No. 11-

IN THE

Supreme Court of the United States

JACOBS ENGINEERING GROUP INC.,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the Minnesota Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state may, consistent with the Due Process Clause of the Fourteenth Amendment, retroactively revive liabilities that have been long-extinguished under a statute of repose.

PARTIES TO THE PROCEEDINGS

Petitioner is Jacobs Engineering Group Inc., which was a third-party defendant in the district court and appellant in the Minnesota Court of Appeals and in the Minnesota Supreme Court. Respondent is the State of Minnesota. The claims of all other parties to the proceedings below have been settled or dismissed.

RULE 29.6 STATEMENT

Jacobs has no parent corporation and no publicly traded company owns 10% or more of Jacobs' stock.

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PETITION FOR A WRIT OF CERTIORARI

Jacobs Engineering Group Inc. ("Jacobs") respectfully petitions for a writ of certiorari to review the decision of the Minnesota Supreme Court in this case.

OPINIONS BELOW

The Minnesota Supreme Court's opinion is reported at 806 N.W.2d 820 and reproduced at Pet. App. 1a–30a. The decision of the Minnesota Court of Appeals is reported at 787 N.W.2d 643 and reproduced at Pet. App. 31a–50a. The opinion of the Minnesota District Court is unpublished and is reproduced at Pet. App. 58a–82a.

JURISDICTION

The Minnesota Supreme Court filed its decision on November 30, 2011. This Court has jurisdiction under 28 U.S.C. § 1257. See *infra* at 18–19.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

The relevant Minnesota statute of repose is Act of Apr. 7, 1980, ch. 518, §§ 2–3, 1980 Minn. Laws 596, 596 (codified at Minn. Stat. § 541.051 (1982)), and provides in relevant part:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition

> of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery thereof, nor, in any event shall such a cause of action accrue more than 15 years after substantial completion of the construction.

The Minnesota compensation statute is codified at Minn. Stat. §§ 3.7391–3.7395. Section 3.7391, subd. 2 provides:

> Compensation Process. The establishment of a compensation process under sections 3.7391 to 3.7395 for survivors of the catastrophe [i.e., the collapse of the Interstate Highway 35W bridge] furthers the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors.

Section 3.7394, subd. 5(a) provides:

> Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party, including an agent, contractor, or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe.

INTRODUCTION

This case raises a fundamental constitutional question regarding a state's ability to resurrect, through new legislation, liabilities long-extinguished under a statute of repose. In 2008, following the collapse of a bridge, the Minnesota legislature appropriated $37 million to pay to victims and survivors of the incident, a sum far exceeding the State's maximum liability under the statutory tort cap in place at the time of the collapse. Simultaneously, the State did what no other litigant could have done: It retroactively changed the rules of the game to protect its own coffers and to allow itself to sue any third-party that it thought contributed to the bridge's collapse, including those involved in the bridge's construction and design, which occurred back in the 1960s.

Liabilities arising out of the bridge's construction had expired in 1982 pursuant to the State's explicit statute of repose. The State thus purported to revive claims that were extinguished 25 years before the bridge's collapse. The Minnesota Supreme Court nonetheless held that the retroactive legislation was consistent with the Due Process Clause, and that states can effectively overturn statutes of repose whenever they so choose, regardless of how much time has passed or how settled expectations have become.

This erroneous decision is the latest addition to a deep divide in the lower courts, contravenes an express holding of this Court, and has serious policy implications for businesses trying to plan their affairs in light of repose statutes that are commonplace around the country. The Court's immediate review is necessary to reconcile the disarray in the lower courts and to correct those decisions that, like the one below,

have overlooked one of this Court's binding precedents.

STATEMENT OF THE CASE

A. Factual Background.

This case arises out of an incident that captured national headlines—the August 1, 2007 collapse of the I-35W Bridge over the Mississippi River in Minneapolis. Forty-five years earlier, Sverdrup & Parcel and Associates, Inc. ("Sverdrup"), entered into a contract with the State of Minnesota to design the bridge. Construction was completed in 1967, and the bridge has at all times been owned and operated by the State and its instrumentality, the Minnesota Department of Transportation ("MnDOT"). Jacobs acquired Sverdrup in 1999, and all of the claims against Jacobs in this action arise out of the work of Sverdrup in the 1960s.

At the time of the collapse, Minnesota law was well settled in two respects. First, the State's tort liability was limited to an aggregate of $1 million for any single occurrence, regardless of the number of plaintiffs. Minn. Stat. § 3.736, subd. 4 (2007). Accordingly, any claim by the State for contribution or indemnity from third parties would likewise have been limited to $1 million. And second, the applicable statute of repose provided that no liability could accrue against any person furnishing the design for an improvement to real property more than 15 years after substantial completion of construction of the improvement. Minn. Stat. § 541.051 (1982). The bridge was such an improvement to real property and, because it was substantially completed in 1967, any claims regarding its design were extinguished in 1982. Pet. App. 8a, 10a.

After the collapse, however, the Minnesota legislature changed the legal landscape completely. First, it established a compensation process through which the State would pay survivors and wrongful death claimants far in excess of the $1 million cap on liability. Minn. Stat. § 3.7394, subd. 6; Pet. App. 10a–11a. Moreover, reviving claims that had long been extinguished, the legislature permitted the State to seek reimbursement "to the extent the third party caused or contributed to the collapse" and directed that the State was "entitled to recover" from such third parties, "[n]otwithstanding any statutory or common law to the contrary." Minn. Stat. § 3.7394, subd. 5(a). Because the State's statute of repose was one such "statut[e] … to the contrary," this provision purported to resuscitate liabilities arising out of the bridge's construction that had expired 25 years before the collapse.[1] Thus, if given effect, the compensation statute both revives a potential liability of Jacobs that had been extinguished decades ago by the repose statute *and* increases Jacobs' potential liability by many times more than it could have been before the State lifted the statutory tort cap.

B. Proceedings Below.

1. This case has an extensive history, but the relevant portion is relatively straightforward.

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[1] In separate legislation passed in 2007, the legislature eliminated the repose period for contribution and indemnity actions and replaced it with a two-year statute of limitations. 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29. These amendments are not relevant to this petition because the Minnesota Supreme Court (correctly) held that they did not retroactively revive the State's cause of action for contractual indemnity, which had also been extinguished in 1982. Pet. App. 7a–9a.

Following the bridge's collapse, over 100 plaintiffs filed personal injury and wrongful death cases against two private entities: URS Corporation ("URS"), an engineering and consulting company which had contracted with MnDOT for consulting and other services related to the bridge in the three years prior to its collapse, and Progressive Contractors, Inc. ("PCI"), a road construction company that was servicing the bridge at the time of the accident pursuant to a contract with MnDOT. Pet. App. 4a–5a, 33a. PCI commenced a third-party action against the State, which, in turn, brought claims seeking to recover its payments to survivor-claimants from URS, PCI, and Jacobs. *Id.* at 5a.

The State's claims seeking reimbursement from Jacobs are at issue here. They were based on (1) the reimbursement provision of the compensation statutes, Minn. Stat. § 3.7394, subd. 5(a), and (2) an indemnity provision contained in the 1962 design contract between the State and Sverdrup. Pet. App. 5a.[2]

2. After the cases were consolidated in the Minnesota district court, Jacobs moved to dismiss all claims against it. Pet. App. 58a–95a. With respect to the State's claims, Jacobs argued, among other things, that they were barred by the repose provisions of Minn. Stat. § 541.051 and that the compensation statutes passed after the bridge's collapse did not revive them. Such a revival, Jacobs contended, would violate the Due Process Clauses of

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[2] Jacobs' defenses to the claims of URS and PCI are irrelevant to this petition and therefore not addressed here. Further, although the State also asserted a common-law claim for contribution and indemnity against Jacobs, this claim derived from PCI's claims and is no longer at issue now that PCI and the State have settled. Pet. App. 34a & n.3.

the United States and Minnesota Constitutions.[3] Pet. App. 71a, 89a–91a; see also Mem. of Law of Jacobs Engineering Group Inc. in Supp. of R. 12 Mot. to Dismiss Cross-Claims of State of Minn., Dep't of Transp. at 7–10, 15–17, *In re Individual 35W Bridge Litig.*, Master File No. 27-CV-09-7519 (Minn. Dist. Ct. July 13, 2009).

The district court disagreed. Pet. App. 58a–95a. Relevant here, it held that the reimbursement provision of the compensation statutes created a claim against Jacobs that was not barred by the repose provisions of § 541.051 and that any revival of Jacobs' potential liability to the State (under either the compensation statute or contractual indemnity provision) did not violate Jacobs' due process rights. Pet. App. 71a, 89a–91a; see also *id.* at 74a–76a.

3. Jacobs appealed. Pet. App. 31a–50a. The court of appeals first determined that it had jurisdiction as a matter of right because the orders were appealable under the collateral order doctrine. Pet. App. 34a–35a, 51a–57a. On the merits, the court affirmed, holding that imposing retroactive liability did not violate Jacobs' constitutional rights. *Id.* at 44a–49a; see also Br. of Appellant Jacobs Engineering Group Inc. at 22–25, *In re Individual 35W Bridge Litig.*, Nos. A10-87, A10-89 (Minn. Ct. App. Feb. 12, 2010) (arguing that retroactive application of compensation statute to reposed liability violates due process).

4. The Minnesota Supreme Court affirmed as well.[4] Pet. App. 1a–30a. Although it determined that

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[3] Due process protection provided under the state and federal constitutions is "identical." Pet. App. 19a n.10.

[4] URS also filed a petition for further review, which was decided in a parallel ruling in its companion case. *See In re Individual 35W Bridge Litig.*, 806 N.W.2d 811 (Minn. 2011).

the contractual indemnity claim was time-barred, *id.* at 7a–9a, the court held that the State's claim under the compensation statute was not, *id.* at 9a–11a. According to the court, that statute "retroactively revives" a cause of action against Jacobs even though all liabilities were "previously extinguished by the statute of repose." *Id.* at 11a.

The court then proceeded to consider Jacobs' constitutional challenges to that provision. As to due process,[5] the court began by holding that Jacobs acquired a constitutionally protected property right when it became immune from liability after the expiration of the repose period, in 1982. Pet. App. 11a–18a. Following the Fourth and D.C. Circuits, however, the court concluded that the retroactive revival of the State's claim did not violate Jacobs' Due Process rights under the United States Constitution (or the State Constitution). *Id.* at 18a–20a. The court was particularly persuaded by the "reasoning" of the D.C. Circuit and held that the reimbursement provision was rationally related to a legitimate state interest. *Id.* at 19a–20a. In that regard, the court found compelling the State's stated desire to "avoid[] the uncertainty of litigation in resolving the issue of the State's liability" and held that it was reasonable to allow the State to seek recovery from third parties for its payments. *Id.*

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari and reverse the Minnesota Supreme Court's erroneous due process decision for three reasons.

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[5] The court also rejected Jacobs' Contract Clause claim, which is not raised in this petition. Pet. App. 21a–25a.

First, there is a deep and enduring split of authority in the lower courts. The decision below and cases from two federal courts of appeals (the Fourth and D.C. Circuits) are directly at odds with decisions from no fewer than six other states. This is precisely the sort of entrenched and irreconcilable conflict that certiorari is designed to resolve.

Second, the decision below conflicts with this Court's decisions, most notably *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925), which squarely held that the Due Process Clause prohibits legislation from retroactively reviving liabilities that were previously extinguished. *Danzer* has never been overruled and has, in fact, been repeatedly reaffirmed over the past 90 years. Nonetheless, the Minnesota Supreme Court reached the contrary conclusion, following two circuit court decisions, one of which failed even to cite *Danzer*, and the other of which improperly decided that *Danzer* was too old and stale to be followed. This was error that only this Court can correct.

Third, the question presented concerns a recurring issue with significant implications for the national economy. Statutes of repose are common around the country, and, as the deep split of authority makes clear, legislatures periodically attempt to nullify them retroactively, be it in light of changed political landscapes or pressures, a precipitating event, or some other reason. This creates substantial uncertainty about settled rights that are granted specifically to provide certainty in the first place.

Worse still, the State has done so here in order to protect its own treasury against a liability that it assumed for itself by waiving its $1 million sovereign immunity tort cap and appropriating $37 million to pay chosen recipients of compensation funds. The

Court should grant certiorari, correct this self-serving maneuver, and bring clarity to an area of law that is needlessly opaque.

I. THE LOWER COURTS ARE DEEPLY DIVIDED AS TO A STATE'S ABILITY RETROACTIVELY TO REVIVE LIABILITIES EXTINGUISHED IN STATUTES OF REPOSE.

The question whether a state can constitutionally revive and retroactively impose on a party a liability that has been long extinguished by a statute of repose is one on which the federal and state courts are sharply and deeply divided. On one side, the decision below expressly aligns Minnesota with the Fourth and D.C. Circuits in holding that retroactive revival of liabilities comports with due process. See Pet. App. 11a–20a; *Shadburne-Vinton* v. *Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995) (divided panel), *cert. denied*, 516 U.S. 1184 (1996); *Wesley Theological Seminary* v. *U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). See also *Harding* v. *K.C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992) (stating in dictum that "the United States Supreme Court makes no distinction between statutes of limitations and statutes of repose" under the Fourteenth Amendment). For these jurisdictions, so long as the retroactive statute minimally "serves a legitimate legislative purpose that is furthered by rational means," it passes constitutional muster. See, *e.g.*, *Shadburne-Vinton*, 60 F.3d at 1076; Pet. App. 19a.

A legion of other courts, by contrast, have held precisely the opposite—that is, the Due Process Clause prohibits the retroactive resuscitation of liabilities extinguished by statutes of repose. Such is the law, for example, in Maryland and Wisconsin.

See *Smith* v. *Westinghouse Elec. Corp.*, 291 A.2d 452, 454–55 (Md. 1972) (retroactive revival of liability under wrongful death statute violated due process); *Haase* v. *Sawicki*, 121 N.W.2d 876 (Wis. 1963). The same result was reached in North Carolina in *Colony Hill Condo. I Ass'n* v. *Colony Co.*, 320 S.E.2d 273, 276 (N.C. Ct. App. 1984), *review denied*, 325 S.E.2d 485 (N.C. 1985).

Nebraska, Virginia, and Rhode Island have followed suit, reaching the identical conclusion under state constitutions that are interpreted coextensively with the federal constitution. See *Farber* v. *Lok-N-Logs, Inc.*, 701 N.W.2d 368, 375–78 (Neb. 2005) (holding that the legislature could not, consistent with due process, "resurrect an action which the prior version of the statute of repose had already extinguished"); *Givens* v. *Anchor Packing, Inc.*, 466 N.W.2d 771, 773 (Neb. 1991) (same); *Keller* v. *City of Freemont*, 790 N.W.2d 711, 713 (Neb. 2010) (per curiam) ("We have interpreted the Nebraska Constitution's due process … clause[] to afford protections coextensive to those of the federal Constitution."); *Sch. Bd. of the City of Norfolk* v. *U.S. Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987) (invalidating on due process grounds retroactive revival of liability under repose statute); *Shivaee* v. *Commonwealth*, 613 S.E.2d 570, 574 (Va. 2005) (state and federal due process clauses coextensive); *Theta Properties* v. *Ronci Realty Co.*, 814 A.2d 907, 916–17 (R.I. 2003) (retroactive application of subsequent statute to reposed rights violates due process); *Rhode Island Depositors Econ. Prot. Corp.* v. *Brown*, 659 A.2d 95, 102–04 (R.I. 1995) (analyzing due process challenge under Rhode Island and U.S. constitutions to retroactive legislation as one in the same); *Pelland* v. *Rhode Island*, 317 F. Supp. 2d 86, 97 (D.R.I. 2004)

(due process analysis "identical" under both constitutions).[6]

These authorities cannot be reconciled, and such entrenched disarray warrants this Court's review.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

The decision below also directly contravenes this Court's settled precedent, most notably *Danzer*, 268 U.S. 633. Time and again, this Court has stressed the law's "singular distrust of retroactive statutes," *E. Enters.* v. *Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring), because they are "'generally unjust'" and "'neither accord with sound legislation nor with fundamental principles of the social compact,'" *id.* at 533 (plurality opinion) (O'Connor, J.) (quoting 2 J. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891)). See also, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 237–38 (1995); *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994); *Gen. Motors* v. *Romein*, 503 U.S. 181, 191 (1992).

Consistent with these decisions, this Court held in *Danzer* that the Due Process Clause prohibits retroactive legislation seeking to resuscitate previously extinguished liabilities. The Interstate

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[6] District courts have also reached opposite results. *Compare*, *e.g.*, *In re Alodex Corp. Sec. Litig.*, 392 F. Supp. 672, 680–81 (S.D. Iowa 1975) (relying on *Danzer* to strike down retroactive revival of liability), *aff'd*, 533 F.2d 372, 374 (8th Cir. 1976) (per curiam) (concluding that district court decision was "well-reasoned"), *with*, *e.g.*, *Indep. Sch. Dist. No. 197* v. *W.R. Grace & Co.*, 752 F. Supp. 286, 296–98 (D. Minn. 1990) (following D.C. Circuit's decision in *Wesley* and finding no support for the proposition that "a statute of repose cannot be modified [retroactively] under the Due Process Clause of the United States Constitution").

Commerce Act imposed a two-year lifespan on liability, at the expiration of which "it was as though liability had never existed." 268 U.S. at 636. Plaintiff nonetheless brought suit after two years had passed, arguing that a later-enacted provision revived his cause of action. This Court disagreed, holding that the subsequent statute could not "be construed retroactively to create liability [because to do so] would be to deprive defendant of its property without due process of law." *Id.* at 637.

Twenty years later, this Court reaffirmed *Danzer* in *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945). *Chase* concerned the retroactive extension of an ordinary statute of limitations, which, unlike a statute of repose, "merely … reinstate[d] a lapsed remedy" such that the defendant "had acquired no vested right to immunity." *Id.* at 312 n.8. The Court held that such reinstatement did not violate the Due Process Clause, but only because the statute at issue was distinguishable from the one in *Danzer*, which, like the statute here, see Pet. App. 11a–18a,[7] did extinguish the cause of action and vest the defendant with a property right to be free from suit.

The Minnesota Supreme Court, however, ignored this controlling authority and instead relied on two

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[7] The Minnesota Supreme Court expressly held that the statute at issue here is a repose statute vesting Jacobs with a protectable property interest. *See* Pet. App. 14a ("Jacobs' defense provided by the statute of repose"); *id.* at 16a–17a ("[W]e conclude that when the repose period expires, a statute of repose defense ripens into a protectable property right. Our conclusion rests on the premise that the statute of repose defense is a substantive limit on a cause of action.") (footnote omitted); *id.* at 17a ("Unlike the statute of limitations, when the repose period expires, the cause of action is extinguished before it comes into existence and prevented from accruing.").

circuit court decisions, one from the D.C. Circuit and the other from the Fourth Circuit. Pet. App. 19a. The D.C. Circuit's opinion, however, did not even cite *Danzer*, let alone engage it. See *Wesley*, 876 F.2d at 120–24. And the Fourth Circuit's decision erroneously held that *Danzer* is no longer good law and is unworthy of being followed. *Shadburne-Vinton*, 60 F.3d at 1074–76.

By following a course charted by two lower courts rather than the path laid out by this one, the Minnesota Supreme Court erred. As an initial matter, it contravened this Court's direction that lower courts are not free to decide for themselves whether controlling precedent has been discarded or rendered obsolete: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Compare *Shadburne-Vinton*, 60 F.3d at 1076 ("the analysis … in *Danzer*, *Chase*, and *Campbell* is outdated and no longer valid").

Moreover, the Minnesota Supreme Court's implicit assessment of *Danzer*'s continued vitality is demonstrably incorrect. Not only has this Court never overruled *Danzer*, it has consistently reaffirmed its principles. Just a few terms ago, for instance, in *Stogner* v. *California*, the Court looked to its "prior statements of what is constitutionally permissible … in the … civil context" and pointed to *Danzer* and *Chase* as holding that the "extension of even an expired civil limitations period can unconstitutionally infringe upon a 'vested right.'" 539 U.S. 607, 631–32 (2003) (emphasis omitted). The principles underlying

Danzer have endured. See also, *e.g.*, *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 416–17 (1998) (contrasting ordinary statutes of limitations with statutes that "talk[] not of a suit's commencement but of a right's duration"); *Pritchard* v. *Norton*, 106 U.S. 124, 130–32 (1882) (distinguishing traditional statute of limitations from those "not only bar[ring] the right of action, but extinguish[ing] the claim or title itself, *ipso facto*, and declar[ing] it a nullity"); *McDonald* v. *Sun Oil Co.*, 548 F.3d 774, 779–80 (9th Cir. 2008) ("'A statute of repose … can bar a suit even before the cause of action could have accrued, or, for that matter, retroactively after the cause of action has accrued. In proper circumstances, it can be said to destroy the right itself. It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace.'").

Indeed, the proposition that *Danzer* has been overruled *sub silentio* rests on a line of cases that has nothing to do with statutes of repose or with the sort of settled expectations that statutes of repose provide. For example, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), merely upheld a statute that established a new industry-wide liability. The statute in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984), imposed a new withdrawal liability to prevent employers from abandoning pension plans during a lengthy legislative process. And the one in *General Motors Corp.* v. *Romein*, 503 U.S. 181 (1992), simply corrected an unexpected decision of the State's supreme court interpreting an earlier law. Although each of these decisions considered the constitutionality of retroactive laws, none involved a revival of claims that had expired through a repose statute, which had vested the defendant with an immunity from suit and liability.

Unsurprisingly, then, none discusses or even cites *Danzer*.

The Minnesota Supreme Court should have followed this Court's precedent to hold that retroactive revival of liabilities long ago extinguished by a repose statute violates Jacobs' right to due process. Because it did not, certiorari should be granted.

III. THE DECISION BELOW CARRIES SIGNIFICANT IMPLICATIONS FOR MANUFACTURERS, INSURERS, AND MANY OTHER SECTORS OF THE NATIONAL ECONOMY.

1. Finally, the decision below and those that it followed have profound consequences for the stability and economic benefits that repose statutes are designed to provide. Such statutes are ubiquitous around the country and important to a variety of industries. They protect, for example, manufacturers from products-liability claims, *e.g.*, *Raithaus* v. *Saab-Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989); physicians from medical-negligence claims, *e.g.*, *Methodist Healthcare Sys. of San Antonio, Ltd.* v. *Rankin*, 307 S.W.3d 283, 288 & nn.29–30 (Tex. 2010); and architects, engineers, and builders from long-expired claims, such as those at issue here, *e.g.*, *Blaske* v. *Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 827 n.9 (Mo. 1991) (citing 35 states' examples). Repose statutes are also critical to the insurance industry; indeed, they "are generally enacted to curb rising insurance rates, to increase the availability of insurance, and to reduce the risk and uncertainty of liability for manufacturers and those in the manufacturer's chain of distribution." *Raithaus*, 784 P.2d at 1161; see also Glenn J. Waldrip, Jr., Comment, *Limiting Liability: Products Liability and a Statute of Repose*, 32 Baylor L. Rev. 137, 141 (1980).

Without statutes of repose, "professionals, contractors, and other actors would face never-ending uncertainty as to liability for their work." *Rankin*, 307 S.W.3d at 286. "Insurance coverage and retirement planning would always remain problematic, as would the unending anxiety facing potential defendants." *Id.* Repose statutes' "key purpose," therefore, "is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions." *Id.*

The threat of enactments like Minnesota's compensation statute upends all of this and subjects such laws to legislative fiat with no recourse. This possibility is precisely what has driven this Court to warn against retroactive legislation. Legislatures, this Court has observed, possess "unmatched powers [that] allow [them] to sweep away settled expectations suddenly and without individualized consideration." *Landgraf*, 511 U.S. at 266. And that means that "retroactive laws [that] change the legal consequences of transactions long closed … can destroy the reasonable certainty and security which are the very objects of property ownership." *E. Enters.*, 524 U.S. at 548 (Kennedy, J., concurring).

2. These concerns, though powerful in any context, become overwhelming here because the State has changed the rules retroactively in order to protect its own treasury. The legislation at issue allows the State itself—not a private litigant—to sue any entity that the State thought had a role in the bridge's collapse. No other litigant can nullify rights secured by repose statutes at its choosing, and a state should not be able to wield its unique power to do so either. Cf. *U.S. Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1, 26 (1977) (in Contract Clause analysis, when the State is a party, "complete deference to a legislative

assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake"); *Energy Reserves Grp., Inc.* v. *Kan. Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983).

Indeed, the State brought its $37 million exposure on itself. It opted to respond to the bridge's collapse by waiving its $1 million aggregate tort liability under sovereign immunity principles and substantially increasing the amount of its own liability. There is nothing intrinsically wrong with adopting such self-imposed burdens. But an imposition of and increase to a state's own liability does not carry with it an automatic right to do the same to everyone else's. The State does not have the unilateral ability to strip third parties like Jacobs of their settled repose rights (not to mention their contract rights, which were frustrated by the State's post hoc waiver of immunity, despite a contractual guaranty to the contrary) in order to compensate itself for what it voluntarily assumed, and the potential implications of sanctioning such conduct would be limited by little more than a legislature's imagination.

The magnitude, reach, and recurring nature of these concerns merits this Court's review.

IV. THE INTERLOCUTORY POSTURE IS NOT A BARRIER TO REVIEW.

The case reached the Minnesota Supreme Court on a collateral-order appeal, Pet. App. 5a n.2, but that is no barrier to review. To the contrary, collateral orders like the one below are "final" for purposes of 28 U.S.C. § 1257(a), where they "reject[] a party's federal-law claim that he is not subject to suit before a particular tribunal." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 n.8 (1985) (citing *Mercantile Nat'l Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963) and *Local*

No. 438 Constr. & Gen. Laborers' Union v. *Curry*, 371 U.S. 542 (1963)); see also E. Gressman et al., *Supreme Court Practice* § 3.6, at 158–61 (9th ed. 2007); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004, 1028–32 (1978). Accordingly, this Court has found jurisdiction "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action [and] a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482–83 (1975).

That is the case here. As the Minnesota Court of Appeals explained:

> The question of whether [Jacobs] is immune from liability based on the statute of repose is a legal issue completely separate from the merits of the action [and a]n order denying an immunity-based motion to dismiss is effectively unreviewable on appeal from a final judgment because it is a denial of a right not to stand trial at all—a right that is lost if the case is permitted to proceed.

Pet. App. 56a. Indeed, these considerations are at least as strong as the reasons why this Court held it had jurisdiction in *Langdeau*, 371 U.S. at 558, and there is no reason to chart a different course here. Immediate review is the only meaningful way for Jacobs to seek vindication of its federal right to be free from retroactive revival of extinguished liability. Because section 1257 presents no jurisdictional bar, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 2012

APPENDIX

APPENDIX A

SUPREME COURT OF MINNESOTA

Nos. A10-0087, A10-0089, A10-0090, A10-0091

IN RE INDIVIDUAL 35W BRIDGE LITIGATION

Nov. 30, 2011

Syllabus by the Court

1. The 2007 amendments to Minn.Stat. § 541.051 (2010) do not clearly and manifestly express a legislative intent to retroactively revive a cause of action previously extinguished by the statute of repose before the amendments were effective.

2. The "notwithstanding" clause of the compensation statutes, Minn.Stat. § 3.7394, subd. 5(a) (2010), clearly and manifestly expresses legislative intent to retroactively revive the State's cause of action for statutory reimbursement that was previously extinguished by the statute of repose in Minn.Stat. § 541.051.

3. The reimbursement provision of the compensation statutes, Minn.Stat. § 3.7394, subd. 5(a) (2010), does not violate appellant's constitutional right to due process by reviving a cause of action for statutory reimbursement previously extinguished by the statute of repose.

4. The compensation statutes, Minn.Stat. §§ 3.7391-.7395, do not result in a substantial impairment of

the contract between the State and appellant because the State was not contractually obligated to assert sovereign immunity as a defense to the claims of the individual plaintiffs.

5. Pursuant to the "notwithstanding" clause of Minn.Stat. § 3.7394, subd. 5(a), the State is not barred by either *Pierringer* releases or the common law doctrine of voluntary payments from asserting its statutory reimbursement claim against appellant.

OPINION

Gildea, C.J., concurred in part, concurred in the result in part, and filed opinion.

Stras, J., concurred in part, concurred in the result in part, and filed opinion.

DIETZEN, Justice.

This case arises out of the August 1, 2007, collapse of the Interstate 35W Bridge where it crosses the Mississippi River in Minneapolis, Minnesota. Following the collapse, individual plaintiffs commenced lawsuits for negligence, breach of contract, and resulting damages against URS Corporation (URS) and Progressive Contractors, Inc. (PCI), contractors that performed work on the Bridge pursuant to contracts entered into with the State of Minnesota. URS and PCI then brought third-party complaints against Jacobs Engineering Group, Inc. (Jacobs), on the basis that Jacobs' predecessor negligently designed the Bridge. PCI also filed a third-party complaint against the State. The State cross-claimed against Jacobs for contribution, indemnity, and statutory reimbursement under Minn.Stat. § 3.7394, subd. 5(a) (2010). Jacobs moved to dismiss the State's cross-claim as time-barred, arguing that neither the 2007 amend-

ments to Minn.Stat. § 541.051 (2010) nor the reimbursement provision of the compensation statutes, Minn.Stat. § 3.7394, subd. 5(a), revived actions against Jacobs that had been previously extinguished by a prior version of the statute of repose. The district court denied the motion, and the court of appeals affirmed. Because we conclude that Minn.Stat. § 3.7394, subd. 5(a), retroactively revives the State's action for statutory reimbursement against Jacobs, that section 3.7394, subdivision 5(a), does not violate Jacobs' constitutional right to due process, and that revival of the action for statutory reimbursement does not unconstitutionally impair Jacobs' contractual obligations, we affirm the court of appeals.

The factual background of this dispute begins with the design and construction of the Interstate 35W Bridge. In October 1962, Sverdrup & Parcel and Associates, Inc. (Sverdrup), entered into a contract with the State to prepare design and construction plans for the Bridge. The indemnity provision of the contract, Article VIII, Section 2(b), provides:

> [Sverdrup] indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of [Sverdrup] provided for under this agreement.

Sverdrup certified the final Bridge design and construction plans in March 1965, and construction of the Bridge was substantially completed in 1967. Between 1966 and 1999, Sverdrup went through a series of name changes and mergers. In September 1999, Sverdrup Corporation merged with Jacobs, and Jacobs was the surviving corporation. Jacobs is the

successor in interest to Sverdrup for the purpose of this proceeding.

In 2003, the State entered into a series of contracts with URS to conduct an inspection of the Bridge to determine the nature and scope of maintenance that needed to be performed on the Bridge. In March 2007, the State hired PCI to perform maintenance to the Bridge. On August 1, 2007, the Bridge collapsed, resulting in the deaths of 13 people and injuries to 145 others.

In 2008, the Legislature passed the compensation statutes, Minn.Stat. §§ 3.7391-.7395 (2010), to compensate survivor-claimants of the collapse.[1] Subsequently, the State entered into settlement agreements with 179 survivor-claimants who made statutory claims for compensation, paying them $36,640,000 through the compensation statutes, and $398,984 from the emergency relief fund created by the State in November 2007. The compensation statutes provide, among other things, that the State may seek reimbursement from third parties for these payments, to the extent the third party caused or contributed to the Bridge collapse. Minn.Stat. § 3.7394, subd. 5(a). All of the survivor-claimants who settled pursuant to the compensation statutes signed releases with the State.

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[1] For purposes of the compensation statutes, "survivor" is defined as "a natural person who was present on the I-35W bridge at the time of the collapse." Minn.Stat. § 3.7392, subd. 8. The definition also includes "(1) the parent or legal guardian of a survivor who is under 18 years of age; (2) a legally appointed representative of a survivor; or (3) the surviving spouse or next of kin of a deceased survivor who would be entitled to bring an action under section 573.02." *Id.*

Individual plaintiffs commenced lawsuits for negligence, breach of contract, and resulting damages against URS and PCI. The district court consolidated the individual plaintiffs' cases for pretrial purposes and dismissed the plaintiffs' breach of contract claims. URS and PCI then brought third-party complaints against Jacobs for contribution and indemnity on the basis that Sverdrup negligently designed the Bridge. PCI also filed a third-party complaint against the State. The State cross-claimed against Jacobs for common law contribution and indemnity, contractual contribution and indemnity, and statutory reimbursement pursuant to Minn.Stat. § 3.7394, subd. 5(a), to recover funds the State paid to individual survivor-claimants pursuant to the emergency relief fund and the compensation statutes.

In the consolidated proceeding, Jacobs moved to dismiss the State's cross-claims against it pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. After a hearing, the district court denied Jacobs' motion to dismiss. Jacobs sought review of the district court's decision in the court of appeals.[2]

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[2] Initially, the court of appeals questioned whether it had jurisdiction over the appeals. After informal briefing, the court dismissed the appeals without prejudice and remanded to the district court to determine the applicability of the statute of repose in section 541.051. Subsequently, the district court issued an amended order concluding, among other things, that the repose provision of section 541.051 did not bar the State's claims, and denied Jacobs' motion to dismiss. Jacobs sought review of the amended order under the collateral order doctrine. The court of appeals concluded that the portion of the amended order related to the statute of repose was appealable under the collateral order doctrine, and that other portions of the order were reviewable in the interests of justice. *See In re Individual*

In a published opinion, the court of appeals affirmed the district court's denial of the motion to dismiss, concluding that the 2007 amendments to section 541.051 apply retroactively to revive the State's action for contractual indemnity against Jacobs,[3] and that the revival of that action did not violate Jacobs' due process rights. *In re Individual 35W Bridge Litig.*, 787 N.W.2d 643, 650-51 (Minn.App.2010). Additionally, the court concluded that the compensation statutes, Minn.Stat. §§ 3.7391-.7395, do not unconstitutionally impair Jacobs' contractual indemnity rights in violation of the U.S. and Minnesota Constitutions. 787 N.W.2d at 653. Finally, the court rejected Jacobs' claims that the releases executed by the survivor-claimants extinguished Jacobs' liability to the State, and that the State is not entitled to obtain reimbursement for its voluntary payments to the survivor-claimants. *Id.* at 653-54. Subsequently, we granted review on all issues.

I.

On appeal, Jacobs presents five arguments to support its position that the court of appeals erred in affirming the district court. First, Jacobs argues that

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35W Bridge Litig., 786 N.W.2d 890, 893 (Minn.App.2010) (opinion on consolidated appeal); *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn.2002) (adopting collateral order doctrine).

[3] During the pendency of the appeal, PCI and the State settled their claims against each other. *In re Individual 35W Bridge Litig.*, 787 N.W.2d 643, 646 n. 3 (Minn.App.2010). Because the State's common law causes of action for contribution and indemnity against Jacobs derived solely from PCI's claims against the State, the court of appeals concluded that those causes of action against Jacobs were no longer an issue before the court. *Id.* The State has not pursued those causes of action here, and therefore they are not before us.

the 2007 amendments to Minn.Stat. § 541.051, and the compensation statutes, Minn.Stat. §§ 3.7391-.7395, do not retroactively revive causes of action previously extinguished by the statute of repose. To address this issue, we first examine whether the 2007 amendments to Minn.Stat. § 541.051 retroactively revive a cause of action previously extinguished by the statute of repose.

We review de novo decisions on motions to dismiss for failure to state a claim upon which relief can be granted under Minn. R. Civ. P. 12.02(e). *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn.2003). The question before us is whether the complaint sets forth a legally sufficient claim for relief. *Id.* We consider only those facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences in favor of the nonmoving party. *Id.* Moreover, interpretation of a statute is also reviewed de novo. *Zurich Am. Ins. Co. v. Bjelland*, 710 N.W.2d 64, 68 (Minn.2006). In construing the language of a statute, we give words and phrases their plain and ordinary meaning. Minn.Stat. § 645.08 (2010); *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn.1999). Thus, if the language of a statute is clear and free from ambiguity, our role is to apply the language of the statute, and not explore the spirit or purpose of the law. Minn.Stat. § 645.16 (2010).

A.

The State asserts causes of action against Jacobs for contractual indemnity[4] and for reimbursement

[4] The State's cause of action for contractual indemnity includes the theory of contractual contribution, and is premised on the indemnity clause in the 1962 contract between the State and

under the compensation statutes, Minn.Stat. §§ 3.7391-.7395. Jacobs argues that the State's actions were extinguished by a prior version of the statute of repose in Minn.Stat. § 541.051, and were not retroactively revived by the 2007 amendments to the statute. According to Jacobs, the Bridge was substantially completed in 1967, and the repose period expired decades before the Bridge collapsed in 2007. The State argues that section 541.051 did not exist at the time Sverdrup and the State executed the contract in 1962, and therefore there is no statute of repose applicable to the State's action for contractual indemnity.

In a companion case, *In re Individual 35W Bridge Litigation*, 806 N.W.2d 811, 816-17, 820 (Minn.2011), we concluded that the fifteen-year repose period in the 1980 version of the statute of repose applied to similar causes of action related to the Bridge collapse, that the repose period for these causes of action expired in 1982, and that the 2007 amendments to section 541.051 do not retroactively revive these causes of action. We reasoned that the 2007 amendments do not clearly and manifestly express legislative intent to retroactively revive actions that had been previously extinguished by a statute of repose before the effective date of the amendments. *Id.* at 820. Our reasoning is equally applicable to this case, and we incorporate it herein. Thus, we conclude that the 1980 version of the statute of repose in section 541.051 was applicable to the State's action for contractual indemnity against Jacobs, and that action was extinguished in 1982, long before the effective date of the 2007 amendments. Accordingly,

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Sverdrup. *See In re Individual 35W Bridge Litig.*, 787 N.W.2d at 647.

the State's cause of action for contractual indemnity was not revived by the 2007 amendments.

B.

Jacobs next argues that the compensation statutes, Minn.Stat. §§ 3.7391-.7395, do not retroactively revive the State's action for statutory reimbursement against it. The State responds that section 3.7394, subdivision 5(a), was enacted by the Legislature to provide to the State the statutory right to recover payments it made to survivor-claimants from third parties that caused or contributed to the Bridge collapse, specifically reviving claims that might otherwise have been subject to repose.

The compensation statutes were enacted by the Legislature in 2008 in response to the Bridge collapse. The Legislature found that the Bridge collapse was "a catastrophe of historic proportions" in Minnesota. Minn.Stat. § 3.7391. Significantly, the Legislature deemed that it was in the public interest to establish a "compensation process" that would provide a remedy for survivor-claimants that avoids the uncertainty of litigation "to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors." *Id.*

The relevant portion of the compensation statutes is set forth in section 3.7394, subdivision 5(a). It states:

> Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party, including an agent, contractor, or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe.

Minn.Stat. § 3.7394, subd. 5(a). Subdivision 5(a) unambiguously provides that the State has the right to recover payments made by the State to survivor-claimants pursuant to the compensation process from responsible third parties that caused or contributed to the Bridge collapse. Notably, the State's right to recover exists "[n]otwithstanding any statutory or common law to the contrary." Minn.Stat. § 3.7394, subd. 5(a). Thus, the question we must answer is whether the "notwithstanding" clause in subdivision 5(a) retroactively revived the State's cause of action for statutory reimbursement previously extinguished by the statute of repose in 1982.[5]

Statutes are generally not construed to apply retroactively, but this presumption may be overcome by language that "clearly and manifestly" demonstrates legislative intent that the statute apply retroactively. Minn.Stat. § 645.21 (2010). Previously, we have interpreted the phrase "notwithstanding" in Minn.Stat. § 15.99, subd. 2 (2010), to clearly express an intent to override conflicting timeline rules. *Breza v. City of Minnetrista*, 725 N.W.2d 106, 113-14 (2006). In *Breza*, the parties disputed the scope of the "notwithstanding" clause in the statute, and we concluded that the "notwithstanding" clause modified the sentence in which it was located. *Id.; see also Business Bank v. Hanson*, 769 N.W.2d 285, 289-90 (Minn.2009) (interpreting the phrase "[n]otwithstanding anything

[5] Both parties refer to the State's cause of action as a cause of action for statutory reimbursement. Strictly speaking, it is an action "to recover from any third party" payments made to survivor-claimants of the Bridge collapse. Minn.Stat. § 3.7394, subd. 5(a). For purposes of consistency, we will use the title given by the parties with the understanding that the language of the statute prevails.

to the contrary herein," to conclude that despite provisions of the contract referencing a larger amount of money, the debt secured by the mortgage was no more than $200,000, the amount listed after the notwithstanding clause).

Similarly, in *Cisneros v. Alpine Ridge Group*, the U.S. Supreme Court concluded that the use of a "'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). Moreover, the Court cited with approval the holdings of the various United States Courts of Appeal generally interpreting "similar notwithstanding language to supersede all other laws, stating that a clearer statement is difficult to imagine." *Id.* (internal punctuation omitted).

We conclude that the "notwithstanding" clause in section 3.7394, subdivision 5(a), clearly and manifestly demonstrates legislative intent to supersede any statutory or common law that would operate to limit the State's ability to seek reimbursement from a responsible third party. Thus, we conclude that the State's right to recover against responsible third parties under section 3.7394, subdivision 5(a), retroactively revives the State's cause of action for statutory reimbursement against Jacobs that was previously extinguished by the statute of repose in section 541.051.

II.

Second, Jacobs argues that the State's cause of action for statutory reimbursement against Jacobs under section 3.7394, subdivision 5(a), is barred by the Due Process Clauses of the U.S. and Minnesota Constitutions. Specifically, Jacobs argues that when

the statute of repose expired at the latest in 1982 for causes of action related to the design or construction of the Bridge, it acquired a vested right in the defense provided by the statute of repose, and this vested right is protected by the U.S. and Minnesota Constitutions. Thus, Jacobs asserts that interpreting the compensation statutes to retroactively revive a cause of action previously extinguished by the statute of repose violates Jacobs' constitutional right to due process of law.

We review an as-applied challenge to the constitutionality of a statute de novo. *Irongate Enters., Inc. v. Cnty. of St. Louis*, 736 N.W.2d 326, 332 (Minn.2007). We "presume statutes to be constitutional and exercise the power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *Id.* (quoting *ILHC of Eagan, LLC v. Cnty. of Dakota*, 693 N.W.2d 412, 421 (Minn.2005) (internal quotation marks omitted)). The party challenging the constitutionality of a statute must demonstrate that the statute is unconstitutional beyond a reasonable doubt. *Id.*

Both the U.S. and Minnesota Constitutions provide that an individual may not be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV (stating that a state shall not "deprive any person of life, liberty, or property, without due process of law."); Minn. Const. art. I, § 7 (stating that no person shall "be deprived of life, liberty, or property without due process of law"). We have previously stated that the due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the U.S. Constitution. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn.1988).

Jacobs' claim rests on the theory that it has been deprived of "property" without due process of law; specifically, Jacobs asserts that the compensation statutes, as applied, violate its right to substantive due process of law.[6] To prevail on its claim, Jacobs has the burden of proving that the interest allegedly interfered with rises to the level of a constitutionally protected "liberty" or "property" interest, and that this interest has been interfered with to an extent that violates the Due Process Clause. *See AFSCME Councils v. Sundquist*, 338 N.W.2d 560, 574 (Minn.1983); *accord Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) (noting that in a substantive due process case, the initial step is a "careful description of the asserted right" to determine if the right fits within pre-existing categories); *C.O. v. Doe*, 757 N.W.2d 343, 349 (Minn.2008) (stating that in a due process case, two inquiries are necessary, "whether the party has a protectable liberty or property interest" and "whether the procedures used were constitutionally sufficient"). When analyzing whether legislation violates substantive due process rights, we apply the rational basis test unless a fundamental right is involved.[7] *Boutin v.*

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[6] Federal and Minnesota case law distinguish between due process claims based on violations of procedural or substantive due process rights. *See Boutin v. LaFleur*, 591 N.W.2d 711, 716-18 (Minn.1999) (analyzing constitutional claims under both substantive and procedural due process). Procedural due process analyzes whether fair procedures were followed when an individual is deprived of life, liberty, or property. *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Substantive due process bars "certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Boutin*, 591 N.W.2d at 716 (quoting *Zinermon*, 494 U.S. at 125, 110 S.Ct. 975).

[7] Jacobs suggests that in cases involving retroactive legisla-

LaFleur, 591 N.W.2d 711, 717 (Minn.1999). Under the rational basis test, legislation is examined to determine whether it is rationally related to a legitimate government interest. *AFSCME*, 338 N.W.2d at 573-75.

A.

We first examine whether Jacobs' defense provided by the statute of repose is a "property" right entitled to due process protection. Historically, courts have limited the type of property rights entitled to due process protection. For example, the U.S. Supreme Court has found protectable property rights in real property and certain categories of personal property, *see Buchanan v. Warley*, 245 U.S. 60, 74, 38 S.Ct. 16, 62 L.Ed. 149 (1917) (noting that "property" includes the item itself and the right to acquire, use, and dispose of it); and in final judgments, *Hodges v. Snyder*, 261 U.S. 600, 603, 43 S.Ct. 435, 67 L.Ed. 819

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tion, we have replaced the rational basis test in favor of a three-factor analysis, citing *Peterson v. City of Minneapolis*, 285 Minn. 282, 173 N.W.2d 353 (1969). In *Peterson*, we concluded, among other things, that legislation retroactively replacing the law of contributory negligence with comparative negligence did not affect a vested right, and therefore the retrospective application of the statute was not unconstitutional as applied. *Id.* at 290, 173 N.W.2d at 358. In analyzing vested rights, we quoted a law review article to suggest that three factors may help determine whether a retroactive law is constitutional: "(1) the nature and strength of the public interest served by the statute; (2) the extent to which the statute modifies or abrogates the preenactment right; and (3) the nature of the right the statute alters." *Id.* at 288, 173 N.W.2d at 357 (citing Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.Rev. 692, 697 (1960)). But we did not abrogate the rational basis test to determine whether a statute violates the Due Process Clause. Consequently, we apply the rational basis test to examine Jacobs' due process claim.

(1923) ("[T]he private right of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation."); but not in the defense of the statute of limitations, *Campbell v. Holt*, 115 U.S. 620, 628-299 [sic], 6 S.Ct. 209, 29 L.Ed. 483 (1885) (declining to expand the meaning of "property" in the Due Process Clause of the U.S. Constitution to include a property right in the statute of limitations defense).

Our court has observed that a protectable property right is a right that is created and defined by "existing rules or understandings that stem from an independent source, such as state law, rules or understandings that support claims of entitlement to certain benefits." *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 791 (Minn.1989) (internal quotation marks omitted). For example, "vested" property rights that have "become so fixed that it would be inequitable to abrogate [the right] by retrospective regulation" may be entitled to protection. *Peterson v. City of Minneapolis*, 285 Minn. 282, 289, 173 N.W.2d 353, 357 (1969). Those rights include real property rights, *See Young v. Mall Inv. Co.*, 172 Minn. 428, 430, 215 N.W. 840, 840 (1927); certain statutory rights, *Yaeger v. Delano Granite Works*, 250 Minn. 303, 307, 84 N.W.2d 363, 366 (1957) (stating that a right exists in certain portions of the workers' compensation statutes); and final judgments, *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957). But we have also concluded that there is no protectable property right in a statute of limitations defense. *Donaldson v. Chase Secs. Corp.*, 216 Minn. 269, 276-77, 13 N.W.2d 1, 5 (1943).

Jacobs relies on *Weston v. McWilliams & Assoc.*, 716 N.W.2d 634 (Minn.2006), to argue that it has a protectable property right in a statute of repose defense. In *Weston* we considered, among other things, whether the application of a statute of repose provision in Minn.Stat. § 541.051 (2002) to bar a contribution and indemnity action violated the Due Process Clauses of the U.S. and Minnesota Constitutions. 716 N.W.2d at 640. In our analysis of that issue, we recognized that there is a significant difference between a statute of limitations and a statute of repose. *Id.* at 641. Specifically, "a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit)." *Id.* We concluded that "a statute of repose . . . is intended to eliminate the cause of action." *Id.*

Applying *Weston*, we conclude that when the repose period expires, a statute of repose defense ripens into a protectable property right.[8] Our conclusion rests on

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[8] The vast majority of states have not yet addressed the issue of whether a statute of repose creates a protectable property right. Four states that have considered this issue have concluded that the expiration of a statute of repose creates a protectable property right. *M.E.H. v. L.H.*, 177 Ill.2d 207, 226 Ill.Dec. 232, 685 N.E.2d 335, 338 (1997) (applying the rule that the expiration of the statute of limitations creates a protectable property right to conclude that the expiration of the statute of repose creates a similar right); *Harding v. K.C. Wall Prods., Inc.*, 250 Kan. 655, 831 P.2d 958, 968 (1992) ("The legislature can *not* revive a cause of action barred by a statute of repose, as such action would constitute the taking of property without due process."); *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 466 N.W.2d 771, 773-74 (1991) (concluding that the immunity granted by the expiration of a statute of repose is a property

the premise that the statute of repose defense is a substantive limit on a cause of action. It is a defense created and defined by statute that ripened into a fixed right upon expiration of the repose period. Unlike the statute of limitations, when the repose period expires, the cause of action is extinguished before it comes into existence and prevented from accruing. Thus, a statute of repose defense is an expectancy that ripens into a protectable property right when the repose period expires and the cause of action can no longer accrue.[9] Moreover, enforcement

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right, protected by due process of law); *Sch. Bd. of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325, 328 (1987) (concluding that the rights bestowed by the expiration of the statute of repose were substantive and therefore were entitled to due process protection).

[9] The concurrence of Justice Stras argues that Jacobs has no protected property interest in a statute of repose defense because the Due Process Clause of the U.S. Constitution does not recognize such an interest, and the Minnesota Constitution provides identical due process protection. Its conclusion rests on the assumption that statutes of repose and statutes of limitations "share identical qualities." This assumption is incompatible with our decision in *Weston.* Rather, in *Weston* we concluded that statutes of repose and statutes of limitations require distinct due process analyses. 716 N.W.2d at 641 ("This difference between statutes of repose and statutes of limitations is significant when either is challenged as being violative of ... due process clauses."). Significantly, in *Weston* we distinguished between the effect of a statute of repose, which is substantive and eliminates a cause of action before it can accrue, and a statute of limitations, which is procedural and merely limits the time to pursue a remedy. It logically follows that the statute of repose defense, which is a substantive limit, is a protected property interest, and the statute of limitations defense, which is a procedural limit, is not. Jacobs' protectable property interest in the statute of repose defense protects against the retroactive *imposition* of a cause of action that, as to Jacobs, did not exist after the expiration of the repose period.

of the defense of the statute of repose after the repose period expires promotes the finality of claims. After a certain amount of time has passed, it is no longer equitable to require a party to litigate a stale claim. *See Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn.1988) (stating that the legislative objective of section 541.051 was to "avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed").

B.

Having concluded that Jacobs has a protectable property right in a statute of repose defense does not end our inquiry. Rather, we must next consider whether the compensation statutes, particularly the revival of the State's claim against Jacobs, is rationally related to a legitimate governmental interest. We have not previously determined whether retroactive revival of claims extinguished by the statute of repose violates due process.

In *Weston*, we held that the statute of repose provision in section 541.051 did not violate the Due Process Clauses of the U.S. and Minnesota Constitutions. 716 N.W.2d at 644. We reasoned that the Legislature has the prerogative to extinguish a common law cause of action through expiration of a statute of repose, and that there was "a legitimate legislative objective" sufficient to support the constitutionality of the statute. *Id.* The logical corollary of *Weston* is that the Legislature may also create an exception to the statute of repose provided there is a legitimate governmental objective to support the exception. We do not read *Weston* to foreclose this possibility.

Several federal cases support our determination.[10] *Wesley Theological Seminary v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C.Cir.1989); *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir.1995). In *Wesley*, the building owner brought a suit against the manufacturer of asbestos-containing products after the owner discovered that the products were used in construction of the building. 876 F.2d at 120. The district court granted partial summary judgment for the manufacturer on the tort claim, applying the earlier version of the statute of repose to bar the claim. *Id.* at 121. Relying on existing U.S. Supreme Court precedent, the D.C. Circuit reversed, concluding that the retroactive repeal of the statute of repose did not violate due process. *Id.* at 121-23. The court reasoned that legislation that adjusts the benefits and burdens of economic life is presumed constitutional even when that legislation is applied retroactively. *Id.* at 122 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). When the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, the statute does not violate due process. *Id.* (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984)). We find the reasoning in *Wesley* persuasive.

Applying these principles, we conclude that the reimbursement provision of the compensation statutes satisfies the rational basis test. The legislative purposes are to establish a compensation process and

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[10] Due process protection is identical under the United States and Minnesota Constitutions and therefore it is appropriate for us to consider relevant federal cases as guidance. *Sartori*, 432 N.W.2d at 453.

provide a remedy for survivor-claimants of the Bridge collapse that avoids the uncertainty of litigation in resolving the issue of the State's liability. Minn.Stat. § 3.7391, subd. 2. The compensation statutes give the State the right to recover from a third party any payments made by the State to the extent the third party "caused or contributed" to the Bridge collapse. Minn.Stat. § 3.7394, subd. 5(a). In the compensation statutes, the Legislature attempted to balance the rights of responsible third parties and the right of the State to seek reimbursement for claims paid under the compensation process.

We recognize that Jacobs has a protectable property right in the defense of the statute of repose. But that right is not absolute and must be balanced against the State's legitimate interest in addressing a Bridge collapse that was a "catastrophe of historic proportions." Minn.Stat. § 3.7391, subd. 1. We acknowledge that it may be economically unfair to allow a cause of action previously extinguished by a statute of repose to be revived by subsequent legislation, but we find nothing in the Due Process Clause to preclude this result. The compensation statutes are narrowly targeted to contribution and indemnity causes of action against responsible third parties. In our view, the compensation statutes are rationally related to a legitimate state interest. Accordingly, we hold that the reimbursement provision of the compensation statutes, section 3.7394, subdivision 5(a), does not violate Jacobs' constitutional right to due process by retroactively reviving a cause of action previously extinguished by the statute of repose.

III.

Third, Jacobs asserts that the statutory reimbursement provision in section 3.7394, subdivision 5(a), impairs its contractual obligations under the State's 1962 contract with Sverdrup, in violation of the U.S. and Minnesota Constitutions. Jacobs asserts it is entitled to the benefit of the State's sovereign immunity defense—namely, the anticipated right to be free from liability to the State for contribution, indemnity, or other reimbursement for tort claims, and to vicariously enjoy the defense of sovereign immunity should a plaintiff assert a tort claim against the State. Therefore, Jacobs concludes that the compensation statutes unconstitutionally impair the 1962 contract by allowing the State to pay survivor-claimants and seek statutory reimbursement, thus abrogating the sovereign immunity defense.

When the contract between the State and Sverdrup was executed in October 1962, governmental units had broad sovereign immunity from tort claims. *See Spanel v. Mounds View Sch. Dist. No. 621*, 264 Minn. 279, 293 n. 42, 118 N.W.2d 795, 803 n. 42 (1962) (discussing the broad sovereign immunity protecting the State). In December 1962, we overruled the doctrine of sovereign tort immunity as a defense to tort claims against school districts, municipal corporations, and "other subdivisions of government on whom immunity has been conferred by judicial decision." *Id.* at 292, 118 N.W.2d at 803. In 1975, we abolished the sovereign immunity of the State against tort liability for claims arising on or after August 1, 1976. *Nieting v. Blondell*, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (1975).

The Legislature responded by enacting Minn.Stat. § 3.736 (1978), effective in August 1976. Act of Apr. 20, 1976, ch. 331, § 33, 1976 Minn. Laws 1282, 1293-97, 1301 (codified at Minn.Stat. § 3.736 (1978)). Generally, this statute established that the State would compensate claimants for torts subject to certain limitations and procedures. Minn.Stat. § 3.736 (1978). The total liability of the State, or "tort cap," was set at $100,000 for a single claimant and $500,000 for any number of claims arising out of a single occurrence. *Id.*, subd. 4. Since that time, the Legislature has increased the tort cap; specifically, the limit applicable on the date of the Bridge collapse was $1 million of total liability against the State based on "any number of claims arising out of a single occurrence." Minn.Stat. § 3.736, subd. 4(e) (2010) (applicable to claims arising between January 1, 2000, and January 1, 2008).

In 2008 the Legislature added Minn.Stat. § 3.7393, subd. 11(b), which removed the $1 million tort cap for claims made by survivor-claimants of the Bridge collapse pursuant to the process set forth in the compensation statutes. Act of May 8, 2008, ch. 288, § 4, 2008 Minn. Laws 969, 971-74 (codified at Minn.Stat. § 3.7393 (2010)). Subdivision 11(b) states: "Notwithstanding section 3.736, subdivision 4, clause (e), or 466.04, subdivision 1, paragraph (a), clause (5), the $1,000,000 limitation on state or municipal liability for claims arising out of a single occurrence otherwise applicable to the [Bridge collapse] does not apply to payments made to survivors under this section." Minn.Stat. § 3.7393, subd. 11(b) (2010). Subdivision 11(b) applies to claims based on the administrative process set forth in the compensation statutes, but it does not apply to claims against the State made outside the statutory process. *See* Minn.Stat.

§ 3.7393, subd. 11(b) (limiting the removal of the $1 million tort cap to "payments made to survivors [of the Bridge collapse] *under this section*" (emphasis added)).

Jacobs argues that the laws in effect at the time of the 1962 contract included the State's defense of sovereign immunity against tort liability, and that defense became part of the contract. According to Jacobs, the State's decision not to assert the defense of sovereign immunity against tort liability under the compensation statutes substantially impairs its rights under the 1962 contract.

The question we must decide is whether the reimbursement provision in section 3.7394, subdivision 5(a), substantially impaired Jacobs' rights as the successor to Sverdrup by allowing the State to pay survivor-claimants and then recover a portion of those payments from Jacobs without the benefit of the sovereign immunity defense.

Both the U.S. and Minnesota Constitutions contain provisions that prohibit the government from enacting a law that impairs the obligation of contracts. U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); Minn. Const. art. I, § 11 ("No . . . law impairing the obligation of contracts shall be passed."). In *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, the U.S. Supreme Court adopted a three-part test to evaluate whether a statute unconstitutionally impairs contractual obligations. 459 U.S. 400, 410-13, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). First, the threshold inquiry is "whether the state law has, in fact operated as a substantial impairment of a contractual relationship." *Id.* at 411, 103 S.Ct. 697 (citing *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 244, 98

S.Ct. 2716, 57 L.Ed.2d 727 (1978)). Second, the Court looked at whether the State has a "significant and legitimate public purpose behind the regulation." *Id.* (citing *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)). Third, once a legitimate public purpose has been identified, the question is whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Id.* at 412, 103 S.Ct. 697 (citing *U.S. Trust*, 431 U.S. at 22, 97 S.Ct. 1505). The courts defer to legislative judgment unless the State is a party to the contract affected. *Id.* at 413, 103 S.Ct. 697. When the State is a party, complete deference to the Legislature's assessment is not appropriate. *Id.* at 413 n. 14, 103 S.Ct. 697. We have adopted and applied the *Energy Reserves* test. *See Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 874-75 (Minn.1986); *Christensen v. Minneapolis Mun. Emps. Ret. Bd.*, 331 N.W.2d 740, 750-51 (Minn.1983).

We conclude that Jacobs has failed to satisfy the first factor of the *Energy Reserves* test—namely, that the compensation statutes have substantially impaired its rights under the 1962 contract. Specifically, the 1962 contract does not obligate the State to assert sovereign immunity as a defense to tort claims by a plaintiff against it. Absent an affirmative obligation in the contract, there is no substantial impairment of the contract for the failure to assert an affirmative defense.

Jacobs correctly points out that existing law at the time of a contract may be incorporated into the contract. But that principle does not apply if a contrary intent is expressed. *Wm. Lindeke Land Co. v.*

Kalman, 190 Minn. 601, 607, 252 N.W. 650 (1934). Here, the 1962 contract provided:

> [Sverdrup] indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of [Sverdrup] provided for under this agreement.

The indemnity clause is very broad and does not require the State to assert sovereign immunity as a defense to claims brought against it. Rather, sovereign immunity is an affirmative defense available to the State. *See Rum River Lumber Co. v. State*, 282 N.W.2d 882, 883 n. 1 (Minn.1979) (discussing the State's ability to pass special legislation and waive sovereign immunity for specific situations). Finally, the contract did not give Jacobs the right to challenge a decision by the State not to assert sovereign immunity.

Consequently, the compensation statutes do not result in a substantial impairment of the 1962 contract between the State and Sverdrup because the State was not contractually obligated to assert sovereign immunity as a defense to the claims of the individual plaintiffs. Because Jacobs has failed to establish the first factor of the *Energy Reserves* test, we need not address the second or third factors.

IV.

Fourth, Jacobs argues that the releases executed by the survivor-claimants in favor of the State are *Pierringer* releases, and thus the terms of the releases bar the State's statutory reimbursement claim against Jacobs. The practical effect of a *Pierringer*

release is to dismiss the settling tortfeasor from the lawsuit and to dismiss all cross-claims for contribution between the settling defendant and the remaining defendants. *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn.1989). Additionally, Jacobs argues that any payments made by the State above the pre-existing statutory tort cap of $1 million were made voluntarily and in the absence of a legal duty. Therefore, the State should not be able to obtain statutory reimbursement from Jacobs. *See Lemmer v. IDS Properties, Inc.*, 304 N.W.2d 864, 869 (Minn.1980) (discussing whether a settling party qualified as a volunteer, such that payment from a third party could not be sought).

We conclude that the "notwithstanding" clause of section 3.7394, subdivision 5(a), negates the application of both *Pierringer* principles and the voluntary payments doctrine to the State's claims for statutory reimbursement. The clause "notwithstanding any statutory or common law to the contrary," Minn.Stat. § 3.7394, subd. 5(a), plainly means that the statutory reimbursement the State may seek is not subject to general common law principles, including the limitations of *Pierringer* releases and the voluntary payments doctrine. Rather, the only limitations placed on this reimbursement provision are the constitutional limits discussed in Parts II and III and the modifier that the reimbursement is limited to the "extent the third party caused or contributed to" the Bridge collapse. Therefore, based upon the "notwithstanding" clause in section 3.7394, subdivision 5(a), we hold that the State is not barred by either *Pierringer* principles or the voluntary payments doctrine from seeking statutory reimbursement against Jacobs.

Affirmed.

GILDEA, C.J., concurring.

STRAS, J., concurring.

GILDEA, Chief Justice (concurring).

I agree with the majority that the result below should be affirmed. But I write separately because I would not decide the question of whether Jacobs has a constitutionally protectable property interest in the statute of repose defense. I would assume, without deciding, that Jacobs has such an interest, and hold that Jacobs' right to due process was not violated under the analysis in part II.B of the court's opinion.

STRAS, Justice (concurring).

I join the court's opinion, except for its conclusion that Jacobs has a protectable property interest in a statute of repose under the Due Process Clauses of the United States and Minnesota Constitutions. With respect to Part II of the court's opinion, therefore, I concur only in the result.

We recognized nearly 130 years ago that statutes exempting a party "from the servitude of certain forms of action" do not create vested rights. *Kipp v. Johnson*, 31 Minn. 360, 362, 17 N.W. 957, 958 (1884); *see also id.* at 363, 17 N.W. at 959 (stating that "[n]o man has a vested right to a mere remedy, or in *an exemption from it* " (emphasis added)). In *Donaldson v. Chase Securities Corp.*, we reiterated the rationale from *Kipp*, concluding that statutes of limitations "are a matter of legislative policy or expediency [that] may be changed as legislative wisdom dictates." 216 Minn. 269, 276, 13 N.W.2d 1, 5 (1943). The Supreme Court of the United States affirmed our decision in *Donaldson*, holding that, despite the running of a prior statute of limitations, the defendant "had ac-

quired no immunity from this suit that has become a federal constitutional right." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). The Court explained that the protections provided by a statute of limitations continue "only by legislative grace," and "[t]heir shelter has never been regarded" as a fundamental or natural right. *Id.* at 314, 65 S.Ct. 1137.

As the court states, the scope of protection provided by the Due Process Clause of the Minnesota Constitution, Minn. Const. art. I, § 7, is identical to that provided by the Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, § 1. *See Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn.1988) (addressing the constitutionality of the statute of repose in Minn.Stat. § 541.051, the same statute at issue here). Yet rather than discussing the precedent of the Supreme Court or this court, the court relies on cases from other states analyzing statutes of repose under the unique language of their own state constitutions. *See M.E.H. v. L.H.*, 177 Ill.2d 207, 226 Ill.Dec. 232, 685 N.E.2d 335, 339 (1997); *Harding v. K.C. Wall Prods., Inc.*, 250 Kan. 655, 831 P.2d 958, 967-68 (1992); *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 466 N.W.2d 771, 773-74 (1991); *Sch. Bd. of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325, 327-28 (1987). Moreover, in the only one of these cases discussing federal due process principles, the Kansas Supreme Court concluded that there is *no* protectable property right in a statute of repose under the United States Constitution. *See Harding*, 831 P.2d at 967 (citing *Donaldson*, 325 U.S. at 314, 65 S.Ct. 1137). Consequently, neither Jacobs nor the court have identified a single case in which a court has held that a defendant has a protectable property interest in a statute of repose defense under

the United States Constitution. That absence of authority should be fatal to Jacobs' claim.

Nonetheless, the court relies on *Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634 (2006), in concluding that Jacobs has a protectable property right in a statute of repose defense.[1] In *Weston*, we noted that, unlike a statute of limitations, a statute of repose is a substantive limit on a cause of action. *Id.* at 641. But characterizing a statute as "*substantive*" no more automatically invokes *substantive* due process than characterizing a statute as "*procedural*" automatically invokes *procedural* due process. If the substantive label were significant for due process purposes, then every time the Legislature modifies or eliminates *any* cause of action, it would be necessary to scrutinize the Legislature's action for compliance with substantive due process. That, however, has never been the law in Minnesota, even though there is no question that altering or eliminating a cause of action constitutes a "substantive" change to the law.

More important, in my view, is that a statute of limitations and a statute of repose share identical qualities: they are both creatures of statute and affirmative defenses to otherwise valid causes of action. Because a statute of repose is equally the product of legislative grace, I see no reason why the rationale and result of *Donaldson* and *Kipp* do not

[1] To be sure, the court also identifies the promotion of finality and the inequity of requiring a party to litigate stale claims in finding a protectable property right in a statute of repose defense. Both of these interests, however, are equally applicable to a statute of limitations defense, and indeed, the policy of avoiding stale claims through a statute of limitations was identified in *Donaldson, see* 325 U.S. at 314, 65 S.Ct. 1137, years before Minn.Stat. § 541.051 was enacted.

apply to a statute of repose. Given their similar function and origin, I also do not understand why a statute of repose defense can "ripen[ ] into a fixed right," but a statute of limitations defense cannot. Other than citing to *Weston*, the court cannot provide a reason either. Accordingly, because the court's conclusion is contrary to well-settled case law in this state and other jurisdictions, I would conclude that Jacobs did not have a constitutionally-protected property interest in its statute of repose defense.

APPENDIX B

COURT OF APPEALS OF MINNESOTA

Nos. A10-87, A10-89, A10-90, A10-91

IN RE INDIVIDUAL 35W BRIDGE LITIGATION

Aug. 24, 2010

Syllabus by the Court

Minn.Stat. § 541.051 (2008) applies retroactively to revive the state's indemnity claims against bridge designer's successor arising out of the 2007 collapse of a bridge that was substantially completed in 1967.

The revival of the state's indemnity claims does not violate the due-process rights of bridge designer's successor.

Minn.Stat. §§ 3.7391-.7395 (2008) do not unconstitutionally impair the 1962 contract between bridge designer and the state.

OPINION

Considered and decided by PETERSON, Presiding Judge; LANSING, Judge; and STAUBER, Judge

STAUBER, Judge.

Appellant challenges the denial of its motion to dismiss the cross-claims of respondent Minnesota Department of Transportation (the state) for contrac-

tual contribution and indemnity and for statutory reimbursement arising out of the collapse of the Interstate Highway 35W bridge in 2007. Appellant argues that: (1) Minn.Stat. § 541.051 (2008) bars the state's claims; (2) the compensation statutes passed after the collapse unconstitutionally impair the 1962 contract between the bridge designer and the state; (3) settlement agreements between the state and some of the plaintiffs bar the state's claims; and (4) appellant is not required to reimburse the state for "voluntary" payments made to survivors of the collapse under the compensation statutes. We affirm.

FACTS

In October 1962, an engineering firm then known as Sverdrup & Parcel and Associates Inc. (Sverdrup) entered into a contract with the state. Sverdrup agreed to design a bridge that would carry Trunk Highway No. 35W across the Mississippi River in Minneapolis. Sverdrup also agreed to indemnify the state for "any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work . . . provided for under this agreement." Sverdrup certified the final design plans for the bridge in March 1965, and construction of the bridge was substantially completed in 1967.

In 2003, the state contracted with URS Corporation (URS) to inspect the bridge and recommend repairs. In 2007, the state contracted with Progressive Contractors Incorporated (PCI) to repair the bridge. The repair project began in June 2007 and was scheduled to be completed in September 2007.

On August 1, 2007, the bridge collapsed. Thirteen people were killed, and more than 100 were injured.

Legislation was passed to compensate survivors[1] of the collapse. *See* Minn.Stat. §§ 3.7391-.7395 (2008) (the compensation statutes). The state entered into settlement agreements with 179 survivors who made statutory claims for compensation, paying them $36,640,000 through the compensation statutes and $398,984.36 from the emergency-relief fund. The compensation statutes provide that the state may seek reimbursement for these payments:

> Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party, including an agent, contractor, or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe.[2] The state is entitled to be reimbursed regardless of whether the survivor is fully compensated.

Minn.Stat. § 3.7394, subd. 5(a).

More than 100 separate actions related to the collapse were filed in Hennepin County District Court. The district court consolidated these actions and sorted them into nine categories. The cases underlying this appeal are the Schwebel firm's wrongful-death and personal-injury cases. The plaintiffs here, some of whom settled with the state under the com-

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[1] "Survivor" is defined as "a natural person who was present on the I-35W bridge at the time of the collapse." Minn.Stat. § 3.7392, subd. 8. "Survivor" also includes the parent or legal guardian of a survivor who is under the age of 18, a survivor's legally appointed representative, and the surviving spouse or next of kin of a deceased survivor. *Id*.

[2] "Catastrophe" is defined as the collapse of the bridge. Minn.Stat. § 3.7392, subd. 2.

pensation statutes, sued URS and PCI for negligence and breach of contract. PCI asserted third-party claims against appellant Jacobs Engineering Group Inc. (Jacobs), which acquired Sverdrup in 1999, and against the state. URS sued Jacobs and PCI.

The state sued Jacobs, alleging that Sverdrup negligently designed the bridge, breached its 1962 contract with the state, and contributed to the collapse. The state cross-claimed against Jacobs, alleging three causes of action: (1) common-law contribution and indemnity; (2) contractual contribution and indemnity; and (3) reimbursement pursuant to the compensation statutes.[3]

Jacobs moved to dismiss the state's cross-claims pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. After a hearing, the district court denied Jacobs's motion.

Jacobs sought review of the district court order denying its motion to dismiss. This court questioned whether the order was appealable as a matter of right, dismissed the appeal without prejudice, and remanded for the district court to rule on the applicability of Minn.Stat. § 541.051 to the state's claim of contractual contribution and indemnity. After receiving further submissions from Jacobs and the state, the district court issued an amended order that addressed the application of section 541.051 and again denied Jacobs's motion to dismiss.

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[3] The state also sued PCI. In November 2009, PCI and the state settled their claims against each other. Because the state's common-law claim against Jacobs derived solely from PCI's claims against the state, the common-law claim for contribution and indemnity is not at issue in this appeal.

Jacobs appealed the original and amended orders. This court granted Jacobs's request for discretionary review of certain issues.

ISSUES

I. Does Minn.Stat. § 541.051 bar the state's claims against Jacobs?

II. Are Jacobs's due-process rights violated by the retroactive revival of the state's claims?

III. Do the compensation statutes unconstitutionally impair Sverdrup's 1962 contract with the state?

IV. Is the state prohibited from pursuing its statutory reimbursement claim against Jacobs because (1) *Pierringer* settlements preclude a settling defendant from asserting indemnity claims against a nonsettling defendant or (2) the state's payments under the compensation statutes were "voluntary"?

ANALYSIS

When reviewing a district court's decision on a motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief. *See Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn.2008) (stating standard of review when a case has been dismissed pursuant to rule 12.02(e)). We consider only the facts alleged in the complaint, accept those facts as true, and construe all reasonable inferences in favor of the nonmoving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn.2003). But we may consider matters outside the pleadings if the pleadings refer to or rely on the outside matters. *In re Hennepin County 1986 Recycling Litig.*, 540 N.W.2d

494, 497 (Minn.1995) (considering contracts central to the dispute). The standard of review is de novo. *Bodah*, 663 N.W.2d at 553.

I.

We first consider Jacobs's argument that the current version of section 541.051, which limits the time within which actions may be brought for damages based on services or construction to improve real property, bars the state's claims against Jacobs for contractual contribution and indemnity and for statutory reimbursement.[4] The construction and applicability of a statute of limitations or repose is a question of law, which we review de novo. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn.2006).

> [An appellate court's] goal when interpreting statutory provisions is to ascertain and effectuate the intention of the legislature. . . . [The appellate court] determine[s] legislative intent primarily from the language of the statute itself. If the text is clear, statutory construction is neither necessary nor permitted and [the appellate court] appl[ies] the statute's plain meaning.

Brayton v. Pawlenty, 781 N.W.2d 357, 363 (Minn.2010) (quotations and citations omitted).

A brief summary of the history of section 541.051 is helpful in reviewing its application to the facts here. In 1939, Minnesota adopted a rule that building contractors could be liable to parties with whom no privity of contract exists. *Murphy v. Barlow Realty Co.*, 206 Minn. 527, 531-36, 289 N.W. 563, 565-67 (1939).

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[4] For brevity, we will refer to these claims as indemnity claims.

"This rule, coupled with holdings in some cases that the statute of limitations does not begin to run until the wrong giving rise to that action is discovered, resulted in greatly increased exposure of architects, engineers, and contractors over an extended period of time." *Pac. Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn.1977). In response to this extended exposure to liability, the Minnesota legislature enacted section 541.051. 1965 Minn. Laws ch. 564, § 1, at 803; *see Lietz v. N. States Power Co.*, 718 N.W.2d 865, 870 (Minn.2006) (presuming that section 541.051 was part of a national trend to protect the construction industry after the abrogation of the privity-of-contract doctrine); *Pac. Indem. Co.*, 260 N.W.2d at 554-55 (noting that Minnesota and other states responded to this extension of liability by enacting statutes to nullify causes of action not asserted within the statutory time limit).

Enacted in 1965, the original version of section 541.051, subdivision 1, provided that an action—including one for contribution or indemnity—to recover damages for an injury arising out of the defective and unsafe condition of an improvement to real property could not be brought more than two years after the discovery of the injury. Minn.Stat. § 541.051, subd. 1 (1965). In addition to this two-year limitations provision, subdivision 1 included a repose provision providing that no action to recover damages for an injury arising out of the defective and unsafe condition of an improvement to real property could be brought more than 10 years after the completion of the improvement. *Id.*; *see also U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98, 102 (Minn.App.2008) (*Zimmerman*) (explaining the difference between a limitations provision, which bars an action if a plaintiff does not file suit within a

set period of time after a cause of action accrues; and a repose provision, which bars a suit a fixed number of years after the defendant has acted, regardless of when the injury was discovered), *review denied* (Minn. Aug. 5, 2008). Subdivision 2 of the original version of section 541.051 provided that if an injury occurred during the tenth year after the completion of the improvement, an action could be brought within one year of the injury but not more than 11 years after the completion of the improvement. Minn.Stat. § 541.051, subd. 2 (1965).

In 1977, the Minnesota Supreme Court held section 541.051 unconstitutional because the statute granted immunity from suit to a certain class of defendants without a reasonable basis for the classification. *Pac. Indem. Co.*, 260 N.W.2d at 555. In 1980, the legislature sought to cure the statute's constitutional defects by eliminating the distinction between certain defendants. *See* 1980 Minn. Laws ch. 518, §§ 2-3, at 595-96; *see also Calder v. City of Crystal*, 318 N.W.2d 838, 839 (Minn.1982) (characterizing the 1980 amendments as an attempt to cure the statute's constitutional defects). The legislature also extended the repose provision of section 541.051, subdivision 1, to 15 years. 1980 Minn. Laws ch. 518, § 2, at 596. And subdivision 2 was altered to provide that if an action accrued during the fourteenth or fifteenth year after the date of substantial completion of the construction, an action could be brought within two years of the date of accrual but not more than 17 years after substantial completion of the construction. *Id*. § 3, at 596.

In 1986, the legislature shortened the repose provision of section 541.051, subdivision 1, to ten years. 1986 Minn. Laws ch. 455, § 92, at 885. Subdivision 2 was amended to provide that if an action accrued

during the ninth or tenth year after substantial completion of the construction, an action could be brought within two years of the date of accrual but not more than 12 years after substantial completion. *Id*. at 885-86.

In 1988, the legislature added language to section 541.051, subdivision 1, providing that a cause of action for contribution or indemnity accrues "upon payment of a final judgment, arbitration award or settlement arising out of the defective and unsafe condition." 1988 Minn. Laws ch. 607, § 1, at 681.

In 2006, the Minnesota Supreme Court decided *Weston v. McWilliams & Assocs., Inc*., 716 N.W.2d 634 (Minn.2006). In *Weston*, a general contractor substantially completed a home in July 1993. 716 N.W.2d at 636. In May 2003, approximately two months before the end of the ten-year period of repose, the general contractor was sued for problems with the home. *Id*. at 636-37. After the ten-year period of repose had run, but within 12 years after substantial completion of the home, the general contractor brought contribution and indemnity claims against its supplier and subcontractors. *Id*. at 637. The supreme court held that Minn.Stat. § 541.051 (2002) "bars a contribution and indemnity claim that has not accrued (i.e., where the principal claim has not been paid) and has not been brought within the 10 years from the completion of the construction." *Id*. at 640. The supreme court noted that if the legislature had wanted "to declare a separate and different repose period for contribution and indemnity claims, it could have done so explicitly." *Id*. at 639.

The legislature's most recent changes to section 541.051 were made in May 2007. 2007 Minn. Laws ch. 105, § 4, at 625-26; 2007 Minn. Laws ch. 140, art.

8, § 29, at 1535-36. These amendments removed the references to contribution and indemnity claims from subdivision 1(a) and created subdivision 1(b) to address such claims. *Id.*; *Zimmerman*, 749 N.W.2d at 102. The current version of section 541.051, subdivision 1, provides, in relevant part:

> (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. . . .
>
> (b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, *regardless of whether it accrued before or after the ten-year period referenced in paragraph (a)*.
>
> (c) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury; provided, however, that in the case of an action for contribution or indemnity under paragraph (b), a cause of action accrues upon the earlier of commencement of the action against the party seek-

> ing contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

Minn.Stat. § 541.051, subd. 1 (2008) (emphasis added). The legislature also added the following sentence to subdivision 2: "Nothing in this subdivision shall limit the time for bringing an action for contribution or indemnity." *Id*., subd. 2 (2008).

The current version of section 541.051 contains a two-year limitations provision that applies to all actions, including those for contribution or indemnity. *Id*., subds. 1(a), 1(b). Section 541.051 also contains a ten-year repose provision. *Id*., subd. 1(a). But this repose provision does not apply to actions for contribution or indemnity. *Id*., subd. 1(b) (providing that an action for contribution or indemnity may be brought at any time, so long as the action is brought within two years of its accrual); *Zimmerman*, 749 N.W.2d at 103 (concluding that the 2007 amendments to section 541.051 "remove[d] the ten-year repose barrier" to the timely assertion of indemnity claims).[5]

Jacobs contends that the state's indemnity claims became barred in 1977, ten years after substantial completion of the bridge. The resolution of this issue hinges upon whether the 2007 amendments to section 541.051 apply retroactively to revive the

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[5] While the legislature may have intended, as a response to the *Weston* decision, for the 2007 amendments to create a 12-year repose period for indemnity and contribution claims, we cannot disregard the clear language of section 541.051 that no period of repose applies to actions for contribution or indemnity. *See Lee v. Fresenius Med. Care, Inc*., 741 N.W.2d 117, 123 (Minn.2007) (stating that an appellate court "will not disregard a statute's clear language to pursue the spirit of the law").

state's indemnity claims. *See Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 590-92 (Minn.App.1994) (holding that 1990 amendment to section 541.051 excluding certain defendants from the statute's protections was not retroactive and, therefore, claims of plaintiffs injured in 1990 were not revived against designer of an improvement completed in 1953).

In *Zimmerman*, this court addressed whether the 2007 amendments to section 541.051 operate to revive indemnity and contribution claims. 749 N.W.2d at 100. In that case, a general contractor was sued on May 4, 2004, for negligent construction of a home that was completed in October 1994. *Id*. On May 3, 2006, the general contractor asserted indemnification and contribution claims against a subcontractor that was not party to the original suit. *Id*. The district court granted summary judgment to the subcontractor in March 2007 because of the ten-year repose provision in Minn.Stat. § 541.051 (2004). *Id*. In May 2007, while the general contractor's appeal was pending, the governor signed into law the legislation that amended section 541.051. *Id.* Because the legislation included the word "retroactive," this court held that the legislature had clearly manifested its intent that the 2007 amendments to section 541.051 be applied retroactively.[6] *Id*. at 101; *see also*

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[6] The governor signed two separate session laws, both of which amended section 541.051. *See* 2007 Minn. Laws ch. 105 (signed by the governor on May 21, 2007); 2007 Minn. Laws ch. 140 (signed by the governor on May 25, 2007). These separate amendments to the statute are substantively the same except for their effective dates. One is "effective retroactively from June 30, 2006"; the other is "effective retroactive to June 30, 2006." *Compare* 2007 Minn. Laws ch. 105, § 4, at 626, *with* 2007 Minn. Laws ch. 140, art. 8, § 29, at 1536. That is, one session law applies the amended section 541.051 retroactively from May 22,

Minn.Stat. § 645.21 (2008) ("No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."); *Duluth Firemen's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn.1985) (stating that legislature's mention of the word "retroactive" is clear evidence of intent that statute be applied retroactively).

The legislature's power to enact retroactive legislation extends to the revival of claims that have already been barred by the passage of time. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417 (Minn.2002). Jacobs argues that the legislature did not expressly indicate that the 2007 amendments were intended to revive claims that had already become time-barred. But the supreme court has held that where, as here, the legislature has expressed its clear and manifest intent that a statute apply retroactively, the statute also acts to revive claims unless the legislature expresses a contrary intent in the plain language of the statute. *See id.* at 418. Because nothing in the language of the 2007 amendments indicates that the legislature intended to make the amendments retroactive without also reviving time-barred claims, we hold that the retroactive application of the current version of section 541.051 revives the state's indemnity claims against Jacobs.[7] *See Zimmerman*, 749 N.W.2d at 101-04 (holding that

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2007 *to* June 30, 2006; the other applies the amended section 541.051 retroactively *from* June 30, 2006 indefinitely into the past. The combined effect of the two session laws is the continuous retroactive application of amended section 541.051 from May 22, 2007 indefinitely into the past.

[7] It is undisputed that the state brought its indemnity claims within two years after the date of accrual of the cause of action. *See* Minn.Stat. § 541.051, subds. 1(a), 1(b).

a general contractor's claims for contribution and indemnity were revived by the retroactive application of Minn.Stat. § 541.051 (Supp.2007)).

II.

We next address Jacobs's contention that revival of the state's indemnity claims through the retroactive application of the 2007 amendments to section 541.051 violates Jacobs's "vested right to repose." In *Zimmerman*, this court addressed whether section 541.051, as amended in 2007, violates due process by reviving indemnity and contribution claims that have already become time-barred. 749 N.W.2d at 101. This court acknowledged that the Fourteenth Amendment prohibits the legislature from enacting retroactive legislation that divests a private vested interest. *Id*. But this court held that the subcontractor in *Zimmerman* had no vested right that implicated the Fourteenth Amendment because judgment had not become final. *Id*. at 101, 103. This court explained:

> A right is not vested unless it is something more than a mere expectation, based on an anticipated continuance of present laws. It must be some right or interest in property that has become fixed or established, and is not open to doubt or controversy. Accordingly, . . . there is no vested right in an existing law nor in an action until final judgment has been entered therein.

Id. at 101 (emphasis omitted) (quotations and citations omitted). What Jacobs characterizes as a vested right not to be sued is merely Jacobs's expectation that a repose provision—enacted in 1965, declared unconstitutional in 1977, reenacted in 1980, and altered several times since—would protect it indefinitely. We therefore hold that Jacobs has no vested

right that is affected by the retroactive application of the current version of section 541.051.

III.

We now turn to Jacobs's argument that the compensation statutes unconstitutionally impair the 1962 contract between Sverdrup and the state. We review the constitutionality of a statute de novo. *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 871-72 (Minn.1986). The challenging party has the burden of demonstrating beyond a reasonable doubt that a statute violates a constitutional provision. *Id.* at 872.

The federal and Minnesota constitutions prohibit any impairment of contract. U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. I, § 11. "Though the language of the contract clauses in both Constitutions is absolute, courts have indicated the prohibitions of such contract clauses must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Jacobsen*, 392 N.W.2d at 872 (quoting *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983) (*Energy Reserves*)). In determining whether a contractual impairment is unconstitutional, courts apply a three-part test:

> The initial question is whether the state law has, in fact, operated as a substantial impairment of a contractual obligation. . . . If there is a substantial impairment, the state, at the second step, must demonstrate a significant and legitimate public purpose behind the legislation. Third, the state's action is examined in the light of this public purpose to see whether the adjustment of the rights and responsibilities of the

> contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740, 750-51 (Minn.1983) (quotation and brackets omitted) (applying test set forth in *Energy Reserves*, 459 U.S. at 411-13, 103 S.Ct. at 704-05). "This three-part test is applied with more scrutiny when the state seeks to impair a contract to which it is a party . . . [because] complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 751 (quotation omitted); *see also Zuehlke v. Indep. Sch. Dist. No. 316*, 538 N.W.2d 721, 727 (Minn.App.1995) (stating that courts should "closely scrutinize" state statutes affecting public contracts to ensure that a state is not attempting to escape its financial obligations).

We first examine whether the compensation statutes have, in fact, operated to substantially impair the 1962 contract between Sverdrup and the state. *See Energy Reserves*, 459 U.S. at 411, 103 S.Ct. at 704. "In determining substantial impairment, courts consider the extent to which reasonable expectations are disrupted. However, there may be substantial impairment without total destruction of contractual expectations. The more severe the impairment, the greater level of scrutiny given the state law." *Drewes v. First Nat'l Bank of Detroit Lakes*, 461 N.W.2d 389, 391 (Minn.App.1990), *review denied* (Minn. Dec. 20, 1990).

The 1962 contract provides:

> [Sverdrup] indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of [Sverdrup] provided for under this agreement.

The compensation statutes provide:

> Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party, including an agent, contractor, or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe. The state is entitled to be reimbursed regardless of whether the survivor is fully compensated.

Minn.Stat. § 3.7394, subd. 5(a).

Jacobs argues that when Sverdrup entered into the 1962 contract with the state, the state enjoyed sovereign immunity from suit in tort. Jacobs contends that the state's tort immunity was an implicit provision of the contract and characterizes the contractual indemnity provision as bestowing Sverdrup and its successors with a contractual right to "zero tort liability." According to Jacobs, Sverdrup did not expect that it might be required to indemnify the state on a tort claim.

"The laws existing at the time and place of the making of the contract, and where it is to be performed, enter into and form part of it." *Hoff v. First State Bank*, 174 Minn. 36, 39, 218 N.W. 238, 239

(1928). Jacobs is correct that the state enjoyed tort immunity when the 1962 contract was formed. *See Nieting v. Blondell*, 306 Minn. 122, 126, 132, 235 N.W.2d 597, 600, 603 (1975) (noting that the state's sovereign immunity had been recognized as early as 1877, and abrogating the state's tort immunity with respect to claims arising on or after August 1, 1976). But before the formation of the 1962 contract, the legislature had repeatedly allowed individuals to assert, in district court, claims against the state arising out of the construction, repair, improvement, and maintenance of the trunk highway system—including claims for negligently caused death, personal injury, and injury to real and personal property.[8] In light of the legislature's practice, on occasion, of waiving the state's tort immunity for claims related to the trunk highway system, Sverdrup

[8] *See, e.g.*, 1943 Minn. Laws ch. 662, at 1186-87 (authorizing certain claims, including claims for negligently caused personal injuries resulting in death); 1941 Minn. Laws ch. 539, at 1068-70 (authorizing certain claims, including claims for negligently caused death and personal injuries); 1939 Minn. Laws ch. 396, at 772-73 (authorizing adjudication and payment of certain claims for damages against the state involving a bridge on a trunk highway); 1939 Minn. Laws ch. 420, at 843 (authorizing certain claims, including claims for negligently caused personal injuries); *see also Dennison v. State*, 215 Minn. 609, 614-15, 11 N.W.2d 151, 154 (1943) (upholding 1943 Minn. Laws ch. 662 against a constitutional challenge); *Westerson v. State*, 207 Minn. 412, 417-18, 291 N.W. 900, 903 (1940) (upholding 1939 Minn. Laws ch. 420); Subcomm. on Immunity of the State from Suit, Minn. State Bar Ass'n, *Claims Against the State in Minnesota*, 32 Minn. L.Rev. 539, 541-44 (1948) (noting that the legislature has occasionally waived the state's tort immunity through special legislation); Orville C. Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 Minn. L.Rev. 293, 722-27 (1942) (discussing legislative acts that waived governmental immunity from suit in tort).

reasonably should have expected that the legislature might authorize tort claims against the state related to the design of the bridge.

We conclude that the compensation statutes do not substantially impair the 1962 contract; rather, the statutes enforce the bridge designer's open-ended obligation to indemnify the state. Because the compensation statutes do not impair the 1962 contract, we decline to address the remaining parts of the *Energy Reserves* test.

IV.

We now address Jacobs's remaining arguments. First, Jacobs argues that the state's settlements with some of the plaintiffs[9] under the compensation statutes constitute *Pierringer* settlements[10] and, as a result, the state cannot assert its claim for statutory reimbursement against a non-settling defendant (here, Jacobs). Second, Jacobs argues that the state cannot seek reimbursement for payments made under the compensation statutes because these payments are "voluntary."

We do not reach the merits of these arguments because the legislature has clearly stated its intent to supersede all statutes and the common law in allowing the state to pursue reimbursement of payments made under the compensation statutes. *See*

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[9] It is not clear from the record which of the plaintiffs entered into settlement agreements with the state under the compensation statutes.

[10] In a *Pierringer* agreement, a tortfeasor settles "for its fair share of plaintiff's award as later determined by the trier of fact." *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn.1989). This type of settlement agreement is based on one used in *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963).

Minn.Stat. § 3.7394, subd. 5(a) (providing that the state is entitled to recover payments made under the compensation statutes "[n]otwithstanding any statutory or common law to the contrary"); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, 113 S.Ct. 1898, 1903, 123 L.Ed.2d 572 (1993) (stating that use of a "notwithstanding" clause in a statute "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section" and that a clearer statement of intent to supersede all other laws is "difficult to imagine" (quotation and citation omitted)); *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 764 (Minn.2005) (stating that legislature may abrogate common law if it expresses a clear intent to do so).

DECISION

Because the current version of section 541.051 applies retroactively to revive indemnity and contribution actions, the state's claims for contractual contribution and indemnity and for statutory reimbursement are not time-barred. Because Jacobs has no vested right to repose, the retroactive application of section 541.051 does not violate Jacobs's due-process rights. Because the 1962 bridge-design contract provided that Sverdrup would indemnify the state, the compensation statutes passed after the collapse of the bridge do not impair the contract. Because the compensation statutes clearly show the legislature's intent to supersede all statutes and the common law, we reject Jacobs's remaining arguments regarding the state's claim for reimbursement of payments made under the compensation statutes. Accordingly, the district court properly denied Jacobs's motion to dismiss the state's claims.

Affirmed.

APPENDIX C

STATE OF MINNESOTA
IN COURT OF APPEALS

[Filed Nov 10, 2009]

IN RE: INDIVIDUAL 35W BRIDGE LITIGATION

A09-1830
A09-1831

ORDER

Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Johnson, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

In these consolidated appeals, appellant Jacobs Engineering Group, Inc. seeks review of orders filed on September 23, 2009, denying appellant's motions to dismiss the State of Minnesota's cross-claims against appellant for common-law contribution and indemnity, contractual contribution and indemnity, and statutory reimbursement. This court questioned whether the orders are appealable as a matter of right. Appellant and respondent State of Minnesota (the state) filed jurisdiction memoranda.

An appeal may be taken from such orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts. Minn. R. Civ. App. P. 103.03(j). Our supreme court adopted the collateral-order doctrine as an analytical framework to assess the immediate appealability of an order

or judgment not specifically identified in the rules of civil appellate procedure. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn. 2002). For the collateral-order doctrine to apply, the order at issue must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S. Ct. 684, 688 (1993). A district court order or judgment that satisfies the three-part collateral-order analysis is subject to immediate appellate review. *Kastner*, 646 N.W.2d at 240.

Appellant argues that to the extent that the September 23, 2009 orders deny appellant's motion to dismiss on the ground that the state's claims were extinguished under the statute of repose, Minn. Stat. § 541.051, the orders are appealable as of right under the collateral-order doctrine. In an order filed on November 3, 2009, a special term panel of this court held that August 28, 2009 orders denying appellant's motions to dismiss the third-party claims of URS Corporation and Progressive Contractors Incorporated under the statute of repose are immediately appealable under the collateral-order doctrine. *In re Individual 35W Bridge Litigation*, Nos. A09-1776 and A09-1778 (Minn. App. Nov. 3, 2009).

The state brought contribution and indemnity claims against appellant under the state's 1962 contract with appellant's predecessor. Because the September 23 orders do not address whether appellant's defense under the statute of repose applies to the state's contractual claims, the state argues that the

orders do not conclusively determine all of the issues relating to appellant's statute-of-repose claims.

A district court ruling on the applicability of appellant's statute-of-repose arguments to the state's contractual claims will assist appellate review.

IT IS HEREBY ORDERED:

1. This appeal is dismissed without prejudice.

2. This matter is remanded to the district court for an order ruling on the applicability of the statute-of-repose defense to the state's contractual-indemnity claim. The district court has discretion to direct additional briefing and a hearing on this issue.

3. Appellant may file new appeals as of right from the orders resolving the statute-of-repose issues after the district court rules on the remanded issue.

4. The clerk of the appellate courts shall provide copies of this order to the Honorable Deborah Hedlund, to counsel of record, and to the district court administrator.

Dated: November 10, 2009

BY THE COURT

/s/ Edward Toussaint
Chief Judge

APPENDIX D

STATE OF MINNESOTA
IN COURT OF APPEALS

A09-1776
A09-1778

IN RE: INDIVIDUAL 35W BRIDGE LITIGATION

ORDER

Considered and decided by Toussaint, Chief Judge; Minge, Judge; and Larkin, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

In these consolidated appeals, appellant Jacobs Engineering Group, Inc. seeks review of orders filed on August 28, 2009, denying appellant's motions to dismiss the third-party claims of respondents URS Corporation and Progressive Contractors Incorporated. This court questioned whether the August 28 orders are appealable as a matter of right. The parties filed jurisdiction memoranda.

An appeal may be taken from such orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts. Minn. R. Civ. App. P. 103.03(j). Appellant contends that the August 28 orders are appealable under the collateral-order doctrine. Our supreme court adopted the collateral-order doctrine as an analytical framework to assess the immediate appealability of an order or

judgment not specifically identified in the rules of civil appellate procedure. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 240 (Minn. 2002).

For the collateral-order doctrine to apply, the order at issue must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from the final judgment. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S. Ct. 684, 688 (1993). A district court order or judgment that satisfies the three-part collateral-order analysis is subject to immediate appellate review. *Kastner*, 646 N.W.2d at 240.

The August 28, 2009 orders hold that the 2007 amendments to Minn. Stat. § 541.051 that provided that claims for contribution and indemnity are subject to a two-year statute of limitations but are no longer potentially barred by a ten-year statute of repose apply to respondents' claims. Prior to the 2007 amendments, Minn. Stat. § 541.051, subd. 1(a) provided that an action for contribution or indemnity shall not accrue more than ten years after substantial completion of the construction.

The statute of repose is intended to eliminate a cause of action and reflects a legislative conclusion that a point in time arises beyond which a potential defendant should be immune from liability for past conduct. *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006). The statute of repose creates a substantive right to be free from liability after the legislatively determined period of time. *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005).

Both governmental entities and nongovernmental entities have the right to immediate review of a determination relating to immunity that results in having to stand trial. *Kastner*, 646 N.W.2d at 240. The supreme court also noted that it is not necessary to address the distinction between immunity from liability and immunity from suit. *Id*. at 240-41. The same analysis applies regardless of the type of immunity claimed. *Id*. at 241.

The question of whether appellant is immune from liability based on the statute of repose is a legal issue completely separate from the merits of the action. An order denying an immunity-based motion to dismiss is effectively unreviewable on appeal from a final judgment because it is a denial of a right not to stand trial at all—a right that is lost if the case is permitted to proceed. Consistent with our supreme court's analysis in *Kastner*, the August 28, 2009 orders denying appellant's motions to dismiss are immediately appealable.

Appellant's statement of the case indicates that a transcript is required. Our records do not reflect that an initial transcript certificate has been filed. *See* Minn. R. Civ. App. P. 110.02, subds. 1, 2(a).

IT IS HEREBY ORDERED:

1. These consolidated appeals shall proceed pursuant to the rules of civil appellate procedure.

2. On or before November 16, 2009, appellant shall file a completed transcript certificate.

3. The clerk of the appellate courts shall provide copies of this order to the Honorable Deborah Hedlund, to counsel of record, and to the district court administrator.

Dated: November 3, 2009

BY THE COURT

/s/ _____
Chief Judge

APPENDIX E

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

[Filed Sep 23, 2009]

Master File No. 27-CV-09-7519
Schwebel Personal Injury: 27 CV 09-7274
Schwebel Wrongful Death: 27 CV 08-28245.

IN RE: INDIVIDUAL 35 W BRIDGE LITIGATION

ORDER

The above-entitled matter came on for hearing before the undersigned Judge of District Court on August 10, 2009, upon the motions of Jacobs Engineering Group Inc. ("Jacobs") and Progressive Contractors, Incorporated ("PCI") to dismiss pursuant to Rule 12 of the Minnesota Rules of Civil Procedure.

Jacobs moved to dismiss the State of Minnesota's (Department of Transportation, MnDOT) ("the State") cross-claims against Jacobs for common law contribution and indemnity, contractual contribution and indemnity, and statutory reimbursement.

PCI moved to dismiss the State's counterclaims against PCI for common law negligence, contribution, indemnity, and subrogation and to declare Minn. Stat. § 3.7394, subd. 5 unconstitutional.

The State was represented by Alan I. Gilbert, Esq. and Kristyn Anderson, Esq. Jacobs was represented by Kirk O. Kolbo, Esq. PCI was represented by Kyle E. Hart, Esq. and Theodore Roberts, Esq. Also present was Richard Nygaard, Esq. representing the Schwebel plaintiffs.

Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Jacobs' motion to dismiss the State of Minnesota's cross-claims *is denied.*

2. PCI's motion to dismiss the State of Minnesota's counterclaims *is denied*, except that PCI's motion to dismiss the State's claim of common law contribution and indemnity for payments made previously by the State *is granted*.

3. The attached Memorandum of Law is made a part of this order.

Dated: September 23 2009

BY THE COURT:

/s/ Deborah Hedlund
Deborah Hedlund
Judge of District Court

MEMORANDUM OF LAW

Rule 12 Motions

Jacobs moves the Court to dismiss the State's cross-claims against it for failing to state a claim upon which relief can be granted. PCI moves the Court to dismiss the State's counterclaims against it for failing to state a claim upon which relief can be granted. *See* Minnesota Rule of Civil Procedure 12.02 (e). A Rule 12 motion raises the single question of whether the complaint states a claim upon which relief can be granted. *Martens v. Minnesota Mining & Mfg. Co*., 616 N.W.2d 732, 739 (Minn. 2000). If any theory of recovery is available to the claimant, the motion should be denied. *Group Health Plan, Inc v. Philip Morris, Inc*., 621 N.W.2d 2, 14 (Minn. 2001). The facts of the complaint must be taken as true and considered in the light most favorable to the non-moving party. *Northern States Power Company v. Minnesota Metropolitan Council*, 667 N.W. 2d 501, 506. A claim is sufficient if it is possible on any evidence which might be produced, consistent with the non-movant's theory, to grant the relief demanded. *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

The court may consider matters outside the pleadings if the pleadings refer to or rely on the outside matters. *In re Hennepin County 1986 Recycling Bond Litg*., 540 N.W.2d 494, 497 (Minn. 1995). The State referred to the releases ("releases") it obtained from the survivors of the Bridge collapse in settlement of their claims against the State in its Complaints.[1] In addition, PCI's Brief[2] and Jacobs' Memoranda[3] refer

[1] State Compl. ¶ 33

[2] PCI Brief. at 9

to and discuss the content of the releases. The Court will, therefore, consider the releases along with the pleadings.

Prior Orders

In an Order filed on April 16, 2009, the Court dismissed Plaintiffs' claims for breach of contract. URS Corporation ("URS") and PCI then commenced third-party actions for contribution and indemnity against Jacobs. In an Order filed August 28, 2009, the Court denied Jacobs' motion to dismiss the third-party claims of PCI and URS.

The Contracts

In October 1962, the State contracted with Sverdrup & Parcel and Associates, Inc. ("Sverdrup") to prepare design and construction plans for the I-35W Bridge ("Bridge") in conformance with Division 1 of the A.A.S.H.O.[4] "Standard Specification for Highway Bridges," 1961 Edition. Article VIII, Section 2(b) of the contract ("Sverdrup/Jacobs Contract") provides:

> [Sverdrup] indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of [Sverdrup] provided for under this agreement.

Sverdrup certified the final Bridge design plans in March 1965. Construction of the Bridge was completed in 1967. The Bridge was constructed according to the Sverdrup design. Between 1966 and 1999,

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[3] Jacobs Mem. at 3

[4] American Association of State Highway Officials

Sverdrup went through a series of name changes and mergers. In 1999, Third-Party Defendant Jacobs acquired or merged with Sverdrup.

In March 2007, the State hired Defendant PCI to perform repairs to the Bridge. The construction contract between PCI and the State ("PCI Contract") includes the following Standard Specifications:

a. *1712.4 Protection And Restoration Of Property—General Liability*: "The contractor is responsible for all damages to property of any character, resulting from any act, omission, neglect, or misconduct in the execution or non execution of the work. . . ."

b. *1720 No Waiver of Legal Rights*: The contractor is liable to the department . . . as regards the department's rights under any warranty or guaranty.

c. *1701 Laws to be Observed*: The contractor shall at all times observe and comply with all applicable laws, ordinances, regulations, orders, and decrees; and shall protect and indemnify the department and its representatives against all claims and liabilities arising from or based on violations committed by the contractor or the contractor's employees.

d. *1716 Contractor's Responsibility for Work*: The contractor has the charge and care of the project and shall take every precaution against injury or damage to any part of the project by the action of the elements or from other cause, whether arising from the execution or the nonexecution of the work.

e. *1805 Methods and Equipment*: Equipment used on any portion of the projects shall be such that no damage to the roadway, adjacent property, or other highways will result from its use.

The Bridge Collapse and the State's Response

The PCI project began in June 2007 and was scheduled for substantial completion in late September 2007. The State alleges that on August 1, 2007, in connection with its performance of the PCI Contract, PCI staged a heavy load of material and equipment on the center span of the bridge. The State further alleges that PCI failed to notify the MnDot Project Supervisor of its plan for staging the materials and equipment and that the State would have denied permission to do so had it been informed.

On August 1, 2007, the Bridge collapsed resulting in the death of 13 people and injury of over 100 people. PCI employees and equipment were on the Bridge when it collapsed. The Minnesota State Legislature ("the Legislature") enacted Minn. Stat. §§3.7391 *et seq*. ("the Compensation Fund Statutes") to compensate survivors of the collapse. The Legislature defined "survivor" to mean "a natural person who was present on the I-35W bridge at the time of the collapse" and "the parent or legal guardian of a survivor who is under 18 years of age, a legally appointed representative of a survivor, or the surviving spouse or next of kin of a deceased survivor who would be entitled to bring an action under section 573.02." Minn. Stat. § 3.7392, subd. 8. The Legislature found that the collapse of the Bridge:

> . . . was a catastrophe of historic proportions. The bridge was the third-busiest in the state, carry-

> ing over 140,000 cars per day. Its collapse killed 13 people and injured more than 100. No other structure owned by this state has ever fallen with such devastating physical and psychological impact on so many. Minn. Stat. § 3.7391, subd.1 (2008).

The Legislature established a compensation process:

> . . . for survivors of the catastrophe [which] furthers the public interest by providing a remedy for survivors while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of the liability of the state, a municipality, or their employees for damages incurred by survivors. Minn. Stat. §3.7391, subd. 2 (2008).

The Compensation Fund Statutes further provide: "These findings are not an admission of liability of the state, municipality, or their employees for damages caused by the catastrophe." Minn. Stat. § 3.7391, subd. 3 (2008). The Legislature directed the Chief Justice of the Minnesota Supreme Court to establish a special master panel to consider claims, make offers of settlement, and enter into settlement agreements with survivors on behalf of the state. Minn. Stat. §3.7393 (2008).

The Compensation Fund Statutes require that the settlement agreements must be approved by the Attorney General and contain a provision:

> . . . to release the state and every municipality of this state and their employees from liability, including claims for damages, arising from the catastrophe and to cooperate with the state in pursuing claims the state may have against any

> other party. The release must also provide that the survivor will indemnify the state, a municipality, and their employees from any claim of contribution and indemnity, or both, made by other persons against the state, a municipality, and their employees, and that the survivor will satisfy any judgment obtained by the survivor in an action against other persons to the extent of the release, if the claim or judgment relates in any way to a claim of the survivor arising from the catastrophe. Minn. Stat. §3.7393, subd. 13 (2008).

The State entered into settlement agreements with all of the 179 survivors who made claims for compensation.[5] The settlement agreements released the State, its municipalities, and their employees from liability. The State made payments of $36,640,000 from the compensation fund together with an additional $398,984.36 from the emergency relief fund.[6]

The Compensation Fund Statutes allow the State the right of subrogation:

> Notwithstanding any statutory or common law to the contrary, the state is entitled to recover from any third party, including an agent, contractor, or vendor retained by the state, any payments made from the emergency relief fund or under section 3.7393 to the extent the third party caused or contributed to the catastrophe. The state is entitled to reimbursement regardless of whether the survivor is fully compensated. Minn. Stat. § 3.7394, subd 5(a) (2008).

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[5] State Compl. ¶ 12

[6] *Id*. ¶ 32

Non-State Claims

Survivors and others damaged by the collapse of the Bridge initiated actions against PCI and URS[7] alleging negligence and breach of contract. PCI sued the State for contribution, indemnity, breach of contract and express and implied warranties, failure to disclose superior knowledge, and negligence. URS, Jacobs and PCI each sued the others for contribution and indemnity.

State Claims

The State sued PCI for: (1) negligence in the performance of its work which the State claims led or contributed to the Bridge collapse resulting in expenses for emergency response, traffic rerouting, and forensic work; (2) breach of contract, specifically for damages to property, under provisions 1712.4 and 1720 of the PCI Contract; (3) breach of implied warranty; and (4) claims it failed to perform the PCI Contract in a workmanlike manner by placing excessive weight from materials and equipment on the Bridge causing it to collapse. The State also sued PCI for subrogation, contractual and common law contribution and indemnity. The State sued Jacobs for contractual and common law contribution and indemnity. The State sued both PCI and Jacobs for statutory reimbursement under Minn. Stat. § 3.7393 and § 3.7394, subd.5(a).

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[7] At the time Jacobs and PCI brought the motions herein, the State had not sued URS.

The Constitutionality of the Compensation Fund Statutes

Jacobs argues the Compensation Fund Statutes are unconstitutional because they impair its 1962 contract with the State. PCI argues that Minn. Stat. § 3.7394, subd[ ] 5 is unconstitutional because it is a bill of attainder or has the effect of an ex post facto law.

Statutes are presumed constitutional. *Doll v. Barnell*, 693 N.W.2d 455, 460 (Minn. 2005). The burden rests on its challenger to demonstrate a constitutional impairment beyond a reasonable doubt. *Jacobsen v. Anheuser-Busch*, 392 N.W.2d 868, 872 (Minn. 1986). Strong deference is applied even when the legislation is applied retroactively. *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 729 (1984). The State must show a legitimate legislative purpose furthered by rational means. *Id*. Those challenging the statute on a due process basis must show there is no reasonably conceivable state of facts that could provide a rational basis for the law. *Lundeen v. Canadian Pac. Ry. Co*., 532 F.3d 682, 690 (8th Circ. 2008).

Constitutional Impairment of Contract

The State has brought a cross-claim against Jacobs alleging it is entitled to contractual contribution and indemnity for the payments it made pursuant to the State's obligations under the emergency relief fund and § 3.7393 and for any other payments made or costs incurred by the State arising out of the collapse of the Bridge. Jacobs argues that the Compensation Fund Statutes unconstitutionally impair the Sverdrup/Jacobs Contract. Both the United States Constitution and the Minnesota Constitution contain

impairment of contract provisions: U.S. Const. art. I, § 10 and Minn. Const. art. I, § 11. The impairment of contract provisions, however, are not absolute. "The Contract Clause's prohibition of any state law impairing the obligation of contracts must be accommodated to the State's inherent police power to safeguard the vital interests of its people." *Energy Reserves Group, Inc. v. Kansas Power and Light Company*, 459 U.S. 400, 410, 103 S. Ct. 697, 704 (1983). "Minnesota statutes are presumed constitutional and are declared unconstitutional only with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W. 2d 363, 364 (Minn.1989). "Fairly debatable questions as to [a law's] reasonableness, wisdom, and propriety are not for the determination or courts, but for the legislative body. . . ." *Doll v. Burnell*, 693 N.W. 2d 455, 461 (Minn.App. 2005) quoting *S.C. State Highway Dept v. Barnwell Bros*., 303 U.S. 177, 191, 58 S. Ct. 510, 517, 82 L.Ed. 734 (1938). Courts are to construe a statute presuming the Legislature does not intend to violate the Constitution of either the United States or of Minnesota and that the Legislature intends to favor the public interest as against any private interest. Minn. Stat. §645.17 (3) and (5). Those challenging a statute on constitutional grounds have the burden of demonstrating the violation beyond a reasonable doubt. *Sartori v. Harnischfeger Corp*., 432 N.W.2d 448, 453 (Minn. 1988).

The Minnesota Supreme Court, in *Jacobsen v. Anheuser-Busch*, 392 N.W.2d 868 (Minn 1986), adopted the three part test found in *Energy Reserves Group, Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 411-413, 103 S.Ct. 231, 238, L.Ed. 413 (1934) to determine whether a law impairs contracts and violates the Constitution. The *Jacobsen* court stated:

> [Al court initially considers whether the state law has, in fact, operated as a substantial impairment of a contractual obligation. The severity of the impairment increases the level of scrutiny to which the legislation is subjected. Secondly, if a substantial impairment exists, those urging the constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation. Finally, the legislature's action is examined in the light of this public purpose to see whether the adjustment of the rights and liabilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public. *Id.* at 872. (Citations omitted).

The facts and ruling in *Jacobsen* are also instructive. The statute at issue in *Jacobsen*, the Minnesota Beer Brewers and Wholesalers Act ("the Beer Wholesalers Act"), Minn. Stat. §§ 325B.15, *et seq*., was made expressly retroactive. It prohibited a brewer from unreasonably withholding consent to any transfer of a wholesaler's business. That was the case even if the brewer had contracted for the unrestricted right to disapprove of any proposed change of ownership. Anheuser-Busch argued that the Beer Wholesalers Act severely impaired its reasonable contractual expectation by stripping it of its right to freely exercise its business judgment in the approval of a franchise transfer. The Court found that application of the Beer Wholesalers Act replaced Anheuser-Busch's unfettered business discretion with statutory standards, the violation of which made the company potentially liable for compensatory and punitive damages. *Id*. at 872-873. The Court cautioned, however, that even though the Beer Wholesalers Act constituted a substantial impairment of contract, if

"there exists a significant and legitimate purpose behind the statute such as 'remedying of a broad and general social or economic problem'[8] the Beer Wholesalers Act may yet be sustained because of the successful establishment of the existence of a legitimate public purpose." *Id*. at 874. In applying the second prong of the *Energy Reserves* test, however, the Court found that the legislative history of the Beer Wholesalers Act demonstrated that the Act was promoted by and served wholesale beer distributors, not the public. *Id*. at 875. As a result, the Court found no "significant or legitimate public purpose in the Act." *Id*. The Court cautioned: "It should be kept in mind that the issue here is not whether the legislature could regulate prospectively contracts of this nature, but rather whether the statute can be retroactively applied absent a significant and legitimate public purpose." *Id*. Because it found no significant and legitimate public purpose, the Court found it unnecessary to address the third prong of *Energy Reserves*.

In this case, the State and Sverdrup contracted for a design which met A.A.S.H.O. Standard Specification for Bridges. At the time the parties entered into the Sverdrup/Jacobs Contract, the State expected a design which net proper specifications and would result in a Bridge that would safely carry cars into the foreseeable future. Sverdrup expected to be paid and agreed to save and hold harmless the State from any and all claims arising out of its performance. *See* Article VIII, § 2(b) of the Sverdrup/Jacobs Contract. The parties' contract specified no date when Sverdrup's liability to the State would cease.

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[8] Quoting *Energy Reserves*, 459 U.S. at 411-12, 103 S.Ct. at 704-05.

To meet the first prong of the *Energy Reserves* analysis, Jacobs must show that the Compensation Fund Statutes substantially impair the Sverdrup/ Jacobs contract. The impairment Jacobs cites is the State's sovereign immunity at the time the parties entered into the contract which caused it to expect it would not be asked for contribution or indemnity. Also, Jacobs argued that any liability it had was extinguished by the Minnesota Statute of Repose, Minn. Stat. § 541.051. As this court found in the order of August 28, 2009, however, Sverdrup/Jacobs has no vested interest in or contractual right to Minnesota's sovereign immunity law or statute of repose remaining static. Jacobs cannot, therefore meet the first prong under the *Energy Reserves* analysis.

Even if Jacobs could meet the first prong by showing a substantial impairment of its contract, the Compensation Fund Statutes demonstrate a significant and legitimate public purpose as required by the second prong of *Energy Reserves*. Jacobs argued that the State's action in compensating the survivors is subject to heightened scrutiny because the State's self-interest is at stake. It relies on *Christensen v. Minneapolis Mun. Employees Ret. Bd*., 331 N.W.2d 740 (Minn. 1983). In *Christensen*, the plaintiff was a government employee who retired at the age of 54 and began receiving pension payments. Later, his retirement activation age was retroactively changed to age 60. The plaintiff had already been receiving funds since age 54. In *Christensen*, the State saved money by not paying the pensions until employees reached an older age. The Court found that the State had impermissibly impaired the plaintiff's contract. In the instant case, however, the Legislature explained that it was paying compensation in reaction

to a "catastrophe of historic proportions" which caused a "devastating physical and psychological impact" on many people. *See* Minn. Stat. § 3.7391, subd.1 (2008). The State paid compensation to the survivors regardless of whether it would ever receive contribution or indemnity from another source. This is not a case, as the Court found in *Jacobsen* with the Beer Wholesalers, where the statutes were enacted to benefit a special interest. The Compensation Fund Statutes are designed to benefit all those who are survivors of a tragedy impacting the motoring public who happened to be on the Bridge at the time of the collapse. *See* Minn. Stat. § 3.7391, subd.2 (2008). This case is also differentiated from *Christensen* where the State directly benefitted financially by withholding funds. While some, or even many, may be critical of the legislature's decision to compensate the survivors, or the manner or amount of the compensation, the State has alleged facts sufficient to support its claim that the Compensation Fund Statutes were enacted to promote the health, welfare, and safety of the public as required under *Energy Reserves*.

The third prong of the *Energy Reserves* analysis is to determine whether "the adjustment of the rights and liabilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the law's adoption." *Jacobsen v. Anheuser-Busch, Inc*., 392 N.W.2d 868, 872 (Minn. 1986). Jacobs argues that the Compensation Fund Statutes' stated purposes of compensating the victims of the Bridge collapse and avoiding the uncertainty and expense of complex and protracted litigation arc insufficient to satisfy the *Energy Reserves* third prong. Jacobs further argues the State narrowly focuses on a singular event and makes no provisions for any similar future events.

Jacobs' argument, however, does not account for the catastrophic and unique impact of the collapse. Responding to an emergency situation caused by the failure of a major bridge was clearly an extraordinary burden on the State. The State has pled facts supporting its contention that the Compensation Fund Statutes were enacted in response to an emergency to protect the health and safety of the affected public, the survivors.[9] It has also pled facts supporting its contention that the statutes are tailored appropriately to achieve their stated purpose with a process requiring the input of the Chief Justice of the Minnesota Supreme Court[10] and the approval of the Attorney General.[11]

Jacobs has not met its burden of showing a substantial impairment of its contract, while the State has demonstrated a significant and legitimate public purpose behind the Compensation Fund Statutes and alleges facts sufficient to show the Compensation Fund Statutes are reasonably tailored to respond to an extraordinary emergency. Therefore, the State has met its burden under the *Energy Reserves* analysis to defeat Jacobs' motion to dismiss and Jacobs has not shown beyond a reasonable doubt that the Compensation Fund Statutes operate as a substantial impairment of the Sverdrup/Jacobs Contract.

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[9] Minn. Stat. § 3.7391, subd. 2

[10] Minn. Stat. § 3.7393

[11] Minn. Stat. § 3.7393, subd. 13

Ex Post Facto / Bill of Attainder

The State has brought counterclaims against PCI alleging the right to contribution and indemnity for the payments the State made pursuant to the State's obligations under the Minnesota Compensation Fund Statutes. PCI argues that the application of Minn. Stat. § 3.7394 of the Compensation Fund Statutes is an unconstitutional attempt to retroactively punish PCI. PCI further argues that the Compensation Fund Statutes violate its due process rights by retroactively punishing it for conduct occurring before the statute's enactment by: (1) creating massive liability to the State of up to $37 million dollars for its voluntary payments to a limited class of persons; (2) attributing liability in the absence of ordinary causation in fact by asserting merely contributing to the collapse is sufficient; (3) asserting liability in the absence of negligence, or other wrongful conduct; (4) eliminating available defenses, and (5) PCI's continued liability to the plaintiffs without any offsets for the amounts received from the State, thus subjecting PCI to liability over and above plaintiffs' actual damages. Those challenging the statute on a due process basis must show there is no reasonably conceivable state of facts that could provide a rational basis for the law. *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 690 (8th Circ. 2008).[12]

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[12] PCI argues that *Lundeen* must be distinguished from the instant cases because the statute in *Lundeen* was a clarification amendment. The *Lundeen* Court, however, had little use for such labels saying, "We reject CP's argument about Congress's reference to the amendment as a "[c]larification of existing law rather than a substantive change to existing law . . . . We are obliged to apply the amendment to pending cases regardless of

Undisputedly, the Compensation Fund Statutes were enacted by the Legislature as the result of a pre-occurring event. Retroactivity, however, does not always render a statute unconstitutional. In fact, retroactive provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies or correct mistakes. *Landgraf v. USI Film Products*., 511 U.S. 244, 267-68, 114 S.Ct. 1483, 1498 (1994). As this Court stated above, the State has alleged sufficient facts to show that the Compensation Fund Statutes were enacted to respond to an emergency, to protect the health and safety of the public, and that the statutes are tailored appropriately to achieve their stated purpose.

PCI also argues that Minn. Stat. § 3.7394, subd. 5 violates the ex post facto clause and is a bill of attainder. The Ex Post Facto Clause of the United States Constitution, article I, section 10, cl. 1 prohibits retroactive application of penal legislation. *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S.Ct. 1483, 1497 (1994). The prohibitions of bills of attainder in Article I, sections 9-10 prevent legislatures from singling out disfavored persons for past conduct. *Id*. An ex post facto law imposes punishment for past acts. *Weaver v. Graham*, 450 U.S. 24, 31 (1980). An ex post facto law renders an act punishable in a manner in which it was not punishable when it was committed. *Starkweather v. Blair*, 71 N.W.2d 869, 879 (Minn. 1955).

In this case, there is no identification of PCI or any other identified tortfeasor in the Compensation Fund Statutes. There are no criminal penalties. PCI's

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the label Congress attached to it." *Lundeen*, 532 F.3d 682 at 689.

arguments are predicated on the assertion that the State's claims subject it to liability over and above its share of liability to the plaintiffs. PCI does not explain, however, why it cannot now raise defenses to the State's claims. The State argues that in enacting the Compensation Fund Statutes "[t]he Legislature provided for a mechanism by which the State could recoup these public funds to the extent it could show that it paid more than its comparative fault-based share." There is no language in the Compensation Fund Statutes removing established defenses to liability.[13] The Compensation Fund Statutes can be construed to require repayment to the State to the extent one is found to have caused or contributed to the collapse. While the Compensation Fund Statutes specify no means of determining who has caused or contributed to the catastrophe, one must presume the Legislature intended a rational means: through the Minnesota courts and established principles of law. The Compensation Fund Statutes can be construed to avoid unconstitutionality. PCI has not shown beyond a reasonable doubt that Minn. Stat. § 3.7394, subd.5 is unconstitutional.

Voluntary Payments

Jacobs argues that the State's payments pursuant to the Compensation Fund Statutes were voluntary in the absence of any legal duty to the plaintiffs. Jacobs cites *Samuelson v. Chicago, R.I. & P.R. Co.*, 178 N.W.2d 620 (Minn. 1970) for the proposition that a voluntary payment by one who is under no legal

[13] Neither PCI nor Jacobs account for the potential ramifications to the Survivors and the State regarding the over $37,000,000.00 the State has paid if the Compensation Fund Statutes are declared unconstitutional.

duty to pay does not give rise to reimbursement rights against others who may be legally liable. Contrary to the facts in the instant case, however, the defendant railroad in *Samuelson*, despite the fact that there was little evidence of its causal negligence, voluntarily and inexplicitly withdrew its claim for indemnity against the co-defendant driver. Here, the State made payments to the survivors, but through legislation retained its rights to contribution and indemnity.

The State argued that one should have the right to discharge a disputed obligation and settle a lawsuit before incurring the costs of defense and that the legislature has latitude to decide how to deal with extraordinary facts. The State relies on *Northland Insurance Company v. Ace Doran Hauling & Rigging Company*, 415 N.W.2d 33 (Minn. 1987), for the proposition that "if the liability is not clear and the insurance company acts in good faith to pay the loss, even the fact that the loss was not covered does not necessarily make the insurance company a volunteer." *Id*., 415 N.W. 2d at 39. Although the Minnesota Supreme Court applied Texas law in *Northland*, its rationale is consistent with that of the earlier *Samuelson* Court's which explained the equitable principles of fairness which underlie contribution and indemnity:

> Parties who share liability for an injury should recompense that injury equally or if not equally liable, in proportion to their liability. Restitution by contribution or indemnity also prevents the unjust enrichment of a tortfeasor found liable for damages which have been satisfied by another party. *Samuelson v. Chicago, Rock Island and Pacific Railroad Company*, 178 N.W. 2d 620, 623 (Minn. 1970).

The State argues that principles of fairness mandate that Jacobs, if found liable for a faulty design which caused or contributed to the Bridge collapse, should repay the State for the damages it paid to the survivors in order to settle claims against it.

The State has admitted it was the owner of the Bridge,[14] likened the Compensation Fund claims process to the existing State tort claims process, denied that its payments were voluntary, and alleged that compensation was paid as a remedy for the survivors "while avoiding the uncertainty and expense of potentially complex and protracted litigation to resolve the issue of liability of the state, a municipality, or their employees for damages incurred by survivors."[15] The State has pled facts sufficient to show its payments under the Compensation Fund Statute were not voluntary and do not affect any right the State may have to state a claim for contribution or indemnity on that basis at this time.

"Pierringer Plus" Releases

The State acknowledges that it has no right to claims for common law contribution and indemnity in count VI of its counterclaim against PCI:

> [t]o the extent Count VI is read to include a claim of common law contribution and indemnity with respect to payments previously made by the State to the victims of the collapse, the State acknowledges it has no right to common law contribution or indemnity from PCI for those payments. Such common law claims in Count VI may be dismissed. Count VI, however, asserts

[14] State Compl. ¶ 6

[15] Minn. Stat. § 3.7391, sdbd.2

> valid contractual contribution and indemnity claims for those payments which should not he dismissed. (State Memorandum at 1).

Jacobs and PCI argue that the State's actions in entering into releases with the survivors preclude it from seeking contribution, indemnity, or subrogation under settled Minnesota common law principles. Jacob states that a Pierringer release, by its terms, operates to release the settling defendant from liability, settles the part of the cause of action equal to its fault, and reserves the balance of the plaintiff's cause of action against the non-settling defendants. Jacobs and PCI further argue that the releases obtained by the State from the survivors contain all the elements of a Pierringer which requires them to be evaluated accordingly. At oral argument the State characterized the releases as "Pierringer plus" releases.

The basic elements of a Pierringer release include: (1) the release of the settling defendants from the action and the discharge of a part of the cause of action equal to that part attributable to the settling defendants' causal negligence; (2) the reservation of the remainder of plaintiff's causes of action against the nonsettling defendants; and (3) plaintiff's agreement to indemnify the settling defendants from any claims of contribution made by the nonsettling parties, and to satisfy any judgment obtained from the nonsettling defendants to the extent the settling defendants have been released. *Bunce v. A.P.I. Inc.*, 696 N.W.2d 852, 855 (Minn. Ct. of App. 2005); and *Frey v. Snelgrove*, 269 N.W.2d 918, 920 (Minn. 1978).

Although Jacobs and PCI argue that the State's payments under the Bridge Compensation Statutes represent only the damages for which the State bears

liability, the statutes may be construed to provide that the State compensated the survivors for the damages caused by the State's fault as well as damages resulting from the fault of others from which the State would later seek contribution and/or indemnity. In addition, the releases can be construed to reflect the State's interpretation that the payments made by the State under the Compensation Fund Statutes reflect more than the State's share of potential damages and do not limit the State's ability to collect from others who may be found to have caused or contributed to the Collapse.

The State also argues that to the extent the principles of Pierringer apply to bar recovery by the State, Minn. Stat. § 3.7394, subds. 5(a) and (b) expressly abrogates that law. Aside from the common law contribution and indemnity claim against PCI the State has acknowledged can be dismissed, the State has no additional claims that fall under the restrictions of the Pierringer common law cases. The remainder of the State's claims are: direct claims alleging negligence (Count I, against PCI); breach of contract (Count II, against PCI); breach of contract/implied warranty claim (Count III, against PCI); subrogation and statutory reimbursement: Minn. Stat. § 3.7394 subd. 5 claims (Count IV, Count V, and Count VI against PCI and Count VIII and Count IX against Jacobs); and common law contribution and indemnity for any recovery against the State by PCI (Count VIII, against Jacobs). The State's claim for common law contribution and indemnity against Jacobs for any damages PCI collects against the State have nothing to do with the State's settlement with the survivors. The State has alleged facts sufficient to defeat PCI's and Jacobs' motions to dismiss under the Pierringer common law cases at this

time with the exception of the State's common law contribution and indemnity claim against PCI in ¶ 6 of its Complaint, which must be dismissed under *Bunce*.

Negligence against PCI

PCI seeks to have the State's negligence claim against it dismissed because it believes the State is attempting to transform a breach of contract claim into a negligence claim. Count I of the State's Complaint alleges that PCI negligently and without permission placed heavy materials and equipment on the Bridge which caused the Bridge to collapse. The State further alleges that the collapse caused resultant damage to the State for emergency response, traffic rerouting, forensic work, and other costs in excess of $50,000. PCI argues correctly that there is no claim in Minnesota for negligent breach of contract. *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423 (Minn. 1987). Minnesota does, however, recognize a claim of negligence as a breach of one's duty to exercise reasonable care in the performance of its contract. *Brasch v. Wesolowsky*, 272 Minn. 112, 117, 138 N.W.2d 619, 623 (1965). The duty to use reasonable care extends to the performance of a contractor working on another's property. *Pac. Fire Inc. Co. v. Kenny Boiler & Mfg. Co*., 277 N.W. 226, 228 (Minn. 1937). A contractor may be held liable for those damages proximately caused by its negligence. *Julian Johnson Construction Corporation v. Parranto*, 352 N.W.2d 808 (Minn. App. 1984). Here the State is not claiming that PCI did poor work which it seeks to be redone or repaired as the plaintiffs in the unpublished case, *Lansing v. Concrete Design Specialties*,

2006 WL 1229638 (Minn. App., May 9, 2006).[16] The State is claiming that PCI's negligence caused it additional harm outside the subject of the PCI Contract that could have been avoided had PCI exercised reasonable care in the manner in which it performed its duties. The State has pled facts sufficient to state a claim of negligence against PCI.

Conclusion

The State's counterclaim against PCI for common law contribution and indemnity in Count VI may be dismissed under Rule 12 of the Minnesota Rules of Civil Procedure and the Pierringer common law cases. Considering the remainder of the State's counterclaim against PCI and cross-claim against Jacobs in a light most favorable to the State, it has stated legally cognizable claims for relief and dismissal is inappropriate at this time.

D.H.

[16] Attached as Exhibit A to the Aff. of Theodore V. Roberts and relied on by PCI.

APPENDIX F

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

IN RE: INDIVIDUAL 35W BRIDGE LITIGATION

Master File No. 27-CV-09-7519
Schwebel Personal Injury: 27 CV 09-7274
Schwebel Wrongful Death: 27 CV 08-28245

ORDER

The above-entitled matters came on for hearing before the undersigned Judge of District Court on June 12, 2009, pursuant to Third-Party Defendant Jacobs Engineering Group, Inc.'s motion to dismiss the third-party claims of Defendants URS Corporation and Progressive Contractors, Inc.

Kirk Kolbo, Esq. and R. Lawrence Purdy, Esq. appeared on behalf of Third-Party Defendant Jacobs Engineering Group, Inc. Jocelyn Knoll, Esq. and Eric Ruzicka, Esq., appeared on behalf of Defendant URS Corporation. Kyle Hart, Esq. and Theodore Robert, Esq., appeared on behalf of Defendant Progressive Contractors Incorporated. Other appearances were as noted on the record.

Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Third-party Defendant Jacobs Engineering Group, Inc.'s motion to dismiss the third-party claims of Defendants URS Corporation and Progressive Contractors, Inc. is denied.

2. The attached Memorandum of Law is made a part of this Order.

Dated: August 28, 2009

BY THE COURT:

/s/ Deborah Hedlund
Deborah Hedlund
Judge of District Court

MEMORANDUM OF LAW

In October 1962, the State of Minnesota ("State") contracted with Sverdrup & Parcel and Associates, Inc. ("Sverdrup") to prepare design and construction plans for the I-35W Bridge ("Bridge"). Article VIII, Section 2(b) of the contract ("Contract") provides:

> [Sverdrup] indemnifies, saves and holds harmless the State and any agents or employees thereof from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of the execution or performance of the work of [Sverdrup] provided for under this agreement.

Sverdrup certified the final Bridge design plans in March 1965. Construction of the Bridge was completed in 1967. Between 1966 and 1999, Sverdrup went through a series of name changes and mergers. In 1999, Third-Party Defendant Jacobs Engineering Group, Inc. ("Jacobs") acquired or merged with Sverdrup.

In 2003, the State entered into a series of contracts with Defendant URS Corporation ("URS") to conduct an inspection of the Bridge. In March 2007, the State hired Defendant Progressive Contractors Incorporated ("PCI") to perform repairs to the Bridge. On August 1, 2007, the Bridge collapsed, resulting in the death of 13 people and injury of 145 people. Plaintiffs initiated these actions seeking damages arising from the collapse of the Bridge. Plaintiffs sued URS and PCI (collectively, "Defendants") alleging negligence and breach of contract. In an Order filed on April 16, 2009, the Court dismissed Plaintiffs' claims for breach of contract. Defendants then commenced third-party actions for contribution and indemnity

against Jacobs. PCI also asserted a contractual indemnity claim. Defendants claim Sverdrup negligently designed the Bridge.

Jacobs moves the Court to dismiss Defendants' third-party claims for failing to state a claim upon which relief can be granted. *See* Minn. R. Civ. P. 12.02(e). The Court must determine whether the complaints set forth legally sufficient claims for relief. *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). If any theory of recovery is available to the claimant, the motion should be denied. *Group Health Plan, Inc v. Philip Morris, Inc*., 621 N.W.2d 2, 14 (Minn. 2001). The facts of the complaints must be taken as true and considered in the light most favorable to the non-moving party. *Martens v. Minnesota Mining & Mfg. Co*., 616 N.W.2d 732, 739 (Minn. 2000). For this motion, the Court considered the Contract since it is referenced in the complaints and is central to PCI's claim for contractual indemnity. *See, e.g*., *In re Hennepin County 1986 Recycling Bond Litig*., 540 N.W.2d 494, 497 (Minn. 1995).

Defendants' claims for contribution and indemnity against Jacobs are actions to recover damages arising out of the allegedly negligent design of the Bridge. In 1965, the Legislature enacted a statute of repose for claims regarding improvements to real property, codified as Minn. Stat. § 541.051. Laws of Minnesota 1965, Ch. 564, § 1. Subdivision 1(a) of the statute provided that actions for contribution and indemnity had to be brought within two years of accrual and within ten years of substantial completion of the project. Specifically, that statute stated:

> Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or per-

> sonal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. . . .

In May 2007, the Legislature amended Minn. Stat. § 541.051, subd. 1 to remove any reference to claims for contribution and indemnity in paragraph (a) and added a paragraph (b) so that the statute now provides:

> a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury, nor in any event shall such a cause of action accrue more than ten years after substantial completion of

> the construction. Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.
>
> (b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).

The amendment also changed the definition of when a claim for contribution and indemnity accrues from payment of a final judgment, arbitration award, or settlement to "the earlier of commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition."

The plain language of the statute allows Defendants' claims for contribution and indemnity. Where the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning. *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). The language of Minn. Stat. § 541.051, as amended in 2007 and effective at the time the Bridge collapsed on August 1, 2007, is plain and unambiguous. Claims for contribution and indemnity may be brought no later than two years from accrual regardless of whether they accrue before or after the ten-year repose period for direct claims. Here, Defen-

dants initiated their claims within two years from the commencement of Plaintiffs' actions and Defendants' claims may be brought even though ten years had past [sic] since completion of the Bridge. Defendants thus have a right to bring their claims for contribution and indemnity against Jacobs.

Jacobs argues that the 2007 amendment did not revive causes of action that were already extinguished under the previous statute. The Legislature made the amendment "effective retroactively from June 30, 2006." 2007 Minn. Laws, Ch. 105, § 4 at 625-26. Specific language indicating claims are revived is unnecessary when the Legislature clearly expresses such intent in retroactive application. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 419 (Minn. 2002). In *U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc.*, 749 N.W.2d 98, 103 (Minn. Ct. App. 2008), *rev. denied* (Minn. Aug. 5, 2008), the Minnesota Court of Appeals determined that the language of the 2007 amendment to Minn. Stat. § 541.051 manifests a clear legislative intent that the statute have retroactive application. Based on this finding, the Court held that the 2007 amendment applied retroactively, reviving a claim for contribution and indemnity that had previously expired. *Id*. Thus, while Defendants' claims for contribution and indemnity were barred by the previous version of Minn. Stat. § 541.051, the amended 2007 version removes the ten-year repose barrier to assertion of the claims.

Jacobs next contends that the revival of time-barred claims by Minn. Stat. § 541.051 is unconstitutional. Minnesota statutes are presumed constitutional. *Doll v. Bamell*, 693 N.W.2d 455, 460-61 (Minn. Ct. App. 2005). Jacobs bears the burden of demon-

strating beyond a reasonable doubt that the statute violates a Constitutional provision. *See Sartori v. Harnischfeger Corp*., 432 N.W.2d 448, 453 (Minn. 1988). The due process clauses of both the United States and Minnesota Constitutions protect against deprivations of life, liberty, or property made without due process of law. U.S. Const. Amend. XIV, § 1; Minnesota Const., Art. I, § 7. "Although a civil defendant's repose is important, it does not receive constitutional protection." *Wschola v. Snyder*, 478 N.W.2d 225, 227 (Minn. Ct. App. 1992). The "legislature can constitutionally modify time limitations and thereby divest a party of previously obtained rights." *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591 (Minn. Ct. App. 1994). The Minnesota Court of Appeals in *U.S. Home Corp*., held that the right to repose is not vested until final judgment has been entered. *U.S. Home Corp*., 749 N.W.2d at 103. The Court thus upheld the retroactive application and revival of time-barred claims under the 2007 amendment to Minn. Stat. § 541.051. *Id*. Jacobs did not have a vested property interest in the prior repose statute because it was an affirmative defense that did not arise until litigation and judgment.

Even if Jacobs had a constitutionally recognized property interest in the repose period of the previous version of Minn. Stat. § 541.051, the 2007 amendment is constitutional because the Legislature had rational reasons for the changes. Since Minn. Stat. § 541.051 does not limit a fundamental right or use a suspect classification, minimal judicial scrutiny is appropriate. *See Doll*, 693 N.W.2d at 463. "Legislation is constitutional if it is not unreasonable, arbitrary or capricious and bears a rational relation to the public purpose it seeks to promote." *Id*. Here, it is not unreasonable, arbitrary or capricious to remove

the ten-year repose period from claims for contribution and indemnity in construction defect cases because it prevents defendants from being liable for others' negligence in certain situations. *See, e.g.*, *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634 (Minn. 2006). The 2007 amendment is rationally related to the purpose of allocating liability among all tortfeasors. Jacobs has not shown beyond a reasonable doubt that Minn. Stat. § 541.051 is unconstitutional.

Defendants' claim for contribution is a "flexible, equitable remedy designed to accomplish a fair allocation of loss among parties." *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 688 (Minn. 1977). It requires that "persons under a common burden share that burden equally." *Spitzack v. Schumacher*, 241 N.W.2d 641, 643 (Minn. 1976). A claim for contribution requires: 1) common liability of two or more actors to the injured party; and 2) the payment by one of the actors of more than its fair share of that common liability. *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). Common liability is created at the instant the tort is committed. *Spitzack*, 241 N.W.2d at 643. It arises when both parties are liable to the injured party for part or all of the same damages. *Milbank Mut. Ins. Co. v. Village of Rose Creek*, 225 N.W.2d 6, 8-9 (Minn. 1974). Common liability may exist even though the parties' liability depends on different legal theories. *City of Willmar*, 512 N.W.2d at 874.

Jacobs argues that it has no common liability with the Defendants because at the time the Bridge collapsed, the statute of repose had extinguished the Plaintiffs' direct claims against Jacobs. Technical defenses that do not go to the merits of a case do not

extinguish common liability even though they eliminate one party's direct obligation to compensate the injured party. *Jones v. Fisher*, 309 N.W.2d 726, 729 (Minn. 1981). Thus, even when a plaintiff cannot enforce recovery against a defendant, common liability remains if the factor preventing enforcement is extrinsic to the tort itself, and the acts or omissions of the defendant are otherwise sufficient to subject the defendant to liability. *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984). Examples of factors that prevent recovery but do not destroy common liability are failure to provide statutory notice, a covenant not to sue, personal immunity, and the expiration of the statute of limitations. *Id*. A statute of repose limits the time within which a party can acquire a cause of action. *Weston*, 716 N.W.2d at 641. It is a substantive rather than procedural limit. *Id*. While such a defense is not labeled technical, it does not go to the underlying merits of the claim. The defense is unrelated to Jacobs' acts, omissions, or culpability. Based on these equitable principles, Plaintiffs' lack of direct claims against Jacobs does not extinguish common liability. Defendants' claims for contribution are legally sufficient and dismissal is inappropriate.

Defendants' claims for indemnity do not require common liability. *See Blomgren v. Marshall Mgmt Svcs, Inc*., 483 N.W.2d 504, 506 (Minn. Ct. App. 1992). Indemnity arises out of a contractual relationship, either express or implied by law, which requires one party to reimburse the other entirely. *Hendrickson v. Minnesota Power & Light Co*., 104 N.W.2d 843, 847 (Minn. 1960). A claimant may recover indemnity where the one seeking indemnity: 1) has only a derivative or vicarious liability for damages; 2) has incurred liability by action at the direction, in the interest of, and in reliance upon the other party;

3) has incurred liability because of a breach of duty owed to him by the other; or 4) where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved. *See Engvall v. Soo Line Railroad Co.*, 632 N.W.2d 560, 571 (Minn. 2001). Defendants' complaints indicate that Defendants' liability for Plaintiffs' damages is derivative or vicarious or incurred due to Jacobs' liability. Defendants have pled facts sufficient to go forward with claims for indemnity.

PCI asserts a claim for contractual indemnity as a third-party beneficiary under the Contract between Jacobs and the State. As noted above, the statute of repose in Minn. Stat. § 541.051 does not bar PCI's claim for indemnity. Generally, only parties to a contract have enforceable rights under the contract. *See Hickman v. Safeco Ins. Co. of America*, 695 N.W.2d 365, 369 (Minn. 2005). There is an exception to this general rule for third-parties who are intended beneficiaries of a contract. *Id*. Minnesota has adopted the Restatement (Second) of Contract's approach to determine if a party is an intended third-party beneficiary. *Cretex Cos., Inc. v. Construction Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). Section 302 of the Restatement (Second) of Contracts provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [duty owed test]; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance [intent to benefit test].

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

If recognition of third-party beneficiary rights is "appropriate" and either the duty owed or the intent to benefit test is satisfied, the third-party can recover as an intended beneficiary. *Cretex*, 342 N.W.2d at 139. The intent to benefit a third party "must be found in the contract as read in light of all the surrounding circumstances." *Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minnesota*, 215 N.W.2d 479, 483 (Minn. 1974).

PCI argues it is "an agent" of the State and entitled to indemnity under Article VIII, Section 2(b) of the Contract. The rights of a third-party beneficiary are based upon the terms of the contract. *See Brix v. General Accident & Assurance Corp*., 93 N.W.2d 542, 544 (Minn. 1958). Where the intention of the parties is clear from the face of a contract, construction of the contract is a question of law for the court. *Hickman* 695 N.W.2d at 369. If there is ambiguity, extrinsic evidence may be used, and construction of the contract is a question of fact for the jury unless such evidence is conclusive. *Id*. Here, the parties' intention is ambiguous with respect to the use of the word "agent." Extrinsic evidence and construction of the contract is necessary to determine whether PCI had an agency relationship with the State and is entitled to indemnity under the Contract. Considering the complaint in a light most favorable to PCI, it has

stated a legally cognizable claim for relief and dismissal is inappropriate at this time.

D.H.