

## Michigan Court Waives Goodbye to Subrogation Claims, Except as to Gross Negligence

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In *Ace American Insurance Company, et. al. v. Toledo Engineering Co., Inc., et. al.*, No. 18-11503, 2023 U.S. Dist. LEXIS 15222 (*Ace American*), the United States District Court for the Eastern District of Michigan determined whether insurers could pursue their subrogation claims against the defendants despite a waiver of subrogation in each of the contracts the insured had with the respective defendants. Based on the language of the contracts and the circumstances leading up to the loss, the court held that the insurers could not pursue their subrogation claims – other than their claims for gross negligence – due to waivers of subrogation in the applicable contracts.

In *Ace American*, the insured, Guardian Industries, LLC (Guardian), retained Toledo Engineer Co., Inc. (TECO) and Dreicor, Inc. (Dreicor) to renovate a glass furnace in the insured's glass manufacturing plant. Guardian and TECO entered into a contract on December 6, 2016. Guardian and Dreicor entered into a contract on September 29, 2013, that the parties later updated on June 3, 2016. Both defendants began work on the project in the spring of 2017 and were finished with the portion of the work known as the "Cold Tank Repair" prior to the loss.

On June 3, 2017, there was an explosion and fire at the plant that caused significant property damage. The plaintiff insurers (Plaintiffs) made payments in the amount of \$80 million and became subrogated to its insured's rights. Plaintiffs then initiated this action.

The defendants filed motions for partial summary judgment, arguing that the waivers of subrogation barred all of Plaintiffs' claims except claims for gross negligence. The court denied the motions, without prejudice, to allow for discovery. The defendants renewed the motions at the end of discovery.

The court first looked at the contract Guardian had with TECO and held that there were no ambiguities to allow for extrinsic evidence, thus making the terms applicable to the subject project. To reach its holding, the court rejected the argument that the contract applied only to engineering and design work, which would have allowed Plaintiffs to pursue their claims for project management or administration against TECO. Instead, the court read the contract's terms to include all work on the project.

The court held that the waiver of subrogation in the TECO contract applied even though the contract only required Guardian to have insurance applicable to the waiver "until final payment has been made or until no person or entity other than [Guardian] has an insurance interest in the property to be covered." Because TECO and Dreicor were both still on site at the time of the loss and Guardian had not made final payment to TECO, the court held the waiver to be applicable.

Similarly, the court held that the waiver of subrogation in the Dreicor contract with Guardian barred all claims except gross negligence since Dreicor was only "winding down its work on the project" and, thus, the project was not complete. Because of this, Guardian was still required to hold insurance for the project and the waiver still applied. In reaching its holding, the court rejected the Plaintiffs' argument that damages separate from the work done by Dreicor should be outside the reach of the waiver, again taking a broad view of the application of the subrogation waiver.

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This case is a reminder of how difficult it can be for subrogation practitioners to convince a court to ignore a waiver of subrogation clause in a contract. Here the court was not interested in considering ambiguities or nuance, instead looking to the intent of the waiver, which it interpreted as all encompassing. While the court seems to have left the door slightly open for an argument that a waiver would not apply in instances where the work was in fact complete and final payment had been made at the time of the loss, this would likely depend on the language of the particular contract. Regardless, it is crucial that practitioners identify waivers of subrogation in contracts early in their investigation, including whether the jurisdiction applies such clauses to claims of gross negligence, before investing significant effort and money into what may be a losing battle.

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