

**Sabo & Zahn**  
233 S. Wacker Dr.  
Suite 8620  
Chicago, IL 60606  
312-655-8620  
312-655-8622 fax  
[Http://www.sabozahn.com](http://www.sabozahn.com)

# Sabo & Zahn

Attorneys at Law

## Waiver of Workers' Compensation Limit – Update

In a recent article, we discussed a provision of AIA Document A201 that acts as a waiver of a limitation that many states impose on the ability of certain parties in a construction project to recover from an injured worker's employer. Briefly, when a worker is injured on a jobsite, that state's workers compensation law will set statutory limits on the amount that the employee can recover from the employer and the employer's insurance carrier. Since the employee's recovery from the employer is limited, the employee then will often sue other parties on the project, such as the owner, general contractor, architect, and other subcontractors in an effort to obtain additional money for his injuries. Because it is frequently the employer that should have taken more care to prevent the injury in the first place, this situation often leads to "innocent" parties paying large sums of money to the injured worker without the ability to recover any of that money from the careless employer who is actually more responsible for the employee's injury in the first place. In other words, the parties do not pay their pro-rata share of the damages, instead, they wind up paying money out of proportion to their own fault.

In recent years, courts have recognized the ability of parties to contractually waive this problem.<sup>1</sup> Such a waiver is found at Section 3.18.2 of AIA Document A201, the General Conditions:

**3.18.2** In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under Subparagraph 3.18.1 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts.

Because general conditions are usually incorporated into the various subcontracts, the waiver is applicable to the subcontractors. Thus, a subcontractor may be liable for more than just the state's statutory workers compensation limit if its worker suffers severe

*This article is not legal advice. Consult with an attorney familiar with the law in your area.*

**Sabo & Zahn**  
233 S. Wacker Dr.  
Suite 8620  
Chicago, IL 60606  
312-655-8620  
312-655-8622 fax  
[Http://www.sabozahn.com](http://www.sabozahn.com)

injuries, particularly if the court finds that the employer was at fault in causing the injury. What this also means is that some insurance carriers who insure contractors will now face larger claims for such injuries. There is a new wrinkle in this situation.

In a recent Illinois case,<sup>2</sup> an employee of Christy-Foltz sustained injuries while working on a construction project in which Christy-Foltz was engaged as a subcontractor to the general contractor, LISI. The employee filed an action against LISI, alleging negligence and violation of the Illinois Structural Work Act. LISI, in turn, brought a contribution action against Christy-Foltz. Christy-Foltz raised the defense that the Illinois Workers' Compensation Act limits the recovery against it to the amount under that Act. LISI then raised the waiver of this limit found in the subcontractor agreement (the language was similar to the AIA language quoted above) and the court agreed, finding that Christy-Foltz had contractually waived this limit.

Next, Christy-Foltz brought a declaratory judgment action against its own insurance company, Safety National. Apparently, Safety National had refused any coverage beyond the limits under the Workers' Compensation Act, even though it appeared now that there was substantial liability above that amount (because of the waiver discussed above). The insurance policy had a clause that excluded coverage for "any loss or claim expenses voluntarily assumed by Employer under any contract or agreement, expressed or implied." Safety National argued that, by signing the contract that contained the waiver, Christy-Foltz had voluntarily assumed a loss under contract, triggering the exclusion.

The court agreed with the insurance carrier, finding that the subcontractor had contracted to do something for which coverage was excluded by the insurance policy. The subcontractor had argued that the waiver was not a loss "voluntarily assumed" under the contract as defined in the insurance policy exclusion, but rather an agreement to waive an affirmative defense. The court found this argument unpersuasive. The court noted that an insurance policy is a contract and must be interpreted in accordance with the rules of contract construction, just like any other contract. The court found the language in the insurance policy clear and unambiguous. That language excluded from coverage any loss voluntarily assumed under contract, which is what happened here. Thus, the subcontractor found itself without coverage for any loss in excess of the statutory limits under the Workers' Compensation Act. The subcontractor would have to pay those excess amounts out of its own pockets.

*This article is not legal advice. Consult with an attorney familiar with the law in your area.*

**Sabo & Zahn**  
233 S. Wacker Dr.  
Suite 8620  
Chicago, IL 60606  
312-655-8620  
312-655-8622 fax  
[Http://www.sabozahn.com](http://www.sabozahn.com)

This case should be of concern to the parties to any construction project. It seems clear that the above-quoted AIA language found in A201 constitutes a waiver by the various contractors of limitations imposed by applicable workers' compensation acts that affect the project. Given this, the owner, architect and contractors will want any potential liability covered by insurance. This case means that there may be insufficient coverage. What can be done about this?

One solution is to require each contractor to obtain a specific rider or other assurance from their insurance carrier that such a loss is covered. This might be difficult to obtain, especially on smaller projects. Naming the owner, architect and other parties as additional insureds on the various policies couldn't hurt. However, be sure to strike Paragraph 11.3.3 of A201, which states as follows:

**11.3.3** The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability Insurance coverage under Paragraph 11.1.

Note that this Paragraph 11.3.3 is effective unless specifically taken out, even though it seemingly refers to something called Project Management Protective Liability Insurance. This type of insurance coverage, which covers the entire project team, but has limited availability at the present time, is another way around the problem presented by this case. If, in fact, such a project insurance policy is obtained, then Paragraph 11.3.3 should remain as is. But, as is usually the case, this provision should be removed or modified.

Finally, the owner could closely examine each insurance policy to see if there are any exclusions such as found in the Christy-Foltz case. This is, at best, a tricky proposition best left to insurance experts. If the owner does find such an exclusion, and the exclusion is required to be waived in the Contract Documents, the owner can then require the contractor to obtain a substitute policy that will provide the coverage.

Werner Sabo, FAIA, CSI  
James K. Zahn, FAIA, CSI

*This article is not legal advice. Consult with an attorney familiar with the law in your area.*

1. *E.g., Braye v. Archer-Daniels-Midland Co.*, 676 N.E.2d 1295 (1997).
2. *Christy-Foltz, Inc. v. Safety Mutual Casualty*, 722 N.E.2d 1206 (2000)