CIRCUMVENTING WAIVERS OF SUBROGATION, EXCULPATORY CLAUSES AND OTHER LIMITATIONS

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1. The Issue

As a general rule, insurers seeking to recoup sums by subrogating against responsible third parties stand in the shoes of their insureds and obtain no greater rights than their insureds.[1] The effect of this rule of equity is that any defense that could be raised against an insured may also be raised against the subrogating carrier.[2] Subrogation rights may be lost in one of two ways: (1) the insurance company, by conduct or agreement, can waive its subrogation rights; or (2) exculpatory or waiver clauses entered into by an insured can relieve the tortfeasor from liability. Adjustors, recovery supervisors, and counsel must avoid a mechanical response of merely looking to see whether a written waiver or conduct exists without a thorough analysis of the provision, if in writing; what truly was intended to be waived; or what is legal in the jurisdiction.

2. Discussion

A. Waiver of Subrogation by Insured's Agreement with Third Parties

Most commercial form leases and construction contracts, and many residential leases, contain clauses that provide for the waiver of the insurer's subrogation rights. A several step analysis of any purported waiver can assist the insurer in determining the likelihood of its enforceability by the courts.

First, the effectiveness of the waiver provision depends upon the specific wording used in the agreement. Often times, the waiver entered into by the insured is contingent upon the insurer's consent to the waiver. Obviously, if the policy language does not permit the insured to

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1 Rohm & Haas v. Lassner, 77 A.2d 675 (Pa. Super. 1951).

2 National Fire Insurance Co. of Hartford v. Daniel J. Keating Co., 35 F.R.D. 137 (W.D. Pa. 1964).

waive subrogation rights, or the policy is silent, an argument can be advanced that the waiver is unenforceable.[3]

Second, the insured's failure to notify its insurer of the waiver may be grounds to defeat its enforcement. Recent case law has established that an insurer may not be bond by a waiver of subrogation to which it was not a party and of which it was not aware.[4]

Third, the timeframe that the waiver provision encompasses as well as the scope of the waiver should be analyzed. In construction contracts, for example, a waiver may only be valid during the time that the parties have an insurable interest, i.e., during the construction of a project. Once the project is completed, the original allocation of risk - including the waiver of subrogation provision in the contracting agreements - may no longer apply.[5]

Another argument involving the timeframe of a waiver of subrogation can be fashioned concerning negligent conduct of a landlord that occurred prior to the landlord and tenant entering into a lease agreement that contains a waiver of subrogation. If the language of the waiver of subrogation provision is not clear as to the conduct involved in the waiver, the subrogating carrier

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[3] See, for example, Cucchi v. Rollins Protective Serv. Co., 377 Pa. Super. 9, 546, A.2d 1131 (1988), rev'd. on other grounds, 524 Pa. 514, 574 A.2d 565 (1990) (where one party failed to sign the contract as required by its terms, that party cannot claim the benefit of exculpatory provisions).

[4] Zurich American Insurance Co. v. Eckerd, 770 F. Supp. 269 (E.D. Pa. 1991); ICC Industries, Inc. v. GATX Terminals Corp., 690 F. Supp. 1282, 1286 (S.D.N.Y. 1988) (applying New Jersey law); Seamless Floors by Ford, Inc. v. Value Line Homes, Inc., 438 S.W.2d 598, 601-02 (Tex. App. 1969); Continental Insurance Co. v. Washeon Corp., 524 F. Supp. 34, 36 (E.D. Mo. 1981); and Alamo Chemicals Transportation Corp. v. M/V Overseas Valdes, 469 F. Supp. 203, 212 (E.D. La. 1979).

[5] Fairchild v. W.O. Taylor Comm. Refrig. & Elec. Co., 403 So.2d 1119 (Fla. Ct. App. 1981) (where damage allegedly caused by negligent installation of an air conditioning unit occurred five years after installation was complete, the Court found no consideration for plaintiff/homeowner's ongoing obligation to continue to insure his home for the subcontractor's benefit).

can argue that the lease agreement contemplated a status that would occur in the future because the engagements undertaken are to be performed in the future, not the past.[6]

Fourth, waivers of subrogation may also be considered "exculpatory clauses" in that they seek to relieve the wrongdoer of liability for injury or damage prior to the occurrence of the injury or damage. Thus, waivers of subrogation, like exculpatory clauses, must be measured against the strict specificity requirement typically set forth by the courts.[7] Where the language does not express an intention to insulate a defendant from "all liability" but is limited to certain types of liability, the exculpatory clause will not exculpate the party from liability for an event not specifically addressed by the exculpatory clause.[8] Exculpatory provisions are often not enforceable where there may be a showing of gross negligence, willful or wanton misconduct, or intentional torts such as fraud, intentional misrepresentation and conversion.[9]

B. Waivers of Subrogation - Insurer's Conduct

Insurers can waiver their subrogation rights by language in their insuring agreement or by their own conduct. Many policies contain waivers of subrogation provisions as

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[6] Employers Liability Assurance Corp. v. greenville Businessmen's Association, 224 A.2d 620 (Pa. 1966) (Pennsylvania Supreme Court held invalid exculpatory clause in lease because lease agreement did not specify that it applied to conduct that occurred before as well as after the execution of the agreement). (It should be noted that the clause in Greenville was an exculpatory clause, not a waiver of subrogation, and was construed strictly).

[7] Nevil Chemical Co. v. Union Carbide Corp., 422 F.2d 217 (3rd. Cir. 1979); Galligan v. Arovitch, 421 Pa. 301, 219 A.2d 463 (1966). It must be noted sound argument can be advanced that waivers of subrogation are simply risk-shifting agreements between businessmen. As such, they should not be analyzed strictly as exculpatory clauses. See generally, Mayfair Fabrics v. Henley, 234 A.2d 503, 507-08 (N.J. Super. Law Div. 1967), aff'd, 246 A.2d 749 (N.J. App. Div. 1969).

[8] Ultimate Computer Services, Inc. v. Biltmore Realty Company, Inc., 183 N.J. Super. 144, 443 A. 2d 723 (1982).

[9] See, e.g. cases cited in Annot. 37 ALR 4th 47 "Liability of Persons Furnishing, Installing or Servicing Burglar or Fire Alarm Systems For Burglary or Fire Losses"; Federal Insurance Co. v. Honeywell, Inc., 641 F. Supp. 1560 (S.D.N.Y. 1986); Markap, Inc. v. Wells Fargo Alarm Services, 427 So. 2d 332 (Fla. Ct. App. 1983).

part of their preprinted clauses or by endorsement. Thee provisions are usually upheld.[10] However, a careful review of the language as noted above should define the extent and scope of the waiver.

An insurance company may also waive its right of subrogation by conduct after the loss inconsistent with its intention to exercise its subrogation rights.[11] This conduct includes inaction such as the carrier's failure to intervene in an action filed by its insured against the tortfeasor.[12]

3. Objectives

To evaluate written waivers of subrogation, a close and detailed analysis of the language must be employed. Waivers can be circumvented if the language used is imprecise, broad or contingent. The waiver may also be challenged as an exculpatory clause that must be strictly construed; and avoided where there is a showing of gross negligence or willful and wanton misconduct. An insurer also must avoid acting in a manner that may result in waiver by conduct.

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[10] Fidelity Phoenix Fire Insurance Co. v. Forest Oil Corp., 141 So.2d 841 (La. App. 1962).

[11] Fireman's Insurance Co. v. Georgia Power Co., 181 Ga. 621, 623, 183 S.E. 799 (1935); 38 A.L.R.2d at 1095. See also, Annot. "Waiver By Insurance Company Of Rights To Subrogation", 16 A.L.R. 2d 1269.

[12] For example, in Gallashaw v. Streaty, 24 Phila. 73 (1992) a Pennsylvania Common Pleas Court chided an insurer for failing to intervene or take appropriate action to obtain reimbursement for its subrogation claim.