IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: SC16-1420
L.T. Case No.: 15-12816

Altman Contractors, Inc.,

Appellant

v.

Crum & Forster Specialty Insurance Company,

Appellee

On Certified Question from the United States Court of Appeals
for the Eleventh Circuit

INITIAL BRIEF ON THE MERITS OF APPELLANT, ALTMAN CONTRACTORS, INC.

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PRELIMINARY STATEMENT

In this Brief, record citations are to Appellant's Appendix filed contemporaneously herewith. Citations beginning with "DE" refer to the documents filed with the District Court below. Citations beginning with "CA" refer to documents filed in the U.S. Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE AND FACTS

I. Statement of Relevant Facts

Appellant Altman Contractors, Inc. ("ACI") served as the general contractor for the construction of the Sapphire Condominium which is a high-rise luxury residential condominium building located in Broward County, Florida (the "Project"). (DE 26 at 1.) Pursuant to its contract with the owner of the Project, ACI maintained general commercial liability insurance for all of its scope of work at the Project. (DE 26 at 1.) ACI paid premiums to Defendant-Appellee Crum & Forster Specialty Insurance Company ("C&F") and, in exchange, C&F issued to ACI those General Commercial Liability Insurance Policies GLO057306, GLO097978, GLO101124, GLO111159, GLO141076, GLO171003, GLO211307 (the "Policies"). (DE 26 at 1.) The Policies were in effect from February 01, 2005 until February 1, 2012. (DE 26 at 1.) At all material times, ACI was named as an "insured," under the Policies. (DE 26 at 1.)

The Policies provide that the insured "must see to it" that C&F is "notified" of an "occurrence or an offense which may result in a claim," or if a "claim is made or a 'suit' is brought." (DE 26 at 2.) The Policies also provide that the Insurer will "have the right and duty to defend the insured against any 'suit'" resulting from "property damage" to which the Policies apply. (DE 26 at 3.) The Policies define a "suit" as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
>
> a.An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>
> b.Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

(DE 26 at 3; DE 26-1 at 64, 182; DE 26-2 at 22, 206.)

On or about April 10, 2012, Hyman & Mars, LLP, counsel for the Sapphire Ft. Lauderdale Condominium Association, Inc. (the "Association"), served ACI with a Notice of Claim pursuant to Chapter 558, Florida Statutes (the "558 Notice"), which included a 13-page report prepared by engineering consulting firm Kimley-Horn and Associates, Inc. ("Kimley-Horn"). (DE 26 at 3.) Following the initial 558 Notice, the Association, through its counsel, served supplemental Notices of Claim dated May 8, 2012, November 15, 2012, and May 28, 2013 (the "Supplemental 558 Notices"). (DE 26 at 3.) In the 558 Notice and the Supplemental 558 Notices (collectively, the "Subject 558 Notices"), the Association alleged defects and deficiencies in construction resulting in property damage throughout the Project. (DE 26 at 3.) In particular, the supplemental Notice of Claim dated November 15, 2012, included an engineering report prepared by

Kimley-Horn containing 792 line items of specific alleged defects. (DE 26-4 at 6-91.)

Following its preliminary investigation, on or about January 14, 2013, ACI sent a demand letter to C&F, among others, notifying it of the Association's claims. (DE 26 at 4.) ACI demanded that C&F defend and indemnify ACI from the Subject 558 Notices, pursuant to the terms of the Policies. (DE 26 at 3.)

The parties exchanged several letters between January 14, 2013, and August 4, 2013. (DE 26 at 5.) C&F at all times during this period denied that it had a duty to defend ACI. (DE 26 at 5.) C&F continuously stated that it would not tender a defense of ACI because no formal "suit" had been filed. (DE 26 at 5.) By way of example, in its May 29, 2013 letter, C&F stated "[b]ecause this case is not in suit, there is no obligation to defend Altman at this time. CFSI asks that if you are served with any lawsuit that you forward same to CFSI's attention immediately […]). (DE 26-6 at 19.)

During that period when C&F would not defend ACI from the Association's claims, ACI was left to defend itself. In furtherance of its defense, ACI expended significant attorneys' and consultants' fees responding to and investigating the Subject 558 Notices, which resulted in the resolution of nearly all of the Association's claims. (DE 26 at 5.) Indeed, through these efforts, on February 15,

2014, ACI was able to obtain a Release from the Association, which released ACI from multiple items that were alleged in the Subject 558 Notices. (DE 26 at 5.)[1]

Seemingly inconsistent with its position that the Subject 558 Notices did not trigger its duty to defend, on or about August 5, 2013, C&F advised ACI that it had retained another law firm, Cole Scott & Kissane, P.A., to defend ACI from the Association's claims. (DE 26 at 6.) ACI was surprised at C&F's change in position since the Association had not filed a "lawsuit" (and still has not) and C&F did not provide any explanation for its apparent change in position. (DE 26 at 6.) Notwithstanding its change in position, C&F did not reimburse ACI the attorney fees and costs it incurred prior to C&F's appointment of counsel. (DE 26 at 6.)

During the pendency of this action, C&F has continuously maintained the position that the 558 process does not constitute a "suit." (DE 26 at 6.) C&F has not asserted any coverage defenses in this action. (DE 26 at 7.) C&F has not reimbursed ACI for any of the fees and costs incurred by ACI in furtherance of its defense from the Subject 558 Notices. (DE 26 at 7.) Therefore, ACI has expended certain funds in order to investigate, defend, and respond to all of the Association's claims. (DE 26 at 7.) ACI seeks to recover those expenses from C&F.

[1] Subsequent to the February 2014 Release, ACI negotiated for an obtained an additional Release from the Association. As of the filing of this Brief, all of the items alleged by the Association to be defective, and resulting property damage claims, have now been resolved or otherwise settled.

II. Procedural History

On August 21, 2013, Plaintiff-Appellant Altman Contractor's, Inc. ("ACI") filed its Complaint for Declaratory Judgment (the "Complaint"). (DE 1.) On April 4, 2014, Defendant-Appellee Crum & Forster Specialty Insurance Company ("C&F") filed its Answer and Affirmative Defenses to the Complaint. (DE 23.)

ACI moved for summary judgment on May 6, 2014, by filing its Motion for Partial Summary Judgment ("ACI's Motion for Summary Judgment") on the issue of whether the Chapter 558 process is a "Suit" under the terms of the Policies, triggering C&F's duty to defend ACI in the Chapter 558 process. (DE 25.) On June 23, 2014, C&F filed its Response in Opposition to Plaintiff's Motion for Partial Summary Judgment and Memorandum of Law in Support denying that the Chapter 558 process is a "Suit" under the Policies and asserting that § 558.004(13) precluded insurance coverage in any Chapter 558 process. (DE 34.)

C&F moved for final summary judgment on June 24, 2014, by filing its Corrected Motion for Summary Judgment and Supporting Memorandum of Law again arguing that § 558.004(13) negated any duty on the part of an insurer to defend a notice of claim under Chapter 558. ("C&F's Motion for Summary Judgment"). (DE 37.) ACI filed its Opposition to Defendant's Motion for Summary Judgment and Reply in Support of its motion for Partial Summary Judgment on August 5, 2014. (DE 46.)

Following further briefing by the parties, on March 2, 2015, C&F filed its three-page Memorandum Regarding *The Cincinnati Ins. Co. v. AMSCO Windows* ("*AMSCO*") in Support of Its Motion for Summary Judgment and Reply to Plaintiff's Motion for Partial Summary Judgment. (DE 62.) In response thereto, ACI filed its Second Surreply on March 13, 2015, in which it argued against the application of the *AMSCO* decision and asserting that in addition to being a "civil proceeding," the Chapter 558 process also constituted an "alternative dispute resolution proceeding" under the Policies. (DE 65.)

On June 4, 2015, the District Court entered its Opinion and Order (the "Order") denying ACI's Motion for Summary Judgment and granting C&F's Motion for Summary Judgment finding that while § 558.004(13) did not preclude insurance coverage for the Chapter 558 process, the Chapter 558 process was not a "civil proceeding" or an "alternative dispute resolution proceeding." (DE 66.)

On June 4, 2015, the District Court entered its Final Judgment in favor of C&F. (DE 67.) On June 24, 2015, ACI timely filed its Notice of Appeal in the District Court. (DE 68.)

On August 11, 2015, ACI filed its Initial Brief before the U.S. Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit"). (CA 1.) On October 2, 2015, the Construction Association of South Florida, South Florida Associated General Contractors, and Leading Builders of America (the "ACI *Amici Curiae*")

filed their Amended Brief in support of ACI. (CA 2.) C&F filed its Response Brief on October 28, 2015. (CA 3.) On November 4, 2015, the American Insurance Association and the Florida Insurance Council (the "C&F *Amici Curiae*") filed their Brief in support of C&F. (CA 4.) Finally, on December 1, 2015, ACI filed its Reply Brief. (CA 5.)

The Eleventh Circuit heard oral argument in this action on April 14, 2016. On August 2, 2016, the Eleventh Circuit certified the following question to this Court:

> Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a "suit" within the meaning of the CGL policies issued by C&F to ACI?

(the "Certified Question") (CA 6 at 18).

III. Standard of Review

The interpretation of an insurance contract is a question of law subject to *de novo* review. *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241, 1246 (Fla. 2008). Matters of statutory interpretation are likewise subject to *de novo* review. *Bay County v. Town of Cedar Grove*, 992 So. 2d 164, 167 (Fla. 2008). Thus, the standard of review for the Certified Question is *de novo*.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Eleventh Circuit has certified to this Court the question: Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a "suit" within the meaning of the CGL policies issued by C&F to ACI?

Altman Contractors, Inc. ("ACI") was the insured under certain insurance policies (the "Policies") issued by Crum & Forster Specialty Insurance Company ("C&F"). The Policies required C&F to defend ACI against a "suit." Under the Policies, "suit" means a "civil proceeding," including arbitration proceedings and "[a]ny other alternative dispute resolution proceeding" to which C&F consents.

Florida's Chapter 558 is a mandatory pre-suit process applicable to claims for construction defects that requires, *inter alia*, written notice by the claimant, an opportunity for inspection and testing of the alleged defects, a written response by the party receiving notice, and response to a request for documents made thereunder. A claimant cannot proceed with any construction defect lawsuit without first complying with the statute.

The Chapter 558 process is a civil proceeding and, therefore, a suit within the meaning of the policies. The Chapter 558 process is the mandatory first step in any construction defect litigation in Florida and is part and parcel of such litigation. In defining a "proceeding," this Court has previously relied upon the 9th edition of *Black's Law Dictionary*, which defines "proceeding," in relevant part, as

"[a]n act or step that is part of a larger action" and "all the steps taken or measures adopted in the prosecution or defense of an action." Additionally, this Court has cited to *Merriam-Webster's Dictionary of Law*, which defines proceeding as "a particular step of series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations." The Chapter 558 process fits within the definitions of proceeding recognized by this Court because it is a condition precedent to bringing a lawsuit for construction defects and determines the scope of any construction defect lawsuit or arbitration that follows.

Further, "suit" under the Policies is defined broadly as a "civil proceeding" and includes the alternative dispute resolution mechanism set forth in Chapter 558. The Policies list two types of alternative dispute resolution. This list is non-exclusive and illustrates that "civil proceeding" is broad and includes various forms of alternative dispute resolution, such as the Chapter 558 process, which the Florida Legislature described as "an alternative method to resolve construction disputes" and "[a]n effective alternative dispute resolution mechanism."

Alternatively, C&F's argument, at best, illustrates that the policy language is ambiguous and must be construed liberally in favor of coverage for ACI. The Policies define a "suit" as a "civil proceeding," which includes (but is not limited to) arbitration proceedings or "*any other* alternative dispute resolution proceeding" to which C&F consents. Further, "civil proceeding" is not defined in the Policies.

Where insurance policy terms are susceptible to more than one reasonable interpretation, courts are bound to construe the policy in favor of coverage.

Finally, the Florida Legislature enacted Chapter 558 to "resolve construction disputes" and "reduce the need for litigation." Interpreting "suit" and "civil proceeding" as including the Chapter 558 process is consistent with that goal. If allowed to stand, the District Court's holding will undermine the Legislature's goal by discouraging, and in many cases preventing, participation in the Chapter 558 process by those in the building trades. Without the assistance of the insurance carrier, many in the construction industry would lack the resources to meaningfully participate in the Chapter 558 process and would have no choice, or would at least be incentivized, to invite lawsuits in order to obtain coverage. Conversely, when insurance carriers defend their insureds, the financial resources of the insurance carrier result in a meaningful and productive process that greatly reduces the likelihood of litigation.

ARGUMENT

The Eleventh Circuit has certified the following question to this Court:

> Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a "suit" within the meaning of the CGL policies issued by C&F to ACI?

(the "Certified Question").

Florida's Chapter 558 is intended to provide the parties with a process to resolve disputes and avoid litigation for construction defects. *See* § 558.001. It is the mandatory first step in any construction defect lawsuit or arbitration in this state and described by Florida's legislature as an "alternative dispute resolution mechanism." *See* §§ 558.001 and 558.003, Fla. Stat. To initiate the process, the party claiming a construction defect must serve the responsible party (typically, the contractor) with written notice detailing the alleged defects at least sixty days before filing suit (120 days in the case of an association representing more than 20 parcels). *See* § 558.004(1), Fla. Stat. The contractor may then notify parties whom it believes may be responsible for the defects—typically subcontractors and suppliers. *See* § 558.004(3), Fla. Stat. All notified parties are then given an opportunity to inspect the alleged defects and conduct destructive testing, if needed. *See* § 558.004(2) and (3), Fla. Stat. The responding parties are then required to provide the claimant with a written response: (a) offering to repair and/or make monetary payment; (b) disputing the claim; or (c) stating that the party's insurer will make a determination as to the monetary payment.

See § 558.004(4) and (5), Fla. Stat. If the dispute remains unresolved or if the contractor fails to respond to the notice within the time specified, the claimant may "proceed to trial **only** as to alleged construction defects that were noticed and for which the claimant has complied with this chapter […]." § 558.004(7) and (11), Fla. Stat. (emphasis added). Thus, only those allegations that flow through the Ch. 558 process can be alleged in the lawsuit. It is a mandatory process, generally, and for each specific allegation of construction defects.

Turning to the language of the Policies, a "suit" is defined as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
>
> a.An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>
> b.Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

(DE 26 at 3; DE 26-1 at 64, 182; DE 26-2 at 22, 206.) The Chapter 558 Process is a "civil proceeding" because it is a mandatory condition precedent to filing a lawsuit or demanding arbitration for construction defects and is part and parcel of the subsequent legal action. As such, the 558 Process constitutes a "suit" as defined in the Policies, and ACI was entitled to a defense from C&F.

I. The Chapter 558 Process is a Suit within the Meaning of the Policies

Because the Chapter 558 process is a mandatory first step in the filing of any construction defect lawsuit or arbitration in Florida, it is part and parcel of such litigation and thus a "civil proceeding." Additionally, the Chapter 558 process was explicitly created by the Florida legislature as an "alternative dispute resolution mechanism." *See* § 558.001, Fla. Stat. As such, it is a "civil proceeding" and falls within the broad definition of "suit" under the Policies. It should be noted that C&F chose the term "suit" and to define it broadly as a "civil proceeding." The Policies do not specifically require a lawsuit (which C&F now seeks to impose as a requirement) and do not define the phrase "civil proceeding." Any argument over the meaning of the term "suit" or the phrase "civil proceeding" needs to inure to the benefit of the insured (ACI) as more specifically stated below.

A. The Chapter 558 Process is a Civil Proceeding Because it is Part and Parcel of any Construction Defect Litigation

The Chapter 558 process constitutes a civil proceeding because, in practice, it serves as the *sine qua non* to any construction defect litigation in Florida. Thus, it is part and parcel of the litigation.

1. Chapter 558 is Inextricably Intertwined with Any Construction Defect Litigation or Arbitration

The Chapter 558 process is the sole means by which a party may initiate a construction defect lawsuit or arbitration in Florida. § 558.003, Fla. Stat.

("[c]laimants may not file an Action subject to this Chapter without first complying with the requirements of this Chapter"). Consequently, Chapter 558 is part of the larger action and therefore part of a civil proceeding.

In defining a "proceeding," this Court has relied on *Black's Law Dictionary* (hereinafter "*Black's*) (9th ed. 2009). *See Raymond James Fin. Serv., Inc. v. Phillips*, 126 So. 3d 186, 190-91 (Fla. 2013) (concluding that "[w]hereas civil actions may be limited to court cases, a proceeding is clearly broader in scope"). Further, the 9th edition of *Black's* relied upon by this Court in *Raymond James* defines "proceeding" as including, *inter alia*, "[a]n act or step that is part of a larger action" and provides that "[i]t is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action […].'" *Black's Law Dictionary* 1324 (9th ed. 2009) (quoting Edwin E. Bryant, *The Law of Pleading Under Codes of Civil Procedure 3-4* (2d ed. 1899)). Additionally, this Court in *Raymond James* also cited *Merriam-Webster's Dictionary of Law* (hereinafter "*Merriam-Webster's*"), which broadly defines a "proceeding" as "'a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, or regulations.'" *Raymond James*, 126 So. 3d at 190, n. 4 (quoting *Merriam-Webster's Dictionary of Law* 387 (1996)).

Chapter 558 requires: written notice by the claimant; an opportunity for inspection and destructive testing of the alleged defects; a response to a request for documents and records; and a written response to the notice offering to repair and/or make payment, disputing the claim, or advising that the party's insurer will make a determination as to payment. *See* § 558.004, Fla. Stat. Only if this process is followed and the dispute remains unresolved or if the contractor fails to respond to the notice may a claimant proceed to formal litigation or arbitration. *See* § 558.004(7), Fla. Stat. This mandatory process cannot be divorced from the litigation that follows.

Further, the Chapter 558 process impacts construction defect lawsuits in several significant respects. First, the filing of the notice required by Chapter 558 tolls the applicable statute of limitations. *See* § 558.004(10). Second, the Chapter 558 process determines the scope of any ensuing litigation because the claimant may "proceed to trial *only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter* […]." § 558.004(11) (emphasis added). Third, Chapter 558 provides for pre-litigation discovery whereby any party may serve written document requests on another party, which must be responded to within 30 days of service, and a party that does not comply with the request for documents is subject to sanctions for a discovery violation in the ensuing lawsuit. *See* §558.004(15), Fla. Stat. Consequently, the Chapter 558

process impacts the course and scope of any construction defect lawsuit. As such, the Chapter 558 pre-suit process is part of a larger action and, therefore, a civil proceeding. *See Black's Law Dictionary* 1324 (9th ed. 2009).

As the foregoing analysis demonstrates, Chapter 558 creates a detailed and multi-step process that the parties are to engage in before filing a lawsuit. The District Court incorrectly concluded that the Chapter 558 process is not a civil proceeding because it merely requires the service of a notice before commencing suit. (DE 66 at 12.) However, this is a mischaracterization that oversimplifies the Chapter 558 process. Chapter 558 contemplates and requires far more than the serving of a notice. Serving the notice is the first required step in a larger statutory scheme that in many ways mirrors formal litigation by requiring a written demand and a written response and provides for an inspection and discovery process in order to reach resolution. The process created by Chapter 558 constitutes a "particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations." *Raymond James*, 126 So. 3d at 190, n. 4 (quoting *Merriam-Webster's Dictionary of Law* 387 (1996)); *see also Black's Law Dictionary* 1324 (9th ed. 2009) (defining a proceeding as a "step that is part of a larger action").

Further, the District Court noted that the legislative findings and declaration of the statute state, in relevant part, that "it is beneficial to have an alternative

method to resolve construction disputes that would reduce the need for litigation" and that "[a]n effective alternative dispute resolution mechanism" would give the parties "an opportunity to resolve the claim without resort to further legal process." § 558.001, Fla. Stat. Based on this language, the District Court concluded that "[f]ar from an act or step that is part of a larger action, Chapter 558 is intended to avoid the commencement of an action." (DE 66 at 13.)

The District Court's analysis on this point is flawed because it incorrectly positions Chapter 558 as an alternative to initiating a lawsuit and ignores the fact that Chapter 558 is the first step in the lawsuit. The District Court's characterization suggests that a claimant could choose to litigate or, alternatively, participate in the Chapter 558 process. This is not the case. There can be no lawsuit without first participating in the Chapter 558 process. Chapter 558 is the sole means by which a party may commence a construction defect lawsuit in Florida. As such, it is a civil proceeding as previously defined by this Honorable Court.

Further, the legislative findings and declaration explicitly state that the Chapter 558 process is intended to resolve the dispute "without resort to *further* legal process," thus recognizing that Chapter 558 itself is part of a legal process. § 558.001 (emphasis added). Additionally, the claims made in the Chapter 558 process determine the scope of any construction defect litigation. *See* § 558.004, Fla. Stat. ("[t]he court shall allow the action to proceed to trial only as to the

alleged construction defects that were noticed and for which the claimant has complied with this chapter"). Accordingly, the actions taken pursuant to Chapter 558 are acts or steps that are part of the larger action and, thus, constitute a "civil proceeding" and "suit" as defined by the Policies.

The specific rationale employed by the California Court of Appeals interpreting identical policy language in the context of California's version of Chapter 558, known as the Calderon Act, is directly on point. *See Clarendon Am. Ins. Co. v. StarNet Ins. Co.*, 113 Cal. Rptr. 3d 585 (Cal. Ct. App. 2010), review granted, 117 Cal. Rptr. 3d 613 (Cal. 2010), review dismissed, 121 Cal. Rptr. 3d 879 (Cal. 2011).[2] Like Chapter 558, the purpose of the Calderon Act "is to encourage settlement of construction and design defect disputes and to discourage unnecessary litigation." *See id.* at 588-589. Under the Calderon Act, before filing suit the association was required to serve a notice on the general contractor listing the alleged defects. Service of the notice commenced a period of time during

[2] The *Clarendon* decision was appealed to the Supreme Court of California, *see* 117 Cal. Rptr. 3d (Cal. 2010), however, briefing and all action was deferred until the Supreme Court of California disposed of the issues in *Ameron Intern. Corp. v. Ins. Co. of State of Penn.*, 50 Cal. 4th 1370, 242 P.3d 1020 (Cal. 2010). Therein, the California Supreme Court found that in a policy where the term "suit" was undefined, the duty to defend was still triggered when an administrative proceeding before the Department of Interior Board of Contract Appeals was commenced. Nothing in the *Ameron* decision in any way undermined the rationale employed by the *Clarendon* court. After this opinion was published, the Supreme Court of California dismissed its review of the original *Clarendon* decision. Therefore, the appellate decision finding that the mandatory pre-litigation notice triggered the duty to defend represents the final opinion on this topic.

which the parties were to attempt to resolve the dispute before proceeding to litigation. *See id.* at 589. The *Clarendon* court found that the term "civil proceeding" as set forth in the applicable insurance policy defining "suit" (which was identical to Policies at issue here), encompassed the Calderon process "because it is a proceeding created by the Civil Code that is required before a common interest development association may file a complaint alleging construction or design defect damages." *See id.* at 591.

The *Clarendon* court went even further to describe why the mandatory Calderon process was a "civil proceeding within the meaning of the policy." *Id.* at 592. The court noted that it is the "first step" in a "continuous litigation process" and that it "is tied directly and securely to an association's complaint for damages against a builder, developer, or general contractor based on construction defects." *Id.* Further, the court described the Calderon process as a mandatory condition precedent to filing construction defect litigation and noted that the results of the process "are incorporated into and become part of the postcomplaint litigation." *Id*. Thus, it is "part and parcel of construction defect litigation." *Id.* Based on these factors, the court concluded that the pre-litigation notice required by the Calderon Act triggered an insurer's duty to defend. *Id.* All of this is similar, if not identical, to Florida's Chapter 558 pre-suit notification process.

2. Chapter 558 is Compulsory to Any Construction Defect Litigation and, Therefore, Part of a Larger Action

The District Court reasoned that because Chapter 558 is a "mechanism" to guide the parties in discussing the dispute, it is not a proceeding. (DE 66 at 14.) The basis for the District Court's conclusion is that Chapter 558 does not require the parties to appear before a decision maker and it does not result in a determination of rights and remedies. (DE 66 at 14.) The District Court concluded that Chapter 558 is not a proceeding because, according to the District Court, it merely encourages settlement discussions and the penalty for noncompliance with the statute is limited. (DE 66 at 14.)

The District Court's reasoning on these points, however, is incorrect and, with all due respect, conclusory and without legal support. Chapter 558 is a civil proceeding not because the process results in adjudication, but because it is "an integral part of construction defect litigation." *Clarendon American Ins. Co. v. StarNet Ins.Co.*, 113 Cal. Rptr. 3d 585, 586 (Cal. App. 4th 2010) (finding that the process under California's version of Chapter 558 was a civil proceeding under an insurance policy with language identical to that at issue in the subject Policies). Further, the District Court's emphasis on penalties for noncompliance is misplaced and without legal justification. The Chapter 558 process is compulsory for both parties and is a prerequisite to any construction defect litigation. *See* §§ 558.00(3), 558.004(1), 558.004(2). The existence of penalties for noncompliance (or lack

thereof) is not relevant to whether the Chapter 558 process is compulsory. Irrespective of penalties, the process is compulsory.

First, a plaintiff must comply with the process provided in Chapter 558 as a prerequisite to filing a lawsuit or arbitration. Second, Chapter 558 imposes mandatory obligations on recipients of a notice of claim. Recipients "*must* serve a written response to the person who served a copy of the notice of claim." § 558.004(4), Fla. Stat. (emphasis added). *See also Banner Supply Co. v. Harrell*, 25 So. 3d 98, 100, n.4 (Fla. 3d DCA 2009) (recognizing that the contractor served with a notice "must" serve a written response to the claimant). Similarly, the statute provides that "[u]pon request, the claimant and any person served with notice […] *shall* exchange" documents. § 558.004(15), Fla. Stat. (emphasis added). The obligations imposed by Chapter 558 are mandatory.

Importantly, courts in Florida find that the words "must" and "shall" connote that a statute is mandatory and requires strict compliance. *See Chalfonte Condo. Apt. Ass'n, Inc. v. QBE Ins. Corp.*, 526 F. Supp. 2d 1251, 1256 (S.D. Fla. 2007) ("it is clear that the legislature, by using mandatory language, intended for the statute to be strictly complied with"); *see also In re Tennyson*, 611 F.3d 873, 877 (11th Cir. 2010) ("the use of the word 'shall' 'normally creates an obligation impervious to judicial discretion'"). The statute's clear terms imposing mandatory obligations on the recipients of a notice of claim must be construed as mandatory.

The absence of specific penalties for non-compliance does not make the requirements of Chapter 558 any less mandatory. To find otherwise would minimize the statutory language and require Florida's legislature to include penalties each time it attempts to impose mandatory obligations. Such a requirement would create an illogical result applicable to all otherwise-mandatory Florida statutes without penalties and a penalty-based statutory scheme moving forward. Florida's Legislature would be forced to insert specific penalty provisions in any statute with mandatory obligations.

Moreover, penalties do exist. If a claimant fails to comply, it cannot bring a lawsuit. *See* § 558.003. If a claimant fails to include a particular defect in its notice, the claimant is precluded from proceeding to trial as to that defect. *See* § 558.004(11). If a recipient fails to respond to a notice, a claimant can proceed immediately to litigation. *See* § 558.004(6), Fla. Stat. Further, the failure of either party to produce requested documents is cause for discovery sanctions in the ensuing lawsuit. *See* § 558.004(15), Fla. Stat.

The mandatory nature of this process renders Chapter 558 "a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulation." *Raymond James*, 126 So. 3d 186, 190, n. 4 (quoting *Merriam-Webster's Dictionary of Law* 387 (1996)). Accordingly, Chapter 558 is a

suit within the meaning of the Policies and the Certified Question should be answered in the affirmative.

B. "Civil Proceeding" as Used in the Policies is Broad and Includes the Alternative Dispute Resolution Mechanism Set Forth in Chapter 558

"Suit" under the Policies is defined broadly as "civil proceeding." *See Raymond James*, 126 So. 3d at 191 ("[w]hereas civil actions may be limited to court cases, a proceeding is clearly broader in scope"). The Policies list, by way of example, two types of alternative dispute resolution that fall within the definition of "civil proceeding." This illustrates that "civil proceeding" is broad and includes various forms of alternative dispute resolution. Significantly, nothing in the language of the Policies indicates that the specific forms of alternative dispute resolution listed therein are exclusive. Rather, the Policies provide that a "suit" or "civil proceeding" includes, but is not limited to, those forms of alternative dispute resolution and confirms the broad scope of the term "suit" and the undefined phrase "civil proceeding."

The process created by Chapter 558 is another form of alternative dispute resolution that falls within the broad definition of "civil proceeding." Indeed, in enacting Chapter 558, the Florida Legislature stated its intention to create "an alternative method to resolve construction disputes" and described Chapter 558 as "[a]n effective *alternative dispute resolution* mechanism." § 558.001 (emphasis

added). The District Court found that the Chapter 558 process is not an alternative dispute resolution proceeding, in part, because it does not contain "any procedure akin to arbitration or mediation." The District Court's reasoning on this point, however, is without support. The Policies contain no such requirement. Nothing in the Policies restricts alternative dispute resolution to arbitration or mediation. Instead, the wording of the Policies is broad; it includes forms of alternative dispute resolution *other than* arbitration and does not specifically mention mediation. Had the Policies intended to restrict alternative dispute resolution to formal arbitration or mediation, they could have done so. Moreover, the term "civil proceeding" is not defined in the Policies. "[W]hen an insurer fails to define a term in a policy, … the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided." *State Farm First & Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998), *quoting State Comprehensive Health Ass'n v. Carmichael*, 706 So.2d 319, 320 (Fla. 4th DCA 1997).

The Colorado Court of Appeals' decision in *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo. Ct. App. 2012), is consistent with the Florida Legislature's intent and is instructive on this point. In interpreting policy language identical to that at issue here and applying it to Colorado's version of Chapter 558, known as "CDARA," the court in *Melssen* found that CDARA was both a "civil

proceeding" and an alternative dispute resolution proceeding to which the carrier had consented. *See id.* at 334-35.

The CDARA process is strikingly similar to the Chapter 558 process: the property owner must serve a written notice of claim seventy-five days before filing suit; the notice must describe the alleged defects and damages; the contractor may inspect the property; the contractor then has thirty days to submit an offer to repair the defect or pay a sum; if the contractor does not make an offer or the owner rejects the offer, only then can the owner bring an action against the contractor. *See id.* at 334-35. Moreover, any action filed without first complying with the CDARA process is stayed, and serving the notice tolls the statute of limitations. *See id.* at 335, fn. 1. The *Melssen* court noted that CDARA was enacted to "encourage [ ] resolution of potential defect claims before suit is filed" and to "facilitate out-of-court resolution of construction defect claims." *Id.* at 335 (quoting *Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1192 (Colo. 2012) and *Shaw Constr., LLC v. United Builder Services, Inc.*, 296 P.3d 145, 151 (Colo. Ct. App. 2012)).

In analyzing the policy language in the context of CDARA, the *Melssen* court noted that "a 'suit' is not limited to a civil complaint" and that "[t]he policy refers broadly to 'a civil proceeding,' not a civil action." *See Melssen*, 285 P.3d at 334 (citing *Black's Law Dictionary* 1324 (9th ed. 2009) (quoting Edwin E. Bryant,

The Law of Pleading Under Codes of Civil Procedure 3-4 (2d ed. 1899)) ("[a proceeding] is more comprehensive than the word 'action'"). Further, in finding that CDARA constituted a civil proceeding, the *Melssen* court noted that civil proceeding under the policy "expressly includes 'any other alternative dispute resolution proceeding […].'" *See Melssen*, 285 P.3d at 334.

The District Court concluded that "because the Florida Chapter 558 *mechanism* is not a 'proceeding' of any kind, it is also not an alternative dispute resolution 'proceeding.'" (DE 66 at 15) (emphasis added); *see also* (DE 66 at 14, n. 6) ("Plaintiff's argument that at the very least this was an alternative dispute resolution proceeding […] similarly does not succeed, because the Chapter 558 *mechanism* is not a 'proceeding' of any kind") (emphasis added). The distinction between a "mechanism" and "proceeding" attempted by the District Court does not have any legal basis or support and is opposite the very broad definitions of "suit" and "civil proceeding" contained within the Policies.

To distinguish the Chapter 558 process as a "mechanism" rather than a "proceeding" as the District Court did is to put form before substance. The fact that the Florida Legislature used the term "mechanism" to describe the process does not mean it is not an alternative dispute resolution *proceeding* as contemplated by the Policies and by the Florida Legislature. Denying ACI the relief sought on this basis

ignores both the Legislature's intent and the well-reasoned legal precedent examined herein.

Even if this Honorable Court held that the Chapter 558 process fell under sub-part b. of the definition of "suit" contained in the Policies, which refers to "other" alternative dispute resolution proceedings and requires C&F's "consent" (which ACI contends is not necessary as the Chapter 558 process is not voluntary or a process that the insureds consent to), ACI submitted to the Chapter 558 process with C&F's consent. C&F was notified of the Subject 558 Notices and ACI demanded that C&F provide it with a defense in the Chapter 558 process. While C&F denied that it had a duty to defend, the undisputed record is devoid of any objection by C&F to ACI's participation in the Chapter 558 process, which would have been illogical as Chapter 558 is mandatory and ACI could not have opted out without violating its statutory rights. Indeed, C&F eventually changed its position and appointed counsel to represent ACI in the Chapter 558 process. Even if C&F did not expressly consent to ACI's participation, it either waived its ability to consent or its consent was implied as a matter of law. *See e.g., Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 334-36 (Colo. App. 2012) ("consent may also be deemed implied or an insurer may waive a consent requirement in a policy"). This alone should have precluded the District Court from entering summary judgment in favor of C&F.

II. Alternatively, the Policy Language is Ambiguous and Must Be Interpreted Liberally in Favor of Coverage for ACI and Strictly against C&F

In the context of the Chapter 558 process, and while ACI contends that the Policies clearly intend for the defense obligation to exist, C&F's argument, at its very best, does nothing more than illustrate that the term "suit" and the phrase "civil proceeding" as used in the Policies are ambiguous and, therefore, must be construed in favor of the insured and against the insurer. Several basic principles of Florida law apply to the construction of insurance policies. In interpreting the provisions of a policy, Florida courts begin with "the plain language of the policies as bargained for by the parties." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). Ambiguity is not necessarily present in an insurance policy merely because the policy requires interpretation or analysis. *See e.g.*, *Penzer v. Transportation Insurance Co.*, 29 So. 3d 1000, 1005 (Fla. 2010). However, Florida law is clear that if the policy language at issue is "susceptible to more than one reasonable interpretation, one providing coverage and [ ] another limiting coverage, the insurance policy is considered ambiguous." *Anderson*, 756 So. 2d at 34. Further, under Florida law, when policy language is ambiguous, it is to be "interpreted liberally in favor of the insured and strictly against the drafter." *Id.*

In this case, even if this Honorable Court accepts C&F's argument, it simply establishes that the term "suit" as used in the Policies is an ambiguous term. In the

Policies issued by C&F, the term "suit" means a "civil proceeding," but the term "civil proceeding" is not defined. While the lack of a definition does not necessarily render a provision ambiguous, "when an insurer fails to define a term in a policy, … the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided." *CTC Development*, 720 So. 2d at 1076. Further, the Policies do not limit the definition of "suit" to the undefined term "civil proceeding." The Policies go on to provide that a "suit" *includes* (but is not limited to) an arbitration proceeding or "*any other* alternative dispute resolution proceeding" to which the insured submits with C&F's consent.

As noted by the Eleventh Circuit in certifying the question to this Court, "differing interpretations of the same provision is evidence of ambiguity[.]" (CA 6 at 14) *quoting Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1220 (11th Cir. 2015); *see also Grissom v. Commercial Union Ins. Co.*, 610 So. 2d 1299, 1304 (Fla. 1st DCA 1992) (noting that the fact that case law gives differing meanings to a policy term "is sufficient in itself to belie the notion that the policy language is clear and unambiguous"). A term's history of ambiguity in the law may also support a finding that the term is ambiguous and subject to interpretation. *See Epstein v. Hartford Cas. Ins. Co.*, 566 So. 2d 331, 333 (Fla. 1st DCA 1990).

Although there are no cases in Florida construing the term "suit" in the context of the Chapter 558 process, as C&F notes and has argued, courts outside of

Florida have reached differing interpretations of the term "suit" when construing *identical* policy language in the context of similar notice and repair statutes. If this Honorable Court accepts C&F's argument, which ACI rejects, C&F will have done nothing more than prove an ambiguity in its policy form. *See Clarendon Am. Ins. Co. v. Starnet Ins. Co.*, 113 Cal. Rptr. 3d 585 (Cal. App. 4th 2010), *review granted*, 117 Cal Rptr. 3d 613 (Cal. 2010), *review dismissed*, 121 Cal Rptr. 3d 879 (Cal. 2011) (wherein the court held that California's notice and repair statute was a "civil proceeding" and therefore a "suit" under a policy with identical language to that at issue here); *see also Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo. App. 2012) (holding that Colorado's notice and repair statute was an "alternative dispute resolution proceeding" and was thus a suit under the relevant identical policy language). To the extent C&F cites to cases holding to the contrary and makes arguments that are accepted by this Honorable Court, such holdings and arguments (if accepted) merely evidence and support a finding of ambiguity.

Indeed, the Eleventh Circuit in certifying this matter to this Court stated that, "[h]ere, there are reasonable arguments presented by both sides as to whether the Chapter 558 process constitutes a 'suit' or 'civil proceeding' within the meaning of the CGL policies issued by C&F." (CA 6 at 14-15.) Florida law is clear that if the relevant provisions are susceptible to more than one reasonable interpretation, an insurance policy is considered ambiguous. *See e.g.*, *Anderson*, 756 So. 2d at 34.

Florida law is likewise clear that "where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer." *CTC Development*, 720 So. at 1076. To the extent that the terms "suit" and "civil proceeding" as used in the Policies issued by C&F are ambiguous, they should be construed liberally in favor of providing coverage to ACI, consistent with Florida law. ACI respectfully submits that the Certified Question should be answered in the affirmative.

III. Legislative Intent Must Be Construed Harmoniously with the Policies

As a final point, it bears mentioning that the Florida legislature's stated intent in enacting Chapter 558 is to "resolve construction disputes that would *reduce the need for litigation* as well as protect the rights of property owners." § 558.001, Fla. Stat. (emphasis added).

The District Court's holding discourages, and in many cases will prevent, contractors from actively participating in the Chapter 558 process or attempting to resolve claims prior to the filing of a lawsuit. Instead, the District Court's ruling will force and incentivize contractors throughout Florida to invite lawsuits to be filed in order to receive insurance coverage. Without the benefit of an insurance carrier providing a defense, many in the construction industry would lack the financial resources to meaningfully participate in the 558 process and will thus be forced to wait for the lawsuit to be filed. Even some contractors with the ability to

defend would choose to force or invite litigation to obtain the carrier's contribution rather than defend with their own resources. The District Court's ruling thus undermines the legislature's intent in enacting Chapter 558. The legislature did not seek to encourage lawsuits. It sought to encourage settlement.

On the other hand, when insurance carriers defend their insureds when a Chapter 558 notice of claim is received, the financial resources of the insurance carrier are beneficial and result in a meaningful and productive process that greatly reduces the likelihood of litigation and, at a minimum, reduces the issues in dispute in any subsequent litigation. In other words, the active participation of insurers throughout Florida in the Chapter 558 process helps to "reduce the need for litigation as well as protect the rights of property owners." § 558.001, Fla. Stat.

The District Court's ruling thwarts the purpose of the statute and encourages litigation rather than reducing it. This ruling goes directly against the intent of the Florida legislature in enacting Chapter 558.

C&F and its *Amici* argued below that interpreting the relevant language in the Policies to allow an insured to demand a defense in the Chapter 558 process will encourage claimants to retain counsel thereby discouraging settlement. This argument ignores the reality of the Chapter 558 process. The Chapter 558 process is the first step in initiating a construction defect lawsuit. Typically, it is the claimant's attorney that drafts and serves the Chapter 558 notice and, thus, the

claimant has already retained counsel and consultants. Moreover, a claimant who serves a formal written notice to initiate the Chapter 558 process is doing so with an eye toward litigation or at a minimum is contemplating future litigation and framing the Chapter 558 notice with that in mind.

The instant case is an illustration of this. Here, ACI was served with several Chapter 558 notices by counsel for a condominium association. The Chapter 558 notices included an engineering report prepared by the Association's engineering consultant which detailed 792 line-item alleged defects with the Project. In the face of such a claim and without the benefit of insurance to provide a defense (including attorneys and consultants), many in the building trades would lack the resources to respond to such a notice or would refuse to respond and instead wait to be sued in order to have defense coverage from the carrier. By restricting an insured's ability to obtain a defense from its carrier, the District Court's ruling punishes respondents for acting responsibly in mitigating legal fees and damages and incentivizes them to invite litigation. Such a result undermines the intent of the Florida Legislature and the stated purpose of Chapter 558.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court answer the Certified Question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to counsel of record identified below by e-mail via the Florida Courts e-filing Portal on October 12, 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

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