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**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC16-1420**

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ALTMAN CONTRACTORS, INC.,

Appellant,

v.

CRUM & FORSTER SPECIALTY INSURANCE COMPANY,

Appellee

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On Certified Question From The United States Court Of Appeals
For The Eleventh Circuit
Case No. 15-12816

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# ANSWER BRIEF ON THE MERITS OF APPELLEE, CRUM & FORSTER SPECIALTY INSURANCE COMPANY

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## STATEMENT OF THE CASE

### A. Statement of the Facts

Appellee Altman Contractors, Inc. ("Altman") was the general contractor for a twin-tower, 172-unit residential high-rise condominium project in Broward County, Florida, known as Sapphire Condominium (Doc 36 - Pg 1). On April 10, 2012, the Sapphire Fort Lauderdale Condominium Association, Inc. (the "Association") sent Altman a notice of claim under Chapter 558, Florida Statutes (Doc 26-3 - Pg 1).

The April 10, 2012 notice of claim advised that the rooftop air conditioning units installed on the project were "an un-equivalent substitute to the equipment specified by the construction documents" and were not performing as intended (Doc 26-3 - Pg 4, 7). The Association supplemented the original 558 notice on May 8, 2012, November 15, 2012, and May 28, 2013 (Doc 36 - Pg 2). As of November 15, 2012, the Association had identified an additional 792 separate claimed construction defects and code violations throughout the entire project on a 74-page defect list (Doc 26-4 - Pg 17-90). The Association demanded that Altman "take all measures necessary to correct the identified construction and/or design defects." (Doc 26-4 - Pg 6).

## **Insurance**

Altman's Initial Brief states that Crum & Forster Specialty Insurance Company ("Crum & Forster") insured Altman "for all of its scope of work at the Project." (Initial Br. at 1) This is an inaccurate description of the insurance. Crum & Forster did not insure Altman's scope of work at the Sapphire project. Rather, Crum & Forster provided seven consecutive one-year commercial general liability ("CGL") insurance policies in place between 2005 and 2012. The policies insured Altman against a variety of commercial risks (including exposure to liability for damages resulting from covered bodily injuries, wrongful death, property damage, etc.), that may occur at Altman's business premises and at any locations at which it performed business operations (Doc 36-1 through 36-7).

The relevant policy terms were identical in all material respects. Under the Coverage Part A insuring agreement of the Commercial General Liability Coverage Form, Crum & Forster agreed to pay sums that Altman becomes "legally obligated to pay as damages because of 'bodily injury' or 'property damage'" occurring "during the policy period" that is "caused by an 'occurrence' and takes place in the 'coverage territory'" (Doc 36-1 - Pg 9).[1] The insuring agreement states that Crum & Forster "will have the right and duty to defend the insured against any 'suit' seeking those damages." (*Id.*)

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[1] Coverage Part B provides personal and advertising injury coverage, which coverage is not at issue in this case (*See* Doc 26-1 - Pg 54).

The coverage form defines "suit" as follows:

> 18. 'Suit' means a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged. 'Suit' includes:
>     a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>     b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

(Doc 36-1 - Pg 23).

Crum & Forster is eligible as a surplus lines carrier in the state of Florida, and all of the policies were issued pursuant to Florida's Surplus Lines Law (Doc 36 - Pg 5).

**Altman Sends Crum & Forster the 558 Notices**

On January 14, 2013, Altman first notified Crum & Forster of the various 558 notices (Doc 26-5). Altman claimed that 16 of the 792 identified defects "have caused resulting property damage to the Project" (Doc 26 - Pg 3-5). Altman has thus represented throughout this case that roughly 2% of the claimed defects had caused property damage that was potentially covered under the policies.

On February 1, 2013, Crum & Forster sent Altman a letter requesting information about the project, to which Altman responded on March 21 and May 15, 2013 (Doc 26-6 - Pg 1, 7). On May 29, 2013, Crum & Forster notified Altman that it would continue to investigate under a reservation of rights, and advised

Altman of various policy provisions that might apply, including the limitations of the relevant insuring agreement, which applied to "property damage," not to defective construction, and various policy exclusions (Doc 26-6 - Pg 18-37). Crum & Forster further explained that it had no current defense obligation because the matter was not in suit, and requested that if Altman were served with a lawsuit, Altman immediately forward it to Crum & Forster (Doc 26-6 - Pg 19, 37).

On August 5, 2013, anticipating the possibility of litigation, Crum & Forster advised Altman that it had retained defense counsel for Altman under a reservation of rights, despite the fact that the Association had not yet filed suit (Doc 26-8 - Pg 2). Crum & Forster explained that it had made the discretionary decision to retain for Altman highly-experienced, well-regarded counsel who was both AV-rated and Florida Bar Board Certified in Florida Construction Law to assist in the legal and practical positioning of the case, and who would then already be well-acquainted with the issues if and when the Association filed suit (Doc 26-10 - Pg 2). Altman objected to Crum & Forster's appointment of defense counsel (Doc 1 - Pg 5, ¶ 25).

Altman continued to work with the Association in the 558 process and repaired or otherwise resolved all of the claimed construction defects without suit ever being filed and without involving Crum & Forster. (Initial Br. at 4, n.1)

### B. Procedural History

On August 21, 2013, Altman filed the instant lawsuit against Crum & Forster in federal district court seeking a judicial declaration that Crum & Forster had a duty to defend Altman against the Association's 558 notices (Doc 1 - pg 4). Altman also claimed that Crum & Forster had breached the insurance contracts by offering to defend Altman with "unilaterally appointed" counsel that was not satisfactory to Altman (*Id.* at 6).[2]

Altman and Crum & Forster filed cross motions for summary judgment (Doc 25; Doc 37). After oral argument and supplemental briefing, on June 4, 2015, the District Court entered its order denying Altman's motion and granting Crum & Forster's motion (Doc 66). The District Court first found that Section 558.004(13), Florida Statutes, did not constitute a prohibition against insurance coverage for the Chapter 558 process (Doc 66 - Pg 7). The District Court next concluded that the Chapter 558 process was not a "civil proceeding" or an "alternative dispute

[2] Altman's claim in this regard was based on the erroneous assumption that the "mutually agreeable counsel" requirement of the Claims Administration Statute, Florida Statutes, Section 627.426, applied. But the statute does not apply to surplus lines carriers. *Essex Ins. Co. v. Integrated Drainage Solutions, Inc.,* 124 So. 3d 947, 950 n.1 (Fla. 2d DCA 2013). Even assuming Crum & Forster were not a surplus lines carrier, Crum & Forster never raised a coverage defense (*i.e.,* a defense to coverage that would otherwise exist, such as late notice, failure to cooperate, etc.) that would trigger application of the Claims Administration Statute. *See AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998, 999-1000 (Fla. 1989). This is not an issue on appeal.

resolution proceeding" and therefore was not a "suit" as that term is defined in Crum & Forster's policy that would give rise to a duty to defend (Doc 66 - Pg 16).

Altman appealed the District Court's ruling. The case was fully briefed and the Eleventh Circuit heard oral argument on April 14, 2016. On August 2, 2016, the Eleventh Circuit certified to this Court the following question:

> "Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a 'suit' within the meaning of the CGL policies issued by [Crum & Forster] to [Altman]?"

*Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.,* No. 15-12816 (11th Cir. Aug. 2, 2016) (slip op. at 18) ("Slip op.").

## SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the negative because the notice and repair process created by the Florida legislature does not qualify as a "suit" as that term is defined in Crum & Forster's policies.

Chapter 558 is intended to provide contractors with the opportunity to correct faulty work before facing lawsuits or arbitration proceedings brought by property owners. It provides a framework for the parties to engage in a collaborative process to correct everything from a non-functioning garage door opener on a single-family home to improperly installed HVAC, plumbing, or envelope systems on high-rise buildings. The focus of the Chapter 558 process is on construction trades correcting non-compliant construction in order to avoid

legal proceedings.[3] Unlike notice and cure regimes in some other states, Chapter 558 does not employ any type of arbitration, mediation, appraisal, or dispute facilitation proceedings in which any judge, arbitrator, or other administrator is empowered to render binding determinations of liability and damages on the parties. As such, the Chapter 558 notice and repair process does not remotely resemble a "suit" as the term is defined in Crum & Forster's policies.

Further, as evidenced by 2004 amendments, which remain fully intact today, the Florida legislature made a deliberate choice to permit, but not require, liability insurer participation in the Chapter 558 notice and opportunity to cure process, and expressly provided that giving a copy of the 558 notice to a contractor's insurer "shall not constitute a claim for insurance purposes." Fla. Stat., § 558.004(13). To hold that the Chapter 558 process is a "suit" that an insurer must "defend" would do violence to both the legislative intent evidenced by the statute and the language of Crum & Forster's insurance contract.

Crum & Forster's policy form contains a three-part definition of the term "suit." The first part of the definition requires a civil proceeding seeking covered damages against the insured. The definition then broadens "suit" to include (a) an arbitration proceeding seeking such damages and to which the insured *must submit* or does submit with the insurer's consent, or (b) any other alternative dispute

[3] Although Chapter 558 is silent on performance bond sureties, the correction of work that does not meet contractual requirements necessarily implicates them.

resolution proceeding seeking such damages, and to which the insured submits with the insurer's consent. Under the plain, unambiguous language of the policy definition, in order to qualify as a "suit," any form of dispute resolution must meet the requirements of one of the three definitional prongs. The Chapter 558 notice and repair process fails to do so, and therefore does not qualify as a "suit."

Altman's argument that "Chapter 558 Process" is "part and parcel of" and is "inextricably intertwined with" a lawsuit for damages confuses the 558 *process* with the 558 *notice.* The *only* mandatory condition precedent to a construction defect lawsuit in Chapter 558 is that the claimant serve a written 558 notice on the contractor. It is then entirely up to the contractor to determine whether or not it wants to participate in the 558 process. Conversely, once the claimant sends the 558 notice, it is free to reject any remediation offer the contractor might make. In either case, the process terminates, with the only "penalty" being that the claimant is free to institute a legal action for damages. Chapter 558 "does not forfeit substantive rights as a penalty for noncompliance; it is expressly limited in scope." *Hebden v. Roy A. Kunnemann Const., Inc.*, 3 So. 3d 417, 419 (Fla. Dist. Ct. App. 2009). The fact that the 558 notice is a condition precedent to bringing a legal action for damages does not render the 558 process "part and parcel" of any later litigation. Rather, as the Florida legislature designed its process, no litigation can proceed until after the 558 process ends.

Contrary to Altman's arguments, there are no conflicting decisions from other courts that would provide "evidence of ambiguity" of the policy definition of "suit." No court in any jurisdiction has ever held that the definition of "suit" in Crum & Forster's policy encompasses the Chapter 558 notice and repair process. The only court to ever rule on the question is the District Court in this case, which found the term "suit" to be unambiguous and that it did not include the Chapter 558 notice and repair process.

Lastly, the public policy arguments advanced by Atman and its supporting Builder/Developer Amici in favor of re-writing the policy to force insurers to "defend" the 558 process are speculative and are disproven by Altman's own conduct in this case, which fully demonstrates that Chapter 558 is operating, and for the last dozen years has been operating, precisely as the legislature intended.

The Eleventh Circuit certified the question to this Court because it was "concerned that the outcome of this case may have significant practical and policy implications for Florida." (Slip op. at 16.) Crum & Forster agrees. In 2010, Colorado did by legislation what Altman is asking this Court to do by judicial fiat. A study commissioned by the Denver Region Council of Governments concluded that the result was a precipitous increase in premiums and decrease in liability insurance available to construction professionals, which adversely and disproportionately affected the availability of affordable housing in Colorado.

The Colorado experience shows the wisdom of the Florida legislature's approach in Chapter 558, and cautions against disturbing the balance achieved by the legislature by imposing a mandatory duty on insurers to defend the notice and repair process. Although well-heeled builders and developers may be able to weather the market upheavals that may be caused by such an imposition, the likely losers will be untold numbers of smaller subcontractors who lack Altman's resources, and ultimately, entry-level home buyers who will be faced with an affordable housing shortage such as has occurred in Colorado.

# ARGUMENT

## I.

**Neither the statute nor the policy language supports that the Chapter 558 notice and repair process is a "suit" as that term is defined in Crum & Forster's policies that would trigger a duty to defend.**

This Court has not been asked to opine on the meaning of a policy term in the abstract. As the Eleventh Circuit indicated, this case involves the intersection of state insurance law with a state statute on a question that has never before been addressed by a Florida state court despite the fact that the statute has been in operation in more or less its present form since 2004. As such, because the question is whether the 558 notice and opportunity to repair process, a creature of statute, constitutes a "suit" under a CGL policy, the legislative intent, as demonstrated by the statute itself, is a relevant consideration in answering the certified question.

Crum & Forster agrees with Altman that the standard of review is *de novo*.

### A. The statutory scheme created by the legislature militates against treating the Chapter 558 notice and repair process as a "suit" requiring a compulsory defense by a CGL carrier.

Originally enacted in 2003, Florida Statutes, Chapter 558 put into place a pre-suit notice and opportunity to repair process for construction defect claims, which the legislature described as an alternative dispute resolution "mechanism" involving the claimant providing a written notice of claim to the responsible

contractor[4] and giving it the opportunity to resolve the defect as a precondition for any lawsuit against the contractor. Fla. Stat., § 558.001.

Chapter 558 defines the term “action” to mean a “civil action or arbitration proceeding” seeking damages caused by an alleged construction defect. Fla. Stat., § 558.002(1). It provides that: “A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter.” Fla. Stat., § 558.003. The legislature thus drew a clear distinction between the statutory notice and repair process and an “action” for damages.

The heart of Chapter 558 is the “Notice and opportunity to repair” section, section 558.004, which was extensively revised in 2004. *See* Ch. 2004-342, § 4, at 3-8, Laws of Fla. As revised, this section begins by requiring the claimant to serve a notice of claim on the contractor (or other responsible party) describing “in reasonable detail sufficient to determine the general nature of” each alleged construction defect. Fla. Stat., § 558.004(1). If the contractor does not respond to the 558 notice or disputes the claim and will not remedy it, there is no penalty; the claimant is simply free to proceed with its action. Fla. Stat., § 558.004(6).

The statute gives the contractor five options for a written response to the notice of claim, which are: (1) an offer to fix the defect, including a detailed

[4] The statute defines “contractor” as a person “that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.” Fla. Stat., § 558.002(6).

description of, and timetable for, the proposed repairs; (2) an offer to settle the claim by payment of money "that will not obligate the person's insurer"; (3) an offer to settle by a combination of repairs and payment of money "that will not obligate the person's insurer"; (4) a statement disputing the claim and refusing to remedy the defect; or (5) a statement "that the payment of money, including insurance proceeds, if any," will be determined by the person's insurer, contingent on the insurer agreeing to make the determination and the claimant agreeing to be bound by it. Fla. Stat., § 558.004(5)(a)-(e).

Just as the contractor is free to terminate the 558 process by failing to respond to or by disputing the claimant's notice, the claimant is also free to terminate the process by rejecting any settlement offer the contractor may make. The result in either instance is the same: "the claimant may, without further notice, proceed with an action against [the contractor] for the claim described in the notice of claim" Fla. Stat., § 558.004(6). *See Hebden v. Roy A. Kunnemann Const., Inc.,* 3 So. 3d 417, 419 (Fla. 4th DCA 2009).

For parties who elect to pursue the statutory process, section 558.004 creates a comprehensive framework for repairs, whose features include:

- detailed provisions for inspections and destructive testing by the contractor, including reasonable access to the property during normal working hours for inspections (§558.004(2));

- a discretionary method for the contractor to involve downstream subcontractors and other trades in the inspection and repair work (§558.004(3)-(4));

- a process for the parties to exchange plans, specifications, contracts, work orders and other construction documents; such documents include expert reports, which are not permitted to be used in any subsequent litigation for any purpose except under limited circumstances (§558.004(15));

- a requirement that the claimant provide the contractor reasonable access to the claimant's property during normal working hours for repairs (§558.004(8)).

In practical terms, the process may be as simple as replacing a non-functioning garage door opener or broken roof tiles on a single family house. Or it may be as complex as repairing or replacing non-compliant HVAC, plumbing, electrical, or envelope components on high-rise buildings, similar to what occurred in this case. Regardless of the size or number of repairs, they will typically include scheduling and overseeing construction workers, tools, and machinery, obtaining permits and inspections, and arranging the purchase, delivery, and handling of materials in order to repair whatever construction defects are at issue.

Significantly, unlike notice and cure regimes adopted in some other states, Chapter 558 contains no requirement that the parties participate in any type of arbitration, mediation, appraisal, or any other alternative dispute resolution proceeding involving any decision maker or facilitator.

The Florida legislature created the Chapter 558 notice and repair process to give construction trades the opportunity to fix deficiencies in their work. The

statute encourages a collaborative process in which the parties correct faulty work; it is antithetical to an adversarial proceeding in which the parties present their grievances to an adjudicator or facilitator who determines a legally enforceable damage award.

Finally, as indicated above, throughout Chapter 558, the legislature permitted—but did not require—insurer participation in the notice and repair process. Fla. Stat., §§ 558.004(5)(d)-(e). Further underscoring the limited and non-coercive role for insurers in the process, the legislature expressly stated that providing a copy of the 558 notice to a contractor's insurer "shall not constitute a claim for insurance purposes." Fla. Stat. § 558.004(13). Although the Florida legislature could have mandated insurer participation in the notice and cure process, it expressly declined to do so.

It is manifest from the "alternative dispute resolution mechanism" it created, that the Florida legislature sought to encourage parties to repair defective construction rather than litigate over it. The statute further evidences that the legislature very deliberately struck a delicate balance, permitting where appropriate, but not forcing, liability insurer participation in the non-binding process, and providing that any adjudication of liability and damages take place entirely outside the Chapter 558 process itself.

### B. The Chapter 558 notice and repair process does not meet the requirements of the policy definition of "suit."

Commercial general liability insurance protects the insured against having to pay for covered "damages" that the insured is determined to be "legally obligated to pay." Because it is the insurer who pays a judgment for covered damages against the insured, CGL policies give insurers the right and duty to defend the insured against any "suit" seeking such damages. The Crum & Forster policies define the term "suit" as follows:

> 'Suit' means a civil proceeding in which damages because of . . . 'property damage'. . . 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.

The policy contains a three-part definition of "suit." The first part states that "suit" means a "civil proceeding" in which covered damages are alleged. The plain meaning of the term "civil proceeding" in the context of the policy definition obviously refers to a lawsuit over which a judge presides, in which a claimant seeks to recover damages against the insured that are covered under the policy. This is confirmed by *Black's Law Dictionary* ("*Black's*"), which defines "civil proceeding" as: "A judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in disputes between litigants in a

matter relating to torts, contracts, property, or family law." *Black's* (10th ed. 2014) 300.[5] The Chapter 558 notice and repair process is not a lawsuit and is therefore not a "civil proceeding."

The policy definition next broadens the term "suit" to include two subcategories of alternative dispute resolution that meet specific requirements.[6] Subcategory (a) requires (1) an "arbitration proceeding" (2) in which covered damages are claimed (3) "to which the insured must submit or does submit with our consent." The subcategory (a) definition plainly refers to arbitration proceedings seeking covered damages to which the insured *must consent*—because the insured is required to do so by contract or by statute—*or*, alternatively, to which the insured submits with the insurer's consent. Florida's Chapter 558 does not require the parties to arbitrate. To the contrary, the statute does not permit any arbitration proceeding to take place until ***after*** the notice and repair process has

[5] Altman argued in the Eleventh Circuit that the 10th edition of *Black's* could not be considered by the court because it did not exist when the policies were in effect. However, prior editions of *Black's* contain no definition of "civil proceeding," and there is simply no reason to believe that a definition of the term in an earlier version of *Black's* would have been different in any respect.

[6] Altman posits in its Initial Brief that the policy definition of suit provides a "*list*," which "*by way of example*" mentions two types of alternative dispute resolution, and that the policy further provides that the term civil proceeding "*includes, but is not limited to*" those forms of alternative dispute resolution. (Initial Br. at 23.) This is not what the policy says. The highlighted terms in quotations which Altman attributes to the policy definition do not appear anywhere in that definition.

been terminated, either by the contractor electing not to participate or by attempting but failing to resolve the defects at issue. The notice and repair process is not an arbitration proceeding and does not satisfy the first requirement of the subcategory (a) definition of "suit."

The subcategory (b) definition of "suit" is the following: "Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent." The subcategory (b) definition contains three requirements that must be met for any "other alternative dispute resolution" to fall under the policy definition of "suit." The Chapter 558 notice and repair process fails to satisfy any of the three requirements.

First, the subcategory (b) definition requires a "proceeding." This Court has previously adopted the following *Black's* definition of "proceeding": "[a]ny procedural means for seeking redress from a tribunal or agency." *Raymond James Financial Svcs. v. Phillips,* 126 So. 3d 186, 190 (Fla. 2013). The *Raymond James* Court also referenced the *Merriam-Webster's Dictionary of Law* definition of "proceeding," which is "a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations." *Id.,* n.4.

The Chapter 558 notice and repair process includes no tribunal or agency to provide redress to any party. It also does not provide for the enforcement, adjudication, or administration of any rights, remedies, laws, or regulations. As one

court has described it, "Chapter 558 encourages settlement by providing a procedure to lead the parties to the waters of compromise; it does not make them drink." *Hebden v. Roy A Kunnemann Const., Inc.,* 3 So. 3d 417, 419 (Fla. 4th DCA 2009). Simply put, the Chapter 558 process created by the Florida legislature lacks the basic attributes of a "proceeding" under the commonly understood meaning of the term.

Second, the proceeding must be one seeking covered "damages." As the title of section 558.004 suggests, the statutory "notice and opportunity to repair" process addresses ***repairs***, not damages. Chapter 558 provides no mechanism to seek, and no adjudicatory procedure for, a determination of damages the insured may be legally obligated to pay. Absent such an adjudicatory proceeding, there is nothing for a liability insurer to "defend." *See* Allan D. Windt, *Insurance Claims and Disputes* (6th ed. 2013) § 4:1, n.3 ("[A]bsent an adjudicatory proceeding—that is, a proceeding the result of which the insured can become obligated to pay damages—there is nothing to 'defend' against."). Because the Chapter 558 notice and repair process is not one in which the claimant may seek or obtain a binding determination of damages against an insured, it does not meet the second requirement of the subcategory (b) definition.

Third, a subcategory (b) proceeding must be one "to which the insured submits with our consent." This requirement could be met in one of two ways.

First, the contractor and the insurer could agree in advance that the insurer consents to the insured participating in any Chapter 558 process that might arise.[7] Alternatively, upon receipt of a notice of a 588 claim, the contractor could request its insurer's permission to participate in the process. It is undisputed that neither one of these things occurred in this case. But even if they had, the statutory notice and repair process still would not meet the other requirements of a suit under the subcategory (b) definition.

### C. The Chapter 558 notice and repair process is not "part and parcel" of, nor is it "inextricably intertwined" with, a lawsuit for damages.

Altman argues repeatedly that the "Chapter 558 Process" constitutes a "civil proceeding" because it is the "mandatory first step" and thus "part and parcel" of and "inextricably intertwined" with any construction defect litigation in Florida.

[7] The legislature cleared the way for this possibility in 2015, when it added language in section 558.004(13) to provide that, "However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such [558.004(1)] notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise." Ch. 2015-165, § 3, at 2, Laws of Fla.

(Initial Br. at 8, 11, 12, 13.) Altman's arguments in this regard confuse the "Chapter 558 Process" with the "Chapter 558 notice." [8]

The ***only*** mandatory condition precedent to a construction defect lawsuit in Chapter 558 is that the claimant serve a written 558 ***notice*** on the contractor. Fla. Stat. § 558.003; § 558.004(1). It is then entirely up to the contractor if it wishes to engage in the "Chapter 558 Process" or not. If the contractor does not desire to participate in the notice and repair process, the statute provides two methods by which the contractor can avoid it: (1) simply not responding to the 558 notice within the time specified, or (2) advising the claimant in writing that it disputes and will not remedy the claimed defect. Fla. Stat., § 558.004(6).

Conversely, if the contractor decides to participate and offers a resolution to the claimant that is not satisfactory to the claimant, then the claimant is free to reject it. In either instance, the statutory process terminates, and the claimant "may, without further notice, proceed with an action. . . ." Fla. Stat. § 558.004 (6). Chapter 558 is expressly limited in scope; it "does not forfeit substantive rights as a penalty for non-compliance." *Hebden*, 3 So. 2d at 419.

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[8] Altman's Initial Brief premises its arguments on the following statements: "The Chapter 558 Process is the mandatory first step in any construction defect litigation in Florida . . . ." (Initial Br. at 8.) "It [the process] is the mandatory first step in any construction defect lawsuit or arbitration in this state. . . ." (*Id.* at 11.) "The Chapter 558 Process is . . . a mandatory condition precedent to filing a lawsuit. . . ." (*Id.* at 12.) "The Chapter 558 process is a mandatory first step in the filing of any construction defect lawsuit or arbitration in Florida." (*Id*. at 13.)

The fact that the Chapter 558 Notice is a condition precedent to a claimant bringing a civil action on any construction defect to which the statute applies does not render the Chapter 558 Process a "suit" or a "civil proceeding." To the contrary, the "Chapter 558 Process" provides a mechanism to guide the parties in cooperating to repair faulty work in order to avoid a suit.

### D. Cases involving other states' notice and repair laws are not persuasive because those laws are significantly different from Chapter 558.

Dozens of states have passed "notice and repair" or "notice and cure" statutes, whose primary goals are to decrease the cost of construction defect litigation and control the cost of insurance premiums—with the ultimate aim of keeping housing affordable.[9] The state statutes vary widely, from brief mention in home warranty laws to complex schemes creating adjudicatory proceedings employing private decision makers with authority derived from statute. *See Id.* at 747-751. Some state statutes, unlike Florida's, expressly require an insurer to treat their process as a lawsuit and require the insurer to defend it. *See, e.g.,* Nev. Rev. Stat. § 40.649; Colo. Rev. Stat. § 13-20-808(7).

Despite what limited surface similarities it may share with any other state's statute, Chapter 558 is unique in its non-coercive, non-binding effect, its

[9] *See* Alice M. Noble-Allgire, *Notice and Opportunity to Repair Construction Defects: An Imperfect Response to the Perfect Storm*, 43 Real Prop. Tr. & Est. L.J. 729, 731-758 (2009)

preservation of the parties' substantive rights, and its deferential treatment of insurer involvement in its process. Thus, to the extent other state courts may have determined that their own notice and cure processes constituted a "suit" under the same definition contained in Crum & Forster's policies, these decisions are not useful in addressing Chapter 558 because the courts were not looking at the same process the Florida legislature employed in its statute.

The non-precedential California case of *Clarendon America Ins. Co. v. Starnet Ins. Co.*, 113 Cal. Rptr. 3d 585 (Cal. Ct. App. 2010),[10] upon which Altman relies, illustrates this point well. (*See* Initial Br. at 18-20). In *Clarendon*, a California court held that procedures (the "Calderon Process") created by California's Calderon Act[11] constituted a "suit" triggering an insurer's duty to defend.

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[10] The California Court of Appeals' *Clarendon* opinion was accepted for review and then dismissed by the California Supreme Court, which effectively depublished it so the opinion cannot be cited or relied upon in any California state court. *See* Cal. R. Ct. 8.1105(e), 8.1115(a); *Clarendon America Ins. Co. v. Starnet Ins. Co.*, 242 P.3d 67 (Cal. 2010); 248 P.3d 191 (Cal. 2011. Further, the California Supreme Court case that superseded the Court of Appeals decision in *Clarendon* held not that all administrative proceedings constituted "suits" implicating an insurer's duty to defend, but that the federal administrative proceeding at issue before the court was sufficiently adjudicative in nature to constitute a "suit." *See Ameron Int'l Corp. v. Insurance Co. of the State of Pa.*, 242 P.3d 1020 (Cal. 2010).

[11] Cal. Civ. Code § 1375, repealed and reenacted without substantive change as Cal. Civ. Code § 6000 (West 2012).

The Calderon process is a legislatively-described "legal proceeding," which commences with a common interest association's service of a "Notice of Commencement of Legal Proceedings," (Cal. Civ. Code § 6000(b)), upon a developer, general contractor, or builder ("contractor"). The "Notice of Commencement of Legal Proceedings" sets into motion compulsory notice requirements by the contractor to subcontractors and their insurers that have no counterpart in Chapter 558. *See* Cal. Civ. Code § 6000(e)(2). *Clarendon,* 113 Cal. Rptr. 3d at 589. The contractor's notice to subcontractors and their insurers must advise the recipient—

- of the "date and manner in which the parties shall meet and confer to select a dispute resolution facilitator;"
- that the recipient "has an obligation participate in the meet and confer;"
- that the recipient's failure to participate will waive any challenge it may have to the dispute resolution facilitator; and
- that the recipient "will be bound by any settlement reached through the Calderon Process."

*Clarendon,* 113 Cal. Rptr. 3d at 589.

The dispute resolution facilitator presides over "the mandatory dispute resolution process" and must hold a case management meeting that results in a "case management statement" establishing procedures and deadlines for creating a document depository and document exchange, inspection and testing, and other

events. *Id.*; Cal. Civ. Code, §§ 6000 (h)(1)-(8) The final event in the Calderon Process is a "[f]acilitated dispute resolution of the claim," with all parties and their insurers "present and having settlement authority." *Clarendon,* 113 Cal. Rptr. 3d at 589.

A party may not be released from the Calderon Process without filing a petition with the dispute resolution facilitator. *Id.* The petition must establish that the party "is not potentially responsible for the defect claims at issue." *Id.* at 589-90. The statute empowers the dispute resolution facilitator to enforce all provisions of the statutory process, and authorizes and directs the dispute resolution facilitator to assess the costs of the process against parties, which shall be binding in any subsequent litigation. Cal. Civ. Code. § 6000(f)(1)-(8). At any time during the Calderon Process, any party may petition the superior court for a number of reasons, including resolving disputes over prelitigation depositions and enforcing third-party subpoenas, and ordering parties and insurers to participate in the process with settlement authority. Cal. Civ. Code. § 6000(n).

With respect to any litigation instituted by the association, any contractor, "subcontractor, or design professional who received timely notice of the inspections conducted under [the Calderon Process] shall be prohibited from engaging in additional inspections or testing" unless it proves to the court that it meets five specific conditions for relief. *Clarendon*, 113 Cal. Rptr. 3d at 592.

Further, the "amount of any settlement reached in the facilitated dispute resolution is binding in any subsequent trial on any subcontractor or design professional who received notice of the facilitated dispute resolution but failed to attend or attended without settlement authority." *Id.*

Unsurprisingly, the California court determined that the Calderon Process—which actually gives an insurer proceedings to defend—was "part and parcel of construction or design defect litigation initiated by an association and, as such cannot be divorced from a subsequent complaint." *Id.* The court thus viewed the Calderon Process as a "civil proceeding," leading to "the reasonable inference that the parties intended [the insurer] would have a duty to defend" the process. *Id.* at 593. Accordingly, the court concluded that [e]xtending the duty to defend the Calderon Process is therefore consistent with a hypothetical insured's reasonable expectations." *Id.*

Florida's Chapter 558 contains no equivalent to any of these procedures. It does not empower a dispute resolution facilitator, a judge, or anyone else to make any binding determinations about anything whatsoever during the notice and opportunity to repair process. The Chapter 558 notice and repair process does not bind any party to the amount of any settlement reached by other parties or otherwise forfeit a party's substantive rights or defenses for failure to participate. Under the Florida statute, all such matters are strictly reserved for the court or the

arbitrator, and can only arise in a ***subsequent*** civil action for damages. Further, unlike the Calderon Act, which requires insurer participation in the entire process almost from its inception, Chapter 558, by contrast, provides that any monetary settlement the contractor may offer to the claimant cannot bind its insurer and that the 558 notice "shall not constitute a claim for insurance purposes." California's *Clarendon* case therefore does not support the proposition that Florida's Chapter 558 imposes a duty on insurers to defend the Chapter 558 notice and repair process or that the Chapter 558 notice and repair process constitutes a "suit."[12]

Altman also relies on the Colorado decision in *Melssen v. Auto-Owners Ins. Co*, 285 P.3d 328 (Colo. Ct. App. 2012), which held that a notice of claim under the Colorado Defect Reform Act ("CDARA"), Colorado's notice and repair statute,[13] triggered an insurer's duty to defend. (*See* Initial Br. at 24-26.) But, again, the Colorado statute under consideration in *Melssen* contained no language similar to that in Chapter 558, which states that providing a 558 notice to an insurer shall not constitute a claim for insurance purposes, and included no limitations regarding insurers similar to those contained in Chapter 558.004(5).

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[12] Compare the pre-suit procedure imposed in medical malpractice cases by Florida Statutes, Section 766.106(3), which requires insurers to participate in and to defend the pre-suit investigation process. In enacting the 2004 amendments to Chapter 558, the Florida legislature was clearly aware of what it had done in Chapter 766, and chose not to repeat it. *See* Fla. H.R. Staff Analysis Bill HB 1899, at 3, n.7 (April 1, 2004).

[13] Colo. Rev. Stat.§ 13-20-801, *et seq.*

### E. Crum & Forster's voluntary appointment of defense counsel under a reservation of rights in the absence of a lawsuit did not transform the Chapter 558 notice and opportunity to repair process into a "suit."

Altman makes a passing argument that, in this case, the 558 proceedings fell under the subcategory (b) definition of a "suit" because Crum & Forster did not object to Altman's participation in the Chapter 558 notice and repair process, or because Crum & Forster "consented" by appointing defense counsel to represent Altman. (Initial Br. at 27.) This argument lacks merit for at least two reasons.

First, Altman was unquestionably entitled to participate in the statutory process created by the legislature, and Crum & Forster never had any right to object to Altman's participation in it. Because the notice and repair process is not an adjudicatory proceeding that could determine Altman's legal liability for damages, and because the legislature specified that providing a copy of a Chapter 558 notice to an insurer "shall not constitute a claim for insurance purposes," Crum & Forster had neither a reason nor a legal basis on which to withhold consent or to object to it. In the absence of a right to object, the lack of an objection cannot transform the notice and repair process into a "suit." *See MidMountain Contractors, Inc. v. American Safety Indemn. Co.,* 893 F. Supp. 2d 1096, 1109-1110 (W.D. Wash. 2012) (holding that a pre-litigation mediation did not constitute a "suit" where the insurer had no ability to withhold consent to the insured's

participation in the pre-suit mediation), *order stricken in part on other grounds by,* 2013 WL 5492952 (W.D. Wash. Oct. 1, 2013).

Second, the record before the District Court fully supports that Altman did not submit to the 558 process with Crum & Forster's consent. Altman's pleadings, affidavit, and moving papers uniformly showed that the Association served the initial 558 notice on Altman on April 10, 2012, (Doc 25 - Pg 4, ¶ 7), and that Altman immediately retained its own counsel who had been intimately involved in the 558 process "since its inception," including the "resolution of hundreds of items" raised by the Association. (Doc 48 - Pg 2-7, ¶¶ 9-11; Doc 1 - Pg 3, ¶ 15; Doc 47 - Pg 34).

It is undisputed that Altman did not notify Crum & Forster of the 558 notices until January 14, 2013, many months after Altman had already submitted to the 558 process instituted by the Association without Crum & Forster's knowledge or consent (Doc 25 - Pg 5, ¶10; Initial Br. at 3). Thus, not only did Crum & Forster lack the ability to object or to withhold consent to Altman submitting to the 558 process, it never had the opportunity to consent—impliedly or otherwise—even if it could have done so. Because Altman had already submitted to the Chapter 558 process long before it first notified Crum & Forster of it, the 558 process in this case does not and cannot satisfy the third requirement of the subcategory (b) definition of suit.

## II.

**The definition of "suit" in Crum & Foster's policy is clear and unambiguous, and does not encompass the Chapter 558 notice and repair process created by the Florida legislature.**

Alternatively, Altman argues that the policy definition of "suit" is ambiguous, and therefore must be construed in it favor. (Initial Br. at 28-31). Altman does not actually provide any alternative meaning based upon the actual policy language, but, rather, argues that courts have "reached differing interpretations of the term 'suit' when construing *identical* policy language in the context of similar notice and repair statutes" and that these differing interpretations are "evidence of ambiguity." (*Id.* at 29-30)

But no court has *ever* interpreted the definition of "suit" in Crum & Forster's policy to include Florida's Chapter 558 notice and repair process. The only court that has ever ruled on the question is the District Court in this case, and it ruled precisely the opposite. The Eleventh Circuit, given the dearth of relevant Florida authority on the question, simply deferred the question to this Court.

Contrary to Altman's argument, the policy's three-part definition clearly and unambiguously states the requirements for a "suit" under the policy. The fact that the Chapter 558 notice and repair process does not meet the requirements of any of the three definitions does not render the definition ambiguous. It merely means that the statutory notice and repair process is not a "suit" under the policy. *See Swire*

*Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165-66 (Fla. 2003) ("Notably, simply because a provision is complex and requires analysis for application, it is not automatically rendered ambiguous.").

Further, the Court is not being asked to determine whether some hypothetical proceeding falls within the policy definition of a "suit." It has been asked to determine whether a statute enacted by the Florida legislature, which provides the contractor with a non-adjudicative, non-binding opportunity to fix faulty work before being subjected to a lawsuit, and which expressly foregoes mandatory involvement by insurers, nevertheless constitutes a "suit" requiring a defense by an insurer. Crum & Forster submits that no reasonable reading of its policy definition of "suit" or of the notice and repair process the legislature created in Chapter 558 could lead to such a conclusion.[14]

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[14] In an effort to render the policy definition of suit" ambiguous, *amicus* United Policyholders engages in a winding semantical journey employing ISO drafting history (Amicus Br. at 9-12), Sister Joseph's grammatical concepts in *The Trivium* (*id.* at 16, 19), and the technique of reading single words in isolation and out of context (*id.* at 14-15), all to the effect of rendering the policy language virtually unrecognizable. *See, e.g., Id.* at 15 (equating the 558 process with "driving a car or making a pie", both of which would constitute "suits" following United Policyholder's logic.). But the use of such devices does not comport with Florida legal standards for interpreting insurance policies. *See, e.g., Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.,* 711 So. 2d 1135, 1138-39 (Fla. 1998) (addressing the inappropriateness of considering arguments pertaining to drafting history of unambiguous policy language); *State Farm Mut. Auto Ins. Co. v. Mashburn,* 15 So. 3d 701, 704 (Fla. 1st DCA 2009) (indicating that "a single policy provision should not be read in isolation and out of context, for the contract is to be construed according to its entire terms. . . .").

## III.

**Altman's and its Builder/Developer Amici's public policy arguments are highly speculative, are based upon an incomplete reading of legislative intent, and ignore real-life unintended consequences that have already occurred elsewhere.**

Altman and its supporting Builder/Developer Amici posit that failing to require insurers to defend Chapter 558 notices will discourage contractors from participating in the 558 notice and opportunity to repair process and invite lawsuits that will burden the courts. (Initial Br. at 31-32; Br. of Builder/Developer Amici at 6-8.) These arguments are unfounded for several reasons.

First, the arguments are based upon pure speculation. Altman and its Amici can point to no evidence to support them. The Chapter 558 process has been operating as the legislature designed it—without any mandatory insurer involvement—for well over a decade. This may explain why in 12 years of operation, there has been no reported Florida state case addressing the question posed by the Eleventh Circuit. No evidence supports that contractors are failing to take advantage of the 558 notice and repair process provided by the statute or that the legislature's decision not to mandate insurer involvement is leading to more lawsuits.

Second, Altman has disproven its own argument that contractors will refuse to participate in the 558 process in this very case. By its own admission, Altman

actively engaged in the notice and opportunity to repair process from its inception. Moreover, when Crum & Forster retained defense counsel for Altman under a reservation of rights, as it is entitled to do under Florida law, Altman refused the proffered defense because Altman did not want to give up control of the process. Instead, Altman resolved all of the construction defects claimed by the Association without any insurer involvement (indeed, rejecting it), and without any litigation, in a picture-perfect example of how the legislature intended Chapter 558 to operate.

Third, the arguments of Altman and its Builder/Developer Amici presuppose that CGL insurance provides coverage for defective construction, when this is not necessarily the case at all. *See, e.g., United States Fire Insurance Co. v. J.S.U.B., Inc.,* 979 So. 2d 871, 889 (Fla. 2007) (explaining that "there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'"); *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241, 1248 (Fla. 2008) (holding that "the mere inclusion of a defective component, such as a defective window or the defective installation of a window," does not constitute property damage falling within the insuring agreement "unless that defective component results in physical injury to some other tangible property."); *Nationwide Mut. Fire Ins. Co. v.*

*Advanced Cooling & Heating, Inc.*, 126 So. 3d 385, 388 (Fla. 3d DCA 2013) (holding that a CGL policy did not provide coverage for a homeowner's claim of faulty workmanship where there was no claim that the faulty workmanship caused damage to other property).

It is the contractor, not the insurer, who ultimately must pay for non-covered damages awarded against the contractor. Contractors therefore have a substantial financial incentive to correct their faulty work informally and inexpensively within the statutory process, rather than to encourage the claimant to seek a judgment against them—which, of course, explains why Altman participated in the 558 process in this case rather than waiting to be sued "in order to receive insurance coverage." (Initial Br. at 31.) Further, significant licensure requirements and reputational concerns also prevent contractors from "inviting lawsuits" as Altman suggests.

Conversely, because it is the insurer who must pay a judgment against the contractor for covered damages, insurers are already significantly incentivized to settle covered claims. Consequently, there is simply no need to re-write insurance policies to require insurers to "defend" the legislatively-created notice and repair process, particularly where the legislature expressly did not provide for any such mandatory insurer involvement at any stage in the statutory process.

Fourth, forcing insurers to defend 558 notices will cause inevitable disputes between insurers and insureds leading insurers to commence coverage lawsuits in cases that could have and should have been resolved in the notice and repair process, thereby increasing, not decreasing, litigation relating to construction defect cases. This, alone, would be sufficient reason for the legislature to craft the 558 process to require no mandatory insurer involvement—which is precisely and deliberately what the legislature has done.

Fifth, treating 558 notices as "complaints" and forcing CGL carriers to provide a "defense" against them will unquestionably lead to increasing premiums and decreasing availability of liability coverage for the construction trades, which was one of the reasons the legislature enacted Chapter 558 in the first place, and undoubtedly the single most important consideration in the Florida legislature's decision to make insurer participation in the notice and repair process voluntary and non-binding on insurers. Although well-heeled builders and developers such as Altman may have calculated that the additional premium costs would be within their budgets, the same is not true for untold numbers of smaller subcontractors, who often lack the resources of general contractors and who, in addition to purchasing insurance for themselves, are often required to purchase additional insured coverage for builders and developers in order to work for large builders such as Altman.

Finally, the ultimate unintended consequence of a notice and repair regime that forces insurers to defend is to drive up construction costs, which disproportionately affects the production of affordable housing, as illustrated by experience in Colorado. In 2010, the Colorado legislature amended CDARA to codify principles of interpretation and add a provision stating that an insurer's duty to defend "shall be triggered" by a notice of claim. Colo. Rev. Stat. § 13-20-808(7)(a)(I) (2010).

On October 29, 2013, a study commissioned by the Denver Region Council of Governments released the Final Report of the Denver Metro Area Housing Diversity Study, the purpose of which was to identify housing development trends and conditions in the Denver, Colorado metropolitan area cities. In its discussion of the effect of insurance premiums on the cost and availability of housing, the study noted that—

> following the passage of [section 13-20-808] in 2010, the number of commercial insurance firms providing construction liability policies in Colorado has also dropped. Approximately a dozen carriers have left the state over the past few years, and brokers attribute their departure to the passage of the 2010 legislation. Some new providers have entered the state, as they work in the 'high cost/high risk' arena. These providers do not write conventional policies. As the standard national carriers have exited Colorado, the only carriers that remain are those that will write what the industry considers 'higher risk policies.' The stipulations of the legislation and the reduction in the supply of insurance providers have resulted in higher premiums. According to an insurance broker interviewed, insurance premiums

are 25 to 45 percent higher in Colorado than other states for comparable products.[15]

The report concluded that the additional costs and insurance premiums associated with construction defect litigation are adversely and disproportionately affecting the availability of entry-level housing in Colorado. *Id.* at 45.

Colorado's affordable housing shortage has become so dire that, after attempts to amend the 2010 state statute failed, several individual cities have instituted their own construction defect ordinances in an effort to spark for-sale, multi-family construction, which has stalled largely because of "builders' fear of being sued and skyrocketing insurance costs."[16] The risk of causing or contributing to this unintended consequence in Florida far outweighs Altman's desire to force Crum & Forster to pay for the administrative costs associated with Altman's investigating and correcting its own defective work in contravention of the public policy already established by the legislature in Chapter 558 and cautions against re-writing CGL policies to treat the Chapter 558 notice and repair process as a "suit."

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[15] Econ. & Planning Sys., Inc., Denver Metro Area Housing Diversity Study, Denver Region Council of Gov't 38 (Oct. 29, 2013), https://www.drcog.org/documents/123065-Report%20102913_Final.pdf.

[16] Quincy Snowdon, "After state stalemate, Aurora tackles construction defects," *Aurora Sentinel* (Aug. 27. 2015), available at http://www.aurorasentinel.com/news/after-state-stalemate-aurora-tackles-construction-defects/.

## IV.

**Cases holding that EPA civil administrative enforcement proceedings under CERCLA constitute a "suit" are inapposite because such administrative proceedings bear no relation to the Chapter 558 notice and repair process.**

Builder/Developer Amici supporting Altman argue that an EPA civil administrative enforcement action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, constitutes a "non-adversarial pre-suit process similar to that codified in Chapter 558 of the Florida Statutes" and that case law holding that such administrative proceedings constitute "suits" supports that the Chapter 558 notice and opportunity to repair process also constitutes a "suit" giving rise to a duty to defend. (Br. of Builder/Developer Amici at 9-13) This assertion is not borne out by the cases they cite.

At the outset, the EPA bears no resemblance to a "claimant" under Chapter 558. The EPA is an agency of the federal government, which, under CERCLA, possesses "broad power to command government agencies and private parties to clean up hazardous waste sites" and is authorized to compel potentially responsible parties ("PRPs") to perform cleanup through administrative or judicial proceedings. *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, 477 S.W.3d 786, 788 (Tex. 2016).

*McGinnes*, the case upon which Builder/Developer Amici primarily rely, described EPA administrative enforcement proceedings as follows:

> The process starts with a notice letter informing the recipient that it is a [PRP]. The letter may invite the PRP to negotiate with the EPA over its liability. But because defenses to liability are limited, the invitation is effectively a demand. The EPA can request information and sanction a PRP's failure to respond with significant fines. It can issue a 'unilateral administrative order' directing a PRP to conduct a 'remedial investigation and feasibility study', or else—the else being civil penalties and punitive damages. The EPA need turn to the courts only for enforcement of its decisions. A PRP cannot seek judicial review until the process is complete, and then only for EPA actions that are arbitrary and capricious, based on the agency's own record. As a practical matter, courts afford PRPs no hope of relief, and consequently they have no choice but to comply with the EPA's directives. There will seldom be a court proceeding.

477 S.W.3d at 788-89 (footnotes omitted). The *McGinnes* court found that given these circumstances, an insurer owed a duty to defend administrative enforcement proceedings brought against its insured by the EPA because "in actuality, they are the suit itself, only conducted outside the courtroom." *Id.* at 791. The Chapter 558 notice and repair process does not remotely resemble administrative enforcement proceedings conducted by the EPA under CERCLA.

Unlike the EPA, a Chapter 558 claimant cannot force a contractor to participate in the 558 process. A 558 claimant cannot sanction or fine a contractor for failing to comply with a request for information. A 558 claimant cannot issue an order requiring a contractor to repair its faulty work or risk civil penalties and punitive damages. A 558 claimant cannot make decisions in the process that are

subject to judicial review under an "arbitrary and capricious standard" based upon an administrative record controlled by the claimant. Nor does Chapter 558 empower any agency or administrator to perform any such acts. Rather, Chapter 558 simply requires the claimant to give the contractor notice and the opportunity to correct its work as a precondition to filing a lawsuit or commencing an arbitration proceeding against the contractor. If the contractor does not wish to participate in the 558 process, it need only say so (or do nothing), with the only "penalty" being that the claimant will be permitted to pursue its action for damages. Builder/Developer Amici's attempt to liken the Chapter 558 process to EPA administrative enforcement actions thus does not withstand scrutiny and cannot support the proposition they advance.

The second case relied on by the Builder/Developer Amici is *Ash Grove Cement Co. v. Liberty Mut. Ins. Co.,* 649 Fed. App'x 585 (9th Cir. 2016). The *Ash Grove* court did not actually render any new decision with respect to whether a letter from the EPA to an insured under 42 U.S.C. § 9604 (e) constituted a "suit" as defined in a CGL policy. Instead, it merely held that all issues raised by the insurer had already been decided in a prior case, *Anderson Brothers., Inc. v. St. Paul Fire & Marine Ins. Co.,* 729 F.3d 923 (9th Cir. 2013).

The *Anderson Bros.* court, in turn, applied an Oregon statute,[17] which contained its own definition of the term "suit," under which any written EPA directive to an insured with respect to environmental contamination in the state constituted the equivalent of a "suit" or "lawsuit" and instructed the court "to apply that definition when interpreting comprehensive general liability policies in cases involving administrative actions by the EPA." *Anderson Bros.* 729 F.3d at 932.

The Florida legislature could have included in Chapter 558 a definition of "suit" similar to that in the Oregon statute. But it did not. As a result, the cases relied upon by Builder/Developer Amici provide no support for the proposition that Florida's Chapter 558 notice and repair process constitutes a "suit" under Crum & Forster's policies. To the contrary, they only serve to demonstrate why the Court should answer the certified question in the negative.

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[17] The Oregon Environmental Cleanup Assistance Act, Or. Rev. Stat. §§ 465.475-465.480. The statutory definition of "suit" provided: "Any action or agreement by the . . . [EPA] against or with an insured in which . . . the [EPA] in writing directs, requests or agrees that an insured take action with respect to contamination within the State of Oregon is equivalent to a suit or lawsuit as those terms are used in any general liability insurance policy." *Id.* at 931.

## CONCLUSION

WHEREFORE, for all the foregoing reasons, the Court is respectfully requested to answer the certified question in the negative, and hold that the Chapter 558 notice and repair process is not a "suit" as defined in Crum & Forster's CGL policies.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Answer Brief has been furnished to counsel of record identified below by e-mail via the Florida Courts e-filing Portal on December 1st, 2016.

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Undersigned counsel hereby certifies that this brief is generated in Times New Roman 14-point font, which complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

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