

COLORADO ROOFING ASSOCIATION

SEMINAR: WHERE INSURANCE AND
LAW INTERSECT

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TOPICS:

1. SB 38 – Roofing contractors are not to be public adjusters.
2. Insurance from subcontractors.
3. Builder's Risk, Property Insurance in the 2017 AIA

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Reyelts v. Cross, 968 F.Supp.2d 835 (N.D. Texas 2013)

- May 2011 hail storm
- Roofing contractor visits Reyelts' home
- June 2011 contract for \$15,951.48
- \$14,775.48 to be covered by insurance
- \$1,176.00 upgrade

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Reyelts v. Cross, 968 F.Supp.2d 835 (N.D. Texas 2013)

- Roofing contractor never contacts homeowner's insurer
- Roofing contractor seeks to collect \$14,775.48
- Contract provides that homeowner authorizes roofing contractor to pursue homeowner's best interests for all repairs at a price agreeable to the insurance company and roofing contractor at no additional cost to homeowner except insurance deductible and upgrades

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Reyelts v. Cross, 968 F.Supp.2d 835 (N.D. Texas 2013)

- Contract declared illegal, void and unenforceable
- Contractor liable for treble damages, and attorney's fees for violations of Texas Debt Collection Act and Texas Deceptive Trade Practices Act
- Plaintiffs recover \$25,000 in damages for mental anguish and \$50,000 in attorney's fees.

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Provision in Lon Smith & Associates and A-1 Systems Standard Contract with Homeowners:

“This Agreement is for FULL SCOPE OF INSURANCE ESTIMATE AND UPGRADES and is subject to insurance company approval. By signing this agreement homeowner authorizes Lon Smith Roofing and Construction (“LSRC”) to pursue homeowners best interest for all repairs, at a price agreeable to the insurance company and LSRC. The final price agreed to between the insurance company and LSRC shall be the final contract price.”

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Lon Smith Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction v. Kay (Court of Appeals of Texas, Fort Worth, August 3, 2017)

- Contract is void
- Roofing contractor can not recover
- Remedy is disgorgement: return of moneys paid to roofing contractor
- Class action status approved

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Colorado Senate Bill 38

C.R.S. 6-22-103 Effective 6/6/2012

Applies to Residential Properties for Roofing Work
Over \$1,000

Review of Provisions in SB 38

(1) Prior to engaging in any roofing work, a roofing contractor shall provide a written contract to the property owner, signed by the roofing contractor or his or her designee and the property owner, stating at least the following terms:

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Colorado Senate Bill 38 - C.R.S. 6-22-103

- a. Scope of roofing services and materials to be provided;
- b. Approximate dates of service;
- c. Approximate costs of the services;
- d. Roofing contractor's contact information;
- e. Roofing contractor's surety and liability coverage insurer and their contact information;

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Colorado Senate Bill 38 - C.R.S. 6-22-103

f. (I) Roofing contractor's policy regarding cancellation of the contract and refund of any deposit, including a rescission clause allowing the property owner to rescind the contract and obtain a full refund of any deposit within 72 hours;

(II) Written statement that property owner may rescind a roofing contract;

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Colorado Senate Bill 38 - C.R.S. 6-22-103

- g. Written statement that if property owner plans to use the proceeds of a property and casualty insurance policy, the roofing contractor cannot pay, waive, rebate or promise to pay, waiver, rebate all or part of any insurance deductible;

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Colorado Senate Bill 38 - C.R.S. 6-22-103

(2) Roofing contractor shall include on the face of the contract, in **bold-faced type**, a statement indicating that the roofing contractor shall hold in trust any payment from the property owner until the roofing contractor has delivered roofing materials at the residential property site or has performed a majority of the roofing work.

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Colorado Senate Bill 38, C.R.S. 6-22-105

(3) A roofing contractor soliciting roofing services in this state shall not claim to be or act as a public insurance adjuster adjusting claims for losses or damages.

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C.R.S. 6-22-105 (3)

Nothing in this article prevents a public insurance adjuster licensed pursuant to Section 10-2-417, C.R.S., from acting or holding himself or herself out as a public insurance adjuster.

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C.R.S. 6-22-105 (3)

Nothing in this subsection(3) precludes a roofing contractor from discussing, on behalf of the property owner, the scope of repairs with a property and casualty insurer when the roofing contractor has a valid contract with the property owner of the residential property on which the roofing contractor has contracted to perform roofing work.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

- (1)(a) A person shall not act or hold himself or herself out as a public adjuster in this state unless the person is licensed as a public adjuster in accordance with this article.

- (c) A business entity acting as a public adjuster is required to obtain a public adjuster license. Application shall be made in the form required by the commissioner.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

(2)(a) Before receiving a license as a public adjuster and or the duration of the license, the applicant shall secure evidence of financial responsibility in a format prescribed by the commissioner through a surety bond executed and issued by an insurer authorized to issue surety bonds in this state, which bond:

(I) Must be in the minimum amount of twenty thousand dollars;

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

(II) Must be in favor of this state and must specifically authorize recovery by the commissioner on behalf of any person in this state who sustained damages as the result of the applicant's erroneous acts, failure to act, conviction of fraud, or convicted of unfair practices in his or her capacity as a public adjuster.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

(4) In the event of a catastrophic disaster, no public adjuster shall charge, agree to, or accept as compensation or reimbursement any payment, commission, fee, or other thing of value in excess of ten percent of any insurance settlement or proceeds. No public adjuster shall require, demand, or accept any fee, retainer, compensation, deposit, or other thing of value prior to settlement of a claim.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

(d) A public adjuster shall not have a direct or indirect financial interest in any aspect of the claim, other than the salary, fee, commission, or other consideration established in the written contract with the insured.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

- (f) A public adjuster shall not refer or direct the insured to get needed repairs or services in connection with a loss from any person:
 - (I) With whom the public adjuster has a financial interest; or
 - (II) From whom the public adjuster may receive direct or indirect compensation for the referral.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

(g) A public adjuster shall not participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that's the subject of a claim adjusted by the public adjuster.

C.R.S.A. § 10-2-417

10-2-417. Public insurance adjusters – license required – financial responsibility – standards of conduct – rules

(h) A public adjuster shall not engage in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, or having a financial interest in, any salvage firm, repair firm, or other firm that obtains business in connection with any claim the public adjuster has a contract or agreement to adjust.

DIVISION OF INSURANCE

Colorado Division of Insurance – Adjuster Licensing Information

- Public Insurance Adjuster is defined as: An adjuster who works as a independent contractor and represents an insured on a fee basis in settlement of claims.
- Public adjusters are licensed in Colorado.
- License type: Individual

DIVISION OF INSURANCE

Colorado Division of Insurance – Licensing Requirements

- File a completed application on a form prescribed by the Commissioner
- File all service contracts that will be used by the public insurance adjuster

DIVISION OF INSURANCE

Colorado Division of Insurance – Licensing Requirements

- An applicant must personally pass a written examination
- Does not apply to individuals licensed as public insurance adjusters on December 31, 1994.

DIVISION OF INSURANCE

Colorado Division of Insurance – Maintaining Your License

Colorado continues a non-resident
adjuster license to individuals for two (2)
years

Provisions in Colorado residential roofing contracts

“By signing below Customer agrees to allow XYZ Roofing Company to pursue Customer’s best interest for a roof replacement at a price agreeable to the insurance company and XYZ Roofing Company, with no additional cost to the Customer except for the deductible.

Provisions in Colorado residential roofing contracts

“By signing this agreement the property owner authorizes XYZ Roofing Company to pursue property owner’s best interests for roof replacement at a “PRICE AGREEABLE” to the insurance company and XYZ Roofing Company with no cost to the property owner except for the insurance deductible. When “PRICE AGREEABLE” is determined, the final contract amount shall be equal to the Insurance Proceeds and Deductible, and the property owner authorizes XYZ Roofing Company to provide labor and material in accordance with this Agreement and the specifications set out herein and on the reverse side hereof to accomplish the roof replacement.”

Provisions in Colorado residential roofing contracts

“By signing below, you acknowledge XYZ Roofing Company as General Contractor and give authorization to negotiate with your insurance company regarding any claims related matter. XYZ Roofing Company agrees to perform the repairs or replacement specified by your insurance company for the final approved replacement cost value (RCV), overhead & profit and supplements only, with no additional cost to you except for your deductible, city code requirements unpaid by your insurance, and any upgrades or additional work authorized by you and XYZ Roofing Company management in writing.”

Provisions in Colorado residential roofing contracts

“By signing below, the “Customer” agrees to allow XYZ Roofing Company to pursue the “Customer’s” best interest for a roof replacement and/or other trade work associated with the claim.”

SUBCONTRACTOR INSURANCE

CERTIFICATES OF INSURANCE

SUBCONTRACTOR INSURANCE

Can you rely on a Certificate of Insurance?

SUBCONTRACTOR INSURANCE

General Answer is "NO"

SUBCONTRACTOR INSURANCE

- Insurance industry has sought to emphasize in recent years that a certificate of insurance affords no rights to the certificate holder and cannot be used to establish the existence of insurance coverage.

SUBCONTRACTOR INSURANCE

ACORD added this disclaimer at the top of the ACORD 25 – Certificate of Liability Insurance immediately below the form title:

This Certificate is issued as a matter of information only and confers no rights upon the certificate holder. This Certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This Certificate of Insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the Certificate holder.

SUBCONTRACTOR INSURANCE

- Most court decisions hold that a certificate of insurance is not a contract between the certificate holder and either the insurer or insurance agent or broker who issued the certificate.

SUBCONTRACTOR INSURANCE

Does naming you as an additional insured on the Certificate of Insurance make you an additional insured?

SUBCONTRACTOR INSURANCE

Most court cases say:

NO

SUBCONTRACTOR INSURANCE

Whether you are an additional insured depends on the insurance policy itself and particularly the additional insured endorsement to the policy.

SUBCONTRACTOR INSURANCE

ACORD-25

IMPORTANT If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

SUBCONTRACTOR INSURANCE

Standard CGL policy promulgated by the Insurance Services Office (ISO) vs. Non-standard CGL policies

SUBCONTRACTOR INSURANCE

Essex Insurance Company v. Y&J Construction, Inc.

(U.S. D. Ct. E. D. VA 2016)

- Excluded any operations involving any hot tar, wand, open flame, torch or heat applications, or membrane roofing.
- Excluded claims arising out of breach of contract

SUBCONTRACTOR INSURANCE

Non-Standard Exclusions

This insurance does not apply to any “bodily injury”, “property damage”, “personal injury” or “advertising injury” nor do we have any duty to defend any:

SUBCONTRACTOR INSURANCE

OPEN ROOF - EXCLUSION

Claim for damage to any building or structure and/or the contents, furniture and fixtures, improvements and betterments of any building or structure, directly or indirectly arising out of or caused, or alleged to have been caused by, in whole or in part, wind, hail, snow, rain, ice or any combination of these or any other form of precipitation occurring while the roof or other covering of the building or other structure is being constructed, repaired or replaced, or as a result thereof.

SUBCONTRACTOR INSURANCE

Non-Standard Exclusions

ATLANTIC CASUALTY INSURANCE COMPANY

This insurance does not apply to any claim, loss, costs or expense due to “property damage” arising out of rain, snow, hail or any combination of these if a suitable waterproof temporary covering, able to withstand the normal elements and large enough to cover the area being worked on, has not been properly secured in place. This cover is to be put into place any time any insured leaves the job site. Relative to roofing operations, the use of tar paper and/or felt paper does not constitute suitable waterproof temporary covering.

SUBCONTRACTOR INSURANCE

Non-Standard Exclusions

Atlantic Casualty Insurance Company

Further, this insurance does not apply to any claim, loss, costs or expense for “bodily injury,” “property damage” or “personal and advertising injury” as a result of any operations, from initial inspection and pre-installation work to ongoing operations and including completed operations, involving any hot tar, wand, sprayed or sprayed-on material, torch or heat applications, hot membrane roofing or any membrane roofing system requiring heat for application.

SUBCONTRACTOR INSURANCE

Non-Standard Exclusions

HOT TAR & TORCH - EXCLUSION

This insurance does not apply to “bodily injury,” “property damage,” “personal injury,” or “advertising injury” nor do we have any duty to defend any claim or “suit” that arises out of, is caused by the use of, or is in any way connected with the application of hot tar or the use of any torch, fire or flame for the application, repair, modification or removal of any roofing materials or components.

SUBCONTRACTOR INSURANCE

CONDOMINIUM OR TOWNHOUSE LIABILITY - EXCLUSION

This Exclusion applies to “property damage,” “bodily injury,” “personal injury,” or “advertising injury” arising from, related to or connected with ongoing operations and/or completed operations, including “your work” or “your product”, performed or supplied with respect to any apartment project or structure which, at the time a claim for such “property damage,” “bodily injury,” “personal injury,” or “advertising injury” is first made, has been or is being converted into a condominium or townhouse, whether your operations, including “your work” or “your product,” were performed, incorporated or supplied before or after the apartment was converted to a condominium or townhouse.

SUBCONTRACTOR INSURANCE

Non-Standard Exclusions

Failure to obtain a Certificate of Insurance for CGL insurance from subcontractor, or fail to have yourself named as an additional insured or failure to include an indemnification provision in your subcontract –

Failure to comply with above forfeits all coverage under the policy.

SUBCONTRACTOR INSURANCE



Preferred Contractors Insurance Company, RRG

ENDORSEMENT TO POLICY NO. 18

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NEW YORK AMENDATORY ENDORSEMENT:
POLICY CONDITIONS WHERE LIABILITY ARISES OUT OF WORK
PERFORMED FOR THE NAMED INSURED BY OTHER
CONTRACTORS OR SUBCONTRACTORS

The following is added to Section IV – General Liability Conditions:

It is a condition precedent to coverage under this policy that:

1. You will obtain Certificates of Insurance for Commercial General Liability coverage, with limits at least equal to or greater than the limits set forth in the Declarations and/or Section III of this policy (“Limits of Liability”), from all contractors and subcontractors you employ, retain, contract with or hire, prior to the commencement of any work performed by you or on your behalf. You will maintain such Certificates of Insurance for a period of at least four years following the expiration date of this policy.
2. You, and any other person or entity insured under this policy, will be named as additional insured(s) on all policies identified by such Certificates of Insurance. You acknowledge and agree that it is your responsibility to arrange for such coverage.
3. You will obtain written agreements from all contractors and subcontractors you employ, retain, contract with or hire, pursuant to which said contractors and subcontractors will be required, to the fullest extent allowed by law, to defend and indemnify you and any person or entity insured under this policy, from and against any claim or “suit” for “bodily injury”, “property damage”, and “personal and advertising injury” arising out of work performed by you or anyone acting on your behalf or any other person or entity insured under this policy.

The requirements set forth in Paragraph 1, 2 and 3 above are conditions precedent to coverage under this policy. If you fail to satisfy any one or more of the foregoing conditions, such failure shall forfeit all coverage under the policy.

SUBCONTRACTOR INSURANCE

Unlicensed Subcontractors and Subcontractor's Failure to comply with OSHA regulations



ENDORSEMENT TO POLICY NO. 51

THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY.

PREFERRED CONTRACTORS INSURANCE COMPANY
RISK RETENTION GROUP, LLC
COMMERCIAL GENERAL LIABILITY POLICY

EXCLUSION- UNLICENSED CONTRACTORS

The following is added to Section II, Exclusions:

This insurance does not apply to:

1. "Bodily injury" or "property damage" arising out of or in any way related to any act or omission of any insured, or any contractor or subcontractor working for or on behalf of any insured, who is required to be licensed by any local, state or federal licensing authority but is not in compliance with any such licensing requirement;
2. "Bodily injury" or "property damage" arising out of or in any way related to any work of any insured, or any contractor or subcontractor working for or on behalf of any insured that does not meet federal, state, or local laws, rules, regulations, or standards, including but not limited to standards promulgated by the Occupational Safety and Health Administration (OSHA), and any and all similar laws, rules regulations and standards.

Other than as set forth above, all other terms, conditions, provisions, exclusions and endorsements of the policy remain in full force and effect.)

III. AIA 2017 CONTRACT DOCUMENTS

INSURANCE PROVISIONS

Builder's Risk Property Insurance and AIA Provisions

AIA Document A101™ – 2017 Exhibit A
INSURANCE AND BONDS

§A.2.3.1 Unless this obligation is placed on the Contractor pursuant to Section A.3.3.2.1, the Owner shall purchase and maintain, from an insurance company or insurance companies lawfully authorized to issue insurance in the jurisdiction where the Project is located, property insurance written on a builder's risk "all-risks" completed value or equivalent policy form and sufficient to cover the total value of the entire Project on a replacement cost basis. The Owner's property insurance coverage shall be no less than

Builder's Risk Property Insurance and AIA Provisions

AIA Document A101™ – 2017 Exhibit A INSURANCE AND BONDS

the amount of the initial Contract Sum, plus the value of subsequent Modifications and labor performed and materials or equipment supplied by others. The property insurance shall be maintained until Substantial Completion and thereafter as provided in Section A.2.3.1.3, unless otherwise provided in the Contract Documents or otherwise agreed in writing by the parties to this agreement. This insurance shall include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds. This insurance shall include the interest of mortgagees as loss payees.

Builder's Risk Property Insurance and AIA Provisions

AIA Document A101™ – 2017 Exhibit A INSURANCE AND BONDS

§A.2.3.1.1 **Causes of Loss.** The insurance required by this Section A.2.3.1 shall provide coverage for direct physical loss or damage, and shall not exclude the risks of fire, explosion, theft, vandalism, malicious mischief, collapse, earthquake, flood, or windstorm. The insurance shall also provide coverage for ensuing loss or resulting damage from error, omission, or deficiency in construction methods, design, specifications, workmanship, or materials. Sub-limits, if any, are as follows:
(Indicate below the cause of loss and any applicable sub-limit.)

Builder's Risk Property Insurance and AIA Provisions

AIA Document A101™ – 2017 Exhibit A INSURANCE AND BONDS

§ A.2.3.1.3 Unless the parties agree otherwise, upon Substantial Completion, the Owner shall continue the insurance required by Section A.2.3.1 or, if necessary, replace the insurance policy required under Section A.2.3.1 with property insurance written for the total value of the Project that shall remain in effect until expiration of the period for correction of the Work set forth in Section 12.2.2 of the General Conditions.

Builder's Risk Property Insurance and AIA Provisions

AIA Document A101™ – 2017 Exhibit A INSURANCE AND BONDS

§ A.2.3.1.4 **Deductibles and Self-Insured Retentions.**

If the insurance required by this Section A.2.3 is subject to deductibles or self-insured retentions, the Owner shall be responsible for all loss not covered because of such deductibles or retentions.

Builder's Risk Property Insurance and AIA Provisions

AIA Document A101™ – 2017 Exhibit A INSURANCE AND BONDS

§ A.2.3.3 Insurance for Existing Structures

If the Work involves remodeling an existing structure or constructing an addition to an existing structure, the Owner shall purchase and maintain, until the expiration of the period for correction of Work as set forth in Section 12.2.2 of the General Conditions, "all-risks" property insurance, on a replacement cost basis, protecting the existing structure against direct physical loss or damage from the causes of loss identified in Section A.2.3.1, notwithstanding the undertaking of the Work. The Owner shall be responsible for all co-insurance penalties.

Builder's Risk Property Insurance and AIA Provisions

AIA Document A201™ – 2017 GENERAL CONDITIONS

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have

Builder's Risk Property Insurance and AIA Provisions

AIA Document A201™ – 2017 GENERAL CONDITIONS

§ 11.3.1 Cont.

to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective

Builder's Risk Property Insurance and AIA Provisions

AIA Document A201™ – 2017 GENERAL CONDITIONS

§ 11.3.1 Cont.

as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

Builder's Risk Property Insurance and AIA Provisions

AIA Document A201™ – 2017 GENERAL CONDITIONS

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

Town of Silverton v. Phoenix Heat Source System,
948 P. 2d. 9 (Colorado Court of Appeals, 1997)

Copper Mountain v. Industrial Systems, Inc.,
208 P. 3d 692 (Colorado Supreme Court
2009)

The effect of the holdings in these cases are reversed if the 2017 AIA Exhibit A is part of the contract.