

NO. A11-0159

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State of Minnesota  
**In Supreme Court**

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Engineering and Construction Innovations, Inc.,  
*Respondent,*

vs.

L.H. Bolduc Co., Inc.,  
*Appellant,*

and

The Travelers Indemnity Company of Connecticut,  
*Appellant.*

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**BRIEF AND APPENDIX OF AMICUS CURIAE  
THE PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTRODUCTION AND STATEMENT OF AMICUS CURIAE<sup>1</sup>

*Amicus* Petitioner the Property Casualty Insurance of America (“PCI”) is a trade group representing the more than 1,000 property/casualty insurance companies who are members of PCI. PCI members are domiciled in and transact business in all 50 states as well as the District of Columbia and Puerto Rico. Its member companies write \$180 billion in direct written premium, or over 38.3 percent of all the property/casualty insurance written in the United States. PCI members write 44.3 percent of the nation’s auto insurance, 31.6 percent of all homeowner’s policies, and 42.6 percent of the private workers’ compensation insurance market.

PCI member companies include all types of insurers, including large national insurance companies, mid-size regional writers, insurers doing business in a single state and specialty companies that serve specific niche markets. PCI member companies include stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry.

PCI’s interest in this matter is both public and private. Any decision by this Court interpreting the Minnesota Anti-Indemnity Act, the contractual indemnity provisions of the construction contract, and/or the additional insured endorsement involved in this case will affect PCI members writing in Minnesota, all of which

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<sup>1</sup> This brief was drafted solely by PCI and its counsel; no party authored any part of the brief. PCI provided the funding to draft this brief.

are insurers. PCI also has a public interest in this case. Its primary concern is to assist in developing clear, precise, and consistent indemnity law in the State of Minnesota.

### **STATEMENT OF THE CASE AND FACTS**

PCI concurs with the Appellants' Statement of the Case and Statement of Facts.

### **STANDARD OF REVIEW**

PCI concurs with the Appellants' statement of the standard of review.

### **LEGAL ARGUMENT**

PCI asks this Court to conclude the following:

A contractual indemnity or insurance policy provision that requires a subcontractor or insurer to indemnify another contractor<sup>2</sup>/additional insured for bodily injury or property damage "caused by the [subcontractor's/named insured's] acts or omissions" does not require a subcontractor or insurer to indemnify the contractor/additional insured when the subcontractor/named insured is free from fault for the damage suffered.

This proposed rule applies only to the duty to indemnify, not to the duty to defend, which is governed by separate, well established considerations. This proposed rule applies only when the subcontractor/named insured has been found free from fault in causing the plaintiff[s]' damages.

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<sup>2</sup> The scenario to which the proposed rule applies generally will arise in a general contractor/subcontractor relationship. But, as here, it may also arise when a subcontractor hires another subcontractor. The rationale of the proposed rule applies equally to both situations.

This rule finds support in Minnesota precedent. It is good systemic policy that will benefit the construction industry overall, the public, subcontractors, insurers, and general contractors.

**I. LEGAL PRECEDENT SUPPORTS APPLYING MINN. STAT. § 337.05, SUBD. 1, AS A NARROW EXCEPTION.**

PCI asks this Court – applying the plain meaning of Minn. Stat. §§ 337.02 and .05 (2010) – and longstanding Minnesota precedent requiring courts to construe indemnity provisions narrowly against the party seeking indemnification – to construe contractual indemnity agreements and additional insured endorsements through the “narrow exception” of Minn. Stat. § 337.05, subd. 1.

Under Minn. Stat. § 337.02, “an attempt to indemnify a party to a construction contract from liability for its own actions” is unenforceable. *Katzner v. Kelleher Constr.*, 545 N.W.2d 378, 381 (Minn. 1996). Under a “narrow exception” to the rule, “ ‘a promisor [can] agree[] to provide specific insurance coverage for the benefit of others.’ ” *Katzner*, 545 N.W.2d at 381 (quoting Minn. Stat. § 337.05, subd. 1) (emphasis added). An example of such a specific agreement is contained in *Holmes v. Watson-Forsberg Co.*, where a subcontractor agreed to obtain insurance to cover the contractor for “claims for which the Contractor may be or may be claimed to be, liable.” 488 N.W.2d 473, 475 (Minn. 1992).<sup>3</sup>

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<sup>3</sup> While the Court of Appeals relied upon the *Holmes* decision in some aspects of deciding this case, the language of the contract between ECI and Bolduc is sufficiently distinct from the contract language considered by the *Holmes* Court.

Here, the Minnesota Court of Appeals held that – because contracts requiring indemnity for a contractor’s negligence have become common in the construction industry – “the ‘narrow exception’ appears to have swallowed the rule.” *Eng’g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc.*, 803 N.W.2d 916, 922 (Minn. App. Sept. 6, 2011). On this premise, the court proceeded to consider whether the contractual indemnity agreement specifically required indemnity insurance – not whether it required insurance specifically to cover the negligent acts of Engineering and Construction Innovations, Inc. (“ECI”). *Id.* at 922-24. Further, instead of considering whether language in the contractual indemnity agreement and additional insured endorsement specifically covered the negligent acts of ECI, the court considered whether any language specifically excluded the negligent acts of ECI. *See id.*

The contractual indemnification agreement between ECI and L.H. Bolduc Co., Inc. (“Bolduc”) requires Bolduc to obtain the necessary insurance to indemnify ECI for:

... injury to any persons or damages to property caused or alleged to have been caused by any act or omission of [Bolduc].” *ECI v. Bolduc*, 803 N.W.2d at 930-31.

Traveler’s additional insured endorsement limits coverage to situations where:

... the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of your work . . . .” *Id.* at 924.

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A reversal of the Court of Appeals in this case would not require a reversal of *Holmes*.

In *Katzner*, a jury found Kelleher, a contractor, was not negligent. 545 N.W.2d at 380. But Ellerbe, the designer/builder on the project, claimed Kelleher had a duty to indemnify Ellerbe for Ellerber's own fault. *Id.* The indemnity provision in *Katzner* required Kelleher to procure insurance to indemnify Ellerbe from claims:

which may arise out of or result from the Contractor's [Kelleher's] operations under the Contract. 545 N.W.2d at 380.

The insuring requirement was not expressly limited to Kelleher's "negligent operations" – only to its "operations." Similarly, here, the contractual indemnity agreement and additional ensured endorsement do not limit Bolduc or Traveler's indemnity obligations to "negligent acts or omissions" – only to "acts or omissions."

Interpreting the indemnity requirement, the Minnesota Supreme Court concluded "[t]his language does not require Kelleher . . . to purchase insurance for claims arising out of Ellerbe's operations, Ellerbe's acts or Ellerbe's omissions." *Id.* at 382. "Without an agreement to procure insurance coverage for any claims arising out of Ellerbe's own negligence, any attempt by the parties to relieve Ellerbe from liability for its own acts and operations cannot be enforced." *Id.* (emphasis added). The *Katzner* holding is consistent with Minnesota's general indemnity law, which does not favor indemnity provisions and construes them against indemnification " 'unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to [them].' " *Yang*

*v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 791 (Minn. 2005) (quoting *Nat'l Hydro Sys. v. M.A. Mortenson Co.*, 529 N.W.2d 690, 694 (Minn. 1995)).

Applying the plain meaning of Minn. Stat. §§ 337.02 and .05 – and longstanding Minnesota precedent, including *Katzner* – PCI asks the the Court to reject as unenforceable any interpretation of contractual indemnity or policy indemnity language that could require a subcontractor that is free from fault, or its insurer, to indemnify a contractor/additional insured for the contractor/additional insured's own fault. A narrow exception to this rule applies when there is a specific requirement to obtain insurance that indemnifies the contractor/additional insured for its own fault.

## **II. APPLYING MINN. STAT. § 337.05, SUBD. 1, AS A NARROW EXCEPTION PRODUCES GOOD SYSTEMIC POLICY.**

It is good policy for the Court to adopt a rule that applies Minn. Stat. § 337.05, subd. 1, as a “narrow exception,” and requires any duty to indemnify a contractor/additional insured for its fault to be clear and unequivocal. Such rule benefits all players in the construction industry: the construction industry overall, the public, subcontractors, insurers, and general contractors.

### **A. Applying Minn. Stat. § 337.05, subd. 1, as a narrow exception benefits the construction industry overall.**

To meet the ever-increasing risk-transfer demands of the construction industry, insurers issue blanket additional insured endorsements. These endorsements generally extend additional insured coverage to any entity for which the named insured has a written contract to indemnify for damage caused by the

named insured's acts or omissions. These endorsements enhance efficiency and reduce costs because a subcontractor does not have to obtain a scheduled additional insured endorsement, identifying each additional insured by name, for each project it works on. Insurers are in a position to issue blanket general insured endorsements because the insurer's risk is limited to the liability caused by the acts or omissions of their named insured – an entity which the insurer has had the opportunity to investigate and underwrite.

But if Minn. Stat. § 337.05, subd. 1, is no longer construed as a narrow exception – and an obligation to indemnify an additional insured for its sole negligence is no longer required to be expressly stated – insurers will be hesitant to provide blanket general insured endorsements. Instead, they will be required to invest the time and resources to investigate each proposed additional insured, an undertaking which may be functionally impossible given the current prevalence of such contractual provisions in the marketplace. Further, insurers may be hesitant to provide additional insured endorsements because the additional insured presents risks the insurer is not willing to assume. This system will inhibit the ability of general contractors and subcontractors to enter into construction contracts. It will cause additional delay for general contractors seeking bids and subcontractors submitting bids. Further, this system creates the possibility that higher costs will be passed along to subcontractors through higher premiums, general contractors through increased bids, and, ultimately, the public through the increased cost of construction.

**B. Applying Minn. Stat. § 337.05, subd. 1, as a narrow exception benefits the public.**

The public – as the end-user – ultimately suffers the effect of a negligent construction project. Even if the consumer recovers for damages, they cannot be reimbursed for the expenditure of time and ensuing stress litigation brings. Therefore, it is good policy to adopt a rule that continues to narrowly apply Minn. Stat. § 337.05, subd. 1.

In developing insurance policy, “the Minnesota Supreme Court has recognized moral hazard as an ‘elementary insurance principle[.]’ ” *Land O’Lakes, Inc. v. Employers Mut. Liab. Ins. Co.*, No. 09-CV-0693 (PJS/JSM), 2010 U.S. Dist. LEXIS 124817, at \*21 (D. Minn. Nov. 24, 2010) (quoting *Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229, 233 (Minn. 1986); citing *Charter Oak Fire Ins. Co. v. Color Converting Indus. Co.*, 45 F.3d 1170, 1174 (7th Cir. 1995) (“quoting *Knutson* as an example of a court’s recognition of the moral-hazard problem”)) (attached as PCI’s Appendix 1-11).

Moral hazard describes a behavioral reaction when a party is protected from the consequences of a risk. The protected party – in this case, someone covered by insurance for a particular loss – may behave differently than he would have behaved if he were fully exposed to the risk. Specifically, he may have tendency to act less carefully because someone else will bear the consequences of any resulting loss. The less careful behavior makes it more likely that a loss will occur. 1 Jeffrey E. Thomas, *New Appleman on Insurance Law Library Edition* § 1.01[4][b] (LexisNexis 2010).

In *Knutson*, the Court – without expressly using the term “moral hazard” – recognized the important role it plays in developing insurance policy. The Court

affirmed the holding of *Bor-Son Bldg. Corp v. Employers Commercial Union*, 323 N.W.2d 58 (Minn. 1981) – that a commercial general liability policy does not cover “business risks” – the types of risk that are within the insured’s control. *Knutson*, 396 N.W.2d at 233-34. The Court noted that a contrary conclusion “would present the opportunity or incentive for the insured general contractor to be less than optimally diligent . . . in the performance of his contractual obligations to complete a project in a good workmanlike manner.” *Id.* at 234. This is because, “notwithstanding shoddy workmanship, the construction project would be properly completed by indemnification paid to the owner by the comprehensive general liability insured.” *Id.*

When determining the standard used to apply the exception in Minn. Stat. § 337.05, subd. 1, the Court should adopt a rule that minimizes moral hazards. A general contractor that is not liable for its negligence – and is not answerable for deductible payments or insurance premiums for its negligence – may be less careful than if it is exposed to such risks. This less careful behavior makes it more likely that a loss will occur. In contrast, adopting a rule that disfavors indemnification provisions makes both contractors and subcontractors answerable for the work that they do. The public – as the end-user – ultimately benefits because loss is less likely to occur.

**C. Applying Minn. Stat. § 337.05, subd. 1, as a narrow exception benefits insurers.**

It is good policy to develop a rule that will allow insurers to accurately assess the risks they are insuring and price their policy accordingly. An “elementary insurance principle[]” is that “[i]n exchange for the payment of a premium, an insurer assumes certain risks that otherwise would be the obligation of the insured.” *Knutson*, 396 N.W.2d at 233. “[T]he insurer must be able to ascertain the point at which its liability will attach in order to evaluate the insurable risk and its cost of coverage.” *Interco, Inc. v. Nat’l Surety Corp.*, 900 F.2d 1264, 1268 (8<sup>th</sup> Cir. 1990) (interpreting the scope of an excess policy).

The scope of risks for which an insurer must provide coverage will greatly expand if the Court holds Minn. Stat. § 337.05, subd. 1, has swallowed § 337.02, so that – unless expressly excluded – a subcontractor found 0% at fault must indemnify a general contractor for the general contractor’s sole negligence.

This rule would immediately impact insurers. Since 2004, many insurers, relying on precedent, have inserted the language “caused by your [the named insured’s] acts or omissions” into their additional insured endorsements with the understanding that the language only created a duty to indemnify the additional insured when the named insured was also found to be negligent. Insurers did not charge a premium designed to cover additional insureds for their sole negligence. To require insurers to now provide such coverage would require them to insure risks for which they did not charge a premium.

Long-term, such rule will make it difficult for insurers to evaluate the risk they are agreeing to assume and the cost of covering such risk. Instead of only agreeing to insure their named insured – and the additional insured for the negligence of the named insured – insurers will essentially be required to directly insure the additional insured. Before agreeing to assume such risk, insurers will be required to invest the time and resources to investigate the entity. This increased investment will necessarily result in higher premiums. And because the risks may be difficult to evaluate, the increased premiums will often likely be higher or lower than actually required, resulting in either a detriment to the named insured or to the insurer.

**D. Applying Minn. Stat. § 337.05, subd. 1, as a narrow exception benefits subcontractors.**

It is good policy to develop a rule that will allow subcontractors to accurately assess the risks they are assuming and price their bids accordingly. If the Court continues to apply Minn. Stat. § 337.05, subd. 1, as a narrow exception, subcontractors will be able to more accurately assess their risks, and incorporate such risks into their bids, because their liability will be tied to their fault. Further, they will retain control over their insurance premiums and deductibles because their liability will be tied to their fault.

Alternatively, if the exception created by Minn. Stat. § 337.05, subd. 1, has, in fact, “swallowed the rule,” it will likely be more difficult for subcontractors to assess their risks or to obtain additional insured endorsements, impeding their

ability to offer bids and enter construction contracts. The insurer's increased risk could be passed along to subcontractors by higher premiums. And if the scope of coverage afforded by such endorsements is not tied to their fault, subcontractors will be required to pay deductible amounts to cover claims for damage over which they had no control and which they did not cause.

**E. Applying Minn. Stat. § 337.05, subd. 1, as a narrow exception benefits general contractors.**

Applying Minn. Stat. § 337.05, subd. 1, as a narrow exception benefits benefit contractors. As analyzed above, such application will increase efficiency in the bidding process. It will allow a contractor, who bears potential responsibility for all forms of loss on the project, to assess overall risk on the project and evaluate costs appropriately up front.

If an alternative rule is adopted, any costs associated with the uncertainty of pricing project risks may be passed on to the general contractor in a subcontractor's bid. *Lowry Hill Prop., Inc. v. Ashbach Constr. Co.*, 291 Minn. 429, 437, 194 N.W.2d 767, 772-73 (Minn. 1971). This additional cost will in turn increase the contractor's overall construction costs. *Id.* Indemnity provisions, designed with an intent to benefit general contractors, may ultimately only increase the very expense the general contractor is seeking to minimize.

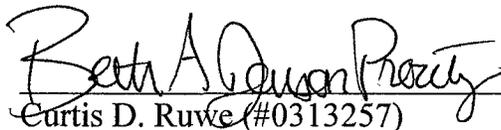
**CONCLUSION**

The Property Casualty Insurance Association of America asks this Court to apply Minn. Stat. § 337.05, subd. 1, as a narrow exception. Precedent supports

such application, and its produces good systemic policy. Applying this application, PCI asks the Court to adopt a rule that contractual indemnity or policy language requiring a subcontractor or insurer to indemnify a contractor/additional insured for damages “caused by the [subcontractor’s/named insured’s] acts or omissions” does not meet the narrow exception of Minn. Stat. § 337.05, subd. 1. It does not require a subcontractor that is free from fault, or its insurer, to indemnify the contractor/additional insured for its own fault.

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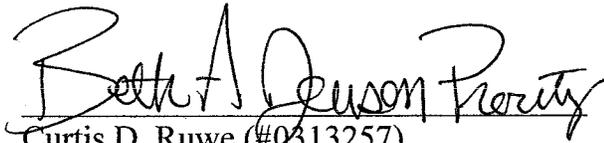
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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel of record, pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate procedure hereby certifies that the attached brief has been prepared using Microsoft Word, Times New Roman, with a font size of 13 pt. and a word count of 3,682.

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