

ALERTS

Construction & Policyholder Insurance Recovery Alert - Recent Minnesota Supreme Court Case May Limit Additional Insured's Rights And Indemnity Obligations In Construction Contracts

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In *Engineering & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc. et al.*, No. A11-0159 (Minn. Jan. 23, 2013), the Minnesota Supreme Court reversed the court of appeals, and found no coverage for Engineering & Construction Innovations (ECI) as an additional insured under the insurance policy issued to its subcontractor, Bolduc Co., Inc.

Frontier Pipeline, LLC was a general contractor for the installation of a sewer pipeline. It contracted with ECI to install a lift station and access points along the pipeline. ECI, in turn, subcontracted with Bolduc to construct cofferdams along the sewer line. Bolduc was to drive metal sheeting into the ground around the line to act as wall for the pits used during excavation and construction. During its work Bolduc drove a sheet into the sewer line.

ECI's contract with Bolduc included an agreement whereby Bolduc agreed to indemnify ECI from all claims related to Bolduc's acts and omissions. Specifically, it stated in part that "[Bolduc] agrees to protect, indemnify and hold harmless ECI . . . from and against . . . all claims . . . arising out of . . . damages to property caused or alleged to have been caused by any act or omission of [Bolduc]." Furthermore, Bolduc was to procure insurance covering the indemnity obligations in the contract and to add ECI as an additional insured. The agreement stated "[Bolduc] agrees to procure and carry . . . insurance that specifically covers the indemnity obligations under this paragraph." Bolduc obtained insurance from the Travelers Indemnity Company of Connecticut. The policy included those entities who Bolduc agreed to add as additional insureds by written contract, but limited the definition of additional insureds as follows:

- 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 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.

After the accident, ECI sought indemnification from Bolduc and sought coverage as an additional insured under the Travelers policy. When indemnity and insurance were not forthcoming, ECI sued. The trial was bifurcated between liability and insurance coverage, and a jury found that Bolduc was not negligent. Based upon that finding, the trial court granted

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Bolduc and Travelers summary judgment, finding that the insurance obligation of Travelers only applied if Bolduc was negligent and therefore did not cover ECI's independent negligence. The trial court further held that Minnesota's anti-indemnity statute, Minn. Stat. §337.02, invalidated the contractual indemnity obligation of Bolduc to ECI.

Looking at the language of the insurance policy and the exception to the anti-indemnity statute in Minn. Stat. § 337.05, Subd. 2, the Minnesota Court of Appeals reversed. The court held that the insurance policy provided coverage, and to the extent it did not, Bolduc was obligated to indemnify ECI. *Engineering & Constr. Innovations v. Bolduc Co., Inc. et al.*, 803 N.W.2d 916 (Minn. Ct. App. 2011). The basis for the court of appeal's decision was the fact that the indemnity obligation in the contract and the insurance policy was for the "acts and omissions" of Bolduc. Because Bolduc's acts caused the damage to the pipe, there was a coverage obligation under the policy. Furthermore, if the policy didn't provide coverage, Bolduc had to step in pursuant to Minn. Stat. 337.05, Subd. 2. The court specifically declined "Travelers' invitation to read the word 'negligent' into the policy." *Id.* at 924. And even though a jury found Bolduc not negligent, that "finding does not equate to a finding that Bolduc did not cause the damage to the pipeline." *Id.*

The Minnesota Supreme Court reversed again. It held that the burden of proof for establishing coverage initially falls on the policyholder. It then held that ECI had not proven that it was entitled to coverage as an additional insured because, and when read as a whole, the reasonable meaning of "acts or omissions" [of Bolduc] in the policy could not be divorced from the concept of fault. The court specifically said the definition had to be limited to "instances of ECI's vicarious liability for Bolduc's negligent acts or omissions." The court acknowledged that other jurisdictions had reached different conclusions, but distinguished those decisions based upon differences in the policy language. The court further held that the language in the indemnity agreement was subject to the same limitation, and would violate the anti-indemnity statute if it covered ECI's sole negligence. Finally, the court held that ECI had waived its argument that Bolduc breached its contract by failing to procure coverage because it was not raised at summary judgment or on appeal. Based upon the policy language and the waiver, the case is distinguishable from the *Watson-Forsberg Co. v. Pro-Tech Roof Systems, Inc.*, 488 N.W.2d 473 (1992), line of cases that recognize a subcontractor can agree to procure insurance for the sole liability of a general contractor. However, construction businesses should look very closely at the indemnification and insurance language in their contracts, even standard contracts, to make sure that the scope of the indemnification provisions and insuring obligations are clear.

Points to consider for contractors and sub-contractors:

In Minnesota, agreements to indemnify in construction contracts will be limited to those instances where damage is attributable to the negligence, wrongful act or omission, or breach of contractual duty of the promisor, or where the promisor fails to procure insurance for that liability in breach of an agreement to insure. See Minn. Stat. §337.02, 337.05, Subd. 2.

If the insurance contemplated by the contract is supposed to cover the sole fault of the additional insured, that intent must be expressly stated in the contract and the additional insured endorsement attached to the

applicable insurance policy. If you are a contractor or subcontractor expecting to be insured by another's insurance policy for your sole negligence, you might consider reading the applicable policy and endorsements, and not rely simply on a certificate of insurance. If the language of the policy or endorsements is not clear, or is inconsistent with the agreement of the parties, consider working with the insurance broker to make sure the policy language is made consistent with the parties' agreement. Finally, you may want to familiarize yourself with each of the state's laws where the work will be performed so statutory limitations do not erode the promises in the contracts.

For more information about the implications of the ECI ruling, contact the Barnes & Thornburg attorney Christopher Yetka (Policyholder Insurance Recovery Group) at 612-367-8748.

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