

Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO

REVISED

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

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

Business, Labor and Technology

A BILL FOR AN ACT

101 CONCERNING COMMERCIAL LIABILITY INSURANCE POLICIES ISSUED TO
102 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.

SENATE
2nd Reading Unamended
May 3, 2010

HOUSE
3rd Reading Unamended
April 22, 2010

HOUSE
Amended 2nd Reading
April 21, 2010

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 COVERING OCCURRENCES OF DAMAGE OR INJURY DURING THE
6 POLICY PERIOD AND THAT INSURES A CONSTRUCTION PROFESSIONAL FOR
7 LIABILITY ARISING FROM CONSTRUCTION-RELATED WORK.

8 (3) (a) IN INTERPRETING A LIABILITY INSURANCE POLICY ISSUED TO
9 A CONSTRUCTION PROFESSIONAL, A COURT SHALL PRESUME THAT:

10 (I) COMPLIANCE WITH A CONSTRUCTION PROFESSIONAL'S
11 OBJECTIVE, REASONABLE EXPECTATIONS IS INTENDED;

12 (II) THE ENTIRE POLICY IS TO BE EFFECTIVE AND IS INTENDED TO
13 BE READ HARMONIOUSLY AS A WHOLE;

14 (III) A JUST AND REASONABLE RESULT IS INTENDED;

15 (IV) AMBIGUITY IN THE INTERPRETATION OF A POLICY IS TO BE
16 CONSTRUED IN FAVOR OF COVERAGE;

17 (V) AN INTERPRETATION THAT RENDERS A COVERAGE PROVISION
18 ILLUSORY IS NOT INTENDED; AND

19 (VI) THE WORK OF A CONSTRUCTION PROFESSIONAL THAT RESULTS
20 IN PROPERTY DAMAGE, INCLUDING DAMAGE TO THE WORK ITSELF OR
21 OTHER WORK, IS AN ACCIDENT UNLESS THE PROPERTY DAMAGE IS
22 INTENDED AND EXPECTED BY THE INSURED, BUT NOTHING IN THIS
23 SUBPARAGRAPH (VI) CREATES INSURANCE COVERAGE NOT INCLUDED IN
24 THE CONTRACT OF INSURANCE.

25 (b) THE PRESUMPTION OF SUBPARAGRAPH (I) OF PARAGRAPH (a)
26 OF THIS SUBSECTION (3) IS REBUTTABLE.

27 (4) (a) IN CONSTRUING AN INSURANCE POLICY TO MEET A

1 CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS,
2 THE COURT MAY CONSIDER THE FOLLOWING:

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

5 (II) WHETHER A CONSTRUCTION DEFECT HAS RESULTED, DIRECTLY
6 OR INDIRECTLY, IN BODILY INJURY, PROPERTY DAMAGE, OR LOSS OF THE
7 USE OF PROPERTY.

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

22 (5) IF AN INSURANCE POLICY PROVISION THAT APPEARS TO GRANT
23 OR RESTORE COVERAGE CONFLICTS WITH AN INSURANCE POLICY
24 PROVISION THAT APPEARS TO EXCLUDE OR LIMIT COVERAGE, THE COURT
25 SHALL CONSTRUE THE INSURANCE POLICY TO FAVOR COVERAGE IF
26 REASONABLY AND OBJECTIVELY POSSIBLE.

27 (6) IF AN INSURER DISCLAIMS OR LIMITS COVERAGE UNDER A

1 LIABILITY INSURANCE POLICY ISSUED TO A CONSTRUCTION PROFESSIONAL,
2 THE INSURER SHALL BEAR THE BURDEN OF PROVING BY A PREPONDERANCE
3 OF THE EVIDENCE THAT:

4 (a) ANY POLICY'S LIMITATION, EXCLUSION, OR CONDITION IN THE
5 INSURANCE POLICY BARS OR LIMITS COVERAGE FOR THE INSURED'S LEGAL
6 LIABILITY IN AN ACTION OR NOTICE OF CLAIM MADE PURSUANT TO SECTION
7 13-20-803.5 CONCERNING A CONSTRUCTION DEFECT; AND

8 (b) ANY EXCEPTION TO THE LIMITATION, EXCLUSION, OR
9 CONDITION IN THE INSURANCE POLICY DOES NOT RESTORE COVERAGE
10 UNDER THE POLICY.

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

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

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

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

26 (A) REASONABLY INVESTIGATE THE CLAIM; AND

27 (B) REASONABLY COOPERATE WITH THE INSURED IN THE NOTICE

1 OF CLAIMS PROCESS.

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

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

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

15 10-4-110.4. Exclusion - claims involving loss in progress not
16 known to insured. (1) FOR PURPOSES OF THIS SECTION, "ACTUAL
17 KNOWLEDGE" MEANS THE ACTUAL KNOWLEDGE OF ONLY:

18 (a) A CORPORATE OFFICER, LIMITED LIABILITY COMPANY
19 MANAGER, PRINCIPAL, PARTNER, OR OWNER OF THE INSURED
20 CONSTRUCTION PROFESSIONAL; OR

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

23 (2) (a) A PROVISION IN A LIABILITY INSURANCE POLICY ISSUED TO
24 A CONSTRUCTION PROFESSIONAL EXCLUDING OR LIMITING COVERAGE FOR
25 ONE OR MORE CLAIMS ARISING FROM BODILY INJURY, PROPERTY DAMAGE,
26 ADVERTISING INJURY, OR PERSONAL INJURY THAT OCCURS BEFORE THE
27 POLICY'S INCEPTION DATE AND THAT CONTINUES, WORSENS, OR

1 PROGRESSES WHEN THE POLICY IS IN EFFECT IS VOID AND UNENFORCEABLE
2 UNLESS THE EXCLUSION OR LIMITATION APPLIES ONLY IF THE INSURED HAD
3 ACTUAL KNOWLEDGE OF THE INJURY OR DAMAGES BEFORE THE POLICY'S
4 INCEPTION DATE.

5 (b) AN INSURED'S KNOWLEDGE OF ORDINARY WARRANTY OR
6 PUNCHLIST SERVICE DOES NOT CONSTITUTE ACTUAL KNOWLEDGE FOR THE
7 PURPOSES OF PARAGRAPH (a) THIS SUBSECTION (2).

8 (3) IF IT IS AT ISSUE, THE INSURER SHALL BEAR THE BURDEN OF
9 PROVING IN AN ACTION, BY A PREPONDERANCE OF THE EVIDENCE, THAT:

10 (a) THE INSURANCE POLICY PROVISION IS NOT SUBJECT TO
11 SUBSECTION (2) OF THIS SECTION; OR

12 (b) THE INSURED HAD THE ACTUAL KNOWLEDGE OF THE MATERIAL
13 FACTS DESCRIBED IN SUBPARAGRAPH (I) OR (II) OF PARAGRAPH (a) OF
14 SUBSECTION (2) OF THIS SECTION.

15 (4) IN AN ACTION ARISING OUT OF AN INSURANCE POLICY
16 PROVISION DESCRIBED IN THIS SECTION, THE INSURER SHALL BEAR THE
17 BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE:

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

20 (b) THE MATERIAL FACTS DESCRIBED BY PARAGRAPHS (a) TO (c)
21 OF SUBSECTION (3) OF THIS SECTION.

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

27 (6) THIS SECTION APPLIES ONLY TO AN INSURANCE POLICY THAT

1 COVERS OCCURRENCES OF DAMAGE OR INJURY DURING THE POLICY PERIOD
2 AND THAT INSURES A CONSTRUCTION PROFESSIONAL FOR LIABILITY
3 ARISING FROM CONSTRUCTION-RELATED WORK.

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

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