COMMITTEE REPORT

February 15, 2011

**S. 431**

Introduced by Senators McConnell, Rankin, Setzler, Campbell, Shoopman, Reese, Bright, L. Martin, Alexander, S. Martin, Fair, Cromer, Bryant, Elliott, O’Dell and Campsen

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Read the first time January 26, 2011.

**THE COMMITTEE ON BANKING AND INSURANCE**

To whom was referred a Bill (S. 431) to amend the Code of Laws of South Carolina, 1976, by adding Section 38‑61‑70 so as to provide that a liability insurance policy issued by an insurer, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, by striking all after the enacting clause and inserting:

/ SECTION 1. Chapter 61, Title 38 of the 1976 Code is amended by adding:

“Section 38‑61‑70. (A)(1) The General Assembly finds:

(a) the interpretation of insurance policies issued to construction professionals is of vital importance to the economic and social welfare of the citizens of South Carolina and in furthering the purposes of this section;

(b) insurance policies issued to construction professionals have become increasingly complex, often containing multiple, lengthy endorsements and exclusions conflicting with the reasonable expectations of the insured; and

(c) the correct interpretation of coverage for damages arising out of construction defects is in the best interest of insurers, construction professionals, and property owners.

(2) The General Assembly declares:

(a) the policy of South Carolina favors the interpretation of insurance coverage broadly for the insured;

(b) the long‑standing and continuing policy of South Carolina favors a broad interpretation of the duty of an insurer to defend the insured under liability insurance policies and that this duty is a first‑party benefit to and claim on behalf of the insured; and

(c) for purposes of guiding pending and future actions interpreting a liability insurance policy issued to a construction professional at any time, past, present or future, the General Assembly clarifies and confirms what has been and continues to be the policy of South Carolina for the interpretation of a past, existing, and future liability insurance policy issued to a construction professional.

(B) For the purposes of this section:

(1) ‘Insurance’ has the same meaning as set forth in Section 38‑1‑20(25);

(2) ‘Insurer’ has the same meaning as set forth in Section 38‑1‑20(33);

(3) ‘Insurance policy’ has the same meaning as set forth in Section 38‑1‑20(45);

(4) ‘Liability insurance policy’ means a contract of insurance that covers occurrences of damage or injury during the policy period and insures a construction professional for liability arising from construction‑related work; and

(5) ‘Construction professional’ means a person, sole proprietorship, partnership, corporation, limited liability company, or other recognized legal entity that engages in an activity intended to assist in the design, construction, or repair of an improvement to real property regardless of whether this person or entity maintains a professional license under Title 40.

(C)(1) In interpreting a liability insurance policy issued to a construction professional, continuous or repeated exposure to substantially the same general harmful condition must constitute an ‘occurrence’ and in these cases no additional or accompanying requirement of an accident or fortuitous event is needed to constitute an ‘occurrence’.

(2) Nothing in this subsection:

(a) requires coverage for damage to an insured’s own work unless otherwise provided in the insurance policy; or

(b) creates insurance coverage that is not included in the insurance policy.

(D)(1) Upon a finding of ambiguity in an insurance policy issued to a construction professional, a court may consider the objective and reasonable expectations of a construction professional in interpreting the policy.

(2) In construing an insurance policy to meet the objective and reasonable expectations of a construction professional:

(a) a court may consider:

(i) the object sought to be obtained by the construction professional in the purchase of the insurance policy; and

(ii) whether a construction defect has directly or indirectly resulted in bodily injury, property damage, or loss of the use of property; and

(b) a court may consider and give weight to any writing concerning the insurance policy provision in dispute:

(i) that is not protected from disclosure by the attorney‑client privilege or work‑product privilege; and

(ii) that is generated, approved, adopted, or relied on by the insurer or a parent company or subsidiary company of the insurer or an insurance rating or policy drafting organization, such as the Insurance Services Office, Inc., or its predecessor or successor organization. A writing described in subitem (b) may not be used to restrict, limit, exclude, or condition coverage or the obligation of the insurer beyond what may be reasonably inferred from the words used in the insurance policy.

(E) 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 insurance policy to favor coverage if reasonably and objectively possible.

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

(1) a policy limitation, exclusion, or condition bars or limits coverage for the legal liability of the insured in an action or notice of claim made pursuant to this section concerning a construction defect; and

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

(G)(1) The duty of an insurer to defend a construction professional or other insured under a liability insurance policy issued to a construction professional is triggered by a potentially covered liability described in a:

(a) notice of claim made pursuant to this section; or

(b) complaint, cross‑claim, counterclaim, or third‑party claim filed in an action against the construction professional concerning a construction defect.

(2)(a) An insurer shall defend a construction professional who receives a notice of claim made pursuant to this section regardless of whether another insurer also may owe the insured a duty to defend the notice of claim unless authorized by law. In defending this claim, the insurer shall reasonably:

(i) investigate the claim; and

(ii) cooperate with the insured in the notice of claims process.

(b) This item does not require the insurer to retain legal counsel for the insured or to pay any sums toward settlement of the notice of claim that are not covered by the insurance policy.

(c) An insurer may not withdraw its defense of an insured construction professional or commence an action seeking reimbursement from an insured for expended defense cost unless authorized by law and unless the insurer has reserved this right in writing when accepting or assuming the defense obligation.”

SECTION 2. Article 5, Chapter 3, Title 15 of the 1976 Code is amended by adding:

“Section 15‑3‑645. (A) For purposes of this section ‘construction professional’ means a person, sole proprietorship, partnership, corporation, limited liability company, or other recognized legal entity that engages in an activity intended to assist in the design, construction, or repair of an improvement to real property regardless of whether this person or entity maintains a professional license under Title 40.

(B) Notwithstanding any other provision of law, a provision in an insurance contract issued to a construction professional excluding or limiting coverage for one or more claims for personal injury, death, or damage to property based upon or arising out of the defective or unsafe condition of an improvement to real property that occurs prior to a policy’s inception date and continues, worsens, or progresses while the policy is in effect is void and unenforceable unless the exclusion or limitation applies only if the insured had actual knowledge of the injury or damage prior to the policy’s inception date.

(C) Any provision contained in a policy in violation of this section is void and unenforceable and a court shall construe any policy containing such a provision as if the provision was not a part of the policy when issued.

(D) This section only applies to an insurance policy that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction related activities.

(E) In order to deny or refuse to defend a claim against an insured construction professional based upon or arising out of the defective or unsafe condition of an improvement to real property, the insurer must prove by a preponderance of the evidence that:

(1) the policy is not subject to the provisions of subsection (B) because the injury did not occur and did not continue, worsen, or progress during the period of coverage; or

(2) the insured had actual knowledge of the injury or damage prior to the policy’s inception date.”

SECTION 3. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 4. This act takes effect upon approval by the Governor and applies to all contracts of insurance in existence on or issued after the effective date and applies to any dispute over coverage that would otherwise be affected by this section ongoing as of the effective date. /

Renumber sections to conform.

Amend title to conform.

DAVID C. THOMAS for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 38‑61‑70 SO AS TO PROVIDE THAT A LIABILITY INSURANCE POLICY ISSUED BY AN INSURER AND COVERING A CONSTRUCTION PROFESSIONAL IN THIS STATE MUST BE BROADLY CONSTRUED IN FAVOR OF COVERAGE, AND TO PROVIDE THAT WORK OF A CONSTRUCTION PROFESSIONAL RESULTING IN PROPERTY DAMAGE IN CERTAIN CIRCUMSTANCES CONSTITUTES AN OCCURRENCE AS COMMONLY DEFINED IN LIABILITY INSURANCE AND IS NOT THE INTENDED OR EXPECTED CONSEQUENCE OF THE WORK OF THE CONSTRUCTION PROFESSIONAL.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 61, Title 38 of the 1976 Code is amended by adding:

“Section 38‑61‑70. (A)(1) The General Assembly finds:

(a) the interpretation of insurance policies issued to construction professionals is of vital importance to the economic and social welfare of the citizens of South Carolina and in furthering the purposes of this section;

(b) insurance policies issued to construction professionals have become increasingly complex, often containing multiple, lengthy endorsements and exclusions conflicting with the reasonable expectations of the insured; and

(c) the correct interpretation of coverage for damages arising out of construction defects is in the best interest of insurers, construction professionals, and property owners.

(2) The General Assembly declares:

(a) the policy of South Carolina favors the interpretation of insurance coverage broadly for the insured;

(b) the long‑standing and continuing policy of South Carolina favors a broad interpretation of the duty of an insurer to defend the insured under liability insurance policies and that this duty is a first‑party benefit to and claim on behalf of the insured; and

(c) for the purposes of guiding pending and future actions interpreting liability insurance policies issued to construction professionals, the General Assembly clarifies and confirms what has been and continues to be the policy of South Carolina for the interpretation of existing and future insurance policies issued to construction professionals.

(B) For the purposes of this section:

(1) ‘Insurance’ has the same meaning as set forth in Section 38‑1‑20(25);

(2) ‘Insurer’ has the same meaning as set forth in Section 38‑1‑20(33);

(3) ‘Insurance policy’ has the same meaning as set forth in Section 38‑1‑20(45);

(4) ‘Liability insurance policy’ means a contract of insurance that covers occurrences of damage or injury during the policy period and insures a construction professional for liability arising from construction‑related work; and

(5) ‘Construction professional’ means a person, sole proprietorship, partnership, corporation, limited liability company, or other recognized legal entity that engages in an activity intended to assist in the design, construction, or repair of an improvement to real property regardless of whether this person or entity maintains a professional license under Title 40.

(C)(1) In interpreting a liability insurance policy issued to a construction professional, continuous or repeated exposure to substantially the same general harmful condition must constitute an ‘occurrence’ and in these cases no additional or accompanying requirement of an accident or fortuitous event is needed to constitute an ‘occurrence’.

(2) Nothing in this subsection:

(a) requires coverage for damage to an insured’s own work unless otherwise provided in the insurance policy; or

(b) creates insurance coverage that is not included in the insurance policy.

(D)(1) Upon a finding of ambiguity in an insurance policy issued to a construction professional, a court may consider the objective and reasonable expectations of a construction professional in interpreting the policy.

(2) In construing an insurance policy to meet the objective and reasonable expectations of a construction professional:

(a) a court may consider:

(i) the object sought to be obtained by the construction professional in the purchase of the insurance policy; and

(ii) whether a construction defect has directly or indirectly resulted in bodily injury, property damage, or loss of the use of property; and

(b) a court may consider and give weight to any writing concerning the insurance policy provision in dispute:

(i) that is not protected from disclosure by the attorney‑client privilege or work‑product privilege; and

(ii) that is generated, approved, adopted, or relied on by the insurer or a parent company or subsidiary company of the insurer or an insurance rating or policy drafting organization, such as the Insurance Services Office, Inc., or its predecessor or successor organization. A writing described in subitem (b) may not be used to restrict, limit, exclude, or condition coverage or the obligation of the insurer beyond what may be reasonably inferred from the words used in the insurance policy.

(E) 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 insurance policy to favor coverage if reasonably and objectively possible.

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

(1) a policy limitation, exclusion, or condition bars or limits coverage for the legal liability of the insured in an action or notice of claim made pursuant to this section concerning a construction defect; and

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

(G)(1) The duty of an insurer to defend a construction professional or other insured under a liability insurance policy issued to a construction professional is triggered by a potentially covered liability described in a:

(a) notice of claim made pursuant to this section; or

(b) complaint, cross‑claim, counterclaim, or third‑party claim filed in an action against the construction professional concerning a construction defect.

(2)(a) An insurer shall defend a construction professional who receives a notice of claim made pursuant to this section regardless of whether another insurer also may owe the insured a duty to defend the notice of claim unless authorized by law. In defending this claim, the insurer shall reasonably:

(i) investigate the claim; and

(ii) cooperate with the insured in the notice of claims process.

(b) This item does not require the insurer to retain legal counsel for the insured or to pay any sums toward settlement of the notice of claim that are not covered by the insurance policy.

(c) An insurer may not withdraw its defense of an insured construction professional or commence an action seeking reimbursement from an insured for expended defense cost unless authorized by law and unless the insurer has reserved this right in writing when accepting or assuming the defense obligation.”

SECTION 2. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 3. This act takes effect upon approval by the Governor.

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