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News

## SOUTHERN DISTRICT OF TEXAS DENIES MOTION TO DISMISS AND FINDS THAT WAIVER OF SUBROGATION PROVISION DOES NOT BAR INSURER FROM ENFORCING CONTRACTUAL INDEMNITY OBLIGATIONS

Newsbrief

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The District Court for the Southern District of Texas, Houston Division, recently denied a motion to dismiss and found that a waiver of subrogation does not preclude an insurer from enforcing a contractual indemnity obligation.

In *Catlin Specialty Ins. Co. v. L.A. Contractors, Ltd*, 2015 WL 806912 (S.D. Tex)(February 25, 2015), Catlin brought suit to enforce contractual indemnity obligations and to recover amounts paid to settle a claim on behalf of its insured.

On June 1, 2010, Wolverine Construction and L.A. Contractors (“LAC”) signed a Master Service Agreement. The Agreement included an indemnity provision whereby LAC and Wolverine mutually agreed to defend and indemnify one another for all claims asserted by the other’s employees. Additionally, LAC was required to maintain worker’s compensation, general liability insurance, and automobile liability insurance. The MSA stated that “the insurance requirements set forth herein are supplementary to and shall not limit or restrict as to amount, extent or otherwise the defense and indemnity obligations undertaken by [LAC] under this Agreement.” Additionally, LAC agreed that its insurance policy “shall waive the right of subrogation against [Wolverine].” Another provision of the MSA stated that Wolverine’s indemnity obligation “will be supported by insurance and will have the same requirements and conditions for insurance” as provided in paragraphs outlining LAC’s obligations.

In February of 2011, Wolverine obtained insurance through Liberty Mutual. Included in Liberty Mutual’s contract was a waiver of transfer of rights to recovery against others to Liberty that stated: “We waive any right of recovery we may have against the person or organization shown in the Schedule above.” The schedule indicated that the waiver extended to “[a]ll persons or organizations where the named insured has agreed, by written contract executed prior to the date of occurrence, to waive rights of recovery against such person or organization.” In addition to its contract with Liberty Mutual, Wolverine obtained an excess liability policy with Catlin. Wolverine’s contract with Catlin contained a similar waiver stating that Catlin waived any right of recovery “as per written contract.” On April 14, 2011, the estate of an employee of LAC brought a claim against Wolverine in Zapata County, Texas, alleging that the employee died as the result of a workplace injury. Wolverine demanded indemnity from LAC based on the MSA, but

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LAC did not defend or indemnify Wolverine as required by the Agreement.

In July 2013, Wolverine entered into a settlement with the decedent's estate. In connection with the settlement, Catlin paid more than the jurisdictional minimum on behalf of Wolverine and pursuant to the terms of Wolverine's insurance policy

Catlin filed this lawsuit on February 4, 2014, alleging contractual indemnity and breach of contract against LAC. On September 5, 2014, LAC filed a Motion to Dismiss for failure to state a claim under Federal Rule of Civil Procedure 12 (b)(6) and 12(c).

LAC argued that the language of the MSA created an unlimited waiver of subrogation between LAC and Wolverine. LAC maintained that because it had a written contract granting a waiver of subrogation, that waiver applies to the underlying insurance contract, which extended subrogation to all organizations agreed by written contract to waive subrogation, and that therefore Catlin failed to state a claim upon which relief can be granted. Catlin responded that LAC has a duty to indemnify Catlin under the terms of the MSA, and that, even assuming that LAC's waiver of subrogation was valid, LAC could not enforce the provision because it materially breached its agreement with Wolverine.

Catlin relied on the Texas Supreme Court's decision in *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344 (Tex.2000). In that case, the court considered whether a provision regarding a waiver of subrogation precluded plaintiff's underwriters from enforcing an indemnity agreement. The court found that a provision that waived plaintiff's right to subrogation in certain circumstances did not prevent plaintiff's underwriters from enforcing an indemnity agreement against defendant.

The Court found that Wolverine and LAC's contract contained an indemnity provision that stated that LAC would protect, defend, indemnify and hold Wolverine harmless from all claims asserted by LAC's employees. Additionally, the contract specifically stated that "[t]he insurance requirements set forth herein are supplementary to and shall not limit or restrict as to amount, extent or otherwise the defense and indemnity obligations undertaken by [LAC] under this Agreement."

On recommendation from the magistrate, the Court concluded that the motion to dismiss should be denied because Catlin has made a short, plain statement showing that it is entitled to relief under the MSA and that Catlin had adequately stated a claim upon which relief can be granted.