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No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification

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Abstract
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Contracts, contractual indemnification, construction, personal injury, railroads, Workers' Compensation, negligence, indemnity, Strict Construction

Disciplines
Contracts
NO RISK ALLOCATION NEED APPLY: THE TWISTED MINNESOTA LAW OF INDEMNIFICATION

DANIEL S. KLEINBERGER†

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INTRODUCTION

The performance of any "building and construction contract"\(^1\) carries an inevitable risk of injury to people and to property. Both the people and the equipment involved in the project are at risk, as are those merely near the project worksite. The people who use or rely on the completed work are also at risk, and their risk continues long after project completion.\(^2\) Defects in the work may appear years after the end of construction.\(^3\)

Although the risk is substantial,\(^4\) at the outset of any particular project the nature and extent of the risk are indefinite and indeterminate. In Minnesota, for at least the past eighty

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1. The phrase comes from and is defined in Minnesota Statutes section 337.01, subdivision 2 (1986). For a discussion of the scope of the statutory definition and of the anti-indemnification statute to which that definition belongs, see infra notes 133-85 and accompanying text.

2. Certain Minnesota cases do, however, draw a fundamental line between risks materializing while the work of a project contractor is underway and those risks which materialize only after the project contractor has completed its work. See R.E.M. IV, Inc. v. Robert F. Ackermann & Assoc., Inc., 313 N.W.2d 431, 434 (Minn. 1981); Frederickson v. Alton M. Johnson Co., 390 N.W.2d 786, 793 (Minn. Ct. App. 1986); Fossum v. Kraus-Anderson Constr. Co., 372 N.W.2d 415, 418 (Minn. Ct. App. 1985). See generally infra notes 111-32 and accompanying text.

3. Although the risk continues indefinitely, the statute of limitations puts a limit to the duration of liability. See Minn. Stat. § 541.051 (1986) (no action to be brought for an injury arising out of any improvement to real property more than two years after discovery of the injury or more than ten years after substantial completion of the construction).

4. See C. Williams, Jr., R. Azevedo, M. Bognanno, P. Schumann, Minnesota Workers' Compensation Benefits and Costs: An Objective Analysis Tables 2.4, 2.6, at 17, 20 (1983). Table 2.4 illustrates how substantial the risk of injury is in the construction industry compared to other industries. Construction-related injuries rank first in Minnesota in recordable cases, lost workday cases, lost workdays, and lost workdays per workday case. In Iowa, construction-related injuries rank first in all of these categories except lost workdays per workday case, where construction-related injuries rank third behind mining and transportation-related injuries. Nationally, construction-related injuries are first in recordable cases, tied for first in lost workday cases, second (behind mining-related injuries) in lost workdays, and third (behind mining and transportation) in lost workdays per lost workday case. Id., Table 2.4, at 17. Despite the risks involved in construction work, courts have generally declined to include construction projects in the special tort category of "inherently dangerous" activities. See, e.g., Garczynski v. Darin & Armstrong Co., 420 F.2d 941 (6th Cir. 1970) (declining to recognize steel erection work as "inherently dangerous"); West v. Guy F. Atkinson Constr. Co., 251 Cal. App. 2d 296, 59 Cal. Rptr. 286 (1967) (declining to hold construction "inherently dangerous").
years, parties to construction contracts and other routinely dangerous undertakings have used indemnification agreements to allocate the risk in advance. Through an indemnification agreement, one party prospectively undertakes to hold the other(s) harmless from the losses and liabilities which may result when a person or tangible property suffers injury in a project-related accident.

In a general sense, indemnification agreements serve a very ordinary contractual purpose; they allocate the risk of uncertainty. Consider, for example, the risk allocation involved in a grain contract between a grain company and a farmer. In the fall, the farmer agrees to sell and deliver to the grain company on the next May 15th a hundred bushels of wheat for $2.65 a bushel. This apparently simple undertaking allocates a variety of substantial risks. The farmer, for instance, assumes the risk of bad weather, crop infestation, and unanticipated increases in the costs of production. The grain company bears, inter alia, the risk that by May 15 the market for grain will have fallen. If the market does fall, the company will be obliged to buy the grain for a price higher than any possible resale price.

Indemnification agreements function analogously, predetermining which party will bear the loss if contract performance causes unintended injury to people or property. Yet, in Minnesota, the particular type of risk allocation provided by indemnification agreements has come to face increasing hostility.

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5. See City of St. Paul v. St. Paul City Ry. Co., 92 Minn. 516, 100 N.W. 472 (1904). The indemnification agreement was adopted as an ordinance by the city, the party seeking indemnification, and formally accepted by the railway company, the party promising the indemnification.

6. Indemnification agreements can, of course, cover liabilities arising from a variety of other causes, ranging from injuries resulting from product defects, see, e.g., Patton v. T.O.F.C., Inc., 79 Ill. App. 3d 94, 99, 398 N.E.2d 319, 317 (1979), to losses caused by material misstatements in a 1933 Securities Act registration statement. 15 U.S.C. § 77k(f) (1982). But see 17 C.F.R. § 229, Regulation S-K, Item 510 (1984) (expressing the view of the Securities and Exchange Commission that such indemnities may be against public policy). In general, for the purposes of this Article, the term "indemnification agreement" has the limited meaning stated in the text. See also infra notes 222-44 and accompanying text (which dissect indemnification agreements into functional parts).

7. The farmer can re-allocate some of the risks. See 7 U.S.C. § 1508 (1982) (crop insurance). The farmer's purchase of insurance does not change the original risk allocation as between the farmer and the grain company.

8. The law does set some limits on and some escapes from the allocation. See, e.g., U.C.C § 2-615 (American Law Institute, Official Text, 1978) (excuse for failure of presupposed conditions).
Since 1979, Minnesota courts have imposed increasingly strict scrutiny on indemnification agreements and, in 1983, the Minnesota Legislature enacted the most radical anti-indemnification statute in the country. Minnesota's statutory law on the subject is now the strictest in the nation and its case law is not only strict but, in many ways, counterintuitive.

In an effort to describe and critique those strictures, this Article reviews and analyzes the Minnesota law governing indemnification agreements. The Article takes for its scope written contracts under which one party involved in a project or undertaking agrees prospectively and in writing to assume the risk of some or all of the liability which may result if the project or undertaking occasions physical injury to people or tangible property. Part I of the Article explains some of the reasons that indemnification agreements have come to exist. Part II provides a taxonomy of indemnity provisions and describes various types and strengths of indemnification agreements. Part III discusses the common law history of contractual indemnification in Minnesota and comments on the rationale which moved the Minnesota courts away from their original position of "fair" (i.e., neutral) construction to the current hostility of "strict" construction. Part IV of the Article outlines the essential elements of the state's new anti-indemnification statute and notes the statute's radical nature. Part IV then raises several issues which may prove problematic in applying

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9. See Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 838, 842 (Minn. 1979). See generally infra notes 72-93 and accompanying text (discussing the adoption of strict construction). Other states have also placed restrictions on indemnification agreements, but Minnesota law is by far the most restrictive. See generally infra notes 148-55 and accompanying text.


11. See infra notes 148-55 and accompanying text.

12. The fact that both parties to the indemnification agreement are also involved in the underlying project or undertaking distinguishes an indemnification agreement from a contract of insurance. Anstine v. Lake Darling Ranch, Inc., 305 Minn. 243, 251, 253 N.W.2d 723, 728-29 (1975). The Article excludes from consideration contractual indemnity for the risks of products liability and the general topic of common law indemnity. The policies underlying strict liability in tort distinguish products liability cases from those considered by this Article. Likewise, common law indemnity (i.e., indemnity in the absence of a contract to indemnify) presents different issues than does contractual indemnity.
the statute and explains how the common law discussed in Part III remains relevant. In Part V, the Article argues that the disdain which Minnesota's current common and statutory law show toward indemnification agreements is at best baseless and at worst harmful. Part VI suggests three practical approaches for dealing with the law's disfavor of indemnification agreements.

I. REASONS FOR THE EXISTENCE OF INDEMNIFICATION AGREEMENTS

By their existence, indemnification agreements reflect a dissatisfaction with the way tort law allocates liability. The types of cases which comprise Minnesota's case law on indemnification suggest why participants in certain types of activities tend to be unwilling to "leave well enough alone" with tort law's liability allocation rules.

A. Recurring Patterns of Danger — Railroads and Construction Projects

_City of St. Paul v. St. Paul City Railway Co._,¹³ a case involving both a railway and a construction project, was the first reported decision to construe a contractual undertaking of indemnity.¹⁴ In the eight decades since that case, the lion's share of reported decisions have involved either railroads or construction projects or both. In the cases relating to construction projects, the indemnification agreements have usually been among companies participating in or benefiting from the construction; e.g., owners, contractors, subcontractors. In the cases arising from railroad operations, the agreements have usually been between a railroad and a customer served by a spur line¹⁵ or between a railroad and a tenant occupying a building owned by a railroad and located near the tracks.

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¹³. 92 Minn. 516, 100 N.W. 472 (1904).

¹⁴. The agreement at issue was actually incorporated into a city ordinance, but the court approached the matter as one of contract between the city and the railroad stating, "We have no doubt that . . . the obligations imposed were contractual . . . ." _Id._ at 520, 100 N.W. at 473.

¹⁵. In order to provide service to customers wishing to regularly receive and ship freight at their own premises, railroads must operate on spurs or "sidetracks" which cross the customer's land. "Sidetrack agreements" allocate responsibilities for, _inter alia_, maintenance and safety on these sidetracks. _See_, e.g., Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Famous Brands, Inc., 924 F.2d 137 (8th Cir. 1993); Minneapolis-Moline Co. v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 199 F.2d 725 (8th
The construction project cases and the railroad cases have a number of elements in common. Each type of case involves (a) activities which are dangerous, (b) activities which occur repeatedly or at least periodically, and (c) participants who have the resources to spend on prospective analysis and proactive efforts.

The maintenance and operation of railroads clearly involve recurring patterns of danger. In the days of steam locomotion, fire was an omnipresent hazard. Even today, railway workers seem peculiarly at risk in their everyday work. From their earliest days, railroad companies have certainly had the financial resources to employ lawyers to draft agreements.

Construction activities likewise involve predictable dangers and recurring patterns. Even today, when OSHA standards minutely prescribe safe methods of construction, the trades involved in construction projects remain significantly more dangerous than most occupations. Moreover, most construction projects have the same essential structure and, over the years, trade associations have spent considerable money and effort developing detailed forms of agreement. These forms give a central role to risk allocation via indemnification. In fact, at least eight of the reported Minnesota decisions on contractual indemnification have interpreted language from these

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19. See supra note 4 (discussing substantial risks encountered in the construction industry).

form contracts.21

The common elements of the railroad and construction cases suggest preconditions for the widespread use of indemnification agreements. Where business people with resources face recurring patterns of danger, the development of devices to prospectively allocate risks seems reasonable and predictable. Where danger exists, injuries are more likely to occur. Injuries give rise to liability. Where the danger and the correlative risk of liability recur, regular participants have a greater likelihood of perceiving the correlation and participants with discretionary resources have a greater incentive to spend some of those resources trying to rationally predetermine the allocation of liability.

B. The Extraordinary Complexity of Construction Projects

The nature of construction projects can also help explain the attraction of indemnification agreements. Even a moderate-sized construction project is a joint venture of extraordinary complexity. The erection of a simple building can bring together dozens of independent businesses, all of whose activities must be synchronized and all of whose work products must be integrated. For example, not only must the electricians be finished running the electrical wire before the sheetrockers arrive, but the sheetrockers must stay at least a room ahead of the painters. All this coordination must be achieved by entities which are under separate ownership and management, which probably have never worked together in the past and which ordinarily have no plans to work together in the future.

When something goes wrong on a construction project, finding the facts can therefore be a daunting experience. Even a moderate-sized project will generate hundreds, if not thousands, of relevant documents.22 Moreover, since con-

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22. Besides the actual contracts involved, even moderate-sized projects will have detailed specifications and drawings as well as multitudinous change orders reflecting agreed-upon deviations from the original plans. In addition, there are likely to be periodic progress or inspection reports from construction managers, superintendents or architects.
struction cases almost always involve multiple parties, the fact finding process must frequently sort through the conflicting accounts of numerous self-interested witnesses. In addition, since construction involves both science and craft, the factfinder must often judge among the conflicting opinions of experts. Given all this complexity, businesses which seek to rationally allocate liability might plausibly distrust jury determination of close questions of fact.\textsuperscript{23}

With regard to most construction disputes, contracts among the direct participants in the construction project can avoid jury determinations. For example, the owner and the general contractor can agree to submit all disputes to binding arbitration. Furthermore, their contract can require that the contractor likewise bind all subcontractors to the same arbitration process.

Avoidance will not work in personal injury cases, however. In those cases, the plaintiffs typically are not privy to or bound by any of the project contracts or subcontracts. Indemnification agreements among project participants are, therefore, the best available means of reducing the importance of the jury’s factfinding role in personal injury cases. As between the indemnitor and the indemnilee, the prospective allocation of liability moots any close factual determinations.

Indemnification agreements also play an important function in simplifying personal injury lawsuits which arise out of construction projects. Because so many parties are usually involved in a construction project, the injured plaintiff can, and typically does, sue a large number of defendants. If those defendants have not predetermined the allocation of liability among themselves, then each defendant must defend itself, at least in part, by placing the blame on the other defendants. The plaintiff has the luxury of arguing to the jury that some wrong must indeed have been done since all the defendants have spent so much time trying to fix the blame on each other. By reducing the number of parties who are ultimately at risk,\textsuperscript{24} an indemnification agreement protects the defendant parties

\textsuperscript{23} For a discussion of the inability of juries to grasp complicated issues, see In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1073-75 (3d Cir. 1980).

\textsuperscript{24} The reduction in the number of parties ultimately at risk does not reduce the number of parties liable to the plaintiff. An indemnification agreement does not release the party being indemnified ("the indemnilee") from liability to the plaintiff. Rather, the indemnilee merely has a right to seek indemnity from the indemnitor.
from the inevitable but largely self-defeating strategy of finger-pointing.

C. The Distorting Influence of Workers’ Compensation Statutes

Most of the indemnification cases reported in Minnesota and elsewhere involve injuries to employees of the indemnitor. This pattern is no mere coincidence; it reflects the impact of workers’ compensation statutes. While the principal characteristic of the workers’ compensation system may be to provide an exclusive remedy for employees against employers, the system simultaneously limits the employer’s exposure to claims for contribution from third parties sued by injured employees. In the view of the Minnesota Supreme Court, barriers to contribution imposed by the workers’ compensation statute have contributed significantly to the use of indemnification agreements.25

The doctrinal explanation for the barriers varies. Some states approach the issue as one of tort law. These states have held that workers’ compensation eliminates an employer’s liability in tort to its employees, which in turn eliminates the joint tortfeasor status which is a precondition to contribution.26 Other states have focused on the intent of the workers’ compensation system. These states have seen workers’ compensation statutes not only as providing employees with an exclusive remedy against employers, but also as establishing for employers an exclusive liability for employee injuries. These states have barred contribution on the grounds that contribution from an employer would undercut the employer’s exclusive liability protection.27

25. Anistone, 305 Minn. at 250 n.5, 233 N.W.2d at 728 n.5.
Whatever the rationale, the results are the same. Absent a written indemnification agreement, a third party sued for a work-related injury may have to bear more than its proportionate share of the liability. For example, assume that a general contractor undertakes to build a building in Minnesota and subcontracts the heating and ventilation work. An employee of the subcontractor is injured while on the job. That employee seeks workers’ compensation benefits from the employer and also brings a civil lawsuit against the general contractor. The lawsuit alleges, inter alia, that the general contractor has failed to provide an adequately safe place to work. A jury finds the employee ten percent negligent and the subcontractor and the general contractor each forty-five percent negligent. No written indemnification agreement exists.

Under tort law principles, the general contractor is responsible to the plaintiff for the entirety of any damage award. If the general contractor seeks contribution from the subcontractor, the Minnesota workers’ compensation system will erect a substantial obstacle. A Minnesota Supreme Court case, Lambertson v. Cincinnati Corp., limits contribution in the absence of an indemnity agreement to “an amount proportional to the employer’s negligence, but not to exceed the employer’s total workmen’s compensation liability to the plaintiff.” That is, a defendant (the general contractor in the example above) “is


In unusual circumstances, the workers’ compensation system can work to the defendant’s benefit and bar the plaintiff’s claim. As explained in Higgins v. Northwestern Bell Tel. Co., 400 N.W.2d 192, 194 (Minn. Ct. App. 1987) (employer and third-party tortfeasor common enterprise election of remedies theory), Minnesota Statutes section 176.061 provides that:

An injured worker’s common law negligence action against third parties is barred if [the employer has sought worker’s compensation benefits and] (1) the employers (i.e. the employee’s employer and the third party) were engaged on the same project; (2) the employees [of the two employers] were working together (common activity); and (3) under the circumstances, the employees were “subject to the same or similar hazards.”

Higgins, 400 N.W.2d at 194. See also Kaiser v. Northern States Power Co., 353 N.W.2d 899, 906 (Minn. 1984); McCourtie v. United States Steel Corp., 253 Minn. 501, 506, 93 N.W.2d 552, 556 (1958).


29. Id.

entitled to receive credit [against the judgment] for the total amount of [the subcontractor's] workmen's compensation liability to [the plaintiff] and nothing more."31 Where, as in Minnesota, workers' compensation interferes with the normal liability allocation rules of tort law, indemnification agreements reflect, in large part, an effort to prevent employers from escaping the normal consequences of their own negligence.32

II. A TAXONOMY OF INDEMNITIES

For the past twelve years, Minnesota courts have shown a growing hostility toward contracts under which the promisor (the "indemnitor") promises to hold the promisee (the "indemnitee") harmless against liability attributable to the indemnitee's own negligence.33 To understand the rationale and ramifications of this hostility, it is first necessary to understand the ways in which indemnification agreements relate to various sources of negligence. If negligence34 causes an injury in a project covered by an indemnification agreement, the negligence will be attributable to one or more of the following three sources: (1) the would-be indemnitee; (2) the would-be indemnitor; or (3) third parties.

When contractual indemnification takes its mildest form, the indemnitor undertakes merely to hold the indemnitee harm-

31. Id. at 733.
32. Anstine, 305 Minn. at 250 n.5, 233 N.W.2d at 728 n.5. Under Lambertson, unless the value of the workers’ compensation award equals the value of the employer’s proportionate share of the damage award, the original defendant will absorb more than its “share” of the judgment. If, for example, (a) an employee of a subcontractor is injured, (b) the “value” of the employee’s injury is $200,000, (c) the worker’s compensation benefits value $50,000, (d) the general contractor was 40% negligent, and (e) the subcontractor (plaintiff’s employer) was 60% negligent, then the worker’s compensation award would reduce the judgment to $150,000, but the general contractor would bear that $150,000 burden alone. In the absence of a written indemnification agreement, Lambertson would cause the general contractor to pay $70,000 more than its proportionate share of the harm. But cf. Shore v. Minneapolis Auto Auction, Inc. 410 N.W.2d 862 (Minn. Ct. App. 1987) (Lambertson does not preclude common law indemnification).
33. See infra notes 72-132 and accompanying text.
34. "Negligence" as used in this Article is shorthand for a broader category of culpable, wrongful acts. The category includes not only unintentional conduct more extreme than negligence, e.g., recklessness, but also wrongs described by doctrines outside of tort law, e.g., breach of contract. For a discussion of how indemnification agreements can apply to breach of contract, see infra notes 216-21 and accompanying text.
less to the extent of liability attributable to the indemnitor’s own negligence. For example, assume that A and B have entered into an indemnification agreement of this type, that an injured party sues A in tort and that A invokes the indemnification agreement. If A is sixty percent negligent and B is forty percent negligent, B will be contractually obligated to pay forty percent of the judgment. This Article will call this mild form of indemnity Type 1 or *pro tanto* indemnification.\(^\text{35}\)

In the next strongest type of indemnification agreement, the indemnitor assumes responsibility not only for liability attributable to its own negligence but also for liability attributable to the negligence of third parties. Frequently, the actual indemnification provision expresses the concept obliquely; i.e., the indemnitor assumes all liability except for that attributable to the indemnitee’s own negligence.\(^\text{36}\) This Article will refer to this type of indemnity as Type 2 or “except for the indemnitee’s negligence” indemnity. In some states, this strength of indemnity is the most allowed by law.\(^\text{37}\)

The next strongest indemnity protects against all liability except liability caused by the indemnitee’s sole negligence; i.e., except when the indemnitee’s negligence is the sole legal cause of the injury.\(^\text{38}\) This Article will refer to this type of indemnity

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\(^{35}\) The Latin translates to “for so much” or “for as much as may be” or “as far as it goes.” *Black’s Law Dictionary* 1100 (5th ed. 1979). For jurisdictions which have adopted comparative negligence, *pro tanto* indemnification appears merely to restate contractually the tort law rules of contribution. In such jurisdictions, the example stated in the text would usually produce the same liability allocation as a matter of tort law. *See*, e.g., *Tolbert*, 255 N.W.2d at 367-68; *Bjorkland v. Hantz*, 296 Minn. 298, 302, 208 N.W.2d 722, 724 (1973).

\(^{36}\) If, however, the plaintiff is an employee of B, and the injury is job-related, *pro tanto* indemnification may make a substantial difference. Workers’ compensation doctrines may interfere with or even preclude A’s tort law claims against B while leaving intact A’s contractual rights of indemnity. *See supra* notes 25-32 and accompanying text.

\(^{37}\) For example: Subcontractor agrees to defend, indemnify, and hold harmless the general contractor against all claims, loss, harm, liability, and expense in any way arising from any bodily injury, death, or damage to tangible property, which is in any way related to the work to be performed under this subcontract, except to the extent that the injury, death, or damage is attributable to the negligence of the general contractor.

\(^{38}\) *See infra* notes 148-51 and accompanying text for a brief discussion of the substantive restraints states other than Minnesota have placed on indemnification agreements.
as Type 3 or "except for sole negligence" indemnity. The strongest form of indemnity applies even when the indemnitee is solely negligent.\textsuperscript{39} This Article will refer to this type of indemnity as Type 4 or "sole negligence covered" indemnity.

In sum, the following four types or strengths of indemnities exist:

Type 1 ("pro tanto") — indemnification only to the extent that the underlying harm is caused by negligence attributable to the indemnitor; the mildest type of indemnity.

Type 2 ("except indemnitee's negligence") — indemnification except to the extent that the underlying harm is caused by negligence attributable to the indemnitee. This type of indemnity covers negligence attributable to the indemnitor and to third parties; a strong type of indemnity.

Type 3 ("except sole negligence") — indemnification except when negligence attributable to the indemnitee is the sole legal cause of the underlying harm; a stronger type of indemnity.

Type 4 ("sole negligence covered") — indemnification even when negligence attributable to the indemnitee is the sole legal cause of the underlying harm; the strongest type of indemnity.

To understand how these various strengths of indemnity apply in practice, consider a simple construction project involving a general contractor\textsuperscript{40} and one subcontractor.\textsuperscript{41} As part of the subcontract, the subcontractor agrees to indemnify the general contractor for liability arising out of injuries related to the work performed under the subcontract. A third party, a stranger to the project, happens by the construction site, is injured and sues the general contractor in tort. The general cons-

\textsuperscript{39} For example: Subcontractor agrees to defend, indemnify, and hold harmless the general contractor against all claims, loss, harm, liability, and expense in any way arising from any bodily injury, death, or damage to tangible property which is in any way related to the work to be performed under this subcontract, including injury, death, or damage attributable to the sole negligence of the general contractor.

\textsuperscript{40} A general contractor contractually undertakes to perform (or have performed) all of the work of the construction project. BLACK'S LAW DICTIONARY 615.

\textsuperscript{41} That is, a company to whom the general contractor has delegated part of the performance obligations stated in the general contract.
tractor, in turn, invokes the indemnity provision and brings a third-party action in contract against the subcontractor.

The following three examples describe the impact of the four types of indemnity on liability arising from different patterns of negligence which might have caused the plaintiff’s injury. Each example assumes that the plaintiff has suffered one indivisible injury and that negligence attributable to the general contractor has contributed to the harm. The examples assume, respectively, that the general contractor is 100% negligent (Example One), that the general contractor and the subcontractor are both negligent (Example Two), and that the general contractor, the subcontractor and some third party (not the plaintiff) are all negligent (Example Three). Under Example One, the general contractor is, by definition, liable to the plaintiff for 100% of any judgment. Under Examples Two and Three, the tort law doctrine of joint and several liability would make the general contractor likewise liable to the plaintiff for the entirety of any award. In each example, the general contractor would invoke the indemnification agreement in order to have the subcontractor assume some or all of the general contractor’s liability.

A. Example One — General Contractor One Hundred Percent Negligent

Only the strongest form of indemnity provision, Type 4, will help the general contractor in this situation. Under a “sole negligence covered” provision, the subcontractor will be completely responsible to the general contractor for the general’s liability. Indemnification “except for sole negligence” of the

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42. Regardless of the allocation of liability among the defendants, as to the plaintiff the parties who are negligent are jointly and severally liable for the full judgment. S. Speiser, C. Krause, A. Gans, The American Law of Torts § 3:6, at 391-92 (1983).

43. If the subcontractor has been negligent and that negligence has contributed to the injury, the general contractor will also bring a claim of contribution. Further, if the subcontractor has breached some other provision of the contract, e.g., a promise to keep strangers off the worksite, and that breach has contributed to the injury, the contractor will have a contract cause of action distinct from the action for contractual indemnity. Both the possible contribution claim and the additional contract action are, however, conceptually separate from the principles reflected in the following examples.

44. Of course, the indemnification agreement does not alter the general contractor’s obligation and liability to the plaintiff. In this respect, an indemnification agreement differs sharply from an exculpatory agreement. The latter protects culpable
general contractor (Type 3) will be useless, since by hypothesis the general contractor is solely negligent. A fortiori, the weaker types of provisions will be useless as well. Type 2 indemnity, ("except for the indemnitee's negligence") will provide no recovery, since the indemnitee's negligence is 100% responsible for the underlying injury. Likewise, pro tanto indemnification (Type 1) will be of no avail, since the indemnitor's legal contribution to the harm is nil.

B. Example Two — General Contractor Sixty Percent Negligent; Subcontractor Forty Percent Negligent

In this situation, both Type 4 indemnity ("sole negligence covered") and Type 3 indemnity ("except for sole negligence") will each make the subcontractor fully responsible to the general for the entirety of the liability. Type 2 indemnification ("except for the indemnitee's negligence") will make the subcontractor responsible for all but sixty percent of the liability; i.e., for forty percent. Pro tanto indemnification (Type 1) will also make the subcontractor responsible for forty percent of the liability.45

C. Example Three — General Contractor Thirty Percent Negligent; Subcontractor Forty Percent Negligent; Third Party (Not the Plaintiff)46 Thirty Percent Negligent

As in Example Two, both "sole negligence covered" (Type

45. The effect of Type 1 and 2 indemnity in this example may appear indistinguishable from comparative negligence contribution. See supra note 35. If the plaintiff were an employee of the subcontractor, the results might be quite different. See supra notes 25-32 and accompanying text.

46. Under the rules of comparative negligence, negligence on the plaintiff's part would, in most instances, just reduce the size of the award. Since that effect would have no impact on the percentage allocation of liability among the other parties, these examples do not consider instances of plaintiff negligence. But cf. Minn. Stat. § 604.02(2) (1986) (allowing for reallocation of liability among joint tortfeasors if it becomes apparent after entry of judgment that one of the judgment debtors is judgment-proof).

The plaintiff's negligence could, however, play a complicating role under Michigan law. Michigan allows indemnification except for those provisions which seek to indemnify against the indemnitee's sole negligence. Smith v. O'Harrow Constr. Co., 95 Mich. App. 341, 345, 290 N.W.2d 141, 143 (Mich. Ct. App. 1980). Smith involved a suit against a contractor by an injured employee of a subcontractor. After judgment for the plaintiff, the contractor sought indemnification from the subcontractor/employer. In the first lawsuit, the employee had been found partially
4) and "except for sole negligence" indemnification (Type 3) will require the subcontractor to hold the general contractor completely harmless. Type 2 indemnification ("except for the indemnitee's negligence") will not be quite as beneficial but will at least require the subcontractor to assume responsibility for the harm attributable to the negligence of the third party. Thus, under a Type 2 provision, the subcontractor will be responsible for all but thirty percent of the liability; i.e., its own forty percent, plus the third party's thirty percent. Pro tanto indemnification will provide considerably less protection for the general contractor. The subcontractor's responsibilities under the indemnity will stop at forty percent.

The following chart restates the three examples in graphic form.

As Figure 1 shows, the various strengths of indemnification provide progressive strengths of protection. Equally important, Figure 1 and the examples emphasize that limiting indemnification to its pro tanto form does far more than merely prohibit indemnification against a party's own negligence. If the law prohibits indemnification beyond Type 1 ("pro tanto") indemnity, then private parties lack the freedom to contractually allocate the liability which might arise from the unwelcome negligence of a stranger to their bargain.

47. If the third party pays its share of the judgment, the subcontractor's burden will be less. But even if the third party is not subject to judgment or is judgment-proof, the subcontractor's obligation to the general contractor remains the same — 100% of the liability.

48. This is, of course, precisely the limit imposed by the Minnesota anti-indemnification statute. Minn. Stat. §§ 337.01-06 (1986). Especially if the negligent third party is truly a stranger to the bargain, i.e., not, for example, another subcontractor working on the same project, this anti-indemnification limit stands in stark contrast to the risk allocation alternatives available in other commercial contexts. Recall the example of the grain contract, supra notes 7-8. That contract allocates to the farmer, inter alia, the risk that vandals will destroy the crop, and no one suggests that public policy is violated when the farmer assumes the risk for a harm created by a third party's misconduct.
FIGURE 1

<table>
<thead>
<tr>
<th>Example One</th>
<th>Example Two</th>
<th>Example Three</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Contractor</td>
<td>General Contractor</td>
<td>General Contractor</td>
</tr>
<tr>
<td>100% Negligent</td>
<td>60% Negligent;</td>
<td>30% Negligent;</td>
</tr>
<tr>
<td>Subcontractor 40% Negligent</td>
<td>Subcontractor 40% Negligent;</td>
<td>Negligent;</td>
</tr>
<tr>
<td>Third party 30% Negligent</td>
<td>Third party 30% Negligent</td>
<td>Negligent;</td>
</tr>
</tbody>
</table>

Including Sole Negligence (Type 4)

Except Sole Negligence (Type 3)

Except for Indemnitee’s Negligence (Type 2)

Pro Tanto (Type 1)

* Shaded area is forty percent of bar
** Shaded area is seventy percent of bar

Each bar represents the full award to plaintiff. Shaded areas represent the extent of protection provided to the general contractor by each type of indemnity provision.

III. The Common Law History

A. The Original and Neutral Approach: Fair Construction

Most controversy concerning indemnification provisions has centered on whether a provision may validly provide for indemnification against the indemnitee’s own negligence. The seminal Minnesota Supreme Court case to focus on the question, Northern Pacific Railway Co. v. Thornton Brothers Co.,49 saw

49. 206 Minn. 193, 288 N.W. 226 (1939). An earlier case, St. Paul Union Depot
the issue as a matter of basic contractual construction. *Thornton Brothers* arose from a sewer construction project. The Minneapolis-St. Paul Sanitary District wished to lay a sewer through a right-of-way owned by the railway. The railway agreed to accommodate the District, but on condition that the District include in its contract with its contractor a requirement that the contractor indemnify the railway company for, *inter alia*, "loss of or damage to the property of third persons arising in any manner out of or in any manner connected with the said work." The railroad also required the contractor to obtain a performance bond to back up the indemnity.

After the project was underway, the railroad negligently allowed a string of freight cars to get loose. Those cars damaged a pile driver owned by one of the project subcontractors. The subcontractor sued the railroad, and the railroad settled. The railroad then invoked the indemnity obligation and sued the general contractor.

On appeal, the defendant general contractor advocated a rule of "strict construction." The defendant apparently argued that (a) indemnification against a party's own negligence was somehow disfavored or disreputable; and (b) therefore, a provision seeking to provide such extraordinary protection should have to state its intent more explicitly than is generally required of ordinary contractual promises.

The court rejected this approach, disposing of "strict construction" cases from other jurisdictions as transcending a court's proper role in construing private agreements. In the opinion of the *Thornton Brothers* court, strict construction cases "seem to thwart contractual intention" solely due to some antagonism towards the intention itself.

In reaching its decision, the court did recognize that an indemnity contract which tends to induce wrongful behavior is

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Co. v. Minneapolis, St. Paul & S.S.M. Ry. Co., 178 Minn. 219, 226 N.W. 572 (1929), enforced an indemnification agreement effectively providing protection against the indemnitee's own negligence. Apparently, however, no one raised the issue that such a provision might be inherently invalid. See also Quirk Milling Co. v. Minneapolis & St. Louis R.R. Co., 98 Minn. 22, 107 N.W. 742 (1906).


51. Id. The language quoted in the preceding sentence is actually from the bond. Today, indemnitees tend to require contractual liability insurance rather than performance bonds.

52. Id. at 195, 288 N.W. at 227.

53. Id. at 197, 288 N.W. at 228.
unenforceable Supra but noted that: "A party may properly bargain for indemnity against his own negligence where the latter 'is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act.' "

The court then rejected as "quite fanciful" the notion that indemnity provisions might encourage negligence:

Particularly in the field of railroads and construction contractors, the results of negligence are so onerous and, the humanities and money loss aside, so altogether annoying, that only the extreme of inexperience would harbor the thought that a contract of the instant sort would operate in the slightest degree as a premium on and so an inducement to negligence.

The court also noted that the inducement-to-negligence argument, if valid, applied equally well to ordinary contracts of insurance. Noting that no one challenged the validity of actual insurance contracts, the court asked: "How does the same process, with identical result, become illicit simply because they are those of the original and basic contract rather than a collateral one for conventional insurance?"

The court then proceeded to construe the indemnification provision. Quoting the "general and inclusive verbiage" of "loss of or damage to property" which arises "in any manner out of or in any manner connected with the said work," the court found the damage clearly within the stated indemnity. "It is perfectly obvious that the [subcontractor's] piledriver was engaged in the 'work,' and that in a practical manner the damage arose out of or at least was connected with the work."

The Thornton Brothers court rejected any requirement that the contractual language specifically refer to the indemnitee's negligence. To impose such a requirement would be to ignore and frustrate the "general and inclusive verbiage" of the contract. The court stated: "There should be no resort to a forced construction so arbitrarily 'strict' as to defeat a legitimate and expressed contractual purpose." In other words,

54. Id. at 196, 288 N.W. at 227.
55. Id. at 197, 288 N.W. at 228.
56. Id.
57. Id.
58. Id. at 198, 288 N.W. at 228.
59. Id.
Minnesota courts should not use a rule of construction to impose indirectly a public policy. If a contract is "within the scope of lawful contractual objectives" then "the contract should not have an arbitrary, that is, unduly liberal or harshly strict, construction, but a fair construction that will accomplish its stated purpose." 60

Thornton Brothers remained good law for forty years. In 1952, the Eighth Circuit Court of Appeals applied Minnesota's rule of fair construction in Minneapolis-Moline Co. v. Chicago, Minneapolis, St. Paul & Pacific Railroad Co. 61 The court quoted Thornton Brothers at length 62 and then added: "If this indemnity contract is the subject of construction it should be construed in the same manner as any other similar contract." 63 A decade later, in 1963, the United States Court of Appeals for the Eighth Circuit again had occasion to apply Minnesota law. The panel cited Thornton Brothers and Minneapolis-Moline and added: "The rules governing the requisites, validity and construction of contracts generally apply to indemnity contracts." 64

Nine years later, in 1972, the Minnesota Supreme Court itself reasserted the validity of the rule of Thornton Brothers on two occasions. First, in Zerby v. Warren, 65 the court reaffirmed Thornton Brothers while refusing to enforce an indemnification agreement which purported to require a manufacturer of glue to indemnify a retailer against all liability "alleged to have resulted from the handling, display, sale, and use, consumption or distribution" of the glue. 66 The injuries at issue arose from the retailer's illegal sale of glue to a minor. 67 According to the Zerby court, since the illegal sale had violated "an absolute duty imposed by law for the protection of others," enforcing the indemnity provision would have frustrated the legislature's effort to protect "the public interest" by deterring sales to minors. 68 Thornton Brothers was distinguished because it had not involved any comparable public interest in any absolute duty

60. Id. at 196, 288 N.W. at 227.
61. 199 F.2d 725 (8th Cir. 1952).
62. Id. at 729.
63. Id. at 730.
64. Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Famous Brands, 324 F.2d 137, 140 (8th Cir. 1963).
65. 297 Minn. 134, 210 N.W.2d 58 (1973).
66. Id. at 143, 210 N.W.2d at 64.
67. Id. at 135, 210 N.W.2d at 60.
68. Id. at 143-44, 210 N.W.2d at 64.
imposed by law. In contrast to the invalid provision in Zerby, the indemnification agreement in Thornton Brothers "was as legitimate as insurance."\(^6^9\)

Six weeks after the decision in Zerby, the Minnesota Supreme Court relied on Thornton Brothers to give a "fair construction" to broad indemnity language. In Christy v. Menasha Corp.,\(^7^0\) the court held that a subcontractor's written agreement to assume liability for all harms "arising out of, resulting from or in any manner connected with the execution of the work provided for" in the subcontract covered liability arising from the indemnatee's own negligence.\(^7^1\)

**B. The Rise of Strict Construction**

Although the Minnesota Supreme Court did not expressly repudiate the rule of "fair construction" until 1979,\(^7^2\) the court signaled some disaffection with the rule in a 1975 case. In Anstine v. Lake Darling Ranch,\(^7^3\) the court noted that Minnesota's fair construction approach was at odds with the majority view.\(^7^4\) The court then refused to enforce an indemnity provision, although not for reasons of strict construction. Instead, the court announced a "nexus" rule, holding that indemnity provisions are enforceable only when there is a "temporal, geographical, or causal nexus between the [indemnitor's] work and the injury which gives rise to liability."\(^7^5\) The case first construed the particular contract at issue and held that the parties intended a nexus requirement.\(^7^6\) The court then went on to state that an indemnity agreement which did not intend to impose a sufficient nexus requirement would be void as an improper contract of insurance.\(^7^7\)

In its direct holding, Anstine seemed not at all radical. The would-be indemnitee was attempting to hold liable eight sepa-

\(^6^9\) *id.* at 143, 210 N.W.2d at 64.

\(^7^0\) 297 Minn. 334, 211 N.W.2d 773 (1973).

\(^7^1\) *id.* at 337, 211 N.W.2d 775-76.

\(^7^2\) See Farmington Plumbing, 281 N.W.2d at 838.

\(^7^3\) 305 Minn. 243, 233 N.W.2d 723 (1975).

\(^7^4\) *id.* at 248 n.2, 233 N.W.2d at 727 n.2.

\(^7^5\) *id.* at 249, 233 N.W.2d at 727.

\(^7^6\) *id.*

\(^7^7\) *id.* at 250, 233 N.W.2d at 728-29. That is, absent sufficient nexus, the indemnification agreement would amount to a contract of insurance. Contracts of insurance which are issued outside of the statutes regulating insurance policies violate those statutes and are therefore void. *Id.*
rate subcontractors which had neither been on the worksite at the time of the accident nor been involved in any work connected with the source of the underlying injury. It required no break with "fair construction" precedent to reject the claim of indemnity. Nothing in the language of the indemnification provision either stated or fairly implied such a broad scope. Fair construction itself sufficed to defeat the indemnity claim and the Anstine court itself expressly considered its ruling to be in harmony with the Thornton Brothers case. 78

The Anstine decision did, however, reflect a lack either of understanding or allegiance to the rationale of Thornton Brothers. Besides holding that an indemnity without nexus would be an illegal policy of insurance, the court also remarked that such an agreement "might be void for want of consideration." The court explained: "No premium was paid and it is difficult to see how the contractor’s promise to pay the subcontractor for work done on the project could constitute consideration for the subcontractor’s promise to insure the contractor against all liability connected with the entire project." 79 This observation ignores the basic perspective articulated in Thornton Brothers, i.e., that a promise of indemnity is part and parcel of the overall bargain between the parties. 80

The real threat of Anstine to indemnification agreements did not, however, lie either in the nexus requirement which the case announced or in the case’s failure to partake of some of the "fair construction" rationale. The real danger was that courts might apply rules of strict construction not only to the question of whether the parties intended coverage for the indemnitee’s negligence, but also to the question of whether the indemnification agreement met the Anstine nexus requirement.

Before that danger could materialize, Minnesota had to adopt a rule of strict construction. It did so four years after Anstine in the case of Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc. 81 In Farmington Plumbing, the Minnesota

78. Id. at 248, 233 N.W.2d at 727.
79. Id. at 252 n.9, 233 N.W.2d at 729 n.9.
80. Thornton Bros., 206 Minn. at 198, 228 N.W. at 228. See also Petitt Grain & Potato Co., 227 Minn. at 228, 35 N.W.2d at 129 (construing and enforcing an exculpatory provision of a lease which recited that the lessee’s assumption of the risk of the lessor’s negligence is "one of the material considerations of this lease without which the same would not be granted").
81. 281 N.W.2d 838 (Minn. 1979).
Supreme Court did a one hundred and eighty degree turn away from *Thornton Brothers*, stating: "Indemnity agreements are to be strictly construed where the indemnitee . . . seeks to be indemnified for its own negligence. There must be an express provision in the contract to indemnify the indemnitee for liability occasioned by its own negligence; such an obligation will not be found by implication."  

The court offered little rationale for its radical change of view. It cited one Wisconsin case as direct support and explained that the policy of strict construction was "consistent with the policy expressed in *Tolbert v. Gerber Industries, Inc.* . . . that each tortfeasor accept responsibility for damages commensurate with its own relative culpability." In a brief footnote, the court acknowledged that its new rule was at odds with precedent and expressly overruled some of the contrary cases.

Curiously, the court chose not to cite *Thornton Brothers*, Minnesota's seminal "fair construction" case. Nor did the court address the rationale for fair construction asserted in *Thornton Brothers*. Indeed, the court offered no persuasive reasons whatsoever for subjecting promises of indemnity to any different rules of contractual interpretation than those applied to other contractual efforts to allocate liability. *Webster v. Klug & Smith*, the Wisconsin case cited as direct support, contained no reasoning to support its own holding. The Minnesota case,

82. *Id.* at 842.
84. *Farmington Plumbing*, 281 N.W.2d at 842.
85. *Id.* at 842 n.4.
86. *Cf.* U.C.C. § 2-316(2), 2-316(3)(a) comment 1. The comment explains why, in contracts for the sale of goods, disclaimers of warranties must be "conspicuous" and must call the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty. According to the comment, "[t]his section . . . seeks to protect a buyer from unexpected and unbargained language of disclaimer . . . ." In contrast, indemnification provisions are not typically unusual or surprise provisions. To the contrary, they appear commonplace and well known. Espel, *supra* note 20, at 84-87; Lord, *supra* note 20, at 5-8, 16.
87. Neither *Webster*, 81 Wis.2d 334, 260 N.W.2d 686, nor any of the cases cited by *Webster*, offer any rationale for the rule of strict construction. The chain of Wisconsin precedent goes back to the case of *Hartford Accident & Indus. Co. v. Worden-Allen Co.*, 238 Wis. 124, 297 N.W. 436 (1941). In Wisconsin cases, *Hartford* is often cited to support the proposition that Wisconsin somehow disfavors indemnification contracts which cover the indemnitee's own negligence. See, e.g., Algren v. Nowlan, 37 Wis. 2d 70, 77-78, 154 N.W.2d 217, 220 (1967); Mustas v. Inland Constr., Inc., 19 Wis.2d 194, 205-07, 120 N.W.2d 95, 101-02, order clarified and petition for rehe'g denied,
Tolbert, was simply inapposite. Tolbert concerned a type of common law indemnity which the supreme court had previously applied in the absence of a written indemnification agreement. In 1960, in Hendrickson v. Minnesota Power and Light Co., the court had recognized five different categories of situations warranting indemnification. Four of these categories concerned situations lacking any written contract of indemnification. The fifth category consisted simply of such written agreements. While Tolbert overruled one of the four non-contractual categories of Hendrickson, it left unaddressed and unaffected the fifth category — i.e., written contracts of indemnity. Since Farmington Plumbing concerned solely a written indemnification contract, and since Tolbert had not overruled Hendrickson’s approval of written indemnification agreements, Tolbert supplied only specious support for the decision in Farmington Plumbing.

Indeed, one year after Farmington Plumbing, the Minnesota Supreme Court expressly acknowledged that the rationale of Tolbert had no relevance to written indemnification provisions.

19 Wis. 2d 194, 121 N.W.2d 274 (1963). However, the Hartford case actually seems to point at least as much in the opposite direction. The case recognizes that the essential purpose of an indemnification agreement is to provide an escape from liability for a party who would otherwise be legally responsible for damages. The court stated, "[i]t appears to us that the liability of [the indemnitee] is precisely the sort that was contemplated under the indemnity contract, and to hold that it is not is to render the indemnity meaningless. The indemnity contract presupposes a liability by [the indemnitee] to employees, frequenters, and others." Id. at 129, 297 N.W. at 439. To read out of the contract liability attributable to the indemnitee’s negligence would be to frustrate the very purpose of the indemnity provision. Id. Far from sounding like the basis of a strict construction approach, this holding closely resembles the reasoning of Thornton Bros., Minnesota’s seminal fair construction case.

Hartford also addresses the contention that strong indemnity contracts might induce carelessness, a notion sometimes used to argue against strong indemnification agreements. In the words of the court, "If there were anything to defendant’s contention, automobile and public liability insurance policies would be void." Id. at 132, 297 N.W. at 440. Again, Hartford seems a poor basis for a rule of strict construction; the case sounds very much like Thornton Bros.

The Hartford court did speculate that different principles might be involved were the indemnitee’s negligence active rather than passive. Id. at 130-31, 297 N.W. at 439-40. However, the court neither identified those different principles nor determined that strict construction would be appropriate. What the court did do, as already mentioned, was embrace two of the major rationales supporting fair construction.

88. Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977).
89. 259 Minn. 368, 104 N.W.2d 843 (1960).
90. 255 N.W.2d at 367-68 & n.11.
In *Ford v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, the court considered a contractual provision requiring a railroad and its customer to share liability equally if they were both partially responsible for an injury. The agreement provided for equal liability regardless of the actual proportions of culpability. Enforcing the provision, the court noted that the written “clause is not affected by the decision in *Tolbert v. Gerber Industries, Inc.*, since *Tolbert* applied only to a category of noncontractual indemnity and left intact the law applicable to express contracts.

In sum, Minnesota adopted the rule of strict construction without explicitly overruling the seminal contrary precedent, without addressing the rationale of that seminal case, and while relying on a tangentially-related decision which one year later was declared inapposite by the same court.

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91. 294 N.W.2d 844 (Minn. 1980).

92. *Id.* at 847. The *Ford* decision termed the risk allocaton provision one of contribution rather than of indemnification, but then validated the provision under the *Hendrickson* category covering written indemnification agreements. *Id.*

93. The court's break with precedent is all the more remarkable considering that neither party even raised the issue of strict construction. Most of the discussion of indemnification concerned a variety of noncontractual indemnification, and the parties strongly contested the meaning of *Tolbert* in that context. Appellant's Brief at 36-47, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 839 (Minn. 1979) (No. 47835) [hereinafter Appellant's Brief]; Respondent's Brief at 11-12, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 839 (Minn. 1979) (No. 47835) [hereinafter Respondent's Brief]; Appellant's Reply Brief at 5, Farmington Plumbing & Heating Co. v. Fischer Sand and Aggregate, Inc., 281 N.W.2d 839 (Minn. 1979) (No. 47835) [hereinafter Appellant's Reply Brief]. Neither party cited any case dealing with the construction of indemnification agreements. The Respondent did argue that the particular written indemnification agreement at issue did not cover the indemnitee's negligence, but Respondent based that argument entirely on the following, ordinary (i.e. fair construction) rules of construction: “First, the general rule that contractual language susceptible to more than one written indemnity agreement meaning shall be construed in favor of the non-drafting party and against the drafter . . . . Secondly, a contract is to be construed as a whole.” Respondent's Brief and Appendix, at 14-15.

Two years after *Farmington Plumbing*, the court evidenced a similar disdain for history when it extended the rule of strict construction to exculpatory agreements, i.e., agreements under which the promisor prospectively releases the promisee from any claim arising from the promisee's future wrongful act. In *Solidification Inc. v. Minter*, 305 N.W.2d 871 (Minn. 1981), the court disregarded 75 years of precedent and “[w]ithout any explanation or reasoning” applied *Farmington Plumbing*'s rule of strict construction to an exculpatory provision. Tanick, *Exculpation Clauses: Loopholes to Legal Liability*, 43 BENCH & BAR 14, 18 (Aug. 1986).
C. From Strict to Absurd Construction

In its first indemnification case after Farmington Plumbing, the Minnesota Supreme Court took a moderate approach to its new rule of strict construction. In 1980, in Johnson v. McGough Construction Co.,94 the court rejected the argument that an indemnity could not extend to the indemnitee’s own negligence unless the contractual provision specifically used the word “negligence.” The court held that a provision relating to claims “for which the [ indemnitee] may be, or may be claimed to be, liable” sufficed to satisfy the strict construction rule.95

Unfortunately, the moderation reflected in Johnson soon gave way. Over the past seven years, both the Minnesota Supreme Court and the Minnesota Court of Appeals have carried strict construction to an extreme. Recent decisions manifest an unremitting hostility to attempts to obtain indemnification against a party’s own negligence — regardless of how clearly that intent may be expressed.

In two instances, aggressive use of the rule of strict construction has allowed the reviewing court to reject particular language and thereby frustrate an intended indemnity. In three other instances, the reviewing court has applied the rule of strict construction to the Anstine nexus requirement. This combined assault has not only frustrated one particular expression of intent, but has also effectively undercut any effort to express and enforce the challenged intent in any form.

The Minnesota Court of Appeals decision of Mattila v. Minnesota Power and Light Co.,96 was the first of the extreme strict construction cases. The case arose from a painting job which Mattila’s employer, National, performed for Minnesota Power and Light (“M.P. & L.”). Mattila was injured and sued M.P. & L. Invoking a contractual provision for indemnity, M.P. & L. brought National in as a third-party defendant. The jury found all three parties to be negligent.

In seeking indemnification for liability arising from its own negligence, M.P. & L. relied on a provision which required National to provide indemnity for any liability “arising in whole or in part from any act or omission of [National], his subcontractors and his or their agents, servants and employees, inci-
dental to performance of this Contract." This broad language was subject to only one qualification. National was responsible for all of M.P. & L.'s liability, "except as may be caused by the sole negligence of [M.P. & L.]."97 There was apparently no question that Mattila's injury came generally within the scope of the indemnity provision. National contended, however, that the provision did not adequately express an intent that National be responsible for M.P. & L.'s own negligence.

It is difficult to see how an exception clause reading "except as may be caused by the sole negligence" does not clearly intend that in all other cases — including cases of M.P. & L.'s partial negligence — National would have a duty to indemnify. The court of appeals, however, managed to see differently. To do so, the court made use of an adjacent provision of the contract. That adjacent provision required National to defend lawsuits arising from the work. That provision created an obligation of defense "irrespective of whether it is alleged, claimed or proven . . . that negligence of [M.P. & L.] . . . caused or contributed" to the underlying harm.98 Since the obligation to defend referred to the indemnitee's negligence in bald and direct language and the obligation to indemnify did not, the court of appeals concluded that the indemnity did not apply to M.P. & L.'s own negligence. The holding in Mattila effectively reads the exception clause in the indemnification provision right out of existence. But, in the words of Thornton Brothers, one can always "resort to a forced construction so arbitrarily 'strict' as to defeat a legitimate and expressed contractual purpose."99

Seven months after deciding Mattila, the Minnesota Court of Appeals again demonstrated the extraordinary powers of the strict construction rule. In Braegelmann v. Horizon Development

97. Id. at 843-44.
98. Id. at 844.
99. Thornton Bros., 206 Minn. at 198, 288 N.W. at 228. On its way to arbitrary construction, the court of appeals also misread Ford. According to the court of appeals, the Minnesota Supreme Court had held the contractual indemnity provision in Ford "sufficient to grant indemnity to the railroad for the grain terminal's negligence but not for the railroad's own negligence." Mattila, 363 N.W.2d at 844. This reading is simply wrong. Ford enforced a provision which divided the liability 50/50 when the parties were both negligent, regardless of their relative culpabilities. Therefore, if, for instance, the railroad was 75% negligent and the grain terminal was 25% negligent, the 50/50 split of liability would result in the railroad being indemnified against some of its own negligence.
the court considered an indemnification agreement which purported to require indemnification "regardless of whether [the underlying harm giving rise to liability] is caused in part by a party indemnified hereunder."\textsuperscript{101} As recognized by the trial court and pointed out by the dissent, the quoted language "‘clearly and unequivocally states the intent that the indemnitor is liable to the indemnitee for its negligence.’"\textsuperscript{102} The majority of the court of appeals’ panel managed nonetheless to find a way to scuttle that clear and unequivocal intent. To do so, the court looked to the part of the indemnification provision which, as required by \textit{Anstine},\textsuperscript{103} stated the required nexus between the indemnitor’s actions and the obligation to indemnify. The \textit{Braegelmann} nexus provision had two parts. The provision first referred to harms relating generally to the performance of the subcontractor’s work and then restricted the scope of the indemnity to harms caused at least to some extent by the subcontractor’s negligence. The indemnification thus purported to extend to:

all claims, damages, losses and expenses ... arising out of or resulting from the performance of the Subcontractor’s Work under the Subcontract, provided that any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, ... to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder.\textsuperscript{104}

The \textit{Braegelmann} contract thus required as nexus some “negligent act or omission of the [indemnitor] or anyone directly or indirectly employed by him or anyone for whose acts he may be liable.”\textsuperscript{105} Unfortunately for the would-be indemnitee, the nexus language began with the phrase “to the extent caused.”\textsuperscript{106}

Under the rules of strict construction, that phrasing proved

\textsuperscript{100} 371 N.W.2d 644 (Minn. Ct. App. 1985), \textit{pet. for rev. denied} (Oct. 11, 1985).
\textsuperscript{101} \textit{Id.} at 645.
\textsuperscript{102} \textit{Id.} at 647 (quoting the trial court which was quoting \textit{Johnson}, 294 N.W.2d at 288).
\textsuperscript{103} \textit{Anstine}, 305 Minn. at 243, 233 N.W.2d at 723.
\textsuperscript{104} \textit{Braegelmann}, 371 N.W.2d at 645 (ellipsis in original).
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
fatal. According to the majority: "[t]he additional phrase, 'to the extent caused,' . . . suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence contributes to the injury."\(^{107}\) At best, according to the panel majority, ambiguity results when this "comparative negligence" language is juxtaposed with the language providing indemnity "regardless of whether [the underlying harm] is caused" by the indemnitee. Therefore, according to the rules of strict construction, the provision fails.\(^{108}\)

While in *Braegelmann* the nexus portion of the contract provided ammunition for a strict construction attack on the overall indemnification provision, in three other post-*Farmington Plumbing* cases *Anstine*’s nexus requirement itself came to be subject to strict construction. This development began in 1981, with the Minnesota Supreme Court case of *R.E.M. IV, Inc.* v. *Robert F. Ackermann & Associates, Inc.*\(^{109}\) The plaintiff in the case, R.E.M. IV, Inc., had hired a general contractor to build a building. That contractor had subcontracted to Norcol, Inc. the work of installing a sprinkler system.\(^{110}\) As part of the subcontract, Norcol agreed to indemnify the general contractor as to: "all damages or injury . . . to all property, arising out of it, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract."\(^{111}\)

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107. *Id.* at 646.

108. *Id.* In the words of T. S. Eliot, the court of appeals may have perpetrated "the greatest treason"; i.e., it may have done "the right deed for the wrong reason." T. S. ELIOT, MURDER IN THE CATHEDRAL 44 (1935) ("The last temptation is the greatest treason: To do the right deed for the wrong reason.") That is, if the indemnification provision was indeed ambiguous, and if the indemnitee was responsible for drafting or including the provision, the doctrine of *contra proferentem* would argue for resolving any ambiguity against the indemnitee and therefore against indemnification. It is unclear, however, whether the indemnitee was responsible for choosing or drafting the contract language. The provision at issue came from a standard form prepared by the American Institute of Architects (AIA). *Braegelmann*, 371 N.W.2d at 645. The indemnitee was the general contractor. AIA forms are typically chosen by owners at the instance of their consulting architects. Moreover, the form is not necessarily a pro-owner form. See Lord, *supra* note 20. It is, therefore, unclear whether the doctrine of *contra proferentem* should apply. In any event, the *Braegelmann* case stands as another example of the lengths to which Minnesota courts will go to find any basis for invalidating provisions indemnifying a party against its own negligence.

109. 313 N.W.2d 431 (Minn. 1981).

110. *Id.*

111. *Id.* at 432.
Sometime after the subcontractor completed its work, the sprinkling system malfunctioned and damaged the building. When the owner brought suit against the general contractor, the general contractor invoked the indemnity provision and brought the subcontractor in as a third-party defendant. The indemnity contract contained the same language approved of in Johnson v. McGough Construction Co. as sufficient to cover the negligence of the indemnitee. The subcontractor in REM IV, Inc. contended, however, that the nexus provision of the indemnity clause was insufficiently specific to apply to harm which occurred after the subcontractor had completed its work.

This argument persuaded the supreme court. The court first viewed the matter as one of construing the intent of the parties. The contract provided for indemnification for harms “arising out of . . ., resulting from or in any matter connected with” the subcontractor’s work on the sprinkling system. It was a malfunction of the sprinkling system which caused the underlying harm, but nonetheless the court stated: “Logic requires the conclusion that only damage occurring during the performance of the work of the subcontract is within the intended coverage of the indemnity provision.”

Besides strictly construing the intent of the agreement, the court went further and implied that the indemnification provision’s problems might be more than mere drafting errors. Referring to Anstine's requirement of nexus the court held:

[t]he necessary causal relationship does not exist. There was no temporal and geographic relationship, since Norcol [the indemnitee] had completed its work prior to the time at which the damage occurred and was not even on the job site at the time of the damage. The damages that occurred are not sufficiently related to Norcol’s on-the-job performance to meet the Anstine requirement.

Thus, even if the indemnification provision had specifically purported to cover harms arising after the completion of the subcontractor's performance, the R.E.M. IV, Inc. court might have declined to allow the indemnity.

112. 294 N.W.2d 286 (Minn. 1980).
113. R.E.M. IV, Inc., 313 N.W.2d at 432.
114. Id.
115. Id. at 435.
116. Id. at 434.
The part of *R.E.M. IV, Inc.* which discusses the *Anstine* nexus requirement is arguably *dicta*. When the court construed the contract language as intentionally excluding post-performance harms, the court had decided the case. There was no need to advise as to whether some different intent might be permissible. But *dicta* or not, that part of *R.E.M. IV, Inc.* certainly tightens the constraints of *Anstine*’s nexus requirement. *Anstine* required *either* "a temporal and geographic *or* a causal relationship between [an indemnitor’s] work and the injury giving rise to the liability . . . ."117 By disregarding the possibility that Norcol’s on-the-job activities might have caused the after-the-job harm, *R.E.M. IV, Inc.* appears to have eliminated causal nexus as a separate and independent basis for satisfying *Anstine*.118

The disregard is significant. In *Anstine*, no geographic, temporal *or* causal connection existed. The *Anstine* court considered would-be indemnitees who were neither on the worksite at the time of the accident nor in any way connected with the actual harm.119 In *R.E.M. IV, Inc.*, in contrast, a connection certainly existed. There was some evidence in early discovery that the indemnitee had itself been negligent.120 In any event, the sprinkling system which caused the underlying damage was the system which the indemnitee had worked on. Under *Anstine*, the indemnitee’s work on that system should have constituted a sufficient causal connection. *Anstine*, after all, required only "but for" causation, not actual negligence to establish nexus.121

The Minnesota Court of Appeals has dutifully followed *R.E.M. IV., Inc*’s erroneous extention of *Anstine*. In 1986, the

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117. *Anstine*, 305 Minn. at 249, 233 N.W. at 727 (emphasis added).
118. *R.E.M. IV, Inc.*, 313 N.W.2d at 434.
119. *Anstine*, 305 Minn. at 244-48, 233 N.W.2d at 725-27.
120. *R.E.M. IV, Inc.*, 313 N.W.2d at 432.
121. *Anstine*, 305 Minn. at 249, 233 N.W. at 728; see also *Johnson*, 294 N.W.2d at 288. The *R.E.M. IV, Inc.* court did raise a troublesome theoretical issue — namely whether negligence of the indemnitee occurring after the work of the contract is completed should be subject to the indemnification provision. *R.E.M. IV, Inc.*, 313 N.W.2d at 435. That issue was not, however, actually present in the case. From the sketchy facts given, it appears that any negligence of the indemnitee occurred before or during the performance of the subcontractor’s work. The real issue was, therefore, whether the mere cessation of the subcontractor’s physical work on the project released the subcontractor from its obligations of indemnity. That is, did the indemnity cover harms "sown" while the contract was being performed but not "reaped" until after the performance ended.
court decided Frederickson v. Alton M. Johnson Co., which involved a timing situation very similar to that of R.E.M. IV, Inc. In Frederickson, the plaintiff was an employee of an electrical company working on an electrical system at a shopping center. When the employee attempted to install a fuse into an electrical cabinet, the cabinet exploded injuring the employee. The employee sued, inter alia, the electrical engineering firm which had designed the electrical system. That firm sought indemnity from the electrical contracting firm which had originally installed the electric cabinet. At the time of the explosion, that electrical firm’s work on the project was long over. Since “nothing in the actual language of the provision speaks of [the electrical contractor’s] duty to indemnify [the electrical engineering firm] after [the electrical contractor’s] work was completed,” the court of appeals saw R.E.M. IV, Inc. as controlling.

That conclusion is hard to challenge, especially since in the Frederickson case a real possibility existed that some contributory negligence of the indemnitee (or third parties) may have occurred after the indemnitor’s work had ended. What is noteworthy, however, is the length the court of appeals chose to go to find an occasion to apply the strictures of R.E.M. IV, Inc. The court had no need even to consider the content of the indemnification agreement, since by the court’s analysis the statute of limitations barred the claim for indemnity.

In a slightly earlier case than Frederickson, the court of appeals had gone even further than merely applying R.E.M. IV, Inc. to a moot issue. In Fossum v. Kraus-Anderson Construction Co., the Minnesota Court of Appeals took to new lengths R.E.M. IV, Inc.’s disregard of the causal nexus aspect of Anstine. Fossum involved a contract in which a subcontractor agreed to hold a general contractor harmless as to: “damages or injuries

122. 390 N.W.2d 786 (Minn. Ct. App. 1986).
124. 390 N.W.2d at 789.
125. Id. at 793.
126. See supra note 121 and accompanying text.
127. Frederickson, 390 N.W.2d at 793. The court’s explanation of the need to provide an apparently advisory opinion is that “we shall also address the merits of the claim, since that was the basis of the decision below.” Id.
to all persons, whether employees or otherwise . . . arising out of, resulting from or in any manner connected with the execution of the work provided for in this subcontract . . . .”

An employee of the subcontractor was hit by a car as he left the job site at the end of the work day. The employee sued the general contractor for negligently placing the exit gate. The general contractor, in turn, invoked the indemnification provision and sued the employee’s employer. Citing R.E.M. IV, Inc. and Anstine, the court of appeals refused to apply the indemnification provision. The court stated:

Since plaintiff had completed his work and left the job site to go home, there was no temporal and geographical relationship between the performance of the subcontractor’s work and plaintiff’s injury. Since plaintiff had finished his employer’s work for the day, there was no causal relationship between performance of the work and his injuries.

The Fossum ruling shows how far the Minnesota Court of Appeals has strayed from the facts which informed the Anstine decision. In Anstine, subcontractors sought to escape indemnity obligations because their work had no connection with the source of the injury and because they were nowhere near the worksite at the time injury occurred. The injury in Fossum, in contrast, involved a subcontractor’s employee and occurred just outside of and in connection with the worksite. What began in Anstine as a reasonable limitation on indemnification by Fossum became a means to irrationally truncate the permitted scope of indemnity agreements.

129. Id. at 417. The Fossum indemnification provision was the same one later construed in Frederickson. See supra notes 122-27 and accompanying text. Because of its facts, Frederickson focused on the language dealing with injuries to property.

130. Fossum, 372 N.W.2d at 416-17.

131. Id. at 418. Presumably, however, enough causal connection existed between the location of a worksite gate and his injuries to allow the plaintiff to proceed against the general contractor.

132. Due to the combined effect of Fossum and the workers’ compensation system, employers of injured plaintiffs may escape paying their proportional share of damages. See supra notes 25-32 and accompanying text. Ironically, one of the purposes of indemnification agreements expressly approved by Anstine was “[requiring] each subcontractor to bear the cost of injuries to his own workers . . . .” Anstine, 305 Minn. at 250, 233 N.W. at 728.
IV. THE LEGISLATURE TAKES A HAND: MINNESOTA STATUTES
CHAPTER 337

In 1983, the Minnesota Legislature enacted a statute radically reforming the law of indemnification.133 This part of the Article will (1) explain the three provisions which provide the main thrust of the indemnification statute; (2) show why the statute constitutes the most radical and restrictive approach to indemnification in the country; (3) identify some potential problems with the way the statute defines its scope; (4) note some possible effects of the statute on insurers and sureties; and (5) explain to what extent the common law of indemnification remains relevant.

A. The Thrust of the Statute

The main thrust and impact of "the anti-indemnification statute"134 is easily stated. Within the purview of the statute, indemnification is permitted only "to the extent that the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty" of the indemnitee.135 Agreements which overreach this limit are not void, but are merely unenforceable to the extent of the overreaching.136

The main purview of the statute is also simply stated. Sub-

133. Act of June 14, 1983, ch. 333, 1983 Minn. Laws 2135. The statute was to be effective May 1, 1984, and applicable to agreements executed on or after that date. The 1984 Minnesota Legislature further delayed the effective date to August 1, 1984. Act of April 26, 1984, ch. 598, § 10, 1984 Minn. Laws 1393.
134. MINN. STAT. §§ 337.01-.06.
135. MINN. STAT. § 337.02.
136. The dicta in Braegelmann, 371 N.W.2d at 646, that the statute voids overreaching agreements is simply wrong. Minnesota Statutes section 337.02 begins by rendering unenforceable all indemnification and then proceeds to resurrect indemnification agreements "to the extent that the underlying injury or damage is attributable to the negligent or otherwise wrongful act or omission, including breach of a specific contractual duty, of the [indemnitee] or the [indemnitor's] independent contractors, agents, employees or delegates." Compare the original language of Senate File 1142, which declared simply that any offending provision "is not enforceable." S.F. No. 1142, 73d Leg. Sess. (first reading on Apr. 11, 1983). In the informal discussions which led to fundamental revisions in the 1983 bills, H.F. No. 855 and S.F. No. 1142, and to additional revisions in 1984, Act. of Apr. 26, 1984, ch. 598, 1984 Minn. Laws 1393, it was clear that the anti-indemnification law would not invalidate overreaching provisions but (to use a phrase common in those discussions) would instead merely "prune them back." The author was deeply involved in those informal discussions and drafted most of the revisionary language which became law.
subject to minor exceptions,\textsuperscript{137} the statute’s strictures apply to any indemnification agreement\textsuperscript{138} “contained in, or executed in connection with, a building and construction contract . . . .”\textsuperscript{139}

The statute defines a “building and construction contract” as follows:

[A] contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges. The term does not include contracts for the maintenance or repair of machinery, equipment or other such devices used as part of a manufacturing, converting or other production process, including electric, gas, steam, and telephone utility equipment used for production, transmission, or distribution purposes.\textsuperscript{140}

Note that this definition extends the meaning of a construction contract beyond what may be the ordinary intuitive sense of the term. For example, a contract to repair a leaking roof is clearly a “building and construction contract.” Likewise, a contract calling for the repainting of lines on a road comes within the statutory definition.\textsuperscript{141}

Although the anti-indemnification statute’s principal thrust is to restrict severely the protections available under indemnification contracts, the statute does affirm an alternative method of risk allocation. The statute expressly preserves the right of a party to require that insurance be provided for its benefit or the benefit of others.\textsuperscript{142} Thus, for instance, a would-be indemnitee can regain much of the protection foreclosed by the stat-

\textsuperscript{137} See Minn. Stat. § 337.03 (accommodation agreements and retrospective releases, i.e. settlements).

\textsuperscript{138} Minnesota Statutes section 337.01, subdivision 3 defines an indemnification agreement as follows: “[A]n agreement by the promisor to indemnify or hold harmless the promisee against liability or claims of liability for damages arising out of bodily injury to persons or out of physical damage to tangible or real property.” Note that this definition encompasses exculpatory provisions; i.e. provisions under which the promisor promises to prospectively release the promisee from any claims that the promisor might have on account of the promisee’s wrongful act. The release is a promise to hold harmless; it has the same effect, though the words used to gain that effect may be different.

\textsuperscript{139} Minn. Stat. § 337.02 (1986).

\textsuperscript{140} Minn. Stat. § 337.01, subd. 2 (1986).

\textsuperscript{141} Id. The statute provides for contracts for the “alteration, improvement, repair or maintenance of real property, highways, roads or bridges.” Id. For a discussion of some of the problems created by this definition see infra notes 157-64 and accompanying text.

\textsuperscript{142} Minn. Stat. § 337.05, subd. 1 (1986).
ute's anti-indemnification provision\textsuperscript{143} simply by requiring the "would-have-been" indemnitee to name the would-be indemnitee as an "additional insured" on the indemnitee's own commercial liability policy.\textsuperscript{144} If the promisor keeps its promise, the insurance takes the place of the indemnity. If the promisor breaches that promise, the statute automatically requires the promisor to indemnify the promisee to the full extent of the coverage that would have been provided by the specified insurance.\textsuperscript{145}

It is possible that this automatic indemnification is redundant to the law of contract. That is, when a party breaches a promise to provide specified insurance and harm materializes within the scope of the bargained-for insurance, the proper measure of contract damages is the value which the specified insurance would have provided the promisee.\textsuperscript{146} Even so, the automatic indemnification provided by section 337.05 is reassuring for those seeking to allocate risk prospectively. At the very least, the section seems to declaw \textit{Anstine}'s suggestion that — absent some payment of premiums — agreements to provide insurance coverage for construction projects are void for want of consideration.\textsuperscript{147}

\textbf{B. The Radicalism of the Statute}

Some thirty-one states have, by statute or decision, limited the permissible scope of indemnity agreements.\textsuperscript{148} Of all these

\begin{footnotes}
\item [143] \textit{Minn. Stat.} § 337.02.
\item [144] Subject to certain limitations, the "additional insured" endorsement extends to the would-be indemnitee the protections of the insured's own commercial liability policy. \textit{See infra} notes 213-15 and accompanying text.
\item [145] \textit{Minn. Stat.} § 337.05, subd. 2 (1986); \textit{see also} \textit{Minn. Stat.} § 337.05, subd. 4 (1986) (likewise providing automatic indemnification for any deductible amount included in the specified insurance).
\item [146] In \textit{Farmington Plumbing}, Appellant, the would-be indemnitee, argued that the Respondent had breached a contract to provide insurance. Appellant's Brief at 54-57. The supreme court rejected the argument, agreeing with Respondent, Respondent's Brief at 17-18, that the contract did not require Respondent to provide insurance for Appellant's benefit. \textit{Farmington Plumbing}, 281 N.W.2d at 842-43.
\item [147] \textit{Anstine}, 305 Minn. at 252 n.9, 233 N.W.2d at 729 n.9.
\end{footnotes}
states, Minnesota takes by far the most restrictive approach.

The substantive restraints on indemnification agreements fall generally into three categories: (1) prohibitions against indemnification of an indemnitee's sole negligence (category 1);\(^{149}\) (2) prohibitions against indemnifying an indemnitee against any of its negligence (category 2);\(^{150}\) (3) prohibitions against indemnifying an indemnitee beyond the culpability of the indemnitor (category 3).\(^{151}\)

Returning to the examples developed for Part II will help illustrate the differing impact of these restrictions.\(^{152}\) The examples are all based on a simple construction project, with one general contractor and one subcontractor. A stranger to the project is injured, and sues the general contractor in tort. The contractor invokes a written indemnification agreement and impleads the subcontractor. For the sake of the following three examples, assume that the subcontractor has agreed to indemnify the general contractor to the full extent permitted by law.


151. \textit{Minn. Stat.} §§ 337.01-.06.

152. The following analysis follows the taxonomy outlined in \textit{supra} notes 33-48 and accompanying text.
1. Example One — General Contractor One Hundred Percent Negligent

In states which place no restrictions on indemnification, the subcontractor would be liable on the indemnity.\textsuperscript{153} The general contractor would have no recovery in any state partaking of any of the three categories of restrictions. One hundred percent negligence is precisely the "sole negligence" which category 1 addresses. Where the negligence is completely that of the would-be indemnitee, the effect of a category 2 type of restriction is the same as a category 1 restriction. A category 3 restriction yields the same result, since by hypothesis the indemnitor has no degree of culpability.

2. Example Two — General Contractor Sixty Percent Negligent; Subcontractor Forty Percent Negligent

In states which preclude only "sole negligence" indemnification, the general contractor will recover 100\% of its liability from the subcontractor. In category 2 states, however, the general contractor will recover the amount of its liability less the sixty percent attributable to the general contractor's own negligence, that is, forty percent. The category 3 approach will produce the same result as category 2, since under category 3 the general contractor will be able to recover indemnity only to the extent of the subcontractor's forty percent culpability.

3. Example Three — General Contractor Thirty Percent Negligent; Subcontractor Forty Percent Negligent; Third Party (Not the Plaintiff) Thirty Percent Negligent

Each of the different categories of stricture will produce a different result. In a category 1 state, the general contractor could obtain complete indemnity from the subcontractor.\textsuperscript{154} Under category 2 restrictions, the indemnity would reach seventy percent; nothing in the restrictive statute would preclude holding the indemnitor responsible for the percentage of harm attributable to the third party. Under category 3 restrictions, the general contractor would have indemnity only to the extent

\textsuperscript{153} It might be necessary that some nexus exist between the subcontractor's work and the actual injury. Cf. Anstine, 305 Minn. at 249, 233 N.W.2d at 727 (requiring a nexus).

\textsuperscript{154} The subcontractor might be able to receive contribution from the third party, but that issue lies beyond the scope of this article.
of the subcontractor’s negligence; that is, forty percent.\textsuperscript{155}

As can be readily seen in these examples, category 3 is by far the most restrictive category. Based on its anti-indemnification statute, Minnesota occupies that category alone.

C. Issues of Statutory Interpretation\textsuperscript{156}

1. "Now You See It; Now You Don’t" — A Potentially Self-Contradictory Definition and a Problem of Statutory Scope

The term “building and construction contract” sets the basic scope of the anti-indemnification statute. In defining that key phrase, section 337.01, subdivision 2 describes not only what the term includes but also what the term excludes.\textsuperscript{157} If these two subsets of the definition were mutually exclusive in fact as well as in definition, no problems would exist. In practice, however, it is quite possible for an enterprise or project to come within both parts of the definition.

Consider, for example, a contract under which the contractor agrees to repair and update manufacturing equipment inside an owner’s plant. As part of the contract, the contractor agrees to indemnify the owner. Does that indemnity agreement come within the statute? If the manufacturing equipment is small, self-contained and movable, both halves of the statutory definition tell us that the undertaking does not involve a “building and construction contract.”\textsuperscript{158} The inclusive part of the definition applies to real property and, as personal property, the manufacturing equipment does not qualify. Moreover, the exclusionary part of the definition exempts contracts for the maintenance or repair of manufacturing equipment.

The question of statutory coverage is a much closer one, however, if the equipment involved is larger or in some way

\textsuperscript{155} These illustrations of category restrictions have been phrased in terms of the indemnitor’s negligence. Minnesota Statutes chapter 337 also allows indemnification to the extent that the underlying injury is attributable to the indemnitor’s breach of a specific contractual duty. This additional scope may be very important for would-be indemnitees. See infra notes 181-82, 216-21 and accompanying text.

\textsuperscript{156} This section does not attempt to analyze exhaustively the indemnification statute but, rather, raises selected salient issues. Note that no reported decision has yet interpreted the statute. The statute applies only to contracts executed after August 1, 1984 and, as yet, no such contract has percolated up to level of the court of appeals.

\textsuperscript{157} For the text of this subdivision, see supra note 140 and accompanying text.

\textsuperscript{158} Minn. Stat § 337.01, subd. 2.
integrated into the plant itself. For example, if the manufacturing equipment requires heat for operation and is tied into the plant's overall heating system, changes to the personal property involved in the manufacturing equipment may nonetheless involve some "alteration . . . of real property."\(^\text{159}\) Moreover, even if the manufacturing equipment is not directly connected to the building structure in which it is housed, updating manufacturing equipment frequently requires changing the utilities (e.g., water, steam or electricity) supplied to that equipment. The same company refurbishing the equipment itself might well undertake to drop a new 220 volt DC electric line down to the equipment's control panel.\(^\text{160}\) If so, does the statute apply to the entire contract merely because some work incidental to the main project does indeed involve "alteration . . . of real property?"\(^\text{161}\) Or, is the contract outside the statute because the contract's principal purpose is the "maintenance or repair of machinery . . . used as part of a manufacturing . . . process?"\(^\text{162}\)

In other words, does the statute apply where (a) a contract touches the area covered by the definition's first sentence, but (b) the principal object of the contract falls squarely within the exceptions stated in the definition's second sentence? For example, a lessee covenants to maintain a leased building and keep it in good repair, and also agrees to indemnify the landlord. Does the repair and maintenance covenant mean that the

\(^{159}\) Id.

\(^{160}\) Quite possibly, the equipment refurbisher would subcontract this responsibility to an electrical firm. Nonetheless, the refurbisher would remain directly obligated to the plant owner for the proper performance of the electrical work.

\(^{161}\) Minnesota Statutes section 337.01, subdivision 2 does not itself define what constitutes an "alteration, improvement [or] repair . . . to real property," but the definitional language parallels somewhat the language of the mechanics lien statute. See Minn. Stat. § 514.01 (1986) (defining lien claimants as "whoever . . . contributes to the improvement of real estate . . . that is to say, for the erection, alteration, repair, or removal of any building"). There is no question that installing electric lines constitutes work subject to lien. See, e.g., Kloster-Madsen, Inc. v. Tafi's, Inc., 303 Minn. 59, 63-64, 226 N.W.2d 603, 607 (1975) (installation of light fixtures and removal of electrical outlet receptacles held to constitute an improvement within the meaning of Minnesota Statutes section 514.01). Cases decided under Minnesota Statutes section 541.051 (statute of limitations for actions for bodily injury "arising out of the defective and unsafe condition of an improvement to real property") might also give guidance. See, e.g., Nitz v. David Nitz, Inc., 403 N.W.2d 652 (Minn. Ct. App. 1987) (barring claim for injuries which allegedly arose when a brace attaching a bird feeder to a residence gave way).

\(^{162}\) Minn. Stat. § 337.01, subd. 2.
lease is a "contract for . . . the repair or maintenance of real property" and that the indemnity is, therefore, within the statute?

To these questions, the statute neither states nor implies any answer. The legislative history is silent as well.

2. Another Problem of Scope — The "In Connection With" Nexus

Someone seeking to avoid the troublesome ambiguity just discussed might think about settling for a "bird in the hand" rather than "two in the bush." That is, a would-be indemnitee might divide a project into separate contracts to avoid as much as possible the impact of the statute. In the equipment repair example, the manufacturer might enter into two separate contracts with the equipment refurbisher. One contract would call for repairing equipment, the other for making necessary alterations to the real property. While the second contract would certainly come within the statute, the first would appear to fit completely within the exclusionary language in the definition of a "building and construction contract." These cases require the court to determine whether Article Two of the Uniform Commercial Code governs contracts which encompass both the sale of goods and the rendering of services.

165. For a possible analogy, see, e.g., Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974) (contract calling for sale and installation of bowling equipment); Valley Farmers' Elevator v. Lindsay Bros. Co., 398 N.W.2d 553 (Minn. 1987) (contract for purchase of a grain storage system); Grossman v. Aerial Farm Serv., Inc., 384 N.W.2d 488 (Minn. Ct. App. 1986) (contract for sale and aerial application of herbicide). These cases require the court to determine whether Article Two of the Uniform Commercial Code governs contracts which encompass both the sale of goods and the rendering of services.

166. From the point of view of the statute's

drafters, this "in connection with" extension is crucial; it is necessary to defeat strategems like the one just described.\footnote{Compare the analogous function performed by the "in connection with" language in federal securities law prohibitions against fraudulent and manipulative practices. 1934 Securities Exchange Act § 10(b), 15 U.S.C. § 78j (1982) and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1987). See SEC v. Wall St. Pub. Inst., Inc., 591 F. Supp. 1070, 1087-88 (D.D.C. 1984) (activities designed to condition the market held to be "in connection with" a sale or purchase); Cumis Ins. Soc. v. E.F. Hutton & Co., 457 F. Supp. 1380, 1386-87 (S.D.N.Y. 1978); Glickman v. Schweickart & Co., 242 F. Supp. 670, 674 (S.D.N.Y. 1965) (fraud as to the financing of the security purchase held to be "in connection with" purchase or sale). See also Annotation, Fraud or Deceit as "in Connection with" Purchase or Sale of Securities within Meaning of Securities Exchange Act of 1934 § 10(b) and SEC Rule 10b-5, 3 A.L.R. Fed. 819 (1970).} Unfortunately, however, the extension does not define its own scope. As a result, the scope of the entire statute is ultimately indeterminate.

Consider, for example, the situation of a bank which loans extensive working capital to a large construction project. The bank may wish to have an expert visit the construction site from time to time — just to keep the bank apprised in general terms as to how the construction money is being spent.\footnote{For example, a bank may retain an architect as a consultant.} In these litigious times, the mere occasional presence at the construction site of an expert representative of the bank may subject the bank to suit in the event of a construction accident. The bank may, therefore, wish its borrower (i.e., the contractor running the project) to hold the bank harmless against such an eventuality. The loan agreement may accordingly include an indemnification provision.

Would such a provision come within the statute? Would it be considered to have been "executed in connection with a building and construction contract?" Although the statute gives no direct answer, it does provide a method of indirect analysis. Compare the bank's situation with the situation of an adjacent landowner who, merely as an accommodation and without compensation, allows construction vehicles to cross her land to reach the jobsite.\footnote{See Thornton Bros., 206 Minn. 193, 288 N.W. 226 (which involved a quite similar situation).} If anything, the bank is more closely connected with a construction project (and the building and construction contracts under which the project will be performed) than is the accommodating landowner. The landowner likely gives little thought to the project before granting the temporary license. In contrast, banks have been known to
give both projects and the project contractors considerable scrutiny before providing major financing. Moreover, the bank profits from the construction project it finances. The landowner receives no compensation for her accommodation. From this comparison it might seem that, if an indemnity for the accommodating landowner comes within the statute, then a fortiori an indemnity for the bank will too. If so, the bank ought to beware. The drafters of the statute apparently felt that the "in connection with" extension might well reach the accommodating landowner. They expressly excluded from the statute indemnities made in favor of such landowners. They did not, however, provide any exclusion for banks.

3. Too Far and Not Far Enough — Underinclusive and Overinclusive (Another Problem of Scope)

Assuming good policy reasons exist for the strictures of the anti-indemnification statute, the statute stops short of effectuating those policies. Its scope is simply too narrow. If indemnification beyond pro tanto is repugnant to the public good, why does that repugnancy end simply because the contracts involved are not "building and construction contracts?"

Consider, for instance, two re-roofing projects. One is to re-

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170. Minnesota Statutes section 337.03 states that the anti-indemnification statute does not apply:

to an agreement by which a promisor that is a party to a building and construction contract indemnifies a person, firm, corporation, or public agency for whose account the construction is not being performed, but who, as an accommodation, permits the promisor or the promisor's independent contractors, agents, employees, or delegates to enter upon or adjacent to its [presumably the promisee's] property for the purpose of performing the building and construction contract.

If, absent the specific exception of section 337.03, the "in connection with" language could have swept within its ambit even agreements for the benefit of parties "for whose account the construction is not being performed," to what reaches may the "in connection with" nexus extend? The statute gives no answer.

171. As the text points out, a distinction does exist between the bank's situation and that of the accommodating neighbor. The bank is deriving profit from the construction project, albeit indirectly, while the neighbor is not. But does this factual distinction warrant the disparate treatment which the statute provides? The legislative history of the statute is sparse, but nothing in the tapes from the committee hearings suggests that it is the involvement of the profit motive which renders an indemnification agreement unclean. Moreover, nothing in the language of section 337.03 prevents an accommodating property owner from receiving compensation for the accommodation and still coming within the section 337.03 exception.

172. This is a dubious assumption. See infra notes 186-209 and accompanying text.
pair the roof on a conventional, "stick-built" home. The other will repair the roof of a manufactured home installed in a state-licensed park.173 If the owner of the first home seeks an indemnification agreement from the roofing contractor, that agreement will come within the anti-indemnification statute. If the owner of the second home seeks an identical agreement, that agreement will relate merely to the repair of personal property and will escape the statute's strictures. Logic simply cannot explain why the statute places its line between two private homes.174 If the law makes sense at all, the law is too narrow.

At the same time, but in another sense, the statute has too broad a scope. Suppose a retailer with no expertise in construction hires a general contractor to do refurbishing work in the retailer's store. The store remains open during the construction work. If the contractor negligently leaves a stack of masonite in an aisle and a customer is thereby injured, the retailer may well be liable in tort to the customer.

Since the retailer may have been negligent in not detecting and preventing the negligence of the general contractor, the anti-indemnification statute precludes shifting the full liability to the general contractor. But why is it wrong for the retailer

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173. See Minn. Stat. § 327.31, subd. 6 (1986) (statutory definition of manufactured housing). In common parlance, manufactured housing is known as "mobile homes." For laws relating to the licensing of mobile home parks, see Minn. Stat. § 327.15 (1986). Mobile homes installed in mobile home parks may easily remain in place 20 years. See, e.g., Minn. Stat. § 327C.07 (allowing owners of homes located on lots in state-licensed parks to sell those homes in the park and assign the lease for the lot to the purchaser of the home); Act of May 20, 1983, ch. 206, §§ 2-4, 1983 Minn. Laws 548 (eliminating from section 327C.07 a provision which had allowed park owners to ban "in park" sales of houses older than 15 years). Nonetheless, mobile homes located in mobile home parks remain personal property and, therefore, outside the scope of the anti-indemnification statute.

174. What logic cannot explain, perhaps politics can. The anti-indemnification bill was introduced in the Minnesota Legislature at the behest of the Minnesota chapter of the Association of General Contractors (AGC). The bill gathered unstoppable momentum thanks largely to the extraordinary lobbying skill of the AGC lobbyist. During negotiations over possible revisions to the bill, that lobbyist acknowledged to the author of this Article that he (the lobbyist) had no mandate from his clients to seek an anti-indemnification provision broader than the scope of the building and construction industry. It appears that the focus of most state anti-indemnification statutes is limited in a fashion similar to the Minnesota law, perhaps for the same reason. See Georgia Chapter, The Society of Chartered Property and Casualty Underwriters, The Hold Harmless Agreement, A Management Guide to Evaluation and Control 26 (3d ed. 1977) (cited in Bethlehem Steel Corp. v. G.C. Zarnas & Co., 498 A.2d 605, 619 (Md. 1985) (Rodowsky, J., dissenting)).
to seek to have the general contractor assume the full risks of the project? The contractor is the expert, and the retailer's only sin is having been an ineffective overseer. Indeed, prior to Tolbert, the common law would have effected an indemnity even in the absence of an express contract. Now — under the anti-indemnification statute — even an express contract cannot achieve the same results provided automatically ten years ago by the common law.


If a party to a building and construction contract promises to provide specific insurance and fails to do so, the anti-indemnification statute automatically requires that promisor to indemnify the promisee to the same extent as the sought-after insurance would have done. This automatic indemnification might have an unanticipated impact on a basic commercial general liability policy.

Suppose, for example, that an owner requires its general contractor to provide general liability insurance with the owner named as "an additional insured." The general contractor signs the contract but fails to have the "additional insured" endorsement added. The contractor's regular liability policy does, however, include "contractual liability" insurance. If the general contractor's work occasions an accident and some injured party sues the owner, the owner will expect the general

175. Tolbert, 255 N.W.2d 362.
176. The facts are taken from Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964). See also Chicago Great W. Ry. v. Casura, 234 F.2d 441, 449 (8th Cir. 1956) (non-contractual indemnity when the indemnitee's negligence consists of failing to detect the negligence of the indemnitor); Lawrence v. Great N. Ry. Co., 109 F. Supp. 552, 554-55 (D. Minn. 1952), aff'd sub nom. Waylander-Peterson Co. v. Great N. Ry. Co., 201 F.2d 408 (8th Cir. 1953) (same); Hendrickson, 104 N.W.2d at 843 (same).
177. MINN. STAT. § 337.05, subd. 2. In fact, the scope of section 337.05 is not necessarily limited to the context of building and construction contracts. The section speaks in terms of "promisors" and "promisees," not in terms of parties to a construction contract.
178. See supra notes 142-47 and accompanying text and infra notes 212-15 and accompanying text.
179. This type of coverage protects the insured for payments which, by operation of law or by specific contractual provision, the insured may be required to make on account of the liability of another. See Rausch v. Beech Aircraft Corp., 277 N.W.2d 645 (Minn. 1979); Trznadel v. E.W. Howell Corp., 112 Misc. 2d 244, 446 N.Y.S.2d 861 (N.Y. Sup. Ct. 1981).
contractor’s insurance company to provide coverage under the “additional insured” endorsement. Under the facts hypothetized, the insurance company will decline to defend the owner, noting that it never issued any such endorsement.

Although the insurance company’s response is certainly logical, the automatic indemnification provision of section 337.05 may well make the insurance company responsible nevertheless. Since section 337.05 will operate to make the general contractor liable in indemnity for the omitted coverage, the contractor’s contractual liability insurance may well cover the indemnity obligation. The insurance company may thus provide, indirectly, precisely the defense and indemnity it had declined to provide directly. 180

Bonding companies should take note of a similar potential problem. Consider the situation if a general contractor (a) makes the automatic indemnification provisions of section 337.05 part of the terms of its private contract with its subcontractor, 181 and (b) requires its subcontractor to obtain a performance bond. Performance bonds typically excuse the surety from liability so long as the principal (in this situation the subcontractor) fully performs all of the obligations of the contract. If the subcontractor fails to provide the specified insurance and then fails (perhaps due to insolvency) to provide the automatic indemnity required both by law and by the terms of the contract, might not the surety be obliged to perform (i.e., to indemnify) on account of its principal’s breach? 182

180. See generally Minn. Stat. § 337.05, subd. 3 (1986). The situation would be the same even if the general contractor had applied to the insurance company for the endorsement, and the insurance company had rejected the application. Unless (a) that type of endorsement was “not reasonably available in the market,” and (b) the general contractor so informed the owner prior to signing the contract (or signed subject to an appropriate exception), the automatic indemnity would occur even if the insurance company had expressly rejected the contractor’s application.

181. When first passed, the anti-indemnification statute permitted but did not provide for the indemnification now described in section 337.05. The 1984 amendments to the statute changed “may” to “shall.” Act of April 26, 1984, ch. 598, § 2, 1984 Minn. Laws 1393, 1395. Had the statute gone into effect without this change, making the incorporation discussed in the text would have been the only prudent approach for would-be indemnitees.

D. The Continuing Relevance of the Common Law

The case law of indemnification agreements\textsuperscript{183} continues, of course, to be relevant to the wide range of indemnification agreements not covered by the anti-indemnification statute. Moreover, the statute has not displaced or affected the nexus requirements developed in Anstine, R.E.M. IV, Inc. and their descendents.

Recall, for example, the facts of Fossum. A subcontractor’s employee was hit by a car as he left the worksite and sued the general contractor for negligence in the placement of the exit gate. The general contractor unsuccessfully sought indemnity from the subcontractor under a written indemnification provision included in the subcontract. The court of appeals held that the employee’s departure from the worksite deprived the indemnification provision of the nexus required by Anstine.\textsuperscript{184}

Assume that the indemnity provision in Fossum had required merely that the subcontractor indemnify the contractor only to the extent that the underlying harm was attributable to the subcontractor’s negligence or to breach of a specific contractual duty. Assume further, that the subcontract specifically required that the subcontractor make certain that its employees entered and exited the construction site in a careful manner. Such language would certainly have satisfied the requirements of the anti-indemnification statute, but what of the requirements of nexus?

It seems difficult to deny a causal nexus where the indemnitor’s alleged negligence or breach of contract appears to have contributed to the harm. Yet, a basis existed in Fossum to attribute Fossum’s injury to the conduct of his employer, the would-be indemnitor. Presumably, the employer was responsible for supervising its employees, and Fossum was injured as he left the project worksite through the wrong gate.\textsuperscript{185} The court of appeals found insufficient nexus.

The broad language and holding of Fossum suggest that the mere contributory negligence of the indemnitor may not be enough to satisfy the nexus requirement when the harm occurs

\textsuperscript{183} See supra notes 49-132 and accompanying text.

\textsuperscript{184} See supra notes 128-92 and accompanying text.

\textsuperscript{185} According to the court of appeals, "[w]orkers were instructed to use pedestrian gates, but [for reasons of convenience] frequently ignored the instructions." Fossum, 372 N.W.2d at 416.
offsite. With Fossum as precedent, courts may feel authorized — in the name of strict construction and the nexus requirement — to challenge even indemnification provisions which satisfy the radical strictures of the anti-indemnification statute.

V. CRITIQUING THE LAW’S DISFAVOR

As a recent Minnesota Court of Appeals case tells us, “[i]ndemnification agreements seeking to indemnify a party for losses resulting from that party’s own negligent acts are not favored in the law.”\(^{186}\) The judicial disaffection which first surfaced in 1975 in Anstine became public policy in 1979 in Farmington Plumbing, and has since evolved into zealous hostility. That same hostility is evident in the anti-indemnification statute.

Unfortunately, the intensity of the anti-indemnification sentiment has not produced a commensurate depth of analysis on the part of the opponents of indemnification. In both the courts and the legislature, those opponents have won the day with arguments which escaped and would not have survived serious analysis. In neither forum did opponents have to adduce any substantial evidence to support their views. In the courts, “strict construction” managed to displace “fair construction” by ignoring rather than rebutting precedent. In the legislature, proponents of the anti-indemnification statute got by with superficial arguments and a dearth of supporting facts.

Opponents of indemnification in Minnesota have offered four rationales for constraining or invalidating indemnification agreements. These rationales hold that indemnification against a party’s own negligence:

1. Encourages or induces carelessness;
2. Reflects unequal bargaining power and tends inevitably or at least generally to favor one identifiable group in society over another;
3. Prevents injured parties from obtaining recovery;
4. Resembles or constitutes unregulated contracts of insurance.

The first argument can be found both in the case law and in the legislative history to the anti-indemnification act. The second and third arguments can be found only in the legislative history. The fourth argument appears primarily in the case

\(^{186}\) Braegelman, 371 N.W.2d at 646.
law, although it also receives brief mention in the legislative discussions. As will be shown, all four of these objections to indemnification are specious.

A. The Inducement Argument

The concern that indemnity against a party's own negligence induces carelessness dominated the hearings on House File 855, the bill which became the anti-indemnification statute. House File 855 had its first hearing on April 6, 1983, before the Law Reform Subcommittee of the Committee on the Judiciary. Douglas Franzen, who was in the process of successfully lobbying the bill into law on behalf of the Associated General Contractors, was the first witness to give any substantive testimony. Franzen explained that the common law made each party responsible for its own negligence and thereby caused people to act carefully. He noted that indemnification allowed a party to "pass off" liability for its own negligence and thereby undercut the interests of safety.

When the full committee heard the bill on April 8, 1983, only one person spoke before the committee which approved the bill on a unanimous vote. Representative Norton, the chief house author of the bill, informed the committee that the bill "probably will encourage more care among parties to construction contracts because they will all have to be responsible for their own negligence."\(^{187}\)

The inducement argument played an equally important role in the Senate considerations of Senate File 1142, the companion bill to House File 855. On April 15, 1983, the Civil Law Subcommittee of the Committee on the Judiciary heard testimony on Senate File 1142. Senator Randy Peterson, the chief senate author, explained that the bill sought to block indemnification because indemnification allows parties to escape responsibility for wrongs they may do. Senator Peterson characterized indemnification as at odds with the policies of tort law.

On April 22, 1983, testifying before the full Committee on the Judiciary, Senator Peterson expanded his inducement analysis. He stated that allowing indemnification would encourage people to be " sloppy." In Senator Peterson's view, indemnification...
tees need not worry about safety because they do not have to worry about paying the costs of accidents. The Senator characterized Senate File 1142 as a bill intended to prevent injuries.

Later in the hearing, Senator Peterson reiterated the inducement theme. Asked by Senator Gene Merriam what public policy the bill sought to achieve, Senator Peterson responded that the policy was rooted in tort law. He stated that if a party is not going to be held responsible for what it does, then the party will not worry about what it does. Senator Peterson then added that Senate File 1142 was intended to prevent accidents from even happening. Asked by another member of the committee to define the real goal of the bill, Senator Peterson reiterated that the real goal was to get people to be careful.

The most succinct way to refute the inducement argument is to rely on the reasoning and quote the language of *Thornton Brothers*. "[O]nly the extreme of inexperience would harbor the thoughts that a contract of the instant sort would operate in the slightest degree as a premium on and so an inducement to negligence." 188

When *Thornton Brothers* was decided, it was "quite fanciful" to suggest that allowing indemnity against a party’s own negligence would "put a premium on negligence rather than . . . discourage it." 189 Social and legal developments in the fifty years since *Thornton Brothers* makes such a suggestion even more fanciful today. Even an indemnity against a party's sole negligence will not avoid a raft of unpleasant consequences in the event of an accident. Disruption to the work, OSHA citations, 190 increases in a firm's rates for workers' compensation insurance, increases in a firm's rate for liability insurance or perhaps even difficulties in obtaining that type of insurance, and, in extreme cases, criminal prosecution 191 — none of these

188. *Thornton Bros.*, 206 Minn. at 197, 288 N.W. at 228.
189. Id.
190. 29 U.S.C. § 666 (1986); 29 C.F.R. § 1903 (1986); Minn. Stat. § 182.666 (1986); Minn. R. 5201.0400 (1986).
are avoided by an indemnification agreement. Moreover, based on three years experience of daily work in this area, the author believes that individuals with "hands-on" responsibility for project safety rarely, if ever, have any understanding of, or interest in, contractual indemnity arrangements. In sum, despite its superficial appeal, the inducement theory rests on neither logic nor credible evidence.

B. The Bargaining Power Argument

Besides arguing the inducement theory, proponents of the anti-indemnification statute also claimed that indemnification against a party's own negligence reflects unequal or overreaching bargaining power and is inherently unfair. In his testimony on April 6, 1983, before the House Law Reform Subcommittee, Douglas Franzen labelled indemnification agreements as unfair, claiming that, "in reality," such agreements allow "big business" to pass on to smaller companies the costs of the negligence of larger companies. Senator Peterson echoed this theme in his testimony before the Senate Civil Law Subcommittee. In his introductory remarks, the Senator asserted that indemnification provisions arise from the superior bargaining power of general contractors and are forced upon subcontractors.192 Senator Peterson made the same point in his testimony to the full Senate Judiciary Committee. Asked by Senator Gene Merriam why indemnification agreements arise in the first place, Senator Peterson responded that indemnification agreements are a function of coercion and unequal bargaining power.193

Although the bargaining power argument has great rhetorical appeal, it lacks any foundation in fact. None of the Minnesota cases construing or restricting indemnification agreements contain any factual support for the concept. Indeed, the case law is remarkable for its lack of reference to concepts of unconscionability or economic duress.194

To the contrary, at least some anecdotal evidence exists to suggest that such concepts would be inapposite. In a recent article on construction law, Mr. Larry Espel\textsuperscript{195} characterizes as follows the contract documents which express the obligations of architects and engineers:

Frequently, the contract documents reflect undertakings or limitations which the parties carefully negotiate. Even if the parties do not engage in detailed negotiations, they may select their form documents with care and with a recognition of the industry usage which those standard forms imply. Usually, the parties are on relatively equal bargaining levels. Depending upon the size and complexity of the project, the parties frequently consult with lawyers, at least in connection with some aspects of the contractual terms.\textsuperscript{196}

Espel cites no authority for this characterization, so it may be assumed he based his statements on his experience in practice. The author’s own past experience (which included three years of almost daily negotiations concerning indemnification provisions) supports Mr. Espel’s statements. In the author’s experience, even very small contractors understood the meaning of indemnification provisions, and many used the services of attorneys or insurance agents to help them assess the risks.

Moreover, there is no empirical evidence that strong indemnification provisions necessarily benefit only large companies or companies skilled in risk assessment and bargaining. To the contrary, restrictions on indemnity disfavor not only entities which are large, knowledgable and powerful but also small or less powerful entities which may wish to repose their trust in, and shift their risk to, a more experienced company.

In his testimony to the Senate Judiciary Committee, Senator Peterson referred only to the relationship between general contractors and subcontractors.\textsuperscript{197} But the strictures of the anti-indemnification statute, and Minnesota’s increasingly hostile case law, apply to other relationships as well. Consider, for instance, a small, start-up manufacturing company which seeks to have a large general contractor build a new warehouse facility on land owned by the manufacturing company. The manufacturing company does not want to be involved in or even worry about the construction project. It wants its contractor

\textsuperscript{195} Espel, \textit{supra} note 20, at 86.
\textsuperscript{196} \textit{Id.} at 86.
\textsuperscript{197} \textit{Hearings on S.F. No. 1142} (Apr. 22, 1983).
not only to provide a "turnkey" result, but also to assume all worries about project safety and safety-related liability. In a jurisdiction which allows strong indemnification language, the manufacturer need merely obtain a general contractor who is willing, as part of the overall bargain, to assume all risks of liability arising from the construction project. In a jurisdiction like Minnesota, which condemns strong indemnification, the manufacturing company cannot buy such "peace of mind" as part of the construction contract.

In sum, the bargaining power argument not only lacks empirical support, but it has also worked a substantial prejudice on less knowledgeable and inexperienced parties to construction projects.

C. The Recovery Prevention Argument

The Senate Judiciary Committee heard an assertion that an indemnification agreement could somehow prevent an injured plaintiff from obtaining any recovery. One of the sponsors of the bill spoke of a situation in which one defendant might be judgment proof and all other defendants might be covered by indemnification agreements. The sponsor argued that the anti-indemnification bill would therefore help insure that deserving plaintiffs actually obtain relief.

This argument rests on a mistaken understanding of an indemnification agreement. Unlike a release or an exculpatory provision, an indemnification agreement has no effect whatsoever on the wrongdoer's liability to the injured party. That party retains its full rights to proceed as plaintiff against the indemnitee. Indeed, an indemnification agreement presupposes that the indemnitee may be liable to that plaintiff.

Under an indemnification agreement, the indemnitee has a cause of action against the indemnitor, but the existence of that action in no way limits the original plaintiff's cause of action against the indemnitees. To the contrary, the indemnification agreement may actually benefit the plaintiff. If the

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198. A turnkey project provides the owner a fully-constructed facility, ready to operate without any significant finishing work left to be done.

199. This "peace of mind" is, of course, dependent on hiring a contractor who is solvent and likely to remain so, or has adequate limits of insurance.

indemnitee is judgment proof and the indemnitor is not, the plaintiff's suit against the indemnitee will be worthwhile only if the indemnification agreement is enforceable.

D. The Insurance Argument

As for the supposed similarity of indemnification agreements to contracts of insurance, the most direct response is "not so." A more elaborate form of response is "even if so, so what?" The nexus requirement first articulated in Anstine\textsuperscript{201} sufficiently distinguishes an indemnity agreement from an insurance contract. So long as the agreement to indemnify has some connection with the project responsibilities or status of the would-be indemnitor, the indemnity agreement is part and parcel of "the original and basic contract" and not "a collateral one for conventional insurance."\textsuperscript{202}

Even assuming a similarity exists, why should the courts or the legislature reach to condemn indemnification agreements on account of the similarity? Of course, no court can enforce and thereby countenance an indemnity which comes squarely within the statutory definition of an insurance contract unless the promisor has issued the contract in conformance with applicable regulations.\textsuperscript{203} But, if the agreement at issue is not \textit{de jure} an insurance contract, why treat it as if it were one \textit{de facto}? Surely not to serve the goals of the insurance statutes. Those statutes seek principally to assure that insurance companies maintain adequate assets and use appropriate procedures so that their promises of insurance will remain worthwhile. It would be illogical and ironic to use a regulatory system designed to protect beneficiaries as an excuse for depriving an indemnification promisee of the benefits of indemnity.

E. The Real Issue

Once the specious arguments against indemnification are stripped away, deciding whether the law should allow strong indemnification agreements comes down to a decision of whether or not private parties may prospectively allocate one of the major categories of risk associated with construction

\textsuperscript{201} 305 Minn. 243, 233 N.W.2d 723 (1975).
\textsuperscript{202} Thornton Bros., 206 Minn. at 197, 288 N.W. at 228.
\textsuperscript{203} Chapter 60A establishes the basic administrative structure and substantive provisions for the state's regulation of insurance contracts and insurance companies.
projects and similar activities.\textsuperscript{204} With the question phrased this way, indemnification agreements seem to present issues little different than those presented in other loss allocation situations.

Consider, for example, a sales agreement in which a buyer agrees to waive consequential damages and further agrees to liquidate damages at a figure significantly below the maximum amount of damages the seller’s failure to deliver might cause the buyer. Assume that (1) seller fails to deliver, causing damages of $100,000, and (2) under the contract, the seller pays liquidated damages of only $10,000. The buyer is left with an uncompensated loss of at least $90,000, but — barring over-reaching of the sort covered by the Uniform Commercial Code’s provision on unconscionability\textsuperscript{205} — the buyer is without further recourse.

Compare now a construction project where a general contractor has agreed to indemnify an owner. A third party is injured and the jury finds that the plaintiff is entitled to $225,000 in compensation, with the contractor being sixty percent negligent and the owner forty percent negligent. Under an enforceable agreement requiring the contractor to indemnify the owner against the owner’s own negligence, the contractor will bear the entire weight of the judgment and, like the buyer in the sales example, will suffer $90,000 of uncompensated loss.

An aficionado of consequential damage limitations might attempt to distinguish the two examples by arguing that (a) the seller’s potential gain from the sale is probably not large enough to warrant taking the risk of consequential damages; (b) the limitation is therefore justified since it makes possible a constructive relationship which otherwise would have been impossible, and (c) the limitation is, in any event, freely bargained for. But much the same arguments can be made for the

\textsuperscript{204} The Minnesota Supreme Court has approved the role of contracts in allocating another major category of construction risks — damages for defective work. Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983). The court held that contract principles should govern the allocation of damages arising from defective work in a construction project. “Any duties between the parties arose out of contracts, about which there was an opportunity to bargain and allocate risks and duties. This is not a situation in which parties were fortuitously brought together as in an automobile accident.” Id. Absent some reason to the contrary, the same rationale should apply to risks of liability for physical harm.

\textsuperscript{205} U.C.C. § 2-302 (unconscionable contract or clause); see also id. § 2-719, subds. 2, 3 (contractual modification or limitation of remedy).
indemnification example. Perhaps the owner has no experience with building contracts and wishes to "leave it all in the hands of the expert" — that is, the general contractor. Knowing or fearing that legal theories exist to inculpate even passive owners,206 the owner seeks protection through contract. In the owner's judgment, the construction project itself does not warrant assuming exposure to liability for construction accidents. So, like the seller, the owner freely bargains for a protection against liability which will make possible a constructive relationship otherwise unobtainable.207 Instead of a limitation of damages, the protection takes the form of an indemnification agreement.

If the contractor accepts the bargain, under the stated hypothetical, it risks $90,000 of undeserved loss. But so too does the buyer in the sales hypothetical. Indeed, any substantial distinction that exists between the two hypotheticals favors the enforceability of the indemnification agreement. The general contractor can insure its risks, so its "undeserved" costs will merely be the expense of insurance. Further, most, if not all, of that expense is probably a fixed cost of being in the construction business. Any incremental costs (for example, raising insurance limits or naming the owner as an additional insured) can be included in the contract price and charged back to the owner.

The hypothetical buyer, in contrast, cannot buy insurance to protect itself from the loss of profits and business resulting from the seller's failure to deliver a necessary piece of equip-

206. See Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964); Restatement (Second) of Torts § 341A (1977) (duties of owner of land to invitees); cf. id. § 387 comment c (liability of person taking over entire charge of the land does not relieve owner of liability).

207. See Famous Brands, Inc., 324 F.2d at 137 (railroad acceded to customer's desire to allow existing structures to remain close to a railroad spur, but only on the condition that the customer assume all liability for any injury arising from the proximity of the structures); Kahler v. Liberty Mut. Ins. Co., 204 F.2d 804 (8th Cir. 1953) (a pistol manufacturer allowed its employees to provide a target shooting demonstration in proximity to the orchestra employed by the company arranging the exhibit, but only on condition that the exhibitor assume all responsibility for any injuries to the orchestra members); Petit Crain & Potato Co., 227 Minn. at 225, 35 N.W.2d at 127 (where a lessee sought to use a building owned by a railroad and located close to rail facilities, the railroad entered into the lease but only on the condition that the lessee take full responsibility for the inherent danger of fire in buildings located close to rail facilities); St. Paul Union Depot Co., 178 Minn. at 219, 226 N.W. at 572 (railroads participating in the joint enterprise of operating a depot prospectively allocated liability for injuries incurring on depot premises).
ment. So, the risk allocation in the sales example leaves the buyer irrevocably burdened with an "undeserved" loss. Ironically, while the risk allocation in the sales example is legal, in Minnesota, at least, the allocation through indemnity is not.

Our society has decided to rely generally on decentralized, private decision-making to direct economic activity. The freedom to bargain is an essential aspect of this basic economic policy since private contracts are the principal tool which individual entities use to regulate their economic relationships. Without persuasive reason, the Minnesota law of indemnification discriminates against one particular form of risk allocation by contract and substitutes government control for decentralized, private decision-making.

VI. COPING WITH THE LAW'S DISFAVOR — PRACTICAL APPROACHES

For Minnesota lawyers who seek to provide their clients the protections available in other states through indemnification agreements, "What is to be done?" This Article offers an answer in three parts: (1) increase your reliance on agreements to insure; (2) reallocate the risk of liability by reallocating the formal responsibility for project safety; and (3) draft your indemnification provisions with extraordinary care.

208. Our society has expressed this economic philosophy in the Sherman Act, 15 U.S.C. §§ 1-7 (1982), which has been called "almost an economic constitution for our complex national economy." NBO Indus. Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262, 278-79 (3d Cir. 1975), vacated on other grounds, 429 U.S. 477 (1977); see also United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 218 (1951) (essential to workings of national economy is "the freedom of traders"); Gilson, "The Outside View of Inside Trading," N.Y. Times, Feb. 8, 1987, at 23, col. 3 (discussing opinion surveys which indicate that "the market is regarded as 'fair and wise' and political practices . . . are regarded as neither").

209. Although the discrimination is poor policy, it is not unconstitutional. Since the legislative classification involves neither a suspect classification nor a fundamental interest, the statute need only pass the mildest of "equal protection" scrutiny. See Allied Stores v. Bowers, 358 U.S. 522, 530 (1959); Tribe, AMERICAN CONSTITUTIONAL LAW 994-96 (1978).

210. V.I. LENIN, WHAT IS TO BE DONE? BURNING QUESTIONS OF OUR MOVEMENT (1929).

211. For projects or clients located outside the borders of the state, it may be possible to avoid the law's disfavor through a choice of laws provision. Such provisions raise conflict of laws questions which are beyond the scope of this Article.
A. Agreements to Insure

The anti-indemnification statute invites a shift of focus from indemnification agreements to agreements to provide insurance. The statute expressly authorizes a would-be indemnitee to require another party to provide insurance to the benefit of the would-be indemnitee.\textsuperscript{212}

Lawyers seeking to provide their clients the benefits of indemnification agreements should accept the statute's invitation. Requiring that the client be named as "an additional insured" on the commercial liability insurance policy of the other party may provide many of the same protections conferred by a strong indemnification provision.\textsuperscript{213} In the past, obtaining the endorsement cost the insured, at most, a small administrative fee. The recent insurance crisis may, however, make the endorsement more difficult or more expensive to obtain.

In any event, a lawyer who plans to have clients rely on "additional insured" endorsements should proceed carefully. The protection afforded by the endorsement depends on the coverage provided in the underlying policy, so the lawyer should consider obtaining a copy of that policy and checking its coverage and exclusions. The limits of insurance require particular attention, since both the insured and the additional insured share the same limit.\textsuperscript{214} The limits are available, of course, only if both the underlying coverage and the endorsement are

\begin{itemize}
\item \textsuperscript{212} MINN. STAT. § 337.05 (1986) (validating agreements requiring one party to provide insurance to the benefit of another, providing for automatic indemnification if the promisor fails to provide the specified insurance).
\item \textsuperscript{213} In the words of one insurance company's "Owner's and Contractor's Endorsement [for] Additional Protected Person's," the endorsement extends to an owner or contractor the same protections afforded the named insured, "[b]ut only for covered injury or damage that results from: [the insured's] work for them . . . ; and their general supervision of that work." St. Paul Fire and Marine Insurance Co., Endorsement to Commerical General Liability, Form #43339, Ed. 7-85, 1, 1 (copy on file with the William Mitchell Law Review). If the would-be indemnitee is an owner, the insured party may prefer to provide the "additional insured" type of protection through a separate insurance policy, frequently called an "Owner's Protective Policy."
\item \textsuperscript{214} The "aggregate" limit is as important as the "occurrence" or "per claim" limit. While the latter two limit the insurance company's obligation as to any one event, the former limits the insurance company's aggregate obligation as to all events within a stated time period or even as to the life of the policy. Consider, for example, a policy issued to an insured involved in numerous projects, where each project carries some risk of injury and resulting claims. Assume that the policy limit is five million dollars per occurrence, five million dollars aggregate per year. By the time the
in place. The lawyer should, therefore, consider requiring by contract that the other party provide appropriate certificates of insurance and that the certificates obligate the insurance company or agent to provide advance notice of any change or cancellation.\textsuperscript{215} For lawyers who are not familiar with the contours of comprehensive general liability policies, consultation with the client's insurance agent may provide valuable assistance.

\textbf{B. Specific Contractual Duties}

Besides the validation of promises to provide insurance, the anti-indemnification statute provides another means for an attentive drafter to expand the scope of a risk allocation provision. Section 337.02 states that indemnification is permissible not only to the extent to which the underlying harm is attributable to the negligence of the indemnitor but also to the extent that the underlying harm is attributable to the indemnitor's "breach of a specific contractual duty."\textsuperscript{216} If a contract which contains such an indemnification provision also makes the would-be indemnitor contractually responsible in detail for taking necessary safety precautions, any accident occurring at the worksite is likely to be attributable to a breach of the indemnitor's specific contractual duty.

By formally reallocating underlying duties, the contract extends the permissible scope of the indemnification agreement. The fact that the would-be indemnitee may owe a so-called nondelegable duty to the injured party does not mean that the indemnitee cannot, in fact, delegate that duty to the indemnitor. The word "nondelegable" is a misnomer. The party owning a nondelegable duty may indeed delegate it, but that delegation does not relieve the delegating party of its original obligation. If the delegatee performs properly, no liability arises. If the delegatee breaches its duty to the delegating

\textsuperscript{additional} insured makes a claim under the policy, some serious accident on another project of the insured may have exhausted the aggregate limit.

\textsuperscript{215} Requiring certificates is a "no lose" proposition, since Minnesota Statutes section 337.05, subdivision 5(2) (1986) states: "A promisor's obligation to provide specified insurance is not waived by . . . a promisee's acceptance of a certificate or other evidence of insurance that shows a variance from the specified coverage." \textit{Id.} Subdivision 5(1) provides that "a promisee's failure to require or insist upon certificates or other evidence of insurance" likewise does not constitute a waiver. MINN. STAT. § 337.05, subd. 5(1).

\textsuperscript{216} \textit{Id.} § 337.02.
party, the delegating party must answer to the party actually harmed. Even in the absence of a written indemnification agreement, the delegating party may obtain common law indemnity from its breaching delegatee.  

A phenomenon analogous to the approach recommended here has surfaced in Minnesota cases dealing with the liability of architects and engineers for defective work. The cases reflect substantial confusion as to whether that liability sounds in tort or contract. However, at least one case, Mounds View Independent School District No. 629 v. Buetow & Associates, Inc., looked to contractual provisions detailing the defendant architect's scope of duties to determine whether the architect had breached his duty "to perform his services with reasonable care and competence."

In Buetow, the Minnesota Supreme Court apparently felt that the provisions of the contract defined the contents of due care. In the approach suggested here, the contract will supplement any negligence concepts of due care with a set of contractual obligations. The violation of either the negligence concept or the contractual requirements will trigger the pro tanto indemnity provision.

C. Strict Judicial Scrutiny, Extraordinary Drafting Care and the Functional Components of an Indemnification Agreement

The core of any indemnification agreement is a promise by the indemnitor to hold the indemnitee harmless. Effectuating

217. Kahler, 204 F.2d at 804 (applying Minnesota law); City of St. Paul v. St. Paul City Ry. Co., 92 Minn. 516, 100 N.W. 472 (1904); Olson v. Schultz, 67 Minn. 494, 70 N.W. 779 (1897); cf. Mervin v. Magney Constr. Co., 399 N.W.2d 579 (Minn. Ct. App. 1986). Mervin considered the tort law significance of federal regulations requiring that contractors on an Army Corps of Engineers Project abide by a Corps safety manual. An employee of the Corps fell from an inadequately secured ladder, was injured and sued the project general contractor and a subcontractor. The trial court instructed the jury that the violation of a safety manual provision regarding the securing of ladders was negligence per se. The court of appeals reversed on the ground that, in Minnesota, negligence per se applies only to provisions "clearly intended to have the force and effect of law." Id. at 582. If the plaintiff had not been an employee of the Corps and had sued the Corps, under the approach discussed in the text, the Corps would have argued that the injury was attributable to the contractor's breach of a specific contractual duty — i.e. the failure to abide, as required by contract, by the safety manual. See id.

218. See Espel, supra note 20, at 88-98.

219. 253 N.W.2d 836, 839 (Minn. 1977); see Espel, supra note 20, at 92-93, n.35.

220. Buetow, 253 N.W.2d at 839.

221. Id.
the core promise requires a good deal of specific and careful elaboration, especially in Minnesota where courts give such hostile scrutiny to indemnification provisions.

The cases discussed in Part III-C show some of the pitfalls for drafters. Avoid ambiguity at all costs. Avoid using language in adjacent provisions which could be juxtaposed to confuse or undercut the indemnification provision. As a general matter, avoid any conceptual gaps in an agreement to indemnify, for any gap which does exist can provide entry for a court's hostile scrutiny.

For those seeking to avoid gaps, length is not necessarily a virtue. Overlong provisions tend to lack a coherent structure. The lack of a coherent structure tends to hide both ambiguities and internal inconsistencies.

What is important is completeness. To properly perform its function, any indemnification agreement should explicitly address and define at least the following six aspects: (1) the types of underlying harm covered by the indemnity; (2) types of injured parties whose claims, lawsuits or judgments will come within the indemnity; (3) the requisite nexus between the underlying harm and the status or action of the indemnitor; (4) the strength of the indemnity; (5) the particular losses, costs and expenses which the indemnity will cover; and (6) the extent to which a liability must have materialized before the indemnity is triggered.

1. Types of Underlying Harms

By definition, indemnification agreements relate to liability arising from physical injury to people and tangible property. A most basic way to define the scope of an indemnification agreement is, therefore, to identify the particular injuries subject to the indemnity. Attempting the succinct approach — e.g., "all injuries" — may well be unsatisfactory, for the phrase may be both under- and overinclusive. For example, the current rules of strict construction may dictate that an occupational illness does not come within the scope of "injury." On the other side, "all injuries" might be viewed as

222. See supra notes 6, 12 and accompanying text.

223. If this concern seems far-fetched, see Frederickson, 390 N.W.2d at 793, which held that an accident allegedly due, in part, to work performed by an electrician did not "arise from" the electrician's work because the accident occurred some time after
extending protection beyond the realm of physical injury to tangible items; for example, to injuries suffered when the indemnitee faces a patent infringement lawsuit on account of equipment provided by the indemniteor.

It is better practice to identify specifically the categories of harms contemplated; for example: sickness, bodily injury, death, damage, destruction, temporary or permanent loss of use of tangible property. It is probably wise to mention specifically any special dangers (e.g., pollution damages) which the indemniteor might later argue are so substantial or unanticipated as to be outside the scope of the indemnity. The danger, of course, of specifying particulars is the concept of expressio unius est exclusio aliorum. But, at least in Minnesota, the hazards of strict construction probably outweigh the dangers of the exclusio doctrine.

2. Claimants Covered

If the other components of an indemnification agreement are carefully drawn, those components may implicitly define the realm of claimants whose claims or injuries will come within the indemnity. However, the strictures of strict construction argue against leaving anything implicit. Among the categories of claimants worthy of particular mention are: employees of the indemniteor, as well as employees of any agents, subcontractors or delegates of the indemniteor; third parties; and the general public.

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the electrician had finished performing his allegedly defective work. Consider also the tortuous path courts have used to require insurance companies to cover losses faced by their insureds on account of longstanding and continuing pollution, despite policy provisions limiting coverage to sudden and accidental occurrences. See National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404 (S.D.N.Y. 1986); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (N.Y. App. Div. 1980).


225. One of the major purposes of an indemnification agreement is to avoid the rule of Lambertson. That case strictly limits the amount of contribution a tort defendant may obtain from the employer of a plaintiff claiming a work-related injury unless, prior to the injury, the employer had agreed in writing to indemnify the defendant. See supra notes 28-32.

226. Claims brought by government agencies may often be in the nature of fines or penalties and are beyond the scope of this Article.
3. The Required Nexus

For an indemnification provision to be valid, the indemnitor must have some minimum connection with the events giving rise to the liability encompassed by indemnity. Without some minimum connection or nexus between the underlying harm and the status or conduct of the indemnitor, the indemnity appears to be a contract of insurance and void unless issued subject to appropriate regulatory control.

For agreements within its scope, the anti-indemnification statute has put a straightjacket on nexus provisions. Since the statute permits no more than pro tanto indemnification, choosing any nexus other than the negligence of the indemnitor is useless. For indemnities beyond the scope of the statute, the drafting of an appropriate nexus provision requires care and attention.

Like all the aspects discussed in this section, the nexus helps to define the scope of the indemnitor's responsibility. Unlike most of the other components, however, the way in which the nexus provision performs its work of definition is not always immediately apparent. Consider, for example, a construction project in which a general contractor undertakes to build a warehouse on land owned by a company which needs additional warehouse space. If the owner seeks an indemnification agreement from the contractor, the nexus might be any of the following, or others:

(A) events caused in whole or in part by the negligent act or omission of the general contractor;
(B) events caused in whole or in part by any act or omission of the general contractor;
(C) events involving any injury to any employee of the

227. Anstine, 305 Minn. at 249-52, 233 N.W.2d at 727-29.
228. Id. at 251 n.7, 233 N.W.2d at 727 n.7. For further discussion and criticism of this point, see supra notes 72-80, 109-32 and 201-03.
229. Since this example involves a construction project, the anti-indemnification statute would in fact apply and the nexus issue might well be moot. But see supra note 185 and accompanying text. The author hopes, however, that this example's use of the same type of factual setting as is used in other examples in this Article will allow the reader to understand more easily the issues involved in drafting a nexus provision.
230. For indemnification agreements outside the reach of the anti-indemnification statute, the nexus need not sound in the negligence of the indemnitor. Minneapolis-Moline Co., 199 F.2d at 751.
contractor or of any agent of the contractor;\textsuperscript{231} 

(D) events connected with the work performed or to be performed as part of the construction project.\textsuperscript{232}

As an illustration of how these nexuses might appear in practice, consider the following two variations on the warehouse example.

First Variation: While excavating for the warehouse project and while using due care, the general contractor inadvertently damages the lateral support of a neighbor's land, and the resulting subsidence causes damage to a building which the neighbor owns. The neighbor brings suit against the owner of the land and the owner in turn seeks to invoke the indemnification provision.

If the nexus required by that provision is some negligent act or omission of the contractor (Example A) or an injury to an employee of the contractor (Example C), then by hypothesis the indemnity does not apply. If, in contrast, the nexus is any act or omission of the contractor (Example B), or any event connected with the work performed or to be performed (Example D), the indemnity will apply.

Second Variation: As one of the contractor's employees is leaving the job site at the end of the day's work, she is hit and injured by a passing car. She brings suit against the owner, alleging breach of a landowner's nondelegable duty to provide a safe place to work for employees of contractor invitees. The owner invokes the indemnification provision.\textsuperscript{233}

If the indemnification agreement takes as its nexus either a negligent act or omission of the contractor (Example A, \textit{supra}) or even the mere act or omission of the contractor (Example B, \textit{supra}), it is unlikely that the indemnity will apply.\textsuperscript{234} The targeted language of Example C, \textit{supra} (employee injuries) and even the broad language from Example D, \textit{supra} ("connected with the work performed") ought to suffice, although \textit{Fossum}

\textsuperscript{231} See \textit{supra} note 230.

\textsuperscript{232} Id.

\textsuperscript{233} If the owner has retained no authority over the construction site, the owner may have a clear defense to the suit. See \textit{Restatement (Second) of Torts} § 414 (1977). However, that question is not relevant here. The question is whether the owner can use the indemnification provision to escape not only liability but also the costs and worries of defense.

\textsuperscript{234} \textit{Fossum}, 572 N.W.2d at 415 (discussed \textit{supra} notes 128-32).
does raise doubts.\textsuperscript{235}

Other than satisfying the minimum nexus requirements of \textit{Anstine}.\textsuperscript{236} choosing a structure and breadth for the nexus between the indemnitor and the underlying harm is largely a matter of strategy. The smaller and less substantial the nexus, the more far reaching will be the indemnity provision. For example, the connection between an accident and some mere act of the indemnitor is certainly less substantial than the connection between an accident and the indemnitor's negligence.\textsuperscript{237} Accordingly, an indemnity triggered by any act or omission of the indemnitor is far broader than an indemnity triggered only by negligent acts or omissions.

Naturally, the would-be indemnitee will seek the largest permissible scope of indemnification, and the would-be indemnitor will seek the narrowest. In seeking a satisfactory accommodation, no prohibition exists against "mixing and matching" nexus provisions. As the examples illustrate, no one simple statement of nexus will suffice to provide broad protection.\textsuperscript{238}

\section{4. Strength of the Indemnity}

Part II of the Article fully discusses this topic.\textsuperscript{239}

\section{5. Costs and Losses}

The \textit{raison d'être} of any indemnification agreement is liability, but prospects of liability generate a variety of different costs and losses. If the indemnification agreement itself does not

\textsuperscript{235} \textit{Id. Fossum} can be read to suggest that both Example C and Example D fail to create a sufficient nexus. As the \textit{Fossum} court stated, "[s]ince plaintiff had finished his employer's work for the day, there was no causal relationship between performance of the work and his injuries." \textit{Id.} at 418. In the author's opinion, \textit{Fossum} should be read merely as restrictively construing particular contractual language and not as establishing a new rule as to the minimum nexus required. Consider, for example, this language of nexus: "any injury or harm suffered by any employee of the contractor while that employee is engaged in any work related to the performance of the contractor's obligations under this contract, or while any employee of the contractor is in transit to or from any of that work." \textit{Fossum} should not be read to nullify such a clear statement of intention.

\textsuperscript{236} \textit{Anstine}, 305 Minn. at 243, 233 N.W.2d at 723.

\textsuperscript{237} Compare the scope created by Example A ("negligent act or omission") with the scope created by Example B ("any act or omission").

\textsuperscript{238} But complexity must not be allowed to degenerate into ambiguity or internal inconsistency. See \textit{supra} notes 96-132 and accompanying text.

\textsuperscript{239} See \textit{supra} notes 33-48 and accompanying text.
state what costs and losses are covered, the case law will supply some answers. If, for example, an indemnitee tenders the defense of an action to the indemnitor and the indemnitor rejects the tender, then the indemnitor is also liable for the indemnitee’s costs of defense.\textsuperscript{240}

It would be wise, however, for the indemnification provision to do its own job of definition. At minimum, the provision should expressly cover the amount of any judgment and the costs of defense, specifically including attorney’s fees.\textsuperscript{241} It is also important to specify the other categories of detriment covered by the indemnity. For example, if the indemnitor is to be responsible not only for liabilities which the indemnitee may incur to third parties but also for losses which the indemnitee may suffer in its own property, merely specifying that the indemnity covers “liabilities” is inadequate.

### 6. Triggering Events

Each indemnification provision should specify the point in an indemnitee’s dispute with a claimant at which the indemnitor’s obligation will begin. Does the obligation arise when a claim is presented? When the claim materializes into a lawsuit? When the lawsuit is reduced to judgment? Or only when the indemnitee actually pays the judgment?

Minnesota case law provides an answer for those contracts of indemnity which are insufficiently precise. According to Christy \textit{v. Menasha Corp.},\textsuperscript{242} when the indemnification provision covers only loss or damage, the indemnitee must first pay a judgment before seeking indemnification.\textsuperscript{243} However, “[w]hen the indemnity contract is one against mere liability, an action [under

\textsuperscript{240} Farmington Plumbing, 281 N.W.2d at 847 (citing Northwest Welding Co. \textit{v. Jordan}, 150 Minn. 12, 184 N.W. 39 (1921); see also Koehnle \textit{v. M.W. Ettinger, Inc.}, 353 N.W.2d 612, 616 (Minn. Ct. App. 1984) (also citing Northwest Welding for the proposition that an indemnity against suits includes, by implication, an indemnity against the cost of defense).

\textsuperscript{241} In fact, a recent Minnesota Court of Appeals decision in a different context suggests that it is wise to err on the side of excess in providing for attorney’s fees. In Brown \textit{v. Weeres Indus., Inc.}, 375 N.W.2d 64 (Minn. Ct. App. 1985), the court held that a lease provision entitling the lessor to reasonable attorney’s fees incurred in enforcing its rights under the lease did not extend to attorney’s fees incurred in a necessary appeal. \textit{Id.} at 65.

\textsuperscript{242} 297 Minn. 334, 211 N.W.2d 773 (1973) (partially overruled on other grounds in Farmington Plumbing, 281 N.W.2d at 838).

\textsuperscript{243} \textit{Id.} at 339, 211 N.W.2d at 776.
the indemnity] may be brought as soon as the liability is legally imposed, e.g., when judgment is entered."\textsuperscript{244}

It would be wise not to trust an indemnification provision to the common law hierarchy stated in \textit{Christy}. For the broadest and least ambiguous protection, the indemnification provision might expressly encompass: threat of claim, claim, litigation, liability, judgment.

**Conclusion**

Minnesota's law on indemnification agreements is the most restrictive in the country. Both the courts and the legislature have acted without convincing reasons or supporting evidence in substituting government rules for private decision-making.

The power of the Minnesota government to constrain this particular domain of freedom of contract is not at issue. \textit{Lochner}\textsuperscript{245} is, after all, dead.\textsuperscript{246} The wisdom of such constraints remains, however, very much at issue. So long as the country's basic economic philosophy presumes the virtue of decentralized decision-making, proponents of policies restricting that decision-making should at least adduce some persuasive rationale for the restrictive policies. This is a task which the opponents of indemnification agreements have so far failed to accomplish.

\textsuperscript{244} \textit{Id.} In a footnote, the case also suggests that, even in the absence of express protection against claims, the interests of judicial economy may allow a third-party action. \textit{Id.} at 340 n.3, 211 N.W.2d at 777 n.3.

\textsuperscript{245} \textit{Lochner v. New York}, 198 U.S. 45 (1905).