

Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO

REREVISED

*This Version Includes All Amendments
Adopted in the Second House*

LLS NO. 10-1006.01 Jery Payne

HOUSE BILL 10-1394

HOUSE SPONSORSHIP

Rice,

SENATE SPONSORSHIP

Scheffel,

SENATE
Recall 3rd Reading
May 10, 2010

House Committees
Business Affairs and Labor

Senate Committees
Business, Labor and Technology

SENATE
Amended 3rd Reading
May 4, 2010

A BILL FOR AN ACT

101 **CONCERNING COMMERCIAL LIABILITY INSURANCE POLICIES ISSUED TO**
102 **CONSTRUCTION PROFESSIONALS.**

SENATE
2nd Reading Unamended
May 3, 2010

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

HOUSE
3rd Reading Unamended
April 22, 2010

In *General Security Indemnity Company of Arizona v. Mountain States Mutual Casualty Company*, 205 P.3d 529 (Colo. App. 2009), the court excluded claims for certain construction defects claims and imposed no obligation to defend in a contractor's professional liability insurance policy. **Section 1** of the bill imposes the following rules of contract

HOUSE
Amended 2nd Reading
April 21, 2010

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

construction to guide a court in such cases:

- ! A court should presume that: Compliance with a construction professional's objective, reasonable expectations is intended; the entire policy is to be effective and read as a whole; a just and reasonable result is intended; ambiguity in a policy is to be construed in favor of coverage; a result that renders a part of coverage illusory is not intended; and the work of a construction professional that results in property damage is an accident unless the property damage is intended and expected by the insured.
- ! When weighing conflicting provisions, the court should construe the contract to favor coverage.
- ! The insurer bears the burden of proving that a policy provision limits or bars coverage.

Section 2 prohibits a professional liability insurer from excluding or limiting coverage of acts arising before the policy was issued unless the insured knows of defects that have a likelihood to subject the insurer to damages and fails to disclose this to the insurer. A policy that conflicts with section 2 is unenforceable.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** Part 8 of article 20 of title 13, Colorado Revised
3 **Statutes, is amended BY THE ADDITION OF A NEW SECTION to**
4 **read:**

5 **13-20-808. Insurance policies issued to construction**
6 **professionals. (1) (a) THE GENERAL ASSEMBLY FINDS AND DETERMINES**
7 **THAT:**

8 **(I) THE INTERPRETATION OF INSURANCE POLICIES ISSUED TO**
9 **CONSTRUCTION PROFESSIONALS IS OF VITAL IMPORTANCE TO THE**
10 **ECONOMIC AND SOCIAL WELFARE OF THE CITIZENS OF COLORADO AND IN**
11 **FURTHERING THE PURPOSES OF THIS PART 8.**

12 **(II) INSURANCE POLICIES ISSUED TO CONSTRUCTION**
13 **PROFESSIONALS HAVE BECOME INCREASINGLY COMPLEX, OFTEN**
14 **CONTAINING MULTIPLE, LENGTHY ENDORSEMENTS AND EXCLUSIONS**

1 CONFLICTING WITH THE REASONABLE EXPECTATIONS OF THE INSURED.

2 (III) THE CORRECT INTERPRETATION OF COVERAGE FOR DAMAGES
3 ARISING OUT OF CONSTRUCTION DEFECTS IS IN THE BEST INTEREST OF
4 INSURERS, CONSTRUCTION PROFESSIONALS, AND PROPERTY OWNERS.

5 (b) THE GENERAL ASSEMBLY DECLARES THAT:

6 (I) THE POLICY OF COLORADO FAVORS THE INTERPRETATION OF
7 INSURANCE COVERAGE BROADLY FOR THE INSURED.

8 (II) THE LONG-STANDING AND CONTINUING POLICY OF COLORADO
9 FAVORS A BROAD INTERPRETATION OF AN INSURER'S DUTY TO DEFEND THE
10 INSURED UNDER LIABILITY INSURANCE POLICIES AND THAT THIS DUTY IS
11 A FIRST-PARTY BENEFIT TO AND CLAIM ON BEHALF OF THE INSURED.

12 (III) THE DECISION OF THE COLORADO COURT OF APPEALS IN
13 *GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA V. MOUNTAIN STATES*
14 *MUTUAL CASUALTY COMPANY*, 205 P.3d 529 (COLO. APP. 2009) DOES NOT
15 PROPERLY CONSIDER A CONSTRUCTION PROFESSIONAL'S REASONABLE
16 EXPECTATION THAT AN INSURER WOULD DEFEND THE CONSTRUCTION
17 PROFESSIONAL AGAINST AN ACTION OR NOTICE OF CLAIM CONTEMPLATED
18 BY THIS PART 8.

19 (IV) FOR THE PURPOSES OF GUIDING PENDING AND FUTURE
20 ACTIONS INTERPRETING LIABILITY INSURANCE POLICIES ISSUED TO
21 CONSTRUCTION PROFESSIONALS, WHAT HAS BEEN AND CONTINUES TO BE
22 THE POLICY OF COLORADO IS HEREBY CLARIFIED AND CONFIRMED IN THE
23 INTERPRETATION OF INSURANCE POLICIES THAT HAVE BEEN AND MAY BE
24 ISSUED TO CONSTRUCTION PROFESSIONALS.

25 (2) FOR THE PURPOSES OF THIS SECTION:

26 (a) "INSURANCE" HAS THE SAME MEANING AS SET FORTH IN
27 SECTION 10-1-102, C.R.S.

1 (b) "INSURER" HAS THE SAME MEANING AS SET FORTH IN SECTION
2 10-1-102, C.R.S.

3 (c) "INSURANCE POLICY" MEANS A CONTRACT OF INSURANCE.

4 (d) "LIABILITY INSURANCE POLICY" MEANS A CONTRACT OF
5 INSURANCE THAT COVERS OCCURRENCES OF DAMAGE OR INJURY DURING
6 THE POLICY PERIOD AND INSURES A CONSTRUCTION PROFESSIONAL FOR
7 LIABILITY ARISING FROM CONSTRUCTION-RELATED WORK.

8 (3) IN INTERPRETING A LIABILITY INSURANCE POLICY ISSUED TO A
9 CONSTRUCTION PROFESSIONAL, A COURT SHALL PRESUME THAT THE WORK
10 OF A CONSTRUCTION PROFESSIONAL THAT RESULTS IN PROPERTY DAMAGE,
11 INCLUDING DAMAGE TO THE WORK ITSELF OR OTHER WORK, IS AN
12 ACCIDENT UNLESS THE PROPERTY DAMAGE IS INTENDED AND EXPECTED BY
13 THE INSURED. NOTHING IN THIS SUBSECTION (3):

14 (a) REQUIRES COVERAGE FOR DAMAGE TO AN INSURED'S OWN
15 WORK UNLESS OTHERWISE PROVIDED IN THE INSURANCE POLICY; OR

16 (b) CREATES INSURANCE COVERAGE THAT IS NOT INCLUDED IN THE
17 INSURANCE POLICY.

18 (4) (a) UPON A FINDING OF AMBIGUITY IN AN INSURANCE POLICY,
19 A COURT MAY CONSIDER A CONSTRUCTION PROFESSIONAL'S OBJECTIVE,
20 REASONABLE EXPECTATIONS IN THE INTERPRETATION OF AN INSURANCE
21 POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL.

22 (b) IN CONSTRUING AN INSURANCE POLICY TO MEET A
23 CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS,
24 THE COURT MAY CONSIDER THE FOLLOWING:

25 (I) THE OBJECT SOUGHT TO BE OBTAINED BY THE CONSTRUCTION
26 PROFESSIONAL IN THE PURCHASE OF THE INSURANCE POLICY; AND

27 (II) WHETHER A CONSTRUCTION DEFECT HAS RESULTED, DIRECTLY

1 OR INDIRECTLY, IN BODILY INJURY, PROPERTY DAMAGE, OR LOSS OF THE
2 USE OF PROPERTY.

3 (c) IN CONSTRUING AN INSURANCE POLICY TO MEET A
4 CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS,
5 A COURT MAY CONSIDER AND GIVE WEIGHT TO ANY WRITING CONCERNING
6 THE INSURANCE POLICY PROVISION IN DISPUTE THAT IS NOT PROTECTED
7 FROM DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE, WORK-PRODUCT
8 PRIVILEGE, OR ARTICLE 72 OF TITLE 24, C.R.S., AND THAT IS GENERATED,
9 APPROVED, ADOPTED, OR RELIED ON BY THE INSURER OR ITS PARENT OR
10 SUBSIDIARY COMPANY; OR AN INSURANCE RATING OR POLICY DRAFTING
11 ORGANIZATION, SUCH AS THE INSURANCE SERVICES OFFICE, INC., OR ITS
12 PREDECESSOR OR SUCCESSOR ORGANIZATION; EXCEPT THAT SUCH WRITING
13 SHALL NOT BE USED TO RESTRICT, LIMIT, EXCLUDE, OR CONDITION
14 COVERAGE OR THE INSURER'S OBLIGATION BEYOND THAT WHICH IS
15 REASONABLY INFERRED FROM THE WORDS USED IN THE INSURANCE
16 POLICY.

17 (5) IF AN INSURANCE POLICY PROVISION THAT APPEARS TO GRANT
18 OR RESTORE COVERAGE CONFLICTS WITH AN INSURANCE POLICY
19 PROVISION THAT APPEARS TO EXCLUDE OR LIMIT COVERAGE, THE COURT
20 SHALL CONSTRUE THE INSURANCE POLICY TO FAVOR COVERAGE IF
21 REASONABLY AND OBJECTIVELY POSSIBLE.

22 (6) IF AN INSURER DISCLAIMS OR LIMITS COVERAGE UNDER A
23 LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL,
24 THE INSURER SHALL BEAR THE BURDEN OF PROVING BY A PREPONDERANCE
25 OF THE EVIDENCE THAT:

26 (a) ANY POLICY'S LIMITATION, EXCLUSION, OR CONDITION IN THE
27 INSURANCE POLICY BARS OR LIMITS COVERAGE FOR THE INSURED'S LEGAL

1 LIABILITY IN AN ACTION OR NOTICE OF CLAIM MADE PURSUANT TO SECTION
2 13-20-803.5 CONCERNING A CONSTRUCTION DEFECT; AND

3 (b) ANY EXCEPTION TO THE LIMITATION, EXCLUSION, OR
4 CONDITION IN THE INSURANCE POLICY DOES NOT RESTORE COVERAGE
5 UNDER THE POLICY.

6 (7) (a) AN INSURER'S DUTY TO DEFEND A CONSTRUCTION
7 PROFESSIONAL OR OTHER INSURED UNDER A LIABILITY INSURANCE POLICY
8 ISSUED TO A CONSTRUCTION PROFESSIONAL SHALL BE TRIGGERED BY A
9 POTENTIALLY COVERED LIABILITY DESCRIBED IN:

10 (I) A NOTICE OF CLAIM MADE PURSUANT TO SECTION 13-20-803.5;

11 OR

12 (II) A COMPLAINT, CROSS-CLAIM, COUNTERCLAIM, OR
13 THIRD-PARTY CLAIM FILED IN AN ACTION AGAINST THE CONSTRUCTION
14 PROFESSIONAL CONCERNING A CONSTRUCTION DEFECT.

15 (b) (I) AN INSURER SHALL DEFEND A CONSTRUCTION
16 PROFESSIONAL WHO HAS RECEIVED A NOTICE OF CLAIM MADE PURSUANT
17 TO SECTION 13-20-803.5 REGARDLESS OF WHETHER ANOTHER INSURER
18 MAY ALSO OWE THE INSURED A DUTY TO DEFEND THE NOTICE OF CLAIM
19 UNLESS AUTHORIZED BY LAW. IN DEFENDING THE CLAIM, THE INSURER
20 SHALL:

21 (A) REASONABLY INVESTIGATE THE CLAIM; AND

22 (B) REASONABLY COOPERATE WITH THE INSURED IN THE NOTICE
23 OF CLAIMS PROCESS.

24 (II) THIS PARAGRAPH (b) DOES NOT REQUIRE THE INSURER TO
25 RETAIN LEGAL COUNSEL FOR THE INSURED OR TO PAY ANY SUMS TOWARD
26 SETTLEMENT OF THE NOTICE OF CLAIM THAT ARE NOT COVERED BY THE
27 INSURANCE POLICY.

1 (III) AN INSURER SHALL NOT WITHDRAW ITS DEFENSE OF AN
2 INSURED CONSTRUCTION PROFESSIONAL OR COMMENCE AN ACTION
3 SEEKING REIMBURSEMENT FROM AN INSURED FOR EXPENDED DEFENSE
4 COST UNLESS AUTHORIZED BY LAW AND UNLESS THE INSURER HAS
5 RESERVED SUCH RIGHT IN WRITING WHEN ACCEPTING OR ASSUMING THE
6 DEFENSE OBLIGATION.

7 **SECTION 2.** Part 1 of article 4 of title 10, Colorado Revised
8 Statutes, is amended BY THE ADDITION OF A NEW SECTION to
9 read:

10 **10-4-110.4. Exclusion - claims involving loss in progress not**
11 **known to insured.** (1) A PROVISION IN A LIABILITY INSURANCE POLICY
12 ISSUED TO A CONSTRUCTION PROFESSIONAL EXCLUDING OR LIMITING
13 COVERAGE FOR ONE OR MORE CLAIMS ARISING FROM BODILY INJURY,
14 PROPERTY DAMAGE, ADVERTISING INJURY, OR PERSONAL INJURY THAT
15 OCCURS BEFORE THE POLICY'S INCEPTION DATE AND THAT CONTINUES,
16 WORSENS, OR PROGRESSES WHEN THE POLICY IS IN EFFECT IS VOID AND
17 UNENFORCEABLE IF THE EXCLUSION OR LIMITATION APPLIES TO AN INJURY
18 OR DAMAGE THAT WAS UNKNOWN TO THE INSURED AT THE POLICY'S
19 INCEPTION DATE.

20 (2) ANY PROVISION IN AN INSURANCE POLICY ISSUED IN VIOLATION
21 OF THIS SECTION IS VOID AND UNENFORCEABLE AS AGAINST PUBLIC
22 POLICY. A COURT SHALL CONSTRUE AN INSURANCE POLICY CONTAINING
23 A PROVISION THAT IS UNENFORCEABLE UNDER THIS SECTION AS IF THE
24 PROVISION WAS NOT A PART OF THE POLICY WHEN THE POLICY WAS ISSUED.

25 (3) THIS SECTION APPLIES ONLY TO AN INSURANCE POLICY THAT
26 COVERS OCCURRENCES OF DAMAGE OR INJURY DURING THE POLICY PERIOD
27 AND THAT INSURES A CONSTRUCTION PROFESSIONAL FOR LIABILITY

1 ARISING FROM CONSTRUCTION-RELATED WORK.

2 **SECTION 3. Applicability.** This act applies to all insurance
3 policies currently in existence or issued on or after the effective date of
4 this act.

5 **SECTION 4. Safety clause.** The general assembly hereby finds,
6 determines, and declares that this act is necessary for the immediate
7 preservation of the public peace, health, and safety.