

Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 10-1006.01 Jery Payne

HOUSE BILL 10-1394

HOUSE SPONSORSHIP

Rice,

SENATE SPONSORSHIP

Scheffel,

House Committees

Business Affairs and Labor

Senate Committees

A BILL FOR AN ACT

101 CONCERNING PROFESSIONAL LIABILITY INSURANCE POLICIES ISSUED
102 TO CONSTRUCTION PROFESSIONALS.

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>.)

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

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 CAUSED BY CONSTRUCTION DEFECTS IS IN THE BEST INTEREST OF
4 INSURANCE CARRIERS, CONSTRUCTION PROFESSIONALS, AND PROPERTY
5 OWNERS.

6 (b) THE GENERAL ASSEMBLY DECLARES THAT:

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

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

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

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

26 (2) FOR THE PURPOSES OF THIS SECTION:

27 (a) "INSURANCE" HAS THE SAME MEANING AS SET FORTH IN

1 SECTION 10-1-102, C.R.S.

2 (b) "INSURER" HAS THE SAME MEANING AS SET FORTH IN SECTION
3 10-1-102, C.R.S.

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

5 (3) IN INTERPRETING AN INSURANCE POLICY ISSUED TO A
6 CONSTRUCTION PROFESSIONAL, A COURT SHALL PRESUME THAT:

7 (a) COMPLIANCE WITH A CONSTRUCTION PROFESSIONAL'S
8 OBJECTIVE, REASONABLE EXPECTATIONS IS INTENDED;

9 (b) THE ENTIRE POLICY IS TO BE EFFECTIVE AND IS INTENDED TO BE
10 READ HARMONIOUSLY AS A WHOLE;

11 (c) A JUST AND REASONABLE RESULT IS INTENDED;

12 (d) AMBIGUITY IN THE INTERPRETATION OF A POLICY IS TO BE
13 CONSTRUED IN FAVOR OF COVERAGE;

14 (e) AN INTERPRETATION THAT RENDERS A COVERAGE PROVISION
15 ILLUSORY IS NOT INTENDED; AND

16 (f) THE WORK OF A CONSTRUCTION PROFESSIONAL THAT RESULTS
17 IN PROPERTY DAMAGE, INCLUDING DAMAGE TO THE WORK ITSELF, IS AN
18 ACCIDENT UNLESS THE PROPERTY DAMAGE IS INTENDED AND EXPECTED BY
19 THE INSURED.

20 (4) (a) IN CONSTRUING AN INSURANCE POLICY TO MEET A
21 CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS,
22 THE COURT SHALL CONSIDER THE FOLLOWING:

23 (I) THE OBJECT SOUGHT TO BE OBTAINED BY THE CONSTRUCTION
24 PROFESSIONAL IN THE PURCHASE OF THE INSURANCE POLICY;

25 (II) WHETHER A CONSTRUCTION DEFECT HAS RESULTED, DIRECTLY
26 OR INDIRECTLY, IN BODILY INJURY, PROPERTY DAMAGE, OR LOSS OF THE
27 USE OF PROPERTY; AND

1 (b) IN CONSTRUING AN INSURANCE POLICY TO MEET A
2 CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS,
3 A COURT MAY CONSIDER AND GIVE WEIGHT TO THE FOLLOWING:

4 (I) ANY WRITING GENERATED OR RELIED UPON BY THE INSURER OR
5 ITS PARENT OR SUBSIDIARY COMPANY, AND ANY WRITING GENERATED BY
6 AN INSURANCE RATING OR POLICY DRAFTING ORGANIZATION, SUCH AS THE
7 INSURANCE SERVICES ORGANIZATION OR ITS PREDECESSOR OR SUCCESSOR
8 ORGANIZATION, THAT PERTAINS TO THE POLICY PROVISION IN DISPUTE;
9 EXCEPT THAT THE WRITING SHALL NOT BE USED TO RESTRICT, LIMIT,
10 EXCLUDE, OR CONDITION COVERAGE OR THE OBLIGATION OF THE INSURER
11 BEYOND THAT WHICH IS REASONABLY INFERRED FROM THE WORDS USED
12 IN THE INSURANCE CONTRACT;

13 (II) WRITINGS BY THE INSURER OR ITS PARENT OR SUBSIDIARY
14 COMPANY CONCERNING COVERAGE.

15 (5) IF AN INSURANCE POLICY PROVISION THAT APPEARS TO GRANT
16 COVERAGE CONFLICTS WITH AN INSURANCE POLICY PROVISION THAT
17 APPEARS TO EXCLUDE COVERAGE, THE COURT SHALL CONSTRUE THE
18 CONTRACT TO FAVOR COVERAGE IF REASONABLY AND OBJECTIVELY
19 POSSIBLE.

20 (6) IF AN INSURER DISCLAIMS COVERAGE IN A POLICY ISSUED TO A
21 CONSTRUCTION PROFESSIONAL, THE INSURER SHALL BEAR THE BURDEN OF
22 PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT:

23 (a) ANY POLICY'S LIMITATION, EXCLUSION, OR CONDITION IN THE
24 COVERAGE GRANT BARS COVERAGE FOR THE INSURED'S LEGAL LIABILITY
25 IN AN ACTION OR NOTICE OF CLAIM; AND

26 (b) ANY EXCEPTION TO THE LIMITATION, EXCLUSION, OR
27 CONDITION IN THE COVERAGE GRANT DOES NOT RESTORE COVERAGE

1 UNDER THE POLICY.

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

5 **10-4-110.4. Exclusion - claims involving loss of progress not**
6 **known to insured.** (1) FOR PURPOSES OF THIS SECTION, "ACTUAL
7 KNOWLEDGE" MEANS THE ACTUAL KNOWLEDGE OF ONLY:

8 (a) A CORPORATE OFFICER, LIMITED LIABILITY COMPANY
9 MANAGER, PRINCIPAL, PARTNER, OR OWNER OF THE INSURED
10 CONSTRUCTION PROFESSIONAL; OR

11 (b) A PERSON RESPONSIBLE FOR INSURANCE MATTERS ON BEHALF
12 OF THE INSURED CONSTRUCTION PROFESSIONAL.

13 (2) EXCEPT AS PROVIDED IN SUBSECTION (3) OF THIS SECTION, AN
14 INSURER SHALL NOT ISSUE AN INSURANCE POLICY FOR THE PROFESSIONAL
15 LIABILITY OF A CONSTRUCTION PROFESSIONAL THAT INCLUDES A
16 PROVISION THAT EXCLUDES OR LIMITS COVERAGE UNDER THE POLICY FOR
17 A CLAIM ARISING FROM BODILY INJURY, PROPERTY DAMAGE, ADVERTISING
18 INJURY, OR PERSONAL INJURY THAT OCCURRED BEFORE THE INCEPTION
19 DATE OF THE POLICY AND IS OTHERWISE AFFORDED COVERAGE BY THE
20 POLICY.

21 (3) AN INSURER MAY ISSUE AN INSURANCE POLICY FOR THE
22 PROFESSIONAL LIABILITY OF A CONSTRUCTION PROFESSIONAL THAT
23 EXCLUDES OR LIMITS COVERAGE UNDER THE POLICY FOR A CLAIM ARISING
24 FROM BODILY INJURY, PROPERTY DAMAGE, ADVERTISING INJURY, OR
25 PERSONAL INJURY THAT OCCURRED BEFORE THE INCEPTION DATE OF THE
26 POLICY IF:

27 (a) THE INSURED HAD ACTUAL KNOWLEDGE BEFORE THE

1 INCEPTION DATE OF THE POLICY OF THE BODILY INJURY, PROPERTY
2 DAMAGE, ADVERTISING INJURY, OR PERSONAL INJURY;

3 (b) THE INSURED HAD ACTUAL KNOWLEDGE BEFORE THE
4 INCEPTION DATE OF THE POLICY OF THE REASONABLE LIKELIHOOD THAT
5 THE INSURED HAS A LEGAL OBLIGATION TO PAY DAMAGES TO ANOTHER
6 PERSON RESULTING FROM THE BODILY INJURY, PROPERTY DAMAGE,
7 ADVERTISING INJURY, OR PERSONAL INJURY; AND

8 (c) THE INSURED KNOWINGLY FAILED TO DISCLOSE KNOWLEDGE
9 DESCRIBED IN PARAGRAPHS (a) AND (b) OF THIS SUBSECTION (1) IN
10 RESPONSE TO THE INSURER'S WRITTEN REQUEST FOR THE INFORMATION
11 BEFORE THE INSURER ISSUED THE POLICY.

12 (4) IN AN ACTION ARISING FROM AN INSURANCE POLICY PROVISION
13 DESCRIBED IN THIS SECTION, THE INSURER SHALL BEAR THE BURDEN OF
14 PROVING BY A PREPONDERANCE OF THE EVIDENCE:

15 (a) THAT THE INSURANCE POLICY PROVISION IS NOT SUBJECT TO
16 SUBSECTION (2) OF THIS SECTION; AND

17 (b) THE MATERIAL FACTS REQUIRED BY PARAGRAPHS (a) TO (c) OF
18 SUBSECTION (3) OF THIS SECTION.

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

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

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