

## COLORADO ENACTS STATUTE RETROACTIVELY CHANGING DUTIES OF INSURERS WITH RESPECT TO CONSTRUCTION DEFECT CLAIMS

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**O**n May 21, 2010, Colorado Governor Bill Ritter signed into law HB 10-1394, a bill which retroactively changes the manner in which insurers must handle and assess construction defect claims against construction professionals. It may also change how policies issued to Colorado construction professionals are underwritten. The bill was enacted with a Safety Clause, making it immediately effective.

The new law applies to insurance policies issued to construction professionals covering "occurrences of damage or injury during the policy period." According to the bill, construction professionals include not only contractors and subcontractors, but also developers, architects, engineers, and inspectors furnishing services in connection with the design, construction, supervision of construction, or inspection of improvements to real property. Additionally, construction professionals include prior owners of commercial properties at the time construction work was performed.

The key provisions of the new law will have a serious impact by:

- **Voiding Claims-in-Progress or Pre-Existing Damage Exclusions:** It declares void as against public policy any insurance policy provision "excluding or limiting coverage" for injury or damage that occurred before the policy incepted unless the insured knew of such injury or damage at the time the policy was issued.
- **Defining What Constitutes an "Occurrence":** It states that courts should presume the work of a construction professional that results in property damage is accidental – even including damage to the work itself – unless the damage was expected or intended by the insured.
- **Expanding the Duty to Defend:** It declares that insurers must investigate and defend statutory pre-suit notices of claims, regardless of whether another insurer is also defending, and must cooperate with the insured in the notice of claim process.

- **Codifying the Reasonable Expectation Doctrine and Permitting the Use of Extrinsic Evidence in Policy Interpretation:** It permits courts to consider a construction professional's "objective, reasonable expectations" when resolving ambiguities, specifically allowing a court to consider any writing concerning the provision in dispute which is generated, approved, adopted or relied on by (1) the insurer or its parent or subsidiary companies, or (2) any insurance rating or policy drafting organization (e.g., ISO publications).
- **Shifting the Burden for Exceptions to Exclusions:** It shifts the burden of establishing the inapplicability of any exception to an exclusion to the insurer. Previously, an insured had the burden of establishing the applicability of an exception to an exclusion.
- **Establishing Statutory Waiver of Reimbursement:** It states that an insurer cannot withdraw from a defense or seek reimbursement of costs incurred defending uncovered claims unless such rights were reserved when it first accepted or assumed the defense.
- **Retroactive Application:** It declares that the statute applies retroactively to "all insurance policies currently in existence or issued on or after the effective date."

Because of the presumptive retroactive application of this new law, insurers should consider reassessing their coverage positions for any claims in Colorado involving construction professionals.

*The attorneys of Cozen O'Connor will continue to keep our clients apprised of developments in this area. For a further analysis of this legislation and its potential impact on the insurance industry, please contact Christopher S. Clemenson or Mark A. Bartholomaei at O'Connor's Denver, Colo., office. Chris can be reached at 720.479.3894. Mark can be reached at 720.479.3932.*