IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-1420
LOWER TRIBUNAL CASE NO. 15-12816

ALTMAN CONTRACTORS, INC.,

Appellant,

vs.

CRUM & FORSTER SPECIALTY INSURANCE COMPANY,

Appellee

BRIEF OF AMICI CURIAE, CONSTRUCTION ASSOCIATION OF SOUTH FLORIDA, SOUTH FLORIDA ASSOCIATED GENERAL CONTRACTORS, LEADING BUILDERS OF AMERICA, FLORIDA HOMEBUILDERS ASSOCIATION, AND NATIONAL ASSOCIATION OF HOME BUILDERS, IN SUPPORT OF APPELLANT, ALTMAN CONTRACTORS, INC.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The South Florida Associated General Contractors ("SFAGC"), chartered in 1922, is the local Chapter of the Associated General Contractors of America ("AGC"). The AGC, established in 1918, is the oldest and largest commercial construction trade organization in the United States. It is composed of nearly 30,000 leading firms in the industry, including construction contractors and industry-related companies. The SFAGC, in conjunction with the AGC, provides guidance and education on matters important to the construction industry; promotes the use of the latest technology; and advocates legislative reform on behalf of the industry.

The Construction Association of South Florida ("CASF") was established in 1950 as the Broward Builders Exchange by a group of professionals concerned with the well-being of Broward's construction industry. In 1991, it was renamed the Construction Association of South Florida. CASF is an organization whose members include general contractors, subcontractors, material suppliers, design professionals, and other professionals and are concerned with the future well-being of the building industry throughout Broward, Miami-Dade and Palm Beach counties. The CASF is committed to professional development through education and active participation in government affairs.

Leading Builders of America ("LBA") is a Washington, D.C.-based trade association comprised of the largest home builders and developers in the United States—both publicly and privately owned companies. Its members have constructed hundreds of thousands of single family homes, many in Florida, representing approximately one-third of all new homes built in the United States. Like the members of the CASF and SFAGC, LBA members have for many years purchased commercial general liability insurance policies to insure certain risks. The rights and remedies provided by these policies have underpinned hundreds of thousands of new home sales over the past decade.

National Association of Home Builders ("NAHB") is a Washington, DC-based trade association whose mission is to enhance the climate for the housing and building industry. Founded in 1942, NAHB is a federation of more than 700 state and local associations, including twenty-four (24) in Florida – representing 7,400 members. NAHB's 140,000 members are home builders or remodelers and its builder members construct about 80 percent of the new homes each year in the United States.

Florida Homebuilders Association ("FHBA") is an affiliate of NAHB and shares its goals and objectives. Established in 1949, FHBA is a non-profit professional and trade association representing approximately 7,400 corporate members who are home builders, developers and remodelers. FHBA's affiliate

members include twenty-four (24) local and regional home builders associations in Florida. The FHBA has appeared as amicus in many Florida cases related to the construction industry and has standing in its own right to represent members in certain types of actions. *See Florida Home Builders Ass'n v. Dep't of Labor & Emp't Sec.*, 412 So. 2d 351 (Fla. 1982).

The above entities seek to appear as amici curiae to address issues and questions before the Court that are of significance beyond application of law to the specific facts of this litigation. Amici examine the importance of construction defect claim notices in the insurance context and possible far-reaching consequences of public policy should the District Court's interpretation of Chapter 558 be allowed to stand.

SUMMARY OF THE ARGUMENT

The amici respectfully request the question certified to this Court by the United States Court of Appeals for the Eleventh Circuit[1] be answered in the affirmative, because: (1) the recent amendment to Chapter 558 and House of Representatives Staff Analysis thereof evidence the Florida Legislature's intent that the respondent's insurer meaningfully participate in 558 proceedings – which

[1] "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. v. Crum & Forster Specialty Ins. Co.*, No. 15-12816, 2016 WL 4087782, at *7 (11th Cir. Aug. 2, 2016).

can only be achieved by the Court holding a 558 notice triggers an insurer's defense obligation; (2) Florida public policy requires that carriers assume their defense obligations upon receipt of a 558 notice – to hold otherwise would discourage carriers and policyholders from participating in the 558 process, delay construction defect repairs, and further burden the judiciary; (3) other jurisdictions have interpreted the term "suit" to include non-adversarial pre-suit process similar to that codified in Chapter 558 – including Environmental Protection Agency "potentially responsible party" letters, and notices sent pursuant to California's Calderon Act and the Colorado Defect Action Reform Act; and (4) the policy term "suit," and more particularly the terms "civil proceeding" and "alternative dispute resolution proceeding", are ambiguous in the context of a Chapter 558 notice, mandating a finding that carriers like C&F owe insureds like Altman a defense.

ARGUMENT

I. THE 2015 AMENDMENT TO CHAPTER 558 AND HOUSE OF REPRESENTATIVES STAFF ANALYSIS THEREOF CONFIRM THE FLORIDA LEGISLATURE'S INTENT TO HAVE THE RESPONDENT'S INSURER ACTIVELY PARTICIPATE IN 558 PROCEEDINGS – WHICH CAN ONLY BE ACCOMPLISHED BY HOLDING A 558 NOTICE TRIGGERS A CARRIER'S DUTY TO DEFEND

In 2015, the Florida Legislature amended Chapter 558. H.R. 87, 2015 Leg., 117th Reg. Sess. (Fla. 2015). The amendment was signed into law June 16, 2015

and became effective October 15, 2015. *Id.* The amendment, which the District Court found persuasive[2], adds the following language to Section 558.001:

> 558.001 Legislative findings and declaration.--The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners. An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional, *and the insurer of the contractor, subcontractor, supplier, or design professional*, with an opportunity to resolve the claim through confidential settlement negotiations without resort to further legal process.

Id. (emphasis added).

This new language confirms the Legislature's intent to have both respondent and the respondent's carrier involved in the process. Holding a 558 notice does not trigger a carrier's duty to defend would discourage the carrier from participating in the 558 process contrary to the expressed intent of the Legislature.

The House of Representatives Staff Analysis of the amendment ("Staff Analysis") confirms the Legislature's intent. H.R. Staff Analysis, H.R. 87, 2015 Leg., 117th Reg. Sess. (Fla. 2015) (attached as Ex. A). The Staff Analysis states, with respect to Section 558.001, as follows:

> The bill amends s. 558.001, F.S., to include *a finding that the insurer of the contractor,* subcontractor, supplier, or designer responsible for

[2] *See* D.E. 66 at 7-8.

> the alleged defect *should also be provided an opportunity to resolve a claim "through confidential settlement negotiations."*

Id. (emphases added).

The Legislature thus found it important for the respondent's carrier to be involved in the 558 process and amended the statute to reflect its finding and urge carriers to participate. The Court finding a defense obligation upon receipt of a 558 notice is critical to upholding the Legislature's goal.[3] Carriers lack an incentive to participate in 558 settlement negotiations unless their duty to defend has been triggered. *See Fun Spree Vacations, Inc. v. Orion Ins. Co.*, 659 So. 2d 419, 422 (Fla. 3d DCA 1995) (if carrier has no duty to defend, it has no duty to indemnify).

II. IMPORTANT CONSIDERATIONS OF FLORIDA PUBLIC POLICY REQUIRE THAT INSURANCE COMPANIES MEET THEIR DEFENSE OBLIGATION WHEN A POLICYHOLDER RECEIVES A 558 NOTICE

A. Florida, as Evidenced by the Enactment of Chapter 558, Seeks to Avoid Imposition of Litigation Costs on Parties, Expedite Construction Defect Repairs, and Reduce the Burden on the Judiciary

Florida's public policy favors alternative dispute resolution as it is efficient and avoids delay and expense associated with litigation. *See, e.g., The Hiller Grp., Inc. v. Torcon, Inc.*, 932 So. 2d 449, 453 (Fla. 2d DCA 2006); *Regency Grp., Inc.*

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[3] Such a holding will not result in any "parade of horribles" as C&F suggests. Carriers will not be required to defend in every instance; insureds still carry the burden to demonstrate, per Florida's "eight corners" rule, that the notice brings the claim within the coverage of the policy. *See, e.g., Mid-Continent Cas. Co. v. Royal Crane, LLC*, 169 So. 3d 174, 182 (Fla. 4th DCA 2015). Carriers still have their same defenses available (i.e., only "property damage" is covered).

v. McDaniels, 647 So. 2d 192, 193 (Fla. 1st DCA 1994) (citing *Midwest Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665 (Fla. 1973)). Chapter 558 embodies and is an example of the codification of this longstanding public policy. *See* § 558.001, Fla. Stat. (2013) ("The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would *reduce the need for litigation* as well as protect the rights of property owners) (emphasis added).

Section 558.001 also demonstrates the Legislature intended to avoid imposition of litigation costs on the parties, reduce the burden on the judiciary, and expedite construction defect repairs:

> *An effective alternative dispute resolution mechanism* in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and *should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process*.

See id. (emphases added).

B. Providing a Prompt Defense Will Further Florida's Public Policy; Accepting C&F's Position Would Discourage Both Carriers and Policyholders from Participating in the 558 Process, Delay Construction Defect Repairs, and Further Burden The Judiciary

Accepting C&F's argument would have a chilling effect on the proper and effective use of Chapter 558's alternative dispute resolution process – it would discourage both the insurance industry and policyholders from participating in the

558 process. Carriers have no obligation to participate in the 558 process if they have no contractual duty to do so. Policyholders will contest or not respond to 558 notices compelling the claimant to file a lawsuit – triggering the duty to defend.

Moreover, insureds would be barred from meaningful participation in the 558 process by their own policies. The "voluntary payments" provision found in C&F's policies (and other typical CGL policies) provides as follows:

> SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS
>
> 2. Duties in The Event of Occurrence, Offense, Claim Or Suit
>
> d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

DE 26-1 at 60. The purpose of the "voluntary payments" provision is to afford the carrier an opportunity to protect itself and its insured by investigating claims and participating in settlement discussions. If the Court does not answer the certified question in the affirmative, policyholders will be forced into litigation because the carrier will have no duty to defend prior thereto, and the "voluntary payments" provision would preclude coverage if a policyholder were to resolve a 558 claim pre-litigation. Thus, if the certified question is not answered in the affirmative, a process will be set up that cannot succeed: policyholders will be left without means to resolve construction defect claims prior to litigation contrary to the Legislature's

intent. Florida's public policy thus dictates the term "suit," as used in CGL policy, includes a Chapter 558 notice.

III. OTHER JURISDICTIONS HAVE INTERPRETED THE TERM "SUIT" TO INCLUDE NON-ADVERSARIAL PRE-SUIT PROCESS SIMILAR TO THAT CODIFIED IN CHAPTER 558 OF THE FLORIDA STATUTES

A. The Majority Rule Holds EPA "PRP" Letters, Similar to Chapter 558 Notices, Constitute "Suits" Triggering a Carrier's Duty to Defend Under CGL Policies

1. PRP Letters Are Similar to 558 Notices

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is a federal statutory scheme authorizing the Environmental Protection Agency ("EPA") to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment. 42 U.S.C. §§ 9601-9675.

CERCLA is similar to Chapter 558: both created a process that ends, only if necessary, in the courts;[4] both processes start with a notice letter;[5] the effect of

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[4] *See McGinnes Indus. Maint. Corp. v. The Phoenix Ins. Co.*, 477 S.W.3d 786, 788 (Tex. 2015) ("As amended, CERCLA [] creates a process that begins in the EPA and ends, only if necessary, in the courts."), *reh'g denied*, Jan. 22, 2016; § 558.003, Fla. Stat. (2013) ("[c]laimants may not file an Action subject to this Chapter without first complying with the requirements of this Chapter").

[5] *See McGinnes*, 477 S.W.3d at 788 ("The [CERCLA] process starts with a notice letter informing the recipient that it is a potentially responsible party ("PRP").."); § 558.004(1), Fla. Stat. (2013) (a party claiming construction defects must first serve a written notice detailing all alleged construction defects and the resulting loss or damages to the claimant's property).

CERCLA and Chapter 558 was to authorize a claimant to conduct on its own what otherwise would have amounted to pretrial proceedings, but without having to initiate a court action until the end of the process;[6] both provide for pre-litigation discovery whereby a party may serve written discovery requests indistinguishable from discovery requests under the rules of civil procedure;[7] both impose statutory fines and penalties that are like sanctions in a court proceeding; and[8] like a PRP letter, a Chapter 558 notice occurs before a complaint is filed and itself does not result in a judgment or court-ordered payment of money.

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[6] *See McGinnes*, 477 S.W.3d at 791 ("One effect of CERCLA was to authorize the EPA to conduct on its own what otherwise would have amount to pretrial proceedings, but without having to initiate a court action until the end of the process."); § 558.001, Fla. Stat. (2013) ("The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation").

[7] *See McGinnes*, 477 S.W.3d at 791 ("The EPA obtains discovery through requests for information, indistinguishable from interrogatories under the rules of civil procedure."); § 558.004(15), Fla. Stat. (2013) (authorizing the parties to serve written requests for documents and requiring the receiving party to respond or face sanctions).

[8] *See McGinnes*, 477 S.W.3d at 791 ("The fines and penalties for willful non-cooperation in the process are like sanctions in a court proceeding, only prescribed by statute."); §§ 558.003, 558.004(11), 558.004(15), Fla. Stat. (2013) (if claimant fails to comply with Chapter 558 it cannot sue; if claimant fails to include a particular defect in its notice, it is precluded from proceeding to trial on that defect; if recipient fails to respond, claimant can proceed immediately to litigation; failure of either party to produce requested documents is cause for sanctions).

2. *The Majority Deems PRP Letters "Suits" Triggering a Carrier's Duty to Defend Under CGL Policies; Chapter 558 Notices Should Likewise Be Held to Constitute "Suits" Triggering a Carrier's Duty to Defend Under CGL Policies*

The majority of courts to have analyzed CGL policy language identical to C&F's have construed the term "suit" to include PRP letters and unilateral administrative orders. *See McGinnes*, 477 S.W.3d at 793 (collecting cases); *Cooper Indus., LLC v. Emp'rs Ins. of Wausau a Mut. Co.*, No. L-9284-11, 2016 WL 4581506, at *7 (N.J. Super. Ct. Law Div. Aug. 30, 2016) (collecting cases); *see also Liberty Mut. Ins. Co. v. Lone Star Bldg. Ctrs. (E.), Inc.*, No. 95-7041-CIV-MARCUS (S.D. Fla. Mar. 19, 1997) (Omnibus Order) (attached as Ex. B) (holding a PRP letter triggers a carrier's duty to defend under a CGL policy).

Texas and New Jersey recently joined the majority. *See McGinnes*, 477 S.W.3d 786, 790, 794 (ruling EPA's PRP letters and unilateral administrative order constituted a "suit" within the meaning of CGL policies, triggering duty to defend); *Cooper*, 2016 WL 4581506, at *6, 8-9 (holding EPA's PRP letter constituted a "suit" within the meaning of the CGL policies triggering the duty to defend, reiterating that "coverage dos not hinge on the form of action taken or the nature of relief sought, but on *actual or threatened use of legal process to coerce payment or conduct by a policy holder*; emphasizing "there is no question that a policy in favor of triggering coverage before a formal complaint is filed serves to enhance the

important functions of [CERCLA]. *To hold otherwise would discourage prompt and cooperative remediation efforts and the timely cleanup of hazardous waste sites*.") (emphases added).

The Ninth Circuit recently went further, holding the EPA's first step in the PRP search and a precursor to PRP letters (a CERCLA Section 104(e) letter) constitutes a "suit" under a CGL policy triggering the duty to defend, finding it is a "coercive information demand" that is "an attempt to gain an end through the legal process." *Ash Grove Cement Co. v. Liberty Mut. Ins. Co.*, 649 Fed. Appx. 585 (9th Cir. 2016). Like the EPA with respect to pollution claims, had a claimant wanted to seek redress with respect to construction defects prior to 2003, it would have been required to sue first. The CGL policies would have obligated the carriers to defend the lawsuit – challenge the pleadings, contest the scope of discovery, engage in mediation, resist judgment, and, perhaps, settle. Like CERCLA, Chapter 558 effectively redefined a "suit" with respect to construction defect claims to mean a proceeding initiated by the claimant and conducted by the parties, followed by judicial intervention only if necessary. Insureds' rights should not be eviscerated by the enactment of a statute intended not to affect insurance[9] but to streamline a

[9] The District Court so recognized. *See* D.E. 66 at 8 ("the Florida Legislature has reconfirmed that the intent of this section is for Chapter 558 to have no impact one way or another on the obligations of an insured to provide whatever notice is required by an underlying insurance policy. Nothing in the language of the statute or the legislative history suggests that this provision acts as a bar to insurance

claimant's ability to resolve construction defect disputes without judicial intervention.

Because Chapter 558 notices are analogous to PRP letters as outlined in Section IV.A.1. *supra*, the Court should answer the question certified to this Court by the Eleventh Circuit in the affirmative.

B. Cases Interpreting California's Calderon Act and Colorado's Defect Action Reform Act Dictate That Chapter 558's Alternative Dispute Resolution Process Constitutes a "Suit" Under C&F's Policies

Florida law requires insurance policies to be interpreted according to their plain language, *Washington National Insurance Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013), and construes coverage clauses in the broadest manner possible so as to effect the greatest extent of coverage. *Westmoreland v. Lumbermens Mut. Cas. Co.*, 704 So. 2d 176, 179 (Fla. 4th DCA 1997) (citations omitted).

The C&F policies provide, in relevant part, "[C&F] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any '*suit*' seeking those damages." D.E. 26–1 at 50 (emphasis added). The policies define "suit" as:

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coverage if the policy otherwise would provide for coverage").

> 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.

D.E. 26-1 at 64 (emphasis added). The term "include" is not a phrase of limitation; under Florida law, it is "used most appropriately before an incomplete list of components." *Alligator Enters., Inc. v. Gen. Agent's Ins. Co.*, 773 So. 2d 94, 95 (Fla. 5th DCA 2000). Thus, sections a. and b. are only examples and do not constitute a complete list.[10]

In *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186, 190-91 (Fla. 2013), the Court relied on Black's Law Dictionary (9th ed. 2009) to define the term "proceeding,"[11] and held "[w]hereas civil actions may be limited to court cases, *a proceeding is clearly broader in scope*." (emphasis added). The Court also cited Merriam-Webster's Dictionary of Law, which broadly defines a "proceeding"

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[10] C&F could have defined the term differently; it must be bound by the language it elected to use. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 36 (Fla. 2000) (holding a policy provision ambiguous where clearer qualifying language was available for use but not used by the carrier).

[11] Black's Law Dictionary (9th ed. 2009) defines "proceeding" to include "[a]n act or step that is part of a larger action" and provides "[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) (quotation omitted).

as "'a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, or regulations.'" *Id.* at 190, n. 4 (quoting Merriam-Webster's Dictionary of Law 387 (1996)).[12]

Because C&F's agreement to defend its insured in any "suit" appears in the coverage grant, the District Court erred in limiting the term to circumstances where "some sort of forum and some sort of decision maker [is] involved." D.E. 66 at 13. The District Court was required to construe "suit" in the "broadest manner possible to effect the greatest extent of coverage." *Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1336 (S.D. Fla. 2001) (citing *Westmoreland*, 704 So. 2d at 179). Application of this principle would have yielded a finding that a Chapter 558 notice constitutes a "suit."

At least 29 other jurisdictions have enacted "right to repair" or "notice and opportunity to repair" statutes similar to Chapter 558. The few jurisdictions that have analyzed the interplay between the statutes and a carrier's duty to defend have determined a notice of construction defects constitutes a "suit." California is one such jurisdiction. In *Clarendon America Insurance Co. v. StarNet Insurance Co.*, 113 Cal. Rptr. 3d 585 (Cal. Ct. App. 2010), *review granted*, 117 Cal. Rptr. 3d 613

[12] *Raymond James* did not involve insurance coverage matters. The holding in that action thus does not dictate the outcome of the analysis outlined in Section IV., infra – whether the terms "civil proceeding" and "alternative dispute resolution proceeding" are ambiguous in the context of a Chapter 558 notice.

(Cal. 2010), *review dismissed*, 121 Cal. Rptr. 3d 879 (Cal. 2011),[13] the court provided a comprehensive overview of the definition of the term "suit," emphasizing: "In 1988, the standard definition was expanded to cover alternative dispute resolution *with the intent to encourage the use of any type of alternate dispute resolution technique*." *Id.* at 591 (emphasis added) (quoting Woodward et al., Commercial Liab. Ins. (Int'l Risk Mgmt. Inst., Inc. 2006) pp. V.L.210–V.L.211).

The court held the term "civil proceeding" within the policy's definition of "suit" (identical to that in C&F's policies), encompassed notices sent pursuant to California's version of Chapter 558 – the Calderon Act – "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. Because the notice is the "first step" in a

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[13] The Clarendon decision was appealed to the Supreme Court of California. *See* 117 Cal. Rptr. 3d (Cal. 2010). Briefing and all action, however, was deferred until the Supreme Court of California disposed of the issues in *Ameron International Corp. v. Insurance Co. of the State of Pennsylvania*, 242 P.3d 1020 (Cal. 2010). Therein, the court found, 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. *Ameron* did not undermine 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. The appellate decision finding that the mandatory pre-litigation notice triggered the duty to defend thus represents the final opinion on this topic.

"continuous litigation process," "is tied directly and securely to an association's complaint for damages against a builder, developer, or general contractor based on construction defects," and is "part and parcel of construction defect litigation," the court concluded the Calderon notice triggered the carrier's duty to defend. *See id.*

Colorado has also examined this issue. In *Melssen v. Auto-Owners Insurance Co.*, 285 P. 3d 328 (Colo. Ct. App. 2012), the court held notice sent pursuant to Colorado's version of Chapter 558 – the Colorado Defect Action Reform Act ("CDARA") – triggered an insurer's duty to defend under a policy containing a definition of "suit" identical to that in C&F's policies. *See id.* at 332. The *Melssen* court disagreed with the carrier's contention that "suit" meant only those actions where a complaint was filed, holding "suit" means "any other alternative dispute resolution proceeding in which...damages are claimed and to which the insured submits with [the insurer's] consent." *Id.* at 334-35.

The court found the notice of claim process fell within the definition of an "alternative dispute resolution" because its ultimate goal, and the very reason for its enactment, was to encourage resolution of construction defect claims prior to an action being filed. *Id.* at 335. In other words, the notice of claim process constituted a procedure for settling a claim without litigation. *Id.*

Like California and Colorado, Florida's alternative dispute resolution process for resolving construction defect claims is part of the larger action. *See* §§

558.003, 558.004(7), Fla. Stat. (2013). This confirms the Chapter 558 process constitutes a civil proceeding, and at least an alternative dispute resolution proceeding. *Clarendon* and *Melssen* instruct the District Court erred in opting for a narrower definition of "alternative dispute resolution process" that encompasses only those proceedings involving some forum with a decision maker. The District Court's definition is contrary to the definition with which it agreed and Florida's rules of insurance policy interpretation.

Moreover, Altman submitted to the Chapter 558 process with C&F's consent.[14] Even if C&F did not expressly consent to Altman's participation, it either waived its ability to consent or its consent was implied as a matter of law. *See e.g., Melssen*, 285 P.3d at 334-36 ("consent may also be deemed implied or an insurer may waive a consent requirement in a policy").[15]

IV. THE TERM "SUIT", AND MORE PARTICULARLY THE TERMS "CIVIL PROCEEDING" AND "ALTERNATIVE DISPUTE RESOLUTION PROCEEDING", ARE AMBIGUOUS IN THE CONTEXT OF A CHAPTER 558 NOTICE, REQUIRING A FINDING THAT CARRIERS LIKE C&F OWE INSUREDS LIKE ALTMAN A DUTY TO DEFEND

[14] Altman demanded C&F assume its defense in relation to the Chapter 558 notices. While C&F denied its defense obligation, the undisputed record is devoid of any objection by C&F to Altman's participation in the Chapter 558 process. C&F eventually changed its position and appointed counsel to represent Altman in the Chapter 558 process.

[15] This should have precluded the District Court from entering summary judgment in C&F's favor.

At best, and as suggested by the Eleventh Circuit, the terms "civil proceeding" and "alternative dispute resolution proceeding" are ambiguous:

> The district court concluded that the terms 'suit,' and more particularly, 'civil proceeding,' were not ambiguous, but we are not as sure. The policies define 'suit,' in part, as a 'civil proceeding.' They do not contain a corresponding definition for the term 'civil proceeding,' but do provide that 'suit' includes an 'arbitration proceeding' or '[a]ny other alternative dispute resolution proceeding' 'in which such damages are claimed' and to which ACI submits with C&F's consent. D.E. 36-1 at 23. Although 'the lack of a definition in a policy does not necessarily render [a] term ambiguous and in need of interpretation by the courts,' we have 'held that differing interpretations of the same provision is evidence of ambiguity [.]' *Hegel*, 778 F.3d at 1220 (internal quotation marks and citations omitted). Here, 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.

Altman Contractors, 2016 WL 4087782, at *6.

C&F and Altman offered competing reasonable interpretations of the undefined terms "civil proceeding" and "alternative dispute resolution proceeding." *See* D.E. 25; D.E. 37. Where policy terms are subject to more than one reasonable interpretation they are deemed ambiguous and must be construed against the insurer and in favor of coverage. *See Ruderman*, 117 So. 3d at 950 (ambiguity exists when relevant language is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage; any ambiguity must be interpreted in favor of the insured).

Even if courts disagree whether notices sent pursuant to acts similar to Chapter 558 constitute "suits" triggering a carrier's defense obligation, C&F was required to resolve this uncertainty in favor of, and provide a defense to, its insured. *See, e.g., Carithers v. Mid-Continent Cas. Co.*, 782 F.3d 1240, 1246 (11th Cir. 2015) ("Given the uncertainty in the law at the time, [the carrier] did not know whether there would be coverage for the damages sought in the underlying action because Florida courts had not decided which trigger applies. [The carrier] was required to resolve this uncertainty in favor of the insured and offer a defense to [the insured]"). An insurer "'cannot, by failing to define the terms ... or to include any additional qualifying or exclusionary language, insist upon a narrow, restrictive interpretation of the coverage provided.'" *Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993).

CONCLUSION

South Florida Associated General Contractors, Construction Association of South Florida, Leading Builders of America, National Association of Home Builders, and Florida Homebuilders Association, as amici curiae in support of Appellant, respectfully request that this Court answer the question certified to this Court by the United States Court of Appeals for the Eleventh Circuit in the affirmative.

* * *

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via the Court's e-service system on October 24, 2016 on:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(2).

/s/ Christine A. Gudaitis
Christine A. Gudaitis, Esq.

EXHIBIT A

EXHIBIT A

HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/CS/HB 87	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Judiciary Committee; Business & Professions Subcommittee; Civil Justice Subcommittee; Passidomo and others	112 **Y's**	0 **N's**
COMPANION BILLS:	CS/SB 418	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/CS/CS/HB 87 passed the House on April 16, 2015, and subsequently passed the Senate on April 24, 2015. The bill changes the current procedures for filing a notice of construction defect claim.

Current law requires that a person who intends to sue regarding a construction defect must notify the contractor of the claim to provide the contractor an opportunity to fix the problem before suit is filed.

The bill includes a "temporary" certificate of occupancy in the definition of "completion of a building or improvement."

The bill requires that the notice of claim identify the location of each defect, based upon at least a visual inspection, sufficient to enable the responding party to locate the alleged defect without undue burden. A claimant is not required to perform destructive or other testing before providing a notice of claim.

The bill requires that the contractor's response to a notice of claim indicate whether he or she is willing to make repairs, settle the claim with a monetary offer, or both, whether the contractor disputes the claim, or whether the contractor's insurer will cover the claim.

The bill provides that furnishing a copy of the notice of claim to an insurance company does not constitute a claim for insurance purposes unless provided for under the terms of the contractor's insurance policy.

The bill adds "maintenance records" and other documents to those records to be exchanged by the claimant with the contractor related to the defect claim. However, a party does not have to disclose privileged documents or records.

The bill does not appear have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 16, 2015, ch. 2015-165, L.O.F., and will become effective on October 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Chapter 558, F.S., provides a method for resolving construction defect disputes before filing a lawsuit. In short, it provides for notice and an opportunity to cure. Before the property owner may file a complaint against a contractor, the property owner is required to serve the contractor with a notice of claim that provides the contractor with information about the alleged defect, gives the contractor the opportunity to examine the defect, and, if the contractor agrees that the defect exists, gives the contractor a reasonable opportunity to repair the defect or make some other offer of settlement. If the parties do not resolve the dispute through this process, the claimant may still bring an action against the contractor in court. Similar methods for presuit notice and resolution are required in other areas, including medical negligence, claims against nursing homes, and eminent domain.[1]

Legislative Findings and Declaration

Section 558.001, F.S., provides legislative findings that it is beneficial to have an effective alternative dispute mechanism for construction defect disputes in which the claimant provides the contractor, subcontractor, supplier, or designer responsible for the alleged defect sufficient notice and an opportunity to cure the defect without having to resort to litigation.

The bill amends s. 558.001, F.S., to include a finding that the insurer of the contractor, subcontractor, supplier, or designer responsible for the alleged defect should also be provided an opportunity to resolve a claim "through confidential settlement negotiations."

Applicability; Temporary Certificate of Occupancy

Current law only requires a notice of claim to be filed after a project has reached completion. "Completion of a building or improvement" is currently defined in s. 558.002(4), F.S., as the

> issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization to occupy or use the improvement, issued by the governmental body having jurisdiction and, in jurisdictions where no certificate of occupancy or the equivalent authorization is issued, means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.

The bill amends the definition of "completion of a building or improvement" in s. 558.002(4), F.S., to provide that the issuance of a temporary certificate of occupancy qualifies as "completion of a building or improvement." The bill also amends the definition of "completion of a building or improvement" in ss. 718.203(3) and 719.203(3), F.S., related to warranties for condominiums and cooperatives, to make those definitions consistent with the amended definition in s. 558.002(4), F.S.

Notice

Section 558.004(1), F.S., requires a claimant to provide a notice of claim of an alleged construction defect to the contractor, subcontractor, supplier, or designer, at least 60 days before filing any action, or at least 120 days before filing an action involving an association

[1] *See* s. 720.311, F.S., related to homeowners association disputes; ch. 766., F.S., related to medical negligence claims; s. 429.293(3), F.S., related to assisted care communities; s. 400.0233(3), F.S., related to nursing homes; and, s. 73.015, F.S., related to eminent domain.

representing more than 20 parcels. "The notice of claim must describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known."

The bill amends s. 558.004(1), F.S., to require that the notice of claim also identify the location of each construction defect, based upon at least a visual inspection, sufficient to enable the responding party to locate the alleged defect without undue burden. A claimant is not required to perform destructive testing or other testing before providing a notice of claim.

Response to Notice

Section 558.004(4), F.S., requires a contractor, subcontractor, supplier, or designer who has received a notice of claim to respond to the notice within 15 days, or within 30 days for an action involving an association representing more than 20 parcels. The response must include reports and inspections, a statement of whether the contractor is willing to make repairs to the property, whether the claim is disputed, a description of any repairs they are willing to make, and a timetable for the completion of such repairs.

The bill amends s. 558.004(4), F.S., to provide that the contractor's response must be in writing and must include at least one of the responses already provided for in s. 558.004(5)(a)-(e), F.S., whether he or she is willing to make repairs, settle the claim with a monetary offer, or both, whether the contractor disputes the claim, or whether the contractor's insurer will cover the claim.

Insurance Claims

Section 558.004(13), F.S., provides that nothing in s. 558.004, F.S., relieves a contractor, subcontractor, supplier, or designer's from complying with all the provisions of a liability insurance policy with regard to coverage of a construction defect claim and provides that providing a copy of the presuit notice to the contractor's insurer does not constitute a claim for insurance purposes.

The bill amends s. 558.004(13), F.S., to provide that if the terms of the contractor's insurance policy permit a claim to be made by providing a copy of the presuit notice to the insurer, the notice may constitute a claim under the policy.

Information Exchange

Section 558.004(15), F.S., provides that any party may, during the ch. 558, F.S., presuit process, request an exchange of the following information relating to the claimed construction defects:

- Design plans, specifications, and as-built plans;
- Any documents detailing the design drawings or specifications;
- Photographs, videos, and expert reports that describe any defect upon which the claim is made;
- Subcontracts; and
- Purchase orders for the work that is claimed defective or any part of such materials.

The requesting party must offer to pay the reasonable costs of reproduction.

The bill amends s. 558.004(15), F.S., to require a party to also exchange "the maintenance records and other documents related to the discovery, investigation, causation, and extent of the alleged defect identified in the notice of claim and any resulting damages." The bill also provides that photographs and videos provided pursuant to a request must be "of the alleged construction defect identified in the notice of claim." However, a party does not have to disclose privileged documents, records, and information.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

   None.

EXHIBIT B

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-7041-CIV-MARCUS

LIBERTY MUTUAL INSURANCE CO.,

Plaintiff,

v.

LONE STAR BUILDING CENTERS (EASTERN), INC., et al.,

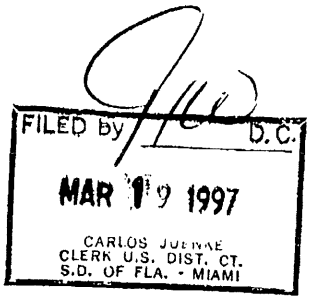
Defendants/Counter-Plaintiffs,

v.

INSURANCE COMPANY OF NORTH AMERICA, et al.,

Counter-Defendants.
_____/

OMNIBUS ORDER



THIS CAUSE comes before the Court upon the following motions: (1) Century's Motion to Dismiss, filed February 16, 1996; (2) Argonaut's Motion to Dismiss, filed February 29, 1996; (3) Lone Star's Motion for Partial Summary Judgment, filed March 11, 1996; (4) Liberty Mutual's Motion for Final Summary Judgment, filed April 26, 1996; (5) Continental's Motion to Dismiss and Motion for Judgment on the Pleadings, filed June 18, 1996; and (6) Lone Star's Motion to Amend, filed July 2, 1996.[1] All of these motions are ripe for resolution, and the Court took argument on them at a status conference on July 23, 1996.

[1]Also before the Court are a number of motions that are either ministerial or appear to have been rendered moot. See infra note 3. The Court's disposition of these motions is recounted at the conclusion of this Order.

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After a thorough review of the record and pleadings, having considered the argument of counsel, and being otherwise advised in the premises, the Court enters the following rulings on these motions. The Plaintiff's motion for final summary judgment is DENIED with respect to the pre-January 1, 1986 policies and DENIED WITHOUT PREJUDICE as to the post-January 1, 1986 policies. The Defendants' motion for partial summary judgment as to Liberty Mutual's duty to defend the NLC action is GRANTED only to the extent that the Court concludes, as a matter of law, that the pollution exclusion in the pre-January 1, 1986 policies did not relieve Liberty Mutual of its obligation to defend or indemnify Lone Star in the NLC case. Century's motion to dismiss the third party complaint is DENIED. Argonaut's motion to dismiss is DENIED. Continental's motion to dismiss and/or for judgment on the pleadings is DENIED. The Defendants' motion for leave to amend is DENIED WITHOUT PREJUDICE. All parties shall appear for a status conference on April 17, 1997 at 9 a.m.

I.

The Plaintiff, a Massachusetts corporation, is a major insurance provider. The original Defendants included Lone Star Building Centers (Eastern), Inc. ("Eastern"), a Delaware corporation, Lone Star Building Centers, Inc. ("Building"), a Minnesota corporation, and Lone Star Industries, Inc. ("LSI"), a Delaware corporation.[2] Thirteen insurance providers are named as

[2]When referred to collectively, these three Defendants shall be identified as "Lone Star."

third party Defendants. Prior to 1978, Eastern was known as Lindsley Lumber Company, and Building was known as National Building Centers, Inc. Lone Star asserts, and no one suggests otherwise, that National Building Centers acquired Lindsley Lumber's stock in December, 1967, and LSI acquired National Building Centers' stock on or about April 15, 1971. The three companies were not merged, but the entities now known as Eastern and Building are "wholly-owned indirect and wholly-owned direct subsidiaries," respectively, of LSI.

Lone Star's pleadings contain the following pertinent allegations. In or about June, 1962, Eastern owned certain land in Dania, Florida (the "Dania site" or the "site"). At various points between 1962 and 1979, Eastern conducted a wholesale and retail lumber and building materials supply operation at the Dania site. In addition, from at least 1967 until some time in 1977, Eastern conducted a wood treatment operation at the site. As part of this process, pieces of wood were lowered into "dip tanks" that contained certain chemicals. Some of these chemicals were kept in underground storage tanks. Through a series of transactions in 1979, Eastern transferred most or all of the tanks, fixtures and land used in its wood treatment operations to a company known as Lindsley Stores, Inc. In 1985, Lindsley Stores changed its name to Nightingale Liquidating Corporation. Nightingale assigned its leasehold interest to Evans Asset Holding Company in 1989, which in turn assigned the lease to NLC Corporation ("NLC"). According to Lone Star, it "had nothing further to do with any of the operations

conducted on the Dania site" after June, 1979.

According to Lone Star's counterclaim, once it commenced its lease of the Dania site, Lindsley Stores (1) demolished the dip tanks, "causing a catastrophic release of pollutants . . . into the soil of the Dania site and into the groundwater in or under the site"; (2) converted certain underground tanks to store unleaded gasoline, exacerbating the spread of contaminants into the soil and groundwater; and (3) placed a water pipe through the soil in the area of the underground tanks, further exacerbating the spread of pollutants. These events (which Lone Star suggests it did not discover until 1990) are alleged to have taken place in 1979, 1980 and 1983, respectively. In 1989, NLC learned that it was being investigated for environmental violations arising out of the contamination of the Dania site. On October 6, 1989, NLC filed a private CERCLA lawsuit against Lone Star, Case No. 89-6822-CIV-NESBITT, seeking damages and an injunction compelling Lone Star to clean up the site. Not surprisingly, NLC alleged a very different version of how the Dania site came to be contaminated, pointing a finger at Lone Star's wood treatment process and/or its improper storage of chemicals used in that process during 1962-1979. The original NLC complaint named only Eastern as a party Defendant; a subsequent amendment added Building and LSI. In January, 1990, the EPA notified Lone Star that it (along with NLC) was a potentially responsible party under CERCLA for the contamination of the Dania site. In the matter of Lindsley Lumber Site Broward County, Florida, EPA Docket No. 90-46-C (the "EPA action"). Lone Star

settled the NLC action in 1993 for $7.3 million after allegedly incurring in excess of $4 million in defense costs. It settled the EPA action through a consent decree that required it to remove and treat the soil at the site. Lone Star alleges that it has "expended in excess of $15 million dollars in remediating the Dania Site, and may incur additional remediation costs in the future."

Lone Star asserts that it provided Plaintiff Liberty Mutual and the third party Defendants with notice of the EPA and NLC actions, requesting that the insurers defend and/or indemnify Lone Star from and against any liabilities incurred in these lawsuits. According to Lone Star, all of the insurers refused to provide coverage. In its counterclaim/third party complaint, filed December 22, 1995, Lone Star asserts that the insurers have breached their duty to defend and/or indemnify Lone Star in connection with the NLC and EPA actions. Lone Star seeks damages (in Count I and II) for the insurers' failure to defend and/or indemnify, and (in Count III) a declaration that the insurers have a duty to defend or indemnify Lone Star against all future damages and fees stemming from the Dania site.[3] Liberty Mutual's com-

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[3]Count I, which alleges a breach of the duty to defend, pertains only to Plaintiff Liberty Mutual and third party Defendants Century Indemnity Company (f/k/a Insurance Company of North America), Argonaut Insurance Company and United States Fidelity & Guaranty Company ("USF&G"). On March 6, 1997, Lone Star and third party Defendant Old Republic Insurance Company filed a stipulation for dismissal of the counterclaim/third party claim as to this carrier. In late 1996, Lone Star indicated that it had reached settlements with six additional third party Defendants: USF&G, Granite State Insurance Company, North Star Reinsurance Corporation, Twin City Fire Insurance Company, the Home Insurance Company and St. Paul Fire and Marine Insurance

plaint essentially preempted Lone Star's counterclaim, by seeking a declaration that, under a "pollution exclusion" clause in its policies with Lone Star, it has no duty to defend and/or indemnify Lone Star for any liability resulting from the alleged contamination of groundwater and soil at the Dania site. The complaint, filed November 9, 1995, contains two counts, with Count I seeking a declaration that Liberty Mutual has no duty to defend and Count II seeking a declaration that Liberty Mutual has no duty to indemnify.

II.

Lone Star has moved for partial summary judgment against Liberty Mutual on Count I of its counterclaim, asserting that there is no genuine issue of material fact and it is entitled to judgment as a matter of law on the question of whether Liberty Mutual breached its duty to defend Lone Star in the NLC action. Liberty Mutual has responded with a cross-motion for final summary judgment on its complaint, asserting that, on the undisputed record, it is entitled to a declaration that it had no duty to defend or indemnify Lone Star in either the NLC or the EPA proceedings.

Company. The notice of settlement suggested that the settlements are "provisional," but should be documented and funded in the near future. In correspondence filed with the Court on or about January 8, 1997, two third party Defendants (the Home and St. Paul) acknowledged that they have "reached an agreement in principle with Lone Star [although] the specific terms and provisions of the settlement have not been agreed upon." Under these circumstances, and absent further guidance from the parties as to the status of the settlements, all pending motions relating to Lone Star's claims against the settling third party Defendants (including the dispositive motions filed by USF&G and the Home) shall be denied without prejudice.

A.

The standard to be applied in reviewing summary judgment motions is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. The moving party bears the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). As the Eleventh Circuit has explained:

> In assessing whether the movant has met [its] burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Adickes, 398 U.S. at 157, 90 S. Ct. at 1608; Marsh, 651 F.2d at 991. All reasonable doubts about the facts should be resolved in favor of the non-movant. Casey Enterprises v. Am. Hardware Mutual Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Marsh, 651 F.2d at 991; Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co., 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. Impossible Electronics, 669 F.2d at 1031; Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970).

> Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes[], 398 U.S. at 160 . . .; Marsh, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. Brunswick Corp. v. Vineberg, 370 F.2d 605, 611-12 (5th Cir. 1967). See Dalke v. Upjohn Co., 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, 684 F.2d 1365, 1368-69 (11th Cir. 1982); see also Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985), cert. denied, 475 U.S. 1107 (1986). The United States Supreme Court has provided significant additional guidance as to the evidentiary standard which district courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-80, 64 S. Ct. 232, 234, 88 L. Ed. 239 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court in Anderson further acknowledged that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Id. at 252. In determining whether this evidentiary threshold has been met, the trial court

"must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Id. at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding in his favor, summary judgment may be granted. Id. at 254-55.

In a companion case, the Supreme Court declared that a non-moving party's failure to prove an essential element of his claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, *and on which that party will bear the burden of proof at trial*. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added). We measure the pending motions for summary judgment against these familiar standards.

B.

The Plaintiff and the Defendant agree that some or all of the Lone Star entities were insureds under a series of Liberty Mutual

policies covering the period January 1, 1972 through January 1, 1992. However, the only policies allegedly creating a duty to defend or indemnify at this point in the litigation are 14 annual CGL policies issued to LSI for the period January 1, 1972 through January 1, 1986.[4] These policies contain the following pertinent terms:

> I. Coverage
>
> [Liberty Mutual promises t]o pay on behalf of the insured all sums which the insured shall become obligated to pay as damages by reason of liability imposed upon the insured by law or assumed by the insured under contract because of
>
> (A) Personal Injury, or
>
> (B) Property Damage
>
> to which this policy applies, caused by an occurrence. Subject to the following paragraph the company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it

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[4]Lone Star, in its motion for partial summary judgment, states that it "presently does not seek to determine its rights" under the post-January 1, 1986 policies. Liberty Mutual, however, has moved for summary judgment on these policies, asserting that — based on the facts in the record — the "absolute" pollution exclusion contained in them precludes Lone Star from seeking coverage for the NLC and EPA proceedings. While Liberty Mutual's position may have merit, the parties devote virtually no attention to the perceived scope or applicability of the post-January 1, 1986 policies. For this reason, and given the posture of the case, the Court is not prepared to address the implications of these policies at this time. We do not preclude either party from seeking summary judgment as to the post-January 1, 1986 policies at a subsequent point in the litigation.

deems expedient.

This promise of coverage is qualified by a so-called "polluter's exclusion," but also encompasses an "exception" within the exclusion:

> It is agreed that the insurance does not apply to any liability arising out of pollution or contamination due to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or pastes, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental or results from an underground seepage of which the insured is unaware.

(emphasis added). It is the "exception within the exclusion" highlighted above that forms the focal point of the parties' arguments. As Lone Star sees it, the exception permits coverage, notwithstanding the exclusion, so long as the underlying lawsuit suggests (1) a "sudden and accidental" discharge, dispersal, release or escape of contaminants; *or* (2) a discharge, dispersal, release or escape of contaminants due to an "underground seepage of which the insured is unaware." The underlying pleadings at issue here are the NLC complaint and the EPA Consent Order (as well as perhaps some additional EPA documents) that were supplied to Liberty Mutual as part of Lone Star's unsuccessful attempt to compel its insurer to defend it in the actions arising out of the Dania site.

C.

For purposes of background, the case at bar must be placed in

the context of another recently-concluded lawsuit between Lone Star and Liberty Mutual, which Liberty Mutual describes as "Lone Star I."[5] Basically, Lone Star I arose out of apparent environmental violations at Lone Star's wood treatment facility in Dade County, Florida. Lone Star sued Liberty Mutual in Dade Circuit Court, alleging a breach of the duty to defend and indemnify it in several lawsuits stemming from contamination of soil and groundwater at the site. While Lone Star sought coverage under a number of policies, the principal contracts in dispute were CGL policies identical to those under which Lone Star seeks coverage in the case at bar. As here, the disputed policies contained a pollution exclusion clause that created an exception to the exclusion if the discharge was "sudden and accidental or results from an underground seepage of which the insured is unaware." Liberty Mut. Ins. Co. v. Lone Star Indus., 661 So. 2d 1218, 1219 (Fla. 3d Dist. Ct. App. 1995), rev. denied, 671 So. 2d 788 (Fla. 1996). Lone Star argued that the underlying complaints contained allegations falling within this clause, and therefore Liberty Mutual was obligated to defend it in those actions. The trial court granted Lone Star's motion for partial summary judgment on the duty to defend, and the Third DCA affirmed, finding, among other things, that the "sudden and accidental" clause was ambiguous in its meaning and therefore must be construed in favor of coverage.

The Florida Supreme Court subsequently quashed the Third DCA's

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[5]Lone Star labels the case "Miami Wood."

holding, pursuant to a ruling in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So. 2d 700 (Fla. 1993) to the effect that the phrase "sudden and accidental," as it appeared in the standard CGL pollution exclusion clause, was not ambiguous, and meant, as a matter of law, "abrupt and unexpected." Liberty Mut. Ins. Co. v. Lone Star Indus. 648 So. 2d 114 (Fla. 1993). On remand, the Third DCA reversed the trial court's ruling on Liberty Mutual's duty to defend. 661 So. 2d at 1220-21. In so doing, the court held that the underlying complaints did not allege that the contamination occurred in an abrupt or unexpected manner:

> Here, the contamination cannot reasonably be construed as "sudden and accidental." The complaints alleged, and Liberty Mutual's subsequent investigation revealed, that gradually over a period of years, there was an expected and intentional release of contaminants during the normal course of Lone Star's business operations. The release of contaminants was neither abrupt nor unexpected, and the contamination falls squarely within the pollution exclusion clause of the policy, not the exception. Therefore, Liberty Mutual has no duty to defend Lone Star under the "sudden and accidental" exception to the pollution exclusion clause.

Id. at 1220. The court also held that the "underground seepage" exception did not apply:

> Second, Liberty Mutual has no duty to defend Lone Star under the underground seepage exception to the pollution exclusion clause because the discharge must "result from" an underground seepage of which the insured in unaware. "[T]he discharge, dispersal, release or escape" to which both the exclusion and the exception refer is the initial discharge, dispersal, release or escape into the atmosphere and not the subsequent migration. In fact, "[t]he behavior of the pollutants,

> after release, is irrelevant to [the application of the pollution exclusion]." Further, application of the pollution exclusion depends solely upon the process or method by which the pollutants enter the environment.
>
> In this case, the complaints clearly allege, and Liberty Mutual's subsequent investigation confirmed, that the release of contaminants occurred above the ground from the dripping of chemicals from the treated wood onto the soil, from the leaking chemical storage containers and from the overflowing of chemical collection pits. The underground seepage exception is inapplicable because the initial [release] did not occur underground; rather, it occurred above ground and subsequently migrated underground. Additionally, Lone Star was aware of the release of the contaminants contrary to the lack of knowledge requirement in the underground seepage exception. Therefore, Liberty Mutual has no duty to defend Lone Star under the underground seepage exception to the pollution exclusion clause.

Id. (emphasis in original).

The parties devote considerable argument to the question of whether the Third DCA's decision "controls" the outcome of this lawsuit. Despite a great many similarities, Lone Star I does not dictate our resolution of this case, since the NLC and EPA pleadings at issue here plainly differ from those under scrutiny in the prior litigation. Among other things, the underlying allegations concerning the Dade County site — unlike the Dania site — apparently did not refer to the presence of underground storage tanks, a distinction that may be relevant to determining the applicability of the "underground seepage" exception to the NLC and EPA complaints. Accordingly, while Lone Star I is controlling Florida precedent on the proper interpretation of terms in the

Liberty Mutual policies under review, the Florida courts' disposition of that litigation is not binding here.

D.

The parties' next area of disagreement concerns the source of the law to be applied to this diversity action. The parties agree that, in a diversity case, a district court typically must apply the forum state's choice of law rules. See, e.g., LaFarge Corp. v. Travelers Indem. Co., 927 F. Supp. 1534, 1536 (M.D. Fla. 1996). Thus, in determining what law applies here, we look to conflicts principles adopted by the courts of Florida. As Lone Star sees it, Connecticut law applies to this dispute under Florida's doctrine of lex loci contractus, because the "last act" in the consummation of the insurance policies at issue took place through Liberty Mutual agents in Stamford and New Haven and at the Plaintiff's principal place of business in Hartford. Liberty Mutual does not dispute that, under traditional lex loci contractus analysis, the law of Connecticut would apply here. It contends, however, that the Eleventh Circuit, in binding precedent, has ruled that lex loci contractus does *not* apply when the parties' dispute concerns an insurance contract for Florida real estate. In this context, Liberty Mutual insists, the law of the forum with the "most significant relationship" to the land must be used — e.g., Florida. As an alternative argument, Liberty Mutual suggests that Lone Star is estopped from arguing that Connecticut rather than Florida law applies, because it argued for (or at least did not challenge) that application of Florida law to the identical policies in Lone Star

I.

Liberty Mutual's argument against the applicability of lex loci contractus principles turns on the Court of Appeals' ruling in Shapiro v. Associated International Insurance Company, 899 F.2d 1116 (11th Cir. 1990). In Shapiro, the Eleventh Circuit considered the terms of an CGL contract covering, among other things, personal injuries at a Florida real estate development known as the "California Club." The insured club and the injured victim argued that California law applied under lex loci contractus analysis, because the insurance contract was consummated in that state. The insurer countered that Florida law applied, because the insurance contract concerned Florida real estate and therefore the Florida courts would apply the "most significant relationship" test from the Restatement instead of lex loci contractus. The district court accepted this position, applied Florida law and found for the insurer. On appeal, the Eleventh Circuit noted that "[t]raditionally, when confronted with questions regarding the interpretation and validity of a contract, Florida courts have applied the law of the state where the contract was made or to have been performed." Id. at 1119 (citing, among other cases, Goodman v. Olsen, 305 So. 2d 753 (Fla. 1974)). It then concluded, however:

> We do not believe . . . that the Florida Supreme Court would apply the antiquated lex loci contractus rule to the instant case. Although the Florida Supreme Court extended "the lex loci contractus rule [to] determine[] the rights and risks of the parties to automobile insurance policies on the issue of coverage," the court specifically limited its holding to contracts for automobile insurance,

> reasoning that we live in a migratory, transitory society and "[t]o allow one party to modify the contract simply by moving to another state would substantially restrict the power to enter into valid, binding, and stable contracts." Using the same reasoning, we believe that if faced with the facts of this case, the court would apply Florida law. While it is true that technological advancements encourage migration and transition, it is equally true that real property remains stationary and immobile. . . . Because in the case at bar the location of the insured risk was stable, any doubt concerning a party's ability to "restrict the power to enter into valid, binding and stable contracts" is dispelled. . . .
>
> Considering our traditional deference to local law in cases involving the adjudication of interests in real property, and Florida's application of the law of the situs of the property in disputes centered on real property, and considering Florida's trend toward application of the concepts advanced by the Restatement (Second) as well as the significance of Florida's interest in the outcome of this case, as evidenced by its diligent regulation of insurers, we hypothesize that the Florida Supreme Court would apply Florida law to this case. Consequently, we also will apply the law of Florida to the substantive issues presented.

Id. at 1119, 1121 (citations omitted).

Lone Star argues that we should not follow Shapiro here, for at least three reasons. First, it suggests that Shapiro is nothing more than a "guess" about Florida law. But this criticism conceivably could be lodged against any federal court required to interpret state law in a lawsuit founded on diversity of citizenship. The Shapiro opinion arguably contains more than the usual dose of cautionary language. Id. at 1118 (noting that "[w]e embark on our expedition only hoping that our interpretation of

state law is accurate"), 1120 (stating that "[w]hile we cannot know for certain whether the Florida Supreme Court would espouse these principles . . ."). The panel was unequivocal in its holding, however, and plainly felt comfortable enough with its ruling to refrain from certifying a question to the Florida Supreme Court. Next, Lone Star asserts that the Eleventh Circuit retreated from Shapiro in a subsequent opinion: Fioretti v. Massachusetts General Life Insurance Company, 53 F.3d 1228 (11th Cir. 1995), cert. denied, 116 S. Ct. 788 (1996). We disagree. In Fioretti, a case involving a life insurance contract, the panel affirmed a judgment in favor of the insurer, and ruled that lex loci contractus required the application of New Jersey law to the policy. The panel rejected the plaintiff's analogy to Shapiro, noting that "[i]n Shapiro, we declined to extend Florida's lex loci contractus rule to contracts insuring real property . . . This distinction clearly has little, if any, application in the present case." Id. at 1236 n.28. Fioretti does not, as Lone Star suggests, "confine[] Shapiro to its facts." The opinion simply confirms that Shapiro applies to insurance contracts similar to those at issue here. Finally, Lone Star insists that post-Shapiro Florida courts have shown no indication that they are retreating from lex loci contractus simply because the insured property is immobile. As support for this assertion, Lone Star calls our attention to a number of pre and post-Shapiro cases from the Florida courts and the Eleventh Circuit that have applied lex loci contractus even where the insured property is arguably immobile. None of these

cases, however, concern real property insurance contracts. More to the point, Shapiro does not hold that all insurance contracts governing "fixed" objects require resort to the "most significant relationship" test. Rather, a close reading of the opinion reveals that the panel was primarily concerned with the unique nature of real estate, and the fact that the state in which the property is located has a paramount interest in having issues relating to that property decided under local law. 899 F.2d at 1121.

In short, while Lone Star's arguments in favor of applying lex loci contractus here may be compelling, the fact remains that Shapiro is binding precedent on this Court, at least absent a powerful showing that subsequent Florida law casts genuine doubt on Shapiro's reasoning. We are not aware of any pronouncement from the Florida courts (or, for that matter, the Eleventh Circuit) disagreeing with Shapiro or expressly disapproving the narrow ruling of that case. Indeed, the Fioretti panel's brief citation to Shapiro as creating a unique rule for real property insurance contracts suggests the continuing vitality of that doctrine. Moreover, a district court in the Middle District of Florida recently distinguished Fioretti and applied Shapiro in resolving a choice of law dispute arising out of a claim for coverage similar to that at issue here. See LaFarge, 927 F. Supp. at 1537 (applying Florida law to interpret the terms of a CGL policy for a site implicated in hazardous waste clean-up actions). Nor are we aware of any post-Shapiro case from the Florida courts that applies lex loci contractus to an insurance contract concerning real estate.

For the foregoing reasons, Shapiro is binding here, and the dispute between Liberty Mutual and Lone Star is governed by Florida law.[6]

E.

Having concluded that, under controlling Eleventh Circuit precedent, Florida law applies to the dispute between Lone Star and Liberty Mutual, we now examine the NLC and EPA complaints against the backdrop of the Florida cases discussing the contours of an insurer's duty to defend. The pertinent allegations of the NLC complaint are the following:

> During a substantial portion of the period between approximately June 1962 and April 1979, Lone Star conducted a wood "dip treating" operation [in the Tank 2 area] on the Dania site . . ..

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[6]Liberty Mutual makes the additional argument that even if Shapiro is no longer controlling, Lone Star is not entitled to object to the application of Florida law to these policies. The Plaintiff bases its argument on the fact that Lone Star did not oppose the application of Florida law to the identical policies when the scope of the pollution exclusion was litigated in Lone Star I in connection with the Dade County site. Indeed, according to the Plaintiff, Lone Star never once raised the possibility of Connecticut law, and instead cast its legal arguments in terms of the language of the Florida courts. Liberty Mutual therefore claims that principles of estoppel and waiver preclude Lone Star from arguing for Connecticut law. Lone Star responds that these principles are inapposite, since the issue of whether Florida or Connecticut law should apply never squarely arose in Lone Star I. Lone Star explains that it initially "consented" to the application of Florida law because it did not believe, prior to commencing the litigation, that Connecticut and Florida law were in conflict on issues such as the ambiguity of the "sudden and accidental" clause and the specificity with which the underlying complaint(s) must allege facts within an exception to a pollution exclusion. Liberty Mutual counters, persuasively, that the Defendants chose, rather than merely "consented" to, Florida law. The Plaintiff adds that the Defendants would not now be insisting on the applicability of Connecticut law if the Florida courts had ruled in Lone Star's favor in Lone Star I.

[Its] employees would place untreated wood into a wire mesh cage and then lower the cage into one of two large open tanks containing dip treatment chemicals. These open tanks contained hundreds of gallons of chemicals. . . . One of the dip treatments used a mixture of [PCP] and mineral spirits. Mineral spirits contains, among other things, benzene, toluene and xylene. After soaking the wood in this mixture, the employees would raise the cage, and allow the wood to drip dry. During this drip drying process, the chemical mixture was allowed to drip onto the soil around the Tank 2 area.

Some of the chemicals used by Lone Star in the wood treatment operation, including PCP and mineral spirits, were stored on the Dania site. Mineral spirits were stored in one or more underground storage tanks. The PCP was stored above ground in large drums.

Lone Star did not empty the dip tanks after a batch of wood was treated, so the dip tanks usually had quantities of dip treatment chemicals in them at all times. When it rained, the dip tanks would overflow and the water and chemicals would pour over the sides of the dip tanks and onto the soil at the Dania site.

On June 27, 1988, the underground storage tanks were removed in the presence of a Broward County environmental specialist who detected contamination in the area where a 200 gallon underground tank was removed, which is the Tank 2 area. In July 1988, NLC employed an environmental expert . . . to assess the extent of the contamination, if any, of the Tank 2 area. . . . The testing showed that actionable levels of benzene, toluene and xylene were present in the ground water under the Tank 2 area. In addition, the testing showed that there were substantial areas of excess soil contamination by volatile organic aromatics as defined by [Florida environmental regulations]. . . .

NLC Compl., at ¶¶ 10-17, 29-30.[7] Count I of the NLC complaint alleged a violation of CERCLA, and asserted that "[d]uring Lone Star's ownership and operation of the Dania site, there were significant releases into the soil and groundwater at the Dania site of PCP, dioxin and mineral spirits containing benzene, toluene and xylene, as a result of Lone Star's wood dip treating and drip drying of wood, storage of chemicals and chemical spills." Id. at ¶49. In Count II, NLC claimed that Lone Star's "use, handling, storage, generation, transportation and disposal of PCP, dioxin and mineral spirits containing benzene, toluene and xylene" created a dangerous condition in violation of RCRA and its Florida counterpart. Id. at ¶60. Count III alleges that "[a]s a result of Lone Star's activities at the Dania site, hazardous materials and wastes . . . were discharged into the soil and water at the Dania site," in violation of the Broward County Code. Id. at ¶66. In Count V, NLC claims that "[a]s a result of Lone Star's releases and discharges, which included the spilling, leaking, seeping, pouring, misapplying, emitting, emptying and dumping of the hazardous substances and wastes, the water and soil at the Dania Site has been contaminated . . ." in violation of certain Florida statues. Id. at ¶82 (emphasis added).

The pertinent pleadings in the EPA action are extremely sparse, but essentially relate allegations similar to those lodged

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[7]An amended complaint was prepared in March, 1990 The parties agree, and our review suggests, that the amended complaint contains virtually identical factual allegations.

by NLC.[8] The PRP Notice indicates that EPA "has documented the release or threatened release of hazardous substances, pollutants or contaminants at the Site." The draft Administrative Order contains a determination that "[t]he release of hazardous substances at the Site may present an imminent and substantial" threat. The Consent Order, signed in June, 1990, contains the following relevant findings of fact:

> Although the Site was used primarily for the distribution of lumber and other building materials . . . EPA alleges that wood treating activities were performed in a discrete portion of the Site . . .. EPA alleges that this operation consisted of dipping lumber into liquid solutions designed to inhibit the effects of weathering and moisture on building materials. These materials are reported to have included mineral spirits and [PCP].
>
> In June 1988, [Broward County] required that [NLC] perform a site investigation to determine the nature and degree of contamination associated with the closure of an underground storage tank at the Site. Through this action, and subsequent investigation of environmental conditions at the Site conducted by [NLC] in 1988-89, evidence of [PCP] and those volatile and semi-volatile organic compounds such as benzene,

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[8]It is unclear which of the EPA materials placed in the record may be considered in determining the scope of Liberty Mutual's duty to defend and/or indemnify Lone Star. Liberty Mutual asserts that Lone Star initially only supplied it with a copy of the EPA Consent Order. Lone Star responds that Liberty Mutual declined an opportunity to review additional materials arising out of the EPA proceeding. In any event, it is undisputed that Liberty Mutual now has had an opportunity to review the EPA's PRP Notice of January 22, 1990 and a "Draft Administrative Order on Consent" that was attached to the PRP Notice. Accordingly, the Court will review the contents of these three documents (all of which contain essentially the same allegations) to determine if Liberty Mutual had a duty to defend the EPA action.

> toluene, xylene and naphthalene which are known to be present in mineral spirits, were detected in on-site soil and groundwater.

Consent Order, at §III B-D. The Order concludes that an "actual or threatened release" occurred at the Dania site, but does not elaborate on how, when or under what circumstances, this "release" may have occurred.

In construing Florida law, we are guided by the decisions of the Supreme Court of Florida. See Geary Distributing Co. v. All Brand Importers, Inc., 931 F.2d 1431, 1434 (11th Cir. 1991), cert. denied, 112 S. Ct. 971 (1992); Royal Health Care Services, Inc. v. Jefferson-Pilot Life Ins. Co., 924 F.2d 215, 216 (1991). Where the Supreme Court of Florida has not addressed a particular issue, we are bound by decisions of the Florida district courts of appeal that address the disputed question, unless there is an indication that the Supreme Court might not adhere to the lower court's decision. See Maseda v. Honda Motor Co., 861 F.2d 1248, 1257 n.14 (11th Cir. 1988). Under Florida law, an insurer's duty to defend arises out of the allegations of the underlying complaint. National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 536 (Fla. 1977). The duty to indemnify, by contrast, only arises after a determination that the alleged conduct actually falls within the policy terms. Hagen v. Aetna Cas. & Sur. Co., 675 So. 2d 963, 965 (Fla. 5th Dist. Ct. App.) (stating that "[r]egardless of the allegations of the complaint, it is the underlying facts that determine the duty to indemnify"), rev. denied, 683 So. 2d 483 (Fla. 1996). In this sense, the duty to

defend is "broader" than the duty to indemnify. See, e.g., Smith v. General Accident Ins. Co., 641 So. 2d 123, 124 (Fla. 4th Dist. Ct. App. 1994) (observing that "[a]n insurance company's duty to defend is separate and more extensive than its duty to pay").

As noted above, "[t]he allegations of the [underlying] complaint govern the duty of the insurer to defend." National Union, 358 So. 2d at 536; Fun Spree Vacations, Inc. v. Orion Insur. Co., 659 So. 2d 419, 421 (Fla. 3d Dist. Ct. App. 1995). If the allegations set forth facts which even potentially bring the case within the coverage of the policy, the insurer has a duty to defend its insured in that case. See, e.g., Lime Tree Village Comm. Club Ass'n, Inc. v. State Farm Gen. Ins. Co., 980 F.2d 1402, 1405-06 (11th Cir. 1993) (Florida law) (remarking that "[t]he insurer must defend when the complaint alleges facts which fairly and potentially bring the suit within policy coverage"); Aetna Comm. Ins. Co. v. American Sign Co., 1996 W'law 709209 at *1 (Fla. 2nd Dist. Ct. App. Dec. 11, 1996). By contrast, when the underlying complaint alleges a state of facts which plainly fails to bring the case within the coverage of the policy, no duty to defend arises. See, e.g., id. at 1405 (finding duty to defend after finding that the underlying case was not one where "there is only a single cause of action based wholly on acts expressly excluded by the policy"); Lone Star I, 661 So. 2d at 1220 (noting that "an insurer has no duty to defend a suit against an insured where the complaint upon its face alleges a state of facts that fails to bring the case within the coverage of the policy"). In other words, "[i]f the

complaint, fairly read, alleges facts which create potential coverage under the policy, the insurer must defend the lawsuit." Fun Spree, 659 So. 2d at 421 (citations omitted).

Of paramount importance, in reviewing the sufficiency of the allegations of the underlying complaint, a court must resolve all doubts in favor of requiring the insurer to defend. See, e.g., Lime Tree Village, 980 F.2d at 1405 (noting that "[i]f the allegations of the complaint leave any doubt as to the duty to defend, the question must be resolved in favor of the insured"); MCO Environ., Inc. v. Agricultural Excess & Surplus Ins. Co., 1997 W'law 54806 at *1 (Fla. 3d Dist. Ct. App. Feb. 12, 1997) (stating that "[i]f the complaint alleges facts that *could* bring the insured *partially* within coverage of the policy, the insurer is obligated to defend the entire suit") (emphasis added); Irvine v. Prudential Prop. & Cas. Ins. Co., 630 So. 2d 579, 580 (Fla. 3d Dist. Ct. 1993) (citing cases for the proposition that "[w]here some allegations set out in the complaint require the insurer to defend the insured and some allegations do not, the insurer must provide a defense on the entire suit"); Marr Invest., Inc. v. Greco, 621 So. 2d 447, 449 (Fla. 4th Dist. Ct. App. 1993) (same). Nevertheless, the focus must remain on the language of the underlying complaint; inferences drawn from that language, however reasonable, cannot create a duty to defend. See, e.g., Fun Spree, 659 So. 2d at 421-22 (rejecting insured's argument that, since all doubts are to be resolved in favor of coverage, inferences drawn from the underlying complaint may give rise to a duty to defend). Moreover, "in determining if

there is a duty to defend, the trial court is restricted to the allegations of the complaint, regardless of what . . . others say happened." Marr Invest., 621 So. 2d at 449.[9] Simply put, therefore, the underlying complaint must contain at least some factual allegations fairly placing the insurer on notice that the insured potentially may be entitled to a defense from the insurer.[10]

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[9]For this reason, the various materials from Lone Star I submitted by the Defendants in an apparent effort to clarify the meaning of the Liberty Mutual "underground seepage" exception may not be considered at this stage.

[10]We are not convinced that the law of Connecticut differs meaningfully from the law of Florida for purposes of evaluating a claimed breach of the duty to defend. Lone Star cites language from a Connecticut case, Cole v. East Hartford Estates Limited Partnership, 1996 W'law 292135 (Conn. Sup. Ct. May 15, 1996), which arguably can be read to suggest that the duty may arise even if the underlying complaint does not allege any facts that potentially may trigger coverage. Id. at *3 (suggesting that "[u]nless the allegations of the underlying complaint fall so clearly within a policy exclusion as to eliminate any possibility of coverage, the insurer must provide a defense to its insured"). In Flint v. Universal Machine Company, 679 A.2d 929, 934 (Conn. 1996), however, the Connecticut Supreme Court stated that an insurer must provide a defense only "if the complaint sets forth a cause of action within the coverage of the policy." This principle is consistent with prior and subsequent Connecticut case law. See, e.g., LaBonte v. Federal Mut. Ins. Co., 268 A.2d 663 (Conn. 1970) (holding that "a duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage"); National Grange Mut. Ins. v. Hartford Ins. Co., 1996 W'law 493209 at *3 (Conn. Sup. Ct. Aug. 16, 1996); Imperial Cas. & Indem. Co. v. State of Connecticut, 1996 W'law 469733 at *3 (Conn. Sup. Ct. Aug. 6, 1996) (observing that "[a] duty to defend an insured arises if the complaint states a cause of action which appears on its face to be within the terms of the policy coverage"). Our review of Connecticut law suggests that while (as in Florida) different courts have adopted different standards for evaluating just how precise the underlying complaint must be, the basic inquiry remains the same: does the underlying complaint fairly allege facts that create a potential for coverage?

An additional reason for Lone Star's desire to apply

Typically it is the insured's burden to establish that it is entitled to coverage under the terms of its policies with the insurer. It is the insurer's burden, however, to establish that a policy exclusion applies to defeat coverage that otherwise would be available. Courts throughout the country have split on the question of who must bear the burden of proving the applicability or inapplicability of an exception to an exclusion. Compare Aeroquip Corp. v. Aetna Cas. & Sur. Co., Inc., 26 F.3d 893, 894-95 (California law) (placing burden on insured to establish the applicability of a "sudden and accidental" exception) with EDO Corp., 878 F. Supp. at 371 (Connecticut law) (placing burden on insurer). We are not aware of an opinion from the Florida courts on this issue. In Hudson Insurance Company v. Double Management

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Connecticut law to this action may be its belief that the Connecticut courts would find Liberty Mutual's "sudden and accidental" clause to be ambiguous (contrary to binding precedent in the Florida courts). While we are not aware of any ruling from the Connecticut Supreme Court on this issue, at least one Connecticut federal court construing Connecticut law has rejected Lone Star's position. See EDO Corp. v. Newark Ins. Co., 878 F. Supp. 366, 374 (D. Conn. 1995) (finding the phrase unambiguous and defining "sudden" as abrupt).

We pause to note at this juncture that the parties have cited and submitted copies of a vast number of cases from outside the State of Florida. These opinions, many of which are unpublished and some of which were submitted long after the completion of briefing, provide the Court with relatively little guidance. To begin with, as noted above, our resolution of this lawsuit is guided by the law of Florida, which contains ample precedent discussing the contours of the issues before us. Second, the determination of an insurer's duty to defend requires a close scrutiny of the allegations lodged against the insured in the underlying complaints giving rise to the controversy at hand. The "case-specific" nature of this scrutiny may diminish the precedential value of prior opinions.

Company, Inc., 768 F. Supp. 1542, 1545 (M.D. Fla. 1991), however, a federal district court, construing Florida law, held that the insured bore the burden of establishing a "sudden and accidental" exception to a pollution exclusion similar to that at issue here. Hudson does not cite any Florida opinions for its conclusion. We nevertheless agree that it is Lone Star's burden to prove that the "sudden and accidental" or "underground seepage" exceptions apply to the NLC and EPA actions. This rule sensibly aligns the burden with the sought-after benefit, and is consistent with the settled principle that the insured ultimately must establish its entitlement to coverage. See Aeroquip, 26 F.3d at 895.

We pause to address one final point about the scope of the Florida case law. The Plaintiff at times maintains that the underlying complaint must "specifically plead" that the contamination resulted from an event addressed in one of the exceptions to the pollution exclusion in the applicable policies. Liberty Mutual suggests, for example, that the "sudden and accidental" exception may not be triggered unless the underlying complaint expressly describes the discharge as sudden and accidental (or at least uses words to that effect). While the underlying complaint undoubtedly must allege at least some facts that, fairly read, may create a potential for coverage, we can discern no requirement in the case law of Florida, or any other jurisdiction, that the underlying complaint must plead the precise word or words that talismanically trigger coverage. This standard seems wholly at odds with the liberal "notice pleading" regime

created by the Florida, and indeed Federal, Rules of Civil Procedure. See, e.g., Citron v. Armstrong World Indus., Inc., 721 F. Supp. 1259, 1261-62 (S.D. Fla. 1989); Fla. R. Civ. P. 1.110(b) (requiring only a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief"). As a result, if the underlying complaint does not allege a "sudden and accidental" occurrence, but does allege facts creating the potential that a sudden and accidental discharge took place, coverage may be available for the insured.

With these principles in mind, we conclude that the NLC complaint triggered Liberty Mutual's duty to defend pursuant to the "underground seepage" exception to the pollution exclusion. To reiterate, Lone Star may be entitled to coverage under the policies if the pollution is attributable to a "discharge, dispersal, release or escape [resulting] from an underground seepage of which the insured is unaware." The NLC complaint alleges, among other things, that Lone Star "stored" mineral spirits in "one or more underground storage tanks." It asserts that, when the tanks were removed in 1988, contamination was detected "in the area [of] a 200 gallon underground tank." Subsequent testing "showed that actionable levels of [chemicals known to be present in mineral spirits] were present in the ground water under the Tank 2 area." According to NLC, the release of these and other chemicals into the soil and groundwater stemmed from, among other things, Lone Star's "storage" of the chemicals. And of critical importance, NLC claims that the releases and discharges included the "*leaking [and]*

seeping . . . of the hazardous substances and wastes" (emphasis added). Under Florida law, an insurer must defend its insured even where "some allegations set out in the complaint require the insurer to defend the insured and some allegations do not." Irvine, 630 So. 2d at 580. Resolving all doubts in favor of the insured, we find, as a matter of law, that the NLC complaint contains sufficient facts to create at least a potential for coverage under the underground seepage exception to the pollution exclusion. The allegations quoted above fairly raise the possibility that some aspects of the pollution at the Dania site resulted, at least in part, from a seepage or leakage of contaminants while they were stored in the underground tanks.

Liberty Mutual observes that the thrust of NLC complaint seems to be that Lone Star allowed the above-ground dip tanks to "overflow," and thereby caused water and chemicals to "pour over the sides of the dip tanks and onto the soil at the Dania site." But NLC never squarely alleged that this phenomenon was the sole or even primary cause of the contamination. As noted above, NLC attributed the pollution to the entire universe of Lone Star's activities at the Site, including its "use, handling, storage, generation, transportation and disposal" of the chemicals. Liberty Mutual also asserts that the complaint does not allege that the release of pollutants occurred without Lone Star's knowledge. But nowhere does the complaint suggest that Lone Star *was* aware of the release of pollutants, from the underground tanks or from any other

source.[11] Reading the complaint as a whole, and resolving all doubts in favor of Lone Star, we conclude that NLC's allegations adequately triggered Liberty Mutual's duty to defend. The fact that the complaint does not expressly allege an "underground seepage of which [Lone Star was] unaware" is not dispositive, since the complaint, fairly read, "alleges facts which create potential coverage under the policy." Fun Spree, 659 So. 2d at 421 (emphasis added).

Liberty Mutual suggests that this result seems unfair and inequitable, given the Florida Supreme Court's analysis in Lone Star I and its observations on how contamination may result from wood treatment operations similar to those undertaken at the Dania site. Nevertheless, the law in Florida and other jurisdictions reflects a policy choice that favors the rights of insureds over insurers in close cases, especially when the insured has procured, paid for and relied on an assurance of protection from the insurer. This is precisely the kind of close case in which Liberty Mutual, confronted with a lawsuit against Lone Star that did not squarely pinpoint a single cause for the apparent release of contaminants, should have erred on the side of caution. After all, if an insurer is not convinced that the claim against its insured triggers

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[11]It is difficult to imagine any complaint similar to that served by NLC actually admitting, at the pleading stage, that a defendant/polluter was completely unaware of the release of the contaminants from its underground storage tanks. For this reason, we attach little weight to NLC's "silence" on what, if anything, Lone Star knew about the possible release of contaminants from the tanks at the Dania site.

coverage, it has the option of defending the insured under a reservation of rights. See Irvine, 630 So. 2d at 580 (noting that "[t]he uncertainty of the ultimate outcome is inherent in the risk assumed by the insurance company when it included in the insurance policy the duty to defend"); Allstate Ins. Co. v. Conde, 595 So. 2d 1005, 1009 (Fla. 5th Dist. Ct. App. 1992) (Sharp, J., concurring in part) (observing that "if one must be [inconvenienced by defending a lawsuit], the proper choice ought to be the insurance company because it has sold and been paid for something beyond a contract to indemnify — a duty to defend its insured in any lawsuit, which on its face, could encompass insurance coverage"). The fact that the NLC complaint may have seemed to Liberty Mutual either misleading or groundless is of no moment for purposes of the duty to defend. See Federal Ins. Co. v. Applestein, 377 So. 2d 229, 233 (Fla. 3d Dist. Ct. App. 1979) (reaffirming that "the 'actual facts' of the situation are not pertinent"). Having been fairly placed on notice that the claim against Lone Star at least potentially implicated the underground seepage exception, Liberty Mutual cannot rely on the pollution exclusion as a basis for denying coverage to the Defendants.

The EPA materials, which necessarily must be viewed in isolation from the NLC complaint, present a somewhat closer question. Nevertheless, we cannot say, as a matter of law, that these materials do not raise at least the *potential* that the alleged discharge resulted from an underground seepage of which the

insured was unaware or from a sudden and accidental occurrence.[12] Unlike the NLC complaint, the EPA materials contain no allegations suggesting that the apparent discharge of contaminants resulted from a "seeping" or "leaking" of contaminants. Nor do the EPA materials suggest that the discharge resulted from, among other things, Lone Star's method of "stor[ing]" the chemicals. The materials do, however, refer repeatedly to Lone Star's "release or threatened release" of contaminants at the site. The materials also refer to the discovery of "contamination associated with the closure of an underground storage tank at the Site," as evidenced by chemicals in the surrounding soil and groundwater. These allegations, while presented at a high order of abstraction, surely did not foreclose the possibility of coverage under the underground seepage exception. Cf. Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810, 811-14 (Fla. 1st Dist. Ct. App. 1985) (finding duty to defend where the underlying complaint was silent on the critical fact that would have precluded coverage for the insured). Liberty Mutual correctly points out that the EPA materials remark

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[12]The "release or threatened release" language used in the EPA materials does not preclude the possibility that the contamination of the Dania site resulted from the kind of abrupt event or occurrence that might be construed as a sudden and accidental "discharge, dispersal, release or escape." The NLC complaint, which contains more detailed allegations about Lone Star's activities at the Dania Site and the perceived causes of the discharge of contaminants, is arguably less susceptible to a reading that encompasses the possibility of a sudden and accidental release of pollutants. Nevertheless, since the NLC complaint does not allege a series of events plainly at odds with the terms of the "sudden and accidental" exception, a defense could have been supplied to the Defendants on this basis as well.

on the Defendants' above-ground practice of "dipping lumber into liquid solutions designed to inhibit the effects of weathering and moisture on building materials." But the EPA materials do not suggest that this practice was the sole or even primary cause of the release of contaminants at the Dania site. Indeed, the EPA materials do not even state squarely that this procedure was a cause of the pollution. We again stress that, under the law of Florida, an insurer must provide a defense to its insured whenever "the complaint alleges facts which fairly and potentially bring the suit within policy coverage." Lime Tree Village, 980 F.2d at 1405-06 (adding that "[i]f the facts alleged show any basis for imposing liability upon the insured that falls within [the terms of the policy], the insurer has a duty to defend"). If the insurer believes that the insured is not entitled to coverage, it may attempt to defend the insured pursuant to a reservation of rights. An insurer who summarily declines to defend its insured acts wholly at its peril. Accordingly, Liberty Mutual cannot, as a matter of law, establish that the contents of EPA materials created no duty to defend Lone Star.

F.

Lone Star suggests that, in light of our conclusion that, as a matter of law, one or more exceptions to the pollution exclusion apply to the NLC complaint, we must enter partial summary judgment in its favor on the question of whether Liberty Mutual breached its duty to defend that action. The Plaintiff responds that summary judgment may not be entered on this issue, since it has "asserted

numerous affirmative defenses" in its answer to the counterclaim, and "has neither waived nor conceded [its] position" on these defenses. Liberty Mutual adds that "Lone Star does not even attempt to address these other affirmative defenses in its summary judgment papers." The case law suggests that, in order to obtain summary judgment, a plaintiff (or, in this instance, a counter-plaintiff) need not address and negate each and every one of its opponent's affirmative defenses. In other words, it is the defendant's burden to at least come forward with evidence establishing that genuine issues of fact exist concerning some or all of its defenses; only at that point must the plaintiff, in order to obtain summary judgment on its cause of action, respond with evidence sufficient to prove that no triable issues remain with respect to the defenses. See, e.g., Frankel v. ICD Holdings S.A., 930 F. Supp. 54, 65 (S.D.N.Y. 1996) (citing post-Celotex cases); Dollar Dry Dock Sav. Bank v. Hudson Street Dev. Assoc., 1995 W'law 412572 at *5 (S.D.N.Y. July 12, 1995) (stating that "[b]ecause [defendant] bears the burden of proving his affirmative defenses at trial, the [plaintiff] is not required to support its summary judgment motion with affidavits or other materials which tend to disprove [defendant's] defenses"); Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076, 1090-91 (D. Del. 1990) (entering summary judgment in plaintiff's favor despite the existence of two affirmative defenses not addressed by either party, and noting that "[a] party resisting summary judgment cannot expect to rely on bare assertions or mere cataloguing of

affirmative defenses"), aff'd, 932 F.2d 951 (3d Cir. 1991). In the case at bar, Liberty Mutual has not articulated which, if any, of its 39 affirmative defenses preclude summary judgment in Lone Star's favor. Nor has Liberty Mutual proffered argument or record evidence to establish the existence of genuine fact issues concerning these defenses.

That being said, it does not follow that Lone Star is now entitled to summary judgment on its claim that Liberty Mutual breached a duty to defend the NLC complaint. Our conclusion that the pollution exclusion in the 1972-1986 policies did not permit Liberty Mutual to deny a defense to Lone Star is insufficient, standing alone, to establish that Liberty Mutual breached the parties' contracts by refusing to provide a defense in the NLC action. Although Lone Star suggests that a breach of contract occurred, it does so only in bald or conclusory terms in its pleadings and legal memoranda. There is little competent evidence establishing the basic parameters of Lone Star's breach of contract claim (including, among other things, its timely satisfaction of any conditions precedent and the status of Building and Eastern as insureds under the Liberty Mutual policies issued to LSI). Under Fed. R. Civ. P. 56, a plaintiff may not obtain summary judgment in its favor without first coming forward with sufficiently persuasive evidence to establish that no genuine issue remains concerning the elements of its cause of action. See supra, at 7-9. Lone Star has failed to make this showing on this limited record, and therefore is not now entitled to summary judgment on the issue of duty to

defend. We do not, of course, preclude Lone Star from attempting to renew its application at a subsequent point in the litigation.

III.

In lieu of an answer to Lone Star's counterclaim/third party complaint, two of the third party Defendants, Century and Argonaut, filed motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. At a status conference on June 11, 1996, the Court raised the question of the whether any of the remaining third party carriers wished to join in these motions. To this end, in an Order dated June 19, 1996, we stated that "[a]ny other party entitled to file its own motion or joinder pleading which wishes to have its own motion or joinder pleading heard at the July 23, 1996 hearing must file same [on or before June 18, 1996]." On June 17th, North River Insurance Company joined in the 12(b)(6) motions of Century and Argonaut through a pair of "Affidavits in Support of Joinder." On June 18th, the Home filed a notice of joinder in the two 12(b)(6) motions as well as a separate motion for summary judgment. Also on June 18th, Continental Casualty Company filed a notice of joinder in Century's motion as well as a separate motion for judgment on the pleadings. USF&G, in turn, filed its own 12(b)(6) motion, along with a motion for judgment on pleadings.

At the outset, Lone Star objects to our consideration of the applications of the "later-filing" third party carriers, because Fed. R. Civ. P. 12(b) forbids the filing of a motion to dismiss once an answer has been submitted. North River, Home, Continental and USF&G all submitted answers prior to indicating their joinder

in the outstanding 12(b)(6) motions of Century and Argonaut.[13] The carriers respond that the Court essentially waived the limitation of Rule 12(b) when it ruled that parties could join in the outstanding motions on or before the 18th. The language of our June 19th Order, however, makes clear that the right to join in the outstanding 12(b)(6) motions extended only to "[a]ny other party *entitled to file its own motion or joinder pleading*." For this reason, the Court shall not, at this time and under these circumstances, consider the arguments raised in North River's motion to dismiss.[14] Continental, however, filed both a motion to dismiss and a motion for judgment on the pleadings. Under Fed. R. Civ. P. 12(c), a motion for judgment on the pleadings may be filed "after the pleadings are closed." Accordingly, we will consider the arguments of this third party Defendant along with the arguments of Argonaut and Century.

A.

The purpose of a Rule 12(b)(6) motion is to test the facial

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[13]As noted above, in light of Lone Star's apparent settlement with USF&G and the Home, the pending motions submitted by these third party Defendants are denied without prejudice. The Court will not, at this time, address issues raised solely in the memoranda filed by USF&G and the Home.

[14]North River's application consists of nothing more than a pair of affidavits that confirm its joinder in the Century and Argonaut motions and aver certain facts pertinent to its relationship with Lone Star. To the extent that the affidavits raise fact issues unique to North River, the proper vehicle to bring these issues to the attention of the Court is a motion for summary judgment. This Order does not preclude North River from seeking to file a Rule 56 motion at a subsequent point in the litigation.

sufficiency of the statement of claim for relief. It is read alongside Rule 8(a) of the Federal Rules of Civil Procedure, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The motion is not designed to strike inartistic pleadings or to provide a more definite statement to answer an apparent ambiguity, and the analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and any accompanying exhibits. See 5 Charles A. Wright & Arthur Miller, Federal Practice and Procedure §1356 at 590-92 (1969) ("Wright & Miller"). Moreover, for the purposes of the motion to dismiss, the complaint must be construed in a light most favorable to the plaintiff and the factual allegations taken as true. See SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir.), reh'g denied, 840 F.2d 25, cert. denied, 486 U.S. 1055 (1988). According to the Eleventh Circuit, "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Tiftarea Shopper, Inc. v. Georgia Shopper, Inc., 786 F.2d 1115, 1117-18 (11th Cir. 1986) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The pleadings must show, in short, that the Plaintiff has no claim before the 12(b)(6) motion may be granted. A motion under Rule 12(c) may appropriately be granted where the "movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of

law." 5A Wight & Miller §1368 at 518. This standard mirrors that applied to a motion to dismiss. See Fed. R. Civ. P. 12(h)(2); see also Sheppard v. Beerman, 18 F.3d 147, 150 (2nd Cir. 1994); Miami Herald Pub. Co. v. Ferre, 636 F. Supp. 970, 974 (S.D. Fla. 1985).

B.

All of the moving carriers assert that Lone Star has failed to state a claim against them, since (1) the third party complaint alleges that the contamination of the Dania site did not occur until Lindsley Stores took over in 1979; and (2) some or all of their policies with the Lone Star entities expired before 1979. Lone Star does not dispute that, if the alleged contamination took place after 1979, there would be no coverage under policies expiring before 1979. Lone Star also acknowledges that its counterclaim does not expressly allege incidents of contamination and/or property damage prior to 1979. According to Lone Star, however, the NLC complaint (as amended) alleged that the Lone Star entities were responsible for contamination and/or property damage at the Dania site as early as 1962, when Eastern acquired the tract.[15] As Lone Star sees it, the question of whether the carriers

[15]The carriers suggest that Lone Star's allegations concerning Lindsley Stores' misconduct after 1979 "contradict and negate" the "inconsistent" allegation in NLC's complaint to the effect that the contamination began under Loan Star's auspices in 1962. This argument is unconvincing. The question of whether the carriers had a duty to defend or indemnify Lone Star must be determined by reference to the NLC complaint, at least to the extent that the allegations in that complaint are not now controverted by Lone Star. Lone Star never alleges that the post-1979 releases were the only incidents of possible contamination and/or property damage at the Dania site. Indeed, Lone Star never affirmatively states that no contamination and/or

had a duty to defend or indemnify it in the NLC actions turns on what appeared in the underlying pleadings; since NLC suggested that the contamination took place between 1962 and 1979, it is not a good defense, at this stage, to insist that no coverage is available under policies that expired after 1962, but before the Lindsley Stores transactions in 1979.[16] A similar argument is made with respect to the EPA materials.

The moving carriers, for the most part, do not disagree with the rule (discussed at length above) that an insurer's duty to defend or indemnify against a lawsuit is governed by a reading of the underlying complaint against the insured. They point out, however, that the NLC pleading was not made part of Lone Star's third party complaint against them, and therefore cannot be considered in evaluating the pending motions. The carriers point out that the NLC pleading was not attached as an exhibit to the third party complaint, and was not properly incorporated by reference. As a result, the carriers insist, we cannot consider the NLC complaint in resolving these motions; and since the third party complaint itself only refers to contamination and/or property damage after 1979, it fails to state a claim against those carriers whose policies expired prior to that year.

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property damage occurred prior to 1979 (although Lone Star may argue that any pre-1979 contamination was inadvertent or unknown to it). Thus, Lone Star's third party complaint does not contain admissions that are facially "inconsistent" with the NLC complaint.

[16]Lone Star concedes, as it must, that it cannot seek coverage under policies that lapsed prior to 1962.

We are not persuaded that dismissal on this basis is warranted here. Technically speaking, the moving parties are correct. Motions to dismiss and/or for judgment on the pleadings necessarily focus on the contents of the pleadings and any accompanying exhibits. The NLC complaint was not an exhibit to the third party complaint, was not — contrary to Lone Star's representation — expressly incorporated by reference and was not served on the third party Defendants.[17] Indeed, nowhere in the third party complaint does Lone Star identify the name or case number of the NLC lawsuit. Rather, it avers that "[i]n 1989, NLC sued Eastern, and subsequently added [LSI] and Building, alleging, inter alia, that Eastern was responsible for the contamination at the Dania site, seeking damages and other relief." C'claim/Third Party Compl., at ¶78. Lone Star explains that it did not attach the NLC complaint because Liberty Mutual had included it as an exhibit to its complaint, and therefore the document was already before the Court. But this argument ignores the difference between a counterclaim and

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[17]Fed. R. Civ. P. 10(c) explains that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." The case law is well-settled that an adoption or incorporation by reference must be done with a "degree of clarity" sufficient to enable the responding party to ascertain the nature and extent of the incorporation. See, e.g., Friedman v. Lansdale Parking Auth., 151 F.R.D. 42, 44 (E.D. Pa. 1993) (noting that documents are not incorporated by reference where the pleading merely uses limited quotations from the document or "just summarizes [its] contents"). Nowhere in the third party complaint does Lone Star clearly signal its intent to incorporate the NLC complaint by reference. Indeed, Lone Star's allusions to the NLC action are presented at the highest order of abstraction.

a third party claim. While it probably would not be necessary for a defendant to attach to a counterclaim a document that already is attached to the plaintiff's complaint, it is necessary for the document to be attached to any claim against a new third party, in order to ensure that the third party has adequate notice of the nature of the charges against it. Moreover, the mere fact that Lone Star "referred" to the NLC complaint in its pleading is not sufficient under these circumstances, because nowhere does Lone Star call attention to the crucial fact that the NLC complaint alleged incidents of contamination and/or property damage by all three Lone Star entities dating back to 1962.

Lone Star counters by citing the Ninth Circuit's opinion in Branch v. Tunnell, 14 F.3d 449 (9th Cir.), cert. denied, 512 U.S. 1219 (1994). In that case, the Court of Appeals held that "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." Id. at 454. The Court is not aware of any Eleventh Circuit authority endorsing this view, which essentially writes Rule 10(c) — the incorporation by reference provision — out of the Federal Rules of Civil Procedure, and ignores the distinction between a motion to dismiss and a motion for summary judgment. More to the point, the references to the NLC complaint contained in Lone Star's pleading are far too sketchy and vague for us to hold that Lone Star properly put the third party carriers on notice of the underlying complaint and its contents.

All that being said, while the third party carriers may not have been on notice of the contents of the NLC or EPA pleadings when Lone Star served its third party complaint, they plainly are now aware of the contents of those pleadings. The NLC complaint was attached to Lone Star's response to Century and Argonaut's motions to dismiss. More recently, Lone Star has sought leave to amend its complaint in order to incorporate the NLC and EPA pleadings and squarely allege that the underlying action(s) suggest a pattern of contamination dating from 1962. Under these facts and circumstances, dismissal on these grounds is not appropriate.

C.

Century and Continental raise an additional ground for dismissal of the third party complaint as to them. Essentially, these carriers assert that the specific Century and Continental policies pursuant to which Lone Star seeks coverage are inapplicable in whole or part, since the entities that Lone Star has suggested were responsible for operating the Dania site prior to April 15, 1971 — the entities now known as Building and Eastern — were not insureds under these policies.

As noted above, Lone Star's third party complaint alleges that Eastern (then known as Lindsley Lumber) and, after 1967, Eastern's parent corporation (Building, then known as National Building Centers) operated the Dania site between 1962 and on or about April 15, 1971. On or about that date, Building and its subsidiary were acquired by Lone Star Cement ("LSC"), which was re-named LSI at or about the time of the acquisition. LSI continued wood treatment

operations at the site, under the aegis of Eastern and Building, until the late 1970's.[18]

Between 1962 and the early 1970's, both Century and Continental allegedly issued policies to LSI. The third party complaint alleges that "[f]rom January 1, 1958 until January 1, 1972, [Century] sold a series of blanket liability policies to [LSI] and/or its predecessors, including its direct corporate predecessor [Lone Star Cement]. . . . From January 1, 1962 until at least January 1, 1970, [Century] also sold to [LSI] and/or its predecessors . . . a series of comprehensive general liability ("CGL") policies." C'claim/Third Party Compl., at ¶¶ 37-38. Lone Star attaches several sample Century policies to its pleading, and suggests that all of the subject annual policies (with one exception) define the term "named insured" to include the named insured (LSI) and "any subsidiary company of the named insured and any other company coming under the named insured's control of which it assumes active management."[19] The third party complaint alleges

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[18]The Lone Star parties assert that Lone Star Cement is the direct corporate predecessor of LSI. Century "[f]or purposes of this motion, does not dispute this assertion." Reply, at 2 n.2. Continental stresses that LSC was the original named insured, but does not suggest that LSI is not a direct corporate predecessor. For ease of reference, we will use "LSI" to refer to the entity formerly known as LSC as well as the entity currently known as LSI.

[19]Century observes that the policy it issued to LSI for the period January 1, 1971-January 1, 1972 defines "named insured" as "the organization named in the declarations of this policy [LSI] and includes: (1) any subsidiary company (including subsidiaries thereof) and any other company under their control and active management at the inception of this policy; (2) new organizations acquired by the Named Insured during the policy period . . .

that Continental issued policies containing similar language for the period January 1, 1961 through January 22, 1970.

Century and Continental ask us to dismiss the third party complaint to the extent that Lone Star seeks relief for breach of the duty to defend/indemnify pursuant to policies issued to LSI for the period January, 1958-January, 1971. According to the carriers, since Lone Star has "conceded" that the Dania site was operated by entities unaffiliated with LSI (the named insured) during these years, the insurers had no duty to defend LSI in the underlying actions — even though the pleadings in those actions suggest that LSI was responsible for operations at the site as far back as 1962. The carriers add that Lone Star does not posit any facts to suggest that the entities now known as Eastern and Building were under LSI's "control" or "active management" such that they would come within the definition of "named insured[s]" during the years that the policies were in effect. The carriers also argue that Building and Eastern cannot "retroactively" be deemed "named insured[s]" within the meaning of the LSI policies that lapsed prior to 1971.

Lone Star does not, and cannot dispute, the proposition that an "insurer is not required to provide coverage under its policy

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provided each acquisition or assumption is reported to [Century] within sixty days after it is effected and provided further such acquisition is endorsed on this policy." Century asserts that even if Building and Eastern (acquired by LSI during 1971) qualify as named insureds within the meaning of this clause, LSI failed to provide the required endorsement. For the reasons noted below, issues relating to the status of Building and Eastern as additional insureds are best left for resolution on summary judgment.

with a named insured for the activities of an entity which the named insured acquired after the expiration of the policy and which . . . committed injurious acts prior to the expiration of the policy." Total Waste Mgmt. v. Commercial Union Ins. Co., 857 F. Supp. 140, 146 (D.N.H. 1994). Nevertheless, Lone Star counters that, for purposes of a breach of duty to defend/indemnify claim, our focus must be solely on the underlying complaints, and the question of whether the allegations of these complaint, taken as true, trigger the protections of the relevant policies issued to LSI. Lone Star asserts that NLC alleged in its amended complaint that LSI essentially controlled the operations of Eastern and Building during the period prior to, as well as subsequent to, the April 15, 1971 acquisition. Specifically, NLC alleged that all three Lone Star entities have "owne[d] and operat[ed] the Dania site," that LSI, Eastern and Building "have continually had common officers and directors" since at least 1967, and that LSI "exerted practically total influence and control over [Building] and [Eastern]'s . . . management and operations" during the period of the contamination and/or property damage. NLC Amend. Compl., at ¶¶ 122, 131. Moreover, according to NLC, LSI and Building "[j]ointly or severally, had the power to direct the mechanisms causing the release . . . control or prevent the wood dip treating operation at the Dania site [and] had the capacity to prevent and abate the damage[]." Id. at ¶¶ 132-33. Thus, NLC sought "an order finding that LSI was a "de facto operator[] of the Dania site" at the time of the alleged releases during 1962-1979. As Lone Star sees it,

the presence of these allegations in the NLC complaint allows it to state a claim for breach of the duty to defend/indemnify, since the NLC complaint asserts facts that, if taken as true and construed in the light most favorable to Lone Star, would make LSI responsible for operations at the Dania site during the years of the subject policies. The Defendants suggest that whether or not LSI actually operated the site, or exercised such active management of Eastern and Building's affairs as to make these companies additional insureds under the policies issued to LSI, is of no moment at this early stage.

According to Century and Continental, Lone Star's argument is at odds with the reasoning of the Florida appellate court in Nateman v. Hartford Casualty Insurance Company, 544 So. 2d 1026 (Fla. 3d Dist. Ct. App.), rev. denied, 553 So. 2d 1166 (Fla. 1989). In that case, the plaintiff, a director of emergency services at a hospital, was sued for defamation. The defamation complaint suggested that the plaintiff had acted in the capacity of a representative, agent or employee of the hospital at the time of the alleged tort. The Plaintiff contacted the hospital's insurer and asked it to defend him in the pending suit, on the theory that he qualified as an "additional insured" under the hospital's policy. The hospital refused to supply a defense, concluding that the plaintiff, as an independent contractor as opposed to an employee or agent of the hospital, did not qualify as an additional insured within the meaning of the policy. The plaintiff then sued the insurer for breach of a contractual duty to defend. The trial

court entered judgment in favor of the insurer, and the Third District Court of Appeal affirmed. In so doing, it rejected the plaintiff's argument that, even if he was not in fact an employee or agent of the hospital, allegations of the underlying complaint to the effect that he was an employee or agent of the hospital required the insurer to provide a defense:

> Nateman . . . points to a plethora of Florida cases for the proposition that the allegations of a complaint determine an insurer's duty to defend . . .. We disagree with this conclusion. While, as a general rule, the obligation to defend an insured against an action, whether groundless or not, must be measured and determined by the allegations of the [complaint] rather than outcome of the litigation, an obvious exception must be made in those instances where, not withstanding allegations in the [complaint] to the contrary, the insurer successfully urges the allege insured is not in fact an insured under the policy.
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> The insurer is not obligated to provide a defense for a stranger merely because the plaintiff alleges that the defendant is an insured or alleges facts which, if true, would make the defendant an insured. The mere allegations of the plaintiff's [complaint] may not create an obligation on the part of an insurer to defend where no such obligation previously existed. . . . While we acknowledge the viability of the general rule that the allegations of the complaint determine an insurer's duty to defend, it would be imprudent and illogical to confer such a duty upon an insurer as to a party who is not an insured. We agree with the courts cited above that the creation of a basic insurer-insured relationship and the ensuing duty to defend cannot be left to the imagination of the drafter of a complaint, and as to who is an insured, the facts as they actually exist must be determined.

Id. at 1027. (citations omitted) (emphasis added). The court went

on to hold that since the plaintiff was not in fact an employee or agent of the hospital, he was not an insured under the subject policy and the insurer had no duty to defend him. Id. at 1028. Although the carriers suggest that neither Eastern nor Building qualify as insureds under the subject policies, there is no dispute that LSI was a named insured under the policies. For this reason, Nateman is not dispositive here. While the logic of Nateman may be helpful in determining what, if any, contractual duties the carriers owed to Building and Eastern, the opinion does not answer the question of whether the carriers were obliged to provide coverage for LSI in the underlying actions.

To overcome this dilemma, the carriers essentially assert that, notwithstanding the allegations in the NLC and EPA pleadings, LSI simply could not have been responsible for any of the alleged releases of contaminants, since the Dania site was operated by entities that (according to Lone Star's own pleadings) had no affiliation with LSI during the years the policies were in force. Reduced to its core, the carriers' argument appears to be that no duty to defend or indemnify should arise, as a matter of law, if the truth is squarely and incontrovertibly at odds with the allegations in the underlying complaint. There is case law in this Circuit arguably endorsing the carriers' position. See Rowell v. Hodges, 434 F.2d 926, 929-30 (5th Cir. 1970) (affirming summary judgment in favor of an insurer and noting that the general rule that allegations in the underlying complaint determine the duty to defend does not apply "where there could not be and was not ever

any factual uncertainly or dispute as to" the need to provide coverage). Rowell may recognize that, under certain circumstances, the allegations of the underlying complaint may be so inconsistent with the facts that it would be "[un]just or [il]logical" to impose a duty to defend or indemnify. Id. at 930 (suggesting that an insurer need not "put blinders on . . . to what it actually knows and has definitely ascertained").

That being said, even assuming arguendo that the reasoning of Rowell makes sense here, we are not prepared to dismiss Lone Star's cause of action. The objections raised by Century and Continental simply cannot be resolved on the basis of the existing pleadings. There is little record evidence, at this stage in the litigation, concerning the relationship between the Lone Star Defendants and any predecessor corporations, or the involvement, if any, of LSI in operations at the Dania site. Although Lone Star's third party complaint traces the corporate history of LSI, it does not concede that LSI had no relationship whatsoever with Building and/or Eastern, or the Dania site itself, prior to April, 1971. Nor is there meaningful record evidence concerning what, if anything, Century and Continental knew about LSI's activities or corporate history at the time they apparently chose not to defend or indemnify LSI in the underlying actions. Regardless of whether Eastern and/or Building actually qualify as additional insureds under the policies purchased to LSI, Lone Star adequately states a claim based on the carriers' alleged failure to defend and indemnify LSI against the NLC and EPA complaints — both of which

suggested, rightly or wrongly, that LSI may be held responsible for operations at the Dania site as far back as 1962. Construing the third party complaint in the light most favorable to the non-moving parties, we conclude that dismissal under Rule 12(b)(6) is neither appropriate nor warranted.

D.

Several of the moving carriers assert that Count III of the counterclaim/third party complaint, which requests declaratory relief concerning future response costs, fails to state a justiciable controversy. Count III alleges as follows:

> 98. Each of the Insurance Carriers in the policies of insurance issued and delivered to Lone Star contractually agreed to fully indemnify Lone Star from and against all damages sustained by Lone Star adumbrated by the coverage of those insurance policies identified in this Counterclaim, including monies expended by Lone Star by virtue of the claims made in the EPA and NLC actions.
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> 99. Each of the Insurance carriers have refused to defend and/or indemnify Lone Star in connection with the claims described in the EPA and NLC actions.
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> 100. Lone Star anticipates that it may suffer additional damages, should additional remediation of the Dania site be required. However, because of the Insurance Carriers' refusals to indemnify Lone Star, as described above, Lone Star is in doubt as to its rights under the policies of insurance issued by the Insurance Carriers to obtain full indemnity for any future damages suffered by Lone Star, and arising out of conditions at the Dania site.
>
> 101. An actual and justiciable controversy exists between Lone Star and the Insurance Carriers requiring declaratory relief, concerning the Insurance Carriers' obligations

> to indemnify Lone Star from and against any future liabilities arising out of the Dania site.
>
> Wherefore, [Lone Star] request[s] that this Court enter a judgment, declaring the obligations of the Insurance Carriers to indemnify [Lone Star] in connection with any prospective liability arising out of the Dania Site for additional remediation or cleanup costs which may have to be expended, and that this Court enter judgment for the amount determined to be due against the Insurance Carriers. . ..

C'claim/Third Party Compl., at ¶¶ 98-101. At other points in its counterclaim/third party complaint, Lone Star refers to the "present uncertainty surrounding the need for additional cleanup at the Dania site." Id. at ¶82. In essence, therefore, Count III seeks a declaration that the carriers are liable for any future damages sustained by Lone Star in connection with the clean-up of the Dania site. Lone Star does not allege the amount of these future damages, or allege facts indicating whether, when and how additional remediation costs might be incurred.

The federal Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. §2201. The purpose of the Act is to alleviate uncertainty with respect to the legal rights and obligations of the parties. Allstate Ins. Co. v. Employers Liability Ins. Co., 445 F.2d 1278, 1280 (5th Cir. 1971). However,

it is fundamental that a court can only issue a declaratory judgment where there is an actual case or controversy. Id.; see also Wolfer v. Thaler, 525 F.2d 977, 979 (5th Cir.), cert. denied, 425 U.S. 975 (1976); Republic of Panama v. Lexdale, Inc., 804 F. Supp. 1521, 1523 (S.D. Fla. 1992). While the line between a potential and actual controversy is often blurred, the United States Supreme Court's observations in Aetna Life Insurance Company v. Haworth, 300 U.S. 227 (1937), remain a useful guide:

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised.

Id. at 240-41.

The carriers argue that, since Lone Star has not alleged that it will — as opposed to may — suffer future damages, let alone alleged what those damages could be, Count III presents a hypothetical controversy. Construing the third party complaint in the light most favorable to Lone Star, the Court is not persuaded that dismissal of Count III is warranted. Although Count III is imprecise at best, it appears that all Lone Star requests is a judicial declaration of the nature and extent of the carriers' obligations to provide indemnification in the event that future

response costs and damages are incurred. In this sense, Count III seeks nothing more than the relief sought in Counts I and II with respect to the past response costs and damages. The controversy is not imaginary, since the carriers have represented that they believe they have no obligation to pay anything for the Dania site clean-up. While the counterclaim/third party complaint admittedly is sketchy on the current status of the Dania site and the kind of future response costs that may be incurred, the Defendants' pleading adequately alleges a genuine likelihood of future expenses, especially when viewed against the backdrop of its allegations concerning the seriousness of the apparent harm to the site.

Argonaut, among others, asserts that Lone Star is seeking more than judicial declaration of the rights and duties of the carriers; rather, it is seeking to obtain a blanket declaration that the carriers are responsible for all future costs and damages that may be incurred by Lone Star in connection with the Dania site. Argonaut contends that we cannot possibly issue so sweeping a declaration at this stage, when no one has any idea what the future costs and damages might be or how they should be apportioned under CERCLA. While certain language in Count III arguably may be read as Argonaut suggests, we do not believe that Lone Star demands this relief. See C'claim/Third Party Compl. at "Wherefore" clause (stating that "[Lone Star] request[s] that this Court enter a judgment, declaring the obligations of the Insurance Carriers to indemnify [Lone Star] in connection with any prospective liability

arising out of the Dania Site for additional remediation or cleanup costs which may have to be expended"); Def. Resp., at 6 n.4 (confirming that "[t]he Lone Star parties ask this Court only to determine Argonaut's liability for future response costs, not the exact amount of those damages"). Plainly we must leave for another day the question of whether particular expenditures may come within the contours of the insurers' contractual obligations. Lone Star is entitled to seek declaratory relief as to whether any on-going obligations exist.

This result is consistent with the general rule in CERCLA actions that while a court may not issue a declaratory judgment regarding the amount or apportionment of future damages, see, e.g., Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1156 (M.D. Fla. 1994) and United States v. Dickerson, 660 F. Supp. 227, 232 (N.D. Ga. 1987), it may entertain a request for declaratory relief as to whether a particular defendant is liable for a share of the response costs, see Kelley v. E.I. DuPont de Neumours and Co., 17 F.3d 836, 844-45 (6th Cir. 1994). And since issues of policy scope and coverage implicated by Count III may mirror those raised by the parties in the course of litigating Counts I and II, permitting Lone Star's declaratory judgment claim to go forward makes sense from the standpoint of efficiency and fairness. Accordingly, we are unwilling to dismiss Count III of the counterclaim/third party claim for lack of jurisdiction.

IV.

While all of the instant motions were pending, and after oral

argument had been set, Lone Star filed a motion to amend its answer and its counterclaim/third party complaint. According to Lone Star, its amendment makes the following changes: (1) "revise[s] nomenclature, and . . . more accurately disclose[s] the present names of certain insurance companies; (2) [more fully] set[s] forth the Lone Star Parties' corporate history and the relationship of the Lone Star Parties to their predecessors; (3) attach[es] as exhibits the NLC and EPA complaints; and (4) [drops] the Lone Star Parties' claims as to policy years prior to 1962 . . .." Lone Star seeks leave to file this amendment in the event that the Court "is inclined to grant any or all" of the pending motions.

In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court established the standards for leave to amend under Rule 15(a) of the Federal Rules of Civil Procedure. The Court explained that:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason ... such as undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment ... the leave sought should, as the rules require, be "freely given."

Id. at 182. Thus, in setting down the rule that leave to amend is to be granted liberally, the Supreme Court also made clear that there are exceptions to that rule. Moreover, while Fed. R. Civ. P. 15(a) guides our judgment, the matter is within the district court's discretion. Smith v. Duff & Phelps, Inc., 5 F.3d 488, 493

(11th Cir. 1993); Hester v. International Union of Op. Eng., AFL-CIO, 941 F.2d 1574, 1578 (11th Cir. 1991).

The amendments proposed by Lone Star are described as, and appear to be, primarily ministerial in nature. Nevertheless, some or all of the new language conceivably may be inconsistent with findings and conclusions contained in this Order. The Eleventh Circuit often has affirmed the denial of motions to amend where the proposed amendment is offered in reaction to, or in anticipation of, an adverse ruling from the district court. See, e.g., Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 622-23 (11th Cir. 1983) (affirming denial of leave to amend which was sought after summary judgment had been entered against the moving party); Local 472, et al. v. Georgia Power Co., 684 F.2d 721, 724 (11th Cir. 1982) (affirming denial of leave to amend "which appears to be nothing more than an effort to avoid an adverse summary judgment"). As noted above, Lone Star did not file its motion for leave to amend until the eve of oral argument on the pending dispositive motions (6½ months after its filed its answer and initial counterclaim/third party claim, and several months after the completion of briefing on some of the motions). We are not willing to permit an amendment that may require re-litigation of issues argued at length by the parties and resolved in this Order, especially given the current status and posture of the lawsuit. In an abundance of caution, therefore, the proposed amendment filed on July 2, 1996 shall not be accepted. We do not, however, preclude the Defendants from subsequently attempting to

file a similar amendment that is consistent with the rulings of the Court.

It is therefore

ORDERED AND ADJUDGED that the Plaintiff's motion for final summary judgment is DENIED with respect to the pre-January 1, 1986 policies and DENIED without prejudice as to the post-January 1, 1986 policies. The Defendants' motion for partial summary judgment as to Liberty Mutual's duty to defend the NLC action is GRANTED only to the extent that the Court concludes, as a matter of law, that the pollution exclusion in the pre-January 1, 1986 policies does not relieve Liberty Mutual of its obligation to defend or indemnify Lone Star in the NLC action. Century's motion to dismiss the third party complaint is DENIED. Argonaut's motion to dismiss is DENIED. Continental's motion to dismiss and/or for judgment on the pleadings is DENIED. The Defendants' motion for leave to amend is DENIED without prejudice.

It is further ORDERED AND ADJUDGED that the following motions are DENIED as moot: Lone Star's motion to extend the time for North River to respond to the third party complaint [D.E. #36], Lone Star's motion for oral argument [D.E. #85], Continental's motion for an extension of time to respond [D.E. #101], Century's motion for a status conference [D.E. #109], Lone Star's motion for oral argument [D.E. #132] and Liberty Mutual's motion to exceed page limitation [D.E. #184]. The following motions are DENIED without prejudice: the Home's motion for summary judgment and application for joinder in the motions of Century and Argonaut

[D.E. #180], USF&G's request for sanctions in conjunction with its motion to compel [D.E. #187] and USF&G's motion to dismiss and/or for judgment on the pleadings [D.E. #182]. Continental's motion for admission pro hac vice of Crista Collins and Robert Wahl [D.E. #127] is GRANTED. The parties shall appear for a status conference on April 17, 1997 at 9 a.m. to discuss, among other matters, the status of discovery in this litigation.

DONE AND ORDERED in Miami, this 24th day of March, 1997.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

copies to:
counsel of record