An essential element of any contract for a design professional is a waiver of subrogation. Absent a waiver, subrogation allows an insurer or third party (usually the owner’s insurer) to recoup monies paid on a claim by pursuing any rights to recovery its insured would have had against the person or entity responsible for the loss.

On May 26, 2020, the Maryland Court of Appeals held that a contractual waiver of subrogation bars a third party from a claim of contribution from a joint tortfeasor. In Gables Construction, Inc. v. Red Coats, Inc., et al, the owner (“Owner”) entered into a Prime Contract with a general contractor (“GC”), which included a waiver of subrogation and required Owner to purchase property insurance and transfer all risk of loss for fire-related claims to an insurer. Thereafter, Red Coats was hired as the security and fire watch contractor (“Red Coats”). As the project was nearing substantial completion, a fire damaged the building and caused nearly $23,000,000 in damages.

After the fire, the Owner’s insurer (“Insurer”) paid for the loss entirely. Since the Prime Contract made no mention of Red Coats, Insurer sought to recoup its costs by filing a subrogation action against Red Coats. Ultimately, Red Coats and its insurer settled with the Owner’s Insurer, with Red Coats paying $4,000,000 and its insurer paying $10,000,000. Thereafter, Red Coats sued the GC for contribution under the Maryland Uniform Contribution Among Joint Tort-Feasers Act (“UCATA”), alleging that the GC’s negligence caused the fire and the GC was therefore a joint tortfeasor.

Joint Tortfeasors and Waivers of Subrogation

For Red Coats to prevail against the GC under the UCATA, Red Coats first needed to establish that the GC was jointly liable in tort to the Owner for negligence. At trial, Red Coats recovered $7,000,000 against the GC as a joint tortfeasor (half the amount paid out by Red Coats and its insurer in the settlement). The GC appealed, and the Maryland Court of Special Appeals, for the first time in Maryland, considered whether a contractual waiver of subrogation barred recovery from a joint tortfeasor under the UCATA.

The CSA held that the waiver of subrogation was not a full bar to recovery through contribution. Red Coats could recover from the GC half of what it had paid out of pocket, but Red Coats’ insurer could not recover against the GC. The GC appealed and the Maryland Court of Appeals agreed that the GC owed nothing as a matter of law. The Court of Appeals stated that the UCATA requires Red Coats to establish that the GC is liable in tort to Owner before Red Coats can recover anything from the GC as a joint tortfeasor. In the Prime Contract, Owner waived all of its rights against the GC for damages caused by fire to the extent covered by property insurance. Because Owner waived such claims against the GC, the GC could not be liable in tort to Owner and could not be a joint tortfeasor together with Red Coats. Therefore, under the UCATA, Red Coats and its insurer were fully barred from any contribution from the GC for the damages it paid in the settlement.

The waiver of subrogation clause, and the requirement that an Owner maintain property insurance during construction, effectively shifted the risk of loss onto Owner’s Insurer and away from the GC. Now, at least in Maryland, waivers of subrogation can also prevent contribution claims against joint tortfeasors.
How Does This Case Effect Design Professionals?

Design professionals must be alert during contract drafting and negotiation to ensure they are protected by a waiver of subrogation provision in both their own contract and the General Conditions. While subrogation clauses are not generally given much time or attention, the importance of including such a provision cannot be understated. Reviewing all project documents and not just your contract with the owner/client, can protect against the exclusion of design professionals from waiver of subrogation provisions.

Many form contracts also assign responsibility for obtaining and maintaining the applicable insurance, for providing proof of such insurance, and allocating the cost of carrying such insurance. It is important to hold the owner and/or GC accountable for any such notification requirements and, when appropriate, to ask the owner/GC for a certificate of insurance as it applies to the waiver of subrogation. Unfortunately, design professionals often do not realize the protection that a waiver of subrogation offers until they are being sued by the owner’s insurance company in a subrogation action. Contract drafting and negotiation allows you to effectively eliminate this risk from the project’s onset.

Conclusion

Waivers of subrogation have long been a staple in AIA form contracts serving the primary purpose of shifting risk of loss onto insurance companies and, after the Red Coats holding, are now being enforced in Maryland to preclude recovery from a joint tortfeasor who was granted such a waiver. Design professionals can avoid being involved in costly litigation by including standard waiver of subrogation language in all contracts and ensuring they are not excluded from waivers of subrogation provisions included in other project documents.

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