

## **Subcontractor Exposure: 2013 Amendments to the Minnesota Anti-Indemnification Statute<sup>1</sup>**

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Subcontractors working on construction projects face a variety of rules and regulations. None are more important than the subcontracts they sign which govern their work. These comprehensive agreements contain provisions that have significant legal implications, including the weight of statutes that can shift responsibility on subcontractors for the fault of others.

The Minnesota Legislature recently passed a law, effective August 1, 2013, that affects liability exposure to subcontractors in construction settings. The new law amends Minnesota's existing anti-indemnification statute, Minnesota Statute 337, which governs contractual provisions that seek to shift the risk of injury and damage to a party that agrees to indemnify (pay on another's behalf) for the fault of another.<sup>3</sup> Such broad indemnification agreements are invalid unless "the promisor agrees to provide specific insurance coverage for the benefit of others."<sup>4</sup>

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<sup>1</sup> This article is provided for educational purposes only and is not intended as legal advice.

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<sup>3</sup> This law dates back nearly 30 years, invalidating indemnification for another's own fault in building and construction contracts, and limiting indemnification only to the promisor's fault:

"An indemnification agreement contained in . . . a building and construction contract is unenforceable except to the extent that: (1) the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the promisor or the promisor's independent contractors, agents, employees, or delegates."

The 2013 amendments to Chapter 337 change this promise-to-procure requirement:

"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."<sup>5</sup>

Importantly, the amendment does not affect contractual requirements to obtain “project-specific insurance,”<sup>6</sup> or “the validity of a provision that requires the promisor to provide or obtain insurance coverage for the promisee's vicarious liability, or liability imposed by warranty, arising out of the acts or omissions of the promisor.”<sup>7</sup> In addition, the amended statute does not preclude a subcontractor from voluntarily procuring broader insurance coverage than required by the subcontract, nor does it expressly preclude broad indemnification for a breach of contract.

Under the 2013 amendment, where a subcontractor has contractually promised to indemnify for the negligence (fault) of another (such as the general contractor) any contractual requirement that the subcontractor insure its indemnification promise (to have an enforceable indemnification agreement) is now limited to the subcontractor’s own fault and breach of warranty, and the vicarious (secondary) liability of the party indemnified. In a construction setting, this means a subcontractor’s liability exposure for an agreement to indemnify the general contractor for the general’s own fault and a coextensive subcontract *requirement* to add the general contractor as an additional insured to the subcontractor’s liability policy is limited to the fault assessed to the general arising out of the

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Minn. Stat. §337.02. "Building and construction contract" means a contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges. Minn. Stat 337.01, subd. 2.

<sup>4</sup> Minn. Stat. §337.05, subd. 1. Subcontractors who fail to provide the promised insurance or keep it in force are statutorily required to indemnify the promisee “to the same extent as the specified insurance.” *Id.*, subd. 2.

<sup>5</sup> Minn. Stat. § 337.05, subd.1(b) (2013).

<sup>6</sup> An undefined term in the amendment, but “including, without limitation, builder's risk policies or owner or contractor-controlled insurance programs or policies,” Minn. Stat. 337.05, subd.1(c)

<sup>7</sup> *Id.*, subd. 1(d).

subcontractor's work and warranty promises. Other fault which might be assessed to the general contractor for other trades would not be indemnified by the subcontractor.

The changes to Chapter 337 bring about several important issues that courts may be asked to determine:

- The amended statute may only limit contractually required “additional insured” coverage and not limit other voluntarily procured insurance. For instance, subcontractors typically have existing standard commercial general liability coverage which includes “insured contract” coverage for their contractual promises to indemnify another, or may for business reasons voluntarily add a party as an additional insured under their liability coverage, or carry blanket additional insured coverage as part of their insurance programs. In such situations, does a subcontractor's voluntary existing insurance program operate as the insurance to fulfill any insurance procurement requirement under a subcontract it enters.
- Must the subcontract specifically state that the subcontractor's existing liability insurance, procured months or even years before, is the insurance selected for its contractual procurement obligation, or can it be assumed and legally binding without mention in the subcontract.
- Is the subcontractor's entire liability coverage program now “required” by the subcontract, and thereby governed by Chapter 337 and the new amendment, or does the insurance program, or portions of it, remain voluntarily procured insurance unaffected by the statute.
- Can a general contractor, in its subcontract form, specifically state the insurance required by the subcontractor to insure its indemnification of the general is “project-specific” insurance and thus unaffected by the new amendment, allowing for broad indemnification for the general's own fault.
- In contrast, can the subcontract expressly denote the exact insurance to be procured under a subcontract (*e.g.*, specific additional insured endorsements) to limit the subcontractor's indemnification exposure.

- What effect, if any, does the amendment's limitation on an insurance procurement promise for another's *fault* have on a subcontractor's indemnification promise predicated on contractual liability. For example, would a subcontractor's failure to procure the insurance required under a subcontract constitute a breach of the subcontract to permit the subcontractor's broad indemnification for the general's own fault. Would any contractual breach by the subcontractor attributable to the claimed injury or damages permit the application of a broad indemnification provision for the general's own fault.
- What effect do Minnesota court decisions have on claims involving subcontractors in light of the amended statute. For instance, must a subcontractor first be found to be at fault to enforce its indemnification for the general contractor's vicarious liability, or for the general's own fault. Are such fault determinations required to enforce a subcontractor's indemnification obligation for its *contractual* liability. How will insurers respond to indemnification claims involving tort (*e.g.* negligence) or breach of contract mindful of recent court decisions and the amended statute. Must subcontractors now ask courts to declare the scope of the insurance procured for their indemnification promises as part of defending their interests in a construction lawsuit.

The answers to such questions may have dramatic impact on the liability exposure and costs for subcontractors and other contracting parties, and the strategies employed to defend and handle these complicated situations.

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The recently amended Chapter 337 affects the scope of indemnification and insurance promises in construction settings. Subcontractors must be aware of the significant legal implications of their subcontract decisions and the interplay of their insurance programs for ongoing business operations. The insurance program should include safeguards for reviewing and comparing specific contractual obligations to indemnify other parties, and to procure insurance, with the subcontractor's existing insurance program as well as its project specific liability coverage to avoid situations of uninsured exposure, or the inadvertent assumption of another's liability for unrelated work or circumstances.