

UNFAIR RISK TRANSFER

INDEMNIFICATION ● HOLD HARMLESS ● ADDITIONAL INSURED

Risk transfer provisions in Minnesota construction contracts shift financial responsibility for the negligence of one party to another, generally from the general contractor to the subcontractor.

These provisions:

- Promote unsafe jobsite practices
- Encourage inequitable bidding practices
- Allow general contractors to shift liability for all negligent acts – even sole negligence of others on the project – to subcontractors
- Increase insurance costs
- Increase construction costs
- Increase unnecessary litigation
- Decrease business profits

ASA-MN believes that state law should require every party on a construction project to bear their fair share of responsibility. Every party – subcontractor, general contractor, design professional, owner – ought to be responsible for its own actions and omissions.

MN Stat. § 337.02 prohibits provisions in construction contract that transfer liability for negligent acts from the actor to another. This is known as a statutory anti-indemnification provision.

However, there is an exception to the rule that allows for the transfer of liability at MN Stat. § 337.05. This exception to the rule has become the norm in construction contracts. The exception is referred to as broad form indemnification.

Broad form indemnity provisions in construction contracts force subcontractors to assume the entire responsibility and liability for all damages and or injury regardless of cause or fault on the project. They hold the subcontractor responsible even if the general contractors, another subcontractor, design professional, or the owner is negligent and responsible for the wrong.

Broad form indemnification is bad policy. The indemnified party has no incentive be careful to avoid injury or loss because they are not liable for their own actions. This sets the stage for unnecessary and complex legal battles and ultimately drives up the cost of construction.

This is not an academic issue:

- The American Council of Engineering Companies recently sought relief through legislation. Their bill would eliminate the loophole for some professionals; but it unfairly removes one group, reduces the size of the insurance pool and still leaves others behind to carry the cost.
- The Bolduc case, a recent Minnesota Court of Appeals decision, held that even though the subcontractor was zero percent at fault, they are 100% liable for the accident.

ASA –MN is seeking changes to repeal MN Stat. § 337.05 to remove the exception to the anti-indemnification rule or amend the exception to prevent parties from being responsible for the negligence of others.