IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: SC16-1420
Lower Tribunal Case No.: 15-12816

Altman Contractors, Inc.,

Appellant,

v.

Crum & Forster Specialty Insurance Company,

Appellee.

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

UNITED POLICYHOLDERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT, ALTMAN CONTRACTORS, INC.

Dated: October 24, 2016

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit organization that provides information and advocacy for insurance policyholders across the country. Its work is supported by donations, foundation grants, and volunteer labor. In addition to providing resources for solving individual coverage problems and promoting insurance literacy, United Policyholders advocates for laws and public policy that advance the interest of insurance consumers.

United Policyholders has been active in Florida since Hurricane Andrew in 1992. We work with the Insurance Commissioner and the Office of Insurance Regulation, other non-profits and individual home and business owners. We are involved in projects related to property insurance availability, depopulating Citizens, promoting disaster preparedness and mitigation and educating and assisting consumers navigating claims. At present, United Policyholders is actively involved in relief efforts related to Hurricane Matthew and its aftermath.

State insurance regulators, academics, and journalists throughout the U.S. routinely seek United Policyholders' input on insurance and legal matters. We have been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

United Policyholders assists courts as *amicus curiae* in appellate proceedings throughout the United States. UP has appeared as *amicus curiae* in many cases in Florida, including: Lemy v. Direct General Finance Company (Case No. 12-14794-FF, U.S. Court of Appeals, 11th Circuit, Florida, 2014); Amado Trinidad v. Florida Peninsula Insurance Company (Case No. SC11-1643, Florida Supreme Court, 2012); Washington National Insurance Corporation v. Sydelle Ruderman, et al. (Case No. SC12-323, Florida Supreme Court, 2012); and Amelia Island Company v. Amerisure Insurance Company (Case No. 10-10960G, U.S. Court of Appeals, 11th Circuit, Florida, 2010).

United Policyholders submits this Brief as *amicus curiae* because it concerns policyholder issues that extend beyond the facts that are the subject of this litigation. United Policyholders recognizes that this case is one of general public interest and seeks to supplement the efforts of the parties' counsel by drawing attention to issues of law that may not have been considered in prior briefing. If allowed to appear, United Policyholders will address the contractual obligations of Crum & Forster and how these obligations should be analyzed under Florida's established rubric for contract analysis. United Policyholder's arguments will support, but not duplicate, the arguments of the Appellant.

SUMMARY OF ARGUMENT

United Policyholders respectfully asks that the question certified to this Court by the United States Court of Appeals for the Eleventh Circuit be answered in the affirmative for the following reasons:

(1) The question of whether the notice-to-repair procedure under §558.001 *et seq.* is a "suit" under the standard commercial general liability policy must be considered part and parcel of the insurance company's duty to defend under the policy.

(2) An insurance company's duty to defend is a broad, contractual obligation. It is, conceptually, a distinct duty, which is broader than the insurer's duty to indemnify.

(3) Analysis of the scope of this duty must arise from a careful consideration of what the policy was designed to do and what the policy says.

(4) The insurance industry designed the version of the commercial general liability policy at issue here to market it as a broad coverage instrument that would provide a defense for policyholders in a variety of pre-litigation proceedings like the 558 notice-to-repair procedure. This broadening of coverage was accomplished by implementing the definition of "suit" that is at issue in this case.

(5) The language of the policy also indicates that the policy drafters anticipated that the policy would provide defense coverage for a wide variety of "civil proceedings" that arise outside the context of formal litigation. Specifically, the policy definition of "suit" indicates that suits encompass a non-exhaustive list of informal proceedings such as arbitrations and alternative dispute resolutions.

(6) The term "civil proceedings" is not defined in the policy. Florida law dictates that when terms are left undefined in the policy, those terms should be construed as they are understood by the common layperson, using a variety of legal *and non-legal* dictionaries.

(7) Further, where policy terms are ambiguous, they should be construed against the insurer and in favor of coverage.

(8) When construed according to the dictates of Florida law, the policy's definition of "suit" includes procedures like the 558 notice to repair.

ARGUMENT

I. Introduction

The insurance industry designed the modern commercial general liability ("CGL") policy to be marketed as a broad coverage instrument that would provide a defense in pre-litigation proceedings like the Florida Statutes Chapter 558 notice to repair. These policies, having been marketed and sold to policyholders, thereby

became contracts, in which the insurance carriers promised, among other things, to provide defense coverage beyond traditional litigation proceedings. Accordingly, when an insurance carrier attempts to back out of its promise and deny coverage, the policy at issue must be analyzed using established rules of contract interpretation.

This may seem an obvious statement, but it would be a mistake to overlook the familiar. Crum & Forster Specialty Insurance Company's analysis wanders through myriad cases and statutes, seeking to interpret the purpose and meaning of the 558 notice to repair and examining that statute alongside other states' pre-litigation statutes. There is no disagreement that the statute is a critical piece of the analysis. But more attention must be given to the policy itself. And to the extent that it can be said that Crum & Forster and its *amici* address the policy at all, they ignore the rules of contractual analysis. The result is an analysis that is tortured and confused.

At issue here is whether Crum & Forster's policy's definition of "suit" is broad enough to embrace the 558 procedure. When scrutinized under Florida's insurance policy contract analysis, the 558 procedure is a "suit" and triggers the insurance company's duty to defend.

II. Analysis

a. The Insurance Company's Expansive Duty to Defend Is an Essential Foundation to the "Suit" Analysis

As an initial matter, Crum & Forster's duty to defend is inextricably entwined with the policy's definition of "suit." The concept of "suit" does not exist in a vacuum in the policy; rather, it is the keystone of the insurer's duty to defend: "We [the insurer] will have the right and duty to defend the insured against any 'suit' seeking those damages." *Crum & Forster Policy* at V.18.

Crum & Forster urges that the 558 notice-to-repair procedure somehow relieves it of its duty to defend. *See Crum & Forster's Brief* at 25-29. As grounds for this position, Crum & Forster argues that "[e]xperience teaches that little perpetuates litigation so much as parties to a dispute 'lawyering up.'" *Id.*at 27.

But this position is grounded upon a false paradigm. Whatever Crum & Forster's "experience" may be concerning the cost of parties' "lawyering up," Crum & Forster can only speak with authority from its own point of sight. It cannot expect the Court to accept that "experience" as authoritative on the strength of Crum & Forster's mere word. Furthermore, it does not stand to reason to attribute this learned wisdom as general to all concerned. Certainly a policyholder, wishing to avoid litigation by cooperating with the 558 process, will find cold comfort in Crum & Forster's "experience" insofar as it teaches that the insureds on Crum & Forster's

liability policies, facing the specter of litigation, should have no access to competent counsel.

This false paradigm is also at odds with established Florida law. The duty to defend is a conceptually distinct duty. *Allstate Ins. Co. v. Rjt Enters.*, 692 So.2d 142, 144 (Fla. 1997); *see also* Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes 278 (Aspen 15th ed. 2011) (citing *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687, 694 (5th Cir. 2010)). Because it is broader than the duty to indemnify, the policyholder is given considerable deference on questions of the duty to defend. *See Rjt Enters.*, 692 So.2d at 144-45. "The duty to defend is broader than the duty to pay" and "encompasses responsibilities beyond the coverage limits." *Id.* To be sure, "the cost of providing a defense may exceed the amount paid to indemnify." *Id.* at 145. And an insurer is obligated to pay these defense costs, without the remedy of reimbursement, even if it is later determined that the claim was not covered under the policy. *See Pa. Lumbermens Mut. Ins. Co. v. Ind. Lumbermens Mut Ins. Co.*, 43 So.3d 182, 186 (Fla. App. 2010). It is this breadth of that duty which dictates that a 558 notice is a "suit."

The duty to defend is, moreover, a contractual duty. *Aetna Ins. Co. v. Borrell-Bigby Elec. Co.*, 451 So.2d 139, 142 (Fla. App. 1989); *see also In re Sept. 11th Liability Ins. Cov. Cases*, 458 F.Supp. 2d 104, 116 (S.D.N.Y. 2006). In other words, the policy represents "the objective intent of the parties, demonstrated over the

course of their negotiations." *See In re Sept. 11th Liab. Ins.*, 459 F.Supp. 2d at 116. The analysis concerning this duty, therefore, arises from the policy. *Id.* *See also Borrell-Bigby Elec. Co.*, 451 So.2d at 142 ("In the absence of statutory regulation, the duty should be established by a fair reading of the contractual language."). Analogies to other pre-litigation procedures in other states may help orient the analysis, but the analysis itself should concentrate on the policy. *In re Sept. 11th Liab. Ins.*, 458 F.Supp.2d at 116.

b. Florida Courts Use a Specific Analysis When an Insurer Attempts to Avoid Coverage

Bearing all of this in mind, we must look to Florida's rules for policy analysis. The Court must: (1) examine the policy in its context, *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003); (2) "give every provision its full meaning and operative effect," *id.*; and (3) construe coverage clauses in "the broadest possible manner to effect the greatest extent of coverage." *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So.2d 176, 179 (Fla. Ct. App. 1997). If the Court determines that the policy language is susceptible to more than one reasonable interpretation, that provision is considered ambiguous. *Swire Pac. Holdings, Inc.*, 845 So.2d at 165. Ambiguous language must be "construed in favor of the insured and strictly against the drafter." *Id.* (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000)).

When we analyze the Crum & Forster policy in this manner, we discover: (1) that the insurance industry designed this version of the CGL policy with the express purpose of expanding the scope of coverage, particularly the carrier's duty to defend; and (2) that, to accomplish this end, the policy employs expansive, living language that anticipates coverage for the broad array of civil proceedings that may obtain outside the formal litigation context.

c. Altman's Policy Was Designed to Cover Alternative Dispute Resolution Like the 558 Notice to Repair

The foremost consideration in policy analysis is to understand *what* the policy was designed to do. "[W]hen analyzing an insurance contract, it is first necessary to examine the contract *in its context and as a whole*, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla. 2003) (emphasis added). Examining the "context" of the policy means a careful consideration of what the policy was designed to protect against. *See id.* Liability insurance provides protection for loss sustained because of a third-party claim against the policyholder. *See id.* We are particularly concerned here with the insurance company's duty to defend under a standard CGL policy. So, we must consider what sort of coverage the CGL policy was designed to provide concerning the carrier's duty to defend.

In the insurance market, CGL policies are primarily sold using standardized forms crafted by Insurance Services Office, Inc. ("ISO").[1] These forms are developed through an arduous and calculated process that considers market conditions, relevant legislation and case law, and general industry concerns. In fact, ISO's drafting process closely resembles the passage of legislation:

> First, a perceived problem arises. Second, the drafter learns of the problem through constituent lobbying or the notoriety of an event reflecting the problem. Third, the drafter (ISO and its core "membership" of insurers) considers the problem and interest group sentiment and responses as best it can consistent with the drafter's assessment of overall interests, including self-interest. Fourth, the drafter issues a response, usually in the form of new or revised policy language.

Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203, 210 (2010). Throughout this process, ISO produces various materials reflecting the drafting history, such as, memoranda, correspondence, committee-meeting minutes, and testimony. "Taken together, these various materials provide a rich source of information potentially shedding light on disputed insurance policy terms." STEMPEL, *supra* note 2.

[1] ISO is a private trade association of the property-casualty insurance industry that, through the use of committees and subcommittees, drafts and revises standard form property and casualty policies. *See* Jeffrey W. Stempel, STEMPEL ON INSURANCE CONTRACTS § 4.05[A] (3rd ed. 2006).

It is plain at the outset that the CGL policy at issue here was designed to expand the scope of the carrier's duty to defend. The policy achieves this expansion by providing a broad, "living" definition of "suit."

"Suit" first appeared as a defined term in the 1986 CGL coverage form, and the definition has been expanded over the years in revisions of the CGL policy. *Annotated ISO CGL Policy*, (attached hereto as Exhibit A). In the 1988 revision, paragraph (b.) was added, so that "suit" now includes "[a]ny other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." *Id.* This expanded definition arose at the urging of industry groups to "encourag[e] the use of alternative dispute resolution (ADR) proceedings to help control the legal costs associated with liability insurance claims." *Id.* Thus, the industry's decision to expand the definition of suit arose from the notion that an expanded duty to defend would control legal costs; insofar as the definition of "suit" is expanded, so is the duty to defend commensurately expanded.[2]

In Crum & Forster's policy, "suit" follows the definition that has been constant in all relevant respects since the 1988 revision:

[2] This reality also gives the lie to Crum & Forster's grim fantasy that "the appearance of defense lawyers for contractors during the 558 notice and opportunity to repair process" would necessarily result in some sort of litigious arms race requiring each party to "run to the courthouse and spend a pile of money on lawyers." *Crum & Forster's Brief* at 27.

> "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal or 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.

Altman's policies were issued between 2005 and 2012. By the mid-2000s, the definition of "suit" in ISO CGL policies had been well established for nearly a generation. This established understanding of the term "suit" is, therefore, the *context* of the policies at issue here. *See Swire Pac. Holdings, Inc.*, 845 So.2d at 165. And so, this Court, in approaching its contractual analysis of these policies, should first take note that these policies were designed and marketed to policyholders so as to include this expanded notion of "suit"; i.e., one that endeavors to mitigate litigation costs by expanding the insurer's duty to defend so that it includes alternative dispute resolution proceedings and arbitrations. *Id.*

d. *"Suit" Embraces Proceedings Beyond Traditional Litigation*

With this context in mind, we turn to the policy. "[I]n construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Swire Pac. Holdings, Inc.*, 845 So.2d at 166 (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000)); *see also* § 627.419(1), Fla. Stat. ("Every insurance contract shall be

construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto.").

Construction of the term "suit" cannot be done by half measures. *Id.* According to the policy, a "suit" is a "civil proceeding" that "*includes*" both arbitration proceedings and "any other alternative dispute resolution proceeding" to which the insured submits with the carrier's consent. *Crum & Forster Policy* at V.18. In Florida, the term "include" is not a phrase of limitation; rather, it is "used most appropriately before an incomplete list of components." *Alligator Enters., Inc. v. General Agent's Ins. Co.*, 773 So.2d 94, 95 (Fla. App. 2000). Whatever else a "suit" may be, it is at *least* an arbitration or an alternative dispute resolution proceeding to which the insured submits with the carrier's consent. And so, if the verb "include" is parsed according to Florida law, it must be that there are *other* "components" that are embraced within the meaning of suit, *in addition to* arbitrations and alternative dispute resolutions to which the carrier consents. *Id.* Those other "components," of course, still must be "a civil proceeding in which damages because of "bodily injury," "property damage," or "personal or advertising injury" to which this insurance applies are alleged." But, from there, they can be also something *other than* the arbitrations and alternative dispute resolutions identified in sub-paragraphs (a.) and (b.).

e. Crum & Forster Cannot Restrict the Meaning of Civil Proceeding After Failing to Define It

So, the question then becomes: what is a "civil proceeding"? Fortunately, this is not the thorny issue that Crum & Forster would have this Court believe. "If an insurer does not define a policy term, the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided." *Harrington v. Citizens Prop. Ins. Corp.*, 54 So.3d 999, 1002 (Fla. 4th DCA 2010) (internal quotation marks omitted) (quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla. 1998)). In Florida, insurance contracts "must be construed in accordance with the plain language of the policy." *Swire Pac. Holdings, Inc.*, 845 So.2d at 165. And the policy terms "should be given their plain and unambiguous meaning as understood by the 'man-on-the-street.'" *Harrington*, 54 So.3d at 1001 (quoting *State Farm Fire & Cas. Co. v. Castillo*, 829 So.2d 242, 244 (Fla. 3d DCA 2002). These terms "must be given their every day meaning and should be read with regards to ordinary people's skill and experience." *Id.* (citing *Watson v. Prudential Prop. & Cas. Ins. Co.*, 696 So.2d 394, 396 (Fla. 3d DCA 1997). When ascertaining the plain meaning of terms in insurance policies, Florida courts often use legal *and non-legal* dictionaries. *Id.* (using Black's Law Dictionary and Merriam-Webster's Collegiate Dictionary to define term "premises").

A brief survey of dictionary definitions, in accordance with *Harrington*, *supra*, indicates that the term "civil proceeding," as conceived by the workaday

policyholder, has broad enough meaning to include the substance of the 558 notice to repair. The adjective "civil," in the context of law, is generally used to distinguish the private rights of individuals "as distinguished from criminal, military, or international regulations or proceedings." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016); *see also* COLLINS ENGLISH DICTIONARY – COMPLETE AND UNABRIDGED (12th ed. 2014); RANDOM HOUSE KERNEMAN WEBSTER'S COLLEGE DICTIONARY (2010).

"Proceeding" is defined by the American Heritage Dictionary as "a course of action; a procedure" and, under the *Law* entry, as "litigation"; "[t]he activities and hearings of a legal body or administrative agency"; or "[t]he the institution or pursuance of legal action." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016). The Collins English Dictionary defines it as "an act or course of action"; "the institution of a legal action"; or "any step taken in a legal action." COLLINS ENGLISH DICTIONARY – COMPLETE AND UNABRIDGED (12th ed. 2014). The Florida Court of Appeal used the Random House dictionary to define "proceeding" as "a legal step or measure: to institute proceedings against a person." *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1260 (5th DCA 2004) (citing Random House Dictionary of the English Language 1542 2d ed. 1987). Common to these various definitions is the notion that "proceeding" embodies the idea of "act"

or "action" or a "step" toward "action." Combined with the adjective "civil," the result is *an action* or *a step toward an action* relating to *private rights*.[3]

These definitions are offered merely as examples. The Court should not think of one as more or less authoritative according to the eminence of the publisher or the nearness of the dictionary's edition to the policy year. Because Crum & Forster declined to define the term "civil proceeding" in its policy, the Court is free to ignore its attempts to limit the term so as to restrict the scope of coverage. *Harrington*, 54 So.3d at 1002. The point of the definitions, therefore, is to demonstrate the usual policyholder's understanding of the term "proceeding" as it is drawn from dictionary definitions like the ones above: viz., "a procedure"; "the institution of a legal action"; "a course of action"; "any step taken in a legal action." Any one of these definitions comports with the 558 notice to repair process. The 558 process is a "procedure" and a "course of action," for it involves "a series of steps taken to accomplish an end" in the same way that driving a car or making a pie are a "procedure" or "course of action." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016). It is an "institution of a legal action" and a "step taken in a legal action"

[3] An adjective is an "attributive," which is to say it symbolizes accident as opposed to substance. Sr. Miriam Joseph, C.S.C., THE TRIVIUM: THE LIBERAL ARTS OF LOGIC, GRAMMAR, AND RHETORIC 47 (Marguerite McGlinn, ed. Paul Dry Books 2002) (1937). In the phrase "civil proceeding," "proceeding" is the substantive term; "civil" the accidental or attributive. We are concerned more here with the substantive term than the attributive. The attributive merely puts the substantive term in its proper accidental place; here, the realm of private rights.

because a Plaintiff cannot file suit until he or she has complied with the 558 notice process. Fla. Stat. § 558.003.

In any event, the common definitions of "civil" and "proceeding" at least create an ambiguity concerning those terms. Ambiguities in the language of an insurance policy are construed strictly against the drafter and in favor of the insured. *Auto-Owners Ins.*, 756 So.2d at 34.

f. Crum & Forster Cannot Limit the Definition of "Suit" to an Arbitration or Alternative Dispute Resolution

When the policy is analyzed according to Florida law, significant points of Crum & Forster's position become tenuous. Crum & Forster argues, for example, that a proceeding must fit within the limits of either sub-paragraph (a.) or (b.) in order to be a "suit" under the policy. *See Crum & Forster's Brief* at 16. But this argument fails *ex facie* because, when the insurer fails to define a policy term, "[it] cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided." *Harrington*, 54 So.3d at 1002. Crum & Forster, having failed to define "civil proceeding" in the policy, cannot now take the position that a "suit" must be confined to the proceedings outlined in sub-paragraphs (a.) and (b.). *Id*. Furthermore, if, according to Florida law, "include" is "used most appropriately before an incomplete list of components," *Alligator Enters., Inc.*, 773 So.2d at 95, as we have seen above, it must be that there are *other* "components" that complete the list; that is, there must be *other* "civil proceedings" that are "suits" *in addition to*

arbitrations or alternative dispute resolutions to which the insurance company consents.

g. Crum & Forster Cannot Unilaterally and Retroactively Alter a Term That Affects Coverage by Withholding Its Consent

But even assuming, *arguendo*, that sub-paragraphs (a.) and (b.) of the definition of "suit" are determinative, Crum & Forster's argument still fails. Crum & Forster argues that the 558 notice to repair does not constitute an "alternative dispute resolution . . . to which the insured submits with our consent" under sub-paragraph (b.) because it did not consent to the ADR. *Crum & Forster's Brief* at 16. But Crum & Forster overstates the significance of its consent.

If Crum & Forster could withhold its consent to deny coverage, the Court would be no closer to the resolution of the problem. Again, the question, as certified to this Court by the 11th Circuit, is whether "the notice and repair process set forth in Chapter 558 of the Florida Statutes is a 'suit' within the meaning of the CGL policies issued by C&F to ACI." *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, No. 15-12816, *Order* dated August 2, 2016 at 18. The 11th Circuit's question concerns "suit" as a general, or universal, term. It is not whether Crum & Forster consented to the 558 procedure; that is a question concerning an

empirical term.[4] The general question is one of law for this Court; the empirical, of fact for a jury. The two questions must not be confused, lest the Court make no determination at all. For, if the Court were to hold that the 558 procedure is not a "suit" because Crum & Forster did not consent to its proceeding, it will have put the question into Crum & Forster's hands, where it does not belong. If Crum & Forster, or some other insurance carrier, were able to make the unilateral determination of whether a "civil procedure" is a "suit" by means of either giving or withholding its "consent," we will have got no closer to resolving the issue than when we first started. If the Court were to follow Crum & Forster's argument on this point, insurance carriers would hereafter consent to the 558 procedure when its being a "suit" fit their purposes and will withhold consent when it does not. And so, the question will come round again.

Ultimately, the issue of Crum & Forster's consent is, for all practical purposes, beside the point. In Florida, an insurance company has a broad duty of good faith to

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[4] "An empirical term designates an individual or an aggregate of individuals. It must be symbolized by either a proper name or an empirical description, for example: Christopher Columbus, the desk in this room.

"A general term, also called a universal term, signifies essence (of either a species or a genus). It must be symbolized by a common name or a general description, for example: tree, a three-sided rectilinear plane figure.

"To be able to distinguish between an empirical term and a general term is of the utmost importance. In doing so, one cannot rely on grammatical tags; one must look through the words at the reality symbolized." Sr. Miriam Joseph, C.S.C., THE TRIVIUM: THE LIBERAL ARTS OF LOGIC, GRAMMAR, AND RHETORIC 73 (Marguerite McGlinn, ed. Paul Dry Books 2002) (1937).

settle claims "when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests." Fla. Stat. Ann. § 624.155(1)(b)(1). It must, then, be supposed that, an insurance company, pursuant to this duty, *will* consent to the 558 procedure unless there is good reason otherwise. But this duty would be compromised if this Court were to determine that insurance companies could unilaterally determine that the 558 procedure is not a "suit" merely by withholding consent. Allowing this would permit the insurance company to hold a critical term of its contract with the policyholder in abeyance to be determined at its own discretion.[5] It is, therefore, only proper that the Court focus its analysis upon the general question of whether the 558 procedure is a "suit" in substance and assume that consent has been granted by the carrier.

[5] There is also an argument to be made that such a holding would render most of the policy unenforceable. As we have seen, "suit" is a key definition in the policy because it directly informs the scope of coverage. It is, therefore, a key contract term. Implicit in any contract is "the premise that contract law protects promisee's expectation interest." E. Allan Farnsworth, CONTRACTS 108 (4th ed. Aspen 2004). The policy would, in other words, lack definiteness concerning a key coverage term. *See id.*

h. The Court Must Construe "Suit" to Effect Coverage Because the Policy Failed to Define "Civil Proceeding" and Conceived of "Suit" as an Unlimited Term

So, at last, the Court must take careful note of the final rule of policy construction. It is well settled in Florida law that "insuring or coverage clauses are construed in the *broadest possible manner to effect the greatest extent of coverage*." *Westmoreland*, 704 So.2d at 179 (emphasis added); *see also Diocese of St. Petersburg, Inc. v. Arch Ins. Co.*, Case No. 8:15-cv-1977-T-30AEP, 2016 U.S. Dist. LEXIS 68076, at *9 (M.D. Fla. May 24, 2016); *Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp.2d 1293, 1340 (S.D. Fla. 2010); *Nautilus Ins. Co. v. S&S Indus. Servs.*, Case No. 05-61411, 2007 U.S. Dist. LEXIS 22248, at *13 (S.D. Fla. March 27, 2007). In light of this, Crum & Forster should not expect the Court to impose upon the policy's definition of "suit" a limitation that is nowhere else identified in the policy. Nor should it expect the Court to use restrictive definitions of key terms that its own policy failed to define. Nor should it expect the Court to construe a definition that directly affects coverage on the basis of Crum & Forster's mutable consent. To be sure, given the language of the policy definition (particularly the use of the verb "include") and the policy's failure to define the key term "civil proceeding," Crum & Forster's case for a limited construction is without merit. Rather, the policy should be construed in the policyholder's favor. Thus, insofar as the definition is at all amenable to including procedures like the 558 notice to repair, the Court *must*

construe the definition (which is an integral component of the coverage clause) in favor of coverage. *Westmoreland*, 704 So.2d at 179.

III. Conclusion

For the reasons argued herein, United Policyholder, as *amicus curiae*, respectfully asks this Court to hold that Florida's 558 notice-to-repair procedure is a "suit" within the definition of the CGL policy issued by Crum & Forster.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing document was furnished to counsel of record identified below by email via the Florida Courts efiling Portal on October 24, 2016.

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief is set in times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(2).

/s/Gregory D. Podolak
Gregory D. Podolak, Esq.

Exhibit A

"Suit"

18. "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.

Summary

The term "suit" is used in the Coverage A insuring agreement, the supplementary payments provision, and certain conditions in conjunction with the insurer's duty to provide a defense of potentially covered claims and the insured's duty to report and assist in the defense of claims. This definition merely establishes that alternative dispute resolution techniques, such as arbitration, fall within the defense coverage and the related conditions of the policy.

Post-1986 Revisions

The second paragraph (b.) of this definition was new with the 1988 CGL and is retained in subsequent editions. The intent is to encourage the use of any type of alternative dispute resolution technique.

A revision in the 1996 edition CGL made the references to arbitration and other alternative dispute resolution forums specifically applicable to any insured; previous editions had referred to such alternatives when "you" (i.e., the *named* insured) submitted to them.

Discussion

This defined term was a new addition to the 1986 CGL coverage form. Although the insuring agreement in earlier CGL policies agreed to "defend any suit against the insured seeking damages on account of such bodily injury or property damage," the term was not defined. This definition was included in the 1986 CGL policy to clarify that the term was intended to include

arbitration proceedings. In fact, the original draft of the 1986 form did not define what the term meant but rather what it included, i.e., arbitration proceedings. This approach, however, required a reader of the form to refer to a dictionary to determine what besides an arbitration proceeding was included in the term. Thus, the first sentence of the definition was added.

With various industry groups encouraging the use of alternative dispute resolution (ADR) proceedings to help control the legal costs associated with liability insurance claims, the 1988 coverage form expanded the definition to encompass the named insured's participation in any other ADR proceeding to settle disputes. Coverage of these alternative dispute resolution proceedings was extended to any insured in the 1996 edition of the CGL form.