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Wisconsin Supreme Court Upholds Application of Construction Contract Subrogation Waiver Over Statutory and Exculpatory Challenges

Subrogation waivers remain enforceable in the construction context in Wisconsin. In *Rural Mut. Ins. Co. v. Lester Buildings, LLC*, 2019 WI 70, 2019 WL 2509255, the Wisconsin Supreme Court narrowly upheld the application of a waiver of subrogation provision contained in a construction contract over a subrogated property insurer's statutory and exculpatory challenges.

Two contractors built a barn for a property owner. Nearly three years after the barn was completed, the barn collapsed during a storm, causing damage to not only the barn itself but also the property owner's cattle. The owner's property insurer paid to rebuild the barn and for losses related to the cattle and then brought a subrogation action against one of the two contractors that was involved in the construction of the barn and its liability insurer. The other contractor and its liability insurer as well as the property owner were later added to the lawsuit, and the property owner pursued its own claim for damages that were not covered by the property insurer.

The contractors and their insurers moved for summary judgment with respect to the property owner's subrogation claims, arguing that the subrogation waiver in one of the contractors' contracts with the property owner barred the property insurer's claims against both contractors and their insurers. The circuit court agreed and dismissed the insurer's claims. The property owner subsequently settled its claims against the contractors and their insurers, and the property insurer appealed. The court of appeals and supreme court (in a 3-2 decision) affirmed.

The property insurer's principal argument on appeal was that the subrogation waiver at issue was void and unenforceable under Wis. Stat. § 895.447, which provides: "Any provision to limit or eliminate tort liability as a part of or in connection with any [construction contract] is against public policy and void." The supreme court rejected the property insurer's argument that the subrogation waiver limited or eliminated the tort liability—i.e., legal obligation or responsibility—of the contractors to the property owner for the collapse of the barn, finding instead that the subrogation waiver merely shifted the responsibility for paying certain damages to the property insurer. "[T]he subrogation waiver neither limits nor eliminates the Contractors' tort liability, it simply makes Rural Mutual the insurer should property damage result." 2019 WI 70, ¶ 17. After all, the property owner was able to pursue a claim against the contractors for damages that were not covered by its property policy and the contractors could have been found 100 percent liable for such damages.

In support of its decision, the supreme court cited it and the court of appeals' prior refusal to apply the statute's precursor to construction indemnity agreements. See *Gerdmann v. United States Fire Ins.*

Co. , 119 Wis. 2d 367, 374, 350 N.W.2d 730 (Ct. App. 1984) ; Dykstra v. Arthur G. McKee & Co. , 100 Wis. 2d 120, 130 n. 4, 301 N.W.2d 201 (1981) . And, while the supreme court did not reference it in its opinion, it is worth noting that efforts to expand the reach of Section 895.447 to expressly apply to subrogation waivers failed during the 2009-2010 Legislative Session. See S.B. 589, 2009-2010 Leg., 99th Reg. Sess. (Wis. 2009) (the statute would have been amended to provide, “Any waiver of subrogation clause that is a part of or in connection with a construction contract is against public policy and void.”).

The property insurer argued in the alternative that the subrogation waiver was an unenforceable exculpatory contract and thus contrary to public policy. But the supreme court rejected this argument for the same reason—the subrogation waiver did not exculpate the contractors from liability, it merely shifted the responsibility for payment of damages from the contractors to the property insurer. In so holding, the court observed that the property insurer expressly anticipated and allowed for this outcome, as evidenced by its policy language permitting the property owner to “waive [its] right of recovery in writing before a loss occurs without voiding the coverage.”

Two justices dissented and would have applied Section 895.447 to void the subrogation waiver. As a result, the dissenting Justices did not reach the exculpatory issue.

While not an issue before the court, the supreme court noted in a footnote that it agreed with the circuit court’s application of the subrogation waiver in one of the contractors’ contracts to bar the subrogation claims against both contractors given the broad language in the first contractor’s contract. 2019 WI 70, ¶ 15 n. 11. The application of the subrogation waiver to bar claims arising after the barn’s construction was complete was also not before the court. The circuit court and court of appeals both refused to limit the subrogation waiver to claims arising during construction, and the property insurer did not challenge the ruling before the supreme court. Finally, the economic loss doctrine did not apply to bar the property insurer’s tort claims because cows (“other property”) were damaged as a result of the collapse of the barn.

OLWK attorneys Dale O. Thornsjo and Lance D. Meyer represented one of the contractors’ liability insurers in the Rural Mutual case and have extensive experience dealing with the scope and enforceability of subrogation waivers in the construction context. Accordingly, if you have questions regarding the decision or waiver of subrogation issues in general, please contact Dale O. Thornsjo , Lance D. Meyer , or one of the other members of our Firm’s Construction and Design , Insurance Coverage , and Subrogation Practice Groups at (952) 831-6544.