

Construction Law Practice Tip: Determining the Scope of a Subrogation Waiver

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PRACTICES Construction Litigation

In *Exxon Mobil Corp. v. Insurance Company of the State of Pennsylvania*, the Texas Supreme Court opined once again on the issue of the extent to which an insurance provision incorporates the terms of an extrinsic contract. The insurance provision in this case was a standard Texas Department of Insurance Form WC 42 03 04 A waiver of subrogation endorsement, but *Exxon Mobil's* holding is valid for any insurance provision, including additional insured provisions, that incorporates terms of an extrinsic contract.

An employee of contractor Savage Refinery Services suffered an injury in an Exxon Mobil refinery (Figure). The employee received benefits from The Insurance Company of the State of Pennsylvania, Savage's workers' compensation carrier ("Carrier") and sued Exxon Mobil in a third-party claim. The employee settled with Exxon Mobil and the latter sued the Carrier to secure a declaration that the Carrier had waived its subrogation rights in a Form WC 42 03 04 A endorsement to Savage's workers' compensation policy. Absent a waiver, the Carrier's subrogation rights grant it a "first money" right to any payment by a third-party (here, Exxon Mobil) to an employee who received benefits from the Carrier. It is not unusual in a construction project that a workers' compensation carrier waives its subrogation rights in exchange for a policy premium. Personal injury lawsuits allegedly settle more easily and for less in the absence of subrogation rights. And, from the carrier's perspective, the increased premium buys one less dispute to litigate.

By its terms, the endorsement waived the Carrier's subrogation rights relative to the party named in the endorsement's Schedule (the "who"); "with respect to bodily injury arising out of the operations described in the Schedule," (the "what"); and where the named insured (here, Savage) was "required by a written contract to obtain th[e] waiver" (the "where"). The Schedule did not expressly name Exxon Mobil. The incompleteness of the waiver meant that the Court also had to examine the terms of the parties' Service Contract.

To read the full publication, click on the PDF linked below.

[Determining-the-Scope-of-a-Subrogation-Waiver.PDF](#)