ONE COURT INTERPRETS NEWLY ENACTED CONSTRUCTION DEFECTS LEGISLATION AS MATTER OF LAW. WILL OTHERS DO THE SAME?

IN THAT THERE IS NO APPELLATE LAW AT THIS point interpreting or applying the recently enacted HB 10-1394, I find even district court orders on the topic to be very interesting. In Colorado Pool Systems, Inc., et al. v. Scottsdale Insurance Company, et al., The Honorable Christopher C. Cross set forth the pertinent facts as follows in an October 4, 2010 order:

> Plaintiff Colorado Pool Systems ("Colorado Pool") claims for breach of contract and negligent misrepresentation arise out of a general commercial liability insurance policy, No. CLS1112693, purchased from Scottsdale ("Policy"). The Policy's effective date was from April 25, 2005, to April 26, 2006. Colorado Pool made a claim under the insurance policy for the costs to repair a defectively constructed swimming pool. As of September, 2006, Colorado Pool had a contractual agreement with White Construction Group, LTD, to construct a swimming pool that was ultimately defective because metal bars were protruding through the concrete. Because the contractual agreement with White Construction required remedy for the defective pool, Colorado Pool requested preapproval from Scottsdale to be reimbursed for losses resulting from demolishing and reconstructing the pool. The relevant parts of the Policy provide:
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> **This insurance applies to "bodily injury" and "property damage" only if:**
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; Policy at Page 1 of 15.
>
> **The Policy defines the word "occurrence" as follows:** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Policy at Page 14 of 15.
>
> **The Policy does not define the word "accident." However, Black's Law Dictionary defines accident as follows:** 1. An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. 2. Equity practice. An unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct. *Black's Law Dictionary* 15 (7th ed. 1999).

New legislation: Liability coverage law or fact?


David McLain

Colorado recently adopted new legislation relating to insurance coverage for construction defects. C.R.S. § 13-20-808 (promulgated in H.B. 10-1394). The new law essentially states that faulty workmanship constitutes an "occurrence" and, thus, construction defect claims generally fall within a general liability policy's insuring agreement.

In light of the enactment of this new legislation, the Court requested briefs on how the new legislation affects these proceedings, and invited comment on whether liability coverage under the insurance policy is a question of law or fact. The parties have briefed these issues in full and the court will now address these issues.

The briefs referred to were Scottsdale's Combined Renewed Motion for Summary Judgment and Brief Regarding Colorado H.B. 10-1394 and Colorado Pool's Motion for Partial Summary Judgment. By this order, Judge Cross granted Scottsdale's Motion and denied that of Colorado Pool. In doing so, Judge Cross provided the following background regarding C.R.S. § 13-20-808 and the issues, as framed by the parties:

> The legislature, in passing H.B. 10-1394 determined that construction defect claims present the most significant liability risk for construction professionals and found that such claims are the primary reason why construction professionals purchase general liability insurance. Therefore, the passage of HB 10-1394 is of importance to the construction industry as it directly addresses the question of coverage for the industry's principal risk.
>
> Section 13-20-808 (IV) provides that one of the intents of the new legislation is "[f]or the purposes of guiding pending and future actions interpreting liability insurance policies issued to construction professionals…" Moreover, Subsection 1 of the Editor's note in C.R.S. § 13-20-808 provides that "Section 3 of chapter 253, Session Laws of Colorado 2010, provides that the act adding this section applies to all insurance policies in existence as of, or issued on or after May 21, 2010."

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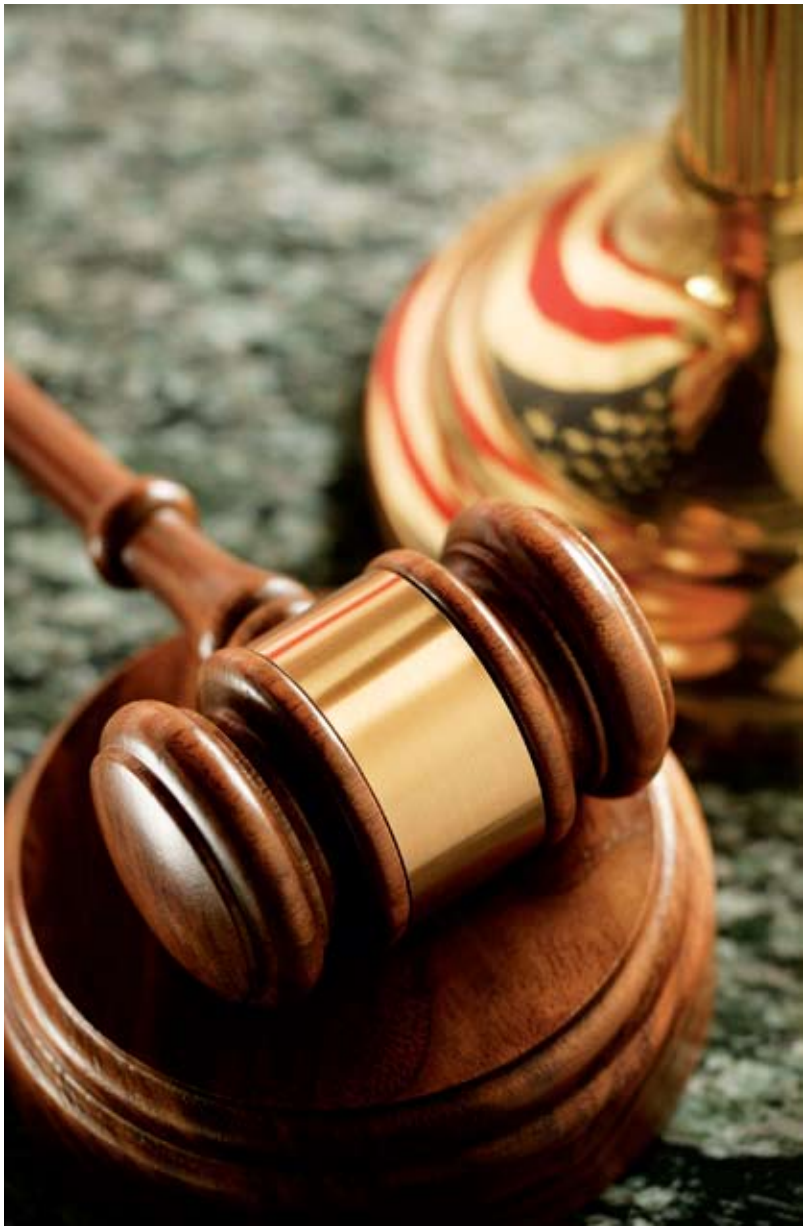

Plaintiff argues that the statute applies in this matter because its claims are "pending" before the Court and are therefore controlled by C.R.S. § 13-20-808. Defendant maintains that because the statute does not apply retroactively to expired policies, the new legislation does not apply to Plaintiff's policy. The Court agrees with Defendant. The Policy was in effect for a one-year period beginning April 25, 2005. The Policy expired by its own terms on April 26, 2006. The statute refers to policies currently in existence or policies issued before the effective date of the statute but not yet expired.

Plaintiff's policy expired on August 26, 2006. Although Plaintiff has pending claims stemming from the period when the Policy was in effect, it would be an impermissible retrospective application of the statute to apply its provisions to this action.

Court concludes liability coverage is a matter of law

After setting forth the general rules regarding contract interpretation in Colorado, Judge Cross continued by stating:

The Policy covers claims for bodily injury or property damage caused by an occurrence. An occurrence is defined in the Policy. Colorado Pools seek coverage under the policy for faulty workmanship causing a defective product (pool). In its previous Motion, Scottsdale relied on the case of *General Security Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo. App. 2009) as determinative of whether Colorado Pool had coverage under the Policy. In that case, the court found that commercial general liability policies are intended to exclude coverage for poor workmanship because poor workmanship is a business risk to be borne by the insured, not a fortuitous event. Id. at 535-36.

Colorado Pool's claim under the Policy was for faulty workmanship by Colorado Pool's subcontractors in constructing the pool, which required Colorado Pool to incur costs to demolish and rebuild the pool. The Court concludes that the General Security case is directly analogous to the case at bar, and also finds that substandard workmanship, standing alone, is not a "fortuitous event" that results in an "occurrence" triggering coverage under the Policy as a matter of law.

Furthermore, the Court finds that no "property damage" occurred, because the cost for which Colorado Pool was seeking reimbursement from Scottsdale was for repairing the defective workmanship on the pool. In other words, there was no damage to any property beyond Colorado Pool's own work product itself, which cannot alone trigger coverage. The Court reconsiders its previous ruling that this issue is a question of fact (where there are disputed interpretations of the facts) and now concludes that the coverage issue is a matter of law. The Court concludes, as a matter of law, that there was no "occurrence" or "property damage" which would trigger coverage in this matter.

Until there is any appellate case law on the subject, I expect that there will be continued interest in any and all trial court orders interpreting or applying HB 10-1394. If you would like a copy of the order discussed in this entry, please send me an e-mail at mclain@hhmrlaw.com. Also, if you have any additional orders on point, I would very much like to see them. Please send me any orders you may have.