



Waivers of Subrogation

THE JUST-IN-CASE SAVIOR

WHAT IS A WAIVER OF SUBROGATION? Its provisions are poorly understood and often ignored, but they can be absolutely critical to protecting your business interests.

In order to understand the meaning of the waiver, you must first grasp the basic concept of subrogation. These clauses must be understood in the context of insurance coverage and protection of your electrical contracting business. Any lawyer will tell you that it is critical to understand each and every clause included in the agreements you sign. A waiver of subrogation is a clause that is frequently included in construction contracts, but it also is a clause that is frequently not understood in these contracts.

What is subrogation?

Subrogation is a legal theory that permits one party to “step into the shoes” of another party and assert that party’s claims for damages. In the construction industry, subrogation is most commonly found where an insurance company has issued payment on a claim against one of their insureds. The right of subrogation allows the insurance company to step into the insured’s shoes in order to sue third parties in an attempt to recoup the claim amount paid out if the third party was responsible for the damages.

Although personal injury claims may give rise to subrogation, they have a somewhat limited application to construction projects due to the widespread use of worker’s compensation insurance. For subcontractors, property damage is the most common type of claim that is subject to subrogation.

As an example of subrogation, consider a project where a building under construction catches fire and burns down. The contractor’s insurance pays for the damages. By using the right of

subrogation, the contractor’s insurance company can now sue the subcontractors allegedly at fault for the loss.

Waiver of subrogation clause

The parties are free to contractually allocate risk, including waiving certain rights against each other at the formation of the contract. A waiver of subrogation clause is a contractual agreement at the start of the project that the parties will waive subrogation claims. Such clauses typically provide that, in the event insurance covers claims, the parties waive all rights against each other and explicitly agree that both parties waive subrogation rights on behalf of their insurance carriers.

Although waiver of subrogation clauses minimize lawsuits and claims among the parties, it is important to make sure your insurance policy allows these clauses. Most insurance policies permit an insured to waive subrogation so long as the waiver is made in writing and preceding any loss. But some insurance policies bar such clauses. If you are the party waiving subrogation, you could jeopardize your insurance coverage if you impede the carrier’s subrogation rights in those cases. So it is always a good idea to carefully review your insurance policy and possibly to even communicate with your broker or carrier before agreeing to a waiver of subrogation.

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Potential impact

Returning to our faulty construction scenario, imagine the contract between the contractor and the subcontractor contained a waiver of subrogation provision. The contractor’s insurance company is barred from recovering anything from the subcontractor. This single provision can eliminate extensive litigation and legal expenses. In a catastrophic-level loss case, this provision can eliminate huge levels of liability exposure.

Standard forms widely used in the industry, such as the AIA form contracts, generally include a mutual waiver of subrogation between the parties to an agreement.

During contract negotiations at the beginning of a project, a waiver of subrogation provision often is relatively easy to obtain because the parties are not very concerned about waiving the rights of others (e.g., their insurance carriers). Such clauses often are considered of little importance; however, they can be your savior if a construction project goes truly bad. Therefore, during contract negotiations, it is vital to remember the implications and potential importance of a waiver of subrogation. It may save you a lot of money and trouble in the end. ■

This article is not intended to provide specific legal advice, but instead as general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice you may receive will depend upon your facts and the laws of your jurisdiction.