Waiver of Subrogation and Additional Insured’s

A great question was brought up regarding waiver of subrogation and I think it is important to share with the class. We do talk about Waiver of Subrogation in this course however only at a very high level and with limited (almost no) depth - it is just really mentioned (pg. 26 Chapter 2).

The person who asked the question correctly noted that in ISNetworld (a contractor management system in which certificates of insurance are entered and must meet requirements selected by each contractor) tends to require a lot of waivers of subrogation and hypothesized it was because contractors tend to check the "select all" requirement boxes without really knowing what they are checking - which is an absolute possibility. They also wondered if people may not really understand what a waiver of subrogation was and I agree.

- So what is a Waiver of Subrogation (WoS)?

**Waiver of Subrogation:** "An agreement between two parties in which one party agrees to waive subrogation rights against another in the event of a loss. The intent of the waiver is to prevent one party’s insurer from pursuing subrogation against the other party. Generally, insurance policies do not bar coverage if an insured waives subrogation against a third party before a loss. However, coverage is excluded from many policies if subrogation is waived after a loss because to do so would violate the principle of indemnity." [International Risk Management Institute](http://www.irmi.com/online/insurance-glossary/terms/w/waiver-of-subrogation.aspx)

- Great, but what is Subrogation?

**Subrogation:** The assignment to an insurer by terms of the policy or by law, after payment of a loss, of the rights of the insured to recover the amount of the loss from one legally liable for it. [International Risk Management Institute](http://www.irmi.com/online/insurance-glossary/terms/s/subrogation.aspx)

We insure Company A. One day Company A is working with Company B and through an accident caused by Company B, the client suffers a loss. The client looks to recover their damages from Company A (keeping this simple and not getting into detail), we as Company A's insurer pay out the claim but believe Company B was negligent. As such we take over the rights of Company A to recover the amount of loss from the legally liable party (in other words, we wish to subrogate against Company B). If Company B had requested a Waiver of Subrogation, AND it was endorsed on the policy, we as Company A's insurer would not be able to recover the paid out loss from Company B as we had waived our right of recovery from them.

The definitions above mention that some insurers will not provide a Waiver of Subrogation because it could be considered to violate the principle of indemnity. This is true, however for many large companies and industries - the waiver of subrogation has become a common requirement when requesting certificates of insurance. There are insurers who will provide Waivers of Subrogation - sometimes even on a blanket basis, but why would they do this?
Even though the Waiver of Subrogation (WoS) could be considered to violate the concept of indemnity, as we all know lawsuits can be expensive! As a result, insurers may be willing to waive subrogation, in order to minimize complex lawsuits and insurance claims, which will help all companies involved to manage the risk and associated expenses.

In the past, the Waiver of Subrogation clause was most common in construction and lease contracts, however we are starting to this request more and more in other the requirements of companies outside of these.

- Sometimes requirements in ISNetworld also stated the company needed to be an Additional Insured, but if they are an additional insured why do they also need a waiver of subrogation?

Great question!!! Let’s start with:

- What is an Additional Insured (AI)?

**Additional Insured:** “A person or organization not automatically included as an insured under an insurance policy who is included or added as an insured under the policy at the request of the named insured. A named insured’s impetus for providing additional insured status to others may be a desire to protect the other party because of a close relationship with that party (e.g., wanting to protect church members performing services for the insured church) or to comply with a contractual agreement requiring the named insured to do so (e.g., project owners, customers, or owners of property leased by the named insured).”  
**International Risk Management Institute**  
[http://www.irmi.com/online/insurance-glossary/terms/a/additional-insured.aspx](http://www.irmi.com/online/insurance-glossary/terms/a/additional-insured.aspx)

Most insurance policies have provisions that prohibit insurers from subrogation against Named and Additional Insured (in theory eliminating the need for the Waiver of Subrogation) however there have been cases where insurers have been able to subrogate against Additional Insureds. This has been most common when the loss was outside of what agreed to in the contract, when the loss was for an activity which was different than that which would normally fall within the insured’s operations, when the policy does not allow for additional insured status and others.  
(Aside: I have a few good examples of Case Law around this if you are interested) Thus, leading to many contracts now requesting/requiring both an Additional Insured and Waiver of Subrogation clause in hopes of reducing their exposure.

So a waiver of subrogation does not provide the same benefits with regards to legal representation and other benefits that a company would have as an Additional Insured. With the Waiver of Subrogation the company only knows that the insurer will not subrogate against them for losses paid. As an Additional Insured, the company can enjoy some of the same benefits as the Named Insured, such as a legal defence, and in theory should not have to worry about being subrogated against as an insured under the policy – HOWEVER, as we have seen above this is not always the case, leading to the current situation of many companies requiring Certificates of Insurance with both Additional Insured and Waiver of Subrogation clauses! The key….understand the terms and why a party is requesting them – does it make sense, do they
need this? And if not, don’t hesitate to ask questions, look to clarify and don’t do it if you are unsure.

- For more information on this, there is a great article on IRMI.com by Mark M. Bell.


I hope this helps!

- About ISNetworld:

**ISNetworld's purpose:** "Maintaining safety, insurance, quality and regulatory information on contractors and suppliers can often be a strain on internal resources. ISN streamlines these processes, saving time and improving safety standards. Hiring Clients use ISNetworld to standardize contractor management...higher compliance numbers." **ISNetworld Website.**