

Contract's Standard Insurance Waiver Does not Preclude Subrogation Claim

by

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A school district can maintain on behalf of its insurance company a lawsuit against a subcontractor for damages it caused to the school's roof despite a contract that waived all claims the insurance company may have against the subcontractor for work it performed. The Western District Court of Appeals announced this result, in a case of first impression, after considering a standard contract provision (AIA Document A201-1997, General Conditions of Contract for Construction, Section 11.4.7) that waives all claims by an insurance company against all parties to the contract.

The case is *Knob Noster R-VIII School Dist. v. Dan Dankenbring d/b/a Dan Dankenbring Masonry*, No. WD 66923 (Mo. App. W.D. 2007), decided February 13. In reaching this decision, the appellate court tackled the thorny world of insurance and how differing insurance provisions in a standard construction contract can be harmonized to determine if coverage exists. The opinion is a must read for anyone involved in insurance construction issues under Missouri law, particularly those who draft and negotiate contracts.

The Whiteman Elementary School and Knob Noster High School (School District) had a contract with Lico Construction Company for replacement of windows and air conditioning work for the sum of \$2,447,000.00. The contract incorporated the General Conditions of Contract for Construction, AIA Document A201-1997, a commonly used form construction contract offered by the American Institute of Architects.

Lico hired Ron Dankenbring Masonry ("Masonry") as a subcontractor to brick up various window openings. Pursuant to a stipulated record before the trial court, the parties agreed that Masonry applied an acid wash solution that destroyed several layers of protective galvanizing on an existing portion of the high school's roof, thereby causing \$116,353.00 in damage. They further agreed that either the School District recovers if insurance applies—or Masonry owes nothing if the AIA clauses preclude recovery.

The School District's lawsuit was a subrogation action, meaning its insurance company paid the claim for damage to the roof and then through its insured—the School District—sought reimbursement from the responsible party—Masonry. Under Missouri law, a subrogation action is brought in the name of the insured and the insurance company is not a named party to the lawsuit. Any money collected, however, goes to the insurance company to reimburse it for its payout on the insurance claim. The School District's insurance carrier was Missouri United School Insurance Council (Music).

At issue on appeal—for the first time in Missouri—were various standard AIA provisions by which the parties agreed to waive any subrogation claim against each other for work performed on the project. The court had to decide if this waiver applied when the damage that Masonry caused was to an area, in this case the high school roof, which clearly was outside Masonry's scope of work.

The appellate court discussed the common industry practice of having just one party obtain insurance to cover everyone, thus avoiding duplicative insurance and multiple premiums. In this case, the School District as owner agreed to obtain builder's risk insurance covering everyone for the new work they performed on this project.

The contract also contained a requirement that everyone waive any right of subrogation against each other in case there was a claim. This was in Section 11.4.7 of AIA A201-1997. (The actual language is too long to quote here.)

The Western District concluded that this provision only applied to a waiver of a subrogation claim relating to damage to construction work; that is, in this case work per Masonry's subcontract. Damage to the roof was not part of Masonry's scope of work or covered by the builder's risk insurance and thus the waiver did not apply.

Thus, the School District could collect from Masonry for the roof damage. This resulted in a final judgment against Masonry and for the School District for \$115,353. (The total damage was \$116,353 but there was a \$1,000.00 deductible that the School District had to pay under the insurance policy.)

In the end Masonry had to pay out of its pocket for this loss, despite AIA standard provisions it thought precluded this result. The reason is because through the court's careful reading of the various contract provisions it did not find the waiver to apply to this loss.

The appellate opinion reinforces the importance of having a professional review the various insurance provisions in a contract, even those within standard form contracts like AIA that are used around the country.

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