



# NATIONAL CONSTRUCTION DEFECT CONFERENCE



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## Emerging Coverage Issues in Construction Defect Cases



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# Tort Reform—Limiting Statute of Repose

- **Florida:**

- Shortened its statute of repose for construction defect claims from 10 to 7 years via Senate Bill 360, effective April 13, 2023.
- The new 7-year period begins to run from the earliest of a certificate of occupancy, completion, or abandonment.

- **Texas:**

- Reduced the statute of repose from 10 years to 6 years for builders of new homes (residential, only applies to certain construction).

- **Oregon:**

- Shortened the repose period for claims against architects and engineers to 6 years, specifically for large commercial structures.



# States Considering a Shortened Statute of Repose

- **Pennsylvania:** The state is actively considering Senate Bill 399, which would shorten the current 12-year statute of repose to six years for construction claims. Additionally, the Supreme Court of Pennsylvania is weighing a case that challenges the validity of the current statute, an outcome that is being closely monitored by industry professionals.
- **New York:** Efforts are underway to enact a meaningful statute of repose for design and construction professionals. Bills are currently being considered by the Assembly's Standing Committee On Higher Education and the Senate's Judiciary Committee. The proposed legislation would establish a 10-year statute of limitations/repose after the completion of improvements to real property, a change advocated to make New York more competitive with other states that already have such protections in place.



# Impact of Shorter SOR on Insurers

- **Increased urgency to investigate:** Insurers may need to investigate potential claims more quickly, as the time for a claim to be made is shorter.
- **Less Opportunity for Risk Transfer:** Shorter Statute of Repose means less policy periods potentially on the risk for the loss
- **More potential for denials:** Insurers can use the shorter statute of repose as a defense to deny claims.
- **Shift in subrogation strategy:** Subrogating insurers will need to evaluate and act on claims immediately upon loss to preserve their rights, as the window to pursue a negligent party is smaller.
- **Need to re-evaluate risk:** Insurers will need to adjust their underwriting and reserving practices to account for the shorter period of exposure for a given project.



# Impact of Shorter SOR on Contractors

- **Potential for lower premiums:** A shorter period of risk for construction errors can lead to lower liability insurance costs.
- **More immediate need for coverage:** Contractors need to ensure they have adequate insurance coverage for the shortened risk period.
- **Reduced "tail" coverage needs:** The shorter repose period can reduce the need for "tail" insurance, which covers claims for damage occurring after the policy period has ended.



# Impact of Shorter SOR on Policy Holders

- **Shorter discovery window:** Owners have less time to find latent construction defects before all claims are barred, regardless of when the defect was discovered.
- **Increased urgency:** There is a greater need to act quickly to document defects and file claims within the limited period.
- **Higher risk of coverage denial:** Insurers may more easily deny claims that are filed after the new, shorter repose period has expired.
- **Potential for more claims:** The shorter period may force owners to file claims sooner than they might have otherwise, potentially leading to more coverage actions.



# Single or Multiple Occurrences

## Single Occurrence

- Minimize Recovery under one policy
- Single Deductible/SIR
- Cause Test
- Long Established Case Law Supporting
- Easy to Calculate and Predict

## Multiple Occurrence

- Potentially more can be recovered from one policy
- Multiple SIRs/Deductible
- Effects Test
- Where does it end? An occurrence per nail? Per Trade? Per Leak?



## But, What If:

- What if there are CO dates on projects with multiple homes/buildings issued in multiple policy periods?
- Impact of different owners of homes or buildings contained in the same lawsuit/claim?
- Did the insured perform work for different GC's or developers on the same project?
- How would deductibles/SIR's apply if there are multiple occurrences – per claim or per occurrence?
- Continuous/Progressive endorsements that re-define “occurrence”?
- Two or More Policies or similar endorsements?



**Koikos v. Travelers Insurance Company, et al., 849 So. 2d 263 (Fla. 2003)**

- Koikos owned a restaurant where shooting occurred that resulted in multiple injuries. Multiple shots were fired. Two patrons were injured from separate bullets.
- Travelers, the carrier for Koikos, had a \$500,000 per occurrence limit and asserted that Koikos' alleged negligent security that permitted the shootings constituted a single "occurrence". The district court agreed since the claims arose out of one basic event and that Koikos' alleged negligence was that he failed to provide adequate security for that event.
- On a certified question, the Supreme Court disagreed and applied the "cause" theory to determine that the causes of the injuries were the gunshots (i.e., the "immediate injury-producing act"), not the lack of adequate security, such that each gunshot constituted a separate "occurrence".



**Southern International Corp. v. Poly-Urethane Industries, Inc., 353 So. 2d 646 (Fla. 3d DCA 1977)**

- Poly-Urethane applied a sealing substance to multiple roofs in a multi-building condominium complex. Months later, several of the roofs began to leak.
- Foremost Insurance Company, GL carrier for Poly-Urethane, had the following occurrence limitation in their policy:
  - “For the purposes of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions, shall be considered as arising out of one occurrence.”
- The Court ruled that applying the sealant to multiple roofs was a single “occurrence” based upon this language.



**Mid-Continent Cas. Co. v. Basdeo., 742 F. Supp. 2d 1293, 1345 (M.D. Fla. 2010), *aff'd*, 477 F. App'x 702 (11th Cir. 2012)**

- Repairs were made to seven buildings in a condominium damaged by Hurricane Wilma. The Association hired First Gate to tarp the buildings and then remove and replace the roofs.
- First State made holes in the roofs when installing the tarps which led to interior damage. First State also left the mansards open causing damage. Finally, the flat roof installation was improper leading to additional water intrusion and damage.
- The insured argued that each type of defect on each individual building could be a separate “occurrence” resulting in 21 “occurrences”. The Court adopted a middle-ground approach and determined the “property damage” arose out of three “occurrences”: tarping, mansards and the work on the flat roofs.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**NON-STACKING OF LIMITS ENDORSEMENT  
TWO OR MORE COVERAGE FORMS, COVERAGE PARTS OR POLICIES ISSUED BY US**

This endorsement modifies insurance provided under the following:

Commercial General Liability Coverage Part

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If any Coverage Form, Coverage Part or Policy issued to you by us or any company affiliated with us apply to the same claim for damages, the maximum Limit of Insurance for Liability Coverage under all of the Coverage Forms, Coverage Parts or Policies shall not exceed the highest applicable Limit of Insurance available under any one Coverage Form, Coverage Part or Policy.

This endorsement does not apply to Coverage Form, Coverage Part or Policy issued by us or an affiliated company specifically to apply as excess insurance over the Policy.



## **TWO OR MORE COVERAGE FORMS OR POLICIES ISSUED BY US**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM  
COMMERCIAL LIABILITY UMBRELLA COVERAGE FORM  
EMPLOYEE BENEFITS LIABILITY COVERAGE FORM  
EMPLOYERS LIABILITY (STOP GAP) COVERAGE FORM  
FARM COVERAGE PART  
LIQUOR LIABILITY COVERAGE FORM  
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE FORM  
PRODUCT WITHDRAWAL COVERAGE FORM  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM  
RAILROAD PROTECTIVE LIABILITY COVERAGE FORM

The following is added to the Limits of Insurance or Conditions section, as appropriate:

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same "occurrence" or offense, the total Limit of Insurance available for the "occurrence" or offense under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or any company affiliated with us specifically to apply as excess insurance over this Coverage Form.



## PRE-EXISTING INJURY OR DAMAGE EXCLUSION

This endorsement modifies the Conditions provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to:

1. Any 'occurrence', incident or "suit" whether known or unknown to any officer of the Named Insured:
  - (a) which first occurred prior to inception date of this policy (or the retroactive date of this policy, if any; or
  - (b) which is, or is alleged to be, in the process of occurring as of the inception date of the policy or the retroactive date of this policy, if any; even if the "occurrence" continues during this policy period.
  
2. Any damages arising out of or related to "bodily injury", "property damage" or "personal and advertising injury", which are known to any officer of any insured, which are in the process of settlement, adjustment or "suit" as of the inception date of this policy or the retroactive date of this policy, if any.

We shall have no duty to defend any Insured or Additional insured against any loss, "occurrence", incident or "suit", or other proceeding alleging damages arising out of or related to "bodily injury", "property damage" or "personal injury" to which this endorsement applies.

For work completed in the state of Colorado, the "unknown" wording is removed from part 1 of this exclusion.



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**EXCLUSION – CONTINUOUS OR PROGRESSIVE DAMAGE CLAIMS –  
APPLICABLE LAW**

This endorsement modifies insurance provided under the following:

Commercial General Liability Coverage Part

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The following exclusion is added to Paragraph 2. Exclusions of both **Section I – Coverage A – Bodily Injury And Property Damage Liability** and **Section I – Coverage B – Personal And Advertising Injury Liability**:

**2. Exclusions**

To the extent permitted by applicable law, this insurance does not apply to:

**Continuous or Progressive Damage Claims**

Any “bodily injury”, “property damage”, or “personal and advertising injury” which is or is alleged to be continuing or progressive in nature where any damage of any kind began or is alleged to have begun prior to the effective date of this policy. This exclusion will apply whether or not the alleged damage or cause of the alleged damage was known to any person or entity prior to the effective date of this policy.

**THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY**  
**CONTINUOUS OR PROGRESSIVE DAMAGE CLAIMS – ALLOCATION OF DAMAGE**  
**ON TIME-ON-THE-RISK BASIS**

This endorsement modifies the insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE PART**  
**PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART**

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In the event of any claim against the insured for “bodily injury”, “property damage” or “personal or advertising injury” which is or is alleged to be continuous or progressive in nature and which was unknown to the insured at the policy’s inception date, the damage to which this insurance applies will be determined as follows:

1. In the event we or you can prove the amount of “bodily injury”, “property damage” or “personal or advertising injury” which actually occurred during the policy period, this insurance will apply only to such amount;
2. In the event we or you cannot prove the amount of “bodily injury”, “property damage” or “personal or advertising injury” which actually occurred during the policy period, then this insurance only will apply to that portion of the total damage equal to a fraction of the numerator of which will be the duration of our “time on the risk,” and the denominator of which will be the total time elapsed since completion of the construction project, or the alleged inception of the continuous or progressive damage, whichever is shorter.

For purposes of this endorsement, the term “time on risk” means the duration during our policy period of an alleged “occurrence” of continuous or progressive damage.



# Other Restrictive Endorsements That Could Limit Risk Transfer



- EIFS Exclusion
- Stucco Exclusion
- Tract Home Exclusion
- Residential Construction Exclusion
- Project-Specific Exclusions (number or units, height of building, etc.)
- Prior Work Exclusions
- Removal of the Subcontractor Exception to the Your Work Exclusion



# Additional Insured Defense

- Reduced Statute of Repose can lead to a reduced number of policies potentially liable for Additional Insured defense
- The number of policies can be further reduced by uneven Additional Insured endorsements and restrictive endorsements on some, but not all, of the policies
- With a smaller pool of potential insurers to share the defense, remaining carriers face paying a larger portion of the of the defense fees



# RIGHT and Duty to Defend

- The right is not lost because the Insured is an Additional Insured by endorsement
- The construction contract does not alter the policy language
- The Right to defend may be impacted if you issue a Reservation of Rights
- Right to defend under the policy generally includes selection of counsel, setting of reasonable billing guidelines, and requirement of reasonable reporting



# Separation and Transfer of Rights

## Separation of Insureds

- Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
  - a. As if each Named Insured were the only Named Insured; and
  - b. Separately to each insured against whom claim is made or "suit" is brought.
- Additional Insureds are likely entitled to Separate Counsel from the Named Insured unless otherwise stated in the AI Endorsement

## Transfer of Rights of Recovery Against Others to Us

- If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.
- This applies to the Additional Insured