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NOTE

RETROGRESSION IN WORKMEN'S COMPENSATION: PRINCIPAL'S LIABILITY AND THE SUBCONTRACTOR CLAUSE

At the present time forty-one states¹ have as a part of their workmen's compensation legislation a subcontractor clause which generally imposes statutory liability for the injuries to a subcontractor's employees upon the principal contractor as well as the subcontractor. The purposes of the clause were to provide the principal contractor with an incentive for requiring that his subcontractors carry insurance, to prevent employer evasion of compensation liability by subdividing a job among small and irresponsible subcon-

1. All states except California, Delaware, Iowa, New Hampshire, North Dakota, Rhode Island, West Virginia. 2 Larson, *The Law of Workmen's Compensation* [hereinafter Larson] § 72.31 n. 22 (1952); 2 Schneider, *Workmen's Compensation* [hereinafter Schneider] § 326 n. 3 (1942).

tractors, and, even in the absence of such attempted evasion, to extend coverage to those employees.² Thus the goal of "protecting the worker from a life on a substandard level as the result of a disabling work injury"³ will be better achieved.

There is a considerable variation in wording in the several statutes.⁴ For example, the terms used to describe the person who must assume liability for his subcontractor's employee include contractor,⁵ principal,⁶ principal employer,⁷ and employer.⁸ In the remainder of this discussion, however, the normal three parties involved in a problem within the subcontractor statute will be designated principal, subcontractor, and employee merely to facilitate treatment of the subject.

In the application of subcontractor clauses, determination of the limits of that class of persons denoted principal frequently presents a litigious problem. This Note is intended to investigate these limits and some of the implications of the principal's liability to determine whether there has been "progressive judicial enlightenment"⁹ in this area to attain the purposes of subcontractor clauses, and more important, the goal of workmen's compensation legislation.

THE TECHNICAL CONTRACTOR-SUBCONTRACTOR RELATIONSHIP

Irregardless of the term used to describe the principal, it may be conceded at the outset that it should not be defined to include every person who contracts to have work done.¹⁰ For instance, legislatures certainly did not intend to make a college liable for accidental injuries suffered by an employee of the contractor who agreed to repair plumbing in the president's home.¹¹ On the other hand, to restrict liability under the subcontractor provision to the *technical*

2. See, e.g., 1 Larson § 49.11; 2 *id.* § 72.31; 2 Schneider § 326.

3. Riesenfeld, *Forty Years of American Workmen's Compensation*, 35 Minn. L. Rev. 525, 529 (1951).

4. For a representative survey of subcontractor statutes, see Ferguson, *Liability of Subcontractors Under Workmen's Compensation Laws*, 21 Notre Dame Law. 155 (1946); for a state-by-state resume of the specific statutes, see 2 Schneider §§ 327-377.

5. *E.g.*, N. Y. Workmen's Compensation Law § 56.

6. *E.g.*, Mich. Stat. Ann. § 17.150 (1951).

7. *E.g.*, Conn. Rev. Gen. Stat. § 7423 (1949).

8. *E.g.*, Wis. Stat. § 102.06 (1951).

9. Riesenfeld, *supra* note 3, at 528.

10. See, e.g., *Hudson v. Industrial Comm'n*, 241 Wis. 476, 480, 6 N. W. 2d 217, 219 (1942); *Wells Coal & Dock Co. v. Industrial Comm'n*, 224 Wis. 546, 548, 272 N. W. 480, 481 (1937); see Malone, *Principal's Liability for Workmen's Compensation to Employees of Contractor*, 10 La. L. Rev. 25, 27 (1949).

11. See *Lombard College v. Industrial Comm'n*, 294 Ill. 548, 128 N. E. 553 (1920).

contractor-subcontractor relationship¹² seems entirely too stringent. Here, as throughout the area of legal reasoning, care must be taken to avoid the pitfall of labeling. Absolving liability merely because the defendant is called an owner rather than a contractor neglects the objective of workmen's compensation.¹³

If an owner or proprietor delegates to another his normal duties or sublets work which he is under an obligation to perform, he should be included within that class of persons termed principal.¹⁴ Three important reasons are apparent in support of this proposition. First, a proprietor can subdivide his work just as easily as a contractor to avoid workmen's compensation. Second, there is no additional hardship imposed upon the proprietor because he has ample opportunity to select responsible subcontractors who will fully comply with these statutory provisions. Finally, the whole tenor of workmen's compensation and the judicial interpretation thereof is to broadly construe this legislation so that the maximum number of employees may be covered.¹⁵

Cognizance of these reasons very likely prompted many legislators to use terms less restrictive in connotation than "contractor."¹⁶ Furthermore, some statutes¹⁷ have been drafted to provide specifically that any person contracting-out or leasing their work or facilities shall be liable under the subcontractor clause, thereby prohibiting a narrow interpretation. Although designed with good purpose, such statutes may prove to be unwise if they fail to include within their categorization every person who can by some means evade the Act.

In Minnesota the statute consists of the usual subcontractor clause¹⁸ and a provision rendering a person liable where a "fraudulent scheme, artifice, or device" to avoid workmen's compensation is

12. Webster's New International Dictionary (unabridged 2d ed. 1947) defines contractor as "one who formally undertakes to do anything for another," and subcontractor as "[o]ne who contracts with a contractor to perform part or all of the latter's contract." Thus, technically, the subcontractor provision could be construed to be operative only when one person contracts to perform work for a person already under a contract obligation with reference to that work.

13. But see, *e.g.*, *Evans v. Tabor City Lumber Co.*, 232 N. C. 111, 59 S. E. 2d 612 (1950).

14. *See, e.g.*, *Madison Entertainment Corp. v. Industrial Comm'n*, 211 Wis. 459, 463, 248 N. W. 415, 416 (1933).

15. *See, e.g.*, *Moore v. McNulty Co.*, 171 Minn. 75, 79, 213 N. W. 546, 548 (1927); *Spanja v. Thibodaux Boiler Works*, 2 So. 2d 668, 672 (La. Ct. App. 1941).

16. Statutes such as those cited in notes 6-8 *supra*.

17. *E.g.*, Colo. Stat. Ann. c. 97, § 328 (1935).

18. Minn. Stat. § 176.30(4) (1949).

shown.¹⁹ When the attempt to evade liability is proved, apparently the principal will be liable whether he is a contractor, proprietor, owner, or lessor.²⁰ In the absence of a "scheme or device" however, the combination of provisions²¹ seems to have required the person to be a contractor in the narrow sense to fall within the protection of the subcontractor statute.²² Seemingly, the reason for this interpretation is that providing liability for "any person" who comes within the purview of the "scheme or device" section excludes a broad construction of the term "contractor" employed in the subcontractor provision. Thus there is an extension beyond the technical contractor-subcontractor relationship, but it still appears overly restrictive in two aspects: it is undoubtedly very difficult to determine what a "fraudulent scheme or device" is, and, further, to prove its existence once determined;²³ and the numerous employees of small and irresponsible subcontractors who have been legitimately delegated their work by a person not a "contractor" are as yet not covered by the statute.

THE "BUSINESS OR TRADE" TEST

Within the outer limits described above, the test to determine whether the defendant is a principal is: was the work performed by the subcontractor a part of the trade, business, or occupation of the principal? Many statutes²⁴ expressly require this before the subcontractor provision operates, and where not required by statute it nevertheless appears to be an integral part of judicial

19. Minn. Stat. § 176.30(1) (1949).

20. In the single Minnesota case where a scheme to evade the Act was found, the defendant was a lessor. *Washel v. Tankar Gas, Inc.*, 211 Minn. 403, 2 N. W. 2d 43 (1941). However, the term used in the "scheme or device" provision is "any person," which should be broad enough to include every type of principal.

21. Minn. Stat. § 176.30(1) (1949) ("scheme or device" section) and Minn. Stat. § 176.30(4) (1949) (subcontractor section).

22. *Nylund v. Thornberg*, 209 Minn. 79, 295 N. W. 411 (1940) (by implication).

23. Although under a similar Nebraska "scheme or device" statute, Neb. Rev. Stat. § 44-116 (1952), an agreement by the subcontractor to obviate the principal's liability and the principal's failure to require the subcontractor to carry insurance was held to be a scheme rendering the principal liable, *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645 (1924), it seems unlikely that the Minnesota statute will be interpreted as leniently, especially because only a "scheme" is required by the Nebraska statute compared with a "fraudulent scheme" in the Minnesota statute. See *Erickson v. Kircher*, 168 Minn. 67, 209 N. W. 644 (1926).

24. *E.g.*, Conn. Rev. Gen. Stat. § 7423 (1949); Mass. Ann. Laws c. 152, § 18 (1949).

decisions.²⁵ This test is the real crux of the determination; for the over-all purpose of the statute is to guarantee protection to the subcontractor's employees who are performing part of the principal's business.²⁶ Moreover, the theory of workmen's compensation is to shift the cost of injuries to the industry and ultimately to its consumers,²⁷ and when the injured employee is not engaged in the business of the principal who is nevertheless liable by statute, the damages are borne by the wrong industry and the wrong consumers.

One point which practically all courts agree upon is that the question of whether a particular activity is a part of a principal's business is usually one of fact,²⁸ and consequently adjudications of analogous fact situations often bring opposite results.²⁹ Opinions are filled with nebulous terminology attempting to define explicitly the line which separates the business of the principal from functions not a part of that business: *e.g.*, it must not be merely incidental, ancillary, or auxilliary to the business;³⁰ the subcontractor must be engaged in the commercial functions of the principal and not merely afford facilities or casual convenience in carrying on the business;³¹ or, the function the subcontractor has agreed to complete must be necessary to the prosecution of the principal's primary business.³²

This linguistic subterfuge achieves only a characterization of any fact situation. Instead, the extent of the principal's business should depend on the type of work in question and how it has been treated by the principal. The most decisive test in this regard is whether or not the activity is ordinarily and customarily done by the prin-

25. See, *e.g.*, *Amerada Petroleum Corp. v. Vaughan*, 200 Okla. 226, 192 P. 2d 639 (1948); *Great A. & P. Co. v. Industrial Comm'n*, 205 Wis. 7, 236 N. W. 575 (1931).

26. See note 2 *supra*.

27. 1 Larson § 1.00.

28. See, *e.g.*, *Johnson v. Robertson Bleachery & Dye Works, Inc.*, 136 Conn. 698, 704, 74 A. 2d 196, 199 (1950); *Dubois v. Soule Mill*, 323 Mass. 472, 476, 82 N. E. 2d 886, 888 (1948).

29. Compare *Burt v. Munising Woodenware Co.*, 222 Mich. 699, 193 N. W. 895 (1923) (repairing boiler part of utensil manufacturer's business), with *Wells Coal & Dock Co. v. Industrial Comm'n*, 224 Wis. 546, 272 N. W. 480 (1937) (repairing boiler *not* part of coal and building materials dealer's business). Compare *Fox v. Fafnir Bearing Co.*, 107 Conn. 189, 139 Atl. 778 (1928) (plant window washing part of manufacturer's business), with *American Radiator Co. v. Franzen*, 81 Colo. 161, 254 Pac. 160 (1927) (plant window washing *not* part of manufacturer's business).

30. See, *e.g.*, *Cummings v. Union Quarry & Const. Co.*, 231 Mo. App. 1224, 1228-1229, 87 S. W. 2d 1039, 1041 (1935).

31. See, *e.g.*, *Sears, Roebuck & Co. v. Wallace*, 172 F. 2d 802, 809 (4th Cir. 1949); *Iowa-Illinois Gas & Elec. Co. v. Industrial Comm'n*, 407 Ill. 360, 372, 95 N. E. 2d 482, 489 (1950).

32. See *Truhlicka v. Beech Aircraft Corp.*, 162 Kan. 535, 542, 178 P. 2d 252, 258 (1947).

cial.³³ This would seem to involve a consideration of the principal's past and present practices and the practices in similar businesses,³⁴ because this indicates what the principal has actually considered a part of his business. The regularity of the work in question is another factor to consider, since it has been held that special construction and usual repairs are not a part of a manufacturer's business.³⁵ In addition, the specialization of the activity ought to be considered, investigating whether this principal has employees with the same training and ability and how well both the principal and the subcontractor are equipped to perform the work.³⁶ Any one of these factors should not be an ultimate criterion, but it is not intended that this be an all-inclusive list of such factors. However, in each case these factors, its particular fact situation, and any other factors peculiar thereto should all be carefully examined to decide whether the activity is a part of the business of the principal.

RESTRICTIONS ON THE APPLICABILITY OF SUBCONTRACTOR CLAUSES

"Premises" test. Although the "business or trade" test is undoubtedly the most significant, in a few states the principal is liable only if the employee is injured on or at the principal's premises³⁷ or a place over which the principal has control.³⁸ This restriction is probably attributable to the legislative belief that to constitutionality attach this statutory liability here must be a possibility of control by the principal over the employee.³⁹ The evident fallacy is that the right to control is not the pivotal test for determining liability under a subcontractor statute as it is in deciding whether a person is an independent contractor or an employee,⁴⁰ and that control of the employee by the principal is not feasible when the subcontractor is his immediate and controlling employer. In addition, application

33. See, e.g., *Crisanti v. Crema Brewing Co.*, 136 Conn. 529, 532, 72 A. 2d 655, 657 (1950); *Cannon v. Crowley*, 318 Mass. 373, 375, 61 N. E. 2d 662, 664 (1945); see 1 Larson § 49.12.

34. See 1 Larson § 49.00; *Malone*, *supra* note 10, at 40.

35. *Bown v. Waterbury Battery Co.*, 129 Conn. 44, 26 A. 2d 467 (1942); *Horrell v. Gulf & Valley Cotton Oil Co.*, 131 So. 709 (La. Ct. App. 1930).

36. See *Atlas Powder Co. v. Hanson*, 136 F. 2d 444 (8th Cir. 1943); *Britton v. Industrial Comm'n*, 248 Wis. 549, 22 N. W. 2d 525 (1946); *Hudson v. Industrial Comm'n*, 241 Wis. 476, 6 N. W. 2d 217 (1942).

37. E.g., Minn. Stat. § 176.30(4) (1949).

38. E.g., Kan. Gen. Stat. Ann. § 44-503 (Corrick 1949); Mass. Ann. Laws c. 152, § 18 (1949).

39. See *D'Alessandro v. Barfield*, 348 Pa. 328, 332-334, 35 A. 2d 412, 413-414 (1944).

40. It has been said that even in the independent contractor-employee situation, a test similar to the "trade or business" test, termed the "relative-nature-of-the-work" test, is tending to replace the right to control concept. See 1 Larson § 45.00 *et seq.*

of the "premises" test often forces the courts to such absurd positions as extending a seed jobber's premises to include a customer's dock several miles away where the employee of a trucking subcontractor was making a delivery.⁴¹

Evasion by sales and leasing. Scheming principals were not completely halted by the subcontractor provision in their attempts to evade workmen's compensation. Other fictions are also used, the most important of which are leases and sales contracts. The lumber industry is a frequent source for sales arrangements⁴² whereby the lumber company will purchase stumpage rights from the landowner and then make a bill of sale to a cutter who agrees to resell the cut product to the lumber company at a certain higher price; in effect the price difference is only the cutter's wages plus any wages he must pay to his employees. That these middlemen are often financially unstable and their employees' remedies in workmen's compensation of little avail is shown by the fact that the sale is financed completely by the lumber company and gradually reduced as the lumber is delivered.⁴³ There is little difference between this arrangement and an ordinary principal-subcontractor relationship and in some extreme cases courts have so held.⁴⁴ On the other hand, if the sale is bona fide, no contractual relation sufficient to bring the parties within the statute exists,⁴⁵ and consequently, many employees in this area are not properly protected.⁴⁶

Minimum employees required. It appears obvious that the subcontractor statute should operate even though the subcontractor

41. *Swift v. Kelso Feed Co.*, 161 Kan. 383, 168 P. 2d 512 (1946); see also *Lee v. McMinn Industries, Inc.*, 167 Pa. Super. 501, 76 A. 2d 493 (1950). In the *Swift* case, it was argued in the dissenting opinion that this decision will necessarily subject all retailers and wholesalers who contract-out their deliveries to liability in workmen's compensation for injuries suffered by the employee-truck drivers. *Swift v. Kelso Feed Co.*, *supra* at 397, 168 P. 2d at 521. But today merchants commonly offer delivery as an integral part of their sales promotion, especially on the retail level, and thus it seems that in many cases such entrepreneurs should be deemed principals. This problem is significant because transportation is one of the functions in which the question of the principal's liability arises most frequently. See 1 Larson § 49.12.

42. See Malone, *supra* note 10, at 29.

43. See, for instance, *Hobbs-Western Co. v. Craig*, 209 Ark. 630, 192 S. W. 2d 116 (1946).

44. *Ibid.*; *Heyman v. Volkman*, 326 Mich. 179, 40 N. W. 2d 110 (1949).

45. See, e.g., *Evans v. Tabor City Lumber Co.*, 232 N. C. 111, 59 S. E. 2d 612 (1950); *Grant v. Consolidated Underwriters*, 33 So. 2d 575 (La. Ct. App. 1947); *Windham v. Newport Co.*, 143 So. 538 (La. Ct. App. 1932).

46. A similar attempt to evade workmen's compensation may be facilitated through the owner's leasing of all or part of his business to uninsured lessees. See *Washel v. Tankar Gas, Inc.*, 211 Minn. 403, 2 N. W. 2d 43 (1941). The possibility of such a situation apparently induced one state to expressly include lessors as principals in the subcontractor provision. *Colo. Stat. Ann. c. 79, § 328* (1935).

does not employ the statutory number of employees if the employees of the subcontractor and principal together total the statutory number.⁴⁷ Otherwise, by subdividing his work among small enough subcontractors it would be possible for the principal to evade the Act, exactly contrary to the purpose of the subcontractor clause.⁴⁸ Yet two jurisdictions have refused to impose liability in that case.⁴⁹ Likewise, a principal previously not covered by the provision should be within it when he begins business by subdividing all the work, such as an owner constructing for profit a building on his land by subcontracting the total construction.⁵⁰ When the principal's work is subdivided among subcontractors who do the work personally but comprise the required number of employees, it would seem that they should be considered employees of the principal,⁵¹ even though a subcontractor employing the requisite number of employees may not be covered.⁵² The subcontractor without the minimum employees is generally only a small operator not financially better off than the principal's employees.

Series of subcontractors. When the case involves not only a principal and subcontractor but also contractors under the subcontractor, the principal assumes the same liability to the employees of both the immediate and remote subcontractors, while the preceding subcontractors are also liable as principals.⁵³ This conclusion

47. *E.g.*, N. C. Gen. Stat. § 97-19 (1950); *Maxwell v. Beck*, 169 Tenn. 315, 87 S. W. 2d 564 (1935).

48. See note 2 *supra*. This problem will probably occur infrequently because the minimum number of employees is very small; of the thirty-one jurisdictions which require a certain number of employees, twenty-three require from two to five, though the minimum is fifteen in South Carolina. Minnesota does not have a statutory minimum. See *Riesenfeld & Maxwell*, *Modern Social Legislation*, 185 and n. 2 (1950).

49. *McDuffie v. Nash Neon Sign Co.*, 202 Okla. 568, 215 P. 2d 839 (1949); see *Industrial Comm'n v. Everett*, 108 Ohio St. 369, 375, 140 N. E. 767, 769 (1923).

50. See *Seabury v. Arkansas Natural Gas Corp.* 171 La. 199, 204, 130 So. 1, 3 (1930). *Contra*: *Dewhurst v. Simon*, 295 N. Y. 352, 67 N. E. 2d 578 (1946). The *Dewhurst* case involved a subcontractor statute using the term "contractor," N. Y. Workmen's Compensation Law § 56, and this court construed the term. See also *Tex. Stat., Rev. Civ. art 8307, § 6* (1948), which uses the word "subscriber" in the subcontractor statute, thus precluding coverage of a person going into business and not previously a subscriber.

51. 1 *Larson* § 45.10.

52. *E.g.*, *Hayes v. Board of Trustees*, 224 N. C. 11, 29 S. E. 2d 137 (1944); *McDowell v. Stillely Plywood Co.*, 210 S. C. 173, 41 S. E. 2d 872 (1947). *Contra*: *Simpson v. New Madrid Stave Co.*, 227 Mo. App. 331, 52 S. W. 615 (1932).

53. S. C. Code § 72-113 (1952); Va. Code § 65-28 (1950); see *Baker & Conrad, Inc. v. Chicago Heights Const. Co.*, 364 Ill. 386, 394-398, 4 N. E. 2d 953, 957-959 (1936); *McVeigh v. Brewer*, 182 Tenn. 683, 695, 189 S. W. 2d 812, 817 (1945).

is supported by the same reasons that justify the principal's liability for the subcontractor's employees.⁵⁴

Insurer's insolvency. Consistency would also require that a subcontractor's employees should not be in a better position than the principal's own employees merely because of the subcontractor statute. For example, if a subcontractor carries workmen's compensation insurance, his injured employee's rights under the Act ought not to extend to the principal if some other event, such as the insurer's insolvency, occurs which deprives the employee of his recovery.⁵⁵

THE SUBCONTRACTOR CLAUSE AND THE PRINCIPAL'S COMMON LAW LIABILITY

Although workmen's compensation is ordinarily an exclusive remedy,⁵⁶ provision is usually made for the injured employee or his subrogee to bring a common law action against a *third party* whose negligence contributed to the injury.⁵⁷ Only in the state of Washington⁵⁸ does the statute exempt from common law liability as third parties all persons who participate in the workmen's compensation plan.⁵⁹ It has been vigorously argued that this is the most equitable conclusion because all parties have been absolved of certain inherent risks and have received definite advantages, part of which is the exclusionary characteristic of this legislation.⁶⁰

Where there is no express provision, the liability of a principal as a third party depends on judicial interpretation of the effect of the subcontractor clause. It should be noted that in this area the "business or trade" test is again very significant, for if the activity of the injured employee was not a part of the business, trade, or occupation of the principal, the principal is not within the subcontractor provision and thus is usually a suable third party.⁶¹ The only difference

54. See note 2 *supra*.

55. *Sciachitano v. Spencer Forbes, Inc.*, 264 N. Y. 324, 190 N. E. 656 (1934).

56. *E.g.*, Minn. Stat. § 176.04 (1949); 2 Larson § 65.10.

57. *E.g.*, Minn. Stat. § 176.06 (1949); 2 Larson §§ 71.10-71.30.

58. Wash. Rev. Code § 51.24.010 (1951). Illinois has a similar statute, Ill. Ann. Stat. c. 48, § 166 (1950), but it was recently declared unconstitutional on the ground that it provided a purely arbitrary classification of immune parties. *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 106 N. E. 2d 124, *cert. denied*, 344 U. S. 837 (1952). Regarding the validity of the Washington statute, see *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145 (1931).

59. The Washington statute does provide for recovery of the compensation award from the ultimate wrongdoer. Wash. Rev. Code § 51.24.010 (1951).

60. See 2 Larson § 72.50.

61. *Settle v. Baldwin*, 355 Mo. 336, 196 S. W. 2d 299 (1946); *Perrin v. American Theatrical Co.*, 352 Mo. 484, 178 S. W. 2d 332 (1944); *Allen v. Babcock & Wilson Tube Co.*, 356 Pa. 414, 52 A. 2d 314 (1947); see

is that now the principal rather than the employee is asserting that the work is a part of his business, and he bears the burden of proof of that allegation.⁶² Courts may in this situation be tempted to restrict the area encompassed by the trade or business of the principal to afford a larger recovery to the employee,⁶³ but if the Act is to be liberally construed to grant the widest coverage when workmen's compensation recovery is in issue, to be logically and justly consistent, the same interpretation must apply to a common law suit.⁶⁴

To some extent, of course, this problem is tied to the type of liability imposed upon the principal.⁶⁵ Thus if he is primarily liable, he should not be deemed a third party because the employee of the subcontractor can, if he desires, initially proceed against the principal for workmen's compensation.⁶⁶ Similarly, when the subcontractor is uninsured and the principal therefore rendered liable even though his liability is secondary, it has been restricted to that provided by statute.⁶⁷ On the other hand, some jurisdictions hold that a principal is a third party amenable to suit regardless of the circumstances,⁶⁸ asserting that the only basis for the exclusiveness of the workmen's compensation remedy is the existence of an *actual* employer-employee relationship.⁶⁹ This conclusion appears both illogical and unwarranted, and it seems that the principal who is covered by the subcontractor provision should be relieved of all common law liability to the subcontractor's employees whether

Greenwald v. Wire Rope Corp., 131 Conn. 465, 466, 40 A. 2d 748, 749 (1944).

62. See Johnson v. Robertson Bleachery & Dye Works, Inc., 136 Conn. 698, 704, 74 A. 2d 196, 199 (1950).

63. See, e.g., Stratis v. McLellan Stores Co., 311 Mass. 525, 536, 42 N. E. 2d 282, 288 (1942), where it was held that running a lunch-counter was not a part of a department store's business but rather it was "conduct[ing] a business within a business."

64. See Thibodaux v. Sun Oil Co., 40 So. 2d 761, 766 (La. Ct. App. 1949), *aff'd*, 218 La. 435, 49 So. 2d 852 (1950).

65. The statutes provide various types of liability for the principal: he may be jointly liable, primarily liable, secondarily liable, liable if he fails to obtain a certificate showing the subcontractor's insured position, or liable where a fraudulent scheme, artifice or device to evade workmen's compensation is shown. See 2 Schneider § 326. The Minnesota statute imposes liability where a fraudulent scheme, artifice, or device is shown, Minn. Stat. § 176.30(1) (1949), and imposes secondary liability under the subcontractor statute, Minn. Stat. § 176.30(4) (1949).

66. E.g., Bogoratt v. Pratt & Whitney Aircraft Co., 114 Conn. 126, 157 Atl. 860 (1932).

67. Marchbanks v. Duke Power Co., 190 S. C. 336, 2 S. E. 2d 825 (1939).

68. Swezey v. Arc Elec. Const. Co., 295 N. Y. 306, 67 N. E. 2d 369 (1946); Culbertson v. Kieckhefer Container Co., 197 Wis. 349, 222 N. W. 249 (1928).

69. See Swezey v. Arc Elec. Const. Co., *supra* note 68, at 310-312, 67 N. E. 2d at 370-371.

the subcontractor is insured or not,⁷⁰ although this is contrary to the majority view.⁷¹ The advantages secured to these employees by the subcontractor clause at the principal's expense—a statutory right of action against not one but two employers—not only outweighs the infrequent advantage attendant to a tort action against the principal,⁷² but in addition should require that the employee forsake his common law remedy in exchange therefor. It was not the purpose of the legislation to place a greater burden upon the principal for injuries to the subcontractor's employees than for the injuries suffered by his own employees.⁷³

The Minnesota statute⁷⁴ bearing on third-party tort liability is noted for its uniqueness.⁷⁵ In effect, it provides that an injured employee may elect between proceeding against his employer for compensation or against a third person in a tort action, but not against both if *both* are either insured or self-insured and ". . . engaged in the due course of business, (a) in furtherance of a common enterprise, or (b) the accomplishment of the same or related purposes in operation on the premises where the injury was received at the time thereof. . . ." However, the recovery by the employee or his subrogee⁷⁶ in the legal action is restricted to the amount provided by workmen's compensation.⁷⁷ Basically then, this is a restriction of recovery rather than immunity from common law liability. Where the "common enterprise" or "related purposes" tests do not apply,⁷⁸ another provision of the Minnesota statute⁷⁹ states expressly that the employee may proceed against the third party in tort, and recovery is not restricted by the Act. Thus a subcon-

70. See *Brickley v. Gulf Coast Const. Co.*, 153 Fla. 216, 14 So. 265 (1943); *Sykes v. Stone & Webster Eng. Corp.*, 186 Va. 116, 41 S. E. 469 (1947).

71. *E.g.*, *Anderson v. Sanderson & Porter*, 146 F. 2d 58 (8th Cir. 1945); *Trumbull Cliffs Furnance Co. v. Shachovsky*, 111 Ohio St. 791, 146 N. E. 306 (1924); see 2 *Larson* § 72.31.

72. See *Gifford v. Nottingham*, 68 Idaho 330, 339, 193 P. 2d 831, 836 (1948).

73. See, *e.g.*, *Bindbeutel v. Willcutt & Sons Co.*, 244 Mass. 195, 198, 138 N. E. 239, 240 (1923).

74. Minn. Stat. § 176.06(1) (1949).

75. See *Volding v. Harnish*, 51 N. W. 2d 658, 662 (Minn. 1952); see 27 *Minn. L. Rev.* 585, 586 (1943); 20 *Minn. L. Rev.* 323, 324 (1936); 15 *Minn. L. Rev.* 257, 258 (1931). Massachusetts has developed a similar though perhaps not as broad doctrine through case law. See 2 *Larson* §§ 72.32-72.34.

76. If the employee should elect to receive compensation, his rights against the third-party tortfeasor are subrogated to the employer. Minn. Stat. § 176.06(1) (1949).

77. Costs and reasonable attorney's fees may also be recovered. Minn. Stat. § 176.06(1) (1949).

78. Or where the third party is not insured or self-insured.

79. Minn. Stat. § 176.06(2) (1949).

tractor's employee may be able to bring a legal action against the principal with recovery unlimited if the respective activities do not comply with the "common enterprise" or "related purposes" tests.⁸⁰

Obviously terms such as "common enterprise" and "related purposes" are at best vague and indefinite, and in the words of the Minnesota Supreme Court, the statute "has given rise to 'endless and fruitless litigation.'"⁸¹ It has been indicated that this statute applies to situations involving subcontractors and contractors,⁸² but the apparent requirement that the *employer* and the third party be mutually engaged has received destructive criticism, because it was felt that the purpose of the "common enterprise" test was to enlarge the employee's common law right of action;⁸³ consequently the section has been interpreted to apply only where the *employees*—not the employer and the third person—are engaged in a common activity and thus exposes to mutual hazards.⁸⁴ This test, aptly termed the "relativity of hazards" test, is not unquestionable.⁸⁵ It would seem that the court has taken a conceptualistic approach to the interpretation of the statute: the legislature first took away the

80. *E. I. Du Pont De Nemours & Co. v. Frechette*, 161 F. 2d 318 (8th Cir. 1947) (applying Minnesota law).

81. *Swanson v. J. L. Shiely Co.*, 234 Minn. 548, 553-554, 48 N. W. 2d 848, 852 (1951). Little assistance may be derived from the numerous cases involving the "common enterprise" and "related purposes" test. Comparable fact situations have brought opposite results. *Compare Rasmussen v. George Benz & Sons*, 168 Minn. 319, 210 N. W. 75 (1926), with *Horgen v. Franklin Co-op. Creamery Ass'n*, 195 Minn. 159, 262 N. W. 149 (1935). The more recent cases indicate a reluctance to find a "common enterprise" or "related purposes." See *Manteuffel v. Theo. Hamm Brewing Co.*, 56 N. W. 2d 310 (Minn. 1952); *Swanson v. J. L. Shiely Co.*, 234 Minn. 548, 48 N. W. 2d 848 (1951); *Johnson v. Duluth*, 216 Minn. 192, 12 N. W. 2d 192 (1943); *Gleason v. Geary*, 214 Minn. 499, 8 N. W. 2d 808 (1943). But see *Volding v. Harnish*, 51 N. W. 2d 658 (Minn. 1952). In one case, *Anderson v. Interstate Power Co.*, 195 Minn. 528, 532, 263 N. W. 612, 614 (1935), the court specified that the "supplying of a necessary product, . . . does not create the relationship of a common enterprise."

82. See, e.g., *Gleason v. Geary*, 214 Minn. 499, 508, 8 N. W. 2d 808, 812-813 (1943), 27 Minn. L. Rev. 585.

83. See *Swanson v. J. L. Shiely Co.*, 234 Minn. 548, 556-558, 48 N. W. 2d 848, 852-854 (1951); *Gleason v. Geary*, 214 Minn. 499, 508-511, 8 N. W. 2d 808, 812-814 (1943); *Gentle v. Northern States Power Co.*, 213 Minn. 231, 237-238, 6 N. W. 2d 361, 364 (1942) (concurring opinion). The "common enterprise" and "related purposes" restriction was enacted in 1923. Minn. Laws 1923, c. 279, § 1(1). An Interim Commission Report suggested the amendment without elaborating upon its reasons or purposes. Minn. H. R. Interim Comm'n Rep., Minn. Industrial Comm'n 1st Bienn. Rep. 117, 126 (1923).

84. See *Volding v. Harnish*, 51 N. W. 2d 658, 662 (Minn. 1952); *Swanson v. J. L. Shiely Co.*, 234 Minn. 548, 556-558, 48 N. W. 2d 848, 852-854 (1951); *Gleason v. Geary*, 214 Minn. 499, 508-511, 8 N. W. 2d 808, 812-814 (1943); *Gentle v. Northern States Power Co.*, 213 Minn. 231, 237-238, 6 N. W. 2d 361, 364 (1942) (concurring opinion).

85. See *E. I. Du Pont De Nemours & Co. v. Frechette*, 161 F. 2d 318, 322 (8th Cir. 1947).

employee's common law action and by a 1923 amendment⁸⁶ intended to replace this right within a broad area; therefore it must be construed to broaden the common law rights. But it is just as likely that the legislature was primarily interested in adjusting the number of insured third parties benefited by the liability restriction so that the industry which bears the compensation loss is more related to the employee who suffers the injury. And certainly the express words of the statute support this viewpoint.

Even if so construed, the legislation seems to have accomplished only two things. First, when there is any possible question as to whether or not the activities are a part of a "common enterprise" or are of "related purposes," it is practically a guarantor of litigation. This is in contravention to the policy of expeditious and inexpensive protection of the employee envisaged by the proponents of workmen's compensation in Minnesota.⁸⁷ Secondly, if there is no question that the employee is within the common activity, the statute provides nothing more than a subrogation right to the employer who has paid compensation;⁸⁸ for surely the employee will not render himself susceptible to the common law defenses of contributory negligence⁸⁹ and assumption of risk in a negligence action against a third party when he is assured recovery through his statutory remedy.

Three legislative alternatives are apparent to remedy this problem. First, liability could be restricted to the amount provided by the Act for all those insured under the workmen's compensation plan, with the insured third-party tortfeasor merely liable for the amount of compensation payable by the immediate employer to the injured employee.⁹⁰ This would have the additional advantage of obviating many of the multifarious and complex problems of contribution and indemnity arising between employer and third party,⁹¹ but it may be susceptible to being declared unconstitutional.⁹² This

86. Minn. Laws 1923, c. 279, § 1(1), now in the final paragraph of Minn. Stat. 176.06(1) (1949).

87. Rep. Minn. Employees' Compensation Comm'n 162-163 (1911).

88. See note 76 *supra*.

89. For discussion of whose contributory negligence is available to the third party as a defense, see 36 Minn. L. Rev. 549 (1952).

90. The argument asserted to support this proposal is that relinquishing the common law action against insured third parties should be part of the quid pro quo which the employees must tender in exchange for their compensation remedy. See 2 Larson § 72.50. This would be reverting to the pre-1923 Minnesota statute. See Minn. Laws 1921, c. 82, § 31(1).

91. See 36 Minn. L. Rev. 549 (1952).

92. Compare *Grasse v. Dealer's Transp. Co.*, 412 Ill. 179, 106 N. E. 2d 124, *cert. denied*, 344 U. S. 837 (1952) (unconstitutional), with *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145 (1931) (valid). The constitutionality of such a provision would appear to be settled in Minnesota. See *Mathison v. Minneapolis Street Ry.*, 126 Minn. 286, 148 N. W. 71 (1914).

broad restriction of liability has the same deficiency as that existent in the "common enterprise" test: there is no direct relationship between the injured employee and the third-party tortfeasor, although in a common enterprise the industrial relation of the two employers may be stabilized by a limitation of liability. The second alternative would be to redraft the present statute, defining explicitly what is meant by "common enterprise" and "related purposes" in terms of *employers*, thereby guaranteeing protection from tort liability at least to one who is principal within the subcontractor clause. The last alternative, and the one which would be in line with the purpose of enlarging the employee's common law rights of action,⁹³ would be to apply the restriction of liability only to principals who are within the subcontractor statute. This test would not only be more certain, but would grant limited liability where the third-party has a direct relationship with the employee, unlike the third-parties benefited by the previous alternatives.

CONCLUSION

Subcontractor statutes generally have not been skillfully drafted in view of the objective which they were intended to achieve. Moreover, courts have not been prone to eliminate these deficiencies. Certainly the coverage of workmen's compensation should be as broad as possible to remedy injuries inherent in an industrial economy, but conversely, as the coverage is broadened—especially in the liability of principals—it seems only fair and logical that the tort liability of those that may be liable for compensation should be narrowed.

93. See note 83 *supra*.