



Construction Law and Insurance Recovery Experts

With comprehensive construction and insurance recovery practices, Brouse McDowell is uniquely suited to help its clients navigate the complex world of construction contracting and claims.

Our attorneys provide a full complement of legal resources to help at all stages of the construction project, from project conceptualization, design, contract drafting, implementation, monitoring and scheduling, to claims resolution.

And, with five Certified Specialists in Insurance Coverage Law, Brouse McDowell's Insurance Recovery group is one of the most experienced in the nation.

Our attorneys work collaboratively to better shift risk at the contracting stage, and to devise claim and litigation approaches that minimize liability and maximize insurance recovery in the event of a loss.

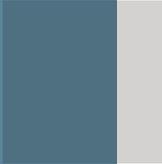
Construction & Coverage Law Seasonal Newsletter

Waiver of Subrogation Provisions in Construction Contracts

Despite the potential financial significance to the contracting parties, the drafting, review, and approval of insurance provisions in construction contracts is frequently delegated to non-lawyers or simply ignored. Other times, the parties insert boilerplate language, such as the language found in an AIA Form, without considering how that language might impact the particular project. As with other construction contract provisions, while the AIA forms can provide a good starting point, the parties should not accept insurance provisions without an understanding of how these clauses will operate.

One clause that may frequently be overlooked is the Waiver of Subrogation provision. The AIA version of the provision states as follows:

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 insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium



directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

AIA Document A201 – 2007, §11.3.7 (emphasis added).

Fundamentally, this provision is simply an agreement of the parties to waive their rights to sue each other for losses covered by their insurance. Though it might seem relatively straightforward, there are several potential pitfalls that parties should consider when negotiating their contract:

1. **Insurer Consent.** Waiver of Subrogation clauses often require that the parties obtain their insurers' consent, and they should – many insurance policies provide that a policyholder may not waive the insurer's subrogation rights and, if the policyholder has done so, the insurer may deny the claim.
2. **Scope of the Waiver.** In the AIA A201-2007 form, the waiver applies only to property or builders risk losses. Section 11.3.7 limits the waivers to “property insurance obtained pursuant to [section 11.3] or other property insurance applicable to the Work.” Under this wording, an owner or contractor could still be subject to a subrogation claim brought by another party's liability insurers, such as general liability, auto, or workers' compensation, in the event of an injury or loss that is paid by one of those policies. If the parties want the waiver to apply more broadly to other types of losses, they should modify the standard form language to make that clear by expressly waiving all rights against one another for losses that are covered by *any* insurance policy.
3. **Definition of “the Work.”** Another area of contention relates to the definition of the term “the Work.” The waiver is limited to “insurance applicable to the Work.” The “Work” generally means “the construction and services required by the Contract Documents.” (§1.1.3). Where a project involves repair or renovation of an existing structure, a dispute can arise as to whether damage to existing or adjacent property is part of the Work.

Nationally, courts take two general approaches. Some courts draw a distinction between the Work and non-Work property, and hold that only the Work is within the scope of the waiver. Other courts limit the waiver to the proceeds of the insurance policy—if the policy is broad enough to cover Work and non-Work property, the waiver would apply to both.



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- 4. Deductibles and Self-Insured Retentions.** Another area of contention is whether the waiver applies to deductibles and self-insured retentions (SIRs). As written, the waiver only applies “to the extent covered by property insurance.” A party might argue that it did not waive a significant SIR, leaving a large gap in the waiver. To avoid the issue, you can expand the waiver of subrogation to include insured losses as well as losses within the waiving party’s deductible or retention.

These potential pitfalls highlight why contracting parties should not simply accept boilerplate insurance provisions without carefully considering how they might impact the project. Review and revision of these provisions can help ensure that all parties effectively minimize and shift the risk to the intended parties and their insurers.

For questions or comments regarding this article, please contact Amanda M. Leffler at aleffler@brouse.com.

“Lunch and Learn” Opportunities. Brouse McDowell collaborates with its clients and business partners to provide unique opportunities for in-person seminars.

Experienced attorneys from our **Construction Law and Insurance Recovery Group** will meet with individuals in your organization in an informal group setting to provide a legal overview on a variety of topics crucial to your business, including maximizing insurance coverage for your projects, project planning and contracting issues, and dispute avoidance and resolution. Prior to meeting, we will provide a “menu” of options on specific sub-issues within these broad topics for you to select. Feel free to select as many or as few as you like. We can travel to your place of business, meet in a conference room at our office, or reach you over the internet through our unique “webinar” service.

The seminar and lunch are on us! Please contact Amanda Leffler (aleffler@brouse.com) or Jim Dixon (jdixon@brouse.com) to get on the schedule or for more information.