

NO. A11-0159

State of Minnesota
In Supreme Court

Engineering and Construction Innovations, Inc.,
Respondent,

v.

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

and

The Travelers Indemnity Company of Connecticut,
Appellant.

**BRIEF OF AMICUS CURIAE
THE AMERICAN INSURANCE ASSOCIATION**

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TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

STATEMENT OF LEGAL ISSUES2

STATEMENT OF FACTS2

STATEMENT OF THE CASE.....2

ARGUMENT2

I. Historical Context for Additional Insured Endorsements2

II. Preserving the Contracting Parties’ Intentions as Expressed in the
Policy Language4

 A. The Parties to the Contract4

 B. The Court of Appeals’ Misapplication of the Policy Language.....5

 C. Impact of Misapplication of Policy Language6

CONCLUSION.....7

FORM AND LENGTH CERTIFICATION8

TABLE OF AUTHORITIES

Rules

Minn. R. Civ. App. P. 129.03	1
------------------------------------	---

Cases

<i>Consolidation Coal Co. v. Liberty Mut. Ins. Co.</i> , 406 F. Supp. 1292 (W.D. Pa. 1976)	3
<i>Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc.</i> , 803 N.W.2d 916 (Minn. Ct. App. 2011)	6
<i>Federated Mut. Ins. Co. v. Concrete Units, Inc.</i> , 363 N.W.2d 751 (Minn. 1985).....	6
<i>Garcia v. Fed. Ins. Co.</i> , 969 So. 2d 288 (Fla. 2007)	5
<i>Gen. Cas. Co. of Wisc. v. Wozniak Travel, Inc.</i> , 762 N.W.2d 572 (Minn. 2009).....	2
<i>J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.</i> , 645 N.E.2d 980 (Ill. App. Ct. 1995)	6
<i>Leamington Co. v. Nonprofits' Ins. Ass'n</i> , 615 N.W.2d 349 (Minn. 2000)	4
<i>N. States Power Co. v. Fid. & Cas. Co. of N.Y.</i> , 523 N.W.2d 657 (Minn. 1994).....	6
<i>Sprouse v. Kall</i> , 2004-Ohio-353, 2004 WL 170451 (Ohio Ct. App. Jan. 29, 2004)	3
<i>Thommes v. Milwaukee Ins. Co.</i> , 641 N.W.2d 877 (Minn. 2002)	4
<i>Travelers Indem. Co. v. Bloomington Steel & Supply Co.</i> , 718 N.W.2d 888 (Minn. 2006)	4
<i>Transp. Ins. Co. v. George E. Failing Co.</i> , 691 S.W.2d 71 (Tex. App. 1985).....	3
<i>Vetter v. Sec. Cont'l Ins. Co.</i> , 567 N.W.2d 516 (Minn. 1997).....	4
<i>Vulcan Materials Co. v. Cas. Ins. Co.</i> , 723 F. Supp. 1263 (N.D. Ill. 1989).....	3

Other Authorities

Jack P. Gibson et al., *The Additional Insured Book* (6th ed. 2011).....2, 3

Trisha Strode, Comment, *From the Bottom of the Food Chain Looking Up: Subcontractors Are Finding That Additional Insured Endorsements Are Giving Them Much More Than They Bargained For*, 23 St. Louis U. Pub. L. Rev. 697 (2004).....4-5

IDENTITY AND INTEREST OF AMICUS CURIAE

The American Insurance Association (AIA) is a leading national trade association representing approximately 300 major property and casualty insurers that collectively underwrite approximately 21% of the property and casualty market in Minnesota.¹ AIA members, ranging in size from small companies to the largest insurer with global operations, underwrite virtually all lines of property and casualty insurance. AIA advocates sound public policies on behalf of its members in the legislative and regulatory forums at federal and state levels; and it keeps members informed of regulatory, legislative, and judicial developments. Among its other activities, AIA files amicus briefs in cases before state and federal courts on issues of importance to the insurance industry. Through such amicus briefs, AIA shares its broad national perspective with the judiciary on matters that shape and develop the law.

AIA's interest in this case is both public and private. Many commercial general liability (CGL) policies issued to construction subcontractors in Minnesota contain "additional insured" provisions extending coverage to general contractors in specified circumstances. AIA has a general interest in the development of insurance law to reflect the contracting parties' expectations, as reflected in the terms of their insurance contracts.

¹ Pursuant to Minn. R. Civ. App. P. 129.03, AIA certifies that this brief was not authored, in whole or in part, by counsel for any party, and that no person or entity, other than the AIA, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Petitioner The Travelers Indemnity Company of Connecticut ("Travelers") and entities related to Travelers are members of AIA. However, AIA does not submit this brief on behalf of Travelers or its related entities. AIA submits this brief as an independent entity.

STATEMENT OF LEGAL ISSUES

AIA adopts by reference the Statement of Legal Issues in the brief of Travelers.

STATEMENT OF FACTS

AIA adopts by reference the Statement of Facts in the brief of Travelers.

STATEMENT OF THE CASE

AIA adopts by reference the Statement of the Case in the brief of Travelers.

ARGUMENT

I. Historical Context for Additional Insured Endorsements

Since 1986, the Insurance Services Office (ISO), which “publishes widely-used insurance forms,” *Gen. Cas. Co. of Wisc. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 576 n.3 (Minn. 2009), has promulgated “additional insured” endorsements for policies issued to policyholders in the construction industry. Jack P. Gibson et al., *The Additional Insured Book* 179-81 (6th ed. 2011). The earliest made a general contractor an additional insured with respect to bodily injury or property damage “arising out of your [i.e., the named insured’s] work.” *Id.* at 181. In response to certain courts’ broad reading of “*arising out of* your work,” ISO began in 2004 to promulgate endorsements that make a general contractor an additional insured for bodily injury or property damage “*caused*, in whole or in part, *by* your [i.e., the named insured’s] acts or omissions.” *Id.*² The Insurance Risk Management Institute has explained the purpose of these 2004 revisions:

² In this brief, AIA uses the term “caused by your acts or omissions” to refer generally to language similar to the 2004 ISO language. The specific Travelers endorsement in this case expresses this limitation in more detail. After stating that a person is an additional insured “[i]f, and only to the extent that, the injury or damage is caused by acts or

The practical result of these changes in wording is the elimination of coverage for liability attributable to the additional insured's sole negligence. A preliminary filing of the 2004 revision actually contained an exclusion of injury or damage arising out of the sole negligence of the additional insured, but that provision was dropped in the final revision. Having already specified in the endorsement's insuring agreement that injury or damage must be caused at least partly by the named insured, an exclusion of sole negligence on the part of the additional insured was considered superfluous by ISO.

Id. Inclusion of superfluous language regarding the negligence of the contractor and subcontractor could have created unnecessary questions regarding the intended scope of coverage. *Id.* at 181-82.

This interpretation of the 2004 ISO revisions is reinforced by pre-2004 decisions that interpreted additional insured language, similar to the "caused by your acts or omissions" language adopted by ISO in 2004, as restricting coverage to the named insured's negligence. See *Vulcan Materials Co. v. Cas. Ins. Co.*, 723 F. Supp. 1263, 1264-65 (N.D. Ill. 1989); *Transp. Ins. Co. v. George E. Failing Co.*, 691 S.W.2d 71, 73 (Tex. App. 1985); *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976); *Sprouse v. Kall*, 2004-Ohio-353, 2004 WL 170451 (Ohio Ct. App. Jan. 29, 2004) (unpublished).

omissions of you or your subcontractor in the performance of 'your work,'" the Travelers endorsement specifies that the "person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization."

II. Preserving the Contracting Parties' Intentions as Expressed in the Policy Language

A. The Parties to the Contract

“Insurance policies are contracts and unless there are statutory provisions to the contrary, general principles of contract law apply.” *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997). It is thus “well-established that general contract principles govern the construction of insurance policies, and that insurance policies are to be interpreted to give effect to the intent of the parties.” *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002).

In a dispute regarding coverage for a putative additional insured, it is important to remember that the parties to the insurance policy—the parties whose intention the court seeks to discern from the words of the contract—are the insurer and the named insured. *See, e.g., Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894-96 (Minn. 2006). *See also Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 354-55 (Minn. 2000) (reformation claim by third-party claiming “additional insured” status turned on intentions of insurer and named insured).

It is the named insured (usually a subcontractor) who ultimately bears the cost of an unduly expansive reading of an additional insured provision. “Every time his insurance becomes involved to defend or pay a judgment, the subcontractor must pay his deductible and further faces the possibility of escalating premiums and diluting policy limits to pay his own costs and judgments.” Trisha Strode, Comment, *From the Bottom of the Food Chain Looking Up: Subcontractors Are Finding That Additional Insured*

Endorsements Are Giving Them Much More Than They Bargained For, 23 St. Louis U. Pub. L. Rev. 697, 698 (2004).

B. The Court of Appeals' Misapplication of the Policy Language

The general contractor, ECI, was not named anywhere in the insurance policy. Its only theory for why the subcontractor, Bolduc, bore actual responsibility or fault (as opposed to the contractual responsibility under the indemnity clause) for the damage to the pipeline was that the subcontractor performed its sheeting work negligently. A jury ruled against the general contractor, finding no negligence on the subcontractor's part. By definition, therefore, Bolduc's acts or omissions did not cause the property damage. Under the plain meaning and intent of the phrase "caused by your acts or omissions," ECI was not entitled to coverage as an additional insured.

The Supreme Court of Florida applied precisely such a common-sense interpretation when applying the similar phrase "because of acts or omissions of you":

When considered in context, these words clearly indicate that an additional insured is only entitled to coverage *concerning* liability that is *caused by* or occurs *by reason of* acts or omissions of the named insured. An additional insured's liability thus must be *caused by* the acts or omissions—that is, the negligence—of the named insured. The policy does not cover an additional insured's liability arising from her own negligent acts.

Garcia v. Fed. Ins. Co., 969 So. 2d 288, 292 (Fla. 2007) (emphasis in original). This ruling is in line with the history of "additional insured" clauses and the weight of authority. *Id. See supra* § I.

The court of appeals construed the phrase "caused by your acts or omissions" by reference to a case interpreting endorsements with "arising out of your work" language.

Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc., 803 N.W.2d 916, 923 (Minn. Ct. App. 2011) (citing *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 645 N.E.2d 980, 982 (Ill. App. Ct. 1995)). It thus overlooked the evolution of the policy language, even though Minnesota courts are to interpret present policy language and not the older, outdated language. *Federated Mut. Ins. Co. v. Concrete Units, Inc.*, 363 N.W.2d 751, 756 (Minn. 1985) (courts analyze coverage issues based on current policy language and not case law that interprets outdated policy language).

C. Impact of Misapplication of Policy Language

An erroneous expansion of coverage could harm Minnesota insurers and their policyholders for decades to come. On a prospective basis, contracting parties are free to negotiate contract terms within the bounds of the law. Policies already in existence, however, may be implicated for years. *See, e.g., N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657, 659 (Minn. 1994) (1987 claim for coverage under CGL policies in effect from 1946 to 1985). For existing policies, the court of appeals has created uncertainty surrounding policy language that the contracting parties specifically negotiated for and understood to have a clear and unambiguous meaning.

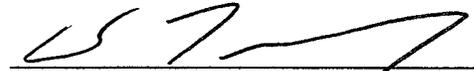
Because AIA's members issue CGL insurance policies both to general contractors and subcontractors, AIA's interest is in contract interpretation. Its interest is that courts in Minnesota and across the country effectuate the intent of the contracting parties, as expressed in the plain language of the insurance contracts. AIA therefore urges this court to apply the plain meaning of the "caused by" language at issue.

CONCLUSION

For these reasons, AIA respectfully urges the court to apply the plain meaning of the policy language at issue, as set forth in this brief.

Respectfully submitted,

Dated: January 13, 2012.



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FORM AND LENGTH CERTIFICATION

This brief was drafted using Word 2007. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 1,668.

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