

No. A09-1963

STATE OF MINNESOTA  
IN SUPREME COURT

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Timothy B. Allen,

*Appellant,*

vs.

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

*Respondent.*

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RESPONDENT BURNET REALTY LLC'S BRIEF AND APPENDIX

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## STATEMENT OF THE CASE

This is an appeal from a judgment of the Hennepin County District Court, entered pursuant to an Order of Judge Stephen C. Aldrich granting Defendant-Respondent Burnet Realty LLC's ("Burnet") motion for summary judgment on all of the claims in the complaint filed by Plaintiff-Appellant Timothy B. Allen ("Allen"). Burnet is a licensed real estate broker, and Allen was one of its sales associates from 1999 until early 2007. During those years Allen, like virtually all other Burnet sales associates, participated in a Legal Administration Program ("the LA Program" or "Program") provided by Burnet. In his complaint, Allen asserted three claims on behalf of a purported class of all current and former Burnet sales associates who participated in the Program, all premised on his contention that the LA Program amounts to "insurance" under Minnesota law: (1) that because Burnet is not authorized to sell insurance, the Program violates Minn. Stat. § 60K.47; (2) that Burnet violated the Consumer Fraud Act ("CFA"), Minn. Stat. § 325F.69, by misrepresenting to its sales associates that the Program was not insurance; and (3) that Burnet would be unjustly enriched if it were allowed to retain the proceeds of the sale of insurance without legal authority.

After discovery, Burnet moved for summary judgment on all of Allen's claims. Before ruling on the motion, the district court solicited the views of the Minnesota Commissioner of Commerce, who administers the state's insurance laws and regulations, about the central question of whether the LA Program is insurance under Minnesota law. A.Apx.169-70. At the court's direction, the parties filed letter briefs with the Commissioner setting forth their respective positions on the issue. On June 22, 2009, the

Commissioner responded to the court's inquiry, concluding that the LA Program does not involve insurance requiring a license under Minnesota law. A.Apx.171-82.

The district court then held additional argument on Burnet's motion for summary judgment, and on August 27, 2009, it announced its intention to grant the motion and directed Burnet's attorney to prepare an order. Allen's attorney objected to Burnet's proposed order, arguing that the court should limit its decision to the question of the LA Program's status as insurance and should not rule on the other grounds for judgment that Burnet had asserted in its motion. R.Apx.1-2.<sup>1</sup> The district court agreed and directed that Burnet's counsel revise the proposed order accordingly. Id.3. Ultimately, the court's September 30, 2009 Order directing the entry of judgment on all counts was limited to the insurance issue, as Allen had requested. ADD. Dist. Ct. Order. Judgment was entered on October 1, 2009.

Allen timely appealed the judgment to the Minnesota Court of Appeals, which affirmed in a published opinion that again addressed only the insurance issue. See Allen v. Burnet Realty LLC, 784 N.W.2d 84 (Minn. Ct. App. 2010). Allen timely sought further review from this Court, which granted that review in an Order dated September 21, 2010.

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<sup>1</sup> Those additional grounds included that the lack of any causal connection between Burnet's alleged misrepresentation about the nature of the LA Program and any action by Allen; the lack of any damages to Allen as a result of the alleged misrepresentation; the lack of any benefit to the public from Allen's CFA claim; and the bar to a claim for unjust enrichment where, as here, the parties' relationship is governed by a valid contract. The district court never ruled on the alternate grounds, and they were not at issue in the Minnesota Court of Appeals. If this Court were to reverse the judgment here, Burnet would be entitled to renew its motions on those grounds in the district court on remand.

## STATEMENT OF THE ISSUE

Burnet and its sales associates are jointly engaged in the business of brokering the purchase and sale of residential real estate. Under both statute and common law, Burnet is jointly and severally liable for its associates' acts and omissions in connection with any transactions in which they engage. For more than 20 years, Burnet has required its sales associates to participate in the LA Program to allocate in advance the costs and risks arising from their joint business activities. The issue here is whether by providing the LA Program Burnet is acting as an "insurance company" and is engaged in the unauthorized sale of "insurance" in violation of Minnesota Statute § 60K.47.

The district court held that the Program is not "insurance" within the meaning of section 60K.47, and that Burnet therefore was not liable for selling "insurance" without authorization or for failing to describe the Program as "insurance" to its sales associates.

The Court of Appeals affirmed.

### Most apposite authorities:

Anstine v. Lake Darling Ranch, 233 N.W.2d 723 (Minn. 1975), overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer, 281 N.W.2d 838 (Minn. 1979)

Jordan v. Group Health Assoc., 107 F.2d 239 (D.C. Cir. 1939)

Hunt by Hunt v. Sherman, 345 N.W.2d 750 (Minn 1984)

Claver v. Coldwell Banker Residential Brokerage Co., 2009 WL 5195969 (S.D. Cal., Dec. 21, 2009)

Minn. Stat. § 60K.47

Minn. Stat. § 60A.20, subd. 3

## STATEMENT OF FACTS

Virtually all of the evidence relating to the LA Program was produced by Burnet, and that evidence was not disputed. There are instances in which Appellant's Brief misstates or overstates the evidentiary record, as noted below. In addition, there are many respects in which Burnet disputes the *interpretation* that Appellant's Brief places on the undisputed facts or the *conclusions* that it draws from those facts. Burnet addresses these differences because they relate to the issue of law posed by this appeal. Finally, the statutes and case law defining the legal relationship between Burnet as a real estate broker and Allen as its sales associate, although not strictly speaking "facts," are undisputed and are included here to give context to the facts

### **Burnet and Its Sales Associates**

Burnet, either in its present form or through a predecessor entity, has been doing business as a real estate broker in Minnesota since 1973. At all times, Burnet has been licensed as a broker under Chapter 82 of Minnesota Statutes and is subject to regulation under that Chapter. See Minn. Stat. §§ 82.58-63, 82.82.<sup>2</sup> Burnet conducts its business and interacts with clients through sales associates, who also must be licensed under Chapter 82 as salespersons or brokers. Pursuant to section 82.63, subd. 4, of the Minnesota Statutes, Burnet "holds" the licenses of its sales associates, who list, market, and sell real property for clients on behalf of Burnet as broker. See *Bedow v. Watkins*,

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<sup>2</sup> Some of the citations to sections in Chapter 82 in this brief differ from those used in earlier briefs and the Court of Appeals decision because of a recent renumbering of those sections.

539 N.W.2d 414, 417 (Minn. Ct. App. 1995), rev'd on other grounds, 552 N.W.2d 543 (Minn. 1996) (observing that Minnesota statutes “make it clear that real estate agents have to have an affiliation with and work under the authority of a licensed real estate broker”).

Burnet’s sales associates are independent contractors, not employees, for employment law purposes.<sup>3</sup> However, their status as independent contractors does not limit Burnet’s tort liability to its clients and others for their actions. The basic legal relationship between Burnet and its sales associates is principal-agent. See Minn. Stat. § 82.55, subd. 20 (defining “real estate salesperson” as “one who acts on behalf of a real estate broker in performing any act authorized by this Chapter”); Minn. Stat. § 82.68, subd. 1 (“A salesperson shall only conduct business under the licensed name of and on behalf of the broker to whom the salesperson is licensed.”). The parties do not dispute that, as a matter of both statute and this Court’s precedent, real estate brokers and their sales associates are jointly and severally liable for the associate’s acts and omissions in connection with real estate transactions for which they provide brokerage services. Minn. Stat. § 82.63, subd. 3 (providing that “[e]ach broker shall be responsible for the acts of

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<sup>3</sup> Allen asserts (Appt.Br.4, ¶3) that “Burnet’s principal reason for engaging sales associates as independent contractors is for liability purposes.” The liability being referenced by the Burnet witness was the liability for taxes (FICA, Medicare, etc.) that an employer must pay for its employees, but that independent contractors pay personally. See A.Conf.Apdx.89 (testimony that it was important that sales associates be characterized as independent contractors “to protect our respective interests as far as how they’re treated for employment issues primarily and probably, ultimately, liability issues.”).

any and all of the broker's sales people and closing agents while acting as agents on the broker's behalf"); Handy v. Garmaker, 324 N.W.2d 168, 172 (Minn. 1982).

In most cases, Burnet would be legally entitled to indemnification by a sales associate for liability that it incurred by reason of the associate's wrongdoing, because a joint tortfeasor may recover indemnity "[w]here the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged." Hendrickson v. Minnesota Power & Light Co., 104 N.W.2d 843, 848 (Minn. 1960), overruled in part on other grounds, Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 368 (Minn. 1977). This principle applies as between real estate broker and sales associate. See Handy, 324 N.W.2d at 170, 173 (affirming trial court judgment that sales agent should pay full indemnification to former broker for any amounts collected against broker by plaintiff-clients, together with \$5,000 in attorneys' fees incurred by broker in defending action).

#### **Allen and His Tenure With Burnet**

Allen was licensed as a real estate salesperson by the State of Minnesota from 1999 through February 2007.<sup>4</sup> A.Apx.31-32. During that same time period, Burnet held Allen's license as his broker. Id. Between 1999 and 2003, Allen worked as an assistant to another Burnet salesperson. From 2003 until February 2007, Allen himself worked as a salesperson. A.Apx.34-35, 37

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<sup>4</sup> Allen's Statement of Facts incorrectly states that Allen turned in his salesperson's license in February 2008. Appt.Br.5, ¶5.

Allen left Burnet and the real estate business voluntarily because the work was not as lucrative as he had hoped and he thought that the market was declining. A.Apx.39. Allen had no complaints about the LA Program during the time that he was associated with Burnet. R.Apx.9. Allen was recruited by a family member who is a lawyer to bring this case as the proposed class representative. R.Apx.5-7.

### **The Independent Contractor Agreement**

The independent-contractor relationship between Burnet and its sales associates is documented annually by the associate's execution of an Independent Contractor Agreement ("ICA"). At the same time as the ICA is executed,<sup>5</sup> each active sales associate must also execute a form ("LA Form") acknowledging his or her participation in the LA Program and agreeing to its terms. A.Conf.Apx.90, lines 10-17.

Allen executed an ICA and an LA Form at the start of each calendar year during which he was affiliated with Burnet (1999-2006). A.Apx.36. Although the forms changed somewhat in detail from year to year, and the LA Program was at one point called the "Arbitration/Legal Administration" Program, these variations are not material to Allen's claims, ADD. Dist. Ct. Order 4-5, and he has never claimed otherwise.

The ICAs (A.Apx.61-63, 65-67, 69-71, 73-75, 77-79) specified the terms and conditions of the independent contractor relationship between Burnet and Allen,

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<sup>5</sup> Allen's Statement of Facts is incorrect in asserting that the LA Program Agreements "were executed separately from the ICAs." Appt.Br.6, ¶11. In the testimony that Allen cites, the Burnet representative said that the ICA and the LA Form were separate documents that were executed *concurrently*. Allen himself admitted executing the ICAs and the LA Forms concurrently. A.Apx.36.

including his rights and responsibilities, the fees that he would owe to Burnet, and the sales commissions that he would receive.

Each ICA made clear that Allen would be conducting his business as a licensed real estate salesperson under Burnet's supervision and subject to Burnet's general control. In each ICA, Allen specifically agreed to comply with (1) "the Sales Associate Policy Manual prepared by Broker", (2) "all applicable standards" for use of Burnet's trademark and trade name that "shall exist from time to time in Broker's sole discretion", (3) "all applicable laws relating to the engaging by Independent Contractor in the real estate business including, without limitation, the Fair Housing Act and any applicable real estate broker licensing statutes, rules or regulations", (4) "Broker's Guidelines for Independent Contractors for Avoidance of Conflicts of Interest", and (5) "all Codes of Ethics that are binding on or applicable to real estate brokers and salespersons operating in the state where the Office is located." See A.Apx.61, 65, 69, 73, 77 (¶3). Allen further agreed that he "must follow any policies and procedures set forth by Broker with respect to commercial real estate." Id. (¶2). Allen also agreed that he would "maintain Automobile Liability Insurance" with certain minimum limits naming Burnet as an additional insured. A.Apx.62, 66, 70, 74, 78 (¶14).

In each ICA, Allen specifically agreed to pay "all expenses imposed by" Burnet in connection with joint business activities, which included technology fees, transaction fees, an MLS fee, and the "arbitration fee" for the LA Program. See A.Apx.62, 66, 70, 74, 78 (¶¶ 8, 9, 12); R.Apx.11-13. Allen also agreed that Burnet had no liability to him

for any personal expenses that he incurred or for any of his acts. A.Apdx.62, 66, 70, 74, 78 (¶ 12).

In each ICA, Allen agreed that he and Burnet would share, in the same proportion that they shared commissions, any expenses “which by reason of some necessity be paid from the commission or are incurred in the collection of, or the attempt to collect, or in an effort to retain, any commission.” Id. In the same paragraph, each ICA referred to the LA Program and provided that all other legal claims or proceedings asserted against Allen or Burnet “as a result of [Allen’s] real estate activity, will be expensed in accordance with the Broker’s Arbitration/Legal Administration Program.” Id.

### **The LA Program**

Each of the LA Forms that Allen signed informed him that the LA Program can effectively limit your personal liability exposure in the event you are involved in a dispute or lawsuit. The following is not an Errors and Omissions (E&O) policy. It is an internal program that in many ways acts to limit exposure in the event of claims and covers legal and administrative costs.

A.Apdx.60, 64, 68, 72, 76 (first paragraph). Under the terms of the Program, Burnet and Allen agreed to mount a joint defense to most legal claims asserted against either or both of them relating to Allen’s actions within the scope of the ICA, as follows:

- Burnet would “participate” with Allen in the defense of any covered claim;
- Allen would cooperate with Burnet in the defense of the claim;
- Burnet would decide whether to handle the claim internally or to retain counsel (and, if so, would choose the counsel), and would make all final decisions about resolving the claim;

- the parties would share the overall costs associated with the claim, including defense costs, settlements, or judgments, in the same proportion as they had agreed, in the ICA, to share sales commissions, except that Allen's share of the joint costs for any claim would be capped at \$1,500; and
- Burnet would not assert claims against Allen for indemnification or contribution, "even though [Burnet] may be exposed to liability to another person as a result of [Allen's] actions."

See generally id.

The LA Program did not apply in certain specified situations. These included situations where Allen's actions being challenged were outside the scope of his agency for Burnet or were contrary to certain Burnet policies. See generally A.Apx.60, 64, 68, 72, 76 (excepting "Disputes, litigation or losses" where "the associate involved also acted as a principal (i.e. buyer or seller)"; where the associate had not complied with Burnet's policies on "Property Disclosure", "Agency Disclosure", "Arbitration Disclosure and Residential Real Property Arbitration", and "DO NOT CONTACT"; or "that relate to the actions of an associate outside of the conduct contemplated within the scope of" the ICAs).

### **The LA Program Fee**

All sales associates were required to participate in the LA Program, and to pay to Burnet an annual fee ("LA Fee"), A.Conf.Apx.81, unless they obtained commercial insurance that provided coverage for Burnet as well as themselves. A.Apx.60, 64, 68, 72, 76 (fifth paragraph). The amount of the LA Fee was fixed each year, but it increased

somewhat over the years while Allen participated in the Program, from \$395 in 2002 to \$450 in 2006. Id.

Burnet charged the LA Fees to fund its costs of doing business as a broker, including its legal and compliance costs. These included the costs of Burnet's Sales Administration Department. See id. (first paragraph, stating that the LA Program "covers legal and administrative costs") (emphasis added). The Department includes two licensed real estate brokers, who are experienced in legal and compliance matters and who assist sales associates and their managers in responding to and resolving complaints and claims about professional conduct. These brokers appear on behalf of Burnet and the sales associates in Board of Realtors proceedings; respond to regulators' inquiries on behalf of Burnet and assist associates in responding to such inquiries; appear in arbitration proceedings brought by buyers and sellers to represent the interests of Burnet and associates; and provide information and assistance to outside counsel that Burnet may retain to represent it and the associates in lawsuits. A.Conf.Apdx.52-55. The Department also provides information and training to Burnet managers and sales associates about ethics and legal compliance issues and answers day-to-day questions from managers, associates, and their clients, seeking to resolve disputes before they lead to litigation. Each of the brokers in the Department fields 20 to 80 calls a day about such matters. Id.

Burnet treats the LA Fees the same as all of the company's other sources of revenue. The fees are deposited into Burnet's general operating account and are used to pay the company's ordinary business expenses. A.Conf.Apdx.118-19. In setting the LA

Fee for a particular year, Burnet considers all of its sources of revenue and its overall profitability. R.Conf.Apdx.27-28, 42. Burnet's CFO Gary Meier testified that the amount of the LA Fee is not based upon any actuarial computations, and "is not related to costs incurred" for "attorneys' fees, settlements and judgments."<sup>6</sup> R.Conf.Apdx.27-28.

Contrary to assertions in Appellant's Brief, there is no reliable evidence suggesting that the LA Program, standing alone, was profitable to Burnet. Burnet never attempted to determine the profitability of the LA Program and does not track the amounts that it pays for settlements, judgments, attorneys' fees, and expenses based on whether a particular claim falls within the scope of the Program. The information Burnet was able to provide related only to its costs for *all* legal complaints, claims, and disputes, including costs unrelated to the Program. A.Conf.Apdx.46, see also id. 118:8-11 (Burnet revenue not allocated to various departments or cost centers).

Moreover, even if all of the necessary cost information were available, an analysis of the LA Program's profitability as a supposed insurance program—presumably the point Allen is trying to make—could not be done by simply comparing revenue received and costs incurred in a particular calendar year. Such an analysis would require a comparison of revenue received in a year against the costs relating to claims made in that

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<sup>6</sup> Allen's Statement of Facts (Appt.Br.10, ¶16) is written to leave the misimpression that Burnet deliberately raised its LA Fee in order to make the Program profitable. In the cited testimony, Burnet's CFO actually testified that Burnet "charged a lot of different kinds of fees" to its sales associates, "[a]nd to the extent that we can increase the fees we charged, that improves our company profitability." A.Conf.Apdx. 123:19-22.

year, costs that may accrue over a number of years thereafter. There is no evidence in this case that permits such an analysis.

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

The first paragraph of each LA Form states clearly that the LA Program “is not an Errors and Omissions (E&O) policy.” A.Apx.60, 64, 68, 72, 76. Contrary to assertions in Appellant’s Brief, there is no evidence that Burnet has ever characterized the Program in a way that contradicts this statement. Allen’s assertion is based on a selective and misleading quotation from a single document, a 2006 email written by Thomas Rehman, the head of Burnet’s Sales Administration Department, expressing the opinion that the LA Program “acts (at least as far as the agents are concerned []) as a lower deductible E&O policy would.” A.Conf.Apx.116 (emphasis added). Appellant’s Brief omits the words “acts” and “would” from the quoted language and claims that Rehman “described” the Program as “a lower deductible E&O policy.” Appt.Br.9-10.

As Rehman’s deposition testimony concerning this statement makes clear, he was suggesting only that the Program “acts to limit [sales associates’] exposure and out-of-pocket expense similarly to the way a deductible does, if they had their own insurance with a deductible or any other insurance with a deductible.” A.Conf.Apx.102. He further explained that “I’m saying it isn’t a deductible. I’m saying, but it acts, at least as far as they’re concerned, as a deductible would *if it were insurance.*” Id.102-03 (emphasis added).<sup>7</sup>

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<sup>7</sup> Allen’s Statement of Facts (Appt.Br.10, ¶15) also attempts to use selective quotations from Rehman’s testimony to incorrectly imply that the only difference

Allen admitted in his deposition testimony that he did not understand the LA Program to be an E&O insurance policy, R.Apdx.14-15, that Burnet did not agree in the LA Program form to indemnify him, id.16, and that he knew of no document in which Burnet had ever promised indemnification, id.

### **E&O Insurance Purchased by Burnet's Corporate Parent**

Burnet was acquired in 1998 by a company now known as NRT LLC ("NRT"), which owns many Coldwell Banker real estate brokerages nationwide. For each year since at least 2002, NRT has annually purchased E&O insurance policies that cover all of the real estate companies that NRT has owned, including Burnet, and all of the sales associates affiliated with those companies. A.Conf.Apdx.104-05. The policies have typically provided coverage for claims in excess of a million dollars. Id.115. Burnet has never incurred liability on a claim that was large enough to trigger payment under these policies.<sup>8</sup> Id. 105-06.

Appellant's Brief falsely claims a connection between the existence of these policies and the LA Program, asserting that Burnet operated the Program to cover "errors and omissions claims" that were within the retention under the NRT insurance policies.

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between the LA Program and E&O insurance lies in who selects defense counsel. In his testimony, Rehman stated that he had not seen an E & O insurance policy for many years, and was not an expert in E & O insurance. R.Conf.Apdx.32-35. Thus, his testimony is fairly understood as speculation.

<sup>8</sup> Allen's Statement of Facts (Appt.Br.5, ¶8) overstates the record in claiming that no claims have ever been made against Burnet or its sales associates under the NRT insurance policies. The cited testimony states that no claims have ever been paid out under the policies, but the Burnet representative could not recall whether claims had ever been made.

Appt.Br.6, ¶9. In reality, Burnet has maintained the LA Program since sometime in the 1980s, A.Conf.Apx.42—at least a decade before NRT acquired Burnet—and there is no evidence that the design or features of the Program changed materially either after NRT acquired Burnet or after NRT began to purchase E&O insurance covering Burnet.

### ARGUMENT

Minnesota's insurance statutes are intended to prevent unscrupulous insurance companies from selling unapproved or insufficiently backed insurance policies to Minnesota citizens. They are not intended to prevent or inhibit people in business relationships from entering into agreements sharing costs and allocating risks between them. On the contrary, public policy strongly approves contractual allocations of risks—they avoid disputes, save transaction costs, and permit people to contract more efficiently.

Allen's effort to fit the square peg of the LA Program into the round hole of section 60K.47 fails for a number of reasons. His convoluted parsing of the insurance statutes creates a chain that redefines "insurance" several times on its way to a result that would catch almost any contractual indemnification agreement in the net of insurance regulation. Moreover, Burnet assumes no new "risk" under the LA Program—state law already makes broker Burnet liable for any conduct that would be within the scope of the Program. Finally, any claimed "indemnity" is "equitable" rather than "for hire," and the LA Program is merely a small part of a business relationship whose primary object and purpose is the sale of real estate. The Court should affirm the judgment in Burnet's favor.

## I. STANDARD OF REVIEW.

This Court reviews a grant of summary judgment de novo, viewing all evidence in the light most favorable to the non-moving party. E.g., Zip Sort, Inc. v. Comm’r of Revenue, 567 N.W.2d 34, 37 (Minn. 1997). The Court must affirm the judgment if no genuine issues of material fact exist and if the court below properly applied the law. Id.

As noted above, the district court solicited the views of the Minnesota Department of Commerce, which concluded that the LA Program was not insurance. A.Apdx.171-182. The Court will of course determine for itself what weight to give the Commerce Department’s opinion, but it is important to note that the circumstances here differ substantially from those presented in the cases cited in Appellant’s Brief, in which this Court declined to defer to agency interpretations. See Appt.Br.18. First of all, Allen’s convoluted statutory argument (discussed below) demonstrates that the statutory language at issue here is far from clear, and the Commerce Department has particular expertise and knowledge in applying it. Compare Minnesota Microwave, Inc. v. Public Service Commission, 190 N.W.2d 661, 665 (Minn. 1971) (declining to defer to agency interpretation where “statute is phrased in common terms” and “is not exceedingly technical in nature”). In addition, the Commerce Department opined here that the LA Program is *not* insurance and did not purport to *expand* the Department’s statutory jurisdiction. Compare Minnesota Microwave, 190 N.W.2d at 665 (declining to defer to agency interpretation of statute “particularly where such interpretation is one which operates to expand the jurisdiction of the agency rendering such interpretation”).

## II. THE INDEPENDENT CONTRACTOR/LA FORM AGREEMENTS SHARE COSTS AND ALLOCATE RISKS BETWEEN TWO PARTIES PURSUING THE BUSINESS OF REAL ESTATE TOGETHER.

Before moving to the specific legal arguments urged in Appellant's Brief, Burnet must address Allen's mischaracterization of the longstanding agreements between real estate broker Burnet and its sales associates. Allen would have the Court believe that these agreements are nothing more than indemnity "products" that Burnet "sells" to its sales associates to increase its own bottom line. In fact, these are agreements between those engaged together in the real estate business to allocate the risks and costs they share, to promote a common defense against claims, and to resolve in advance any disputes they may have about how to handle such claims. Such agreements are common in businesses of all kinds, and do not constitute insurance.

*First*, the LA Program permits Burnet and its sales associates to allocate the costs and risks they already share as a matter of law. As noted above, Burnet is already legally liable for its associates' acts and omissions within the scope of the ICAs. See Minn. Stat. § 82.63, subd. 3; Handy, 324 N.W.2d at 172.

*Second*, the LA Program enables Burnet to control the handling of claims for which it bears ultimate legal liability. Claimants naturally look to recover from Burnet as the "deep pocket." Burnet therefore has a strong interest in controlling how such claims are handled, be it through negotiation, mediation, arbitration, or litigation. Burnet also has a strong interest in having its associates contribute to its ongoing legal and compliance costs, including the cost of its Sales Administration Department. At the same

time, the sales associates have a strong interest in limiting their exposure to any claimant, to Burnet for indemnification, and for defense costs.

The LA Program addresses all these concerns. In essence, Burnet tells its associate: "If you permit us to handle any dispute within the scope of the ICA as we see fit, we will limit your liability concerning the dispute to \$1500, and we promise that we will not assert any claim against you even if the problem was entirely your fault." The LA Program benefits both Burnet and the associate by providing certainty in how claims will be handled and how risks and costs will be allocated.

In sum, the advantages of the LA Program to both sides are clear, and have nothing to do with making money off the LA Fees.

### **III. UNDER MINNESOTA'S INSURANCE STATUTES, THE LA PROGRAM IS NOT "INSURANCE."**

As Allen acknowledges, all of his claims rest on his allegation that Burnet violated Minnesota Statute § 60K.47. That statute provides in relevant 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... is personally liable for all premiums, earned or unearned paid by the insured, and the premiums may be recovered by the insured ....

Minn. Stat. § 60K.47; see also Appt.Br.41 (acknowledging that his consumer fraud and unjust enrichment claims depend on resolution of insurance issue). Allen's section 60K.47 claim fails for a number of reasons based on the language of Minnesota's insurance statutes themselves.

**A. Minnesota Statute § 60K.47 Does Not Apply To Burnet.**

As a threshold matter, Allen's section 60K.47 claim fails because, even assuming *arguendo* that the LA Program were insurance, the section does not apply to Burnet. Allen tries to cast Burnet as an "insurance company" that bears the risks of a promise to indemnify. *E.g.*, Appt.Br.12, 19, 20, 37. But section 60K.47 does not impose liability on insurance companies; it imposes liability *only* on persons who participate in a sale of insurance "for or on behalf of any company" that is unauthorized to engage in the business of insurance in Minnesota. Minn. Stat. § 60K.47. By its terms, the statute applies only to *agents* who act "on behalf of," and *not* to the companies themselves. See also Minn. Stat. § 82.68, subd. 1 ("A salesperson shall only conduct business... *on behalf of* the broker to whom the salesperson is licensed.") (emphasis added); Minn. Stat. § 60K.31 (defining "sell" as exchanging insurance for consideration "*on behalf of* an insurance company") (emphasis added). Indeed, this Court has described section 60K.47 as "the agent's personal liability law." Farmers & Merchants State Bank v. Bosshart, 400 N.W.2d 739, 744 (Minn. 1987).<sup>9</sup>

The context of the statute confirms this interpretation. Section 60K.47 appears under the general heading "Insurance Producers" and is part of a group of sections that "govern the qualifications and procedures for the licensing of insurance producers."

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<sup>9</sup> The Bosshart case involved the predecessor of current section 60K.47, Minn. Stat. § 60A.17, subd. 12 (1986). The statutory numbering was changed in 1992. See 1992 Minn. Laws ch. 564, art. 3, § 18. As Allen correctly notes, the two statutes are substantively identical. See Appt.Br.22 n.15.

Minn. Stat. § 60K.30.<sup>10</sup> An “insurance producer” is “a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance.” Minn. Stat. § 60K.31, subd. 6; see also Minn. Stat. § 60A.02, subd. 7 (defining “insurance agent” as “insurance producer” acting for “an insurer”).

This reading also is consistent with the section’s use of the phrase “personally liable,” which fits much better with an agent’s “personal” liability than with the corporate liability of an insurer. Moreover, the reading is consistent with the *separate* statutory provisions that specifically address improper or unauthorized conduct by insurers themselves. See, e.g., Minn. Stat. § 72A.40-44 (“Regulation of Unauthorized Insurers”); see also Minn. Stat. § 72A.33-39 (providing for jurisdiction of Commerce Commissioner over unauthorized insurers operating in state).

Consistent with this reading, the few cases that have applied section 60K.47 and its predecessor have applied them exclusively to insurance agents and brokers—the persons who execute the sale “on behalf of” others—and not to insurers themselves. See Bosshart, 400 N.W.2d at 739; St. Michel v. Burns & Wilcox, Ltd., 433 N.W.2d 130, 134 (Minn. Ct. App. 1988) (imposing liability under predecessor statute on agency that served as agent or broker for insurance at issue);<sup>11</sup> cf. also Webster v. Ferguson, 102 N.W. 213

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<sup>10</sup> Similarly, the section’s materially identical predecessor appeared in a statute entitled “Agents; Solicitors.” Minn. Stat. § 60A.17 (1986).

<sup>11</sup> See also Eddy v. Republic Nat. Life Ins. Co., 290 N.W.2d 174, 176 (Minn. 1980) (“whereas an insurance agent acts on behalf of a particular insurance company, an insurance broker acts on behalf of the prospective insured”).

(Minn. 1905) (applying similar liability statute to insurance agent under similar statute (1895 Minn. Laws ch. 175, section 87) but finding no liability under facts of case).

This is not of course to suggest that companies may engage in the unauthorized business of insurance with impunity. The insurers who actually assume the insurance risk are governed by numerous other provisions of Minnesota law. See, e.g., Minn. Stat. § 60A.07, subd. 4 (2010) (barring insurance companies from offering insurance in state without license from Commerce Commissioner). But section 60K.47 does not address insurers—by both its language and its historical use, it is addressed to the conduct of insurance *agents*, not insurers.

In the present case, section 60K.47 cannot apply to Burnet because Burnet did not act as an agent for an insurer, and Allen does not claim otherwise. The fact that no agent served as intermediary between Burnet and Allen does not convert Burnet into an agent any more than it converts Allen into an insurance broker. Nothing in either the language or the context of section 60K.47 suggests that a person can serve as his or her own “agent”; an agent is, by definition, one who acts on behalf of *another*. See Black’s Law Dictionary 64 (7th ed. 1999) (“agent: 1. One who is authorized to act for or in the place of another”); Minn. Stat. § 60A.02, subd. 7.

Thus, even assuming for the sake of argument that Burnet were an “insurance company” as Allen posits, it cannot be subject to liability under section 60K.47. The Court should affirm the judgment on this ground.

**B. The LA Program Is Not Insurance Under Minn. Stat. § 60K.47.**

Even assuming that section 60K.47 could apply to Burnet, the LA Program does not constitute “insurance” under that section. Allen’s attempt to fashion from various statutes a definition of “insurance” that includes the Program here is prolix and ultimately circular. Allen takes language plainly intended to apply to the business of insurance companies with lines of coverage represented by insurance agents and tries to apply it to private agreements allocating costs and risks among business associates. Under Allen’s proposed interpretation, every business that adopts common types of cost-sharing or indemnity agreements would be an “insurance company” subject to regulation by the Department of Commerce and liability under section 60K.47. That is not the law in Minnesota, nor should it be.

**1. Allen’s lengthy statutory analysis.**

Allen’s statutory argument rests on a lengthy chain of cross-references from one statute to another and back again, involving at least two different definitions of “insurance.” As best as Burnet can determine, Allen’s argues:

- Under section 60K.47, “sell” (a word that section 60K.47 does not use) means to exchange a contract of “insurance” for consideration on behalf of an “insurance company.” Appt.Br. 19, citing Minn. Stat. § 60K.31, subd. 14.
- Under section 60K.31, subd. 14, an “insurance company” is an “insurer” or other entity “engaged in insurance as principal.” Appt.Br. 19-20, citing Minn. Stat. § 60A.02, subd. 3.

- Under section 60K.47, “insurance” (first definition) constitutes “any of the lines of authority in section 60A.06.” Appt.Br. 20, citing Minn. Stat. § 60K.31, subd. 5.
- Those lines of authority under section 60A.06 include lines that “insure” against “liability for loss or damage to the property or person of another caused by the insured” and against fees incurred with the use of attorneys’ services. Appt.Br. 20, citing Minn. Stat. § 60A.06, subds. 13 and 15.
- Allen then moves to section 60A.02, subd. 3, for a *second* definition of “insurance”: “an agreement whereby one party, for a consideration undertakes to indemnify another to a specified 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.” Appt.Br. 20-21, citing Minn. Stat. § 60A.02, subd. 3.
- Under section 60K.47, an “insurance company” that wishes to “transact the business of insurance” in Minnesota requires a license. Appt.Br. 21-22, citing Minn. Stat. § 60A.07, subd. 4.
- Under 60A.07, “transacting insurance business in this state” includes various acts concerning the sale of a “contract of insurance.” Appt.Br. 22, citing Minn. Stat. § 72A.41, subd. 2.

This lengthy series of cross-references to definitions and terms in other statutes repeatedly defines words using different forms of the same words, and is ultimately unhelpful in addressing the issue here.

**2. Allen's argument uses two inconsistent definitions of "insurance."**

The most glaring problem with Allen's argument is its use of two different and inconsistent definitions of the term "insurance." Allen looks first to the definition of "insurance" in section 60K.31, subd. 5: "any of the lines of authority in section 60A.06." Appt.Br.19. This is the definition properly applicable to section 60K.47, the statute under which Allen asserts his claims. See Minn. Stat. 60K.31, subd. 1 (stating that that section provides definitions "[f]or purposes of sections 60K.30 to 60K.56").

Section 60A.06, the statute referred to in section 60K.31, subd. 5, is headed "Kinds of Insurance Permitted" and lists the types of insurance that may be written under Minnesota law. Minn. Stat. § 60A.06, subd. 1 ("Insurance corporations may be authorized to transact...any of the following kinds of business"). This makes sense: because section 60K.47 addresses the conduct of insurance *agents*, the "insurance" covered by the section includes any kind of insurance that an agent might sell, which might be any kind of insurance that an insurer might write.

At this point, however, Allen introduces a *second* definition for "insurance." Because section 60A.06's "specific lines" themselves use the word "insure," e.g., Minn. Stat. § 60A.06, subds. 13 and 15, Allen invokes the definition of "insurance" from section 60A.02, subd. 3, despite the fact that the statute Allen is asking to apply, section 60K.47, already has its own, different definition of "insurance." In other words, Allen asks the Court to interpret the unique and specific definition of insurance under sections 60K.31, subd. 5 and 60K.47 to mean exactly the same thing as the general definition of

insurance under section 60A.02, subd. 3. The legislature could not have intended such an interpretation, which would render the definition in section 60K.31, subd. 5 entirely superfluous. See Owens v. Federated Mut. Implement & Hardware Ins. Co., 328 N.W.2d 162, 164 (Minn. 1983) (“[W]henever possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant.”).

**3. Allen’s argument would make every indemnification agreement an insurance contract.**

Allen’s statutory analysis also proves too much: under Allen’s interpretation of section 60A.02, subd. 3, any contract that provides for indemnification not already owed under the common law would constitute a contract for insurance subject to regulation by the Department of Commerce. Such an overbroad reading is inconsistent with Minnesota precedent and would pose substantial problems for many ordinary commercial contracts.

The portion of section 60A.02, subd. 3, on which Allen relies 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 to do some act of value to the assured in case of such loss or damage.

Allen would have the Court treat the word “indemnify” here very broadly: unless the first party is *already* legally obligated to pay the loss or damage incurred by the second party, Allen would treat any agreement to pay the loss or damage as “indemnification” within section 60A.02, subd. 3, and therefore “insurance.” And in Allen’s interpretation, this line is absolute: if *any* portion of the promised indemnity is new or shifts the risk from the second party to the first, the contract is one for insurance. See Appt.Br.24-31.

Allen is mistaken. As discussed below, Minnesota law does not treat *every* agreement that shifts a risk from one party to another as insurance. Nearly every contract shifts risks, and such a holding would render virtually any party entering into a business contract an “insurer.” Indeed, under Allen’s expansive reading of the definition of “insurance” under section 60A.02, subd. 3, Allen himself provided “insurance” to Burnet under the LA Program. After all, Allen agreed under the Program to “participate” in the “defense and/or settlement” of any “dispute, arbitration proceeding, or lawsuit” initiated against Burnet “relating to [Allen’s] actions which are contemplated within the scope of the [ICA],” including the payment of a portion of any costs up to \$1500. A.Apx.60, 64, 68, 72, 76. Thus, if the Program required Burnet to “indemnify” Allen for claims against him, it likewise required Allen to “indemnify” Burnet for claims against Burnet (at least up to \$1500), *regardless* of whether any claim was made against Allen and regardless of whether Allen bore any fault. Similarly, the Program also required Allen to “do some act of value to” Burnet in the event of a claim: among other things, Allen agreed to “cooperate in providing testimony, evidence, and other assistance requested by” Burnet in handling the claim. *Id.* And Allen undeniably received consideration for the LA Program; even apart from all the benefits of the ICA of which the Program was a part, Allen received in the LA Form itself Burnet’s waiver of any claims against him. *Id.*

Allen in fact fit section 60A.02, subd. 3’s definition of insurance *better* than Burnet did: Allen agreed to participate in the Program “to a specified amount” (\$1500) as section 60A.02, subd. 3 contemplates, whereas Burnet’s share of the obligations under the LA Program was not so specified or limited. And, although Burnet was already liable

by operation of law for Allen's conduct within the scope of the ICA, Minn. Stat. § 82.63, subd. 3, Allen was not necessarily liable (absent the LA Program) for any such liability if Allen was not at fault. See, e.g., Shair-A-Plane v. Harrison, 189 N.W.2d 25, 27 (Minn 1971).

**4. This Court's prior decisions do not support Allen's reading of the insurance statutes.**

The cases on which Allen bases his argument do not support his interpretation of the statutes at issue. Indeed, this Court's central precedent on this issue contradicts Allen's interpretation. See Anstine v. Lake Darling Ranch, 233 N.W.2d 723 (Minn. 1975), overruled on other grounds, Farmington Plumbing & Heating Co. v. Fischer, 281 N.W.2d 838 (Minn. 1979).

In Anstine, a contractor asked this Court to hold that a contractual indemnity provision obligated its subcontractors "to indemnify the general contractor for all personal injuries arising out of the entire construction project," even if the subcontractor had no relationship to the work the injured employee was doing. 233 N.W.2d at 727. The Anstine court rejected the contractor's claim, opining that the contractor's "proposed interpretation would make each subcontract in effect one of insurance." Id. at 728. The Court commented that such indemnity provisions are permissible in business contracts (that is, are not subject to regulation as "insurance") where the indemnitor has a connection with or exercises control over the conduct that prompts the losses. Id.

Anstine thus makes clear that indemnity agreements do not necessarily constitute "insurance." Id. at 729 (noting that earlier Minnesota cases "do imply that an indemnity

contract which covers liability arising out of the indemnitee's negligence *is not a commercial insurance contract*") (emphasis added)). This conclusion directly contradicts the overly broad reading of section 60A.02, subd. 3's definition of "insurance" that Allen urges here.<sup>12</sup>

Although not arising under section 60K.47, the Court's decision in Hunt by Hunt v. Sherman, 345 N.W.2d 750 (Minn 1984), also is informative. In Hunt, the Court considered whether a self-funded medical plan involving the pooling of contributions and the payout of medical benefits fell within ERISA's insurance exception. The Court concluded that it did not:

Intervenor's ERISA Plan is neither an "insurance company" nor an "insurance contract." It is a self-funded employee benefit plan whereby contributions on behalf of employees are pooled to provide medical benefits for the Plan participants in accord with the collective bargaining agreement between the employees and their employers. Moreover, the benefits provided under the Plan are not funded or provided through insurance.

Id. at 753. Likewise here, Burnet's and Allen's allocation of risks and costs arising from the real estate business they conduct together is not "insurance."

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<sup>12</sup> The remaining cases on which Allen relies do not involve the definition of insurance and provide no support for his reading of section 60A.02, subd.3. For example, Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237 (Minn. 2005), did not involve a question of whether a particular contract was insurance. The contract was undeniably insurance; the issue was whether "a party insured by an insolvent insurer may be liable to a claimant for any portion of the claim that constitutes the difference between the \$ 300,000 statutory maximum available from the Minnesota Insurance Guaranty Association and the liability limit of the insolvent insurer's policy." Id. at 240. Other cases did not involve insurance at all. See Plain v. Plain, 240 N.W.2d 330, 333 n.16 (Minn. 1976) (addressing husband's now-obsolete statutory and common law obligation to "bear ultimate liability for his wife's necessities"); Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362 (Minn. 1977) (addressing effect of Minn. Stat. § 604.01 on common law indemnity).

In sum, neither Allen's protracted statutory analysis nor the case law he cites support a reading of section 60K.47 that would treat the LA Program as "insurance."

**C. The LA Program Is Not Insurance Under Minn. Stat. § 60A.02.**

Even if the Court were to conclude that the definition of "insurance" under section 60A.02, subd.3 applied to section 60K.47, this Court should nevertheless affirm the judgment because the LA Program does not meet section 60A.02, subd. 3's definition.

**1. The LA Program does not provide "indemnification" because Burnet is already legally liable for all covered claims.**

First and most important, the LA Program does not involve Burnet's "indemnification" of its sales associates. Indemnification comprises an agreement by one person (the indemnitor) to pay the liability of another person (the indemnitee) for which, but for its agreement, *the indemnitor would not have been responsible*. See, e.g., Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 233 (Minn. 1986) (stating as an "elementary insurance principle" that "an insurer assumes certain risks *that otherwise would be the obligation of the insured*") (emphasis added).

No such transfer of risk or liability occurs under the LA Program. With respect to the types of claims that are the subject of the Program, Burnet is fully liable *as a matter of law* to the same persons and to the same extent as its sales associate, regardless of any agreement it may have with the associate. Minn. Stat. § 82.63, subd. 3; Handy, 324 N.W.2d at 172. Indeed, Allen himself acknowledged that Burnet did not agree to indemnify him, either in the LA Form or in any other document. R.Apx.16.

Allen tries to attach significance to the fact that Burnet's liability is "derivative," Appt.Br.13-14, 25-26. But that fact is irrelevant; derivative or not, the liability is real, and is a primary reason Burnet wishes to control the handling of any disputes. A successful claimant against Burnet and a sales associate is not required to look first to the associate for payment of a claim, with Burnet having only secondary liability if the associate fails to pay. A claimant can collect the *entire* judgment directly from deep-pocket Burnet without ever attempting to collect from the associate.<sup>13</sup> This is the premise of joint and several liability.

Under the LA Program, Burnet simply agrees with a jointly-liable sales associate about the terms on which they will share their joint risks and costs, and specifies the circumstances under which Burnet waives its right to seek contribution or indemnification from the associate.<sup>14</sup> Indeed, if any indemnification—any agreement to assume liability that the assuming party otherwise would not bear—occurs under the LA Program, it involves the sales associate's agreement to share, up to the agreed cap of \$1,500, in costs that Burnet incurs on claims that are asserted solely against the company.

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<sup>13</sup> In contrast, Minnesota law would not allow a claimant to make such a direct claim against a sales associate's E&O insurer. See Anderson v. St. Paul Fire & Marine Ins. Co., 414 N.W.2d 575, 577 (Minn. Ct. App.1987), and cases cited therein.

<sup>14</sup> Although a waiver of liability may have the same effect as insurance, they are not legally equivalent. Pettit Grain & Potato Co. v. N. Pac. R. Co., 35 N.W.2d 127, 133 (Minn. 1948).

**2. Burnet's alleged indemnification obligation is not limited to a "specified amount."**

The LA Program also is not insurance because it does not meet section 60A.02, subd. 3's requirement of an undertaking of indemnification "to a specified amount against loss or damage from specified causes." Although Appellant's Brief acknowledges this "to a specified amount" requirement, Allen fails to otherwise address it or to demonstrate that the LA Program meets the requirement. In fact, it does not. To the extent that Burnet can be regarded as undertaking any obligation to "indemnify" a sales associate, neither the LA Forms nor the ICAs contain any limitation or "specified amount" of such indemnification. Absent such a specified amount, Allen cannot fit the LA Program into section 60A.02, subd. 3's definition of insurance.

**3. Defense costs under the LA Program do not constitute an undertaking to "do some act of value" to Allen.**

Allen also tries in a single paragraph to satisfy section 60A.02, subd. 3's alternative definition for "insurance," in which a party "undertakes...to do some act of value to the assured." Appt.Br.31. This attempt also fails. Allen alleges that "CB Burnet's payment of the sales associates' legal defense costs" constitutes "some act of value." Appt.Br.31. But Allen overlooks the "undertaking" requirement

Despite Allen's repeated assertions that Burnet has a "duty to defend" its associates, e.g., Appt.Br.14, 27, 29, 36, the LA Program does *not* in any way obligate Burnet to hire or pay for a lawyer to represent a sales associate in a dispute. Burnet has complete discretion whether to resolve a dispute internally, without involving an attorney, or to hire an attorney. If Burnet decides to hire an attorney, that attorney is

chosen by Burnet, not the associate, and Burnet is responsible for paying the attorney. If the associate retains a separate attorney, the Program does not cover the claim.

A.Apx.60, 64, 68, 72, 76. Burnet also has complete discretion concerning whether and on what terms to resolve or settle the dispute. All of these provisions primarily benefit Burnet and only incidentally benefit the associate. They are utterly unlike the defense obligations of a commercial insurer under a liability insurance policy. Compare State v. Bean, 258 N.W. 18 (Minn. 1934) (relied on by Allen, involving agreement “to defend [policyholder] or ‘any member of his family, his agents or employees,’ against civil or criminal litigation resulting from the use of his automobile”).

Because Burnet has not “undertaken” to pay associates’ defense costs, Allen cannot succeed based on the “some act of value” prong of section 60A.02, subd. 3.

#### **IV. THE LA PROGRAM IS NOT “INSURANCE” BECAUSE ANY INDEMNITY IT PROVIDES IS “EQUITABLE” RATHER THAN “FOR HIRE.”**

Allen also tries to justify classifying the LA Program as “insurance” based on the Anstine decision’s distinction between “equitable indemnity” and “indemnity for hire.” Apx.Br.15-16, 25-28. However, the LA Program falls squarely into the “equitable indemnity” category. Even assuming Burnet had agreed to “indemnify” Allen—despite already bearing the identical liability as a matter of law—Anstine makes clear that this type of indemnification does *not* constitute insurance.

As noted above, Anstine involved the scope and enforceability of provisions requiring subcontractors on a construction project to indemnify their general contractor. The Court interpreted each subcontractor’s contract as requiring indemnification only

against liability resulting from the acts of that subcontractor or its employees. It rejected the general contractor's claim that the indemnification provision also required each subcontractor to indemnify against liability resulting from the acts of other subcontractors, holding that such an interpretation would turn a lawful contract of indemnification into an illegal contract of insurance. 233 N.W.2d at 728. As the Court observed, a contract providing indemnification for "losses with which the indemnitor had no connection and over which it had no control would be a contract of insurance." *Id.* at 728. The court termed this type of indemnification "indemnity for hire." *Id.* at 729. In contrast, the court held that "equitable indemnification," where the indemnitor has a connection with the losses or exercises some control over them, is not "insurance." *Id.*

Here, the LA Program constitutes "equitable indemnity" for two reasons.

*First*, as a broker, Burnet has "a connection" with its sales associates' activities under the ICAs, and any "losses" under the LA Program would necessarily arise out of those activities. Burnet and its sales associates are in business together, and they are jointly and severally liable by operation of law for the consequences of their business acts. *See* Minn. Stat. § 82.63, subd. 3; *Handy*, 324 N.W.2d at 172. Burnet obviously has "a connection" with any losses incurred as a result of its sales associates' activities. That connection is sufficient to establish that any indemnification that Burnet arguably provides sales associates under the LA Program is "equitable" and does not constitute insurance. *Anstine*, 233 N.W.2d at 728-29.

*Second*, Burnet exercises some "control" over the sales associate activities that might lead to a "loss" within the scope of the LA Program. As detailed in the Statement

of Facts above, the ICAs make clear that sales associates (including Allen) will conduct their real estate business under Burnet's supervision and subject to Burnet's general control. This control includes mandatory compliance with Burnet's Sales Associate Policy Manual, Burnet's standards for use of the company trademark and trade name, Burnet's conflict-of-interest rules, and all applicable laws, statutes, and ethical codes.

A.Apx.61, 65, 69, 73, 77 (¶3) Sales associates further agree that they "must follow any policies and procedures set forth by Broker with respect to commercial real estate."

Id.¶2.

Allen tries to divert the Court from the *actual* control that Burnet has over its sales associates by focusing on the sales associates' status as "independent contractors" and arguing that that status necessarily means that Burnet has no control over the associates. See Appt.Br.15, 32-33 & n.21. But that status has nothing to do with the question before the Court. Unlike the cases Allen cites,<sup>15</sup> the instant case presents no issue of whether a defendant is vicariously liable for damages caused by the conduct of another. Both the legislature and this Court have clearly stated that real estate brokers like Burnet are liable for their agents' conduct. See Minn. Stat. § 82.63, subd. 3; Handy, 324 N.W.2d at 172. That status also has nothing to do with the decision in Anstine. The Court there did not even address whether the defendants were independent contractors, but looked only to

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<sup>15</sup> Sutherland v. Barton, 570 N.W.2d 1 (Minn. 1997) (addressing whether defendant had sufficient control over contractor's work to justify imposing legal duty to contractor's employee); Willner v. Wallinder Sash & Door Co., 28 N.W.2d 682 (Minn. 1947) (addressing whether defendant had sufficient control over contractor's work to excuse contractor from liability for negligently starting fire).

whether the defendants *actually* possessed control with respect to the conduct causing the claimed loss. See Anstine, 233 N.W.2d at 725, 728-29.

Moreover, Allen incorrectly assumes that an independent contractor cannot be under the control of the party that employed him. To the contrary, this Court has recognized that although some “independent contractors” are non-agent service providers, other “independent contractors” are actually agents. Jurek v. Thompson, 241 N.W.2d 788, 792 (Minn. 1976). The agent independent contractor “is distinguished on the ground that the parties are in a fiduciary relationship and the principal retains some right of control, although not necessarily a right of *physical* control over the agent independent contractor’s performance.” Id. at 792, n.5 (citing Restatement (Second) of Agency § 14 N, comment a) (emphasis in original); see also Dalager v. Montgomery Ward & Co., 350 N.W.2d 391, 394 (Minn. Ct. App. 1984) (affirming verdict that roofer was an agent independent contractor of retailer, where retailer retained certain aspects of control over the project).

As a matter of common law, any agent—even an independent contractor—is obligated to follow the lawful instructions of its principal. 2 Restatement (Third) of Agency § 8.09(2) (2006); Rude v. Larson, 207 N.W.2d 709, 711 (Minn. 1973). Allen’s cited cases all involved non-agent independent contractor service providers.<sup>16</sup> Allen himself, however, was an agent independent contractor and as such was under Burnet’s

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<sup>16</sup> See footnote 15, supra.

right of control. There can be no dispute but that Burnet exercised that right of control through the ICAs.

In sum, Burnet's LA Program here falls within both of Anstine's categories of "equitable indemnity": Burnet has a connection with the losses within the scope of the LA Program, and Burnet exercises control over the conduct that could lead to such losses. Anstine, 233 N.W.2d at 728-29. Because any claimed indemnification Burnet owes to Allen under the LA Program is "equitable" rather than "indemnity for hire," the LA Program is *not* insurance. See id. The Court should therefore affirm the judgment in Burnet's favor.

**V. UNDER THE "PRINCIPAL OBJECT AND PURPOSE" TEST, THE LA PROGRAM IS NOT "INSURANCE."**

The Court of Appeals decision in this case applied what is commonly called the "principal object and purpose" test and concluded that under that test, the "'principal object and purpose' of the ICA, of which the LA Program is a part, is to sell real estate." 784 N.W.2d at 89. In this context, the court held, "the LA Program functions less as a traditional insurance program and more as an arrangement to share potential risk." Id. The court therefore concluded that "the LA Program is not insurance or 'indemnity for hire.'" Id. (citing Anstine).

In this Court, Allen does not dispute the Court of Appeals' conclusion that the LA Program is not "insurance" under the "principal object and purpose" test, and therefore concedes the issue. See In re Olson, 648 N.W.2d 226, 228 (Minn. 2002) (holding that issues not argued in the briefs are deemed waived). Allen argues *only* that the Court of

Appeals erred in adopting the test at all. As noted above, even without the “primary object and purpose” test, the LA Program is not “insurance” under Minnesota law. Nevertheless, the “primary object and purpose” test is consistent with Minnesota law, sound as a matter of public policy, and provides yet another ground for this Court to conclude that the LA Program is not “insurance.”

**A. The Principal Object And Purpose Test Is A Useful Means Of Addressing The Issue Of What Constitutes “Insurance.”**

Courts around the country have found the “primary object and purpose” test to be a valuable tool in evaluating the character of an indemnity agreement in the context of statutory definitions that are, if taken literally, impossibly broad. As the Court of Appeals noted here, section 60A.02, subd. 3’s definition “is unworkably broad to be dispositive here.” Allen, 784 N.W.2d at 88. And as the Minnesota Commissioner of Commerce observed noted in his opinion, the definition in section 60A.02, subd. 3, “covers many agreements that are *not* subject to Minnesota’s insurance laws in chapters 60A-79A,” citing as an example an extended warranty sold with the purchase of a product. A.Apx.175 (emphasis in original); see also Anstine, 233 N.W.2d at 729 (“Contracts of indemnity are not contracts of insurance.”) (quoting Brotherton Const. Co. v. Patterson-Emerson-Comstock, Inc., 178 A.2d 696 (Pa. 1962)); St. John’s Reg’l Health Ctr. v. Am Cas. Co., 980 F.2d 1222, 1224 (8th Cir. 1992) (“There are other sorts of risk-shifting agreements which are not insurance contracts, such as private indemnity agreements collateral to the main business or transaction between the parties.”).

This view is consistent with that of the leading expert commentators on insurance law, who recognize that broad statutory definitions of “insurance” like the definition in section § 60A.02, subd. 3 should not be read literally. “The primary requisite essential to a contract of insurance is the assumption of a risk of loss and the undertaking to indemnify the insured against such loss.” Steven Plitt et al., Couch on Insurance § 1:9 (3d ed. 2007). However, “not all contracts of indemnity are insurance contracts; rather, an insurance contract is one type of indemnity contract.” Id. at §1.7.

There are many contractual devices, legally valid, by which persons seek assurance and peace of mind regarding future events. These contracts of assurance have distinctive names, such as guaranty, warranty, suretyship, indorsement, pledge, mortgage, conditional sale, indemnity, and insurance.

1 Eric Mills Holmes, Appleman on Insurance, 2d § 1.3 at 17 (1996); see also Robert E. Keeton & Alan I. Widiss, Insurance Law, § 8.3(a) n.1 (1988), at 942-943 (“Reading these statutes . . . as stating that all transactions having these characteristics are insurance would be to give them a meaning plainly inconsistent with the much narrower scope of regulation in practice.”).

Numerous courts in other states have likewise recognized that broad statutory definitions of “insurance” should not be taken literally, because doing so would sweep up many types of contractual arrangements that cannot reasonably be regarded as insurance. Courts therefore adopted a test that turned on whether the indemnity aspect was the “principal object and purpose” of the parties’ contractual relationship. Among the first courts to adopt this approach was Jordan v. Group Health Ass’n, 107 F.2d 239, 248 (D.C. Cir. 1939), in which the court commented:

[O]bviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts . . . . The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.

Thus, for example, in Kinkaid v. John Morrell & Co., 321 F. Supp. 2d 1090 (N.D. Iowa 2004), the court held that a meatpacker's practice of deducting a small portion of the price it paid to hog farmers for hogs that were shipped to it alive, as compensation for its commitment to pay full purchase price even if some of the hogs died during shipment, did not amount to selling insurance to the farmers against the risk of loss. Citing numerous Iowa Supreme Court decisions, the court held that, "even where an agreement *literally* satisfies the [legal definition], it is still not necessarily 'insurance.'" Id. at 1098 (emphasis in original). Rather, "the *character* of the program, not its terminology, is determinative of whether or not it is 'insurance;'" to be considered insurance, "*the assumption of risk by the promoter must be the 'principal object and purpose of the program.'*" Id. at 1099 (emphasis in original) (quoting Barberton Rescue Mission, Inc. v. Insurance Div. of Iowa Dep't of Commerce, 586 N.W.2d 352, 355 (Iowa 1998)). The court noted that the Uniform Commercial Code permits buyers and sellers of goods to agree on how the risk of the goods' loss while they are in transit should be allocated, see, e.g., Minn. Stat. § 336.2-509, subd. 4, and it expressed concern about turning routine contracts for the sale of goods into "insurance" merely because they include such an agreement.

Similarly, in State ex rel. Londerholm v. Anderson, 408 P.2d 864 (Kan. 1965), the court held that defendant cemetery operators were not engaged in the business of selling

insurance where their pre-need installment contracts for the sale of cemetery plots, burial vaults, and markers included provisions cancelling the balance owed on the contract if the purchaser died before full payment had been made. Although state law defined insurance broadly, in language similar to that of Minn. Stat. § 60A.02, subd. 3, as “any contract whereby one party promises for a consideration to indemnify the other against certain risks,” *id.* at 874, the court noted that “it does not necessarily follow that every contract which contains some technical element of indemnity or insurance is an insurance contract for the purpose of state regulation.” *Id.* at 875. The court concluded that the primary object and purpose of the contracts in question was the sale of cemetery plots and related items, not the transfer of risks, that the provision cancelling the unpaid debt if the buyer died was “merely incidental” to that primary purpose, and that the provision therefore was not insurance. *Id.* at 876; *see also, e.g., GAF Corp. v. County School Bd.*, 629 F.2d 981 (4th Cir. 1980) (applying Virginia law; roofing supplier’s agreement to repair leaks resulting not only from defects in its product but also from faulty workmanship of installers not controlled by it, although possessing some characteristics of insurance, was not “insurance” because provision shifting risk of faulty installation was incidental to essential character of agreement as warranty accompanying sale of goods); *Boyle v. Orkin Exterminating Co.*, 578 So. 2d 786 (Fla. Dist. Ct. App. 1991).

Courts in other jurisdictions have employed this “primary object and purpose” test in cases addressing the precise issue here. Most recently, the federal district court in California held that a real estate broker’s Legal Assistance Program that was substantially similar to Burnet’s LA Program was *not* insurance under California law. *Claver v.*

Coldwell Banker Residential Brokerage Co., 2009 WL 5195969 (S.D. Cal., Dec. 21, 2009), R.Apdx.19-22. The Claver court dismissed the complaint of a real estate sales associate who asserted, as Allen does here, that his broker's program involved the unlicensed sale of insurance. Applying a long line of California cases embracing the "principal object and purpose" test discussed above, the court concluded:

The principal object and purpose of the Agreement in this case is evident from its terms. It obligates [the sales associate] "to use his ... best efforts to list and sell residential real estate" exclusively on behalf of Defendant. Defendant, on the other hand, is obligated to provide a branch sales office and make available to [the associate] all current listings for that office. When [the associate] earns a commission for services performed under the Agreement, it is divided between the parties according to a commission schedule, which is a part of the Agreement. *Other parts of the Agreement, including the [Legal Assistance] Program, are secondary to the principal purpose and object of dividing responsibilities and compensation related to residential real estate sales.*

Id. at \*4 (internal citations omitted; emphasis added). Therefore, the court held, the Legal Assistance Program in that case was not an insurance contract. Id.

An Ohio appellate court reached a similar result in addressing a real estate broker's "legal defense plan" for jointly sharing defense responsibilities and costs with its sales associates. In Dietz-Britton v. Smythe, Cramer Co., 743 N.E.2d 960 (Ohio App. 2000), the court observed that there are many risk-shifting agreements that are not insurance, including

private indemnity agreement[s] where affording the indemnity is not the primary business of the indemnitor and ... is merely ancillary to and in furtherance of some other independent transactional relationship between the indemnitor and the indemnitee. The indemnity is, thus, not the essence of the agreement creating the transactional relationship but is only one of its negotiated terms.

Id. at 973 (quoting Am. Nurses Ass'n v. Passaic Gen. Hosp., 471 A.2d 66, 70-71 (N.J. App. Div.), aff'd in relevant part, 484 A.2d 670 (N.J. 1984)). The court found that the evidence before it “tend[ed] to suggest that the legal defense program is more in the nature of a private indemnity agreement between [the broker] and its realtors than an insurance program,” and it reversed a trial court decision that the program was insurance under Ohio state law. Id.

As the Court of Appeals noted, Minnesota law provides no “definitive precedent” concerning the “primary object and purpose” test, 784 N.W.2d at 88, but the principle is implicit in the Anstine court’s observation that “[c]ontracts of indemnity are not contracts of insurance.” 233 N.W.2d at 728 (quoting Brotherton Constr., 178 A.2d at 697).

Insurance generally involves a stranger to a business or transaction who assumes certain risks relating to that business or transaction in return for a fee in the form of an insurance premium. Conversely, as the Court recognized in Anstine, an agreement between parties who are engaged in business or involved in a transaction together, in which they agree to allocate between themselves the risks of that business or transaction, is not the type of relationship that the insurance laws were intended to regulate.

In objecting to the Court of Appeals’ use of the “primary object and purpose” test, Allen addresses only a single case applying the test, Jordan v. Group Health Assoc., 107 F.2d 239 (D.C. Cir. 1939), and tries to distinguish the case on its facts.<sup>17</sup> Appt.Br.35-36. This effort is unpersuasive for several reasons.

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<sup>17</sup> Although the Court of Appeals decision itself cited only the Jordan case by name, it noted that “[m]any courts rely on the ‘principal object and purpose’ test,” 784 N.W.2d

First, Allen errs in asserting that the holding in Jordan “is flatly inconsistent with Minnesota law, which regulates such [health service] plans as insurance.” Appt.Br.35 (citing Minn. Stat. §§ 62C.01 & 62C.08). In fact, the statute Allen cites states just the opposite, providing that corporations operating such health plans “shall not be subject to the laws of this state relating to insurance.” Minn. Stat. § 62C.01, subd. 3; see also Minn. Stat. § 62C.04, subd. 3 (“No service plan corporation shall include within its name the words ‘insurance,’ ‘casualty,’ ‘surety,’ ‘mutual,’ ‘indemnity,’ or any other words descriptive of the insurance, casualty, or surety business.”). Second, contrary to Allen’s assertion, the Jordan court did not “criticize” this Court’s decision in Physicians’ Defense Co. v. O’Brien, 111 N.W. 396, 397-98 (Minn. 1907). Instead, the Jordan court merely noted that it was distinguishing Physicians’ Defense and other cases “[w]ithout indicating approval of the results in the cases distinguished.” Jordan, 107 F.2d at 249.

More importantly, however, Allen ignores the substantial body of more recent case law from multiple jurisdictions that adopts and applies the “primary object and purpose” test. Given the unavoidably fact-specific nature of whether a particular contract constitutes “insurance,” one can nearly always find arguable grounds for distinguishing one case from another. Under such circumstances, Burnet submits that it is important to look instead at the broad acceptance of the underlying analytical approach and the public policies that approach serves. It is that broader view, set forth in the cases and treatises discussed above, that Allen does not address.

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at 88, and Burnet’s brief in the Court of Appeals discussed half a dozen such cases. Burnet COA Br.25-29.

**B. The Minnesota Legislature's Adoption Of Minnesota Statute § 471.981 Does Not Implicitly Reject The Principal Object And Purpose Test.**

Allen spends several pages constructing an elaborate but ultimately futile attempt to create an implied legislative rejection of the "primary object and purpose" test.

Appt.Br.36-39.

Allen starts with the Legislature's adoption of general legislation providing for self-insurance for local governments. See 1980 Minn. Laws ch. 529. That legislation happened to include an amendment to section 60A.02, subd. 3, that provided that a self-insurance program established under the new legislation is not "insurance" under that definition. 1980 Minn. Laws ch. 529, § 1 (amending section 60A.03, subd. 3). Allen then infers that the Legislature intended this added limitation in section 60A.02, subd. 3, to *expand* the scope of the unaltered portion of the statute to include all other (i.e., non-governmental) "employer-based" self insurance plans within the section's definition of "insurance," invoking Minn. Stat. § 645.19. Allen also notes that other statutes regulate non-governmental employer-based plans as insurance. Appt.Br.37-38.

Based on these statutes, Allen extends his inference further to suggest that, because such employer-based insurance plans are (in his view) "incidental to, and not the 'principal object and purpose of'" the underlying employer-employee relationship, the Legislature's adoption of the local government self-insurance bill in 1980 implicitly rejected the "principal object and purpose" test for all other kinds of indemnity agreements. Appt.Br.38.

To summarize this reasoning is to reveal its flaws. “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. If they do not serve that purpose, they are not helpful.

As this Court has noted:

Rules of construction are mere aids in ascertaining the legislative intent. Being founded on reason and experience they are neither ironclad nor inflexible. They have force only as suggestions to the judicial mind. The rules yield when an intention contrary to the inference ordinarily suggested by them is ascertained, ... and are to be resorted to only so long as they furnish aid.

Bull v. King, 286 N.W. 311, 315 (Minn. 1939) (citations omitted).

Here, Allen’s reasoning goes far beyond any reasonable attempt to ascertain legislative intent, invoking inapposite rules of construction and negative inferences to reach his desired result, which in the end is nothing more than speculation. Neither section 645.19 nor In the Matter of the Welfare of the Child of S.L.J., 782 N.W.2d 549 (Minn. 2010) (which Allen cites), suggests that an amendment that merely states that a particular type of program is not within a statutory definition reflects a legislative intent to reject a specific analytical approach (here, the “primary object and purpose” test) to interpreting the statutory definition in an entirely different context, especially an analytical approach that no Minnesota court had at that point ever addressed. Allen’s reasoning simply is not credible.

**C. Minnesota Case Law Does Not Implicitly Reject The Principal Object And Purpose Test.**

Allen also briefly argues that two Minnesota cases implicitly reject the “primary object and purpose” test. Appt.Br.39-40. Allen’s argument does not survive scrutiny.

Allen first argues that the contract at issue in State v. Beardsley, 92 N.W. 472 (Minn. 1902), was held to involve insurance “even though it was necessarily ancillary and incidental to the underlying relationship of lender and borrower.” Appt.Br.39. In reality, however, the Beardsley decision offers no evidence that the parties to the transactions had any previous business relationship until one of them borrowed money from the other and, in the loan document, the lender (whom the Court held to be an insurer) agreed to cancel the debt under specified circumstances.<sup>18</sup> Beardsley thus does not present a situation in which, as here, the alleged insurance agreement was incidental to a larger business relationship that was the parties’ primary purpose for doing business together.

Allen presents a more complicated argument with respect to Anstine, claiming that the Anstine court “cited with approval for the distinction between a warranty and insurance two opinions in which courts rejected the principal object and purpose test.” Appt.Br.39-40 (citing Ollendorff Watch Co. v. Pink, 17 N.E.2d 676, 677-78 (N.Y. 1938) and State of Ohio ex rel. Duffy v. Western Auto Supply Co., 16 N.E.2d 256, 259 (Ohio 1938)). First, Burnet respectfully submits that Anstine’s footnoted dicta citing cases for holdings concerning warranties, 233 N.W.2d at 729 n.8, is not a sound basis on which to conclude that the Anstine court implicitly adopted those cases’ unrelated analysis of the “primary object and purpose” test. Second, whatever Ohio’s position on the issue 60

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<sup>18</sup> Two other Minnesota cases that Allen cites elsewhere in his brief, Physicians’ Defense Co. v. O’Brien, 111 N.W. 396 (Minn. 1907), and State v. Bean, 258 N.W. 18 (Minn. 1934), are distinguishable on the same ground as Beardsley—the parties were strangers apart from the contract that was held to be insurance.

years ago in the Duffy decision, the state's courts have since adopted and applied the "principal object and purpose" test in the very same context presented here. See Dietz-Britton, 743 N.E.2d at 973 (discussed above at 43-44).

In sum, application of the "primary object and purpose" test in the present case is entirely consistent with Minnesota law. Because Allen does not dispute that the LA Program is not insurance under that test, the Court should affirm the judgment in Burnet's favor.

**VI. THERE ARE NO POLICY REASONS TO CATEGORIZE THE LA PROGRAM AS "INSURANCE."**

**A. Public Policy Favors Risk-Allocation And Cost-Sharing Agreements Like The LA Program.**

Allen cites no substantial public benefits that would be served by classifying the LA Program and other agreements like it as "insurance" subject to Department of Commerce regulation, and in fact public policy strongly favors holding that such agreements are *not* insurance. As courts have noted, nearly every contract involves some shifting of risk in exchange for consideration, and classifying all such shifts of risk as "insurance" would effectively prohibit such provisions in many common contracts.

Public policy favors provisions of the specific type at issue here for a number of reasons. First, contractual provisions that allocate risk in advance permit the parties to accurately assess their likely expenses. Second, agreements that address in advance how third-party claims will be handled eliminate uncertainty and give the parties clear guidance when and if such claims arise. Finally, public policy favors provisions that reduce parties' transaction costs. Here, the LA Program accomplishes such cost

reductions by unifying Burnet's and the associate's handling of any claim and by eliminating (through Burnet's waiver of cross-claims) any internecine dispute over who is at fault. Classifying such agreements as "insurance" subject to regulation by the Department of Commerce would inevitably discourage parties from entering into such agreements and would eliminate these advantages.

In addition, the adoption of Allen's broad definition of "insurance" would substantially and unavoidably increase the burden on the Department of Commerce. If contracting parties fail to treat such agreements as insurance, the Department will face the increased burden of policing and sanctioning such conduct. If contracting parties *do* treat such agreements as insurance, they would need to comply with all the concomitant regulations, which would in turn increase the burden on the Department of reviewing a significant body of new submissions and regulating the plethora of business relationships that would be implicated.

And of course imposing insurance regulations on any party who contracts to shift a risk or provide for indemnification would impose a substantial burden on commerce itself. Risk shifting and indemnity provisions are vital parts of many business agreements, and categorizing such provisions as insurance would require businesses to expend significant time and energy in either complying with or avoiding the Department of Commerce's requirements. See Minn. Stat. § 645.16, subs. 3, 4, and 6 (directing court seeking legislative intent to consider "the mischief to be remedied; ...the object to be attained;...[and] the consequences of a particular interpretation").

**B. The Commissioner Of The Department Of Commerce Expressed No Public Policy Concerns Over The ICA And LA Program.**

The Commissioner of Commerce's opinion that the LA Program is not insurance is significant at least to the extent that it reveals any public policy issues in the LA Program that concern the Commerce Department, which is of course in the business of regulating *both* insurance *and* real estate agents and brokers. See Minn. Stat. Ch. 82 ("Real Estate Brokers And Salespersons"). The Commissioner expressed no public policy concerns that suggest that the LA Program should be regulated as insurance and has disclaimed any desire for regulatory jurisdiction over the Program under the insurance laws. A.Apx.171-82.

**C. The Handling Of The LA Fees For The LA Program Poses No Public Policy Concerns.**

The only allusion to public policy in Appellant's Brief suggests that because Burnet "upstreams" all of its revenues to NRT (Appt.Br.11, ¶18), and because NRT is supposedly highly leveraged (*id.* ¶19), there should be some public policy concern about the LA Program. Allen's suggestion is a red herring for three reasons.

First, unlike in some states, real estate brokers and salespersons in Minnesota are not required to obtain E&O insurance. Instead, consumers are protected through the Real Estate Education, Research and Recovery Fund established under Minn. Stat. § 82.86. Thus, Burnet's handling of the LA Fees does not implicate consumer interests. This Court should not reach out to provide protection to sales associates by distorting the insurance laws, as Allen requests. If the risk of broker insolvency requires a change in the law, that is a question for the Legislature.

Second, Burnet upstreams all of its revenues to NRT because since October 2005 NRT has operated a centralized accounts payable function for all NRT-owned brokerages. A.Conf.Apdx.118-19. The fact that this administrative function is handled centrally does not mean that funds are, or would be, unavailable to pay Burnet's obligations as they become due.

Third, there is no evidence that Burnet has ever failed to pay any of its obligations for legal or compliance matters in the more than 20 years that it has operated the LA Program. Specifically here, Allen does not claim that Burnet failed to fulfill any of its obligations to him under the ICAs or the LA Program.

Burnet respectfully submits that subjecting real estate brokers to insurance regulation would provide no public policy benefits, while the costs and drawbacks would be real and substantial. Public policy does not support treating the LA Program as "insurance."

**VII. THE COURT SHOULD AFFIRM SUMMARY JUDGMENT AS TO ALLEN'S CONSUMER FRAUD ACT AND UNJUST ENRICHMENT CLAIMS AS WELL.**

As both parties recognize, Allen's claims against Burnet based on the CFA and unjust enrichment both depend on the premise that the LA Program is insurance under Minnesota law. See Appt.Br.41. Because the LA Program is not insurance under Minnesota law, as discussed above, the lower courts correctly granted summary judgment to Burnet on Allen's CFA and unjust enrichment claims, and this Court should affirm those rulings.

**CONCLUSION**

For the reasons discussed above, Burnet asks the Court to affirm the judgment in favor of Burnet in all respects.

Respectfully submitted,

Date: November 29, 2010

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STATE OF MINNESOTA  
IN SUPREME COURT

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Timothy B. Allen,

Appellant,

vs.

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

Respondent.

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CERTIFICATION OF  
BRIEF LENGTH

Appellate Court  
Case Number: A09-1963

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,782 words. This brief was prepared using Microsoft Word 2007 software.

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