

JAN 26 2011

A BILL FOR AN ACT

RELATING TO INSURANCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

- 1 SECTION 1. (a) The legislature finds that:
- 2 (1) The interpretation of insurance policies issued to
- 3 construction professionals is of vital importance to
- 4 the economic and social welfare of the citizens of
- 5 Hawaii;
- 6 (2) Insurance policies issued to construction
- 7 professionals have become increasingly complex, often
- 8 containing multiple, lengthy endorsements and
- 9 exclusions conflicting with the reasonable
- 10 expectations of the insured; and
- 11 (3) The correct interpretation of coverage for damages
- 12 arising out of construction defects is in the best
- 13 interest of insurers, construction professionals, and
- 14 property owners.
- 15 (b) The legislature declares that:
- 16 (1) The policy of the State is to favor broad
- 17 interpretation of insurance coverage for the insured;



1 (2) The long-standing and continuing policy of the State
2 is to favor a broad interpretation of an insurer's
3 duty to defend the insured under liability insurance
4 policies;

5 (3) The decision of the Hawaii intermediate court of
6 appeals in *Group Builders, Inc. and Tradewind*
7 *Insurance Company, Ltd. v. Admiral Ins. Co.*, (Haw.
8 App. 2009) does not properly consider a construction
9 professional's reasonable expectation that an insurer
10 would defend the construction professional against an
11 action or notice of claim; and

12 (4) For the purposes of guiding pending and future actions
13 in the interpretation of liability insurance policies
14 issued to construction professionals, what has been
15 and continues to be the policy of the State is hereby
16 clarified and confirmed.

17 SECTION 2. Chapter 431, article 1, Hawaii Revised
18 Statutes, is amended by adding two new sections to part I to be
19 appropriately designated and to read as follows:

20 "§431:1- Insurance policies issued to construction
21 professionals. (a) For the purposes of this section,

22 "liability insurance policy" means a contract of insurance that



1 covers occurrences of damage or injury during the policy period
2 and insures a construction professional for liability arising
3 from construction-related work.

4 (b) In interpreting a liability insurance policy issued to
5 a construction professional, a court shall presume that the work
6 of a construction professional that results in property damage,
7 including damage to the work itself or other work, is an
8 accident unless the property damage is intended and expected by
9 the insured. Nothing in this section:

10 (1) Requires coverage for damage to an insured's own work
11 unless otherwise provided in the insurance policy; or

12 (2) Creates insurance coverage that is not included in the
13 insurance policy.

14 (c) Upon a finding of ambiguity in an insurance policy, a
15 court may consider a construction professional's objective and
16 reasonable expectations in the interpretation of an insurance
17 policy issued to a construction professional.

18 (d) In construing whether an insurance policy meets a
19 construction professional's objective and reasonable
20 expectations, the court may consider the following:



1 (1) The object sought to be obtained by the construction
2 professional in the purchase of the insurance policy;
3 and

4 (2) Whether a construction defect has resulted, directly
5 or indirectly, in bodily injury, property damage, or
6 loss of the use of property.

7 (e) In construing whether an insurance policy meets a
8 construction professional's objective and reasonable
9 expectations, a court may also consider and give weight to any
10 writing concerning the insurance policy provision in dispute
11 that is not protected from disclosure by the attorney-client
12 privilege, work-product privilege, or other law, and is
13 generated, approved, adopted, or relied on by the insurer, its
14 parent or subsidiary company, or an insurance rating or policy
15 drafting organization; provided that the writing shall not be
16 used to restrict, limit, exclude, or condition coverage or the
17 insurer's obligation beyond that which is reasonably inferred
18 from the words used in the insurance policy.

19 (f) If an insurance policy provision that appears to grant
20 or restore coverage conflicts with an insurance policy provision
21 that appears to exclude or limit coverage, the court shall



1 construe the insurance policy in favor of coverage, if
2 reasonably and objectively possible.

3 (g) If an insurer disclaims or limits coverage under a
4 liability insurance policy issued to a construction
5 professional, the insurer shall bear the burden of proving by a
6 preponderance of the evidence that:

7 (1) Any policy's limitation, exclusion, or condition in
8 the insurance policy bars or limits coverage for the
9 insured's legal liability in an action or notice of
10 claim concerning a construction defect; and

11 (2) Any exception to the limitation, exclusion, or
12 condition in the insurance policy does not restore
13 coverage under the policy.

14 (h) An insurer's duty to defend a construction
15 professional or other insured under a liability insurance policy
16 issued to a construction professional shall be triggered by a
17 potentially covered liability described in the following:

18 (1) A notice of claim; or

19 (2) A complaint, cross-claim, counterclaim, or third-party
20 claim filed in an action against the construction
21 professional concerning a construction defect.



1 (i) An insurer shall defend a construction professional
2 who has received a notice of claim regardless of whether another
3 insurer may also owe the insured a duty to defend the notice of
4 claim unless authorized by law. In defending the claim, the
5 insurer shall:

6 (1) Reasonably investigate the claim; and

7 (2) Reasonably cooperate with the insured in the notice of
8 claims process;

9 provided that this subsection shall not require the insurer to
10 retain legal counsel for the insured or to pay any sums toward
11 settlement of the notice of claim that are not covered by the
12 insurance policy.

13 (j) An insurer shall not withdraw its defense of an
14 insured construction professional or commence an action seeking
15 reimbursement from an insured for expended defense costs unless
16 authorized by law and unless the insurer has reserved the right
17 in writing when accepting or assuming the defense obligation.

18 **§431:1- Exclusion; claims involving loss in progress**
19 **not known to insured.** (a) A provision in a liability insurance
20 policy issued to a construction professional excluding or
21 limiting coverage for one or more claims arising from bodily
22 injury, property damage, advertising injury, or personal injury



1 that continues, worsens, or progresses when the policy is in
2 effect shall be void and unenforceable if the exclusion or
3 limitation applies to an injury or damage that was unknown to
4 the insured at the policy's inception date.

5 (b) Any provision in an insurance policy issued in
6 violation of this section shall be void and unenforceable as
7 against public policy.

8 (c) A court shall construe an insurance policy containing
9 a provision that is unenforceable under this section as if the
10 provision was not a part of the policy when the policy was
11 issued.

12 (d) This section shall apply only to an insurance policy
13 that covers occurrences of damage or injury during the policy
14 period and that insures a construction professional for
15 liability arising from construction-related work."

16 SECTION 3. This Act shall apply to all insurance policies
17 currently in existence or issued on or after the effective date
18 of this Act.

19 SECTION 4. New statutory material is underscored.

20 SECTION 5. This Act shall take effect upon its approval.

21

INTRODUCED BY:

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by request



Report Title:

Commercial Liability Insurance Policies; Construction Professionals

Description:

Clarifies the laws relating to the interpretation of commercial liability insurance policies affecting construction professionals.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

