

AT ISSUE: UNFAIR RISK TRANSFER & INDEMNIFICATION

INDEMNIFICATION CLAUSE - A contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur.

Broad Form Indemnification is when Party A promises to pay for anything that Party B does. Case law and public policy do not favor this type of indemnification because it reduces incentive for Party B to act responsibly and within the law.

Minnesota has an anti-indemnity statute to prevent Broad Form Indemnification. However, it has a dangerous-for-subcontractors loophole.

It works like this:

Rule: MN Stat. § 337.02 - You cannot indemnify someone else for their negligent acts.

Exception: MN Stat. § 337.05 - You may sign a contract resulting in you indemnifying someone else for their negligent acts.

This loophole and its unfair application were recently etched into law by the Minnesota Court of Appeals in ECI v. Bolduc, A11-159 (Minn. Ct. App. 9/6/11).

PROBLEMS FOR SUBCONTRACTORS UNDER CURRENT LAW:

- Virtually all current construction contracts require some type of Broad Form Indemnification.
- When a Subcontractor signs such an agreement the Subcontractor's business assets, personal assets, and/or insurance company become liable for every negligent act on the entire project including the sole negligence of a 3rd party, even if the Subcontractor is 0% at fault.
- When Third Parties are not financially liable for their own negligent acts they have reduced incentive to ensure a safe work site, hire qualified people, monitor the work of their employees, hire quality Subcontractors or think before they act.
- Subcontractors work in an environment where the risk of a job always outweighs the reward of the paycheck. ***It is like holding the person who puts the screen door on a house responsible for the foundation.***
- Despite the anti-indemnification statute, in 2011 the MN Court of Appeals held that the plain language of §337 requires that if you insure and thus indemnify someone on a construction project, and if they are negligent - even if they are 100% negligent and you are 0% negligent - you will pay to fix their mistake.

WHAT ARE SUBCONTRACTORS DOING?

ASA-MN is seeking changes to **repeal § 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.**