



OPPOSE SENATE BILL 45

Proposed Strike below to SB 45 Benefits Insurance Companies and Hurts Construction Professionals

The proposed Senate Appropriations Committee strike below Amendment to SB45 (SB045_L.008 draft 3.20.17) (“the Strike Below”), puts the interests of insurance companies ahead of the interests of hardworking construction professionals (contractors, homebuilders, developers and subcontractors). The proposed strike below hurts construction professionals in the following ways:

- 1. Additional insureds could completely lose coverage.** The proposed strike below amendment imposes a strict, 21-day deadline after receipt of a notice of claim for an additional insured to notify all insurers who have a duty to defend it of all policies on which it is an additional insured (section 7(c)(II), page 2, lines 11-16). This deadline is unfair and extremely prejudicial and would cause additional insureds to lose coverage to which they are entitled. In many cases, additional insureds could not meet the 21-day deadline because it takes time to understand a claim, get counsel, inspect the alleged defect and determine which subcontractors’ work is implicated. Plus, years after a project is completed, a developer, contractor or homebuilder likely will not know the implicated subcontractors’ insurance companies or policies as these could change every year. If all required information was not provided within 21 days, the additional insured would lose the right to a defense.
- 2. Additional insureds would lose the benefit of the “notice-prejudice” rule.** Colorado and a majority of states follow the “notice-prejudice” rule. This rule says that if an insured delayed in giving the insurance company notice of a claim or suit, the insured is entitled to coverage unless the insurance company shows it was prejudiced by the late notice. Under the proposed strike below, additional insureds would lose the benefit of this rule.
- 3. Additional insureds’ defense would be delayed for months.** Even if the additional insured met the 21-day deadline, they would not receive a defense for months. Currently, insurers must defend an additional insured immediately upon receipt of a notice of a construction defect claim. Under the proposed strike below, the additional insured would not receive a defense until either the defending insurers agreed to an allocation of defense costs or the court held an evidentiary hearing and issued an allocation decision. That easily could be 4-6 months or more after the notice of claim because, among other things, an insurer would need time to file a contribution action, the evidentiary hearing could be up to 63 days later, the hearing could be continued and there is no deadline for the court to issue a decision. During that time the additional insured would have to respond to a notice of claim, inspect the alleged defects and try to protect their rights, either without counsel or with counsel paid out of their own pocket.
- 4. Insurers’ duty to defend additional insureds would be dramatically changed.** In Colorado and a majority of states, when two or more insurers have a duty to defend, that duty is joint and several. See, e.g., D.R. Horton, Inc.-Denver v. Travelers Indem. Co. of Am., 2012 WL 5363370 (D. Colo. Oct. 31, 2012); Scott C. Turner, Insurance Coverage for Construction Disputes (2012) § 7:21 (“Where multiple policies cover

the same risk, carriers have a joint and several obligation to defend the insured.”). This means every insurer that sold a liability insurance policy, accepted premium payments and agreed in their policy to defend an additional insured, must do so if the policy covers the claim. The insurance industry, through the original SB 45 and the proposed strike below, wants to change this well-settled law. This dramatic a change in existing law should not be made without a full understanding of its implications, including how it would harm construction professionals.

5. A closed hearing may be unconstitutional. The proposed strike below, like the original SB 45, calls for a court evidentiary hearing if two or more insurance companies with a duty to defend disagree about how to allocate defense costs between them. The proposed strike below calls for the court evidentiary hearing to be closed and sealed (section 7(c)(IV), page 2 lines 31-39). Courts generally are open to the public. Court proceedings can be closed to the public only in very limited circumstances. Here, while closing the evidentiary hearing and sealing all records in the contribution action may be an attempt to address a concern with the original bill, there is a substantial risk that the courts would find the closing and sealing unconstitutional. In that event, the evidentiary hearing would be open to the public and construction professionals would be harmed by having the plaintiffs’ bar sit in the courtroom and use what they learn against construction professionals.

6. Construction professionals could be sued by insurers. The proposed strike below (section 7(c)(VIII), page 3, lines 37-40) allows an insurer to sue any insured or additional insured who did not have liability insurance for any period of time implicated by the claim. This would penalize construction professionals who did not buy liability insurance or did but for some reason coverage was not renewed, lapsed or did not cover the entire time period at issue.

7. The rights of construction professionals are not protected. The proposed strike below says the contribution claim does not limit an insurer’s duty to defend (section 7(c)(X), page 4, lines 1-2), but this does not go far enough to protect the rights of construction professionals. The proposed strike below would call into question construction professional insureds’ rights to a defense, to timely payment of defense costs and to bring bad faith claims against insurers who do not comply with their obligations.

8. Insurance rates are unlikely to be lowered. While SB 45 has been called a small step to help address the problem of construction defect claims, there is no indication or assurance that the proposed strike below would do anything to lower the price of insurance.

9. Condo construction would not be encouraged. The proposed strike below, like the original bill, will not apply to insurance for condominium construction. Almost every condominium project today uses a “wrap” insurance policy that covers the developer, contractor and all enrolled subcontractors. With this kind of policy, there never are multiple insurers with a duty to defend a construction professional, so the proposed strike below would not apply.

10. The annual cost to the state is over \$250,000. The bill’s fiscal note cost is over \$250,000 a year for additional judicial department personnel to handle the contribution actions among insurers.

Additional Organizations Opposed to SB45 as Introduced and Proposed Strike Below:

- Associated General Contractors of Colorado (AGC)
- Associated Landscape Contractors of Colorado (ALCC)
- American Subcontractors Association of Colorado (ASAC)
- Associated Builders & Contractors – Rocky Mountain (ABC)
- Building Jobs4Colorado Construction & Design Coalition (BJ4C)
- CO BUILDS
- Colorado Concern
- Colorado Association of Home Builders (CAHB)
- Colorado Association of Mechanical & Plumbing Contractor (CAMPC)