



NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS

Successful Subrogation in Construction Defect Cases: Surviving the Storm of Contractual and Insurance Coverage Issues

Thomas Paolini - Stutman Law

Rob Jones - The Jones Law Firm

Chris L. Wright, AIC
Great American Insurance Group

Agenda

- 1. Loss Investigation - Initial Action**
- 2. Critical Documents to Obtain**
- 3. Deadlines to Determine**
- 4. Notice to Parties and Scene Inspection**
- 5. Potential Causes of Action**
- 6. Contractual Issues**
- 7. Insurance Policies and Coverage Overview**
- 8. Overlapping Insurance Coverage**

1. Loss Investigation - Initial Action

- a. Secure the Scene and Preserve Evidence**
- b. Identify Potential Causes of Loss**
- c. Identify Potentially Responsible Parties**
- d. Obtain the Appropriate Expert(s)**

2. Critical Documents to Obtain

a. Contractual Agreements

- i. General Contractor / Construction Manager Agreements**
- ii. Subcontract Agreements**
- iii. Equipment or Machinery in the Area**
- iv. Maintenance and Service Agreements**
- v. Security Companies and Other Vendors**

b. Tariffs

2. Critical Documents to Obtain

c. Insurance Policies of Potentially Responsible Parties

i. General and Subcontractor Declarations Page and Policy

ii. Accord Documents Identifying Potential Carriers

iii. Insurance Services Office (ISO) Claim History and Prior Losses

**iv. Many State Statutes allowing you to request insurance coverage
information**

3. Deadlines to Determine

- a. Statute of Limitations**
- b. Statute of Repose**
- c. Governmental Notice Provisions**
- d. Warranty Provisions**
- e. Insurance Coverage Demands**

4. Notice to Parties and Scene Inspection

a. Notice Issues

i. Preservation of Evidence

ii. Information about other potentially responsible parties

4. Notice to Parties and Scene Inspection

b. Scene Inspection

i. Factual Background

ii. Scene Inspection Process

iii. Collection and Preservation of Evidence

5. Potential Causes of Action

a. Negligence

b. Breach of Contract

c. Breach of Warranty

d. Professional Negligence / Malpractice

e. Environmental Claims

6. Contractual Issues

a. Tariff

b. Warranty Provisions

c. Waiver of Subrogation

d. Waiver of Consequential Damages

e. Indemnification Provisions

f. Insurance Coverage Required by Contract

Tariff



What is a Tariff?

- a. Document filed with and approved by the regulating agency.**
- b. Set of operating rules imposed by the State that a public utility must follow.**
- c. Sets forth schedule of rates and services, rules, contracts, regulations and practices regarding services.**
- d. Generally has the force and effect of law.**

Tariff

The Company shall not be liable in damage to the Customer, their directors, officers, employees, agents, contractors or other affected third parties for any act, omission or circumstance occasioned by or in consequence of any acts of God, acts of the public enemy, wars, blockages, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and any other other than for the gross negligence or willful misconduct wise, other limitation on liability shall apply to all claimed damages Company. This limitation on liability shall apply to all claimed damages regardless of whether the damages are considered direct, in contract or incidental, tort, special, consequential, exemplary or punitive damages or whether they arise in contract or tort or any other cause of action.

Warranty

2.9.1 Design-Builder warrants to Owner that the construction, including all materials and equipment furnished as part of the construction, shall be new and unused, unless otherwise specified in the Contract Documents, of good merchantable quality, in conformance with the Contract Documents and the applicable manufacturer's instructions, standards, and guidelines, and that such construction shall be free of defects in materials and workmanship, in compliance with all Legal Requirements with respect to Design-Builder's scope of Work. Design-Builder's warranty obligation excludes defects caused solely by Owner's abuse, alterations, or failure to maintain the Work in a commercially reasonable manner. Nothing in this warranty is intended to limit any manufacturer's warranty which provides Owner with additional or different warranty rights than set forth in this Section 2.9 or the Contract Documents. Design-Builder will provide Owner with all manufacturers' warranties upon Substantial Completion.

Waiver of Subrogation

The Owner and Contractor waive all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, for damages caused by fire or other causes of loss . . .

Waiver of Subrogation

The Owner and Contractor waive all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, for damages caused by fire or other causes of loss . . . **to the extent covered by property insurance obtained pursuant to this Section 7.1, except such rights as they have to the proceeds of such insurance.**

Waiver of Subrogation



Waiver of Subrogation



Waiver of Subrogation



Waiver of Subrogation



Waiver of Subrogation

Owner and Construction Manager waive all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section 7.1 or other property insurance applicable to the Work, accept such rights as they have to the proceeds of such insurance.

Waiver of Subrogation

RELEASE OF INSURED LOSSES – Insured hereby releases Company and Representatives from and against all losses, damages and expenses arising out of or related to hazard covered by Insurance or bond, including all deductibles and retained limits as well as loss, damage and expense in excess of available policy limits.

Waiver of Consequential Damages

14.7.3 Mutual Waiver of Consequential Damages. Owner and Construction Manager waive claims against each other for consequential damages arising out of or relating to this Agreement. This mutual waiver includes:

14.7.3.1 Damages incurred by Owner for rental expenses, losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or the services of such persons; and

Waiver of Consequential Damages

CONSEQUENTIAL DAMAGES.

10.5.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY NEITHER DESIGN-BUILDER NOR OWNER SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES WHETHER ARISING IN CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

Indemnification

INDEMNIFICATION – Insured agrees to protect, indemnify, defend and hold harmless company and representatives from and against and pay (without any condition that company or representatives first pay) for all claims, demands, suits, liabilities, damages, judgments, losses and expenses including, without limitation, attorneys' fees, which may be asserted against or incurred by company or representatives by or due to any person not a party to this agreement, including insured's insurance company, for any expense, loss or damage...

Indemnification

7.4.1 Design-Builder, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Owner, its Separate Contractors, the City of Dublin and County of Laurens Development Authority (the "Authority"), the City of Dublin, Georgia (the "City"), the County of Laurens, Georgia (the "County"), and the directors, officers, employees, officials, members, and designated representatives of any of them from and against claims, losses, damages, liabilities, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) arising out of or resulting, in whole or part, from the acts or omissions of Design-Builder, Design Consultants, Subcontractors, Sub-Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable; provided, however, this provision shall not apply to any indemnified party whose sole negligence causes any such injury, damage, or harm.

Contractual Limitation of Actions

CONTRACTUAL LIMITATION OF ACTIONS – All claims, actions or proceedings, legal or equitable, against Company or Representatives must be commenced in court within one (1) year after the cause of action has accrued or the act, omission or event occurred from which the claim, action or proceeding arises, whichever is earlier, without judicial extension of time, or said claim, action or proceeding is barred, time being of the essence of this paragraph.

Binding Agreement

BINDING AGREEMENT: APPLICABLE LAW – This Agreement becomes binding upon Company **only when signed by President** of the Company. This Agreement is binding on the heirs, executors, administration, successors and permitted assigns of the parties, and **shall be governed by and construed according to the laws of the State of _____**.

7. Insurance Policies and Coverage Overview

- a. Property Policies**
- b. Builders Risk Insurance**
- c. Commercial General Liability Coverage**
- d. Errors and Omissions Coverages**
- e. Owner Controlled Insurance Policies (OCIP) and Contractor
Controlled Insurance Policies (CCIP)**

Insurance Coverage Required by Contract Documents

- 1. Commercial General Liability**
- 2. Builder's Risk Insurance**
- 3. Workers Compensation and Employers Liability Insurance**
- 4. Automobile Liability**
- 5. Professional Liability (Errors and Omissions)**
- 6. Umbrella or Excess Liability**
- 7. Contractual Liability Coverages**

Insurance Coverage Required by Contract Documents

Owner Named as Additional Insured

Insurance policies required of Design-Builder and Subcontractors shall be endorsed to name as “additional insureds” Owner . . .

Insurance Coverage Required by Contract Documents

Insurance Required by the Contract could be Primary

The coverage afforded the Additional Insureds under these policies shall be primary insurance to the extent the claim arises from the covered acts and omissions of Design-Builder or its Subcontractors. In such cases, if the Additional Insured has other insurance that is or may such other insurance shall be on an excess and non-excess contributory basis butory basis.

8. Overlapping Insurance Coverage

a. Property Policy and Builder's Risk Policies

b. Subrogation, Indemnification and Contribution

i. Definitions

ii. Distinctions

8. Overlapping Insurance Coverages

Priority of Policy Payments

7.1.2 General Insurance Requirements.

All insurance policies shall be placed with insurers reasonably acceptable to the Owner and with an A. M. Best rating not less than A- IX. The Owner, Developer, Lender, and each of their respective directors, officers, employees, and agents shall be included as **Construction Manager's liability insurance policies shall be primary and noncontributory** as respects any other coverage and shall include a Waiver of Subrogation in favor of each additional insured party. Products and Completed Operations coverage shall remain in effect for 5 years after substantial completion.

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- Conclusion
 - *Questions*