

Not a Waiver for All: Maryland Declines to Apply Subrogation Waiver to Subcontractors

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In *Lithko Contr., LLC v. XL Ins. Am. Inc.*, No. 31, Sept. Term, 2023, 2024 Md. LEXIS 256, the Supreme Court of Maryland considered whether a tenant who contracted for the construction of a large warehouse facility waived its insurer's rights to subrogation against subcontractors when it agreed to waive subrogation against the general contractor. The court ultimately decided that the unambiguous language of the subrogation waiver in the development agreement between the parties did not extend to subcontractors. The court also held that the tenant's requirement that subcontracts include a subrogation waiver did not, in this case, impose a project-wide waiver on all parties. The court, however, found that the requirement that the subcontracts include a similar, but not identical, waiver provision rendered the subcontract's waiver clauses ambiguous and remanded the case to the lower court to determine if the parties to the development agreement – i.e., Duke Baltimore LLC ("Duke") and Amazon.com.dedc, LLC ("Amazon") – intended that the waiver clause in the subcontracts covered claims against subcontractors.

This case involved roof and structural damage to a warehouse in Baltimore, Maryland that Duke owned. In March 2014, Amazon entered into a development agreement with Duke for the construction of the warehouse. Amazon also agreed to subsequently lease the warehouse from Duke. Although Amazon essentially owned and/or developed the project, the development agreement identified Duke as "Landlord" and Amazon as "Tenant."

The development agreement stated that Duke would be the general contractor for the construction of the warehouse. Section 12.4 of the development agreement stated that "neither party" to the agreement—Amazon and Duke—shall be liable to the other for any claim or loss that could be covered by insurance, including negligent acts of "Landlord or Tenant, or their employees, agents, contractors, or invitees . . ."

The development agreement stated that Duke would hire the necessary subcontractors to complete the construction. One of the terms Duke had to include in its subcontracts was a subrogation waiver, which stated that "no party shall be liable to another party" for any claim or loss that could be covered by insurance, including negligent acts of "a party or Tenant [i.e. Amazon], or their respective officers, directors, employees, agents, contractors, or invitees . . ." This clause was similar to Section 12.4 with the exception that it referenced "no party" rather than "neither party."

After the roof of the structure blew off and a wall collapsed, the plaintiff, as the property insurance carrier for Amazon, made payments to Amazon in excess of \$30 million. The plaintiff filed a subrogation lawsuit in the Circuit Court for Baltimore City (Circuit Court) against several subcontractors involved in the installation of the roof and subject wall. Two of the subcontractors filed a motion for summary judgment on grounds that the subrogation waivers in the development agreement and the subcontracts barred the plaintiff's claim. The Circuit Court found that the subrogation waivers applied to Amazon's carrier and dismissed plaintiff's claims. Plaintiff appealed, and the Appellate Court of Maryland (Appellate Court) reversed the Circuit Court's ruling, finding that the waiver in the development agreement was limited to Amazon and Duke only, and provided no rights to the subcontractors. The Appellate Court also ruled that the waivers of subrogation in the subcontracts did not apply to Amazon because it was not a party to those agreements. The Supreme Court of Maryland (Supreme Court) granted the subcontractors' writ of certiorari.

The Supreme Court acknowledged that Maryland follows the objective theory of contract interpretation, which states that unless the language of the contract is ambiguous, courts interpret the contract based on what a reasonable person in the position of the parties would have understood the language to mean and not the subjective intent of the parties at the time of formation. With respect to the subrogation waiver in section 12.4 of the development agreement, the court found that the provision unambiguously protected only the two parties to the contract—Amazon and Duke—as the plain language of the waiver referenced only the two parties to the contract. The court agreed with the Appellate Court’s holding that this provision provided no benefit to the subcontractors. The court also rejected the subcontractors’ argument that section 12.4 was replaced by the subrogation waiver in Exhibit I of the agreement.

While the Supreme Court held that the subrogation waiver in the development agreement did not extend to the subcontractors, it found that the subrogation waiver in the subcontracts was ambiguous as to whether it meant to waive subrogation between Amazon (who was not a party to the subcontracts) and the subcontractors. The court noted that the reference to “no party” as opposed to “neither party” establishes that the term plainly contemplates application of the waiver to more than two parties. However, nothing in the subcontracts suggested what other parties may or may not be included. As stated by the Supreme Court, in contrast to the clarity of § 12.4, by requiring that a similar, but not identical, clause be included in the subcontracts, the subrogation waiver in the subcontracts was ambiguous. Since the language of the development agreement did not provide sufficient guidance to clear up the ambiguity, the court found that extrinsic evidence must be considered to ascertain the mutual intent of Duke and Amazon (i.e., to waive claims against subcontractors) when they formed the contract. In so finding, the Supreme Court declined to adopt a rule that would impose project-wide waivers of subrogation on parties who have not agreed to them and choose to structure their contractual arrangements differently.

The Lithko case establishes that, in Maryland, a contractual requirement that subrogation waivers be included in subcontracts does not automatically create a project-wide subrogation waiver. This part of the decision counts as a win for subrogation advocates in Maryland. However, the decision also suggests that a subrogation waiver in a subcontract, to which someone such as Amazon is not a party, can potentially apply to that party’s (i.e., Amazon’s) carrier. This part of the decision is not a win for subrogation advocates. Thus, the holding in Lithko makes the case a double-edged sword.

While the court found that the waiver clause in the subcontracts in the Lithko case is ambiguous, it remains unclear whether the trial court will interpret the waiver to apply to Amazon’s carrier and bar it from subrogating against the subcontractors. It is important for a subrogation advocate in Maryland to consider this decision when deciding if, based on principles of contractual

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