



# Minnesota Subcontractors Association

## Duty to Defend

### BACKGROUND

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MSA is leading an effort at the Minnesota State Capitol to close the loophole that allows an at-fault general contractor to require an innocent subcontractor to pay the general contractor's attorneys' fees – we want to end these unfair “Duty to Defend” contract clauses.

The change is necessary because this unfair practice has become common-place in the MN construction industry. So common, that if a subcontractor does not agree to pay the general's attorneys' fees when the general is negligent, the Subcontractor does not get the work.

In 2013 the legislature unanimously passed a law that stated “A provision that requires a party to provide insurance coverage to one or more other parties, including third parties, for the negligence or intentional acts or omissions of any of those other parties, including third parties, **is against public policy and is void and unenforceable.**” But general contractors created a loophole and require subs to pay all the legal fees for general contractor when the subcontractor is zero percent at fault. We need to protect the intent of the 2013 law, and close this loophole.

The proposed change will make sure that each party to a construction contract is responsible for their own attorneys' fees when they are negligent. Basic justice. Basic fairness.

If you have any questions about the materials or how to contact your State Representative or Senator contact the MSA at 612-598-1753.

#### **Elevator Speech / Issue Summary:**

To get work, Subcontractors are being required to pay for the General Contractor's attorneys' fees, when the General Contractor is negligent and the Subcontractor is not. This is unfair, goes against common sense, and is bad for work-site safety.

#### Key Talking Points:

- Support and Pass House File 1099 / Senate File 924.
- The negligent party should pay for their own attorneys' fees. Common Sense.
- Subcontractors do not seek to avoid responsibility for their own actions. Subcontractors just don't want to pay the General's attorneys' fees when the General is negligent.

Close the “defense” loophole... before it closes my business.

## Support HF1099 / SF924

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### **The Problem - They break it, and we have to buy it.**

General contractors require that subcontractors pay the general’s attorneys’ fees, when the general is negligent. Agreeing to this puts the subcontractor’s business at risk, for things they have no control over, everyday. But if a subcontractor does not agree, the sub does not work.

### **The Ask - Basic Fairness & Common Sense:**

**Close the loophole and have the negligent party pay their own attorney’s fees.**

#### **The Background**

- In 2012, “indemnity agreements” included “the duty to defend”, and these agreements were illegal... but could be insured;
- In 2013, the legislature **unanimously** passed the anti-indemnity law prohibiting these insured agreements;
- Today, general contractors created a loophole by separating “the duty to defend” from the prohibited “indemnity agreements” in their contracts. Now generals make subcontractors insure and pay all the general’s attorneys’ fees, when the general is at fault.

**Actual contract example:** “Subcontractor agrees to defend Contractor, its agents and employees from all claims including, without limitation, claims for which Contractor may be or may be claimed to be liable and to pay all legal fees and disbursements paid or incurred by Contractor in defense of such claims...”

*- AGC standard form contract*

### **The Fix & The Bill - HF1099 (Loonan) / SF926 (Jensen)**

1. Adds the word “defend” to a list of prohibited agreements, to close the loophole and make sure the negligent party pays their own attorneys’ fees;
2. Deletes the term “project-specific insurance”, to get rid of the ambiguous wording and ensure only available insurance products can be demanded of subcontractors.

Support HF1099 / SF924