

OPPOSE SENATE BILL 45

Unless Changed, Proposed Legislation Could Potentially Stifle, Not Support, Construction of Attainable Housing in Colorado

Senate Bill 17-045 as introduced could significantly harm construction professionals by:

1. Removing protections the General Assembly passed in 2010 in House Bill 10-1394, and
2. Putting the interests of insurance companies ahead of insureds.

Before 2010:

Before HB 1394, when construction professionals got a notice of construction defect claim, many insurers refused to provide a defense. **The legislature stopped that practice with HB 1394 by requiring insurers to defend upon receipt of a notice of claim, reasonably investigate the claim and reasonably cooperate with the insured.** HB 1394 also said insurers cannot withdraw a defense or recover defense costs from an insured unless authorized by law and the insurer reserved that right in writing.

For many years, both before 2010 and currently, if more than one insurer has a duty to defend an insured (which can happen, for example, when a homebuilder or general contractor is an additional insured on multiple subcontractors' liability policies), each insurer has a joint and several duty to provide and pay for a defense for the insured.

Senate Bill 45's Flawed Change:

SB 45 would remove from statute the parts of HB 1394 that for seven years have required, when there are multiple insurers, that they defend a notice of claim, reasonably investigate the claim and reasonably cooperate with the insured. It also prohibited insurers from withdrawing a defense or recovering defense costs from an insured unless specific conditions are met.

SB 45 proposes to replace the joint and several duty to defend with an allocation among insurers based on the expected liability of the insureds. **This dramatic change in Colorado law puts the interests of insurers ahead of insureds and hurts construction professionals—who must buy insurance to stay in business.**

SB 45 could result in a second lawsuit among insurers and an evidentiary hearing while the defect lawsuit is in the early stages. **But at that time, before experts and a full investigation, there simply will not be sufficient information for a judge to make a reasoned and fair allocation of liability among multiple potentially responsible parties.** This will further burden the courts and let plaintiffs' lawyers sit in the courtroom and take notes while the construction professionals are forced to argue about liability before all the facts are known.

Under SB 45, insurers could potentially delay paying any defense costs until the court's allocation decision is made and final—which could take six months to a year, or possibly more—while today insurers have to pay defense costs starting immediately.

SB 45 Can Be Fixed:

Changes in the bill's language will solve these problems with SB 45. **The bill should leave in place HB 1394's protections for insureds and make clear there is no change to the duty to defend or the rights of insureds.**

- A potential revision would allow, when more than one insurer agrees to defend an insured, for the insurers to agree among themselves how to share the costs of the defense. Absent agreement, each insurer would pay an equal share of defense costs.
- Later—after the defect claim is concluded and actual defense costs are known—if an insurer believed it paid more than it should have, it could bring a claim against any insurer with a duty to defend who paid less than their equitable share of defense costs.
- The prevailing insurer could recover its attorneys' fees in the contribution action.
- This results in a fair allocation of defense costs among insurers, avoids an early evidentiary hearing and does not prejudice insureds.

Organizations Opposed to Senate Bill 45, as introduced:

American Council of Engineering Companies of Colorado
American Institute of Architects, Colorado
Associated Builders and Contractors
Associated General Contractors of Colorado
Building Jobs 4 Colorado
Colorado Association of Home Builders
Colorado Association of Mechanical & Plumbing Contractors
Colorado BUILDS
Colorado Concern
Colorado Contractors Association
Home Builders Association of Metro Denver
Homeownership Opportunity Alliance
Independent Electrical Contractors Rocky Mountain (IECRM)
Mechanical Contractors Association of Colorado
Mechanical Service Contractors Association of Colorado
National Certified Pipe Welding Bureau, Colorado Chapter
National Electrical Contractors Association
Sheet Metal and Air Conditioning Contractors National Association, Colorado Chapter