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An Act

HOUSE BILL 10-1394

BY REPRESENTATIVE(S) Rice, Fischer, Gerou, Labuda, Swalm,
Carroll T., McFadyen;
also SENATOR(S) Scheffel, Carroll M., Gibbs, Tochtrop.

CONCERNING COMMERCIAL LIABILITY INSURANCE POLICIES ISSUED TO
CONSTRUCTION PROFESSIONALS.

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

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

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

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

(II) INSURANCE POLICIES ISSUED TO CONSTRUCTION PROFESSIONALS HAVE BECOME INCREASINGLY COMPLEX, OFTEN CONTAINING MULTIPLE,

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

LENGTHY ENDORSEMENTS AND EXCLUSIONS CONFLICTING WITH THE REASONABLE EXPECTATIONS OF THE INSURED.

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

(b) THE GENERAL ASSEMBLY DECLARES THAT:

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

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

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

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

(2) FOR THE PURPOSES OF THIS SECTION:

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

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

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

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

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

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

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

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

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

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

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

(c) IN CONSTRUING AN INSURANCE POLICY TO MEET A CONSTRUCTION PROFESSIONAL'S OBJECTIVE, REASONABLE EXPECTATIONS, A COURT MAY CONSIDER AND GIVE WEIGHT TO ANY WRITING CONCERNING THE INSURANCE POLICY PROVISION IN DISPUTE THAT IS NOT PROTECTED FROM DISCLOSURE BY

THE ATTORNEY-CLIENT PRIVILEGE, WORK-PRODUCT PRIVILEGE, OR ARTICLE 72 OF TITLE 24, C.R.S., AND THAT IS GENERATED, APPROVED, ADOPTED, OR RELIED ON BY THE INSURER OR ITS PARENT OR SUBSIDIARY COMPANY; OR AN INSURANCE RATING OR POLICY DRAFTING ORGANIZATION, SUCH AS THE INSURANCE SERVICES OFFICE, INC., OR ITS PREDECESSOR OR SUCCESSOR ORGANIZATION; EXCEPT THAT SUCH WRITING SHALL NOT BE USED TO RESTRICT, LIMIT, EXCLUDE, OR CONDITION COVERAGE OR THE INSURER'S OBLIGATION BEYOND THAT WHICH IS REASONABLY INFERRED FROM THE WORDS USED IN THE INSURANCE POLICY.

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

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

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

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

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

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

(II) A COMPLAINT, CROSS-CLAIM, COUNTERCLAIM, OR THIRD-PARTY CLAIM FILED IN AN ACTION AGAINST THE CONSTRUCTION PROFESSIONAL

CONCERNING A CONSTRUCTION DEFECT.

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

(A) REASONABLY INVESTIGATE THE CLAIM; AND

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

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

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

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

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

(2) ANY PROVISION IN AN INSURANCE POLICY ISSUED IN VIOLATION OF THIS SECTION IS VOID AND UNENFORCEABLE AS AGAINST PUBLIC POLICY.

A COURT SHALL CONSTRUE AN INSURANCE POLICY CONTAINING A PROVISION THAT IS UNENFORCEABLE UNDER THIS SECTION AS IF THE PROVISION WAS NOT A PART OF THE POLICY WHEN THE POLICY WAS ISSUED.

(3) THIS SECTION APPLIES ONLY TO AN INSURANCE POLICY THAT COVERS OCCURRENCES OF DAMAGE OR INJURY DURING THE POLICY PERIOD AND THAT INSURES A CONSTRUCTION PROFESSIONAL FOR LIABILITY ARISING FROM CONSTRUCTION-RELATED WORK.

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

SECTION 4. Safety clause. The general assembly hereby finds,

determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Terrance D. Carroll
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Brandon C. Shaffer
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Karen Goldman
SECRETARY OF
THE SENATE

APPROVED _____

Bill Ritter, Jr.
GOVERNOR OF THE STATE OF COLORADO