

NO. A09-1963

State of Minnesota  
In Supreme Court

Timothy B. Allen,

*Appellant,*

vs.

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

*Respondent.*

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

**Is Respondent Burnet Realty, LLC, d/b/a Coldwell Banker Burnet (“CB Burnet”), unlawfully engaged in the business of insurance in violation of Minnesota insurance statutes such that summary judgment in favor of CB Burnet was inappropriate on Appellant Timothy B. Allen’s claims under Minn. St. § 60K.47 (2010), Minn. St. § 325F.69, subd. 1 (2010), and the doctrine of unjust enrichment?**

**Court of Appeals: No.**

### Most Apposite Statutory Authority

Minn. St. §§ 60A.02, subds. 3(a) and 4 (2010)  
Minn. St. §§ 60A.06, subd 1, (13) and (15) (2010)  
Minn. St. § 60A.07, subd. 4 (2010)  
Minn. St. §§ 60K.31, subds. 1, 5, and 14 (2010)  
Minn. St. § 60K.47 (2010)  
Minn. St. § 72A.41, subd. 2 (2010)  
Minn. St. § 325F.69, subd. 1 (2010)  
Minn. St. § 471.981, subd. 1(2010)  
Minn. St. § 645.19 (2010)

### Most Apposite Case Authority

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

*Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362 (Minn. 1977)

*Anstine v. Lake Darling Ranch*, 305 Minn. 243, 233 N.W.2d 723 (1975), *overruled on other grds.*, *Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838 (Minn. 1979)

*State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (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 (the "Summary Judgment"), which was affirmed by the Court of Appeals. *See Allen v. Burnet Realty, LLC*, 784 N.W.2d 84 (Minn. App. 2010). On September 21, 2010, this Court granted the Petition for Review of Appellant Timothy B. Allen ("Allen").

The lawsuit is a putative class action that involves three counts: violation of Minn. St. § 60K.47 (2010), violation of Minn. St. § 325F.69, subd. 1 (2010), and unjust enrichment. All of the counts 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 by maintaining and selling its 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 Allen. The motion came on for hearing on March 12, 2009. The district 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 district court sent a letter to the Minnesota Department of Commerce soliciting its views. On June 22, 2009, the Minnesota Department of Commerce responded to the district 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 district court held a further hearing on CB Burnet's Motion for Summary Judgment. On August 27, 2009, the district 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 district 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 district court signed and entered on October 1, 2009, as the Summary Judgment in favor of CB Burnet.

On June 29, 2010, the Minnesota Court of Appeals affirmed the Summary Judgment. On July 23, 2010, Allen filed a Petition for Review, which this Court granted in an Order dated September 21, 2010.

## Statement of Facts

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

1. In 1998, NRT, Inc. (whose successor is 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 and Confidential Appendix (collectively referred to as "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 2,300-3,000 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 at 26:7-23 (Rehman Deposition).<sup>1</sup> CB Burnet's principal reason for engaging 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.

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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.

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 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 operation for 21 years. App. 39 at 83:20-84:4; 30 at 8:3-21.

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

6. At all relevant times, 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 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 more than 41,000 sales associates, and by 2006-2007 more than 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 third-party errors and omissions insurance for itself and its sales associates to cover claims that are under the \$1,000,000 retention amounts of the NRT High-Retention E&O Policies. App. 97 at 73:6-10. At all material times CB Burnet operated the 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 \$1,000,000 retention 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 written agreements that all of CB Burnet's independent contractor sales associates were required to sign annually (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. All provisions of the LA Program were 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 CB Burnet policy manual (App. 80-81).<sup>3</sup> App. 95-96 at 69:18-70:6.

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<sup>2</sup> The only reference to the LA Program in the ICAs 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, (Footnote continued on next page ...)

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. The first sentence 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).
- C. Covered Disputes. The second paragraph 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).<sup>4</sup>

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(... Footnote continued from previous page)

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 CB Burnet 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.

<sup>4</sup> This version of the LA Program (App. 60, 64) that was used in 2002 and 2003 was slightly reworded, with no substantive change, during 2004-2006:

In the event a dispute, arbitration proceeding or lawsuit is initiated against you, The Company, 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, then The Company will participate with an associate in the defense and/or settlement arising out of the Covered Disputes. Such disputes and lawsuits are referred to hereafter as “Covered Disputes.”

(Footnote continued on next page ...)

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 agreed to pay all costs of defense, settlements, and judgments except for a maximum of \$1,500 participation by the sales associate.<sup>5</sup>

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."

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."

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;

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(... Footnote continued from previous page)

App. 68, 72, 76.

<sup>5</sup> The Department of Commerce opined that the \$1,500 borne by the sales associate "is a deductible, yet another common feature of insurance contracts." App. 181.

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.
- 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>6</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."<sup>7</sup>

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

14. Contrary to its written representation in the LA Program Agreements, CB Burnet internally characterized the LA Program as errors and omissions insurance. Thomas L. Rehman, CB Burnet's administrator of the LA Program, described it in

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<sup>6</sup> From 2002 forward, no sales associate has availed himself or herself of this option. App. 93 at 50:7-10.

<sup>7</sup> While the Court of Appeals stated that the LA Program "provided other educational and support services for sales associates" *Allen*, 784 N.W.2d at 86, the LA Program Agreements do not provide for such services.

writing “at least as far as 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 that he understood to distinguish the LA Program from third-party errors and omissions insurance was that “[d]efense counsel is chosen by us on all versus, typically, insurance companies . . . .” (objection omitted). App. 91-92 at 41:18-42:7.

### **Profitability of the LA Program**

16. Gary Meier, CB Burnet’s CFO, testified that the reason for the fee increases to sales associates under the LA Program [from \$395 to \$450] was to increase “[c]ompany profitability.” App.123 at 77:9-22.

17. From 2002 to present, the LA Program has made a profit, i.e., the amount collected from sales associates (App. 45)<sup>8</sup> has exceeded the amount that has been paid in defense costs, settlements, and judgments. App. 46-47.<sup>9</sup> *See also Allen*, 784 N.W.2d at 86 (“In general, the LA Program generated more in fees than it paid out to settle disputes.”).<sup>10</sup>

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<sup>8</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 (CB Burnet’s Answers to Interrogatories).

<sup>9</sup> Because CB Burnet contends that it does not track whether a particular claim falls within the LA Program, App. 46, the amounts that CB Burnet reported that it paid for defense, settlement, and judgment costs necessarily overstate the expenses for claims that fall within the LA Program (i.e., Covered Disputes).

<sup>10</sup> In its discovery responses, CB Burnet counted the entire annual cost of its Sales Administration Department as a litigation expense attributable to claims made under the (Footnote continued on next page ...)

### **CB Burnet's Up-Streaming of the LA Program Fees to NRT**

18. All revenues that CB Burnet collected from all sources, including all payments from sales associates for participation in the LA Program, were either "up-streamed" to NRT, or NRT always had access to the funds. App. 118-119 at 38:8-39:16.

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

19. 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 by private interests through a leveraged buy-out that encumbered the entity and its subsidiaries, including CB Burnet, with over \$7,000,000,000 in debt. App. 139, 152-154, 158.

20. This highly leveraged condition of the Coldwell Banker family of companies, combined with the current recession, has caused them substantial financial strain, as reflected in the poor "Caa1" creditworthiness rating from Moody's Investor Services for both the Coldwell Banker companies and their outstanding debt. App. 140, 166, 167-168.

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(... Footnote continued from previous page)

LA Program. App. 46-47. 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. Accordingly, the inclusion of the entire expense of the Sales Administration Department in any profit calculation overstates the expenses of the LA Program.

### **No Reserves Are Maintained for Claims under the LA Program**

21. CB Burnet does not establish or maintain any reserves for claims with funds collected from sales associates to participate in the LA Program. App. 122 at 56:6-25.

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

22. CB Burnet is neither licensed as an insurance producer nor an as 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. Moreover, CB Burnet admitted that it is not authorized to transact insurance business in Minnesota and does not comply with the exacting regulations governing insurers. The central issue involving the Summary Judgment is thus one of law: does the LA Program constitute insurance that subjects CB Burnet to the panoply of statutory provisions (including actuarial reserves, annual financial statements, participation in the Minnesota Insurance Guaranty Association, etc.), which are designed to protect Minnesota residents from the hazardous operation of companies engaged in the business of insurance?

To resolve this issue requires an analysis of the apposite insurance statutes and applicable Minnesota case law. The plain meaning of those statutory provisions, particularly in light of more than a century of Minnesota case law prohibiting a wide

array of unauthorized insurance practices, leads to the conclusion that the LA Program is insurance that subjects CB Burnet to regulation by the Department of Commerce.

The Court of Appeals based its opinion as to why the LA Program is not insurance on two propositions: that there is no transfer and distribution of risk from Allen and all other sales associates to CB Burnet, which is the central concept of insurance; and that the LA Program is not the “principal object and purpose” of the underlying independent contractor relationship between CB Burnet and its sales associates. These positions are mistaken.

The Court of Appeals stated its conclusion that the LA Program does not involve a transfer and distribution of risk as follows:

Burnet, as a real estate broker, retains responsibility for the actions of the agent acting within the terms of the ICA; by requiring [sales associates’] adherence to its policies, Burnet exercises a degree of control over the risk of incurring losses. Thus we conclude the LA Program is not insurance or “indemnity for hire.” *See Anstine*, 305 Minn. at 251-52, 233 N.W.2d at 729.

*Allen*, 784 N.W.2d at 89. This conclusion contradicts undisputed facts, misapplies controlling legal principles, and misapprehends the effect of CB Burnet’s vicarious or derivative liability on the transfer and distribution of risk under the LA Program.

The fact that CB Burnet has financial “responsibility for the actions” of its sales associates in the form of derivative or vicarious liability by virtue of Minn. St. § 82.34, subd. 3 (2008) (renumbered as Minn. St. §82.63, subd. 3 (2010)), does not mean that there is an absence of transfer or distribution of risk under the LA Program. That Program, like any errors and omissions insurance policy, involves two separate and

independent obligations: defense and indemnification of third party claims. As to the defense obligation, the Court of Appeals did not consider that CB Burnet's statutory "responsibility for the actions" of its sales associates does not extend, absent the LA Program, to the payment of the legal fees incurred by sales associates to defend themselves if sued by a third party. Conversely, under the LA Program, as with any errors and omissions policy, the risk of incurring the expense to defend such third-party claims is transferred to CB Burnet. The risk and expense is spread among all of the sales associates. This defense obligation alone, apart from the indemnification obligation, not only satisfies the core concept of insurance to transfer and distribute risk, but also falls squarely within a line of insurance that the Legislature refers to as "legal expense insurance." *See* Minn. St. § 60A.06, subd. 1 (15) (2010) and Minn. St. § 60A.08, subd. 10 (2010). It is only in connection with risks involving the indemnification obligation under the LA Program that CB Burnet has "responsibility for the actions" of the sales associates in the form of vicarious or derivative liability. While CB Burnet may have such derivative liability, the presence of such liability does not alter the independent or separate liability of the sales associates to satisfy judgments rendered against them, absent the transfer of such risk to CB Burnet under the LA Program. The Court of Appeals failed to note that, based upon well-established precedent of this Court, a sales associate who voluntarily or involuntarily satisfies a third-party claim, by settlement or judgment, would have no recourse against CB Burnet for indemnity or reimbursement were it not for the LA Program. *See, e.g., Shair-A-Plane v. Harrison*, 291 Minn. 500, 503, 189 N.W.2d 25, 27 (1971). Conversely, under

the LA Program, as with any errors and omissions policy, that risk of direct or personal liability of the sales associate is transferred to CB Burnet and distributed among all sales associates.

The Court of Appeals' conclusion that CB Burnet exercised "control" over its sales associates' actions by virtue of a sales associates' duty to comply with CB Burnet's policies was a further misstep toward its erroneous holding that there was no transfer of risk under the LA Program. The Court of Appeals overlooked this Court's precedents that an independent contractor's compliance with its principal's policies does not constitute "control" over the contractor. *See, e.g., Sutherland v. Barton*, 570 N.W.2d 1, 2, 5-6 (Minn. 1997). The Court of Appeals and CB Burnet acknowledged that Allen and all other CB Burnet sales associates were independent contractors. *See* Respondent's Brief and Appendix at 5 ("Burnet sales associates are independent contractors, not employees."); *Allen*, 784 N.W.2d at 85 ("All of Burnet's sales associates are independent contractors.").

The Court of Appeals also overlooked that if its errant finding of "control" were correct, it would then follow under insurance law that the entire LA Program has been economically superfluous from its outset. This Court, in *dicta* in *Anstine v. Lake Darling Ranch*, 305 Minn. 243, 233 N.W.2d 723 (Minn. 1975), *overruled on other grds.*, *Farmington Plumbing & Heating Co., v. Fischer Sand and Aggregate. Inc.*, 281 N.W.2d 838 (Minn. 1979), made a distinction between "equitable indemnity" and "indemnity for hire," the latter constituting insurance that is regulated by statute, and the former not constituting insurance. Contractual indemnification in the nature of

equitable indemnity is not insurance, because it involves no transfer and distribution of risk; rather, it reflects the pre-existing indemnity obligations that are present outside the contract. For example, if the LA Program merely required the sales associates to indemnify CB Burnet for third-party claims arising out of the sales associates' actions (i.e., "Covered Disputes" as defined in the LA Program), this would not be insurance—the associates, absent the LA Program, would still have that obligation to CB Burnet. Likewise, if CB Burnet actually controlled the actions of its sales associates, then the LA Program would not be insurance, because CB Burnet would be required to provide "equitable indemnity" for the sales associates in connection with third-party claims. See *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 366 (Minn. 1977) (a person must indemnify another who acts "at the direction, in the interest of and in reliance upon" that person). The Court of Appeals failed to grasp that because of this well-established law, if in fact CB Burnet had such control over the actions of its sales associates, then CB Burnet would be requiring its associates to purchase CB Burnet's promise to indemnify what it already had a pre-existing obligation to equitably indemnify. The LA Program would be superfluous and void for lack of consideration.

The other basis for the Court of Appeals' holding that the LA Program was not insurance was its determination that the "principal object and purpose" of the relationship between CB Burnet and Allen and the other sales associates "is to sell real estate." *Allen*, 784 N.W.2d at 89. This unprecedented holding is contrary to Minnesota law. The Court of Appeals failed to consider that, in amending in 1980 the definition of "insurance" set forth in Minn. St. § 60A.02, subd. 3(a) (2010), the Legislature impliedly

rejected the “principal object and purpose” test by including within § 60A.02, subd. 3(a)’s definition of insurance all forms of employer-based plans that provide coverage for their agents. This legislative intent is further reflected in other sections regulating employer-based plans as insurance. The protection provided by such plans, like that provided by CB Burnet to its sales associates under the LA Program, is necessarily part of a pre-existing relationship between the employer and the covered agents, and thus not the “principal object and purpose” of that relationship. The Court of Appeals also failed to address the implication of *State v. Beardsley*, 88 Minn. 20, 26, 92 N.W. 472, 475 (1902), where this Court held that a lender’s implementation of a program of cancelling debts upon the death or disability of its borrowers constituted insurance. While this Court did not expressly address the “principal object and purpose” test in *Beardsley*, the fact that the debt cancellation program was necessarily ancillary to the making of a loan and the lender-borrower relationship did not alter this Court’s analysis in determining that the debt cancellation program was insurance.

The Court of Appeals’ decision should be reversed and the case remanded to the district court.

## **Argument**

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

#### **1. This Court Reviews the Summary Judgment *de novo*.**

In reviewing an appeal from an order granting summary judgment, this Court reapplies a “de novo standard of review.” *Kratzer v. Welsh Companies, LLC*, 771

N.W.2d 14, 18 (Minn. 2009). All evidence must be considered in a light most favorable to the nonmoving party. *Id.*

**2. This Court Should Accord no Deference to the Opinion of the Minnesota Department of Commerce.**

The district court solicited the views of the Minnesota Department of Commerce as to whether the LA Program was insurance. App. 169-170. The Department of Commerce concluded that it was not. App.171-172. The Court of Appeals properly held that “this matter was not before the commissioner for formal decision and therefore his opinion is informational, but not entitled to deference.” *Allen*, 784 N.W.2d at 89, n.1; *see also 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 an HMO from making a premium adjustment based on non-HMO Members’ costs).

**B. The Court of Appeals Erred in Affirming the Summary Judgment as to Allen’s Claim under Minn. St. § 60K.47 (2010).**

**1. The Minnesota Legislature Has Established the Elements and Consequences of Unlawfully Engaging in the Business of Insurance in Minn. St. § 60K.47 (2010).**

Minn. St. § 60K.47 (2010) 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.195 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 . . . .

Conduct prohibited under § 60K.47 involves three elements: (i) a sale (ii) of 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. Each of these elements is further defined by other statutory sections.

**a. The Minnesota Legislature Has Established the Meaning of a “Sale.”**

Minn. St. § 60K.31, subd. 14 (2010) 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 § 60K.31, subd. 14, that section instructs that recourse be made to Minn. St. § 60A.02, subd. 4 (2010),<sup>11</sup> which states:

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<sup>11</sup> Minn. St. § 60K.31, subd. 1 (2010) 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 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.)

“Company” or “insurance company”<sup>\*</sup> 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.

**b. The Minnesota Legislature Has Established the Meaning of Insurance.”**

The second element of § 60K.47, that there be an “insurance policy or certificate, or any other contract providing benefit,” is further elucidated by Minn. St. § 60K.31, subd. 5 (2010), which defines “Insurance” as “any of the lines of authority in section 60A.06.” In turn, Minn. St. § 60A.06, subd. 1 (2010) includes as two of the fifteen lines of authority the following:

(13) To insure against liability for loss or damage to the property or person of another caused by the insured . . . ;<sup>12</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>13</sup>

Whether a particular program falls within one of the “lines of authority” enumerated in § 60A.06 necessarily requires an analysis of what constitutes “insurance” itself as defined in Minn. St. 60A.02, subd. 3(a) (2010):

“Insurance” is an agreement whereby one party, for a consideration undertakes to indemnify another to a specified

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<sup>12</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>13</sup> This line of insurance is commonly referred to as “legal expense insurance.” See Minn. St. § 60A.08, subd. 10 (2010).

amount against loss or damage from specified causes, or to 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.<sup>14</sup>

Additionally, the term “company” that is used directly in § 60K.47 (see below) and indirectly in the definition of “sale” (see above) requires reference to the definition of that term in § 60A.02, subd. 4. Because the definition of “company” in § 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” can only be fully understood by reference to the definition of “insurance” in § 60A.02, subd. 3(a) (2010).

**c. The Minnesota Legislature Has Established the Meaning of Transacting the Business of Insurance.**

The third element of § 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 § 60K.47 is undefined, reference should be made to the definition of that term in § 60A.02, subd. 4. As to whether a company, as defined in § 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 (2010) states:

No insurance company or association, or fraternal benefit society, not specifically exempted therefrom by law, shall

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<sup>14</sup> While the Court of Appeals agreed that it had to apply the definition of insurance contained in § 60A.02, subd. 3(a) to determine whether the LA Program constituted insurance, *see Allen*, 784 N.W.2d at 87-8, the Court of Appeals inappropriately rejected its plain meaning by holding that § 60A.02, subd. 3(a) was “unworkably broad.” *Allen*, 784 N.W.2d at 88.

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” as used in § 60K.47 is further defined in Minn. St. § 72A.41, subd. 2 (2010) 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 and arising out of it.

**2. The LA Program Is Insurance Under § 60K.47**

**a. The Purpose of § 60K.47 is to Protect Minnesota Consumers.**

In applying § 60K.47, this Court has held in connection with its predecessor enactment (§ 60A.17, subd. 12)<sup>15</sup> that:

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 against any insolvent Guaranty Association member.

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<sup>15</sup> Minn. St. § 60A.17, subd. 12 (repealed) was identically worded except for certain non-substantive differences in terminology. For example, the current statute uses the term “producer” where the predecessor statute used the term “agent.”

*Farmers & Merchants State Bank of Pierz v. Bosshart*, 400 N.W.2d 739, 742 (Minn. 1987). To enforce this salutary policy, § 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 § 60K.47 and its predecessor, Allen presented uncontested evidence to the district court that CB Burnet maintains no actuarial reserves for claims under the LA Program, while “up-streaming” all of its revenues to a parent (NRT) that is now in extremely weak financial condition. *See* Facts 18-21, *supra*. CB Burnet is requiring the thousands of sales associates who have paid into the LA Program to bear the risk of CB Burnet’s insolvency, with no protection from the Minnesota Insurance Guaranty fund.

**b. The LA Program is Insurance under Minn. St. § 60A.02, subd. 3(a) (2010).**

Because neither the Court of Appeals nor the parties suggested that § 60K.47 was ambiguous, the language of that statute should be applied as written. *See, e.g., Brua v. The Minnesota Joint Underwriting Assoc.*, 778 N.W.2d 294, 300 (Minn. 2010) (“If the meaning of a statute is unambiguous, we interpret the statute’s text according to its plain language.”).

Because it was undisputed that CB Burnet sold the LA Program to all of its sales associates and was not authorized to engage in the business of insurance in Minnesota, the only element of Section 60K.47 in dispute, and the subject of the Court of Appeals’ opinion, is whether the LA Program is insurance. Section 60A.02, subd. 3(a) provides

two alternate definitions of insurance: one involving indemnification and the other “some act of value.” Indemnification insurance has four elements: (i) an agreement whereby one party for a consideration (ii) agrees to indemnify another (iii) to a specified amount (iv) against loss or damage from specified causes. *See* § 60A.02, subd. 3(a). The “act of value” alternate definition merely requires that one party, for a consideration, undertake to do some act of value to the assured in case of such loss or damage. In applying the definition of insurance, this Court has observed that “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.” *Beardsley*, 88 Minn. at 24, 92 N.W. at 474.

The LA Program plainly satisfies either of the Legislature’s alternate definitions of “insurance.” As discussed above, the Legislature’s entire statutory scheme is designed to prevent the very situation that is present here: a financially weak, unlicensed company taking premiums from thousands of Minnesota residents in exchange for its promises of future defense and indemnification. The Court of Appeals erred in concluding otherwise.

**(1) The LA Program Satisfies the First Definition of Insurance in Minn. St. § 60A.02, subd. 3(a).**

As to whether the LA Program meets the definition of indemnification insurance, the core issue concerns the element of “indemnity.”

**(a) The Principal Concept of Insurance is the Transfer and Distribution of Risk.**

This Court has held that the “indemnity” element is satisfied where an agreement “essentially shifts the risk of loss from the insured to the insurer whereby the insurer assumes the risk of loss and undertakes to indemnify the insured against such loss.” *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 244 (Minn. 2005). The concept of transfer or shifting of risk, the core ingredient of insurance, is also the basis for the distinction by this Court in *Anstine* between “equitable indemnity”, which is not insurance, and “indemnity for hire,” which is insurance:

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.<sup>16</sup>

305 Minn. at 251-52, 233 N.W.2d at 729. This 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 (1976). Examples of equitable indemnity are “[w]here the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged” or “[w]here the one seeking

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<sup>16</sup> In an earlier part of the opinion, this Court re-phrased the same distinction:

It seems clear that a contract which requires the indemnitor to indemnify the indemnitee for losses with which the indemnitor had no connection and over which it had no control would be a contract of insurance.

*Anstine*, 305 Minn. at 251, 233 N.W.2d at 728.

indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged.” *Tolbert*, 255 N.W.2d at 366 (Minn. 1977) (cit. omitted). If the indemnitor exercises “control” over the indemnitee, or has engaged in “conduct” that “bears” a “relationship to the loss,” as those terms are used in *Anstine*, then the indemnitor would be subject to a claim of “equitable indemnity,” because the indemnitee “incurred liability at the direction, in the interest of, and in reliance upon” the indemnitor. *Tolbert, id.* Thus, an indemnification agreement that in effect merely memorializes the indemnitor’s “equitable indemnity” of the indemnitee is not insurance, because the agreement transfers and distributes no risk to the indemnitor that it did not already possess.

The key question, therefore, for purposes of the “indemnity” element is whether the LA Program actually shifts or transfers from the sales associates a risk that equity would not already require CB Burnet to indemnify. In answering this question, it is initially important to note that the LA Program, like any liability policy, has two separate obligations: defense and indemnification of third party claims. *See generally, Cargill, Inc. v. ACE American Ins. Co.*, 784 N.W.2d 341, 349 (Minn. 2010) (noting the distinction between the scope of the duty to defend and the duty to indemnify). Additionally, the LA Program covers third-party claims that relate to the conduct of the sales associates (and not CB Burnet’s conduct) under the ICAs (i.e. “Covered Disputes”). The best way to determine whether there is any transfer and distribution of risk in connection with either the defense or indemnification obligation is to set forth the

legal rights and responsibilities of the parties (i.e., CB Burnet and the sales associate) in the absence of the LA Program and under the terms of the LA Program.<sup>17</sup>

**(b) The LA Program Transfers and Distributes Risk From Thousands of Sales Associates to CB Burnet in Connection with CB Burnet's Duty to Defend Covered Disputes.**

Turning to CB Burnet's defense obligations under the LA Program, in the absence of the LA Program, a sales associate must bear the costs of legal defense if sued and has no right to seek reimbursement for that cost from CB Burnet. *See, Shair-A-Plane*, 291 Minn. at 503, 189 N.W.2d at 27 ("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. Rather, the rule is that such a duty does not exist under those circumstances."). Conversely, under the LA Program, the sales associates transfer, and CB Burnet assumes, the risk of incurring the expenses of defending the sales associates when they are faced with third-party claims arising out of their conduct under the ICA (i.e., "Covered Disputes"). Under the LA Program, CB Burnet, in consideration of fees (i.e., premiums) from its sales associates assumes an obligation to defend the sales associates if they are sued in Covered Disputes, which completely reverses the obligations of the parties absent the LA Program. This defense

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<sup>17</sup> Interestingly, the Department of Commerce concluded that the LA Program did satisfy this core element of insurance: "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 distribute risk. Such risk transfer and risk distribution are the hallmarks of insurance." App. 181.

obligation thus creates a substantial transfer and distribution of risk under the LA Program.

**(c) The LA Program Transfers and Distributes Risk From Thousands of Sales Associates to CB Burnet in Connection with CB Burnet's Duty to Indemnify Covered Disputes.**

Another material transfer and distribution of risk takes place in connection with CB Burnet's indemnification obligation under the LA Program. As with the defense obligation, absent the LA Program, if a sales associate is sued, he or she is independently responsible to satisfy any judgment rendered against him or her for his or her acts and, as noted above, has no right to seek contribution from CB Burnet toward the judgment. *See Shair-A-Plane, id.* In other words, without the LA Program a sales associate bears the risk that a judgment creditor might choose to garnish the associate's income or levy on the associate's assets to satisfy any judgment on which the associate is jointly liable with CB Burnet. Under the LA Program that entire risk is transferred to CB Burnet.

The Court of Appeals thus plainly erred when it reasoned that, because Minn. St. § 82.34, subd. 3 (2008) (renumbered as Minn. St. § 82.63, subd. 3 (2010)) imposes liability on CB Burnet for the acts of its sales associates, it does not effect any transfer of a new risk. *Allen*, 784 N.W.2d at 89. The Court of Appeals overlooked that, absent the LA Program, the sales associate would continue to face the risk of a judgment being enforced against the associate's own assets, regardless of the existence of CB Burnet's statutory vicarious liability, with no right of contribution or reimbursement from CB

Burnet. Under the LA Program that risk is transferred to CB Burnet.<sup>18</sup> The Court of Appeals got it backwards: the LA Program's indemnification obligation would be a classic case of "equitable indemnity" and not "indemnity for hire" only if it had instead provided that the sales associate must defend and indemnify CB Burnet for any third-party claims arising out of the sales associate's conduct (i.e., Covered Disputes), because a sales associate entering such a contract would have a pre-existing obligation to indemnify CB Burnet for its derivative liability. *See, Tolbert*, 255 N.W.2d at 366.<sup>19</sup>

Moreover, a sister state court has rejected the notion that an indemnitor, who had pre-existing vicarious liability for the acts of its indemnitees, did not assume any risk when it agreed to defend and indemnify the indemnitees against third-party claims. *See Grand Rent A Car Corp. v. 20<sup>th</sup> Century Ins. Co.*, 25 Cal. App.4<sup>th</sup> 1242, 1252, n.6, 31 Cal. Rptr.2d 88 (Cal. App. 1994) (rev. denied). In *Grand*, the defendant rental car company, like CB Burnet here, contended that its program to indemnify the renters of its vehicles for any loss caused by the renters did not transfer and distribute any risk and

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<sup>18</sup> The agreement in *Anstine* was the converse of the instant case: the subcontractor had indemnified the general contractor for the conduct arising out of the subcontractor's acts. *Anstine* would only be analogous to the instant case if the general contractor had indemnified the subcontractor for third-party claims arising out of the subcontractor's acts.

<sup>19</sup> That very indemnity obligation of a sales associate to CB Burnet is vitiated by the LA Program, in which CB Burnet waives its right to contribution and indemnity against the sales associate. This provision of the LA Program necessarily follows from CB Burnet's obligation to indemnify the sales associates for Covered Disputes, lest that obligation be rendered illusory. This is the same principle behind the well-accepted doctrine that "an insurer cannot subrogate against its own insured." *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).

thus was not insurance, because under Cal. Vehicle Code § 17150 (2010) (which is substantially similar to Minnesota's counterpart statute) the owner of the vehicle was vicariously liable for the torts of the operator (up to certain monetary limits).<sup>20</sup> The Court rejected this position:

It [defendant] argues that since it was already liable as an owner of the vehicle for those minimum limits, it did not distribute any risk among its renters . . . We are not persuaded by this contention. Although the owner of the vehicle is secondarily liable up to the minimum financial responsibility limits for injuries to third persons arising out of the operation of the vehicle, the driver is primarily liable and must indemnify the owner for any liability the owner must assume . . . Under the terms of the car rental agreements, Grand shifted the risk of primary loss from renters to itself and distributed that risk among all renters of its vehicles by means of the car rental fees.

*Id.* (Emphasis supplied). So too here: Although Minnesota statute makes real estate brokers secondarily liable for the acts of their sales associates, it also makes the

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<sup>20</sup> Cal. Vehicle Code § 17150 (2010) states:

Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.

Minn. St. § 169.09, subd. 5a (2010) states:

Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.

associates primarily liable and requires them to indemnify the broker for any liability it must assume. Under the terms of the LA Program, CB Burnet shifted the risk of primary loss from the sales associates to itself, and distributed that risk among all the associates by means of the LA Program's fees.

**(2) The LA Program Is Insurance under the Alternate Definition of Insurance in Minn. St. § 60A.02, subd. 3(a) Involving an “Act of Value to the Assured in Case of Such Loss or Damage.”**

The LA Program also satisfies the Legislature's second alternate definition of insurance—the “act of value” definition. CB Burnet's payment of the sales associates' legal defense costs for Covered Disputes under the LA Program in connection with claims asserted against them has long been recognized as “some act of value to the assured in case of such loss or damage,” within the meaning of Minn. St. § 60A.02, subd. 3(a). *See, e. g., State v. Bean*, 193 Minn. 113, 114, 258 N.W.18 (1934) (agreement that provided, among other things, for defense of insured in connection with civil or criminal litigation arising from use of an automobile constituted “several acts ‘of value to the insured in case of such loss or damage’” and thus was insurance).

**(3) The Court of Appeals Erred in Holding that CB Burnet has “Control” Over its Sales Associates in Connection with Covered Disputes under the LA Program.**

The Court of Appeals did not specifically apply the above statutory definitions of “insurance” except in a roundabout way by referring to this Court's discussion of “indemnity for hire” (i.e., commercial insurance) in *Anstine*. The holding of the Court of Appeals concerning the transfer-of-risk issue centered on its conclusion that CB

Burnet exercised “control” over the activities of the sales associates sufficient to deprive the LA Program of the status of “indemnity for hire:”

Burnet, as a real estate broker, retains responsibility for the actions of an agent acting within the terms of the ICA; by requiring adherence to its policies, Burnet exercises a degree of control over the risk of incurring losses. Thus, we conclude the LA Program is not insurance or “indemnity for hire.” *See Anstine*, 205 Minn. at 251-52, 233 N.W.2d at 729.

*Allen*, 784 N.W.2d at 89. The Court of Appeals based this “control” conclusion principally on a statute governing real estate brokers, not on any undisputed facts.<sup>21</sup>

There are two flaws with this reasoning. First, it is inconsistent with established law: an independent contractor who merely adheres to the policies of its principal is not subject to the principal’s control for liability purposes. *See, e.g., Sutherland Corp.*, 570 N.W.2d at 2, 5-6 (requirement that an independent contractor comply with its

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<sup>21</sup> The Court of Appeals’ source for its statement about a broker’s “responsibility for the actions of an agent” is Minn. St. §82.34, subd. 3 (2008) (renumbered at Minn. St. § 82.63, subd. 3 (2010)):

Each 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. Each officer of a corporation or partner in a partnership licensed as a broker shall have the same responsibility under this chapter as a corporate or partnership broker with regard to the acts of the salespeople and closing agents acting on behalf of the corporation or partnership.

As noted above, as a factual matter the Court of Appeals and CB Burnet conceded that all the sales associates are “independent contractors.” *See, Allen*, 784 N.W.2d at 85 (“All of Burnet’s sales associates are independent contractors . . .”).

principal's rules does not expose the principal to a loss arising out of the independent contractor's conduct); *see also Willner v. Wallinder Sash & Door Co.*, 224 Minn. 361, 369, 28 N.W.2d 682, 686 (1947) ("the real test 'as to whether a person is an independent contractor or employee is whether the asserted employer, under the 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).<sup>22</sup> Moreover, the record is devoid of any evidence showing that CB Burnet exercised any actual, day-to-day control over its sales associates' conduct of their business.

Second, even if the record before the district court hypothetically did establish that CB Burnet actually exercised a degree of control over the sales associates' conduct beyond requiring them to adhere to CB Burnet's policies, this fact would render the LA Program void for lack of consideration—because then, even absent the LA Program, the sales associates would have a right of "equitable indemnity" against CB Burnet based upon incurring "liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged." *Tolbert*, 255 N.W.2d at 366 (cit. omitted). *See*

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<sup>22</sup> While it is correct that CB Burnet is vicariously liable for the acts of its sales associates by virtue of Minn. St. § 82.34, subd. 3 (2008) (renumbered as Minn. St. § 82.63, subd. 3 (2010)) and the licensing scheme whereby a sales associate only can transact business through a real estate broker under Minn. St. § 82.34, subd. 4 (2008) (renumbered as Minn. St. § 82.63, subd. 4 (2010)), that statutory liability is required for the very reason that sales associates are, as the Court of Appeals held, independent contractors over whom by definition the broker does not exercise the type of detailed control necessary to subject the broker to vicarious liability under the common law.

also, e.g., *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.”); *Anstine*, 305 Minn. at 252, n.9, 233 N.W.2d at 729, n.9 (raising potential issue of want of consideration). Accordingly, the Court of Appeals misapplied the *dicta* in *Anstine*.

**c. The LA Program Also Meets the Definition of Insurance in Minn. St. §60A.06 (2010).**

As noted above, Minn. St. § 60K.31, subd. 5 (2010) contains the definition of “insurance” used in §60K.47 as “any lines of authority in section 60A.06.” The defense obligation contained in the LA Program falls squarely within § 60A.06, subd. 1 (15)—legal expense insurance. *See also Physicians’ Defense Co. v. O’Brien*, 100 Minn. 490, 495-96, 111 N.W. 396, 397-98 (1907) (program that provided for defense and not indemnification of physicians for malpractice actions was insurance). Similarly, the indemnification obligation falls squarely within Minn. St. § 60A.06, subd. 1 (13)—liability insurance.

The Court of Appeals erred in holding that the LA Program was not insurance under these statutory definitions.

**3. The Court of Appeals Erred in Adopting the Principal Object and Purpose Test.**

Prior to *Allen*, neither this Court nor the Court of Appeals had adopted the so-called “principal object and purpose” test to determine whether a particular agreement

satisfies the Legislature’s statutory definition of insurance. The Court of Appeals erred in adopting this test.

**a. The Court of Appeals’ Authority for the Adoption of the Principal Object and Purpose Test is Inapposite.**

As an initial matter, the only case authority that the Court of Appeals cited for the test actually undercuts the Court of Appeals’ holding in several ways. *See Allen*, 784 N.W.2d at 88, citing *Jordan v. Group Health Assoc.*, 107 F.2d 239 (D.C. Cir. 1939). *Jordan* involved a non-profit health cooperative, which the D.C. Circuit Court concluded was not insurance. That holding is flatly inconsistent with Minnesota law, which regulates such plans as insurance. *See* Minn. St. § 62C.01 (2010) (creating non-profit health service plan corporations) and Minn. St. § 62C.08, subd. 1 (2010) (non-profit health service plan corporation must obtain a certificate of authority from the Commissioner of the Department of Commerce to operate). Apart from that fact, in explaining the rationale for the “principal object and purpose” test, *Jordan* criticized this Court’s holding in *Physicians Defense Co.* and relied, in part, upon the dissent in that case. *See, Jordan*, 107 F.2d at 249, n. 38, 250, n. 40. Finally, *Jordan* distinguishes other cases when plans were held to constitute insurance, because such programs either were issued by for-profit companies, or involved “assumption of liability, legally enforceable, by the insurer to the insured” and “definite and binding obligations [on the part of the insurer] as to which, in their absence, there is a danger of default” justifying the need for regulatory oversight in the form of requiring reserves and monitoring the financial condition of the plan sponsors. *Jordan*, 107 F.2d at 250. Both of those

distinguishing criteria are present here: the LA Program is operated on a for-profit basis, and it contains specific obligations on the part of CB Burnet to defend and indemnify risks, the default of which would expose the sales associates to substantial injury. Accordingly, the facts and analysis in *Jordan* are inapposite to the instant case.

**b. The Minnesota Legislature has Impliedly Rejected the Principal Object and Purpose Test.**

Apart from the Court of Appeals' misplaced reliance on *Jordan*, the "principal object and purpose" test has been impliedly rejected by the Legislature. In 1980, the Legislature enacted Minn. St § 471.981 (2010), subdivision 1 of which provides as follows:

A political subdivision may by ordinance or resolution of its governing body self insure against liability of the political subdivision and its officers, employees, agents and servants under chapter 466, sections 340A.801 and 340A.802 and other law, for damages resulting from its torts including torts for which the political subdivision has immunity and those of its officers, employees, agents and servants. A political subdivision may by ordinance or resolution of its governing body extend the coverage of its self insurance to afford protection in excess of any limitations on liability established by law but unless expressly provided in the ordinance or resolution extending the coverage, the statutory limitations on liability shall not be deemed to have been waived. A political subdivision may by ordinance or resolution of its governing body provide for self insurance against risk of damage to any of its property, for any liability exposure, or against any other risk or hazard, not including health, life, accident or disability of its employees, and may, through its self insurance program, provide coverage for insuring any of its officers or employees

against any risk or hazard, not including health, life, accident or disability of its employees.<sup>23</sup>

(Emphasis supplied). The first sentence of this subdivision provides for liability coverage for a political subdivision's agents, and the last sentence provides for certain casualty coverage such as for burglary or theft of an employee's property at work.

At the same time that the Legislature enacted § 471.981, it amended the definitions of "insurance" in Minn. St. § 60A.02, subd. 3(a), and "insurance company" in Minn. St. § 60A.02, subd. 4 (2010), to exclude from those terms only a political subdivision's provision of self-insurance under § 471.981 and not other providers of self-insurance. Under the applicable principle of statutory construction set forth in Minn. St. § 645.19 (2010),<sup>24</sup> other forms of employer-based plans (i.e., self-insurance programs) that provide liability coverage for the employers' agents' torts or casualty coverage for their agents are necessarily insurance, because they are not excepted from the definition of "insurance." This legislative intent is further manifested in other statutory sections concerning employer-based plans that are regulated as insurance companies. *See, e.g.*, Minn. St. § 60F.01 (2010) (joint self-insurance employer liability

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<sup>23</sup> The apparent reason for the exclusion of health, life, accident or disability coverage from this section is that there is a separate statutory section that authorizes political subdivisions to self-insure health and disability coverage, *see* Minn. St. § 471.617 (2010) (self-insurance of employee health benefits), and another section that authorizes political subdivisions to provide life, health and accident coverage "under a policy or policies or contract or contracts of group insurance or benefits." Minn. St. § 471.61 (2010).

<sup>24</sup> "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); *see also, In the Matter of the Welfare of the Child of S.L.J.*, 782 N.W.2d 549, 557 (Minn. 2010) (applying Minn. St. § 645.19).

and casualty plans) and Minn. St. § 60F.04 (2010) (applicability of particular regulatory sections that govern all types of insurance); Minn. St. § 62H.01 (2010) (joint self-insurance health plans); and § 62H.04 (2010) (applicability of particular regulatory sections that govern all types of insurance).

By their very nature, all of the above self-insurance programs are incidental to, and not the “principal object and purpose” of, the underlying relationship between employer and employee or principal and agent. Accordingly, the very statute that defines insurance as well as other statutory sections reflect that the Legislature has impliedly rejected the “principal object and purpose” test. As applied to the LA Program, merely because a transfer and distribution of risk is part of an underlying broker-independent contractor relationship is immaterial to whether the LA Program is insurance for purposes of regulation under the applicable Minnesota statutes.

The Legislature acted rationally in crafting a broad statutory scheme that requires the licensing and regulation of plans, such as the LA Program, whereby a private company seeks to profit by accepting a transfer of risk from a pool of persons with whom it has pre-existing business relationships. The principal rationale for regulating insurance in general—protecting the pool of indemnitees from the risk of an insolvent indemnitor—equally applies in such situations. The Legislature, not the judiciary, is far better situated to investigate and decide whether creating an exception to the regulation of the issuers and sellers of insurance based upon a “principal object and purpose” test is appropriate. Moreover, other courts have envisioned the untoward consequence of the judicial adoption of a wholesale exception to insurance regulation in

the form of the “principal object and purpose” test. *See, e.g., Wayne v. Staples*, 135 Cal. App.4<sup>th</sup> 466, 477, 37 Cal. Rptr. 544, 552 (Cal. App. 2006) (review denied) (noting an untoward consequence of adopting the principal object and purpose test: “[it] 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 sales of insurance was incidental to the purchase of a car or house.”).

**c. This Court has Impliedly Rejected the Principal Object and Purpose Test.**

The Court of Appeals further failed to consider this Court’s opinions that have addressed, albeit indirectly, the principal object and purpose test. Specifically, in *Beardsley*, 88 Minn. at 26, 92 N.W. at 475, this Court held that a program issued by a lender that provided for cancellation of debt upon the death or disability of the borrower was insurance, even though it was necessarily ancillary and incidental to the underlying relationship of lender and borrower. More recently, in *Anstine*, 305 Minn. at 252, n.8, 233 N.W.2d at 729, n.8, this Court cited with approval for the distinction between a warranty and insurance two opinions in which the courts rejected the principal object and purpose test.<sup>25</sup> *See Ollendorff Watch Co. v. Pink*, 279 N.Y.32, 37-8, 17 N.E.2d 676,

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<sup>25</sup> The Court of Appeals attempted to characterize the LA Program as a “warranty” for a “defective product” in the form of “a dispute in the sales process, between the parties to the ICA.” *See Allen*, 784 N.W.2d at 89. That analogy is inapt. A warranty is given to the end-user of a good to guarantee that the item is free from defects. The end-user of the services provided by a sales associate is the buyer or seller of property, neither of whom is a party to the LA Program. The alleged warrantor (CB Burnet) does (Footnote continued on next page ...)

677-78 (1938);<sup>26</sup> *State of Ohio ex rel. Duffy v. Western Auto Supply Co.*, 134 Ohio 163, 170-71, 16 N.E.2d 256, 259 (1938).<sup>27</sup>

For these reasons, the Court of Appeals erred in adopting the principal object and purpose test.

**C. The Court of Appeals Erred in Affirming the Summary Judgment on Allen's Claim under Minn. St. § 325F.69, subd. 1 (2010).**

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(... Footnote continued from previous page)

not provide any "product" to the alleged warrantee (the sales associate) that is the subject of the LA Program.

<sup>26</sup> In holding that a seller of watches, who in connection with a sale agreed to replace a watch if it was stolen, was engaged in the business of insurance, *Ollendorff* relied on and quoted the following opinion of Massachusetts' highest court:

Whether this clause in the contracts of defendant is ancillary to its chief business or is mainly for advertising ends is not relevant in view of the absolute prohibition in G.L. c. 175 § 3, against the making of contracts for insurance except by companies and in the manner authorized by law. This prohibition is sweeping. It is not subject to exceptions.

*Id.* (quoting *Attorney General ex rel. Monk v. C.E. Osgood Co.*, 249 Mass. 473, 144 N.E. 371, 372 (1924)).

<sup>27</sup> In holding that a seller of automobile tires, whose warranty extended to conditions other than defects in material and workmanship, was insurance, *Duffy* rejected the argument that it was not insurance because it was incidental to the sale of the tire:

If the contracts of indemnity involved here are not violative of the insurance laws, then every company may, in consideration of the purchase price therefore, furnish its product and also undertake to insure it against all hazards for a specified period. Even if such contract is an incident in the sale of merchandise and its use therein does not constitute the business of insurance, it in effect is a contract "substantially amounting to insurance" within the restrictive provisions of Section 665, General Code.

*Id.*

Because the Court of Appeals erred in holding that the LA Program was not insurance for purposes of § 60K.47, its use of the same analysis with respect to the § 325F.69, subd. 1, claim was equally flawed. Allen hereby incorporates his preceding arguments 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 the LA Program Agreements that the LA Program was “not an Errors and Omissions (E&O) policy” was false and thus violated § 325F.69, subd. 1 (2010).<sup>28</sup>

**D. The Court of Appeals Erred in Affirming the Summary Judgment on Allen’s Unjust Enrichment Claim.**

Because the Court of Appeals erred in holding that the LA Program was not insurance, its use of the same analysis for the unjust enrichment claim was equally unavailing. Because the basis for this claim is that CB Burnet unjustly enriched itself by operating an unlawful insurance program that generated substantial profits, Allen hereby incorporates his preceding arguments that the LA Program was an unlawful insurance program.

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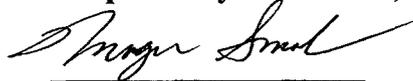
<sup>28</sup> Minn. St. § 325F.69, subd. 1 (2010) states:

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided in section 325F.70.

## Conclusion

The fact that the LA Program has been in effect for a period of time and has not been challenged prior to the instant suit is of no legal consequence. Instead of complying with the insurance laws' manifold requirements, including setting reserves that are designed to protect the interests of those for whom CB Burnet has assumed the risk of providing defense and indemnification against third-party claims, CB Burnet has flaunted those laws, enriched itself, and placed its sales associates in potential peril. This Court should reverse the opinion of the Court of Appeals, reverse the Summary Judgment, and remand the case to the district court for further proceedings.

**Respectfully submitted,**



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