BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
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Rocky Mountain Sigh: Colorado Governor Signs Pro-Policyholder Law Addressing Coverage for Construction Defects

Could This Be The Start Of An Avalanche?

Binding Authority takes up a lot of time. But that sacrifice is nothing compared to what I did for this issue – put a John Denver song into my head that I now can't get out. Dear readers – let there be no doubt that there is no limit to what I'll do for you.

It is not news that courts are all over the place when it comes to coverage for construction defects. Hundreds of decisions nationally have produced a multitude of rules for deciding what's covered and what's not. By my count, there are five schools of thought: (1) Damage to an insured's own defective workmanship is not covered because it is not an "occurrence;" (2) Damage to an insured's own defective workmanship is an "occurrence," but coverage is precluded by the "your work" exclusion; (3) Damage to an insured's own defective workmanship is not covered because of the "your work" exclusion, but coverage is restored by the "subcontractor exception;" (4) Even if damage to an insured's own defective workmanship is not covered because it is not an "occurrence," damage to other property, caused by the defective workmanship, is an "occurrence" and is covered; and (5) Damage to an insured's own defective workmanship is not covered because it is not an "occurrence," and nor is damage to other property caused by the defective workmanship an "occurrence," and, therefore, it is also not covered. Got all that.

As if there weren't enough cooks in the kitchen, welcome Colorado's Governor Bill Ritter, Jr., who on May 21 signed into law "An Act Concerning Commercial Liability Insurance Policies Issued to Construction Professionals." (HB 10-1394) [Appreciation to Joe Junfola at Admiral Insurance in New Jersey for bringing this significant development to my attention.]

Colorado's new law goes where no other state has gone (as far as I know) when it comes to coverage for construction defects. Rocky Mountain Highhhhh. The Act addresses several issues, including what's an "occurrence;" duty to defend CD claims; the permissible scope of First Manifestation Endorsements; and how to interpret the policy for CD claims -- including the express admissibility of ISO's views (which I'm sure

won't sit well with the boys in Jersey City). Other provisions of the Act simply codify rules of insurance policy interpretation that courts generally apply.

The new Colorado law makes it clear that it was motivated by the Colorado Court of Appeals decision in *General Security Indemnity Co. of Arizona v. Mountain States Mut. Cas. Co., 205 P.3d 529* (Colo. Ct. App. 2009) which the legislature described as not properly considering a construction professional's reasonable expectation that an insurer would defend the construction professional against a CD claim. In general, the decision held that "a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence, regardless of the underlying legal theory pled." Id. at 534.

The Act is not very long. A link to it is here and below are a couple of highlights:

http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont3/C56C7FB9CB7882B8872576E2005F17CE?open&file=1394_enr.pdf

The "Occurrence" Issue: 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.

First Manifestation Endorsements: (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.

The Act applies to all insurance policies currently in existence or issued on or after the effective date.

Colorado's new law is almost heavennnnnnn for policyholders. But the bigger issue is whether this is the start of things to come for construction defect coverage. Will other state legislatures follow Colorado's lead and get into the game for CD coverage or will the Centennial State simply have an asterisk next to its name for this issue? [Just like Colorado's 1990 College Football National Championship following the 5th down play against Missouri].

New Article on Insurance Coverage for "Green" Claims

A quick plug for an excellent article that appears in the current issue of *Mealey's Emerging Insurance Disputes* by my friend Josh Mooney of Ballard Spahr's Philadelphia office that addresses coverage for "green" claims. Specifically, the article explores how

the “Failure to Conform” exclusion in a CGL policy may apply in the context of claims brought against parties (by customers and competitors) for allegedly overstating just how organic or green their products are. These so-called “greenwashing” claims are being filed with frequency and it is inevitable that the Failure to Conform exclusion is going to arise when coverage is sought for them. A copy of Josh’s article is attached.

If you have any questions, please let me know.

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