



RLI DESIGN PROFESSIONALS  
Design Professionals Learning Event

# Waiver of Subrogation: You Won't See It Until Something Happens

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**DIFFERENT WORKS**



An Interview With

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Subject Matter Expert

**RLI**<sup>™</sup>

**DIFFERENT WORKS**

# Course Description



A Waiver of Subrogation clause is often given little attention and its importance is not realized until an unfortunate event takes place during the construction project. In this course, we will recognize the importance of and better understand the Waivers of Subrogation.

# Learning Objectives

## Participants in this session will:

Identify and understand the common language and concepts of Waivers of Subrogation

Understand the effects and risks of Waivers of Subrogation

Recognize the issues that should be considered when negotiating Waivers of Subrogation

Review the importance of Waivers of Subrogation to protect your business

# You Won't See It...



# Story: “Archie Goes to Court”

Oliver the Owner, owner of the new school building

Archie the Architect

The new building is about 80% complete

The ceiling in the library began sinking slowly

One night of March 13<sup>th</sup>, Friday, the ceiling collapsed

Entire library destroyed and the blame game began

Cause: Faulty design by Archie the Architect caused the collapse

Damage: Approximately \$10 million



# “Archie Goes to Court” cont.

The Insurance Co. (TIC) is the builder’s risk policy and property insurer for Oliver

The Oliver’s builder’s risk policy pays Oliver for the loss

Does the story end here?

What happens now? Walk away? Lawsuit?

Subrogation? Waiver of Subrogation?



# What is “Subrogation?”

Definition from:  
Black’s Law  
Dictionary

“The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy”

SUBROGATION, Black's Law Dictionary (10th ed. 2014).



Huh??

# How Subrogation Works

Architect is at fault for the damage



Owner's insurer pays the owner for the damages



Owner's insurer "steps into the shoes" of the owner...



Sues the design professional to recoup the claim amount it paid to the owner



# What Insurance Company Acquires

While standing in the shoes, the insurance company acquires:

All of the rights and entitlements

All of the limitations and obligations

Insurance company has no greater rights than its insured.

The opposing party can assert all the same defenses against the insurance company.

# Application to Our Story

Archie is at fault for the damage



TIC pays Oliver for the damages



TIC “steps into the shoes” of Oliver...



Sues Archie to recoup the claim amount it paid to Oliver



# Archie Goes to Law Office

He visits Linda the Lawyer



Linda the Lawyer asks, “Did you include a Waiver of Subrogation provision in your contract?”

Archie answers, “What is that?”

Linda the Lawyer explains to Archie

“Waiver of Subrogation” provision is not in the contract

TIC has a subrogation right

Linda the Lawyer defends Archie anyway

# Archie Goes to Court and... Loses

TIC won in court to recoup its loss

Archie the Architect obligated to pay TIC

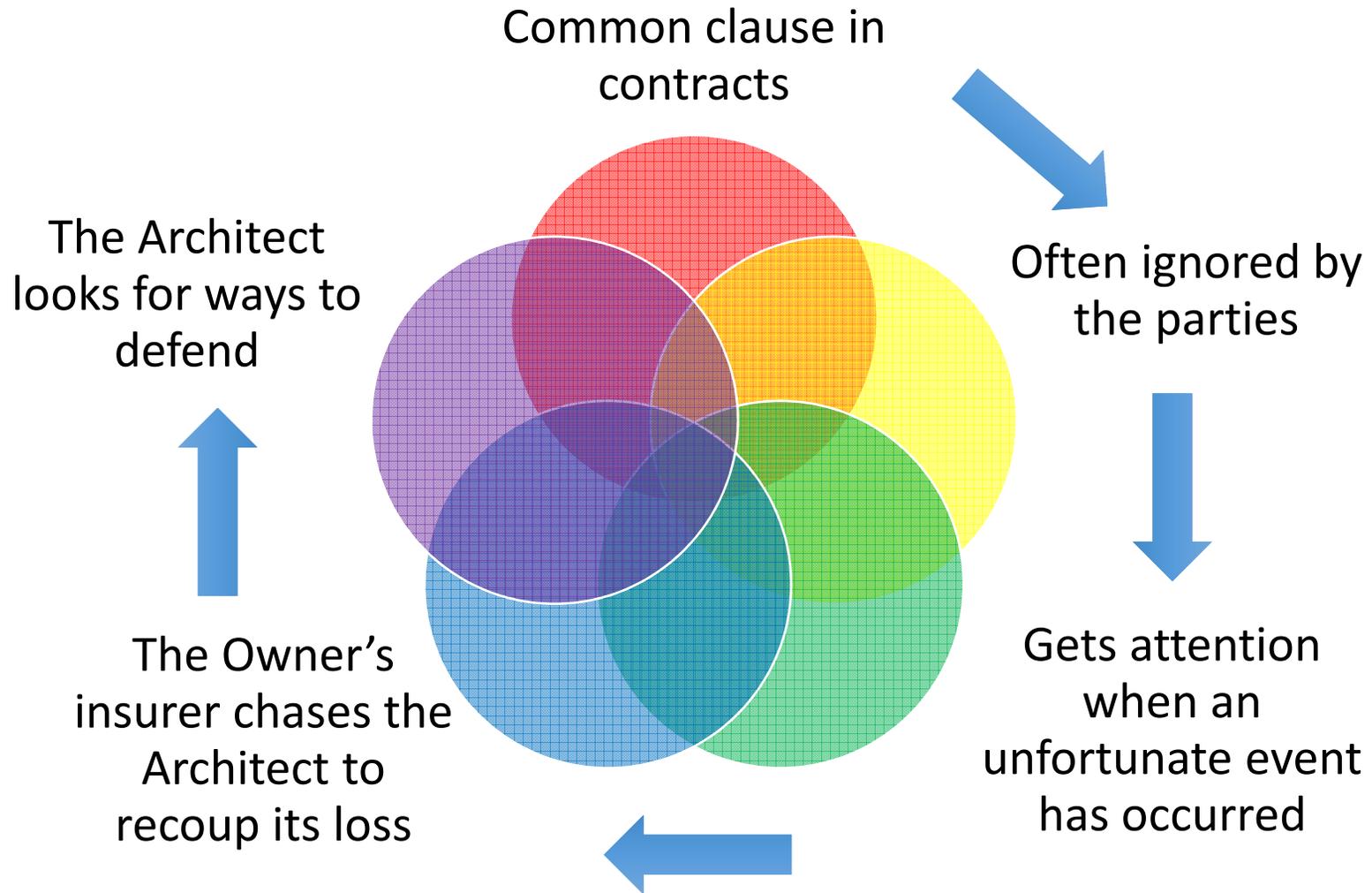
But can Archie afford to pay TIC?

Archie might have to file bankruptcy and liquidate his business

Clients may not want to hire Archie



# No Love for Waiver of Subrogation



# No Love for Waiver of Subrogation

What could Archie have done differently?

Negotiated to have both parties include a **Waiver of Subrogation** clause in the contract.

The problem is that Archie and Oliver did not give much attention to this provision of the contract.

# What is a “Waiver”?

## Waiver

The **voluntary relinquishment or abandonment**, either expressly or by implication, **of a legal right or advantage**.

WAIVER, Black's Law Dictionary  
(10th ed. 2014).

# Waiver of Subrogation Clause

Parties are free to contractually allocate risks



Parties have the legal right to structure the contract



Agreement must be included before the start of the project

# Purpose of Waiver of Subrogation



To prevent long litigation



Keeps parties focused on  
the construction



Protect you and your  
business assets

# Common Clause in AIA Contracts

## AIA A201-2007, General Conditions Form Section 11.3.7:

“The Owner and Contractor waive all rights against...

- 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... or other property insurance applicable to the Work...

# Common Clause in AIA Contracts

## AIA B101-2007 Standard Form of Agreement Between Owner and Architect, Section 8.1.2:

**“To the extent damages are covered by property insurance, the Owner and Architect waive all rights against:**

- each other
- and against the contractors, consultants, agents, and employees of the other **for damages...”**

# Common Clause in ConsensusDocs

## ConsensusDOC 240, Standard Form of Agreement Between Owner and Architect/Engineer, § 7.3.2:

“The ***Owner and Architect/Engineer*** waive all rights against each other and the Contractor, subcontractors, and Sub-subcontractors for loss or damage to the extent covered by property insurance, except such rights as they may have to the proceeds of such insurance.”

# What Are You Waiving?



The right of both parties to sue each other “to the extent of coverage available”



Parties agree that project risks are to be borne solely by insurance.

# What Happens When Waived?

The waiver of subrogation places the covered risk with the insurance company, regardless of fault.



This eliminates lawsuits over covered claims.



Because a subrogated party cannot have greater rights than the party whose rights it obtained.

The Waiver of Subrogation is binding on insurance company; and...

prevents the insurance company from recouping any losses.

# Application to Our Story

Archie is at fault for the damage

TIC pays the owner for the damages

~~TIC “step into the shoes” of Oliver~~

~~Sues the Archie to recoup the claim amount it paid to the Oliver~~

# Looking at the Issues

Insurance obligation

Harmonize the contract with insurance policy

Enforceability

Scope of coverage

Gross negligence

# Insurance Obligations for the Owner

The Owner is often, but not always, required to obtain builder's risk property insurance.

“Unless otherwise provided, the **Owner shall purchase and maintain.... property insurance** written on a builder's risk “all-risk” or equivalent policy form in the amount of the initial Contract Sum... **Such property insurance shall be maintained...**” (A201-2007, § 11.3.1)

# Insurance Obligation for the Architect

The Architect is usually required to maintain various insurance

“The architect shall maintain the following insurance for the duration of this Agreement...

1. General Liability
2. Automobile Liability
3. Workers' Compensation
4. Professional Liability”

(AIA Document B101-2007, § 2.5)

# Insurance Obligation for the Contractor

The Contractor is usually required to obtain liability insurance

“The Contractor shall purchase... such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor’s operations and completed operations under the Contract and for which the Contractor may be legally liable... claims for damages other than to the Work itself...”(A201-2007, § 11.1.1)

# Insurance Obligation

What if the Owner refuses to maintain proper insurance?

The owner must notify the contractor, architects, and engineers.

What if the owner fails to notify the parties of its intended action?

Owner bears the risk of loss to the extent that damages are not covered by insurance.

# Harmonizing the Contract & the Insurance Policy

If negotiating  
Waiver of  
Subrogation

Check your  
insurance  
policy

Harmonize  
contract with  
the policy

Without insurer's  
consent:

An insured may not impair  
the insurer's right of  
recovery after paying a loss.

This still applies even though  
the parties sign the contract  
with waiving subrogation  
rights.

Insurance policy  
violated if:

The insurance policy  
prohibits waivers of  
subrogation; and

The contractor enters into a  
construction contract  
containing mutual waiver of  
subrogation provision.

# Harmonizing the Contract & the Insurance Policy

## Insurer's Rights Under the Insurance Policy

Right to deny coverage

Require a warranty from the insured

Investigate potential insured

Raise premiums

Obtain reinsurance

# Enforceability of Waiver of Subrogation



Most courts enforce waivers of subrogation.



Courts recognize that waivers of subrogation helps avoid disruptions and disputes among parties.



Enforcement validates agreed risk allocation decisions.

# Case Law on Enforceability

## Empress Casino Joliet Corp. v. W.E. O'Neil Constr. Co.

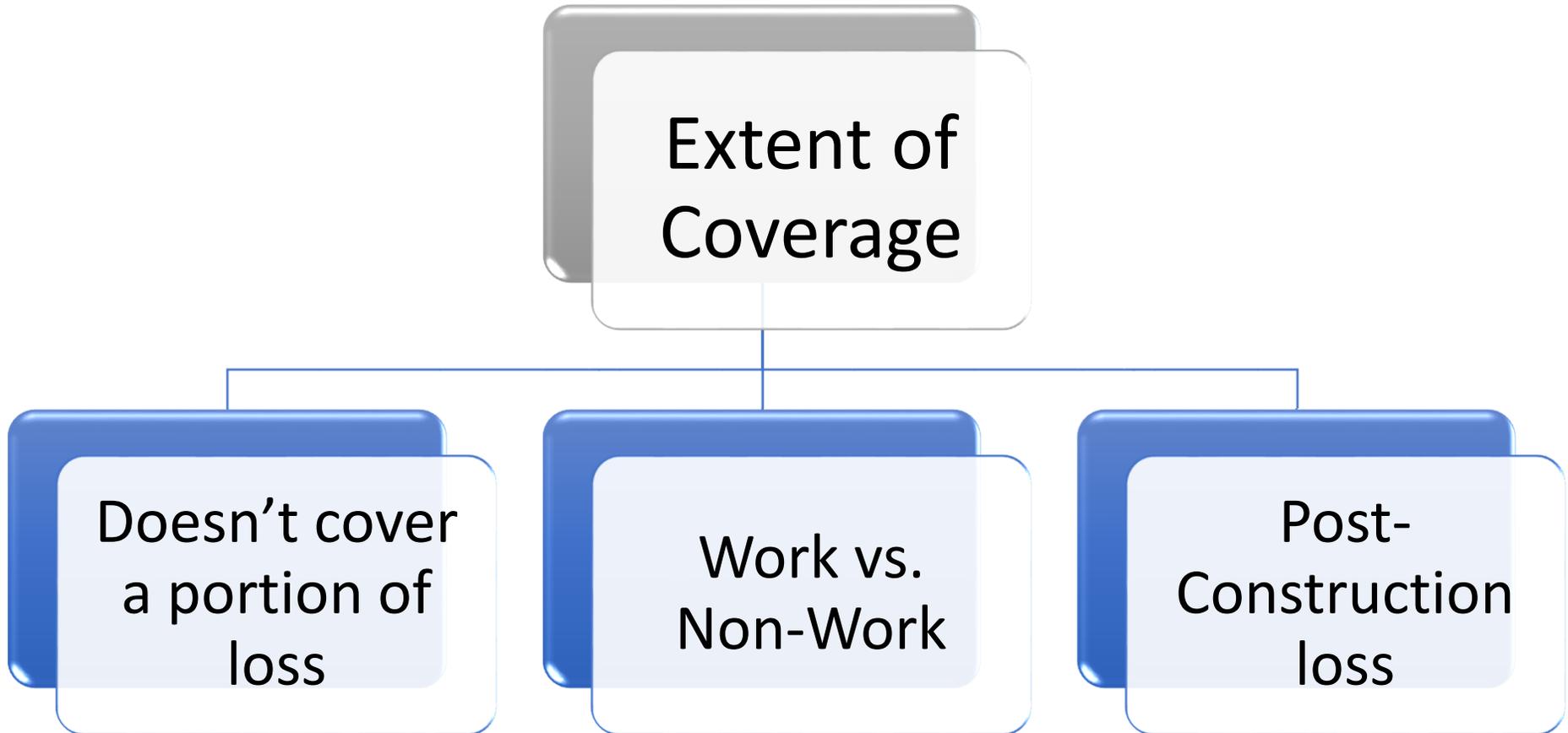
- The Owner hired the Contractor and the Architect hired to design and renovate the property
- Fire occurred during the renovation
- Insurer paid the damages and then sued the Contractor and the Architect
- Held: Waiver of Subrogation provision in the contract barred the insurer from recovery.
- Both parties released each other in the event of property loss by including a Waiver of Subrogation provision.

# Case Law on Non-Enforceability

## Gulf Ins. Co. v. Quality Bldg. Contractor, Inc.

- The Owner hired the Architect to design a renovation to the property
- A portion of the garage roof collapsed during the construction
- Insurer paid the damages and then sued the Architect and the Contractor
- Held: Waiver of Subrogation provision barred recovery from everyone EXCEPT the Architect
- The construction contract between the Owner and the Architect did not contain a waiver of subrogation provision
- The Architect was not a party to the prime contract

# Extent of Coverage



# Uninsured Losses Not Covered

## AIA Contracts: “to the extent of coverage”

- Waiver of Subrogation is limited to risks covered under the policy
- No coverage, no waiver of subrogation

## Waiver of Subrogation:

- Not applicable to uninsured losses
- Limited to risks covered under the policy

# “Work” vs. “Non-work”

## Meaning of “Work”

- Generally, “Work” means “the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor materials, equipment and services provided or to be provided... to fulfill the obligations.”
- The “Work” may also constitute the whole or a part of the Project.

## Meaning of “Project”

- Generally, “Project” is the total construction of which the Work performed under the Contract Documents may be the whole or a part...”

# “Work” vs. “Non-work”

## Minority Approach

Waiver of Subrogation hinge on “work” vs. “non-work” analysis.

Waiver of subrogation apply to damages to “work” but not outside of “work”

## Majority Approach

Waiver of Subrogation hinge on “any insurance” analysis

Waiver of subrogation apply if damages are covered by “any insurance” such as property insurance.

# “Work” — Majority Approach

Courts jointly look at Section 11.3.5 and Section 11.3.7 of AIA A201 2007

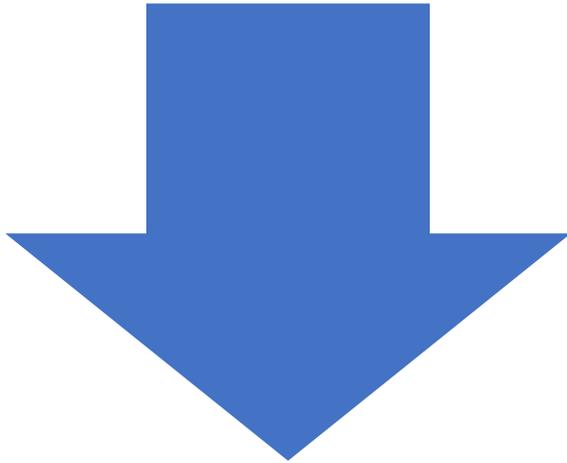
- Section 11.3.5: **“If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project... the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.**

# “Work” – Majority Approach

## Lexington Insurance Company v. Entrex Communications Services, Inc.

- Property damaged by a collapsing television tower.
- The construction contract included A201-1997, which contained paragraphs 11.4.5 and 11.4.7 (11.3.5 and 11.3.7, respectively for A201-2007)
- Court decided to follow majority approach where it draws no distinction between Work and non-Work, but instead, limits the scope of the waiver [of subrogation] to the proceeds of the insurance provided under the contract.

# Post-Construction Loss

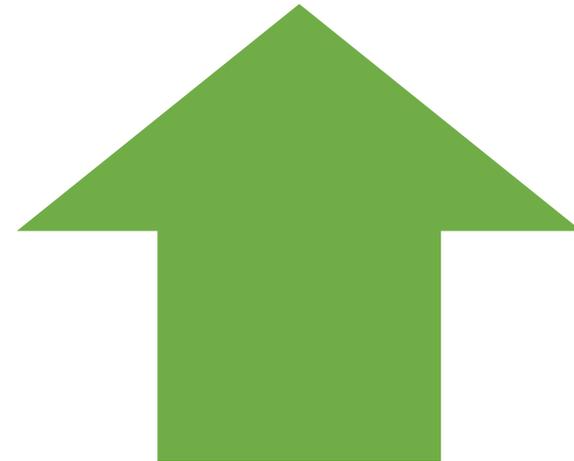


## Courts: Not Applicable

- Provisions are ambiguous if the contracting parties intended to waive claims for losses that arise after project completion

## Other Courts: Applicable

- Contract language evidences the parties' intent that the waivers of subrogation apply after completion of construction



# Post-Construction Loss

Depends on  
the  
language of  
continuation  
provision:

- “If... **after final payment**, property insurance is to be provided on the completed Project.... **the Owner shall waive all rights in accordance with the terms of the Section 11.4.7 for damages... covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.**” AIA A201-2007 Section 11.4.5

# Post-Construction Loss - Applicable

## Argonaut Great Cent. Ins. v. DiTocco Konstruction, Inc.

- A fire occurred at a T.G.I. Friday's restaurant in 2005.
- Owner's insurer brought claims against the parties.
- Held: Waiver of subrogation provision apply to post-construction losses.
- The contract contained "subrogation continuation clause."
- This clause made clear that:
  - the parties contemplated that the owners would acquire additional insurance; and
  - the waiver of subrogation contained in the general conditions would apply to those additional policies.

# The Takeaway

## Waiver of Subrogation:



- It's a **common feature** in many construction contracts.
- It's a clause that is given **little** attention by the parties until an unfortunate event occurs.
- If **written clearly and unambiguously** showing **clear intent** of the parties, it can be very helpful.
- Make sure to **consult your insurance advisor or attorney before** including a waiver of subrogation provision in your contract.

Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects  
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