ENGINEERING AND CONSTRUCTION INNOVATIONS, INC. V. L.H. BOLDUC: NEW DEVELOPMENTS IN THE CONSTRUCTION ANTI-INDEMNITY STATUTE

BY MARK A. BLOOMQUIST
Meagher & Geer PLLP

INTRODUCTION

On September 6, 2011, the Minnesota Court of Appeals issued its ruling in *Engineering and Construction Innovations, Inc. v. L.H. Bolduc Co.*, 2011 WL 3903277, A11-159 (MinnCt.App. Sept. 6, 2011), *petitions for review filed* (Oct. 6, 2011). The court addressed both prongs of the indemnity and insurance analysis under Minnesota's anti-indemnity law, Minn. Stat. §337.01-06. The court then carried its analysis further to determine whether an additional insured endorsement imposed liability on the named insured's insurer to indemnify the additional insured. The case is significant because it construes key language frequently used in construction indemnity agreements and because it also addresses the obligation of the party at the end of the indemnity line: the insurer who issues the additional insured endorsement.

In a 2-1 decision, the court ruled that a subcontractor's agreement to indemnify the general contractor for the subcontractor's "acts or omissions" created a duty to indemnify the general contractor despite the fact that a jury found the subcontractor had no fault for the claimant's liability. The court further ruled that the subcontractor's general liability insurer must indemnify the general contractor as an additional insured under the subcontractor's liability policy. The dissent took issue with the majority's reasoning that the term "acts or omissions" included non-negligent conduct. The dissent also opined that the majority erred in holding that the subcontractor's insurer owed a duty of indemnity to the general contractor where the additional insured endorsement excluded coverage to the general contractor with respect to the general contractor's independent acts or omissions.

Both the subcontractor and its liability insurer have petitioned the Minnesota Supreme Court for further review. Regardless of the disposition by the high court, the case will significantly impact the construction and insurance industries. It is critical that parties to construction contracts and their insurers understand the effect of contractual indemnity and insurance language which they choose to place in their agreements. *Bolduc* addresses some common and typical language and indicates what obligations and liabilities should result from that language. As such, the case will be closely followed.

This article discusses the development of Minnesota construction indemnity law. There have been several high water marks in the law's development, starting with the "fair construction doctrine," then progressing to the rule of strict construction against the party to be indemnified, then to the enactment of Chapter 337 in 1983. The Minnesota Supreme Court's 1992 decision in *Holmes v. Watson-Forsberg* explained the interplay between the statute's anti-indemnity and agreement to insure language. The cases of *Katzner v. Kelleher Construction* and *Hurlburt v. Northern States Power* suggested a two-prong analysis whereby a court first determines if a contract's language requires a party to indemnify another party for the other's party fault and, if so, then the court determines if the indemnifying party also has agreed to procure insurance for the other party's benefit. *Bolduc* is the latest of these high water marks, addressing what language will effectively indemnify another for the other's own fault and determining the insurer's obligations to its additional insured.

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THE COMMON LAW OF CONTRACTUAL INDEMNITY

Indemnity is the right to receive reimbursement for discharging a debt or obligation. Indemnity should be distinguished from contribution. Contribution requires parties equitably to share payment of an obligation based on their respective fault whereas indemnity requires one party to reimburse the other entirely. A right to contractual indemnity exists where the parties explicitly agree that the indemnitor will reimburse the other for liability of the character identified in the contract. *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 372,104 N.W.2d 843, 848 (1960), *overruled in part by Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977).

Until 1979, contracts for indemnity in Minnesota were subject to the same rules of construction and interpretation as all other contracts. It was frequently argued that indemnity contracts should be strictly construed against a right of indemnity because the contracts operated too harshly upon the indemnitor, particularly where the indemnitor was required by contract to indemnify the indemnitee for the indemnitee's own negligence or fault. The Minnesota Supreme Court rejected these arguments, embracing instead a rule of "fair construction" requiring such indemnity provisions to be construed neutrally, weighted neither for nor against indemnification. *E.g., Anstine v. Lake Darling Ranch,* 305 Minn. 243, 233 N.W.2d 723 (1975).

In 1979, the court expressly overruled its prior rulings and declared that contracts requiring one to indemnify another for the other's own negligence should be strictly construed against the party seeking indemnity. *Farmington Plumbing v. Fischer Sand and Aggregate, Inc.*, 281 N.W.2d 838, 842 & n.4 (1979). The court explained:

> Indemnity agreements are to be strictly construed when the indemnitee * * * seeks to be indemnified for its own negligence; such an obligation will not be found by implication. * * . This is consistent with the policy expressed in *Tolbert v. Gerber Industries, Inc.*, that each tortfeasor accepts responsibility for damages commensurate with its own relative culpability.

Id., 281 N.W.2d at 838.

Construing the contract strictly, the court held that the contract in that case did not require indemnity for the indemnitee's own negligence. *Id.* at 842. One year later, in *Johnson v. McGough Construction Co.*, 294 N.W.2d 286 (Minn. 1980), the court held that the contract at issue in that case, the Association of General Contractors of Minnesota (AGC) standard subcontract, did provide the general contractor with indemnity for its own negligence. The AGC standard subcontract, paragraph 7, then provided:

> The Sub-Contractor agrees to assume entire responsibility and liability for all damages or injury to all persons * * * and to all property, arising out of, resulting from or in any manner connected with, the execution of the work provided for in this Sub-Contract or occurring or resulting from the use by the Sub-Contractor * * * of materials, equipment, instrumentalities or other property, * * * *and the subcontractor agrees to indemnify and save harmless the Contractor * * * from all such claims including without limiting the generality of the foregoing, claims for which the Contractor may be, or may be claimed to be, liable * *.*

Id., 294 N.W.2d at 287 (emphasis added).

The court held that the emphasized language in the AGC contract "necessarily includes claims of the contractors' negligence." *Id.* at 288.

ENACTMENT OF MINN. STAT. CH. 337

Farmington Plumbing and *Johnson v. McGough* remained the defining cases in the law of indemnity, including indemnity in construction contracts, until enactment of Minn. Stat. Ch. 337 in 1983, effective to construction project contracts of indemnity executed on or after August 1, 1984. The statute goes beyond the rule of strict construction by absolutely prohibiting a person from obtaining indemnity from another for its own negligence. Minn. Stat. § 337.02. The statute contains other provisions, however, which enable parties to obtain indemnity for their own negligence through the use of agreements to obtain insurance. It is the potential conflict between the statute's anti-indemnification provision and its allowance of agreements to procure insurance which has been and will continue to be the source of litigation.

There are three fundamental provisions to the statute.

1. Scope of the Statute: Definition of "Building and Construction Contract"

The statute applies to any "building and construction contract," which is defined as:

> [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 the production, transmission, or distribution purposes.

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Minn. Stat. § 337.01, subd. 2 (2010). This is a broad definition which includes most construction or renovation projects.

2. The Anti-Indemnification Provision

The anti-indemnification language provides:

> *An indemnification agreement* contained in, or executed in connection with, a building and construction contract *is unenforceable except 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 promisor* or the promisor's independent contractors, agents, employees, or elegatees.

Minn. Stat. § 337.02 (2010) (emphasis added). The statute allows indemnity only to the extent of the promisor's fault. But a right to "indemnity" which extends only to the extent of the indemnitor's fault is essentially a common law or equitable right to contribution — which exists in the absence of any contractual provision. *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d at 367-68.

3. No Effect on Agreements to Procure Insurance.

The last key provision is section 337.05, subd. 1:

> Sections 337.01 to 337.05 do not affect the validity of agreements whereby a promisor agrees to provide specific insurance coverage for the benefit of others.

The Supreme Court has construed this apparently benign provision as an "exception" to the anti-indemnification provision in section 337.02. It is this "exception" which raises difficult questions. First, the statute does not identify the degree of specificity required to render agreements to procure insurance enforceable. Second, the statute does not define how and to what extent a contractually-required insurance policy must benefit another so as to remove the contract from the effect of the statute's anti-indemnification provision.

***HOLMES V. WATSON-FORSBERG:* APPROVING RISK ALLOCATION**

The first reported decision construing Minn.Stat.Ch. 337, *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473 (Minn. 1992), involved a standard Minnesota AGC subcontract containing an indemnity provision similar to that which was enforced in the pre-statute case of *Johnson v. McGough*. In *Holmes*, the subcontractor's employee was injured on the job, the employee sued the general contractor, and the general contractor sought indemnity from the subcontractor and/or its general liability insurer. The court of appeals determined that the AGC indemnity provision was an agreement to indemnify for another's negligence, and thus unenforceable under section 337.02. *Holmes v. Watson-Forsberg Co.*, 471 N.W.2d 109,112 (Minn.Ct.App. 1991), *reversed by* 488 N.W.2d 473 (Minn. 1992). The court of appeals considered whether section 337.05 should apply to the agreement to procure insurance contained in the AGC contract which required the indemnitor to "obtain, maintain and pay for such general liability insurance coverage as will insure the [indemnity] provisions of this paragraph." The court of appeals ruled that because the indemnity provisions of the paragraph were invalid there was no indemnity obligation to insure; therefore, the agreement to procure insurance for an unenforceable obligation was essentially meaningless.

In reversing the court of appeals, the Supreme Court merged the provisions in sections 337.02 and 337.05. It acknowledged that section 337.02 prohibited such indemnity agreements, but it then stated that the legislature had approved the use of the AGC form language and "for practical purposes, carved out an *exception* from the general prohibition contained in section 337.02." 488 N.W.2d at 475 (emphasis added). The court characterized the AGC contract as an enforceable risk allocation mechanism whereby the parties agree to place the risk of loss on a specific insurer. *Id.*

While summarily approving the AGC subcontract as a valid risk allocation scheme, the *Holmes* court did not explain whether its approval derived solely from the subcontractor's insurance provision or from the combined effect of both the indemnity and insurance provisions. In other words, it was not clear whether any indemnity provision, no matter how watered down or inartfully drafted, would be enforced by virtue of the existence of insurance coverage.

***KATZNER* AND *HURLBURT* ESTABLISH THE TWO-STEP ALTERNATIVE ANALYSIS.**

In 1996, the Minnesota Supreme Court issued two opinions: *Katzner v. Kelleher*, 545 N.W.2d 378 (Minn. 1996); and *Hurlburt v. Northern States Power Company*, 549 N.W.2d 919 (Minn. 1996). Both cases involved weaker indemnity provisions than those in the AGC standard subcontract. The contracts in both cases required the indemnitors to indemnify for damages caused by or attributable to the indemnitor's negligent or otherwise wrongful act or omission. Unlike the AGC subcontract, the contracts did not unequivocally require the indemnitor to indemnify the general contractor for claims for which the general contractor was liable. However, as in *Holmes*, the contracts *did* require the subcontractors to procure insurance for the indemnity obligation.

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Before addressing the insurance obligation, the *Katzner* court explained that it would first scrutinize the particular indemnity provision which was limited to damage

> caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor or Sub-subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

545 N.W.2d at 379.

In distinguishing this provision from that in the AGC subcontract, the *Katzner* court said the provision could be read two ways: either as an agreement to indemnify regardless of who was at fault; or as an agreement to indemnify only for damage caused in whole or part by the indemnitor, its subcontractors or employees. Determining that the language was equivocal, the court invoked the rule of resolving ambiguities against the drafter and thus held that the drafter of the contract, the indemnitee, was not entitled to indemnity. *Id.* at 382-83.

After completing its initial contract construction analysis, the *Katzner* court explained that indemnity could be awarded if the contract expressly required the purchase of insurance for claims arising out of the indemnitee's negligence. The court then resolved the issue by holding that the particular insurance provision was insufficient because it required only that the indemnitor purchase insurance for claims arising out of its *own* operations — it did not require the purchase of insurance for claims arising out of the indemnitee's operations, acts or omissions.

Three months later, *Hurlburt* adopted a similar two-part alternative analysis where the contract required indemnity "only to the extent that the underlying injury or damage is attributable to the negligence or otherwise wrongful act or omission [of the indemnitor]." 549 N.W.2d at 919. Like *Katzner*, *Hurlburt* held that the provision was insufficient to require indemnity for the indemnitor's own negligence. Then, addressing the contract's insurance provision, which simply required insurance to cover the indemnity obligations, the court held that the insurance provision itself could not establish a right to indemnity where it was tied to the insufficient indemnity provision. In doing so, the court suggested that if the indemnity provision had been stronger, like that in *Holmes*, the contract's insurance provision would have been sufficient to establish a right to indemnity. *Id.* at 924 (indemnity provision may be saved from invalidity by requirement that indemnitor's contractually assumed liability be insured). In a thoughtful concurrence, Justice Anderson in *Hurlburt* expresses his disagreement with the majority's analysis by identifying the inherent tension between Chapter 337's anti-indemnification provision and its insurance provisions. While the majority notes that indemnity agreements and agreements to procure insurance in construction contracts "are invariably linked," Justice Anderson reminds us that the legislature has treated these two types of agreements "in vastly different ways." *Hurlburt*, 549 N.W.2d at 524 (Anderson, J. concurring specially). While the legislature has shown its clear disapproval of indemnity agreements by prohibiting them, it simultaneously has encouraged agreements requiring one party to procure insurance for another. *Id.* But such agreements to procure insurance must define the required insurance with specificity:

> By supporting agreements to provide insurance for the negligence of another, the legislature has acknowledged the public interest in providing adequate compensation for construction-related injuries and has acknowledged the practical need for the allocation of risk in the performance of construction contracts. However, in so doing, the legislature has required that such agreements to provide insurance be specific.

Id.

Read in conjunction, *Katzner* and *Hurlburt* established a two-step approach: analyze if the contract requires

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indemnity for one's own negligence; and then to determine if one party was required to purchase insurance for the other's benefit. But Justice Anderson questioned the apparent "linkage" between the indemnity obligation and the agreement to procure insurance because the two types of agreements require quite different treatment by the courts.

CASE LAW DEVELOPMENT IN THE WAKE OF *KATZNER* AND *HURLBURT*.

The Minnesota Supreme Court has addressed Chapter 337 only once since 1996, in *Seward Housing Corp. v. Conroy Bros. Co.*, 573 N.W.2d 364 (Minn. 1998). The important question for review in *Seward* was whether the general contractor was entitled to indemnity where the subcontractor agreed to indemnify for the general contractor's fault and also agreed to procure insurance for the indemnity obligation, but then did not purchase the agreed-upon insurance. The *Seward* court declined to impose liability upon the subcontractor, not because the agreement to procure insurance was unenforceable, but because the agreement required procurement of only general liability insurance. The damage in that case occurred after completion of construction; therefore, the court concluded that, even had the subcontractor procured the required general liability coverage, the insurance would not have been sufficient to cover damages occurring after construction. To cover those damages, the subcontractor would have needed completed operations coverage, which coverage was not required by the contract. *Seward*, 573 N.W.2d at 367-68. The court relied on its holding in *R.E.M. IV, Inc. v. Robert F. Ackermann &Assoc., Inc.*, 313 N.W.2d 431, 434-35 (Minn.1981), which construed identical contract language and drew the distinction between basic general liability coverage and more specific completed operations coverage.

The federal district court subsequently addressed, and supported, the *Seward* court's reasoning by drawing the distinction between a party's duty to procure general liability versus completed operations coverage. *Westfield Ins. Co. v. Weis Builders, Inc.*, 2004 WL 16390871 (D. Minn. July 1, 2004). In *Weis Builders*, the obligor had not purchased the required general liability coverage. So the court separated out the damages occurring during and after completion of construction, holding that the obligor was liable to indemnify only for damages occurring during construction because it had not agreed to purchase completed operations coverage. *Id.* at *14 (citing *Seward*).

Until its ruling in *Bolduc*, the court of appeals' several other decisions since *Hurlburt* and *Katzner* did not confront any clearly controversial issues. In a 1997 decision, the court of appeals addressed circumstances similar to those in *Holmes*, holding that the AGC subcontract language was intended to cover the general contractor's own fault and that the subcontractor has agreed to provide the required insurance to cover its indemnity obligation. *Van Vickle v. C. W. Scheurer and Sons, Inc.*, 556 N.W.2d 238 (Minn.Ct.App. 1996), review denied (Minn. March 18, 1997). *See also, Christenson v. Egan Companies, Inc.*, 2010 WL 2161822, No. A09-1539 (Minn. Ct. App. June 1, 2010) (general contractor entitled to indemnity where subcontractor agreed to indemnify for general's fault and to purchase insurance to cover the obligation). The court in *Lyrek v. Wick Building Systems, Inc.*, 2001 WL 410330, No. 0-00-1602 (Minn. Ct. App. April 24, 2001), confirmed the obvious proposition that, in the absence of an agreement to insure, the subcontractor cannot be required to indemnify the general contractor for the general's negligence. *Id.* at *2.

In its most recent decision before *Bolduc*, the court of appeals in *Kuntz v. Park Construction Company*, 2010 WL 346397, A09-669 (Minn. Ct. App. Feb. 2, 2010), needed to parse indemnity language carefully because the language was similar but not identical to language in *Hurlburt*. The court determined there was an important distinction because, unlike in *Hurlburt*, the indemnity rider in *Kuntz* did not limit the scope of the required insurance. Therefore, the court held that the subcontractor was required to maintain insurance for the general contractor's benefit. *Id.* at *4.

***BOLDUC*: DEFINING AN "ACT OR OMISSION" AND THE DOWNSTREAM OBLIGATION OF THE INSURER TO ITS ADDITIONAL INSUREDS.**

Case Background

The *Bolduc* case arose out of a pipeline project in White Bear Lake and Hugo. Metropolitan Council Environmental Services ("the owner") contracted with Frontier Pipeline who contracted out a portion of the project, including installation of a lift station and forcemain access structures, to Engineering & Construction Innovations, Inc. (ECI). ECI then subcontracted with L.H. Bolduc Co. (Bolduc) to furnish, drive, and remove sheeting cofferdams required as part of ECI's responsibilities under the project. (For purposes of this discussion, ECI is referred to as the general contractor and Bolduc as the subcontractor, even though both are a tier removed from those roles.)

Indemnity and Insurance Requirements

The subcontract agreement between ECI and Bolduc contained the following indemnity language:

> [Bolduc] agrees to protect, indemnify, defend, and hold harmless ECI ... to the fullest extent permitted by law and

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> to the extent of the insurance requirements below, from and against (a) all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of injury to any persons or damages to property ***caused or alleged to have been caused by any act or omission of [Bolduc]***, its agents, employees or invitees, and (b) all damage, judgments, expenses, and attorney's fees ***caused by any act or omission of [Bolduc]*** or anyone who performs work or services in the prosecution of the Subcontract. [Bolduc] shall defend any and all suits brought against ECI ... on account of any such liability or claims of liability.

(Emphasis added.) The subcontract contains the following insurance language:

> [Bolduc] agrees to procure and carry until the completion of the Subcontract, workers compensation and such other insurance ***that specifically covers the indemnity obligations under this paragraph***, from an insurance carrier which ECI finds financially sound and acceptable, ***and to name ECI as an additional insured on said policies.***

(Emphasis added.) Bolduc procured a commercial general liability (CGL) insurance policy from Travelers, including an additional insured (AI) endorsement, naming ECI as additional insured. The AI endorsement provided, in pertinent part:

> COMMERCIAL GENERAL LIABILITY COVERAGE
>
> PART 1. WHO IS AN INSURED—(Section II) is amended to include any person or organization that you [Bolduc] agree in a "written contract requiring insurance" to include as an additional insured on this Coverage Part, but:
>
> a) Only with respect to liability for "bodily injury," "property damage" or "personal injury"; and
>
> b) If, and ***only to the extent that, the injury or damage is caused by acts or omissions of you [Bolduc]*** or your subcontractor in the performance of "your work" to which the "written contract requiring insurance" applies. ***The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization.***

(Emphasis added).

The Incident and Resulting Litigation

In carrying out its obligations under the subcontract, Bolduc furnished and drove the sheeting. The sheeting struck and damaged the pipeline which Frontier previously installed. The owner and Frontier demanded that ECI immediately repair the damage to the pipeline to avoid delay in the project schedule. ECI was exposed to potential liquidated damages of $5,000 for each day of delay. ECI incurred expenses of $235,339.89 in repairing the pipeline.

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2011

Insurance Law Committee Meeting
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Workers' Compensation Committee Meeting
Heacox Law Firm
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Long Term Care Committee Meeting
Bassford Remele
November 17, 2011, 12:00 p.m.

New Lawyer Brown Bag Lunch Presentation
Bowman and Brooke
November 21, 2011, 12:00 p.m.

Motor Vehicle Accident Committee Meeting
Brown & Carlson
December 1, 2011, 12:00 p.m.

Government Liability Meeting: Bias CLE & Holiday Party
Iverson Reuvers Law Firm
December 8, 2011, 4:30 p.m.

Medical Health and Liability Committee Meeting
Bassford Remele
December 15, 2011, 12:00 p.m.

2012

Long Term Care Committee Meeting
Bassford Remele
January 19, 2012, 12:00 p.m.

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Arrowwood Resort & Conference Center
February 10-12, 2012

Long Term Care Committee Meeting
Bassford Remele
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2012 Trial Techniques Seminar
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As an additional insured under Bolduc's CGL policy, ECI submitted to Travelers a claim for reimbursement of expenses. Travelers denied the claim. ECI assessed a backcharge against Bolduc for the $32,513.29 owing to Bolduc under the subcontract. ECI further claimed that Bolduc was liable to pay ECI $202,826.60, representing the difference between ECI's repair expenses and subcontract balance. ECI then sued both Bolduc and Travelers, alleging breach of contract and negligence against Bolduc and breach of contract and declaratory judgment against Travelers. Travelers filed a counterclaim for declaratory judgment, and Bolduc filed a counterclaim for its unpaid contract balance.

The trial court bifurcated ECI's negligence claim from the remaining claims. The parties stipulated that the only issues to be tried to the jury were (a) ECI's claim that Bolduc's negligence resulted in damage to the pipeline, (b) Bolduc's defense that it was ECI's negligence that resulted in damage to the pipeline, and (c) the amount of damages, if any, to which ECI is entitled if it prevails on its negligence claim. The parties agreed to defer for later determination ECI's contract claims against Bolduc and Travelers. Following trial, the jury found that Bolduc was not negligent and that ECI was not entitled to any money for its loss resulting from damage to the pipeline.

After the verdict, ECI and Bolduc brought cross-motions for summary judgment on the remaining breach-of-contract claims. ECI and Travelers also brought cross-motions for summary judgment on the indemnification issue. The trial court concluded that because a jury had determined that Bolduc was not negligent and the contract required Bolduc to indemnify and insure ECI only from damages caused by Bolduc's negligence, Bolduc had not breached its contract with ECI. Under similar reasoning, the trial court concluded that Travelers was not required to indemnify and insure ECI for the damage to the pipeline. The trial court granted Bolduc's and Travelers' motions for summary judgment; denied ECI's motion for summary judgment; and awarded Bolduc $45,965.53, plus prejudgment interest, on its breach-of-contract claim against ECI. ECI appealed.

The Majority Decision on Appeal

By 2-1 decision, the court of appeals reversed. The court held that the subcontract required Bolduc to indemnify ECI for loss caused by, or alleged to be caused by, Bolduc's "acts or omissions." The jury's finding of no negligence did not relieve Bolduc of its contractual duty to indemnify ECI, the court reasoned, because the court construed the contract to require Bolduc to indemnify ECI "without regard to fault." Slip op. at *5. In rejecting Bolduc's contention that the contract required a finding of negligence to trigger the duty to indemnify, Judge Muehlberg explained:

> * * * [S]uch an argument misconstrues the language of the contract. Under the language of the contract, Bolduc agreed to indemnify ECI from and against "all claims, causes of action, liabilities, obligations, demands, costs, and expenses arising out of ... damages to property caused *or alleged to have been caused* by any act or omission of [Bolduc], its agents, employees or invitees" and carry insurance to cover such an obligation. (Emphasis added.) In other words, Bolduc agreed to indemnify ECI without regard to fault. While an apportionment of fault would be relevant to the analysis under section 337.02 of the permissible extent of an indemnification obligation without a coextensive agreement to insure, because the indemnification and insurance obligations coincide, section 337.05 exempts the contract from the application of section 337.02.
>
> To adopt Bolduc's argument would require us to read the word "negligence" into the insure-and-indemnify paragraph of the contract. We decline to do so. Because the contract required Bolduc to insure and indemnify ECI without regard to fault, the district court erred by concluding that the jury's finding that Bolduc was not negligent extinguished its obligation under the contract.

Slip op. at *5. (Emphasis in original). Apparently, the majority determined there were two grounds to hold that the contract called for indemnity regardless of Bolduc's fault: (1) the indemnity was triggered simply by an allegation that Bolduc's acts or omissions caused the damage; and (2) the term "act or omission" does not imply or require negligence or fault.

Applying the same reasoning that it did to the indemnity argument, the majority held that Travelers must indemnify ECI because the AI endorsement provided coverage for damage caused by the named insured's (Bolduc's) "acts or omissions." Like the contractual indemnity clause, the AI endorsement does not state that coverage is limited to damage caused by Bolduc's *negligent* acts or omissions. Id., slip op. at *6. The majority did not address the other language in the AI endorsement which states that ECI does not qualify as an additional insured "with respect to the [ECI's] independent acts or omissions."

The Dissent

Judge Connolly dissented:

> I would affirm the district court's grant of summary judgment in favor of Bolduc because our statutory prohibition against indemnifying parties for their own negligence prohibits ECI from being indemnified by Bolduc when Bolduc was specifically found not negligent by a jury and the jury awarded no damages to ECI. I would also affirm the district court 's grant of summary judgment in favor of Travelers because the specific language of its endorsement

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> limits its insurance coverage to the acts and omissions of Bolduc, not any other alleged acts or omissions.

Id. at *8, (Connolly, J., dissenting). He reasoned that requiring Bolduc to indemnify ECI where Bolduc was not at fault runs afoul of the anti-indemnity language in Minn. Stat. §337.02. *Id.* He distinguished the contractual indemnity language in *Bolduc* from the much broader language in *Holmes v. Watson-Forsberg* where the subcontractor agreed to indemnity for all damage "arising out of, resulting from or in any manner connected with, the execution of the [subcontractor's] work." *Id.*, at *8 (quoting *Holmes v. Watson Forsberg*, 488 N.W.2d at 474). In contrast, the *Bolduc* language was limited to damage *caused* by the subcontractor's alleged or actual acts or omissions. *Id.*

The dissent concludes by addressing the AI endorsement language which explicitly states ECI would be qualified as an additional insured "with respect to the independent acts or omissions of (ECI)." *Id.*, at *9. Judge Connolly explains the purpose and impact of the AI endorsement:

> This language makes it clear that the intent of the parties was that Travelers would provide coverage to ECI "only to the extent that" ECI became responsible for payment of damages due to improper acts or omissions of Bolduc, but that Travelers would not provide coverage to ECI for damages that resulted from ECI's independent actions, or the actions of some third party.
>
> Reading this language any other way (or reading the words "acts or omissions" as advocated by ECI) disregards the policy and its intent, namely that ECI would be entitled to coverage only for Bolduc's negligent acts. * *

Id. So Judge Connolly would have affirmed the trial's decision in favor of both Bolduc and Travelers.

CONCLUSION

The marked contrast between the *Bolduc* majority and minority opinions illustrates the important and lingering questions about how to construe the language in indemnity agreements and agreements to procure insurance. The construction and insurance bar awaits the supreme court's decision on the pending petitions for review.

Mark Bloomquist represents design professionals, contractors and product manufacturers. He also represents attorneys, financial advisors, title companies and other professionals in civil litigation and before government licensing agencies.

Mark is past Chair of the Construction Law section of the Minnesota State Bar Association. Mark is a currently a board member of the American Council of Engineering Companies, Minnesota Chapter, serving on its membership and professional registration committees. He also serves on the CLE Committee of the Hennepin County Bar Association. He received his bachelor's degree from Stanford University and his J.D. cum laude from William Mitchell College of Law.