

# H.B. 10-1394: New Law Governing Insurance Coverage for Construction Defect Claims

by Ronald M. Sandgrund and Scott F. Sullan

*House Bill 10-1394, codified at CRS §§ 10-4-110.4 and 13-20-808, significantly affects insurance coverage for construction defect claims. This article discusses this new law's technical provisions and examines its important implications for Colorado liability insurers, construction professionals, and construction defect claimants.*

In response to concerns regarding how courts were applying the insurance coverage case *General Security Indemnity Co. of Arizona v. Mountain States Mutual Casualty Co. (General Security)*,<sup>1</sup> and the broadening scope of insurance policy “loss in progress” and “known loss” provisions, House Bill (H.B.) 10-1394, codified at CRS §§ 10-4-110.4 and 13-20-808: (1) provides courts guidance when interpreting liability policies issued to construction professionals; (2) deems property damage resulting from construction defects, including damage to a construction professional’s own work, an “accident,” unless the construction professional intended and expected the resulting damage; (3) requires insurers to defend notices of potentially covered claims under Colorado’s Construction Defect Action Reform Act (CDARA);<sup>2</sup> and (4) prescribes that “loss in progress” and “known loss” provisions are effective only if they apply to damage or injury known to the insured construction professional before the policy’s inception date. This article provides an overview of this new law.

## Act Summary

H.B. 10-1394 (Construction Professional Commercial Liability Insurance Act or Act) amends CDARA and the Colorado Insurance Code by codifying certain interpretive rules for occurrence-based liability policies insuring construction professionals. The Act allows courts to consider: (1) an insured’s objective, reasonable expectations concerning coverage; and (2) insurance industry and internal insurance company explanatory materials to help interpret

and apply certain policies.<sup>3</sup> The Act declares that an insurer’s duty to defend is triggered if a potentially covered liability is described in a CDARA notice of claim.<sup>4</sup>

The Act also declares that property damage, including damage to construction work performed by an insured, is presumed to be an “accident” unless the damage was intended and expected by the insured.<sup>5</sup> It clarifies and confirms that the “duty to defend” is a first-party insurance benefit and, thus, likely subject to CRS §§ 10-3-1115 and -1116, sometimes referred to as Colorado’s “prompt payment” statute.<sup>6</sup> This law provides for double damages and attorney fees in the event an insurer unreasonably delays or denies payment of insurance contract benefits to a first-party claimant.<sup>7</sup> Finally, the Act declares that *Montrose*<sup>8</sup> provisions, purporting to exclude coverage for damage or injury that begins before a policy’s inception date and that continues into, worsens, or progresses during the policy period, are ineffective unless the insured knew of the damage or injury before the policy’s inception.<sup>9</sup>

The new law applies to insurance policies in existence on or issued after the Act’s effective date that cover occurrences of damage or injury during the policy period and that insure a construction professional’s liability arising from construction-related work.<sup>10</sup> The Act’s procedural and remedial aspects, such as its evidentiary and burden of proof provisions, probably will be applied retroactively; retrospective application of its substantive elements to previously existing insurance policies depends on the circumstances and awaits court review. If a court can resolve a coverage dispute under

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the common law and reach the same result provided by the statute, such retrospective analysis would be moot.

Although the Act applies only to liability policies issued to construction professionals, because the same, standardized wording is used in policies insuring most other Colorado business risks, the Act's effects may broadly resonate. Colorado insureds can be expected to argue that the adoption of the Act supports the conclusion that some standardized insurance policies issued to construction professionals are adhesion contracts; Colorado courts appear to have already tentatively embraced this conclusion.<sup>11</sup>

## The Act's History

Support for the Act arose after a series of construction defect insurance coverage decisions issued, followed by a number of liability insurers relying on those decisions to deny any duty to defend or indemnify Colorado construction professionals against claims arising from construction-related defects.<sup>12</sup> The first of these decisions, *General Security*, and two later U.S. District Court for the District of Colorado decisions, were the subject of a November 2009 article in *The Colorado Lawyer*.<sup>13</sup> That article noted that the procedural posture of the *General Security* coverage appeal was unusual insofar as it involved only insurers. The article suggested that the parties did not bring pertinent legal arguments and Colorado precedent to the court of appeals' attention, and that large parts of the opinion may constitute *dicta*.

Three U.S. District Court opinions followed, two of which read *General Security* broadly as precluding coverage for, and any duty to defend arising from, property damage to the insured's previously performed work arising from construction defects.<sup>14</sup> Both of these cases, *Greystone Construction, Inc. v. National Fire & Marine Insurance Co. (Greystone)*,<sup>15</sup> and *United Fire & Casualty Co. v. Boulder Plaza Residential*<sup>16</sup> are on appeal. On June 3, 2010, the U.S. Tenth Circuit Court of Appeals certified the following question framed by the *Greystone* appeal to the Colorado Supreme Court for its consideration: "Is damage to non-defective portions of a structure caused by conditions resulting from a subcontractor's defective work product a covered 'occurrence' under Colorado law?"<sup>17</sup> On June 23, 2010, the Colorado Supreme Court declined to accept the certified question, and a ruling by the Tenth Circuit in *Greystone* may issue soon.<sup>18</sup>

The Act suggests that aspects of *General Security* were decided or were being viewed in a way that the legislature believed contravened Colorado precedent and public policy. Consistent with published insurance industry policy interpretive materials allegedly contradicting the insurers' coverage position in *Greystone*,<sup>19</sup> an insurance industry attorney and lobbyist testified during the legislative hearings that *General Security* and *Greystone* were a "shock" to the insurance industry and "not the rule of law," "not the way courts have ruled in other jurisdictions," and that the rulings "took it too far."<sup>20</sup> The Act found bipartisan cosponsorship.<sup>21</sup>

Support for the Act also sprung from the insurance industry's use of what are commonly referred to as *Montrose* provisions, intended to bar coverage when an insured knows before its policy's inception date of damage or injury that later gives rise to a covered claim. These *Montrose* provisions morphed into what are now frequently referred to as super-*Montrose* provisions that bar coverage without regard to whether the insured knew of the injury or damage before the policy's inception date, as long as the injury or damage, even if hidden and unknown to anyone, began before that date.

## The Act's Framework

The Act consists of two main parts. The first part, CRS § 13-20-808, formalizes certain rules for construing coverage for construction professionals under "occurrence-based" commercial liability insurance policies, such as commercial general liability insurance, multi-peril insurance, and liability coverages found in builder's risk policies. Occurrence-based insurance coverage typically is triggered by the occurrence or happening of injury or damage during the policy period, but the statute's reach is limited to policies that insure a "construction professional for liability arising from construction-related work."<sup>22</sup> The Act was not intended to apply to errors and omissions coverage written on a "claims made" basis for persons such as design professionals.

The first part also addresses an insurer's duty to defend a construction professional against a property owner's notice of claim served under CDARA. The second part, CRS § 10-4-110.4, voids as against public policy under certain conditions insurance provisions that purport to exclude coverage for property damage that, unknown to the insured, begins before an occurrence-based policy's inception date and that continues or worsens during the policy period.

### First Part—Policy Construction and Duty to Defend

The Act begins by finding that insurance policies "have become increasingly complex, often containing multiple, lengthy endorsements and exclusions conflicting with the reasonable expectations of the insured."<sup>23</sup> The Act codifies and modifies certain rules of insurance policy construction approved by the Colorado Supreme Court. The Act declares that insurance coverage and an insurer's duty to defend shall be interpreted broadly in favor of the insured.<sup>24</sup> The Act also provides:

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 policy to favor coverage if reasonably and objectively possible.<sup>25</sup> The Act requires courts to 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.<sup>26</sup>

This provision was designed to parallel the holdings of the Texas and Florida Supreme Courts,<sup>27</sup> to embrace the Colorado Supreme Court's description of what renders an event "accidental" as expressed in *Hecla Mining Co. v. N.H. Ins. Co.*,<sup>28</sup> and to negate any inference to the contrary that some might draw from *General Security*. This section, however, ensures that a court still should consider application of any relevant exclusions, because the statute is not intended to "create[] insurance coverage that is not included in the insurance policy."<sup>29</sup> It also makes clear that the Act does not require an insurer to provide "coverage for damage to an insured's own work unless otherwise provided in the insurance policy."<sup>30</sup>

The Act is directed specifically at the perceived failure of *General Security* to "properly consider a construction professional's reasonable expectation that an insurer would defend the construction professional against an action or [a CDARA] notice of claim."<sup>31</sup> The Act allows courts to consider a construction professional's objective, reasonable expectations when there is a finding of an insurance policy ambiguity.<sup>32</sup> In construing the policy to meet these

reasonable expectations, a court may consider: (1) “the object sought to be obtained by the construction professional” in purchasing the insurance; and (2) “whether a construction defect has resulted, directly or indirectly, in bodily injury, property damage, or the loss of use of property.”<sup>33</sup> Because the purpose of the Act is to resolve reasonable doubts in favor of an insured construction professional’s liability coverage, construction professionals will argue that preexisting case law permitting courts to consider extrinsic evidence in making the threshold determination whether a policy is ambiguous likely was not intended to be supplanted by the Act.<sup>34</sup>

The Act also allows courts to consider as part of the evidentiary record in evaluating an insured’s reasonable expectations certain non-privileged writings generated, approved or adopted, or relied on by an insurer (or its parent or subsidiary) or an insurance rating or policy-drafting organization pertaining to the policy provision in dispute.<sup>35</sup> Such writings specifically include matters published by the Insurance Services Offices, Inc. (ISO) or its predecessor or successor organizations, and may include the Fire, Casualty & Surety (FC&S) Bulletins issued by the National Underwriter Company.<sup>36</sup>

Consideration of these industry publications was mandated because the insurance industry had published materials construction professionals contended acknowledged coverage for consequential property damage to an insured’s own work as a result of defective construction rendered by the insured’s subcontractors;<sup>37</sup> however, none of these materials was considered by *General Security* or cases

construing *General Security*. These writings also might include internal company memoranda, training materials, and perhaps reservation of rights or coverage acknowledgment letters pertaining to substantially similar claims; however, locating and producing these materials may be burdensome or expensive and require safeguards against disclosure of a customer’s confidential information. Critically, such industry writings may not be used to restrict, limit, exclude, or condition coverage or the obligation of the insurer beyond that which is reasonably inferred from the words used in the insurance contract.<sup>38</sup>

The Act also declares which party—insurer or insured—bears the burden of proof, providing that if an insurer disclaims or limits coverage, it bears the burden of proving by a preponderance of the evidence that: (1) any policy limitation, exclusion, or condition bars or limits coverage for the insured’s legal liability in an action or CDARA notice of claim concerning a construction defect; and (2) any exception to the limitation, exclusion, or condition does not restore coverage.<sup>39</sup> While (1) codifies a rule previously adopted by the Colorado Supreme Court, (2) imposes a burden of proof on insurers not previously and unambiguously imposed on them by prior case law.<sup>40</sup>

The Act then addresses an insurer’s duty to defend, providing that this duty is triggered by: (1) a potentially covered liability described by a CDARA notice of claim; or (2) a potentially covered liability described in a complaint, cross-claim, counterclaim, or third-party claim in a lawsuit or arbitration concerning a construction defect.<sup>41</sup> To date, Colorado courts had not decided whether

an insurer owes a duty to defend an insured against a CDARA notice of claim.<sup>42</sup>

In discharging its duty to defend, the insurer must reasonably investigate the claim and reasonably cooperate with the insured's participation in CDARA's notice of claim process regardless of whether other insurers owe a duty to defend.<sup>43</sup> The insurer is not required to retain legal counsel for the insured or pay any sums toward settlement of the notice of claim not covered by its policy.<sup>44</sup> This statutory imposition of a duty to defend a CDARA notice of claim was adopted, in part, to reduce defect litigation by enhancing pre-suit settlement possibilities, because the notice of claim process often had been rendered impotent due to a lack of insurer involvement.

An insurer may deny its duty to defend only if authorized by law, and it may not withdraw its defense or seek reimbursement from an insured of any defense costs expended unless permitted by law and unless the insurer previously reserved its right to do so in writing when it first accepted or assumed the defense.<sup>45</sup> Also, the Act clarifies and confirms that the "duty to defend" is a first-party insurance benefit.<sup>46</sup> Thus, the duty to defend likely is subject to the prompt payment statute, CRS §§ 10-3-1115 and -1116.<sup>47</sup>

### *Second Part—Loss in Progress*

All insurance contracts implicitly embrace the "fortuity" or "accident" principle.<sup>48</sup> Insurance generally is designed to insure against "fortuities"—that is, losses or liabilities that are not certain to occur.<sup>49</sup>

A fortuitous event . . . is an event which, so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; *it may even be a past event, . . . provided that the fact is unknown to the parties.*<sup>50</sup>

The differences and distinctions among the "known loss," "known risk," and "loss in progress" doctrines are not well settled and often are confused.<sup>51</sup> None of the doctrines has yet been expressly accepted in Colorado. However, in *Hoang v. Monterra Homes LLC*, the court of appeals noted, without expressly recognizing the known loss doctrine:

Under the 'known loss' doctrine, coverage will not be defeated unless, at the time it entered into the insurance contract, the insured had a legal obligation to pay damages to a third party in connection with a loss.<sup>52</sup>

The court affirmed the trial court's refusal to apply the doctrine where the insured did not have actual knowledge of a covered loss or of any legal obligation to pay damages before inception of any of the policies.<sup>53</sup>

In response to uncertainty regarding the common law doctrine, many policies since 1995 have included language limiting coverage for property damage that began before the policy inception.<sup>54</sup> These limitations may be incorporated in the coverage grant or appear as a separate exclusion, and sometimes are referred to as *Montrose* provisions, after the California case whose holding they are intended to limit or negate.<sup>55</sup> The limiting language takes many forms, some based on standardized ISO forms, others uniquely

crafted by insurers. Most attempt to “telescope” coverage for long-term or progressive property damage that occurs across multiple policy periods into a single policy year. Only recently has a body of case law begun to emerge so as provide guidance to practitioners regarding the contours and reach of this limiting language. Courts have arrived at different results when applying *Montrose* (and even more onerous super-*Montrose*) exclusions, often turning on complicated facts and the unique policy language employed.<sup>56</sup>

As discussed during the Act’s debate, many insurers were coupling use of such *Montrose* provisions with the holding in *Public Service Co. v. Wallis & Cos.*<sup>57</sup> to greatly circumscribe coverage. In *Public Service Co.*, the court created a method for apportioning insurance liability for gradual or progressive harms across multiple policy periods, as well as uninsured periods.<sup>58</sup>

[W]here property damage is gradual, long-term, and indivisible, the trial court should make a reasonable estimate of the portion of the ‘occurrence’ that is fairly attributable to each year by dividing the total amount of liability by the number of years at issue. . . .<sup>59</sup> The trial court should then allocate liability accordingly to each policy-year, taking into account primary and excess coverage, SIRs [self-insured retentions], policy limits, and other insurance on the risk.<sup>60</sup>

*Public Service Co.* instructed that courts generally should allocate liability according to the time-on-the-risk method, taking into account the degree of risk assumed where appropriate, and holding the policyholder responsible for self-insured retentions per policy year where applicable.<sup>61</sup> The court added, however, that in some cases, such apportionment need not be “precisely attributed,” and the court “should make a ‘reasonable estimate’ of the portion of the ‘occurrence’ that is fairly attributable to each year.”<sup>62</sup>

By coupling these *Montrose* provisions with *Public Service Co.*’s apportionment rule, insurers, whose policies defined a covered occurrence as including property damage resulting from “continuous or repeated exposure to substantially the same general harmful conditions,” were arguing that, in the event of the insured’s liability for \$100,000 in damages for long-term, progressive property damage spanning, for example, three policy years, the *Montrose* or super-*Montrose* provision, as the case might be, barred coverage during the last two years while the *Public Service Co.*’s apportionment rule only allowed allocation of one-third of the damages (\$33,333) to the first policy year.<sup>63</sup> In light of the perceived unfairness of this result, the legislature effectively adopted its own statutory known loss and loss in progress rules that attempt to balance insurer and insured interests.

The Act provides that an insurer shall not issue a liability policy to a construction professional that includes a provision

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 [if the exclusion or limitation applies to injury or damage that] was unknown to the insured at the policy’s inception date.<sup>64</sup>

The terms “bodily injury,” “property damage,” “advertising injury,” and “personal injury,” are terms of art in the insurance industry and similarly defined by most standardized ISO liability policies; however, one may reasonably anticipate that these statutory terms will be construed broadly to include any damage or injury covered by an occurrence-based commercial liability policy.

If some other, separate injury or damage unknown to the insured continues, worsens, or progresses when the policy is in effect, presumably the exclusion would not apply to this distinct injury or damage. In the event of a dispute regarding whether certain injury or damage is sufficiently distinct to avoid application of the exclusion, the Act places the burden of proving this fact and any allocation between the covered and uncovered portions of the injury or damage on the insurer.<sup>65</sup>

Any liability insurance policy provision violating the Act is rendered “void and unenforceable as against public policy.”<sup>66</sup> Insurers may argue that noncompliant provisions should be reformed to satisfy the Act, while construction professionals may argue that such provisions must be stricken in their entirety because the Act provides that a court shall construe an insurance policy containing such noncompliant provision “as if the provision was not a part of the policy when the policy issued.”<sup>67</sup>

## Act’s Effective Date and Retroactive and Retrospective Effect

The Act applies to all insurance policies in existence or issued on or after the Act’s effective date of May 21, 2010.<sup>68</sup> Insurers can be expected to argue that “in existence” means that the policy must have been “in effect” as of May 21, 2010. Construction professionals will argue that a policy was “in existence” if it had not been rescinded as of May 21, 2010, noting that an insurer’s duty to defend or indemnify under an occurrence policy often is triggered by a suit filed long after the policy period has expired and the policy no longer is “in effect,” but the policy still is “in existence.”

Presumably, the Act may be applied retroactively and retrospectively and, therefore, constitutionally, to the extent it effects changes that are remedial or procedural (such as evidentiary rules and burdens of proof),<sup>69</sup> and such retroactive intent may be assumed unless a contrary intent is expressed by the legislature.<sup>70</sup> To the extent the law “impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,” constitutional challenges may exist to its retrospective, substantive application to existing contracts or contract disputes.<sup>71</sup> Disputes regarding the Act’s retrospective application will be mooted if the court finds that the same result would obtain under the common law predating the Act’s passage as would obtain if the Act was applied.

A law is not retrospective, however, “merely because the facts upon which it operates occurred before” its adoption.<sup>72</sup> When a statute is found to be retroactive, the Colorado Supreme Court has prohibited retrospective application of the statute when the reasonable expectations and substantial reliance of a party vested before the enactment of the statute.<sup>73</sup> An important factor in this analysis is whether a change in the law was reasonably foreseeable at the time of contracting, especially if the business or transaction at issue is highly regulated by Colorado statute.<sup>74</sup>

Construction professionals can be expected to argue that even if the Act in some specific instances allegedly impairs vested rights acquired under existing laws, or allegedly creates a new obligation or duty in respect to transactions or considerations already past, be-

cause Colorado insurers’ conduct is a highly regulated and ever-changing subject of legislative action, the law may be applied both retroactively and retrospectively.<sup>75</sup> In addition, construction professionals likely will rely on the fact that the Act expressly provides that for 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” by the Act in the interpretation of policies “that have been and may be issued to construction professionals.”<sup>76</sup> Insurers will counter that they already have charged and accepted a premium commensurate with the risks insured by their existing policies, and that any retrospective broadening of the substantive scope of those risks is unfair and unconstitutional.

## Conclusion

The Act is a narrowly drawn attempt to legislate commercial liability insurance coverage unique among the fifty states. The Act codifies and further details some long-standing common law rules of insurance policy construction and burdens of proof. It also describes the scope of an insurer’s duty to defend a pre-suit notice of claim under CDARA. The Act adopts a statutory version of the known loss and loss in progress rules that balances an insured construction professional’s reasonable expectation of coverage for fortuitous liabilities against an insurer’s legitimate concern that it not be required to insure against past events known to the insured that are deemed likely to result in the insured’s legal liability to pay damages. Some construction professionals testified during the legislative hearings that the Act might result in premium increases, the withdrawal of some insurers from the market, and stricter underwriting requirements, but they explained that the greater certainty and fairness the Act would afford was worth this cost.

## Notes

1. *General Security Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo.App. 2009).
2. CRS § 13-20-803.5.
3. CRS § 13-20-808(4)(a), (4)(b)(I), and (4)(c).
4. CRS § 13-20-808(7)(a)(I).
5. CRS § 13-20-808(3).
6. CRS § 13-20-808(1)(b)(II).
7. CRS §§ 10-3-1115(1)(a) and -1116(1).

8. *Montrose* provisions take their name from the California Supreme Court's liability insurance coverage decision *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995).

9. CRS § 10-4-110.4(1) and (2).

10. H.B. 10-1394, Section 3 (Applicability); CRS §§ 13-20-808(2)(a) to (d) and 10-4-110.4(1) and (3).

11. See, e.g., *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 645-46 (Colo. 2005) (adopting "notice-prejudice" rule due, in part, to the "adhesive nature of insurance contracts").

12. See generally, April 7, 2010 House Testimony on H.B. 10-1394 (Business Affairs and Labor Committee); April 28, 2010 Senate Testimony on H.B. 10-1394 (Business, Labor, and Technology Committee).

13. See *Graves et al.*, "Shoddy Work, Negligent Construction, and Reconciling the Irreconcilable Under the CGL Policy," 38 *The Colorado Lawyer* 43 (Nov. 2009).

14. Compare *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 2009 U.S. Dist. LEXIS 73055, 2009 WL 2568521 (D.Colo. Aug. 18, 2009) and *United Fire & Casualty Co. v. Boulder Plaza Residential*, No. 06-cv-00037-PAB-CBS, 2010 U.S. Dist. LEXIS 14257, 2010 WL 420046 \_\_\_ F.Supp.3d \_\_\_ (D.Colo. Feb. 1, 2010) (construing *General Security's* holding broadly against coverage arising from construction defects) with *Am. Family Mut. Ins. Co. v. Teamcorp, Inc.*, No. 07-cv-00200-WYD-MJW, 2009 U.S. Dist. LEXIS 87173, 2009 WL 3077836 (D.Colo. Sept. 22, 2009) (construing *General Security's* "corollary" rule broadly in favor of coverage for consequential damage arising from construction defects).

15. *Greystone Constr., Inc.*, *supra* note 14 (appeal filed Sept. 17, 2009, No. 09-1412).

16. *United Fire & Casualty Co.*, *supra* note 14 (appeal filed Feb. 24, 2010, No. 10-1056).

17. "Certification of Question of State Law Order," *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, No. 09-1412, Doc. No. 01018433257 at \*2 (10th Cir. June 3, 2010).

18. Order of Court, *Greystone Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, No. 2010SA176 (Colo., June 21, 2010).

19. See Opening Brief of Appellants, *Greystone Constr.*, *supra* note 14 at 39-47 (and Exhibits 5-7 thereto) (Nov. 18, 2009). One of the *Greystone* appellants was an insurance company.

20. See House Testimony on H.B. 10-1394 at \*21 (lines 2-11) (April 7, 2010) (Business Affairs and Labor Committee).

21. The Bill's co-sponsors were Representatives Joe Rice (D), Randy Fischer (D), Cheri Gerou (R), Jeanne Labuda (D), Spencer Swalm (R), Terrance Carroll (D), Liane McFadyen (D), and Senators Mark Scheffel (R), Morgan Carroll (D), Dan Gibbs (D), Lois Tochtrop (D).

22. See CRS § 13-20-808(2)(d). See generally *Ballow v. PHICO Ins. Co.*, 875 P.2d 1354, 1357 (Colo. 1993) (distinguishing occurrence from claims-made policies on the basis that coverage under the former is triggered regardless of when notice of claim is received, and coverage under the latter depends on when the notice is received). See also *Leprino v. Nationwide Prop. & Cas. Ins. Co.*, 89 P.3d 487, 490 (Colo.App. 2003) ("Occurrence policies protect an insured against claims made by third parties based on occurrences within the policy period that result in injury to the third parties' property interests.").

23. CRS § 13-20-808(1)(a)(II).

24. CRS § 13-20-808(1)(b)(I) and (II).

25. CRS § 13-20-808(5).

26. CRS § 13-20-808(3).

27. See *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 887 (Fla. 2007).

28. See *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1087 (Colo. 1991), where the court said:

In general, *what make injuries or damages expected or intended rather than accidental* are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended

the damages, or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act. . . . (emphasis added).

See also *State Farm Mut. Auto Ins. Co. v. McMillan*, 925 P.2d 785, 792-93 (Colo. 1996) (because policy term "accident" is not defined, the term is ambiguous and determination of whether an accident had occurred would be viewed from standpoint of the insured).

29. CRS § 13-20-808(3)(b).

30. CRS § 13-20-808(3)(a).

31. CRS § 13-20-808(1)(b)(III).

32. CRS § 13-20-808(4)(a).

33. CRS § 13-20-808(4)(b)(I) and (II).

34. See *KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769, 776-77 (Colo. 1985) (holding that a court may consider extrinsic evidence of usage and circumstances to determine whether ambiguity exists). See also *Roberts v. Am. Family Mut. Ins. Co.*, 113 P.3d 164, 167 (Colo.App. 2004) (where a contract term has a special technical meaning or usage unique to an industry, parol evidence may be considered in giving meaning to the term), *revid on other grounds*, 144 P.3d 546 (Colo. 2006).

35. CRS § 13-20-808(4)(c).

36. *Id.* The Fire, Casualty & Surety (FC&S) Bulletins are "used by insurance agents and brokers to interpret standard insurance policy provisions." *Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648, 652 (9th Cir. 1988).

37. See, e.g., Insurance Services Offices, Inc. (ISO) Circular, Commercial General Liability Program Instructions Pamphlet (July 15, 1986); FC&S Bulletins: Public Liability at Aa 16-17 (Sept. 1993); FC&S Bulletins: Public Liability, M.10-3 (Feb. 2002). Even had such materials been part of the record, absent this new law, Colorado's parol evidence rule might have precluded their consideration. But see *KN Energy, Inc.*, *supra* note 34 (extrinsic evidence of usage and circumstances may be used to determine whether ambiguity exists); *Roberts*, *supra* note 34 (parol evidence may be considered in giving meaning to contract term that has a special technical meaning or usage unique to an industry).

38. CRS § 13-20-808(4)(c).

39. CRS § 13-20-808(6)(a) and (b).

40. Cf. *Public Serv. Co. v. Wallis & Cos.*, 955 P.2d 564, 568 (Colo.App. 1997) (insured bears burden of proving exception to pollution exclusion), *revid on other grounds*, 986 P.2d 924 (Colo. 1999).

41. CRS § 13-20-808(7)(a)(I) and (II).

42. Most ISO policies require that the insurer defend the insured against any "suit seeking damages because of property damage," and define "suit" as including a "civil proceeding in which damages are alleged because of property damage," or "any other alternate dispute resolution proceeding in which such damages are claimed and to which the insured must submit." Arguably, the Construction Defect Action Reform Act's (CDARA) notice of claim process may qualify as an "alternate dispute resolution proceeding," a phrase typically undefined by commercial general liability policies.

43. CRS § 13-20-808(7)(b)(I)(A) and (B).

44. CRS § 13-20-808(7)(b)(II).

45. CRS § 13-20-808(7)(b)(III).

46. CRS § 13-20-808(1)(b)(II).

47. See CRS § 10-3-1115(1)(a) (an insurer "shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant") and (b)(I) ("First-party claimant" means a person or entity "asserting an entitlement to benefits owed directly to or on behalf of an insured under an insurance policy"). But compare *Stresscon Corp. v. Rocky Mtn. Struc., Inc.*, No. 09-cv-3252 (Denver District Court April 22, 2010) (liability insurer's failure to defend subject to statute) with *New Salida Ditch Co. v. United Fire & Cas. Inc.*, No. 08-cv-00391-JLK, 2009 WL 5126498, 2009 U.S. Dist. LEXIS 118377, (D.Colo. Dec. 18, 2009) (*contra*). Cf. *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 703 (Tex.App. 2006) (although liability policies are termed "third-party" policies, the duty to defend is a form of first-party insurance contained within

the liability policy); *Rx.Com Inc. v. Hartford Fire Ins. Co.*, 364 F.Supp.2d 609, 617 (S.D.Tex. 2005) (demand for defense was “first-party claim” under statute mandating prompt payment of claims). For a recent discussion of Colorado’s prompt payment statute, see Kristofco, “CRS §§ 10-3-1115 and -1116: Providing Remedies to First-Party Claimants,” 39 *The Colorado Lawyer* 69 (July 2010).

48. “Insurance” means a contract whereby one, for consideration, undertakes to indemnify another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies.” CRS § 10-1-102(12) (emphasis added). See also *General Security*, supra note 1 at 534-35 (discussing implied “fortuity” condition).

49. *General Security*, supra note 1 at 529. Cf. *Hunt v. Aetna Casualty & Surety Ins. Co.*, 387 P.2d 405, 406-07 (Colo. 1963); *Adams-Arapahoe Joint School Dist. v. Cont’l Ins. Co.*, 891 F.2d 772, 774-75 (10th Cir. 1989).

50. See *Adams-Arapahoe Joint Sch. Dist.*, supra note 49 at 775, quoting *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 562, 564 (10th Cir. 1978).

51. For a general discussion of these doctrines and their nuances, see Medaglia et al., “The Status of Certain Nonfortuity Defenses in Casualty Insurance Coverage,” 30 *Tort & Ins. L.J.* 943 (Summer, 1995). See also *Stonebenge Engineering Corp. v. Employers Ins. Of Wausau*, 201 F.3d 296 (4th Cir. 2000) (rejecting application of known loss doctrine in construction defect progressive damage case where notice of claim not proven to establish that insured knew that imposition of liability on it was substantially certain to occur in light of availability of various defenses and existence of other, potential causes of damage).

52. *Hoang v. Monterra Homes (Powderhorn), LLC*, 129 P.3d 1028, 1034 (Colo.App. 2003), *rev’d on other grounds*, *Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007).

53. *Id.*

54. FC&S Bulletins, Public Liability, M.19-1 through M.19-10 (Nat’l Underwriter Co., Nov. 2003) (lengthy discussion of *Montrose* exclusion from insurance industry’s perspective).

55. This California case refused to imply such an exclusion into a liability policy. *Montrose Chem. Corp.*, supra note 8 at 904-06 (discussing the loss-in-progress doctrine, and holding that as long as there is any contingency with respect to liability, an insurable interest exists). See also FC&S Bulletins, Public Liability, A.1-2 (Nat’l Underwriter Co., 2007) (referring to “known loss” (*Montrose*) exclusions); FC&S Bulletins, supra note 54 (discussing same).

56. See, e.g., *Trinity Universal Ins. Co. v. Northland Ins. Co.*, No. C07-0884-JCC, 2008 U.S. Dist. LEXIS 72196 at \*1-\*7, 2008 WL 4386760 at \*4-\*6 (W.D.Wash. Sept. 23, 2008) (known loss provision precluded coverage for insured subcontractor where subcontractor had notice of water intrusion and damage to condominiums allegedly caused by its stucco work before insurance policy incepted); *Essex Ins. Co. v. H&H Land Dev. Corp.*, 525 F.Supp.2d 1344, 1347 (M.D.Ga. 2007) (disputed issues of fact existed whether, under “known loss exclusion,” complaints by one homeowner regarding groundwater contamination under his property were sufficient to make developer aware that such property damage was occurring on two other homeowners’ properties, especially where insured believed its prior remedial measures had eliminated the problem of excess runoff); *Westfield Ins. Co. v. Sheehan Constr. Co., Inc.*, 580 F.Supp.2d 701, 716 (S.D.Ind. 2008) (damage to new homes constructed by insured general contractor was excluded from coverage only if insured knew before policy commenced that property damage had occurred).

57. *Public Service Co. v. Wallis & Cos.*, 986 P.2d 924 (Colo. 1999).

58. *Id.* at 939.

59. *Id.* at 940.

60. *Id.* A “self-insured retention” (SIR) is like a deductible; it is an amount of money that the policyholder must pay before the insurer’s indemnity payment obligation is triggered.

61. *Id.* at 940-41. The Court also held that if liability is allocated according to the time-on-the-risk method, the insurer is not also entitled to

a set-off for amounts the policyholder receives in settlement from other insurers. *Id.* at 935.

62. *Id.* at 940. Cf. *Hoang*, supra note 52 at 1032 (approving “front-loading” allocation of property damage to earlier policy periods when most significant repairs first became necessary, even if damage not obvious), *rev’d on other grounds*, *Hoang v. Assurance Co. of Am.*, supra note 52 at 798.

63. Another inadvertent effect of *Public Service Co.*’s apportionment rule is to render it very difficult to trigger any excess or umbrella policies because they require exhaustion of the underlying limits, and such exhaustion rarely occurs if the primary coverage liability is prorated across policy periods and coverage under later policies is barred by *Montrose* provisions.

64. CRS § 10-4-110.4(1). The Act does not resolve the question of whether an insured’s knowledge of a third-party allegation or claim of the insured’s liability for property damage alone constitutes knowledge of any actual property damage itself; however, language expressly permitting insurers to exclude coverage based solely on the insured’s knowledge of a claim or suit was deleted from the bill during the amendment process.

65. See CRS § 13-20-808(6) (insurer bears burden of proving by preponderance of the evidence that policy provision bars or limits coverage). Cf. *Bohrer v. Church Mut. Ins. Co.*, 965 P.2d 1258, 1264 (Colo. 1998) (when both covered and noncovered conduct “causes injury resulting in damages, and the excluded conduct has not occurred in close temporal and spatial relationship to the covered conduct,” the exclusion will not defeat coverage); *State v. Allstate Ins. Co.*, 201 P.3d 1147, 1165-67 (Cal. 2009) (questions of fact existed regarding coverage apportionment between covered and uncovered losses; if damages indivisible, all damages are covered; burden on insurer to prove divisibility of damages).

66. CRS § 10-4-110.4(2).

67. CRS § 10-4-110.4(3).

68. See H.B. 10-1394, Section 3 (Applicability), signed into law by Governor Bill Ritter on May 21, 2010. Historically, when a bill contains a “safety clause,” as here in section 4, it is immediately effective on signing. See generally *Van Kleeck v. Ramer*, 156 P. 1107 (Colo. 1916). See also January 18, 2008, Legal Memorandum (Office of Legislative Legal Services).

69. See *In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002). See also *Day v. Madden*, 48 P. 1053, 1056 (Colo.App. 1897) (right to have controversy determined by existing evidentiary rules not a vested right; evidentiary changes are not retrospective because they are to be applied in future trials and do not affect previous trials); *United Securities Corp. v. Bruton*, 213 A.2d 892, 893, 894 (D.C.App. 1965) (holding “[t]here is no vested right in a rule of evidence, and a statute relating solely to procedural law, such as burden of proof and rules of evidence, applies to all proceedings after its effective date even though the transaction occurred prior to its enactment.”) The *United Securities Corp.* rule was adopted by the Colorado Court of Appeals in *Krumback v. Dow Chemical Co.*, 676 P.2d 1215, 1218 (Colo.App. 1983).

70. See *Suley v. Board of Ed.*, 633 P.2d 482, 483 (Colo.App. 1981).

71. *In re Estate of DeWitt*, supra note 69 at 854, quoting *Denver S. Park & Pac. Ry. Co. v. Woodward*, 4 Colo. 162, 167 (1878).

72. *Id.* at 855, quoting *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 445 (Colo. 2000).

73. *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006).

74. *Dewitt*, supra note 69 at 860 (retrospective application of law proper because insurance industry and probate process both highly regulated by statute). Cf. *Alliance of Auto. Mfgs. v. Gwadosky*, 304 F.Supp.2d 104, 115 (D.Me. 2004) (“[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them . . . courts look long and hard at the reasonable expectations of the parties [and] . . . examine whether the parties operated in a regulated industry”) (internal quotes and citations omitted).

75. CDARA, of which the Act is a part, was adopted in 2001 and has been revised three times since then. Colorado’s insurance code, of which the Act also is a part, undergoes regular revision.

76. CRS § 13-20-808(1)(b)(IV). ■

