

Presenting a live 90-minute webinar with interactive Q&A

Construction Contract Waivers of Subrogation, Indemnity and Contribution

Navigating the Complexities and Pitfalls of Waiver Provisions for Contractors, Owners and Insurers

THURSDAY, SEPTEMBER 4, 2014

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Construction Contract Waivers of Subrogation, Indemnity, and Contribution

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Construction Contract Waivers of Subrogation, Indemnity, and Contribution

- **Where we are going:**
 - Construction Contract Clauses
 - Insurance and Construction
 - Impact on parties to the contract and recent case law

Construction Contract Waivers of Subrogation, Indemnity, and Contribution

- Construction Contracts may be complicated
- Read Incorporated Documents
- Be aware of Order of Precedence, if any
- Be aware of statutes impacting enforceability

Construction Contract Waivers of Subrogation, Indemnity, and Contribution

- A key purpose of Construction Contracts is Risk Management
- Numerous Types of Construction Contract Clauses impact risk management

Risk Management Clauses in Contracts

- Pay When Paid Clauses
- Liquidated Damages
- Waiver of Consequential Damages
- No Damages for Delay Clauses
- Differing Site Conditions
- Notice Provisions
- Indemnity
- Insurance



Risk Allocation

- Allocate risk to party best to able to manage
- Traditional contract: Owner contracts with contractor and architect separately; owner responsible for coordinating between design and construction; architect/engineer responsible for design; contractor responsible for construction means and methods
- Design-build: Owner responsible for performance criteria; design-builder responsible for design and construction, including coordination; bridging

Indemnity Clauses

■ Indemnification

- Indemnity against loss: actual loss, expense, cost, damage
- Indemnity against liability: claims, suits, complaints, allegations
- Must know state law – broad, intermediate, limited
- Anti-indemnity statutes
- Does clause require indemnitor to indemnify/defend for indemnitee's negligence
- Insurance coverage

Indemnity Clauses

■ **Broad Form**

- Consultant agrees to hold harmless and indemnify Client from any and all loss or liability, including cost of defense, arising out of performance of the services described herein.

■ **Intermediate**

- Consultant agrees to defend, hold harmless and indemnify Client from any and all loss or liability arising out of Consultant's performance except for the sole negligence or willful misconduct of Client.
- Consider "to the extent caused by Consultant's negligence or wrongful act"

■ **Limited**

- Consultant agrees to hold harmless and indemnify Client from and against liability arising out of Consultant's negligent performance of services.

Contribution Clauses

■ Contribution

- Construction contracts rarely address the issue of contribution
- Contribution: The sharing of a loss or payment among several. The act of any one or several of a number of co-debtors, co-sureties, etc., in reimbursing one of their number who has paid the whole debt or suffered the whole liability, each to the extent of his proportionate share

Waivers

- **Waiver - the intentional relinquishment of a known right**
- **The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege**
- **Courts generally review waivers of rights with scrutiny & skepticism**
- **If a waiver is deemed ambiguous, it may not be enforced as intended**
- **Ambiguous - susceptible to more than one reasonable interpretation**

Insurance/Risk Management

■ **Builder's Risk**

- Who buys (lowest rates, coverage)
- Who is an insured
- Who is responsible for deductible
- What does it cover
- When does coverage end

Builder's Risk Insurance

- Before commencing the Work, the Owner shall obtain and maintain a Builder's Risk Policy upon the entire Project for the full cost of replacement at the time of loss. This insurance shall also name the Constructor, Subcontractors, Subsubcontractors, Material Suppliers, and the Design Professional as insureds. This insurance shall be written as a Builder's Risk Policy or equivalent form to cover all risks of physical loss except those specifically excluded by the policy, and shall insure (a) at least against the perils of fire, lightning, explosion, windstorm, hail, smoke, aircraft (except aircraft, including helicopter, operated by or on behalf of the Contractor) and vehicles, riot and civil commotion, theft, vandalism, malicious mischief, debris removal, flood, earthquake, earth movement, water damage, wind damage, testing if applicable, collapse however caused, and (b) damage resulting from defective design, workmanship, or material. The Owner shall be solely responsible for any deductible amounts or coinsurance penalties. This policy shall provide for a waiver of subrogation in favor of the Constructor, Subcontractors, Subsubcontractors, Material Suppliers, and the Design Professional. This insurance shall remain in effect until final payment has been made or until no person or entity other than the Owner has an insurable interest in the property to be covered by this insurance, whichever is sooner. Partial occupancy or use of the Work shall not commence until the Owner has secured the consent of the insurance company or companies providing the coverage required in this subsection. Before commencing the Work, the Owner shall provide a copy of the property policy or policies obtained in compliance with this subsection.

CGL Coverage

■ Commercial General Liability

The CGL policy shall include coverage for liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury, contractual liability, and broad form property damage. The Constructor shall maintain completed operations liability insurance for one year after Substantial Completion, or as required by the Contract Documents, whichever is longer.

- Operations/completed operations
- Exclusions
- Policy/insurance certificate
- Limits (based on scope of work, project size/value)
- Insured/Additional Insured

Professional Liability Insurance

■ Professional Liability

PROFESSIONAL LIABILITY INSURANCE The Architect shall obtain professional liability insurance for claims arising from the negligent performance of professional services under this Agreement, which shall be Project Specific Coverage written for not less than \$_____ per claim and in the aggregate with a deductible not to exceed \$_____. The Professional Liability Insurance shall include prior acts coverage sufficient to cover all services rendered by the Design Professional. This coverage shall be continued in effect for ____ year(s) after the Date of Substantial Completion.

- Architect, engineer, contractor, subcontractor, supplier
- Insured/additional insured
- Deductible
- Claims-made, wasting policy
- Project specific policy/limits

Pollution Insurance

■ Pollution

Contractor shall maintain Pollution Liability covering the contractor's liability for bodily injury, property damage and environmental damage resulting from pollution and related cleanup costs incurred, all arising out of the work or services to be performed under this contract. Coverage shall be provided for both work performed on site, as well as during the transport of hazardous materials. Limits of not less than \$[Insert Limit of Insurance] shall be provided.

- Who buys
- What does it cover
- Insured/Additional Insured
- Claims made
- Deductibles

AI Endorsement – Ongoing Ops

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY
CG 20 10 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf.

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

AI Endorsement – Completed Ops

ENDORSEMENT No.

This endorsement, effective 12:01 AM:

Forms a part of policy no:

Issued to:

By:

Commercial Umbrella Liability Policy with CrisisResponse®

Additional Insured Endorsement - Products-Completed Operations and Primary Non-Contributing

This policy is amended as follows:

Section VII, DEFINITIONS, Paragraph M, is intended to include the following additional provision:

Insured means:

Any person or organization to which you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization is an additional insured on your policy, but only if such person or organization is included under the coverage provided by Scheduled Underlying Insurance. Such person or organization is an additional insured only with respect to liability.

1. arising out of Your Work at the location designated; or
2. included within the Products-Completed Operations Hazard.

This provision does not apply to liability arising out of the sole negligence of such person or organization for its own acts or omissions or those of its employees or anyone else acting on its behalf.

Coverage afforded to these additional insured parties will be primary to, and non-contributory with, any other insurance available to that person or organization.

All other terms, definitions, conditions, and exclusions of this policy remain unchanged.

Authorized Representative
or Countersignature (Where Applicable)

030894 (8/2014)
AE-1407

SPECIMEN

Property and Wrap-Up Insurance

- **Property Insurance**
- **Waiver of Subrogation** - The Owner and the Constructor waive all rights against each other and their respective employees, agents, contractors, subcontractors and subsubcontractors, and design professionals for damages caused by risks covered by the property insurance except such rights as they may have to the proceeds of the insurance and such rights as the Constructor may have for the failure of the Owner to obtain and maintain property insurance in compliance with agreement.
 - After project completion/substantial completion
 - Primary to contractor/subcontractor CGL
 - Coverage
- **Wrap-Up (OCIP/CCIP)**
 - Tail
 - Limits, deductible
 - State law

§ 11.3.7 Waivers of Subrogation 2007 AIA A201

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such instance held by the Owner as fiduciary. ...

The AIA-B141 Owner/Architect Agreement

The AIA-B141 owner/architect agreement contains the following mutual waiver of rights provision in Paragraph 9.4:

The Owner and Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, but only to the extent covered by property insurance during construction, except such rights as they may have to the proceeds of such insurance as set forth in the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement. The Owner and Architect each shall require similar waivers from their contractors, consultants and agents.

Builders Risk Insurance

J. Transfer of Rights of Recovery Against Others to Us

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property
2. After a loss to your Covered Property only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance; or
 - b. A business firm:
 - (1) Owned or controlled by this insurance; or
 - (2) That owns or controls you.

This will not restrict your insurance

Analyzing the Policy Terms

Any person or organization to or for whom we make payment

- Extends beyond named insured on policy
- Includes insureds by policy definition and endorsement
- Includes insured by policy definition

Analyzing (cont.)

Has rights to recover damages from another

- Not limited to a particular type of claim
- Can include contract or tort remedies
- Includes any right of recovery

Insurer stands in the shoes of its insured

Analyzing (cont.)

Insured must do everything necessary to secure insurer's rights of recovery

Insured must do nothing after loss to impair insurer's rights of recovery

- Use of phrase “after loss” implies that right of recovery can be limited or waived if done pre-loss
- Insurer has only the same right of recovery as its insured has against a liable third party

Analyzing (cont.)

Common policy provision often explicitly provides for pre-loss waiver of subrogation subject to conditions:

- Waiver of rights must be in writing
- Agreed to before the loss occurs
- May allow for post-loss waiver if the recipient of the waiver is:
 - Someone insured by the policy – or –
 - A related business

Commercial General Liability Insurance

The Insurance Services Office (“ISO”) Commercial General Liability Form (CG 00 01) includes a provision pertaining specifically to subrogation. Condition 8 of this form reads as follows:

8. Transfer of Rights of Recovery Against Others to Us.

If the insured has rights to recover all or part of any payment we have made under this coverage part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring “suit” or transfer those rights to us and help us to enforce them.

Commercial General Liability (CG 24 04)

CG 24 04 05 09

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Person Or Organization:

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The following is added to Paragraph 8. **Transfer Of Rights Of Recovery Against Others To Us** of Section IV – Conditions:

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or "your work" done under a contract with that person or organization and included in the "products-completed operations hazard". This waiver applies only to the person or organization shown in the Schedule above.

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Policy Endorsement For Waiver of Subrogation

“Waiver of Transfer of Rights of Recovery Against Others to Us” (CG 24 04).

- This endorsement expressly eliminates the insurance companies’ rights to subrogate against those entities listed in the schedule.
- Endorsement restates what the policy actually grants.
- Endorsement documents the fact that the insurance company is aware of the contractual agreement between the insured and the person named in the schedule and also serves as evidence to the individual named in the schedule that rights have been specifically waived.

Manuscript Endorsements

BLANKET WAIVER OF SUBROGATION

It is agreed that, notwithstanding anything to the contrary in paragraph 8 of Commercial General Liability Conditions (Section IV), in the event of any payment under this policy we waive our right of recovery against any person or organization with respect to which the insured has waived its right of recovery.

It is further agreed that work commenced under letter of intent or work order, subject to subsequent reduction to writing, with customers whose customary contracts would require a waiver of recovery rights against them also falls within this blanket waiver of subrogation.

WAIVER OF SUBROGATION BETWEEN INSURED

It is agreed that we waive any right of recovery to which we are entitled by virtue of paragraph 8 of Commercial General Liability Conditions (Section IV) against any person or organization that is an insured under this policy.

Commercial Auto Insurance

The standard ISO Business Auto Coverage Form (CA 00 01) has a very similar subrogation provision to that provided in the Commercial General Liability policy. The ISO Commercial Auto subrogation provision read as follows:

8. Transfer of Rights of Recovery Against Others to Us.

If any person or organization to, or for whom we make payment under this coverage form, has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after “accident” or “loss” to impair them.

CG 24 04 (cont.)

Important to note that this provision pertains to both liability and physical damage.

- An insured can waive the insurance company's rights if it is done before a loss
- There is no standard endorsement available for automobile coverage similar to the CG 24 04, which is available under a general liability policy.

Professional Liability Insurance

- There is no standard professional liability form – professional liability policies are all written on a non-standard basis. Many policies specifically prohibit waiving an insurance company's rights either before or after a loss.
 - This can be extremely problematic for design professionals. It is not uncommon to see a contractual requirement that the design professional waive rights of subrogation on all the policies affected by a contract.

Commercial Property and Inland Marine Insurance

Most property forms are similar to commercial general liability and auto liability coverages with regards to waivers of subrogation, there are some differences.

Some manuscripted forms, particularly inland marine policies, may specifically deny the insured the right to waive subrogation.

The ISO Commercial Property Conditions Form, for example, expressly grants the right to waive subrogation by the insured.

Commercial Property and Inland Marine Insurance (cont.)

I. Transfer of Recovery Rights

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing.

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at the time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

This will not restrict your insurance.

Interpreting Waiver Provisions

- Indemnification
- Other insurance clauses
- Changes to contract
- Work and non-work
- During construction
- Completed construction
- Dependent on contract provisions

Indemnity and Waiver of Subrogation

- *Summit Contractors, Inc. v. General Heating & Air Conditioning, Inc.*, 358 S.C. 410 (2004)
 - Subcontractor allegedly caused fire that destroyed the Work under construction
 - Contractor's insurer paid the loss and subrogated against subcontractor
 - Subcontractor claimed waiver of subrogation precludes carrier's action
 - Trial court granted a directed verdict in favor of subcontractor; Court of Appeals affirmed

Summit Contractors, Inc. v. General Heating & Air Conditioning, Inc.

- Supreme Court affirmed –
 - Subcontract holding subcontractor liable for damage caused by faulty workmanship (and requiring subcontractor to carry liability insurance) does not invalidate waiver of subrogation
 - Subrogation is waived *to the extent damages are covered by property insurance*; subcontractor remains liable for excess damages not covered by property insurance and other damages not covered by property insurance
 - Indemnification provision applies to damage to property *other than the Work itself*
 - Subcontractor must fully indemnify contractor for damage to property of others, but owner waived subrogation rights for the Work, to the extent covered by insurance

Copper Mountain, Inc. v. Industrial Systems, Inc.

- Supreme Court of Colorado
- Similar holding as in *Summit Contractors*
- Contract contained indemnity clause, insurance provisions, and waiver of subrogation
- During construction, fire occurred causing extensive to lodge
- All real and personal property was covered by policy; Copper paid \$1M deductible

Nodaway Valley Bank v. E.L. Crawford Const., Inc.

- Missouri Court of Appeals (2004)
- Bank hired Crawford to construct an addition and renovate the Bank's building
- Crawford hired a subcontractor, Crane, to perform the steel erection
- Fire occurred while Crane was using a cutting torch, damage the Bank's property
- Bank's insurer paid Bank for the loss sustained
- Bank filed suit against Crawford for breach of contract, negligence, and indemnity and negligence against Crane
- Court found in favor of Crawford and Crane – waiver of subrogation barred the Bank's claims

Jalapenos, LLC v. GRC General Contractor, Inc.

- Superior Court of PA
- Contractor hired to perform renovations for property owner
- During renovations, fire occurred causing significant damages
- Contractor claimed owner's failure to obtain insurance precluded it from recovering damages from contractor
- Owner claim indemnification provision should control
- Court found waiver precluded owner's claims against contractor

Acadia Insurance Co. v. Buck Construction Co.

- Supreme Judicial Court of Maine
- Fire broke out while contractor was making repairs to its completed work
- Owner's insurer, Acadia, paid the owner for its losses and brought the action to recover the loss paid from contractor
- Contractor claimed claim was barred by waiver of subrogation

Completed Construction

- *Middleoak Insurance Co. v. Tri-State Sprinkler Corp.*, 931 N.E.2d 470 (Mass. App. Ct. 2010)
- Waiver of subrogation applies to completed projects
- If owner secures coverage for property after final payment
- *TX. C.C., Inc. Wilson/Barnes General Contractors, Inc.*, 233 S.W. 3d 562 (Tex. App. 2007)

Coverage for Non-work

- Split by courts on issue of whether waiver of subrogation applies to non-work when insurance policy covers damage to non-work
- Majority of courts hold if owner purchases or obtains coverage for damage to non-work property, waiver applies to all property covered by property insurance
 - Parties intended to allocate risk to insurance
 - In many cases, owner did not obtain builder's risk insurance, but chose to increase coverage for project under existing property insurance
 - Applies to property damage during construction and after project completion

Questions?

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