

Nos. A10-87 and A10-89
(Consolidated)

STATE OF MINNESOTA

IN COURT OF APPEALS

In re: Individual 35W Bridge Litigation

On Appeal of Order dated and filed: September 23, 2009
and as amended and filed on: December 23, 2009
Trial Court File Nos. (Hennepin County)
MASTER FILE NO. 27-CV-09-7519
Schwebel Personal Injury: 27-CV-09-7274
Schwebel Wrongful Death: 27-CV-08-28245

BRIEF OF RESPONDENT STATE OF MINNESOTA

LORI SWANSON
Attorney General
State of Minnesota
ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678
KRISTYN ANDERSON
Assistant Attorney General
Atty. Reg. No. 0267752
GARY CUNNINGHAM
Assistant Attorney General
Atty. Reg. No. 0186210
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2127
(651) 282-5700 (Voice)
(651) 296-1410 (TTY)
ATTORNEYS FOR RESPONDENT
STATE OF MINNESOTA

David F. Herr (#44441)
James Duffy O'Connor (#80780)
Kirk O. Kolbo (#151129)
Rita O'Keeffe (#0306873)
Nicole Narotzky (#0329885)
Abigail Richey-Allen (#0388864)
Maslon Edelman Borman & Brand, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

*Attorneys for Appellant Jacobs
Engineering Group, Inc.*

Jeffrey Baill
Yost & Baill
2050 US Bank Plaza South
220 South Sixth Street
Minneapolis, Minnesota 55402

*Attorneys for Respondent Intervenors
/Subrogated Parties*

Richard J. Nygaard
Courtney Lawrence
Schwebel Goetz & Sieben, P.A.
5120 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Attorneys for Respondent Plaintiffs

Jocelyn L. Knoll
Eric A. Ruzicka
Dorsey & Whitney, LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402

Attorneys for Respondent URS Corporation

Scott Ballou
Patrick M. Biren
Brownson & Ballou, PLLP
225 South Sixth Street, #4800
Minneapolis, Minnesota 55402

*Attorneys for Intervenor Gallagher Bassett
Services*

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LEGAL ISSUES

1. Does the statute of repose in Minn. Stat. § 541.051 bar the State's claims for contractual indemnity and statutory reimbursement where the contract pre-dates the statute of repose, retroactive amendments to the statute of repose in 2007 unambiguously allow for indemnity, and the reimbursement statute unambiguously provides the State with a right to reimbursement "[n]otwithstanding any statutory or common law to the contrary"?

The district court held in the negative.

Apposite Authority: Minn. Stat. § 3.7394, subd. 5(a); § 541.051, subd. 1(b); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002); *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008); *Richards v. Gold Circle Stores*, 501 N.E.2d 670, 674 (Oh. Ct. App. 1986)

2. Does due process bar the State's contractual indemnity and statutory reimbursement claims against Jacobs where Jacobs had no vested property interest in freedom from liability for its malfeasance in causing the collapse of the I-35W Bridge, and the 2007 amendments to the statute of repose and the reimbursement statute are rationally related to a legitimate governmental purpose?

The district court held in the negative.

Apposite Authority: *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008); *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

3. Does the voluntary payments doctrine require dismissal of the State's contractual indemnity and statutory reimbursement claims where the pleadings establish that the State's payments to the victims were not voluntary both as a matter of fact and of law?

The district court held in the negative.

Apposite Authority: Minn. Stat. § 3.7394, subd. 5(a); *Iowa Nat'l Mutual Ins. Co. v. Liberty Mutual Ins. Co.*, 464 N.W.2d 564 (Minn. Ct. App. 1990), *rev. denied* (Mar. 15, 1991); *Northland Ins. Co. v. Ace Doran Hauling & Rigging Co.*, 415 N.W.2d 33 (Minn. Ct. App. 1987).

4. Do the State's settlements with the victims of the Bridge collapse preclude the State from seeking contractual indemnity or statutory reimbursement from Jacobs where the indemnity contract requires indemnity for all claims and demands and where the settlement agreements and the reimbursement statute permit recovery of the public monies paid to the victims from third parties "to the extent the third party caused or contributed to" the catastrophic collapse of the I-35W Bridge?

The district court held in the negative.

Apposite Authority: Minn. Stat. § 3.7394, subd. 5(a); *Isle Wellness, Inc. v. Progressive Northern Ins. Co.*, 703 N.W.2d 513 (Minn. 2005); *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983).

5. Does Jacobs have a contractual right to "zero tort liability" arising out of its promise to indemnify the State for any claims or demands "of whatsoever nature or character," which was unconstitutionally impaired by the State's reimbursement statute which seeks to hold Jacobs accountable for its malfeasance?

The district court held in the negative.

Apposite Authority: *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Spanel v. Mounds View School Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962); *Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721 (Minn. Ct. App. 1995).

STATEMENT OF THE CASE

This interlocutory appeal relates to 121 lawsuits brought by the victims of the Bridge collapse (or their family members) against URS Corporation and PCI Corporation.¹ PCI thereafter impleaded the State and Jacobs.² The State then cross-claimed against Jacobs for contractual indemnity and statutory reimbursement pursuant to Minn. Stat. § 3.7394, subd. 5(a), with respect to the \$37 million paid by the State to the victims of the collapse to settle their claims against the State.

Jacobs moved to dismiss the State's claims, and contribution and indemnity claims brought by URS against Jacobs, based upon the statute of repose and due process arguments. Jacobs also contended in its motion against the State that the Legislature's authorization of payments to victims was voluntary and that *Pierringer* releases required by the Legislature released Jacobs despite language in the settlements and in the statute to the contrary. Finally, Jacobs argued that it had a contractual "right to zero tort liability" which was unconstitutionally impaired by the reimbursement statute. After carefully considering Jacobs' arguments, the district court denied Jacobs' motions to dismiss against URS and the State on all grounds.

The district court denied Jacobs' motion to dismiss against URS, concluding that the plain language of the 2007 amendments to the statute of repose, Minn. Stat. § 541.041, subd. 1(b), permits claims for contribution and indemnity against Jacobs.

¹ The Plaintiffs did not bring suit against Jacobs because a direct claim is barred by the 10-year limitation period established by Minn. Stat. § 541.041, subd. 1(a).

² The State also brought claims against PCI and URS. The claims against PCI were subsequently settled.

(Aug. 28, 2009 Order.) The court determined that, since the Legislature expressly provided for the retroactive application of the amendments, the legislation revived the contribution and indemnity claims made by URS. Based upon precedent of this Court, *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008), the district court also held that Jacobs had no vested property interest in “repose” and therefore rejected Jacobs’ due process challenge to the 2007 amendments. The district court further held that even if a vested property right existed, the amendments satisfied due process because they were rationally based, *i.e.*, to allocate liability among all tortfeasors. (Aug. 28, 2009 Order at 4-6.)

On September 23, 2009, the district court denied Jacobs’ motion to dismiss the State’s claims. In so doing, it incorporated by reference its August 28, 2009 Order. (Sept. 23, 2009 Order at 12.) The court rejected Jacobs’ constitutional challenges to the State’s reimbursement statute, finding that Jacobs had “no vested interest in or contractual right to Minnesota’s sovereign immunity law or statute of repose remaining static,” and that the reimbursement statute was reasonably based. (*Id.* at 12-14.) In addition, the court concluded that the State pled sufficient facts to show that its payment to survivors pursuant to the compensation fund legislation was not voluntary since the payments were expressly made for the purpose of “avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of liability of the state, a municipality, or their employees for damages incurred by survivors.” (*Id.* at 18.) The court similarly rejected Jacobs’ *Pierringer* argument because the State’s contractual

indemnity and statutory reimbursement claims do not “fall under the restrictions of the *Pierringer* common law cases.” (*Id.* at 19-20.)

In response to the November 10, 2009 Order of this Court, on December 23, 2009, the district court amended its September 23 Order and concluded that the statute of repose was inapplicable to the State’s claim for contractual indemnity for the additional reason that the State’s contract with Jacobs predated the statute of repose. The court cited Minn. Stat. § 645.21 and determined that the statute of repose was not made retroactive. (Dec. 23, 2009 Order at 1.)

Jacobs now brings this interlocutory appeal seeking an order from this Court reversing the district court’s ruling on its motion to dismiss.

STATEMENT OF FACTS

In 1962, the State of Minnesota entered into a contract with Sverdrup & Parcel and Associates, Inc. (“Sverdrup”), Jacobs’ predecessor, for the design of the I-35W Bridge to span the Mississippi River. (A. 138, 140, ¶¶ 3, 11, 13.) The contract contained an agreement to indemnify the State from all liability associated with Sverdrup’s work. The contract states, in pertinent part:

The Consultant indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of the Consultant provided for under this agreement.

(A. 148, ¶ 59; A. 235.)

Sverdrup certified the final design plans in March 1965. (A. 57, ¶ 101.) Although the Bridge’s design was to conform to the applicable American Association of State

Highway Officials' Standard Specification for Highway Bridges, Sverdrup designed gusset plates of insufficient strength and half the thickness required by the Specifications. (A. 140, ¶¶ 12, 15, 16.) The gusset plates are critical components of the Bridge which connect the main members in the Bridge's superstructure. Unaware of Sverdrup's improper design, the State constructed the Bridge as Sverdrup designed it. (A. 140-141, ¶¶ 17, 18.)

On September 28, 1999, Jacobs acquired Sverdrup, assuming all of Sverdrup's liabilities. (A. 138-139, ¶¶ 3, 9-10.) Jacobs is a large publicly-traded company that performs engineering services throughout the world.

On August 1, 2007, as a result of Sverdrup's improper design, the I-35W Bridge collapsed, killing 13 people, injuring more than 145 others, and resulting in significant damages to the State. (A. 142, ¶¶ 22, 24.)

In response to this historic catastrophe, the Minnesota Legislature enacted the Bridge compensation fund legislation, Minn. Stat. § 3.7391, *et seq.*, appropriating approximately \$37 million to settle the claims of the Bridge collapse victims against the State. Minn. Laws 2008, c. 288. The stated purpose of the legislation was to "further the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by

survivors.”³ Minn. Stat. § 3.7391, subd. 2. The compensation fund legislation also provides that the “state is entitled to recover from any third party, including an agent, contractor or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe.” Minn. Stat. § 3.7394, subd. 5(a).

Pursuant to the legislation, the Chief Justice of the Minnesota Supreme Court established a special master panel to consider the survivors’ claims and make offers of settlement. (A. 142, ¶ 27.) 179 survivors made claims for compensation, and all were made and accepted offers of settlement. (A. 143, ¶ 28.) In total, the State paid to survivors over \$37 million.⁴ All survivors executed settlement agreements required by the compensation fund legislation, Minn. Stat. § 3.7393, subd. 13, releasing the State and its municipalities, the University of Minnesota, and their respective employees from liability. (*Id.* ¶ 32; A. 182-183.) The compensation fund legislation and the settlement agreements with the survivors also preserve all rights of the State against third parties. Minn. Stat. §§ 3.7393, subd. 13; 3.7394, subd. 5. (A. 143-144, ¶ 33; A. 186-187.)

³ The legislation defines “survivors” as natural persons present on the Bridge at the time of the collapse, parents, legal guardians (for minors) and legally appointed representatives of survivors, and surviving spouse and next of kin. Minn. Stat. § 3.7392, subd. 8.

⁴ The State paid a total of \$36,640,000 to survivors through the compensation fund legislation, and \$398,984.36 from an emergency relief fund which was created by the State on November 30, 2007. (A. 143, ¶ 32; Minn. Stat. § 3.7392, subd. 4.)

SUMMARY OF THE ARGUMENT

These appeals involve perhaps the most tragic and horrific catastrophe ever seen in the State of Minnesota, the collapse of the I-35W Bridge. The collapse caused 13 deaths and injured more than 145 people. (A. 142, ¶ 24.) Jacobs, by its predecessor (hereinafter collectively “Jacobs”), severely under-designed the Bridge, creating a ticking time bomb that ultimately caused the Bridge to collapse. (A. 140-142, ¶¶ 15-17, 22.) That Jacobs was negligent and breached its contract with the State in designing the Bridge, and that Jacobs’ negligence and breach of contract caused the Bridge to collapse (*Id.*, ¶¶ 17, 22), are deemed to be true facts for purposes of this appeal.

Jacobs ignores the historic magnitude of the Bridge collapse and seeks to escape accountability for its actions by advancing a series of flawed, technical arguments. For example, it asserts that a statutory cap on State tort liability of \$1 million for any one incident created an ironclad limit on the State’s liability for damage claims, including the State’s vicarious liability for Jacobs’ negligence, that might be brought by the faultless victims of the collapse (or their family members). The suggestion that the \$1 million aggregate limit on State liability would not be challenged by victims of the collapse, or that any such challenge would not place the validity of the cap at substantial risk, defies reality.

Shortly after the collapse, the Minnesota Legislature commenced hearings to consider compensation for the victims as part of a process to resolve the State’s liability for the collapse. Recognizing the historic nature of the collapse and the “devastating physical and psychological” effect on the victims and the entire State, Minn. Stat.

§ 3.7391, subd. 1, the Legislature appropriated approximately \$37 million to promptly compensate victims in return for a release of liability for the State, its municipalities, the University of Minnesota (which had done a study and prepared a report on the Bridge in 1999) and their respective employees. Minn. Stat. § 3.7393, subd. 13; Minn. Laws 2008, c. 288, § 6. (A. 143-144, ¶¶ 28, 32, 33).

An important aspect of the legislation was that the State was given the right to seek reimbursement of some or all of the \$37 million of public money paid to victims of the collapse from any third party, including “an agent, contractor or vendor retained by the state . . . to the extent they caused or contributed to the catastrophe.” Minn. Stat. § 3.7394, subd. 5(a). Recognizing potential statute of repose arguments and other statutory and common law defenses, the Legislature specifically provided that the State’s right of reimbursement existed “[n]otwithstanding any statutory or common law to the contrary.” *Id.*

The Legislature therefore compensated 179 victims quickly and without requiring them to endure protracted litigation, resolved the State’s liability, and allowed the State to seek reimbursement of the public monies paid to the victims, from Jacobs and others to the extent they were responsible for the Bridge collapse. (A. 143, ¶¶ 28, 29.) Accordingly, the legislation serves several public purposes, such as holding Jacobs accountable for the public monies paid to the victims to the extent of Jacobs’ culpability. As the district court concluded, the statute is rationally based and is therefore constitutional. (Sept. 23, 2009 Order at 12-14.)

Jacobs summarily dismisses the Legislature's authority to hold it accountable. It simply ignores the clear language and purpose of the legislation, as well as the presumption that the law is constitutional and Jacobs' burden to prove beyond a reasonable doubt that the legislation violates the Constitution. The Legislature has the authority to hold entities accountable for the consequences of their malfeasance, without regard to a statute of repose, just as it has properly held asbestos manufacturers accountable for their wrongful past conduct. *See Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 297-298 (D. Minn. 1990) (upholding constitutionality of Minnesota law which revived claims against asbestos manufacturers that would otherwise be precluded by statute of repose).

Jacobs' statute of repose defense against the State is without merit for all of the reasons articulated by URS in Jacobs' related appeal, including this Court's precedent in *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App. 2008). There also are additional reasons why the statute of repose is inapplicable to the State's claims. The statute of repose does not apply to the State's statutory reimbursement right because that right applies "[n]otwithstanding any statutory or common law to the contrary." Minn. Stat. § 3.7394, subd. 5(a). With respect to the State's contractual indemnity claim, as the district court concluded (Dec. 23, 2009 Order at 1), the State's contractual right of indemnity is not subject to repose because the State's 1962 contract with Jacobs predates the 1965 enactment of the statute of repose and the law was not made retroactive. *See* Minn. Stat. § 645.21.

Jacobs' voluntary payment contention is fanciful for numerous reasons. There is no doubt that the \$1 million aggregate cap would have been challenged in this extraordinary case and its validity placed in jeopardy. The Legislature acted reasonably in settling the victims' claims and therefore the payments to the victims were not voluntary. *See, e.g., Northland Ins. Co. v. Ace Doran Hauling & Rigging Co.*, 415 N.W.2d 33, 39-40 (Minn. Ct. App. 1987). Moreover, Jacobs' second-guessing of the Legislature's judgment has no merit, *see, e.g., Opatz v. City of St. Cloud*, 196 N.W.2d 298, 300 (Minn. 1972), and is really nothing more than a disguised and specious challenge to the constitutionality of the compensation fund legislation without acknowledgment of Jacobs' heavy burden to prove that a state law is unconstitutional. Finally, the terms of the indemnity contract, not principles regarding voluntary payment, govern Jacobs' obligation to indemnify the State. *See, e.g., Osgood v. Medical Incorporated*, 415 N.W.2d 896 (Minn. Ct. App. 1988), *review denied* (Feb. 12, 1988). The indemnity provision broadly requires Jacobs to indemnify the State for all "claims" and "demands" against the State "of whatsoever nature or character." (A. 235.) This includes the claims and demands of the victims of the collapse which were reasonably settled by the State. *See Osgood*, 415 N.W.2d 896.

The Legislature also clearly authorized a "Pierringer-plus" release with the victims to address this extraordinary situation, by allowing for immediate payments to victims, a release of the State's liability and the State's right to seek reimbursement of the public funds from culpable parties. Minn. Stat. §§ 3.7393, subs. 9, 11, 13; 3.7394, subd. 5(a). Jacobs fails to acknowledge the Legislature's well-established authority to

abrogate the common law in circumstances it deems appropriate. *See, e.g., Isle Wellness, Inc. v. Progressive Northern Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005). Jacobs similarly ignores that under basic contract law principles, its contractual indemnity obligation to the State is not eviscerated by the State's separate settlement with the victims. *See, e.g., Lesmeister v. Dilly*, 330 N.W.2d 95, 101-102 (Minn. 1983). In addition, the purpose of the *Pierringer* release has no application with respect to Jacobs. A *Pierringer* release is a settlement device which allows the plaintiffs (in this case the victims of the collapse) to maintain a legal action against non-settling tortfeasors who are subject to suit. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978). There is no dispute in this case that Jacobs has not been, and cannot be, sued by the victims of the collapse due to the statute of repose.

Jacobs' concocted impairment of contract claim turns the State's contractual right of indemnity on its head. Jacobs claims that the contract granted it a "right of zero tort liability," but the indemnity obligation runs in favor of the State, not Jacobs. (A. 235.) The State was given the right of indemnity by Jacobs for "all claims, demands, actions or causes of action of whatsoever nature or character." *Id.* Jacobs was given no rights under this contractual provision, let alone a "right of zero tort liability." *Id.* Rather, Jacobs is obligated under the contract to indemnify the State for whatever claims or demands by third parties arise out of Jacobs' execution or performance of the contract. *Id.* If there is any impairment of a contract right, it is Jacobs' attempt to impair the State's contractual right by its tortured interpretation of the indemnity provision. In any event, as the district court determined, the compensation fund legislation furthers

legitimate State interests and is properly tailored to serve those public interests. (Sept. 23, 2009 Order at 12-14.)

This is not a garden-variety breach of contract or tort case, as Jacobs tries to suggest. The Bridge collapse is of historic proportion and the Legislature acted well within its constitutional authority in enacting legislation to deal with the catastrophe. Jacobs is properly accountable for its culpability in causing the Bridge collapse, and its arguments to the contrary should be rejected by this Court, as they were by the district court.

ARGUMENT

I. THE LEGAL STANDARD FOR GRANTING A MOTION TO DISMISS IS DIFFICULT TO SATISFY AND A DISMISSAL MOTION RARELY IS GRANTED.

The legal standard for deciding a motion to dismiss is a difficult one to satisfy, and Jacobs fails to do so. A motion for dismissal rarely is granted. As with the district court, the only question before this Court is whether the State's complaint sets forth a legally sufficient claim for relief, and it is immaterial to that consideration whether the State can establish the facts alleged or other facts consistent with the legal theory. *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

If *any* theory of recovery is available to the State, the motion must be denied. *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 14 (Minn. 2001). The complaint should be construed liberally, and all assumptions and inferences must be made in favor of the State opposing the motion to dismiss. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). Therefore, all of the alleged facts in the

complaint are taken as true for purposes of deciding the motion, and a dismissal of the complaint may not be upheld on appeal “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005).

II. THE STATUTE OF REPOSE DOES NOT BAR THE STATE’S CLAIMS FOR CONTRACTUAL INDEMNITY OR STATUTORY REIMBURSEMENT.

In the related appeal by Jacobs (Nos. A09-1776 & A09-1778), URS articulates the reasons why the 2007 amendments to the statute of repose allow contribution and indemnity claims against Jacobs and why the amendments are constitutional. The State will not repeat all of URS’s arguments, but refers the Court to URS’s brief.

The State has additional arguments supporting its contractual indemnity and statutory reimbursement claims. Indeed, the statute of repose, enacted in 1965, and not made retroactive, is inapplicable to the State’s indemnity right derived from Jacobs’ contractual obligations entered in 1962. The statute of repose similarly does not apply to the compensation fund legislation’s reimbursement provision because the Legislature provided for that right “[n]otwithstanding any statutory or common law to the contrary.” Minn. Stat. § 3.7394, subd. 5(a).

A. The Statute of Repose Does Not Apply to The State’s Contractual Indemnity Claim Because the Contract Predated the Enactment of the Statute of Repose, Which Was Not Made Retroactive.

The contract between the State and Jacobs’ predecessor expressly provides for indemnity to the State. The 1962 contract has no specific time limit or restriction for asserting an indemnity claim. In fact, Article VI, Section 8 of the contract provides that

“termination shall not affect any legal right of the State against the Consultant for any breach of this Agreement.” (A. 233.)

Three years after the contract was executed, and two months after Jacobs completed its work on the contract, (A. 57, ¶ 101), the Minnesota Legislature enacted a statute of repose with respect to improvements to real property, codified as Minn. Stat. § 541.051. Minn. Laws 1965, c. 564, § 1.⁵ In enacting this law, the Legislature did not provide for its retroactivity. See Minn. Stat. § 645.21 (“No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.”); see also *Mason v. Farmers Ins. Cos.*, 281 N.W.2d 344, 348 (Minn. 1979) (“Minnesota laws are presumed to have no retroactive effect unless clearly and manifestly intended by the legislature.”). Therefore, the statute of repose became effective on May 22, 1965, the day following final enactment. See Minn. Stat. § 645.02 (1961).

The statute of repose is inapplicable to Jacobs’ indemnity obligations under the 1962 contract because the statute was not made retroactive. See *Richards v. Gold Circle Stores*, 501 N.E.2d 670, 674 (Oh. Ct. App. 1986) (rejecting applicability of statute of repose in part because “[t]o hold otherwise would enable [the defendant] to avoid the contractual obligation of indemnity, which it undertook when it executed the contract in question, by virtue of a statute [of repose] enacted subsequent to the execution of the

⁵ The statute of repose enacted in 1965 was subsequently declared unconstitutional in *Pacific Indemnity Co. v. Thompson-Yeager, Inc.*, 260 N.W.2d 548, 555 (Minn. 1977). In 1980, the Legislature amended the statute of repose to address the constitutional infirmity. Laws 1980, c. 518, §§ 2-4. Like the initial 1965 statute of repose, the 1980 version of the statute was not made retroactive. *Id.*

contract.”); *see also Cooper v. Watson*, 187 N.W.2d 689, 693 (Minn. 1971) (indicating that presumption against retroactivity ensures that newly enacted legislation does not create “a new disability, *in respect of transactions or considerations already past*” unless legislation clearly expresses such an intent) (emphasis in original; citation omitted). Simply put, the statute of repose did not retroactively limit the State’s pre-existing contractual right to indemnity.

Jacobs cites three cases⁶ wherein the 1980 version of the statute of repose was applied to construction work performed prior to the enactment of the statute. (Jacobs’ Br. 21.) However, none of those cases addressed a claim for contractual indemnity or the issue of retroactivity with respect to any such contract rights. Jacobs’ reliance on those cases is therefore misplaced. Rather, *Richards* correctly concludes, consistent with the presumption against retroactivity, that a subsequently enacted statute of repose is inapplicable to a pre-existing contractual indemnity provision. 501 N.E.2d at 674.⁷ As the *Richards* court reasoned, “[t]o hold otherwise would allow [the defendant] to avoid the contractual obligation of indemnity. . . .” *Id.* Likewise, Jacobs should not be

⁶ *Satori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1998); *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982); *Lourdes High School of Rochester, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443 (8th Cir. 1989).

⁷ Contrary to Jacobs’ argument (Jacobs Br. 11, n.6), the State does not cite the *Richards* case for the proposition that actions in contract generally are not subject to the Minnesota statute of repose, but for its rationale that a subsequently enacted, non-retroactive statute of repose should not be interpreted to destroy a pre-existing express contractual indemnity obligation. *See South Dearborn School Building Corp. v. Duerstock*, 612 N.E.2d 203, 208 (Ind. Ct. App. 1993) (recognizing that the *Richards* decision was based upon two different and independent grounds, one of which was “the fact that the obligations and rights created by the indemnity contract predated the statute of repose.”)

permitted to use the statute of repose to avoid its pre-existing contractual obligations to the State.

B. Even If The Statute Of Repose Applies, The Plain Language Of The 2007 Amendments To The Statute Of Repose Allow The State's Contractual Indemnity Claim Against Jacobs.

Even if this Court permits the statute of repose to override the pre-existing contract, the Legislature amended the statute of repose in 2007 to provide for an indemnity claim in the instant situation:

(b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).

Minn. Stat. § 541.051, subd. 1(b). This provision was made retroactive to June 30, 2006 (the "2007 amendments"). Minn. Laws 2007, c. 105, § 4; Minn. Laws 2007, c. 140, art. 8, § 29.

While Jacobs claims that the 2007 amendments should be construed to apply only to claims for which the 10-year statute of repose for direct claims in subdivision 1(a) had not already run by June 30, 2006, that reading is contrary to the plain language of the provision and *U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 100 (Minn. Ct. App. 2008), *rev. denied* (Minn. August 5, 2008).⁸ The plain language

⁸ In *U.S. Home*, the 10-year statute of repose ran in October 2004 (10 years after substantial completion of the home at issue), almost two years prior to the June 30, 2006 effective date of the 2007 amendments. The general contractor's contribution claim, filed on May 3, 2006, also predated the effective date of the 2007 amendments. This Court, (Footnote continued on next page)

leads to only one conclusion. Subdivision 1(b) specifically states that a contribution or indemnity claim may be brought “[n]otwithstanding paragraph (a),” the provision creating a 10-year repose period for direct actions, and “regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).” While Jacobs argues that the Legislature intended the 2007 amendments to address only the type of fact situation found in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006), such a limitation is not reflected in the unambiguous statutory language.⁹ See Minn. Stat. § 645.16 (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”)¹⁰

nevertheless, had no difficulty finding that the general contractor’s contribution claim, once defunct, was resurrected by the 2007 amendments.

⁹ Jacobs’ reliance on *Galbraith v. Engineering Consultants, Inc. v. Pochucha*, (Tex. 2009) (Jacobs Br. 18, n.11) for the proposition that the Legislature did not intend the 2007 amendments to revive extinguished claims is misplaced. The issue in *Galbraith* was whether a revival statute which specifically applied to “limitations” applied at all to repose. 290 S.W.3d 863. Here, the 2007 amendments plainly exempt contribution and indemnity claims from the statute of repose. In declining to read the ambiguous statute at issue to apply to statutes of repose rather than statutes of limitations, the *Galbraith* court recognized that, “[s]tatutes of repose are created by the Legislature, and the Legislature may, of course, amend them or make exceptions to them.” *Id.* at 867.

¹⁰ Jacobs asserts that the district court’s interpretation of the 2007 amendments defeats the purpose of the statute of repose, citing a number of cases wherein the statute of repose was found constitutional. (Jacobs Br. 12-13.) Jacobs is incorrect. First, the district court correctly interpreted the 2007 amendments, which are unambiguous, and no construction is permitted. See Minn. Stat. § 645.16; *Commissioner of Revenue v. Richardson*, 302 N.W.2d 23, 26 (Minn. 1981). Second, the 2007 amendments, which involve solely contribution and indemnity claims, merely represent a legitimate legislative determination that parties should not be responsible for the negligence of others.

In *U.S. Home*, this Court held that the 2007 amendments applied retroactively, reviving a claim for contribution and indemnity that previously had expired. The case involved a claim by a general contractor for contribution and indemnity against its subcontractor. The trial court determined, based on the version of the statute of repose in effect at the time, that the general contractor's claim was barred. While the case was on appeal to this Court, the Governor signed into law the 2007 amendments, effective retroactive to June 30, 2006 (the day after the decision in *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634 (Minn. 2006)). The Court then specifically "analyze[d] whether retroactive application of the statute revives [the general contractor's] claims." 749 N.W.2d at 101. This Court concluded that, although the claims for contribution and indemnity had been barred under the statute's earlier version, they were revived and "timely" under the statute of limitations found in the 2007 revised statute, since they were brought within two years of the date upon which the contribution and indemnity claims had accrued. *Id.* at 103.

Likewise, the State's claim against Jacobs for contractual indemnity is not barred by the statute of repose and is timely pursuant to Minn. Stat. § 541.051, subd. 1(b), since the State filed suit against Jacobs within two years after it made settlement payments to the survivors. Jacobs attempts to distinguish the facts in *U.S. Home* from the instant facts, but the distinctions are inconsequential and do not contradict the Legislature's intent to revive claims that would have been barred under the previous version.

C. The Statute Of Repose Does Not Apply To The State's Statutory Right Of Reimbursement.

The compensation fund legislation provides the State with a statutory right of reimbursement, “[n]otwithstanding any statutory or common law to the contrary.” Minn. Stat. § 3.7394, subd. 5(a). Accordingly, the statute of repose simply does not apply to the State’s right of statutory reimbursement.

Jacobs argues that the State’s reimbursement statute does not revive a claim against it despite the use of the phrase “notwithstanding any statutory law to the contrary,” because the statute does not use the words “retroactive” or “revive.” (Jacobs Br. 20.) Jacobs, however, ignores the plain language of the statute. *See Gomon v. Northland Family Physician, Ltd.*, 645 N.W.2d 413, 416 (Minn. 2002) (holding that plain language of statute controls and that statute is unambiguous where not subject to more than one reasonable interpretation). Through the reimbursement statute, the Legislature manifestly reached back to past events which led up to and “caused or contributed” to the Bridge collapse, itself a past event at the time the statute was enacted. Minn. Stat. § 3.7394, subd. 5(a) (State entitled to recover from any third party to extent third party caused or contributed to Bridge collapse). The compensation fund legislation necessarily created a cause of action based upon past causative acts of any “agent, contractor or vendor.” *Id.* It cannot be read any other way, and in such a situation, the use of the words “retroactive” or “revive” would be superfluous. *See Gomon*, 645 N.W.2d at 417, 419 (citing Minn. Stat. § 645.21, and finding no express language of revival is necessary where intent to revive is clearly and manifestly expressed in plain language of statute).

Even if the statute is deemed to be ambiguous, it is properly construed to revive a claim against Jacobs. *See, e.g.*, Minn. Stat. § 645.17(1) (statutes to be read to avoid absurd result); Minn. Stat. § 645.16 (“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.”).¹¹

III. JACOBS’ DUE PROCESS CHALLENGE TO THE REIMBURSEMENT STATUTE AND THE 2007 AMENDMENTS IS WITHOUT MERIT.

Jacobs contends that both the reimbursement statute and the 2007 amendments to the statute of repose violate due process. This assertion is without merit because Jacobs had no vested property interest in repose and, as a result, due process is not implicated. Even if a vested property right to repose existed, the statutes satisfy due process because they are rationally based.

A. The Statutes Are Presumed To Be Constitutional.

“[E]very legislative enactment comes to the court with a presumption in favor of its constitutionality.” *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986), *cert. denied*, 479 U.S. 1060 (1987). The burden on a challenger is heavy; the challenger must prove, beyond a reasonable doubt, that the challenged statute violates a

¹¹ While Jacobs defends its motion to dismiss against URS arguing that URS’s common law contribution claim fails for lack of common liability, it does not and cannot make this argument against the State. First, the law is clear in Minnesota that common liability is not required for the State’s contractual indemnity claim. *See Blomgren v. Marshall Management Servs., Inc.*, 483 N.W.2d 504, 506 (Minn. Ct. App. 1992) (indemnity does not require common liability). Second, the State’s statutory right to reimbursement is not a common law claim for contribution. Third, the statutory right of reimbursement applies “notwithstanding any statutory or common law to the contrary,” which includes the common law principle of common liability. Finally, the State agrees with URS that Jacobs’ argument regarding common liability is in error. (*See* URS Br. 19-26.)

constitutional provision. *Id.* Moreover, as here, where the legislation is of the sort “adjusting the burdens and benefits of economic life,” even where applied retroactively, “the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In other words, “[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.” 467 U.S. at 729.

B. Jacobs Has No Vested Property Interest Immunizing It From Liability.

Although a statute of repose did not exist at the time of Jacobs’ contract with the State, and the 2007 amendments in effect at the time of the collapse allow the State to make its claims, Jacobs asserts that the statute of repose protects it from liability. Jacobs contends that because it would have had a statute of repose defense to claims brought in 2006, it necessarily has that defense now.

Jacobs does not, however, possess a vested property right to freedom from civil liability. In direct contradiction to the *U.S. Home* decision, Jacobs erroneously equates “substantive right” with “vested property right.” In *U.S. Home*, this Court, while acknowledging the substantive nature of the statute of repose, expressly held the right to repose is not “vested” until final judgment is entered. 749 N.W.2d at 103. The Court noted that there is a distinction between statutes of limitations and repose: the mere repeal of a statute of repose, by itself, does not revive a claim. *Id.* at 102, citing *Larson v.*

Babcock & Wilcox, 525 N.W.2d 589, 591 (Minn. Ct. App. 1994). However, the Court found, “when an amendment is clearly intended to be retroactively applied, the legislature can revive a claim that was otherwise barred by a repose period.” *Id.*

This Court therefore rejected the argument that retroactive application of the 2007 amendments to revive previously barred claims violates due process. 749 N.W.2d at 101-102 (holding that since there is no vested right in an existing law until final judgment and there was no such final judgment in the case, “respondent has no vested right [in repose] that implicates the Fourteenth Amendment.”). Under *U.S. Home*, Jacobs has no vested property interest in repose and accordingly the 2007 amendments to the repose statute and the State’s reimbursement statute do not contravene due process.

Jacobs’ reliance on *Weston* is misplaced. While the Minnesota Supreme Court characterized the repose statute as “substantive” rather than “procedural,” it never held that “substantive” meant “vested right.” 716 N.W.2d at 634. Rather, the issue involved in *Weston* was the constitutionality of a statute of repose with respect to the remedies and rights of a third party plaintiff. *Id.* The *Weston* court distinguished statutes of repose, which constitutionally may eliminate common law rights, and statutes of limitation, which must allow for a reasonable time after accrual of the cause of action for the plaintiff to enforce her rights. *Id.* at 641-642. Thus, since the *Weston* decision did not address the issue of the constitutionality of retroactive application of legislation modifying a defendant’s repose, it does not support Jacobs’ position in this case that it had a vested right in continued repose. *U.S. Home*, acknowledging *Weston*, directly

addressed the issue at hand and explicitly held that the statute of repose creates no vested rights until final judgment. 749 N.W.2d at 103.¹²

U.S. Home was properly decided based upon well-established principles. Any party claiming a vested right “must overcome the well-established presumption that ‘a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.’” *Nat’l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 456 (1985) (quotations omitted); *Peterson v. Humphrey*, 381 N.W.2d 472, 475 (Minn. Ct. App. 1986), *rev. denied* (Apr. 11, 1986) (same).

The United States Supreme Court has similarly held that, “our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.” *Usery*, 428 U.S. at 15-16. The federal district court in Minnesota likewise decided that “[a]n interest in freedom from civil liability is not a constitutionally protected property right.” *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 297-298 (D. Minn. 1990) (quoting *In re State and Regents Building Asbestos Cases*, (File Nos. 99081, 99082), slip. op. at 1 (Dakota Cty. Dist. Ct. Mar. 1, 1989) (holding that Minnesota’s asbestos revival statute

¹² Jacobs makes the absurd contention that *U.S. Home* held that final judgment, rather than the expiration of the repose period, created a vested right only because the defendant never made that argument. (Jacobs Br. 24.) Jacobs’ assertion is directly contrary to the *U.S. Home* decision, wherein the Court explicitly recognized that the repose period had expired for the claim at issue. 749 N.W.2d at 102-103.

revived claims otherwise barred by Minn. Stat. § 541.051 without depriving defendant of property right)).¹³

Recognizing these principles, the court in *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), upheld the retroactive repeal of a statute of repose in similar circumstances. There, the defendant sold asbestos-laced ceiling tiles which were used in the construction of the plaintiff's buildings up to 1960. *Id.* at 120. In 1972, a statute of repose for defective improvements to real property was passed, barring actions for injury occurring more than ten years after the improvement's completion. In 1984, the plaintiff learned that the tiles were releasing asbestos, and sued in 1985. *Id.* The defendant argued that the statute of repose barred the plaintiff's claim, given that the injury occurred more than ten years after the buildings' completion. *Id.* However, in 1987, the legislature amended the statute so it no longer protected manufacturers of a component to an improvement, making the amendment applicable to actions pending in court as of July 1, 1986. *Id.* at 120-121.

¹³ Jacobs contends that the holding in *William Danzer & Co., Inc. v. Gulf & Ship Island R.R.*, 268 U.S. 633 (1925) dictates a contrary result. *Danzer*, however, is factually distinct since there the claim the Court refused to revive was one both created and limited by the same statute. 268 U.S. at 636-637. Here, the State's claims arise from its indemnity contract with Sverdrup and from the reimbursement statute, and not from the statute by which the repose limitation was created. Additionally, *Danzer* is no longer good law, even under its own facts. See *Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976); *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 887-888 (Minn. Ct. App. 1987), *overruled on other grounds*.

Although the defendant argued that the amendment was inapplicable to the claim since its right not to be sued previously had vested, the court found no vested right. The court rejected any due process distinction between substantive and procedural rights, and relied on United States Supreme Court precedent upholding legislation creating liability for past acts. *Id.* at 121-122 (citing *Usery*, 428 U.S. 1; *Pension Benefit Guaranty Corp.*, 467 U.S. 717). The court also found that the equities did not favor the defendant since the statute of repose became law after the buildings at issue were completed, and the defendant therefore could not have sold the offending tiles in reliance on the statute. 876 F.2d at 122. Similarly, Jacobs can make no claim that it contracted with the State or designed the Bridge in reliance upon a statute of repose that did not yet exist.

Minnesota case law also confirms that Jacobs has no vested property right to repose. Consistent with the reasoning in the *Wesley* case, the Minnesota Supreme Court has explained that the term “‘vested interest,’ as used in a constitutional sense, reflects a determination that justice and equity require that the interest be preserved.” *See Reinsurance Assoc. of Minnesota v. Dunbar Kapple, Inc.*, 443 N.W.2d 242, 247 (Minn. Ct. App. 1989) (citing *Peterson v. City of Minneapolis*, 173 N.W.2d 353, 357 (Minn. 1969)); *Olsen v. Special Sch. Dist. No. 1*, 427 N.W.2d 707, 711 (Minn. Ct. App. 1988) (“[A] right is not “vested” unless it is something more than a mere expectation, based on an anticipated continuance of present laws. It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy.”). Under the facts of this case, equity and justice do not support a vested, absolute right of Jacobs to be free from civil liability. *See, e.g., Independent Sch. Dist. No. 197*, 752 F. Supp. at

298 (interest in freedom from civil liability is not constitutionally protected property right); *Olsen*, 427 N.W.2d at 712 (no vested right in exemption from remedy).¹⁴

The equities in this case favor the State. As previously discussed, Jacobs' predecessor entered into a pre-repose contract with the State. It completed the Bridge design-- including the faulty design of the gusset plates which caused the Bridge to collapse-- in March 1965, also prior to the enactment of the statute of repose. Even assuming Jacobs had the benefit of the statute of repose from its effective date until 2007 when the statute was amended, no injustice results from a legislative enactment reverting the parties to their prior positions. See *Wesley*, 876 F.2d at 122; see also *Harvard Law Review*, Feb. 1960, *The Supreme Court and the Constitutionality of Retroactive Legislation*, Hockman, Charles B. (citations omitted) (“[A]n act which has the effect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose.”)

Based on the foregoing, including this Court's precedent in the *U.S. Home* decision, Jacobs has no vested property interest in repose.¹⁵ Thus, Jacobs' due process claim must be rejected.

¹⁴ *Yaeger v. Delano Granite Work*, 84 N.W.2d 363 (Minn. 1967), cited by Jacobs, was an impairment of contract case dealing with retroactive changes to employer rights under the workers' compensation laws, which the court found to be contractual in nature. As a result, this case is inapposite to Jacobs' vested rights argument since the statute of repose is not contractual in nature.

C. The 2007 Amendments And The State's Reimbursement Statute Satisfy Due Process Because They Are Rationally Related To A Legitimate Governmental Purpose.

Even assuming that Jacobs has a property right to repose, the 2007 amendments and the reimbursement statute satisfy due process. The Legislature had the power to revive claims against Jacobs so long as it had a rational basis to do so. *See Pension Benefit Guaranty Corp.*, 467 U.S. 717; *Usery*, 428 U.S. 1; *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). Without question, the Legislature had such a basis in passing the 2007 amendments to the statute of repose and the reimbursement statute.

Courts have used rational basis review to uphold revival of claims despite a previous period of immunity or repose. For example, in *Lundeen v. Canadian Pacific Railway Co.*, 532 F.3d 682 (8th Cir. 2008), the Eighth Circuit upheld against due process challenge the retroactive application of an amendment to a preemption statute which allowed for railroads to be sued for negligence arising out of a previous train derailment, although under the prior statute, the railroad was immune based on federal preemption. The amendment was effective retroactive to the date of the derailment. *Id.* at 688. The railroad argued that due process was violated because Congress specifically had targeted it and “upset its settled expectations about the state of the law governing its business

¹⁵ Jacobs inaccurately asserts that the district court failed to provide a reason for refusing to dismiss the State's statutory reimbursement claim based on the statute of repose. (Jacobs Br. 11-12, n.7.) The court found that the statute of repose presented no bar to the State's claims since Jacobs had no vested interest in or contractual right to the statute of repose “remaining static.” (Sept. 23, 2009 Order at 12.)

activities.” *Id.* at 689. The Eighth Circuit, reviewing “legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review,” concluded that Congress had acted rationally in providing injured parties the chance to seek recovery in state courts against the railroads, and that due process was not offended by legislation addressing one particular event. *Id.*

Likewise, using this same rational basis standard, the Fourth Circuit upheld the retroactive application of a statute removing claims against IUD manufacturers from a statute of repose. *See Shadburne-Vinton*, 60 F.3d 1071. *Accord Wesley*, 876 F.2d 119 (upholding amendment to statute of repose reviving claims against asbestos manufacturers); *M.K. v. L.C. & N.G.*, 901 N.E.2d 468 (Ill. Ct. App. 2009) (upholding amendment to child sexual abuse act eliminating statute of repose retroactively).

In *Pension Benefit Guaranty Corp.*, 467 U.S. 717, the United States Supreme Court, using rational basis review, similarly upheld retroactive application of provisions of the Multiemployer Pension Plan Amendments Act which penalized employers who withdrew from pension plans prior to the statute’s enactment. *See also Usery*, 428 U.S. at 15-16 (using rational basis review and upholding against due process challenge legislation creating new liability for mine operators for miners’ illnesses caused by work done long before legislation); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (using rational basis review to uphold statute requiring retroactive repayment of workers’ compensation benefits withheld in reliance on earlier statute).

Since the 2007 amendments and reimbursement statute are rationally based, they constitutionally revive claims against Jacobs. In this case, the Legislature acted rationally

in retroactively amending the statute of repose to allow for a contribution or indemnity claim “regardless of whether it accrued before or after the ten-year [repose period],” Minn. Stat. § 541.051, subd. 1(b), thus allowing for fair apportionment of damages amongst responsible parties. While Jacobs is correct that the Legislature had legitimate policy reasons for creating a statute of repose (Jacobs Br. 23-24), it likewise had legitimate policy reasons to limit that repose so as to prevent parties from bearing responsibility for the negligence of others and to prevent those at fault from avoiding their contractual obligations. *See Doll v. Barnell*, 693 N.W.2d 455, 461 (Minn. Ct. App. 2005), *rev. denied* (June 14, 2005) (“[F]airly debatable questions as to [a law’s] reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body. . . .”)

The reimbursement statute is similarly based on a rational legislative purpose. The State paid \$37 million to compensate victims of the catastrophic Bridge collapse. The compensation fund enabled the victims to receive payment promptly without protracted litigation against the State. The Legislature also created a mechanism for public money to be recouped from those who are shown at trial to have caused or contributed to the collapse — regardless of whether a repose otherwise would have been applicable. Any potential liability of Jacobs is based upon its misconduct, since the State will recover “to the extent” Jacobs’ misconduct is shown at trial to have resulted in the collapse. Minn. Stat. § 3.7394, subd. 5(a). The Legislature had rational bases for the 2007 amendments and the reimbursement statute and therefore they do not violate due process.

IV. “VOLUNTARINESS” DOES NOT BAR THE STATE’S CLAIMS TO RECOUP THE COMPENSATION FUND PAYMENTS, AND THE PAYMENTS WERE NOT VOLUNTARY IN ANY EVENT.

Jacobs argues that the compensation fund payments to the survivors were voluntarily made by the State and, therefore, the State is precluded from seeking recovery against Jacobs. (Jacobs Br. 9, 34-36.) This argument is both legally and factually wrong.

A. “Voluntariness” Does Not Bar the State’s Recovery Under the Reimbursement Statute.

“Voluntariness” does not bar the State’s statutory reimbursement claim for several reasons. First, the “voluntariness” concept applies to common law actions for contribution, indemnity and subrogation. *See, e.g., Samuelson v. Chicago, Rock Island & Pacific R. Co.*, 178 N.W.2d 620, 623-624 (Minn. 1970); *Iowa Nat’l Mutual Ins. Co. v. Liberty Mutual Ins. Co.*, 464 N.W.2d 564, 566-567 (Minn. Ct. App. 1990), *rev. denied* (Mar. 15, 1991)). The State’s reimbursement claim is a statutory claim not subject to such common law principles.

Second, the concept of voluntariness, even if otherwise applicable, was overridden by the express language of Minn. Stat. § 3.7394, subd. 5(a) (“[n]otwithstanding any statutory or common law to the contrary, the state is entitled to recover . . .”). Again, Jacobs’ argument is entirely contrary to the express language and purpose of the compensation fund legislation.

Third, the State’s payments were not “voluntary” as a matter of law. A payment is considered voluntary where a party pays “without any obligation to do so, or . . . without any interest to protect.” *Iowa Nat’l Mutual Ins. Co.*, 464 N.W.2d at 567. However, a

payor does not become a volunteer where it “acts in *good faith* to pay the loss,” even if the liability is not clear. *Northland Ins. Co. v. Ace Doran & Rigging Co.*, 415 N.W.2d 33, 39 (Minn. App. 1987) (emphasis in original).

A delineated purpose of the compensation fund legislation was to “resolve the issue of the liability of the state.” Minn. Stat. § 3.7391, subd. 2. The State entered into settlement agreements based on payment of tort damages to survivors. *See, e.g.*, Minn. Stat. §§ 3.7392, subd. 3 (damages paid under statute were compensable under state tort law and wrongful death statute); 3.7393, subd. 1 (special masters to make offers of settlement and enter into settlement agreements on behalf of state). The statute provides that settlement offers are to be “considered for all purposes to be an offer to the survivor to settle a legal claim.” Minn. Stat. § 3.7393, subd. 8. Moreover, the State received consideration for the payments to survivors in the form of a release from liability for not only the State, but also for municipalities, the University of Minnesota, and all of their respective employees, and dismissal of all legal actions. Minn. Stat. § 3.7393, subd. 13, A. 182-183.

Jacobs erroneously argues that any payment beyond the State’s tort cap was voluntary. (Jacobs Br. 34.) The Legislature was faced with “a catastrophe of historic proportions” resulting from a situation in which “[n]o other structure owned by this state has ever fallen with such devastating physical and psychological impact on so many.” Minn. Stat. § 3.7391, subd. 1. In the face of substantial uncertainty as to whether a court would uphold a \$1 million aggregate tort cap for liability to the approximate 180

survivors of this catastrophe, the Legislature reasonably provided for payment beyond the cap in order to settle the claims.¹⁶ As this Court has noted:

'One should have the right to settle a lawsuit in which there is reasonable doubt concerning liability and not be required to incur all of the expenses of litigation to conclusion before being entitled to seek subrogation. To hold otherwise would be to discourage settlements and to promote litigation, a concept which should be discouraged by the courts. We believe it is not inappropriate to hold that one who is sued for alleged negligence and who, in an effort to save his property, including the expenditure of attorney's fees, enters into a reasonable settlement is not a volunteer and is entitled to seek reimbursement under the doctrine of equitable subrogation.'

Northland, 415 N.W.2d at 39-40 (emphasis added; citations omitted). In light of the magnitude of this tragedy and the virtual certainty of lawsuits challenging the constitutionality of the tort cap, the Legislature did not act as a volunteer when it provided for the settlement of the survivors' claims. See *Opatz v. City of St. Cloud*, 196 N.W.2d 298, 300 (Minn. 1972) (legislative judgment is entitled to deference).

Fourth, since Jacobs' voluntary payment argument turns on the reasonableness of the payments authorized by the Legislature in response to the collapse, the contention is simply a challenge to the constitutionality of the reimbursement statute, cast in different

¹⁶ Jacobs misreads Minn. Stat. § 3.7394, subd. 1 to suggest that the Legislature believed it had no legal duty to make any payments to the survivors. (Jacobs Br. 34.) The statutory statement that the creation of the fund and offers of settlement do not "establish a duty" of the State must be read in context of the whole subdivision, which focuses on non-admission of liability, a common element of settlements of legal claims. This provision prevents the fund and the settlements from being construed by a future tribunal as proof of liability should some claimants reject the settlement offers, or should non-covered parties bring suit. It is not an indication of the voluntariness of the payments made to settle legal claims against the State.

language. As discussed above, because Jacobs cannot meet its heavy burden of proving unconstitutionality, the voluntariness argument also fails.

Finally, as the district court concluded, the State has properly pled its claims to recovery, and a voluntary payment defense cannot support a motion to dismiss. (Sept. 23, 2009 Order at 18.) Although Jacobs' voluntary payment argument should be rejected on the merits as a matter of law for all the reasons stated above, at a minimum the State has properly pled its claims and Jacobs' motion to dismiss cannot be granted on that basis.

B. The Indemnity Contract Provides Coverage For The State's Payments Under the Compensation Fund Legislation.

The indemnity provision uses broad language to provide coverage to the State including, for example, for all "claims" or "demands" "of whatsoever nature or character." (A. 235.) The terms "claim" and "demand," must be given their plain and ordinary meaning. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979). Black's Law Dictionary defines "claim" as "[a] demand for money, property, or a legal remedy to which one asserts a right" and "demand" as "[t]he assertion of a legal or procedural right." Black's Law Dictionary 282, 495 (9th ed. 2009). *See also Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (in the res judicata/collateral estoppel context, defining a "claim" as "'a group of operative facts giving rise to one or more bases for suing'"); *Illinois Farmers Ins. Co. v. Glass Service Co.*, 683 N.W.2d 792, 804 (Minn. 2004) (same; also noting that the Court has "defined 'claim' in the context of the arbitration provisions of the No-Fault Act as 'the amount the claimant is asking for'").

Other courts have similarly defined the terms “claim” and “demand.”¹⁷ Consistent with the above definitions, the indemnity agreement applies to a claim or demand against the State regardless of whether the claim or demand is adjudicated. *See, e.g., Osgood v. Medical Incorporated*, 415 N.W.2d 896, 903 (Minn. Ct. App. 1988), *review denied* (Feb. 12, 1988) (applying contractual indemnity provision to settlement).

The compensation fund legislation created a process wherein the claims and demands of survivors were made and resolved. *See* Minn. Stat. § 3.7393, subd. 8 (compensation fund settlements are to be considered for all purposes to be an offer to settle legal claim). A necessary prerequisite to payment from the compensation fund was the filing of a “claim” with the special master panel. *See* Minn. Stat. § 3.7393, subd. 9 (stating “a survivor must file a claim with the panel by October 15, 2008.”). Many of the survivors also provided Notices of Claim to the State pursuant to the State Tort Claims Act, Minn. Stat. § 3.736, even before they filed a claim under the compensation fund legislation. The compensation fund payments clearly settled claims or demands of the Bridge collapse victims.

¹⁷ *See, e.g., Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 449 (8th Cir. 1997) (defining a “claim” as “a demand for compensation or benefits”); *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 959 P.2d 265, 280 (Cal. 1998) (insurance case where “claim” was not defined by the policy, stating that “[a] “claim” can be any number of things, none of which rise to the formal level of a suit -- it may be a demand for payment communicated in a letter, or a document filed to protect an injured party’s right to sue a governmental entity, or the document used to initiate a wide variety of administrative proceedings. . . . While a claim may ultimately ripen into a suit, “claim” and “suit” are not synonymous.”); *Gutierrez v. State*, 871 N.Y.S.2d 729, 731 (N.Y. App. Div. 2009) (giving the term “claim” its ordinary meaning as a demand for money or other legal remedy to which one asserts a right).

The State's settlement of these claims and demands was also reasonable and therefore Jacobs must indemnify the State under the contract. *See Osgood*, 415 N.W.2d at 903 (concluding that indemnity provision applied to reasonable settlement). The "determination of the question of reasonableness is a question of law for the court." *Id.* This determination requires the court to "take into account the *bona fides* of the settlement" which include the circumstances of the settlement. *Id.* The question for the Court "is not whether the party seeking indemnification *would have* been liable for at least the amount of the settlement," but rather whether the party "*could have*" been liable under the applicable facts. *Id.* (emphasis in original).

As discussed above, the Legislature acted reasonably under the unique facts and circumstances of the I-35W Bridge collapse to settle with the victims of the collapse for the aggregate payment of \$37 million. The State's settlement involves 179 claims and demands, including 13 wrongful deaths and numerous other severe personal injuries and property damage. The State's payment reflects only a portion of the victims' total damages, as evidenced, in part, by the Plaintiffs' claims against others. *See also* Minn. Stat. §§ 3.7393, subd. 11 (limit on individual offer of settlement to survivors) and 3.7394, subd. 2 (compensation fund payments intended to supplement payments required to be made by third parties to survivors).

Moreover, as the district court concluded, the State's claim for contractual indemnity is properly pled and therefore Jacobs' motion to dismiss is improper for that reason alone. *See supra* p. 34.

V. PIERRINGER PRINCIPLES DO NOT BAR THE STATE'S CLAIMS FOR STATUTORY REIMBURSEMENT OR CONTRACTUAL INDEMNITY.

Pierringer principles applicable to common law contribution and indemnity claims do not apply to the State's statutory right of reimbursement. In any event, this statutory right applies "notwithstanding any statutory or common law to the contrary." Minn. Stat. § 3.7394, subd. 5(a). Moreover, a *Pierringer* release, which is based upon comparative fault principles, does not void a settling defendant's contractual right of indemnity.

A. The State's Statutory Right Of Reimbursement Is Not Subject To Common Law *Pierringer* Principles.

The Legislature created a statutory cause of action for reimbursement, Minn. Stat. § 3.7394, subd. 5(a). The legislation also provides that "[t]he rights of the state under this subdivision [subdivision 5] are in addition to other remedies, claims, and rights relating to the catastrophe that the state may have against other persons for the recovery of monetary or other relief." Minn. Stat. § 3.7394, subd. 5(b). This language establishes that the reimbursement claim is distinct from common law claims of contribution and indemnity.

Moreover, even if the Court construed reimbursement as a claim for contribution or indemnity, the common law is inapplicable to the reimbursement right if it conflicts with the legislation. *See* Minn. Stat. § 3.7394, subd. 5(a). The legislation explicitly provides that "[n]otwithstanding any statutory or common law to the contrary," the State is entitled to reimbursement for the payments it made to survivors from any third party that caused or contributed to the collapse. The Legislature has the power to abrogate the

common law as long as it is done “by express wording or necessary implication.” *Isle Wellness, Inc. v. Progressive Northern Ins. Co.*, 703 N.W.2d 513, 521 (Minn. 2005) (quoting *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377-78 (Minn. 1990)). Since *Pierringer* law is a common law doctrine (see *Frey v. Snelgrove*, 269 N.W.2d 918, 921-22 (Minn. 1978) (adopting *Pierringer* principles)), to the extent it would otherwise operate to bar recovery, section 3.7394, subd. 5(a) expressly abrogates that common law.

The purpose of a *Pierringer* release also belies Jacobs’ argument. A *Pierringer* release enables a plaintiff to continue the action against a non-settling tortfeasor. Here, however, Jacobs is not subject to suit by Plaintiffs in the I-35W Bridge litigation because of the 10-year statute of repose limiting direct claims, Minn. Stat. § 541.041, subd. 1(a). Therefore, the *Pierringer* aspect of the State’s releases with the victims has no application to Jacobs.

Nevertheless, Jacobs argues, using *Pierringer* principles, that the State’s “payments represent exactly the share of the State’s fault for Plaintiffs’ damages.” (Jacobs Br. 41.) While the release has aspects of a *Pierringer*, including that the Plaintiffs will indemnify the State against claims by others for contribution and indemnity in relation to the State’s percentage of fault determined by the fact-finder, it also expressly preserves the State’s right to statutory reimbursement. See A. 186; Minn. Stat. § 3.7393, subd. 13. Jacobs’ contention entirely ignores the plain language of the release and the law, and undermines the clear legislative intent to create a right of reimbursement to recoup taxpayer monies from others who were responsible for the Bridge collapse. See, e.g., *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004) (court is to give effect to

plain meaning of clear and unambiguous statutory language); Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”); § 645.17 (in construing statute, courts presume legislature intends entire statute to be effective and certain and to favor the public interest against any private interest).

Jacobs erroneously relies on *Bunce v. API, Inc.*, 696 N.W.2d 852 (Minn. Ct. App. 2005) to contend that the State’s statutory reimbursement claim must be dismissed. *Bunce* deals solely with the effect of a *Pierringer* release on a settling defendant’s common law claims for contribution and indemnity, and does not apply to a claim for statutory reimbursement. In any event, as noted above, the common law of *Pierringer* is abrogated with respect to the State’s right of statutory reimbursement.

B. *Pierringer* Principles Do Not Apply To The State’s Contractual Indemnity Claim.

A *Pierringer*-type release does not defeat contractual indemnity rights. See Knapp, Peter B., *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 Wm. Mitchell L. Rev. 1, 40 n.132 (1994) (“Nor should a *Pierringer* release extinguish a settling defendant’s independent contractual right to indemnity, should one exist. . . . [A claim for contractual indemnity] survive[s] a *Pierringer* settlement.”).

While the common law of *Pierringer* is based upon comparative fault, the State’s cause of action results from contract. Indeed, in permitting the use of *Pierringer* releases in Minnesota, the Supreme Court found that “[t]he use of a so-called *Pierringer* release is in accord with Minnesota practice and our law of comparative negligence in tort actions” *Frey*, 269 N.W.2d at 921. *Pierringer* is therefore inapplicable to contract

claims. “[C]ontract law has never spoken in terms of fault; the contract measure of damages generally is based on recovery of the expectancy or benefit of the bargain.” *Lesmeister v. Dilly*, 330 N.W.2d 95, 101-102 (Minn. 1983) (holding that comparative fault does not apply to contract claims). In fact, an instruction to allocate fault in a contract action constitutes reversible error. *Id.* at 102. *See also Ploog v. Ogilvie*, 309 N.W.2d 49, 54 n.4 (Minn. 1981) (comparative fault statute not intended to negate common law rule whereby parties may allocate liability by express contract).

Minnesota and Wisconsin (which initially upheld the *Pierringer* release) courts have considered several cases involving indemnity contracts and *Pierringer* releases. In none of the cases did the courts find that the *Pierringer* release nullified the contractual indemnity agreement.¹⁸ *See Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364, 365-368 (Minn. 1998) (court presumed that had indemnity been appropriate, indemnity contract applied notwithstanding *Pierringer* release); *Osgood*, 415 N.W.2d 896, 899 (holding purchaser required to indemnify manufacturer under indemnification clause despite *Pierringer* agreement between manufacturer and plaintiff); *Foskett v.*

¹⁸ Jacobs argues that the State’s contractual right to indemnity is insufficiently broad to permit indemnity for the State’s alleged negligence in failing to discover Jacobs’ malfeasance in designing the Bridge. (Jacobs Br. 40.) The State disagrees with Jacobs’ reading of the agreement. *See, e.g., Johnson v. McGough Constr. Co., Inc.*, 294 N.W.2d 286, 288 (Minn. 1980) (permitting indemnity for indemnitee’s own negligence although agreement did not specifically mention negligence); *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994) (“Indemnity applies when, among other situations, a party fails to discover or prevent another’s fault and, consequently, pays damages for which the other party is primarily liable.”). Nevertheless, to what extent the indemnity agreement ultimately provides coverage for this dispute is a separate question from the issue presented in Jacobs’ motion to dismiss: whether the State’s *Pierringer-Plus* release requires dismissal.

Great Wolf Resorts, Inc., 2008 WL 4756643, *8 (W.D. Wis. Oct. 29, 2008) (concluding buyer must reimburse seller for settlement costs under indemnity contract despite existence of *Pierringer* agreement between seller and plaintiff); *Rudolph Moravian Church & Church Mut. Ins. Co. v. Michels Pipe Line Constr. Inc.*, 1982 WL 171750 (Wis. Ct. App. Oct. 4, 1982) (allowing Wisconsin Gas to obtain contractual indemnity against its contractor after Wisconsin Gas entered into a *Pierringer* release with plaintiff).

Jacobs' reliance on *Bunce* is again misplaced. As noted above, *Bunce* involved the issue of whether the third party plaintiff who had executed a *Pierringer* release had a right to *common law* contribution or indemnity from a non-settling tortfeasor. 696 N.W.2d at 854. The settling defendant in *Bunce* did not have a contractual indemnity claim against any of the non-settling defendants and therefore the decision does not address such a contractual claim.

Bargained-for rights of contractual indemnity are fundamentally different from a common law equitable right of contribution or indemnity. *See, e.g.*, Knapp, Peter B., *supra*. Jacobs has pointed to no authority that holds that a *Pierringer*-type agreement with a plaintiff nullifies a settling defendant's contractual indemnity rights. Simply put, the State's settlements with the Plaintiffs have no effect on the validity of the indemnity provision in the State's contract with Jacobs.

VI. THE REIMBURSEMENT STATUTE DOES NOT UNCONSTITUTIONALLY IMPAIR JACOBS' PURPORTED "RIGHT TO ZERO TORT LIABILITY."

Jacobs contends that its contractual obligation to indemnify the State somehow gives Jacobs a "right to zero tort liability" which was unconstitutionally impaired by the

enactment of section 3.7394, subd. 5(a). Jacobs has no such contractual right and, in any event, it cannot meet its heavy burden to show that the statute unconstitutionally impaired its purported contract right.

The U.S. and Minnesota constitutions contain impairment of contract provisions, neither of which are absolute. States are permitted to impair contracts when done as part of the state's police power to provide security and safety and to promote the general welfare of the public. *Willys Motors, Inc. v. NW Kaiser-Willys, Inc.*, 142 F. Supp. 469, 471 (D. Minn. 1956) (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)). In addition, "the economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Home Bldg. & Loan v. Blaisdell*, 290 U.S. 398, 437 (1934).

The U.S. Supreme Court has adopted a three-part test for analyzing whether a party's contract has been unconstitutionally impaired. This test has also been adopted in Minnesota. The test is: (1) has the legislation substantially impaired a contractual obligation? (2) if a substantial impairment exists, does the legislation have a significant and legitimate public purpose? and (3) is the legislation reasonably and appropriately tailored to accomplish the asserted public purpose? *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983); *Christensen v. Mpls. Mun. Emp. Ret. Bd.*, 311 N.W.2d 740, 750-51 (Minn. 1983).

A. Jacobs Has No Contract "Right To Zero Tort Liability."

Jacobs asserts that the indemnity provision of the contract between Sverdrup and the State guarantees Jacobs that it will not indemnify the State for any tort claims made

by others against the State. As Jacobs articulates it, the contract confers on Jacobs “[t]he right to zero tort liability.” (Jacobs Br. 28.) No such right exists in the clear contractual provision which gives rights only to the State and requires indemnity by Jacobs in the broadest terms.

“[Z]ero tort liability” simply was not a term of the contract. To the contrary, the indemnity provision unambiguously reads:

The Consultant indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of the Consultant provided for under this agreement.

(A. 235.) (Emphasis added.) This provision establishes that Jacobs must indemnify the State regardless of the type of claim asserted.¹⁹ It conferred no rights whatsoever on Jacobs.

The absurdity of Jacobs’ argument is highlighted by its assertion that the indemnity provision meant that under no circumstances would Sverdrup have liability to the State for tort claims made against the State. (Jacobs Br. 26.) The plain language of the contract represents the objective expectations of the parties. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979) (court must give the language in the contract its plain and ordinary meaning); *Metropolitan Sports Facilities Comm’n v.*

¹⁹ This type of indemnity provision is construed broadly by courts to require indemnity whenever there is a temporal, geographical or causal nexus between the indemnitor’s work and the injury giving rise to liability. See *Anstine v. Lake Darling Ranch*, 233 N.W.2d 723, 727 (Minn. 1975), *overruled on other grounds*. It is indefensible that Jacobs now asserts that such a broad provision actually provides for no indemnity against tort claims.

General Mills Inc., 470 N.W.2d 118, 123 (Minn. 1991) (“Where a written contract is unambiguous, the court must deduce the parties’ intent from the language used.”). On its face, the indemnity provision provides extremely broad protection for the State, and simply cannot be read as Jacobs suggests.

Jacobs’ reading renders an essential term of the contract-- indemnity for claims or demands of *whatsoever nature or character*-- meaningless and the contract illusory. *See, e.g., Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990) (law presumes that parties intended all language in the contract to have effect and avoids interpretation of contract that would render a provision meaningless). While Jacobs argues that the contract would not be illusory since, by its reading, non-tort claims would still be covered, nowhere does the indemnity provision contain such a limitation.

Jacobs’ purported contract right to “zero tort liability” also ignores the fact that the State’s liability to others was not fixed by the terms of the contract. Rather, the State’s tort liability, and Jacobs’ corresponding indemnity obligation, is determined by the law applicable to the third party’s claim and that law can, and did, change. The impairment of contract jurisprudence does not preclude states from repealing, amending or enacting legislation. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (“[T]he contract clause does not prohibit the states from repealing or amending statutes generally or from enacting legislation with retroactive effects.”).

Moreover, judicial decisions and legislative activity related to changes in standards and principles of civil liability are commonplace. Accordingly, it can be reasonably expected that, over the course of the intended life of the Bridge, standards and

principles for determining liability, including those relating to sovereign immunity, may be affected by future court action or legislation. In fact, the continuing viability of sovereign immunity was at issue in 1962, the very year the contract was executed. See *Spanel v. Mounds View School Dist. No. 621*, 118 N.W.2d 795 (Minn. 1962) (abolishing sovereign immunity for local governmental units subject to action by legislature). See also *Energy Reserves*, 459 U.S. at 411, 413 (finding that when an area is heavily legislated, parties can reasonably expect their contracts may be affected by future legislation). Recognizing the controversial history of sovereign immunity, in *Spanel*, the Minnesota Supreme Court stated:

[T]he handwriting has long been on the courtroom wall. . . . Since we have repeatedly proclaimed that this defense [of sovereign immunity] is based on neither justice nor reason, the time is now at hand when corrective measures should be taken by either legislative or judicial fiat.

118 N.W.2d at 799.

The State, as a party to the contract, clearly was aware that the its tort liability could be modified by judicial or legislative action. Thus, the parties to the contract, in plain language, provided for indemnity of the State without qualification. The contract simply can be read no other way.

Since Jacobs had no contractual right to “zero tort liability,” there is *no* impairment, let alone a substantial impairment, of a contract right. Therefore, on this basis alone, Jacobs’ impairment of contract claim must be rejected.

B. The Legislation Serves A Significant And Legitimate Public Purpose.

Even assuming, *arguendo*, that the State's reimbursement statute somehow substantially impairs Jacobs' contractual rights, it is nevertheless constitutional because it is supported by a significant and legitimate public purpose. The compensation fund legislation resolving the Plaintiffs' claims with the State is designed to address a specific catastrophic event—the collapse of the I-35W Bridge. It serves, in part, the significant and legitimate public purpose of providing expedited financial recovery to the survivors of the catastrophe, without requiring them to endure protracted litigation with the State. Related to this purpose is the recoupment of taxpayer dollars from the party or parties who were actually responsible for the Bridge collapse. This recoupment effort redounds to the benefit of all taxpayers, and therefore, also serves a significant and legitimate public purpose. As the district court concluded, “Jacobs’ argument, however, does not account for the catastrophic and unique impact of the collapse. Responding to an emergency situation caused by the failure of a major bridge was clearly an extraordinary burden on the State.” (Sept. 23, 2009 Order at 13.)

C. The Act Is Reasonably And Appropriately Tailored.

When evaluating the third factor, *i.e.*, whether legislation is reasonably and appropriately tailored, courts have been reluctant to second-guess any state's manner of dealing with a public issue. *See Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 505, 506 (1987); *see also Energy Reserves*, 459 U.S. at 418; *Midwest Family Mut. Ins. Co. v. Bleick*, 486 N.W.2d 435, 440 (Minn. Ct. App. 1992). When the purpose of the legislation is served by the means chosen, the legislation will be upheld. *See Energy*

Reserves, 459 U.S. at 418. The statutory reimbursement provision is narrowly tailored to apply only to those who can be shown at trial to have caused or contributed to the Bridge collapse, and to recoup taxpayer funds to that extent. Jacobs provides no rationale for its conclusion that the reimbursement provision is not reasonable or narrowly tailored. Indeed, it is eminently reasonable that culpable entities be financially responsible for damages caused by the catastrophic Bridge collapse, particularly to the extent the State has used taxpayer money to settle claims with the victims of the collapse. Therefore, the third factor in the impairment of contract analysis also supports the reimbursement statute's constitutionality.

Jacobs argues that because the State impairs its own contract, heightened scrutiny should apply. (Jacobs Br. 30). The cases relied upon by Jacobs, however, involve circumstances wherein a state statutorily voids its own financial obligations for its self-interest, and therefore are inapposite. *See Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 727 (Minn. Ct. App. 1995). Here, as discussed above, the State had no financial obligations to *Jacobs* arising out of the indemnity agreement at issue.

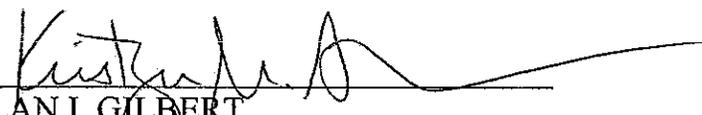
CONCLUSION

Based on the foregoing, Respondent State of Minnesota respectfully requests that the district court's decision denying Jacobs' motion to dismiss be affirmed.

Dated: March 17, 2010

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

By 
ALAN I. GILBERT
Solicitor General

Atty. Reg. No. 0034678

KRISTYN ANDERSON

Assistant Attorney General

Atty. Reg. No. 0267752

GARY CUNNINGHAM

Assistant Attorney General

Atty. Reg. No. 0186210

445 Minnesota Street, Suite 1100

St. Paul, MN 55101-2127

(651) 282-5700 (voice)

(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT
STATE OF MINNESOTA

**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 13,370 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

Dated: March 17, 2010



KRISTYN ANDERSON
Assistant Attorney General
Atty. Reg. No. 0267752
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2127
(651) 757-1225 (voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT
STATE OF MINNESOTA

AG. #2589155-v1