

# AN IMPORTANT CHANGE TO MINNESOTA'S ANTI-INDEMNITY STATUTE AND WHAT IT MEANS FOR MINNESOTA CONSTRUCTION COMPANIES<sup>1</sup>

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## *Introduction*

Some major changes have been made to the laws affecting construction contracts. This article focuses on changes affecting one of the most important statutes governing construction contracts, Minnesota Statute § 337.02, commonly referred to as the “Anti-indemnity Statute.” The Anti-indemnity Statute applies to public and private construction contracts, and it governs the enforceability of a construction contract’s indemnity provision.

The Anti-indemnity Statute has not been changed since 2013, meaning there has been some stability about what the statute means and how it is to be applied by construction professionals when they are negotiating contracts. Effective May 25, 2023, the Anti-indemnity Statute got a facelift. This article is limited to perhaps the most important change to the Anti-indemnity Statute: adding the word “defend” to the definition of “indemnity agreement”. Because of this change, amongst others, construction companies should take efforts to have a good understanding of changes to the Anti-indemnification Statute and update the indemnity provisions in their contracts.

## *History Of The Anti-Indemnity Statute*

Minnesota first passed the Anti-indemnity Statute in 1984. The purpose of the statute was to try to make each party responsible for their own conduct. The Anti-indemnity Statute prohibited agreements in “building and construction contracts” where one party agreed to indemnify another for the other’s own fault. The original Anti-indemnity Statute, however, included an exception that allowed one party to require the other to purchase insurance covering the other’s liability (the “insurance exception”).

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A decade ago, in 2013, the Minnesota Legislature amended the Anti-indemnity Statute to address issues with the insurance exception. Specifically, an amendment was added that prohibited agreements requiring one party to purchase insurance covering another party's fault. The amendment did not only apply to subcontractors, but applied to general contracts, design contracts, purchase orders and all other "building and construction contracts."

### *A Major Change To The Anti-Indemnity Statute*

The Minnesota Legislature revised the Anti-indemnity Statute a second time in 2023. The primary change to the Anti-indemnity Statute is not actually a change to the Anti-indemnity Statute itself. It is the addition of the word "defend" to the definition of "indemnification agreement" under Minnesota Statute § 337.01, Subd. 3, which is the statute you should look to when you are interpreting the anti-indemnity statute.<sup>3</sup> The new definition of "indemnification agreement" is as follows:

"Indemnification agreement" means an agreement by the promisor to indemnify, **defend**, 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.

*Id.* (Emphasis added on the change).

The addition of the word "defend" to the definition of "indemnification agreement," and in context with the anti-indemnity statute, now means that a promisor (*i.e.*, a property owner, general contractor, etc.) cannot require a promisee (*i.e.*, a subcontractor or material supplier) to defend and indemnify the promisor for indemnity, **and now defense** costs that do not arise out of the promisee's wrongful acts.

This is a lot of legal speak, so here's an example of how the new change would work versus the previous statute.

#### **Scenario #1: Under The Previous Version Of The Anti-Indemnity Statute**

On a date **before May 25, 2023**, ABC general contractor entered into a residential construction contract with XYZ subcontractor to perform exterior finishing work. ABC's contract with XYZ contained an indemnification agreement that required XYZ to "indemnify and hold harmless ABC from any and all claims arising out of XYZ's negligent and wrongful acts." The indemnification agreement goes on to say that XYZ must "defend ABC from any and all claims that arise out of XYZ's work, regardless of XYZ's fault."

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<sup>3</sup> See Minnesota Statute § 337.01, Subd. 1; see also Minnesota Statute § 15.71, which defines "indemnification agreement" for public construction contracts. The legislature also amends Sections 15.71 and 15.72, so the definitions for "indemnification" and "promisee" are identical for contracts relating to public and private projects.

XYZ left scaffolding up at the project site after its workers left for the weekend. ABC did not perform its normal project site safety check before the weekend. Had ABC performed its Friday site check, it would have noticed the scaffolding was left up. Over the weekend, a child climbed onto the scaffolding and the scaffolding fell. The child was seriously injured.

The child's parents sued ABC for negligent project site supervision. ABC then sued XYZ for defense and indemnity under the terms of the contract's indemnification agreement. The lawsuit went before a jury. The jury determined the child was entitled to \$100,000, split as follows: 75% fault on ABC and 25% fault on the child. Under the terms of the contract's indemnity agreement and under the old terms of the Anti-indemnity Statute, XYZ cannot be required to indemnify ABC, but could be responsible to pay for **all of ABC's defense costs, which includes attorneys' fees and costs.**

### **Scenario #2: Under the New, Amended Anti-Indemnity Statute**

Let's assume we have the same fact pattern as the one set forth in Scenario #1, except for one change: ABC and XYZ signed their contract after May 25, 2023 (the day the Anti-indemnity Statute's revisions took effect).

Under the revised Anti-indemnity Statute, a court would probably determine that XYZ does not have to pay ABC's defense costs because the contract's provision requiring XYZ to pay ABC's defense costs for ABC's wrongful conduct would likely be deemed in violation of the Anti-indemnity Statute.

The fact pattern in these scenarios is fairly straightforward. But, what happens if both ABC and XYZ are at fault? Would XYZ have to pay ABC's defense costs then? The short answer is: it depends on the facts of the case. We won't really know until the courts have had the opportunity to interpret the revised Anti-indemnity Statute.

### ***Conclusion***

Now is a good time to review your construction contract templates to ensure that they comply with the Anti-indemnity Statute's new defense cost limitations. You should also make sure to adjust your expectations about the right to get a downstream party to pay your defense costs if you get into a dispute.

The big question that remains is how the courts will interpret the new changes to the Anti-indemnity Statute. You will want to make sure you speak with your attorneys about tracking the litigation that will surely follow the changes to the Anti-indemnity Statute.