

2000

# Mountain States Steel, INC. v. Voest-Alpine Services and Technologies Corporation: Reply Brief

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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MOUNTAIN STATES STEEL, INC., : Case No. 20000608-SC

Third-Party Plaintiff, : Priority No. 15

vs. :

VOEST-ALPINE SERVICES & :  
TECHNOLOGIES CORPORATION, :

Third-Party Defendant. :  
:

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**APPELLEE'S REPLY BRIEF**

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On Appeal from Judgment  
of the Fourth Judicial District Court,  
Utah County, State of Utah  
Honorable James Taylor, Presiding

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Appellee/Cross-Appellant

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**IN THE UTAH SUPREME COURT**

MOUNTAIN STATES STEEL, INC.,	:	Case No. 20000608-SC
	:	
Appellant/Third-Party Plaintiff,	:	Priority No. 15
	:	
vs.	:	
	:	
VOEST-ALPINE SERVICES & TECHNOLOGIES CORPORATION,	:	
	:	
Appellee/Third-Party Defendant.	:	

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**APPELLANT'S REPLY BRIEF**

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On Appeal from Judgment  
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## ARGUMENTS

### **I. THERE IS NO BASIS FOR MODIFYING THE LEASE TERM OR DELAYING VOEST-ALPINE'S OBLIGATION TO PROVIDE LIABILITY INSURANCE.**

Voest-Alpine admits that no provision of the Lease expressly provided for modification of the Lease term. (Pg. 19) Voest-Alpine admits that no provision of the Lease expressly provided for delaying its obligations under the Lease, except the payment of rent. (*Id.*) As a result, Voest-Alpine admits that no provision of the Lease expressly provided for delaying its obligation to provide liability insurance. (Pg. 17) This should have ended the inquiry since Voest-Alpine admits that the foregoing Lease provisions are “clear.” (Pg. 17)

However, Voest-Alpine invites the Court to read beyond the express language of the agreement because it “produces an inequitable result....” (Pg. 19) Voest-Alpine argues that “[t]here is no justifiable basis for finding that Voest-Alpine was obligated to procure a bodily injury and property damage liability insurance policy covering Mountain States and Mountain States’ building where Mountain States failed to deliver possession of the building.” (*Id.*)

The first problem is that no provision of the Lease required Voest-Alpine “to procure a...property damage liability insurance policy

covering...Mountain States' building...." (Pg. 19) The obligation for real property insurance lay with Mountain States. (R. 314, ¶6.2(a)) Voest-Alpine's obligation for property insurance was limited to its own "personal or other property to be located on or about the premises...." (*Id.* at ¶6.2(b)) It is clear that Voest-Alpine is speaking only of its obligation to provide liability insurance. (*Id.* at ¶6.1)

To answer Voest-Alpine's question about that insurance, it made perfect sense to require liability insurance at the start of the Lease term even if possession were delivered later. At the time the Lease term commenced, Voest-Alpine was on the property working on its lessee improvements. (R. 252/4-12) It may be also that Voest-Alpine was working on its commitments to Geneva Steel. (R. 252/13-22) It is certain that Voest-Alpine was assisting Mountain States' with its lessor improvements. (R. 250/5-25) Voest-Alpine's presence on the leased premises increased the risk of injury and justified the procurement of liability insurance even though possession was not formally delivered until later.

Despite what it said about the Lease provisions being "clear," Voest-Alpine invites the Court to consider whether the Lease provisions are "vague and ambiguous." (Pg. 18 n.2) This is based on the deposition testimony of

Mountain States' Chris Olsen. (R. 290) Mr. Olsen offered his "opinion" that the Lease term was extended by Mountain States' failure to complete tenant improvements. (R. 229/8-12) However, as recognized by counsel for both parties, Mr. Olsen's testimony was nothing more than a "legal conclusion." (R. 229/2-4) Mr. Olsen's deposition testimony could not create an ambiguity that did not otherwise exist in the contract language.

Voest-Alpine claimed (at one time) that the liability insurance provision did not apply because the accident did not arise out of its "ownership, use, occupancy or maintenance of the premises." (Pg. 5, ¶6) Voest-Alpine wisely dropped this argument since the cited provision is not limited to Voest-Alpine's "ownership, use, occupancy or maintenance." (R. 314, ¶6.1) In fact, it says nothing about whose ownership, use, occupancy or maintenance is at issue. It clearly speaks of "any liability arising out of the ownership, use, occupancy or maintenance of the premises...." There is no question that the accident arose out of someone's "ownership, use, occupancy, or maintenance of the premises...." That is enough for the provisions of ¶6.1 to apply.

At one time, Voest-Alpine also raised the insurance provision in the "Work Letter," Exhibit "C" to the Lease. (Pg. 6, ¶6) Voest-Alpine wisely dropped this argument because the cited provision is perfectly consistent with



the liability insurance provision of ¶6.1. In ¶5 of the Work Letter, (R. 298) Voest-Alpine was required to obtain certain insurance, including “Comprehensive General Liability Insurance...during the continuance of any of Lessee’s Improvements within the Premises.” There is nothing in ¶5 providing that this Comprehensive General Liability Insurance was a substitute for the liability insurance required by ¶6.1. In fact, it appears that the liability insurance required by ¶6.1 would have satisfied Voest-Alpine’s obligation in ¶5 of the Work Letter. Both provisions are therefore perfectly complimentary.

Mountain States could not disagree more with Voest-Alpine’s statement of contract interpretation. (Pg. 20) Voest-Alpine cites a case about “postnuptial agreements” where the agreement in question could not be located, and one of the parties was deceased. *Peirce v. Peirce*, 994 P.2d 193 ¶3 (Utah 2000). There is an important distinction, which Voest-Alpine failed to mention, between postnuptial agreements and “commercial contracts.” *Id.* at ¶20.

In the end, Voest-Alpine’s authority is not truly apposite. It merely restates the rule stated by the Court in *Winegar v. Froerer Corp.*, 813 P.2d 104 (Utah 1991): “A contract provision is ambiguous if it is capable of

more than one reasonable interpretation because of ‘uncertain meanings of terms, missing terms, or other facial deficiencies.’ 813 P.2d at 108 (quoting *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983)).

All of which stands for the proposition that courts should not consider the “fairness” of a written agreement in the absence of an ambiguity. Voest-Alpine concedes that the Lease provisions are clear. There is nothing more to do than sustain the decision of the district court that Voest-Alpine was obligated, by the clear and unambiguous terms of the Lease, to provide Mountain States with liability insurance upon the commencement of the Lease term.

## **II. THERE WAS NO WAIVER OF SUBROGATION WITHOUT NOTICE TO AND ENDORSEMENT FROM THE PARTIES’ INSURERS.**

Mountain States’ position on the “Waiver of Subrogation” is simple. If the first sentence of ¶6.4 accomplished a waiver of subrogation, as Voest-Alpine contends, (pp. 23-24) there was no need for the second sentence requiring notice to and endorsement from the parties’ insurers. If notice and endorsement were required for “the insurance policies required [by the Lease],” it was required for “any” insurance the parties might have if it was going to form the basis for a waiver of subrogation.

Once again, it does not appear that the parties intended a waiver of subrogation by the first sentence of ¶6.4. It is certain that the first sentence accomplished a waiver of “rights of recovery” between the parties, which included their “officers, employees, agents and representatives.” However, the first sentence says nothing about the parties’ “insurers.”

Voest-Alpine seems to concede that a waiver of subrogation cannot be effected without the parties’ insurers. (Pp. 23-24) Voest-Alpine claims that “insurers” was implied because of the rules of equitable subrogation. *E.g.*, *Fashion Place Inv. v. Salt Lake County*, 776 P.2d 941, 945 (Utah App. 1989). However, that only speaks to the application of equitable subrogation to the parties’ agreement, not to whether the parties intended the rules of equitable subrogation as part of their agreement. No one questions that the parties were free to craft their own agreement, no matter the rules of equitable subrogation.

Voest-Alpine knows that it must address the second sentence of ¶6.4. It does so by limiting its application to the “the policies of insurance required [by the Lease].” (Pp. 25-26) However, even if that were the proper interpretation, it does not answer the question: Why would the parties require notice and endorsement for some insurance policies and not others?

Voest-Alpine has no explanation. It lamely asserts that “it was possible that the parties would need to obtain additional insurance to meet the lease requirements.” (Pg. 26) That may be true, but it does not explain why notice and endorsement were required for the “additional insurance” required by the Lease and not for other insurance the parties might have irrespective of their Lease obligations.

There must be some reason for the notice and endorsement requirement even if that requirement were limited to “the policies of insurance required [by the Lease].” Strangely enough, Voest-Alpine supplies the very reason: “Voest-Alpine desired that Mountain States inform its insurers of the waiver to preclude Mountain States’ insurers from bringing an action against Voest-Alpine....Mountain States and Voest-Alpine sought to make certain that they would not be bothered by insurer-driven subrogation actions.” (Pp. 29-30)

This is an acknowledgement that waiver cannot be accomplished without a “knowing relinquishment of a known right.” *Jenkins v. Percival*, 962 P.2d 796, 799 (Utah 1998). It is also an acknowledgement that the first sentence of ¶6.4 does not accomplish a waiver of subrogation. Otherwise, there would be no need to inform Mountain States’ insurers, in any case, that they were “preclude[d] from bringing an action against Voest-Alpine.”

Given that, it may be that the parties did not intend to limit the application of the notice and endorsement requirement to the insurance required by the Lease. The language of the second sentence says that “upon obtaining the policies of insurance required hereunder, [the parties shall] give notice to the insurance carrier or carriers....” There is nothing indicating that “insurance carrier or carriers” is limited to “the insurance carrier or carriers providing the policies of insurance required hereunder.” That is certainly one possible interpretation, but not the only one.

Fortunately, there is a way out of this linguistic conundrum. The Court may interpret ¶6.4 in a manner that is consistent with all of its stated language to provide that notice and endorsement were required in the case of any insurance acquired by the parties, whether or not it was required by the Lease. This would give effect to the waiver in the first sentence and harmonize it with the notice and endorsement requirement in the second sentence.

Otherwise, the Court is left to interpret ¶6.4 so that the waiver of subrogation applies only to “the policies of insurance required [by the Lease].” In such a case, the waiver in the first sentence would remain intact, but it would not apply to the parties’ insurers except in the case of “the

policies of insurance required [by the Lease]” where there was notice to and endorsement from those insurers.

Admittedly, this is not the best interpretation, but it is the only other one that gives effect to and harmonizes the waiver in the first sentence with the notice and endorsement requirement in the second sentence. *LDS Hospital v. Capitol Life Insurance Co.*, 765 P.2d 857, 858 (Utah 1988).

One way or the other, ¶6.4 cannot be interpreted in the manner contended by Voest-Alpine. According to Voest-Alpine, there was an unconditional waiver of subrogation for insurance not required by the Lease, but not for insurance required by the Lease. It makes no sense that the parties would condition waiver of subrogation for the very insurance required by the Lease, but not for other insurance upon which they might base a waiver of subrogation.

This would permit suits by the insurers most likely to indemnify the parties for loss under the Lease, which would defeat the purpose behind the waiver of subrogation and cannot be what the parties intended.

Since there is no indication that the parties were thinking about “rules” of equitable subrogation when they made the waiver in the first sentence, it makes sense that they intended for notice and endorsement to be required in

all cases. The only other conclusion is that the parties were thinking about insurance required by the Lease, since the Lease does not mention insurance not required by the Lease.<sup>1</sup>

The legal authority cited by the parties does not help. That is because the circumstances and waivers were different in every case. For instance, *Touchet Valley Grain v. Opp. & Seibold*, 831 P.2d 724 (Wash. 1992), the parties' agreement expressly provided for waiver of "[s]ubrogation rights." 831 P.2d at 726. The same was true in *Continental Ins. Co. v. Boraie*, 672 A.2d 274, 275 (N.J. Super. Law Div. 1995). That was not true in this case.

It may be a small point, but *Richmond Steel, Inc. v. Legal & General Assurance Soc., Ltd.*, 821 F. Supp. 793 (D. P.R. 1993) does not stand for the proposition that waivers have been enforced "even though the insurers were not informed of the waiver." (Pg. 31) The court did not address this issue, and there is no way to know if that was the case. 821 F. Supp. at 799-802.

The same is true for *Millican of Wash. v. Wienker Carpet Service*, 722 P.2d 861 (Wash. App. 1986). The court ruled that a waiver of subrogation was enforceable because, according to its own language, it did not "prejudice the insurance afforded by such policies." That may be because

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<sup>1</sup> Other than, possibly, the word "any" in the first sentence.

the insurers were notified of the provision. However, it is impossible to say. For these reasons, this case should be decided based on the circumstances of these parties and the language of their agreement.

We can state with assurance that Voest-Alpine is serving up a recipe for disaster when it seeks to place “the burden on insurers to protect their subrogation rights by including prohibitions against unilateral subrogation waivers in their insurance policies.” (Pg. 32)

Insurers are sure to do just that, but insureds are no more likely to read those provisions than they are other insurance provisions. This will provide insurers an opportunity to deny coverage, which will defeat the purpose behind waivers of subrogation, which is to provide parties to a contract with insurance to cover their risks. *Richmond Steel, supra*, 821 F. Supp. at 800. That is not sound policy.

It is interesting that Voest-Alpine would say: “If notice and endorsements were required, either party could unilaterally destroy the waiver simply by failing to inform its insurers of the provision or by failing to obtain the endorsement.” (Pg. 30)

As we said before, enforcing the waiver in this case, would permit Voest-Alpine to avoid its obligation to provide liability insurance, which once



again defeats the purpose behind waivers of subrogation. Besides, the solution to Voest-Alpine's problem is quite simple. Parties could demand to see the insurer endorsements. If Voest-Alpine had done that in this case, it would have known that the waiver was not enforceable.

Mountain States is in perfect agreement with the citation of *Allstate v. Ivie*, 606 P.2d 1197, 1202 (Utah 1980): The purpose of subrogation "is to work out an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who, in equity and in good conscience ought to pay it."

Mountain States' insurers surely bargained for a premium to pay a loss, but they would not have paid the loss if Voest-Alpine had satisfied its indemnity insurance obligation. When Voest-Alpine denied the tender of defense, Mountain States' insurers had no choice but to pay the loss.<sup>2</sup> Therefore, according to Voest-Alpine, they should be denied a recovery since they paid a loss, which they were legally contracted to do, when Voest-Alpine failed to provide the insurance for which it was legally contracted. There is no fairness in that.

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<sup>2</sup> Since their insurance was not conditioned on the absence of a waiver of subrogation in the Lease.

### **III. IT DOES NOT FOLLOW THAT THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO AWARD THE ADDITIONAL AMOUNT OF ATTORNEY'S FEES.**

Voest-Alpine explained to the trial court the "arithmetic error" that accounted for the omission of \$8,173.55 in attorney's fees from the Judgment for Attorney's Fees. (R. 1139) It submitted a Second Affidavit of Terry M. Plant (R. 1063) and Memorandum in Opposition to Mountain States Steel's Objections. (R. 1074)

Voest-Alpine explained that the actual amount of attorney's fees billed by its Salt Lake City law firm were \$38,380.00. (R. 1071, ¶f) Voest-Alpine explained that this was supported by all of the bills from Voest-Alpine's Salt Lake City law firm. (R. 1069) There is every indication that the trial court considered this information before entering Judgment.

Voest-Alpine contends that the trial court abused its discretion by refusing to award one-hundred percent of the billed amount from its Salt Lake City law firm. (Pg. 36) However, Voest-Alpine's legal authority stands contrary: "A court need not award the entire amount requested, but must evaluate the requested fees to determine if a lesser amount is reasonable under the circumstances." *Hoth v. White*, 799 P.2d 213, 220 (Utah App. 1990).

There is no indication that the trial court rejected the higher amount simply because some part of it was left out of the original calculation. Instead, there is every indication that the trial court agreed with Voest-Alpine that \$30,206.45 was a reasonable attorney's fee no matter how much Voest-Alpine was billed by its Salt Lake City law firm.

Admittedly, this does not appear in the record. All we have is the trial court's handwritten interlineation of the Judgment prepared by Voest-Alpine. (R. 1133) If a remand is warranted, it should be for the trial court to state its reasons for refusing the higher amount.

There is no basis to enter judgment for the entire amount requested by Voest-Alpine. Mountain States objected to the higher amount (R. 1135) because Voest-Alpine made it extremely difficult to evaluate the reasonableness of the extra amount after the initial representation that \$30,206.45 was reasonable.

This Court would have to review all of Voest-Alpine's attorney bills to confirm that \$38,300.00, not \$30,206.45, is the proper amount. The better course, if the trial court's Judgment for Voest-Alpine (R. 955) is not reversed, is to remand to the trial court for further determination.

## CONCLUSION

Voest-Alpine has conceded that the Lease was “clear” on the beginning of the Lease term and its obligation to provide liability insurance. That should end the inquiry. However, it was not “unfair” to require Voest-Alpine to provide liability insurance at the beginning of the Lease term when its employees were on the premises working on tenant improvements. In any event, “fairness” is not a consideration when the agreement is clear.

It is not at all clear that the first sentence of ¶6.4 provided for a waiver of subrogation. It says nothing about “subrogation” or “insurers.” All it says is that Mountain States waived claims against Voest-Alpine, its “officers, employees, agents and representatives.”

If there were no second sentence, the Court could probably conclude that Mountain States’ insurers were barred from bringing claim because of the law of equitable subrogation. However, it is clear from the second sentence that notice to and endorsement from the parties’ insurers was necessary to effect a waiver of subrogation, even if only for the insurance required by the Lease, whatever the law of equitable subrogation.

There is no basis on which to distinguish the insurance required by the Lease and the insurance upon which Voest-Alpine bases its claim of waiver of

subrogation. It makes no sense that the parties would condition the waiver of subrogation in the very case where loss would be indemnified under the Lease. That being the case, the Court must look for a way to harmonize the notice and endorsement requirement with the waiver.

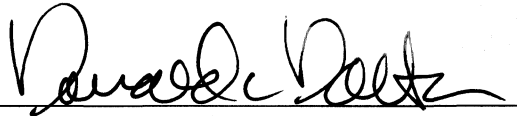
The only way to do that is construe ¶6.4 to require notice to and endorsement from “any” parties’ insurer, which, as Voest-Alpine concedes, is the only sure way to secure a waiver of subrogation. Otherwise, the Court must construe ¶6.4 as applying only to the insurance required by the Lease in order to harmonize all of the provisions of ¶6.4 and to secure the benefits of waivers of subrogation in this and other cases.

Finally, at the very most, the Court should remand the matter of attorney’s fees to the trial court for further determination. There is no basis on which to enter judgment for the higher amount requested by Voest-Alpine.

For the foregoing additional reasons, Mountain States respectfully requests that the Judgment of the trial court (R. 955) be REVERSED.

DATED this 25<sup>th</sup> day of July, 2001.

DALTON & KELLEY

By   
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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that two true and correct copies of the within and foregoing "Appellant's Reply Brief" were mailed, postage prepaid, this 25<sup>th</sup> day of July, 2001, to:

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