

NO. A09-1963

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State of Minnesota  
**In Court of Appeals**

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Timothy B. Allen,

*Appellant,*

vs.

Burnet Realty, LLC,  
d/b/a Coldwell Banker Burnet,

*Respondent.*

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**APPELLANT'S BRIEF, ADDENDUM AND APPENDIX**

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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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## Legal Issues

**Was the Arbitration/Legal Administration or Legal Administration Program insurance subject to regulation under the Minnesota insurance statutes, and was Burnet Realty LLC d/b/a Coldwell Banker Burnet (“CB Burnet”) unlawfully engaged in the business of insurance in violation of Minnesota insurance statutes making summary judgment in favor of CB Burnet inappropriate on the claim under Minn. St. § 60K.47 (2005)?**

Trial Court’s Ruling: No.

Minn. St. §§ 60A.02, subds. 3(a) and 4 (2005), 60A.06, subds. 13 and 15 (2005), 60A.07, subd. 4 (2005), 60K.30 (2005), 60K.31, subds. 1, 5, and 14 (2005), 60K.47 (2005), 471.981 (2008), 645.19 (1947).

*Farmers & Merchants State Bank of Pierz v. Bosshart*, 400 N.W.2d 739 (Minn. 1987)

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*overruled on other grds., Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838 (Minn. 1979)

*State v. Spalding*, 166 Minn. 167, 207 N.W.317 (Minn. 1926)

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Trial Court’s Ruling: No.

Minn. St. §§ 60A.02, subds. 3(a) and 4 (2005), 60A.06, subds. 13 and 15 (2005), 60A.07, subd. 4 (2005), 60K.30 (2005), 60K.31, subds. 1, 5, and 14 (2005), 60K.47 (2005), 325F.69, subd. 1 471.981 (2008), 645.19 (1947).

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Trial Court’s Ruling: No.

Minn. St. §§ 60A.02, subds. 3(a) and 4 (2005), 60A.06, subds. 13 and 15 (2005), 60A.07, subd. 4 (2005), 60K.30 (2005), 60K.31, subds. 1, 5, and 14 (2005), 60K.47 (2005), 471.981 (2008), 645.19 (1947).

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*State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (Minn.1902).

## Statement of the Case

This appeal involves review of a summary judgment entered by the District Court, Fourth Judicial District, County of Hennepin (Judge Stephen C. Aldrich, presiding) on October 1, 2009 (“Summary Judgment”). The lawsuit is a putative class action that involves three counts: violation of Minn. St. § 60K.47 (2005), violation of Minn. St. § 325F.69 (2005), and unjust enrichment. All claims are based on the premise that Respondent Burnet Realty LLC d/b/a Coldwell Banker Burnet (“CB Burnet”) has been unlawfully engaged in the business of insurance in violation of Minnesota insurance statutes in the issuance and sale of the Arbitration/Legal Administration or Legal Administration Program (the “LA Program”).

On January 6, 2009, CB Burnet filed and served its Motion for Summary Judgment on all claims asserted by Appellant Timothy B. Allen (“Allen”). The matter came on for hearing on March 12, 2009, when the trial court suspended the hearing in order to solicit the views of the Minnesota Department of Commerce as to whether the LA Program was subject to regulation under Minnesota insurance statutes. On April 7, 2009, the trial court sent a letter to the Minnesota Department of Commerce soliciting its views. On June 22, 2009, a staff attorney for the Minnesota Department of Commerce responded to the trial court’s inquiry and opined that CB Burnet was not required to obtain a certificate of authority from the Department of Commerce to operate the LA Program. On July 14, 2009, the trial court held a further hearing on CB Burnet’s Motion for Summary Judgment. On August 27, 2009, the trial court instructed CB Burnet to prepare an order granting summary judgment. Initially, CB Burnet prepared an Order

and Memorandum that granted summary judgment on every ground that it had urged, many of which had nothing to do with the issue of whether the LA Program was insurance subject to regulation under Minnesota insurance statutes. The trial court rejected that draft of the Order and instructed CB Burnet to limit the basis for the order to the ground that the LA Program was not insurance. CB Burnet prepared a new Order and Memorandum, which the trial court signed, and was entered on October 1, 2009, as the Summary Judgment in favor of CB Burnet.

## Statement of Facts

### **NRT, Inc.'s Acquisition of CB Burnet**

1. In 1998, NRT, Inc. (now known as NRT, LLC) (collectively, both are referred to herein as "NRT") purchased Burnet Realty, Inc., a Minnesota corporation, which then began to operate under the name Coldwell Banker Burnet. *See* Allen's Appendix ("App. \_\_\_"), 1 at ¶¶ 4, 5; 15-16 at ¶¶ 4, 5.

### **CB Burnet's Sales Associates Are Independent Contractors**

2. Since 2002, Burnet Realty LLC d/b/a Coldwell Banker Burnet ("CB Burnet") has had between approximately 2,300 to 3,000 sales associates. App. 44.

3. All of CB Burnet's sales associates have worked and still work as independent contractors under an Independent Contractor Agreement (the "ICA") with CB Burnet. App. 16 at ¶¶ 6-7, 9; App. 89<sup>1</sup> at 26:7-23. CB Burnet's principal reason for treating sales associates as independent contractors is for liability purposes. App. 89 at 26:7-18.

4. Timothy B. Allen ("Allen") had a real estate salesperson license from late 1998 until February 2007, during which time he was affiliated with CB Burnet. App. 31 at 9:14-15; 32 at 10:3-9. At all times, Allen was an independent contractor with CB Burnet. App. 97 at 73:2-5.

5. After 2003, Allen averaged about five (5) transactions per year. App. 38 at 83:13-17. Allen obtained listings for potential transactions mostly from his friends. *Id.* at 83:2-4. Allen turned in his salesperson's license in February 2008, because he was

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<sup>1</sup> Thomas Rehman ("Rehman") has been CB Burnet's vice-president of sales administration since the 1990's. App. 88 at 17:8-24.

unhappy with his production, and he saw the real estate market declining. App. 39 at 84:8-21. While Allen was a real estate salesperson, he also operated a landscape or lawn business, which has been in business for 21 years. App. 39 at 83:20-84:4; 30 at 8:3-21. Since Allen ceased his affiliation with CB Burnet, Allen has been operating the lawn service and snow removal business. App. 30 at 8:3-21.

### **The NRT High-Retention E&O Policies**

6. NRT, the parent of CB Burnet, has owned a group of residential brokerage businesses throughout the United States, most of which operate under the name of "Coldwell Banker." App. 1-2 at ¶5. From at least 2003 to present, NRT has purchased certain errors and omissions insurance policies with deductibles or retention amounts of \$1,000,000 for its nationwide operations, which included coverage for CB Burnet and its sales associates (the "NRT High-Retention E&O Policies"). App. 105 at 131:15-132:3; App. 115.

7. In 2001 over 41,000 sales associates and by 2006-2007 over 66,000 sales associates were insured under the NRT High-Retention E&O Policies. App. 115.

8. No claims against CB Burnet or its sales associates have ever been made under the NRT High-Retention E&O Policies. App. 87 at 12:10-14; 105-106 at 132:20-133:17.

### **The LA Program**

9. CB Burnet never attempted to obtain errors and omissions insurance for only itself. App. 97 at 73:6-10. Instead, as a result of the NRT High-Retention E&O Policies, at all material times CB Burnet operated substantially the same Arbitration/Legal Administration or Legal Administration Program (the "LA Program")

to provide defense and indemnification for errors and omissions claims asserted against its sales associates that were under the retention deductible amounts of the NRT High-Retention E & O Policies. App. 101 at 89:3-24; 116.

10. The terms of the LA Program were reflected in agreements that all of CB Burnet's independent contractor sales associates were required annually to sign (the "LA Program Agreements"). App. 90 at 28:1-6; App. 60, 64, 68, 72, 76.

11. The LA Program Agreements were not exhibits or appendices to the ICAs and were executed separately from the ICAs. App. 90 at 28:10-20 and App. 60, 64, 68, 72, 76.

12. There were no provisions of the LA Program that were not embodied in the LA Program Agreements (App. 60, 64, 68, 72, 76), the ICAs (App. 61-63, 65-67, 69-71, 73-75, 77-79)<sup>2</sup> or the policy manual (App. 80-81).<sup>3</sup> App. 95-96 at 69:18-70:6.

13. The provisions of the LA Program Agreements (App. 60, 64, 68, 72, 76) are summarized as follows:

- A. Name. The Program was entitled "Arbitration/Legal Administration" in 2002 and subsequently "Legal Administration Program."
- B. Offer. In the first sentence, it states that CB Burnet "is pleased to offer the following program to its sales associates, which can effectively limit your personal liability exposure in the event you are involved in a dispute or lawsuit." (Emphasis supplied).

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<sup>2</sup> The only reference in the ICAs to the LA Program is in the last sentence of paragraph 12, "All other legal claims or proceedings asserted against Independent Contractor or Broker as a result of Independent Contractor's real estate activity, will be expensed in accordance with the Broker's Legal Administration Program." App. 70, 74, 78; *see also* App. 62, 66 (same text except at the end of the sentence the reference is to "Broker's Arbitration/Legal Administration Program.").

<sup>3</sup> The Policies and Procedures, Number 5.50, generally sets forth the internal procedures for an associate to notify CB Burnet of a third-party complaint and also summarizes certain terms of the LA Program Agreements. App. 80-81.

- C. Covered Disputes. In the second paragraph, it states, "In the event a dispute, arbitration proceeding, or lawsuit is initiated against you, The Company [CB Burnet], or both you and The Company relating to your actions which are contemplated within the scope of The Company's Independent Contractor Agreement, during a calendar year when you are participating in the program (such disputes and lawsuits are referred to hereafter as 'Covered Disputes'), then The Company will participate with an associate in the defense and/or settlement arising out of the Covered Disputes." (Emphasis supplied).
- D. CB Burnet's Defense and Indemnification Obligations. The various obligations in connection with CB Burnet's defense and indemnification of Covered Disputes are then set forth:
1. CB Burnet will pay all costs of defense, settlements, and judgments except for a maximum of \$1,500 participation by the sales associate.
  2. "Defense of Covered Disputes may, at The Company's [CB Burnet's] option, be provided by an attorney chosen by the Company." (Emphasis supplied).
  3. "Decisions on resolutions/settlements will be discussed jointly with the sales associate, however, all final decisions will ultimately be made by The Company." (Emphasis supplied).
  4. The sales associate agrees to "cooperate in providing testimony, evidence, and other assistance requested by The Company in The Company's defense of the Covered Dispute." (Emphasis supplied).
  5. "In connection with a Covered Dispute, The Company will not assert any claims, cross-claims, or third party claims against the associate for contribution or indemnity, even though The Company may be exposed to liability to another person as a result of the associate's actions."
- E. Exclusions From Covered Disputes. "A Covered Dispute does not include, and the program will not cover any of the following and The Company may assert claims, cross claims or third party claims against the associate for contribution or indemnity." Such Exclusions from Covered Disputes include claims involving:
1. a sales associate who acted as a principal (i.e. buyer or seller);

2. admissions or adjudications of fraud or intentional wrongdoing by the sales associate;
  3. a failure by the sales associate to complete various standard forms in connection with real estate closings;
  4. a sales associate who chose his or her attorney;
  5. a sales associate whose conduct was outside the scope of the ICA; and
  6. the forfeiture or return of a sales associate's commission as a result of a final adjudication.<sup>4</sup>
- F. Cost to Sales Associates. The annual charge to the sales associates to participate in the LA Program was \$395 from 2002 to 2004, \$425 in 2005, and \$450 in 2006.
- G. Option to Purchase Third-Party E &O Insurance. "Participation [in the LA Program] is required unless proof of company approved outside coverage is submitted (must have comparable rating and provide coverage for The Company also, and said insurance coverage must be protected by the Minnesota Insurance Guarantee Fund). It is important, with rising litigation, legal and administrative costs, that you have the security that this program or outside coverage provides." (Emphasis supplied).<sup>5</sup>
- H. CB Burnet's Representation of the Nature of the LA Program. The LA Program Agreements state that they are "not an Errors and Omissions (E&O) policy."

### **CB Burnet's Internal Characterization of the LA Program**

14. Contrary to the written representation in the LA Program Agreements, CB Burnet has characterized the LA Program as errors and omissions insurance. Rehman, CB Burnet's administrator of the LA Program, described it in writing as "at least as far as

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<sup>4</sup> This exclusion was added in 2004. In the Summary Judgment, the trial court overstated this exclusion as including non-adjudicatory resolutions of commission claims. Allen's Addendum ("Add."), Summary Judgment at 7.

<sup>5</sup> From 2002 forward, no sales associate has availed himself or herself of this option. App. 93 at 50:7-10.

the agents are concerned as a lower deductible E & O policy . . .” App. 98-103 at 86:13-91:20 (emphasis supplied); App. 116.

15. Rehman testified that the only alleged fact, which he understood to distinguish the LA Program from third-party errors and omissions insurance, was as follows:

Q. Okay, Mr. Rehman, in what ways does the CB Burnet program differ from real estate agent’s E and O insurance—  
--to your understanding?

\* \* \* \* \*

A. Well, the only difference that I can think of off the top of my head is, this is our internal program that is controlled essentially by us, administered by us. Defense counsel is chosen by us on all versus, typically, insurance companies, and it’s going back 25 years; they picked and controlled how—how issues were handled.

App. 91-92 at 41:18-42:7 (objection omitted).

**Profitability of the LA Program**

16. Gary Meier, CB Burnet’s CFO, testified as to the fee increases to sales associates under the LA Program:

Q. And what was the reason for the various increases in the fee?

A. Company profitability. We charge fees to our sales associates; we charged a lot of different kinds of fees, and that’s one of them. And to the extent we can increase the fees we charged, that improves our company profitability.

App.123 at 77:9-22.

17. From 2002 to present, CB Burnet’s sales associates have paid approximately the following amounts and CB Burnet has paid in net defense costs, settlements and judgments,<sup>6</sup> the following amounts:

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<sup>6</sup> Because CB Burnet contends it does not track whether a particular claim falls within the LA Program, App. 46, the following amounts that CB Burnet reported that it paid for

Year	Net Amount Collected <sup>7</sup> (A)	Net Amount Paid <sup>8</sup> (B)	Net Profit (A)-(B)
2002	\$957,763	\$377,845	\$579,918
2003	\$1,039,366	\$219,338	\$820,028
2004	\$1,130,002	\$704,094	\$425,908
2005	\$1,221,183	\$366,306	\$854,877
2006	\$1,265,752	\$814,562	\$451,190
2007	\$1,038,714	\$1,132,940	\$(94,226)

18. CB Burnet quantified certain "Internal Legal Costs" as the "costs of operating Burnet's Sales Administration Department" in the following amounts:

Year	Internal Legal Costs	Alternate Net Profit ( $\uparrow$ 17 above Net Profit Amount Minus Internal Legal Costs)
2002	\$269,531	\$310,387
2003	\$295,899	\$524,129
2004	\$264,329	\$161,579
2005	\$277,382	\$577,495
2006	\$293,130	\$158,060
2007	\$304,074	\$(398,300)

App. 47.

19. The trial court found that, "Burnet tells its sales associates in its Sales Associates Policy Manual that the LA Fee [i.e., \$395-\$450 annual per associate fee] is

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defense, settlement, and judgment costs necessarily overstate those expenses for solely the LA Program.

<sup>7</sup> While CB Burnet quantified the gross amount charged to sales associates from 2002 to 2007 to participate in the LA Program, it further averred that "based upon a review of current collectability data, Burnet believes that it would be reasonable to estimate that 5% of the total LA Program Fees recorded were not received." App. 46. Accordingly, Allen has deducted 5% from the gross amount charged for each year to arrive at the estimated "net amount collected" column.

<sup>8</sup> CB Burnet's defense, settlement, and judgment costs less the amounts charged back to sales associates under the LA Program (i.e., maximum deductible of \$1,500) are reflected in the "net amount paid" column. App. 47.

charged 'to cover administrative and legal costs' incurred by Burnet in operating its business. These include the costs of operating an in-house Sales Administration Department." Add., Summary Judgment at 8.

20. The Sales Associate Policy Manual merely states in the description of the LA Program, "All sales associates are required to pay a set fee per calendar year (unless proof of outside coverage, acceptable and approved by Coldwell Banker Burnet is submitted) in order to cover administrative and legal costs." App. 81. There is no statement that these costs cover all the costs "incurred by Burnet in operating its business" or the entire costs "of operating the Sales Administration Department."

21. The Sales Administration Department has many functions that have nothing to do with the LA Program, such as training, licensing, and transactional advice. App. 53-55. While one of the Sales Administration Department's enumerated functions is "Administering Burnet's LAP," there is no way to allocate its time between non-LA Program functions and LA Program functions, because "Burnet does not create or maintain time records, logs or other summary information that would permit it to answer this interrogatory with detailed dates or tasks [regarding Sales Administration Department activities involving legal education, advice transactional matters, and administration of claims]." App. 56.<sup>9</sup>

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<sup>9</sup> While the trial court made no reference to any other expenses relating to the LA Program, CB Burnet has indicated that the above amounts involving the costs of the LA Program do not include alleged costs of in-house counsel or the NRT E&O High-Retention Policies that NRT allocates to CB Burnet. App. 47. These costs should not offset any profit analysis. As to costs of in-house counsel, NRT's allocation was for budgeting purposes only, was not based on any time records reflecting services rendered to CB Burnet, and was not based upon any services that were rendered under the LA Program. App. 127-132 at 8:18-9:11, 37:4-40:18, 42:19-44:14, 46:10-49:14, 51:12-52:10,

22. CB Burnet does not establish any reserves for claims with the monies collected for the LA Program. App. 122 at 56:6-25.

23. The money collected by CB Burnet was “up-streamed” to NRT, or if it was not up-streamed, NRT always has had access to the funds. App. 118-119 at 38:8-39:16.

**The Financial Condition of the Coldwell Banker Companies**

24. The ultimate parent of NRT and CB Burnet is Realogy Corp. (“Realogy”), which until mid-2007 was a publicly-traded company. App. 137. In mid-2007, Realogy was acquired through a leveraged buy-out that encumbered the entity and its subsidiaries, including CB Burnet, with over \$7 billion in debt. App. 139, 152-154, 158.

25. This highly leveraged condition of the Coldwell-Banker family of companies has caused a substantial financial strain, particularly in light of the current recession, which is reflected in the negative financial ratings by Moody’s of both the Coldwell Banker companies and the outstanding debt. App.140, 166, 167-168.

**CB Burnet is Not Licensed to Act as a Producer or Issuer of Insurance**

26. CB Burnet is not licensed either as an insurance producer or an insurance company in Minnesota. App. 6, 8 at ¶¶ 23, 41, respectively; 18, 19 at ¶¶ 23, 41, respectively.

**Summary of Argument**

The terms of the LA Program are set forth clearly in the LA Program Agreements and are not in dispute. The administration of the LA Program is in dispute only as to how

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53:4-14. Similarly, because the NRT High-Retention E&O Policies are not part of the LA Program, their costs are not properly allocated to the LA Program. Even if they were, the cost per associate between 2003 and 2007 was approximately annually \$38 per associate. App. 115.

much profit Respondent has made in connection with the LA Program, which the trial court properly did not resolve on the summary judgment motion. The central issue involving the Summary Judgment is one of law: does the LA Program constitute an insurance program that subjects CB Burnet to the panoply of statutory provisions (including actuarial reserves, annual financial statements, participation in the Minnesota Insurance Guaranty Association etc.) that are designed to protect Minnesota residents?

To resolve this issue requires both a detailed analysis of the apposite insurance statutes and applicable Minnesota case law. The trial court did neither. The trial court failed to analyze any statutes in light of a well-established body of Minnesota law. The plain meaning of those provisions, particularly in light of Minnesota's 100 plus-year body of case law that has prohibited a wide array of unauthorized insurance practices, leads to the conclusion that the LA Program is an insurance program that subjects CB Burnet to regulation by the Department of Commerce.

The Summary Judgment is based on three propositions as to why the LA Program is not insurance: there is no shifting of risk from Allen and all other sales associates to CB Burnet; the LA Program is ancillary to the underlying independent contractor relationship; and the LA Program is self-insurance that is exempt from regulation. All of these positions are without merit.

As to whether the LA Program involves a transfer of risk, the Covered Disputes, by definition, only involve claims arising out of the sales associates' actions, which expose the associates to personal liability and potentially adverse judgments. Absent the LA Program, these sales associates, who are independent contractors and not employees, would have no right of indemnification from CB Burnet. Accordingly, there is a massive

shifting of risk of personal liability of over 2,000-3,000 sales associates to CB Burnet, which has agreed in the LA Program to defend and indemnify the sales associates for the Covered Disputes. Even the staff attorney for the Department of Commerce noted that this aspect of the LA Program is the very hallmark of insurance. App. 181. This cornerstone of the LA Program further explains why CB Burnet's administrator of the LA Program correctly wrote and then testified that from the standpoint of Allen and all sales associates the LA Program operates as a "lower deductible E & O policy." The trial court opined, however, that this shifting of risk was purportedly subverted by the fact that CB Burnet, by statute, has derivative or secondary liability for the misconduct of its sales associates, and that CB Burnet concurrently defends and resolves under the LA Program its secondary liability and the primary liability of sales associates. Merely because the resolution of the primary liability of the sales associate inherently resolves CB Burnet's secondary liability does not alter the reality that under the LA Program, as under a licensed errors and omissions policy, the sales associates' primary liability is shifted to a third party who in the absence of the agreement would not bear that liability. Moreover, the concurrent resolution of the sales associate's primary liability and the broker's secondary liability under the LA Program is exactly how such liability claims would be resolved under an errors and omissions insurance policy issued to a sales associate.

Relying exclusively on non-Minnesota authority, the trial court further erred by holding that the LA Program was not insurance, because it was "ancillary" to the underlying relationship between the parties. Apart from the fact that the trial court ignored Minnesota authority that is directly to the contrary, the sister state authority generally involves employer-employee retirement or health plans that are operated on a

non-profit basis. There is no sister state case that holds that a program like the LA Program involving defense and indemnification of thousands of similarly situated independent contractors for their misconduct, and which generates millions of dollars in profits for the indemnitor, is not insurance.

The trial court's opinion that the LA Program was self-insurance, which was exempt from compliance with Minnesota laws governing insurance programs, was a mere conclusion without any analysis of the applicable statutes. A thorough review of those statutes reveals that the LA Program, which is a *de facto* errors and omissions insurance policy, is not exempt from any statutes governing the licensure of the issuers of such policies. The only statutory exemption involving self-insurance programs that otherwise would be regulated as insurance involve political subdivisions' programs to self-insure the risks of their agents, officers, and servants.

Finally, the trial court misapplied the only Minnesota case that it cited that addressed any insurance-related issue. In *Anstine v. Lake Darling Ranch*, 305 Minn. 243, 233 N.W.2d 723 (Minn. 1975), the Supreme Court in *dictum* distinguishes indemnity contracts that are not insurance from those that are based upon the presence or absence of risk shifting, which is the lynchpin of all insurance. The Supreme Court classified indemnification agreements as either "equitable indemnity" or "indemnity for hire," the latter constituting insurance that is regulated by statute and the former not constituting insurance. Contractual indemnification that is in the nature of equitable indemnity involves no shifting of risk, because it reflects the pre-existing indemnity obligations that exist outside the contract. For example, if the LA Program merely required the sales associates to indemnify CB Burnet for the associates' Covered Disputes, this would not

be insurance, because the associates, absent the agreement, would have that same obligation to CB Burnet. Conversely, absent the LA Program, CB Burnet has no obligation to defend and indemnify its 2,000-3,000 sales associates for Covered Disputes that, by definition, arise out of the sales associates' conduct. Accordingly, under *Anstine*, CB Burnet's defense and indemnification obligations to sales associates is not a form of "equitable indemnity," but is "indemnity for hire," which is subject to insurance regulation.

The trial court erred in its application of the law as to what constitutes insurance in Minnesota. Accordingly, the Summary Judgment should be reversed and the case remanded.

## **Argument**

### **A. The Standards of Review**

#### **1. The Court reviews the Summary Judgment *de novo*.**

In reviewing an appeal from an order granting summary judgment, the court of appeals must determine whether there are any genuine issues of material fact and whether the trial court erred in applying the law. *See, e.g., Augustine, M.D. v. Arizant, Inc.*, 751 N.W.2d 95, 100 (Minn. 2008). Both of these determinations are made *de novo*. *See Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997) (district court's application of law is reviewed *de novo*); *Fairview Hospital and Health Care Services v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995) (genuine issues of material fact are reviewed *de novo*). All evidence must be considered in a light most favorable to the nonmoving party. *See Augustine*, 751 N.W.2d at 100. It is improper to weigh evidence. *See, Fairview*, 535 N.W.2d at 515. This Court should not

address grounds for summary judgment that the trial court did not address in its Summary Judgment. *See, Minnesota Central Railroad Co. v. MCI Telecommunications Corp.*, 595 N.W.2d 533, 539 (Minn. App. 1999 rev. denied).

**2. The Court should accord no deference to the opinion of the staff attorney for the Minnesota Department of Commerce**

On April 7, 2009, the trial court solicited the views of the Minnesota Department of Commerce as to whether the LA Program was insurance. App. 169-170. On June 22, a staff attorney for the Department of Commerce responded to that inquiry, and concluded that, “Burnet would not have been required to obtain a certificate of authority from the Commissioner before entering into the LA/AP Agreements with its salespersons. Bear in mind that this conclusion is strictly limited to the facts and parties described in the parties’ position paper.” App.171-172. Attached to the letter was an unsigned Memorandum that discussed the basis for that opinion, which the trial court generally adopted. App. 174-182.

Where, as in this case, the issue is a question of law, and there is no long-standing administrative interpretation that governs the issue, the administrative interpretation is not accorded any weight. *See, e.g., Minnesota Microwave, Inc. v. Public Service Commission*, 291 Minn. 241, 246, 190 N.W.2d 661, 665 (1971) (“[t]hus, this court is faced with a pure question of law involving statutory interpretation, one which is not to be decided by deference to the discretion of the administrative agency or the lower court.”); *Medica Primary v. Central States, Southeast and Southwest Areas Health and Welfare Funds*, 505 N.W.2d 589, 593 (Minn. 1993) (on a matter of statutory

interpretation, the Court rejected the opinion of the Department of Health that the statute barred HMO from making a premium adjustment based on non-HMO Members' costs).

**B. The trial court erred in granting CB Burnet's motion for summary judgment as to Allen's claim under Minn. St. § 60K.47 (2005) on the grounds that the LA Program was not subject to regulation under Minnesota insurance statutes and that CB Burnet was not unlawfully engaged in the business of insurance in violation of Minnesota insurance statutes**

**1. The elements of Minn. St. § 60K.47 (2005)**

Minn. St. § 60K.47 (2005) provides, in part:

Any person, whether or not licensed as an insurance producer, who participates in any manner in the sale of any insurance policy or certificate, or any other contract providing benefits, for or on behalf of any company that is required to be, but that is not authorized to engage in the business of insurance in this state, other than pursuant to sections 60A.105 to 60A.209, is personally liable for all premiums, earned or unearned paid by the insured, and the premiums may be recovered by the insured . . . .

There are three elements of Minn. St. § 60K.47: (i) a sale of (ii) an insurance policy or certificate or any other contract providing benefits (iii) for or on behalf of any company that is required to be, but that is not authorized to engage in the business of insurance in Minnesota. All of these elements are further defined by various other statutory sections.

As to the meaning of a "sale," Minn. St. § 60K.31, subd. 14 (2005) provides:

"Sell" means to exchange a contract of insurance by any means, for money or its equivalent on behalf of an insurance company.

Because there is no definition of the imbedded term "insurance company" in Minn. St. § 60K.31, subd. 14, that section instructs that recourse be made to Minn. St. § 60A.02, subd. 4 (2005),<sup>10</sup> which states:

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<sup>10</sup> Minn. St. § 60K.31, subd. 1 (2005) states, in part, "[f]or purposes of sections 60K.30 to 60K.56, the terms in subdivisions 2 to 18 have the meanings given them. The definitions

“Company” or “insurance company” includes every insurer, corporation, business trust, or association engaged in insurance as principal, but for purposes of this subdivision does not include a political subdivision providing self-insurance or establishing a pool under section 471.981, subdivision 3.

The second element of Minn. St. § 60K.47 that there be an “insurance policy or certificate, or any other contract providing benefit,” is defined in Minn. St. § 60K.31, subd. 5 (2005) (“Insurance”) as “any of the lines of authority in section 60A.06.” In turn, Minn. St. § 60A.06 (2005) includes as two of the fifteen lines of authority the following ones:

(13) To insure against liability for loss or damage to the property or person of another caused by the insured . . . .<sup>11</sup>

\* \* \* \*

(15) To insure against attorneys fees, court costs, witness fees and incidental expenses incurred in connection with the use of professional services of attorneys at law.<sup>12</sup>

The trial court stated that no recourse to the definition of “insurance” in Minn. St. § 60A.02, subd.3(a) (2005) should be made when considering whether Minn. St. § 60K.47 was violated. Add., Summary Judgment at 10.<sup>13</sup> The problem with this myopic view is

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in section 60A.02 are applicable to terms not defined in this section, unless the language or context clearly indicates that a different meaning is intended.” (emphasis supplied).

<sup>11</sup> This line of insurance is commonly referred to as “liability insurance.” See *Reinsurance Assoc. of Minn. v. Johannessen*, 516 N.W.2d 562, 565 (Minn. App. 1994).

<sup>12</sup> This line of insurance is referred to as “legal expense insurance.” See Minn. St. § 60A.08, subd. 10 (2005).

<sup>13</sup> Minn. St. § 60A.02, subd. 3(a) (2005) provides:

“Insurance” is any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or do some act of value to the assured in case of such loss or damage. A program of self-insurance, self-insurance revolving fund or pool established under section 471.981 is not insurance for purposes of this subdivision.

that underlying the concept of whether a particular program falls within one of the “lines of insurance” that are enumerated in Minn. St. § 60A.06 necessarily requires an understanding as to what constitutes “insurance” itself, which term and concept are embedded in § 60A.06. Additionally, the term “company” that is used directly in Minn. St. § 60K.47 (see below) and indirectly in the definition of “sale” (see above) requires reference to the definition of that term in Minn. St. § 60A.02, subd. 4 (2005). Because the definition of “company” in Minn. St. § 60A.02, subd. 4, uses the phrase “engaged in insurance as a principal” as part of the definition, the term “company” and “lines of insurance” only can be fully understood by reference to the definition of “insurance” in Minn. St. § 60A.02, subd. 3(a) (2005).

The third element of Minn. St. § 60K.47 is that a “company” must obtain a certificate of authority to transact the business of insurance in Minnesota. As noted above, because “company,” as used in Minn. St. § 60K.47 is undefined, reference should be made to the definition of that term in Minn. St. § 60A.02, subd. 4. As to whether a company, as defined in Minn. St. § 60A.02, subd. 4, is “required to be, but is not authorized to engage in the business of insurance in this state,” Minn. St. § 60A.07, subd. 4 (2005) states:

No insurance company or association, or fraternal benefit society, not specifically exempted therefrom by law, shall transact the business of insurance in this state unless it shall hold a license therefor from the commissioner.

(emphasis supplied). Finally, the imbedded term “transact the business of insurance in this state” is further defined in Minn. St. § 72A.41 (2005) as follows:

Any of the following acts in this state, effected by mail or otherwise by an unauthorized insurer, shall be included among those deemed to constitute

transacting insurance business in this state: (a) the issuance or delivery of a contract of insurance or annuity to a resident of this state; (b) the solicitation of an application for such contract; (c) the collection of a premium, membership fee, assessment or other consideration for such a contract; or (d) the transaction of any matter subsequent to the execution of such a contract arising out of it.

## 2. Application of the unambiguous statutory terms

In applying Minn. St. § 60K.47, the trial court held there was “no case law.” Add., Summary Judgment at 9. While technically correct, the trial court (as well as the staff attorney for the Department of Commerce) ignored several decisions that applied the predecessor enactment (§ 60A.17, subd. 12) that was identically worded, except for the use of certain non-substantive differences in terminology such as referring to “producer” as “agent.” See, *Farmers & Merchants State Bank of Pierz v. Bosshart*, 400 N.W.2d 739(1987); *St. Michel v. Burns & Wilcox, Ltd.* 433 N.W.2d 130 (Minn. App. 1988 rev. denied). While both *Farmers* and *St. Michel* dealt with a particular issue in applying the statutory predecessor to § 60K.47 that is not present here – i.e. whether non-compliance with the disclosure requirements for surplus line insurance companies constituted a violation – the courts emphasized the salutary purpose behind this enactment. Specifically, the Court in *Farmers*, 400 N.W.2d at 740, observed:

The objective of the licensure requirements is ultimately to ensure solvency of the companies to pay losses which might be incurred by Minnesota residents. That objective is furthered by compelling licensed insurers to participate in the Minnesota Insurance Guaranty Association. The Association assesses all licensed Companies to create a fund to pay any claims made against any insolvent Guaranty Association member.<sup>14</sup>

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<sup>14</sup> To the extent that the trial court implied that Minn. St. § 82.43, subd. 7 (2009) (the Minnesota Real Estate, Education, Research and Recovery Fund) serves as some form of guaranty association for insolvent real estate companies (Add., Summary Judgment at 8, n. 2), it grossly overstated the protection afforded by that enactment. In sharp contrast to

To enforce this salutary policy, Minn. St. § 60K.47 and its predecessor permit “assessment of personal liability against any person who participates in the placement with an unauthorized and unlicensed insurer.” *Farmers*, 400 N.W.2d at 741. To highlight the very concern that lay behind the enactment of Minn. St. § 60K.47 and its predecessor, Allen presented evidence to the trial court as to the extremely weak financial condition of CB Burnet and its parent NRT, the up-streaming of the LA Program fees to NRT, and the concomitant absence of any actuarial reserves for claims under the LA Program, which evidence CB Burnet did not contest.

Apart from the trial court’s failure to consider the above purpose of §60K.47 in the context of the LA Program, the court did not even attempt to methodically apply the specific elements of that enactment to the LA Program. Because neither the trial court nor the parties suggested that Minn. St. § 60K.47 was ambiguous, the language of that statute should be applied as written. *See, e.g., Kirkwold Construction Co. v. M.G.A. Construction, Inc.*, 513 N.W.2d 241, 244 (Minn. 1994) (“[t]he language of the statute should not be disregarded if the meaning is clear,” citing Minn. St. § 645.16).

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the Minnesota Insurance Guaranty Association for insolvent insurers, a claimant against a real estate company must first obtain a judgment, exhaust all attempts to collect from other responsible persons, and most significantly, the recovery from the fund is limited to judgments “on grounds of fraudulent, deceptive, or dishonest practices, or conversion of trust funds.” None of these limitations are found in the Minnesota Insurance Guaranty Association Act. *See* Minn. St. § 60C.01 et seq. (2005). Most significantly, while that Act covers any and all claims arising under an insurance policy (i.e. negligence etc.), *see* Minn. St. § 60C.08 (2005), the Real Estate Education, Research and Recovery Fund provides no protection for CB Burnet if it became insolvent for its indemnification of Covered Disputes under the LA Program, which expressly excludes fraudulent or dishonest actions.

**a. Sale**

There is no dispute that there was an “exchange of money” by Allen and all other sales associates to CB Burnet to participate in the LA Program by virtue of their annual payments. The only other issue in connection with the presence of a “sale,” is whether the LA Program is a “contract of insurance” issued by an “insurance company.” Those terms necessarily involve consideration of the remaining two elements; namely, the nature of the LA Program and whether CB Burnet must be licensed as an insurance company to issue the LA Program.

**b. Insurance**

If the LA Program falls within any of the “lines of insurance” set forth in Minn. St. §60A.06, then it is insurance within the meaning of Minn. St. § 60K.47. The trial court, however, did not even apply Minn. St. § 60A.06 to determine whether the LA Program constituted liability insurance (§ 60A.06, subd.13), or legal expense insurance (§ 60A.06, subd.15). Moreover, the trial court eschewed any application of the definition of “insurance” in Minn. St. § 60A.02, subd. 3(a), which, as noted above, it should have done in order to place in a proper context what constitutes a particular “line of insurance.”

The LA Program falls squarely within the definition of “insurance” as used in Minn. St. § 60A.02, subd. 3(a) and Minn. St. § 60A.06. There are two elements of § 60A.02, subd. 3(a): (i) an agreement whereby one party for a consideration (ii) agrees to indemnify another to a specified amount against loss or damage from specified causes. Minnesota courts have long held that in determining whether a program is, in substance, insurance, “it is wholly immaterial that on its face this contract does not expressly purport to be one of insurance and that this nowhere appears in it. Its nature is to be determined

by an examination of its contents, and not by the terms used.” *State v. Beardsley*, 88 Minn. 20, 24, 92 N.W. 472, 474 (Minn. 1902).

The elements of Minn. St. § 60A.02, subd. 3(a) are handily met here. The essence of the LA Program is set forth in the first sentence, “Coldwell Banker Burnet (the “Company”) is pleased to offer the following program to its sales associates, which can effectively limit your personal liability exposure in the event that you are involved in a dispute or lawsuit.” (emphasis supplied). The first element of Minn. St. § 60A.02, subd. 3(a) of consideration is established by the fee paid by the sales associates to participate in the LA Program, which was \$395 in 2002 and then increased to \$450 by 2006. The second element of Minn. St. § 60A.02 subd. 3(a) of indemnification for specified causes is met, because in consideration for the payment, CB Burnet agrees to pay and retain “an attorney chosen by the Company,” and pay for resolutions or settlements in connection with certain specified actions in the form of “Covered Disputes,” which are defined to solely involve third-party claims arising solely out of the sales associates’ conduct (and not CB Burnet’s) conduct.<sup>15</sup> Finally, because the LA Program only covers claims and losses that are not covered by the NRT High-Retention E&O Policies -- claims that are less than \$1 million -- there is a specified amount of coverage provided under the LA

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<sup>15</sup> In an attempt to distinguish the LA Program from licensed errors and omissions insurance policies, the trial court asserted, without any evidentiary foundation, that licensed errors and omissions policies purportedly do not cover administrative complaints and do not exclude from Covered Disputes non-compliance with certain of broker’s policies. Add., Summary Judgment at 11. Even if the above were true, it is irrelevant. Assuming that the scope of the Covered Disputes and exclusions from Covered Disputes in the LA Program may be somewhat broader than what is contained in a licensed errors and omissions policy has nothing to do with whether the LA Program falls within the “lines of authority” described in Minn. St. § 60A.06 and the definition of insurance in Minn. St. § 60A.02, subd. 3(a).

Program. Accordingly, the LA Program meets the definition of “insurance” in Minn. St. § 60A.02, subd. 3(a), which informs the meaning of “lines of insurance” in Minn. St. § 60A.06.

As to whether the LA Program falls within any of the specific lines of insurance, the trial court did not engage in this analysis. Because the LA Program provides for payment of all defense costs in connection with Covered Disputes, including attorneys’ fees, it falls squarely within “legal expense insurance” as enumerated in Minn. St. § 60A.06, subd. 15. Moreover, because the LA Program provides for CB Burnet to indemnify the sales associates for losses, it also falls within a form of “liability insurance” as defined in Minn. St. § 60A.06, subd. 13.<sup>16</sup>

In addition to the above provisions that meet the statutory definitions of insurance, the true intent of the LA Program is further evidenced by the limited option afforded to sales associates not to participate. Specifically, the LA Program states:

Participation is required unless proof of company approved outside coverage is submitted (must have comparable rating and provide coverage for The Company also, and said insurance coverage must be protected by the Minnesota Insurance Guarantee Fund). It is important, with rising litigation, legal and administrative costs, that you have the security that this program or outside coverage provides.

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<sup>16</sup> The trial court noted that because the sales associates’ deductible in the LA Program is determined by the proportionate amount of commission that he or she received, up to a maximum of \$1,500, it is different than licensed errors and omissions policy. Add., Summary Judgment at 11. This fact, however, has nothing to do with whether the LA Program falls within one of the prescribed “lines of authority” or otherwise is insurance. Even the Memorandum accompanying the Department of Commerce staff attorney’s letter noted, “[m]oreover, participating salespersons are responsible for a prorated portion of all expenses incurred up to a maximum amount of \$1,500-2,500-i.e. there is a deductible, yet another common feature of insurance contracts.” App. 181. (emphasis supplied).

(emphasis supplied). App. 64, 68, 72, 76. Because such optional third-party errors and omission insurance had to be comparable to the coverage afforded by the LA Program, this provision necessarily means that the LA Program also is an errors and omissions insurance program. This conclusion is buttressed by the LA Program administrator's written statement that preceded the lawsuit in which he correctly characterized the LA Program as a "low deductible E & O policy" (App. 116) as well as his deposition testimony in which he stated that the only difference between the LA Program and third-party errors and omissions insurance was that "(d)efense counsel is chosen by us on all versus, typically, insurance companies . . . ." App. 91-92 at 41:18-42:7 (objection omitted). Accordingly, the LA Program falls within the definition of "insurance" as used in Minn. St. § 60K.47.

**c. Unauthorized company**

The final element of Minn. St. § 60K. 47 is whether CB Burnet must obtain a certificate of authority to operate the LA Program. The Supreme Court in *Farmers*, 400 N.W.2d at 740, noted that for purposes of the substantially identical predecessor section to Minn. St. § 60K.47, this requirement is contained in Minn. St. § 60A.07, subd. 4. As with the definition of insurance, neither the trial court nor the staff attorney for the Department of Commerce identified any statutory exemption to this provision that encompassed the LA Program.

For over 100 years, Minnesota courts have taken an expansive view of when a company has been engaged in the unauthorized business of insurance, due to its failure to obtain a certificate of authority, in criminal prosecutions against such companies. *See, e.g., Beardsley*, 88 Minn. at 25-6, 92 N.W. at 474-5 (payment for an agreement to cancel

a debt upon death or disability was unauthorized insurance); *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 495, 111 N.W. 396, 397-8 (Minn. 1907) (payment for the service of providing a defense for malpractice actions, subject to a certain maximum amount for defense costs was unauthorized insurance); *State v. Spalding*, 166 Minn. 167, 170-171, 207 N.W. 317, 318-19 (Minn. 1926) (voluntary contributions by members of a non-profit association of owners of Ford automobiles to indemnify losses involving damage to vehicles was unauthorized insurance); and *State v. Bean*, 193 Minn. 113, 114-115, 258 N.W. 18 (Minn. 1934) (payment for, among other things, two-year coverage for bail bond if arrested for wrongfully causing injury to a person or property by use of a vehicle, tow service, roadside repairs, and mechanical advice was unauthorized insurance).

Based upon the above, applying the plain meaning of § 60A.07, subd. 4 and the absence of any statutory exemptions, the trial court erred by concluding that CB Burnet did not have to obtain a certificate of authority to issue, sell, and administer the LA Program.

**3. The trial court erred in its non-statutory analysis of Minn. St. § 60K.47**

Instead of carefully applying Minn. St. § 60K.47, the trial court (and the staff attorney for the Department of Commerce) employed an extra-statutory analysis to conclude that CB Burnet did not violate that statute in issuing and selling the LA Program. The trial court, which generally adopted the position of the staff attorney for the Department of Commerce, took three positions, all of which were errant, to arrive at its position that the LA Program was not insurance. First, it held that the LA Program

involved no transfer of risk; second, that the LA Program was incidental to an underlying broker-independent contractor relationship; and third, that it was self-insurance that fell outside regulation. Finally, the trial court briefly analyzed certain *dictum* in *Anstine*, which it believed to support its opinion.

**a. The LA Program involves a massive transfer and distribution of risk.**

The trial court concluded that the LA Program provides no shifting or transfer of risk. The trial court arrived at this incorrect conclusion by focusing on the fact that CB Burnet has statutory derivative liability for the acts of its sales associates. The trial court then concluded that because the actual defense and indemnification concurrently addresses the primary (sales associate) liability and secondary or derivative (CB Burnet) liability, there is no shifting of risk. The trial court further noted that in the LA Program CB Burnet waived the right to seek indemnification against sales associates for losses arising out of the sales associates' conduct in connection with Covered Disputes.

What the trial court failed to grasp is that a statute making party A derivatively liable for the acts of party B does not relieve party B of its risk of primary liability. But for CB Burnet's defense and indemnification of the 2,000-3,000 independent contractor sales associates under the LA Program in exchange for their payment of over \$1,000,000 annually, the sales associates would be subject to personal liability and adverse judgments.<sup>17</sup> As to CB Burnet's secondary liability, the concurrent resolution of its

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<sup>17</sup> The Memorandum that was submitted by the staff attorney for the Department of Commerce noted that the LA Program involved a substantial transfer of risk: "In addition, the fee, \$350-\$450, is small compared to the potential E&O exposure, which suggests that participating salespersons' E&O exposures are pooled by Burnet to

secondary liability would be no different if the sales associates opted out of the LA Program by purchasing coverage under a licensed errors and omissions insurance policy. In the event the associate was sued, the carrier would defend and indemnify, and regardless of the outcome CB Burnet's liability would be extinguished. If there were a defense verdict in favor of the sales associate, it would concurrently extinguish any secondary liability and thus redound to CB Burnet's benefit. Similarly, if there were a plaintiff's verdict against the sales associate, it would be paid by the sales associate's carrier, which would concurrently satisfy or extinguish any secondary liability, and this would also benefit CB Burnet. Accordingly, the mere fact that there is derivative liability that is concurrently resolved with primary liability has nothing to do with whether there is the transfer of the risk of primary liability to a third party, which under the LA Program is from the sales associates to CB Burnet.

CB Burnet's waiver of indemnification against the sale associates for CB Burnet's secondary liability necessarily follows from its indemnification of the sale associates' primary liability, lest CB Burnet's indemnification would be illusory. This is the same principle behind the well-accepted doctrine that "an insurer cannot subrogate against its own insured." *The St. Paul Cos. v. Van Beek*, 609 N.W.2d 256, 257 (Minn. App. 2000); *United States Fire Ins. Co. v. Ammala*, 334 N.W.2d 631, 634 (Minn. 1983).

- b. The sister state ancillary employer-employee rule is inconsistent with Minnesota law, and even if it were not, it does not apply to the LA Program**

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distribute risk. Such risk transfer and risk distribution are the hallmarks of insurance." App. 181. (emphasis supplied).

Relying exclusively on sister state authority, the trial court held that CB Burnet did not have to obtain a certificate of authority to operate the LA Program because it was ancillary to the sales associate's relationship with CB Burnet, its broker, and not made available to the general public. Add., Summary Judgment at 13-14. While all that authority is distinguishable, the trial court neglected to discuss Minnesota cases that address this very issue. Moreover, there is nothing in the Minnesota statutes governing insurance that in any manner exempts regulation of insurance based on the trial court's proposition.

The thrust of the sister state cases upon which the trial court relied is that in an employer-employee relationship, if the employer operates a non-profit health or retirement program for its employees, then it is not subject to regulation under the insurance laws of certain other states.

- *Mutual Life Ins. Co. of N.Y. v. N.Y. State Tax Commission*, 32 N.Y.2d 348, 352-3, 298 N.E.2d 632, 635 (N.Y. 1973) (a health insurance program operated by company for its employees on a non-profit basis was not subject to premium tax as an insurance business).<sup>18</sup>

- *H.B. McHorse v. Portland General Electric Co.*, 268 Or. 323, 334, 521 P.2d 315, 320 (Or. 1974) (an employer pension plan was "an early retirement plan and not a plan of insurance" within the definition of insurance in Oregon, because a "pension

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<sup>18</sup> This holding was expressly rejected in *Mutual Life Ins. Co. of N.Y. v. Insurance Bureau*, 424 Mich. 656, 663, 384 N.W.2d 25, 28 (Mich. 1986) ("once an agreement was reached and the plaintiff [MONY] decided to furnish its own insurance to its employees rather than to contract with an outside insurance company, as any non-insurance company employer would have done, it ceased to act as an employer and began to act as an insurer.").

plan is not payable ‘upon a determinable risk’ contingency, but upon the employee’s having satisfied certain eligibility requirements”).<sup>19</sup>

- *West & Co. of La., Inc. v. Sykes*, 257 Ark. 245, 247, 251, 515 S.W.2d 635, 636, 638 (Ark. 1974) (an employer program providing health benefits to its employees “that are substantially supported by the employer’s profits” was not subject to insurance regulation, but noting that to determine whether insurance regulations apply to a program “we believe the best policy is to approach the matter on a case by case basis and in accordance with the purpose of the evils to be regulated . . .”).

- *Killebrew v. Abbott Laboratories*, 359 So.2d 1275, 1278-9 (La. 1978) (an employer, which operated a long-term disability plan for employees that was not operated for profit, was not an insurer).<sup>20</sup>

- *State ex rel. Farmer v. Monsanto Co.*, 517 S.W.2d 129, 130, 132-3 (Mo. 1974) (a sickness and medical benefits program in which “employees do not now contribute to the plan” and thus was operated on a nonprofit basis, was not insurance, based primarily upon the above New York court of appeals decision in *Mutual Life Ins. Co.* ).

- *American Nurses Assoc. v. Passaic General Hospital*, 98 N.J. 83, 89, 484 A.2d 670, 673 (N.J. 1984) (in a dispute between the insurance carriers for a hospital and a nurse as to which insurer was primarily obligated to indemnify an employee-nurse of the

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<sup>19</sup> As the holding in *McHorse* reflects, the court addressed an issue that is not remotely raised in this case.

<sup>20</sup> In response to the decision, the Louisiana legislature added employee benefit trusts, with certain exceptions including plans of the state or political subdivisions, to the statutory definition of “insurance.” See, *Nelson v. Continental Cas. Co.*, 412 So.2d 701, 703 (La.App., 1982 writ denied).

hospital for her malpractice, the nurse's carrier was primarily liable for the first \$100,000 of loss, because that was the deductible on the hospital's policy and the hospital had no contractual or other obligation to pay that deductible on behalf of its employee-nurse).

None of the above cases involves a program to provide defense and indemnification to 2,000-3,000 independent contractors (not employees) for third-party claims in consideration of payment of annual premiums by those contractors as the LA Program does. Moreover, in none of the above programs did the company make substantial profits from premiums, as CB Burnet did here.<sup>21</sup>

Apart from those distinguishing characteristics, Minnesota courts have rejected the analysis employed in the above cases and adopted by the trial court. Specifically, the Minnesota Supreme Court has held that a company engaged in the unauthorized business of insurance, even though the subject program was ancillary to an underlying relationship, and thus not available to the general public (*Beardsley*) and even though the program was not designed to make a profit (*Spalding*).

In *Beardsley*, which involved a criminal prosecution for the unlicensed sale of insurance, the parties had an underlying lender-borrower relationship. The Home Cooperative Company was in the business of financing the purchase of homes. As an ancillary part of that lending business, there was a debt cancellation benefit under which if the borrower died or became disabled the remaining loan payments were forgiven. In holding that the debt forgiveness feature of the loan program involved the unauthorized sale of insurance, the Court described this program "as a combination of a loan of money

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<sup>21</sup> The evidence, which must be construed in favor of Allen, reflects that CB Burnet's profit from the LA Program exceeded \$3 million during a 6-year period.

with security and a life insurance policy.” *Beardsley*, 88 Minn. at 26, 92 N.W. at 475. Accordingly, in *Beardsley*, it was irrelevant that the unauthorized insurance product did not exist independently of the pre-existing loan relationship and was not sold separately to the public. This is precisely the situation involving the LA Program: it is made available to independent contractors as part of their broker-salesperson relationship with CB Burnet.

*Spalding* involved the criminal prosecution for the unlicensed sale of insurance in connection with the Ford Car Owners’ Protective Association, which was comprised solely of owners of Ford automobiles. If a member was in an accident, then the Association would send an assessment to each member to voluntarily contribute a *pro rata* share to meet the actual losses. *See Spalding*, 166 Minn. at 169, 207 N.W. at 318 (“[i]f a member sustains a loss, Davis [the managing agent] is requested to give notice of the pro rata share of the loss to be ‘donated’ by each member.”). Even though payment of such assessments was purely voluntary, the Court held that the program was insurance. *See Spalding*, 166 Minn. at 171, 207 N.W. at 319 (“the mere fact that contributions depended on the promptings of conscience falls short of demonstrating that the certificate is not a contract of insurance”). Because the assessments for losses were made after actual losses had been incurred and were payable *pro rata* on a strictly voluntary basis, the program necessarily was not an actuarial-based program that operated for profit. This nature of the program did not in any manner preclude the Court from holding that it was an illegal insurance program that was required to be licensed in Minnesota.

Further support for the rejection of the sister state position that the trial court adopted is the treatment of self-insurers as insurance companies by the Minnesota

legislature, as discussed in the following section of this Brief. As explained below, the definitions of “insurance” and “insurance company” in Minn. St. §§ 60A.02, subd. 3(a) and 4, respectively, as well as other statutory sections, reflect a legislative intent to subject self-insurers, who insure the risks of their agents or servants to the regulations governing other insurers. This inclusion of self-insurers reflects the rejection by the Minnesota legislature of the position trumpeted by the staff attorney for the Department of Commerce and the trial court, namely; that an insurance plan which is not offered to the general public is not subject to regulation as insurance by the Department of Commerce.

Accordingly, the sister state authority upon which the trial court relied is inapposite to the facts of the instant case involving independent contractors (and not employees) and a program that generates substantial profits. Moreover, even if such authority were applicable under the facts of this case, the Minnesota Supreme Court has rejected this line of authority. There are sound policy reasons for such rejection. As a California court of appeals noted in rejecting the application of an ancillary purpose test to the sale of insurance that is regulated by the California Department of Insurance:

In other words, while it is true not all contracts allocating risk are insurance contracts subject to statutory regulation, all insurance contracts, even if sold as a secondary or incidental facet of a transaction with another, primary commercial purpose, are regulated by the Insurance Code and Department of Insurance unless they fall within a specific regulatory exemption. Followed to its logical extreme, the contrary rule, as adopted by the trial court in this case, would permit a car dealership to obtain commissions for the sales of automobile insurance or a real estate broker to sell homeowners insurance without being subject to regulation by the Insurance Code or the Insurance Commissioner because in each instance the sale of insurance was incidental to the purchase of a car or house.

*Wayne v. Staples*, 135 Cal. App. 4<sup>th</sup> 466, 477, 37 Cal. Rptr. 544, 552 (Cal. App. 2006 rev. denied).

**c. CB Burnet as the sponsor of the LA Program is not exempt from regulation as an insurer on the grounds that the LA Program is self-insurance.**

The Memorandum accompanying the letter from the staff attorney for the Department of Commerce concluded that the LA Program was “a self-insurance arrangement that would not be regulated under Minnesota’s insurance laws.” App. 182. In arriving at this position, the staff attorney did not engage in any detailed analysis of the statutes governing insurance regulation, and particularly, self-insurance. While the trial court did not expressly adopt the staff attorney’s position, it did note, without any analysis, that Minn. St. § 60K.47 “addresses the sale of insurance issued by an unauthorized insurer who is engaged in the business of insurance in Minnesota, not self-insurance.” Add., Summary Judgment at 12, n.4.

As noted above, in determining whether a particular contract is insurance under Minn. St. § 60K.47 and whether the issuer must be licensed under Minn. St. § 60A.07, subd. 4 one cannot avoid applying the inextricably linked and co-extensive definitions in Minn. St. § 60A.02, subd. 3(a) (insurance) and Minn. St. § 60A.02, subd. 4 (insurance company or company). Significantly, both of these definitions exempt a form of “self-insurance” only involving political subdivisions under Minn. St. § 471.981 (2009).<sup>22</sup> This type of “self-insurance” necessarily is insurance, lest its exemption from the term

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<sup>22</sup> The legislature added this exemption in 1980 when it enacted Minn. St. § 471.981. The Memorandum submitted by the staff attorney conveniently truncated the quotation of the definition of “insurance” in Minn. St. § 60A.02, subd. 3(a) by deleting the text that limited the self-insurance exemption to political subdivisions. App. 175.

“insurance” would be meaningless. *See, e.g., Farmers*, 400 N.W.2d at 742 (rejection of respondent’s construction of predecessor to Minn. St. § 60K.47 that all surplus lines carriers are *per se* “authorized” carriers, lest the exclusion of surplus lines carriers in Minn. St. § 60K.17, subd. 12 would be rendered meaningless and unnecessary). Minn. St. § 471.981, subd. 1 allows political subdivisions to “self insure against liability of the political subdivisions and its officers, employees, agents and servants . . . for damages resulting from its torts . . . and those of its officers, employees, agent and servants.” In other words, political subdivisions are empowered to shift the risk of liability of its officers, employees, agents and servants to the political subdivision. As noted above, that is the hallmark of insurance, and the reason that self-insurance that is authorized under § 471.981 would be “insurance,” and a political subdivision an “insurance company,” but for the exemption.

The significance of the exemption of this form of self-insurance necessarily means that all other similar forms of self-insurance, which involve true shifting of risk, are included in the definitions of “insurance” and “insurance company and company.”<sup>23</sup> *See,*

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<sup>23</sup> Self-insurance that does not involve any shifting of risk does not fall within the definition of insurance, such as when a company merely insures itself (and not its independent contractors or agents) against third-party claims. *See, e.g., Minn. St. § 79A.03(2005)* (employer’s right to self-insure individually against workers’ compensation claims); *see also, Metro U.S. Services, Inc. v. City of Los Angeles*, 96 Cal. App.3d 678, 683, 158 Cal. Rptr. 207 (Cal. App. 1979) (a program whereby Los Angeles merely self-insured the risk of lawsuits against itself was not insurance, because “[a] self-insurer enters into no contract to indemnify another. For all intents and purposes the City, to use a popular expression, has chosen to go ‘bare.’”); *Richardson v. GAB Business Services, Inc.*, 161 Cal. App.3d 519, 523, 207 Cal. Rptr. 519, 521 (Cal. App. 1984) (in holding that a program in which Safeway merely self-insured the risk of lawsuits against itself was not insurance, the Court held, “[t]he allegation of self-insurance, which is the equivalent of no insurance, is repugnant to the concept of insurance which fundamentally involves shifting to a third party, by contract, for consideration, the risk of loss as a result

Minn. St. § 645.19 (1947) (“Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a law shall be construed to exclude all others.”) (emphasis supplied); *BCBSM, Inc. v. Minnesota Comprehensive Health Assoc.*, 713 N.W.2d 41, 45 (Minn. App. 2006) (employing the statutory construction principle of “the expression of one thing indicates the exclusion of another,” stop-loss coverage was insurance for purposes of the assessment of premium tax, because there were eight specified exclusions from the definition of accident-and-health insurance and stop-loss coverage was not one of them); *Maytag Co. v. Comm. of Taxation*, 218 Minn. 460, 463, 17 N.W.2d 37, 39-40 (Minn. 1944) (it was reasonable to infer that the statutory exclusion from the computation of a tax on sales from outside the state did not encompass sales that were negotiated in the state and sent out of state).

The above definitions help explain when a “company is required to be, but is not authorized to engage in the business of insurance,” as set forth in Minn. St. § 60K.47. As stated above, the Supreme Court in *Farmers* noted that this element of Minn. St. § 60K.47 was set forth in Minn. St. § 60A.07, subd. 4. That section provides that all insurance companies, which include self-insurers that meet the definition of insurance, must obtain a “license” unless “specifically exempted therefrom by law.” (emphasis supplied). When the legislature intends to exempt self-insurers, who fall within the definition of insurers, from various provisions otherwise governing insurers, it has carefully indicated such exemptions.<sup>24</sup> Neither the trial court nor the staff attorney for the

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of an incident or event. In the instant case the liability for the injury to plaintiff was shifted to no one. It remained with Safeway, the very entity that caused the injury.”)

<sup>24</sup> See, e.g., Minn. St. §§ 60F.01 (2005) (joint employer self-insurance plans), 60F.04 (specifically identifying the various sections governing insurance companies that apply to

Department of Commerce identified any exemption for the issuance and sale of the LA Program, which is a form of a *de facto* errors and omissions insurance policy. Accordingly, the trial court and the staff attorney for the Department of Commerce erred in relying on some unspecified exemption for self-insurers to issue unlicensed insurance policies, such as the LA Program, under Minn. St. § 60K.47.

**d. The trial court misapplied *Anstine*.**

The only insurance-related Minnesota case authority that the trial court cited was *Anstine*. The actual holding of the case was that an indemnification agreement made by a subcontractor in favor of a general contractor was limited to the losses arising out of the subcontractor's conduct and not losses arising out of the activities of its co-subcontractors.<sup>25</sup> The Supreme Court did note in *dictum* that if the indemnification agreement of the subcontractor in favor of the general contractor were construed to encompass negligent acts of co-subcontractors it would be insurance subject to regulation. This digression led the Court to distinguish indemnification agreements that constituted insurance, which it denominated as "indemnity for hire," and those which

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joint employer self-insurance plans); 60F.08 (joint employer health plans are exempt from chapter 60C governing guaranty insurance associations); Minn. St. §§ 62H.01(2005) (joint employer self-insurance health plans); 62H.04(b)-(d) (joint employer self-insurance health plans are exempt from numerous sections governing insurance companies).

<sup>25</sup> Since *Anstine*, the entire area of law involving general contractor-subcontractor indemnification has been radically altered both by judicial rulings and statutory action. The ruling in *Anstine* not to apply a strict construction rule to indemnification agreements in which a subcontractor purported to indemnify a general contractor for the latter's negligence was overruled by *Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.* 281 N.W.2d 838, 842, n. 4 (Minn. 1979). Later, the legislature prohibited any indemnification agreements in which a subcontractor indemnified the general contractor for the general contractor's own negligence. See Minn. St. §337.02 (2002); *Katzner v. Kelleher Const.*, 545 N.W.2d 378, 381 (Minn. 1996).

were not insurance, which it categorized as “equitable indemnity.” In making that distinction, the Court made the following comments:

A contract which permits indemnity where the indemnitor’s conduct bears no relationship to the loss provides for indemnity for hire, rather than equitable indemnity, and seems to be a commercial insurance contract subject to the laws regulating the insurance business.

*Anstine*, 305 Minn. at 251-2, 233 N.W.2d at 729 (emphasis supplied); *see also*, *Fossum v. Kraus-Anderson Construction Co.*, 372 N.W.2d 415, 417 (Minn. App. 1985) (citing *Anstine* and noting, “[i]n determining whether contractual indemnity is allowed, courts should determine whether the indemnity sought would be within the scope of equitable indemnity or would instead be indemnity for hire.”). The Minnesota Supreme Court has further noted that “equitable indemnity operates only when the party from whom indemnity is sought ought, in justice, to bear ultimate liability for payment.” *Plain v. Plain*, 307 Minn. 399, 404, n. 16, 240 N.W.2d 330, 333, n. 16 (Minn. 1976). The most common example of a person who has a right to equitable indemnity is “ ‘where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged.’ ” *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 366 (Minn. 1977) (cit. omitted). Thus, an indemnification agreement that memorializes the presence of the indemnitor’s pre-existing “equitable indemnity” of the indemnitee is not insurance, because the agreement transfers no risk to the indemnitor that it did not already possess.

The indemnification obligations of CB Burnet to Allen and all other sales associates under the LA Program is not “equitable indemnity” and, thus, it is “indemnity for hire.” Absent the LA Program, CB Burnet not only would have no obligation to

defend and indemnify sales associates for their conduct, but, as the trial court noted, also would have the right to seek indemnification from the associates to the extent CB Burnet is vicariously liable for those acts. *See* Add., Summary Judgment at 14; *see also*, App. 62, 66, 70, 74, 78 (ICA at ¶ 12) (“Broker shall not be liable to Independent Contractor for any expenses incurred by him or her, for any of his or her acts, nor shall Independent Contractor be liable to Broker for officer help or expense.”) (emphasis supplied); *Shair-A-Plane v. Harrison*, 291 Minn. 500, 503, 189 N.W.2d 25, 27 (Minn. 1971) (“we know of no rule of law whereby, absent an express agreement to the contrary, a duty of indemnity is imposed upon a principal for losses incurred due to the agent’s fault.”); *Sheely v. Mower County Farmers Mutual Ins. Co.*, Case No. CO-96-434, 1996 WL 509759 at \*2 (Minn. App., Sept. 4, 1996, rev. denied) (after noting the above rule in *Shair-A-Plane* that companies “are not indemnitors for third party claims of negligence brought against independent agents,” the court then aptly observed, “[t]hat is precisely why errors and omissions insurance exists”) (emphasis supplied). The LA Program serves the same function as third-party errors and omissions insurance and thus, is not a form of “equitable indemnity.”

Because the LA Program is not equitable indemnity, it necessarily is indemnity for hire. The trial court correctly found that Allen and all sales associates were independent contractors.<sup>26</sup> Add., Summary Judgment at 4. Accordingly, as independent contractors,

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<sup>26</sup> The trial court could not have otherwise held, because CB Burnet in its Answer, deposition testimony and motion for summary judgment consistently stated and testified that Allen and all other sales associates were independent contractors. *See, e.g.*, App.16 at ¶ 6; App. 89 at 26:7-9; *see also, Dahlgren v. Caring and Sharing, Inc.*, No. C1-88-2275, 1989 WL 23319 at \*2 (Minn. App. March 21, 1989, rev. denied) (“[b]ecause Dahlgren

CB Burnet did not control their conduct and, within the meaning of *Anstine*, CB Burnet's "conduct bears no relationship to the loss" incurred by the sales associates arising out of Covered Disputes. See, e.g., *Willner v. Wallinder Sash & Door Co.*, 224 Minn. 361, 369, 28 N.W.2d 682, 686 (Minn. 1947) ("the real test 'as to whether a person is an independent contractor or employee is whether the asserted employer, under this arrangement with the other party, has or has not any authoritative control of the latter with respect to the manner and means in which and by which the details of work are performed' . . . , as distinguished from the right which every owner or general contractor has to supervise and coordinate the general work.") (cit. omitted); see also, App. 62, 66, 70, 74, 78 (ICA, ¶¶7, 10) (independent contractor sales associate determines his or her own hours, ¶ 7; independent contractor is not an employee, ¶ 10).<sup>27</sup>

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admits in his amended complaint that he was an independent contractor, he cannot have been an employee of Bethel's.").

<sup>27</sup> Apart from the fact that the trial court properly held that Allen and all sales associates were independent contractors, it did note that a broker, like CB Burnet, has a general duty of supervision under Minn. St. § 82.48, subd. 3 (2009) of "the activities of their salespersons and employees." Add., Summary Judgment at 15. This duty, however, does not convert the independent contractor salespersons into employees. See *Willner*, 224 Minn. at 369, 28 N.W.2d at 686. If such supervision did constitute "control" over the activities of the sales associates, then those associates would be employees instead of independent contractors. *Id.* As employees, the LA Program would be void for want of consideration, because employers have a pre-existing statutory obligation to indemnify their employees (as opposed to independent contractors) for their conduct other than for willful or fraudulent acts. See Minn. St. § 181.970, subd. 1 (2006) ("[a]n employer shall defend and indemnify its employees for civil damages, penalties, or fines claimed or levied against the employee, provided that the employee (1) was acting in the performance of the duties of the employee's position; (2) was not guilty of intentional misconduct, willful neglect of the duties of the employee's position, or bad faith; and (3) has not been indemnified by another person for the same damages, penalties, or fines."); *Deli v. Hasselmo*, 542 N.W.2d 649, 657 (Minn. App. 1996 rev. denied) ("[a] promise to do something that one is already legally obligated to do does not constitute consideration.").

The trial court's reference to Minn. St. §82.34, subd. 3 (2009),<sup>28</sup> which imposes vicarious liability on brokers for the acts of their salespersons, is a recognition by the legislature of the independent contractor status of salespersons who, but for the statutory imposition of liability, may not expose the broker to liability for the salesperson's misconduct. *See*, Minn. St. § 82.48, subd. 3 (2009) (distinguishes between a broker's "salespersons and employees"); *compare* Minn. St. §169.09 subd. 5a (2006) and *Shuck v. United Automobile Assoc.*, 302 Minn. 93, 95-6, 226 N.W.2d 285, 287 (Minn. 1975) (imposition of statutory liability of owners of automobiles for the torts of operators overrode common law that exculpated owners from those torts). Accordingly, contrary to the trial court's conclusion, the LA Program is "indemnity for hire, rather than equitable indemnity, and seems to be a commercial insurance contract subject to the laws regulating the insurance business." *Anstine*, 205 Minn. at 251-2, 233 N.W.2d at 729.

**C. The trial court erred in granting CB Burnet's motion for summary judgment on Allen's claim under Minn. St. § 325F.69 subd. 1 (2005) on the ground that the statement in the LA Program that it was "not an Errors and Omissions (E&O) policy" was true, and thus, did not violate Minn. St. § 325F.69, subd. 1 (2005).**

Because the trial court erred in determining that the LA Program was not insurance for purposes of Minn. St. § 60K.47, its use of the same analysis with respect to the Minn. St. § 325F.69, subd. 1 claim was equally flawed. Allen incorporates the preceding argument as to why the LA Program is insurance and CB Burnet is subject to regulation by the Department of Commerce, to support his position that the statement in

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<sup>28</sup> Minn. St. § 82.34, subd. 3 states, in part, "[e]ach broker shall be responsible for the acts of any and all of the broker's sales people and closing agents while acting as agents on the broker's behalf."

the LA Program that it was “not an Errors and Omissions (E&O) was false, and thus, violated Minn. St. § 325F.69, subd. 1.

**D. The trial court erred in granting CB Burnet's motion for summary judgment on Allen's unjust enrichment claim on the ground that the LA Program was not an unlawful insurance program.**

The trial court granted summary judgment on the unjust enrichment claim on the sole basis that the LA Program was not an unlawful insurance program. Allen incorporates his preceding argument that the LA Program was an unlawful insurance program and submits that the trial court erred in granting summary judgment on this claim.

### Conclusion

Based upon the foregoing, Allen submits that the trial court erred in granting Summary Judgment; that the Summary Judgment be reversed; and that the case be remanded for further proceedings.

Respectfully submitted,



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