

State Specific: Indiana



In Indiana an AIA Agreement is an “Any Insurance Agreement.” To What Extent Does the AIA Subrogation Waiver Bar Recovery for Damage to a Property Where Construction Work is Being Performed?

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Many subrogation professionals are familiar with the construction industry standard American Institute of Architects (“AIA”) form agreement and its troublesome subrogation waiver.

Interpretation of the scope of the AIA subrogation waiver has divided courts nationwide. Recently, the Indiana Supreme Court joined the controversy issuing its own interpretation of the AIA subrogation waiver.

In *Bd. of Com'rs of County of Jefferson v. Teton Corp.*, Jefferson County Indiana contracted with the Teton Corporation (“Teton”) through an AIA agreement for the renovation of the Jefferson County courthouse. 30 N.E.3d 711, 712 (Ind. 2015). In turn, Teton, subcontracted with a series of roofing contractors to repair the courthouse roof. While one such subcontractor was repairing the roof a fire occurred,

resulting in substantial damage to the courthouse. Subsequently, Jefferson County brought an action on behalf of its property insurer, St. Paul Fire & Marine Insurance Company, against Teton and its various roofing subcontractors.

During the course of motion practice, Jefferson County raised the issue of the effect of the AIA subrogation waiver. The waiver stipulated that, “The Owner and Contractor waive all rights...for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to [this agreement] or other property insurance applicable to the Work.”

Jefferson County urged the court to adopt the “work versus non-work”

interpretation of the subrogation waiver, by which subrogation claims are waived for damages related to “the work” being performed pursuant to the AIA agreement. *Id.* at 713. Alternatively, the defendants argued the court should adopt the “any insurance” approach, whereby subrogation is waived for all property damages covered by the insurance policy obtained pursuant to the AIA agreement or any other applicable property insurance policy. *Id.*

Jefferson County advocated for the application of the “work versus non-work” interpretation because it had not obtained separate insurance to specifically cover the renovation project. Rather, Jefferson County

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relied on its general all-risk property insurance policy to insure the project. However, the trial court and the Indiana Court of Appeals were unconvinced by Jefferson County's interpretation of the waiver, and ruled that the "any insurance" approach controlled.

On appeal, the Indiana Supreme Court affirmed. The Court reasoned that the "any insurance" interpretation of the subrogation waiver gave effect to the waiver's plain meaning. The Court elaborated that the waiver contemplated the project owner either obtaining specific insurance to cover

a project, or relying on a general all-risk policy. *Id.* at 716. Therefore, the court held that Jefferson County was precluded from recovery because it had chosen to rely on its general all-risk property insurance policy, rather than obtain insurance to specifically cover the project. *Id.*

Bd. of Com'rs of County of Jefferson illustrates the ongoing trend among courts to adopt the "any insurance" approach when analyzing the scope of the AIA subrogation waiver. This latest court ruling provides cautionary guidance to subrogation professionals to be proactive by

instructing their insureds to procure additional insurance to cover a construction project that is controlled by an AIA agreement. Such a practice mitigates the risk to an insurer of losing a valuable subrogation claim when facing an AIA subrogation waiver. Consequentially, while the AIA subrogation waiver remains a potential hazard to subrogation rights, there remain important steps that can be taken by subrogation professionals to minimize and manage such risks allowing for successful prosecution of a subrogation action.