

INDEMNITY IN IOWA CONSTRUCTION LAW

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I. INTRODUCTION

Indemnity issues pervade Iowa construction law. Before work even begins on a construction site, the issue of indemnity often makes contract formation difficult. Indemnity raises complex issues of insurance coverage and endorsements.¹ Claims of indemnity invariably follow any construction accident or loss.² A surety's obligation raises many indemnity issues after a principal defaults or goes bankrupt.³

This Article will survey Iowa court decisions on indemnity in the construction field,⁴ discuss the most common standard contract provisions,⁵ and address a legislative proposal to limit the enforcement of certain indemnity contracts.⁶ Hopefully, the Article provides useful analysis and guidance for attorneys and members of the construction industry.

II. WHAT INDEMNITY IS

Indemnity shifts liability from the legally responsible person to another person.⁷ Indemnity is a claim for reimbursement by a party who has paid or may pay money for a loss or

liability against a party who should reimburse the payor because of an agreement, relationship, or duty.⁸

Indemnity's roots are grounded in principles of equity.⁹ The Iowa Supreme Court has recognized a civil action for common law indemnity¹⁰ based on equitable principles:

Indemnity, a form of restitution, is founded on equitable principles; it is allowed where one person has discharged an obligation that another person should bear; it places the final responsibility where equity would lay the ultimate burden.¹¹

Indemnity is implicated when a person discharges another's duty:

A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.¹²

Considerations of equity, justice, and fairness course throughout the courts' discussions of indemnity:¹³

The unexpressed premise has been that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the indemnitor should bear the total responsibility, rather than to leave it on the indemnitee or to divide it proportionately between the parties by contribution. It is sometimes said that a right to indemnity arises when the indemnitor owns an independent duty to the indemnitee. This may prove to be nothing more than a way of stating the problem (when is the duty owed?), but it happens to be true in some of the instances . . . in which the indemnitee would have an action of tort against the indemnitor, irrespective of a right of indemnity.¹⁴

The recent unpopularity of indemnity stems from the shifting of liability to persons because of the express terms of a contract, which may, in certain circumstances, produce results that appear contrary to the traditional principles of fairness or justice which gave rise to indemnity.

III. WHAT INDEMNITY IS NOT

Indemnity and contribution are distinct remedies.¹⁵ Contribution is when the parties responsible for a loss share its liability.¹⁶ Indemnity shifts the entire liability from one legally responsible person to another.¹⁷ “Contribution is based on concurrent negligence of the parties

toward the injured party,”¹⁸ and before there can be contribution among tortfeasors, there must be tortfeasors.¹⁹ Contribution requires common liability to the injured party.²⁰ Where the parties have no common liability, there can be no right of contribution.²¹ Indemnity, on the other hand, does not require common liability and is permitted in circumstances where there is no common liability to injured party, provided there is an agreement, relationship, or duty between the indemnitor and indemnitee that allows indemnity.²²

“ “[A] third party’s action for indemnity is not exactly for “damages” but for reimbursement,”²³ although this seems to be a distinction without a difference. The indemnitor receives no consolation by calling the money paid to the indemnitee “reimbursement” or “restitution” rather than “damages.”

A claim for indemnity is also not a claim for breach of contract.²⁴ A claim for breach of contract is separate and distinct from a claim for indemnification.²⁵ The plaintiff may choose between the claims or include both in the same action.²⁶ A contract claim requires proof of a breach of a contractual duty and proximate cause of the claimed damages,²⁷ while an indemnity claim has other elements, including the requirement that the indemnitee is liable for the underlying claim.²⁸

A right to indemnification is not a “promise to pay.”²⁹ Unless modified by contract, the indemnitee’s liability generally must be fixed first by settlement or judgment.³⁰

IV. BASIS FOR INDEMNITY

The Iowa Supreme Court allows indemnity based on the following: “(1) express contract; (2) vicarious liability; (3) breach of an independent duty . . . ; and (4) primary as opposed to secondary liability.”³¹ This Article focuses primarily on express contract and breach of an independent duty, because these claims for indemnity occur most frequently in construction cases.

V. CONTRACTUAL INDEMNITY

Contractual indemnity is the promise of ““one party (the *indemnitor*) . . . to hold another party (the *indemnitee*) harmless for loss or damage of some kind.””³² Courts do not disfavor contractual indemnity and will generally enforce it.³³ The parties need no special words to establish the obligation and it can arise “without specifically expressing the obligation as indemnification.”³⁴ The parties create an indemnification agreement when their words express the “intention by one party to reimburse or hold the other party harmless for any loss, damage, or

liability.”³⁵ As with other issues of contract law, intent is the controlling consideration for whether an indemnity agreement exists.³⁶

Although the Iowa Supreme Court states that it applies “the same rules of formation, validity, and construction [to indemnity contracts] as [to] other contracts,”³⁷ there are notable exceptions. The first is that contracts for indemnity are interpreted narrowly in favor of the indemnitor.³⁸ This rule differs considerably from insurance indemnity contracts, which are uniformly interpreted in favor of the insured indemnitee.³⁹ This apparent contradiction may have more to do with the drafter of the contract than it does with differentiating the industry to which the indemnitor belongs.⁴⁰ A second example of a different rule of interpretation for indemnity contracts is that a party receives indemnification for its own negligence only if there is a clear and unequivocal expression of that intent.⁴¹

Contractual indemnification can alter the common law concepts of indemnification and impose obligations not otherwise supported by those equitable principles that support indemnification outside of a contract.⁴² For example, an indemnification agreement can change the common law rule that prohibits indemnification for voluntary payments.⁴³ Also, the

prohibition of indemnifying a party for its own negligence may be overcome by clear contract terms.⁴⁴

VI. FRAMEWORK FOR RESOLVING CONTRACTUAL INDEMNITY ISSUES

When interpreting and construing⁴⁵ an indemnity provision, the Iowa Supreme Court has recognized that the issue should be framed by resolving two questions: ““(1) for whose negligent acts causing damage is indemnity promised? and (2) what is the scope of the area in which indemnity is available?””⁴⁶

VII. FOR WHOSE NEGLIGENT ACTS?

The first inquiry asks for whose negligent acts is indemnity available.⁴⁷ The most common answer is the negligence of the indemnitor and all persons it controls, namely its subcontractors, agents, employees, and other persons over whom it exercises supervision or control.⁴⁸ Two significant legal questions may arise in determining for whose negligent act indemnity is available: (1) whose negligence may be imputed to the indemnitor;⁴⁹ and (2) when is the indemnitor responsible for the indemnitee’s negligence?⁵⁰ These questions will be addressed in turn.

A. Imputed Negligence

A claim for indemnity seeks to shift liability for an underlying claim.⁵¹ Often the underlying claim is a personal injury claim by an injured worker against companies, other than the worker's employer, who had some connection to the worker's injury.⁵² The Iowa Supreme Court has held that, absent an agreement providing otherwise, the injured worker's negligence that caused the worker's own injury will not be imputed to the employer or a third party for purposes of determining indemnity.⁵³ The precise reason for the rule is not as important as the rule itself.⁵⁴

Without the rule, the employer of the injured worker and any other company could be held liable merely for having a connection to the injury.⁵⁵ If the negligence of an injured worker was imputed to her employer or to another company, these companies would then be deemed to have committed a negligent act, which would trigger their obligation to indemnify another party for the underlying claim.⁵⁶ For example, injured workers could bring actions against companies other than their employers by alleging that imputed negligence is a basis for recovering in tort. If the company has an indemnification agreement with the employer of the injured worker, it could seek indemnity by asserting that the negligence imputed to the employer satisfies the act of negligence required by the indemnity provision.

Also, a different rule likely would require general liability insurers to indemnify workers' compensation insurers in many more situations than they currently do. Under a different rule, a workers' compensation insurer could claim indemnity from the general liability carrier even if the injured employee never brings a claim. If injured workers' negligence were imputed to their employers or third parties, the general liability carriers would pay the claims of injured workers more often and then seek indemnity from the employers of the injured workers.

Under certain circumstances, a supervisory employee's negligence may be imputed to an employer or others.⁵⁷ Specifically, in *Sward v. Nelson Construction, Inc.*,⁵⁸ the court determined that an injured supervisor's knowledge of the danger presented by an uncovered opening could be imputed to his employer for purposes of an indemnity claim.⁵⁹ The jury then determined that the employer was fifty percent at fault and the injured supervisor was five percent at fault.⁶⁰ The court ruled that the holding in *Martin* was not applicable because the indemnification claim was not grounded in the injured employee's own negligence, but instead on the employer's failure to follow a contractual agreement to comply with Occupational Safety and Health Administration (OSHA) standards.⁶¹

A third case involving imputed negligence is *McComas-Lacina Construction Co. v. Able Constructors*.⁶² In that case, an injured worker claimed that the negligence of his employer, a subcontractor who failed to provide safety equipment or regulate safety at the job site, was imputed to the general contractor.⁶³ The general contractor sought indemnity from the injured worker's employer (the subcontractor), arguing that it was seeking indemnity for the subcontractor's negligence.⁶⁴ The Iowa Supreme Court held that summary judgment was precluded by a genuine issue of fact of whether the general contractor had suffered any loss as a result of the subcontractor's negligence, which was imputable to the general contractor.⁶⁵

Plaintiffs' lawyers and workers' compensation insurers' lawyers should keep these cases in mind when contemplating litigation and drafting pleadings. The cases show that the supervisory employee's negligence and the subcontractor's negligence are imputable to the general contractor for purposes of recovering on a third party claim against the general contractor.⁶⁶ Similarly, a general contractor who is sued on a theory of imputed negligence may have a claim under its indemnity agreement with the subcontractor-employer for reimbursement of the amount paid to settle the underlying claim.⁶⁷ In many cases, an imputed negligence allegation could expand the number of comprehensive general liability policies available to

injured workers for recovery of their claims or for reimbursement of the workers' compensation lien.⁶⁸

B. *Indemnification for One's Own Negligence*

The issue of when workers may be indemnified for their own negligence is a frequently litigated topic in Iowa construction law. The Iowa Supreme Court's description of the appropriate test to determine whether the indemnitor must indemnify for the negligence of the indemnitee has varied over the years, but it may now be succinctly stated as follows: "the intent of the parties will control as revealed by the language of the agreement."⁶⁹ Because the intent of the parties controls, the agreement need not contain any specific language or reference.⁷⁰ As an illustration of how the phrasing of this test has changed over the years, the Iowa Supreme Court previously has said that "[g]eneral, broad and all-inclusive language is insufficient for the purpose,"⁷¹ but more recently that "even broad indemnity language may reveal an intent to indemnify an indemnitee for its own negligence."⁷²

The court has wavered as to whether unequivocal language is part of this test. To illustrate, in *Martin v. Pitz Associates v. Hudson Construction Services, Inc.*, the Iowa Supreme Court reaffirmed the "clear and unequivocal language" test.⁷³ Three years later, in *McNally &*

Nimergood v. Neumann-Kiewit Constructors, Inc., the Iowa Supreme Court held that indemnification for one's own negligence is not proper "unless the intention of the parties is clearly and unambiguously expressed."⁷⁴ The word "unequivocal" does not appear in *McNally* or *Maxim Technologies, Inc. v. City of Dubuque*,⁷⁵ although the issue of indemnification for one's own negligence is a main topic in both opinions.⁷⁶ *McComas-Lacina* uses the word "unequivocal" only once in a quote.⁷⁷

The more explicit traditional test of "clear and unequivocal language" for indemnification of one's own negligence has been employed by the Iowa Court of Appeals⁷⁸ and one of Iowa's federal district courts.⁷⁹ The situations in which one court finds "clear and unequivocal language," however, may raise doubts in other courts' views.⁸⁰

A "contract need not expressly relieve the indemnitee of its own negligence if" that intent is clear from the words of the agreement.⁸¹ The indemnitee's negligence or fault need not be specifically mentioned, as long as the intention is clearly expressed.⁸² The court's "tendency to find general, all-inclusive indemnification contracts" insufficient is "only a guideline, not a strict principle."⁸³ The Iowa Supreme Court has no requirement of a specific reference.⁸⁴

Construction contracts usually require indemnity from the person being hired or brought to the job (the indemnitor) to the person who hired or brought the contractor or subcontractor to the job (the indemnitee).⁸⁵ Indemnification usually requires the indemnitor (or its subcontractors or agents) to have acted negligently and caused the damage in whole or in part.⁸⁶ A metaphor familiar to the construction industry, but lacking legal precision, is that indemnification usually runs “upstream” in favor of the owner, and the indemnitor has responsibility for the acts of persons “downstream” whom it brought to the project.⁸⁷ While exceptions are rife, this general statement describes the intent of many standard form contract provisions on indemnification.⁸⁸

In *Cochran II*, Chief Judge Bennett interpreted the phrase “anyone for whose acts they may be liable,”⁸⁹ which was included in the standard American Institute of Architects forms.⁹⁰ Judge Bennett concluded that the word “anyone” included the general contractor, who hired and brought the subcontractor to the project.⁹¹ For that reason, he found that the subcontractor had agreed to indemnify the general contractor for its own negligence.⁹² Respectfully, the general contractor should not be “anyone for whose acts” the subcontractor may be liable. The ones “for whose acts” the subcontractor may be liable are those persons or companies the subcontractor

brings to the project, such as its employees, agents, and visitors.⁹³ The general contractor may commit many acts of negligence without the subcontractors' involvement or knowledge.

A factual example illustrates this issue. If the general contractor's employee negligently ran over a sub-subcontractor's employee with a forklift, the indemnification provision, as interpreted in *Cochran II*, could require the subcontractor to indemnify the general contractor of all damages paid to the injured employee, even if the general contractor's employee was one hundred percent at fault. This would be so because, according to *Cochran II*, the general contractor is "anyone for whose acts [the subcontractor] may be liable."⁹⁴

That result is not a necessary interpretation of the indemnification language in paragraph 3.18.1 of the American Institute of Architects Document A201-1997.⁹⁵ The alternative interpretation, which seems to be preferred, is that the subcontractor has no obligation to indemnify the general contractor because neither the subcontractor nor "anyone for whose acts [it is] liable" was negligent. This preferred interpretation makes the indemnitor responsible for the acts of the persons whom it brought to the project and over whom it has control; it does not make the indemnitor responsible for acts of the persons over whom it did not bring to the project and over whom it has no control.⁹⁶ Unless the subcontractor or "one for whose acts" it is liable

was negligent, the subcontractor has not committed the triggering act that implicates the indemnification obligation.

Martin involved a case where neither the indemnitee nor the indemnitor was negligent.⁹⁷

The Iowa Supreme Court refused to impute the injured employee's fault to his employer; thus, the indemnitor had not been negligent.⁹⁸ In the absence of the indemnitor's negligence or that of "anyone for whose acts they may be liable," the indemnitors had no duty under the indemnification provision.⁹⁹ Because paragraph 3.18.3 excused the indemnitors from indemnifying the architect for negligent design, the court concluded that there was no "clear and unequivocal" expression of indemnity for a party's own negligence.¹⁰⁰

In *McNally*, the Iowa Supreme Court found that the language in the parties' agreements expressed a clear intention for the lessee to indemnify the lessor of its own negligence, unless that negligence was based on or attributable to a defect in the leased equipment.¹⁰¹ Indemnification would be prevented by the indemnitee's negligence that causes a defect in the equipment, negligent inspection, and failure to maintain the equipment free from defects would have prevented indemnification.¹⁰²

In *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*,¹⁰³ the language of the indemnification provision created a duty of the sub-subcontractor to indemnify the owner, general contractor, and subcontractor of its own negligence, “exclud[ing] only total liability created by the sole and exclusive negligence” of the party to be indemnified.¹⁰⁴

In *Weik v. Ace Rents, Inc.*,¹⁰⁵ the Iowa Supreme Court concluded that the contract required indemnification of the indemnitee’s own negligence where the language was the following: “I [. . .] do hereby exonerate, indemnify and save harmless the company from all claims and liabilities to all parties for damage or loss to any person, persons, or property in any way arising out of or during the use of said equipment.”¹⁰⁶

The intent of the parties, as demonstrated by the language of the agreement, controls the issue of whether a party will be indemnified of its own negligence.¹⁰⁷

VIII. FOR WHAT AREA IS INDEMNITY AVAILABLE?

A. *Scope of Claims*

When considering an indemnity claim, the courts should consider whether the type of claim presented is covered by an indemnity agreement.¹⁰⁸ The Iowa Supreme Court requires that

the claim come within the scope of the indemnification agreement.¹⁰⁹ When the underlying litigation against a potential indemnitee is limited to allegations that are not covered by the indemnitor's indemnity agreement, there can be no recovery.¹¹⁰ In *McNally*, the claim of a defect against the lessor was expressly excluded from coverage under the indemnification agreement.¹¹¹ Likewise, in *Martin*, the allegations of the architect's negligence were expressly excluded from the indemnification obligation.¹¹² In *Ward v. Loomis Bros.*¹¹³ and *Evans v. Howard R. Green Co.*,¹¹⁴ in order to sustain a claim for indemnity from the subcontractor the injury had to arise from the subcontractor's work.¹¹⁵ One federal court has stated that "a general principle applicable to this . . . question is that an obligation to indemnify requires some relationship between the work done by the subcontractor under the subcontract and the injury."¹¹⁶ This principle flows from the express language of the indemnity provisions and can be modified by different contract language.¹¹⁷

The courts may look to other provisions of the contract, particularly the insurance provisions, to determine the scope of the available indemnity.¹¹⁸ The Iowa Supreme Court has determined the scope of indemnity that is available by looking at the scope of the indemnitor's insurance.¹¹⁹ The court found that a requirement to provide general liability insurance, rather

than completed operations insurance, reveals an intention to limit the duty to indemnify to the duration of performance.¹²⁰ In *Modern Piping*, the contract only required a subcontractor to have general liability insurance, indicating that the duty to indemnify terminated upon completion of performance.¹²¹ Thus, the subcontractor had no duty to indemnify for damages caused by a sprinkler leak that occurred after completion of the work.¹²² In *Campbell v. Mid-American Construction Co.*,¹²³ the court interpreted the indemnification provision as limiting the coverage for damages or injuries to the duration of the performance of the subcontract.¹²⁴

B. *What Is Required to be Paid?*

The indemnity agreement defines “the scope of the area in which indemnity is available.”¹²⁵ Many construction contracts indemnify against losses and expenses¹²⁶ and some impose a duty to defend.¹²⁷ The duty to indemnify and hold harmless does not necessarily include or impose a duty to defend.¹²⁸

“The general rule is attorney fees are not recoverable unless authorized by statute or contract.”¹²⁹ An indemnity agreement may provide that attorney’s fees are due for defense of claims even without establishing that the indemnitor is liable on the underlying claim.¹³⁰

IX. BREACH OF AN INDEPENDENT DUTY

Absent an express promise of indemnity, the common law allows indemnity based on a breach of an independent duty.¹³¹ Iowa courts have found independent duties based on contracts and torts.¹³² Iowa courts have not yet found an independent duty of a contractor based on a statute or regulation.¹³³ The court's decisions make it difficult to predict whether a duty is sufficiently definite and precise to be considered an independent duty whose breach would require indemnity.

A. Independent Duties Based on Contract

A breach of contract may require a party to indemnify another party even when there is no express indemnification contract.¹³⁴ Only contractual duties of a specific and defined nature, however, are independent duties that can give rise to indemnity.¹³⁵ Not every breach of contract gives rise to a duty to indemnify.¹³⁶ Current case law is unclear as to which contractual duties are independent duties.

As a general rule, Iowa courts do not imply an agreement to indemnify in contracts for the sale of goods or service contracts.¹³⁷ Similarly, the Iowa courts do not imply independent duties because those duties are not sufficiently specific and definite to require indemnity upon their breach.¹³⁸

Courts focus on the express language of a contract to determine whether the contract creates an independent duty of indemnity.¹³⁹ Not all duties set forth in a contract are independent duties.¹⁴⁰

Iowa courts have found independent duties in contracts in very limited circumstances. Specifically, the courts have only found independent duties in the following circumstances: (1) when a contractor agrees¹⁴¹ to notify the utility of work near power lines;¹⁴² (2) when an express provision of a sales or service contract requires the purchaser to inspect, to perform necessary repairs, or to install safety devices;¹⁴³ (3) when the lessee of a building agrees to “remove snow from sidewalks;”¹⁴⁴ and (4) when a purchaser provides design modifications to the manufacturer.¹⁴⁵ Additionally, in dicta, Iowa courts have indicated that the duty to follow specific procedures or plans may be an independent duty allowing indemnity.¹⁴⁶

Finding an independent duty is rare. Iowa courts have not found an independent duty in the following situations: (1) when a contractor has no agreement with the utility to give notice of work near power lines;¹⁴⁷ (2) when a contract outlines the work to be performed;¹⁴⁸ (3) when a contractor must competently supervise, professionally manage, and successfully complete the project;¹⁴⁹ (4) when an implied duty requires a contractor to exercise proper skill and to complete

the project “in a reasonably good and workmanlike manner”;¹⁵⁰ and (5) when the only duty is the duty owed to every member of society: the duty not to harm another through tortious acts.¹⁵¹ Even though these cases have sustained and rejected indemnity claims, no bright line demarks independent duties from those that do not justify indemnity.

In conclusion, Iowa courts have held that, absent an express indemnity provision, a breach of a contractual provision will require indemnity only when the alleged indemnitor breaches a duty that is sufficiently specific and defined that it constitutes an independent duty.¹⁵² Labeling some contractual duties as independent duties does not clarify which duties are sufficient to sustain indemnity.¹⁵³ Iowa cases have set forth only a few general principles: (1) to state a claim for indemnity, the independent duty must run from the indemnitor to the indemnitee;¹⁵⁴ and (2) an independent duty is a specific and defined duty, and is usually a specific promise of an affirmative act.¹⁵⁵ The absence of precedents that clearly define which contractual duties sustain indemnity will result in continued litigation until the courts provide further clarification.

B. Independent Duties Based on Tort

In *Determan v. Johnson*,¹⁵⁶ the Iowa Supreme Court held that in construction disputes, tort actions should be brought only to remedy injuries resulting from a sudden and dangerous occurrence or for damage to property other than to the work itself.¹⁵⁷ Absent personal injury or damage to property other than the work itself, for which traditional tort remedies are available, a breach of contract action should be brought to remedy defective or poor construction.¹⁵⁸ Many recent indemnity claims have concerned personal injuries.¹⁵⁹

Iowa courts have required indemnity for breach of an independent duty arising from tort principles in very limited circumstances.¹⁶⁰ In general, this particular duty to indemnify arises from “liability based on the breach of an independent duty of care owed by the indemnitor.”¹⁶¹ This tort-based duty of care has limited, if any, application for requiring indemnity in construction law.¹⁶²

C. Independent Duties Based on Safety Regulations

Safety regulations covering construction or maintenance practices do not create an independent duty running from the indemnitor to the indemnitee.¹⁶³ The Iowa Supreme Court has never held that OSHA standards create an independent duty in favor of a party making a claim for indemnity.¹⁶⁴ The court also has held that state statutes and regulations do not imply a

duty to indemnify. For example, the owner of an elevator owes no independent duty to the contractor who built the elevator to inspect it or maintain it as required by state law.¹⁶⁵ These safety statutes and regulations only establish benefits in favor of individuals at risk for injury, not third parties seeking indemnity; thus, these regulations do not give rise to an independent duty.¹⁶⁶

D. *One's Own Negligence and the Breach of an Independent Duty*

The law will not imply a duty to indemnify for the indemnitee's own negligence.¹⁶⁷ An indemnitor will be required to indemnify the indemnitee for its own negligence only upon a showing that the indemnitor agreed to do so.¹⁶⁸ Implied indemnity, by definition, is not based on an agreement to indemnity; rather, it is implied by law or implied in fact.¹⁶⁹ The Iowa Supreme Court "summarily reject[ed] the argument that the law implies a right to indemnify a party to recover damages attributed to its own negligence."¹⁷⁰

IX. VICARIOUS LIABILITY

Only in limited circumstances have courts applied vicarious liability principles in construction indemnity disputes.¹⁷¹ In *State Auto Mutual Insurance Co. v. Dover Construction*,

Inc. (Dover III),¹⁷² Judge Bennett refused to grant a motion for summary judgment, noting that the general contractor may be liable to a subcontractor's injured employee because the general contractor had a duty to provide a safe working environment.¹⁷³ In later cases, the same court has clarified the exceptions to the general rule ““that an employer of an independent contractor is not vicariously liable for injuries arising out of the contractor's negligence’.”¹⁷⁴ Both contracts and tort principles give rise to duties that are exceptions to this general rule.¹⁷⁵

The contractual liability exception holds a general contractor liable for the injuries of a subcontractor's employees when the general contractor has contracted to provide a safe workplace.¹⁷⁶ An employee injured by the breach of this duty has standing to bring a claim against the general contractor as a third-party beneficiary of the contract.¹⁷⁷

The control of the workplace exception gives rise to a nondelegable duty, based on tort principles, to take reasonable precautions to provide a safe workplace.¹⁷⁸ In *Farris v. General Growth Development Corp.*,¹⁷⁹ the Iowa Court of Appeals said:

The duty imposed upon [the possessor] to exercise reasonable care to prevent injuries on the job site may be premised upon its possession and control of the premises. . . . Restatement (Second) of Torts section 422 provides that normally an owner of property is

liable for injuries caused to others by the unsafe condition of the property as long as he has possession of the land. However, comment (c) provides that an owner is not liable for injuries occurring while the land is turned over to a contractor since possession usually is surrendered fully in the case of construction. The logical converse of this provision is that the general contractor acquires possession in such circumstances.¹⁸⁰

If the general contractor has possession of the workplace by, for example, having a supervisor on site, then the contractor has a duty to the subcontractor's employees.¹⁸¹ The breach of this duty may be remedied in tort.¹⁸²

Additionally, Judge Bennett has indicated that the Restatement (Second) of Tort's doctrine of peculiar risk or inherent danger of the work may establish a duty to take reasonable precautions to maintain a safe workplace.¹⁸³

X. WORKERS' COMPENSATION EXCLUSIVITY

A party seeking indemnity from an employer for payments made to an injured employee seemingly would violate the employer's immunity from liability provided by Iowa's workers' compensation statute.¹⁸⁴ Generally, workers' compensation is the exclusive remedy through which employees may recover from their employers due to injuries arising out of and in the

course of employment.¹⁸⁵ Under workers' compensation theories, an employer is statutorily liable but not liable in tort.¹⁸⁶ Requiring an employer to indemnify a person who has paid the damages for a tort claim brought by the injured employee exposes the employer to greater damages than would seem consistent with the workers' compensation statute. Such an indemnity claim would also invoke the employer's general liability coverage rather than the employer's workers' compensation insurance coverage.

One ground for indemnity that is barred by the workers' compensation statute is that a party may not seek indemnity from an employer on grounds that the employer is primarily liable in tort for the employee's injuries.¹⁸⁷ The workers' compensation statute precludes this claim because an employer is only statutorily liable, and not liable in tort, to an injured employee; this principle precludes common liability between the employer and any other tortfeasors.¹⁸⁸ Also, without common liability, the tortfeasors have no right of contribution from the employer.¹⁸⁹ The exclusivity of the workers' compensation statute bars any cause of action alleging negligence of or seeking contribution from the injured employee's employer.¹⁹⁰

An indemnitee may claim indemnity against an employer because of their relationship and not because of any negligent act by the employer, because negligence claims are barred by

the workers' compensation statute's exclusivity.¹⁹¹ Iowa law permits an indemnitee, notwithstanding workers' compensation exclusivity, to recover from the injured employee's employer based on an express contract of indemnity, a theory of vicarious liability, or a breach of an independent duty.¹⁹² In *Johnson v. Interstate Power Co.*,¹⁹³ the court held that "[a]n independent duty in this context means an obligation sufficiently independent so that it cannot be said to be a liability based on account of the employee's injury that forms the basis for the employer's immunity."¹⁹⁴ A claim for indemnity based on an express contract, vicarious liability, or a breach of an independent duty is not barred by the workers' compensation statute because it is not premised on the common liability of the injured employee's employer.¹⁹⁵

XII. PROCEDURAL MATTERS

A. *Pleading and Proving Liability*

In *Ke-Wash Co. v. Stauffer Chemical Co.*,¹⁹⁶ the Iowa Supreme Court followed the principle that for a party to state a claim for indemnity after settlement, the indemnitee must plead and prove that: "(1) it was liable to the injured party, (2) the settlement was reasonable, and (3) the facts are such as to give rise to a duty on the part of the indemnitor to indemnify the indemnitee."¹⁹⁷

After settlement or trial of an injured construction worker's tort claims, a paying defendant may seek indemnity from a party who should have paid the claim.¹⁹⁸ In such a subsequent action for indemnity, a prior judicial determination of liability for the underlying claim normally establishes that the indemnitee was liable to an injured party, and the issue of whether the indemnitee was liable to the underlying claimant need not be relitigated.¹⁹⁹ However, disputes about liability to an injured party may arise when the indemnitee has settled a case.²⁰⁰ In *McNally*, the court discussed the following:

The first principle is that a party who seeks to establish a right to indemnity in an independent action must normally plead and prove it was liable to the injured party. The rationale for this rule is tied to the fundamental concept that indemnity involves the shifting of responsibility of liability for loss from one who is legally responsible to another.²⁰¹

Unless the indemnitee established liability for the underlying claim, any payment made by the indemnitee would simply have been simply voluntary.²⁰² Courts do not permit indemnity for voluntary payments.²⁰³ This rule, however, may be changed by agreement.²⁰⁴ Specifically, the Iowa Supreme Court said that “express indemnification agreements can alter the common law

rules on indemnity by calling for indemnification in the absence of underlying liability between the indemnitee and the injured party.”²⁰⁵ For example, an indemnification and hold harmless clause for costs related to legal claims has been held to alter the common law rule.²⁰⁶ Absent the common law requirement of proving the liability on the underlying claim, an indemnitee may state a claim for indemnification by pleading (1) that the indemnitor has a duty to indemnify the indemnitee; and (2) the amount to be indemnified is reasonable.²⁰⁷

The Iowa Supreme Court has held that the common law rule requires that the underlying cause of action must be a claim covered by an indemnification agreement.²⁰⁸ If the underlying claim is not “covered” by the terms of the indemnification agreement, then no indemnity is required.²⁰⁹ For example, the lessor in *McNally* was sued for negligence based on a defect in a crane rather than based on its failure to operate or erect the crane properly.²¹⁰ Since the indemnification agreement excluded indemnity for the lessor’s negligence, the allegations of the lessor’s negligence was covered by the indemnity agreement and, accordingly, no indemnity was permitted.²¹¹

The implications for subsequent cases are significant. The court has yet to address the situation where the underlying claim is that the indemnitee breached a contract with a third party

due to the negligence of the indemnitor.²¹² For example, an owner might breach a contract or a warranty with a third party (e.g., general contractor) due to the alleged negligence of an architect or engineer.²¹³ Although the language of the indemnification clause may not cover the original cause of action by the third party against the owner, because the underlying cause of action does not allege the negligence of the indemnitee, the owner should have an opportunity to prove that the negligence of the architect or engineer caused the breach of contract or warranty.

If an indemnitee settles a claim, the amount sought by the indemnitee must be reasonable,²¹⁴ in terms of both the settlement and attorney fees.²¹⁵ A judicial determination that a settlement is reasonable is conclusive of the issue.²¹⁶ A settlement of the underlying case by an indemnitee does not waive any right to indemnity.²¹⁷

The indemnitee must prove that the indemnitor is “legally obligated to discharge the obligation for which the [indemnitee] seeks indemnity.”²¹⁸ An indemnitor has no duty to indemnify the indemnitee when the indemnitee has forfeited or relinquished its indemnification and lien rights under the workers’ compensation statute.²¹⁹

B. Role of the Judge and Jury

As long as interpretation of the indemnity provision does not depend on extrinsic evidence, construction and interpretation of an indemnity provision is to be decided by the court.²²⁰ The court determines whether a party is liable for indemnity.²²¹ Juries examine extrinsic evidence to determine the meaning of ambiguous terms and to allocate fault.²²² The fault of each party may have to be determined before addressing whether the indemnitor has a duty to indemnify the indemnitee.²²³ Unless the indemnitor agreed to indemnify for the negligence of the indemnitee, the negligence of the indemnitee must be established before the indemnitor has a duty to indemnify.²²⁴ Absent an agreement to the contrary, the portion of the underlying claim for which the indemnitor is responsible is the portion of fault assigned by the jury.²²⁵

C. Bifurcation or Severance

A trial court may bifurcate the claims involving the injured party from the indemnity claims.²²⁶ Judge Bennett severed the indemnity claims in *Eischeid v. Dover Construction, Inc. (Dover IV)*²²⁷ after concluding the following:

Specifically, such a severance is most likely to result in clarity and avoidance of confusion of the issues that each jury must decide, and also result in judicial

economy and expedition, in the sense that each trial will be brief and focused.

Severance will focus the damages trial against [the general contractor] entirely on the issue of [the injured party's] damages, without interjecting issues regarding how those damages will be divided among [the general contractor] and the third parties as a result of indemnity claims.²²⁸

To serve the interest of judicial economy other courts have decided to avoid the redundant presentation of evidence rather than bifurcate trials.²²⁹

XIII. PROPOSED LEGISLATION

Historically, state legislatures and courts disfavor indemnification for one's own negligence.²³⁰ Many states have recognized that contractors and subcontractors cannot effectively bargain over indemnity provisions and that they accept more risk than is economically prudent.²³¹ The hostility towards indemnifying a negligent party appears in statutes prohibiting indemnification of one's own negligence and one's sole negligence as well as in court decisions that narrowly construe indemnification clauses.²³²

Currently, Iowa has no statute addressing indemnification for one's own negligence. Master Builders of Iowa has proposed legislation to eliminate indemnification for one's own

negligence in construction contracts.²³³ The proposed legislation is modeled²³⁴ after a New Mexico statute.²³⁵ The Iowa legislature may consider this matter in the 2005 legislative session.²³⁶

In almost all construction projects, the architects, engineers, general contractors, subcontractors, and sub-subcontractors carry insurance to cover indemnity obligations.²³⁷ Thus, when considering indemnification for one's own negligence, a pertinent question is whether the insurer of the negligent party should be held responsible or whether the allocation of responsibility by the parties should control.

Currently, Iowa law permits an indemnitee to be indemnified for its own negligence only if the indemnitor clearly and unequivocally agreed to do so.²³⁸ Iowa is one of nine states to have adopted this or a similar rule in the absence of legislation addressing the subject.²³⁹

Many states have adopted statutes precluding indemnification for one's own negligence.²⁴⁰ These statutes usually say that an indemnity provision requiring an indemnitor to indemnify an indemnitee for its own negligence²⁴¹ or for the negligence of the indemnitee²⁴² is void and not enforceable. Other statutes use language prohibiting indemnification of any underlying claims that resulted "partially or solely from"²⁴³ or was caused "in whole or in

part”²⁴⁴ by the negligence of the indemnitee. Certain statutes prohibit the indemnitee from being indemnified for its own negligence.²⁴⁵

These statutes do not prohibit indemnification for claims resulting from the negligence of the indemnitor.²⁴⁶ To permit the indemnitee to be indemnified for any negligence of the indemnitor imputed to the indemnitee, the Iowa legislature should indicate that negligence will not be imputed to the indemnitee when deciding the scope of the indemnitee’s negligence.

Many states have adopted the rule that an indemnitee cannot be indemnified if the underlying claim resulted from the sole negligence of the indemnitee.²⁴⁷ South Dakota’s statute is fairly typical:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the

promisee, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable.²⁴⁸

South Dakota courts interpret this statute to prohibit indemnification for one's own negligence if one's own negligence is the sole cause of the injury.²⁴⁹ That is, this type of statute only addresses the most extreme circumstances where the indemnitee is completely at fault and the indemnitor is free from fault.

The Iowa legislature would do well to consider the limitations placed on construction indemnification by Minnesota Statute § 337.01-.05²⁵⁰ on construction indemnification. Minnesota renders indemnification agreements in construction contracts unenforceable "except to the extent" that the injury or damage is attributable to the promisor's negligence or breach of contract.²⁵¹ Minnesota statute § 337.02 expressly provides as follows:

an indemnification agreement contained in, or executed in connection with, a building and construction contract is unenforceable except to the extent that: (1) 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 delegates; or (2) an owner, a responsible party, or a governmental entity agrees

to indemnify a contractor directly or through another contractor with respect to strict liability under environmental laws.²⁵²

The cases interpreting this statute make clear that indemnification agreements are enforceable only to the extent of the indemnitor's negligence and that "each link in the chain of construction [is] responsible for the consequences of its own negligence."²⁵³

Minnesota has several exceptions, including one for a contractual requirement that a construction contractor purchase "specific insurance coverage for the benefit of others."²⁵⁴ For example, a requirement that a subcontractor purchase liability insurance to cover the contractor's own negligence is enforceable in Minnesota.²⁵⁵

When a party required to purchase specified insurance to cover the negligence of others fails to do so, that party may have the obligation to indemnify the promisee to the extent of the specified insurance.²⁵⁶ Under the statute and case law interpreting the Minnesota construction indemnity provisions, contractors and subcontractors are required to indemnify only to the extent of their own negligence and are not required to indemnify other parties for those parties' negligence, unless the construction contract included a requirement of the purchase of insurance to cover another party's negligence or fault.²⁵⁷ Such insurance requirements are enforceable in

Minnesota, and the failure to purchase the specified insurance makes the party required to purchase that insurance the indemnitor to the extent of the specified insurance.²⁵⁸

Some statutes forbidding indemnification for one's own negligence or for one's sole negligence expressly provide that it has no effect on indemnity of a surety,²⁵⁹ workers' compensation statutes,²⁶⁰ and insurance agreements.²⁶¹

IVX. CONCLUSION

Iowa courts often address indemnity claims arising out of construction disputes by examining the express contract rather than by implying duties based on tort law.²⁶² A focus on the contract rather than implying duties gives effect to the expectations of the parties, although problems arise because of the disparity of bargaining power or lack of attention to the provisions.²⁶³

Recently, courts have broadly interpreted indemnification agreements by requiring the indemnitor to indemnify for the indemnitee's own negligence.²⁶⁴ These court decisions have kindled interest in legislation prohibiting indemnification for one's own negligence, and such legislation may succeed in passage.²⁶⁵

¹ McComas-Lacina Constr. Co. v. Able Constructors, 641 N.W.2d 841, 844–45, 847–48 (Iowa 2002).

² See, e.g., Cochran v. Gehrke, Inc. (*Cochran III*), 305 F. Supp. 2d 1045, 1047 (N.D. Iowa 2004) (addressing a contractor’s indemnity claims after a workplace accident resulted in one worker’s death and another’s critical injury); Eischeid v. Dover Constr., Inc. (*Dover II*), 265 F. Supp. 2d 1055–59 (N.D. Iowa 2003) (determining the enforceability and scope of an indemnification provision after a worker was injured at a construction site).

³ See, e.g., Employers Mut. Cas. Co. v. United Fire & Cas. Co., 682 N.W.2d 452, 456–57 (Iowa Ct. App. 2004) (addressing the issue of whether a surety waives its limitation of liability under a performance and payment bond when it chooses to assume performance of the principal’s contract in lieu of paying the amount of the bond after the principal defaults).

⁴ See *infra* Part ____.

⁵ See *infra* Part ____.

⁶ See *infra* Part ____.

⁷ See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc., 648 N.W.2d 564, 570 (Iowa 2002) (“Under a contract for indemnification, ‘one party (the *indemnitor*) promises to hold another party (the *indemnitee*) harmless for loss or damage of some kind.’” (quoting II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.3, at 108 (2d ed. 1998))); Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger, 172 N.W.2d 137, 142 (Iowa 1969), *overruled on other grounds* by Lewis v. State, 256 N.W.2d 181 (Iowa 1977), *superseded by statute on*

other grounds, Act of June 16, 1971, ch. 131, 1971 Iowa Acts 286 (codified at IOWA CODE § 123.94 (2005)), *as recognized in Ayers v. Straight*, 422 N.W.2d 643 (Iowa 1988).

⁸ *See Hunt v. Ernzen*, 252 N.W.2d 445, 447–48 (Iowa 1977).

⁹ *See id.* at 447 (noting that indemnity is allowed on equitable principles because it shifts the burden of a liability to the party who should rightfully bear it).

¹⁰ *Iowa Elec. Light & Power Co. v. Gen. Elec. Co.*, 352 N.W.2d 231, 236 (Iowa 1984); *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969).

¹¹ *Hunt*, 252 N.W.2d at 447–48 (citing *McCarthy v. J.P. Cullen & Son Corp.*, 199 N.W.2d 362, 371 (Iowa 1972)); *see also Iowa Elec. Light & Power Co.*, 352 N.W.2d at 236; *Peters*, 168 N.W.2d at 767.

¹² RESTATEMENT (FIRST) OF RESTITUTION § 76 (1937); *see also Hunt*, 252 N.W.2d at 448 (citing RESTATEMENT (FIRST) OF RESTITUTION § 76 (1937)); *Iowa Home Mut. Cas. Co. v. Farmers Mut. Hail Ins. Co.*, 73 N.W.2d 22, 26 (Iowa 1955) (“A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability.” (quoting RESTATEMENT (FIRST) OF RESTITUTION § 96 (1937))).

¹³ See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 574 (Iowa 2002) (stating that indemnity combines contract and tort law as well as a variety of equitable and public policy considerations).

¹⁴ RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1979). The Iowa Supreme Court specifically upheld a trial court’s findings supported by the Restatement. See *Iowa Elec. Light & Power*, 352 N.W.2d at 238–39; see also *Hunt*, 252 N.W.2d at 448 (“Indemnity is a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other.” (quoting WILLIAM PROSSER, LAW OF TORTS § 51 (4th ed. 1971))).

¹⁵ *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 10 (Iowa 1970).

¹⁶ *Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger*, 172 N.W.2d 137, 142 (Iowa 1969).

¹⁷ *Id.*

¹⁸ *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 308 (Iowa 1966).

¹⁹ *Allied Mut. Cas. Co. v. Long*, 107 N.W.2d 682, 684 (Iowa 1961) (noting that contribution requires joint tortfeasors, meaning two or more individuals are jointly and severally liable).

²⁰ *Iowa Power & Light Co.*, 144 N.W.2d at 308; *see also* *Herter v. Ringland-Johnson-Crowley Co.*, 492 N.W.2d 672, 673 (Iowa 1992) (permitting contribution between two subcontractors when both have indemnity provisions in favor of the general contractor, and one subcontractor discharged the duty of both to the general contractor, thereby conferring a benefit on the other subcontractor).

²¹ *Cochran v. Gehrke Constr. (Cochran I)*, 235 F. Supp. 2d 991, 999 (N.D. Iowa 2002); *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 136 (Iowa 1984) (holding “that the right of contribution in Iowa is conditioned on the existence of common liability”); *Stowe v. Wood*, 199 N.W.2d 323, 326 (Iowa 1972) (holding that indemnitor cannot claim a right of contribution from an indemnitee).

²² *Cochran I*, 235 F. Supp. 2d at 998–99. There is no common liability between the employer of an injured worker and a third party who has contributed to the employee’s injury, because of the exclusive remedy provisions of the Iowa Worker’s Compensation Act. *Id.* at 999 (citing *Iowa Power & Light Co.*, 144 N.W.2d at 306. However, indemnity claims are permitted by the third

party against the employer if there is an indemnification agreement or a breach of an independent duty. *See infra* Part XI.

²³ Woodruff Constr. Co. v. Barrick Roofers, Inc., 406 N.W.2d 783, 785 (Iowa 1987) (quoting A. Larson, *Workmen's Compensation: Third Party's Action over Against Employer*, 65 NW. U. L. REV. 351, 368–69 (1970)).

²⁴ *Id.* at 784–85. *But see* Payne Plumbing & Heating v. Bob McKiness Excavating & Grading, Inc., 382 N.W.2d 156, 159–60 (Iowa 1986) (holding that a claim for damages by a general contractor against its subcontractor for repair costs on a project was governed by an indemnity agreement providing that the subcontractor would indemnify and hold harmless the general contractor for loss or damage).

²⁵ Ke-Wash Co. v. Stauffer Chem. Co., 177 N.W.2d 5, 13 (Iowa 1970) (illustrating that a contract to indemnify is quite distinct thing from an unqualified promise to perform); *see also* Mut. Serv. Cas. Ins. Co. v. Armbrrecht, 142 F. Supp. 2d 1101, 1105 (N.D. Iowa 2001) (“[I]n *Ke-Wash* . . . , the Iowa Supreme Court recognized the two theories of recovery based on a claim for breach of contract and a claim for indemnification and ultimately concluded that the theories were, indeed, separate and distinct.”). Iowa courts have also recognized that a breach of

warranty claim is separate and distinct from a claim for indemnity. *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 626 (Iowa 1998) (citing *Campbell v. Mid-Am. Constr. Co.*, 567 N.W.2d 667, 671 n.2 (Iowa Ct. App. 1997), *overruled on other grounds* by *Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22 (Iowa 1999)).

²⁶ *See, e.g., Armbrecht*, 142 F. Supp. 2d at 1106–07.

²⁷ *Id.* at 1111.

²⁸ *Id.* at 1108. Another difference is that an indemnity claim requires proof that the indemnitee was liable to the underlying claimant. *Id.*

²⁹ *Kaydon Acquisition Corp. v. Custum Mfg., Inc. (Kaydon I)*, 301 F. Supp. 2d 945, 960 (N.D. Iowa 2004) (“Generally, the right to indemnification is not . . . an unqualified promise to pay by the indemnitor.” (quoting *Vermeer v. Sneller*, 190 N.W.2d 389, 392 (Iowa 1971))).

³⁰ *Kaydon I*, 301 F. Supp. 2d at 959 (citing *Evjen v. Brooks*, 372 N.W.2d 494, 496 (Iowa 1985)); *Israel v. Farmers Mut. Ins. Ass’n*, 339 N.W.2d 143, 146 (Iowa 1983) (citing *Vermeer*, 190 N.W.2d at 392); *see also Becker v. Cent. States Health & Life Co.*, 431 N.W.2d 354, 357 (“In an agreement to indemnify, a cause of action does not accrue unless and until some actual loss or damage has been suffered. In contrast, . . . an action for breach of contract accrues when the

time for doing such an act or making such payment has occurred and the promiser has failed to perform.”).

³¹ *Britt-Tech Corp. v. Am. Magnetics Corp.*, 487 N.W.2d 671, 673 (Iowa 1992) (citing *Sweeney v. Pease*, 294 N.W.2d 819, 821 (Iowa 1980)). The Iowa Supreme Court has rejected the doctrine of indemnity based upon active-passive negligence because it does not fit within the statutory network of comparative fault. *Daniels v. Hi-Way Truck Equip., Inc.*, 505 N.W.2d 485, 490 (Iowa 1993) (reiterating its abandonment of the decision to reject the doctrine of indemnity based upon active-passive negligence (citing *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989))). After abandoning the active-passive distinction, the court considered a claim for indemnity based on a theory of primary-secondary liability in *Britt-Tech Corp.*, 487 N.W.2d at 673–74.

The decisions of the Iowa Supreme Court provide many examples of shifting the burden of liability from one party, which has discharged a statutory obligation, to another party, which should bear the ultimate burden. *See, e.g.*, *Peters v. Lyons*, 168 N.W.2d 759, 767–68 (Iowa 1969) (holding that a dog owner who was liable under a statute could obtain indemnity from the seller of a defective chain); *Franzen v. Dimock Gould & Co.*, 101 N.W.2d 4, 10 (Iowa 1960)

(holding that the city could obtain indemnity from an abutting property owner for injury to a third party); *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 508 (Iowa 1951) (holding that a common carrier which was liable under statute could obtain indemnity from an operator); *City of Des Moines v. Barnes*, 30 N.W.2d 170, 173 (Iowa 1947) (holding that a city liable because of statutory duty could obtain indemnity from creator of dangerous condition).

The basis for indemnity based on vicarious liability is represented by the Iowa Supreme Court's decision in *Federated Mutual Implement & Hardware Ins. Co. v. Dunkelberger*, 172 N.W.2d 137, 141–42 (Iowa 1969). The court held that an automobile owner, whose liability was vicarious by reason of a statute and arose from the operator's negligence and the dramshop's violations, was entitled to indemnity against a dramshop. *Id.* at 141. The owner was an innocent party and "not guilty of intentional wrong or moral turpitude." *Id.*

"The first three grounds [of indemnity] are based upon a relationship existing between the indemnitor and the indemnitee. The fourth ground is based solely upon a common liability arising from the concurrent negligence of the parties." *Hansen v. Anderson, Wilmarth & Vander Maaten*, 630 N.W.2d 818, 823 (Iowa 2001) (citation omitted). The Iowa Supreme Court has abandoned the doctrine of indemnity based on primary-active liability versus secondary-passive

liability because it is incompatible with “its statutory network of comparative fault.” *Am. Trust & Sav. Bank*, 439 N.W.2d at 190.

³² *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 (Iowa 2002) (quoting II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.3, at 108 (2d ed. 1998)).

³³ *Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc.*, 540 N.W.2d 647, 649 (Iowa 1995); *Walker v. Ryan Cos. US, Inc.*, 149 F. Supp. 2d 849, 855 (S.D. Iowa 2001) (citing *Martin & Pitz Assocs. Inc. v. Hudson Constr. Servs. Inc.*, 602 N.W.2d 805, 808–09 (Iowa 1999)).

³⁴ *McNally*, 648 N.W.2d at 570 (citing *Jenckes v. Rice*, 93 N.W. 384, 385 (1903)).

³⁵ *Id.* (citing Robert L. Meyers III & Debra A. Perelman, *Risk Allocation Through Indemnity Obligations in Construction Contracts*, 40 S.C. L. REV. 989, 990 (1989)).

³⁶ *Bunce v. Skyline Harvestore Sys., Inc.*, 348 N.W.2d 248, 250 (Iowa 1984).

³⁷ *McNally*, 648 N.W.2d at 571 (citing *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 916 (Iowa 1975)); *see also* *Campbell v. Mid-Am. Constr. Co.*, 567 N.W.2d 667, 669 (Iowa 1997) (citing *Bunce*, 348 N.W.2d at 250); *Sward v. Nelson Constr., Inc.*, No. 01-0020, 2003 WL

118206, at *3 (Iowa Ct. App. Jan. 15, 2003) (citing *McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841, 845 (Iowa 2002)).

³⁸ *Martin & Pitz Assocs., Inc. v. Hudson Constr. Serv., Inc.*, 602 N.W.2d 805, 809 (Iowa 1999) (citing 41 AM. JUR. 2D *Indemnity* § 13 (1995)).

³⁹ *Farm & City Ins. Co. v. Gilmore*, 539 N.W.2d 154, 157 (Iowa 1995); *see also Kaydon I*, 301 F. Supp. 2d 945, 958 (N.D. Iowa 2004) (“Even assuming that an insurance policy is analogous to an indemnity agreement in all pertinent respects—a premise that the court by no means accepts as true—courts have recognized that an insurer’s duty to defend an insured is necessarily broader than its duty to indemnify its insured.”).

⁴⁰ *See Martin, Inc.*, 602 N.W.2d at 808–09 (noting that indemnity contracts should be interpreted against the person who wrote the agreement). In insurance indemnity contracts, the insurers (the indemnitors) write the contracts. In the construction business, the owners or its agents (indemnites) usually write or choose the contract forms. Thus, the rule of construction that disfavors the drafter would seem to explain the apparent inconsistent treatment of indemnitors in the construction industry from indemnitors in the insurance industry. *See Winfield State Bank v.*

Snell, 226 N.W. 774, 777 (Iowa 1929) (holding that “[c]onstruction should be most strongly against the user of the words”).

⁴¹ *McNally*, 648 N.W.2d at 571 (citing *McComas-Lacina Constr. Co.*, 641 N.W.2d 841, 845 (Iowa 2002)); *Herter v. Ringland-Johnson-Crowley Co.*, 492 N.W.2d 672, 674 (Iowa 1992) (citing *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156, 160 (Iowa 1986)).

⁴² *See McNally*, 648 N.W.2d at 575 (noting “that express indemnification agreements can alter the common law rules on indemnity by calling for indemnification in the absence of underlying liability between the indemnitee and the injured party.”) (citing 42 C.J.S. *Indemnity* § 23(b) (1991)).

⁴³ *Id.*

⁴⁴ *Id.* at 572–73.

⁴² In *Cochran III*, Judge Bennett summarized Iowa’s rules of contract interpretation and construction as follows:

[I]nterpretation is a process for determining the meaning of words in a contract while construction is a process of determining the legal effect of such words The primary

goal of contract interpretation is to determine the parties' intentions at the time they executed the contract. Interpretation involves a two-step process. First, . . . the court determines whether a disputed term is ambiguous Once an ambiguity is identified, the court must then choose among possible meanings. If the resolution of ambiguous language involves extrinsic evidence, a question of interpretation arises which is reserved for the trier of fact [W]here the dispute centers on determining the legal effect of contractual terms, the court engages in the process of construction, rather than interpretation [C]onstruction is always a question of law.

Cochran III, 305 F. Supp. 2d 1045, 1055–56 (N.D. Iowa 2004) (quoting *Cent. States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005, 1032–33 (N.D. Iowa 2003) (internal quotations, citations and alterations omitted)).

⁴⁶ *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 624 (Iowa 1998) (quoting *R.E.M. IV, Inc. v. Robert F. Ackermann & Assocs., Inc.*, 313 N.W.2d 431, 433 (Minn. 1981)).

⁴⁷ *Id.*

⁴⁸ *See, e.g.*, AIA DOCUMENT A201-1997 (1997), GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, para. 3.18.1 [hereinafter AIA DOCUMENT A201-1997] (naming the parties for which indemnity is available).

⁴⁹ *See, e.g., Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.* 602 N.W.2d 805, 807–08 (Iowa 1999) (analyzing whether an employee’s fault in causing his own injury may be imputed to his employer).

⁵⁰ *See, e.g., McNally*, 648 N.W.2d at 572–73 (stating that even “broad indemnity language may reveal an intent to indemnify an indemnitee for its own negligence”) (citing *Reliance Ins. Co. of Ill., Inc. v. Richfield Hospitality Servs., Inc.*, 92 F. Supp. 2d 1329, 1336 & n.6 (N.D. Ga. 2000)).

⁵¹ *See generally id.* at 574–76 (discussing the shifting of responsibility for liability of an underlying claim through indemnification).

⁵² *See, e.g., Cochran I*, 235 F. Supp. 2d 991, 994 (N.D. Iowa 2002); *McNally*, 648 N.W.2d at 568; *Martin*, 602 N.W.2d at 806; *Sward v. Nelson Constr. Inc.*, No. 01-0020, 2003 WL 118206, at *1–2 (Iowa Ct. App. Jan. 15, 2003).

⁵³ *Martin*, 602 N.W.2d at 809.

⁵⁴ The Iowa Supreme Court’s discussion does not clearly state the reason why the rule was selected among competing lines of authority, but the court’s emphasis appears to be on cases that state a party does not act tortiously to itself but only to others. *See id.* at 807. The Iowa Court of

Appeals' subsequent discussion of the *Martin* decision shows that the basis of the decision was not clear. *Sward*, 2003 WL 118206, at *4–5.

⁵⁵ *Martin*, 602 N.W.2d at 808–09 (noting that the rule against imputing one's own negligence is one of the “unique rules [that] apply in the construction of indemnity contracts,” and the general rule is that “indemnifying agreements will be enforced according to their terms”).

⁵⁶ *See, e.g., id.* at 808 (detailing the provisions of an indemnity contract which provided that indemnity was triggered only by a negligent act).

⁵⁷ *See Sward*, 2003 WL 118206, at *5.

⁵⁸ *Id.* at *1.

⁵⁹ *Id.* at *5.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841 (Iowa 2002).

⁶³ *Id.* at 846–47.

⁶⁴ *Id.* at 844.

⁶⁵ *Id.* at 847.

⁶⁶ *See supra* notes 51–53 and accompanying text.

⁶⁷ *See supra* notes 54–57 and accompanying text.

⁶⁸ *See, e.g., McComas-Lacina*, 641 N.W.2d at 845. If the subcontractor's negligence caused the worker's injuries, then the general contractor's liability insurer may become liable for the imputed negligence of the subcontractor to the general contractor, and the subcontractor employer's general liability insurer may become liable for the injuries under its contractual liability endorsement which covers the indemnification obligation of the subcontract. *See id.* at 847 (holding that an indemnity agreement may apply if the subcontractor was negligent and was the proximate cause of the subcontractor's employee's injuries).

⁶⁹ *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 572 (Iowa 2002).

⁷⁰ *Id.*

⁷¹ *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 916 (Iowa 1975).

⁷² *McNally*, 648 N.W.2d at 572 (citing *Reliance Ins. Co. of Ill., Inc. v. Richfield Hospitality Servs., Inc.*, 92 F. Supp. 2d 1329, 1335–36 (N.D. Ga. 2000)).

⁷³ *Martin & Pitz Assocs. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805, 809 (Iowa 1999) (internal quotations omitted).

⁷⁴ *McNally*, 648 N.W.2d at 571 (citing *McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841, 843 (Iowa 2002)); *accord* *Maxim Techs., Inc. v. City of Dubuque*, 690 N.W.2d 896, 901 (Iowa 2005).

⁷⁵ *Maxim Techs.*, 690 N.W.2d at 896.

⁷⁶ *See McNally*, 648 N.W.2d at 570–71; *Maxim*, 690 N.W.2d at 900–01.

⁷⁷ *McComas-Lacina*, 641 N.W.2d at 845.

⁷⁸ *See, e.g.*, *EFCO Corp. v. M.W. Builders, Inc.*, No. 02-0654, 2003 WL 21229414, at *1–2 (Iowa Ct. App. May 29, 2003) (recognizing “a special rule of construction for indemnification contracts” that provides that they “will not be construed to permit an indemnitee to recover for its own negligence unless the intention of the parties is clearly and unambiguously expressed” (citing *McNally*, 648 N.W.2d at 570)); *Iowa Wine & Beverage, Inc. v. Martens*, No. 01-1587, 2002 WL 1973924, at *2 (Iowa Ct. App. Aug. 28, 2002) (upholding the district court’s conclusion that “the clear intent of the language of the agreement is to provide indemnification for [the lessor]’s own negligence” (internal quotation omitted)).

⁷⁹ *See Cochran v. Gehrke, Inc. (Cochran II)*, 293 F. Supp. 2d 986, 998 (N.D. Iowa 2003) (recognizing the “clear and unequivocal test” as set out in numerous Iowa Supreme Court cases).

⁸⁰ *See Cochran II*, 293 F. Supp. 2d at 998–99 & n.1 (finding that a subcontractor clearly and unambiguously agreed to indemnify a general contractor of its own negligence, while disagreeing with the Iowa Supreme Court’s interpretation of similar language).

⁸¹ *McNally*, 648 N.W.2d at 572 (quoting *Herter v. Ringland-Johnson-Crowley Co.*, 492 N.W.2d 672, 674 (Iowa 1992)).

⁸² *Id.*

⁸³ *Id.* (citing *Evans v. Howard R. Green Co.*, 231 N.W.2d 907, 916 (Iowa 1975)).

⁸⁴ *Id.*

⁸⁵ *See id.* at 570–71 (“Indemnification is commonly utilized in construction contracts . . .”).

⁸⁶ *See generally id.* at 571 (explaining that allowing for the indemnitee’s negligence it is an exception to the general rule).

⁸⁷ *Cf. Bethlehem Steel Corp. v. Chi. E. Corp.*, 863 F.2d 508, 523 (7th Cir. 1988) (noting that upstream indemnification against manufacturers of defective products is usually permitted, given that such manufacturers should be held liable for damages they cause in placing their defective products into the stream of commerce).

⁸⁸ Need support.

⁸⁹ *Cochran II*, 293 F. Supp. 2d at 998–99. The court set forth the relevant indemnity provision:

The Subcontractor agrees to indemnify and save harmless the Contractor from any and all loss or damage (including, without limiting the generality of the foregoing, legal fees, and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph), occasioned wholly or in part by any negligent act or omission of the subcontractor or that of anyone directly or indirectly employed by them or performing the work of this Subcontract under the direction of the Subcontractor or anyone for whose acts any of them may be liable in carrying out the provisions of the general contract and of this Subcontract regardless of whether or not it is caused in part by a party indemnified hereunder.

Id. at 989.

⁹⁰ See AIA DOCUMENT A201-1997, *supra* note 44, at para. 3.18.1.

⁹¹ *Cochran II*, 293 F. Supp. 2d at 998.

⁹² *Id.*

⁹³ *Id.* at 997. The underlying question then, is who are the persons for whose acts the subcontractor may be liable? The answer, generally, is the persons the subcontractor hires or brings to the job, rather than the general contractor or owner, who brings the subcontractor to the job. *Id.*

⁹⁴ *Cochran II*, 293 F. Supp. 2d at 998.

⁹⁵ AIA DOCUMENT A201-1997, *supra* note 44, at para. 3.18.1

⁹⁶ See *R.E.M. IV, Inc. v. Robert F. Ackermann & Assocs., Inc.*, 313 N.W.2d 431, 435 (Minn. 1981) (“If the subcontractor is to assume risks for acts not under his control, the subcontractor must be put on notice by clear and unambiguous language.”). The Minnesota Supreme Court has interpreted the phrase “by anyone for whose acts any of them may be liable” as not requiring the purchase of insurance arising out of anyone’s operations except for the activities of the subcontractor and any persons working “downstream” from it. *Katzner v. Kelleher Constr.*, 545 N.W.2d 378, 382 (Minn. 1996) (internal quotation omitted).

⁹⁷ See *Martin & Pitz Assocs. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805, 806 (Iowa 1999) (stating that in the lower court, the jury found the injured employee one hundred percent at fault).

⁹⁸ *Id.* at 807–08.

⁹⁹ *See id.* The court recited the indemnity provision at issue:

[T]he *Contractor shall indemnify and hold harmless* the Owner [University], *Architect* [MPA], Architect's consultants, and agents and employees . . . *from and against claims, damages, losses and expenses . . . but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.*

Id. at 806. This provision, including the phrase “anyone for whose acts they may be liable,” is based on the American Institute of Architects Document A201-1997. *See* AIA DOCUMENT A201-1997, *supra* note 44, at para. 3.18.1. In interpreting paragraph 3.18.1 of the contract, the court also relied on a nearby provision, paragraph 3.18.3, that stated:

The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Architect, the Architect’s consultants, and agents and employees of any of them arising out of (1) *the preparation or approval of maps, drawings,*

opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

Martin, 602 N.W.2d at 809. This provision is also derived from American Institute of Architects Document A201-1997. See AIA DOCUMENT A201-1997, *supra* note 44, at para. 3.18.3.

¹⁰⁰ *Martin*, 602 N.W.2d at 809.

¹⁰¹ *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 572–73 (Iowa 2002) (considering indemnification clauses in terms of both a lease and a rental agreement). The lease agreement stated:

C. . . . Lessee shall be responsible for normal maintenance and for repair of any damage incurred

D. INSURANCE AND LIABILITY OF LEASEE [sic]: . . . Lessee assumes full responsibility for and indemnifies Lessor against and will protect and save Lessor against harm from any and all loss, liability, damage, and expense in connection with any injury or claim of injury of Lessee's employees and will save Lessor

harmless from any and all loss, liability, damage, and expense to other persons or any property arising from or in connection with the use or operation of the leased equipment

Id. at 567–68.

The rental agreement stated:

[B.] (iii) DAMAGES. Lessee shall be liable for any and all damage to any persons or property while said equipment is in Lessee's possession, except for damage caused by defects in the equipment.

. . . .

G. ATTORNEY'S FEES. In the event either party institutes suit in court against the other party in connection with any dispute or matter arising under this Agreement, the prevailing party shall be entitled to recover a reasonable attorney's fee in addition to any other relief granted by the court.

H. FULL AGREEMENT. The agreement constitutes the full and complete understanding between the parties

Id. at 568.

¹⁰² *Id.* at 573.

¹⁰³ *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616 (Iowa 1998),
overruled on other grounds by Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, 594 N.W.2d 22
(Iowa 1999).

¹⁰⁴ *Id.* at 624. The provision read:

INDEMNITY. The Subcontractor [Blackhawk] shall defend and indemnify Modern Piping, Inc. and the Owner [Mortenson] and their agents and employees from and against all claims, damages, losses and expenses (including without limitation legal fees and disbursements) arising in whole or in part out of or relating to the Subcontractor's Work, including without limitation the failure or alleged failure of the Subcontractor to perform any obligation under this Subcontract. The Subcontractor agrees to assume entire responsibility and liability for all damages or injury to all persons, whether employees or otherwise, and to all property, arising out of or resulting in whole or in part from or in any manner connected with, the execution of the Work under this Subcontract or occurring or resulting in whole or in part from the use by the Subcontractor, its agents or

employees, of materials, equipment, instrumentalities or other property, whether the same be owned by Modern Piping, Inc., the Subcontractor or third parties; . . .

. The Subcontractor's obligation under this paragraph expressly excludes only total liability created by the sole and exclusive negligence of Modern Piping, Inc. or the Owner. The Subcontractor further agrees to obtain, maintain and pay for such general liability insurance coverage as will insure the provisions of this paragraph and other contractual indemnities assumed by the Subcontractor in this Subcontract.

Id. at 622.

¹⁰⁵ *Weik v. Ace Rents, Inc.*, 87 N.W.2d 314 (Iowa 1958).

¹⁰⁶ *Id.* at 317 (internal quotations omitted). In *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, the court did not reach the issue of whether the indemnifying agreement provided for indemnification of the contractor's own negligence, although the case is often cited for the proposition. *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156, 160 (Iowa 1986). Rather, the court decided that a claim for "damages" was permitted by the plain language of the indemnifying agreement and required the

subcontractor to pay all the contractor's damages, regardless of whether the contractor was negligent in part. *Id.*

¹⁰⁷ See *Weik*, 87 N.W.2d at 317 (holding that if construction of the indemnity agreement is not required, the language of the indemnity agreement controls).

¹⁰⁸ See *Modern Piping*, 581 N.W.2d at 624 (citing *R.E.M. IV, Inc. v. Robert F. Ackermann & Assocs., Inc.*, 313 N.W.2d 431, 433 (Minn. 1981)); *Cochran II*, 293 F. Supp. 2d 986, 1000 (N.D. Iowa 2003).

¹⁰⁹ *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 577 (Iowa 2002) (citing *Ke-wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 11 (Iowa 1970)).

¹¹⁰ *Id.* at 578; *Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805, 809 (Iowa 1999).

¹¹¹ *McNally*, 648 N.W.2d at 577–78.

¹¹² *Martin*, 602 N.W.2d at 809.

¹¹³ *Ward v. Loomis Bros.*, 532 N.W.2d 807 (Iowa Ct. App. 1995).

¹¹⁴ *Evans v. Howard R. Green Co.*, 231 N.W.2d 907 (Iowa 1975).

¹¹⁵ *Ward*, 532 N.W.2d at 812 (relying on the terms that expressly required that the loss arise from the subcontractor's work); *Evans*, 231 N.W.2d at 916 (“[U]nder the indemnitee provision any right of indemnity against [the subcontractor] had to be due to the carrying on of [the subcontractor's] work.” (internal quotations omitted)); *see also* *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 625 (Iowa 1998) (interpreting the indemnification agreement to be limited in time because of a corresponding agreement to insure the obligation under the indemnification agreement).

¹¹⁶ *Cochran II*, 293 F. Supp. 2d 986, 1000 (N.D. Iowa 2003) (internal quotations omitted).

¹¹⁷ *See id.* (finding a relationship between the work done by the subcontractor under a subcontract and the injury sustained where an indemnity provision expressly provided for indemnity for negligent acts in carrying out the provisions of the general contract).

¹¹⁸ *Campbell v. Mid-Am. Constr. Co.*, 567 N.W.2d 667, 670 (Iowa Ct. App. 1997); *see also* *Am. Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.*, 586 N.W.2d 325, 334 (Iowa 1998) (finding that agreements should be interpreted as a whole and in a way that gives meaning to all terms, rather than in a way that renders a part unreasonable (quoting *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 26 (Iowa

1978)); Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 825 (Iowa 1987) (“[W]e adhere to the proposition that ‘a contract should be read and interpreted as an entirety rather than seriatim by clauses.’”(quoting Archibald v. Midwest Paper Stock Co., 176 N.W.2d 761, 763 (Iowa 1970)).

¹¹⁹ *Modern Piping*, 581 N.W.2d at 626.

¹²⁰ *Id.*

¹²¹ Need support.

¹²² *Id.* at 625–26.

¹²³ *Campbell v. Mid-Am. Constr. Co.*, 567 N.W.2d 667 (Iowa Ct. App. 1997).

¹²⁴ *Id.* at 670.

¹²⁵ *Kaydon I*, 301 F. Supp. 2d 945, 957 (N.D. Iowa 2004) (citing *Cochran II*, 293 F. Supp. 2d 986, 993–94 (N.D. Iowa 2003)).

¹²⁶ *See, e.g., McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841, 844–45 (Iowa 2002).

¹²⁷ *See, e.g., Modern Piping*, 581 N.W.2d at 622.

¹²⁸ *See Kaydon I*, 301 F. Supp. 2d at 958 (“The court has found no Iowa or other authorities holding that a duty ‘to indemnify and hold harmless’ necessarily imposes or implies a duty ‘to

defend.”); *see also* State Auto Mut. Ins. Co. v. Dover Constr., Inc. (*Dover III*), 273 F. Supp. 2d 1023, 1028 (N.D. Iowa 2003); Maxim Techs. v. City of Dubuque, 690 N.W.2d 896, 902 (Iowa 2005); Yegge v. Integrity Mut. Ins. Co., 534 N.W.2d 100, 102 (Iowa 1995).

¹²⁹ Ward v. Loomis Bros., 532 N.W.2d 807, 813 (Iowa Ct. App. 1995) (citing Tucker v. Nason, 87 N.W.2d 547, 549–50 (Iowa 1958)); *see also* Suss v. Schammel, 375 N.W.2d 252, 256 (Iowa 1985).

¹³⁰ Kaydon Acquisition Corp. v. Custum Mfg., Inc. (*Kaydon II*), 317 F. Supp. 2d 896, 911 (N.D. Iowa 2004).

¹³¹ *See* State *ex rel.* Miller v. Philip Morris, Inc., 577 N.W.2d 401, 406 (Iowa 1998) (noting that the bases for indemnity are breach of an independent duty, contractual indemnity, and vicarious liability). *See generally* Woodruff Constr. Co. v. Barrick Roofers, Inc., 406 N.W.2d 783, 785 (Iowa 1987) (proposing that a breach of an independent duty should be thought of as an “[implied contract] that put into promissory language the court’s finding that a party to the agreement ought to act as if he had made such a promise, even though nobody actually thought of it or used words to express it” (citing 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 561 (1960))); Iowa Power & Light Co. v. Abild Constr. Co., 144 N.W.2d 303, 309 (Iowa 1966)

(holding the breach of an independent duty running from the indemnitor to the indemnitee can give rise to a duty to indemnify).

¹³² See, e.g., *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001) (basing indemnity on tort principles); *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 (Iowa 2002) (discussing the use of express contracts to indemnify). See generally *Farmers Coop. Co. v. Stockdales' Corp.*, 366 N.W.2d 184, 186 (Iowa 1985) (“In allowing indemnity for breach of an independent duty between the indemnitor and the indemnitee, we have previously made no distinction based on the nature of the liability of the indemnitee Contract liability as well as tort liability should be a proper subject of indemnity, even in the absence of an express contract.” (citing *Fla. Power Corp. v. Taylor*, 332 So. 2d 687 (Fla. Dist. Ct. App. 1976))).

¹³³ See, e.g., *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 315 (Iowa 1992); *Reese v. Werts Corp.*, 379 N.W.2d 1, 5 (Iowa 1985).

¹³⁴ See, e.g., *Stowe v. Wood*, 199 N.W.2d 323, 326 (Iowa 1972); *Iowa Power & Light*, 144 N.W.2d at 317.

¹³⁵ *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775, 782 (8th Cir. 1976); *accord Cochran I*, 235 F. Supp. 2d 991, 1000 (N.D. Iowa 2002) (quoting *Merryman v. Iowa Beef Processors, Inc.*, 978 F.2d 443, 445 (8th Cir. 1992)); *Johnson*, 481 N.W.2d at 320–21.

¹³⁶ *See, e.g., Larimer v. Raque Mfg. Co.*, 498 F. Supp. 37, 39 (S.D. Iowa 1980) (“[A]ny such implied duty to use due care that may be contained in the contract of sale is not enough to give rise to an implied agreement or duty to indemnify or contribute . . .”).

¹³⁷ *See McNally*, 648 N.W.2d at 573 (stating “a service contract or a sale and purchase contract alone is insufficient to imply indemnification for a loss”). The Iowa Supreme Court continued by saying that “[t]he indemnity that is implied is indemnity for the loss or liability incurred by one party to the contract as a result of the other party’s breach of a particular duty under the contract.” *Id.* at 574.

¹³⁸ *See, e.g., id.* at 575–76; *McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841, 844–46 (Iowa 2002); *see also Steinmetz v. Bradbury Co.*, 618 F.2d 21, 24–25 (8th Cir. 1980) (holding that an employer had no implied contractual obligation to train employees about operating dangerous equipment absent an independent contractual duty to do so and written instructions or safety warnings provided by the manufacturer); *W. Cas. & Sur. Co. v. Grolier Inc.*, 501 F.2d 434, 438 (8th Cir. 1974) (distinguishing a duty to indemnify based on the expressed terms of an agreement from a duty to indemnify based on an independent duty implied

from the relationship between the parties). *But see Steinmetz*, 618 F.2d at 24 (finding that an independent duty may be expressed or implied in a contract).

¹³⁹ See *McNally*, 648 N.W.2d at 570; *McComas-Lacina*, 641 N.W.2d at 844.

¹⁴⁰ See generally *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d (indicating that a contract binds the parties to all of the general duties agreed upon by the terms and further noting that specific contractual agreements may lead to a separate claim of indemnity).

¹⁴¹ Compare *id.* at 313–14 (stating that the contractor agreed to notify the utility a couple of days “before proceeding with work . . . , and plaintiff agreed, upon receiving such notification, to take safety precautions such as shutting off electrical service on the line during the period of construction near the line or moving the line temporarily away from the immediate vicinity of the work” (internal quotations omitted)), with *Mo. Pub. Serv. Co. v. Henningsen Steel Prods. Co.*, 612 F.2d 363, 367–68 (8th Cir. 1980) (concluding that the employer owed the utility only the general duty not to harm the utility through tortious acts, and that this general duty did not support a right of indemnity under either Iowa or Missouri law), *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775, 783 (8th Cir. 1976) (holding that the contractor owed only a general duty of care to the utility), and *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 321 (Iowa 1992) (holding that the contractor owed the utility no special duties because the transaction “was nothing more than the sale and purchase of electricity”).

¹⁴² *Johnson*, 481 N.W.2d at 317.

¹⁴³ *McNally*, 648 N.W.2d at 573 (“[T]he imposition of certain duties within a service or sales contract may imply an obligation for indemnification of a loss, such as the duty to inspect,

perform necessary repairs, or install necessary safety devices.” (citing *Johnson*, 481 N.W.2d at 319)).

¹⁴⁴ *Stowe v. Wood*, 199 N.W.2d 323, 326 (Iowa 1972).

¹⁴⁵ *Weggen v. Elwell–Parker Elec. Co.*, 510 F. Supp. 252, 254–55 (S.D. Iowa 1981).

¹⁴⁶ *See IBP, Inc. v. DCS Sanitation Mgmt. Servs., Inc.*, 498 N.W.2d 425, 427–28 (Iowa Ct. App. 1993); *see also Dover II*, 265 F. Supp. 2d 1047, 1058 n.3 (N.D. Iowa 2003); *Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1285–86 (N.D. Iowa 2000) (denying the subcontractor’s motion for summary judgment based in part on allegations that the subcontractor installer breached an independent duty to the purchaser to properly install the equipment “under the undisputed terms of the installation contract”);

¹⁴⁷ *See Mo. Pub. Serv. Co. v. Henningsen Steel Prods. Co.*, 612 F.2d 363, 365–68 (8th Cir. 1980); *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775, 782–83 (8th Cir. 1976); *Johnson*, 481 N.W.2d at 321–22.

¹⁴⁸ *See, e.g., Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116, 126–29 (Iowa 1976) (holding that an agreement to “furnish all materials and labor, including all necessary scaffolding, and fully construct and in a good, substantial, thorough and workmanlike manner perform and in every

respect complete the roofing and roof insulation requirements” and to “provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect, the Contractor or his authorized representatives” created no independent duty (emphasis omitted)).

¹⁴⁹ *Merryman v. Iowa Beef Processors, Inc.*, 978 F.2d 443, 445 (8th Cir. 1992).

¹⁵⁰ *Cochran I*, 235 F. Supp. 2d 991, 1003–04 (N.D. Iowa 2002) (discussing how the benefit of the duty to set up and operate the crane in a safe manner ran to the injured employee).

¹⁵¹ *Hysell*, 534 F.2d at 782–83 (citing *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 310–11 (Iowa 1966)).

¹⁵² *See supra* note 116 and accompanying text.

¹⁵³

¹⁵⁴ *See Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 824 (Iowa 2001)

(“To prove a claim for indemnity based on a breach of an independent duty, the party seeking indemnity must establish that the indemnitor owed a duty to the indemnitee.”); *Reese v. Werts Corp.*, 379 N.W.2d 1, 6 (Iowa 1985) (“Grounds for indemnity arise from the relationship between indemnitor and indemnitee, and they exist independently from those parties’ relationship to the claimant.”); *Rees v. Dallas County*, 372 N.W.2d 503, 505 (Iowa 1985)

(“Indemnity based on express contract, vicarious liability, or breach of an independent duty focuses on the relationship between the indemnitor and indemnitee.”).

¹⁵⁵ *See* *Weggen v. Elwell-Parker Elec. Co.*, 510 F. Supp. 252, 255 (S.D. Iowa 1981) (stating that the independent duty of due care is not contingent upon existing duties); *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 573 (Iowa 2002) (finding that establishing duties outside of a service or sales contract can create an independent duty); *Stowe v. Wood*, 199 N.W.2d 323, 326 (Iowa 1972) (declining to limit independent duties to limited fact situations); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d at 316-17 (holding that agreeing to do a specific act constituted an independent duty); *IBP, Inc. v. DCS Sanitation Mgt. Servs., Inc.*, 498 N.W.2d 425, 427–28 (Iowa Ct. App. 1993) (recognizing that failing safety requirements violated a defined independent duty).

¹⁵⁶ *Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000).

¹⁵⁷ *Id.* at 262 (citing *Nelson v. Todd’s Ltd.*, 426 N.W.2d 120, 125 (Iowa 1988)); *see also* *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 651 (Iowa Ct. App. 1996) (excluding economic losses to the product itself).

¹⁵⁸ *Richards*, 551 N.W.2d at 651 (citing *Nelson*, 426 N.W.2d at 125); *see also* Roger Stone, *Construction Damages in Iowa*, 52 DRAKE L. REV. 449, 452–53 (2004).

¹⁵⁹ *See, e.g., Cochran I*, 235 F. Supp. 2d 991, 994 (N.D. Iowa 2002); *Eisheid v. Dover Constr., Inc. (Dover I)*, No. C00-4100-MWB, 2001 WL 34008478, at *1 (N.D. Iowa Sept. 6, 2001); *McNally*, 648 N.W.2d at 568; *Sward v. Nelson Constr., Inc.*, No. 01-0020, 2003 WL 118206, at *1 (Iowa Ct. App. Jan. 15, 2003).

¹⁶⁰ *See, e.g., Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 825–26 (Iowa 2001) (holding that an attorney replying to a request for information has an independent duty to provide it truthfully); *Peters v. Lyons*, 168 N.W.2d 759, 767–68 (Iowa 1969) (listing four circumstances “which, if found to exist, will allow one negligent person to be indemnified by another notwithstanding any contract for indemnity”).

¹⁶¹ *McNally*, 648 N.W.2d at 570 n.1; *see also Peters*, 168 N.W.2d at 767 (“Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged.” (quoting *Epley v. S. Patti Constr. Co.*, 228 F. Supp. 1, 5 (N.D. Iowa 1964), *rev’d sub nom. Carstens Plumbing & Heating Co. v. Epley*, 342 F.2d 830 (8th Cir. 1965))).

¹⁶² This rule could apply when architects, engineers, contractors, or subcontractors are negligent because they relied on information given by a different party if the party giving the information knew it was false. Then, the negligent party may have a claim for indemnity against the party who provided the false information. *See Hansen*, 630 N.W.2d at 825 (allowing indemnity recovery by a third party).

¹⁶³ *See, e.g., Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 315 (Iowa 1992); *Reese v. Werts Corp.*, 379 N.W.2d 1, 5 (Iowa 1985). *But see Dover II*, 265 F. Supp. 2d 1047, 1058 n.3 (N.D. Iowa 2003) (implying that OSHA regulations may give rise to an independent duty).

¹⁶⁴ *Johnson*, 481 N.W.2d at 315.

¹⁶⁵ *Reese*, 379 N.W.2d at 5–6.

¹⁶⁶ *Johnson*, 481 N.W.2d at 315.

¹⁶⁷ *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987).

¹⁶⁸ *See supra* Part VI.B.

¹⁶⁹ *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576 n.2 (Iowa 2002).

¹⁷⁰ *Woodruff*, 406 N.W.2d at 785.

¹⁷¹ See, e.g., *Dover III*, 273 F. Supp. 2d 1023, 1030–31 (N.D. Iowa 2003); *Goebel v. Dean & Assocs.*, 91 F. Supp. 2d 1268, 1285 (N.D. Iowa 2000). In *Goebel*, the federal court discussed a common law indemnity claim without deciding if the parties had a contractual indemnity agreement. *Goebel*, 91 F. Supp. 2d at 1284. As the court noted, the indemnity and contribution claim asserted by the contractor against its subcontractor actually was only a claim for contribution under Iowa Code Chapter 668. *Id.* at 1286 & n.4. The court discussed how the subcontractor could be liable for indemnity to the general contractor for its failure to inspect the work of its sub-subcontractor or for breach of its nondelegable duty to ensure that the work was properly installed. *Id.* at 1285–87 (holding that the failure of the subcontractor to inspect the work of the sub-subcontractor created liability under Restatement (Second) of Torts section 412 and that the subcontract was vicariously liable for the nondelegable duty to ensure that the work was properly installed under Restatement (Second) of Torts section 404). This decision likely will have limited applicability to indemnity claims because the court treated the claim as a contribution claim, and the same court squarely addressed the issue of indemnity in the *Cochran* line of cases. See *Cochran III*, 305 F. Supp. 2d at 1058 (treating claims under the indemnity provision of a contract as claims for indemnity and not contribution); see *Cochran II*, 293 F.

Supp. at 1001–02 (treating claims as claims for indemnity); *see Cochran I*, 235 F. Supp. 2d at 999–1000 (dismissing the contribution claim for lack of common liability between the contractor and subcontractor).

¹⁷² *State Auto Mut. Ins. Co. v. Dover Constr., Inc. (Dover III)*, 273 F. Supp. 2d 1023 (N.D. Iowa 2003).

¹⁷³ *Id.* at 1029–31.

¹⁷⁴ *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 523–24 (Iowa 1992) (quoting *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 475 (Iowa 1980)); *see also Dover III*, 273 F. Supp. 2d at 1029–31; *Goebel v. Dean & Assoc.*, 91 F. Supp. 2d at 1285.

¹⁷⁵ *Cochran III*, 305 F. Supp. 2d 1045, 1057 (N.D. Iowa 2004) (basing the duty on a contract); *Eischeid v. Dover Constr., Inc. (Dover IV)*, 217 F.R.D. 448, 460 (N.D. Iowa 2003) (basing the duty on a contract and tort principles); *Dover III*, 273 F. Supp. 2d at 1030 (basing the duty on tort principles). Although the *Dover* and *Cochran* line of cases clarify the legal principles of indemnity in the state of Iowa, neither line considers whether a breach of the duty to provide a safe workplace gives rise to a duty to indemnify. The Iowa Supreme Court in *Peters v. Lyons* held “[t]he breach of nondelegable duties may constitute a basis for an action in indemnity

against a third person who creates a dangerous condition.” *Peters v. Lyons*, 168 N.W.2d 759, 766 (Iowa 1969). In *Dover IV* and *Cochran III*, the court did not address whether a subcontractor, as employer of an injured employee, may bring an indemnity claim against the general contractor for breach of a nondelegable duty. See *Cochran III*, 305 F. Sup. 2d at 1057; *Dover IV*, 217 F.R.D. at 460. In *Dover III*, the court indicated that only injured employees, and not their employers, have standing to bring a claim as a third-party beneficiary of the contract. *Dover III*, 273 F. Supp. 2d at 1030 (recognizing that a contract “impose[s] a duty on the general contractor to provide reasonable precautions for employee safety” (citing *Farris v. Gen. Growth Dev. Corp.*, 354 N.W.2d 251 (Iowa Ct. App. 1984))). Hence, if the duty only runs to the employee, the general contractor owes no duty to the subcontractor. In *Cochran III*, the court also stopped using the language of vicarious liability and only mentioned it in regard to counsel’s argument. See *Cochran III*, 305 F. Supp. 2d at 1051.

¹⁷⁶ *Cochran III*, 305 F. Supp. 2d at 1053–54.

¹⁷⁷ *Id.* at 1057–58.

¹⁷⁸ *Dover IV*, 217 F.R.D. at 460.

¹⁷⁹ *Farris v. Gen. Growth Dev. Corp.*, 354 N.W.2d 251 (Iowa Ct. App. 1984).

¹⁸⁰ *Farris*, 354 N.W.2d at 254 (footnote, alteration, and internal quotation marks omitted).

¹⁸¹ *Id.*

¹⁸² *Dover IV*, 217 F.R.D. at 463.

¹⁸³ *Cochran III*, 305 F. Supp. 2d at 1058 (declining to apply the principles of vicarious liability in addressing the issue of a nondelegable duty to take reasonable precautions to provide a safe workplace).

¹⁸⁴ *See, e.g., Dover II*, 265 F. Supp. 2d 1047, 1055 (N.D. Iowa 2003); *Cochran I*, 235 F. Supp. 2d 991, 998–99 (N.D. Iowa 2002); *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 134–36 (Iowa 1984); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 308 (Iowa 1966).

¹⁸⁵ IOWA CODE § 85.20 (2005); *see Estate of Harris v. Papa John’s Pizza*, 679 N.W.2d 673, 680 (Iowa 2004). The workers’ compensation statute, however, is not the exclusive remedy for an employee when the employer has failed to procure workers’ compensation insurance. IOWA CODE § 87.21.

¹⁸⁶ IOWA CODE § 85.20; *see Iowa Power & Light*, 144 N.W.2d at 306.

¹⁸⁷ *See Cochran I*, 235 F. Supp. 2d at 1005 (holding that the duty to discover or prevent misconduct may be sufficient to impose liability generally, but that such liability is barred by the

workers' compensation statute). *See generally* Woodruff Constr. Co. v. Barrick Roofers, 406 N.W.2d 783, 785 (Iowa 1987).

When an employer is the proposed indemnitor, the question whether an indemnity agreement will be implied under the circumstances of a particular case is a complex one, and its resolution turns on application of diverse and often competing, interests including public policy, simplicity of administration, fairness, and the underlying philosophy of workers' compensation law. Under these circumstances, there is no right or wrong answer.

Id. (internal citation omitted).

¹⁸⁸ *Cochran I*, 235 F. Supp. 2d at 999 (describing the workers' compensation statute as an "insuperable bar") (internal quotation marks omitted); *Weggen v. Elwell-Parker Elec. Co.*, 510 F. Supp. 252, 254 (S.D. Iowa 1981) (citing *Sweeny v. Peasy*, 294 N.W.2d 819, 821 (Iowa 1980)); *Iowa Power & Light*, 144 N.W.2d at 309.

¹⁸⁹ *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775, 783 (8th Cir. 1976) (citing *Iowa Power & Light*, 144 N.W.2d at 306).

¹⁹⁰ *Id.*; *Dover II*, 265 F. Supp. 2d 1047, 1051 (N.D. Iowa 2003); *McDonald v. Delhi Sav. Bank*, 440 N.W.2d 839, 841 (Iowa 1989) ("Thus, we have held that an employer's special defense under the worker's compensation act immunizes the employer from contribution to a third party

who was responsible for an employee's injuries." (citing *Iowa Power & Light*, 144 N.W.2d at 308)).

¹⁹¹ *Woodruff Constr. Co.*, 406 N.W.2d at 785.

¹⁹² *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 134 (Iowa 1984) (citing *Iowa Power & Light*, 144 N.W.2d at 308–09); *see Merryman v. Iowa Beef Processors, Inc.*, 978 F.2d 443, 444 (8th Cir. 1992) (stating that Iowa “permit[s] a third party to recover from the employer under an express contract of indemnity, notwithstanding worker’s compensation exclusivity”); *Hysell*, 534 F.2d at 782 (recognizing that Iowa law allows indemnity ““when the right arises out of a separate duty due the third party from the employer”” (quoting *Iowa Power & Light*, 144 N.W.2d at 309)); *Cochran I*, 235 F. Supp. 2d at 1007–08 (discussing theories upon which indemnity can be established and the exclusive remedy under the Iowa Workers’ Compensation Act).

¹⁹³ *Johnson v. Interstate Power Co.*, 481 N.W.2d 310 (Iowa 1992).

¹⁹⁴ *Id.* at 319 (internal quotation marks omitted).

¹⁹⁵ *Hysell*, 534 F.2d at 783; *McComas-Lacina Constr. Co. v. Able Constructors*, 641 N.W.2d 841, 844 (Iowa 2002). Iowa courts have not addressed the question of whether the breach of a duty based on tort principles can give rise to a claim for indemnity that is not preempted by the

workers' compensation statute. In *Thompson v. Stearns Chemical Corp.*, the Iowa Supreme Court cited and rejected *Dole v. Dow Chemical Co. Thompson*, 345 N.W.2d at 134–36 (citing *Dole v. Dow*, 282 N.E.2d 288 (N.Y. 1972)). The court cited *Dole* for the proposition that the New York workers' compensation statute “allows third-party indemnification from employer apportioned to each party's share of the fault with indemnification rights akin to contribution as it is asserted by the third party on its own right to recover for breach of independent duty of the employer to not negligently injure the employee.” *Id.* This citation indicates that Iowa's workers' compensation statute prevents an indemnitee from claiming indemnification from an employer due to a breach of an independent duty is based on tort principles.

¹⁹⁶ *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5 (Iowa 1970).

¹⁹⁷ *Id.* at 11; *see also McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 575 (Iowa 2002) (applying the same principle).

¹⁹⁸ *McNally*, 648 N.W.2d at 569.

¹⁹⁹ *Id.* at 574 (“Normally, a judgment in the underlying action will establish the essential liability to pursue indemnification.”).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 574 (citing *Ke-Wash*, 177 N.W.2d at 9–10).

²⁰² *Id.*

²⁰³ *Henning v. Sec. Bank*, 564 N.W.2d 398, 404 (Iowa 1997).

²⁰⁴ *McNally*, 648 N.W.2d at 575; *Ke-Wash*, 177 N.W.2d at 11.

²⁰⁵ *McNally*, 648 N.W.2d at 575.

²⁰⁶ *Kaydon II*, 317 F. Supp. 2d 896, 909–10 (N.D. Iowa 2004). The clause read:

12.2 *Indemnification by Seller.* Seller, ACI and the Mefferds shall, jointly and severally, *indemnify and hold* Buyer (and its shareholders, directors, officers, employees and affiliates) *harmless from and against any and all claims, liabilities* (including any strict liabilities with respect to any Loss specified under clause (iv) below), fines, penalties, natural resource damages, losses, damages, (including incidental or consequential damages such as lost profits resulting from any disruption of operation of the Assets), *costs and expenses (including costs and counsel fees) incurred by Buyer from or related to any of the following* (hereinafter called a "Loss" or "Losses"): . . . (iii) *any product liability claim* or other claim for the breach of any express or implied warranty, and any other claim

of whatever nature, and from all damages resulting therefrom, which may be
*made in connection with the sale of products manufactured by Seller prior to the
Closing Date[.]*

Id.

²⁰⁷ *Id.* at 910.

²⁰⁸ *McNally*, 648 N.W.2d at 577 (“[A]n indemnitee must show the circumstance of the original claim asserted by the injured party that resulted in the liability or the loss by the indemnitee was covered by the contract of indemnification.” (citing *Hoffman Constr. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 352 (Ala. 2001))).

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 578 (ruling an indemnitee cannot settle a claim alleging that the indemnitee’s own negligence resulted in harm and then claim indemnity when the indemnification provision excluded indemnity for one’s own negligence); *Martin & Pitz Assocs., Inc. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805, 809 (Iowa 1999) (same).

²¹³ See *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 222–23 (Iowa 1988)

(discussing the liability of a contractor for defects in the designs provided to it).

²¹⁴ *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 11 (Iowa 1970).

²¹⁵ *Wells' Dairy, Inc. v. Travelers Indem. Co. of Ill.*, 266 F. Supp. 2d 964, 969–70 (N.D. Iowa 2003) (noting that the reasonableness of fees is a question of fact to be determined by the trier of fact).

²¹⁶ *Kaydon II*, 317 F. Supp. 2d 896, 899 (N.D. Iowa 2004) (regarding, without expressly holding, that the prior judicial determination by a California court that the settlement was reasonable and was conclusive of the issue); *Kaydon I*, 301 F. Supp. 2d 945, 951 (N.D. Iowa 2004) (same).

²¹⁷ *McNally*, 648 N.W.2d at 578 (citing *Liberty Mut. Ins. Co. v. Pine Bluff Sand & Gravel Co.*, 849 F.3d 243, 248 (5th Cir. 1996)).

²¹⁸ *Henning v. Sec. Bank*, 564 N.W.2d 398, 401 (Iowa 1997) (citing *Chi. & N.W. Ry. v. Kramme*, 59 N.W.2d 204, 206 (Iowa 1953)).

²¹⁹ *Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc.*, 540 N.W.2d 647, 648–49 (Iowa 1995); *Sward v. Nelson Constr., Inc.*, No. 01-0020, 2003 WL 118206, at *6 (Iowa Ct. App. Jan. 15, 2003).

²²⁰ See *Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc.*, 581 N.W.2d 616, 623–24 (Iowa 1998), *overruled on other grounds by* *Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc.*, 594 N.W.2d 22 (Iowa 1999); *Campbell v. Mid-Am. Constr. Co. of Iowa*, 567 N.W.2d 667, 669–70 (Iowa Ct. App. 1997) (“The construction or legal effect of a contract is always a matter of law to be decided by the court, as is the interpretation or meaning of contractual words unless it depends on extrinsic evidence or a choice among reasonable inferences from extrinsic evidence.” (citing *Connie’s Constr. v. Fireman’s Fund Ins.*, 227 N.W.2d 207, 210 (Iowa 1975))); *see also Cochran II*, 293 F. Supp. 2d 986, 995–96 (N.D. Iowa 2003) (discussing the roles of the court and jury).

²²¹ *Cochran II*, 293 F. Supp. 2d at 995 (citing *Martin & Pitz Assocs. v. Hudson Constr. Servs., Inc.*, 602 N.W.2d 805, 808 (Iowa 1999)).

²²² See *Modern Piping*, 581 N.W.2d at 623 (noting that “the district court should have submitted special interrogatories on any relevant issues of fact”); *see also Cochran II*, 293 F. Supp. 2d at 996 (stating that extrinsic evidence is a question for the jury); *Dover II*, 265 F. Supp. 2d 1047, 1058 (N.D. Iowa 2003) (recognizing that assignment of fault is for the jury (citing *Sward*, 2003

WL 118206, at *5)); *Martin*, 602 N.W.2d at 806 (stating that the court interprets construction contracts when determining indemnification issues).

²²³ *See Cochran II*, 293 F. Supp. 2d at 1002.

²²⁴ *See, e.g., Sward*, 2003 WL 118206, at *5–6.

²²⁵ *Id.* at *5. When the employer of an injured employee is the indemnitor, the judge will order it to indemnify the indemnitee in accordance with the jury’s allocation of fault. *Id.* at *5. The Iowa Supreme Court has discussed the application of comparative fault principles in the context of workers’ compensation exclusivity and allocation of fault, and has concluded that the employer, rather than the injured third party, should bear the loss. *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 307 (Iowa 1966).

²²⁶ *See, e.g., Dover IV*, 217 F.R.D. 448, 466 (N.D. Iowa 2003); *Walker v. Ryan Cos. US, Inc.*, 149 F. Supp. 2d 849, 857 (S.D. Iowa 2001).

²²⁷ *Dover IV*, 217 F.R.D. at 448.

²²⁸ *Id.* at 466 (internal citation and quotation marks omitted).

²²⁹ *Walker*, 149 F. Supp. 2d at 857.

²³⁰ See generally Allen Holt Gwyn & Paul E. Davis, *Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law*, in *THE CONSTRUCTION LAW.*, Vol. 23, No. 3, Summer 2003, at 26 (2003).

²³¹ See Philip L. Bruner & Patrick J. O'Connor, Jr., 3 *BRUNER & O'CONNOR ON CONSTRUCTION LAW* § 10:90 (2002).

²³² See generally Gwyn & Davis, *supra* note 230, at 28.

²³³ See generally Master Builders of Iowa, Legislative priorities for 2005 Session, <http://www.mbionline.com/mbi/page.ww?section=Government+Affairs&name=Legislative+Priorities+for+2005+Session> (last visited Oct. 10, 2005) (indicating the Master Builders of Iowa's lobbying team will focus on promoting legislation that eliminates broad-form indemnification).

²³⁴ Need support.

²³⁵ N.M. Stat. Ann. § 56-7-1 (LexisNexis Supp. 2003). Section 56-7-1 states:

A. A provision in a construction contract that requires one party to the contract to indemnify, hold harmless, insure or defend the other party to the contract, including the other party's employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, arising out of bodily injury to persons or damage to property caused by or resulting from, in whole or in part, the

negligence, act or omission of the indemnitee, its officers, employees or agents, is void, unenforceable and against the public policy of the state.

B. A construction contract may contain a provision that, or shall be enforced only to the extent that, it:

(1) requires one party to the contract to indemnify, hold harmless or insure the other party to the contract, including its officers, employees or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of the indemnitor or its officers, employees or agents; or

(2) requires a party to the contract to purchase a project-specific insurance policy, including an owner's or contractor's protective insurance, project management protective liability insurance or builder's risk insurance.

C. This section does not apply to indemnity of a surety by a principal on any surety bond or to an insurer's obligation to its insureds.

D. As used in this section, 'construction contract' means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or

maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.

E. As used in this section, 'indemnify' or 'hold harmless' includes any requirement to name the indemnified party as an additional insured in the indemnitor's insurance coverage for the purpose of providing indemnification for any liability not otherwise allowed in this section.

Id.

²³⁶ A. DRAFTING ISSUE The statutory proposal has a drafting problem. Paragraphs A and B apparently conflict. The words "caused by or resulting from, in whole or in part," should be deleted from Paragraph A and the word "for" substituted in their place. Then the two paragraphs would appear consistent.

If the statute becomes enacted as written with the drafting error future indemnity provisions will be written so to require indemnity without regard to the indemnitee's negligence. Since the new provisions would not depend on a finding of the indemnitee's negligence "in

whole or in part," as a requirement, the prohibition in paragraph A would not apply or invalidate such provisions. This drafting issue needs careful consideration by the proponents.

Also, paragraph A makes indemnity unenforceable if the indemnitee is negligent "in part." That would not appear as what is intended; rather, the intent appears to be that the indemnitee should not be indemnified for its negligence or to the extent it is negligent. Paragraph A goes too far. For example, if a general contractor is 5% at fault because of its own negligence and another 50% at fault because of the imputing of the negligence of its subcontractor to it, the Iowa fault statute could make the general contractor jointly and severally liable for all damages (100%). Because that general contractor is 5% at fault for its own negligence Paragraph A would make the indemnity provision unenforceable even though Paragraph B would have allowed a provision that made the indemnitor responsible for its own negligence.

B. SECOND DRAFTING ISSUE: Paragraph A makes reference to negligence; Paragraph B does not. Eventually, a court will have to figure out the significance of the omission of the term "negligence" from Paragraph B. Does the omission reflect an intent that indemnity provisions do

not require a finding of negligence on the part of the indemnitor to enforce indemnity? The court will address this issue if the drafters do not.

C. RELATION TO WORKER'S COMPENSATION: The legislative proposal apparently intends to eliminate contractual indemnity, except where a person (e.g., a general contractor) becomes liable for the fault of one of its subcontractors. The proposal, if enacted, makes everyone responsible for their own fault under comparative fault statute, just as if no contractual indemnity provisions existed. The immunity provided an employer under the worker's compensation statute, however, will protect the employer of an injured worker (and its general liability insurer) from any contribution to the settlement or judgment.

The statutory proposal has a weakness in that it gives the employers of injured workers the full protection of limited liability under the workers compensation statute. Currently, a subcontractor (employer) may be the indemnitor under its subcontract and probably has to indemnify the owner, architect or general contractor if one of its employees was injured and made claims against those persons. Under the proposed legislation, those contracts are unenforceable. The employer, who is often in the best position to avoid injuries, would have only

workers compensation exposure and its injured employees could still bring negligence claims against the other persons at the site.

D. ISSUE OF IMPUTED NEGLIGENCE: Indemnification actions can get complex when the negligence of the subcontractor (employer) is imputed to the general contractor and the injured employee can recover against the general for the negligence of his own employer and that negligence is imputed to the general contractor. The employer may not be liable under the indemnity provision because it might be unenforceable under Paragraph A. In that event, the employer, who is often in the best position to avoid the injury, has no exposure for liability except through the workers compensation statute. Again, for example, the statutory proposal may mean that a general contractor who was liable in part (e.g., 5%) because of its own negligence and in part (e.g., 50%) because of the negligence of its subcontractor that is imputed to it might not be able to recover from the subcontractor (or the subcontractor's general liability insurer) because of the immunity of the worker's compensation statute.)

E. WORKER'S COMPENSATION INSURERS SUBROGATION SUITS: The legislative proposal will encourage workers compensation carriers to promote injury lawsuits even more than the current situation. Often workers compensation carriers and CGL carriers are the same

or related companies for a contractor or subcontractor. If the CGL carriers have no liability under the contractual liability endorsements (as proposed by the legislation), then the workers compensation carrier has nothing to lose by encouraging the worker to bring a third party claim or bringing that claim itself. A potential for more claims sponsored by workers compensation carriers exists, even though previously they may have been dissuaded by a related company's exposure under an indemnity provision.

F. OTHER (NONCONTRACTUAL) GROUNDS FOR INDEMNITY: The legislative proposal does not address other common law grounds for indemnity (primarily breach of an independent duty). These common law grounds require a breach of a duty so the indemnitor has done something wrong. Common law indemnity does not make someone responsible to indemnify someone for their own negligence; it takes an express intent to accomplish that result. If the proposal becomes law, the litigation between the general contractor's insurers and the subcontractor's insurers will focus on "breach of an independent duty" theory.

Regardless, a claim for common law indemnity may include that a party has breach a contract requirement that would amount to an "independent duty," (which is not clearly defined by the courts). If a party breaches an independent duty, it could be subject to a claim of

common law indemnity against by the party who suffered liability. The proposed legislation's effect on such a claim is uncertain. The proposed legislation purports to invalidate (any contractual provision). This could be left to the courts to sort out, but it is another issue raised by the proposed legislation.

G. LEGITIMATE CONCERNS VERSUS OVERSTATED CONCERNS: The statutory proposal addresses a legitimate concern of the construction industry. The concern of builders is that they have little or no bargaining power over indemnification provisions. Because the risk of injury is uncertain and other contractors who need work will overlook the risk, everyone in the industry basically accepts the provisions as drafted and then hopes for the best or hopes their insurance covers the risk.

Some recent court decisions appear to have made more likely the prospect of a contractor having to indemnify a person of their own negligence. These decisions may have rekindled the interest in the statutory proposal.

Any greater concern than these seems overstated. The ostensible concern for "improving long term construction costs" and "improving the overall business climate," seems overstated. A better proposal to achieve both ends would be to have one policy covering all risks on a

construction project. Then there would be just one premium, one insurer, and no fight over who was at fault. The total cost for insurance on the project should be reduced by a "one project policy" concept.

The concern over "promoting corporate responsibility," is also exaggerated. Thoughts about whether an employer's carrier may be responsible for injuries has very little to do with the safety practices at a site. Safety meetings, OSHA training, and vigilance at a project have so much more to do with safety than who may ultimately have insurance coverage. Few workers or supervisors probably discuss "who has insurance coverage" at a job site meeting.

²³⁷ Need support.

²³⁸ *See supra* note 65 and accompanying text.

²³⁹ *See, e.g.,* Royal Ins. Co. of Am. v. Whitaker Contracting Corp., 824 So.2d 747, 753 (Ala. 2002); Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co., 151 S.W.3d 306, 310 (Ark. 2004); Johnson v. Bd. of County Comm'rs, 913 P.2d 119, 136 (Kan. 1996); Emery Waterhouse Co. v. Lea, 467 A.2d 986, 993 (Me. 1983); Wallace v. Sherwood Constr. Co., 877 P.2d 632, 634 (Okla. Civ. App. 1994); Bernotas v. Super Fresh Food Mkts., Inc., 863 A.2d 478, 482 (Pa. 2004); Barrons v. J.H. Findorff & Sons, Inc., 278 N.W.2d 827, 831 (Wis. 1979); *see also* Fosson v. Ashland Oil & Refining Co., 309 S.W.2d 176, 178 (Ky. 1957) (holding that the clause must be

free from doubt); *Dunn v. CLD Paving, Inc.*, 663 A.2d 104, 106 (N.H. 1995) (stating that the language must “clearly and specifically” indicate the intention).

²⁴⁰ Specifically, eighteen states have adopted such a statute. *See* COLO. REV. STAT. § 13-50.5-102(8) (year) (Colorado); CONN. GEN. STAT. § 52-572k (year) (Connecticut); DEL. CODE ANN. tit. 6, § 2704 (1999) (Delaware); FLA. STAT. § 725.06 (year) (Florida); 740 ILL. COMP. STAT. 35/1 (year) (Illinois); LA. REV. STAT. ANN. § 38:2216(G) (2005) (Louisiana); MASS. GEN. LAWS ch. 149, § 29C (2004) (Massachusetts); MINN. STAT. § 337.02 (year) (Minnesota); MISS. CODE ANN. § 31-5-41 (1999) (Mississippi); MO. REV. STAT. § 434.100 (year) (Missouri); MONT. CODE ANN. § 28-2-2111 (2005) (Montana); NEB. REV. STAT. § 25-21, 187(1) (year) (Nebraska); N.M. STAT. ANN. § 56-7-1 (New Mexico); N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2001) (New York); N.C. GEN. STAT. § 22B-1 (2003) (North Carolina); OHIO REV. CODE ANN. § 2305.31 (LexisNexis 2005) (Ohio); R.I. GEN. LAWS § 6-34-1 (2001) (Rhode Island); TEX. GOV’T CODE ANN. § 2252.902 (Vernon 2000) (Texas).

²⁴¹ *See* COLO. REV. STAT. §§ 13-50.5-102(8); 740 ILL. COMP. STAT. 35/1; MISS. CODE ANN. § 31-5-41; MO. REV. STAT. § 434.100; NEB. REV. STAT. § 25-21,187(1); *see also* MASS. GEN. LAWS

ch. 149, § 29C (limiting the duty to indemnify to claims resulting from negligent acts of the indemnitor).

²⁴² See CONN. GEN. STAT. § 52-572k; LA. REV. STAT. ANN. § 38:2216(G); MINN. STAT. § 337.02; MONT. CODE ANN. § 28-2-2111; OHIO REV. CODE ANN. § 2305.31.

²⁴³ DEL. CODE ANN. tit. 6, § 2704(a); see also R.I. GEN. LAWS § 6-34-1(a) (prohibiting indemnification “caused by or resulting from” the indemnitee’s negligence); TEX. GOV’T. CODE ANN. § 2252.902(b)(1) (prohibiting indemnification “caused by or results from the sole, joint, or concurrent negligence of the indemnitee”).

²⁴⁴ See FLA. STAT. § 725.06; N.M. STAT. § 56-7-1; N.Y. GEN. OBLIG. LAW § 5-322.1(1); N.C. GEN. STAT. § 22B-1; OR. REV. STAT. ANN. § 30.140(1) (LexisNexis 2003).

²⁴⁵ See, e.g., *Sierra v. Garcia*, 746 P.2d 1105, 1108 (N.M. 1987) (“[L]iability arising in whole or in part from an indemnitee’s negligence . . . may not be contracted away by an indemnity agreement.”).

²⁴⁶ See, e.g., N.M. STAT. § 56-7-1; N.Y. GEN. OBLIG. LAW § 5-322.1(1) (“This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.”).

²⁴⁷ Specifically, eighteen states have adopted such a rule. ALASKA STAT. § 45.45.900 (2004) (Alaska); ARIZ. REV. STAT. ANN. § 32-1159 (2002) (Arizona); CAL. CIV. CODE § 2782 (West Year) (California); GA. CODE ANN. § 13-8-2 (2003) (Georgia); HAW. REV. STAT. § 431:10-222 (1993) (Hawaii); IDAHO CODE ANN. § 29-114 (year) (Idaho); IND. CODE § 26-2-5-1 (year) (Indiana); MD. CODE ANN., CTS. & JUD. PROC. § 5-401 (LexisNexis 2002) (Maryland); MICH. COMP. LAWS § 691.991 (year) (Michigan); N.J. STAT. ANN. § 2A:40A-1 (West 2000) (New Jersey); OR. REV. STAT. § 30.140 (year) (Oregon); S.C. CODE ANN. § 32-2-10 (year) (South Carolina); S.D. CODIFIED LAWS § 56-3-18 (2004) (South Dakota); TENN. CODE ANN. § 62-6-123 (1997) (Tennessee); UTAH CODE ANN. § 13-8-1 (1953) (Utah); VA. CODE ANN. § 11-4.1 (year) (Virginia); WASH. REV. CODE § 4.24.115 (year) (Washington); W. VA. CODE § 55-8-14 (year) (West Virginia).

A few other state statutes set forth rules about indemnification of one's own negligence unique to the relationship between the indemnitor and indemnitee. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-2586 (2004) (designating architects or engineers as indemnitees and contractors as indemnitors); *id.* § 34-226 (2000) (same); N.H. REV. STAT. ANN. § 338-A:1 (1995) (same); 68 PA. CONS. STAT. ANN. § 491 (2004) (same); TEXAS CIV. PRAC. & REM. CODE ANN. § 130.002 (Vernon 2005) (same); VA. CODE ANN. § 11-4.4 (Supp. 2005) (same); *see also* N.D. CENT. CODE § 9-08-02.1 (1987) (designating owners as indemnitees and contractors as indemnitors).

²⁴⁸ S.D. CODIFIED LAWS § 56-3-18 (2004).

²⁴⁹ *See* Becker v. Black & Veatch Consulting Eng'rs, 509 F.2d 42, 47 n.7 (8th Cir. 1974) (noting that a contract construed to allow such indemnification "would be contrary to the public policy of South Dakota and void" (citing S.D. CODIFIED LAWS § 56-3-18)).

²⁵⁰ MINN. STAT. §§ 337.01-.05 (2002).

²⁵¹ *Id.* § 337.02.

²⁵² *Id.*

²⁵³ *See Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 475 (Minn. 1992) (quoting *Holmes v. Watson-Forsberg Co.*, 471 N.W.2d 109, 112 (Minn. Ct. App. 1991) *rev'd*, 488 N.W.2d 473 (Minn. 1992)); *Seward Hous. Corp. v. Conroy Bros.*, 573 N.W.2d 364, 366 (Minn. 1998); *Katzner v. Kelleher Constr.*, 545 N.W.2d 378, 381 (Minn. 1996); *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 241–42 (Minn. Ct. App. 1996); *Seifert v. Regents of the Univ. of Minn.*, 505 N.W.2d 83, 85–86 (Minn. Ct. App. 1993).

²⁵⁴ *Van Vickel*, 556 N.W.2d at 241 (quoting MINN. STAT. § 337.05).

²⁵⁵ *Seifert*, 505 N.W.2d at 86.

²⁵⁶ MINN. STAT. § 337.05(2); *Van Vickle*, 556 N.W.2d at 241–42; *Holmes*, 488 N.W.2d at 475.

²⁵⁷ *See* MINN. STAT. § 337.05; *Van Vickle*, 556 N.W.2d at 241; *Holmes*, 488 N.W.2d at 475.

²⁵⁸ *See Van Vickle*, 556 N.W.2d at 241; *Holmes*, 488 N.W.2d at 475.

²⁵⁹ *See, e.g.*, MONT. CODE ANN. § 28-2-2111 (year); N.M. STAT. § 56-7-1(C) (year).

²⁶⁰ *See, e.g.*, ALASKA STAT. § 45.45.900 (2004); CAL. CIV. CODE § 2782 (West 1993); CONN. GEN. STAT. § 52-572k (1958); GA. CODE ANN. § 13-8-2 (2003); HAW. REV. STAT. § 431:10-222

(1993); MD. CODE ANN., CTS. & JUD. PROC. § 5-401 (LexisNexis 2002); N.J. STAT. ANN. § 2A:40A-1 (West 2000); N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2001); R.I. GEN. LAWS § 6-34-1 (1956); S.C. CODE ANN. § 32-2-10 (1991); VA. CODE ANN. § 11-4.1 (1999).

²⁶¹ See statutes cited *supra* note 212.

²⁶² See *supra* Part IX.A–B.

²⁶³ See *supra* Part IX.A–B.

²⁶⁴ See *supra* Part VII.B.

²⁶⁵ See *supra* Part XIII.