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

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Defendant,

&

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UNITED VAN LINES, LLC,

&

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&

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Judge Kenneth M. Romines
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REPLY TO RESPONDENT'S JURISDICTIONAL STATEMENT

In its Jurisdictional Statement, Plaintiff/Respondent North American Specialty Insurance Company (hereinafter, "NASI" or "Respondent") "rejects the jurisdictional statement" of Appellants UniGroup, Inc. ("UniGroup") and United Van Lines, LLC ("UVL"). NASI argues that this Court lacks jurisdiction of the instant appeal because the matter appealed from is the denial of a motion for summary judgment. But, as detailed in UniGroup and UVL's Substitute Opening Brief, this case falls under a well-established exception to the general rule that a denial of a motion for summary judgment is ordinarily not appealable. Specifically, when 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); accord, THF Chesterfield North Development, L.L.C. v. City of Chesterfield, 106 S.W.3d 13, 19 (Mo. App. 2003).

Here, the issues presented by UniGroup and UVL's appeal of the denial of their motion for summary judgment against NASI are identical to issues presented by Vanliner Insurance Company's ("Vanliner") consolidated appeal of the entry of summary judgment in favor of NASI. *Compare* NASI's "Point Relied On V" at 31-32 of its Substitute Response Brief ("The trial court did not err in entering

summary judgment for NAS and against Vanliner, because the indemnity language in the Agency Agreements does not affect or control the insurers' obligations for the Brouhard and Powell claims . . .") with "Point Relied On VI" at 32 of its Substitute Response Brief ("The trial court did not err in denying UniGroup's Motion for Partial Summary Judgment, because the indemnity language in the Agency Agreements does not affect or control the insurers' obligations for the Brouhard and Powell claims . . .").

There is simply no authority that would support NASI's proposition that the "inextricably intertwined" exception must be limited to "cross-motions" for summary judgment. See, e.g., Bituminous Cas. Corp., 107 S.W.3d 327; see also, e.g., THF Chesterfield North Development, 106 S.W.3d at 19. Likewise, there is no authority that would support NASI's notion that the "inextricably intertwined" exception should not be applied here merely because Vanliner's consolidated appeal also presents several additional legal issues in addition to the identical "Agency Agreement" issue presented by UniGroup and UVL's appeal. See id.

Finally, it bears repeating that UniGroup and UVL have a profound stake in this appeal going well beyond any financial interest they may have as Vanliner's parent and affiliate. As detailed in UniGroup and UVL's Substitute Opening Brief, the structure and meaning of the Agency Agreements and, indeed, of the UVL Insurance Program as a whole -- bedrock components of the relationship

between UniGroup, UVL and the Agents who own them -- are imperiled by the decision of the trial court in this matter.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

In its Statement of Facts, NASI makes several assertions that are not only argumentative, but also incorrect. First, on p. 16 of its Substitute Response Brief, NASI argues that, "the trial court rejected Vanliner's reformation claim that its Truckers Policy should be transformed into a policy providing "hit and run" coverage, a transformation that would have eliminated all coverage under the Vanliner policies . . ." However, Vanliner's reformation claim in no way seeks a "transformation" of its policy but instead seeks that the actual agreement of the parties to that policy be given effect by reforming the written policy. NASI is entitled to disagree that Vanliner is entitled to reformation, but it is entirely improper -- particularly in an appellate "statement of facts" -- for it to incorrectly characterize the claim for reformation as seeking a "transformation." See Rule 84.04(c) ("The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument").

Likewise, NASI argues 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." Substitute Response Brief at 26; see also id. at 17-18 ("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 and save Vanliner from the multi-million dollar exposures resulting from the two accidents. UniGroup has not taken this step, however, as to its other insurers such as Travelers and American Guarantee and Liability Insurance Company").

However, as recounted in their Substitute Opening Brief, 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. This shared understanding of the parties is not an example of *post hoc* collusion, as cynically asserted by NASI, but is instead well supported by the evidence of record. (L.F. Vol. 3, 351, 355; L.F. Vol. 4, 490-495, 499-506; L.F. Vol. 8, 1226, 1229, 1233, 1252, 1260, 1261, 1277, 1282-84; L.F. Vol. 9, 1327, 1340-44, 1413-14; L.F. Vol. 10, 1591; L.F. Vol. 20, 3139). There is no evidence that would rebut such understanding. Moreover, UniGroup and UVL did not "take the step" of confessing judgment on the reformation claims of Vanliner with respect to Travelers and American Guarantee for the simple reason that there is no basis for reforming the insurance policies issued by those companies. Indeed, neither Travelers nor American Guarantee pursued any claim for reformation in this matter.

Finally, NASI makes several statements regarding UVL's purportedly "significant control" over Paul Carroll and Hiram Jackson's "rights and duties in driving under UVL's authority" and the fact that Messrs. Carroll and Jackson were required to meet certain UVL standards as a condition of their contracts with Fister and East End, respectively. Response Brief at 19, 21. In this regard, it should be emphasized that there was no determination or allocation of liability or negligence between the various defendants in the underlying personal injury actions inasmuch as the cases settled without any such determination. (L.F. Vol. 5, 707-717; L.F. Vol. 5, 743-756). Indeed, Paul Carroll was not even sued and, accordingly, no amounts were paid on his behalf in settlement. (L.F. Vol. 1, 41-60; L.F. Vol. 5, 707-717).

ARGUMENT

I. The Trial Court erred in finding the indemnification provisions in the UVL Agency Agreements insufficient and unenforceable, and Respondent's arguments, raised for the first time on appeal, regarding the purported unenforceability and/or insufficiency of those agreements are unavailing.

NASI makes the very same arguments in response to both Vanliner's Substitute Opening Brief and that of UniGroup and UVL with respect to the question of the effect of the indemnification provisions of the Agency Agreement upon the insurance policies at issue. See NASI's Substitute Response Brief at Sections I.C., V., and VI. This again demonstrates that the issues on the two appeals are indeed "inextricably intertwined" and that this Court has jurisdiction over this matter. Moreover, NASI simply did not raise any of these issues below. As the Missouri Court of Appeals held in Country Mut. Ins. Co. v. Matney, 25 S.W.3d 651, 654 (Mo. App. 2000), "appellate review, even from the grant of summary judgment, or in court-tried cases, is limited to those issues put before the trial court." Accordingly, NASI's arguments regarding the purported unenforceability of the Agency Agreement are entitled to no consideration.

Even if NASI's arguments in this regard are given consideration, they nevertheless must be rejected for all of the reasons set forth in UniGroup and

UVL's Substitute Opening Brief (as well as that of Vanliner). First, despite NASI's creative and newly minted contentions on appeal, the indemnification agreements contained in the Agency Agreements, involving sophisticated businesses (UniGroup and UVL, on one hand, and the Agents, independent moving and storage companies who actually own UniGroup and UVL (L.F. Vol. 6, 878-886; 923-924)), are simply not unenforceable as "contracts of adhesion." See Burke v. Goodman, 114 S.W.3d 276, 280 (Mo. App. 2003); see also Swain v. Auto Services, Inc., 128 S.W.3d 103, 107 (Mo. App. 2003). Not even the trial court's manifestly flawed decision purported to characterize the Agency Agreements as contracts of adhesion.

Likewise, the indemnification provisions are not unenforceable or inapplicable on the grounds that they do not specifically provide that UniGroup and UVL are being indemnified for their own negligence. Utility Service and Maintenance, Inc. v. Noranda Aluminum, Inc., 163 S.W.3d 910 (Mo. banc 2005), a recent *en banc* decision of this Court, gives the lie to NASI's arguments in this regard. As this Court held in Utility Service:

> 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.

NASI seeks to claim in its Substitute Response Brief that Utility Service is inapposite because "[t]he drivers are insureds under the Vanliner policies,[1] but they are not parties to the Agency Agreements." This, of course, has nothing to do with the ruling of this Court in Utility Service that broad indemnification agreements between sophisticated entities like those set forth in the Agency Agreements validly provide indemnity for one's own negligence in spite of NASI's contentions to the contrary.

In addition, NASI claims that UniGroup and UVL are "selectively applying" the Agency Agreements and "colluding" with their subsidiary and affiliate Vanliner. However, such is not a valid basis for refusing to apply the Agency Agreements in this case nor is it an accurate characterization of the facts. UniGroup and UVL have supported Vanliner's position throughout this litigation

[1] NASI's assertion is incorrect. Drivers are never insureds under the Vanliner Truckers and Umbrella Policies at issue because if the identity of a driver involved in a particular accident is known, then coverage under these Vanliner "hit and run" policies is, by definition, never properly invoked.

and, indeed, confessed judgment on Vanliner's reformation claim because UniGroup and UVL agree that the Vanliner policies were and are "hit and run policies," not the policies of general applicability that NASI contends in the face of overwhelming -- and unrebutted -- evidence to the contrary. (See L.F. Vol. 4, 490-495, 499-506; L.F. Vol. 8, 1233, 1261, 1277; L.F. Vol. 9, 1327, 1340-44, 1413-14; L.F. Vol. 10, 1591).

Moreover, Vanliner is in a much different position than American Guarantee and Travelers for the additional reason that 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 "Carrier") and Section 1.A. (defining "Carrier" to include Vanliner). (L.F. Vol. 7, 1186, 1190; L.F. Vol. 12, 2003, 2007). NASI's overblown contention that "[i]f Vanliner's assertion were taken as true and it was entitled to indemnity from the agents under the Agency Agreements because it is owned by UniGroup, then Vanliner would never have to pay on the hundreds of policies that it issues each year to UniGroup's agents" (see Substitute Response Brief at 84) is a red herring with no connection to the facts of this case. As set forth above (and as detailed in Vanliner's briefing), the unrebutted evidence makes clear that the Vanliner Truckers and Umbrella Policies are, in reality, "hit and run" policies, which should

never involve claims against an Agent because, by definition, any claim under those Vanliner policies is a claim where the Agent is unidentified.

Similarly, NASI's argument that the "plain language reading of the indemnity language would require an agent to indemnify UniGroup in an unlimited capacity" is incorrect. As the evidence demonstrates, the UVL Insurance Program is an integrated whole, which does not provide for unlimited indemnification of UniGroup and UVL. The indemnification agreements in the Agency Agreements must be read in combination with all of the other agreements between the parties, including the UVL Insurance Requirements, which only 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. 7, 1211; L.F. Vol. 9, 1345-46, 1351-52, 1414, 1439-1440). The $50 million American Guarantee Umbrella Policy, for example, expressly sits on top of all of the Agents' insurance policies as well as the UniGroup and UVL Policies (including the "UniGroup Hit and Run" policy and the "United Hit and Run" policy, as the American Guarantee Policy identifies the Vanliner's Trucker's Policy and the Vanliner Umbrella Policy at issue here). (See L.F. Vol. 3, 351, 355). Hence, the "absurd results" which NASI speculates about

will never occur. Instead, accepting NASI's argument would lead to "absurd results" -- namely, duplicative coverage or, worse, a potential gap in coverage.[2]

Specifically, the Vanliner "hit and run" policies at issue not coincidentally provide the same level of protection ($3 million) as required of the Agents by the UVL Insurance Requirements. (Compare L.F. Vol. 2, 168, 206 and L.F. Vol. 3, 407-8 with L.F. Vol. 7, 1211.) The difference is both slight and significant. If the Agent, van operator or equipment involved in an accident can be identified, then the Agent's three million dollars of coverage (including, in the case, the NASI policies) is in play. If, however, a claim is made against UniGroup or UVL and an agent, van operator or piece of equipment cannot be identified, the Vanliner "hit and run" policies are in play. UniGroup, UVL, their Agents, the carefully crafted UVL Insurance Program, and, indeed, the public at large are thus protected because the first three million dollar layer of coverage is always present.

In the scenario proposed by NASI, UniGroup and UVL have duplicative coverage for an accident wherein the Agent, van operator and/or equipment is identified, but, worse, potentially no coverage for a true "hit and run" or phantom

[2] The only absurdity truly present in this scenario is the cynical attempt of a large insurance company, NASI, to substantially disrupt the insurance program of UniGroup and UVL, and to have the temerity to claim that UVL Agents signed "contracts of adhesion" when the Agents themselves make no such claim.

vehicle accident because it can never be proven the vehicle was owned, operated or leased to UniGroup or United. NASI's interpretation could lead to a disruption of coverage in the UVL Insurance program.

II. The Trial Court erred in finding the Federal Insurance case distinguishable from the instant case, despite Respondent's untimely arguments to the contrary.

Yet again, NASI never raised any claim at the trial court level that Federal Ins. Co. v. Gulf Ins. Co., 162 S.W.3d 160, 166 (Mo. App. 2005), was distinguishable from the case at bar. Instead, it merely contended that Missouri did not follow the rule that indemnification agreements control insurance policies as set forth in Wal-Mart Stores, Inc. v. RLI Ins. Co., 292 F.3d 583 (8th Cir. 2002), a contention that is plainly wrong in light of Federal Insurance. Accordingly, none of its thirteenth-hour arguments regarding the alleged inapplicability of Federal Insurance are entitled to consideration on appeal. Country Mut. Ins. Co., 25 S.W.3d at 654. This is an overwhelming deficiency that NASI cannot, and does not, satisfactorily address in its Substitute Response Brief.

Of course, despite NASI's attempts to argue that Federal Insurance is "irrelevant" to the case at bar, Federal Insurance squarely addresses the effects of an indemnification agreement in an insurance allocation dispute -- unquestionably a matter of significance in the instant appeal -- and, like Wal-Mart and a litany of

other cases from other jurisdictions, mandates that indemnification agreements control over insurance policies in such circumstances.

NASI's main argument -- again, never once raised in the trial court -- appears to be that Federal Insurance is not applicable here because the Agents, East End and Fister, and the truck drivers in the underlying accidents, Hiram Jackson and Paul Carroll,[3] qualify as "additional insureds" under NASI's reading of the Vanliner policies. First and foremost, this argument only begs the other, even more fundamental, question at issue in this case, namely, what coverage were the Vanliner policies at issue actually meant to provide? As the unrebutted evidence cited above demonstrates, the Vanliner Trucker's Policy and Umbrella Policy were, in fact, meant to cover situations involving a UVL truck where the Agent (and, consequently, the driver and/or his equipment) remain unidentified because of a "hit and run" situation. Hence, East End, Fister, and Messrs. Carroll and Jackson could never be "additional insureds" under the Vanliner policies, if they are properly construed.

Furthermore, as set forth in UniGroup and UVL's Substitute Opening Brief, whether or not an entity is an "additional insured" should not affect application of

[3] Again, it should be emphasized that Paul Carroll was not sued and no amounts were paid on his behalf in settlement. (L.F. Vol. 1, 41-60; L.F. Vol. 5, 707-717). Hence, his example can provide no support for NASI's argument.

the rule of Federal Insurance. The named insured 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, and is also the party who bargained in the indemnification agreement for the right to have the other party indemnify it for any liability. It would hardly be fair, then, to render an indemnification agreement wholly ineffectual merely because the indemnitor might also qualify as an "additional insured" under the indemnitee's insurance policy. Accepting NASI's argument would gut the rule of Federal Insurance that the indemnitor, whom the parties have contractually agreed should bear the liability for any claims within the scope of the indemnification agreement, should, in fact, be held so accountable.

CONCLUSION

NASI's contentions that Federal Insurance is inapposite and the indemnification agreements contained in the Agency Agreements are unenforceable must be rejected in light of its failure to preserve them for appellate review. Moreover, in light of the strong policy expressed in Federal Insurance and numerous cases from other jurisdictions that indemnification agreements control over insurance policies, as well as the clear rule set forth by this Court in Utility Service with respect to the enforceability of Agency Agreements between sophisticated commercial entities, NASI's arguments are unavailing. In particular, it is critically important that this Court not endorse the trial court's manifestly

erroneous holding -- subsequently adopted by NASI on appeal -- that the indemnification agreements in the Agency Agreements are unenforceable, a holding which unjustifiably and unnecessarily creates doubt regarding the meaning and structure of the Agency Agreements and the UVL Insurance Program, which have been bedrock components of the relationship between UniGroup, UVL and their owners/Agents for decades.

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,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Substitute Reply Brief was mailed, by U.S. Mail, first class, postage prepaid, together with a floppy disk containing this document, this 14th day of December 2006, to:

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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 3,500 words, excluding the cover page, signature blocks, 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 Appellants' Substitute Reply Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

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