

## **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 3<sup>rd</sup> 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.**