent” right to assert them.

NASI seems to contemplate a no-holds-barred world in which it is freed from all of the strictures that bound its insureds merely because the various insurance companies for the parties agreed to settle the underlying negligence suits on behalf of the insureds and resolve coverage allocation issues later. Such does not comport with reason or common sense. As Federal Insurance confirms, the insurers’ rights and obligations must be determined by reference to the rights and obligations of their respective insureds. Thus, NASI is bound by the indemnification provisions of the Agency Agreements.

¹⁸ “A party making a claim through a derivative right acquires no greater rights in law or equity than the party for whom it was substituted.” Freeman v. Leader Nat. Ins. Co., 58 S.W.3d 590, 597-598 (Mo. App. 2001) (holding that assignees “stand in the shoes” of assignor and only receive the rights the assignor possessed at the time of assignment).

II. The Trial Court erred in failing to grant summary judgment in favor of UniGroup, UVL, and Vanliner because the Agency Agreements signed by Fister and East End operate to waive any right of subrogation that Fister, East End, and thus their insurer/subrogee NASI had against UniGroup, UVL, and Vanliner in that waiver of subrogation provisions such as those contained in the Agency Agreements are valid and enforceable in Missouri.

“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, 648-649 (Mo. Ct. App. 2003) (citation omitted). Put slightly differently:

[A]ny person, who pursuant to a legal obligation to do so, has paid even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter, persons who stand in the shoes of the wrongdoer, or others who, as payor, are primarily responsible for the wrong or default.

Id. at 648-49. In the instant case, NASI’s claim against Vanliner is a subrogation claim; in other words, NASI stands in the shoes of its insureds, East End and Fister, in asserting its claims against Vanliner and the other insurance companies

involved herein. Because of Vanliner’s clerical error allegedly enlarging the scope of its coverage from “hit and run” claims to a much broader class of claims,¹⁹ NASI—again standing in the shoes of its insured, now opportunistically seeks to label the Vanliner Trucker’s policy as “primary” and thus escape its obligation to

¹⁹ NASI’s claim that an inadvertent clerical error could have the effect of changing the class of claims that the original parties to the insurance policies, Vanliner and UVL, intended that the Vanliner policies cover could have a disastrous impact on the UVL and UniGroup Insurance program--potentially embroiling UniGroup, UVL, and Vanliner in years of litigation. Among other things, it is conceivable that if the Vanliner policy is not read as a “hit and run” policy (as it was intended), UVL could be held to lack insurance coverage on a nationwide basis for any prior claims arising from an accident involving an unidentified driver/agent. This is a risk not only to UVL and UniGroup, but conceivably also to the public at large. NASI seeks to undermine the entire structure of the UVL Insurance Program for its sole benefit, even though, as a stranger to the Vanliner policies, it lacks standing to challenge UVL, UniGroup, and Vanliner’s agreed interpretation of those policies. See Swearengin v. Swearengin, 202 S.W. 556 (Mo. 1918) (holding that standing to reform written instruments is limited to original parties or those claiming in privity under them, such as heirs, assigns, grantees, personal representatives, judgment creditors, or purchasers with notice).

provide insurance for these accidents.²⁰ However, the Agency Agreements -- embodying the purposes of the UVL Insurance Program -- once again independently operate to prevent NASI from succeeding in its desired gambit.

As set forth above, the Agency Agreements contain a “waiver of subrogation” provision (L.F. Vol. 7, 1187; L.F. Vol. 12, 2004). In Missouri, contract provisions waiving subrogation rights are fully valid and enforceable. Messner, 119 S.W.3d at 649. In this regard, they are interpreted and applied like any other contract.

²⁰ Ironically, even the clerical error evidenced by the missing endorsement results in an ambiguous insurance policy since the policy references “covered autos” with an industry shorthand designation identified only as symbol “51.” That designation, however, is nowhere defined within the four corners of the Vanliner policies at issue. (L.F. Vol. 3, 427, 432). Therefore, even NASI has conceded that the policies are ambiguous as written. (L.F. Vol. 4, 671). Hence, as a matter of law (and in spite of the trial court’s erroneous holding to the contrary), extrinsic evidence is required in order to determine the proper construction of the Vanliner policies (State Farm Mut. Auto. Ins. v. Esswein, 43 S.W.3d 833, 842 (Mo. App. 1999) (citing Modine Manufacturing Co. v. Carlock, 510 S.W.2d 462, 467 (Mo. banc. 1974))).

For example, in Disabled Veterans Trust v. Porterfield Const., Inc., 996 S.W.2d 548, 549 (Mo. Ct. App. 1999), the Missouri Court of Appeals found that a “waiver of subrogation” clause in a lease prevented a landlord (Franklin) from recovering for damages stemming from a fire caused by its tenant (Porterfield).

The “Waiver of Subrogation” clause at issue in that case provided that:

As part of the consideration for this lease, each of the parties hereto does hereby release the other party hereto from all liability for damage due to any act or neglect of the other party (except as hereinafter provided) occasioned to *property owned* by said parties which is or might be incident to or the result of a fire or any other casualty against loss for which either of the parties is now carrying or hereafter may carry insurance; provided, however, that the releases herein contained shall not apply to any loss or damage occasioned by the willful, wanton or premeditated negligence of either of the parties hereto, and the parties hereto further covenant that any insurance they obtain on their respective properties shall contain an appropriate provision whereby the insurance company, or companies, consent to the mutual release of liability contained in this paragraph.

Id. at 550 (emphasis in original). The dispute regarding the meaning of this provision revolved around the fact that “Franklin attempts to limit the words

‘property owned’ to premises leased by Porterfield. Porterfield, conversely, argues that by utilizing the term ‘property owned,’ it was Franklin's intent that the clause apply to the entire building, not just to the leased premises.” Id. at 552.

The court first held that “[w]aiver of subrogation clauses are valid and enforceable” Id. (citing Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15 (Mo. banc 1995)), and then found “the term ‘property owned’ to be an all encompassing term which demonstrates Franklin's intent to apply the waiver of subrogation to damage to the entire building, not merely damage to the leased premises.” Id. Thus, it had little difficulty upholding the lower court’s grant of summary judgment to Porterfield.

In Butler, 895 S.W.2d 15, relied upon in Disabled Veterans, this Court confronted a warehouse owner’s (Butler) claims arising out of 1990 collapse of the warehouse against, among others, the architect of the warehouse’s 1991 retrofit (Mitchell). Id. at 17. The lower court had granted summary judgment to Mitchell based on certain waiver clauses. Id. One of the clauses at issue provided as follows:

11.3.7 Waivers of Subrogation. The Owner [Butler] and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect [Mitchell], Architect's consultants, ... for damages caused by

fire or other perils to the extent covered by property insurance obtained pursuant to this paragraph 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.

Id. at 20-21. The Court confirmed that waivers of subrogation are effective and enforceable, but held that the language of the waiver at issue was limited to the “the value of the Work.” Id. (stating that “the obvious meaning of the quoted provisions of article 11.3.7 is that the waiver of subrogation is only effective to the extent of the value of the ‘Work’). Hence, it affirmed the trial court’s summary judgment in favor of Mitchell, but modified it to hold that Butler waived its rights to recovery against Mitchell to the extent of the value of the ‘Work.’ Id. at 21-22.

In short, there is no doubt that waivers of subrogation are enforceable in Missouri to the same extent as other contracts. Here, as discussed above, the Agency Agreement requires that Fister’s “insurance coverage . . . shall ***provide for a waiver of subrogation against the Carrier.***” (L.F. Vol. 7, 1190; L.F. Vol 12, 2007) (emphasis added). Given that the Agency Agreement specifically defines Carrier to include Vanliner, UniGroup and UVL, and because NASI’s rights in the instant litigation can be no greater than those of its insureds and subrogors, East End and Fister, NASI must be precluded from recovering on its subrogation claims against Vanliner, UniGroup and UVL.

Thus, UniGroup, UVL, and Vanliner are entitled to reversal of the trial court's ruling for the additional reason that the waiver of subrogation agreements contained in the Agency Agreements, like the indemnification agreements, control the insurance policies at issue. Consequently, NASI must provide coverage under its policies, ahead of any Vanliner policy, for the underlying settlements in accordance with UVL's carefully constructed and contractually mandated insurance arrangements.

CONCLUSION

Respondent NASI seeks to stand in the shoes of its insureds in order to assert the rights of those insureds to protection from the multimillion dollar claims filed against them. But in doing so, NASI must also assume the contractual burdens to which its insureds clearly agreed—to obtain their own insurance at their own cost, to indemnify UVL, UniGroup and Vanliner, and to waive any subrogation rights that those insured agents might otherwise have in return for the privilege of being a UVL agent. Furthermore, NASI must not be permitted to damage a long-standing insurance program that is the bedrock of UniGroup's interstate household goods carriers and their affiliated agents merely to satisfy its own financial desires.

NASI raised essentially none of the arguments that it now seeks to rely upon at the trial court level. It never asserted the Agency Agreements were

somehow unenforceable or “contracts of adhesion.” It never asserted that Federal Insurance is distinguishable from the instant case. It never asserted that UniGroup and UVL were “selectively applying” the Agency Agreements. Accordingly, it may not now raise those issues as a means of supporting the trial court’s erroneous Judgment. Country Mut. Ins. Co., 25 S.W.3d at 654. In any event, NASI’s eleventh-hour arguments are entirely unavailing and insufficient to preclude reversal of the Judgment.

WHEREFORE, Appellants UniGroup and UVL pray that this Honorable Court reverse the decision of the trial court denying Summary Judgment as to UniGroup, UVL and Vanliner and enter judgment in favor of UniGroup, UVL and Vanliner against NASI in this matter, ordering that NASI must provide coverage for the underlying Brouhard and Powell claims (and the settlements thereof) pursuant to the NASI East End Policy and the NASI Fister Policy ahead of and prior to any coverage provided by the Vanliner Trucker’s Policy, the Vanliner Umbrella Policy and/or any other policy issued by Vanliner, and for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted,

POLSINELLI SHALTON WELTE SUELTHAUS PC

By: _____

ROBERT J. SELSOR (#33245)

rselsor@pswslaw.com

GRAHAM L. W. DAY (#45687)

gday@pswslaw.com

7733 FORSYTH BOULEVARD, 12th Floor

Clayton, Missouri 63105

(314) 889-8000

Fax: No. (314) 727-7166

ATTORNEYS FOR DEFENDANTS/APPELLANTS

UNITED VAN LINES, LLC and

UNIGROUP, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing pleading were mailed, by U.S. Mail, first class, postage prepaid, together with a floppy disk containing this document, this 13th day of October, 2006, to:

Bradley J. Baumgart, Esq.
Michael E. Brown, Esq.
Kutak Rock, LLP
Valencia Place, Suite 200
444 West 47th Street
Kansas City, MO 64112-1914

and

Fairfax Jones, Esq.
Casserly Jones, P.C.
211 North Broadway, Suite 2150
St. Louis, Missouri 63102

ATTORNEYS FOR DEFENDANT
AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY

Theodore J. MacDonald, Jr., Esq.
Bharat Varadachari, Esq.
103 West Vandalia, Suite 300
P.O. Box 510
Edwardsville, IL 62025

ATTORNEYS FOR TRAVELERS
INDEMNITY COMPANY OF ILLINOIS

Adrian P. Sulser, Esq.
Thomas Buckley, Esq.
Buckley & Buckley, L.L.C.
1139 Olive Street, Suite 800
St. Louis, MO 63101-1928

James W. Erwin, Esq.
Matthew S. Darrough, Esq.
Thompson Coburn LLC
One U.S. Bank Plaza
St. Louis, MO 63101

ATTORNEYS FOR VANLINER
INSURANCE COMPANY

Russell Watters, Esq.
Kenneth Goleaner, Esq.
Brown & James, P.C.
1010 Market Street, 20th Floor
St. Louis, MO 63101-2000

ATTORNEYS FOR PLAINTIFF/RESPONDENT NORTH AMERICAN
SPECIALTY INSURANCE COMPANY

POLSINELLI SHALTON WELTE SUELTHAUS PC

By: _____
ROBERT J. SELSOR (#33245)
rselsor@pswslaw.com
GRAHAM L. W. DAY (#45687)
gday@pswslaw.com
7733 FORSYTH BOULEVARD, 12th Floor
Clayton, Missouri 63105
(314) 889-8000
Fax: No. (314) 727-7166
ATTORNEYS FOR DEFENDANTS/APPELLANTS
UNITED VAN LINES, LLC and UNIGROUP, INC.

CERTIFICATE OF COMPLIANCE

Graham L.W. Day, the undersigned attorney for Defendants/Appellants hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Appellant's brief:

1. Complies with Missouri Supreme Court Rule 55.03;
2. Complies with Missouri Rule of Civil Procedure 84.06(b);
3. Contains 17,336 words, excluding the cover page, signature blocks, appendix, certificate of service, and this certificate, according to the word count feature of Microsoft Word software, with which it was prepared;
4. Contains zero lines of monospaced type in the brief (excluding the cover, the signature blocks, the appendix, the certificate of service, and this certificate);
5. The floppy disk accompanying this Appellant's Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

Respectfully submitted,

POL SINELLI SHALTON WELTE SUELTHAUS PC

By: _____
ROBERT J. SELSOR (#33245)
rselsor@pswslaw.com
GRAHAM L.W. DAY (#45687)
gday@pswslaw.com
7733 FORSYTH BOULEVARD, 12th Floor
Clayton, Missouri 63105
(314) 889-8000
Fax: No. (314) 727-7166
ATTORNEYS FOR DEFENDANTS/APPELLANTS
UNITED VAN LINES, LLC and
UNIGROUP, INC.

