

# Defending Subrogation Claims in Design and Construction Cases

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This article identifies the issues that a design or construction team attorney often confronts in a subrogated claim, and it illuminates key subrogation defenses. As explained below, a diverse body of case law, primarily interpreting the American Institute of Architects' (AIA) form contract language, provides the tools to challenge a subrogated carrier's rights, based on the public policy of honoring the precontract risk allocation of parties to a construction project. In many instances, so long as there is insurance available to pay for a loss, industry-standard clauses (in design and in construction agreements) that waive subrogation rights will bar an insurance carrier from claiming any legal or equitable subrogation right. They even may constitute a complete waiver of liability by an owner. The analytical starting point is the language typical of AIA and other industry-standard contract forms.

## Relevant Contract Clauses

Design and construction agreements typically contain clauses waiving or limiting subrogation rights, such as the following AIA paragraphs:

**9.4** The Owner and Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages, but only to the extent covered by property insurance during construction . . . . The Owner and Architect shall each require similar waivers from their contractors, consultants and agents.<sup>1</sup>

**11.4.7 Waivers of Subrogation.** *The Owner and Contractor waive all right against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) 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 pursuant to this Paragraph 11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, . . . similar waivers each in favor of the other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty if indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.* [Emphasis added.]<sup>2</sup>

Several courts, in construing how much liability has been waived, focus their attention on section 11.4.7 (or its equivalent) and its two prongs of waiver: "to the extent covered by property insurance [or] other property insurance applicable to the Work."

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A successful defense of an action brought by a property insurer subrogated to the owner's rights (after paying for damages allegedly caused by a contractor, subcontractor, or design professional) depends initially upon obtaining from the court a broad reading of the omnipresent waiver of subrogation clause in the relevant construction or design contracts. The key to the lawyer's approach may lie in crossing a subrogation waiver with a careful interpretation of the owner's property insurance to create the analytical framework of a subrogation defense.

Using the insuring provisions of the AIA contract language, the design or construction team attorney should be able to force a carrier bringing a subrogation case to make a fateful decision about its claim. If counsel can make the insurer admit there was coverage, the carrier's claim arguably is waived under AIA Section 11.4.7 (or its equivalent in other standard agreements) because the scope of waiver is measured by the breadth of applicable insurance. If the carrier denies coverage, then it has necessarily made a voluntary payment.<sup>3</sup> Under this second scenario, no subrogation normally would be allowed. The cornerstone to these strategies is the argument that the ubiquitous waiver of subrogation clause constitutes an advance, enforceable release of liability by the owner of potential construction and design team member liability.<sup>4</sup>

## Majority Approach Favors Defendant Contractor and Design Team Members

Two recent cases illustrate the approach favored by a majority of jurisdictions: that the waiver of subrogation provision covered any loss arising out of the work that was covered by applicable insurance. *Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.*,<sup>5</sup> and *Walker Engineering, Inc. v. Bracebridge Corp., f/k/a MBNA Texas Property Inc.*,<sup>6</sup> both construed waiver of subrogation clauses as complete waivers of liability not only for the actual parties to the construction contracts, but also as to all identified subcontractors and subconsultants. Importantly, these decisions reach far beyond an interpretation that such clauses are effective to the extent that the loss is covered by builder's risk insurance or "other insurance applicable to the work." They determine that liability for *any* damage caused by an identified party is waived. In effect, these courts ratified the contractual allocation of risk drafted at the inception of a construction project.

In *Walker*, a subcontractor damaged water pipes not in its contract and flooded an existing office complex. The Dallas Court of Appeals held that "a review of the contract and the case law interpreting similar AIA contract provisions reveals the parties agreed that [the] property coverage would protect all the parties from property loss."<sup>7</sup>

Quoting its decision in *Temple EasTex*, the *Walker* court said,

“the parties agreed in advance to avoid disruption and disputes by agreeing that all contracting parties are protected from property loss under the owner’s property insurance.”<sup>8</sup> The *Temple EasTex* court had determined that because the damages suffered by the owner were covered by insurance that applied to the “Work,” the waiver of subrogation clause was effective to release the party in error from liability.<sup>9</sup> Further, the court adopted the predominant approach of defining insurance “applicable to the Work” as referring to the location of the work or the building containing the “Work.”<sup>10</sup> The *Walker* court then held that “[t]o the extent the property damage at issue was covered by . . . insurance, [the carrier] waived its right to sue Walker.”<sup>11</sup>

### **The Majority View on Scope of Waiver: Not Just the Area of Contract Work**

After a review of case law from numerous jurisdictions, the court in *Trinity Universal Insurance v. Bill Cox Construction, Inc.*, found that the majority of judges considering the scope of the clauses waiving subrogation refuse to distinguish between damage to property within or outside the contractual “work.”<sup>12</sup> Most decisions consider narrowing the waiver only to the contractor’s work as wrongly ignoring the actual language defining the scope of claims falling within the waiver clause. Instead, the majority of jurisdictions only look to the breadth of the applicable insurance coverage itself to interpret how much has been waived by clauses such as the AIA’s section 11.4.7 (waiver “to the extent covered by property insurance obtained pursuant to this Paragraph 11.4 or other property insurance applicable to the Work”). Such courts then decide whether the policy references the location of the Work or the building containing that Work. If such coverage broadly refers to existing property, not merely the contractual scope of “the Work,” then the waiver of subrogation bars the insurance company’s claim, and the preconstruction risk allocation will remain intact.

The *Trinity* court noted that the majority of jurisdictions ask whether the owner’s policy was broad enough to cover both the immediate work and nonwork property and whether the policy paid for damages. If the location of the damages suffered is covered in the policy, then the policy constitutes “other property insurance applicable to the Work”—although it is not confined just to the contract’s Work—and the subrogation claim is waived.

The *Trinity* insurer also vainly argued that because it was unaware that its insured had agreed to the waiver of subrogation, the waiver did not apply to the carrier’s subrogation claim. The court stated that an insurer’s right to subrogation arises when the insured has a cause of action against the defendant,<sup>13</sup> and that those rights only are as great as the rights of the damaged party. In addition, the court noted the general rule that a release between the insured and the offending party prior to the loss destroys the insurance company’s rights by way of subrogation.<sup>14</sup> Such preloss waivers fully comport with many policies that explicitly specify that the insured shall do nothing after the loss to prejudice the insurer’s subrogation rights.<sup>15</sup> The *Trinity* policy prevented its insured from impairing Trinity’s subrogation rights after incurring a loss, but it did nothing to affect Trinity’s rights or obligations prior to a loss.<sup>16</sup> As a result, the *Trinity* court decided that the waiver of liability

found in the waiver of subrogation effectively barred the claims against the general contractor and its subcontractor.

In 1993, the New Hampshire Supreme Court adopted the majority approach toward waiver of subrogation clauses. In *Chadwick v. CSI, Ltd.*,<sup>17</sup> the court interpreted the applicable work “site” as referring to the place where the work occurred, regardless of whether that place constitutes an entire parcel of property or just a portion thereof.<sup>18</sup> Further, the court said that “[t]he structure of the contract relies upon the distinction between what is included in the Work and what is separate from the Work.”<sup>19</sup> The court held that “[t]o interpret the word ‘site’ as distinguishing between parcels of land is nonsensical within the framework of the contract.”<sup>20</sup> Moreover, “[s]uch a distinction between parcels of land as opposed to Work and non-Work areas also has no functional basis in the overall contractual scheme for obtaining insurance and allocating risks.”<sup>21</sup> In conclusion, the court noted, “[t]he trial court did not err in applying the waiver of subrogation provisions to the damages incurred . . . beyond those sustained by the Work.”<sup>22</sup>

An interesting case was presented to the Minnesota Supreme Court in 1998, leading to the adoption of the majority rule in Minnesota. In *Employers Mutual Casualty Co. v. A.C.C.T.*,<sup>23</sup> the court cited the Second, Third, and Sixth Circuit Courts of Appeals, as well as courts in Alabama, Arizona, California, Florida, and Indiana, and fully adopted the majority approach. It held that unless the policies reflected that they were *not* applicable to the “Work” and did not cover or pay for the loss, then the waiver of subrogation applies.<sup>24</sup> The court rejected the approach that waiver of subrogation clauses are limited to the “Work” and stated instead that this minority view

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“ignored the fact that the contractual language defined waived claims not by the type of property damaged, but by which policy provided indemnification against the loss.”<sup>25</sup> Interestingly, the court in *Employers* acknowledged a footnote in a California court of appeals case where “the outcome might have been different had the owner purchased a specific policy only covering the Work rather than relying upon its existing all-risk policy.”<sup>26</sup>

To understand why the minority approach is flawed and the focus on the actual coverage available is more appropriate, a short review of how various courts define “work” and “applicable to the Work” is necessary.

### **Meaning of “Work”**

“Work” is usually defined by the contract itself. Under the AIA A201 General Conditions:

1.1.3 “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 by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or part of the Project.<sup>27</sup>

Courts have defined "Work" as construction of the entire building,<sup>28</sup> or more narrowly as including the exterior walls and the floor of a parking garage, where the owner's responsibility to procure insurance and the corresponding waiver of subrogation rights extend only to those specific areas.<sup>29</sup> Courts that interpret the scope of the waiver by drawing a distinction between Work and non-Work property ask only whether the Work was damaged. If yes, then the waiver applies; if no, then the waiver does not apply.<sup>30</sup>

In *Fidelity & Guarantee Insurance Co. v. Craig-Wilkinson, Inc.*,<sup>31</sup> the U.S. District Court for the Southern District of Mississippi had to define "Work" to decide the applicability of the waiver of subrogation clause. The contractor claimed that his failure to clean up the yard around the house or remove his equipment upon completion of the Work transformed the contents of the plaintiff's home and existing residence into the contractor's work. The court refused to accept such a tenuous argument and instead looked to the contract itself for the definition of "Work." Once there, the court found that the term matched the definition found in the A201 General Conditions.

The court cited *Butler v. Mitchell Hugelback, Inc.*, which interpreted an identical term: "[t]his definition indicates that 'Work' only refers to the contractor's labor, materials, etc. that are needed to fulfill its contractual obligation."<sup>32</sup> Further, the court found that, by the contract's plain language, the "Work" pertained only to the 800-square-foot addition the contractor agreed to build, not to the existing residence, its contents, or any surrounding landscaping.<sup>33</sup>

Six years prior to the *Fidelity* decision, the court in *S.S.D.W.*<sup>34</sup> construed "Work," as well as the meaning of "applicable to the Work." It agreed with the carrier and held that a waiver of subrogation clause under the AIA language did not bar the owner's insurer from seeking recovery from the contractor for property damage to the owner's existing building, so long as the damage was not to the actual work to be performed under the contract.<sup>35</sup> The court in *S.S.D.W.* found that the "Work" included only the exterior walls and the floor of a parking garage; the owner's responsibility to procure insurance and the corresponding waiver of subrogation rights extended only to those specific areas.<sup>36</sup>

### Meaning of "Other Insurance Applicable to the Work"

"Other Insurance Applicable to the Work" has been defined as "capable of being applied to the Work."<sup>37</sup> In 1996, the U.S. District Court for the Southern District of Mississippi was presented with the task of defining "applicable to the Work" within the meaning of a waiver of subrogation clause.<sup>38</sup> The contract in *Fidelity* contained a waiver of subrogation clause similar to that of the AIA A201 section 11.4.7 and the contractor purchased a builder's risk insurance policy.

The contractor's argument that the subrogation provision barred the suit was based on an interpretation of "applicable to the Work" as meaning "causally connected to the Work" or "insurance coverage, which would apply to any damages

caused by the Work."<sup>39</sup> The court held that the phrase "applicable to the Work" is unambiguous and does not require one to resort to redefining its terms as done by the contractor.<sup>40</sup> Further, the court opined that the contractor's interpretation rephrased the contract to serve its own purposes.<sup>41</sup> The court defined "applicable to the Work" as unambiguously meaning *capable of being applied to the Work*.<sup>42</sup>

The preceding discussion outlines the basic principle that courts have enunciated when interpreting waiver of subrogation clauses. They focus on the contractual risk allocation put in place by the parties. By raising these arguments, the design/construction team attorney can force an owner or subrogated carrier to pick the position that either the claim was covered, hence waived, or not covered. If a claim is not covered, the owner cannot benefit from its failure to provide the required coverage. If insurance payments were made, but certain portions were excluded, the construction/design team member should receive a credit for the payment and a waiver, as discussed below, for the portion not covered.

### Owner Becomes Insurer by Failing to Obtain Insurance

What happens when, despite the contractual requirement, the owner does not purchase builder's risk coverage, or any other insurance applicable to the work? A failure to procure insurance results in the owner becoming the insurer to the extent that damages are not covered by insurance. It is worthwhile to make this argument in any design or construction defect case where a waiver of subrogation clause is present, stating that regardless of the phase of the project, the clear intent of the parties was to shift all risk to the owner's insurance carrier, as mentioned by the presence of "other insurance applicable to the Work" language.

AIA Section 11.4.1 places an affirmative duty upon the owner to procure property insurance that covers the interests of the owner, the contractor, the design team, and the subcontractors. "If the owner fails to purchase adequate insurance and fails to notify the contractor that the project is underinsured, the owner bears the risk of loss to the extent that damages are not covered by insurance."<sup>43</sup>

The *Temple EasTex* Court held that "[s]ection 11.3.1 places an affirmative duty upon the owner to procure property insurance that covers the interests of the owner, the contractor, and the subcontractors."<sup>44,45</sup> Further, the court stated that "[i]f the owner fails to purchase adequate insurance and fails to notify the contractor that the project is underinsured, the owner bears the risk of loss to the extent that damages are not covered by insurance."<sup>46</sup> The court said that "[t]he policy rationale underlying these clauses is to avoid disruption and disputes among the parties to the project. The need for lawsuits between the parties is eliminated because all contracting parties are protected from property loss under the owner's property insurance."<sup>47</sup> The *Temple EasTex* court cited the Colorado Court of Appeals' decision in *Steamboat Development Corp. v. Bacjac Ind. Inc.*<sup>48</sup> as authority in support of its decision.

### Failure to Procure All-Risk Coverage

The *Steamboat* court found that the owner breached the construction contract by failing to obtain all-risk insurance

protecting the contractor. The agreement provided that, if the contractor is damaged by such failure, “the owner shall bear all reasonable costs properly attributable thereto.”<sup>49</sup> As a result of the owner’s failure, the court held that “the owner in effect became the insurer of the contractor and was liable to it for its losses to the same extent as an insurance carrier would have been liable had insurance been obtained.”<sup>50</sup>

The Supreme Court of Nebraska, in *Midwest Lumber Company v. Dwight E. Nelson Construction Company*,<sup>51</sup> addressed the issue of an owner that contracts to procure insurance to cover the contractor, and upon failing to procure that insurance becomes the insurer of the contractor. The court noted that “[a]n owner who contracts to procure insurance to cover the contractor and fails to do so is the insurer of the contractor.”<sup>52</sup> The court also noted that “[t]he rights of a subrogated insurer can rise no higher than the rights of its insured against the third party.”<sup>53</sup> “An insurer cannot recover by right of subrogation from his own insured.”<sup>54</sup> Because the owner failed to name its contractor as an insured in the policy, “the owner [could not] recover from the contractor because the risks of both the contractor and the owner were intended by the parties to the construction contract to be covered by insurance.”<sup>55</sup>

Addressing the situation where an owner chooses to rely on its preexisting insurance policies instead of purchasing a specific builder’s risk policy, the Illinois Appellate Court in *Inter-governmental Risk Management v. O’Donnell*<sup>56</sup> held that the contractual provision obligating the owner to maintain property insurance ran with the entire project, and that provision, joined by a waiver of subrogation clause, barred the owner from enforcing subrogation rights. There, the owner/subrogee argued that the waiver of subrogation clauses did not apply to the insurance policies because they were not builder’s risk or construction insurance purchased for the project. The court disagreed and noted that, “[w]ere one to accept the plaintiffs’ interpretation, it would render the phrase ‘or other property insurance applicable to the Work’ redundant as to the immediately preceding phrase ‘property insurance obtained pursuant to this § 11.3.’”<sup>57</sup>

The most effective argument in this instance is the most simple; because the owner breached its contractual obligation to obtain the specified insurance coverage, we will never know what coverage was purchased, or what coverage could have been purchased. As a result, that failure to purchase insurance should result in the release of any party who could be liable for the resulting harm, whether it is a construction or design team member, regardless of whether the harm occurs during construction or after the project is finished. The plain language of the contractual clauses demonstrates the parties’ intent to waive liability for all risk. If that were not the case, why would an architect, for instance, agree to a waiver of subrogation but not receive one because an owner purchased a builder’s risk policy that did not cover the architects’ risk?<sup>58</sup>

### Minority Approach Favors Owner or Its Subrogee Insurance Company

As the opinions discussed above point out, courts addressing waiver of subrogation clauses agree that the clauses bar the

owner, or its subrogee insurance company, from bringing suit against either general contractors or subcontractors for damages caused by fire or other peril.<sup>59</sup> However, the courts disagree as to the scope of the waiver. A minority of jurisdictions interpret the scope of the waiver by drawing a distinction between Work and non-Work property. This view is focused only on whether the Work was damaged: if yes, then the waiver applies; if no, then the waiver does not apply.<sup>60</sup> The court in *Trinity Universal* made note of this, under the following interpretation:

[i]t makes no difference whether the policy under which subrogation is sought is one which the owner purchased specifically to insure the Work pursuant to [the contract] or some other policy covering the owner’s property in which the owner has also provided coverage for the Work. In either event, the waiver clause, if given its plain meaning, bars subrogation only for those dam-

## Failure to purchase insurance should result in the release of any party who could be liable for the resulting harm.

ages covered by insurance which the owner has provided to meet the requirement of protecting the contractor’s limited interest in the building—i.e., damages to the Work itself.<sup>61</sup>

As a result, in minority jurisdiction, preexisting portions of a job site are not included in the waiver of subrogation, regardless of the insurance coverage that is available.<sup>62</sup> Courts in minority jurisdictions have reached their decisions by focusing on the language of the contract, saying that if the parties had intended an existing structure to be part of the waiver, they would have said so in the contract.<sup>63</sup> In addition, courts have looked at the value of the contract to be performed, including the labor, materials, equipment, and services to be provided.<sup>64</sup> The most intriguing argument is that the contractor/designer is a constructive insured under the owner’s policy, to the extent of the contractor/designer’s insurable interest in the property.<sup>65</sup> Then, because the insurer has no right to subrogation against its own insured, the carrier is barred from asserting a subrogation interest, only to the extent of the contractor/design team members’ insurable property interest in the project, its tools, labor, materials, and service.<sup>66</sup> The problem with the minority view is that the limited construction of the waiver clause requires a trial to determine the extent to which the damages suffered by plaintiff were related to that Work. This construction leaves the contractor’s liability uncertain in every case and undermines the purpose of the subrogation waiver clause.<sup>67</sup>

The purpose of the waiver of subrogation should be to eliminate the need for lawsuits, by protecting all contracting parties from loss under the owner’s insurance. A minority of jurisdictions refuse to adhere to this policy by considering a distinction between Work (as the word is defined in the contract) and non-Work property and limiting the scope of the waiver to damages to the Work, as opposed to focusing on the scope of the insurance coverage. Design and construction team members with a multistate footprint should be counseled accordingly.

## Defense in Legal or Equitable Subrogation That Company Paid as a Mere Volunteer

The Supreme Court of Wyoming, in *Commercial Union Insurance Co. v. Postin*,<sup>68</sup> held that because an insurance company did not make payment under compulsion, it had no interest of its own to protect and was, therefore, a mere volunteer. Because it was a volunteer, the company could not recover against alleged third-party tortfeasors under the theory of legal or equitable subrogation.

In *Commercial*, a portion of a roof collapsed long after the project was finished. At that time, Commercial Union Insurance Company insured the building under a policy that excluded coverage for inherent or latent defects. Even so, relying on an insurance adjuster's report that recognized the cause of the collapse in all probability to be from latent or inherent defect, i.e., "design of this building," the company settled with the insured city and then sued the project's architects and engineers.


Citing *Couch on Insurance* 2d § 61:2 (1966), the court stated, "[t]he right to legal subrogation occurs upon the payment of the debt by the subrogee for the subrogor. An insurer has the right to recover for damages that it is obligated to pay to an insured under its policy."<sup>69</sup> Further, pursuant to the U.S. Fourth Circuit Court of Appeals:

Where the tortious conduct of a third person is the cause of a loss covered by an insurance policy, the insurer, upon payment of the loss, becomes subrogated pro tanto by operation of law to whatever rights the insured may have against the wrongdoer.<sup>70</sup>

The court found that, "with respect to whether the insurance company has paid under its policy, it is a defense in legal or equitable subrogation to show that the company paid as a mere volunteer."<sup>71</sup> "Under the doctrine of legal subrogation the insurance company has no cause of action because it did not pay the insured under compulsion and did not, as a matter of law, have a legally protectable interest when payment was made."<sup>72</sup> The laws of conventional subrogation keep the company from becoming a volunteer because its subrogation assignment was limited by the condition that payment must have been made under the policy.<sup>73</sup> Finally, the court found that "[t]his did not occur in view of the fact that insurance companies will be regarded as mere volunteers where payment has been made for a harm not covered."<sup>74</sup> The *Commercial* court's opinion highlights the most glaring problem subrogated carriers have in construction and design defect cases: they are arguing to recover for payments made, despite the plain language of their insurance policies, which typically exclude coverage for loss caused by defective design or construction.

## Conclusion

The central purpose of this article is to provide legal arguments that will assist with case resolution. To the extent that a carrier that asserts a subrogation interest can be convinced that its chances for success are less than certain, then it is likely to be flexible and to negotiate splits of settlement proceeds with its own insureds, thereby improving the chances of settlement. The alternative is to watch counsel for the carrier and the owner attempt to explain to a court why instead of picking one theory of recovery and living with the consequences, they

should be able to pick the best arguments from separate theories of recovery to circumvent the plain language of the insurance policy and the construction or design agreement.<sup>75</sup> 

## Endnotes

1. *Standard Form of Agreement Between Owner and Architect for Housing Services*, AIA Document B181, 1994 Edition.

2. *General Conditions for the Contract of Construction*, AIA Document A201-1997.

3. Such payments should be admissible evidence because those payments are not a collateral source.

4. For a more thorough discussion of legal and ethical subrogation principles, and of the minority position, see [www.aaplaw.com/publications](http://www.aaplaw.com/publications).

5. 848 S.W.2d 724 (Tex. App. 1992), *writ denied*.

6. 102 S.W.3d 837 (Tex. App. 2003), *petition denied*.

7. *Id.* at 840; see also *Eslon Thermoplastics v. Dynamic Systems, Inc.*, 49 S.W.3d 891, 897 (Tex. App. 2001), *no petition* (damage to chip fabricating equipment that was connected or "hooked" up became part of the covered work).

8. *Walker*, 102 S.W.3d at 844 (citing *Temple EasTex*, 848 S.W.2d at 730-31).

9. *Id.*

10. *Id.* (citing *Trinity Universal Ins. Co. v. Cox Constr. Co.*, 75 S.W.3d 6, 15 (Tex. App. 2002), *no petition*).

11. *Id.*

12. *Trinity*, 75 S.W.3d at 12.

13. *Id.* at 10 (citing *Interstate Fire Ins. Co. v. First Tape, Inc.*, 817 S.W.2d 142, 145 (Tex. App. 1991), *writ denied*).

14. *Id.* (citing *Nat'l Union Fire Ins. Co. v. John Zink Co.*, 972 S.W.2d 839, 844 (Tex. App. 1998), *petition denied*).

15. *Id.* (citing 16 COUCH ON INSURANCE, § 224.76).

16. *Id.* at 11.

17. 629 A.2d 820 (N.H. 1993).

18. *Id.* at 827.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. 580 N.W.2d 490 (Minn. 1998).

24. *Id.* at 493 (mentioning *Lloyd's Underwriters v. Craig and Rush, Inc.*, 32 Cal. Rptr. 2d 144 (Cal. Ct. App. 1994); *Tokio Marine & Fire Ins. Co. v. Employers Ins. of Wausau*, 786 F.2d 101 (2d Cir. 1986); *Commercial Union Ins. Co. v. Bituminous Cas. Corp.*, 851 F.2d 98, 101 (3d Cir. 1988); *Am. Ins. Co. v. L.H. Sowles Co.*, 628 F.2d 967, 968-69 (6th Cir. 1980); *Indus. Risk Insurers v. Garlock Equip. Co.*, 576 So. 2d 652, 656-57 (Ala. 1991); *United States Fid. & Guar. Co. v. Farrar's Plumbing & Heating Co.*, 762 P.2d 641, 642 (Ariz. Ct. App. 1988); *Housing Inv. Corp. v. Carris*, 389 So. 2d 689, 689-90 (Fla. Dist. Ct. App. 1980); *S. Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc.*, 395 N.E.2d 320, 332-33 (Ind. Ct. App. 1979)).

25. *A.A.C.T.*, 580 N.W.2d at 494.

26. *Id.* (citing *Craig and Rush*, 32 Cal. Rptr. 2d at 146 n.4).

27. *General Conditions of the Contract for Construction*, AIA Document A201-1997 § 1.1.3.

28. *S.S.D.W. Co. v. Brisk Waterproofing Co.*, 556 N.E.2d 1097, 1101 (N.Y. 1990) (citing *Trump-Equitable Fifth Ave. Co. v. H.R.H. Constr. Corp.*, 485 N.Y.S.2d 65 (N.Y. App. Div. 1985)).

29. *Id.* at 1101.

30. *Trinity Universal Ins. Co. v. Cox Constr. Co.*, 75 S.W.3d 6, 11 (Tex. App. 2002).

31. 948 F. Supp. 608 (S.D. Miss. 1996), *aff'd*, 101 F.3d 699 (5th Cir. 1996).

32. *Id.* at 612 (citing *Butler v. Mitchell Hugeback, Inc.*, 895 S.W.2d 15 (Mo. 1995) (en banc)).

33. *Id.*; see also *Town of Silverton v. Phoenix Heat Source*, 948 P.2d 9, 12 (Colo. Ct. App. 1997) (where the contract defined "Work" as the reroofing of the town hall; the court held that the scope of the waiver

of subrogation was limited to the value of the work performed under the contract, i.e., the new roof, and was inapplicable to other parts of the town hall damaged in the fire).

34. S.S.D.W. Co. v. Brisk Waterproofing Co., 556 N.E.2d 1097, 1101 (N.Y. 1990).

35. *Id.* at 1102.

36. *Id.* at 1101; *see also* Eslon Thermoplastics v. Dynamic Sys., Inc., 49 S.W.3d 891, 897 (Tex. App. 2001) (where incorporated fixture was part of work).

37. U.S. F. & G. Co. v. Craig-Wilkinson, 948 F. Supp. 608, 611 (S.D. Miss. 1996).

38. *Id.* at 609.

39. *Id.* at 611.

40. *Id.*

41. *Id.*

42. *Id.* (emphasis added); *see also* Travelers Ins. Co. v. Dickey, 799 P.2d 625 (Okla. 1990); Pub. Emp. Mut. Ins. v. Sellen Constr., 740 P.2d 913 (Wash. App. 1987) (waiver extends to amounts paid by carrier).

43. Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd., 848 S.W.2d 724, 730–31 (Tex. App.–Dallas 1992) (citing Steamboat Dev. v. Bacjac Indus., Inc., 701 P.2d 127, 128 (Colo. Ct. App. 1985)).

44. *Id.* at 730 (citing Commercial Union Ins. Co. v. Bituminous Cas. Corp., 851 F.2d 98, 101 (3d Cir. 1988); United States Fid. & Guar. Co. v. Farrar's Plumbing & Heating Co., 762 P.2d 641, 642 (Ariz. Ct. App. 1988)).

45. Note that the argument could extend to design team members as well, based on the language of A-201 § 11.4.7.

46. Temple EasTex, 848 S.W.2d at 730–31 (citing Steamboat Dev., 701 P.2d at 128).

47. *Id.* at 731 (citing Tokio Marine & Fire Ins. Co. v. Employers Ins. of Wausau, 786 F.2d 101, 104 (2d Cir. 1986)); *see also* Farrar's Plumbing, 762 P.2d at 642.

48. 701 P.2d 127, 128 (Colo. Ct. App. 1985).

49. *Id.*

50. *Id.*; *see also* S. Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc., 395 N.E.2d 320, 332–33 (Ind. App. 1979) (claims against architect waived where its interests were not included under builder's risk insurance).

51. 196 N.W.2d 377 (Neb. 1972).

52. *Id.* at 379 (citing Connor v. Thompson Constr. & Develop. Co., 166 N.W.2d 109 (Iowa 1969)).

53. *Id.* at 380 (citing Bd. of Educ. Woodbridge Tp. v. Kane Acoustical Co., Inc., 143 A.2d 853 (N.J. Super. Ct. App. Div. 1958)).

54. *Id.* at 380 (citing Connor, 166 N.W.2d at 112).

55. *Id.* at 379.

56. 692 N.E.2d 739 (Ill. App. Ct. 1998).

57. *Id.*

58. S. Tippecanoe Sch. Bldg. Corp. v. Shambaugh & Son, Inc., 395 N.E.2d 320, 333 (Ind. App. Ct. 1979).

59. Trinity Universal Ins. Co. v. Cox Constr. Co., 75 S.W.3d 6, 11 (Tex. App. 2002).

60. *Id.*; *see, e.g.*, Fidelity & Guar. Ins. Co. v. Craig-Wilkinson, 948 F. Supp. 608, 611 (S.D. Miss. 1996) (plaintiff's claim for damage to non-Work property not barred because contractual waiver provided solely for waiver of claims for damage to Work); Town of Silverton v. Phoenix Heat Source, 948 P.2d 9, 12 (Colo. Ct. App. 1997) (waiver limited to value of work performed under contract and inapplicable to other parts of town hall damaged by fire); S.S.D.W. Co. v. Brisk Waterproofing Co., 556 N.E.2d 1097, 1100 (N.Y. 1990) (waiver applies only to damage to areas within the limits of the Work).

61. Trinity, 75 S.W.3d at 11 (citing S.S.D.W., 556 N.E.2d at 1099).

62. Craig-Wilkinson, 948 F. Supp. at 614.

63. *Id.*

64. Town of Silverton, 948 P.2d at 12.

65. S.S.D.W., 556 N.E.2d at 1097.

66. *Id.*

67. *Id.* at 1104.

68. 610 P.2d 984, 985 (Wyo. 1980).

69. *Id.* at 986 (citing COUCH ON INSURANCE 2d § 61:2 (1966)).

70. *Id.* at 986–87 (citing United States v. S. Carolina State Highway Dep't, 171 F.2d 893, 898 (4th Cir. 1948) (quoting Rivers v. Liberty Nat'l Bank, 133 S.E. 210 (S.C. 1926))); *see also* Employers Mut. Cas. Co. v. A.C.C.T., 580 N.W.2d 490, 493 (Minn. 1998) (citing Rowe v. St. Paul Ramsey Med. Ctr., 472 N.W.2d 640, 644 (Minn. 1991)).

71. Commercial Union, 610 P.2d at 987.

72. *Id.* at 993; *see also* Westchester Fire Ins. Co. v. Admiral Ins. Co., 52 S.W.3d 172, 178–81 (Tex. App. 2004), petition filed.

73. Commercial Union, 610 P.2d at 993.

74. *Id.* It should be noted that the U.S. Seventh Circuit addressed the historical concerns that undermine the volunteer rule. It has been suggested that the origins of the "volunteer" rule are in the individualistic bent of the English national character and in the common law regard for privity of contract. The rule has been traced to the case of *Grymes v. Blofield*, which held that a debt could not be satisfied by a stranger, and more generally to the fear of champerty and maintenance, which found expression in the early common law restricting the assignability of choses (things) in action. It is obvious that the modern practice, which permits free alienability of choses, has robbed the "volunteer" rule of much of its rational justification. Am. Nat'l Bank & Trust Co. v. Weyerhaeuser Co., 692 F.2d 455, 466 (7th Cir. 1982).

75. The best response to those arguments is the one advocated by Caveman Lawyer, of *Saturday Night Live* fame, who said, "I am just a Caveman Lawyer, I do not understand your complicated ways. . . ."